IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

BRETT KIMBERLIN,

Plaintiff,

v.

NATIONAL BLOGGERS CLUB, *et al.*,

Defendants.

Case No.: CVPWG-13-3059

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION BY DEFENDANTS PATRICK FREY AND MANDY NAGY TO DISMISS THE SECOND AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Pursuant to Fed. R. Civ. P. 12(b)(6), defendants Patrick Frey and Mandy Nagy, through their undersigned counsel, respectfully move this Court to dismiss the Second Amended Complaint ("SAC").

This litigation is a vexatious attempt by a convicted domestic terrorist – plaintiff Brett Kimberlin – to use this Court to silence anyone who dares report or comment on his violent past or his present-day activities, associations, and conduct. The time is at hand for the Court to put an end to plaintiff's abuse of its offices and of defendants – and, as set forth herein, the Court has ample legal grounds to do so.

Plaintiff, the public record shows, has made a career of filing inane and abusive lawsuits. This case is no exception; not one of the claims in the Second Amended Complaint constitutes a cognizable claim for relief. Rather, plaintiff's latest "achievement" in that career is no more than an ugly attempt to misuse the powers and privileges afforded civil litigants to punish defendants Patrick Frey and Mandy Nagy (and about 20 others) for exercising their First Amendment rights.

But publishing the unflattering facts about a convicted criminal's violent past is not a tort. Publishing damning commentary about his harassment of critics is not a conspiracy. And recounting his history of litigation abuse is not sanction for more litigation abuse. The only reality behind the SAC's cookie-cutter verbiage and Internet legal flotsam is a ham-fisted and legally meritless attempt at intimidation and censorship via litigation.

As set forth in detail below, this Court should dismiss the SAC for the following reasons:

(1) The complaint fails to state a claim under RICO. Plaintiff is not a victim of any of the alleged racketeering acts, his allegations of fraud are not pled with particularity, and he has failed to allege a pattern of racketeering acts.

(2) The complaint fails to state a claim under 42 U.S.C. § 1983. Plaintiff has failed to allege facts amounting to action under color of state law by Mr. Frey, and fails to allege that he was deprived of any constitutional rights.

(3) Plaintiff has failed to state a claim under 42 U.S.C. § 1985 against Ms. Nagy, as he has not alleged any invidious discrimination against any protected class.

(4) Plaintiff's false light claims are barred by the statute of limitations; they fail to identify false statements with specificity; they fail to allege facts showing actual malice; and the statements about which they complain are protected by privilege under Maryland law.

(5) Plaintiff's claim for interference with prospective economic fails because plaintiff fails to allege any specific future business relationship affected by defendants' alleged actions. And,

(6) The claim for intentional infliction of emotional distress does not specify damages as required by Maryland law, and targets speech concerning a matter of legitimate public concern that is protected by the First Amendment.

For these reasons, as set forth in detail herein, the Court should dismiss the SAC without leave to amend.

STATEMENT OF FACTS

A. The factual context of the allegations of the Second Amended Complaint is a matter of incontrovertible public record.

As the Court is aware, in considering whether, under Rule 12(b)(6), a pleading states a cause of action, the plausible allegations of the complaint (here, the SAC) are assumed to be true. Typically the sufficiency of those allegations is reckoned without reference to any facts other than those expressly alleged and "documents incorporated into the complaint by reference," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322 (2007), "as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic," *Philips v. Pitt Cnty. Mem'l Hosp.,* 572 F.3d 176, 180 (4th Cir. 2009). *See also*, *U.S. ex r el. Oberg v. Pennsylvania Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014). "But in exceptional cases, as high authority shows, the dictates of [mechanical] logic will yield to the demands of justice, and the courts, in order to reach a just result, will make use of established and uncontroverted facts not formally of record in the pending litigation." *French v. Chosin Few, Inc*., 173 F. Supp. 2d 451, 457 (W.D.N.C. 2001), *aff'd sub nom. French v. The Chosin Few, Inc.*, 60 F. App'x 942 (4th Cir. 2003). It is particularly appropriate for the Court to do so where, as here, the gravamen of a *pro se* plaintiff's claims is defamation but the pleadings do not include the actual publications that are the subject of those claims. See, *Cobin v. Hearst-Argyle Television, Inc.*, 561 F. Supp. 2d 546, 552 (D.S.C. 2008) (collecting cases).

Here the Court's consideration of the public record, which defendants place before the Court solely based on facts set forth in reported judicial opinions, is also proper – and, as will be seen, manifestly just. While, as demonstrated below, plaintiff's allegations fail as a matter of

law to set forth a single cause for which relief may be granted, the facts of record concerning Kimberlin's past – his criminal conviction and his record of abusive litigation – should also inform the Court's appreciation of the legal sufficiency of this lawsuit, especially as regards the question of whether additional leave to amend should be granted. In general, however, it is respectfully submitted that the Court should at all times view this motion in light of the fact that Kimberlin instituted this action to repress public discussion of his past. Thus defendants place before the Court a précis of the facts Kimberlin asks this Court to repress through the continuation of this litigation.

The narrative begins with Kimberlin's most notorious act, the facts regarding which have been thoroughly adjudicated. This is Kimberlin's cold-blooded maiming of Carl DeLong, a Vietnam veteran and captain in the Army Reserves employed at General Motors, by a bomb placed in a parking lot that exploded as DeLong and his wife were leaving a high school football game. *See*, *Kimberlin v. DeLong*, 637 N.E.2d 121, 130 (Ind. 1993). The extent of DeLong's suffering; that of his wife, who was also injured by the blast; and the tragic outcome of Kimberlin's terrorist act are summarized in *Kimberlin v. White*, 7 F.3d 527 (6th Cir. 1993):

> Kimberlin was convicted as the so-called "Speedway Bomber," who terrorized the city of Speedway, Indiana, by detonating a series of explosives in early September 1978. In the worst incident, Kimberlin placed one of his bombs in a gym bag, and left it in a parking lot outside Speedway High School. Carl Delong was leaving the high school football game with his wife when he attempted to pick up the bag and it exploded. The blast tore off his lower right leg and two fingers, and embedded bomb fragments in his wife's leg. He was hospitalized for six weeks, during which he was forced to undergo nine operations to complete the amputation of his leg, reattach two fingers, repair damage to his inner ear, and remove bomb fragments from his stomach, chest, and arm. In February 1983, he committed suicide.

In addition to being convicted for this crime, Kimberlin was sued by DeLong's widow for damages. She was awarded $360,000 for her own injuries as well as $1.25 million arising from the suicide of her husband, which the trial court concluded were proximately caused by the

injuries to DeLong's body and spirit inflicted by Kimberlin. The Indiana Supreme Court agreed, finding that DeLong's death "was within the scope of harm intended by Kimberlin's intentional criminal conduct." *Kimberlin v. DeLong*, 637 N.E.2d at 128.

It should not be lost on the Court that the 1993 Indiana ruling concerned compensation for a crime committed by plaintiff in 1978 – **15 years earlier**. As the Indiana high court noted, this phenomenal delay in the dispensing of justice was no mere procedural quirk: "The unusual delay in this case results from the intervening trial and appellate proceedings related to the resolution of Kimberlin's attempt to initiate this appeal at public expense." *Id*. at 124, n.1. Indeed, to his repertoire of domestic terrorism, Kimberlin had by this time added the dark art of abusive litigation. Kimberlin employed his newfound talent in a manner calculated to deny justice to his victim, Carl DeLong's widow, for as many years possible, at the greatest possible expense to Mrs. DeLong. Warring at once both through and with the court system, Kimberlin's efforts to evade satisfaction of the judgment against him went beyond the standard defensive stratagems of an ordinary judgment debtor. Instead, he employed audacious guerilla tactics, in the form of affirmative litigation, to impose expense, delay and anxiety on his victim's widow – a cynical, subversive approach to litigation that should inform this Court's view of this action.

There is no better example of Kimberlin's contumacious relationship with the justice system than the facts recounted in *Kimberlin v. U.S. Department of Justice*, 788 F.2d 434 (7th Cir. 1986), which explains that Mrs. DeLong learned that the incarcerated Brett Kimberlin was transferring substantial sums through his prison commissary account to avoiding satisfaction of the money judgment against him. Mrs. DeLong instituted an action to attach those funds. Kimberlin's response was to file his own federal lawsuit against her, her lawyer, and a host of Bureau of Prisons and Department of Justice officials on the spurious ground – as ultimately

determined by the Seventh Circuit – that their actions constituted a violation of his privacy under the federal Privacy Act, 5 U.S.C. § 552a. His meritless claim was dismissed – but Kimberlin had, again, succeeded in manipulating the court system to harass, delay and punish his adversaries exercising their rights . . . just as he seeks to do through this litigation.

Released on parole, Kimberlin paid no heed to the conditions of his release, much less to his moral obligations to pay the judgment. To the contrary, he set to erecting a web of shell entities and fake transactions to shield his income and assets from collection. The result, ineluctably, was the revocation of his parole. No less ineluctably, Kimberlin instituted an action to overturn this determination. Unsurprisingly as well the parole revocation was affirmed in *Kimberlin v. Dewalt*, 12 F. Supp. 2d 487, 493 (D. Md. 1998) *aff'd sub nom. Kimberlin v. Bidwell*, 166 F.3d 333 (4th Cir. 1998) (Williams, J.) and Kimberlin was returned to prison. Even this did not abate his use of the courts for sport, however, as typified by *Kimberlin v. Department of Justice*, 318 F.3d 228 (D.C. Cir. 2003), in which Kimberlin unsuccessfully demanded the right to an electric guitar in prison.

As frivolous as Brett Kimberlin's electric-guitar case was, the themes of his career are no joke: cold-blooded violence; a pathological lack of remorse; a consistent disregard for the truth; and contempt for the legal system paired with a determination to manipulate it as a cudgel. It is discussion of these facts, judicially determined and incontrovertible – stripped of the "legal" window dressing – that Brett Kimberlin through this lawsuit seeks to censor.

B. The facts alleged in the Second Amended Complaint fail to allege the existence of a claim for which relief can be granted as a matter of law.

While the facts summarized above provide context for the factual allegations of the SAC, even in isolation the SAC's factual allegations concerning defendants Frey and Nagy fail to

allege conduct that could serve as the factual basis of a claim for which relief can be granted. These allegations are summarized briefly in this section.

1. Blogs and blogging – protected speech of defendants Frey and Nagy

The SAC alleges that Ms. Nagy is a blogger. (¶ 15.) Mr. Frey is, it also alleged, a blogger, and is employed as an "Assistant State's Attorney for Los Angeles." (¶ 24.) The SAC alleges that on October 11, 2010, Ms. Nagy "wrote an article smearing Plaintiff" that appeared on "Breitbart.com." Mr. Frey followed with a "similar article" about plaintiff on his blog, "Patterico's Pontifications" ("the Blog"). (¶ 38.) Though he claims that these posts "smeared" him, Kimberlin does not identify a **single** false statement of purported fact in either post.

Plaintiff also alleges that a man named Seth Allen sent Mr. Frey, Ms. Nagy, and others an email "telling them that he was planning to come to Maryland and 'murder' plaintiff." Plaintiff alleges that Ms. Nagy contacted the authorities, but that for some reason complains Mr. Frey did not duplicate Ms. Nagy's actions and independently contact the authorities. (¶ 41.)

In 2011, defendant Aaron Walker "was co-hosting Defendant Frey's blog" and Mr. Frey "supervised Defendant Walker in that capacity." (¶ 40.) Plaintiff alleges that Mr. Frey, Ms. Nagy, and Mr. Walker consulted with one another on legal pleadings "attacking Plaintiff and the judge who issued" a default judgment against Seth Allen in plaintiff's lawsuit against Mr. Allen. (¶¶ 43-45, 49.) When Mr. Frey was "swatted" shortly after criticizing Kimberlin (the first of three swattings of plaintiff's critics, as set forth below), defendants Nagy, Walker, and Frey allegedly exchanged private emails in which Mr. Frey complained of being harassed by plaintiff (¶ 46), discussed the possibility of seeking an investigation by law enforcement as to whether Kimberlin was involved in the swattings (¶¶ 43, 47-48, 50-51.), and, again privately, expressed his opinion that Kimberlin indeed had some hand in his swatting (¶ 45.). These private statements pre-date Plaintiff's complaint by more than one year. No allegation is made of any

specific **public** statement by Mr. Frey or Ms. Nagy claiming that Kimberlin was responsible for any swatting.

Plaintiff also alleges that in January 2012, Mr. Frey, Ms. Nagy, and Mr. Walker "concocted" a "false narrative" to the effect that Kimberlin caused Mr. Walker to be terminated from his job; that Kimberlin was not assaulted by Mr. Walker; and that Kimberlin falsified his hospital records. (¶ 58.) Defendants and others, the SAC alleges, "planned ways to push their false narrative into the media" to "demonize plaintiff" (¶ 60), a convicted terrorist. The SAC also alleges that defendants and others decided that Kimberlin "would be the first smear target" of defendant National Bloggers Club ("NBC") through a plan called "Everybody Blog About Brett Kimberlin Day" set for May 25, 2012. Plaintiff claims that he received several threats of injury and death by unnamed persons who read the allegedly "false narratives." (¶¶ 60, 73-75.)

Kimberlin also claims that defendants and others "conspired to intimidate" state attorneys and judges in Maryland. In particular, Mr. Frey and others allegedly "condemned Judge [Cornelius] Vaughey online," which "intimidation," Kimberlin claims, "resulted in the judge being targeted by having his home phone number and address posted online." (¶ 80.) No defendant is alleged to have published this information; Judge Vaughey is not a party to this action; and it is not explained how **his** alleged "intimidation" is related to the publication of information about him by third parties.

2. The "swatting" directed at various defendants and the claim that Mr. Frey defamed plaintiff by accusing Kimberlin of instigating these incidents

"Swatting" is the act of calling police and falsely reporting the present occurrence of a serious, potentially violent crime at the address of the swatting victim, initiating a massive police or SWAT team response that both unnerves and intimidates the victim but place him and his family in mortal danger. (¶ 2.) According to the SAC, at some point between December 2011

and May 2012, Mr. Frey, Mr. Walker, Mr. Erickson, and others "concluded that they had to create a more sinister false narrative against Plaintiff that would result in criminal and Congressional investigations." They did so, the SAC alleges, by deciding to falsely accuse Kimberlin of having "swatted" them. (¶ 37.)

It is no fiction, however, that three of the defendants are public critics of Kimberlin and have been swatted. Mr. Frey was swatted at his California home in June of 2011, according to the Second Amended Complaint. (¶ 57.)[1] Plaintiff cites Mr. Frey's blog post[2] of May 25, 2012, and provides a specific URL for the post (http://patterico.com/2012/05/25/convicted-bomber-brett-kimberlin-neal-rauhauser-ron-brynaert-and-their-campaign-of-political-terrorism/). (¶ 8 2) The blog post cited by the SAC, however, does not state, or even suggest, that Kimberlin is personally responsible for the swatting. In that post, incorporated into the SAC, Mr. Frey described the ordeal as follows:

> At 12:35 a.m. on July 1, 2011, sheriff's deputies pounded on my front door and rang my doorbell. They shouted for me to open the door and come out with my hands up.
>
> When I opened the door, deputies pointed guns at me and ordered me to put my hands in the air. I had a cell phone in my hand. Fortunately, they did not mistake it for a gun.
>
> They ordered me to turn around and put my hands behind my back. They handcuffed me. They shouted questions at me: IS THERE ANYONE ELSE IN THE HOUSE? and WHERE ARE THEY? and ARE THEY ALIVE?
>
> I told them: *Yes, my wife and my children are in the house. They're upstairs in their bedrooms, sleeping. Of* ***course*** *they're alive.*
>
> Deputies led me down the street to a patrol car parked about 2-3 houses away. At least one neighbor was watching out of her window as I was placed, handcuffed,

[1] Contrary to the date set forth there, however, Mr. Frey was actually swatted on July 1, 2011.

[2] All blog posts by Mr. Frey and articles on Breitbart.com by Ms. Nagy referred to herein are reproduced fully in the certification of counsel filed herewith.

> in the back of the patrol car. I saw numerous patrol cars on my quiet street. There was a police helicopter flying overhead, shining a spotlight down on us as I walked towards the patrol car. Several neighbors later told us the helicopter woke them up. I saw a fire engine and an ambulance. A neighbor later told me they had a HazMat vehicle out on the street as well.
>
> Meanwhile, police rushed into my home. They woke up m y wife, led her downstairs and to the front porch, frisked her, and asked her where the children were. Then police ordered her to stand on the front porch with her hands against the wall while they entered my children's bedrooms to make sure they were alive.
>
> The call that sent deputies to my home was a hoax. Someone had pretended to be me. They called the police to say I had shot my wife. The sheriff's deputies who arrived at my front door believed they were about to confront an armed man who had just shot his wife. I don't blame the police for any of their actions. But I blame the person who made the call.
>
> Because I could have been killed.

The SAC claims that Mr. Frey "imputed [*sic*] that Plaintiff was responsible for the swatting." But in fact, the post does not accuse; does not suggest; does not so much as speculate. Instead, it lays out objective facts. Thus, after describing the swatting and saying that "someone" had made the call, the post referred to in the SAC lays out what Mr. Frey describes as a pattern of harassment by Kimberlin and his associates directed against Mr. Frey and several of the other defendants. He supports this by setting out numerous examples of such harassment – **not one of which** is swatting. The harassment laid out in the post included, just as some examples:

- Plaintiff's calling Mr. Frey's workplace and telling Mr. Frey's colleagues that Mr. Frey was a "stalker" because Mr. Frey had written about Plaintiff;
- Plaintiff's filing spurious complaints with multiple law enforcement agencies for "stalking" due to Mr. Frey's truthful blogging;
- The publication on a website owned by an entity controlled by plaintiff of Mr. Frey's home address and pictures of Mr. Frey's home (well aware of the fact that

> Mr. Frey is a prosecutor of gang murders and that publicizing his address put his family at risk);

Kimberlin has never disputed any of the facts that make up the pattern of harassment described in Mr. Frey's post, including in the SAC. Nor does he deny the post's contention that Kimberlin undertook these actions to retaliate against Mr. Frey's for publishing, on his blog, the established facts of record concerning plaintiff's extraordinary history of violence and dishonesty. While Mr. Frey does, in the post, note that in general, the FBI associates swatting with acts of harassment such as those described, the post never accuses plaintiff of involvement in the swatting incident.

The SAC goes on to acknowledge that defendant Erick Erickson, also a critic of Plaintiff's, was swatted at his Georgia home on May 27, 2012 (¶ 83); and that defendant Walker, a third critic of plaintiff's, was swatted at his Virginia home on June 25, 2012 (¶ 86). The juxtaposition in time of these incidents with defendants' public criticism of Kimberlin is not addressed directly in the SAC, but it does allow that Mr. Erickson had contacted his local police and expressed concern that his recent criticism of Plaintiff might result in his being swatted – which, in fact, he was, within days. (¶ 83.)

From these facts, however, plaintiff alleges that the wrong committed was that Mr. Frey, in concert with Ms. Nagy and others, allegedly "began publicly implying and stating that Plaintiff had him swatted" in 2012. Defendants, the SAC claims, "concocted a plan to get the swatting smear into the mainstream media" which they accomplished by "recruiting" Mr. Erickson, a paid commentator at CNN. (¶ 83.) In a June 8, 2012 appearance on CNN, Mr. Erickson noted – entirely accurately, which the SAC does not deny – that "the same fact pattern" applied in each of the cases, "where the bloggers wrote about Plaintiff and within weeks they are

swatted." (¶ 85.) This statement, according to the SAC, "imputed [*sic*] that Plaintiff was responsible for the swatting through 'his fan club.'" The SAC does **not**, however, allege that Mr. Erickson actually accused Kimberlin of anything – merely that he laid out facts which are themselves not disputed.[3] Significantly for this motion, moreover, the SAC does not allege that Mr. Erickson attributed any aspect of his comments to Mr. Frey or Ms. Nagy, much less that Mr. Frey or Ms. Nagy made any false claim about Kimberlin themselves.

The SAC, however, does eventually return to allegations that directly bear on statements made by Mr. Frey, namely comments made by Mr. Frey in a telephone interview conducted by defendant Glenn Beck on his radio program. The allegations of the SAC are that that Mr. Beck allowed Mr. Frey and Mr. Walker to "impute, imply and state that Plaintiff targeted Defendant Frey with swatting and caused Defendant Walker to be fired." (¶ 87.) The SAC even cites a YouTube video of Mr. Beck conducting the interview found at the URL http://www.youtube.com/watch?v=o8F0gXl8bUE. (¶ 87.) Far from supporting the SAC's conclusory characterization of Mr. Frey's statements, however, the interview found at the link provided by the SAC negates it: At no point during the interview does Mr. Frey ever state that plaintiff was responsible for the swatting. Indeed, while Mr. Beck, in introducing the topic, states (at eight minutes and 24 seconds into the interview), "Help me out. Help me out on, now, this is – you can't directly tie this to him. However – you had a SWAT team at your house!" (http://www.youtube.com/watch? v=o8F0gXl8bUE at 8:24), Mr. Frey does not, indeed, "directly tie" Kimberlin to the swatting.

[3] In fact, Mr. Erickson never did make such a statement. This is readily confirmed by viewing the entire CNN appearance, which is incorporated into the SAC, at http://www.youtube.com/watch? v=T150f46AwIM. Counsel for Mr. Frey and Ms. Nagy can, if the Court requests for its convenience or otherwise, provide a transcription of the interview as well.

The SAC also alleges that during that interview, Mr. Frey stated that he is a Deputy District Attorney. (¶ 87.) The SAC omits, however – despite the fact that it is readily available at the link provided by the SAC and incorporated by reference – the fact that Mr. Frey **expressly disclaimed** speaking as a Deputy District Attorney. His complete statement, per the interview referred to in the SAC, is: "I'm a deputy district attorney. Now, saying that, **I'm obviously speaking in my personal capacity today; I'm not speaking on behalf of the office**." (http://www.youtube.com/ watch?v=o8F0gXl8bUE at 10:02; emphasis added).

In a similar vein, the SAC alleges that on June 25, 2012, Mr. Frey published a blog post "implying that Plaintiff was responsible for the swatting of Defendant Walker" and advising other bloggers to call the police if they planned to write about plaintiff Kimberlin because they could end up being swatted too. (¶ 94.) The actual passage, however, at the URL cited by plaintiff (http://patterico.com/2012/06/25/aaron-walker-swatted/) does not support this allegation. It states only this:

> Any blogger or even commenter who has taken an aggressive position talking about this story—especially people who know they have come onto Brett Kimberlin's radar screen—should consider talking to their local police about the possibility that they could be SWATted. It is no joke, and worrying about looking silly is a poor reason not to act.

The post says nothing about who might be behind past or future swatting. Perhaps in an effort to make good this factual deficiency, the SAC then alleges that the three swatting victims – Mr. Frey, Mr. Walker, and Mr. Erickson (all critics of plaintiff) – accused plaintiff of orchestrating these swattings in communications with unidentified members of the U.S. House of Representatives and Senate and urging a criminal investigation. (¶ 98.) The SAC does not identify the dates on which these alleged statements were made; it does not specify which defendants allegedly communicated with any specific Representatives or Senators – naming only

one Senator, and, again, without any further detail; it does not allege the method of communication used; and above all it does not claim that Kimberlin was in way damaged or even affected by these alleged communications, much less how he came to learn of them.

Plaintiff also cites some private emails from December 2011 and January 2012. (¶¶ 44-51). These emails, which are not alleged to have been made public by Mr. Frey or Ms. Nagy, show only that Mr. Walker, Ms. Nagy, and Mr. Frey were discussing, amongst themselves, the question of whether the swatting of Mr. Frey was connected to Mr. Frey's previous criticism of Mr. Kimberlin. As noted below, all of these private statements were made more than one year before plaintiff filed his complaint in October 2013.

3. The SAC's conclusory but factually unsupported allegations that Mr. Frey acted under color of state law

Plaintiff asserts in a conclusory fashion that Mr. Frey, as an "Assistant District Attorney," acts – for all purposes, including his blogging and public commentary related to his blogging – under color of the law of the State of California. (¶ 117.) The SAC makes only cursory mention, however, of the express disclaimer prominently posted on the blog that its contents consist solely of Mr. Frey's personal opinions and are not made in any official capacity. Plaintiff claims that Mr. Frey denies any connection to his work to maintain "plausible deniability," but does not allege facts that suggest that Mr. Frey's denial is anything but plausible – indeed, that any contrary allegation is fatally implausible. The SAC, in fact, alleges **no facts** to support its conclusion that Mr. Frey's personal blogging was conduct done under color of law, or indeed to justify its inane suggestion that blogging could **ever** be considered within the job description of an Assistant District Attorney anywhere on earth – even Los Angeles County. (¶¶ 117-122.)

C. Plaintiff sues all his "enemies"

Kimberlin sued Mr. Frey, Ms. Nagy, and about a score of other defendants whom he evidently deems his tormentors, under a wide variety of preposterous legal theories.

1. In his First Claim for Relief, Plaintiff asserts that defendants violated the "Racketeer Influences [sic] and Corrupt Organizations Act" under 18 U SC §§ 1962(c) and 1962(d).
2. In his Second Claim for Relief, Plaintiff asserts that Mr. Frey violated his civil rights in violation of 42 U.S.C. § 1983 ("§ 1983") by (i) "creating false narratives about Plaintiff"; (ii) "planning gang attacks on Plaintiff based on false narratives known that such attacks would result in threats of injury or death"; (iii) failing to contact law enforcement when someone allegedly threatened to murder plaintiff; (iv) attempting to get the "Anonymous" group to retaliate against him; and (iv) directing other defendants to create false narratives and make false criminal accusations against him.
3. Kimberlin's Third Claim for Relief asserts a violation of 42 USC § 1985, against various defendants including Ms. Nagy (but not Mr. Frey) for allegedly depriving him of various constitutional and civil rights in unspecified ways.
4. Plaintiff's Fourth Claim for Relief alleges defamation against other defendants, based on unspecified statements regarding plaintiff's involvement in swattings. This claim is not alleged against Mr. Frey or Ms. Nagy.
5. Plaintiff's Fifth Claim for Relief alleges "false light invasions of privacy" by numerous defendants, including Mr. Frey and Ms. Nagy, apparently in connection with the same alleged defamatory statements that are the subject of the Fourth Claim for relief (which is not alleged against Mr. Frey or Ms. Nagy).

6. Plaintiff's Sixth Claim for Relief is for "interference with business relations." This claim is not alleged against Mr. Frey or Ms. Nagy.
7. Plaintiff has two claims labeled "Seventh Claim for Relief." Plaintiff's first "Seventh Claim for Relief" is for "interference with prospective economic advantage," against all defendants. The second so-called "Seventh Claim for Relief " is for battery, against defendant Walker only.
8. Plaintiff's Eighth Claim for Relief seeks compensation for intentional infliction of emotional distress on him arising, again, from the same alleged false statements about his involvement with swattings.
9. Plaintiff's Ninth Claim for relief simply alleges a conspiracy among defendants to commit the various tortious acts alleged in the SAC.

Defendants Frey and Nagy address the legal insufficiency of the respective claims against them as follows.

LEGAL ARGUMENT

A. The Court treats only the well-pleaded allegations of the Second Amended Complaint as true.

Under the well-known standard for evaluating a motion to dismiss under Rule 12(b)(6) for failure to state a claim, a court treats as true the "well-pleaded" facts in a complaint, in contrast to allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. The Court is not "bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain,* 478 U.S. 265, 286 (1986). "Were it otherwise, Rule 12(b)(6) would serve no function, for its purpose is to provide a defendant with a mechanism for testing the legal sufficiency of the complaint." *District 28, United Mine Workers of America, Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083, 1085–86 (4th Cir.1979); *see also*, *Randall v. United*

States, 30 F .3d 518, 5 22 (4th Cir.1994) ("we are not . . . bound by the plaintiff's legal conclusions"). T hus a complaint that relies upon "labels and conclusions, and a formulaic recitation of the elements of a cause of action" does not suffice to state a cause of action. *Bell Atlantic Corporation v. Twombly*, 550 U .S. 554, 555 (2007). M oreover, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." *Id.* In other words, a complaint must be "plausible on its face" – meaning that the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Under these black-letter rules of law, the SAC must, as a matter of law, be dismissed as against Mr. Frey and Ms. Nagy.

B. <u>The SAC fails to state a claim under RICO</u>

Plaintiff uses the civil RICO statute in a vain attempt to give the impression of heft to his meritless, and legally inconsequential, core complaint: that people talked about him in ways he didn't like on the Internet. But "RICO was intended to combat organized crime, not to provide triple damage to every tort claimant." *Globe International, Inc. v. Superior Court (Collins)* (1992) 9 Cal.App.4th 393, 401. Courts are thus consistently hostile to makeweight RICO claims especially where, as here, the supposed torts supposedly providing the predicate acts for plaintiff's RICO claims are themselves patently deficient.

"To state a claim for relief based on a violation of 18 U.S.C. § 1962(c), a plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Bhari Info. Tech. Sys. Private Ltd. v. Sriram*, PWG-13-1480, 2013 WL 6231389 (D. Md. Dec. 2, 2013) (citations omitted). At least two unlawful predicate acts must be alleged to satisfy RICO's pattern element. *H.J. Inc. v. Northwestern Bell Telephone Co.* 492 U.S. 229, 237 (1989). Additionally, a series of such acts forms a pattern of racketeering activity only when a plaintiff shows both **continuity** and a **relationship among them**. *Id.* at p. 240. The first component,

continuity, can be either "open-ended" – prior conduct that projects into the future with a threat of repetition – or "closed-ended," meaning a lengthy period of repeated prior conduct. *Id.* at pp. 241-42. To establish the second component, i.e., a **pattern**, the allegations must make out "**repeated** criminal [or tortious] activity, not merely repeated acts to carry out the same . . . scheme." *Ford Motor Company v. B&H Supply, Inc.* 646 F.Supp. 975, 1000 (D. Minn. 1986) (emphasis added).

Put another way, the requirements of continuity and relationship among alleged predicate acts requires the plaintiff to plead facts in which the acts alleged are central, not incidental, to a defendant's business operation. In other words, they define the so-called "racket" where "the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes or where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business . . . . , or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'" *H.J. Inc.*, *supra*, 492 U.S. at 242-43 (internal quotations omitted). Thus even two predicate acts, if "isolated" from the overall operation of racketeering activity, do not constitute a pattern. *Sedima, S.P.R.L. v. Imrex Co., Inc.* 473 U.S. 479, 497, fn. 14. (1985). Furthermore, because RICO is a cause of action sounding in fraud, a plaintiff must satisfy the heightened pleading standard of Fed. R. Civ. P. 9(b) and allege fraud with particularity to avoid dismissal. *Menasco, Inc. v. Wasserman,* 886 F.2d 681, 684 (4th Cir. 1989).

Kimberlin has failed to allege a legally cognizable injury to himself proximately caused by any predicate act, which deprives him of his claimed standing to make the RICO claims; he falls far short of the legal standard for pleading fraud with the required particularity; at best he has imagined a single "scheme" against a single victim – not a pattern of racketeering activity, as the RICO statute requires; and the "scheme" itself is no more than lawful expression protected

by the First Amendment. In view of the legal standards, as detailed below, the SAC's RICO and RICO conspiracy claims collapse as a matter of law.

1. Plaintiff has no standing to make a RICO claim because the SAC fails to allege injury proximately caused by a predicate act.

The most glaring deficiency of the SAC's RICO claim is the lack of any allegation of injury caused by a predicate act. It is axiomatic that a RICO plaintiff must allege that he suffered such harm arising from the predicate acts; failing the same, he lacks standing and his claim will be dismissed. See, *Walters v. McMahen*, 684 F.3d 435, 443 (4th Cir. 2012) *cert. denied*, 133 S. Ct. 1493, 185 L. Ed. 2d 548 (U.S. 2013) (dismissing civil RICO claim for failure to plead injury proximately caused by tortious acts). It is not enough to allege injury suffered as an **indirect** result of the predicate act; the allegations must, on their face, "establish proximate causation between [the] asserted injury and the RICO activity" to establish standing to bring a civil RICO claim. *Jackson v. Nat'l Ass'n for Advancement of Colored People*, 12-20399, 2013 WL 5530576 (5th Cir. Oct. 8, 2013). The wide-ranging, paranoid allegations of the SAC – even if accepted as true – simply fail to meet at that legally required point that embodies (1) a tortious act, (2) proximately causing (3) injury to plaintiff.

That is not to say that the SAC is short on generalized and formulaic allegations of a wide variety of supposed wrongful acts by defendants. The SAC, for example, alleges – albeit in the most vague and conclusory way – that defendants engaged in "mail fraud" and "wire fraud." But the alleged victims of these acts are unnamed and unidentified "citizens" – people who are not Brett Kimberlin. Two amendments into his complaint, Kimberlin still does not allege that he was a victim of these alleged fraudulent acts. They cannot, therefore, constitute RICO injuries with respect to Plaintiff.

Similarly, the SAC alleges conduct amounting to obstruction of justice by the defendants, claiming that false information provided by defendants "caused federal, state and local law enforcement officials to waste valuable time and resources." (¶ 180.) Nowhere, however, is it alleged that this conduct proximately, or otherwise, caused injury to Brett Kimberlin. Kimberlin has not been deputized to vindicate the wasted time of law enforcement in any jurisdiction; nor is RICO a statutory vehicle by which violent felons are invited to cast themselves as private attorneys general. Similarly, while he alleges – again vaguely – that the defendants tried to "intimidate" him with respect to his prospective involvement in unidentified legal proceedings, the SAC does not even attempt to suggest that he was actually intimidated – quite clearly he was not – or otherwise personally damaged by these acts. They are not RICO injuries either.

The SAC goes on to allege the filing of a malicious federal lawsuit against him. It would hardly suit Brett Kimberlin, a serial litigation abuser, to claim that engaging in litigation is tortious, however; thus he characterizes certain settlement discussions by the defendants as extortion. These allegations do not even allege any involvement in those discussions by Mr. Frey or Ms. Nagy, but in any case the SAC neither makes out a cognizable claim for extortion or, more significantly for this discussion, any connection between this activity and some injury suffered by Brett Kimberlin. These litigation-based allegations do not establish RICO injuries.

Similarly, the SAC alleges that the National Bloggers Coalition ("NBC") is nothing but a money-laundering scheme – a flight of fancy, by every indication, yet even then not one that is alleged to have injured plaintiff. Nor does plaintiff allege that Mr. Frey or Ms. Nagy are members of NBC, made any false allegations regarding NBC, or had anything whatsoever to do with funds sent to NBC. Because he neither claims damage arising from the NBC's activities or

connects Mr. Frey or Ms. Nagy to the supposed "money laundering" by the NBC, Kimberlin's NBC-related allegations cannot provide standing for his RICO claims against them either.

Because none of the alleged predicate acts alleged in the SAC even purports to have proximately caused injury to plaintiff, he lacks standing to assert a RICO claim against any of the defendants, and certainly against Mr. Frey and Ms. Nagy. For this reason alone, that claim fails as a matter of law.

2. The SAC fails to allege facts concerning its fraud-based claims with particularity.

To the extent that the SAC's RICO cause of action relies on predicate acts sounding in fraud, it is also deficient as a matter of law because it fails to allege facts amounting to fraud with the level of particularity required by Fed. R. Civ. P. 9(b). "When mail and wire fraud are asserted as predicate acts in a civil RICO claim, each must be pled with particularity, pursuant to Rule 9(b). Rule 9(b) requires pleading the time, place, and content of the false representations, the person making them, and what that person gained from them." *Proctor v. Metro. Money Store Corp*., 645 F. Supp. 2d 464, 473 (D. Md. 2009) (internal quotes and citations omitted).

The SAC fails to meet these requirements concerning the fraud-based claims against Mr. Frey or Ms. Nagy. The vague allegations of fraud-based predicate acts in the SAC amount to nothing but conclusory allegations that certain defendants – not Mr. Frey or Ms. Nagy – misrepresented the nature of the NBC to persons unknown and induced such persons to send it money; or that they generally committed undescribed acts of wire or mail fraud affecting unidentified victims. Nowhere does the SAC set forth **what** fraudulent statements were made, **where** the statements were made, **who** made them, or – last, but not least – **how** they were fraudulent. Because none of the fraud-based predicate acts of the SAC's RICO claims is alleged

with the particularity required by Fed. R. Civ. P. 9(b) regarding Mr. Frey and Ms. Nagy, those claims against these two defendants should be dismissed.

3. The SAC fails to allege a pattern of racketeering activity

Another fatal flaw of the SAC's civil RICO causes of action is the absence of a legally cognizable allegation of a pattern of racketeering activity, which "requires at least two acts of racketeering activity . . . To state a plausible claim of a pattern of racketeering activity, the plaintiff must allege facts establishing that the racketeering predicates are related and that they amount to or pose a threat of continued [unlawful] activity." *Bailey v. Atl. Auto. Corp.*, CIV.A. MJG-13-1243, 2014 WL 204262 at *18 (D. Md. Jan. 17, 2014) (internal quotes and citations omitted). That activity, moreover, must be specifically allege acts constituting "fraudulent conduct beyond that directed to Plaintiff . . ." *Id*. at *19, citing *Menasco, supra,* 886 F.2d at 684 (alleged actions directed towards a "single fraudulent goal" fail to satisfy the continuity prong of RICO's pattern requirement).

Here too the SAC alleges, for all its twists and turns, nothing but a scheme by defendants to "spread falsehoods" about or "smear" **one and only one** alleged victim: Brett Kimberlin. His vague, unrelated allegations of wire fraud and money laundering – unrelated conceptually or factually to the supposed "Kimberlin smear" scheme – cannot be grafted onto the latter to create a sort of hybrid RICO pattern. Such a "scheme" does not, as a matter of law, constitute "a pattern of racketeering activity," and for this reason, too, his RICO claim should be dismissed.

C. The SAC fails to state a claim against defendant Frey under § 1983

The SAC's second claim is against Mr. Frey only, and is brought under 42 U.S.C. § 1983. It claims, in essence, that because Mr. Frey allegedly works in law enforcement for the State of California, anything he says or does in his personal life, especially if it involves commentary or reporting that happens to involve criminal activity, is done "under color of state law." It is well

established, however, that this is not the law. Moreover, to state a claim under 42 U.S.C. § 1983, Kimberlin had to plead that Mr. Frey's "under color of state law" conduct deprived **Kimberlin** of some constitutional right. *West v. Atkins,* 487 U.S. 42, 48 (1988). The SAC's § 1983 claim against Mr. Frey, however, fails to plead facts sufficient to satisfy either of these elements, as set out in detail below.

1. The SAC fails to allege facts sufficient to show action under color of state law by defendant Frey.

The "state action" and "color-of-state-law" requirements of § 1983 exclude claims for "merely private conduct, no matter how discriminatory or wrongful." *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 50 (1999) (quotations and citations omitted). The SAC does not allege facts sufficient to establish that Mr. Frey's conduct, even if it did constitute a deprivation of Kimberlin's constitutional rights (as discussed in the next section, it does not), qualifies as action taken under color of state law, and fails to state a claim for relief under § 1983.

Action taken under color of law is defined as conduct "fairly attributable to the state." See *DeBauche v. Trani,* 191 F.3d 499, 506 (4th Cir. 1999). It is never enough merely to recite that the defendant is an employee of the government, or even that his work is in law enforcement, to transform his private conduct into state action. Even "[a]cts of police officers in the ambit of their personal, private pursuits fall outside of 42 U.S.C. § 1983." *Bailey v. Prince George's Cnty.*, 34 F. Supp. 2d 1025, 1026 -27 (D. Md. 1999) (internal quotes and citations omitted), *citing Revene v. Charles County Commissioners,* 882 F.2d 870, 872 (4th Cir.1989). Thus "[a]n officer can be on-duty, in uniform, in the station house itself and still not be acting under color of state law." *Bailey*, 34 F. Supp. 2d at 1027. As the police cases – where the "color" of state law is most likely to be inferred – demonstrate, "[m]erely private conduct, no matter how discriminatory or wrongful, is not state action. . . . The state action requirement

ensures § 1983 i s maintained as a shield that protects private citizens from the excess of government, rather than a sword that they may use to impose liability upon one another." *Morales v. Richardson*, 841 F. Supp. 2d 908, 913 (D. Md. 2012) *aff'd*, 475 F. App'x 894 (4th Cir. 2012) (internal quotes and citations omitted).

To overcome this burden, then, a plaintiff must allege plausibly that when the defendant committed the supposed constitutional deprivation, he was actually and literally "acting within the scope of his employment." *Id*. As the police "uniform" examples demonstrate, it is of no relevance whatsoever whether, and to what extent, a defendant is **perceived** as acting under color of law. *Accord*, *Van Ort v. Stanewich*, 92 F.3d 831, 839 (9th Cir. 1996), *citing Martinez v. Colon,* 54 F.3d 980, 986 (1st Cir. 1995) ("Merely because a police officer is recognized as an individual employed as a police officer does not alone transform private acts into acts under color of state law"). H ere, however, plaintiff cannot even fall back on t he discredited "police uniform" argument that the acts complained of could be perceived as state action – for there is no plausible allegation that Mr. Frey's conduct is related to his duties as an "Assistant District Attorney." Nor does the SAC posit some meaningful connection between Mr. Frey's job and his private actions as a blogger, notwithstanding Plaintiff's ritual insertion of reminders that Mr. Frey is an Assistant District Attorney into sentences having nothing to do with his job. For example, in ¶ 41 of the SAC, Kimberlin claims as follows:

> On or about August 17, 2011, Seth Allen sent an email to Andrew Breitbart, and Defendants Walker, Frey and Nagy telling them that he was planning to come to Maryland and "murder" Plaintiff. Defendant Frey, an Assistant District Attorney, did not contact Plaintiff or law enforcement officials to report the murder threat.

Assuming the truth of this claim, as the Court must, the "fact" that someone threatened, in an email to Mr. Frey, to go to Maryland and "murder" plaintiff would not make Mr. Frey's alleged inaction conduct taken under color of state law – especially where, as here, the SAC

acknowledges that someone else (Ms. Nagy) was, in fact, already taking such action. Plaintiff, hardly a shrinking violet, still does not have the audacity to allege that reporting "threats" arising out of heated political debates among people separated by hundreds or thousands of miles are part of a Los Angeles County prosecutor's scope of employment. Nor would such an allegation be credible if it were made.

The SAC attempts to bracket other allegations concerning Mr. Frey's conduct, in particular as a blogger or commentator, with reminders of what he does for a living, as if by doing so his blogging and other public expression would be somehow transformed into state action. This is particularly true of ¶¶ 110 - 114 of the SAC, all of which refer to blog posts that mention the fact that Mr. Frey is a prosecutor, but none of which has anything to do with his work as a prosecutor. Only the latter, however, could – if plausible – place Mr. Frey's conduct within the ambit of § 1983. Plaintiff's argument is especially misleading given that Mr. Frey includes a disclaimer on the sidebar indicating that he speaks in his private capacity and not on behalf of his office. Indeed, in the *body* of the one of the posts cited by plaintiff and incorporated by reference in the SAC, the post dated May 25, 2012, Mr. Frey explicitly states: "*As always, opinions on this site are my own, and do not necessarily reflect the views of my employer. I speak in my personal capacity and not my official capacity, and do not intend to speak on behalf of my office in any way*."

It is not until ¶ 117 that Kimberlin truly attempts, however incompetently, to connect Mr. Frey's employment with the Los Angeles County District Attorney's Office to the supposed injury suffered by him. In that paragraph, Kimberlin makes the fantastic, albeit dramatic, claim that "the State of California . . . has given [Mr. Frey] full authority and permission to smear Plaintiff, falsely accuse Plaintiff of swatting, and defame Plaintiff." No factual details are

provided to fill out the incredible claim that the great "State of California" could and did grant (not even that it purported to grant, but, per the SAC, that it **actually did grant**) such authority to Mr. Frey – who, incidentally, is employed by the County of Los Angeles, not the State of California. The SAC does not even hint at how Kimberlin came to know how Mr. Frey's job duties as a Los Angeles County gang murder prosecutor metamorphosed into a sort of trans-jurisdictional Minister for Kimberlin Affairs.

These allegations make interesting reading, as do the similarly preposterous ones in ¶¶ 118-122, which juxtapose Mr. Frey's blogging and reporting work with his job duties, scaling new heights of implausibility. But none of them suffices to transmogrify his private avocation as a blogger into "state action" under § 1983. *See Roginsky v. Blake*, 131 F. Supp. 2d 715, 719 (D. Md. 2000), *aff'd*, 238 F.3d 414 (4th Cir. 2000) (rejecting conclusory allegation of state action premised on vague claim of conspiracy involving state due to lack of factual detail regarding conspiracy); *In re Valentine*, 357 B.R. 744, 754 (Bankr. E.D. Va. 2007) ("to the extent the complaint may have attempted to allege state action on the part of the probate court as a participant in the conspiracy . . . it has done so in only a conclusory manner and has made no specific factual averments in support of the claim that the alleged conspirators acted under color of state law").[4]

For these reasons, the SAC simply fails plausibly to allege state action on the part of Mr. Frey, and for this reason the § 1983 claim against him should be dismissed.

[4] Based on these authorities, the Court should also dismiss the SAC's ninth claim for relief, the vague throwaway count for "conspiracy to commit state law torts."

2. The SAC fails to allege facts sufficient to make out a deprivation of his constitutional rights due to conduct by defendant Frey

The § 1983 claim is legally unsustainable for an additional reason: The SAC fails to plead facts establishing the deprivation of a right protected by the Constitution of the United States by anything allegedly done by Mr. Frey. Yes, Kimberlin claims that Mr. Frey "has used his position to intimidate, harass, stalk, threaten and harm Plaintiff, directly and through others" and "target[ed] Plaintiff with smears, false narratives and" – the unkindest cut of all – "legal analysis [*sic*]." (¶¶118. 122.) But there is no constitutional right not to be annoyed, much less when the annoyance arises out of reminding the public of the vicious and unrepented crimes of violence for which one has been convicted. As this Court explained in *Taylor v. Vickers*, CIV.A. RWT-13-786, 2014 WL 956530 (D. Md. Mar. 11, 2014), general bills of complaint such as Kimberlin's SAC, claiming a wide range of offenses and injuries but never actually enunciating a basis for legal relief, do not deserve limitless judicial patience:

> Plaintiff makes generalized claims of due process and equal protection violations, but provides no particulars as to what liberty interest was violated or how he was treated differently from others. Indeed, it would appear that these claims are bound up with his burglary, robbery, false imprisonment, false arrest, malicious prosecution, invasion of privacy, vigilantism, racketeering, emotional and mental distress, and loss of consortium claims. For reasons previously articulated by this Court, the claims shall be dismissed.

Here, too, plaintiff's generalized bill of irrelevant and irrational particulars – despite the splendor of its multifaceted legal theories and its byzantine claims of state-sponsored conspiracy and intrigue – should be dismissed because it fails to state facts supporting a violation of his constitutional rights, just as it fails to allege even a legally cognizable injury at all.

D. The SAC fails to state a claim under 42 U.S.C. § 1985

The SAC's claim for conspiracy under 42 U.S.C. §§ 1985(2) and (3) appears to have been included for no other reason other than the providing Kimberlin with the imagined cachet

of suing a conservative blogger, defendant Mandy Nagy (Mr. Frey is no longer a defendant on this claim) under the Ku Klux Klan Act. Conspiracy claims under § 1985(2) are based on acts impeding or obstructing justice in a state court in order to deny equal protection of the laws, whereas those brought under § 1983(3) arise from conduct depriving a plaintiff of the equal protection of the law or of equal privileges and immunities under the law. "Under both of these theories," however, "the objective of the conspiracy must be to deprive the victims of their equal protection rights" based on their membership in a **constitutionally protected class**. *Rockwell v. Mayor & City Council of Baltimore*, CIV.A. RDB-13-3049, 2014 WL 949859 (D. Md. Mar. 11, 2014). But Kimberlin is neither a member of, nor does he claim in the SAC to be a member of, any such class. As this Court explained in *Rockwell*:

> In order to establish a claim under § 1985(3), the plaintiff must prove that:
>
> (1) a conspiracy of two or more persons, (2) who are motivated by **a specific class-based, invidiously discriminatory animus** to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy. *A Society Without A Name [v. Virginia*, 655 F.3d 342,]346 [(4th Cir.2011)], (citing *Simmons v. Poe*, 47 F.3d 1370, 1376 (4th Cir.1995)).

Id. at *9-10 (emphasis added). The same requirement must be met under § 1985(2), the statute relied on by Kimberlin. *Id*. It is not enough, therefore, to allege that Ms. Nagy had an animus **against Kimberlin** for him to sustain his claim under § 1985(3). He must allege that the animus results from his **membership in a specified class of people** protected by § 1985, i.e., that that act complained of was motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

The SAC does not so much as allege that Ms. Nagy was motivated by such an animus – not even that she targeted Kimberlin because of his extreme political views, though even that would be fail to meet the pleading standard to state a claim under this statute. See, *Harrison v.*

KVAT Food Mgmt., Inc., 766 F .2d 155, 161 (4th Cir. 1985) ("we find little support for the contention that § 1985(3) includes in its scope of protection the victims of purely political conspiracies."). Plaintiff's allegations under § 1985 are completely meritless as a matter of law, and that claim should be dismissed.

E. The SAC fails to state a claim for false light invasion of privacy.

Plaintiff's fourth claim for relief, for defamation, does not name Mr. Frey or Ms. Nagy as defendants. He does, however, include them as defendants in his fifth claim, for false light invasion of privacy. This claim is legally deficient on numerous grounds, including the statute of limitations and other deficiencies arising from Maryland's law on defamation.

To prove a claim for false light invasion of privacy, a plaintiff must show the defendant has given publicity to a matter concerning the plaintiff that places the latter before the public in a false light "if (a) the false light in which the other person was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Furman v. Sheppard*, 130 M d. App. 67, 77 (2000). "In Maryland, a claim for false light invasion of privacy may not stand unless the claim also meets the standards for defamation." *Crowley v. Fox Broadcasting Co*., 851 F.Supp. 700, 704 (1994).

These standards include the statute of limitations. *Smith v. Esquire, Inc*., 494 F.Supp. 967, 970 (D. Md. 1980). For this reason alone, the SAC's false light claim is barred. Under Maryland law an action for defamation must be filed within one year from when it accrues. Md. Code Ann., Cts. & Jud. Proc. § 5-105 (West). "False light" claims in Maryland are subject to the same legal standards as defamation claims. *Piscatelli v. Van Smith*, 35 A.3d 1140, 1146-47 (Md. 2012) "A cause of action for defamation generally accrues upon the publication of the

defamatory material." *Interphase Garment Solutions, LLC v. Fox Television Stations, Inc*., 566 F. Supp. 2d 460, 464 (D. Md. 2008).

The initial complaint in this case was filed on October 15, 2013, a date that is more than one year after any of the blog posts, media appearances, or even private emails on which the SAC's false light claims are premised. The only posts on Mr. Frey's blog cited in the SAC and which are alleged to be defamatory were published on October 11, 2010 (¶ 38), May 25, 2012 (¶ 65), and June 25, 2012 (¶ 94.). Plaintiff also cites a post by Ms. Nagy that he says was published on October 11, 2010. (¶ 38). Plaintiff also cites some private emails (which clearly would not serve as the basis for a false light **publicity** claim) that were allegedly sent in December 2011 and January 2012. (¶¶ 44-51). The SAC also cites the aforementioned appearance by Mr. Frey on defendant Glenn Beck's show that occurred on May 25, 2012. (¶ 87.) Mr. Frey's June 25, 2012 post, the last of all the alleged false light statements by Mr. Frey or Ms. Nagy, was also published more than one year before the filing of plaintiff's initial complaint on October 15, 2013. No other specific statement by Mr. Frey or Ms. Nagy is alleged to have been made in connection with the SAC's false light claim that falls within the one-year bar.

Moreover, the false light claim fails because the SAC fails to meet Maryland's requirement that a defamation claim both specify the alleged defamatory statements and allege facts demonstrating that the statement in question placed him in an objectively **false** (as opposed to an unflattering) light. The failure of a complaint "to specify any inaccurate statements" is fatal to a defamation claim and, concomitantly, to a false light claim. *Brown v. Experian Credit Reporting*, 12-CV-2048-JKB, 2012 WL 6615005 (D. Md. Dec. 17, 2012).

Moreover, a defamation plaintiff must allege specific facts showing that the defendants acted with actual malice where, as here, the plaintiff is a public figure and the topic of discussion

is a public matter. *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377-78 (4th Cir. 2012) (dismissing defamation claim including only conclusory allegation of malice). While it ritually intones a conclusory allegation of actual malice, the SAC contains no **factual allegations** on which a finding of actual malice could, as a matter of law, be based.

Finally, virtually all the statements Kimberlin complains of are privileged. He does not allege a single specific statement by Ms. Nagy or Mr. Frey purporting to be fact that is false – not one. To the extent that Plaintiff bases his claims on opinions expressed by Mr. Frey or Ms. Nagy, those opinions are protected by the "fair comment" privilege of Maryland law and by the First Amendment. In Maryland, "any member of the community may, without liability, honestly express a fair and reasonable opinion or comment on matters of legitimate public interest. The reason given is that such discussion is in the furtherance of an interest of social importance, and therefore it is held entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." *Piscatelli*, 35 A.3d at 1151-52, citing *A.S. Abell Co. v. Kirby*, 176 A.2d 340, 342 (Md. 1961).

Obviously, the issue of whether critics of a convicted domestic terrorist are being swatted because they criticize him is a matter of legitimate public interest. This conclusion is reinforced by the fact that, as plaintiff concedes, the issue was discussed on national television, and, as he alleges, was the subject of letters from Congressmen to the Attorney General of the United States. And on that note, to the extent that Kimberlin complains about Ms. Nagy or Mr. Frey approaching law enforcement or members of Congress with their concerns about him for the purpose of seeking the initiation of a criminal prosecution against Plaintiff, that too is absolutely privileged conduct under Maryland law – as well it should be, as a matter of policy. Statements made with the direct purpose or effect of producing a judicial or quasi-judicial proceeding are

absolutely privileged. *Adams v. Peck*, 288 Md. 1, 4 (1980). The privilege to report misconduct to law enforcement or other public officials applies "even if [the witness's] purpose or motive was malicious, he [or she] knew that the statement was false, or his [or her] conduct was otherwise unreasonable," to allow the greatest possible freedom to witnesses to speak without fear of being sued at some later date. *Adams*, 288 Md. at 3.

F. The SAC fails to state a claim for interference with prospective economic advantage.

Kimberlin's claim for interference with prospective economic advantage is also invalid on its face. To maintain such a claim, "an individual must allege more than a disruption of a future relationship to a yet to be determined party – a 'reasonable probability' must be shown that 'a contract will arise from the parties' current dealings.'" *Baron Fin. Corp. v. Natanzon*, 471 F. Supp. 2d 535, 542 (D. Md. 2006). Where a party "has failed to identify a specific future relationship . . . that would have occurred absent" the defendant's alleged conduct, "there can be no interference with prospective advantage." *Mixter v. Farmer*, 215 Md. App. 536, 549 (2013).

Such is the case here. The SAC's vague allegations that defendants "deprive[d]" plaintiff of some unspecified "future business" (¶ 266) and that he has "suffered actual damage and loss" (¶ 268) do not remotely meet the requirement that one seeking relief for this tort identify a **specific** future relationship that was ruined, via some plausible chain of causation, by defendant's acts. This claim, added to the SAC as mere ballast, should be dismissed with prejudice.

G. The SAC fails to state a claim for intentional infliction of emotional distress

The SAC's claim for intentional infliction of emotional distress is also legally deficient:

> Under Maryland law, a plaintiff must allege the following elements to state a claim for intentional infliction of emotional distress: (1) the conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional

> distress; and (4) the emotional distress must be severe. In general, Maryland courts have only imposed liability sparingly and have limited the tort to situations where the wounds are truly severe and incapable of healing themselves. Accordingly, Maryland courts require the element of severe emotional distress to be pled with particularity."

Rockwell, *supra*, *id*. First, the SAC does not allege the required level of particularity as to damage. In *Rockwell*, this Court dismissed a claim similar to Kimberlin's, explaining: "In this case, the sole allegations in the Complaint pertaining to emotional distress are that Plaintiffs suffered 'pain and suffering' and 'mental anguish.' … These allegations fail to plausibly allege the extreme and severe emotional distress necessary to satisfy the requirements of Maryland law, and as such, the claim must be dismissed." *Id*. Kimberlin's make-weight claim for emotional distress should be dismissed for the same reason.

Second, the conduct Kimberlin complains of – debate and commentary on a subject of public interest – is protected by the First Amendment, and hence absolutely exempt from attack as infliction of emotional distress. This was clarified once and for all in *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), in which the United States Supreme Court struck down an intentional infliction of emotional distress judgment against defendants whose conduct – waving vile and abusive placards in a protest outside the funeral of a U.S. soldier killed in action overseas – was far more outrageous than anything Mr. Frey and Ms Nagy are alleged to have said about the plaintiff. Yet as obnoxious as this conduct was, the Court held that a claim for intentional infliction of emotional distress, even premised on "outrageous" speech, cannot lie when that speech was directed at a matter of public concern, for such expression is entitled to "special protection" under the First Amendment. "In public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Id.* at 1219.

Kimberlin's claimed heartache pales in pathetic comparison to the anguish inflicted on the plaintiffs in *Snyder* by the phenomenal cruelty exhibited by the defendants in that case. His claim for intentional infliction of emotional distress arising from being reminded of his own acts of cruelty – acts whose wounds went far beyond those inflicted by even the most callous expression – certainly deserves no better fate than did theirs.

H. The Court should dismiss without leave to amend

Leave to amend a complaint should be denied where "the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Alston v. United Collections Bureau, Inc.*, CIV.A. DKC 13-0913, 2014 WL 859013 (D. Md. Mar. 4, 2014). The facts and law above demonstrate that Brett Kimberlin's Second Amended Complaint – already his third bite at the apple – constitutes such a case.

Brett Kimberlin's Second Amended Complaint is a frivolous and malicious attempt to grind his critics into dust with the gross crushing weight of the legal system. An attempt to retaliate against those who will not let his victims' suffering be lost in a miasma of radical chic posing, Kimberlin has bogged down countless parties and counsel, many of whom (including the undersigned) are acting *pro bono publico* with a numbing sheaf of factual claims that are either of no legal significance or which constitute implausible and hyperbolic fantasy – all to support a series of legal theories that are patently untenable under well-established law and which, if proffered by an attorney, would readily provide grounds for severe sanctions. Notwithstanding Kimberlin's display of simulated victimhood and bathos, the only injustice before the Court is that so many have had to waste so much time, effort, and spirit to fend off a serial abuser of the judicial system whose habit of submitting material misrepresentations to courts of law has been repeatedly augmented even in this action.

And the darkest irony of all is that this plaintiff should impose this pain on these men and women – as retaliation for what? For their audacity in recalling the unceasing pain he – the same cold-hearted, unrepentant Brett Kimberlin – imposed on a young family with everything to live for, before he took it upon himself to blow up one its members as they sought to enjoy a game of football on a brisk autumn morning.

Enough hurting by this plaintiff is enough. The Court should dismiss the SAC without leave to amend.

CONCLUSION

Based on the foregoing, this Court should dismiss the Second Amended Complaint with prejudice.

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