

Rowan v. Pierce

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United States District Court, D. Puerto Rico.

Nathan ROWAN, individually and on behalf
of all others similarly situated, Plaintiff
v.

Brock PIERCE, Defendant

CIVIL NO. 20-1648 (RAM)

|

Signed September 1, 2023

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OPINION AND ORDER

RAÚL M. ARIAS-MARXUACH, United States District Judge

***11** Pending before the Court is Defendant Brock Pierce's ("Pierce" or "Defendant") *Motion for Summary Judgment*, accompanied by his *Statement of Undisputed Material Facts* ("SUMF"). (Docket Nos. 153 and 154). For the reasons discussed below, having considered the parties' submissions both in opposition to and in support of the same, the Court hereby **GRANTS IN PART** and **DENIES IN PART** Defendant's *Motion for Summary Judgment*.

I. PROCEDURAL BACKGROUND

On November 16, 2020, Plaintiff Nathan Rowan ("Rowan" or "Plaintiff") filed a *Complaint* against former Independent presidential candidate Brock Pierce. (Docket No. 1). Subsequently, Plaintiff filed an *Amended Complaint* on July 12, 2021. (Docket No. 35). Rowan claims Pierce violated the Telephone Consumer Protection Act ("TCPA" or "Act"), [47 U.S.C. § 227\(b\)\(1\)\(A\)\(iii\)](#), by sending pre-recorded messages to promote Defendant's campaign to consumers' phone numbers, including Plaintiff's, without their consent. *Id.* ¶ 40.

Defendant filed a *Motion for Summary Judgment* on March 24, 2023. (Docket No. 153). Pierce asserted two main arguments: first, that Plaintiff lacks standing because he has not presented evidence of any injury-in-fact, and second, Defendant is not personally liable. Plaintiff filed a *Response in Opposition*, accompanied by his *Opposing Statement of Material Facts* ("OSMF") and *Additional Statement of Material Facts* ("Add'l SMF"), and Defendant filed a *Reply* containing a *Reply Statement of Undisputed Material Facts* ("Reply SUMF"). (Docket Nos. 170, 170-1, and 173, respectively).

II. LEGAL STANDARD

Summary judgment is proper under *Fed. R. Civ. P. 56(a)* if a movant shows "no genuine dispute as to any material fact" and that they are "entitled to judgment as a matter of law." "A dispute is 'genuine' if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party." *Thompson v. Coca-Cola Co.*, 522 F.3d 168, 175 (1st Cir. 2008) (citation and quotation marks omitted). A fact is considered material if it has "the potential to 'affect the outcome of the suit under governing law.' " *Sands v. Ridefilm Corp.*, 212 F.3d 657, 660–61 (1st Cir. 2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986)).

The party moving for summary judgment "bears the initial burden of showing that no genuine issue of material fact exists." *Feliciano-Muñoz v. Rebarber-Ocasio*, 970 F.3d 52, 62 (1st Cir. 2020) (citation omitted). "The nonmovant may defeat a summary judgment motion by demonstrating, through submissions of evidentiary quality, that a trialworthy issue persists." *Iverson v. City of Boston*, 452 F.3d 94, 98 (1st Cir. 2006). However, it "cannot merely 'rely on an absence of competent evidence, but must affirmatively point to specific facts that demonstrate the evidence of an authentic dispute.' " *Feliciano-Muñoz*, 970 F.3d at 62 (quoting *McCarthy v.*

Nw. Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995)). The nonmovant similarly cannot rely on “conclusory allegations, improbable inferences, and unsupported speculation” to defeat summary judgment. River Farm Realty Tr. v. Farm Family Cas. Ins. Co., 943 F.3d 27, 41 (1st Cir. 2019) (citation and quotation marks omitted).

*2 In this District, summary judgment is governed by Local Rule 56. See L. CV. R. 56. Per this Rule, an opposing party must “admit, deny or qualify the facts supporting the motion for summary judgment by reference to each numbered paragraph of the moving party’s statement of material facts.” L. CV. R. 56(c). Furthermore, unless the fact is admitted, the opposing party must support each denial or qualification with a record citation. Id. In particular, citations must refer “to the specific page or paragraph or identified record material,” and “[t]he court may disregard any statement of fact” that is improperly supported. L. CV. R. 56(e). If a party opposing summary judgment fails to comply with the rigors that Local Rule 56 imposes, “a district court is free, in the exercise of its sound discretion, to accept the moving party’s facts as stated.” Caban Hernandez v. Philip Morris USA, Inc., 486 F.3d 1, 7 (1st Cir. 2007). Thus, litigants ignore this rule at their peril. Id.

III. PRELIMINARY MATTERS

As an initial matter, the Court considers issues raised by Defendant in his *Reply* regarding admissibility of evidence. Defendant moves to exclude portions of Plaintiff’s *Response* as inadmissible. (Docket No. 173 at 11–12). These portions include a WhatsApp chat, Plaintiff’s discovery responses and declaration, and the expert declaration of Randall Snyder. Id.

A. The WhatsApp Chat at Docket No. 112-7

Defendant seeks to exclude a WhatsApp chat purportedly containing conversations between Pierce and others on two bases: first, that its “veracity has never been tested” and second, that it contains inadmissible hearsay. (Docket No. 173 at 11). The Court construes the first objection as a challenge to the document’s **authenticity**. In general, “[e]vidence that is inadmissible at trial ... may not be considered on summary judgment.” Vazquez v. Lopez-Rosario, 134 F.3d 28, 33 (1st Cir. 1998). Accordingly, unauthenticated documents typically cannot be used to defeat a motion for summary judgment. Gomez-Gonzalez v. Rural Opportunities, Inc., 626 F.3d 654, 666 (1st Cir. 2010); *see also* Carmona v. Toledo, 215 F.3d 124, 131 (1st Cir. 2000) (citing to Fed.

R. Civ. P. 56(e) for the proposition that “[d]ocuments supporting or opposing summary judgment must be properly authenticated.”). However, following a 2010 amendment to Fed. R. Crim. P. 56, the essential inquiry is whether a party can show that it will be able to authenticate questioned evidence at trial. *See Joseph v. Lincare, Inc.*, 989 F.3d 147, 155–57, 155 n.4 (1st Cir. 2021) (remarking that when documents are produced during the discovery process, they should be presumed to be authentic unless reason is given to think otherwise).

To authenticate evidence, “the proponent must produce evidence to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). The proponent may rely on the testimony of a witness with knowledge to do so. Id. 901(b). Evidence may also be authenticated through extrinsic evidence. *See United States v. Browne*, 834 F.3d 403, 413–415 (3d Cir. 2016) (permitting authentication of group Facebook chats through circumstantial evidence).

The document in question here is the purported transcript of a WhatsApp group chat that included Pierce; John Souza (“Souza”), an associate of Pierce’s; and Brian Anderson (“Anderson”), the owner and operator of a company called Media Mash, among others. *See* Docket No. 112 at 6–7. The WhatsApp chat was produced in response to a subpoena sent by Plaintiff to Media Mash. Id. Defendant questions the “veracity” of the WhatsApp chat because Plaintiff did not depose specific third parties in the chat.¹ (Docket No. 173 at 11). However, Plaintiff did depose both Pierce and Anderson. (Docket Nos. 154-1 and 154-2, respectively). During his deposition, **Anderson was shown the WhatsApp chat and acknowledged that it was the same chat that (1) he had participated in with Defendant and other individuals and (2) he had testified about earlier in the day.** (Docket No. 154-3 at 66). Anderson also noted that he believed a particular cell phone number in the chat belonged to the Defendant.² Id. at 67–68. Finally, there is circumstantial evidence in the WhatsApp chat that supports its authenticity, such as references to Defendant’s presidential campaign staff. *See, e.g.*, Docket No. 112-7 at 6 (referring to Andy Do, the treasurer for Defendant’s campaign). For these reasons, the Court finds that Rowan has sufficiently authenticated the WhatsApp chat in the record that it may be relied upon for summary judgment purposes.

*3 Turning next to the issue of hearsay, “[i]t is black-letter law that hearsay evidence cannot be considered on summary judgment.” Dávila v. Corp. De P.R. Para La Difusión Pública,

498 F.3d 9, 17 (1st Cir. 2007); *see Fed. R. Civ. P.* 56(e) (requiring parties to properly support an assertion of fact). Hearsay is an out-of-court statement offered for the truth of the matter asserted. *Bonner v. Triple-S Mgmt. Corp.*, 68 F.4th 677, 689 (1st Cir. 2023) (citing *Fed. R. Evid.* 801(c)). However, admissions made by a party-opponent are not hearsay. *Id.* Nor are statements offered for context, rather than for the truth of the matter asserted. *United States v. Cruz-Diaz*, 550 F.3d 169, 176 (1st Cir. 2008) (citing *United States v. Bailey*, 270 F.3d 83, 87 (1st Cir. 2001)).

Here, Plaintiff relies on statements made by Pierce and others in the **WhatsApp chat**. *See* Docket No. 170 at 12–13. Given that Pierce is the named Defendant and Rowan's party-opponent, the portions of the **WhatsApp chat** associated with Pierce's phone number that Plaintiff used to support the *OSMF* and *Add'l SMF* are non-hearsay and are therefore admissible in the summary judgment context. However, Plaintiff also refers to statements made by individuals speaking about the campaign. *See, e.g.*, Docket No. 170-1 at 20 (citing to statements made by two individuals regarding voicemail scripts). The individuals are unidentified “and, without that information, there is no reliable way to tell whether” their messages may fit within the category of statements that are not hearsay. *Dávila*, 498 F.3d at 17 (referring to *Fed. R. Evid.* 801(d)(2)). Accordingly, the **WhatsApp chat** messages sent by persons other than Defendant are hearsay and cannot be used to create a genuine dispute of material fact.

B. Plaintiff's Discovery Responses and Declaration at Docket Nos. 13-1, 73-11, 73-12, 100-13, 170-4, and 170-5

Defendant also objects to inclusion of the Plaintiff's discovery responses and declaration because he claims they contain self-serving hearsay statements. (Docket No. 173 at 10). “An affidavit or declaration used to support or oppose a motion must be made on personal knowledge [and] set out facts that would be admissible in evidence” *Fed. R. Civ. P.* 56(c)(4). The First Circuit has consistently stated that affidavits submitted in opposition to a motion for summary judgment are insufficient if they merely reiterate allegations made in the complaint. *Garmon v. Nat'l R.R. Passenger Corp.*, 844 F.3d 307, 315 (1st Cir. 2016) (citing *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 53 (1st Cir. 2000)). However, “whether a nonmovant's deposition testimony or affidavits might be self-serving is not dispositive.” *Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11, 18 (1st Cir. 2007). Affidavits that set forth specific factual information based on the

party's personal knowledge must be considered with other evidence. *Santiago-Ramos*, 217 F.3d at 53. The timing of the proffered statements is also significant, and affidavits offered after the filing of a motion for summary judgment may constitute inappropriate attempts to manufacture issues of fact. *Escribano-Reyes v. Pro. Hepa Certificate Corp.*, 817 F.3d 380, 387 (1st Cir. 2016).

In his *Reply*, Defendant takes issue with a broad swath of materials.³ However, the rule governing how courts should view affidavits supporting or opposing a motion for summary judgment “requires a scalpel, not a butcher knife,” and an evaluating court must examine questioned affidavits segment by segment. *Perez*, 247 F.3d at 315. Defendant here refers to paragraphs in the Plaintiff's *OSMF* and *Add'l SMF* without listing the specific documents he seeks to exclude. *See* Docket No. 170 at 11 (referring to Plaintiff's discovery responses generally).

*4 In support of Defendant's claim that Plaintiff's discovery responses and declaration should be excluded, he cites to *Dávila*, 498 F.3d at 17. (Docket No. 170 at 11). In *Dávila*, however, the First Circuit noted that the statement at issue was only hearsay because the appellant had no personal knowledge of the conversation he included in the affidavit. *See id.*, 498 F.3d at 17. The same is not true here. After reviewing the materials in question, it is clear most of the documents contain sufficient specific factual information based on Rowan's personal knowledge. To the extent that statements used to support the *OSMF* and *Add'l SMF* were not based on personal knowledge, they have been excluded from the findings of fact and from consideration. Finally, the documents in question were not filed after the motion for summary judgment, and they are therefore unlikely to be sham affidavits.

C. Expert Report at Docket No. 170-6

Defendant further objects to any reliance on the expert declaration of Randall Snyder because it constitutes inadmissible hearsay. (Docket No. 170 at 11–12). Because the Court did not rely on the expert declaration for the purposes of evaluating this motion, Defendant's request is moot.

IV. FINDINGS OF FACT

To make findings of fact, the Court analyzed Defendant's *SMF*, Plaintiff's *OSMF* and *Add'l SMF*, and Defendant's

Reply SUMF (Docket Nos. 154, 170-1 at 1–18, 170-1 at 18–23, and 173 at 13–16, respectively).

After **only crediting material facts that are properly supported by a record citation and uncontroverted**, the Court makes the following findings of fact⁴:

A. Plaintiff Received a Voicemail

1. On October 29, 2020, Plaintiff Nathan Rowan received a single ringless voicemail. (Docket No. 154 ¶ 1).
2. On October 29, 2020, Plaintiff was on his iPhone XR cell phone speaking with a coworker. The conversation was not work-related. (Docket No. 154-1 at 123).
3. An incoming call showed up on Plaintiff's phone during the call with his coworker, and then the incoming call notification on his phone screen went away. (Docket No. 154-1 at 138-39).
4. Plaintiff subsequently received a notification that he had a voicemail. (Docket No. 154-1 at 165).
5. Plaintiff read the transcript of the voicemail message and believed it was an unsolicited spam call. He ended his call with his coworker to document the voicemail as evidence. (Docket No. 154 ¶ 60).
6. Plaintiff also listened to the voicemail. (Docket No. 170 at 22).
7. Plaintiff was furloughed from his day job from July 2020 through April 2021. During this time, he was legally not allowed to do any work. (Docket No. 154 ¶ 1–2).
8. Plaintiff's receipt of the ringless voicemail did not increase the cost of his monthly cell phone bill. *Id.* ¶ 71.
9. Plaintiff's employer paid for his phone's monthly service plan, and his employer incurred no extra charge for the voicemail message. *Id.* ¶ 72.
10. Plaintiff has pursued TCPA class action claims against other defendants. *Id.* ¶ 2.

B. Defendant's Political Campaign

11. Defendant Brock Pierce was a candidate for President of the United States during the 2020 election cycle. *Id.* ¶ 3.

12. The Brock Pierce for President, Inc. campaign (the “Campaign”) was incorporated in July 2020 and was operated by a campaign manager and a team of political staffers and volunteers. Andy Do was the Treasurer of the Campaign and John Souza was a volunteer for the Campaign. *Id.* ¶ 4.
13. The Campaign was incorporated as a separate legal entity to distribute Defendant's political message. *Id.* ¶ 16.
14. Defendant loaned the campaign approximately six million dollars. (Docket No. 112-5 at 38).
15. Media Mash is a marketing services company hired by the Campaign and was the marketing vendor that physically initiated and executed the ringless voicemail program at issue in this case. (Docket No. 154 ¶ 5).
- *⁵ 16. Souza reached out to Media Mash and coordinated the ringless voicemail campaign. *Id.* ¶ 35.
17. Brian Anderson is the owner, operator, and lead decision-maker at Media Mash. *Id.* ¶ 6.
18. Anderson communicated with Pierce via a **WhatsApp chat**, but never met or spoke to Pierce on the phone. (Docket Nos. 154 ¶ 7; 154-3 at 60; and 170-3 at 3).
19. Anderson testified that, because Media Mash's customer was the Campaign, he took direction from persons who worked for the Campaign. Anderson further understood that if Pierce “told [him] to do X, Y, Z, then [he] would assume [he] should do X, Y, Z.” (Docket No. 154-3 at 28–29).
20. The Campaign's marketing team and Media Mash coordinated Facebook ad campaigns, radio advertisement spots, ringless voicemails, and other voter outreach. (Docket No. 154 ¶ 34).
21. The Campaign and Media Mash executed an agreement for, among other things, ringless voicemail services. The Campaign was considered the customer, and the agreement detailed that Media Mash would “architect a custom strategy for the Brock Pierce for President Campaign,” including through ringless voicemails to residents of Alaska, Idaho, Utah, Vermont, and Wyoming. *Id.* ¶ 37

22. Media Mash was paid by the Campaign for providing the ringless voicemail services. *Id.* ¶ 39.
23. Media Mash, on behalf of the Campaign, organized, executed, and sent the ringless voicemails to voters, including to Plaintiff. *Id.* ¶ 43.
24. The phone numbers for the calls to the aforementioned five states were obtained from lead lists that the Campaign purchased from a company called Aristotle. *Id.* ¶ 44; (Docket Nos. 122-1 ¶ 9 and 112-5 at 267).
25. Stratics Network (“Stratics”) is the software platform that Media Mash used to mobilize the ringless voicemail program for the Campaign, and there is no evidence that Mr. Pierce or the Campaign knew that Media Mash had selected or would use Stratics. (Docket No. 154 ¶ 9).
26. Media Mash used the Stratics platform to send ringless voicemails, and no one else had access to the Stratics platform for such purposes. *Id.* ¶ 41.
27. The Stratics platform identified the client as BP4P, referring to “Brock Pierce for President,” or the Campaign. *Id.* ¶ 42.
28. The pre-recorded messages were recorded by Defendant with his own voice. (Docket No. 170-1 at 18).
29. Defendant recorded different pre-recorded messages for different states. *Id.*
30. At the beginning, all of the pre-recorded messages specifically identified “Brock Pierce” as the person initiating the calls; no other person or entity is identified at any other point during the prerecorded message. *Id.*
31. On October 25, 2020, Defendant asked in the **WhatsApp chat**: “How are the [voicemails] and ads doing?” and Anderson responded: “Hi Brock – first [voicemails] hit at 9:30 PDT on Monday. We are using the new ones you recorded.” *Id.* at 19; (Docket No. 112-7 at 9).
32. On October 27, 2020, Defendant asked in the **WhatsApp chat** what was going on with the calls, saying: “I’m so concerned I want to stop it all ... Sounds like we are calling a few thousand people a few thousand times”. Defendant also expressed that the individuals working on sending voicemails had spent money on a poor quality list, and told the **WhatsApp**

chat: “PAUSE ALL CALLS[.] THIS ISN’T WORKING AS PLANNED” and “STOP EVERYTHING UNTIL I SEE THE DATA[.] WHO WAS CALLED WHERE AND HOW MANY TIMES”. (Docket No. 112-7 at 13–14) (emphasis in original).

- *6 33. On October 28, 2020, Defendant asked: “Do we have the right data now?”. *Id.* at 21.
34. Anderson confirmed in his deposition that on October 28, 2020, he had asked for the direct link to Aristotle data, stated that he had received it, and acknowledged he replied to Pierce in the **WhatsApp chat** that Anderson had the new data and was in the process of uploading the new files. (Docket No. 154-3 at 80, 87-88).
35. On October 28, 2020, Defendant wrote in the **WhatsApp chat**: “After the first round of calls I’d like us to do another round of IVR in the key states[.] Then second set of [voicemails].” (Docket No. 112-7 at 21).
36. On October 29, 2020, Defendant posted an image of a consumer complaint regarding the prerecorded calls in the **WhatsApp chat**, to which Souza responded: “You are sending 100’s of thousands of drops out. Expect complaints.” (Docket No. 170-1 at 19).
37. Later that day, Defendant wrote in the **WhatsApp chat**: “We did Alaska, Utah, Idaho, and Wyoming? And NY? Minnesota next?” *Id.*
38. The Campaign continued to operate the ringless voicemail campaign until November 3, 2020. *Id.*; (Docket No. 173-2 at 14).

V. ANALYSIS

A. Standing

“Article III confines the federal judicial power to the resolution of ‘Cases’ and ‘Controversies.’ ” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). To establish Article III standing, a plaintiff must have: (1) suffered an injury-in-fact; (2) that is fairly traceable to defendant’s challenged actions; and (3) that is likely redressable by a favorable decision. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). At issue here is the “injury-in-fact” requirement, which the Supreme Court defined as “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *Id.* (citations and quotations omitted).

For an injury to be concrete, “it must actually exist.” [Spokeo, Inc. v. Robins](#), 578 U.S. 330, 340 (2016). Though the injury need not be tangible, a “bare procedural violation” of a “statutory right” does not confer Article III standing. *Id.* at 340–41. When evaluating whether an intangible harm confers standing, a district court must consider both “history and tradition” as well as the “the judgment of Congress.” [TransUnion](#), 141 S. Ct. at 2204–05; [Spokeo](#), 578 U.S. at 340.

A claim under section 227(b)(1)(A)(iii) of the TCPA has the following elements: “(1) the defendant used an automatic dialing system or an artificial or prerecorded voice, (2) to call a telephone number assigned to a cellular telephone service or to a service for which the called party is charged for the call.” [Breda v. Cellco P'ship](#), 934 F.3d 1, 4 (1st Cir. 2019) (referring to 47 U.S.C. § 227(b)(1)(A)(iii)). As the Court noted in a previous order in this case, the First Circuit has not weighed in on whether a single prerecorded call can constitute an injury-in-fact under the TCPA. (Docket No. 46 at 4). However, several other circuits that analyzed standing issues in the wake of [TransUnion](#) and [Spokeo](#) have concluded that a plaintiff’s allegation of a single unwanted call⁵ or text message is sufficient to establish injury in fact. See, e.g., [Drazen v. Pinto](#), 2023 WL 4699939, at *5–7 (11th Cir. 2023) (en banc) (collecting cases and concluding single text message is sufficient for standing);⁶ [Dickson v. Direct Energy, LP](#), 69 F.4th 338, 349 (6th Cir. 2023) (single ringless voicemail establishes standing); [Cranor v. 5 Star Nutrition, L.L.C.](#), 998 F.3d 686, 690 (5th Cir. 2021) (single text message sufficient for standing); [Susinno v. Work Out World Inc.](#), 862 F.3d 346, 352 (3d Cir. 2017) (unsolicited call resulting in one minute voicemail conferred standing); see also [Gadelhak v. AT&T Servs., Inc.](#), 950 F.3d 458, 463 n.2 (7th Cir. 2020) (Barrett, J.) (“the number of texts is irrelevant to the injury-in-fact analysis”); [Golan v. FreeEats.com, Inc.](#), 930 F.3d 950, 959 (8th Cir. 2019) (“that the harm suffered here was minimal” does not matter for standing analysis); [Melito v. Experian Marketing Solutions, Inc.](#), 923 F.3d 85, 94 (2d Cir. 2019) (unspecified number of text messages demonstrate standing).

*7 Additionally, several district courts in this circuit have also held that unsolicited calls and messages confer standing under the TCPA. See, e.g., [Laccinole v. Students for Life Action Inc.](#), 2022 WL 3099211, at *3 (D.R.I. 2022) (text messages create standing); [Sagar v. Kelly Auto. Grp., Inc.](#), 2021 WL 5567408, at *3–4 (D. Mass. 2021) (at least three text messages establish standing); [Carl v. First Nat'l Bank of Omaha](#), 2021 WL 2444162, at *7 (D. Me. 2021) (“each

violating call is already sufficiently concrete in itself”); [Clough v. Revenue Fronter, LLC](#), 2019 WL 2527300, at *3 (D.N.H. 2019) (single text message sufficient for standing).

The Court agrees with these persuasive authorities. [Dickson](#) is particularly instructive here, given its similarities to the facts of the case at bar. Pierce argues that Rowan did not incur additional fees due to the ringless voicemail and did not suffer additional “wear and tear” to his phone. (Docket No. 153 at 15). In [Dickson](#), the plaintiff: (a) could not remember if he was interrupted by a single ringless voicemail; (b) was not charged for the voicemail; (c) did not establish that the voicemail tied up his phone line; and (d) spent very little time reviewing the voicemail. *Id.*, 69 F.4th at 342. However, the Sixth Circuit nevertheless found the plaintiff in [Dickson](#) still sufficiently established Article III standing because the harm he suffered was analogous *in kind* to injuries recognized by common law. *Id.* at 348 (emphasis added). Accordingly, Rowan, too, has sufficiently alleged an injury-in-fact to establish Article III standing.

Defendant further argues that Plaintiff did not suffer an injury-in-fact because—in Pierce’s view—Rowan was excited to receive the ringless voicemail and did not experience annoyance, nuisance, or an invasion of privacy. (Docket No. 153 at 15). Pierce’s discussion of Rowan’s financial incentive to file TCPA suits is appropriately classified as a challenge to the Plaintiff’s statutory standing. See, e.g., [Carl](#), 2021 WL 2444162, at *8 (defendant argued plaintiff lacked statutory standing because he allowed unwanted calls to continue); [Katz v. Liberty Power Corp., LLC](#), 2019 WL 4644424, at *10 (D. Mass 2019) (defendant argued plaintiff lacked prudential standing because he turned unwanted calls into financial opportunity). However, Rowan’s filing of other TCPA suits has no bearing on his standing to file this one. See [Carl](#), 2021 WL 2444162, at *8 n.9 (plaintiff’s use of cell phone for reasons other than to generate TCPA claims “is likely sufficient to bring him within the zone of statutory standing”); [Katz](#), 2019 WL 2644424, at *10 (plaintiff’s standing depends on whether he maintained telephone number “for any other purpose other than attracting telemarketing calls to support his TCPA lawsuits”). Plaintiff here has filed other TCPA suits, but he also maintained his phone for a plethora of other reasons, including for personal calls. (Fact ¶ 2; Docket No. 154-1 at 132-34). As such, Plaintiff remains within the zone of interest that the TCPA was intended to protect, and he has statutory standing.

In sum, the motion for summary judgment on standing grounds is **DENIED**.

B. Personal Liability

The TCPA makes it unlawful:

[T]o make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone number assigned to a ... cellular telephone service ... or any service for which the called party is charged for the call *8 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA is a strict liability statute. *Breda*, 934 F.3d at 4. It provides a private right of action and allows claims for actual or statutory damages. 47 U.S.C. § 227(b)(3).

The litigants raise and contest several theories of personal liability under the TCPA—an area which the First Circuit has not yet addressed. Each of them is discussed in turn below.

i. Direct Liability

The plain language of the TCPA makes clear that a defendant is directly liable when he or she makes a call. See *Golan*, 930 F.3d at 960 (“The scope of direct liability is determined by the statutory text.”). The Federal Communications Commission (“FCC”) analyzed liability under § 227(b)(1)(B) and concluded that, to be held directly liable, a defendant must initiate a call. *In re DISH Network, LLC*, 28 FCC Rcd. 6574, 6582 (2013); see also *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 168 (2016) (“[w]e have no cause to question [the FCC’s ruling in *DISH Network*]”); *In re Dialing Servs., LLC*, 29 FCC Rcd. 5537, 5543 (2014) (“The same logic that *DISH Network* applied to robocalls to landline phones with respect to ‘initiation’ of calls (Section 227(b)(1)(B) of the Act) likewise applies to robocalls to wireless phones with respect to ‘making’ calls (Section 227(b)(1)(A) of the Act.”). A defendant initiates a call “when it takes the steps necessary to physically place a telephone call.” *DISH Network*, 28 FCC Rcd. at 6583. There must be a “direct connection between a person or entity and the making of a call,” and the scope of direct liability does not include those “that might merely have some role, however, minor, in the causal chain that results in the making of a telephone call.” *Id.*

Notably, the FCC has generally limited direct liability to telemarketers who make phone calls on behalf of sellers and

declined to extend such liability to the sellers themselves.⁷ *DISH Network*, 28 FCC Rcd. at 6583. As an example of when liability could be extended, the FCC has suggested that a seller would be directly liable if it was deeply involved in the placing of a telephone call, such as by giving “specific and comprehensive instructions as to timing and the manner of the call” *Id.* The FCC has further clarified that certain activities are “plainly within the understanding of ‘making’ or ‘initiating’ a call under the *DISH Network* standard.” *Dialing Servs.*, 29 FCC Rcd. at 5544–45. The type of conduct that can trigger direct liability includes:

- (1) providing a software platform for making robocalls;
- (2) leasing or otherwise securing telephone connections for making robocalls;
- (3) purchasing voter lists;
- (4) providing technical support;
- (5) reviewing and/or editing messages;
- (6) reviewing phone numbers to determine if they are valid;
- (7) transmitting the calling party’s number to be displayed by the call recipient’s caller identification services;
- (8) storing the prerecorded message on a server;
- (9) playing a recorded message to a called party;
- (10) detecting whether a call is answered by a live person or by an answering machine;
- (11) providing reports of call history, results, and polling; and
- (12) dialing telephone numbers.

*9 *Worsham v. TSS Consulting Group, LLC*, 2023 WL 2664203, at *5 (M.D. Fla. 2023) (citing *Dialing Servs.*, 299 FCC Rcd. at 5543–44). In short, a defendant is directly liable under the TCPA if it is the entity “that places the unlawful telephone calls,” *Smith v. Liberty Mut. Ins. Co.*, 2021 WL 1581017, at *3 n.1 (D. Mass. 2021), or if it “developed or authorized the policies and procedures that led to violations of the TCPA.” *McGee v. Halsted Fin. Servs. LLC*, 2014 WL 1203138, at *1 (D. Del. 2014); see also *Childress v. Liberty Mut. Ins. Co.*, 2018 WL 4684209, at *3 (D.N.M. 2018) (collecting cases).

Here, it is undisputed that the entity that transmitted the prerecorded message was Media Mash, through the Stratics platform. (Fact ¶ 26). As such, direct liability does not apply to Defendant. See *Thomas v. Taco Bell Corp.*, 582 F. App’x 678, 679 (9th Cir. 2014) (affirming district court that direct liability under the TCPA did not apply when parties agreed that actual sender of subject text message was a third party).

Without citing to any case law, Plaintiff recites a litany of Defendant’s purported actions that would confer direct liability. (Docket No. 170 at 11–13). These include, for example, recording a voicemail message that only identifies Brock Pierce and not the Campaign, being aware of the

transmitting of ringless voicemails, having control over the content of call scripts, and purchasing voter lists. *Id.* The latter two activities are certainly types of conduct that the FCC recognized could contribute toward a conclusion that Pierce may be directly liable. *See Worsham*, 2023 WL 2664203, at *5 (listing “purchasing voter lists” and “reviewing and/or editing messages” as two out of a total of twelve actions that led to a conclusion that a defendant was directly liable under the TCPA). **However, it was the Campaign, not Pierce, that actually purchased the voter lists.** (Fact ¶ 24). Moreover, Plaintiff offers no admissible evidence in either his *OSMF* or *Add'l SMF* that Defendant had a hand in drafting or editing the call scripts.⁸ Taken together, Defendant's purported actions are insufficient to create a genuine issue of material fact that he placed the offending call or developed the policies and procedures facilitating it.

In conclusion, a reasonable finder of fact could not reasonably conclude on the provided record that Defendant is directly liable. As such, the motion for summary judgment is **GRANTED** on this theory of liability.

ii. Vicarious Liability

Even when a party is not directly liable, it may nevertheless be vicariously liable “under federal common law principles of agency for TCPA violations committed by third-party telemarketers.” *DISH Network*, 28 FCC Rcd. at 6584. These agency principles include “not only formal agency [or actual authority], but also ... apparent authority and ratification.” *Id.*; *see also FDS Rest., Inc. v. All Plumbing, Inc.*, 241 A.3d 222, 238 n.24 (D.C. 2020) (noting that a different provision of the TCPA, 47 U.S.C. § 217, creates vicarious liability for the acts of an agent).⁹ The plaintiff must establish the agency relationship between the defendant and the third-party caller to establish vicarious liability. *See Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068, 1072–73 (9th Cir. 2019), *as amended on denial of reh'g and reh'g en banc* (May 6, 2019) (*citing Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 878 (9th Cir. 2014), *aff'd*, 577 U.S. 153 (2016), *as revised* (Feb. 9, 2016)).

^{*10} Deciding the issue of vicarious liability at the summary judgment stage is appropriate only when “evidence of the relationship is clear and unequivocal.” *Shamblin v. Obama for Am.*, 2015 WL 1754628, at *6 (M.D. Fla. 2015). “Vicarious liability under the TCPA is a fact intensive inquiry ...” *Smith*, 2021 WL 1581017, at *4. Though the existence of an agency

relationship is usually a question of fact for the jury, a district court may nonetheless find no such relationship exists if there is no genuine issue of material fact. *McDermet v. DirecTV, LLC*, 2021 WL 217336, at *7 (D. Mass 2021) (*citing White's Farm Dairy, Inc. v. De Laval Separator Co.*, 433 F.2d 63, 66 (1st Cir. 1970)) (quotations omitted). Additionally, the court may “consider whether the parties are trying to limit or prevent liability by characterizing their relationship as something other than an agency relationship.” *Restatement (Third) of Agency* § 1.02; *Henderson*, 918 F.3d at 1073.

Plaintiff's *Amended Complaint* appears to contemplate Defendant as principal and the Campaign as his agent.¹⁰ (Docket No. 35 ¶ 57–58). Accordingly, for the purposes of evaluating the *Motion for Summary Judgment* and based on admitted facts, the Court will assume without deciding that Media Mash and Stratics are subagents of the Campaign.¹¹ “A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal.” *Restatement (Third) of Agency* § 3.15. If the principal grants an agent actual or apparent authority to do so, the agent may appoint a subagent. *Id.*

a. *Actual Authority*

Actual authority refers to the manifestations that a principal makes to an agent. *Ophthalmic Surgeons, Ltd. v. Paychex, Inc.*, 632 F.3d 31, 38 n.6 (1st Cir. 2011) (citations omitted); *Restatement (Third) of Agency* § 2.01. Actual authority may be express or implied. *Id.* § 2.01 cmt. b. An agent acts with express authority when the principal has provided authority through specific or detailed language, whereas an agent acts with implied authority when he acts as necessary to accomplish express responsibilities or acts in accordance with his reasonable interpretation of the principal's manifestations given all attendant circumstances. *Id.*

To establish liability under this theory in a TCPA context, the essential inquiry is whether there was “actual authority to place the unlawful calls.” *Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 449 (9th Cir. 2018). In answering this question, courts look to the degree of control that the principal exercised over the agent. *Smith*, 2021 WL 1581017, at *5 (*citing Legg v. Voice Media Grp., Inc.*, 20 F. Supp. 3d 1370, 1377 (S.D. Fla. 2014)). “The power to give interim instructions distinguishes principals in agency relationships from those who contract

to receive services provided by persons who are not agents.” Restatement (Third) of Agency § 1.01 cmt. f. With regard to TCPA violations, the principal must have “control over the manner and means of the agent’s calling activities.” [Worsham](#), 2023 WL 2664203, at *6 (citations and internal quotation marks omitted). Callers who violate a defendant’s explicit instructions also lack express authority. [McDermet](#), 2021 WL 217336, at *8. Actual authority is limited to actions requested in “a written or oral communication or consistent with a principal’s general statement of what the agent is supposed to do.” [Jones](#), 887 F.3d at 449.

In this case, there is no written or oral evidence that the Campaign, Media Mash, or Stratics had *express* authority from Defendant himself to send a TCPA-violative ringless voicemail to the Plaintiff. However, there is a genuine issue of material fact as to whether the Campaign and its subagents had *implied* authority to call Rowan. Defendant interjected in the [WhatsApp chat](#) at various moments with instructions to stop the calls, use voter lists purchased by the Campaign, ask for data, or to inquire as to which states had already been called. (Facts ¶¶ 31–37). Anderson testified that he understood that because Media Mash had been hired by the Campaign, he should accede to demands made by Pierce, the candidate. (Fact ¶ 19).

The Court also notes that generally, contracts that contain the terms requiring compliance with state and federal laws can serve as evidence that there is a lack of actual authority to violate the TCPA. See [McDermet](#), 2021 WL 217336, at *8 (factoring in the terms of contracts with authorized retailers in evaluating express and implied authority). Here, the parties do not point to any evidence in the record of a clear contract that expressly prohibits or authorizes TCPA violations. In fact, the agreement Media Mash executed with the Campaign is silent as to compliance with the TCPA and notes: “Media Mash requires no contracts – this allows for termination of contract by either party.” (Docket No. 154-3 at 115).

Thus, viewed in the light most favorable to Plaintiff, the communications between Anderson, the Campaign, and Pierce could give the reasonable impression that Pierce impliedly authorized the Campaign to call Rowan. As a result, a reasonable jury might find that Pierce and the Campaign were in an agency relationship that makes Defendant personally liable for violations of the TCPA. Accordingly, summary judgment on this theory of liability is **DENIED**.

b. Apparent Authority

Apparent authority exists when “a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.” Restatement (Third) of Agency § 2.03. Apparent authority is only created by the principal’s manifestations to the third party, not the agent’s representations of authority. [Moreau v. James River-Otis, Inc.](#), 767 F.2d 6, 10 (1st Cir. 1985) (citing Restatement (Second) of Agency § 27). To be held liable under this theory, the principal must hold “the agent out to third parties as possessing sufficient authority to commit the particular act in question,” and the third party must “rel[y] upon the apparent authority.” [Keating v. Peterson’s Nelnet, LLC](#), 615 Fed. App’x 365, 374 (6th Cir. 2015) (citation omitted); see also [Warciak v. Subway Rests., Inc.](#), 949 F.3d 354, 357 (7th Cir. 2020) (noting that reasonable reliance is necessary to establish apparent authority). Furthermore, the third party’s belief about apparent agency must be reasonable. [Vazquez-Robles v. CommoLoCo](#), 757 F.3d 1, 7 (1st Cir. 2014).

Illustrative examples provided by the FCC that demonstrate apparent authority include:

- (1) allowing access to “information and systems that normally would be within the seller’s exclusive control;” (2) providing access to customer information; (3) allowing the third party to “enter consumer information into the seller’s sales or customer systems;” (3) approving a telemarketing script; or (4) knowing of TCPA violations and failing to stop such violations.

[Shamblin](#), 2015 WL 1754628, at *6 (quoting [DISH Network](#), 28 FCC Rcd., at 6593-94). However, “[t]he use of a defendant’s trademark or name **alone** is ‘not sufficient to establish apparent authority.’ ” [Doane v. Benefytt Techs., Inc.](#), 2023 WL 2465628, at *10 (D. Mass. 2023) (citing [McDermet](#), 2021 WL 217336, at *10) (emphasis added). But see [Garvey v. Citizens for Rauner, Inc.](#), 2020 WL 13512715, at *3 (N.D. Ill. 2020) (finding that allegations of apparent authority of a political campaign were sufficiently plausible to survive a motion to dismiss where plaintiff received ringless voicemail soliciting support for the candidate’s campaign that was recorded in candidate’s voice and stated it was paid for by the campaign).

*12 As relevant to the question of apparent authority, the *Amended Complaint* only alleges that Defendant is liable on

this theory because he “[i]dentif[ied] only himself, and not the campaign, as the person initiating the calls” (Docket No. 35 ¶ 57). Plaintiff argues that Defendant is liable on a theory of apparent authority as well as a ratification theory—discussed further *infra*—for the ringless voicemails because he made prerecorded messages. (Docket No. 170 at 19 n.4). However, Plaintiff does not offer any evidence that the prerecorded voice message was a grant of apparent authority to the purported agent or subagents—that is, the Campaign, Media Mash, or Stratics—and in fact, the names of these entities are not mentioned in the voice message. See [Smith v. State Farm Mut. Auto. Ins. Co.](#), 30 F. Supp. 3d 765, 778 (N.D. Ill. 2014) (finding no apparent authority in part because there was nothing in the prerecorded message that would suggest the telemarketer was acting as an agent of the defendants). There is no identifiable statement made by the Defendant to the Plaintiff in the record that could allow Rowan to reasonably believe Pierce authorized agents to call him. Accordingly, the motion for summary judgment on this theory of liability is **GRANTED**.

c. Ratification

“Ratification is the affirmation of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.” [Restatement \(Third\) of Agency](#) § 4.01(1). A principal ratifies an act of an agent by either manifesting assent that its legal relationships will be affected by the act, or through conduct that justifies a reasonable assumption that the principal consents. [Id.](#) § 4.01(2). Ratification can create “consequences of actual authority, including in some circumstances, creating an agency relationship when none existed before.” [Henderson](#), 918 F.3d at 1073 (citing [Restatement \(Third\) of Agency](#) § 4.01 cmt. b.). A principal may ratify the acts of an agent in two ways. [Henderson](#), 918 F.3d at 1073. First, the principal can knowingly accept the benefit of a transaction in a manner that is “objectively or externally observable.” [Id.](#) (citing [Restatement \(Third\) of Agency](#) § 4.01 cmt. d.). Second, the principal may choose to be willfully ignorant, remaining unaware of material facts but nonetheless choosing to ratify “with awareness that such knowledge was lacking.” [Henderson](#), 918 F.3d at 1073–74 (citing [Restatement \(Third\) of Agency](#) § 4.01 cmt. b.).

Vis-à-vis the TCPA, a defendant is vicariously liable under a ratification theory if it specifically ratifies the unlawful conduct at issue. See [Smith](#), 2021 WL 158107, at *6 (citing

[DISH Network](#), 28 FCC Rcd. at 6582). In particular, the defendant must have “knowledge of the calls or of the allegedly illegal marketing methods.” [Doane](#), 2023 WL 2465628, at *11. The extent of the principal’s knowledge may be established through circumstantial evidence. [Henderson](#), 918 F.3d at 1075 (citing [Restatement \(Third\) of Agency](#) § 4.06 cmt. b.). Defendants who terminate their relationships with offending callers or otherwise disavow TCPA-violative conduct are not liable under a ratification theory. See [McDermet](#), 2021 WL 217336, at *11–12 (granting summary judgment on this theory). Moreover, mere awareness of commonplace marketing methods is not enough to require a defendant to investigate whether the purported agent was violating the TCPA. [Kristensen v. Cell Payment Servs., Inc.](#), 879 F.3d 1010, 1015 (9th Cir. 2018); see also [Smith](#), 2021 WL 1581017, at *6 (granting motion to dismiss and finding no ratification where complaint alleged defendant was aware of telemarketing methods, but not of calls made to plaintiff).

There is a genuine issue of material fact in this case as to whether Defendant ratified the Campaign and Media Mash’s actions. For example, after inquiries about the data used by Media Mash, Defendant was informed by Anderson that new data had been uploaded. (Facts ¶¶ 32–34). Defendant was also aware of complaints from callers. (Fact ¶ 36). The Campaign and Media Mash nonetheless continued to distribute ringless voicemails. (Fact ¶ 38). Defendant does point to evidence that he asked the Campaign to reevaluate its process for making calls once he learned of a single caller complaint. (Docket Nos. 173 at 13, 154-2 at 107–08). Nevertheless, such efforts are not sufficient to warrant a grant of summary judgment. See [Aranda v. Caribbean Cruise Line, Inc.](#), 179 F. Supp. 3d 817, 833 (N.D. Ill. 2016) (denying summary judgment where, although defendant made some attempts to cease unlawful conduct, a reasonable jury could nonetheless conclude that it was still accepting the benefits of an unlawful call campaign). Because a reasonable jury could find Defendant ratified the actions of the Campaign and Media Mash, summary judgment on this theory of liability is **DENIED**.

iii. Control Based Liability

*13 Plaintiff pleads another theory of liability based on section 217 of the TCPA. (Docket No. 35 ¶¶ 60–62). That section provides that:

the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or

user, **acting within the scope of his employment**, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.

[47 U.S.C. § 217](#) (emphasis added). Vicarious liability under the TCPA may extend beyond agents in certain circumstances. See [DISH Network](#), 28 FCC Rcd. at 6591. (noting Congress extended vicarious liability of entities under [47 U.S.C. § 217](#) to any party acting for common carriers or users) (quotation marks omitted).¹² The language of [47 U.S.C. § 217](#) is “extremely broad” and has been interpreted by the FCC as extending to independent contractors. [In Matter of Long Distance Direct, Inc.](#), 15 FCC Rcd. 3297, 3300 (2000); see also [Shamblin v. Obama for Am.](#), 2014 WL 12610221, at *3 (M.D. Fla. 2014) (section 217 provides a “broad definition of responsible parties”).

However, the case law is divided as to the mechanism by which corporate officers are liable under the TCPA. Some courts view [section 217](#) as the source of liability. See, e.g., [Champion v. Credit Pros. Int'l Corp.](#), 2022 WL 3152657, at *3 (D.N.J. 2022) (quoting [City Select Auto Sales Inc. v. David Randall Assocs.](#), 855 F.3d 154, 162 (3d Cir. 2018)) (“The Third Circuit has interpreted [[section 217](#)] to mean[] a corporate officer can be personally liable if he actually committed the conduct that violated the TCPA, and/or [he] actively oversaw and directed this conduct.”); [Appelbaum v. Rickenbacker Grp., Inc.](#), 2013 WL 12121104, at *3 (S.D. Fla. 2013) (“the plain language of [[section](#)] 217 seems to suggest personal liability”). [Contra Charvat](#), 630 F.3d at 465 (remarking [section 217](#) is only applicable to common carriers or users); [Hammann v. 1-800 IDEAS.COM, Inc.](#), 455 F. Supp. 2d 942, 969 (D. Minn. 2006) (precluding liability of individual corporate officers under [section 217](#)). Other courts take the view that liability for corporate officers is established by other provisions of the TCPA, particularly [section 227](#). See [Spurlark v. Dimension Serv. Corp.](#), 2022 WL 2528098, at *5 (S.D. Ohio 2022) (“[T]he ‘any person’ language in § 227 of the TCPA applies to individuals, including corporate officers.”) (citations omitted). Regardless of how liability attaches, it is nevertheless the “prevailing view that personal liability may extend to corporate officers under the TCPA.” [Appelbaum](#), 2013 WL 12121104, at *3 (S.D. Fla. 2013).

*14 Officers who violate the TCPA **while acting in the scope of their employment** may be personally liable. [Alvord v. QuickFi Cap. Inc.](#), 2019 WL 5788572, at *3 (D. Utah 2019). To incur individual liability even while acting on behalf of the corporation, corporate officers must have “directly participated in or authorized the statutory violation” [Texas v. Am. Blastfax, Inc.](#), 167 F. Supp. 2d 892, 897 (W.D. Tex. 2001). Additionally, there must be at least “[s]ome showing of intentional misconduct or gross failures to implement policies that comply” with the TCPA. [Mais v. Gulf Coast Collection Bureau, Inc.](#), 2013 WL 1283885, at *4 n.1 (S.D. Fla. 2013).

In this case, Plaintiff argues for Defendant's liability on the basis that Pierce was heavily involved in placing the violative call. (Docket No. 170 at 15). Plaintiff does not allege, however, that Pierce was a corporate officer or employee of the Campaign. There is also no evidence in the record to suggest that the same. Because Plaintiff has not put forth any evidence in the record that Defendant was an officer or employee of the Campaign, summary judgment is **GRANTED** on this theory of liability.

iv. Alter Ego Liability

Plaintiff stated that he is no longer pursuing an alter ego theory of liability. (Docket No. 170 at 19 n.5). Accordingly, the motion for summary judgment on this theory of liability is **GRANTED**.

VI. CONCLUSION

For the foregoing reasons, the Court finds and ORDERS that the Defendant Brock Pierce's *Motion for Summary Judgment* is **GRANTED IN PART** and **DENIED IN PART**.

IT IS SO ORDERED.

All Citations

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Footnotes

1 Defendant nonetheless refers and cites to the [WhatsApp chat](#) in his own *SUMF*. (Docket No. 154 ¶¶ 44(a), 52–53).

- 2 Defendant also acknowledged that phone number listed the **WhatsApp** **chat** that is attributed to him is, in fact, his personal cell phone number. (Docket No. 170-3 at 3).
- 3 The Court notes that as an initial matter, the preferred mechanism for a party to voice objections to affidavits should be a motion to strike. Cf. [Perez v. Volvo Car Corp.](#), 247 F.3d 303, 314 (1st Cir. 2021) (nonetheless preserving a party's rights as to an allegedly deficient affidavit when objections were noted in a motion for summary judgment).
- 4 References to a Finding of Fact shall be cited as follows: (Fact ¶ __).
- 5 According to guidance issued by the Federal Communications Commission ("FCC"), a ringless voicemail is a "call" covered by section 227(b)(1)(A)(iii) of the TCPA. [In the Matter of Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991 Petition for Declaratory Ruling of All About the Message, LLC](#), No. CG02-278, 2022 WL 17225556, at *1 (OHMSV Nov. 21, 2022).
- 6 Defendant cites to cases from the Eleventh Circuit in support of his claim that Plaintiff has no standing. (Docket No. 153 at 4, 14–15); see [Grigorian v. FCA US LLC](#), 838 F. App'x 390, 392–94 (11th Cir. 2020) (holding that single ringless voicemail was insufficient for standing without conducting *Spokeo* standing inquiry); [Eldridge v. Pet Supermarket Inc.](#), 446 F. Supp. 3d 1063, 1066 (S.D. Fla. 2020) (multiple text messages insufficient to establish standing). However, both [Grigorian](#) and [Eldridge](#) relied heavily on the reasoning from [Salcedo v. Hanna](#), 936 F.3d 1162, 1170–72 (11th Cir. 2019), which was overturned by [Drazen](#).
- 7 Defendant's role here would be akin to that of a "seller."
- 8 Per Defendant's *Reply*, Pierce stated in his deposition that while he did not have any input into the scripts, he "may have ad lib[bed] a line or two if [he] had the transcript" (Docket Nos. 173 at 6 and 154-2 at 103).
- 9 [Section 217](#) is discussed further in Section V.B. iii of this Opinion and Order.
- 10 The Campaign, Media Mash, and Stratics are all non-parties to this action.
- 11 "Subagents may be appointed in series." [Restatement \(Third\) of Agency § 3.15 cmt. c.](#)
- 12 The Court notes that the term "user" is not clearly defined by the statute. See [DISH Network](#), 28 FCC Rcd. at 6594 n.126 ("we have been presented with no authoritative precedent on the meaning of 'user'"). Further, although "common carrier" is defined in section 153 of the TCPA, the definition is of little use in the context of vicarious liability litigation. See [Charvat v. EchoStar Satellite, LLC](#), 630 F.3d 459, 465 (6th Cir. 2010) (remarking on the ambiguous and undefined meaning of both "user" and "common carrier" in [section 217](#) and noting that the FCC has to develop the meaning of "common carrier" through a "case-by-case adjudication").

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United States v. Ojimba

United States Court of Appeals, Tenth Circuit. | October 20, 2021 | Not Reported in Fed. Rptr. | 2021 WL 5822137

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Outline

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v.
Nnamdi Franklin OJIMBA,
Defendant - Appellant.

No. 20-6109

|

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(D.C. No. 5:17-CR-00246-D-1) (W.D. Oklahoma)

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Before McHUGH, BALDOCK, and BRISCOE, Circuit Judges.

ORDER AND JUDGMENT*

Carolyn B. McHugh, Circuit Judge

*1 Nnamdi Franklin Ojimba participated in a scheme to defraud older, widowed women, including victim Pamela Bale. Mr. Ojimba appropriated the photograph of a finance professional, Hill Feinberg, and posted it on fraudulent dating profiles used to defraud victims into turning over control of their savings.

The government eventually discovered the scheme and indicted Mr. Ojimba on two counts of wire fraud, conspiracy to commit wire fraud, and aggravated identity theft. At Mr. Ojimba's first trial, the jury acquitted him of the substantive wire fraud counts and the aggravated identity theft count, but it could not reach a verdict on the conspiracy count. The district court declared a mistrial on that count. The government elected to retry Mr. Ojimba on the conspiracy

count, and the second jury convicted him. The district court sentenced Mr. Ojimba to 102 months' imprisonment, with a three-year term of supervised release.

Mr. Ojimba now appeals his conviction and sentence. He argues the district court abused its discretion by (1) allowing Ms. Bale to testify at the second trial and admitting evidence regarding the use of Mr. Feinberg's likeness; (2) excluding evidence of his prior acquittal; (3) admitting "WhatsApp" messages into evidence; and (4) considering acquitted conduct and applying an offense level increase for targeting vulnerable victims when determining his United States Sentencing Guidelines range.

For the following reasons, we affirm his conviction and sentence.

I. BACKGROUND

A. Factual History

Mr. Ojimba was one of several individuals behind the fictitious dating profile of "Edward Peter Duffey." "Mr. Duffey" would contact women online and develop fake romantic relationships with them. Many of the women were recently widowed or divorced and had little experience with the internet or financial matters. Although none of the women met "Mr. Duffey" in person, he would send them gifts and have his fictitious daughter, "Heather," reach out by telephone to tell them how happy she was her father had finally found love.

"Mr. Duffey," supposedly a retired financial planner, would ask the women questions about where their savings and retirement funds were invested. He would then initiate one of two schemes. Under the first approach, "Mr. Duffey" would express alarm and claim his contacts at the Securities and Exchange Commission (SEC) had informed him the firms identified were about to fail. In other instances, he would simply convince the woman that he could yield a higher return than their current investors. To facilitate the first scheme, "Mr. Duffey" would volunteer to have Mary Jo White, the then-Chairwoman of the SEC, confirm his concerns about the financial health of the firm holding the woman's money. Then, someone purporting to be Chairwoman White would often call the potential victim to buttress his claims. These tactics convinced the women to wire substantial sums of money to

“Mr. Duffey.” Once a woman made the transfer, “Mr. Duffey” ended the relationship and absconded with the money.

*2 According to Mr. Ojimba's coconspirator, Akunna Ejiofor, “Mr. Duffey” was actually a pseudonym used by Mr. Ojimba, Ken Ezeah, and Anthony Benson. Ms. Ejiofor sometimes acted as “Heather,” although she testified other women played that role as well. And Chairwoman White was impersonated by Curtissa Green, Mr. Ezeah's wife. At least one of the photographs used in “Mr. Duffey's” dating profile was a photograph of Mr. Feinberg, a finance professional in Dallas, Texas.

B. Procedural History

A federal grand jury sitting in the Western District of Oklahoma indicted Mr. Ojimba, charging him with conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 (Count 1); aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1) (Count 2); and two counts of wire fraud in violation of 18 U.S.C. § 1343 (Count 3 and Count 4).

Prior to the trial on these charges, Mr. Ojimba moved to exclude evidence of a “WhatsApp” chat, arguing its accuracy could not be independently verified. The district court ruled against Mr. Ojimba regarding the reliability of the evidence, but reserved ruling on the admissibility of the messages on other grounds until trial.

At the first trial, the jury acquitted Mr. Ojimba on the count of identity theft and the two counts of wire fraud. But it did not reach a verdict on the conspiracy charge. Following the district court's declaration of a mistrial, the government informed the district court it intended to retry that count.

Thereafter, Mr. Ojimba filed two motions in limine relating to the effect of his first trial on his second trial: he moved to exclude Ms. Bale's and Mr. Feinberg's testimony, arguing it was collaterally estopped, irrelevant, and unfairly prejudicial; and he moved to admit evidence of his prior acquittal. The government opposed both motions. The district court agreed with the government and held the motion was moot as to Mr. Feinberg, whom the government did not intend to call, collateral estoppel did not apply to block Ms. Bale's testimony, and Ms. Bale's testimony would be relevant and not substantially outweighed by the danger of unfair prejudice. It also held the judgment of acquittal was inadmissible hearsay.

Mr. Ojimba later moved to preclude the government from questioning Ms. Ejiofor about Mr. Feinberg's photograph, claiming her testimony also was collaterally estopped, irrelevant, and unfairly prejudicial. The district court denied the motion.

At trial, the government called four of “Mr. Duffey's” victims (Ms. Bale, Carol Hill, Nancy Meagher, and Beryl Wickliffe), Ms. Ejiofor, and FBI Special Agent Timothy Schmitz to testify. Mr. Ojimba's only witness was an investigator at the Oklahoma Public Defender's Office, Brenda McCray, who testified about the reliability of the WhatsApp evidence. The government connected Mr. Ojimba to the scheme through the testimony of Ms. Ejiofor and Agent Schmitz. They established that connection through the WhatsApp messages and Ms. Ejiofor's interview with the FBI, as well as the fact that Mr. Ojimba resided at the same hotel as Mr. Benson, a coconspirator.

The only references to Mr. Feinberg at trial were elicited by Mr. Ojimba. In response to defense questions, Ms. Ejiofor testified she “specifically saw [Mr. Feinberg's] picture on a dating profile that [Mr. Ojimba] was working on.” ROA Vol. III at 438.

The government moved for admission of the WhatsApp chat early in the second trial. Defense counsel renewed his prior objection, “for the argument we made previously, that it's not reliable.” *Id.* at 418. He also stated, “we don't have any foundational objections or anything like that.” *Id.* The district court “adopt[ed] its previous ruling with respect to the WhatsApp chats[,] allowing for their admission if properly authenticated.” *Id.* at 419. It specifically noted, “[t]here has been no objection to authentication.” *Id.* The court explained that Mr. Ojimba could attack the reliability of the messages at trial, but that reliability was ultimately a matter for the jury. The second jury convicted Mr. Ojimba of conspiracy to commit wire fraud.

*3 Prior to sentencing, the U.S. Probation Office filed a Presentence Investigation Report (PSR). The PSR recommended a base offense level of seven. It then recommended an eighteen-level increase because the loss amount was between \$3,500,000.00 and \$9,500,000.00, pursuant to United States Sentencing Commission, *Guidelines Manual*, § 2B1.1(b)(1)(J) (Nov. 2018); a two-level increase due to the financial hardship to victims, pursuant to USSG § 2B1.1(b)(2)(A)(iii); a two-level increase for

misrepresenting that the defendant was acting on behalf of a government agency, pursuant to USSG § 2B1.1(b)(9)(A); a two-level increase for using sophisticated means to further the commission of the offense, pursuant to USSG § 2B1.1(b)(10)(C); a two-level increase for unauthorized use of an identification (Mr. Feinberg's) to create the dating profile, pursuant to USSG § 2B1.1(b)(11)(C)(i); and a two-level increase for targeting vulnerable victims, namely 65- to 78-year-old widows, pursuant to USSG § 3A1.1(b).

Taken together, the PSR recommended a total offense level of thirty-five. Combined with his criminal history category of I, Mr. Ojimba's total offense level of thirty-five yielded a Guidelines range of 168 to 210 months' imprisonment.

Mr. Ojimba objected to every offense level increase recommended in the PSR. The district court overruled all of Mr. Ojimba's objections to the offense level increases and adopted the PSR's recommended total offense level of thirty-five, criminal history category of I, and resultant Guidelines range of 168- to 210-months. The district court determined, however, that a downward variance to 102 months' imprisonment was warranted. It noted Mr. Ojimba "was not at the top or the bottom of the hierarchy" of the conspiracy and the court was "[m]indful of the need for proportionality in sentencing and the avoidance of unwarranted disparities in sentencing." *Id.* at 1033. It also noted Mr. Ojimba's age, family status, and lack of prior convictions.

The district court entered judgment on July 10, 2020. Mr. Ojimba filed a timely notice of appeal.

II. DISCUSSION

Mr. Ojimba's issues on appeal fall into two categories—evidentiary and sentencing challenges. In the evidentiary category, Mr. Ojimba argues (1) Ms. Bale should not have been allowed to testify and evidence about Mr. Feinberg should have been excluded; (2) he should have been allowed to introduce evidence of his prior acquittal; and (3) the WhatsApp messages should have been excluded. In the sentencing category, Mr. Ojimba argues (1) the district court could not consider acquitted conduct in calculating his Guidelines sentencing range, and (2) the district court erred in applying a vulnerable victim enhancement.

We address Mr. Ojimba's challenges in turn and affirm the district court on each.

A. Evidentiary Challenges

This court "review[s] evidentiary decisions for abuse of discretion" and "legal interpretations of the Federal Rules of Evidence de novo." *United States v. Silva*, 889 F.3d 704, 709 (10th Cir. 2018). An abuse of discretion occurs when the district court "renders an arbitrary, capricious, whimsical, or manifestly unreasonable judgment," and this court will reverse "only if the [district] court exceeded the bounds of permissible choice." *Id.* (quotation marks omitted). On appeal, Mr. Ojimba argues the district court abused its discretion by (1) admitting Ms. Bale's testimony and all testimony about Mr. Feinberg, (2) excluding evidence of Mr. Ojimba's prior acquittals, and (3) admitting the WhatsApp messages.

1. Testimony of Ms. Bale and about Mr. Feinberg

Mr. Ojimba argues the government was collaterally estopped, by reason of his prior acquittal and because such evidence was unfairly prejudicial, from relying on testimony from Ms. Bale and about Mr. Feinberg. He thus contends the district court abused its discretion by admitting the testimony.

a. Collateral estoppel

*4 Collateral estoppel is the principle that when an issue has been determined "by a valid and final judgment," it cannot be litigated again by the same parties. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). It is "an established rule of federal criminal law." *Id.* The Fifth Amendment's protection against double jeopardy incorporates the principle of collateral estoppel. *Id.* at 442–43; see also *Dowling v. United States*, 493 U.S. 342, 350–51 (1990).

Where, as here, "a previous judgment of acquittal was based upon a general verdict," we must determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444. The answer depends on two questions: "First, what facts were necessarily determined in the first law suit? ... Second, has the government in a subsequent trial tried to relitigate facts necessarily established against it in the first trial?" *United States v. Rogers*, 960 F.2d 1501, 1508 (10th Cir. 1992).

The district court found collateral estoppel did not apply in this instance because the district court could not “divine the issue of fact at the heart of the [first] jury’s verdict,” given “the problematic nature of general verdicts and parsing out the issue or question of fact upon which the acquittal was based.” ROA Vol. I at 165–66. We agree with the district court for two reasons.

First, the basis of the first jury verdict is uncertain. The verdict form simply listed the four charged counts in numerical order, with a place for the jury to check “not guilty” or “guilty.” The jury placed checkmarks next to “not guilty” on the first three counts and left the fourth blank. Without any additional information, it is impossible to surmise the basis for the jury’s decision. Juries may make decisions for any number of reasons. “[A] jury acquittal may simply be the result of the jury’s ‘mistake, compromise, or lenity,’ rather than a conclusion that the codefendants are not guilty beyond a reasonable doubt.” *United States v. Nichols*, 374 F.3d 959, 970 (10th Cir. 2004) (quoting *United States v. Powell*, 469 U.S. 57, 64 (1984)), cert. granted, judgment vacated on other grounds, 543 U.S. 1113 (2005), opinion reinstated in relevant part, 410 F.3d 1186 (10th Cir. 2005). Even more granularly, we cannot tell what the jury thought about specific evidence presented. Therefore, we cannot say the evidence Mr. Ojimba wishes to foreclose, the testimony from Ms. Bale and about Mr. Feinberg, was the “actual basis for [his] prior acquittal.”

Second, the elements of the charges brought against Mr. Ojimba in the first and second trials are different. While Mr. Ojimba was acquitted of the substantive charges against him, the jury could not reach a decision on the conspiracy charge. Importantly, the acquittals on those substantive charges do not preclude a finding of guilty on the conspiracy count.

“[T]he essence of a conspiracy is ‘an agreement to commit an unlawful act.’” *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (quoting *Iannelli v. United States*, 420 U.S. 770, 777 (1975)). A conspiracy “may exist and be punished whether or not the substantive crime ensues.” *Id.* (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)). It follows that a verdict of acquittal on a substantive offense does not bar the introduction of the same evidence in a subsequent prosecution for conspiracy to commit that offense. *See, e.g., United States v. Brackett*, 113 F.3d 1396, 1400 (5th Cir. 1997); *United States v. Yearwood*, 518 F.3d 220 (4th Cir. 2008). And in this case, Mr. Ojimba’s acquittal on the substantive counts does not bar the introduction of the same evidence in his

subsequent prosecution because the elements of the charges were inherently different.

*5 Because we agree with the district court that collateral estoppel does not apply here, we cannot say the district court’s decision was “arbitrary, capricious, whimsical, or manifestly unreasonable.” *Silva*, 889 F.3d at 709.

b. Undue prejudice

Nor do we agree with Mr. Ojimba that the introduction of the evidence was unfairly prejudicial due to his prior acquittal. Relevant evidence may be excluded only if “its probative value is substantially outweighed by a danger of … unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” *Fed. R. Evid. 403*. “Overturning a *Rule 403* decision on appeal is an uphill battle” because “the district court has considerable discretion in performing the *Rule 403* balancing test.” *United States v. Alfred*, 982 F.3d 1273, 1282 (10th Cir. 2020) (internal quotation marks and brackets omitted), cert. denied, No. 20-8081, 2021 WL 2519390 (U.S. June 21, 2021).

We agree with the district court that the evidence here was relevant because it went to the operation and existence of a conspiracy. Specifically, the testimony regarding Mr. Feinberg’s photograph was probative because it made it more likely than not that Mr. Ojimba was a knowing participant in the conspiracy. And Ms. Bale’s testimony was relevant because it described the operation and means of the conspiracy. This evidence was highly probative, and we cannot say the district court abused its discretion in finding its probative value was not outweighed by the danger of unfair prejudice.

We therefore affirm the district court on this issue.

2. Judgment of Acquittal

Mr. Ojimba also argues the district court should have allowed him to introduce evidence of his prior acquittals. According to Mr. Ojimba, this evidence should have been admitted under the doctrine of curative admissibility to counter the impact of the erroneously admitted testimony from Ms. Bale and about Mr. Feinberg.

But we have concluded that Ms. Bale’s testimony and the references to Mr. Feinberg were not erroneously admitted. *See supra* at 9–12. As a result, the doctrine of curative

admissibility is inapplicable. *See United States v. Morales-Quinones*, 812 F.2d 604, 610 (10th Cir. 1987). This alone is sufficient to reject Mr. Ojimba's argument. In addition, our precedent leaves no doubt that “a judgment of acquittal is hearsay, and there is no exception to the hearsay rule for judgments of acquittal.” *United States v. Sutton*, 732 F.2d 1483, 1493 (10th Cir. 1984) (citing *United States v. Viserto*, 596 F.2d 531, 537 (2d Cir. 1979)). “The Federal Rules of Evidence except from the operation of the hearsay rule only judgments of conviction, Rule 803(22), not judgments of acquittal.” *Id.* at 1492 (quoting *Viserto*, 596 F.2d at 537). We cannot say the district court's adherence to our established precedent was an “abuse of discretion.”

We therefore affirm the district court's exclusion of the prior acquittals.

3. WhatsApp Messages

Mr. Ojimba makes several arguments as to why the district court abused its discretion in admitting the WhatsApp messages. Each depends on his assertion that the WhatsApp platform is accessible to third-party hackers and therefore the messages cannot be fairly attributed to Mr. Ojimba. Because it is uncertain whether Mr. Ojimba was the author of the comments reflected in the WhatsApp messages, he contends they are irrelevant, more prejudicial than probative, and inadmissible hearsay that runs afoul of the Sixth Amendment's Confrontation Clause. The government responds that these arguments are waived because Mr. Ojimba stated he had no foundational objections to the WhatsApp messages, and because his arguments are inadequately briefed.

a. Trial waiver

*6 When the government sought to introduce the WhatsApp messages at trial, the district court gave Mr. Ojimba an opportunity to place his objections on the record. Mr. Ojimba's counsel “renew[ed] our objection” from the first trial that the WhatsApp chat was “not reliable” but also stated Mr. Ojimba did not “have any foundational objections.” ROA Vol. III at 418–19. In response, the district court acknowledged there was “no objection to authentication” and admitted the evidence, noting that questions of reliability could be addressed to the jury. *Id.*

Relying on this exchange, the government argues Mr. Ojimba has waived the objections he raises on appeal, which are foundational objections. We agree. With one exception that

we address below, Mr. Ojimba's challenges to the WhatsApp messages are related to authentication—whether they are what they purport to be. And authentication is a foundational objection.

For example, in *United States v. Durham*, 902 F.3d 1180 (10th Cir. 2018), the court held “testimony laid a sufficient foundation for authentication” of cellphone videos, *id.* at 1230, stated the standard for authentication in terms of foundation, *id.* at 1232, and ultimately determined the district court did not abuse its discretion in finding “a sufficient foundation supporting the cellphone videos' authenticity,” *id.* See also *United States v. Bush*, 405 F.3d 909, 918 (10th Cir. 2005) (“Rule 901 … requires authentication or identification to establish a foundation for evidence as a precursor to admitting audio recordings....”); *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1220 (10th Cir. 2007) (holding “that the admission of the audio tapes was supported by sufficient evidence to satisfy the foundational requirements of Rule 901(a).”).

Here, Mr. Ojimba stated he had no foundational objections, and the court noted there were thus no authentication objections. While Mr. Ojimba preserved his right to bring concerns about reliability to the jury's attention, he waived any foundational objection to admissibility, including those related to authentication. Under these circumstances, Mr. Ojimba has waived any objection to admissibility of the WhatsApp chat based on foundation or authenticity.

b. Briefing waiver

On appeal, Mr. Ojimba raises one objection to the admission of the WhatsApp messages that does not fall within the foundational waiver—his Sixth Amendment argument. But this argument is inadequately briefed.

We have instructed that “a party's failure to address an issue in its opening brief results in that issue being deemed waived” and that “rule applies equally to arguments that are inadequately presented in an opening brief” or advanced “only in a perfunctory manner.” *United States v. Walker*, 918 F.3d 1134, 1151 (10th Cir. 2019) (internal quotation marks omitted). Here, the whole of Mr. Ojimba's Sixth Amendment argument is found in a single conclusory sentence: “Admission of this unreliable evidence also denied Mr. Ojimba the right to confront evidence or witnesses against him. U.S. Const. Amend. VI.” Appellant Br. at 31. This argument is wholly inadequate, and we do not consider it.

In sum, Mr. Ojimba's counsel objected to the **WhatsApp** messages only on the basis that they were "not reliable," expressly waiving all foundational objections. He cannot now challenge the foundation of the **WhatsApp** messages for the first time on appeal. Based on Mr. Ojimba's concession, the district court did not abuse its discretion by admitting the **WhatsApp** messages and permitting Mr. Ojimba to raise his concerns about reliability with the jury. Although Mr. Ojimba's Sixth Amendment challenge to the **WhatsApp** messages was not included in his waiver of foundational objections, it is inadequately briefed and we do not consider it.

*7 For the foregoing reasons we affirm each of the district court's evidentiary rulings and turn now to Mr. Ojimba's sentencing challenges.

B. Sentencing Challenges

This court typically "review[s] sentences for reasonableness under a deferential abuse of discretion standard." *United States v. Nkome*, 987 F.3d 1262, 1268 (10th Cir. 2021) (quotation marks omitted). A sentence's procedural reasonableness implicates the district court's Guidelines calculation and the court's explanation of the underlying sentence, while a sentence's substantive reasonableness focuses on the court's application of the sentencing factors in 18 U.S.C. § 3553(a). *Id.*

Mr. Ojimba claims the district court made two errors in calculating his Guidelines sentencing range: it improperly considered acquitted conduct and it inappropriately applied the vulnerable victim increase. A challenge to the district court's calculation of the Guidelines range implicates the sentence's procedural reasonableness. *Id.* In analyzing such a challenge, we "review de novo the district court's legal conclusions regarding the [G]uidelines and review its factual findings for clear error." *Id.* (quotation marks omitted). "[W]hether facts satisfy a prescribed standard is a mixed question of fact and law;" the court reviews "mixed questions under the clearly erroneous standard or de novo standard, depending on whether the mixed question involves primarily a factual inquiry or legal principles." *United States v. Patton*, 927 F.3d 1087, 1101 (10th Cir. 2019) (quotation marks and ellipses omitted).

We consider Mr. Ojimba's argument that the district court should not have considered his acquitted conduct in sentencing before turning to his argument that the vulnerable

victim enhancement was not properly applied. "In evaluating the application of a Guidelines enhancement, we review factual findings for clear error, but to the extent the defendant asks us to interpret the Guidelines or hold that the facts found by the district court are insufficient as a matter of law to warrant an enhancement, we must conduct a de novo review." *United States v. Scott*, 529 F.3d 1290, 1300 (10th Cir. 2008) (quotation marks and brackets omitted).

1. Acquitted Conduct

Mr. Ojimba argues the district court's imposition of his sentence was procedurally unreasonable because the court's consideration of acquitted conduct violated his "Sixth Amendment right to a jury trial and his Fifth Amendment rights to due process of law and equal protection of th[e] law." Specifically, he challenges the district court's consideration of the misappropriation of Mr. Feinberg's identity and the loss incurred by Ms. Bale. He posits that because he was acquitted of the substantive charges, the district court was precluded from considering this evidence at sentencing.

To the contrary, "[t]he Supreme Court and this circuit have both expressly held that acquitted conduct *can* be considered for purposes of sentencing." *United States v. Todd*, 515 F.3d 1128, 1137 (10th Cir. 2008) (emphasis in original); *see also United States v. Lewis*, 594 F.3d 1270, 1289 (10th Cir. 2010) (same). In *United States v. Watts*, 519 U.S. 148, 155–57 (1997) (per curiam), the Supreme Court explained the Double Jeopardy Clause does not bar considering acquitted conduct at sentencing for several reasons: (1) sentencing implicates a lower standard of proof; (2) it is impossible to know exactly why a jury found a defendant not guilty on a certain charge; and (3) it does not constitute punishment for a separate offense. The Court thus held "that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157. And we have held that *United States v. Booker*, 543 U.S. 220 (2005)—a Sixth Amendment case—did not change this reasoning. *United States v. Magallanez*, 408 F.3d 672, 684 (10th Cir. 2005).

*8 Mr. Ojimba fails to show why we should depart from our precedent on this issue, and we decline his invitation to do so. We therefore affirm the district court's consideration of previously acquitted conduct in sentencing.

2. Vulnerable Victim Enhancement

Mr. Ojimba also argues the district court abused its discretion in applying the vulnerable victim enhancement. The Guidelines provide for a two-level increase “[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim.” USSG § 3A1.1(b)(1). Vulnerable victim “means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.” USSG § 3A1.1 comment (n.2).

Mr. Ojimba argues application of the enhancement here “merely reflects unfortunate ‘ageism.’ ” Appellant Br. at 35. The government disagrees, claiming that the coconspirators carefully selected their victims based on their particular vulnerability to the scheme. Under the present facts, we agree with the government.

In *United States v. Proffit*, 304 F.3d 1001, 1008 (10th Cir. 2002), this court reversed the district court’s application of the vulnerable victim enhancement. There, the defendant pretended to be a wealthy rancher interested in buying the victim’s cattle ranch. *Id.* at 1004. During the negotiations, the victim revealed he was selling the ranch due to his *cancer diagnosis*. *Id.* The defendant continued to express interest in buying the ranch and eventually defrauded the victim out of \$50,000, allegedly to invest in cattle futures. *Id.* The defendant instead used the money for personal expenses, while the victim retained ownership of the ranch. *Id.*

The defendant pleaded guilty to a single count of mail fraud. *Id.* at 1003. At sentencing, the district court imposed a two-level vulnerable victim offense increase. *Id.* at 1004. On appeal, this court reversed. We explained that:

Membership in a class of individuals considered more vulnerable than the average individual is insufficient standing alone. See *United States v. Tissnolthos*, 115 F.3d 759, 761-62 (10th Cir. 1997) (rejecting enhancement based on advanced age alone).

Id. at 1007 (additional citations omitted).

In reaching that conclusion, the panel noted the victim was “a successful businessman who built a multi-million dollar ranch from the ground up.” *Id.* It also acknowledged the victim’s “illness may have opened the door for [d]efendant’s criminal conduct,” because it allowed the defendant to approach the victim as an interested buyer. *Id.* at 1008. We found it significant that the defendant never fraudulently obtained

ownership of the ranch and never attempted to do so. Rather, pretending to be interested in buying the ranch was simply how the defendant initiated communications with the victim about cattle futures. *Id.*

Importantly, we clarified that the result may have been different if “[d]efendant had defrauded Mr. Cook of his ranch after discovering Mr. Cook was ill and wished to sell it.” *Id.* We explained that under those circumstances, “the correlation between Mr. Cook’s health, his decision to sell the ranch, and [d]efendant’s ability to defraud him of ranch ownership would be direct.” *Id.* In this case, the connection between the scheme to defraud and the vulnerabilities of the victims is direct.

*9 The dating profile conspiracy in the instant case targeted not only women who were older, but also women who were vulnerable in other ways that made them desirable targets of this specific fraud. As the district court noted, “the trial evidence established that the scheme targeted older, divorced, or widowed women,” many of whom “only recently became users of online dating websites.” ROA Vol. III at 1038–39. And the PSR related Mr. Ezeah’s testimony at Ms. Ejiofor’s separate trial, in which Mr. Ezeah admitted the scam targeted a particular age group to “reflect people who were either divorced, widowed, more -- more available both emotionally and physically” and those who were “less sophisticated enough to understand the ropes of investments.” ROA Vol. II at 37.

This evidence/testimony provided ample support for the district court’s application of the vulnerable victim offense level increase. See *United States v. Brown*, 7 F.3d 1155, 1160–61 (5th Cir. 1993) (holding that a “district court could have reasonably concluded that lonely, elderly widows, *as a group*, are more susceptible than the general public to” a scam involving a “lonely hearts pen-pal magazine”) (emphasis in original). The district court therefore did not err in finding the victims were unusually vulnerable and in applying the Guidelines enhancement. We therefore affirm the district court’s application of the enhancement.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** Mr. Ojimba’s conviction and sentence.

All Citations

Not Reported in Fed. Rptr., 2021 WL 5822137

Footnotes

- * This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with [Federal Rule of Appellate Procedure 32.1](#) and [Tenth Circuit Rule 32.1](#).

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United States v. Hernandez

United States District Court, S.D. Florida. | September 19, 2023 | Not Reported in Fed. Supp. | 2023 WL 6121981

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Outline

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v.
Javier HERNANDEZ, Defendant.

Case No. 22-cr-20557-BLOOM
|
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|
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ORDER ON MOTION TO SUPPRESS

BETH BLOOM, UNITED STATES DISTRICT JUDGE

*1 THIS CAUSE is before the Court upon Defendant Javier Hernandez's ("Hernandez") Motion to Suppress Hernandez Cell Phone Evidence, ECF No. [102] ("Motion"). Hernandez filed Thomas Pullen's Expert Report under seal in support of the Motion. ECF No. [109-1]. The Government filed a Response opposing the Motion, ECF No. [122], and Hernandez filed a Reply in support of the Motion. ECF No. [124]. The Court has carefully considered the Motion, the Response, the Reply, the record in this case, the applicable law, and is otherwise fully advised. For the reasons set forth below, the Court denies the Motion.

I. BACKGROUND

The Court assumes the parties' familiarity with the allegations in this case but sets forth allegations pertinent to adjudicating the Motion.¹ The Government alleges that between December 2017 and October 2019, Hernandez actively participated in a criminal organization that smuggled Cuban migrants into the United States by way of Mexico via boat. ECF No.

[103] at 1. The Government further alleges that Hernandez participated in the conspiracy by procuring stolen boats and transporting them from Florida to Mexico, and Defendant Ramon Reyes Arnada ("Reyes Arnada") would identify the target vessels and communicate with Hernandez about them. *Id.* at 2. Hernandez and Reyes Arnada would then obtain counterfeit documentation for the vessels and boat parts, among other things, and were paid by others in the criminal organization. *Id.*

On March 24, 2023, the Government filed a five-count Superseding Indictment charging Hernandez with conspiring to encourage aliens to enter the United States for financial gain in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) (Count 1); conspiring to transport stolen vehicles in violation of 18 U.S.C. § 371 (Count 2); conspiring to traffic in certain motor vehicles, to export a motor vehicle with tampered identification number, and to alter motor vehicle identification numbers in violation of 18 U.S.C. § 371 (Count 3); trafficking in certain motor vehicles in violation of 18 U.S.C. § 2321 (Count 4); and engaging in a money laundering conspiracy in violation of 18 U.S.C. § 1956(h) (Count 5). ECF No. [51]. Reyes Arnada is charged only in Counts 2 and 5 of the Superseding Indictment. *See id.*

A. Seizure of Hernandez's Phone

The Government represents that Mexican law enforcement officials ("LEOs") seized and secured Hernandez's phone ("Phone") on November 21, 2019 in Progreso, Mexico. ECF No. [102] at 1; ECF No. [122] at 4. Mexican LEOs were aware of the Federal Bureau of Investigation's ("FBI") investigation into the alien smuggling ring, so Mexican LEOs notified the FBI of Hernandez's arrest and the recovery of his cellphone. *Id.* FBI agents traveled to Mexico to retrieve the Phone and the parties dispute when FBI agents did so. ECF No. [102] at 1 (November 24, 2019); ECF No. [122] at 4 n.2 (December 10, 2022). However, on February 26, 2020, Magistrate Judge Edwin G. Torres signed a search warrant authorizing the extraction of data on the Phone using Cellebrite software. ECF No. [102] at 2; ECF No. [122] at 5. And on February 27, 2020, FBI agents executed the search warrant by performing the forensic extraction, consistent with Hernandez's representation that FBI agents picked up the Phone on November 24, 2019. ECF No. [122] at 5. On March 2, 2020, FBI agents took photographs of the Phone's messages on the application WhatsApp that were not extracted during the February 27, 2020 search. *Id.* at 5. FBI agents took photographs of the WhatsApp chats "and additional items on the phone that were not captured" on February 27, 2020.

Id. In September 2020, “agents powered on the cellphone to take additional photographs of the **WhatsApp** messages.” *Id.*

*2 On April 7, 2021, the FBI’s Computer Analysis Response Team (“CART”) performed a second extraction from the Phone for **WhatsApp** data using Cellebrite premium software. *Id.* at 6. Hernandez asserts the only warrant pertaining to the Phone had expired on March 10, 2020. ECF No. [124] at 4.

B. Thomas Pullen Report

Hernandez retained computer/digital forensic expert Thomas Pullen to analyze the Phone contents. ECF No. [102] at 2. Pullen asserts that Mexican LEOs left the Phone turned on after the seizure, allowing it to communicate with the network, “which violates one of the canons of mobile forensic work: do not change the evidence from the time of seizure.” ECF No. [124] (quoting ECF No. 109-1 at 16). Pullen states,

there also does not appear to be any documentation of what was done with the phone, but apparently it was browsed by [LEOs] and screen shots taken using the phone itself on November 22 [2019], which violates another rule of mobile forensics: as the FBI’s regional computer forensic laboratory put it, “don’t browse. Scrolling through a suspect’s mobile phone may alter evidence, and preserving evidence is key.”

Id. (quoting ECF No. [109-1] at 16) (alterations in Reply). Pullen indicates that someone took the Phone off airplane mode after the Phone’s seizure, indicating that the Phone was placed on airplane mode sometime after the seizure, and that

taking the phone out of airplane mode destroyed the forensic preservation of the phone, which means [LEOs] connected the phone to the Internet, and thereby changed the information on the phone. New messages came in, which changed the **WhatsApp** cache, which made messages irrecoverable that may have been otherwise recovered.

Id. (quoting ECF No. [109-1] at 16). According to Pullen, 190 new files appeared on the phone while it was in police custody and nine of those files are from **WhatsApp**. *Id.* (citing ECF No. [109-1] at 18). Moreover, 9,309 text messages on **WhatsApp** were deleted and only 18 were recoverable. *Id.* (citing ECF No. [109-1] at 18).

According to Pullen, “by leaving the phone on, connected to the Internet, and having **WhatsApp** opened, the message data base changed from the time of seizure, when new messages

were written to the database. And in writing new data to the database, any deleted messages present will be overwritten by the SQL cache.” *Id.* (citing ECF No. [109-1] at 18-19). Pullen asserts that “somebody” logged onto the PayPal application using the Phone sometime after the seizure. *Id.* at 3 (quoting ECF No. [109-1] at 20). Due to the foregoing, Pullen opines that “it is certain that the phone was substantially altered by the non-standard forensic procedures undertaken: messages were made irrecoverable, time stamps were changed, data was altered.” *Id.* at 4 (citing ECF No. [109-1] at 22) (emphasis removed).

C. Motion

Hernandez seeks suppression and exclusion from trial of any testimonial or documentary evidence relating the Phone, specifically “the Government’s Cellebrite software extraction of the contents of the Phone.” ECF No. [102] at 1. Hernandez contends that law enforcement officials had failed to implement well-established rules designed to prevent the tainting, alteration, or loss of cellphone evidence. ECF No. [102] at 2. In particular, “there does not appear to be proper chain-of-custody evidence supporting the integrity of the Phone’s contents after seizure.” *Id.* at 3. Moreover, Hernandez asserts “evidence on the phone must not change after its seizure” to preserve the integrity of that evidence. *Id.* at 2-3 (emphasis in original).

*3 On the latter point, Hernandez contends the integrity of the evidence was undermined by numerous changes to the Phone after the search. First, “the Phone was browsed manually which *changed* data on the Phone.” *Id.* (emphasis in original). Second, LEOs permitted **WhatsApp** to “continue communicating with the network,” resulting in an unknown number of messages being deleted and rendered irrecoverable. *Id.* at 3. Item 42084, a message on **WhatsApp** on the Phone, is a communication that post-dates the Phone’s seizure. *Id.* at 4. Also, the last entry on the Phone indicates that 190 new files appeared on the Phone while it was in law enforcement official custody, and 9,309 **WhatsApp** messages were deleted and only 18 were recoverable. *Id.* at 4-5. Third, Hernandez submits that “someone took the Phone off [airplane] mode,” thereby destroying the forensic preservation of the phone. *Id.* Together, Hernandez concludes those alterations constitute a substantial change to or tampering with evidence. *Id.*

In support, Hernandez relies on *United States v. Garcia* and argues that the Court may not permit introduction of evidence on the Phone if the Court cannot be satisfied that “in

reasonable probability the evidence has not been changed in any important respect[.]” ECF No. [102] at 9 (citing *United States v. Garcia*, 718 F.2d 1528, 1534 (11th Cir. 1983), *aff’d*, 469 U.S. 70, 105 S. Ct. 479, 83 L. Ed. 2d 472 (1984)).

The Government asserts that the purported failure to follow well-established procedures for the preservation of cellphone evidence was due to *Mexican* law enforcement officials. ECF No. [122] at 9. The Government maintains that under those circumstances the Fourth Amendment does not mandate the exclusion of the evidence on the Phone because the Mexican LEOs were not acting as agents of U.S. law enforcement officials—even if U.S. LEOs were present during the search of the Phone—and, in any event, the Mexican LEO’s conduct was not such that it can “shock[] the judicial conscience.” *Id.* at 10. Even if the Fourth Amendment embraces the Mexican LEOs’ conduct, the Government submits that Hernandez has failed to carry his burden to show that suppression is proper because he does not attack the warrant authorizing the Phone search, the probable cause supporting the warrant, or “the circumstances surrounding [the cellphone search’s] execution.” *Id.* at 10 n.6. As such, the Government contends the Defendant’s arguments go to the reliability or **authenticity** of the evidence under Rule 901 of the Federal Rules of Evidence and not to whether law enforcement violated Hernandez’s Fourth Amendment rights. *Id.* In the Government’s view, those arguments fail in any event. First, the Government contends that purported gaps in the chain of custody go to the weight of the evidence and not its admissibility. *Id.* at 12. Second, the Government states that the Court is entitled to presume that law enforcement officials would not tamper with exhibits, so questions as to authentication and reliability of the evidence on the Phone are jury questions. *Id.* at 14. That is so because the Government asserts that manually browsing the Phone “cannot be said to cause the alteration of data on the device, aside from the operating system functions that run on a live device.” *Id.* at 8. To the extent Hernandez contends that LEOs took screenshots of the Phone after it was “on the network,” the Government submits that no evidence supports that claim. *Id.*

The Government contends deletion of cellphone data does not require exclusion of cellphone evidence. *Id.* at 12-13. Nor does LEO’s failure to take a cellphone off a network. *Id.* at 13. Regarding the 190 new items on the Phone, the Government counters that Hernandez overlooks how those changes may stem from the normal operation of the Phone. *Id.* at 7-8. Regarding the deleted items, the Government responds that Hernandez ignores how *he* may have been the one who

deleted the files. *Id.* at 6. Finally, the Government states that it is immaterial whether Mexican LEOs turned off the Phone’s airplane mode because the Government does not intend to introduce evidence of Reyes Arnada’s November 23, 2019 phone call. *Id.* at 6-7.²

*4 Hernandez generally replies that the Government’s Response is attorney argument not supported by expert opinion. ECF No. [124] at 1. Hernandez further replies that the April 7, 2021 phone extraction was not pursuant to a lawful search warrant; thus, the evidence obtained from that extraction is “fruit of the poisonous tree” that must be suppressed. *Id.* at 4 (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)).

II. LEGAL STANDARD

The Fourth Amendment to the United States Constitution guarantees the rights of individuals “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure” and provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation[.]” *United States v. Easterling*, No. 2:21-CR-455-MHT-SMD, 2022 WL 1671871, at *3 (M.D. Ala. May 9, 2022), *report and recommendation adopted*, No. 2:21CR455-MHT, 2022 WL 1667549 (M.D. Ala. May 25, 2022) (quoting U.S. Const. amend. IV). “Probable cause exists if, ‘given all the circumstances set forth in the affidavit ..., there is a fair probability that contraband or evidence of a crime will be found in a particular place.’” *United States v. Trader*, 981 F.3d 961, 969 (11th Cir. 2020) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). “Search warrants are presumed to be validly issued, and a defendant seeking to suppress evidence seized pursuant to a warrant bears the burden of proving that the warrant was defective.” *Easterling*, 2022 WL 1671871, at *3 (citing *Batten v. United States*, 188 F.2d 75, 77 (5th Cir. 1951)).³

The exclusionary rule bars the admission of evidence obtained in violation of the Fourth Amendment and prohibits the introduction of derivative evidence acquired as an indirect result of an unlawful search. *United States v. Noriega*, 676 F.3d 1252, 1259 (11th Cir. 2012) (first citing *Davis v. United States*, 564 U.S. 229, 232, 131 S. Ct. 2419, 2423, 180 L. Ed. 2d 285 (2011), then citing *Murray v. United States*, 487 U.S. 533, 536-37, 108 S. Ct. 2529, 2533, 101 L. Ed. 2d 472 (1988)).

III. DISCUSSION

A. The Fourth Amendment's Applicability

The central issue is whether the Court must exclude evidence from the Phone on the grounds that LEOs conducted a search or seizure in violation of the Fourth Amendment. The analysis depends on whether the Fourth Amendment applies to actions by Mexican LEOs. The Fourth Amendment exclusionary rule generally does not apply to searches and seizures conducted by foreign officials on foreign soil. *United States v. Odoni*, 782 F.3d 1226, 1238 (11th Cir. 2015). That is because the exclusionary rule is a deterrent sanction that is inapplicable where a private party or foreign government commits the offending act. *Id.* (citing *United States v. Janis*, 428 U.S. 433, 455 n.31, 96 S. Ct. 3021, 3033 n.31, 49 L. Ed. 2d 1046 (1976)). However, the exclusionary rule applies if “American law enforcement officials substantially participate in [a] foreign search” or if “the foreign authorities actually conducting the search were acting as agents for their American counterparts.” *United States v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir.), modified, 801 F.2d 378 (11th Cir. 1986). The exclusionary rule also applies where the conduct of the foreign officers “shocks the conscience of the American court.” *Id.* at 1231-32.

*5 Here, the Court discerns no conduct by the Mexican LEOs that “shocks” its conscience. However, FBI agents traveled to Mexico and executed the search warrant by performing a forensic extraction of the Phone on February 27, 2020. That fact concerns whether the FBI’s participation in Mexican LEOs’ search of the Phone was so substantial “so as to convert the search into a joint venture.” *Id.* at 1231 (citing *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968)). However, the Court need not consider the issue further because Hernandez does not raise it in his Motion and the parties’ submissions do not indicate the Phone was searched pursuant to a joint U.S.-Mexican law enforcement venture. The opposite is true: the FBI searched the Phone *after* the Yucatan State Police contacted the FBI following Hernandez’s arrest. ECF No. [102] at 1.

In any event, Hernandez has not demonstrated that LEOs’ failure to implement well-established forensic procedures while conducting a search of the phone renders the search unreasonable.⁴ Hernandez provides no legal authority supporting that a failure to implement well-established procedures can amount to a Fourth Amendment violation. Hernandez relies on *Garcia*, but *Garcia* addressed whether the evidence admitted at trial met the requirements for

authentication and identification under Rule 901(a). *Garcia*, 718 F.2d at 1533. *Garcia* did not address arguments concerning the exclusionary rule. Nor does Hernandez provide support for his contention that a gap in chain-of-custody evidence justifies the application of the exclusionary rule. As such, Hernandez has failed to carry its burden to demonstrate that conduct by Mexican LEOs requires the exclusion of evidence from the Phone.

B. Admissibility under Rule 901

To the extent that the Motion is a motion *in limine* to exclude evidence from the Phone on reliability or authentication grounds, the Government’s submissions demonstrate that such evidence is not excludable on that basis. First, as the Government correctly observes, gaps in the chain of custody do not mandate the exclusion of evidence under Rule 901(a); rather, such gaps “affect only the weight of the evidence and not its admissibility.” *United States v. Roberson*, 897 F.2d 1092, 1096 (11th Cir. 1990). Rule 901 provides that evidence is properly authenticated when there is “evidence sufficient to support a finding that the item in question is what the proponent claims it is.” Fed. R. Evid. 901(a). Once a party makes out a *prima facie* showing that proffered evidence is what the party purports the evidence to be, the proffered evidence should be admitted. *United States v. Caldwell*, 776 F.2d 989, 1001-02 (11th Cir. 1985). Purported gaps in the Phone’s chain of custody do not warrant the Phone’s exclusion at trial. See *United States v. Ramirez*, 491 F. App’x 65, 73 (11th Cir. 2012) (“The district court did not abuse its discretion when it admitted evidence of the lab reports over Ramirez’s objection that there were problems with the chain of custody.”).

Second, Hernandez has not otherwise shown that the Phone must not be admitted. *Garcia*, 718 F.2d at 1533-34 (“The admission of exhibits into evidence is predicated on a showing that the physical exhibit being offered is in substantially the same condition as when the crime was committed.”) (citing *Brewer v. United States*, 353 F.2d 260, 262 (8th Cir. 1965)). Contrary to Hernandez’s contention, the question is not whether WhatsApp messages were deleted from the Phone but instead whether WhatsApp messages that were *not* deleted are themselves in the same state as when those messages were sent. See *United States v. Moore*, 71 F.4th 678, 687-88 (8th Cir. 2023) (affirming admission of text messages where messages were in the same state as when cellphone was seized based on testimony that the messages were accurate records of what existed on phone even though other data was lost during a reset of the cellphone). Hernandez

has not alleged that the **WhatsApp** messages that were on the Phone prior to its seizure were changed or fabricated, so exclusion is not warranted because other messages were deleted. *Id.* Nor has Hernandez alleged—that through his expert or otherwise—that the actions by Mexican LEOs of manually browsing the cellphone, failing to immediately place the Phone on airplane mode, or subsequently taking the Phone off airplane mode affected the content of Phone's extant messages. Absent such allegations, the Phone is not inadmissible on Rule 901 grounds. See *Garcia*, 718 F.2d at 1534 (explaining that a trial judge may admit tangible objects into evidence where the trial judge is satisfied that “in reasonable probability the [object] has not been changed *in any important respect*” (emphasis added)).

C. April 7, 2021 Search

*6 For the first time in his Reply, Hernandez contends that “[t]he Government reports on the phone extraction using Cellebrite on April 7, 2021 were not the product of a lawful search warrant” because there was no valid search warrant in effect on that date. ECF No. [124] at 4 (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)). Hernandez did not raise that issue in its Motion but is responding to the Government's representation in its Response that the FBI's CART performed a second extraction of data from the Phone. ECF No. [122] at 6. The Court has already determined that

Hernandez has failed to demonstrate that Mexican LEOs' failure to adhere to standard procedures to preserve cellphone evidence is violative of the Fourth Amendment. And as the Government observes, Hernandez does not articulate any attack on the warrant authorizing the Phone search, or the probable cause supporting the warrant. ECF No. [122] at 10 n.6. Hernandez has not shown that the February 2020 warrant had “expired” in the sense that the Government acted beyond the warrant's scope by performing the second extraction; nor has he provided legal authority supporting that a subsequent search of a phone obtained pursuant to a lawfully executed warrant is an unreasonable search or seizure.⁵ Accordingly, the April 7, 2021 search of the phone does not require the Court to exclude the evidence obtained on that date and the Court declines to do so.

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that the Motion, ECF No. [102], is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida, on September 18, 2023.

All Citations

Not Reported in Fed. Supp., 2023 WL 6121981

Footnotes

- 1 The Court previously entered an Omnibus Order on Hernandez's Motions *in Limine*, which set forth the pertinent allegations in this action. ECF No. [101].
- 2 The Court assumes the Government is referring to Item 42084 given the date of that item.
- 3 *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (adopting as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).
- 4 The Court reaches that issue because the Court disagrees with the Government's assertion that Hernandez does not attack the circumstances surrounding the cellphone search's execution. Hernandez argues that the search of the Phone failed to meet the standard for searches of cellphones.
- 5 Hernandez states that he need not cite case law in addition to *Garcia* because “[t]hose who have practiced in the legal community a long time have learned that when there are not a multitude of cases on a certain legal principle it is because that principle is so well-settled it is not litigated[.]” ECF No. [124] at 7. However, the Court notes that statement is itself unsupported by legal authorities and ignores that the absence of cases on a legal principle may also mean the “legal principle” does not exist. See *Goldberg for Jay Peak, Inc. v. Raymond James Fin., Inc.*, No. 16-21831-CIV, 2017 WL 7791564, at *7 (S.D. Fla. Mar. 27, 2017) (quoting *Rapid Transit Lines, Inc. v. Wichita Developers, Inc.*, 435 F.2d 850, 852 (10th Cir. 1970)) (“A party's failure to cite legal authority in support of its position ‘suggests either that there is no authority to sustain its position or that it expects the court to do its research.’ ”). The Local Rules generally require that memoranda of law cite supporting authorities and the Court expects the parties to do so. See S.D. Fla. 7.1(a)(1).

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United States v. Avenatti

United States District Court, S.D. New York. | September 9, 2021 | 559 F.Supp.3d 274 | 2021 WL 4120539

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559 F.Supp.3d 274
United States District Court, S.D. New York.

UNITED STATES of America,
v.
Michael AVENATTI, Defendant.

19-CR-374-1 (JMF)
|
Signed 09/09/2021

Synopsis

Background: Defendant, a former attorney, moved to exclude certain evidence, and to require government to produce other evidence, in his prosecution for allegedly defrauding former client.

Holdings: The District Court, [Jesse M. Furman](#), J., held that:

[1] government had no obligation to provide defendant copies of text messages between him and former client in forensically collected electronic form;

[2] defendant's arguments for exclusion of text messages were premature;

[3] rule of completeness did not support excluding text messages;

[4] government's use of filter team to undertake privilege review of seized communications before disclosing them to prosecution team was proper;

[5] government could search defendant's electronic tablet and use filter team to review communications, provided defendant had opportunity to object to privilege determinations;

[6] defendant was not entitled to order directing government to comply with [Brady](#) and [Giglio](#) obligations; and

[7] defendant was not entitled to early disclosure of government's Jencks Act witness statements.

Motion denied.

West Headnotes (16)

[1] **Criminal Law** Particular documents or tangible objects

Criminal Law Test results; demonstrative and documentary evidence

Government was not obligated under [Brady](#) or by rule to provide defendant, former attorney, copies of text messages between him and former client in a forensically collected electronic form in prosecution of defendant for allegedly defrauding client, where government did not possess messages in that form, and instead had only screenshots from client's cell phone of messages and an export file provided by client, government possessed client's phone only fleetingly, to make screenshots with client's approval, client did not consent to a full search of phone or creation of forensic record of messages, defendant provided no reason to believe that exculpatory information existed in a forensic version of messages, and defendant had access to his own records of messages with client. [Fed. R. Crim. P. 16](#).

[2] **Criminal Law** Circumstances precluding disclosure; information unavailable

Criminal Law Information Within Knowledge of Prosecution

The government's discovery and disclosure obligations extend only to information and documents in the government's possession.

1 Case that cites this headnote

[3] **Criminal Law** Duty to locate information

The government has no obligation, under [Brady](#) or otherwise, to seek out information like a private investigator and valet gathering evidence and delivering it to opposing counsel.

[4] **Criminal Law** Telecommunications

Criminal Law Motions in limine

Argument of defendant, a former attorney, that copies of text messages between him and former client should be excluded in his prosecution for allegedly defrauding client because messages were in screenshot format or in export file provided by client rather than in a forensically collected electronic form and allegedly could not be authenticated or were incomplete was premature, as admissibility of any particular exhibit was more appropriately addressed at or, through a motion in limine, shortly before trial. [Fed. R. Evid. 106](#).

[5] **Criminal Law** ↗ Rule of Completeness

Rule of completeness could not support excluding text messages between defendant, a former attorney, and former client in defendant's prosecution for allegedly defrauding client, on basis that messages were allegedly incomplete, since rule was one of admissibility, authorizing a court to permit introduction of material that in fairness should be considered along with admitted evidence, not a rule calling for exclusion of writings or statements offered in the first instance. [Fed. R. Evid. 106](#).

[2 Cases that cite this headnote](#)

[6] **Criminal Law** ↗ Telecommunications

If properly authenticated, for example, by a witness with knowledge, such as a participant, screenshots of text messages and copies of electronic communications are admissible, even if the messages were cut from electronic communications and then pasted into word-processing files and thus, in theory, could have been edited or even completely fabricated.

[1 Case that cites this headnote](#)

[7] **Criminal Law** ↗ Electronic surveillance; telecommunications

Communications of defendant, former attorney, seized by government in search, pursuant to warrant, of defendant's account with cloud-services provider were not subject to suppression in defendant's prosecution for

allegedly defrauding former client, regardless of whether government's use of filter team to review communications for possible privilege before disclosing them to prosecution team was proper, where use of filter team was approved in search warrant issued by judge, and government was entitled to rely on that approval. [U.S. Const. Amend. 4](#).

[2 Cases that cite this headnote](#)

[8] **Search, Seizure, and Arrest** ↗ Persons Participating in or Present for Search

Government's use of filter team to undertake privilege review of communications seized, pursuant to warrant, in search of cloud-services account of defendant, former attorney, was proper in defendant's prosecution for allegedly defrauding former client and adequately protected against disclosure to prosecution team of protected attorney-client communications. [U.S. Const. Amend. 4](#).

[2 Cases that cite this headnote](#)

[9] **Privileged Communications and Confidentiality** ↗ Determination

Where evidentiary material that might be protected by privilege is already in the government's possession, the use of a taint or filter team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious to, the protection of privilege.

[1 Case that cites this headnote](#)

[10] **Privileged Communications and Confidentiality** ↗ Objections; claim of privilege

Where documents have been lawfully seized pursuant to a valid warrant, the government should be allowed to make fully informed arguments as to privilege if the public's strong interest in the investigation and prosecution of criminal conduct is to be adequately protected. [U.S. Const. Amend. 4](#).

[11] Privileged Communications and Confidentiality  Determination

In most cases, so long as the putative privilege holder (or its designee) has notice and the opportunity to raise objections with the court before potentially privileged materials are disclosed to members of the prosecution team, it offends neither the law of privilege nor the Fourth Amendment to allow the government to make the first pass in determining privilege. *U.S. Const. Amend. 4.*

[12] Search, Seizure, and Arrest  Persons Participating in or Present for Search

Search warrant authorizing government to seize communications from cloud-services account of defendant, a former attorney, and to use filter team to undertake privilege review of seized communications was proper in defendant's prosecution for allegedly defrauding former client, even though defendant did not have opportunity to object to privilege-review procedures before ex parte issuance of warrant, where defendant had ample opportunity to object to government's privilege-review process before any seized materials were actually disclosed to prosecution team. *U.S. Const. Amend. 4.*

1 Case that cites this headnote

[13] Search, Seizure, and Arrest  Form and Contents of Order or Warrant

Search warrant authorizing government to seize communications from cloud-services account of defendant, a former attorney, and to use filter team to undertake privilege review of seized communications was not defective for failing to specify in detail the government's privilege-review procedures, even though specifying those procedures in warrant would probably have been better, where defendant had ample opportunity to object to review procedures and did not do so until more than two years after he was indicted, and defendant did not identify any communications that were improperly disclosed to prosecution team. *U.S. Const. Amend. 4.*

[14] Privileged Communications and Confidentiality  Determination
Search, Seizure, and Arrest  Persons Participating in or Present for Search

Government was entitled to search electronic tablet of defendant, former attorney, and to use filter team to undertake privilege review of seized communications in prosecution of defendant for allegedly defrauding former client, but before communications could be provided to prosecution team, defendant was entitled to reasonable notice and an opportunity to object to filter team's privilege determinations. *U.S. Const. Amend. 4.*

1 Case that cites this headnote

[15] Criminal Law  Request for disclosure; procedure

Government's good-faith representation that in prosecution of defendant, a former attorney, for allegedly defrauding former client, government was complying, and would continue to comply, with its obligations under *Brady* and *Giglio* to provide defendant with prior statements of witnesses precluded granting defendant's motion seeking order to compel government to produce such statements.

1 Case that cites this headnote

[16] Criminal Law  Time when disclosure is permitted

Request of defendant, an attorney, for early disclosure of government's trial materials, including statements of witnesses and victims covered by Jencks Act, in defendant's prosecution for allegedly defrauding former client was frivolous; Jencks Act prohibited court from ordering pretrial disclosure of witness statements, and government represented it would provide such material one week before trial as long as defendant stood by his reciprocal commitments. *18 U.S.C.A. § 3500.*

1 Case that cites this headnote

Attorneys and Law Firms

*276 Matthew D. Podolsky, Assistant US Attorney, Robert Benjamin Sobelman, United States Attorney's Office, New York, NY, for United States of America.

Robert M. Baum, Andrew John Dalack, Tamara Lila Giwa, Public Defenders, Federal Defenders of New York Inc., New York, NY, for Defendant.

OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

Michael Avenatti, a formerly high-profile lawyer, is charged in this case with an *277 alleged scheme to defraud a former client. He previously filed two motions, which the Court denied. But taking advantage of the delay in his trial due to the COVID-19 pandemic and armed with new counsel, he now files an “omnibus” motion raising three issues. See ECF No. 115 (“Def.’s Mem.”). First, he moves to exclude evidence of **WhatsApp** messages between him and his former client—in the form of screenshots of certain messages and a document of messages “exported” from the former client’s cellphone—on the ground that the Government had an obligation to obtain and produce “the original, electronically stored version” of the messages. *Id.* at 1. Second, relying principally on a recent decision by the Fourth Circuit, he moves to suppress all fruits of the Government’s search of his iCloud account on the ground that it was conducted pursuant to a search warrant that improperly delegated to the executive branch responsibility for determining whether information obtained from the iCloud account is protected by the attorney-client privilege and work-product doctrine.¹ And third, he moves to compel the Government to promptly produce all prior statements attributable to certain allegedly critical witnesses.

The Court would be on firm ground denying Avenatti’s “omnibus” motion as untimely given that he did not seek, let alone obtain, leave of Court to bring another set of motions and there is no reason he could not have made his present arguments earlier. But as an exercise of its discretion, the Court has reviewed Avenatti’s arguments, even though untimely, on the merits. For the reasons that follow, they are

rejected. Avenatti’s first and third requests — to suppress the **WhatsApp** messages evidence and to compel immediate production of certain witnesses’ prior statements — require comparatively little discussion. With respect to the first, the law is clear that the Government has an obligation to produce only what is in its possession, custody, or control — and the Government complied with that obligation here. Additionally, so long as the **WhatsApp** messages are properly authenticated at trial, they can be admitted even if they are not in their “original, electronically stored” format. With respect to the request for immediate disclosure, the Government has already produced some of the prior statements at issue (in connection with an earlier trial of Avenatti in an unrelated case); to the extent the Government has not yet produced other statements, the law is clear that it is not required to do so at this time.

Avenatti’s second argument — that the warrant authorizing a search of his iCloud account improperly delegated to the executive branch responsibility for conducting a privilege review — requires more discussion, if only because it arguably finds some support in a Fourth Circuit decision, which held that a lower court had erred in allowing a government “filter team” to conduct a privilege review in the first instance of communications that had been seized pursuant to a search warrant from a law firm that did criminal defense work. Ultimately, though, the Court concludes that the unique facts and circumstances of the Fourth Circuit’s case distinguish it from Avenatti’s case and that the privilege review conducted by a Government filter team in this case does not provide a basis to suppress any, let alone all, evidence obtained from the judicially authorized *278 search of Avenatti’s iCloud account. To the extent that the Fourth Circuit’s decision is not distinguishable, and can be read to categorically prohibit the use of filter teams to conduct privilege reviews in the first instance of lawfully seized materials, the Court declines to follow it. Courts in this Circuit have long blessed such procedures and rightly so, as they adequately balance the law enforcement (and public) interest in obtaining evidence of crimes with respect for privileged communications. As long as a defendant has the opportunity to seek judicial review before materials are turned over to those involved in his prosecution, as Avenatti did in this case, there is nothing categorically improper about that practice.

BACKGROUND

In February 2018, Avenatti was hired to represent Stephanie Clifford, an adult entertainer more commonly known by her stage name, Stormy Daniels, “in connection with various matters relating to her previous liaison with the 45th President of the United States,” Donald J. Trump. *Id.* at 6. In early 2019, however, Avenatti’s life took a dramatic turn. First, in March 2019, he was arrested and charged in this District with crimes related to an alleged scheme to extort Nike (“*Avenatti I*”). *See Compl., United States v. Avenatti*, No. 19-CR-373 (PGG) (S.D.N.Y. Mar. 24, 2019), ECF No. 1. Then, in April 2019, he was indicted in the Central District of California on charges stemming from an alleged scheme to defraud and embezzle several of his clients (“*Avenatti II*”). Indictment, *United States v. Avenatti*, No. 8:19-CR-61 (JVS) (C.D. Cal. Apr. 10, 2019), ECF No. 16. Finally, in May 2019, he was indicted in this case with a scheme to defraud Ms. Clifford. *See ECF No. 1* (“Indictment”). In February 2020, after a trial before Judge Gardephe, a jury found Avenatti guilty on three counts in *Avenatti I*. *See Verdict, Avenatti I*, No. 19-CR-373 (PGG) (S.D.N.Y. Feb. 14, 2020), ECF No. 265. On July 8, 2021, Judge Gardephe sentenced him to thirty months’ imprisonment. Judgment, *Avenatti I*, No. 19-CR-373 (PGG) (S.D.N.Y. July 15, 2021), ECF No. 339. The California case, meanwhile, was severed into two sets of charges. Trial on the first set of the charges began July 13, 2021, but it ended in a mistrial. Minutes, *Avenatti II*, No. 8:19-CR-61 (JVS) (C.D. Cal. July 13, 2021), ECF No. 553; Minutes, *Avenatti II*, No. 8:19-CR-61 (JVS) (C.D. Cal. Aug. 24, 2021), ECF No. 780. A second trial on those charges is scheduled for November 2, 2021; trial on the other set of charges in the California case is scheduled for May 10, 2022. Order, *Avenatti II*, No. 8:19-CR-61 (JVS) (C.D. Cal. Sept. 2, 2021), ECF No. 804.

This case was originally assigned to the Honorable Deborah A. Batts. On August 29, 2019, Avenatti filed a motion seeking to transfer the case to the Central District of California under **Rule 21 of the Federal Rules of Criminal Procedure**. *See ECF No. 19*. By Opinion entered on September 24, 2019, Judge Batts denied the motion. *See United States v. Avenatti*, No. 19-CR-374 (DAB), 2019 WL 4640232 (S.D.N.Y. Sept. 24, 2019) (ECF No. 21). After Judge Batts’s death, the case was reassigned to the undersigned. When the Court adjourned trial due to the COVID-19 pandemic, Avenatti filed a second motion to transfer the case to the Central District of California. *See ECF No. 56*. On August 7, 2020, the Court denied the motion from the bench. *See ECF No. 73*; ECF No. 87 (“Aug. 7, 2020 Tr.”), at 9. The same day, the Court appointed new counsel to represent Avenatti and adjourned trial *sine die*. Aug. 7, 2020 Tr. 15, 23. New counsel

requested “an opportunity to determine whether there should be any motions going forward.” Aug. 7, 2020 Tr. 19. The *279 Court responded that it was “obviously not going to preclude [counsel] from making an effort,” but, citing the fact that Avenatti had filed two motions already, and had “had plenty of time since then to raise other issues,” cautioned that counsel “would have an uphill climb to persuade [the Court] that ... Avenatti should be granted leave to file any [more] motions” and that counsel “would certainly have to persuade [the Court] that a late motion would be appropriate.” *Id.* at 21.

On January 6, 2021, the Court set January 10, 2022, as a new trial date. ECF No. 103, at 2. Avenatti filed this “omnibus” motion on May 1, 2021. *See ECF No. 115*. He did so without leave of Court. Nor did he make any effort to explain why he could not have raised the arguments he now makes earlier.

DISCUSSION

As noted, Avenatti moves for three forms of relief. First, he argues that any evidence of his **WhatsApp** communications with Ms. Clifford should be excluded unless the Government obtains and produces “the original, electronically stored version” of the relevant communications. Def.’s Mem. 1, 13-17. Second, he seeks to suppress the fruits of the Government’s search of his iCloud account on the ground that the warrant authorizing the search improperly delegated to the executive branch the task of reviewing the material for privilege. *See id.* at 18-26. In a more recently filed letter-motion, he moves, on the same grounds, to bar the Government from searching the contents of his iPad, to which the Government apparently obtained access after briefing on the “omnibus” motion was complete. *See ECF No. 143*. Finally, he moves to compel the immediate production of prior statements made by three allegedly critical witnesses. *See* Def.’s Mem. 26-30. The Court will address each issue in turn.

A. The WhatsApp Message Evidence

On March 11, 2019, the Government interviewed Ms. Clifford as part of its investigation. According to the Government, during the interview, Ms. Clifford provided “limited consent for the Government to screenshot in her presence certain portions of [her] **WhatsApp** text messages with the defendant, and an Investigative Analyst with the United States Attorney’s Office did so.” ECF No. 130 (“Gov’t Mem.”), at 4. Two weeks later, Ms. Clifford, through counsel,

“voluntarily provided to the Government an export of all of the **WhatsApp** text messages with the defendant that were stored on [her] cellphone, which covered the time period of February 28, 2018 through February 15, 2019.” *Id.* at 4-5. The Government’s understanding is that the “export” was “generated automatically using an electronic feature that compiles the entirety of a **WhatsApp** conversation into a printable and shareable electronic file.” *Id.* at 5.

[1] Avenatti does not accuse the Government of any discovery impropriety *per se*; that is, he does not suggest, with respect to the **WhatsApp** messages, that the Government currently has in its possession more than the screenshots and the “export” file, both of which have been produced. *See* Def.’s Mem. 13-14. Nevertheless, Avenatti argues that the Government’s “failure to produce the original, electronically stored version of the **chats**” calls for exclusion of the evidence from trial or, “at a minimum, ... an evidentiary hearing.” *Id.* at 14, 16. More specifically, Avenatti contends that, under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Rule 16 of the Federal Rules of Criminal Procedure, the Government “has a duty to produce all of *280 [his] communications with Ms. Clifford ... in their entirety and forensically-collected format” and that “[i]ts failure to do so violates due process and deprives [him] of a meaningful opportunity to defend against the government’s evidence and theory of the case.” Def.’s Mem. 15. Separately, he contends, in substance, that the screenshots and “export” document cannot be properly authenticated or should be excluded pursuant to the “rule of completeness.” *Id.* at 15.

[2] [3] Avenatti is wrong. Avenatti provides no basis to believe that there is material, let alone exculpatory, evidence on Ms. Clifford’s cellphone or to be found in a “forensic” version of the **WhatsApp** messages. (That failure is especially noteworthy because, as the Government notes, Avenatti has access to the contents of his iCloud account, “which includes thousands of records of **WhatsApp** calls and messages” between him and Ms. Clifford, including, presumably, most, if not all, of the messages at issue here. Gov’t Mem. 5.) But more fundamentally, it is well established that the Government’s “discovery and disclosure obligations extend *only* to information and documents in the government’s possession.” *United States v. Brennerman*, 818 F. App’x 25, 29 (2d Cir. 2020) (summary order) (emphasis added); *accord United States v. Hutcher*, 622 F.2d 1083, 1088 (2d Cir. 1980) (“Clearly the government cannot be required to produce that which it does not control and never possessed or inspected.” (internal quotation marks omitted)). Relatedly, the

Government has no obligation, under *Brady* or otherwise, “to seek out ... information like a ‘private investigator and valet ... gathering evidence and delivering it to opposing counsel.’” *United States v. Thomas*, 981 F. Supp. 2d 229, 239 (S.D.N.Y. 2013) (quoting *United States v. Tadros*, 310 F.3d 999, 1005 (7th Cir. 2002)); *accord United States v. Raniere*, 384 F. Supp. 3d 282, 325 (E.D.N.Y. 2019) (“*Brady* does not require the government to search for exculpatory material not within its possession or control.” (citation omitted)).

Avenatti suggests that electronic versions of the **WhatsApp** messages *were* in the Government’s possession because “Ms. Clifford’s phone was at one point in the government’s possession, custody, or control.” Def.’s Mem. 16. But he does not dispute that the cellphone was in the Government’s possession only fleetingly and, presented with an argument much like Avenatti’s here, the Second Circuit has explicitly “reject[ed] ... a notion of ‘possession’ which is so elastic as to embrace materials that the prosecution never had in its files, never inspected, and never knew about.” *Hatcher*, 622 F.2d at 1088. Moreover, Avenatti does not dispute that Ms. Clifford provided only limited consent to take screenshots of certain communications and did not consent to a search of her cellphone or to the creation of a “forensic” copy of its entire contents. Avenatti cites, and the Court has found, no authority for the proposition that where, as here, a government official is in possession of a person’s cellphone, that official even has authority to access or copy the contents of the cellphone without a warrant or the person’s consent. Such a rule would not be consistent with the Fourth Amendment, *see, e.g.*, *Riley v. California*, 573 U.S. 373, 400, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), and would undoubtedly discourage victims and witnesses alike from coming forward and cooperating with law enforcement investigations. In short, the Government was under no obligation to disclose to Avenatti more than it obtained itself, so neither *Brady* nor Rule 16 calls for exclusion of the **WhatsApp** evidence here.

*281 [4] [5] [6] Avenatti’s arguments about authentication and completeness fall short as well. For starters, they are premature. The admissibility of any particular exhibit under the Federal Rules of Evidence is more appropriately addressed at, or (through a motion *in limine*) shortly before, trial. *See, e.g.*, *United States v. Solomonyan*, 451 F. Supp. 2d 626, 646 (S.D.N.Y. 2006) (denying a pretrial motion to preclude evidence at trial as “premature because the government has not yet decided what evidence they will seek to introduce”). In any event, Avenatti’s arguments fail on the merits. First, by its terms, Rule 106 of the Federal

Rules of Evidence, which codifies the “rule of completeness,” is a rule of *admissibility*. It provides that a court should *permit* the introduction of certain writings or statements “that in fairness ought to be considered” when other writings or statements are offered; it does not call for *exclusion* of the writings or statements that are offered in the first instance. Second, it is well established that, if properly authenticated (for example, by a witness with knowledge, such as a participant), screenshots of text messages and copies of electronic communications are admissible. *See, e.g.*, *United States v. Davis*, 918 F.3d 397, 401-04 (4th Cir. 2019) (photographs of text messages); *United States v. Arnold*, 696 F. App'x 903, 906-07 (10th Cir. 2017) (unpublished) (screenshots of text messages); *see also, e.g.*, *In re E.D.T. ex rel. Adamah v. Tyson*, No. 09 Civ. 5477 (FB), 2010 WL 2265308, at *3 n.4 (E.D.N.Y. May 28, 2010) (holding that testimony by a participant in text messages “was sufficient to establish their **authenticity**”). That is true, as the Second Circuit has held, even if the messages were “cut from … electronic communications and then pasted into word processing files” and thus, in theory, “could have been subject to editing by the government” or “even … completely fabricated.” *United States v. Gagliardi*, 506 F.3d 140, 151 (2d Cir. 2007).

In sum, Avenatti's motion with respect to the **WhatsApp** messages must be and is DENIED. That denial, however, is without prejudice to particularized objections to specific exhibits that the Government seeks to introduce at trial.

B. The iCloud and iPad Searches

Next, Avenatti moves to suppress the fruits of the search of his iCloud account, principally on the ground that “[t]he warrant authorizing” the Government's search of the account, signed by Judge Gardephe on August 13, 2019, “improperly delegated to the Department of Justice — an interested party — the responsibility of identifying and (presumably) walling off from the prosecution team materials protected by the attorney-client privilege and work-product doctrine.” Def.'s Mem. 12; *see* ECF No. 125-2. This error was compounded, he argues, by the fact that “the warrant was apparently approved *ex parte* (without any opportunity for Mr. Avenatti or other interested parties to object)” and because the warrant “failed to set forth the actual procedures to be used by the ‘filter team’ to prevent disclosure of privileged materials.” Def.'s Mem. 12. In a supplemental letter motion, Avenatti moves on these same grounds to preclude the Government from searching the contents of his iPad, to which the Government gained access after the initial motion had been briefed. *See* ECF No. 143.

[7] [8] [9] Avenatti's motion is without merit.² First, the use of a “filter team” to *282 review Avenatti's communications in the first instance does not call for suppression of any — let alone all — of the seized communications. Judge Gardephe approved that procedure in the warrant, and the Government was entitled to rely on that approval. *See United States v. Leon*, 468 U.S. 897, 920-21, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). More fundamentally, “[t]he use of a filter team is a common procedure in this District and has been deemed adequate in numerous cases to protect attorney-client communications.” *In re Search Warrants Executed on Apr. 28, 2021, No. 21-MC-425 (JPO)*, 2021 WL 2188150, at *2 (S.D.N.Y. May 28, 2021) (citing *United States v. Blakstad*, No. 19-CR-486 (ER), 2020 WL 5992347, *8 (S.D.N.Y. Oct. 9, 2020); *United States v. Ceglia*, No. 12-CR-876 (VSB), 2015 WL 1499194, *1 (S.D.N.Y. Mar. 30, 2015)); *see also, e.g.*, *United States v. Yousef*, 327 F.3d 56, 168 (2d Cir. 2003) (“[T]he Government established an effective firewall to prevent disclosures to the Government's trial attorneys of trial strategies or confidential communications between [the defendants] and their attorneys.”), *overruled on other grounds by Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009); *United States v. Nunez*, No. 12-CR-778-2, 2013 WL 4407069, at *1 (S.D.N.Y. Aug. 16, 2013) (noting that, “[a]t the Court's direction, a Government ‘Wall Assistant’ ” had reviewed seized emails involving the defendant for claims of privilege); *United States v. Winters*, No. 06 Cr. 54, 2006 WL 2789864, at *2 (S.D.N.Y. Sept. 27, 2006) (noting that the proposed use of “‘wall Assistant’ adequately protects the defendant's asserted privilege”); *United States v. Grant*, No. 04-CR-207 (BSJ), 2004 WL 1171258, at *2 (S.D.N.Y. May 25, 2004) (approving review by a filter team in the first instance of documents “lawfully seized pursuant to a valid warrant”). Put simply, where, as here, material is “already in the government's possession … the use of the taint team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious to, the protection of privilege.” *In re Grand Jury Subpoenas*, 454 F.3d 511, 522-23 (6th Cir. 2006).

In arguing otherwise, Avenatti relies almost exclusively on *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019), in which the Fourth Circuit held that a magistrate judge had erred in permitting the Government to use a filter team to review emails that had been seized from a law firm pursuant to a search warrant. But the facts and circumstances in that case — which one member of the panel stressed were “unique,” *id.* at 183 (Rushing, J., concurring) — are

very different from those here. There, 99.8% of the 52,000 emails seized did not involve the client whose relationship with a member of the firm was under investigation; the firm involved did criminal defense work and “many” of the seized emails contained privileged information relating to *other* clients, some of whom were potential subjects or targets of investigations by the office conducting the review; the law firm immediately and vigorously objected to review of the seized emails by the filter team; if the filter team determined that a communication was not privileged, the law firm was not given an opportunity to object; and the filter team was prospectively authorized to contact clients of the firm *ex parte* to seek waivers of their attorney-client *283 privileges.³ *Id.* at 165-68, 172. None of these circumstances are present here. Most notably, Avenatti was not involved in criminal defense work; he was given an opportunity to review all communications before they were turned over to the prosecution team; and, until this motion, he raised zero objections, either to the review procedures or to the filter team’s conclusions. *See, e.g., In re Sealed Search Warrant & Application for a Warrant*, No. 20-MJ-03278, 2020 WL 5658721, at *5 (S.D. Fla. Sept. 23, 2020) (distinguishing various cases, including the Fourth Circuit’s decision in *In re Search Warrant Issued June 13, 2019*, on the ground that they involved searches of lawyers involved in criminal defense work, giving rise to the concern “that members of the filter team might have been involved in or could later become involved in the criminal investigation and or prosecution of other clients”); *cf. United States v. Stewart*, No. 02-CR-395 (JGK), 2002 WL 1300059, at *7, *10 (S.D.N.Y. June 11, 2002) (appointing a special master to review materials seized pursuant to a warrant from a criminal defense lawyer’s office where the documents were “likely to contain privileged materials relating not only to unrelated criminal defendants but also to the clients of attorneys other than defendant”).

[10] In any event, the Court need not ultimately decide if the Fourth Circuit’s decision is distinguishable because it is not binding here and, “to the extent it suggests that the use of a filter team by a federal prosecuting office may violate the constitutional separation of powers,” the Court — like Judge Oetken — “respectfully disagrees.” *In re Search Warrants Executed on April 28, 2021*, 2021 WL 2188150, at *2 n.3.⁴ The attorney-client privilege “is an important privilege, to be sure.” *Grant*, 2004 WL 1171258, at *2. But where, as in this case, documents have been “lawfully seized pursuant to a valid warrant, … the Government should be allowed to make fully informed arguments as to privilege if the public’s

strong interest in the investigation and prosecution of criminal conduct is to be adequately protected.” *Id.*

[11] Moreover, it is a *non sequitur* to say that merely because the final adjudication of a privilege dispute — that is, whether materials that are lawfully in the Government’s possession pursuant to a seizure *284 warrant are privileged — is a judicial function, a court may not allow the Government to review the materials in the first instance and reserve its power to adjudicate any disputes that may arise. In most cases, so long as the putative privilege holder (or its designee) has notice and the opportunity to raise objections with the court before potentially privileged materials are disclosed to members of the prosecution team, it offends neither the law of privilege nor the Fourth Amendment to allow the Government to make the first pass.⁵ In fact, in the absence of a dispute, a federal court arguably has no business even exercising judicial power. *Cf. Carney v. Adams*, — U.S. —, 141 S. Ct. 493, 498, 208 L.Ed.2d 305 (2020) (noting that Article III, which grants “courts the power to decide ‘Cases’ or ‘Controversies,’ ” requires “that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions”). Finally, taken to its logical conclusion, Avenatti’s position would require a judicial officer to conduct the initial review of almost any communications seized pursuant to a warrant — including wire communications seized pursuant to a judicially authorized wiretap — because, in theory, any such communications could contain privileged information. The resulting burdens on the courts (even if such review were limited to a subset of cases) would be intolerable. *See, e.g., Grant*, 2004 WL 1171258, at *3 (noting “the burden that magistrates and district court judges would face if they were to routinely review lawfully-seized documents in every criminal case in which a claim of privilege was asserted”). Neither the law of privilege nor the Fourth Amendment mandates that burden.

[12] [13] Avenatti’s other objections — to Judge Gardephe’s *ex parte* approval of the warrant and to the absence of detailed protocols for the privilege review in the warrant — carry even less weight. As Avenatti himself “acknowledges,” the Government, “in the normal course, routinely obtains search warrants in criminal cases *ex parte*, primarily to maintain the integrity of its investigations.” Def.’s Mem. 25; *see, e.g., United States v. Abuhamra*, 389 F.3d 309, 322 n.8 (2d Cir. 2004) (“[T]he criminal law does permit *ex parte* submissions in support of arrest and search warrants”); *In re Search Warrant for Secretarial*

Area Outside Off. of Gunn, 855 F.2d 569, 573 (8th Cir. 1988) (“[H]istorically the process of issuing search warrants involves an *ex parte* application by the government and *in camera* consideration by the judge or magistrate.”); *United States v. Cohen*, 366 F. Supp. 3d 612, 632 (S.D.N.Y. 2019) (“History and experience indicate that proceedings to obtain search warrants traditionally involve *in camera* determinations of *ex parte* applications.”). And in any event, Avenatti does not (and could not) object to the *ex parte* nature of the seizure; he merely argues that, before blessing a review protocol, the court should have given him an opportunity to be heard. But notably, he had ample opportunity to raise any objections to the review process before any materials were *285 actually disclosed to the prosecution team. For the same reason, his objection that the warrant should have “set forth the actual procedures to be used by the ‘filter team’ to prevent disclosure of privileged materials” falls short. Def.’s Mem. 12. Yes, it probably would have been better for the Government to propose (and the court to bless) more detailed procedures in the warrant itself. But the fact is that Avenatti had ample opportunity to object to the review and, until this motion, failed to do so. Even now, his categorical objections to the filter team aside, he cites nothing deficient in the way the Government actually conducted its review and identifies no communications that were improperly disclosed to the prosecution team. Thus, there is no basis for suppression.

[14] Accordingly, Avenatti’s motion to suppress the fruits of the Government’s search of his iCloud account is DENIED. For similar reasons, Avenatti’s objections to the filter team’s review of the contents of his iPad in the first instance are overruled.⁶ That said, before any contents from the iPad are shared with any member of the prosecution team, the Government shall give Avenatti reasonable notice and an opportunity to raise with the Court any objections to the filter team’s privilege determinations. See *Grant*, 2004 WL 1171258, at *2 (approving review by a filter team in the first instance because “the Defendant will have the opportunity to make objections to the Court before any documents are turned over to the trial team”).

C. Immediate Disclosure of Witnesses’ Prior Statements

[15] [16] Avenatti’s final argument — that, pursuant to *Brady* and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Court should order the Government “to promptly produce all prior statements in its possession, custody, or control (or that could be through due diligence) attributable to Stephanie Clifford, Judy Regnier,

and Luke Janklow,” Def.’s Mem. 1 — is easily rejected. To the extent that he seeks evidence pursuant to *Brady*, *Giglio*, and their progeny, the request is denied on the basis of the Government’s good faith representation that it has complied with its obligations and will continue to do so. See Gov’t Mem. 31; see, e.g., *United States v. Davis*, No. 17-CR-610 (LGS), 2018 WL 4373998, at *10 (S.D.N.Y. Sept. 13, 2018); see also *United States v. Mangano*, No. 16-CR-540, 2018 WL 851860, at *17 (E.D.N.Y. Feb. 9, 2018) (“Courts in the Second Circuit generally do not compel immediate disclosure of *Brady/Giglio* materials where (1) the Government represents it is aware of and will comply with its *Brady/Giglio* obligations, and (2) the Defense does not provide any reason for suspecting the Government will not comply.” (internal quotation marks omitted)). To the extent that Avenatti seeks early disclosure of the Government’s trial materials, including the statements of witnesses and victims, his request is frivolous as 18 U.S.C. § 3500, the Jencks Act, “prohibits a District Court from ordering the pretrial disclosure of witness statements.” *United States v. Coppa*, 267 F.3d 132, 145 (2d Cir. 2001) (emphasis added).⁷ In any event, the *286 Government represents that it is prepared to stand by its previous commitment to produce all § 3500 material one week before trial (at least if Avenatti stands by his own reciprocal commitments). See Gov’t Mem. 27-28, 32-33; see also ECF No. 55. If the Government does so, that is more than adequate under the law. See *United States v. Noble*, No. 07-CR-284 (RJS), 2008 WL 1990707, at *9 (S.D.N.Y. May 7, 2008) (approving the United States Attorney’s Office’s agreement “to produce any … § 3500 material on the Friday before trial, consistent with its standard practice” (internal quotation marks omitted)). Accordingly, Avenatti’s request for immediate disclosure is DENIED.

CONCLUSION

For the foregoing reasons, Avenatti’s “omnibus” motion is DENIED in its entirety. Additionally, his objections to the filter team’s privilege review of the contents of his iPad in the first instance are overruled, subject to the requirement that, before any contents are shared with any member of the prosecution team, the Government shall give Avenatti reasonable notice and an opportunity to raise with the Court any objections to the filter team’s privilege determinations.

The parties are ordered to confer and, no later than **one week from the date of this Opinion and Order**, submit a proposed order consistent with the Court’s earlier scheduling order,

see ECF No. 55, setting pretrial deadlines. The parties shall file the proposed order on ECF and, simultaneously, email a version in Microsoft Word format to the Court.

All Citations

559 F.Supp.3d 274

SO ORDERED.

Footnotes

- 1** As discussed below, in a letter-motion filed more recently, Avenatti also moves, on the same grounds, to enjoin the Government from searching the contents of his iPad, to which the Government apparently gained access after the “omnibus” motion was fully briefed. See ECF No. 143.
- 2** The Government makes a forceful argument that Avenatti forfeited the objections he now presses, at least with respect to the earlier search of his iCloud account, because he had an opportunity to raise them before the filter team conducted its search. See Gov’t Mem. 19-20. In fact, as the Government notes, Avenatti’s prior counsel actually participated in the filter team’s review process. See *id.* at 13-16. Nevertheless, the Court need not and does not decide whether the objections were forfeited because Avenatti’s motion fails on the merits.
- 3** After the law firm’s appeal to the Fourth Circuit was lodged, the district court entered an agreed order modifying the protocols to permit the law firm to review communications deemed not to be privileged before they were shared with the prosecution team. See *id.* at 170. Notably, the panel did not consider the impact of that modification, let alone suggest that the revised procedures were impermissible; indeed, one member of the panel made a point of emphasizing that the decision “does not suggest that the [modified procedure] … impermissibly usurps a judicial function.” *Id.* at 184 (Rushing, J., concurring).
- 4** In support of its holding that the magistrate judge had improperly delegated judicial power to the executive branch, the Fourth Circuit cited the Second Circuit’s decision in *In re The City of New York*, 607 F.3d 923, 947 (2d Cir. 2010), for the proposition that “evaluating [a] privilege claim is always a judicial function.” 942 F.3d at 176-77. But the Second Circuit’s decision does not suggest, let alone hold, that the use of a filter team in the first instance to review lawfully seized materials for privilege constitutes an improper delegation of judicial power. In the phrase cited by the Fourth Circuit, the Second Circuit merely observed — ironically, in the course of holding that the district court in that case had improperly *usurped* the power of the executive branch — that “evaluating a claim of law enforcement privilege is unquestionably a proper and important judicial function” — 607 F.3d at 947. In short, the Second Circuit’s decision provides no real support for the Fourth Circuit’s separation-of-powers analysis — and certainly does not compel this Court to follow the Fourth Circuit’s lead.
- 5** It is worth noting that there is language in the Fourth Circuit’s decision that is not inconsistent with that proposition. See 942 F.3d at 176 (“We have recognized that, *when a dispute arises* as to whether a lawyer’s communications or a lawyer’s documents are protected by the attorney-client privilege or work-product doctrine, the resolution of *that dispute* is a judicial function.” (emphasis added)); see also *id.* at 184 (Rushing, J., concurring) (approving of approaches in which the review of potentially privileged seized materials is delayed pending adversary proceedings with respect to proposed review protocols and emphasizing that “the burden remains on the parties to voice their objections … in the normal course.”).
- 6** Although Avenatti invokes *Brady* in his submissions with respect to the iPad, see ECF No. 143, at 2; ECF No. 146, that is no reason to bar the Government’s review *ex ante*. As discussed below, the Government has represented that it is aware of its *Brady* obligations, has complied with them, and will continue to comply with them. That is sufficient at this stage.
- 7** Moreover, as the Government notes, and Avenatti does not dispute, Avenatti “already has possession of all *Giglio* and Jencks Act materials that were produced in advance of the trial in the Extortion Case for Judy Regnier, who testified at that trial.” Gov’t Mem. 31 n.10.

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Kitchen Winners NY Inc. v. Rock Fintek LLC

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v.

ROCK FINTEK LLC, Defendant.

Rock Fintek LLC, Third-Party
Plaintiff and Counter Claimant,

v.

Kitchen Winners NY Inc.,
Counterclaim Defendant,

JNS Capital Holdings LLC, Joel Stern,
Hershey Weiner, Joseph Mendlowitz,
Adorama, Inc., Third-Party Defendants.

22 Civ. 5276 (PAE)

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Signed August 6, 2024

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OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

*1 The claims in this case involve a series of COVID-era transactions for the supply of synthetic gloves. Before

the onset of the pandemic, none of the parties in this case were in the business of manufacturing or supplying Personal Protective Equipment (“PPE”). Each, to some extent, saw a business opportunity in this space in the weeks and months following March 2020.

Central to the events here, defendant Rock Fintek, LLC (“Rock Fintek”) secured a contract to supply gloves with certain specifications for use by Ascension Health Alliance (“Ascension”), a large nationwide hospital group. Rock Fintek eventually connected with the other parties, each of which by then had entered the PPE-supply business, and which each then took on a role supplying Rock Fintek and its customer Ascension with the required gloves. Negotiations, transactions, shipments, and deliveries followed. So did disagreements, dysfunction, and discord. And the parties’ ill-documented and at times seemingly chaotic course of dealings leaves aspects of these difficult to reliably reconstruct.

In 2021, Ascension notified Rock Fintek that its hospital facilities were having problems with the substandard gloves Rock Fintek had supplied. Thereafter, Rock Fintek lost its fledgling business relationship with this hospital. Its nascent PPE business also cratered. These events spawned this litigation. Plaintiff Kitchen Winners NY Inc. (“Kitchen Winners”), a supplier of gloves to Rock Fintek, initiated this action in state court, suing Rock Fintek for breach of contract based on Rock Fintek’s failure to pay approximately \$1 million allegedly due it. Rock Fintek removed to this Court. It brought counterclaims against Kitchen Winners and impled multiple third-party defendants, which it blamed for furnishing it with substandard gloves.

Following contentious and prolonged discovery, the Court is now presented with several sets of motions for summary judgment. Each is brought against Rock Fintek; Rock Fintek does not itself move or cross-move for relief. Kitchen Winners, both as plaintiff and as counterclaim-defendant, moves for summary judgment on its claims against Rock Fintek and on Rock Fintek’s counterclaims against it. The remaining third-party defendants—JNS Capital Holdings LLC (“JNS”) and its sole member Joel Stern, Adorama, Inc. (“Adorama”) and its executive Joseph Mendlowitz¹—move for summary judgment on Rock Fintek’s claims against them.

For the reasons that follow, the Court (1) denies Kitchen Winners’ motion for summary judgment on its claims against Rock Fintek and (2) grants in part and denies in part all other

summary judgment motions. The decision, although pruning this litigation, leaves substantial claims standing. These will now proceed to trial.

I. Background

A. Factual Background²

*2 The following summary presents, with such clarity as the challenging discovery record permits, the events on which the pending motions turn.

1. The Parties

This case involves numerous corporate entities and their officers and representatives, all of whom came to be involved, after early 2020, in the purchase and sale of PPE following the onset of the COVID-19 pandemic.

Plaintiff and counterclaim-defendant Kitchen Winners is a New York corporation. JSF ¶ 1. Kitchen Winners' sole shareholder is Yitty Weiner; Kitchen Winners also identifies her as its president, although Rock Fintek contests that Kitchen Winners has a president. *Id.* ¶ 2; Rock Fintek 56.1 ¶ 12. Yitty Weiner's husband, Joseph Weiner—a/k/a “Hershey Weiner”—runs Kitchen Winners' day-to-day operations. JSF ¶ 5. Kitchen Winners was originally founded as an online outlet for kitchen wares. At the start of the pandemic, it “expanded its business to focus on the sale of Personal Protective Equipment (“PPE”).” *Id.* ¶ 4.

Defendant, third-party plaintiff, and counterclaim-plaintiff Rock Fintek is a limited liability company formed in Delaware to facilitate sales of goods from China to the United States. *Id.* ¶ 8; Rock Fintek 56.1 ¶ 4; *see also* Frisch Decl., Ex. 2 (“Kato 30(b)(6) Dep.”) at 16. Thomas Kato is Rock Fintek's sole member. Bradley Gilling was Rock Fintek's chief operating officer at all relevant times. JSF ¶¶ 9–10.

Third-party defendant Adorama, a New York corporation, is an e-commerce company that specialized, before the pandemic, in photography and video-related goods. Kitchen Winners/Adorama 56.1 ¶ 8. In 2020 and 2021, Adorama appears to have advertised for sale various types of “nitrile”—a synthetic compound—gloves. Rock Fintek 56.1 ¶ 8. Eugene Mendlowitz is Adorama's sole owner; third-party defendant Joseph Mendlowitz³ directs multiple Adorama departments. Kitchen Winners/Adorama 56.1 ¶ 10. In this litigation, Rock

Fintek claimed at times that Adorama was an “alter ego” of Kitchen Winners, but it has abandoned that claim; the exact relationship between these entities is in dispute. *See* Rock Fintek 56.1 ¶¶ 17, 19.

Third-party defendant JNS, an LLC, was formed for the purpose of selling PPE during the pandemic. JSF ¶ 11. Third-party defendant Joel Stern is JNS's sole member. *Id.* ¶ 13. During the pandemic, JNS sold, as PPE, MedCare brand gloves. *Id.* ¶ 12. As of October 2023, JNS's bank account was empty. *Id.* ¶ 15.

2. 2020-2021: Rock Fintek's Entry Into the PPE Business and its Agreement to Supply Hundreds of Millions of Gloves to Ascension

In or around 2018, Kato formed Rock Fintek. Kato 30(b)(6) Dep. at 16. At the onset of the COVID-19 pandemic, when demand dipped for products it had been sourcing from China, Rock Fintek shifted to selling PPE. *Id.* at 24–25. Rock Fintek represents that, between March 2020 and June 2021, it obtained approximately \$100 million in revenue from the PPE business. Rock Fintek 56.1 ¶ 156. Taking into account these revenues and its payments to “primar[y]” suppliers of PPE and to trucking or logistics companies it used in connection with its PPE business, Rock Fintek estimates its “average profit margin” in 2020 and 2021 as “approximately 50%.” *Id.* ¶¶ 156–61.

*3 Rock Fintek's first PPE client was Ascension, a large hospital chain. Kato 30(b)(6) Dep. at 27.⁴ Kato, Rock Fintek's Rule 30(b)(6) representative, states that Rock Fintek obtained this contract after Kato was introduced to Ascension by an acquaintance who did real estate work with Ascension in St. Louis. Ascension was interested in whether Rock Fintek had connections in China to obtain PPE. *Id.* at 26. Rock Fintek asked intermediaries with whom it already sourced other products whether they had access to PPE; the intermediaries indicated yes. *Id.* Kato also learned he had a “close family connection” to an Ascension executive, which “positioned Rock Fintek to solidify a long-term relationship with Ascension.” Rakhunov Decl., Ex. 8 ¶ 3.

In or around March 2020, Rock Fintek began doing business, and entered into a series of contracts, with Ascension, which became Rock Fintek's largest client. Kato 30(b)(6) Dep. at 26, 53; Frisch Decl., Ex. 1 (“Gilling Dep.”) at 31. The first was entered into in September 2020. All involved the sale

of PPE—specifically gloves, masks, and gowns. Kato 30(b) (6) Dep. at 53; *see also* JSF ¶ 86. Between March 2020 and December 2020, Rock Fintek's bank records reflect receiving approximately \$23 million in payments from Ascension for products other than the gloves at issue in this case. Rock Fintek 56.1 ¶ 151; Kitchen Winners/Adorama Reply 56.1 ¶ 151.⁵

On December 7, 2020, Rock Fintek and The Resource Group, Ascension's purchasing entity, executed the purchase order at issue in this case. It called for Rock Fintek to supply 200 million “examination-grade” gloves bearing FDA 510(k) certification and meeting ASTM D6319 specifications. JSF ¶¶ 32, 71; *see also id.*, Ex. 2 (“Ascension Purchase Order”). Under the contract, Ascension was to pay Rock Fintek \$37 million for the 200 million gloves, equating to 18.5 cents per glove. JSF ¶ 72. At the time the purchase order went into effect, Rock Fintek did not have contracts with vendors to secure the examination-grade gloves specified. Kitchen Winners/Adorama 56.1 ¶ 33; Rock Fintek 56.1 ¶ 33.

In trying thereafter to source the 200 million gloves, Rock Fintek attempted to procure gloves from a supplier in Thailand. It wired this entity \$6.2 million. Kitchen Winners/Adorama 56.1 ¶ 34. The potential Thailand supplier, however, did not supply the promised gloves, and kept Rock Fintek's money in what Rock Fintek terms a theft. *See Rock Fintek 56.1 ¶ 162.*⁶ This purported theft ate into the approximately \$9 million deposit Rock Fintek had received from Ascension, impaired its ability to fulfill the Ascension Purchase Order, and, with the higher supply costs Rock Fintek came to pay, resulted in Rock Fintek's not making a profit from the Ascension Purchase Order. *Id.*

3. Late 2020 and Early 2021: Rock Fintek Comes to Purchase Gloves from JNS/Stern and Kitchen Winners

After the Thailand episode, Rock Fintek was seeking alternative suppliers of gloves to fulfill the Ascension Purchase Order. *See Rock Fintek 56.1 ¶ 35.* At this point, the other parties to this action come into view. In or around December 2020 or January 2021, Rock Fintek was introduced to JNS as a potential supplier; it came to do several transactions with JNS for examination-grade gloves. *Id.* ¶¶ 35–38. Through its dealings with JNS, Rock Fintek came into contact with Kitchen Winners, a supplier to JNS. Rock Fintek then sought out Kitchen Winners as an additional (and potentially lower-cost) supplier of the same gloves. *See id.*

¶ 40–42. It entered into several agreements to buy gloves from Kitchen Winners, culminating in a larger purchase agreement in April 2021. *See id.* ¶¶ 43–50. Thus, from early 2021 through the summer, as detailed below, Rock Fintek contracted with either or both of JNS and Kitchen Winners for gloves to fulfill its Ascension Purchase Order.

a. JNS/Stern's dealings with Rock Fintek

*4 Beginning in December 2020, JNS entered into a series of Sales and Purchase Agreements with Kitchen Winners to purchase MedCare brand examination-grade gloves. JSF ¶ 27; *id.*, Ex. 20. The agreement in the record, at least, specified that the gloves JNS would purchase from Kitchen Winners were to be “Nitril Gloves (Box 100) Color: Blue, Medical exam grade with FDA 510(k) [certification].” *Id.*, Ex. 20 at 1. JNS intended then to re-sell these gloves. JNS 56.1 ¶ 1.

When JNS would purchase gloves, and store them at its warehouses, Stern—JNS's sole member—would receive from the warehouses “Packing Lists” or “tally sheets” that listed container numbers for the gloves, and a bare description of the gloves. *See Rakhunov Decl.*, Ex. 13 (“Stern Dep.”) at 68–69; *id.*, Ex. 44 (emails from Stern attaching packing lists). Stern attested that it was his practice to review these documents. Stern Dep. at 68–69. Some packing lists in evidence list “synthetic nitrile *protection* gloves”; others list “nitrile *examination* gloves[.]” Rakhunov Decl., Ex. 44 (emphasis added). Protection-grade gloves do not meet the same specifications as examination-grade gloves and are not fit for the same uses. *See Rock Fintek 56.1 ¶¶ 213–14.*

To help acquire customers for JNS's gloves, JNS and Stern associated with a man named Bruno Azra. Azra “worked independently to drum up business to earn a commission on [Stern's and JNS's] sales.” Stern Decl. ¶ 5. Azra helped broker JNS's first order from Rock Fintek. In particular, in early February 2021, Azra discussed the prospect of a sale from JNS to Rock Fintek with a woman named Chunron Li. Rakhunov Decl., Ex. 43 (“Li Decl.”) ¶ 4; *see also* JSF ¶¶ 28–29. Li was also in the business of buying and selling PPE, became acquainted with Kato and Rock Fintek in late 2020, and worked as a quasi-broker for Rock Fintek in its transactions with JNS. Li Decl. ¶ 2.

As part of these efforts, Azra gave Li paperwork concerning the gloves to be purchased. Rock Fintek 56.1 ¶ 203. Stern had given these documents to Azra in an effort to generate

business for JNS. Stern Decl. ¶ 3. Stern attests that the documents he gave to Azra were ones Kitchen Winners had given to him and that he understood them to have come from the brand Medcare and to be authentic. *Id.* ¶¶ 3–4; *see also* Rock Fintek 56.1 ¶ 204 (“Stern obtained this paperwork from Kitchen Winners.”).

Paperwork from Azra in hand, Li then provided these documents to Rock Fintek via a **WhatsApp chat**. Rock Fintek 56.1 ¶ 205. The documents Li sent included: (1) a CTS Inspection Report for “examination gloves,” with “Kitchen Winners INC” listed as the “client,” Rakhunov Decl., Ex. 19, (2) a screenshot of the first page of an FDA 510(k) clearance letter from 2016 for “Nitrile Powder Free Patient Examination Gloves, Blue Color”, *id.*, Ex. 20, (3) bills of lading for shipments of “nitrile gloves” from Qingdao, China to New York, *id.*, Ex. 21, and (4) a packet of materials including the FDA 510(k) letter, additional testing reports, and photos of boxes of gloves marked with the Medcare brand and labeled “Nitrile Examination Gloves,” *id.*, Ex. 22.

On February 2 and 3, 2021, Rock Fintek gave an Irrevocable Corporate Purchase Order to JNS for 90,000 boxes of 100 gloves, designated as “NITRILE GLOVE MEDICARE MEDICAL EXAM BLUE COLOR,” for a total of \$1,350,000. JSF, Ex. 12.⁷ At \$15/box, this pricing arrangement meant Rock Fintek was buying at a loss. *Id.* The Purchase Order provided that once the gloves were released from U.S. Customs Enforcement (having been shipped to New York from China), the buyer (Rock Fintek) had 48 hours to inspect the goods and thereafter release the funds. *Id.* Li was deputized to inspect the gloves in the first instance. She sent a video in a **WhatsApp chat** with Gilling and Kato depicting this inspection. Li **WhatsApp Chat** at 43.⁸ After this correspondence, Rock Fintek wired the relevant funds to JNS. *Id.* at 43–44.

*⁵ JNS thereafter sold Rock Fintek additional orders of gloves until May 2021, although not all were sold pursuant to purchase orders or written contracts. JNS sold gloves in April and May 2021 for \$11.50/box, below the \$15/box price governing the February 2021 sale. Kitchen Winners/Adorama 56.1 ¶ 37. Stern, Kato, and Gilling appear to have coordinated these additional sales directly via a **WhatsApp chat** among themselves, with purchases being made informally based on Rock Fintek’s needs and Stern’s ability and/or willingness to supply given quantities of gloves at given times. *See generally* Rakhunov Decl., Ex. 28 (“Stern **WhatsApp Chat**”). Standard procedures for all of these transactions, however, had gloves

shipping from China to JNS’s warehouses, *see* Rakhunov Decl., Ex. 21 (bills of lading), with trucking companies hired by Rock Fintek picking up the gloves at JNS’s warehouses, and delivering them to Ascension’s warehouses, *see* Rock Fintek JNS 56.1 ¶ 73.

In early April 2021, Stern attests, he received an offer from a supplier other than Kitchen Winners for boxes of examination-grade gloves whose labels were “misprinted” as protection-grade gloves. Stern Decl. ¶ 14. These boxes had stickers placed on them to “correct the misprint.” *Id.* Stern offered these gloves to Rock Fintek at a lower price. Although Kato and Gilling appear to have considered buying these gloves in the event they could find a buyer, they ultimately did not agree to buy boxes labeled protection grade. *See* Rock Fintek 56.1 ¶¶ 221–22; Stem **WhatsApp Chat** at 4–6.⁹

Unsurprisingly in light of the ad hoc and only partly documented dealings between JNS and Rock Fintek, the parties dispute the exact number of gloves JNS delivered to Rock Fintek during their business relationship. However, all agree that JNS’s bank records show 13 separate payments from Rock Fintek, Gilling, or a related entity through the end of May 2021, totaling \$3,327,215. Rock Fintek 56.1 ¶ 39.

b. Rock Fintek’s Early 2021 One-Off Transactions With Kitchen Winners

At some point in connection with Rock Fintek’s purchases from JNS, Kato saw the name “Kitchen Winners” on a purchase order from JNS. Rock Fintek 56.1 ¶ 41. Hoping to source gloves for a lower price than JNS provided, Kato sought to contact Kitchen Winners, *id.* Kato Googled “Kitchen Winners,” which led him to a man named Mendel Banon. *Id.* ¶ 42. Banon apparently worked as a broker for Kitchen Winners. The parties dispute to what extent he also worked for Adorama; Rock Fintek asserts that Banon held himself out as working with both Kitchen Winners and Adorama, but Mendlowitz attests that he never did business with Banon. *See* Kato 30(b)(6) Dep. at 194–97; Sperber Decl., Ex. 5 (“Mendlowitz Dep.”) at 19.

*⁶ In addition, early in its dealings with Kitchen Winners and Banon, Rock Fintek arranged for Arik Maimon, an acquaintance of Kato’s, to participate in Rock Fintek’s PPE business. Rock Fintek 56.1 ¶ 196. Maimon told Kato that cultural and religious similarities between Maimon and the

parties with whom Kato was working (all Jewish) would help Maimon protect Rock Fintek's business interests. *Id.*

Kato contacted Banon in early 2021 and told him Rock Fintek was already buying Kitchen Winners' gloves from JNS, but could buy much larger quantities for a lower price. Kato 30(b) (6) Dep. at 193–96. Kato attests that Banon told him Kitchen Winners could slowly bring the price down on gloves for Rock Fintek, *id.* at 193, and that thereafter in March 2021, Kitchen Winners and Rock Fintek did a series of one-off transactions for the examination-grade gloves, JSF ¶¶ 38–40.¹⁰ In these transactions, Kitchen Winners sold Rock Fintek 90,000 boxes of gloves, at \$14/box. *Id.*

On March 4, 2021, before the series of one-off transactions, Gilling wrote Banon via **WhatsApp**: “Mendel, I do not see an ASTM D6319 certification or FDA with what was sent via email. Do you have documents?” Rakhunov Decl., Ex. 4 (“Banon **WhatsApp Chat**”) at 1. In response, Rock Fintek asserts that Mendel provided the FDA 510(k) clearance letter Stern had provided. Rock Fintek 56.1 ¶ 209.¹¹ That letter states that the product given clearance to go to market was substantially similar to one approved by the FDA—“Nitrile Powder Free Patient Examination Gloves, Blue Color” which are “manufactured in accordance with the requirements of ASTM D6319 and ASTM D5151 requirements.” Rakhunov Decl., Ex. 25 (“Banon FDA 510(k) Letter”) at 5–6.

It is undisputed that many boxes of gloves that Kitchen Winners provided Rock Fintek as part of these transactions were labelled “Protection” gloves, despite the parties’ understanding that Rock Fintek sought examination-grade gloves. See Kitchen Winners/Adorama 56.1 ¶ 48; Rock Fintek 56.1 ¶ 48. Kitchen Winners states that these gloves were mistakenly labeled as protection-grade, but in fact were *examination*-grade gloves, Kitchen Winners/Adorama 56.1 ¶ 48. Kitchen Winners further states that it notified Rock Fintek about the labelling error, and that Maimon, on Rock Fintek’s behalf, agreed to accept the mislabeled gloves. Kitchen Winners/Adorama 56.1 ¶ 48; Rakhunov Decl., Ex. 10 (“Weiner Dep.”) at 33. Rock Fintek disputes that it ever agreed to purchase gloves labeled “Protection”; to the extent Maimon represented as much, it contends, he was not authorized to do so. Rock Fintek 56.1 ¶ 224. Rock Fintek also disputes that the gloves Kitchen Winners provided were actually examination-grade gloves, mislabeled or otherwise. Rock Fintek 56.1 ¶ 48.

4. The Transactions Between Rock Fintek, Kitchen Winners, and Adorama, Leading to the April 2021 Execution of a Sales Purchase Agreement

*7 In March and early April 2021, after several one-off orders between them, Rock Fintek and Kitchen Winners began to negotiate a larger deal for the purchase and sale of gloves. Kato attests that, leading up to this deal, he participated in “numerous” telephone calls with Weiner directly, had frequent communications with Banon, and conveyed that the large order Rock Fintek intended to make was for Rock Fintek’s hospital client, who required examination-grade gloves meeting required specifications. Rock Fintek 56.1 ¶¶ 192, 197. Rock Fintek also states that it was willing to enter into a larger deal with Kitchen Winners because it understood that Adorama—whom Rock Fintek thought to be a manufacturer or procurer of gloves for Kitchen Winners and an established business “around since the 70s,” *id.* ¶¶ 165, 167—would be a party to the transaction “as a seller,” *id.* ¶ 166. To this end, Kato states, he had “one or two” telephone conversations with Mendlowitz to discuss a larger deal. *Id.*

Meanwhile, Adorama and Mendlowitz worked with Kitchen Winners as part of its PPE-related business. Mendlowitz attests that when the pandemic started, he began looking to obtain PPE for internal use by Adorama’s employees while in the office or in Adorama’s warehouses. Kitchen Winners/Adorama 56.1 ¶ 21. Mendlowitz was able to source PPE only from Kitchen Winners. *Id.* ¶ 22. Although Adorama had not done business with Kitchen Winners before the pandemic, Mendlowitz knew Weiner from their community in New York. *Id.* ¶¶ 23–24. Viewing Kitchen Winners’ PPE business as profitable, Mendlowitz and Adorama agreed to loan Kitchen Winners funds to further its PPE business, with Adorama charging interest. *Id.* ¶¶ 26–27. Initially, such business was based on a “handshake agreement”; Adorama made small, short-term loans to Kitchen Winners; in lieu of providing security, Kitchen Winners had its customers pay Adorama directly. *Id.* ¶¶ 28–29. But, Mendlowitz attests, because Kitchen Winners’ anticipated deal with Rock Fintek stood to be larger than any prior transactions Adorama had financed, on or about March 26, 2021, Adorama and Kitchen Winners “memorialized their agreement in a written Hebrew-language loan agreement.” *Id.* ¶ 30.¹²

Rock Fintek disputes knowledge of such an agreement. See *Id.* ¶¶ 28–30. Its understanding of Adorama’s role, it states,

was as set forth in a Letter of Intent (“LOI”) it signed with Maimon on April 1, 2021 in connection with the anticipated deal with Kitchen Winners and Adorama. The LOI states: “Rock Fintek desires to purchase up to 1 million boxes of powder-free nitrile medical gloves (100 gloves/box as per specifications) from Kitchen Winners NY Inc. (KWNY) / Adorama for import to the USA[.]” JSF, Ex. 3 (“Maimon LOI”) at 1. It anticipates payments due under the transactions to Kitchen Winners as largely to flow to Adorama, because “Adorama is financing these transactions for Kitchen Winners.” *Id.* at 1.

On April 5, 2021, Weiner emailed a document titled “Sales Purchase Agreement – Kitchen Winners to Rock Fintek v6 clean” to Mendlowitz. The email read: “Please look it over and call me about.” Rakhunov Decl., Ex. 3 at 1. It is unclear if Mendlowitz did call Weiner in response or, if so, what the two discussed. The final, executed Sales Purchase Agreement (“SPA”) that emerged was, in various respects, different from the draft Weiner had sent. Kitchen Winners/Adorama Reply 56.1 ¶ 171.

5. April 7, 2021: The Sales and Purchase Agreement

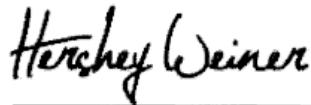
On April 7, 2021, the parties’ negotiations terminated with the execution of the SPA. JSF, Ex. 1 (“SPA”). The SPA’s preamble designates Kitchen Winners as “Seller,” Rock Fintek as “Buyer,” and the two collectively as “Parties,” and does not mention Adorama. *Id.* at 1. The SPA provides that “Seller agrees to sell to Buyer and Buyer agrees to purchase from Seller the ‘Products’ described below subject to the following terms and conditions[.]” *Id.* The SPA specifies the product to be sold as “Nitrile Gloves (Box 100) Color: Blue, Medical exam grade with FDA 510k,” “Brand: Medcare, examination glove,” and sets out the gloves to be sold by size (small through extra large). *Id.* The SPA states that the sale will involve 1.5 million boxes of gloves, at \$11.50/box, with a total purchase price of \$17,250,000. *Id.*

*8 Under the subhead “Payment Terms,” the SPA provides that “Buyer shall wire to an account designated by Seller the sum of \$1,250,000.00 (the ‘First Deposit’).” *Id.* It provides for a “Second Deposit” of \$600,000, to be wired by the “Buyer” to “an account designated by Seller” on April 26, 2021. *Id.* The SPA states that the deposits “shall be paid to Adorama Inc.” and lists Adorama’s bank account and wire information. *Id.* The SPA states that “Buyer shall pay Seller in full by wire transfer of funds for each container Delivered to the

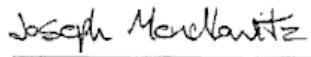
Seller’s warehouse in Los Angeles, California.” *Id.* Buyer Rock Fintek was to pay Seller Kitchen Winners upon its inspection of the products before collecting them; payments would be considered timely “if wire confirmation is made within 48 hours (excluding Saturday and Sunday) from product availability at Seller’s Los Angeles warehouse.” *Id.* at 2. Rock Fintek would also be eligible for a rebate of \$75,000 total on the first five containers of gloves delivered, provided it timely made all payments due. *Id.* After applying this rebate, the SPA stated, the purchase price for the gloves would drop to \$11/box for the balance of the contract’s term, provided the purchases under the SPA were all completed. *Id.*

The SPA was signed, on its final page, by Weiner on behalf of Kitchen Winners, Mendlowitz on behalf of Adorama, and Gilling on behalf of Rock Fintek. *Id.* at 4. The signature page is reproduced as follows:

The foregoing Agreement is read and agreed by:

Seller:  April 7, 2021
 Signature: _____
 Name: Hershey Weiner
 Title:

On behalf of: Kitchen Winners NY Inc.
 Phone:
 Email:

Signature: 
 Name: Joseph Mendlowitz
 Title:

On behalf of: Adorama Inc.
 Phone:
 Email:

Buyer:  4/7/21
 Signature: _____
 Name: Bradley Gilling
 Title: COO

On behalf of: Rock Fintek LLC
 Phone:
 Email:

Id.

6. The Parties’ Performance Under the SPA

Throughout the SPA's implementation, there were hiccups in its performance. For example, on April 26, 2021, Kato alerted Banon via **WhatsApp chat** to a mistake in the brand of gloves Rock Fintek had received and sent to the warehouses of its client, Ascension. Banon **WhatsApp Chat** at 9–10. Kitchen Winners' warehouse had apparently supplied Rock Fintek with LevMed brand gloves, not the agreed-upon Medcare brand. This caused a "major issue" with Ascension and delayed Rock Fintek's receipt of payment from Ascension, *Id.* On April 28, 2021, Gilling wrote in the **WhatsApp chat** that "[t]his disaster has crippled our [c]ash flow and ... [b]ecause of this mess, we can not buy containers today." *Id.* at 11. Rock Fintek, for its part, continued to have periodic cash flow issues for the duration of the SPA's term. It attributed these to the errant LevMed delivery, which led to discussions among the parties and delayed or incomplete payments. *See id.* at 11–16, 21.

At least partly in response to its cash flow issues, Rock Fintek began requesting that some shipments of gloves be delivered by truck to its client's warehouses across the country, including in Illinois and Texas. Rock Fintek 56.1 ¶¶ 107–08. The parties dispute whether the SPA envisioned direct deliveries to Rock Fintek's client, but all agree that Rock Fintek agreed to pay for these tracking costs. *Id.* ¶¶ 109. Rock Fintek, however, viewed Kitchen Winners'

transportation bills as exorbitant and demanded shipping invoices from Kitchen Winners. Banon **WhatsApp Chat** at 20.¹³ Kitchen Winners claims that, at times, Rock Fintek lacked the funds to pay for shipments of gloves that had been delivered to the client in Illinois or Texas, requiring Kitchen Winners to pay to store the gloves until Rock Fintek had paid. Kitchen Winners/Adorama 56.1 ¶¶ 109–13.

Rock Fintek asserts that at various points it paid for more gloves than Kitchen Winners had actually delivered. Rock Fintek 56.1 ¶¶ 279–80. For example, Rock Fintek points to an email Weiner sent to Mendlowitz stating that some loads sold to Rock Fintek "have less quantities, but their payments was always for full loads." *Id.* ¶ 280; *see also* Rakhunov Decl., Ex. 5. Kitchen Winners counters that, at Rock Fintek's request, it ultimately supplied Rock Fintek with thousands of gloves in excess of those specified under the SPA. Kitchen Winners/Adorama Reply 56.1 ¶ 281.

*9 It is undisputed that the parties concluded the SPA in early June 2021. The following table documents the payments Rock Fintek made to Kitchen Winners through May 2021, and the invoices Kitchen Winners issued to Rock Fintek under this agreement:

Date	Amount Due	Amount Paid By Rock Fintek
April 8, 2021	\$1,250,000	\$1,250,000
April 20, 2021	\$622,725	\$690,000
April 26, 2021	\$600,000	\$690,000
April 26, 2021	\$671,600	N/A
April 27, 2021	\$345,000	\$345,000
May 3, 2021	\$690,000	\$690,000
May 5, 2021	\$690,000	\$690,000
May 10, 2021	\$690,000	\$690,000
May 11, 2021	\$1,020,510	\$690,000
May 12, 2021	\$1,035,000	\$690,000
May 13, 2021	\$666,770	N/A
May 19, 2021	\$2,070,000	\$1,380,000

May 20, 2021	\$690,000	\$345,000
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Kitchen Winners/Adorama 56.1 ¶ 82. The parties dispute, however, how many gloves were actually sought, paid for, and delivered under the SPA.

7. Alleged Deficiencies with the Gloves Delivered to Fintek by Kitchen Winners, Adorama, and JNS

A central area of factual dispute is whether, if so, and to what extent Kitchen Winners, Adorama, and/or JNS delivered to Rock Fintek lesser-quality, protection-grade gloves, as opposed to examination-grade gloves meeting certain specifications. On summary judgment, the parties have submitted ample evidence on this issue. However, because this dispute is generally not central to the pending motions—and because it does not appear capable of resolution other than by the ultimate trier of fact—the Court reviews the evidence on this point only as necessary to the pending motions.

Ascension has attested that when the gloves delivered by Rock Fintek began to leave Medline warehouses for use by Ascension's healthcare providers across the country, it began receiving complaints about the gloves, including of gloves tearing, fluid seeping into the gloves, gloves stretching and other issues with size and fit. Rock Fintek 56.1 ¶ 227; *see also* Rakhunov Decl., Ex. 30. Ascension has attested that the gloves supplied by Rock Fintek did not meet the specifications for gloves set out in the Purchase Order. Rock Fintek 56.1 ¶ 226.

There is substantial contemporaneous documentation of these complaints, dating to July 2021, when Ascension first raised concerns to Rock Fintek about the quality of the gloves Rock Fintek had delivered. *Id.* ¶ 225. It includes the following. On July 8, 2021, Grilling sent an email to Weiner, copying Kato, asking for "SGS or other testing documents for the gloves we received from you," explaining that he had "just got a call from the hospital wanting to verify the nitrile gloves testing." Rakhunov Decl., Ex. 31 at 4. Weiner forwarded this message to Maimon. *Id.* at 5. On July 12, 2021, a representative from Ascension reported such problems to Kato and Gilling by email, asking for Rock Fintek's "perspective on this situation and possible resolution[.]" *Id.*, Ex. 30 at 3. On July 12, 2021, Gilling emailed Maimon, copying Kato, Weiner, and Banon, stating, "Hershey and Mendel, the email I sent email [sic] is very important to gather documentation of the **authenticity** of

the MedCare gloves. We have a serious issue with our client that we would like to distinguish with proper documentation and testing reports.... Our attempt to mitigate this immediately would be helpful for all parties." *Id.*, Ex. 31 at 2. That same day, Weiner forwarded this message to Mendlowitz, *Id.*

On July 14, 2021, Weiner sent an email to Kato, Gilling, and Maimon, copying Banon and Mendlowitz, with the subject line: "SETTLEMENT PROPOSAL FINTEK KITCHEN WINNERS[.]" Rakhunov Decl., Ex. 12. The body of that message reads:

Good day Tom, Bradley and Arik,

For settlement purposes only, and towards a global settlement intended to resolve all outstanding matters between the parties, including the open invoices in the amount of \$661,095.00 which owed to Kitchen Winners and overdue, a contract for 2 million boxes (of Medcare nitrile gloves for \$9.30 (\$9 for KW, \$.30 for Arik) per box of 100 — promised by Rock Fintek to Kitchen Winners), \$662,000.00 that Rock Fintek claims is owed to it by Kitchen Winners and a demand/request by Rock Fintek that Kitchen Winners provide documentation in order to verify that the nitrile gloves delivered to Rock Fintek were in fact produced by a licensed Medcare Factory, I would like to propose the following path forward to a mutually agreeable resolution.

- ***10** 1. Rock Fintek shall unconditionally acknowledge in writing the Six Hundred Sixty One Thousand Ninety Five and 00/100 (\$661,095.00) dollars outstanding in open invoices due to the seller under the contract of sale for nitrile gloves.
- 2. Within 45 days (e.g. on or before Friday, August 27, 2021) Rock Fintek shall deliver to Kitchen Winners and enter into a contract with Kitchen Winners and fund the deposit for the purchase of Two (2) Million boxes of Medcare nitrile gloves for \$9.30 (\$9 for KW, \$.30 for Arik) per box of 100 (all other terms remain the same as previous agreement unless the parties agree otherwise).
- 3. Upon Rock Fintek's written (email shall be sufficient to constitute a "writing" for the purpose of this agreement) acknowledgement of the invoices and consent to the terms as delineated above, Kitchen Winners shall immediately cooperate with the

document demands of Rock Fintek and proceed with providing the documentation, evidence and verifications requested.

4. Upon entering into a purchase and sale agreement pursuant to section 2 above, and in furtherance of an amicable resolution, Kitchen Winners shall waive the outstanding balance (\$661,095.00) due under the original contract and additionally, Kitchen Winners shall pay \$662,000.00 (from the new contract) to Rock Fintek as follows:
 - a. \$200,000.00 issued Arik Maimon towards the debt owed by Rock Fintek to Arik, and an additional,
 - b. \$200,000.00 credited to Arik Maimon in full satisfaction of the promissory note, PG and COJ (in the amount of \$200k that Arik owes to Kitchen Winners) and such payment shall also be towards the debt owed by Rock Fintek to Arik, and
 - c. \$262,000.00 payable to Rock Fintek directly.

Tom, Bradley and Arik, please review the terms above carefully with your respective attorneys and respond to this message confirming you understand, acknowledge and agree with all the above terms. Please call me if you have any questions I will not accept ambiguous replies. Thank you in advance for your anticipated cooperation regarding this very important matter and I look forward to hearing from you soon.

Id. The record as presented leaves unclear whether any party ever responded to this message. Email correspondence between Rock Fintek and JNS/Stern immediately after Ascension's reports of faulty gloves has not been presented—nor evidence that Kitchen Winners or Adorama supplied Rock Fintek with replacement or additional gloves.¹⁴

On July 19, 2021, however, Kato and Gilling messaged Stern via **WhatsApp**:

We have identified the gloves that are failing tests and of poor quality (fake nitrile) are from you. When you approached us in the past to buy 31 these gloves, we specifically said no. How you got these on our trucks and delivered to our client is unacceptable. Furthermore we have identified these gloves were being offered at \$4.80 buy price, to move these fake gloves. Obviously you made a significant amount of margin to sell us these gloves. We are having a meeting with our client to discuss full return and replacement of these fake nitrile gloves. We need you

to find and replace these gloves as they are not what we agreed to buy. We will be orchestrating the return of the goods to you with full credit and replacement immediately.

*11 Stern **WhatsApp Chat** at 30–31. Kato and Gilling followed up with similar messages to Stern on July 19 and 20. It does not appear Stern ever responded in that message chain. *See id.* at 31.

8. Ascension's Demands to Rock Fintek and Rock Fintek's Claim of Lost Business From Ascension

Ascension did not do additional business with Rock Fintek after reporting the deficient gloves delivered under the Purchase Order. On March 16, 2022, Ascension sent Rock Fintek a letter demanding to be made whole, including for the money it paid under the Purchase Order and for the costs of storing the gloves. Rock Fintek 56.1 ¶ 294; Rakhunov Decl., Ex. 62. To date, Ascension has not sued Rock Fintek or taken other concrete action against it. Rock Fintek 56.1 ¶ 296.

Although no additional purchase plans were in place between Ascension and Rock Fintek at the time Ascension protested the gloves that had been delivered, its representative has testified in this litigation that, but for its dissatisfaction with those gloves, Ascension would have been willing to do further business with Rock Fintek. JSF ¶¶ 84, 87.¹⁵ The representative testified that Ascension's then-chief operating officer and its vice president for supply chain had spoken with Rock Fintek about future business, potentially involving providing medical supplies, while notifying Rock Fintek that, to do such work, Rock Fintek would need to clear “major” hurdles such as obtaining its own FDA 510(k) certifications, and price its offerings to compete with existing “ginormous” companies in the space. Elstro Dep. at 40–41.

All told, Rock Fintek—between March 2020, when it entered the PPE business, and July 2021, when its relationship with Ascension ended—obtained about \$62 million in revenue from dealings with Ascension. The final purchase order was placed in March 2021. *See* Rock Fintek 56.1 ¶ 286. Kato estimated that, but for the glove dispute that ended the companies' relationship, Rock Fintek would have done at least the same amount of business, at a profit margin of about 50%, from July 2021 through November 2023 if not later. *Id.*; *see also* Rakhunov Decl., Ex. 8 ¶ 19. On those assumptions, Kato testified, Rock Fintek would have earned approximately \$30 million a year had it supplied Ascension for another three years. Rakhunov Decl., Ex. 8 ¶ 19.

B. Procedural History

On May 17, 2022, Kitchen Winners initiated this action, suing Rock Fintek on various grounds in New York State Supreme Court in Manhattan. Dkt. 1. On June 22, 2022, Rock Fintek removed this case to federal court, based on diversity jurisdiction. *Id.* On June 24, 2022, Rock Fintek filed an answer, and brought a counterclaim against Kitchen Winners and a third-party complaint against JNS, Stern, Hershey Weiner, Mendlowitz, and Adorama. Dkt. 5.

*12 On July 15, 2022, Kitchen Winners, Weiner, Mendlowitz, and Adorama filed a motion to dismiss Rock Fintek's third-party claims and counterclaims. Dkt. 31. The Court ordered Rock Fintek to oppose the motion or amend its pleadings as a matter of course, pursuant to [Federal Rule of Civil Procedure 15\(a\)](#). Dkt. 35. Rock Fintek filed an amended answer, amending its third-party complaint and counterclaim. Dkt. 43. Kitchen Winners, Weiner, Mendlowitz, and Adorama again moved to dismiss, Dkt. 46, as did JNS and Stern, Dkt. 53.¹⁶

On March 31, 2023, the Court resolved these motions, granting some and denying some. Dkt. 68. The Court dismissed Rock Fintek's fraud, negligent misrepresentation, tortious interference, and conspiracy claims against Kitchen Winners, Adorama, Weiner, and Mendlowitz, its breach of express warranty claim against Weiner, and its breach of covenant, negligent misrepresentation, tortious interference of contract, and conspiracy claims against JNS and Stern.¹⁷ That left the following claims, on which the parties proceeded to discovery:

- All of Kitchen Winners' claims against Rock Fintek (against which Rock Fintek had not moved).
- Rock Fintek's breach of contract claims, under the SPA, against Kitchen Winners and Adorama. Dkt. 43 at 27–28.
- Rock Fintek's breach of contract claims against Kitchen Winners and Adorama (on an alter-ego theory) as to the one-off transactions. *Id.* at 28–29.
- Rock Fintek's breach of contract claims against JNS and Stern. *Id.* at 29–30.

- Rock Fintek's breach of the covenant of good faith and fair dealing claims against Kitchen Winners and Adorama. *Id.* at 30–31.
- Rock Fintek's fraudulent inducement claims against JNS and Stern. *Id.* at 31–33.
- Rock Fintek's unjust enrichment claims against Kitchen Winners and Adorama. *Id.* at 36.
- Rock Fintek's breach of warranty claims against Kitchen Winners, Adorama, JNS, Mendlowitz, and Stern. *Id.* at 39–40.

On January 16, 2024, after a conference regarding summary judgment motions, the parties filed a Joint Statement of Undisputed Facts, and attached exhibits, Dkt. 135. On February 16, 2024, JNS and Stern, Kitchen Winners, and Adorama and Mendlowitz filed motions for summary judgment on Rock Fintek's remaining claims plus memoranda of law and attachments in support. *See* Dkts. 136–138; Dkts. 136, Ex. 22 (“JNS Br.”), 139 (“Adorama Br.”), 140 (“Kitchen Winners Br.”). On March 15, 2024, Rock Fintek filed a combined memorandum in opposition, plus supporting materials. Dkts. 146–49 (“Rock Fintek Br.”). On March 31, 2024, JNS and Stern filed a reply. Dkt. 154 (“JNS Reply Br.”). On April 5, 2024, Kitchen Winners, Adorama and Mendlowitz filed replies. Dkts. 157 (“Adorama Reply Br.”), 158 (“Kitchen Winners Reply Br.”).

II. Applicable Legal Standards

A. Summary Judgment

*13 To prevail on a motion for summary judgment, the movant must “show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” [Fed. R. Civ. P. 56\(a\)](#); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The movant bears the burden of demonstrating the absence of a question of material fact. In making this determination, the Court must view all facts “in the light most favorable” to the non-moving party. *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008).

If the movant meets its burden, “the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment.” *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008). “[A] party may not rely on mere speculation

or conjecture as to the true nature of the facts to overcome a motion for summary judgment.” *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (citation omitted). Rather, to survive a summary judgment motion, the opposing party must establish a genuine issue of fact by “citing to particular parts of materials in the record.” Fed. R. Civ. P. 56(c)(1)(A); see also *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009).

“Only disputes over facts that might affect the outcome of the suit under the governing law” will preclude a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In determining whether there are genuine issues of material fact, a court is “required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought.” *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012) (quoting *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003)).

B. Breach of Contract

“Under New York law, a breach of contract claim requires proof of (1) an agreement, (2) adequate performance by the plaintiff, (3) breach by the defendant, and (4) damages.” *Fischer & Mandell, LLP v. Citibank, N.A.*, 632 F.3d 793, 799 (2d Cir. 2011).

As to questions of interpretation, “[t]he primary objective of a court in interpreting a contract is to give effect to the intent of the parties as revealed by the language of their agreement.” *Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 232 F.3d 153, 157 (2d Cir. 2000). “Summary judgment is generally proper in a contract dispute only if the language of the contract is wholly unambiguous.” *Id.* at 157. “The question of whether the language of a contract is ambiguous is a question of law to be decided by the Court.” *Id.* at 158. Ambiguity is “defined in terms of whether a reasonably intelligent person viewing the contract objectively could interpret the language in more than one way.” *Topps Co. v. Cadbury Stani S.A.I.C.*, 526 F.3d 63, 68 (2d Cir. 2008); see *Sayers v. Rochester Tel. Corp. Supplemental Mgmt' Pension Plan*, 7 F.3d 1091, 1095 (2d Cir. 1993) (“Contract language is ambiguous if it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.” (citation omitted)).

To give effect to the intent of the parties, a court must interpret a contract by considering all of its provisions, and “words and phrases … should be given their plain meaning.” *LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 206 (2d Cir. 2005). “A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties,” *In re Coudert Bros.*, 487 B.R. 375, 389 (S.D.N.Y. 2013) (quoting *Acumen Re Mgmt. Corp. v. Gen. Sec. Nat'l Ins. Co.*, No. 09 Civ. 1796 (BGD), 2012 WL 3890128, at *5 (S.D.N.Y. Sept. 7, 2012)). At the summary judgment stage, “[t]he mere assertion of an ambiguity does not suffice to make an issue of fact.” *Thompson v. Gjivoje*, 896 F.2d 716, 721 (2d Cir. 1990); see also *Sayers*, 7 F.3d at 1095 (“Parties to a contract may not create an ambiguity merely by urging conflicting interpretations of their agreement.”). “Thus, the court should not find the contract ambiguous where the interpretation urged by one party would ‘strain [] the contract language beyond its reasonable and ordinary meaning.’” *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 467 (2d Cir. 2010) (quoting *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 161 N.Y.S.2d 90, 94, 141 N.E.2d 590 (1957)). “Language whose meaning is otherwise plain does not become ambiguous merely because the parties urge different interpretations in the litigation, unless each is a ‘reasonable’ interpretation.” *Id.* (internal citation and quotations omitted).

*14 Generally, summary judgment is appropriate in a contract dispute only where the contract's terms are unambiguous, whereas “interpretation of ambiguous contract language is a question of fact to be resolved by the factfinder.” *Compagnie Financiere*, 232 F.3d at 158. However, summary judgment is also appropriate “when the [contract] language is ambiguous and there is relevant extrinsic evidence, but the extrinsic evidence creates no genuine issue of material fact and permits interpretation of the agreement as a matter of law.” *Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296, 299 (S.D.N.Y. 1997); see also *3Com Corp. v. Banco do Brasil, S.A.*, 171 F.3d 739, 746–47 (2d Cir. 1999) (“[T]he court may resolve ambiguity in contract language as a matter of law if the evidence presented about the parties' intended meaning is so one-sided that no reasonable person could decide the contrary.”). “Similarly, if there is no extrinsic evidence bearing on the parties' intentions, the proper interpretation of ambiguous contract language is an issue for the court.” *In re Coudert Bros.*, 487 B.R. at 390 (emphasis in original) (citing *Mellon Bank, N.A. v. United Bank Corp. of N.Y.*, 31 F.3d 113,

116 (2d Cir. 1994); *Williams & Sons Erectors, Inc. v. S.C. Steel Corp.*, 983 F.2d 1176, 1184 (2d Cir. 1993)).

III. Discussion

The Court separately considers each motion for summary judgment, while noting overlap between them as relevant.

A. Kitchen Winners' Motions

Kitchen Winners seeks summary judgment on: (1) its affirmative claims for breach of contract and/or unjust enrichment, and (2) Rock Fintek's counterclaims against it.

See Kitchen Winners Br. at 15–25.¹⁸

1. Kitchen Winners' Affirmative Claims

Kitchen Winners argues it prevails as a matter of law on its breach of contract and unjust enrichment claims against Rock Fintek.

a. Breach of Contract

Kitchen Winners argues that there is no genuine issue of material fact that Rock Fintek breached the SPA by refusing to pay it for (1) gloves Kitchen Winners provided or (2) certain ground transportation and storage services. It argues it is entitled to \$967,165.42 for these breaches, a sum which reflects the total amounts it claims it was owed for providing gloves under the contract (\$20,787,794), for “post-customs ground transportation” and storage (\$827,806.42), minus the total amount Rock Fintek paid Kitchen Winners and/or Adorama (\$20,648,435). Kitchen Winners Br. at 15–17. Rock Fintek counters that summary judgment is unwarranted, because disputes of fact exist as to (1) whether Kitchen Winners materially breached by delivering nonconforming gloves, excusing Rock Fintek's performance; and (2) the amount Rock Fintek owes. Rock Fintek Br. at 43–45. Rock Fintek is correct on both points.

Taking these points in reverse order, there is clearly a genuine dispute of material fact as to the outstanding balances on the contract. On several points, a reasonable jury, reviewing the evidence adduced, could reject Kitchen Winners' calculations.

For one, a jury could find discrepancies in the number of gloves or boxes of gloves actually delivered by Kitchen Winners. In an email from Weiner to Mendlowitz on May 28, 2021, during the SPA, Weiner attached a Microsoft Excel document titled “qty delivered.xlsx” and commented: “See attached report[.] Note, some loads have less quantities, but their payments was always for full loads.” Rakhunov Decl., Ex. 5 at 2. In another email to Mendlowitz on June 27, 2021, Weiner references an “[o]verage” of a certain amount, and comments that “there are 22,760 boxes in dispute, which according to BOLs were delivered[.]” *Id.* at 12. Kitchen Winners acknowledges that there are multiple interpretations available of these communications. Kitchen Winners/Adorama Reply 56.1 ¶ 281. A reasonable factfinder could construe them to mean that Kitchen Winners did not uniformly deliver the precise quantity of gloves due under the contract.

*15 A reasonable jury could also dispute Kitchen Winners' claim against Rock Fintek for shipping or storage costs. The parties stipulated to the **authenticity** of trucking invoices from wenzy inc., but Rock Fintek disputes that wenzy inc. was a real trucking company. *Compare* JSF ¶ 98, with Rock Fintek 56.1 ¶ 101. And it has adduced evidence giving rise to a genuine dispute whether the wenzy inc. invoices on which Kitchen Winners relies reflect costs actually incurred for shipping services. It notes evidence that wenzy, inc.'s listed address “appeared to have been a private residence in the past but was vacant,” Rock Fintek Br. at 42; *see also* Rakhunov Decl., Ex. 7 (affidavit of attempted service), and testimony from Weiner calling into question the ownership of the company and whether it ever provided trucking services. Sperber Decl., Ex. 32 at 55–56 (“Q: Has Wenzy, Inc. ever provided trucking services? A: Not that I recall—I don't recall.”). Given these ambiguities, the Court cannot find on the record presented that the purported invoices would be received as business records. *See Kasper Glob. Collection & Brokers, Inc. v. Glob. Cabinets & Furniture Mfrs. Inc.*, 952 F. Supp. 2d 542, 572–74 (S.D.N.Y. 2013) (invoices likely inadmissible at trial, and improperly considered at summary judgment, where a qualified witness, familiar with the business's record-keeping system, had not testified when or how invoices were made). This prevents crediting the purported wenzy invoices—on which Kitchen Winners relies in seeking summary judgment as to this aspect of its damages. *See, e.g., James v. Albark*, 307 A.D.2d 1024, 763 N.Y.S.2d 838, 839 (2d Dep't 2003) (competing evidence about **authenticity** in contract action created fact question for jury).

In any event, there is a genuine issue of material fact about whether, and to what extent, Kitchen Winners materially breached its obligations, excusing performance by Rock Fintek. “Under New York law, a party’s performance under a contract is excused where the other party has substantially failed to perform its side of the bargain or, synonymously, where that party has committed a material breach.” *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 186 (2d Cir. 2007) (citing *Hadden v. Consol. Edison Co.*, 34 N.Y.2d 88, 356 N.Y.S.2d 249, 255, 312 N.E.2d 445 (1974)). For a breach to be material, it must “go to the root of the agreement between the parties.” *Septembertide Pub., B.V. v. Stein & Day, Inc.*, 884 F.2d 675, 678 (2d Cir. 1989). “A party’s obligation to perform under a contract is only excused where the other party’s breach of the contract is so substantial that it defeats the object of the parties in making the contract.” *Frank Felix Assocs., Ltd. v. Austin Drugs, Inc.*, 111 F.3d 284, 289 (2d Cir. 1997) (citing *Babylon Assocs. v. County of Suffolk*, 101 A.D.2d 207, 475 N.Y.S.2d 869, 874 (2d Dep’t 1984)). In this inquiry, courts are to consider factors such as “the ratio of the performance already rendered to that unperformed, the quantitative character of the default, the degree to which the purpose behind the contract has been frustrated, the willfulness of the default, and the extent to which the aggrieved party has already received the substantial benefit of the promised performance.” *Hadden*, 356 N.Y.S.2d at 255, 312 N.E.2d 445. In most cases, “the question of materiality of breach is a mixed question of fact and law—usually more of the former and less of the latter—and thus is not properly disposed of by summary judgment.” *Bear, Stearns Funding, Inc. v. Interface Group-Nevada, Inc.*, 361 F. Supp. 2d 283, 296 (S.D.N.Y. 2005).

There is a genuine dispute of material fact here surrounding whether any breach on Rock Fintek’s part should be excused in light of material breaches by Kitchen Winners. A reasonable jury could find that Kitchen Winners knowingly delivered protection-grade gloves that did not conform to the SPA’s specifications and which were unfit for their intended purpose of hospital use, and that this breach went to the heart of the parties’ contract. See, e.g., *Exp. Dev. Canada v. Elec. Apparatus & Power, L.L.C.*, No. 03 Civ. 2063 (HBP), 2008 WL 4900557, at *15 n.7 (S.D.N.Y. Nov. 14, 2008) (systemic failure of products bought and sold under contract constituted material breach); *Sinco, Inc. v. Metro-North Commuter R. Co.*, 133 F. Supp. 2d 308, 311–12 (S.D.N.Y. 2001) (material breach where one component of worker safety system was uniformly defective).

Kitchen Winners denies a dispute of material fact as to whether it breached the SPA in this respect. It argues that any breach was necessarily immaterial. Kitchen Winners Br. at 17. That argument is a loser on summary judgment. A reasonable factfinder could find such a breach material, based on the fact that the SPA provided for the purchase of examination-grade gloves according to provided specifications, see SPA at 1; testimony from Gilling that Kitchen Winners was on notice Rock Fintek was contracting to buy gloves for resale to a hospital that needed gloves with these specifications, see Gilling Dep. at 66–67; emails by Weiner supporting that he understood the need for properly labeled and constituted gloves, Rakunov Decl., Ex. 35; and results from scientific tests Rock Fintek commissioned post-dispute that purport to show the gloves provided by Kitchen Winners were not examination-grade gloves, see, e.g., Rock Fintek 56.1 ¶ 268. Although a finder of fact could view the evidence otherwise, the record does not permit the Court to find the absence of breaches by Kitchen Winners, or that any breaches were immaterial. See, e.g., *Soldiers’, Sailors’, Marines’ & Airmen’s Club, Inc. v. Carlton Regency Corp.*, 10 N.Y.S.3d 65, 66, 128 A.D.3d 593 (1st Dep’t 2015) (issues of fact regarding whether breach was in fact material precluded summary judgment); *Smolev v. Carole Hochman Design Grp., Inc.*, 79 A.D.3d 540, 913 N.Y.S.2d 79, 80 (1st Dep’t 2010) (same); see also *Jacob & Youngs v. Kent*, 230 N.Y. 239, 243, 129 N.E. 889 (1921).

*16 Kitchen Winners responds that because Rock Fintek was able to resell the gloves at issue here to Ascension, and because Ascension has yet to sue it or demand repayment, any breach by Kitchen Winners in furnishing substandard gloves was necessarily immaterial. Kitchen Winners Br. at 17; Kitchen Winners Reply Br. at 9. That argument is most germane to any claim by Rock Fintek for damages from Kitchen Winners arising from its breach—a point addressed below. But Rock Fintek’s ability to resell the gloves notwithstanding their deficiencies is only one factor a reasonable jury could consider in assessing whether Kitchen Winners substantially performed. See *Hadden*, 356 N.Y.S.2d at 255, 312 N.E.2d 445 (extent to which aggrieved party received benefit of bargain only one factor in determining materiality of breach). Kitchen Winners’ breach is a far cry from breaches so clearly immaterial as to enable a court to find immateriality as a matter of law. Compare *Wolfson v. Faraci Lange, LLP*, 103 A.D.3d 1272, 959 N.Y.S.2d 792, 794 (4th Dep’t 2013) (plaintiff’s failure to submit invoices within reasonable time not, as a matter of law, a material

breach of agreement for medical consulting services); *Savasta v. Duffy*, 257 A.D.2d 435, 683 N.Y.S.2d 511, 511–12 (1st Dep't 1999) (plaintiff's failure to disclose \$4400 assessment in context of a million-dollar contract immaterial as a matter of law), with *Bear, Stearns Funding, Inc.*, 361 F. Supp. 2d at 296–97 (genuine dispute of material fact precluding summary judgment on material breach where evidence went both ways as to whether breach precluded benefit of bargain); *RR Chester, LLC v. Arlington Bldg. Corp.*, 22 A.D.3d 652, 803 N.Y.S.2d 100, 101–102 (2d Dep't 2005) (failure to deposit down payment check could not establish material breach as a matter of law).

The Court thus denies Kitchen Winners' summary judgment motion on its breach of contract claim.

b. Unjust Enrichment

The Court likewise denies Kitchen Winners' summary judgment motion on its unjust enrichment claim against Rock Fintek. Under New York law, a “cause of action for unjust enrichment requires a showing that the defendant was enriched at the expense of the plaintiff and that it would be inequitable for the defendant to retain the benefit provided by the plaintiff.” *Milherst Constr., Inc. v. Natale Bldg. Corp.*, 193 N.Y.S.3d 539, 541, 218 A.D.3d 1310 (4th Dep't 2023). “The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.” *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 521 N.Y.S.2d 653, 656, 516 N.E.2d 190 (1987). But, where there is a “bona fide dispute” whether certain transactions are covered under the contract, a quasi-contract action, such as for unjust enrichment, may proceed as to those transactions. See *Pulver Roofing Co. v. SBLM Architects, P.C.*, 65 A.D.3d 826, 884 N.Y.S.2d 802, 804 (2009).

Here, to the extent Kitchen Winners' unjust enrichment claim is based on gloves it claims to have delivered in excess of the amount called for under the contract, an unjust enrichment claim may proceed. Kitchen Winners thusly defines this claim. See Kitchen Winners Reply Br. at 10 n.3 (“Kitchen Winners can only recover payment for those excess gloves, and the trucking costs associated therewith, under an unjust enrichment cause of action.”). But Kitchen Winners is not entitled to summary judgment on this claim. There are disputes of material fact as to how many, if any, gloves were

delivered in excess of those called for under the SPA, and, as reviewed above in connection with the contract-breach claim, whether misconduct by Kitchen Winners occurred —e.g., providing gloves unwanted by Rock Fintek—that create an issue of fact whether the retention of any excess gloves by Rock Fintek would be “inequitable.” See, e.g., *E.D. & F. Man Sugar, Inc. v. ZZY Distributors, Inc.*, 55 N.Y.S.3d 10, 11, 150 A.D.3d 452 (1st Dep't 2017) (“issues of fact as to whether and to what extent there [was] any unpaid balance in connection with the three shipments at issue” precluded summary judgment on unjust enrichment claim); *Speedfit LLC v. Woodway USA, Inc.*, 432 F. Supp. 3d 183, 219 (E.D.N.Y. 2020) (summary judgment on unjust enrichment claim inappropriate where reasonable jury could find either way on equities prong of the test).

2. Kitchen Winners' Challenge to Rock Fintek's Counterclaims

Kitchen Winners also moves for summary judgment on Rock Fintek's counterclaims against it. It argues that the breach of contract, breach of the covenant of good faith and fair dealing, and breach of warranty claims fail because Rock Fintek cannot establish damages. See Kitchen Winners Br. at 17–25. In so arguing, Kitchen Winners assumes *arguendo* that “Rock Fintek could ultimately prove its allegations regarding the quality of the gloves[.]” *Id.* at 18. But even if all of Rock Fintek's damages theories were found factually unsustainable—and the Court does not so find, *see infra*—that would not support summary judgment in favor of Kitchen Winners on the contract- and covenant-breach claims. That is because, on these claims, Rock Fintek could still seek nominal damages at trial.

*17 It is well established that “[u]nder New York law, where actual damages have not been proven with the requisite certainty, and indeed even if the breach of contract caused no loss at all, nominal damages are available ‘as a formal vindication of plaintiff's legal right to compensation.’” *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 10 Civ. 5762 (PAE), 2016 WL 3098842, at *17 (S.D.N.Y. June 1, 2016) (quoting *Freund v. Washington Square Press, Inc.*, 34 N.Y.2d 379, 357 N.Y.S.2d 857, 861, 314 N.E.2d 419 (1974)); *see also T & NPLC v. Fred S. James & Co. of N.Y., Inc.*, 29 F.3d 57, 60 (2d Cir. 1994) (“[N]ominal damages are always available for breach of contract.”). Thus, “a plaintiff may proceed to trial on a breach of contract claim even if the claim is limited to

nominal damages.” *NAF Holdings, LLC*, 2016 WL 3098842, at *17 (internal quotation and citation omitted).

The parties have not directed the Court to case law resolving whether nominal damages are also available for breach of covenant claims. But movant Kitchen Winners has not adduced law in its favor on this point, and, insofar as these claims are variants of a contract-breach claim, it is likely the case that nominal damages would be available to vindicate these legal rights as well. *See, e.g., Forman v. Guardian Life Ins. Co.*, 76 A.D.3d 886, 908 N.Y.S.2d 27, 30–31 (1st Dep’t 2010) (“It is axiomatic that all contracts imply a covenant of good faith and fair dealing in the course of performance.”). Absent persuasive authority in Kitchen Winners’ favor on this point, the Court would permit Rock Fintek to pursue these claims even if only nominal damages were available.

Rock Fintek’s express warranty claims are, however, distinct. These require a showing of injury caused by the alleged breach. If an express warranty was made, a plaintiff must then make out a “breach of the warranty, and [] injury to the buyer caused by the breach.” *Housey v. Procter & Gamble Co.*, No. 21 Civ. 2286 (NRB), 2022 WL 874731, at *3 (S.D.N.Y. Mar. 24, 2022) (emphasis added); *see also id.* at *7–8 (express warranty claim failed given inadequate injury allegations); *Avola v. Louisiana-Pacific Corp.*, 991 F. Supp. 2d 381, 401–02 (E.D.N.Y. 2013) (for breach of express warranty claim, as with false advertising claim, party needed to establish breach caused injury).

To determine whether this claim survives, the Court therefore must assess the viability of Rock Fintek’s theories of injury, each of which Kitchen Winners challenges. This assessment is also important in that it delimits the damages available on Rock Fintek’s breach of contract and breach of covenant claims. *See, e.g., Lauricella v. LC Apartments, LLC*, 103 N.Y.S.3d 726, 727–28, 173 A.D.3d 1821 (4th Dep’t 2019) (affirming grant of partial summary judgment limiting permissible theories of damages).

Because Rock Fintek has not been compelled to pay Ascension for allegedly providing it non-conforming gloves, it does not and cannot claim damages to cover such repayment. It advances four alternative theories of damages: that (1) its lost profits as a result of Ascension’s decision not to do future business with it; (2) it faces potentially future legal exposure to Ascension, notwithstanding that Ascension to date has not sued it; (3) it stood to, but did not, receive a \$750,000 rebate under the SPA; and (4) it is

owed approximately \$2 million for gloves it claims to have bought from Kitchen Winners above the quantity which the SPA provided. Rock Fintek Br. at 30. Kitchen Winners argues that the record does not permit Rock Fintek to recover under any of these theories.

a. Lost future profits

*18 Rock Fintek seeks damages on all its claims on the ground that, because of Kitchen Winners’ nonperformance and malfeasance, it lost out on a business relationship with Ascension, that could have netted it \$30 million or more per year in revenue “in the short term.” Rock Fintek Br. at 35. Kitchen Winners argues that this damage claim cannot be calculated with reasonable certainty, and that such damages were not in reasonable contemplation when the parties entered into the SPA. Kitchen Winners Br. at 18–24. On this point, the Court holds with Kitchen Winners and enters summary judgment precluding this theory of damages. Rock Fintek has not come close to establishing future profits that could be calculated with any certainty.

“Under New York law, loss of future profits which would have been earned but for the breach of contract are recoverable, provided they satisfy three criteria.” *Great Earth Intern. Franchising Corp. v. Milks Development*, 311 F. Supp. 2d 419, 432 (S.D.N.Y. 2004). “First, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty.” *Kenford Co. v. Erie County*, 67 N.Y.2d 257, 502 N.Y.S.2d 131, 132, 493 N.E.2d 234 (1986) [hereinafter “*Kenford I*”]. Third, “there must be a showing that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made.” *Id.*

Critically here, as to the second requirement, a plaintiff (including a counterclaim-plaintiff) is “entitled to recover lost profits only if he can establish both the existence and amount of such damages with reasonable certainty.” *Schonfeld v. Hilliard*, 218 F.3d 164, 172 (2d Cir. 2000). “[T]he damages may not be merely speculative, possible or imaginary.” *Kenford I*, 502 N.Y.S.2d at 132, 493 N.E.2d 234. “Damages resulting from the loss of future profits are often an approximation. The law does not require that they be determined with mathematical precision. It requires only that damages be capable of measurement based upon known reliable factors without undue speculation.” *Ashland*

Mgmt. Inc. v. Janien, 82 N.Y.2d 395, 604 N.Y.S.2d 912, 915, 624 N.E.2d 1007 (1993). But, “[p]rojections of future profits based upon a multitude of assumptions that require speculation and conjecture and few known factors do not provide the requisite certainty.” *Schonfeld*, 218 F.3d at 172.

Here, Rock Fintek's ostensible lost profits can be arrived at only by extreme speculation. It is conjectural that Rock Fintek would have done future business with Ascension, let alone the nature or profitability of this business. Even assuming such business, Kato, testifying for Rock Fintek, made broad guesstimates as to revenue and damages. He derived a \$62 million/year revenue estimate taking Rock Fintek's revenue from Ascension for a period of about 15 months during the height of the pandemic (March 2020 to May 2021). He then assumed a 50% profit margin, Rakhunov Decl., Ex. 8 ¶ 19, based on subtracting the money Rock Fintek paid to its suppliers in connection with that business, plus sums it paid to its two trucking and logistic companies. *See Rock Fintek* 56.1 ¶¶ 157–61; *see also* Rakhunov Decl., Ex. 8 ¶ 15. This methodology is inexact and conclusory.

Particularly problematic, Rock Fintek's lost-profits theory proceeds from the highly dubious premise that its services to Ascension early in the pandemic would recur in the future and/or, if different, be representative, in revenue and profitability, of its future services. *See, e.g., Coastal Aviation, Inc. v. Commander Aircraft Co.*, 937 F. Supp. 1051, 1063–64 (S.D.N.Y. 1996) (declining to award lost profits on basis of “simple mathematical formula” based on unsubstantiated assumptions); *Dupont Flooring Sys., Inc. v. Discovery Zone, Inc.*, No. 98 Civ. 5101 (SHS), 2004 WL 1574629 (S.D.N.Y. July 14, 2004) (proffered calculation of lost-profit damages insufficient where, among other things, it failed to satisfactorily account for potential costs, and was not based on reliable analysis of any outside expert); *Awards.com, LLC v. Kinko's Inc.*, 42 A.D.3d 178, 834 N.Y.S.2d 147, 154 (1st Dep't 2007), aff'd, 14 N.Y.3d 791, 899 N.Y.S.2d 123, 925 N.E.2d 926 (2010) (expert report did not assist in lost-profits showing, as it was “based on nothing but unverified assumptions about future profitability given to [expert] by plaintiffs themselves”); cf. *Trademark Rsch. Corp. v. Maxwell Online, Inc.*, 995 F.2d 326, 333 (2d Cir. 1993) (rejecting damages calculation by accounting expert as based on dubious assumptions). It has also not accounted for the anomalies of the March 2020 to March 2021 period, marked by acute demand and idiosyncratic supply chain issues that may have provided rare opportunities for profit-taking. Ascension itself acknowledged that its supply chain problems

receded after this period. Elstro Dep. at 41; *see Schonfeld*, 218 F.3d at 174 (noting New York courts' hesitance to embrace claims for lost profits on entertainment industry ventures, given the volatile nature of the business environment and consumer preferences).¹⁹

*19 Rock Fintek's *ipse dixit* that it would continue to earn approximately \$30 million in profits from its business dealings with Ascension for years to come is also undermined by its own short history. Its own evidence supports that Rock Fintek was first formed as an LLC in 2018 and first entered the PPE market and did business with Ascension in March 2020. *See Kato* 30(b)(6) Dep. at 16–27. Even treating as accurate Rock Fintek's assumptions of the profit it stood to make from its arrangement with Ascension, it is conclusory to assume that arrangement would prefigure its future profits. New York courts hesitate to permit lost profit theories in connection with a new business, recognizing that without a proven track record, past profits are not reliably prologue. *See, e.g., Coastal Aviation, Inc.*, 937 F. Supp. at 1065 (“[W]e have found no case from a New York State court permitting a recovery of lost profits to a ‘new business.’ ”); *Kenford I*, 502 N.Y.S.2d at 132, 493 N.E.2d 234 (“If it is a new business seeking to recover for loss of future profits, a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty.”). That caution is all the more warranted here, given the volatility of the pandemic-era work that defined Rock Fintek's relationship with Ascension, and the inherent uncertainty of the premise that new and equally lucrative contracts for different services would have followed but for the non-conforming gloves it received. *See Elstro Dep.* at 37–40 (testimony of Ascension representative that there was no guarantee of future contracts with Rock Fintek). And while Ascension's representative testified that there had been short-term opportunities for business with it, such as helping it source bent metal products like wheelchairs, for which Rock Fintek could have competed, *id.* at 37–38, there was no assurance that Rock Fintek would have secured such business, let alone that it lost profits calculable to a reasonable certainty. *See Buffalo Riverworks LLC v. Schenne*, 199 N.Y.S.3d 311, 314, 221 A.D.3d 1463 (4th Dep't 2023) (plaintiff failed to support claim for lost profits where it did not establish benchmark from which factfinder could determine future performance with reasonable certainty); *Blinds to Go (U.S.), Inc. v. Times Plaza Dev., L.P.*, 88 A.D.3d 838, 931 N.Y.S.2d 105, 108 (2d Dep't 2011) (performance of other outlets in chain store did not help calculate lost future profits with

reasonable certainty where there were relevant differences between outlets).

In the end, the scant evidence adduced by Rock Fintek falls far short of supporting a claim for lost profits damages. Any such claim would turn on unacceptable guesswork. The Court grants Kitchen Winners' motion to bar a lost profits theory of damages.

b. Potential liability to Ascension

Rock Fintek next pursues damages based on its asserted exposure to claims from Ascension. But it is premature to assert such money damages, as Ascension has not pursued such a claim, let alone recovered on it, *See RDI Corp. v. Charter Comm'cns, Inc.*, No. 19 Civ. 10929 (CM), 2022 WL 604723, 2022 U.S. Dist. LEXIS 38123 (S.D.N.Y. Jan. 31, 2022) (contract damages cannot lie based on possibility of future fines or other liability from federal agency where fines had not been assessed). In March 2022, Ascension sent Rock Fintek a demand letter. Rock Fintek 56.1 ¶ 294. But there is no evidence that Ascension took further action, including filing a lawsuit. Were it to do so, Rock Fintek could seek indemnification from responsible parties. *RDI Corp.*, 2022 WL 604723, at *—, 2022 U.S. Dist. LEXIS 38123, at *31–33. Rock Fintek cannot, however, pursue money damages based on a claim against it that has not been made.

Rock Fintek's case authority is unavailing. *See* Rock Fintek Br. at 40–41. In *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 89 S.Ct. 1144, 22 L.Ed.2d 371 (1969), the Supreme Court stated that a stevedore could seek *indemnity* for liability it might face from the family of a deceased employee. *Id.* at 408–09, 89 S.Ct. 1144. But it did not hold exposure to as-of-yet hypothetical liability could support a contract damages claim. And in *City of New York v. Lead Industries Ass'n*, 222 A.D.2d 119, 644 N.Y.S.2d 919 (1st Dep't 1996), the First Department held that a plaintiff could recover for measures it took to protect against the threat of liability caused by an alleged breach of contract. *Id.* at 129. Rock Fintek has not, however, pointed to any such actions on its part, let alone identified money damages traceable to them. The Court grants Kitchen Winners' summary judgment motion as against this theory of damages.

c. Contractual Rebate and Alleged Overages

Rock Fintek's final two theories of damages are properly analyzed together. It alleges that Kitchen Winners owes it money under the SPA's rebate provision, for gloves it paid for but never received in full quantity, and for trucking and associated costs that were not actually or properly incurred. Rock Fintek Br. at 42–43. Kitchen Winners argues that a reasonable jury could not find that it owes Rock Fintek any of this money. Kitchen Winners Br. at 24–25.

Kitchen Winners is wrong. Its arguments largely replicate its arguments in favor of its affirmative breach of contract claim. As noted, however, genuine disputes of material fact exist as to whether Rock Fintek should have been paid a rebate under the SPA, and the balance due under the contract. Although the parties have not specifically briefed the point, the Court assumes that Rock Fintek's breach of covenant claim would support its claim for damages based on the withheld contractual rebate, gloves supplied in excess of the SPA, and shipping costs.

*20 However, on Rock Fintek's breach of warranty claim, a reasonable jury could not find that a breach as to the quality of the gloves that Kitchen Winners sold Rock Fintek caused Rock Fintek these injuries. If established, these sources of monetary injuries derive from factors other than Kitchen Winners' breach of warranty. And Rock Fintek has not articulated how Kitchen Winners' alleged breach of warranty in failing to provide examination-grade gloves caused it an injury. *See, e.g., Dickinson v. Dowbrands Inc.*, 261 A.D.2d 703, 689 N.Y.S.2d 548, 549–50 (3d Dep't 1999) (warranty claim failed where record did not support that alleged defect was proximate cause of injury); *Nitz v. Gusmer Corp.*, 245 A.D.2d 929, 666 N.Y.S.2d 841, 843–44 (3d Dep't 1997) (same). That leaves Rock Fintek without a theory of injury on its breach of warranty claim against Kitchen Winners. The Court accordingly dismisses that claim.

In sum, as to the claims brought by Rock Fintek against Kitchen Winners, the Court denies Kitchen Winners' motion for summary judgment on account of a lack of damages as to the breach of contract and covenant claims, but grants it on the breach of warranty claim. The Court likewise grants Kitchen Winners' motion to preclude, as to all claims, Rock Fintek's lost profits and litigation-exposure theories of damages. Because the other parties sued by Rock Fintek incorporate Kitchen Winners' challenges to damages theories, *see* Adorama Br. at 19; JNS Br. at 13–17, the Court's holdings

as to the availability of damages equally apply to Adorama, JNS, and Stern, except as specifically noted in the following.

B. Adorama's Motion

Adorama moves for summary judgment on all claims Rock Fintek brings against it. Adorama Br. at 19.²⁰

1. Breach of Contract

Rock Fintek argues that Adorama breached the SPA by “knowingly” delivering gloves that did not conform to the SPA’s specifications. Rock Fintek Br. at 9. For purposes of its summary judgment motion, Adorama does not dispute that there was such a breach. It instead argues that it was not a “Seller” under the SPA, that it had no obligations under the SPA, and thus that it did not breach the SPA. Adorama Br. at 8–12.²¹

The parties centrally dispute whether Adorama can be found a “Seller” under the SPA. If so, as Rock Fintek argues, it is bound by the SPA’s relevant provisions, including the obligation to provide examination-grade gloves. Rock Fintek Br. at 21–25. If not, as Adorama argues, it was not so obligated, and cannot be held liable for breach of contract on that basis. Adorama Br. at 8–12. This dispute is one of contract interpretation: to which parties does the term “Seller” in the SPA apply. Drawing on the legal principles above, the Court finds that the SPA is textually ambiguous on this point, and that a reasonable jury, considering extrinsic evidence, could find for Rock Fintek that Adorama was a “Seller.”

Analysis begins with the text of the SPA. See *Compagnie Financiere*, 232 F.3d at 157–58 (summary judgment on contract claim based on contract construction appropriate only where Court finds language unambiguous). Adorama argues that the SPA’s definition of a “Seller” in its preamble excludes it. See Adorama Br. at 8–12. That preamble reads:

***21 THIS SALES AND PURCHASE AGREEMENT**
 (this “Agreement”) is entered into on April, 7, 2021
 (the “Effective Date”), **KITCHEN WINNERS NY INC**,
 a New York corporation having an address at 1134
 53rd Street, Brooklyn, NY 11219 (“Seller”) and **ROCK
 FINTEK LLC** a Limited Liability Company having an
 address at 1680 Michigan Avenue, Miami Beach, Florida
 33139 (“Buyer”) (each a “Party” and, collectively, the

“Parties”). The Parties agree jointly, severally, mutually, and reciprocally to the terms and conditions stated herein ... SPA at 1. The preamble indeed does not identify Adorama as a “Seller,” or even as a “Party.” Indeed, as Adorama notes, the preamble, using the singular, defines Kitchen Winners as the sole “Seller,” and lacks language suggestive of multiple Sellers. Further, as Adorama notes, it is first mentioned in the SPA by name in a provision that Adorama’s account as the destination for Rock Fintek’s deposit under the SPA—an account that the SPA identifies as “an account designated by Seller.” SPA at 1. These aspects of the SPA support Adorama’s claim not to be a Seller.

But the signature page of the SPA points in the other direction. Rock Fintek notes that on it, reproduced above, Mendlowitz signed the SPA on Adorama’s behalf—and did so immediately below Weiner’s signature on behalf of Kitchen Winners, with the signatures immediately below the designation “Seller.” SPA at 4. Gilling’s signature, on Rock Fintek’s behalf, in turn appears immediately below the designation “Buyer.” *Id.* That Adorama signed the SPA, and under the heading “Seller,” is evidence within the four corners of the contract that the intent of the parties was that Adorama be bound by the SPA as a Seller. See *Brown Bros. Elec. Contractors, Inc. v. Beam Const. Corp.*, 41 N.Y.2d 397, 393 N.Y.S.2d 350, 352, 361 N.E.2d 999 (1977) (“In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look ... to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds[.]” (citations omitted)); *Willsey v. Gjuraj*, 65 A.D.3d 1228, 885 N.Y.S.2d 528, 530 (2d Dep’t 2009) (“When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties’ reasonable expectations.”).

Rock Fintek fairly argues that Adorama’s signature under the word “Seller” is hard to square with its bid for summary judgment on the ground that the parties all understood Adorama to be merely Kitchen Winners’ financer and as such an expected recipient of part of Kitchen Winners’s payout under the SPA. Cf. *BOCA Aviation Ltd. v. AirBridgeCargo Airlines, LLC*, 669 F. Supp. 3d 204, 223 (S.D.N.Y. 2023) (“[A] contract should be interpreted in a way that reconciles all of its provisions, if possible.”) (quoting *N.Y. State Thruway Auth. v. KTA-Tator Eng’g Servs., P.C.*, 78 A.D.3d 1566, 913 N.Y.S.2d 438, 440 (4th Dep’t 2010)). Had such been the case, the SPA provision designating Adorama’s bank account as the place for the deposit would have appeared to have

protect Adorama's interest in this payment, if its role were thus limited. *See* SPA at 1. Put differently, Adorama's signature on the SPA complicates its proposed construction, under which it had no obligations under the agreement. The Court thus finds that the SPA is textually inconclusive as to whether Adorama qualified—and could be held liable—as a Seller thereunder.

*22 Adorama urges that it intended to sign the SPA solely in its capacity as a lender to Kitchen Winners, and that none of it, Rock Fintek, and Kitchen Winners intended it to be bound by the SPA's terms. Adorama Br. at 8–12. The SPA, however, does not unambiguously support that construction. In the provision that provides for the deposit to be made to Adorama's bank account, the SPA does not delineate Adorama as a lender, SPA at 1, and it does not anywhere memorialize what Adorama contends was a mutual understanding that it was not obligated under the SPA. With the contract language ambiguous, Adorama's argument that it signed the SPA solely as a lender thus can be credited only on the basis of extrinsic evidence, as this Court noted in denying Adorama's motion to dismiss. *See* Dkt. 68 at 24–27. The same is so as to Rock Fintek's contrary argument. *See* Rock Fintek Br. at 22; *Compagnie Financiere*, 232 F.3d at 157.

Where contract text is ambiguous, for a movant to obtain summary judgment on the basis of extrinsic evidence, that evidence must so buttress its position that a reasonable factfinder could not resolve the ambiguity otherwise. *See* *Indep. Energy Corp. v. Trigen Energy Corp.*, 944 F. Supp. 1184, 1193 (S.D.N.Y. 1996). On the summary judgment record, the Court finds sufficient evidence on which a reasonable jury could find either way. It thus denies Adorama's summary judgment motion on its theory to not qualify under the SPA as a "Seller."

Adorama—which as the movant bears the burden on summary judgment—adduces some evidence that the parties did not intend it to be a Seller, but rather to be Kitchen Winners' lender, without any performance duties. Mendlowitz directly so testified. He stated that Adorama's relationship with Kitchen Winners and its involvement in the PPE business writ large was solely as a financer of deals between other buyers and sellers. *See* Mendlowitz Dep. at 36–40. He testified that he signed the SPA on behalf of Adorama solely out of a desire to protect its money “from a lender's perspective.” *Id.* at 41. A reasonable jury could credit this account.

But Rock Fintek's opposite narrative also has testimonial support. Its Rule 30(b)(6) witness, Kato, testified that the

only reason Rock Fintek agreed to pivot to the SPA from its prior practice of doing smaller, one-off transactions with Kitchen Winners was because Adorama, which Kato viewed as a legitimate and established concern, signed onto the deal. Kato 30(b)(6) Dep. at 196–98. A jury could credit that, too.

The balance of the potentially apposite extrinsic evidence bearing on the SPA parties' view of Adorama's intended role carries limited weight. Adorama relies on the absence of evidence of direct pre-SPA communications between Kato, Gilling, or anyone else at Rock Fintek and Mendlowitz or anyone else at Adorama. *See* Adorama Br. at 6–7. Although he had had numerous conversations with Banon, apparently in Banon's capacity as a broker for Kitchen Winners, Mendlowitz testified that Banon did not work with or for Adorama. Mendlowitz Dep. at 92–93. Rock Fintek, for its part, notes testimony by Gilling that Banon held himself out as working for Kitchen Winners and Adorama, and that, in calls discussion and negotiating terms of the SPA, an unidentified Adorama principal participated, and that in at least one, he recalls the parties discussing that Adorama would be a party to the SPA. *See* Gilling Dep. at 35–37, 113–19. A reasonable jury might credit Gilling's testimony on these points, but, perhaps noting the absence of any supporting documentation or other corroboration, might reject it as incredible.

Relevant too, but not dispositive, is the pre-SPA LOI between Rock Fintek and Maimon. It states that “Adorama is financing [the glove] transactions for Kitchen Winners.” LOI at 1. A factfinder could logically infer from this that Rock Fintek knew that Adorama was serving as a financing party for Kitchen Winners. But the LOI does not establish, one way or the other, whether Adorama's role was larger. The LOI lists as its “Subject” that “Rock Fintek desires to purchase up to 1 million boxes of powder-free nitrile medical gloves (100 gloves/box as per specifications) from Kitchen Winners NY Inc. (KWNY)/Adorama[.]” *Id.* Although it is far from conclusive, a factfinder could conclude from this language that the parties did not understand Adorama's function as lender to be mutually exclusive with its function as a Seller.

*23 Rock Fintek has adduced other evidence that undermines Adorama's bid for summary judgment on this ground. It includes an email from Weiner to Mendlowitz seeking feedback on a draft of the SPA a few days before its execution, Rakunov Decl., Ex. 3 at 2; the post-SPA fact that all payments under the SPA were directed to Adorama, not Kitchen Winners, Rock Fintek 56.1 ¶ 176; and evidence that

Weiner kept Mendlowitz apprised of performance under the SPA during its contract term, Rakhunov Decl., Ex. 5.

On Adorama's motion for summary judgment, Rock Fintek has adduced enough extrinsic evidence on which a finder of fact could find Adorama to be a Seller under the SPA. The Court denies Adorama's motion for summary judgment on the breach of contract claim.

2. Breach of the Covenant of Good Faith and Fair Dealing

Adorama next moves against Rock Fintek's claim for breach of the implied covenant of good faith and fair dealing. Adorama Br. at 15–17.

Under New York law, a duty of good faith and fair dealing is implied in every contract, to the effect that neither party “shall do anything which has the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” *Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 407 (2d Cir. 2006) (quoting *M/A-COM Sec. Corp. v. Galesi*, 904 F.2d 134, 136 (2d Cir. 1990) (per curiam)). A claim for breach of the implied covenant requires the existence of a duty, breach of that duty, causation, and damages. *See Washington v. Kellwood Co.*, No. 05 Civ. 10034 (DAB), 2009 WL 855652, at *6 (S.D.N.Y. Mar. 24, 2009). “[S]ince there is a presumption that all parties act in good faith, the burden of proving a breach of the covenant of good faith and fair dealing is on the person asserting the absence of good faith.” *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 98 (2d Cir. 2007) (quoting 23 Williston on Contracts § 63:22 (4th ed. 2006)). Where the breach of the implied duty arises from a breach of the underlying contract, it does not create a freestanding cause of action. *See, e.g.*, *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 125 (2d Cir. 2013).

Here, as Rock Fintek admits, the only part of its claim for breach of an implied duty of good faith that is independent of a breach of the SPA itself is based on an email by Weiner on July 14, 2021, which Rock Fintek claims attempted to extort \$18 million from Rock Fintek under the guise of a settlement proposal.²² Rock Fintek Br. at 25–26; *see also* Rakhunov Decl., Ex. 12 (settlement email from Weiner). But the only evidence Rock Fintek has adduced of Adorama's involvement in the alleged extortionate plot is that Weiner “bcc-ed” Mendlowitz on this single email. *See* Rakhunov Decl., Ex. 12 (bcc-ing Mendlowitz and Banon). It does not point to any evidence that Adorama took any step to

further Weiner's asserted extortion plot, let alone evidence to overcome the presumption of Adorama's good faith. On this record, a reasonable jury could not find that Adorama breached an implied duty of good faith. The Court grants Adorama's motion for summary judgment on this claim.

3. Unjust Enrichment

*²⁴ Adorama next moves to dismiss Rock Fintek's unjust enrichment claim against it, arguing both that it duplicates the breach of contract claim and that Rock Fintek cannot prove enrichment. Adorama Br. at 17–18; Adorama Reply Br. at 5–6. Rock Fintek responds that it brings this claim as an alternative to its breach of contract claim, in the event the Court or jury find Adorama not bound by the SPA (i.e., not a “Seller”). Rock Fintek. Br. at 26–27. That is correct. The Court has sustained the contract breach claim against Adorama under the SPA as factually supportable while noting the contract's ambiguity as to whether Adorama was a Seller bound under it. As such, Rock Fintek's unjust enrichment claim properly survives, to cover the circumstance that Adorama is found not to be bound by the SPA. *See, e.g.*, *Kramer v. Greene*, 36 N.Y.S.3d 448, 451–52, 142 A.D.3d 438 (1st Dep't 2016) (denying summary judgment on unjust enrichment claim because genuine dispute of material fact existed as to coverage of contract); *Goldman v. Simon Prop. Grp, Inc.*, 58 A.D.3d 208, 869 N.Y.S.2d 125, 135 (2d Dep't 2008) (“[W]here there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies[.]” (citation omitted)); *cf. Federal Deposit Insur. Corp. v. Murex LLC*, 500 F. Supp. 3d 76, 120–21 (S.D.N.Y. 2020) (where court at summary judgment awarded plaintiff summary judgment on breach of contract claim, unjust enrichment claim could no longer be maintained in the alternative). As for Adorama's argument about its lack of enrichment, Kitchen Winners' evidence Adorama received and kept money from Rock Fintek for non-conforming gloves would support its claim of enrichment (and damages).²³

4. Breach of Written Warranty

Finally, Adorama challenges Rock Fintek's claim for breach of express written warranty, which alleges that Adorama, through Banon, provided written (but false) assurances that the gloves would meet the SPA's specifications. *See* Adorama

Br. at 18. The Court's bases for precluding the warranty claim against Kitchen Winners equally apply to this claim against Adorama. Additionally, as to Adorama, the record at summary judgment does not contain evidence on which a reasonable jury could infer that Adorama ever made the warranty at issue, which provides an independent ground for entering summary judgment against this claim.

A claim for breach of express warranty entails: "(1) the existence of a material statement amounting to a warranty, (2) the buyer's reliance on this warranty as a basis for the contract with the immediate seller, (3) breach of the warranty, and (4) injury to the buyer caused by the breach." *Housey*, 2022 WL 874731, at *3. "Generalized or vague allegations that defendant made express warranties are insufficient; plaintiff must plead some affirmative statement of fact that forms the basis of the warranty." *Tears v. Bos. Sci. Corp.*, 344 F. Supp. 3d 500, 512 (S.D.N.Y. 2018) (citation omitted).

Critically here, there is no evidence on which a jury could find that Adorama made any express warranty to Rock Fintek regarding the gloves at issue. Rock Fintek argues that Adorama made such a warranty via Banon, whom Rock Fintek says was working for both Adorama and Kitchen Winners when he provided Rock Fintek with documentation that allegedly described the composition of the gloves. Rock Fintek Br. at 49–50; *see also* Banon WhatsApp Chat at 1 (sending documentation). But even if a jury could find that Banon represented Adorama as well as Kitchen Winners—and the evidence on that point is threadbare and likely inadmissible, as it consists of second-hand testimony from Kato and/or Gilling about what Banon ostensibly told them—Rock Fintek has not adduced evidence that that was so at the early point at which Banon provided Rock Fintek with the documentation in question. Banon did so on March 4, 2021, before the SPA, at the start of the period when Kitchen Winners and Rock Fintek engaged in a series of one-off glove transactions, *see* Banon WhatsApp Chat at 1. No evidence has been adduced that Adorama was a party to these pre-SPA transactions. Rock Fintek identifies evidence suggesting that Adorama at some point sold some PPE on its website, *see* Rakhunov Decl., Ex. 1 (website screenshot), but that does not tie Adorama to the one-off sales by Kitchen Winners to Adorama. Kitchen Winners' name alone appears on the documents that Rock Fintek contends were a written warranty by *Adorama*.

*25 A reasonable jury could not find that Adorama made an actionable express warranty here. The Court thus grants

summary judgment to Adorama's on Rock Fintek's breach of warranty claim against it.

C. JNS/Stern's Motion

JNS and Stern move for summary judgment on all of Rock Fintek's claims against them.

1. Claims Against Stern

Stern moves against Rock Fintek's claims against him individually for breach of contract, fraudulent inducement, and breach of express warranty. JNS Br. at 5–13.

a. Breach of contract

Stern is not himself a party to any contract between JNS and Rock Fintek. To hold Stern liable for breach, Rock Fintek would have to justify piercing the corporate veil. Rock Fintek argues that such is justified here because Stern assertedly "made fraudulent statements related to transactions on which Stern used JNS to serve as the contracting party." Rock Fintek Br. at 48. *see also* Stern Dep. at 52–54 (discussing passing documentation for the gloves to Azra, who in turn passed to Rock Fintek). The record, however, does not support piercing the corporate veil to enable Stern to help liable for JNS's breach of contract.

New York law "allows a party to pierce the corporate veil upon showing '(i) that the owner exercised complete domination over the corporation with respect to the transaction at issue; and (ii) that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil.'" *Parnell v. Tremont Capital Mgmt. Corp.*, 280 F. App'x 76, 77–78 (2d Cir. 2008) (summary order) (citing *Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997)). And to be entitled to the equitable remedy of piercing the corporate veil, a "plaintiff must allege 'more' than the underlying fraud or breach of contract in the sense that in addition to the fraud or breach of contract or other injustice he or she must also allege that 'the corporate structure itself [was] used to further the fraud or injustice or 'as a shield for' unjust acts.'" *Mohegan Lake Motors, Inc. v. Maoli*, 559 F. Supp. 3d 323, 341 (S.D.N.Y. 2021) (quoting *Partner Reinsurance Co. Ltd. v. RPM Mortg., Inc.*, No. 18 Civ. 5831 (PAE), 2020 WL 6690659, at *11 (S.D.N.Y. Nov. 13, 2020)). Further, because it is "perfectly legal to

incorporate for the express purpose of limiting the liability of the corporate owners,” “[t]he party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate” the subject wrong or injustice. *Morris v. New York State Dept. of Taxation and Fin.*, 82 N.Y.2d 135, 603 N.Y.S.2d 807, 810–11, 623 N.E.2d 1157 (1993).

Here, even assuming *arguendo* Stern's domination, Rock Fintek has not adduced any evidence that Stern used the corporate form to perpetrate the alleged fraud. Rock Fintek argues that Stern fraudulently induced it to contract with JNS by falsely promising that the gloves provided would be conforming. Rock Fintek Br. at 48–49; *see also* Stern Dep. at 52–54 (discussing passing documentation for the gloves to Azra, who in turn passed to Rock Fintek). But it does not point to any evidence that Stern, in making the allegedly fraudulent statements, “abused the privilege of doing business in the corporate form,” *Morris*, N.Y.S.2d at 810–11. That JNS alone signed any contract with Rock Fintek—and that JNS today may be judgment-proof—does not justify holding Stern liable for JNS's alleged breach of contract. *See, e.g., Skanska USA Bldg. Inc. v. Atlantic Yards B2 Owner, LLC*, 40 N.Y.S.3d 46, 54, 146 A.D.3d 1 (1st Dep't 2016) (piercing corporate veil on breach of contract claim unjustified where plaintiff, itself a “sophisticated party,” had knowingly entered contract with corporation, not with third-party against whom sought to bring claim); *E. Hampton Union Free School Dist. v. Sandpebble Builders, Inc.*, 66 A.D.3d 122, 884 N.Y.S.2d 94, 99 (2d Dep't 2009) (despite individual defendant's domination over corporate conduct, no basis to pierce corporate veil where evidence did not suggest that defendant “acted other than in his capacity as president and principal owner of [corporation], or that he failed to respect the separate legal existence of the corporation ... or that he, in any other way, abused the privilege of doing business in the corporate form”). The Court thus enters summary judgment for Stern on Rock Fintek's breach of contract claim against him individually.

b. Fraudulent inducement

*26 “In New York[,] a plaintiff alleging fraud must show by clear and convincing evidence that the defendant knowingly or recklessly misrepresented a material fact, intending to induce the plaintiff's reliance, and that the plaintiff relied on the misrepresentation and suffered damages as a result.” *Merrill Lynch & Co. Inc.*, 500 F.3d at 181. “The clear and

convincing evidence standard ‘demands a high order of proof and forbids the awarding of relief whenever the evidence is loose, equivocal or contradictory’ because ‘fraud will not be assumed on doubtful evidence or circumstances of mere suspicion.’ ” *Hindsight Sols. LLC v. Citigroup Inc.*, 53 F. Supp. 3d 747, 772 (S.D.N.Y. 2014) (quoting *Century Pac., Inc. v. Hilton Hotels Corp.*, 528 F. Supp. 2d 206, 219 (S.D.N.Y. 2007), *aff'd*, 354 F. App'x 496 (2d Cir. 2009)). Summary judgment is thus appropriate if “no reasonable trier of fact could find” that clear and convincing evidence supports Rock Fintek's claim. *Mount Vernon Fire Ins. Co. v. Belize NY, Inc.*, 277 F.3d 232, 236 (2d Cir. 2002).

Rock Fintek has not adduced sufficient evidence to allow a reasonable jury to find the necessary elements of its fraudulent inducement claim. That claim asserts that Stern, through Azra, gave Rock Fintek documentation as to the specifications of the gloves to be sold, knowing based on packing lists that he had reviewed that the gloves were non-compliant, and that Rock Fintek relied on this. *See* Stern Dep. at 52–54; *see generally* Li Decl. But even if a reasonable jury could find that Stern at some point had reason to know that the gloves JNS was selling were protection grade and not examination grade, Rock Fintek has not adduced evidence on which a jury could find that Stern knew this at the time he provided the documents on which Rock Fintek is said to have relied, let alone that he did so intending to induce Rock Fintek's reliance.

Following discovery, Rock Fintek's fraud claim against Stern turns on several packing lists documenting gloves that JNS received from China and allegedly later sold to Rock Fintek. *See* Rakhunov Decl., Ex. 44. The majority of these describe examination-grade gloves, although some describe protection-grade gloves. *See id.* Rock Fintek argues that JNS delivered to Rock Fintek gloves corresponding to the shipment numbers for protection grade gloves, in contravention of the SPA. *See* Rock Fintek 56.1 ¶¶ 248–52. In arguing that Stern knew the gloves were non-conforming, Rock Fintek notes deposition testimony by Stern to the effect that he typically reviewed these packing lists. Stern Dep. at 68–69.

Rock Fintek's evidence, however, falls short of supplying clear and convincing evidence of Stern's fraudulent inducement. For one, the packing lists largely post-date the single act of alleged false representation for which Rock Fintek seeks to hold Stern accountable—Azra's provision to it of certification and testing documents. *See* Rakhunov Decl.,

Ex. 44. Rock Fintek has not established when Stern provided these documents to Azra, but the evidence reflects that Azra handed them to Li, and Li to Rock Fintek, in early February 2021. Li **WhatsApp Chat** at 32–33; Rock Fintek 56.1 ¶ 205. Rock Fintek and JNS thereafter entered into the irrevocable purchase order, on February 3, 2021. JSF, Ex. 12. The packing lists at issue, however, are mostly from March 2021 or later. And those from February are dated February 3, 2021—the same date that Rock Fintek entered into the purchase order with JNS. See Rakunov Decl., Ex. 44. Without more, Rock Fintek thus cannot rely on Stern's ostensible review of these documents to establish that he knew at the time that Azra provided Rock Fintek the document at issue that such was false. See, e.g., *Cohen v. Avanade, Inc.*, 874 F. Supp. 2d 315, 323 (S.D.N.Y. 2012) (fraudulent inducement could not lie where evidence did not establish defendant knew or should have known statements were false); *Banco Espírito Santo de Investimento, S.A. v. Citibank, N.A.*, No. 03 Civ. 1537 (MBM), 2003 WL 23018888, at *13 (S.D.N.Y. Dec. 22, 2003) (“[Plaintiff] has failed to plead a cause of action for fraudulent inducement because it has not alleged that Citibank knew the statements to be false at the time the statements were made or that Citibank intended to defraud BESI.”).

*27 Moreover, even assuming Stern's review of the packing documents predated the representations to Rock Fintek, many if not most of these documents describe shipments of what appear to be examination-grade gloves consistent with the representations to Rock Fintek. See Rakunov Decl., Ex. 44. A jury would have to assume Stern's real-time appreciation that, while many if not most gloves described in the documents were examination-grade, a subset were described otherwise. That is possible. But Rock Fintek has not adduced evidence, let alone clear and convincing evidence, on which a jury could non-speculatively so find, to wit, that when Stern caused Rock Fintek to receive the certification of compliant gloves, he appreciated that in fact, it stood to receive some non-compliant protection-grade gloves. See *Gosmire, Inc. v. Levine*, 81 A.D.3d 77, 915 N.Y.S.2d 521, 524 (1st Dep't 2010) (fraudulent inducement requires “knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it”). Rock Fintek, finally, notes Stern's April 2021 offer to it of protection grade gloves. See Stern **WhatsApp Chat** at 4–6. But that does not bear on Stern's state of mind at the critical point two months earlier, in early February 2021.

The Court grants summary judgment to Stern on the fraudulent inducement claim brought against him individually.

c. Breach of written warranty

As to the breach of express warranty claim against Stern, Rock Fintek does not identify—or even attempt to—any injury to it resulting from this alleged breach, beyond the lost profits and litigation exposure theories of damages that this Court ruled against as a matter of law. The Court enters summary judgment for Stern on this claim.

2. Breach of Contract Claim Against JNS

JNS moves for summary judgment on the breach of contract claim against it.²⁴ It argues that: (1) Rock Fintek cannot establish damages; (2) there is insufficient evidence to prove that the gloves JNS shipped were defective or otherwise in breach of the purchase order; and (3) Rock Fintek failed to timely object to allegedly non-conforming goods, as required by the Uniform Commercial Code (“UCC”), barring its breach of contract claim on this basis. JNS Br. at 13–21.

a. Contract damages

Like Kitchen Winners and Adorama, JNS argues that Rock Fintek's breach of contract claim against it fails for lack of cognizable damages. The holdings above that Rock Fintek cannot pursue damages based on lost future profits or legal exposure to Ascension equally apply to this claim against JNS. Rock Fintek does not specifically allege other damages than those it seeks on its contract-breach claim against Adorama. However, as noted above, under New York law, where actual damages have not been proven, nominal damages are available “as a formal vindication of plaintiff's legal right to compensation.” *NAF Holdings, LLC*, 2016 WL 3098842, at *17 (quoting *Freund*, 357 N.Y.S.2d at 861, 314 N.E.2d 419). The Court thus rejects JNS's challenge to the contract breach claim to the extent based on the unavailability of damages.

b. Breach

JNS next argues that the evidence does not establish JNS sold it non-conforming gloves. It disputes that there is evidence on which a reasonable jury could trace nonconforming gloves to any of its shipments. It also disputes that it was contractually required to provide gloves in accordance with ASTM D6319. JNS Br. at 13–19. These arguments fail.

There is a genuine dispute of fact whether JNS sold Rock Fintek non-conforming gloves. JNS notes that it sold Rock Fintek gloves in distinct orders. *See generally Stern*

WhatsApp Chat (negotiating these orders). It notes evidence that these orders were shipped from JNS's warehouses to Ascension's warehouses for storage, Stern Dep. at 131–32, but that Ascension's warehouses mingled JNS's gloves with other shipments such that it is impossible to track which originated with JNS. *See Elstro Dep.* at 50–52. But although a jury might draw this conclusion, the evidence would also give it a basis to trace non-conforming gloves to JNS. Among other evidence, Rock Fintek points to packing lists, Rakhunov Decl., Ex. 44, bills of lading, *id.*, Ex. 42, and contemporaneous communications, Li **WhatsApp Chat** at 41, that trace deliveries from JNS by reference to container numbers. *See Rock Fintek* 56.1 ¶¶ 244–48. Some appear to link JNS containers in Ascension's warehouses described as containing protection-grade—not examination-grade—gloves.²⁵ Notwithstanding the issues tracing the provenance of non-conforming gloves after their delivery to hospitals, this evidence would permit a reasonable jury to infer that at least some non-conforming gloves delivered to Ascension derived from JNS.

***28** JNS alternatively denies an obligation to supply Ascension with ASTM D6319 certified gloves. That argument does not defeat Rock Fintek's claim of its contractual liability. Under its agreement with Rock Fintek, JNS was to provide "Medcare Nitrile Examination Gloves produced in an FDA 510(k) certified factory." JSF, Ex. 12. As reflected in documents that Stern, through Azra, furnished Rock Fintek during negotiations, an FDA 510(k) certification means that the product or process to be certified need not go through more extensive FDA approval processes before hitting the market because it is "substantially similar" to an entity that the FDA has previously approved. *See* Banon FDA 510(k) Letter at 5–6. The FDA 510(k) certification thus incorporates by reference the attributes of a comparator product. The FDA letter that JNS provided Rock Fintek identified, as the substantially similar product supporting 510(k) certification, "Nitrile Powder Free Patient Examination Gloves, Blue Color" which are "manufactured

in accordance with the requirements of ASTM D6319 and ASTM D5151 requirements." *Id.* There is thus a factual basis on which JNS could be found to have contractually committed that its gloves would meet the ASTM D6319 standards. At trial, JNS will be at liberty to adduce evidence—if any exists—that the reference to FDA 510(k) incorporated different standards with respect to Medcare Nitrile Examination Gloves, and to persuade the jury that the gloves it supplied met those alternative standards. JNS is not entitled to summary judgment on this ground.

c. U.C.C. Timely Rejection of Goods

JNS, finally, argues that because Rock Fintek accepted all gloves within the meaning of the U.C.C. as adopted in New York, Rock Fintek was required to timely notify JNS of any breach or forfeit ability to bring claims for breach of contract (or of express warranty). JNS contends that Rock Fintek did not timely notify it of a breach. On this premise, it argues that this supports summary judgment in JNS's favor. JNS Br. at 19–22. Questions of fact on this point, however, require this claim to go to a jury.

The parties agree that the U.C.C. covers the transactions at issue. **Section 2-606 of the New York U.C.C.** provides that a buyer accepts goods when it, among other things, "after a reasonable opportunity to inspect the goods[,] signifies to the seller that the goods are conforming or that [it] will take or retain them in spite of their non-conformity" or "fails to make an effective rejection ... but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them." **N.Y. U.C.C. §§ 2-606(1)(a)–(b).** Once a buyer accepts a tender offer, "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." *Id.* § 2-607(3) (a).

The Court assumes *arguendo* there will be competent evidence that Rock Fintek accepted JNS's asserted non-compliant gloves. But there is a genuine dispute of material fact whether Rock Fintek notified JNS of the alleged breach in a reasonable time. JNS shipped gloves to Rock Fintek in a series of orders spanning February 2021 to May 2021. In July 2021, after Rock Fintek heard from Ascension, to whose warehouses the gloves had been directly shipped, of various problems with the gloves, Rock Fintek promptly raised this concern with JNS's Stern. It stated, among other things: "We need you to find and replace these gloves as they are not what

we agreed to buy.” Stern **WhatsApp Chat** at 30–31. Stern apparently never responded directly to this notice.

This communication on its face clearly gave JNS notice of the asserted breach. Whether that notice was given within reasonable time, as required by the U.C.C., presents a question of fact. *See, e.g., Cliffstar Corp. v. Elmar Industries, Inc.*, 254 A.D.2d 723, 678 N.Y.S.2d 222, 223 (4th Dep’t 1998) (U.C.C. requirement of notice satisfied to the extent that plaintiff “alert[ed] [defendant] that the transaction [was] troublesome and [did] not need to include a claim for damages or threat of future litigation.” (quoting *Comput. Strategies v. Commodore Bus. Machs.*, 105 A.D.2d 167, 483 N.Y.S. 2d 716, 723 (2d Dep’t 1984))); *In re Frito-Law N. Am., Inc. All Natural Litig.*, No. 12 MD 2413 (RRM) (RLM), 2013 WL 4647512, at *28 (E.D.N.Y. Aug. 29, 2013) (notice sufficient where seller is “informed that the buyer considers him to be in breach of the contract.” (quoting *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 971 (5th Cir. 1976))). Reported cases have often left that determination, based on the assembled circumstances, to the finder of fact. *See Cuba Cheese, Inc. v. Aurora Valley Meats, Inc.*, 113 A.D.2d 1012, 494 N.Y.S.2d 571, 572 (4th Dep’t 1985) (“Timely notification is governed by the standard of reasonableness and is a question of fact.”); *Hubbard v. Gen Motors Corp.*, No. 95 Civ. 4362, 1996 WL 274018, at *4 (S.D.N.Y. May 22, 1996) (“[T]he sufficiency and timeliness of the notice if generally a question for the jury.”).

***29** The evidence would permit a reasonable jury to find that Rock Fintek’s notice to JNS of the deficient merchandise was reasonably timely, under the circumstances. A jury could so find based on, *inter alia*, (1) JNS’s representation that it would be shipping examination-grade gloves, JSF, Ex. 12, (2) the absence of notice to Rock Fintek before July 2021 that some gloves sent by JNS were non-compliant, (3) the promptness with which Rock Fintek notified JNS of this deficiency upon its notification of this by Ascension in July 2021 of various problems with the gloves, and (4) the exigencies associated with the ongoing COVID pandemic. *See Patellos v. Hello Products, LLC*, 523 F. Supp. 3d 523, 533 (S.D.N.Y. 2021) (notice of breach seven months after purchase not unreasonable in light of fact that defect first became apparent after use).

The Court therefore denies JNS’s motion for summary judgment on this ground, too.

CONCLUSION

For the foregoing reasons, the Court hereby grants each motion for summary judgment in part, and denies each in part.

To recap the rulings on summary judgment:

As to all parties, the Court dismisses Rock Fintek’s theories of damages based on lost profits and based on ongoing exposure to Ascension. The Court dismisses Rock Fintek’s breach of warranty claim against Kitchen Winners; Rock Fintek’s covenant of good faith and fair dealing and warranty claims against Adorama, and its alter-ego theory of liability for Adorama under the breach of contract claim (as abandoned); Rock Fintek’s breach of express warranty claim against Mendlowitz (as abandoned); and Rock Fintek’s breach of contract, fraudulent inducement, and breach of warranty claims against Stern.

That leaves the following claims surviving in this action:

- Kitchen Winners’ claims against Rock Fintek for breach of contract (under the SPA only) and for unjust enrichment.
- Rock Fintek’s breach of contract claims, under the SPA, against Kitchen Winners and Adorama.
- Rock Fintek’s unjust enrichment claims against Kitchen Winners and Adorama.
- Rock Fintek’s breach of contract claim against Kitchen Winners as to the one-off transactions. This claim may proceed for the recovery of nominal damages only.
- Rock Fintek’s breach of the covenant of good faith and fair dealing claim against Kitchen Winners. This claim may proceed for the recovery of nominal damages only.
- Rock Fintek’s breach of contract claim against JNS. This claim may proceed for the recovery of nominal damages only.

All claims against individual defendants have been dismissed.

The case will now proceed to trial. The remaining parties are directed to file a joint pretrial order, compliant with the Court’s Individual Rules, by Tuesday, September 17, 2024, and to contemporaneously file any motions *in limine*. Any oppositions to motions *in limine* are due Tuesday, September 24, 2024.

All Citations

SO ORDERED.

Slip Copy, 2024 WL 3676931

Footnotes

- 1** The Court has previously dismissed all claims against an additional third-party defendant, Kitchen Winners' employee Joseph Weiner, a/k/a "Hershey Weiner," whom Rock Fintek had sued. See *infra*, n.17.
- 2** The Court draws the following facts from the parties' submissions in support of and in opposition to the pending summary judgment motions. These include the following: (1) the parties' joint statement of undisputed facts ("JSF"), Dkt. 135, and attached exhibits; (2) JNS and Stern's Local Rule 56.1 statement, Dkt. 136, Ex. 1 ("JNS 56.1"); the declarations of Joel Stern, Dkt. 136, Ex. 2 ("Stern Decl.") and of Avram Frisch, *id.*, Ex. 3 ("Frisch Decl."), in support of JNS and Stern's motion, and attached exhibits; Kitchen Winners', Adorama's, and Mendlowitz's Local Rule 56.1 statement, Dkt. 137, Ex. 1 ("Kitchen Winners/Adorama 56.1"); the declaration of Alexander J. Sperber, Dkt. 141 ("Sperber Decl.") in support of Kitchen Winners' and Adorama's motions, and attached exhibits; Rock Fintek's Local Rule 56.1 counter-statements to Kitchen Winners' and Adorama's Local Rule 56.1 statement, Dkt. 147 ("Rock Fintek 56.1") and to JNS and Stern's Local Rule 56.1 statement, Dkt. 148 ("Rock Fintek JNS 56.1"); the declaration of Phillip Rakunov in opposition to all motions for summary judgment, Dkt. 146 ("Rakunov Decl.") and attached exhibits; as well as Adorama and Kitchen Winners' additional Local Rule 56.1 statement, Dkt. 159 ("Kitchen Winners/Adorama Reply 56.1"); and a reply declaration of Alexander J. Sperber, Dkt. 156 ("Sperber Reply Decl."), and attached exhibits.

Citations to a party's Rule 56.1 statement incorporate by reference the documents cited therein. Where facts in a party's Rule 56.1 statement are supported by testimonial or documentary evidence, and are denied by a conclusory statement by the other party without citation to conflicting testimonial or documentary evidence, the Court finds such facts true. See S.D.N.Y. Local Rule 56.1(c) ("Each numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party."); *id.* at 56.1(d) ("Each statement by the movant or opponent ... controverting any statement of material fact[] must be followed by citation to evidence which would be admissible, set forth as required by Fed. R. Civ. P. 56(c).").

- 3** The parties alternatively spell this name as Mendlowits or Mendlowitz. The Court heeds the latter, as it is the named used in the filing of this action.
- 4** Rock Fintek claims it had other PPE clients, including the City of New York, Prisma Health, and Delta Airlines. Kato 30(b) (6) Dep. at 27.
- 5** The parties dispute whether payments by Ascension to Rock Fintek between January 2021 and April 2021, which totaled approximately \$2.5 million, were for gloves at issue in this lawsuit or for other products. See Kitchen Winners/Adorama 56.1 ¶ 151.
- 6** Rock Fintek later sued the law firm that it claims to have hired to do due diligence on the Thailand deal. Rock Fintek 56.1 ¶ 297. In that Florida state court lawsuit, which settled, Rock Fintek maintained that the firm's misconduct caused it to do business with the parties in this case, which Rock Fintek maintains is the "actual cause" of the demise of its relationship with Ascension. *Id.*
- 7** It appears that the purchase order may have been edited at some point to reflect the proper brand name "Medcare" (not "Medicare"). See Dkt. 136, Ex. 9 ("Li WhatsApp Chat") at 41–42.
- 8** Rock Fintek appears to have been unhappy about the distribution of glove sizes upon inspection of the goods at JNS's warehouse (more extra-large gloves than expected). Li WhatsApp Chat at 45–50. This discrepancy appears to have been resolved and is not a basis for any present claims.
- 9** Later in April, Kato told Stern that, if Stern could give Rock Fintek short-term credit, Rock Fintek would place another order with Stern. See Stern WhatsApp Chat at 10. Stern responded: "Can I possibly get a [Purchase Order] direct from

a Hospital? Or some other sort of security" *Id.* Kato responded that a personal guaranty from him and Rock Fintek would be possible, but that he "would never introduce anyone to any of [his] clients." *Id.*

On April 27, 2021, in a **WhatsApp** message, Stern told Kato and Gilling that JNS's warehouse had given Rock Fintek more gloves in its latest order than Rock Fintek had paid for. He asked Rock Fintek to pay for the surplus gloves. *Id.* at 15. Kato responded that this was "a major mess up," because it meant Rock Fintek had delivered "more [gloves] to the hospitals" than contracted and would need to prove this to the hospitals to get them to pay for the overage. *Id.* Stern asked if Rock Fintek had placed the gloves it had picked up in warehouses or had sent them straight to customers; Kato responded that Rock Fintek had sent the gloves straight to its customer, and only had paperwork documenting the amount of gloves Rock Fintek understood itself to be delivering, as the customer was "a major group with warehouses around the US." *Id.*

- 10 Rock Fintek does not claim Adorama was a party to these transactions. Rock Fintek 36.1 ¶ 47.
- 11 Adorama and Kitchen Winners argue that any statement by non-party Banon is inadmissible hearsay. See, e.g., Kitchen Winners/Adorama Reply 56.1 ¶ 209. They are correct that a party cannot survive a motion for summary judgment by relying on evidence inadmissible at trial. The Court recites Banon's statements here to provide a full account of relevant events, and considers issues of admissibility *infra* to the extent Banon's statements, taken for the truth, are potentially dispositive of a summary judgment motion. Given the limited briefing to date on this point, the Court's assessments here are without prejudice to the parties' right to litigate, *in limine*, whether and to what extent Banon's statements will be admissible at trial.
- 12 The parties have not produced this Hebrew-language agreement, let alone a certified English translation thereof.
- 13 Kitchen Winners has produced invoices from a company named "wenzy inc." which it represents reflected these shipping services. See JSF, Ex. 4 (invoices). Rock Fintek disputes that these are valid. It states that it was unable to serve wenzy inc. at its listed address which now appears vacant, and that the wenzy invoices produced "look nothing like invoices provided by other (legitimate) trucking companies." Rock Fintek 56.1 ¶ 9.
- 14 Gilling did testify that he participated in a phone call with Weiner and Maimon in summer 2021, in which Weiner threatened to kill and bury Gilling. Gilling Dep. at 312–13. The summary judgment record does not make clear whether this episode relating to asserted deliveries of deficient gloves.
- 15 In the "short term," the representative testified, "it's highly likely that [Ascension] would have continued to engage with Rock Fintek in additional business opportunities" including to meet its needs for "wheelchairs and walkers [and] crutches and canes." Frisch Decl., Ex. 5 ("Elstro Dep.") at 37–38. The representative also testified that supply chain "blips" did continue into the future, potentially creating opportunities for a supplier like Rock Fintek. *Id.* at 41; see also *id.* at 18 (noting that after ceasing to use Rock Fintek, Ascension continued to obtain PPE from another supplier).
- 16 On August 31, 2022, during briefing of these motions, Rock Fintek sought an emergency conference to discuss preservation of the gloves at issue. Dkt. 49. It reported that the gloves it had secured from other parties had been shipped to Ascension's warehouses throughout the country, and that Ascension was still storing them at significant cost. See *id.* at 2. But, Rock Fintek represented, because Ascension viewed the gloves as unfit for medical use, Ascension had notified Rock Fintek that it planned to dispose of the gloves rather than continuing to store them. *Id.* Rock Fintek asked the Court to intervene to order that a statistically significant sample of the gloves be preserved for testing as anticipated evidence. *Id.* at 2–3. The other parties opposed this request, raising concerns, including about the chain of custody and Rock Fintek's proposed methodology for testing the gloves. Dkt. 51 at 3–5. The Court found it premature to address these concerns but that it was necessary that the adequate sample of the gloves be preserved for future testing and examination. Dkt. 56. On October 28, 2022, the Court approved a joint letter setting out terms governing the identification, inspection, and preservation of a sample of gloves in the Ascension warehouses. Dkt. 62.
- 17 These rulings eliminated all claims against Joseph Weiner. See Dkt. 43; Dkt. 68 at 52.
- 18 In moving against Rock Fintek's unjust enrichment claim, Kitchen Winners incorporates by reference Adorama's argument for summary judgment on Rock Fintek's unjust enrichment claim against it. Kitchen Winners Br. at 17. Because Kitchen

Winners does not add substantive argument on this point, the Court relies on Adorama's briefing and addresses this motion in connection with Adorama's motion.

- 19 The integrity of Rock Fintek's mathematical calculations is further impeached by its decision to discount as irrelevant the \$6.2 million it squandered in the Thailand "theft," on the premise that a loss event of this nature could not happen again. See Rock Fintek 56.1 ¶¶ 162–63; see also Rakhunov Decl., Ex. 8 ¶ 16.
- 20 Rock Fintek has withdrawn its one claim against Mendlowitz in his individual capacity—for breach of warranty. See Rock Fintek Br. at 50 n.8. The remaining claims against the "Adorama Parties" are those brought against Adorama itself. Rock Fintek has also abandoned its "alter ego" theory of contract liability for Adorama. Rock Fintek Br. at 25 n.3.
- 21 Adorama also argues that Rock Fintek's damages claims are too uncertain to support a breach of contract claim. For the reasons above, some species of damages are available on that claim.
- 22 The Court assumes *arguendo* that this email, though styled as a settlement proposal, could be received under [Federal Rule of Evidence 408](#) as offered for a purpose other than to prove the validity of Rock Fintek's contract claims—to show the asserted breach of the implied covenant. Cf. *PRL USA Holdings, Inc. v. U.S. Polo Ass'n, Inc.*, 520 F.3d 109, 114 (2d Cir. 2008) (defendant in trademark infringement suit permitted to use evidence that during settlement discussions plaintiff gave permission to use trademark, as such furthered estoppel defense).
- 23 The Court has precluded Rock Fintek's alternative damages theories, based on lost future profits or legal exposure to Ascension.
- 24 Rock Fintek brought a warranty-based claim and a fraudulent inducement claim against JNS as well as against Stern, Dkt. 43 ¶¶ 140 (fraud claim naming JNS and Stern), 179 (warranty claim doing the same), but it did not defend that claim in its opposition to summary judgment, addressing that claim only in relation to Stern. See Rock Fintek Br. at 49 (listing Stern, Adorama, and Kitchen Winners as parties relevant to a warranty-based claim), 45–48 (arguing only that the fraud claim against Stern survives because it is not duplicative of a breach of contract claim where only JNS is named). The Court dismisses those claims as abandoned. See *Jackson v. Fed. Exp.*, 766 F.3d 189, 196 (2d Cir. 2014).
- 25 Rock Fintek also points to photographic evidence from July 2021 that pallets of gloves stored in Ascension's warehouses were labelled with container numbers, some of which identified the pallet's supplier (including JNS). Rock Fintek 56.1 ¶ 252; Rakhunov Decl., Ex. 52.

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Fuks v. Vanetik

United States District Court, C.D. California. | July 19, 2022 | 615 F.Supp.3d 1159 | 2022 WL 2817473

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Outline

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615 F.Supp.3d 1159
United States District Court, C.D. California.

Pavel FUKS, Plaintiff,
v.
Yuri VANETIK, Defendant.

Case No. 8:19-cv-01212-FLA (JDE)
|
Signed July 19, 2022

Synopsis

Background: Purchaser brought action against seller, asserting various claims arising from allegations that he paid seller \$200,000 for “VIP” events package for attending presidential inauguration and related events but that it “was all a scam,” and that seller never provided tickets for such events.

Holdings: Following bench trial, the District Court, [Fernando L. Aenlle-Rocha, J.](#), held that:

[1] purchaser established California-law claim for promissory fraud;

[2] purchaser was entitled to recover \$200,000 in compensatory damages;

[3] purchaser did not establish California-law claim for intentional misrepresentation;

[4] purchaser established California-law claim for breach of contract;

[5] purchaser did not establish California-law claim for conversion; and

[6] purchaser did not establish California-law claim for unjust enrichment.

So ordered.

West Headnotes (23)

[1] **Federal Civil Procedure** **Sufficiency**

One purpose behind rule requiring court in bench trial to find facts especially and state separately its conclusions of law thereon is to aid appellate court's understanding of basis of trial court's decision; this purpose is achieved if district court's findings are sufficient to indicate factual basis for its ultimate conclusions. [Fed. R. Civ. P. 52\(a\).](#)

[2] **Federal Civil Procedure** **Sufficiency**

For purposes of rule requiring court in bench trial to find facts especially and state separately its conclusions of law thereon, characterization of a finding as one of “fact” or “law” is not controlling; to extent that finding is characterized as one of “law” but is more properly characterized as one of “fact” or vice versa, substance shall prevail over form. [Fed. R. Civ. P. 52\(a\).](#)

[3] **Fraud** **Existing facts or expectations or promises**

Under California law, “promissory fraud” is subspecies of action for fraud and deceit.

[4] **Fraud** **Existing facts or expectations or promises**

Under California law, promise to do something necessarily implies intention to perform; hence, where promise is made without such intention, there is implied misrepresentation of fact that may be actionable fraud.

[5] **Fraud** **Existing facts or expectations or promises**

Fraud **Weight and Sufficiency**

Under California law, to recover on a theory of promissory fraud, plaintiff must show by

a preponderance of the evidence that: (1) defendant made a promise to plaintiff; (2) defendant did not intend to perform this promise when he made it, that is, defendant knew the promise was false; (3) defendant intended that plaintiff rely on this promise; (4) plaintiff reasonably relied on defendant's promise; (5) defendant did not perform the promised act; (6) plaintiff was harmed; and (7) plaintiff's reliance on defendant's promise was a substantial factor in causing the harm.

[6] **Fraud** Acts induced by fraud

Under California law, an action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract.

[7] **Fraud** Effect of existence of remedy by action on contract

Under California law, where a defendant fraudulently induces the plaintiff to enter into a contract and the contract is enforceable, plaintiff has a cause of action in tort as an alternative at least, and perhaps in some instances in addition to, his cause of action on the contract.

[8] **Fraud** Fraud in particular transactions or for particular purposes

Purchaser established California-law claim for promissory fraud against seller; purchaser paid seller \$200,000 for "VIP" events package for presidential inauguration and related events, but seller did not provide purchaser list of events included in supposed package until several days after purchaser paid, changed events purportedly included in package several times, did not provide tickets for events seller had "confirmed" were included in package, and ultimately blamed lack of tickets on unnamed third parties who appeared to have played no role in events stated, and purchaser justifiably relied on seller's promise to arrange experience as seller claimed to be politically well-connected.

[9] **Fraud** Amount awarded

Purchaser was entitled to recover \$200,000 in compensatory damages from seller of "VIP" events package for presidential inauguration and related events, after establishing California-law claim for promissory fraud against seller based on seller's failure to provide tickets for such events; purchaser's detrimental reliance on seller's promise for "VIP" experience directly caused purchaser to lose \$200,000.

[10] **Corporations and Business Organizations** Torts in general

Under California law, the corporate veil doctrine does not shield a director from his own tortious conduct.

[11] **Fraud** Existing facts or expectations or promises

In context of California-law claim for intentional misrepresentation, actionable misrepresentations must pertain to past or existing material facts.

¹ Case that cites this headnote

[12] **Fraud** Existing facts or expectations or promises

Purchaser did not establish that seller made actionable misrepresentation of past or existing fact, and thus failed to establish California-law claim for intentional misrepresentation against seller to whom purchaser paid \$200,000 for "VIP" events package for presidential inauguration and related events, despite assertion that seller knew that purchaser, as foreign national, could not buy tickets to top events; seller's offer to sell purchaser tickets and seller's statements that tickets needed to be purchased by certain date did not constitute affirmative statement that it was legal for purchaser to purchase tickets to inaugural events, and it was also unclear whether purchaser could have attended events as guest of American donor.

¹ Case that cites this headnote

[13] Contracts ➔ Offer and acceptance in general

Text messages exchanged between seller and purchaser constituted contract, as element of purchaser's California-law claim for breach of contract against seller to whom purchaser paid \$200,000 for tickets for "VIP" events package for presidential inauguration and related events; seller messaged purchaser offering "VIP" packages for \$100,000 per person, and purchaser responded indicating that he would "take two tickets."

[14] Contracts ➔ Sufficiency of Performance in General

Purchaser performed his obligations under contract with seller for purchase of tickets for "VIP" events package for presidential inauguration and related events, as element of purchaser's California-law claim for breach of contract against seller; purchaser wired seller \$200,000 four days after contracting for purchase of two packages at \$100,000 each.

[15] Contracts ➔ Sufficiency of Performance in General

Seller did not sufficiently perform under contract for purchase of tickets for "VIP" events package for presidential inauguration and related events, as element of purchaser's California-law claim for breach of contract against seller; seller failed to provide itinerary for inauguration or to provide tickets to presidential swearing-in ceremony or numerous other events seller later confirmed were part of "VIP" package.

[16] Conversion and Civil Theft ➔ Money and commercial paper; debt

Under California law, although cash ordinarily cannot be the subject of a cause of action for conversion, when the money at issue is a specific identifiable sum that has been misappropriated, a conversion claim can be made.

[17] Conversion and Civil Theft ➔ Intent

Under California law, conversion is a strict liability tort; it does not require bad faith, knowledge, or even negligence, but requires only that the defendant have intentionally done the act depriving the plaintiff of his or her rightful possession.

[18] Conversion and Civil Theft ➔ In general; nature and scope of remedy

Conversion and Civil Theft ➔ Title and Right to Possession of Plaintiff

Purchaser of "VIP" events package for presidential inauguration and related events did not establish California-law claim for conversion against seller, even if seller took purchaser's \$200,000 payment but did not use that money to buy packages to provide to seller as agreed upon and then willfully refused to return money after purchaser asked for refund; purchaser did not cite any legal authority showing he retained possessory interest in the \$200,000 after sending it to seller, nor did purchaser cite any legal authority for proposition that money lost as result of false promise could also constitute conversion.

[19] Unjust Enrichment and Constructive Contracts ➔ Claims by Buyers or Consumers

Purchaser did not establish claim for unjust enrichment under California law against seller to whom purchaser paid \$200,000 for "VIP" events package for presidential inauguration and related events, based on purchaser's failure to provide tickets for such events; valid written contract existed between parties covering same subject matter.

[20] Unjust Enrichment and Constructive Contracts ➔ Recognition of theory, claim, or cause of action

California does not recognize a separate cause of action for unjust enrichment.

[21] Contracts ↗ Grounds of action**Unjust Enrichment and Constructive Contracts** ↗ Effect of Express Contract

Under California law, an action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter.

[22] Fraud ↗ Effect of existence of remedy by action on contract

Under California law, when one party commits fraud during contract formation or performance, injured party may recover in contract and tort.

[23] Federal Courts ↗ Interest

In diversity actions brought in federal court, prevailing plaintiff is entitled to pre-judgment interest at state law rates, while post-judgment interest is determined by federal law.

Conference Order, “FPCO”) at 3. Plaintiff alleges he paid Defendant \$200,000 for a “VIP” events package for Donald Trump’s 2017 U.S. presidential inauguration in Washington, D.C., but it “was all a scam.” Dkt. 1 (“Compl.”) ¶ 1. The Complaint states six causes of action against Defendant for: (1) promissory fraud; (2) intentional misrepresentation; (3) breach of contract; (4) conversion; (5) unjust enrichment; and (6) violation of California’s unfair competition law, *Cal. Bus. & Prof. Code § 17200 et seq.* (“UCL”). See generally Compl.

The court held a bench trial beginning September 21, 2021. After the close of evidence on September 23, 2021, Plaintiff dismissed his sixth cause of action for violation of the UCL. Dkt. 92 (Reporter’s Transcript Volume III (“Vol. III”)) at 56. The parties submitted proposed findings of fact and conclusions of law on November 19, 2021. Dkts. 96, 97. Plaintiff also filed objections to Defendant’s proposed findings on November 29, 2021. Dkt. 99.

After considering and weighing the evidence presented at trial, and evaluating the credibility of witnesses, the court FINDS in Plaintiff’s favor on his promissory fraud and breach of contract claims and AWARDS Plaintiff \$200,000 in compensatory damages, plus interest. The findings below explain the court’s award.

Attorneys and Law Firms

***1162 John W. Lomas, Jr.**, Pro Hac Vice, **William Thomas O’Brien**, Pro Hac Vice, Eversheds Sutherland US LLP, Washington, DC, **Joseph R. Ashby**, Ashby Law Firm PC, Los Angeles, CA, for Plaintiff.

John M. Hamilton, John M. Hamilton Law Offices, Los Angeles, CA, for Defendant.

ORDER FOLLOWING BENCH TRIAL

FERNANDO L. AENLLE-ROCHA, United States District Judge

INTRODUCTION

This diversity action concerns Plaintiff Pavel Fuks (“Plaintiff” or “Fuks”), a citizen and resident of Ukraine, and Defendant Yuri Vanetik (“Defendant” or “Vanetik”), a U.S. citizen and resident of California. Dkt. 65 (Final Pretrial

CREDIBILITY DETERMINATIONS

Plaintiff and Defendant told vastly different stories at trial. In short, Plaintiff testified he paid Defendant \$200,000 in November 2016 for two “VIP” packages for the 2017 presidential inauguration that never came to fruition. Dkt. 90 (Reporter’s Transcript Volume I (“Vol. I”)) at 37, 43-44; Ex. 3. Defendant, on the other hand, testified that this payment was not related to the inauguration, but was a partial payment for consulting services his company, Odyssey Management LLC (“Odyssey”), performed in April 2016 for Plaintiff’s close friend, Gennady Kernes (“Kernes”).¹ Reporter’s Transcript Volume II (“Vol. II”) at 50-53, 139. Specifically, Defendant testified that Odyssey was engaged in two agreements concerning the Kernes project: (1) Defendant would fly to Rome, Italy and create a strategy memorandum for \$65,000; and (2) Defendant would perform additional consulting services for a \$250,000 initial retainer and \$50,000 monthly retainer for six months. Vol. II at 46; Ex. 10 (“Consulting Agreement”). According to Defendant, he agreed to create a program of inauguration events for ***1163** Plaintiff as a

courtesy when Plaintiff agreed to start paying the outstanding Odyssey bill. Vol. II at 55.

The court's judgment in this matter, therefore, ultimately hinges on whether it believes Plaintiff or Defendant. The court finds instructive Ninth Circuit Model Jury Instruction 1.14, which provides guidance to jurors to assess the credibility of witnesses. The factors include: (1) the opportunity and ability of the witness to see or hear or know the things testified to; (2) the witness's memory; (3) the witness's manner while testifying; (4) the witness's interest in the outcome of the case, if any; (5) the witness's bias or prejudice, if any; (6) whether other evidence contradicted the witness's testimony; (7) the reasonableness of the witness's testimony in light of all the evidence; and (8) any other factors that bear on believability. Ninth Cir. Model Jury Instr. (Civil) 1.14 (2017).

At trial, the court admitted into evidence Plaintiff's Exhibit 1, consisting of message exchanges between Plaintiff and Defendant on the **WhatsApp** Messenger mobile phone application. According to the messages, on November 18, 2016, after the presidential election in the United States, Defendant offered to sell Plaintiff "VIP" tickets to the inauguration for "100k per person." Ex. 1 at 22. That same day, Plaintiff responded he would take two tickets. *Id.* Three days later, on November 21, 2016, Defendant sent an invoice for \$200,000 to Plaintiff's coworkers via email. Ex. 2; Vol. I at 35-36. The next day, Plaintiff's company, BEM Global, sent Odyssey \$200,000 via SWIFT. Ex. 3; Vol. I at 37-38. The **WhatsApp** messages show Plaintiff and Defendant exchanging numerous communications about inauguration events in the aftermath. *See* Ex. 1 at 23-29. Plaintiff also requested a refund from Defendant in the months following the January 2017 inauguration. *Id.* at 28-29.

The court finds the contemporaneous **WhatsApp** messages and chronology of events support Plaintiff's assertion that the \$200,000 payment was for two "VIP" inauguration packages organized by Defendant. At trial, Defendant claimed the **WhatsApp** messages in Exhibit 1 were fabricated and/or out of sequence. *E.g.*, Vol. II at 101-03, 109. Plaintiff, however, credibly testified that he exported all **WhatsApp** messages between himself and Defendant into a data file to produce Exhibit 1, and did not alter any messages. Vol. I at 17-18. Notably, Defendant did not offer his own fulsome version of **WhatsApp** messages into evidence to compete with Exhibit 1. Rather, Defendant offered into evidence a small sample of messages that match the messages in Exhibit 1, corroborating Exhibit 1's **authenticity**. *See* Ex. 13.

Defendant also claimed that the Federal Bureau of Investigation took his mobile telephone in February 2017 to investigate threats Plaintiff made to him, and the messages in Exhibit 13 were what he could find upon return of the telephone. Vol. II at 119-20, 134-35. The court finds Defendant's version of events incredible, particularly in light of the other evidence presented at trial. Defendant offered no documents or emails showing Odyssey had performed consulting work for Kernes. *See* Vol. II at 94, 140. Although Defendant submitted into evidence a document dated September 21, 2016, entitled "ODYSSEY – PAVLO FUKS Confidential Consulting Agreement," *see* Ex. 10, Plaintiff credibly testified he had never seen the document and the signature on the last page was not his.² Vol. I at 56-57.

Further, although the \$200,000 invoice sent to BEM Global on November 21, 2016 *1164 purported to be for an "Earned retainer" for "Project Analysis, business plan development, and Due Diligence; legal and accounting management; public relations," *see* Ex. 2, Plaintiff credibly testified Defendant required the invoice for the "VIP" tickets to be labeled in this manner. Vol. I at 36. The \$200,000 payment was also sent on November 22, 2016, only four days after Plaintiff told Defendant he would buy two "VIP" tickets costing \$100,000 per person, whereas the consulting services allegedly performed for Kernes occurred months prior in April 2016. Ex. 3; Ex. 1 at 22; Vol. II at 50. Finally, the court was provided with no credible evidence that Plaintiff personally agreed to pay Odyssey \$200,000 for consulting services supposedly performed on behalf of Kernes.

In sum, the court finds Plaintiff's testimony regarding the sequence of events more credible than Defendant's,³ and supported by the **WhatsApp** messages in Exhibit 1, which the court finds authentic and controlling. As the **WhatsApp** messages make clear the \$200,000 payment was for two "VIP" packages for the 2017 presidential inauguration, the findings of fact outlined below largely adopt Plaintiff's version of events. The court limits its findings to the facts relevant to the claims and defenses raised in the parties' post-trial briefs. *See* Dkts. 96, 97.

FINDINGS OF FACT⁴

[1] [2] Plaintiff and Defendant met for the first time in the spring of 2016, when Plaintiff's close friend Gennady Kernes

—then mayor of Kharkiv, Ukraine—introduced Plaintiff to Defendant. Dkt. 65 (FPCO, Admitted Facts (“AF”)) ¶ 3; Vol. I at 14-15. At that time, Defendant hoped to be retained by the city of Kharkiv to promote its interests in the United States, and Defendant claimed to be well-connected politically in the United States. *Id.* After that initial meeting, Plaintiff and Defendant kept in touch and communicated with each other via text message using the **WhatsApp** Messenger mobile phone application. Vol. I at 16-19; Ex. 1.

In the fall of 2016, Plaintiff and Defendant exchanged messages about the United States presidential election. Ex. 1 at 20. After Donald Trump won the election, Defendant told Plaintiff that some of his close friends had received major appointments. *Id.* at 22. On November 16, 2016, Defendant *1165 noted the inauguration was set to take place on January 20, 2017, and advised Plaintiff the “[t]ime to book everything [to attend the inauguration] is now.” *Id.* Defendant elaborated that “[t]here are guests that get tickets [to the inauguration] and guests that get VIP treatment. Regular attendance is a joke.” *Id.*

On November 17, 2016, Defendant told Plaintiff the “[t]ime to get tickets is next 5 days. Then, they go up. Next year they will be at least 3 times the price – at best.” *Id.* Plaintiff responded he wanted to buy “the very best,” and asked Defendant how much the tickets would cost. *Id.* Defendant responded he would verify costs and “explain several options.” *Id.* On November 18, 2016, Defendant messaged Plaintiff: “Best VIP 100k per person. 3 days includes top briefings tickets to inaugural ball, etc. photo opps most likely. There are levels below that as well.” *Id.* Defendant further noted that “[h]otels should be booked now and payments handled as soon as possible.” *Id.* Plaintiff responded he would take two “VIP” tickets. *Id.*; Vol. I at 33. Defendant responded: “Passports email to me. Will send you wire information later today,” and gave his email address to Plaintiff. Ex. 1 at 22.

Initially, Defendant instructed Plaintiff to wire payment to a Citibank account for his attorney’s client trust account —“Hamilton Law Offices Client Trust Account.” *Id.*; Vol. I at 33-34. Defendant also instructed Plaintiff to note that the wire was for “legal services.” *Id.* Two days later, however, Defendant sent an invoice for \$200,000 to Plaintiff’s coworkers via email, and asked Plaintiff to pay in accordance with that invoice instead. Ex. 2; Vol. I at 34-36. The \$200,000 invoice was from Defendant’s company (Odyssey) to Plaintiff’s company (BEM Global), with the description: “Project Analysis, business plan development,

and Due Diligence; legal and accounting management; public relations. Earned retainer.” Ex. 2. The following day, on November 22, 2016, Plaintiff wired Odyssey \$200,000 for the “VIP” tickets from an account held by BEM Global, per Defendant’s instructions. Vol. I at 36-38, 54; Ex. 3.

On November 24, 2016, Plaintiff asked Defendant when he would send the program of events for the package he had purchased. Ex. 1 at 23; Vol. I at 38-39. Defendant responded: “Should have some type of schedule next week. We are all waiting for details.” Ex. 1 at 23. On November 29, 2016, Defendant messaged Plaintiff: “Hi Pavel. Everything is done. I now have what seems to be the final layout. There are a few ‘nuances’ to go over. Let’s **chat** a little later.” *Id.* On November 30, 2016, Defendant sent Plaintiff the following details for the “VIP package” he had purchased:

- Cabinet Dinner – 2 tickets
- Victory Reception – 4 tickets
- Inaugural Concert and Fireworks – 4 tickets
- Parade – 4 VIP Tickets
- Inaugural Ball Premier Access – 2 tickets

*1166 Presidential Swearing-In Ceremony – 2 tickets Ex. 1 at 23; Vol. I at 39. Plaintiff asked Defendant to confirm that all the tickets Defendant had listed in his message were, in fact, the events of the “VIP” package Plaintiff had purchased. *Id.* Defendant confirmed they were and stated there were also “a few extras.” Ex. 1 at 24. Later, Defendant told Plaintiff that if he wanted a better chance to meet president-elect Trump, Plaintiff would have to pay an additional \$350,000.⁵ *Id.* at 25; Vol. I at 39-40.

*1166 On January 13, 2017, one week before the inauguration, Defendant told Plaintiff there were “tons of changes to the program.” Ex. 1 at 26. Two days later, Defendant messaged Plaintiff: “Hi pavel. I should have final schedule sent to me today. Will forward it to you. I will be leaving for DC tomorrow.” *Id.* at 27. On January 17, 2017, Plaintiff asked Defendant to send him the schedule of all events. *Id.* Defendant responded: “Hey Pavel. I just arrived to DC. I am waiting for a revised one. There is a problem with dinner. Trying to fix it ... should have it in am. What time are you flying in?” *Id.* Plaintiff responded he was arriving on January 19, 2017, the day before the inauguration. *Id.* Defendant replied: “I will send you schedule in about an hour or so. We got fucked on the dinner. I am working on fixing it.

I hate this Inauguration. It is nothing but headaches. It would be better if you came tomorrow or today.” *Id.*

During Plaintiff’s time in Washington, Defendant never gave Plaintiff tickets to the cabinet dinner, victory reception, inaugural concert and fireworks, parade, inaugural ball, or presidential swearing-in ceremony. Vol. I at 42-44, 47. Defendant was often unavailable and did not answer his telephone. Vol. I at 46-47. Defendant did provide Plaintiff three tickets to an event hosted by the Texas State Society the day before the inauguration called “Black Tie & Boots,” which Defendant had purchased one week prior for \$2,500 each. Exs. 5, 6; Vol. I at 44.

The morning of the inauguration, Defendant told Plaintiff he would have a driver pick up Plaintiff and his guests. Ex. 1 at 27-28; Vol. I at 45. The car never arrived. Vol. I at 45. As a result, Plaintiff and his party walked towards the inauguration site in the rain in the hopes of attending. Vol. I at 45-46. When they approached an access point to the inauguration, they were not allowed to enter because they did not have passes. *Id.* Plaintiff and his guests returned to their hotel, where they watched the inauguration ceremony on television at the hotel bar. Vol. I at 46.

Later that day, Defendant sent a car to take Plaintiff and his guests to a party located in a midrise building overlooking the Capitol. *Id.* at 47. By the time Plaintiff arrived, most attendees had left, the food had been eaten, and the staff were cleaning the venue.⁶ *Id.*; Vol. II at 10. Defendant also invited Plaintiff and his friends to a party on inauguration day where two members of Congress, Representatives Ed Royce and Kevin McCarthy, were in attendance. Vol. II at 9, 72-73. During the event, Defendant introduced Plaintiff to elected officials, including United States Senator Cory Gardner. *Id.*

Plaintiff left Washington the day after the inauguration, on January 21, 2017. *See* Ex. 1 at 28. Via **WhatsApp** message, Plaintiff asked Defendant to let him know when it would be a convenient time to discuss a refund. *Id.* Defendant told Plaintiff he did not receive tickets to inaugural events because Defendant had been cheated by third parties organizing the events. Vol. I at 49-50. Plaintiff asked Defendant to work with Plaintiff’s lawyers to recover the money, identify who had cheated him, and provide documentation, such as receipts, showing payments for event tickets. *Id.* at 49; *see also* Ex. 1 at 28-29. Defendant agreed to do so, but never did. Vol. II at 14-15.

On March 8, 2017, Plaintiff requested an update from Defendant. Ex. 1 at 28. Defendant *1167 responded the next day, stating he could not send Plaintiff the agreements with third parties who had organized events due to a non-disclosure agreement. *Id.* at 28-29. Defendant never provided Plaintiff with a copy of the alleged non-disclosure agreement. Vol. I at 53.

Another month passed, and Plaintiff again asked Defendant to provide documentation that supported Defendant’s story. Ex. 1 at 29. On April 8, 2017, Plaintiff wrote to Defendant: “Dear Yuri, you promised to give me the contact info of the people who cheated me and took my money. I’m planning to get the money from them through the court.” *Id.* Defendant did not respond. *Id.* Plaintiff followed up on May 9, 2017, asking when Defendant would return the \$200,000. *Id.* Defendant responded: “So now you crossed the line. Get this straight: I do not owe you … any money. In fact, you owe us for the meetings in Rome and subsequent work.” *Id.* Defendant never refunded Plaintiff or BEM Global the \$200,000. Vol. I at 54.

CONCLUSIONS OF LAW

I. Promissory Fraud

[3] [4] [5] [6] [7] Plaintiff’s first claim is for promissory fraud. “ ‘Promissory fraud’ is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud.” *Lazar v. Super. Ct.*, 12 Cal. 4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981 (1996). To recover on a theory of promissory fraud, Plaintiff must show by a preponderance of the evidence that: (1) Defendant made a promise to Plaintiff; (2) Defendant did not intend to perform this promise when he made it (i.e., Defendant knew the promise was false); (3) Defendant intended that Plaintiff rely on this promise; (4) Plaintiff reasonably relied on Defendant’s promise; (5) Defendant did not perform the promised act; (6) Plaintiff was harmed; and (7) Plaintiff’s reliance on Defendant’s promise was a substantial factor in causing the harm. *See Beckwith v. Dahl*, 205 Cal. App. 4th 1039, 1060-65, 141 Cal.Rptr.3d 142 (2012); *Engalla v. Permanente Med. Group, Inc.*, 15 Cal. 4th 951, 973-77, 64 Cal.Rptr.2d 843, 938 P.2d 903 (1997). “An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract.” *Lazar*, 12 Cal. 4th at 638, 49 Cal.Rptr.2d 377, 909 P.2d 981. If the contract is enforceable, Plaintiff “has a cause of action in tort as an

alternative at least, and perhaps in some instances in addition to his cause of action on the contract.” *Id.* (internal citation omitted).

[8] Here, the court finds Plaintiff presented sufficient evidence at trial to establish his claim for promissory fraud. Defendant promised to provide Plaintiff a “VIP” inauguration events package for two people. Ex. 1 at 22. Defendant did not provide Plaintiff a list of the events included in the supposed package Plaintiff had bought until several days after Plaintiff paid, changed the events purportedly included in the package several times, and did not provide tickets for events he had “confirmed” were included in the package. *Id.* at 23, 26-27. When Plaintiff confronted Defendant with the lack of tickets to inaugural events, Defendant ultimately blamed unnamed third parties who appeared to have played no role in the events stated. *Id.* at 29. The evidence in the record, therefore, sufficiently demonstrates Defendant intended for Plaintiff to rely on his promise to provide two “VIP” inaugural packages to induce Plaintiff to pay Odyssey \$200,000, and that Defendant did not intend to perform at the time the promise was made.⁷

*1168 Plaintiff also justifiably relied on Defendant's promise to arrange a “VIP” inauguration experience, as Defendant claimed to be politically well-connected in the United States. AF ¶ 3. Although Defendant facilitated a few events for Plaintiff to attend when he was in Washington, D.C., those events differed from and were not substantially equivalent to the “VIP” experience he had promised. Notably, Defendant did not provide any tickets for a cabinet dinner, the inaugural parade, the inaugural concert and fireworks, or for the presidential swearing-in ceremony. While Defendant provided tickets for a “Black Tie & Boots” event, Defendant paid just \$2,500 per ticket the week before. Similarly, while Defendant sent a car to deliver Plaintiff to an event in a midrise building overlooking the Capitol, that event appears to have ended by the time Plaintiff and his guests arrived. And although Defendant introduced Plaintiff to a few elected officials at another event on inauguration day, the tickets and experience Defendant provided did not match his promises both before and after Plaintiff made the \$200,000 payment, nor were they substantially equivalent to the “VIP” package promised.

[9] [10] Plaintiff's detrimental reliance on Defendant's promise for a “VIP” inauguration experience directly caused Plaintiff to lose \$200,000. The court, therefore, finds in

Plaintiff's favor on his promissory fraud claim. Plaintiff is entitled to recover \$200,000 in compensatory damages.⁸

II. Intentional Misrepresentation

[11] To establish his claim for intentional misrepresentation, Plaintiff must prove: (1) Defendant represented to Plaintiff that a fact was true; (2) Defendant's representation was false; (3) Defendant knew that the representation was false when he made it, or that he made the representation recklessly and without regard for its truth; (4) Defendant intended Plaintiff to rely on the representation; (5) Plaintiff reasonably relied on Defendant's representation; (6) Plaintiff was harmed; and (7) Plaintiff's reliance on Defendant's representation was a substantial factor in causing his harm. *Jud. Council of Cal. Civil Jury Instructions (“CACI”) No. 1900.* “The law is well established that actionable misrepresentations must pertain to past or existing material facts.” *Cansino v. Bank of Am., 224 Cal. App. 4th 1462, 1469, 169 Cal.Rptr.3d 619 (2014).*

[12] Although Defendant falsely promised Plaintiff he would organize “VIP” inauguration packages for two people, the court finds Defendant did not make an actionable misrepresentation of a past or existing fact. Plaintiff fails to adequately identify a specific false statement Defendant made that induced Plaintiff to pay \$200,000. Plaintiff argues Defendant falsely represented to Plaintiff that he could have “VIP” tickets to the 2017 inauguration, knowing that Plaintiff, as a foreign national, could not buy tickets to the top *1169 inauguration events. Dkt. 97-1 at 11. However, Defendant's offer to sell Plaintiff tickets and statements that they needed to be purchased by a certain date do not constitute an affirmative statement that it is legal for Plaintiff to purchase tickets to inaugural events. It is also unclear whether Plaintiff could have attended inaugural events as a guest of an American donor, or whether Plaintiff could have attended some events and not others. Indeed, Plaintiff testified that he attended three events during his time in Washington. Vol. I at 44-45; Vol. II at 9-10. Accordingly, the court finds Plaintiff has not met his burden to show Defendant made a false representation, and Plaintiff's claim for intentional misrepresentation fails.

III. Breach of Contract

For Plaintiff's breach of contract claim to succeed, he must prove: (1) a contract existed between Plaintiff and Defendant; (2) Plaintiff performed his obligations under the contract; (3) Defendant breached his obligations under the contract; and (4) Defendant's breach harmed Plaintiff. See *CACI No. 303.* To show that a contract was created, Plaintiff must

prove that: (1) the contract terms were clear enough that the parties could understand what each was required to do; (2) the parties agreed to give each other something of value; and (3) the parties agreed to the terms of the contract. CACI No. 302. The terms of a contract may be sufficiently clear “even though it empowers one or both parties to make a selection of terms in the course of performance.” Restatement (Second) of Contracts § 34(1) (1981). Furthermore, “[a] contract in writing may be modified by a contract in writing.” CACI No. 313.

[13] [14] The court finds the WhatsApp messages Plaintiff and Defendant exchanged created a written contract between the parties.⁹ Specifically, on November 18, 2016, Defendant texted Plaintiff: “Best VIP 100k per person. 3 days includes top briefings tickets to inaugural ball, etc. photo opps most likely.” Ex. 1 at 22. Plaintiff responded: “I’ll take two tickets ...” *Id.* Plaintiff then performed his obligations under the contract by wiring Odyssey \$200,000 four days later. Ex. 3.

On November 30, 2016, Defendant confirmed the “VIP” package included tickets to the following events:

- Cabinet Dinner – 2 tickets
- Victory Reception – 4 tickets
- Inaugural Concert and Fireworks – 4 tickets
- Parade – 4 VIP Tickets
- Inaugural Ball Premier Access – 2 tickets
- Presidential Swearing-In Ceremony – 2 tickets

Ex. 1 at 23; Vol. I at 39.¹⁰

[15] Defendant, however, did not sufficiently perform under the contract as stated above. Defendant failed to provide a three-day itinerary for the inauguration in January 2017, and did not provide tickets to the presidential swearing-in ceremony or numerous other events Defendant later *1170 confirmed were part of the “VIP” package. *See* Ex. 1 at 23. The court, therefore, finds in Plaintiff’s favor on his breach of contract claim, and Plaintiff is entitled to recover \$200,000 in compensatory damages.

IV. Conversion

[16] [17] Although cash ordinarily cannot be the subject of a cause of action for conversion, “when the money at issue is

a specific identifiable sum ... that has been misappropriated, a conversion claim can be made.” *SP Inv. Fund I LLC v. Cattell*, 18 Cal. App. 5th 898, 907, 227 Cal.Rptr.3d 268 (2017). To succeed on his conversion claim, Plaintiff must prove: (1) Plaintiff had a right to possess the specific sum of \$200,000; (2) Defendant substantially interfered with Plaintiff’s property by knowingly or intentionally refusing to return the money after Plaintiff demanded its return; (3) Plaintiff did not consent; (4) Plaintiff was harmed; and (5) Defendant’s conduct was a substantial factor in causing Plaintiff’s harm. *See CACI No. 2100*. “[C]onversion is a strict liability tort. It does not require bad faith, knowledge, or even negligence; it requires only that the defendant have intentionally done the act depriving the plaintiff of his or her rightful possession.” *Voris v. Lampert*, 7 Cal. 5th 1141, 1158, 250 Cal.Rptr.3d 779, 446 P.3d 284 (2019).

[18] Plaintiff argues his conversion claim succeeds because Defendant failed to use the \$200,000 payment as authorized when Defendant did not buy “VIP” inauguration packages, and Defendant willfully refused to return the money after Plaintiff asked for a refund. Dkt. 97-1 at 13. Plaintiff does not cite any legal authority, however, showing he retained a possessory interest in the \$200,000 sent to Defendant’s company. Although Plaintiff is entitled to a refund, Plaintiff does not adequately demonstrate he continued to have an independent right to possess the \$200,000 outside of his claim for breach of contract and compensatory damages. Under Plaintiff’s theory of conversion, any breach of contract could also be brought as a claim for conversion. Plaintiff also does not cite any legal authority for the proposition that money lost as a result of a false promise can also constitute conversion. Plaintiff’s conversion claim, therefore, fails.

V. Unjust Enrichment

[19] [20] [21] Plaintiff’s final claim is for unjust enrichment. California, however, does not recognize a separate cause of action for unjust enrichment. *See Hill v. Roll Int’l Corp.*, 195 Cal. App. 4th 1295, 1307, 128 Cal.Rptr.3d 109 (2011) (“Unjust enrichment is not a cause of action, just a restitution claim.”). In some circumstances, courts have construed purported claims for unjust enrichment as quasi-contract claims seeking restitution. *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015). But “it is well settled that an action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter.” *Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44 Cal. App. 4th 194, 203, 51 Cal.Rptr.2d 622 (1996); *see also Klein*

v. *Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1388, 137 Cal.Rptr.3d 293 (2012) (“A plaintiff may not ... pursue or recover on a quasi-contract if the parties have an enforceable agreement regarding a particular subject matter.”). As the court has found Defendant breached the parties’ written contract, Plaintiff’s claim for unjust enrichment fails.

VI. Award

[22] “When one party commits a fraud during the contract formation or performance, the injured party may recover in contract and tort.” *1171 *Harris v. Atl. Richfield Co.*, 14 Cal. App. 4th 70, 78, 17 Cal.Rptr.2d 649 (1993), as modified on denial of reh’g (Apr. 8, 1993). As set forth above, Plaintiff has succeeded on claims sounding in both contract and tort. Although the Complaint in this action prayed for punitive damages in light of the tort claims, see, e.g., Compl. ¶ 82, Plaintiff sought to recover only \$200,000 in compensatory damages at trial. Vol. III at 48. Plaintiff also abandoned his claim for reimbursement of the cost of travel to Washington. Vol. II at 25. The court, therefore, AWARDS Plaintiff the sum of \$200,000, plus pre- and post-judgment interest. See *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 714 (9th

Cir. 1992) (noting the trial judge has discretion to award pre-judgment interest); 28 U.S.C. § 1961 (“Interest shall be allowed on any money judgment in a civil case recovered in a district court.”).

CONCLUSION

[23] For the reasons stated above, the court finds Plaintiff is the prevailing party and AWARDS Plaintiff \$200,000 plus pre- and post-judgment interest. No later than five (5) business days from the filing of this Order, Plaintiff’s counsel shall submit a proposed Judgment¹¹ and email a copy in Word format to the courtroom deputy. Any motion for attorney’s fees must be filed within 14 days after the entry of Judgment. See Fed. R. Civ. P. 56(2)(B)(i).

IT IS SO ORDERED.

All Citations

615 F.Supp.3d 1159

Footnotes

- 1 According to Defendant, Kernes—the mayor of Kharkiv, Ukraine—was indicted for multiple crimes after surviving an assassination attempt. Vol. I at 15; Vol. II at 39, 139.
- 2 To be sure, Eric Rogers, Defendant’s former partner at Odyssey, testified that Odyssey performed services for Kernes and there was an outstanding bill. Vol. II at 146-49. Ultimately, however, whether Odyssey was in fact owed money for consulting services is a separate question from the purpose of the \$200,000 payment made on November 22, 2016. As the court, below, finds the \$200,000 payment was made in exchange for attending “VIP” inauguration events, the fact that Odyssey may have consulted for Kernes in the past is irrelevant to Plaintiff’s claims in the instant action.
- 3 The court also notes a jury previously found Defendant liable for fraud in an unrelated action. Vol. II at 125-26. Although Plaintiff admitted he was subject to a five-year travel ban in the United States, was recently sanctioned by Ukraine, and was the subject of an arrest warrant issued by Russia, these admissions were not relevant to the claims in this action and did not bear on Plaintiff’s character for truthfulness or untruthfulness. Vol. I at 59, Vol. II at 15; see Fed. R. Evid. 608.
- 4 “In bench trials, Fed. R. Civ. P. 52(a) requires a court to find the facts specially and state separately its conclusions of law thereon.” *Vance v. Am. Haw. Cruises, Inc.*, 789 F.2d 790, 792 (9th Cir. 1986) (internal quotation omitted). “One purpose behind Rule 52(a) is to aid the appellate court’s understanding of the basis of the trial court’s decision. This purpose is achieved if the district court’s findings are sufficient to indicate the factual basis for its ultimate conclusions.” *Id.* (citations omitted). The characterization of a finding as one of “fact” or “law” is not controlling. To the extent that a finding is characterized as one of “law” but is more properly characterized as one of “fact” (or vice versa), substance shall prevail over form. Further, to the extent the court has relied on evidence to which Plaintiff objects, see Dkt. 99, those objections are overruled.
- 5 No evidence was introduced at trial to establish Plaintiff paid Defendant any money beyond the \$200,000 payment to Odyssey.

- 6 While Defendant testified that Odyssey paid for tickets to this event, Vol. II at 60, no evidence was introduced at trial showing the payment or cost of attendance.
- 7 Indeed, it appears Defendant may have even intended to falsely offer Plaintiff a “VIP” inauguration experience to induce Plaintiff to pay Odyssey for consulting services Defendant believed he was owed for the Kernes project.
- 8 In his Proposed Findings of Fact and Conclusions of Law, Defendant argues that the \$200,000 payment was between BEM Global and Odyssey—not Plaintiff and Defendant—and that Plaintiff did not present evidence at trial sufficient to “pierce the corporate veil” to hold Defendant personally liable. Dkt. 96-1 at 8. The corporate veil doctrine, however, does not shield Defendant from his own tortious conduct. See *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 504, 229 Cal.Rptr. 456, 723 P.2d 573 (1986) (“Directors are liable to third persons injured by their own tortious conduct regardless of whether they acted on behalf of the corporation and regardless of whether the corporation is also liable.”). The evidence in the record establishes that Plaintiff lost \$200,000 in reliance on Defendant’s false promises. Defendant’s argument, therefore, is without merit.
- 9 Defendant argues Plaintiff’s breach of contract claim is barred by the statute of limitations because a two-year statute of limitations applies to oral agreements under California law. Dkt. 96-1 at 9; see also Cal. Code of Civ. P. § 339(a). For written contracts, however, a four-year statute of limitations applies. Cal. Code of Civ. P. § 337(a). The Complaint in this action was filed in June 2019. Dkt. 1. As the court finds the parties’ WhatsApp messages formed a written contract that was breached in January 2017, the claim is timely.
- 10 Defendant testified he sent Plaintiff another itinerary of inaugural events approximately one month later, as outlined in Exhibit 9. Vol. II at 68-70. The parties, however, do not dispute Plaintiff was not provided tickets to attend those events.
- 11 Plaintiff’s Proposed Conclusions of Law seek pre-and post-judgment interest under California law. Dkt. 97-1 at 14-15. However, “[i]n diversity actions brought in federal court a prevailing plaintiff is entitled to pre-judgment interest at state law rates while post-judgment interest is determined by federal law.” *In re Cardelucci*, 285 F.3d 1231, 1235 (9th Cir. 2002). The proposed Judgment, therefore, should reflect an award of pre-judgment interest under California law and post-judgment interest under federal law.

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United States v. Jean-Claude

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Outline

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UNITED STATES of America,
v.
JEAN-CLAUDE Okongo Landji
and Jibril Adamu, Defendants.

(S1) 18 Cr. 601 (PGG)

|

Signed 06/27/2022

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MEMORANDUM OPINION & ORDER

PAUL G. GARDEPHE, U.S.D.J.:

*1 Defendants Jean-Claude Okongo Landji and Jibril Adamu are charged with conspiring to distribute and possess with intent to distribute five kilograms and more of cocaine on board a U.S.-registered or U.S.-owned aircraft, or by a U.S. citizen on board any aircraft, in violation of 21 U.S.C. §§ 959(c), 959(d), and 963. ((S1) Indictment (Dkt. No. 39)) Landji and Adamu proceeded to trial on October 6, 2021. (Oct. 6, 2021 Minute Entry) On October 25, 2021, the jury returned a verdict finding both Defendants guilty. (Verdict (Dkt. No. 605); Trial Tr. ("Tr.") 1183-86)¹

Landji and Adamu have moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, or alternatively for a new trial under Rule 33. (Dkt. Nos. 638-39) Landji and Adamu argue that (1) the evidence is insufficient; (2) this Court erred in permitting the Government to introduce extractions from their cell phones; and (3) the venire and petit jury did not reflect a fair cross-section of the community. (Landji Br. (Dkt. No. 638) at 33-40, 42-44, 46-49; Adamu Br. (Dkt. No. 639) at 3-14) Landji also argues that (1) the jury was prejudiced by references to the presence of cocaine that was not admitted at trial; and (2) the conditions of confinement during trial deprived him of a meaningful opportunity to participate in his defense. (Landji Br. (Dkt. No. 638) at 40-42, 44-45)

For the reasons stated below, Landji's and Adamu's motions will be denied.

BACKGROUND

I. EVIDENCE AT TRIAL

A. The Government's Evidence

The Government called six witnesses at trial, including co-defendant and Government cooperator David Cardona-Cardona. The Government's proof also included video and audio recordings of the Defendants, text messages authored by the Defendants, stipulations as to certain facts, and other documentary evidence.

1. Cardona-Cardona's 2009 and 2010 Contacts with Landji and Adamu

In 2009 and 2010, Cardona-Cardona – an international drug trafficker and arms dealer – schemed with Landji and Adamu to transport cocaine from South America to West Africa.²

Landji met Cardona-Cardona in 2009 through a mutual acquaintance "Loco Lucho," with whom Cardona-Cardona had trafficked cocaine. (Tr. 286-87, 331) At their first meeting, Cardona-Cardona, Landji, Lucho, and others discussed a plan to transport two tons of cocaine using a Gulfstream III – a plane typically used for charter or business flights. (Tr. 287-88) Cardona-Cardona gave Landji money to lease the Gulfstream III through Landji's aviation charter company, Oakland Aviation. (Tr. 289, 405; GX 502W) The

conspirators agreed that Landji – a pilot and a U.S. citizen – would fly the Gulfstream III from the United States to Conakry, Guinea in West Africa, and then on to Venezuela, where he would pick up the cocaine, and then return to Conakry with the drugs. (Tr. 90, 289-90, 329; GX 1000) A military officer who controlled the airport in Conakry was paid a \$50,000 bribe to ensure that the drugs would be secure upon arrival. (Tr. 330-31) In addition, because Landji had not been authorized to fly into Venezuela airspace, he planned to land at a Caribbean island close to Venezuela and await clearance from Venezuelan officials. These Venezuelan officials – who had likewise been bribed – would inform Landji when he could fly to Venezuela to pick up the cocaine. (Tr. 290, 327-34, 570-71)

*2 The scheme did not proceed as planned. After Landji landed at the Caribbean island, he did not receive the necessary authorization to enter Venezuela. (Tr. 332-34) To placate officials at the airport – who were suspicious as to his reasons for being there – Landji falsely reported that the plane had technical issues. (See Tr. 332-34, 571) Landji eventually returned to West Africa without picking up the cocaine in Venezuela. (Tr. 333, 572)

A few months later, Cardona-Cardona, Landji, and Lucho attempted to transport 2.5 tons of cocaine from Venezuela to West Africa using the Gulfstream III. (Tr. 334, 336) Landji was responsible for arranging for the plane to be picked up in the United States, resolving issues with the pilots' expired licenses, and preparing the flight plan. (Tr. 334-35, 344-45) Cardona-Cardona and Landji agreed that the plane would be officially registered to fly from Mali to Conakry. Instead of landing in Conakry, the plane would fly on to Venezuela to pick up the cocaine, and would then return to Conakry. (Tr. 335-39, 343-46; GX 238) This flight would be a “black flight” – that is, an undeclared flight in which no flight plan is filed and the plane's transponders and GPS location systems are disabled so that the plane cannot be detected. (Tr. 275-76, 335-36, 458) Cardona-Cardona bribed officials in Conakry to ensure that the drugs would be secure upon arrival. (Tr. 336-38) Although the plane arrived in Mali, the remainder of the operation had to be cancelled because the plane's batteries were overheating. (Tr. 343-44, 347) Despite these failed operations, Cardona-Cardona and Landji “agreed not to lose touch.” (Tr. 348)

In or around 2010, Adamu – who is also a pilot – was introduced to Cardona-Cardona by “Jimmie,” a mutual friend. Jimmie was one of Cardona-Cardona's cocaine customers.

(Tr. 271-72, 355) Cardona-Cardona and Adamu discussed purchasing a King Air 350 or a Cessna Conquest II that would be used to transport cocaine from South America to Conakry in West Africa. (Tr. 271-75, 354, 708) Cardona-Cardona and Adamu estimated that, depending on which plane they purchased, they could transport between 800 kilos and one ton of cocaine at a time. (Tr. 275) Adamu agreed to fly the plane on black flights. (Tr. 275-76) Cardona-Cardona and Adamu also discussed bribing officials at airports and using makeshift landing strips to avoid detection by authorities. (Tr. 276-77) Ultimately, Cardona-Cardona and Adamu did not purchase either plane. (Tr. 277)

That same year, Cardona-Cardona and Adamu – and Cardona-Cardona's friend Juan Carlos – began planning a separate narcotics trafficking operation. (Tr. 277-78) As part of that operation, Adamu was to be paid to fly a Boeing 727 – “a large-capacity cargo plane” – from Senegal to Panama. (Tr. 278-79, 709) The plan was for Adamu to transport a large quantity of cocaine from Panama to West Africa. (See Tr. 278-79, 354) After Adamu arrived in Panama, the Colombian drug traffickers who held the cocaine decided to use a different pilot, and Adamu returned to West Africa. (Tr. 278-79) The Boeing 727 airplane Adamu had flown to Panama was loaded with five tons of cocaine and flown to West Africa. The plane crashed in Mali, however, as a result of a sandstorm. (Tr. 279-80) After Adamu returned to Africa, Adamu and Cardona-Cardona discussed Adamu's compensation for his participation in the operation, and Cardona-Cardona informed Adamu that the plane had crashed in Mali with the cocaine, an event that was reported internationally. (*Id.*)

2. Cardona-Cardona's 2016-17 Contacts with Landji and Adamu

*3 In 2016, Landji purchased a Gulfstream II airplane. Although Landji purchased the plane in Portugal, it was registered in the United States. (Tr. 261-62, 348, 350; GX 214, 1000) While Landji was in Europe, he contacted Cardona-Cardona to discuss using the plane to traffic cocaine. (Tr. 261-62, 348) A few months later, Landji and Cardona-Cardona met in Lomé, Togo and discussed using the plane to transport two tons of cocaine from South America to West Africa. (Tr. 348-49) Cardona-Cardona told Landji that he needed a “trusted pilot” to transport the drugs, and suggested Adamu. (Tr. 349-50, 353-54) Landji and Cardona-Cardona discussed the training Adamu would have to receive in order

to pilot the Gulfstream II, as well as the maintenance required for the plane. (Tr. 350) Landji and Cardona-Cardona also discussed changing the plane's U.S. registration. Cardona-Cardona expressed concern that using a U.S.-registered plane to transport illegal drugs would subject them to criminal liability under U.S. law. (Tr. 350-51) Cardona-Cardona gave Landji \$350,000 to cover the cost of changing the plane's registration and performing required maintenance on the plane. (Tr. 351-52) Cardona-Cardona and Landji also purchased new phones so that they could communicate about the operation without detection. (Tr. 352-53)

A few months later – in late 2016 or early 2017 – Cardona-Cardona met with Adamu and Jimmie in Lomé to discuss the operation. (Tr. 353-55) Cardona-Cardona told Adamu that Landji “had proved himself to be courageous” in their prior drug trafficking operations. (Tr. 355-56) Cardona-Cardona and Adamu agreed that Adamu's role in the new operation would be to fly a plane carrying cocaine from South America to West Africa. (Tr. 356-57) Adamu requested that he be paid \$250,000 per flight. (Tr. 357-58)

The next day, Cardona-Cardona met separately with Landji in Lomé. (Tr. 358-59) Landji told Cardona-Cardona that he wanted to be paid \$1,000 per kilogram of cocaine, and that he wanted to “be in charge of everything,” including the plane's crew and expenses. (Tr. 359)

Cardona-Cardona then introduced Landji to Adamu, and the three men discussed the logistics of the operation – including how much cocaine would be transported (two tons per shipment) and under what circumstances black flights would be utilized. (Tr. 359-63) Cardona-Cardona, Landji, and Adamu agreed that the plane would transport cocaine from South America to the Western Sahara, either Sierra Leone or Conakry. (Tr. 360-61; see also Tr. 249-50)

3. Landji and Adamu Prepare for the 2018 Operation

Over the next few months, Landji and Adamu began preparing for the transport of cocaine from South America to West Africa. Adamu was responsible for overseeing the maintenance of the Gulfstream II, then in Mali. (Tr. 260, 373-74) In September 2017, Landji travelled to the Western Sahara to inspect various landing strips to determine whether they would be suitable for the operation. (See Tr. 363, 368, 841-42, 847-52; GX 502Q1, 502X1) Landji used his phone to take photos and videos of the landing strips and

considered whether they were large enough to accommodate the Gulfstream II, and whether the desert dust at these locations would interfere with the functioning of the plane. (See Tr. 364-66, 368-73, 841-42, 847-52; GX 502Q, 502X, 502Y) Landji reported to Cardona-Cardona that he felt “confident” about the landing strips he visited, because these sites were kept secure by a local military officer with close ties to Cardona-Cardona's friends, Richard and Gordo. (Tr. 251-52, 361-63, 369-73)

Landji and Adamu were in frequent contact at this time, including through phone calls and text messages over the **Whatsapp** platform. (See, e.g., GX 501S, 501T, 501U1, 501U2, 501U3) Landji and Adamu discussed the progress of the operation, and Landji helped coordinate Adamu's training to become certified to fly the Gulfstream II. In March 2018, for example, Adamu sent Landji a **Whatsapp** message stating: “They are ready for us and the aircraft” when “we finish training.” Adamu also stated that, “[o]nce you conclude[,] I sure he is ready to deal.” (GX 501U1; see also Tr. 350, 385-86, 409-10, 807, 827; GX 501Z1-T) Landji and Adamu also discussed the status of the operation with Youssouf Fofana, one of Cardona-Cardona's cocaine customers who acted as an intermediary between Landji and Adamu on the one hand, and Cardona-Cardona on the other. (Tr. 252-54, 374; see also Tr. 261-62)

*⁴ In May 2018, Cardona-Cardona contacted Landji over **Whatsapp** to discuss a “big opportunity” to increase the scale of their planned operation. (Tr. 384-92; GX 501Z1-T, 501Z2-T, 501Z3-T, 501Z4-T) At that time, Cardona-Cardona was in communication with an individual he knew as “Rambo.” Rambo posed as a large-scale drug trafficker who was interested in purchasing planes that could be used to transport drugs. In reality, Rambo was a Drug Enforcement Administration (“DEA”) informant. (Tr. 250, 389-90, 397-99) Using coded language, Cardona-Cardona instructed Landji to meet him in Lomé, where Cardona-Cardona would “explain everything.” (Tr. 388-89; GX 501Z1-T, 501Z2-T) Landji told Cardona-Cardona, “I'm ready for everything” (GX 501Z3-T), and Cardona-Cardona told Landji that he would “have a business like never” (GX 501Z4-T).

4. May 2018 Meetings in Lomé

A few days after Cardona-Cardona and Landji exchanged these text messages, Landji travelled to Lomé to meet with Cardona-Cardona. (Tr. 392) Landji, Cardona-Cardona, and

Fofana met outside of a hotel where Rambo was staying, and Cardona-Cardona briefly explained that they were going to meet Rambo to discuss Rambo's investment in their operation. (Tr. 392-95; GX 208) Landji, Cardona-Cardona, and Fofana then went to the lobby area of the hotel, where Rambo joined them. (Tr. 395-96) Over the next two days, the four men discussed the logistics of the scaled-up operation. (Tr. 396-97)

During these meetings – which Rambo secretly recorded – the men discussed purchasing cargo and charter planes that would be used to transport large quantities of cocaine under the “cover of a legal enterprise” – Landji's company, Oakland Aviation. (Tr. 396-98; GX 301 A, 303H; see also Tr. 491-92; GX 304D (“[T]he idea is to make a fusion of the real business with the illegal business.”)) Rambo proposed that they transport drugs through the company's planes “twice a month” and conduct legal business “the rest of the time.” (GX 304D) Alternatively, he proposed mixing legitimate cargo – such as mangoes, bananas, or fish – with “our cargo” – i.e., narcotics – in order to avoid detection. (Tr. 492; GX 301D, 304D) Landji responded “Yeah” and “[t]his will be a good time” to Rambo's proposals, indicating his agreement to the scheme. (Tr. 443-46, 492-93; GX 304D, 302E; see also GX 303M) Landji told the others that he had two pilots at Oakland Aviation “who are there solely for what we do” – that is, drug trafficking. (Tr. 471-75; GX 303Q-T, 303S-T) Landji identified Adamu as one of the pilots who did the “dirty work.” (Tr. 473-75; GX 303Q-T, 303S-T)

The four men discussed how they would avoid law enforcement detection, including by using black flights, secret landing strips, and bribes to airport officials. As to black flights, Landji explained which devices onboard an aircraft would have to be disabled in order to fly undetected to Africa with drugs. (Tr. 470-71; GX 303P; see also Tr. 463-66; GX 303L, 303M) Landji said that the King Air 350 airplane would be suitable for black flights, and that he had been seeking to purchase that plane in South Africa. (Tr. 464-65; GX 303L; see also GX 501CC, 501EE)

Landji also described the secret landing strips in remote desert locations that would be used to unload the narcotics shipments. Landji stated that the pilots could “leave the lights off” on the plane, unload the plane in “five ... or ten minutes,” and then “boom, boom, boom” take off with an empty plane. (Tr. 475-77; GX 303T) Landji also agreed that airport officials in Africa would be bribed to ensure that the narcotics remained safe when they were loaded and unloaded. (Tr. 401-04, 454-56; GX 303C) The four men discussed working

with Landji's “friends” – a reference to a military officer and his associates who controlled the airport in Conakry, and whom Cardona-Cardona and Landji had bribed during a prior drug trafficking operation. (Tr. 330-31, 399-404; GX 301A) The drugs would be transported from West Africa to Europe. Odessa, Albania, and Montenegro were discussed as possible destinations, because Rambo represented that he had relationships with officials there. (Tr. 401; GX 301A, 302C, 302F, 303F, 303M)

*5 Cardona-Cardona, Landji, Fofana, and Rambo also discussed the types of planes they would use for the drug shipments and the quantities of drugs those planes could carry. They discussed Landji's Gulfstream II, and the fact that it could transport as much as 2.5 tons of cocaine, depending on the distance the plane would be traveling. Landji told the others that they would “keep the seat[s]” in the plane, but load it up with “paper” – referring to cocaine. (Tr. 410-12; GX 301C; see also GX 303D, 303S) They also discussed purchasing additional planes that could carry “bigger cargo.” (Tr. 404-05; GX 301 A; see also GX 303L) These larger planes included (1) the “Sukhoi Superjet,” a “multipurpose” aircraft that could carry both passengers and cargo; (2) the “Ilyushin 76D,” a cargo plane suitable for landing in the desert; and (3) the “Antonov 12,” a cargo plane that has the ability to land in many types of terrain. (Tr. 479-85, 490-91; GX 304A, 304D; see also GX 210, 212, 213) The men also discussed the fact that the King Air 350 – which they agreed to use for black flights – would be able to transport as much as one ton of cocaine:

Rambo: Once [the King Air 350] is loaded ... once the planes is with the tanks, everything.

Cardona-Cardona: Uh-hum.

Rambo: It creates weight. It creates weight. So how much weight more from the dope.

Landji: One ton.

Rambo: How much can we put in?

Cardona-Cardona: One ton.

Rambo: So one ton plus the gas.

Cardona-Cardona: So one ton plus, plus the ... fuel. One ton.

Rambo: Is strong plane.

(Tr. 486-90; GX 304C)

During the May 2018 Lomé meetings, Cardona-Cardona remarked that none of the planes they would use could be registered in the United States, because using a U.S.-registered plane would subject them to criminal liability under U.S. law:

Cardona-Cardona: If you put one kilo on a plane that has the American registration, it's the same thing as putting it in ... in the middle of ... of ... of Madi ... Madison Square Garden in New York. The same thing. For the justice system.

Landji: Yes, yes.

(Tr. 460-62; GX 303J)

Landji agreed that they would have to change the Gulfstream II's registration in order to use it for drug shipments:

Cardona-Cardona: But we're going to change the registration.

Fofana: No, there's no way around that.

Landji: No way around it.

(Tr. 462-63; GX 303N-T; see also Tr. 469-70; GX 303O-T)

Landji also agreed that they would use the Gulfstream II to transport a small sample of drugs from Mali – where the Gulfstream II was maintained – to Montenegro, in order to show their European investors that they had the capacity to ship larger quantities of drugs:

Cardona-Cardona: It is very, very, very important ... and is very good, uh ... in a few time, as soon possible. I think in two, three weeks send the plane there for, for ... flight proof.

Landji: Uh-hum.

Cardona-Cardona: To show them that we has ... that kind of capacity.

Landji: Yeah.

Rambo: Is to show them the line is open.

Cardona-Cardona: [overlapping voices] The line is open.

Landji: [overlapping voices] Yeah, the line is open.

(Tr. 452-53, 459-60; GX 303B, 303F; see also Tr. 457; GX 303E (Landji: "I will do it I will take it. We go and do the testing."))

During this portion of the discussion, Landji asked whether the plane would be flying "empty." Rambo stated that the plane would carry a "small thing," "[n]othing expensive" – a reference to a small sample of cocaine – to show the investors that "we're ready for business." Landji responded "Yeah, cool, no problem." (Tr. 453-54; GX 303B) Landji later confirmed that he would transport a "kilo" of cocaine in the test shipment. (Tr. 463; GX 303L) Landji further agreed that, after completing the test shipment, they would begin transporting up to two tons of cocaine at least twice a month, or as frequently as every week. (See Tr. 451-52, 466-67, 492-93; GX 303B, 303M, 304D) Landji also confirmed that – after the narcotics shipments arrived in Europe – he would take responsibility for transporting the money paid for the cocaine – which could amount to as much as 40 million euros for a ton of cocaine – back to Africa. (Tr. 449-51; GX 303B)

*6 The four men also agreed to purchase a new "Skype" or "PGP" phone for Landji that was specially encrypted; that Landji would use an encrypted messaging app called "Telegram"; and that they would use coded language when speaking with each other about cocaine – all in an effort to ensure that their scheme would not be discovered by law enforcement. (Tr. 485-86; 502-04; GX 304B, 305D-T; see also GX 501Z1-T)

5. Landji and Adamu Finalize the Plan for the Test Shipment

While the May 2018 meetings in Lomé were underway, Adamu was waiting to receive an update regarding the operation. On May 27, 2018 – the first day of the meetings – Adamu sent Landji a message asking what the "next plan" was. (GX 503R3) Landji responded, "standby []we are in a meeting pls," to which Adamu responded "Ok. Standing by when you done." (Id.) Adamu also sent Fofana a message, asking Fofana to call him back: "[I] have not heard from you and a[!]so jc [Jean-Claude] is not contact. so dont know his program." (GX 503N4) Fofana was tasked with informing Adamu what his role would be in the operation. (Tr. 504-05)

On May 29, 2018 – after the Lomé meetings had concluded – Fofana contacted Adamu and said that he had a "programme" for Adamu, but that they had to meet. Adamu responded,

"Oook! Where and when?" (GX 503N4 (text message), 503N4 (voice note); Tr. 505, 507, 868; see also Tr. 517-18) That day, Landji messaged Adamu asking him "to come out to" "Cotonou," to which Adamu responded, "ok.cool." (GX 503U) Landji and Adamu exchanged dozens of calls over the next week. (See GX 503T)

In subsequent months, Landji continued to coordinate the trafficking operation with Fofana and Cardona-Cardona. In a June 6, 2018 text message to Landji, Fofana stated that "[t]here is hope ... [f]or Monte Negro" (GX 501Y4-T) – referring to the test shipment of cocaine they planned to transport from Mali. In a June 10, 2018 text message to Cardona-Cardona – whose screen name on **Whatsapp** was "Antony Bah" (Tr. 383-84) – Landji stated that he would be speaking with their "friend," and that Landji would "organize things." (GX 501Z5-T; see Tr. 509-10)

In July 2018, Landji and Fofana exchanged a series of text messages regarding the whereabouts of Gordo – the drug trafficker with ties to a military officer who controlled a landing strip in the Western Sahara that Landji intended to use. Landji and Fofana discussed whether they would ask Gordo to invest \$50,000 in their operation, (GX 501Y7-T; see Tr. 252, 360-61, 370-71) Landji and Fofana also discussed paying a \$500,000 to \$1 million bribe to a military officer who was stationed at the Conakry airport. (GX 501Y8-T; see also Tr. 402-04)

Several months after the May 2018 Lomé meetings, Landji met with Cardona-Cardona and Fofana in Sierra Leone. (Tr. 511) Landji updated Cardona-Cardona on the progress of Ms preparations, and asked for more money to cover the maintenance of the Gulfstream II and to expedite the process to change its registration. (Tr. 511-13) Cardona-Cardona gave Landji \$300,000 to cover these expenses. (Tr. 512) Landji also inquired as to the status of their plan to purchase additional planes, and Cardona-Cardona explained that Rambo was "wait[ing] for us to do a gesture of good faith" – that is, a test shipment of cocaine – "before the planes could be bought." (Tr. 513)

In October 2018, Landji and Adamu began their final preparations for the test shipment. Landji and Adamu – who were in Mali conducting last-minute inspections and adjustments to the plane (Tr. 514-15) – each remained in close contact with Fofana, exchanging dozens of calls with him in October 2018 alone. (See GX 502O (Landji); 503L (Adamu); see also Tr. 810) Landji's and Adamu's

Whatsapp communications with Fofana make clear that Fofana continued to be an intermediary between them and Cardona-Cardona throughout this period.

*7 In an October 10, 2018 **Whatsapp** exchange, Fofana told Landji, "I am in position" and "I am waiting to meet with David [Cardona-Cardona]." Several hours later, Landji reported to Fofana that "it is all good. I spoke to our friend." (GX 501Y10-T)

Fofana confirmed that Cardona-Cardona would meet Landji and Adamu when they landed with the test shipment. In an October 20, 2018 exchange, for example, Adamu asked Fofana "[i]s david coming back before we depart," and Fofana responded "[y]ou will see him there ... [a]t the appointment." (GX 503N6)

At about this time, Cardona-Cardona informed Landji and Adamu (through Fofana) that Cardona-Cardona had changed the final destination of the test shipment from Montenegro to Zagreb, Croatia, in a further effort to avoid detection. (See Tr. 519-20; GX 402-T) Cardona-Cardona then travelled to Zagreb to wait for Landji and Adamu to arrive with the one-kilogram test shipment. (Tr. 514) On October 18, 2018, Fofana reported to Landji that "David is there today." (GX 501Y11-T)

During this time, Croatian law enforcement authorities intercepted a number of phone calls between Cardona-Cardona and Fofana. In October 21, 2018 telephone calls, Fofana told Cardona-Cardona that he was having trouble finding someone to transport a single "diamond stone" – coded language for the one-kilogram test shipment of cocaine – because it was such a small quantity. (Tr. 517-22; GX 402-T, 403-T ("[F]inding a one-stone transporter is complicated. If it is a lot, it is quickly done.")) Cardona-Cardona and Fofana also discussed the need to obtain new "papers" because the flight plan Landji had prepared listed Montenegro as the destination. (See Tr. 519-20; GX 402-T, at 3, 6; GX 403-T, at 6; GX 406-T, at 2-4) In an October 26, 2018 telephone call, Cardona-Cardona instructed Fofana to tell Landji that, after Landji landed in Zagreb, he was to "leave the stone in the car" – code language for leaving the one kilogram of cocaine in the plane – and that Cardona-Cardona would retrieve the cocaine from the plane later in the evening. (Tr. 523-24; GX 407-T, at 5)

In the days leading up to Landji's and Adamu's flight to Zagreb, Adamu and Fofana exchanged text messages

regarding the status of the flight. On October 28, 2018, Fofana informed Adamu that they would have to “pay for the delay” and that there was a “problem,” and Adamu asked whether the “meeting” would be “cancelled.” (GX 503N6) Fofana stated that he was conferring with “David,” and asked whether Adamu could “move tomorrow.” (*Id.*) Adamu responded: “Yes. We are going for a test flight now.” (*Id.*)

On October 29, 2018, Adamu told Fofana that he was “[t]opping up oxygen” and “doing [a] flight plan,” and that he was “with jc” – referring to Landji. (*Id.*) Soon thereafter, Fofana messaged Adamu asking for an update (“[t]ell me something”), and Adamu responded with a photograph of him and Landji inspecting the plane. (*Id.*; GX 503N6C; *see also* GX 503W; Tr. 515-16) At about this time, Fofana told Cardona-Cardona that the one kilogram of cocaine had arrived in Mali and that – according to Adamu – Landji had hidden the cocaine on the plane. (Tr. 525-28)

6. The Arrest of Cardona-Cardona, Landji, and Adamu in Zagreb

On October 29, 2018, Cardona-Cardona was arrested by Croatian authorities in Zagreb. (Tr. 86, 528) On the evening of October 30, 2018, Landji, Adamu, and a flight instructor took off from Mali on board the Gulfstream II and flew the plane – which contained the one-kilogram test shipment of cocaine – to Zagreb. (Tr. 87, 127-28, 515-16, 612) Shortly after landing, Landji and Adamu identified themselves at passport control, and Croatian authorities arrested them. (Tr. 89) Croatian authorities then took Landji back to the plane and secured it. (Tr. 90-91, 93-98, 128-29; GX 601A1 to 601A13, 602A1 to 602A15) The following morning, members of Croatian law enforcement searched the Gulfstream II and recovered a white plastic bag with red and yellow markings in the plane's cargo area. (Tr. 95, 99, 141-47, 178-79; GX 102-03, 223-27, 241) Inside the white bag was a black bag, and inside the black bag was a rectangular-shaped package containing a white powdery substance “with characteristics of cocaine.” (Tr. 143-45, 179-85; GX 228-34) Croatian law enforcement weighed the rectangular package and determined that it weighed approximately one kilogram. (Tr. 143, 147; GX 234) The Croatian authorities also seized various electronic devices, including Landji's and Adamu's cellphones. (Tr. 139-41, 148; *see* GX 104-06)

*⁸ Shortly after his arrest in Zagreb, Adamu was questioned by DEA agents. (Tr. 706-07) During questioning, Adamu

stated that he knew Cardona-Cardona and Fofana, and that Fofana had told Adamu that Cardona-Cardona was in Europe. (Tr. 707-08) Adamu also admitted that he knew that Cardona-Cardona was involved in drug trafficking, and that Cardona-Cardona used planes for drug trafficking. (Tr. 708-10) Adamu told the agents that he had previously worked with Cardona-Cardona, including by attempting to broker an airplane sale for Cardona-Cardona and by piloting flights for him. (Tr. 708-09) Adamu stated that he had been paid \$3,000 to pilot a Boeing 727 from West Africa to Panama, and that he was aware that that same aircraft later crash-landed in Mali while loaded with drugs. (*Id.*)

On October 17, 2019 – nearly a year after their arrest – Landji and Adamu were extradited from Croatia to the United States. (GX 1001)

B. The Defense Case

Landji and Adamu did not testify and did not call any witnesses.

Landji introduced a Gabon passport issued to him in 2015. (*See* DX A, S-A) The passport has a 2020 expiration date. Landji argued that the passport demonstrates that he did not travel to (1) Togo in 2016 or 2017 to meet with Cardona-Cardona; (2) the Western Sahara in September 2017 to research possible landing strips; or (3) Sierra Leone in 2018 to meet with Cardona-Cardona. (Tr. 902-03, 906, 1047, 1056-57) Landji also introduced a stipulation stating that Okland Aviation was formed in 2016. (Tr. 903-04; DX S-B) Landji argued that this stipulation showed that Landji had not leased a plane through Okland Aviation during the alleged drug operation in 2009. (Tr. 1056) Landji also introduced a stipulation showing that Okland Aviation – during the time period alleged in the Indictment – had leased three planes registered in Morocco. (Tr. 904-06; DX S-C) Landji argued that his access to three Moroccan-registered planes made it implausible that he would have agreed to use a U.S.-registered plane to smuggle cocaine into Croatia. (Tr. 1021-23, 1046)

Adamu did not offer any evidence. (Tr. 906)

* * * *

At the close of the evidence, Landji and Adamu moved for a judgment of acquittal pursuant to *Fed. R. Crim. P. 29*, arguing that there was insufficient evidence to support a conviction. (Tr. 953-54) The Court reserved decision on their motions. (Tr. 955)

In Landji's summation, counsel argued that Landji had never agreed to transport cocaine for Cardona-Cardona, and that Cardona-Cardona, Fofana, and Rambo were just “spitballing ideas” with Landji at the May 2018 meetings in Lomé, Togo. (Tr. 1028 (“We are not arguing that Mr. Landji was not aware that [transporting drugs] was a subject of conversation. He is savvy. He is a hustler, ... and he is no fool. He heard them out. He talked the talk. But that is not a crime. It is not a crime to talk to criminals. It is not a crime to discuss transporting drugs.”); see also Tr. 1008, 1016-18, 1024-25) Both Adamu and Landji argued that Cardona-Cardona was not a credible witness, given his prior crimes, which included acts of violence. (Tr. 1008, 1012, 1052-66, 1070, 1072-78) Landji and Adamu also argued that someone else – possibly Fofana (according to Landji) or Croatian law enforcement authorities (according to Adamu) – had planted cocaine on the Gulfstream II aircraft. (Tr. 1006, 1014-15, 1037, 1049-51, 1067, 1082-85)

DISCUSSION

I. LEGAL STANDARDS

A. Rule 29 Motions

Federal Rule of Criminal Procedure 29(a) provides that a court shall, upon a defendant's motion, “enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” Fed. R. Crim. P. 29(a).

“In evaluating a sufficiency challenge, [a court] ‘must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence.’ ” United States v. Coplan, 703 F.3d 46, 62 (2d Cir. 2012) (quoting United States v. Chavez, 549 F.3d 119, 124 (2d Cir. 2008)); see also United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984) (“The court should not substitute its own determination of the credibility of witnesses, the weight of the evidence and the reasonable inferences to be drawn for that of the jury.” (citation omitted)). In assessing a sufficiency challenge, “[t]he evidence is to be viewed ‘not in isolation but in conjunction.’ ” Mariani, 725 F.2d at 865 (quoting United States v. Geaney, 417 F.2d 1116, 1121 (2d Cir. 1969)). “So long as the inference is reasonable, ‘it is the task of the jury, not the court, to choose among competing inferences.’ ” United States v. Kim, 435 F.3d 182, 184 (2d Cir. 2006)

(quoting United States v. Martinez, 54 F.3d 1040, 1043 (2d Cir. 1995)).

*9 “The Second Circuit has observed that ‘[t]hese strict rules are necessary to avoid judicial usurpation of the jury function.’ ” United States v. DiPietro, No. S502 Cr. 1237 (SWK), 2005 WL 1863817, at *1 (S.D.N.Y. Aug. 5, 2005) (quoting Mariani, 725 F.2d at 865) (alterations in DiPietro). “[T]he task of choosing among competing, permissible inferences is for the fact-finder, not for the reviewing court.” United States v. McDermott, 245 F.3d 133, 137 (2d Cir. 2001) (citation omitted). Given this standard, “[a] defendant bears a ‘very heavy burden’ in challenging a conviction based on insufficient evidence.” United States v. Goldstein, No. S2 01 Cr. 880 (WHP), 2003 WL 1961577, at *1 (S.D.N.Y. Apr. 28, 2003) (quoting United States v. Brewer, 36 F.3d 266, 268 (2d Cir. 1994)).

B. Rule 33 Motions

Pursuant to Federal Rule of Criminal Procedure 33, a court may “vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33. “Rule 33 confers broad discretion upon a trial court to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice,” United States v. Sanchez, 969 F.2d 1409, 1413 (2d Cir. 1992). Courts may not only grant a Rule 33 motion where the evidence is legally insufficient, see United States v. Leslie, 103 F.3d 1093, 1100-01 (2d Cir. 1997), but also where a jury's verdict is contrary to the weight of the evidence, see United States v. Ferguson, 246 F.3d 129, 136 (2d Cir. 2001). Moreover, in contrast to the analysis under Rule 29, a district court considering a Rule 33 motion need not view the evidence in the light most favorable to the Government. United States v. Lopac, 411 F. Supp. 2d 350, 359 (S.D.N.Y. 2006) (citing United States v. Ferguson, 49 F. Supp. 2d 321, 323 (S.D.N.Y. 1999), aff'd, 246 F.3d 129 (2d Cir. 2001)).

The Second Circuit has explained that

[t]he ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice. The trial court must be satisfied that competent, satisfactory and sufficient evidence in the record supports the jury verdict. The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation. There must be a real concern that an innocent person may have been convicted. Generally, the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, but it

nonetheless must exercise the Rule 33 authority sparingly and in the most extraordinary circumstances. [Ferguson](#), 246 F.3d at 134 (quotation marks and citations omitted).

Under Rule 33, “[i]n the exercise of its discretion, the court may weigh the evidence and credibility of witnesses.” [United States v. Autuori](#), 212 F.3d 105, 120 (2d Cir. 2000) (citing [Sanchez](#), 969 F.2d at 1413). However, “[t]he district court must strike a balance between weighing the evidence and credibility of witnesses and not ‘wholly usurp[ing]’ the role of the jury.” [Ferguson](#), 246 F.3d at 133 (quoting [Autuori](#), 212 F.3d at 120) (second alteration in [Ferguson](#)). “Because the courts generally must defer to the jury’s resolution of conflicting evidence and assessment of witness credibility, ‘[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment.’” [Id.](#) at 133-34 (quoting [Sanchez](#), 969 F.2d at 1414) (alteration in [Ferguson](#)). Such “exceptional circumstances” may exist “where testimony is ‘patently incredible or defies physical realities.’” [Id.](#) at 134 (quoting [Sanchez](#), 969 F.2d at 1414).

II. ANALYSIS

A. Motions for a Judgment of Acquittal

***10** Landji and Adamu contend that there is insufficient evidence that (1) they participated in the charged conspiracy; or (2) the conspiracy involved five kilograms or more of cocaine.³ In arguing insufficiency, Defendants’ primary argument is that Cardona-Cardona was not a credible witness. (Landji Br. (Dkt. No. 638) at 46-49; Adamu Br. (Dkt. No. 639) at 3-9; Landji Reply Br. (Dkt. No. 648) at 5-7)

At trial, the Government’s case centered on Cardona-Cardona’s testimony. As the head of the alleged drug trafficking conspiracy, Cardona-Cardona was ideally situated to testify regarding the roles that Landji and Adamu played in that conspiracy.

Cardona-Cardona testified that on four occasions in 2009 and 2010 he had attempted to traffic cocaine with Landji and Adamu. (Tr. 271-80, 286-90, 326-39, 342-47) None of those efforts was successful. In 2016 – after Landji acquired the Gulfstream II aircraft – he contacted Cardona-Cardona to discuss a new plan to traffic in cocaine. The two men met in Lomé, Togo shortly thereafter to discuss their plan to distribute cocaine using the Gulfstream II. (Tr. 261-62, 348-53) Cardona-Cardona testified that he and Landji met

in Lomé again in 2016 or 2017 – this time with Adamu – and at that meeting, they all agreed to transport ton-quantities of cocaine from South America to West Africa. (Tr. 353-61) Cardona-Cardona also testified about Landji’s and Adamu’s preparations for this plan, including undergoing pilot training, performing maintenance on the Gulfstream II, and researching potential landing strips in the Western Sahara. (Tr. 363-74, 385-86)

Cardona-Cardona also testified that, during additional meetings held in May 2018 in Lomé, Togo, Landji agreed to transport a test shipment of one kilogram of cocaine to Europe as part of a larger scheme to traffic in cocaine with Rambo and others. (Tr. 416-18, 451-54, 457, 461, 492-93) Although Adamu did not attend these meetings in Lomé, Cardona-Cardona testified that Fofana updated Adamu as to the discussions in Lomé, and that Fofana kept Cardona-Cardona apprised of Landji’s and Adamu’s preparations leading up to the test shipment flight. (Tr. 253-54, 374, 504-05) Cardona-Cardona also testified that he and Landji met in Sierra Leone in late 2018 to discuss the status of the operation, and that Cardona-Cardona – at Landji’s request – provided Landji with an additional \$300,000 for maintenance costs associated with the Gulfstream II and for costs associated with changing the registration of the plane. (Tr. 511-13) Cardona-Cardona further testified that – through co-conspirator Fofana – he notified Landji and Adamu that the one-kilogram of cocaine test shipment would be transported to Zagreb, Croatia rather than Montenegro; that they should leave the cocaine in the plane after landing in Zagreb; and that Cardona-Cardona would himself retrieve the cocaine from the plane. (Tr. 519-20, 523-24) Finally, Cardona-Cardona testified about his arrest in Zagreb on October 29, 2018. (Tr. 528)

Cardona-Cardona’s detailed testimony about Landji’s and Adamu’s involvement in the charged conspiracy – if credited by the jury – is sufficient on its own to sustain their convictions for conspiring to distribute five kilograms or more of cocaine. See [United States v. Truman](#), 688 F.3d 129, 139 (2d Cir. 2012) (“[E]ven the testimony of a single accomplice witness is sufficient to sustain a conviction, provided it is not incredible on its face, or does not defy physical realities.” (quotation marks, alteration, and citations omitted)).

***11** Landji and Adamu argue that Cardona-Cardona’s history of “deceit” and “perjury” renders his testimony incredible as a matter of law. (See Landji Br. (Dkt. No. 638) at 47-49; Adamu Br. (Dkt. No. 639) at 3-4, 6; see

also Landji Reply Br. (Dkt. No. 648) at 5) In this regard, Defendants argue that Cardona-Cardona lied to (1) Italian authorities in order to obtain a lesser sentence in a cocaine trafficking case in Italy; and (2) authorities in Mali – and subsequently bribed government officials in Mali – in order to obtain a lesser sentence for murdering a competing drug dealer. (Landji Br. (Dkt. No. 638) at 47; Adamu Br. (Dkt. No. 639) at 3-4; see Tr. 281-86, 640-45) Landji also argues that Cardona-Cardona's testimony that he had only committed one murder since he began trafficking drugs in the 1990s, and that he had given Landji “over one million dollars to conduct fruitless drug trafficking operations in Venezuela,” is “patently incredible.” (Landji Br. (Dkt. No. 638) at 47; see Tr. 541-42, 544-45, 555-57, 563, 572-75, 580-82)

The matters now cited by counsel were the subject of extensive cross-examination and argument before the jury, and the issue of Cardona-Cardona's credibility was for the jury. Truman, 688 F.3d at 139 (“The proper place for a challenge to a witness's credibility is in cross-examination and in subsequent argument to the jury, not in a motion for judgment of acquittal,” (quotation marks, alteration, and citations omitted)). Defense counsel questioned Cardona-Cardona extensively about the perjury, drug trafficking, bribery, and murder offenses he had committed in the past, and elicited from Cardona-Cardona that he was testifying against Landji and Adamu in order to obtain a more lenient sentence. (E.g., Tr. 541-42, 545-46, 559-563, 652-58, 676) Cardona-Cardona's alleged lack of credibility was also the centerpiece of the defense jury addresses. Defense counsel argued that Cardona-Cardona was a “psychopath” and a “sociopath,” and they urged the jury not to credit his testimony, (E.g., Tr. 65-66, 75, 1005, 1008, 1052-54, 1066, 1068, 1072-73, 1077-78) Moreover, in the jury charge, the Court instructed the jury that the “testimony of a cooperating witness [like Cardona-Cardona] must be scrutinized with special care and caution.” (Tr. 1133-36) In short, the issue of Cardona-Cardona's credibility or lack of credibility was squarely put to the jury. Indeed, it was the central issue at trial.

The Government offered ample evidence corroborating Cardona-Cardona's testimony. The corroborating evidence included the following: (1) video and audio recordings of the May 2018 meetings in Lomé, Togo in which Landji agreed to transport ton-quantities of cocaine on planes with Adamu (see, e.g., GX 301A, 301C, 302A-T, 302C, 302D, 302E, 302F, 303B, 303C, 303D, 303E, 303F, 303G, 303H, 303I-T, 303J-T, 303K-T, 303L, 303M, 303N-T, 303O-T, 303P, 303Q-T, 303S-T, 303T, 303U-T, 304A, 304B, 304C, 304D, 305A, 305B-T,

305C-T, 305D-T); (2) photographs and videos from Landji's phone showing that Landji had inspected remote landing strips in West Africa (GX 502Q, 502X, 502Y); (3) text messages between Landji and Adamu and between Landji and Cardona-Cardona regarding Adamu's pilot training (GX 501U1, 501Z1-T); (4) text and telephone records showing Landji's and Adamu's continued coordination with each other and with Fofana and Cardona-Cardona in advance of the one-kilogram of cocaine test shipment (GX 501Y4-T, 501Y7-T, 501Y10-T, 501Y11-T, 501Z5-T, 503L, 503N4, 503N5, 503N6, 502O, 503R3, 503T); (5) recordings of intercepted telephone calls between Cardona-Cardona and Fofana in October 2018 in which Cardona-Cardona and Fofana discuss the difficulties in obtaining the one-kilogram sample of cocaine, and in which Cardona-Cardona instructs Fofana that Landji and Adamu should leave the cocaine in the plane after landing in Zagreb (see GX 401-T, 402-T, 403-T, 404-T, 405-T, 406-T, 407-T); (6) testimony from Croatian law enforcement officers that approximately one kilogram of a white powdery substance with “characteristics of cocaine” was found on the Gulfstream II when the plane landed in Zagreb (Tr. 143-45, 147, 179-85; GX 102-03, 234); and (7) Adamu's post-arrest statements, in which he admitted that he knew that Cardona-Cardona used planes to traffic cocaine, and that Adamu had previously piloted a plane to Panama that was later found loaded with cocaine (Tr. 708-10).

*12 Landji argues, however, that (1) the video recordings of the May 2018 meetings are “ambiguous” and “incomprehensible,” because the individuals in these recordings were “speaking over each other in multiple languages”; (2) there is no “reliable interpretation” of the text messages extracted from Landji's and Adamu's cell phones; and (3) the Government did not prove that the white powdery substance recovered from the Gulfstream II was in fact cocaine. (Landji Br. (Dkt. No. 638) at 46-47)

As to the video recordings, the parties stipulated to the accuracy of the English translations of the French portions of these recordings, and these English translations were admitted into evidence. (GX 1002; Tr. 377-82, 1129) A rational jury could have found that the English translations show: (1) Landji agreeing that the Gulfstream II's registration in the United States would have to be changed in order to avoid criminal liability in the United States (GX 303J-T, 303K-T, 303N-T, 303O-T, 305A-T); (2) Landji proposing that Adamu do the “dirty work” for the cocaine trafficking operation under the guise of Oakland Aviation (GX 303Q-T, 303S-T); and (3) Landji agreeing to use an encrypted phone for further

communications with Cardona-Cardona and other members of the conspiracy (GX 305D-T).

As to the English language portions of the recordings, defense counsel had ample opportunity to challenge their significance at trial, and did so.⁴ Viewed in a light most favorable to the Government, the English language portions of the recordings show, *inter alia*, (1) Landji agreeing to fly two tons of “paper” – code for cocaine – while keeping the seats of the Gulfstream II in place (GX 301C; Tr. 410-12); (2) Landji agreeing to fly a test shipment to show investors that the “line is open” (GX 303B, at 9; Tr. 452-54); (3) Landji agreeing that they could “do two” tons of cocaine every two weeks,⁵ and that “[m]ore flights” means “[m]ore money” (GX 303B, at 7-8; Tr. 451-52); and (4) Landji stating that they could transport “[o]ne ton” of “dope” on the King Air 350, which would be used for black flights (GX 303L, 304C; Tr. 463-66, 486-90).

In sum, while the recorded evidence presented challenges both as to intelligibility and ambiguity at certain points, it nonetheless constitutes compelling corroboration of Cardona-Cardona's testimony.

Landji also complains that the Government was “incapable of establishing any reliable interpretation” of text messages among and between Landji, Adamu, and Fofana, because these messages were introduced through Enrique Santos – an investigative analyst employed by the U.S. Attorney's Office, who “was not competent to testify as to the meaning of [the] messages.” (Landji Br. (Dkt. No. 638) at 46-47) But Santos did not testify as to the meaning of the messages. Instead, a reasonable jury could have discerned the meaning of the messages as a result of Cardona-Cardona's testimony. Cardona-Cardona explained the roles of Landji, Adamu, and Fofana in the conspiracy, and his testimony provided a chronology that assisted the jury in understanding the text messages. (See, e.g., GX 503R3 (May 27, 2018 message from Adamu to Landji asking what the “next plan” is, to which Landji responds, “standby[,]we are in meeting”); GX 503N4 (May 29, 2018 Adamu message to Fofana complaining that “jc is not contact” and that Adamu does not know “his program,” and Fofana's response that he and Adamu should meet to discuss the “programme”)) Given Cardona-Cardona's testimony that he, Landji, Adamu, and Fofana commonly used coded language in order to avoid detection (see Tr. 384-85, 388-89, 411-12, 485-86, 503-04, 517-19, 524-26, 622-23), the use of what appears to be purposely cryptic language in the text messages is indicative of guilt.

*13 Landji also complains that the Government did not establish that the white powdery substance that Croatian law enforcement authorities found onboard the Gulfstream II aircraft after it landed in Zagreb was in fact cocaine. (Landji Br. (Dkt. No. 638) at 47; see Tr. 429-41 (bench ruling excluding purported cocaine on chain-of-custody grounds); Tr. 184 (Milunic testifying that Croatian law enforcement personnel performed field test on the white powdery substance, but not disclosing the results of the test))

As an initial matter, defense counsel introduced during the cross-examination of DEA Special Agent Anton Kohut two DEA Form 7 Report[s] of Drug Property Collected, Purchased or Seized (see DX AAA, DX BBB) stating that the white, powdery substance found on the Gulfstream II was in fact cocaine. (Tr. 229-41, 243) DX AAA states:

Exhibit 1 consists of approximately one kilogram of cocaine. Exhibit 1 was discovered by Croatian officials inside a Gulfstream IIB jet which landed at Zagreb International Airport on 10-30-2019. Jean Claude OKONJO LANDJI and Jibril Bala ADAMU were taken into custody following this seizure. Croatian police maintained custody of Exhibit 1 and processed it as evidence in accordance with host country policies and procedures.

(DX AAA (emphasis in original))⁶

DX BBB states:

Exhibit 1a consists of a white powdery substance contained in a clear plastic bag. The exhibit was previously reported for information only under [redacted] as Exhibit 1; that exhibit was maintained by the Croatian National Police as evidence in a foreign prosecution. However on 06-24-2020, Inspector Ivica Sestak of the Croatian National Police transferred custody of the exhibit to Special Agent Anton Kohut of the DEA Zagreb Country Office for future domestic prosecution in SDNY. As the exhibit had since been analyzed, the precise weight determined (992.23 grams) and then physically turned over to DEA for the first time, this report documents the re-designation of the exhibit as Exhibit 1a.

(DX BBB) DX BBB indicates that Exhibit 1a contains 992.23 grams of cocaine hydrochloride. (*Id.*)

In any event, in order to demonstrate that the Defendants had conspired with Cardona-Cardona and Fofana to distribute and possess with intent to distribute five kilograms or more

of cocaine, the Government was not required to prove that the one-kilogram “white powdery substance” found on the Gulfstream II was in fact cocaine. The elements of conspiracy to distribute or possess with intent to distribute a controlled substance are: (1) an agreement between two or more people to distribute or possess with intent to distribute a controlled substance; and (2) the defendant’s knowing and intentional participation in that conspiracy. See [United States v. Dupree](#), 870 F.3d 62, 78 (2d Cir. 2017); [United States v. Santos](#), 541 F.3d 63, 70-71 (2d Cir. 2008). The essence of this offense is an unlawful agreement, and the defendant’s knowing and intentional participation in the conspiracy. See [United States v. Svoboda](#), 347 F.3d 471, 476 (2d Cir. 2003) (“‘The gist of conspiracy is, of course, agreement.’” (quotation marks and citation omitted)); see also [United States v. Fabian](#), No. 16-CR-131 (DLI), 2022 WL 1085243, at *4 (E.D.N.Y. Apr. 11, 2022) (“The essence of conspiracy is an agreement among two or more persons to join in a concerted effort to accomplish an illegal purpose.” (quotation marks, alteration, and citation omitted)).

*14 Accordingly, the Government was required to prove that Landji and Adamu entered into an unlawful agreement with Cardona-Cardona and Fofana to distribute and possess with intent to distribute five kilograms or more of cocaine. While the presence of cocaine on the Gulfstream II would tend to support the Government’s allegation that Landji and Adamu had entered into an unlawful agreement with Cardona-Cardona to distribute and possess with intent to distribute cocaine, the presence of cocaine on the Gulfstream II plane was not a prerequisite for a conspiracy conviction. See [United States v. Pauling](#), 924 F.3d 649, 660 (2d Cir. 2019) (“Proof of drug quantity may be established through proof of an agreement to distribute or possess with intent to distribute, regardless of whether the substantive act was actually completed.” (citing [United States v. Jackson](#), 335 F.3d 170, 181 (2d Cir. 2003))); [Jackson](#), 335 F.3d at 181 (“A member of a conspiracy is ... liable for an act he agreed to and intended to commit in furtherance of the conspiracy regardless of whether he ultimately committed the substantive act.”). Indeed, in countless narcotics conspiracy cases – including “reverse cases” in which law enforcement agents pose as drug traffickers – there is never any actual controlled substance. This presents no impediment to the Government proving the crime of narcotics conspiracy.

In sum, Landji’s argument that the Government did not introduce into evidence the one-kilogram of cocaine

allegedly found on the Gulfstream II does not demonstrate insufficiency.

Adamu likewise raises several arguments challenging the sufficiency of the Government’s evidence. Adamu first contends that the Government did not demonstrate that Cardona-Cardona and Adamu were in contact with each other regarding the plan to traffic in cocaine, or that Fofana served as a “bridge” between Cardona-Cardona and Adamu. In this regard, Adamu points out that (1) Fofana did not testify at trial; and (2) the Government did not introduce recordings of telephone calls between Adamu and Cardona-Cardona, or between Adamu and Fofana. (Adamu Br. (Dkt. No. 639) at 4)

As discussed above, however, the Government offered ample evidence of Adamu’s guilt, including the following: (1) Cardona-Cardona’s testimony regarding his discussions with Adamu in 2010 about transporting tons of cocaine from South America to West Africa (Tr. 271-80, 354, 708-09); (2) Cardona-Cardona’s testimony regarding his discussions with Landji in 2016 about using Adamu as a pilot to transport drugs, and the training Adamu would need to pilot the Gulfstream II for this purpose (Tr. 348-50, 354); (3) Cardona-Cardona’s testimony that he, Landji, Adamu, and Fofana met in Lomé, Togo in 2016 or 2017 to discuss the air transport of huge quantities of cocaine from South America to West Africa, and that Adamu requested during these meetings that he be paid \$250,000 per flight (Tr. 353-61); (4) text messages among Adamu and Landji and Fofana discussing the progress of the operation and Adamu’s training to pilot the Gulfstream II (GX, 501U1, 503N4, 503R3; see also Tr. 350, 374, 385-86, 409-10, 807); (5) text messages between Adamu and Fofana discussing that “David” would meet Adamu “[a]t the appointment” (GX 503N6); (6) Cardona-Cardona’s testimony that Adamu told Fofana that the kilogram of cocaine was hidden on the Gulfstream II (Tr. 525-28); and (7) Adamu’s post-arrest statements acknowledging that he knew that Cardona-Cardona was a drug trafficker, that Adamu had flown a plane to Panama for Cardona-Cardona, and that that plane later crashed in Mali while loaded with five tons of cocaine (Tr. 707-10).

As to the flight to Panama, Adamu argues that this evidence does not establish a connection between him and Cardona-Cardona’s drug trafficking, because Adamu was not aware at the time of his flight to Panama that the plane would later be used to traffic drugs. (Adamu Br. (Dkt. No. 639) at 4) Adamu further argues that his post-arrest statement – in which he acknowledged that Cardona-Cardona is a drug trafficker – “is

not surprising,” given the “widespread publicity” regarding the crashing of the plane in Mali, and the discovery that it was loaded with drugs, (*Id.* at 6) These arguments – which Adamu also made to the jury (Tr. 1078-79) – are not persuasive. Cardona-Cardona testified that Adamu was fully aware that the plane he piloted to Panama – and was expected to fly back to West Africa – was intended to carry cocaine. According to Cardona-Cardona, at the last minute, “the owners of the drugs decided to switch pilots.” (Tr. 278-29) Cardona-Cardona also testified that Adamu later demanded that Cardona-Cardona pay him \$20,000 for his role in flying the plane to Panama, even though Adamu had not been chosen to fly the plane during the remainder of the operation. (Tr. 279)

*15 As noted above, Cardona-Cardona also testified that he and Adamu had discussed purchasing a King Air 350 or Cessna Conquest II to traffic between 800 kilograms and one ton of cocaine at a time. (Tr. 271-77) This testimony was corroborated by Adamu's post-arrest statement acknowledging that he had helped broker airplane sales for Cardona-Cardona, and that he knew that Cardona-Cardona used such planes for “drug smuggling.” (Tr. 709-10)

In sum, there was ample evidence of Adamu's knowledge and intent to assist Cardona-Cardona in a plot to transport huge quantities of cocaine from South America, to West Africa, and on to Europe.

Adamu argues, however, that Cardona-Cardona's arrest in Zagreb the day before the test flight “undercut[s]” Cardona-Cardona's testimony and that of the Croatian police officers. According to Adamu, he and Landji would not have flown the cocaine to Zagreb if they had been “unable to contact a major cog on the distribution chain.” (Adamu Br. (Dkt. No. 639) at 5-6) Adamu appears to be arguing that the Croatian National Police planted the cocaine on the Gulfstream II, and then falsely testified that they discovered the cocaine onboard the plane, because “they [had] placed their investigation in great jeopardy” by prematurely arresting Cardona-Cardona. (*Id.* at 5-6) Adamu made this argument to the jury (Tr. 78, 111-12, 1081-85), and it was rejected. It provides no basis for this Court to find the evidence insufficient.

Adamu also contends that there is insufficient evidence that the Gulfstream II was registered in, or owned by a citizen of, the United States. (Adamu Br. (Dkt. No. 639) at 3) This argument likewise fails. At trial, the parties stipulated that Landji was a citizen of the United States during the relevant time period; that he purchased the Gulfstream II in 2016

and has owned it since that time; and that the Gulfstream II was registered in the United States since at least 2016. (GX 1000; *see Tr. 895-96*) This evidence was sufficient to establish the necessary nexus with the United States. *See 21 U.S.C. § 959(c).*⁷

Landji's and Adamu's motions for a judgment of acquittal pursuant to Rule 29 will be denied.

B. Rule 33 Motions for New Trial

Landji and Adamu argue that they are entitled to a new trial under Fed. R. Crim. P. 33 because (1) this Court admitted extractions from the Defendants' cell phones through the testimony of Enrique Santos – an analyst at the U.S. Attorney's Office – who did not himself perform the extractions; and (2) the venire and petit jury did not reflect a fair cross-section of the community. (Landji Br. (Dkt No. 638) at 33-40, 42-44; Landji Reply Br. (Dkt. No. 648) at 7-18; Adamu Br. (Dkt. No. 639) at 9-14) Landji further contends that (1) he was prejudiced by the presence of the alleged cocaine in the courtroom, because the Court ruled in the course of the trial that the alleged cocaine was inadmissible; and (2) Landji's conditions of confinement during trial deprived him of a meaningful opportunity to participate in his defense. (Landji Br. (Dkt. No. 638) at 40-42, 44-45)

1. Cell Phone Extractions

a. Background

*16 At trial, the Government introduced three cell phones that had been seized from Landji and Adamu at the time of their arrest in Zagreb (GX 104-06), along with excerpts from the extraction reports concerning the contents of these cell phones.⁸ The excerpts from the extraction reports were introduced through Enrique Santos, an investigative analyst and mobile phone forensics examiner at the U.S. Attorney's Office.

While Croatian analysts – and not Santos – had performed the cell phone extractions, the Government argued that Santos was competent to testify regarding the process used to perform the extractions because, *inter alia*, (1) Santos used Cellebrite – the forensic software program employed by the Croatian analysts to perform the extractions – each day during

his work at the U.S. Attorney's Office; (2) the Cellebrite software makes a forensic copy of the contents stored on a cell phone that cannot be altered or edited; and (3) the Cellebrite software extraction report reveals the unique IMEI number for each source cell phone, which can be matched to the actual cell phone. (See Oct. 13, 2021 Govt. Ltr. (Dkt. No. 585) at 3-10; Tr. 117-25)

Defendants objected to the cell phone extractions, arguing that (1) Santos could not authenticate the cell phone extractions, because he had not performed the extractions; and (2) Landji's and Adamu's Sixth Amendment Confrontation Clause rights would be violated because they had no opportunity to cross-examine the Croatian analysts who had performed the extractions. (Oct. 11, 2021 Jt. Def. Ltr. (Dkt. No. 583) at 2; Oct. 13, 2021 Jt. Def. Ltr. (Dkt. No. 586) at 2-5; Tr. 117-25)

While Defendants' objections to the cell phone extractions were pending, the jury heard testimony regarding the seizure of Defendants' phones. Tomislav Milunic – a Croatian National Police officer – testified that, during his search of the Gulfstream II on October 31, 2018, he recovered a bag that contained two cell phones. (Tr. 139) Landji told Milunic that the bag belonged to him. (Tr. 140-41) Milunic also recovered two cell phones belonging to Adamu. (Tr. 148) Later that day, Milunic gave the phones to Inspector Ivica Sestak of the Croatian National Police. (Tr. 148-49)

Agent Kohut testified that, on October 15, 2019, he took custody of the cell phones and other evidence seized from the Gulfstream II. (Tr. 206) Sestak gave Agent Kohut the evidence – which was sealed in evidence bags – along with a detailed inventory of the evidence. (Tr. 206-09) Kohut later unsealed these evidence bags at the U.S. Attorney's Office for the Southern District of New York, and he confirmed that the evidence bags contained the cell phones and the hard drive listed in the inventory. (Tr. 209-10)

*17 On October 14, 2021 – in the midst of trial – this Court issued a bench ruling denying Defendants' motions to exclude the cell phone extractions. (Tr. 303-15) Relying on the Government's offer of proof regarding Santos's anticipated testimony (see Oct. 13, 2021 Govt. Ltr. (Dkt. No. 585) at 3-10), this Court concluded that neither *Fed. R. Evid. 901*, nor the Confrontation Clause, prohibited the admission of the cell phone extractions. (Tr. 307-15) In so ruling, this Court noted that

(1) Government Exhibit 500A, 500B, and 500C are reports concerning the extraction of data from cell phones; (2) the extraction reports are forensic images that were created through the use of Cellebrite, a software tool with which [Santos is] familiar; (3) Cellebrite creates an exact copy of data from cell phones, and the image[s] this program contains are not subject to editing or alteration; (4) each cell phone has an [International Mobile Equipment Identifier ("IMEI")] number which is unique; (5) each of the three cell phones at issue has an IMEI number that Santos has identified; (6) the forensic image created by the Cellebrite software reveals the IMEI number for the source cell phone; and (7) by comparing the IMEI numbers, Santos has matched each of the forensic reports with one of the three cell phones.

(Tr. 310-11) This Court further noted that Santos would testify that certain "attribution" data found in the extraction reports – including "selfies" and email addresses containing the Defendants' names – provided further confirmation that the cell phones on which the extraction reports were based belonged to the Defendants. (Tr. 311)

In rejecting Defendants' motion to exclude the cell phone extractions, this Court cited *United States v. Gayle*, No. 16 Cr. 361 (CS) (S.D.N.Y.), in which Judge Seibel had admitted cell phone extractions through Santos's testimony, even though Santos had not performed the extractions. (Tr. 311-12 (citing Oct. 13, 2021 Govt. Ltr., Ex. 1 (Sept. 14, 2017 Gayle transcript) (Dkt. No. 585-1)) As to Defendants' Confrontation Clause argument, this Court noted that Santos would testify – based on the above-stated facts – that data presented in the extraction reports had been extracted from the Defendants' cell phones, and that he could be cross-examined as to the basis for his conclusions. (Tr. 314) This Court also distinguished cases cited by Defendants – including *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *United States v. Hajbeh*, 565 F. Supp. 3d 773 (E.D. Va. Oct. 5, 2021) – because they involved the admissibility of affidavits or certifications regarding forensic analysis. (Tr. 312-14)

On October 20, 2021 – after the Court's ruling – the Government called Santos to testify. (See Tr. 726) Santos testified that he had received approximately 160 hours of formal classroom training in mobile device forensics; that he had attended numerous conferences and workshops related to forensics; that he belongs to a number of forensics-related associations; and that he is trained and certified in a number of mobile device forensic tools, including the Cellebrite forensics software program. (Tr. 728-29) Santos has used

the Cellebrite software tool “every single day since 2014” during his work at the U.S. Attorney’s Office; has performed more than 2,000 cell phone extractions using the Cellebrite program; and has analyzed Cellebrite cell phone extractions performed by others approximately fifty times. (Tr. 729, 747)

***18** Santos explained in detail the three-step process by which a Cellebrite cell phone extraction is performed, including “acquisition,” “analysis,” and “reporting.” (Tr. 730-31) During the acquisition stage, cell phone data is downloaded and preserved as a “forensic image” – a compilation of data that cannot be altered or edited.⁹ (Tr. 730-33, 750) Although the data contained in a cell phone can be manipulated before a forensic image is created – for example, by placing a call or sending a text message – “[i]n most cases” any changes made to the contents of a cell phone device prior to an extraction would be apparent through a “timestamp” indicating the last action(s) taken with that device. (Tr. 750-51)

When using the Cellebrite software program to perform an extraction, the user must select a “profile” on Cellebrite that matches the make and model of the phone. Once a profile is selected, the analyst must choose which type of extraction to perform, and the Cellebrite tool can then download the data. (Tr. 747-49) A “unique qualifying number[]” is recorded in the forensic image to ensure that the forensic image can be matched to the physical cell phone. (Tr. 733) An International Mobile Equipment Identifier (“IMEI”) is an example of a “unique qualifying number” for cell phones that can be used to correlate a forensic image with a particular cell phone. (Tr. 733-36; see also Tr. 753)

During the “analysis” stage, an analyst parses through the data recorded in the forensic image and can separate that data into different categories. (Tr. 730-31) “[F]or example, all the different **chats** would be put together, all the different images, the videos, web browsing history, and the like.” (Tr. 731)

The third and final stage of a Cellebrite extraction involves “creat[ing] a report that gets turned over to ... a prosecutor or agent.” (*Id.*) At this stage in the extraction process, a user “can never ... modify the content of a message” or “edit anything” within the report. A user of the Cellebrite software can, however, “exclude certain items from a report,” as either “entire categories of data, or ... very specific records.” (Tr. 752)

In connection with the instant case, Santos examined three cell phones and a hard drive containing forensic images and extraction reports created by the Croatian National Police. (Tr. 737-38) Santos determined that the forensic images found on the hard drive were created in January 2019 using the Cellebrite forensic software program, and that the forensic images could not have been altered after they were generated. (Tr. 737-38, 749) By comparing the IMEI numbers listed on the extraction reports to those engraved on the cell phones, Santos was able to match each extraction report to the corresponding cell phone. (Tr. 738) Santos confirmed Landji’s and Adamu’s use of the seized cell phones from certain identifying data contained in the extraction reports.¹⁰ (Tr. 739-40) Santos also compared the size of the data in each extraction report with the size of the data in the corresponding forensic image, and he concluded that each extraction report reflected the contents of each forensic image. (Tr. 753-54)

***19** During Santos’s testimony, the Government offered excerpts from the extraction reports, including certain text messages, photos, and videos.¹¹ (Tr. 739-41) Landji – joined by Adamu – renewed his Rule 901 objections to this evidence at sidebar, offering a variety of arguments. (See Tr. 742-46, 755-66) Landji first argued that Santos had not adequately addressed whether the data on the cell phones could be altered before the forensic image was made or during the process of creating the forensic image. (Tr. 742-45) Landji later argued that (1) Santos was not competent to testify whether the forensic image reflects a “full copy” of all the data on the cell phones; and (2) the forensic image of the data on a cell phone might contain exculpatory material not reflected in the extraction report. (Tr. 757-60)

In response to Landji’s arguments, this Court commented that

the principal issue here[] ... is whether the material on the phone could have been edited or manipulated in some fashion such that what we are going to be seeing is not an accurate representation of what was actually on the phone, and in fact is a fabrication, ... [T]o the extent the objection is that not all of the data on the phone was extracted, to me, that sounds like the kind of objection that goes to the weight of the evidence rather than its admissibility.

(Tr. 765; see also Tr. 756-59)

The next morning, this Court overruled Defendants’ objection to the cell phone extraction evidence. (Tr. 776-84) In so ruling, this Court noted that Santos had “testified in a manner that was generally consistent with the [G]overnment’s proffer”

underlying the Court's earlier ruling. Santos had deviated from the Government's proffer only to the extent that he testified that the Cellebrite software does not necessarily result in a copy of all data from a cell phone.¹² (Tr. 776, 782) This fact did not require the Court to alter its analysis, because the Government had sufficiently demonstrated that the forensic images are "what they purport to be": "a compilation of data from the phones." (Tr. 782-83)

With respect to the possible manipulation of the data on a cell phone, this Court noted that Santos had testified that

(1) ... any such manipulation would likely be revealed on the extraction report because of the timestamp feature; (2) once the forensic image is created, it's not possible to alter its contents or to edit its contents; and (3) the data size of the forensic image matches the data size of each extraction report, indicating that each extraction report reflects all of the data contained in the forensic image.

(Tr. 783)

This Court also noted that there would be "ample evidence" – based on the data extracted from the cell phones – that each phone was in fact associated with the Defendants. (*Id.*)

***20** "In light of the low threshold for **authenticity** that applies pursuant to **Federal Rule of Evidence 901**," this Court concluded that any objection premised on the forensic image not capturing all the data on the Defendants' phones "goes to the weight of this evidence and not to its admissibility." (Tr. 784)

Following this ruling, Santos's testimony continued, and the relevant excerpts from the Defendants' cell phones were admitted into evidence. (Tr. 786-87) During his testimony, Santos pointed out that the IMEI number contained in the extraction reports matched those printed on the cell phones.¹³ (Tr. 787-89, 794-96, 831-32, 835, 853-54, 856) He explained what kinds of extractions were performed on each of the Defendants' phones, and what kind of data were retrieved during these extractions. (Tr. 789-92, 794, 832-33, 854-55) According to Santos, "logical extractions," "file system extractions," and "physical extractions" are three types of extractions that can be performed on a cell phone, and "[n]ot every phone model supports every type of extraction." (Tr. 791) A logical extraction – "the most widely supported type of extraction" – captures "mostly just live data, data that you can see on your phone and navigate to." (*Id.*) A file system extraction is "less supported," but captures more data,

including the "file structure of a phone," (*Id.*) A physical extraction is "the least supported type of extraction," but captures "all the data" on a phone, including some deleted data. (Tr. 791, 855, 859, 882) Santos testified that logical and file system extractions had been performed on each of the Defendants' phones, and that a physical extraction had been performed on Adamu's Samsung Galaxy J7 phone, GX 106.¹⁴ (Tr. 792, 832-33, 855)

Santos further testified that the data reflected in each forensic image were not altered or modified in any way, and that the excerpts of the corresponding reports accurately reflect the data contained in those forensic images. (Tr. 793, 833, 855-56)

Santos also testified about "attribution evidence" included in the cell phone extractions, including identifying email addresses, user account names, profile photos of Defendants, "selfies" taken by Defendants, and instances of Defendants referring to themselves in text messages.¹⁵ (E.g., Tr. 796-801, 833-37, 856-57) Santos also testified about various excerpts from the extraction reports, including contact list entries, call logs, text messages, voice notes, photographs, and videos, as well as the metadata associated with each of these items. (Tr. 796-830, 835-53, 856-76)

***21** During cross-examination, defense counsel elicited from Santos that he had not examined the contents of the cell phones (Tr. 878-79, 881); that certain data, such as the name of a contact, could be changed on a cell phone without necessarily being reflected with a timestamp (Tr. 880-81); and that he did not know who had custody of the phones prior to his receipt of them (Tr. 879-80). Santos also acknowledged that the fact that a forensic image and extraction report contain the same amount of data does not conclusively establish that the data in each are the same. (Tr. 885)

Santos also testified that "[a] PDF from a Cellebrite report is usually read-only" and cannot be easily manipulated, (Tr. 882-83) A user cannot "backspace and delete stuff [as one can with a Word document]." (Tr. 883) Santos also stated that the extraction reports he reviewed indicated that none of the data had been altered or modified. (Tr. 884)

Landji and Adamu renewed their **Rule 901** objection to the admissibility of the cell phone extractions based on Santos's testimony during cross-examination. (Tr. 898) This Court overruled their objections, reiterating that the issues identified by Defendants "go[] to the weight of the evidence rather

than the admissibility.” (Tr. 898-99) This Court also noted that it “view[ed] the [cell phone extraction] evidence as quite marginal in terms of its significance to the jury,” and that it “believe[d] the case [would] turn on the jury’s estimate of Mr. Cardona’s credibility.” (Tr. 899)

b. Whether the Cell Phone Extractions Were Properly Admitted Under Rule 901

In support of his [Rule 33](#) motion, Landji contends that the cell phone extractions from his and Adamu’s cell phones were improperly admitted under [Rule 901](#). Landji argues that (1) the cell phone data could have been manipulated prior to the creation of the forensic image; and (2) the cell phone data, as reflected in the extraction reports, could have been manipulated after the creation of the forensic image. (Landji Br. (Dkt. No. 638) at 34-38; Landji Reply Br. (Dkt. No. 648) at 8-16)

Under [Fed. R. Evid. 901](#), the Government was required to provide an evidentiary basis from which the jury could find that the cell phone extractions offered by the Government are what they purport to be: a compilation of data extracted from the Defendants’ cell phones. The Second Circuit has summarized the legal standard for demonstrating [authenticity](#) as follows:

The bar for authentication of evidence is not particularly high. [United States v. Dhinsa](#), 243 F.3d 635, 658 (2d Cir. 2001). “The requirement of authentication … is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” [Fed. R. Evid. 901\(a\)](#). Generally, a document is properly authenticated if a reasonable juror could find in favor of [authenticity](#). [United States v. Tin Yat Chin](#), 371 F.3d 31, 38 (2d Cir. 2004). The proponent need not “rule out all possibilities inconsistent with [authenticity](#), or [] prove beyond any doubt that the evidence is what it purports to be.” [United States v. Pluta](#), 176 F.3d 43, 49 (2d Cir. 1999).

[United States v. Gagliardi](#), 506 F.3d 140, 151 (2d Cir. 2007) (first alteration in [Gagliardi](#)).

With respect to potential manipulation of the cell phone data prior to the creation of the forensic image, Santos testified that, “[i]n most cases,” any manipulation of the data on a cell phone would be reflected through a “timestamp” on the phone. (Tr. 750-51) While Santos conceded that certain information – such as the name of a contact – could be

changed without such a timestamp (Tr. 880), Landji has never argued that any of the cell phone extractions admitted at trial were actually altered. And, as discussed above, there was ample evidence that, for example, the Landji, Adamu, and Fofana [Whatsapp](#) messages introduced at trial were sent by them based on the profile photos, account usernames, and phone numbers associated with these messages.¹⁶ (E.g., Tr. 798-803, 811, 826, 839-40, 856-58)

*22 Landji also contends that – if prior extractions were performed on the cell phones – the data contained on the cell phones could have been altered. (Landji Br. (Dkt. No. 638) at 37; *see also* Tr. 891-93) There is, of course, no evidence that prior extractions were performed on the cell phones. Moreover, Santos testified that, if such prior extractions had been performed, a forensics analyst “would potentially see artifacts of the first extraction,” (Tr. 892) In short, a reasonable jury could have concluded that the data contained on the cell phones were not altered before the forensic images were created.

As to possible manipulation of the data after the creation of the forensic images, Landji points out that Santos did not examine the forensic images or compare their contents to those contained in the corresponding extraction reports. (Landji Br. (Dkt. No. 638) at 37; *see* Tr. 883, 889-90) Santos testified, however, that, in converting the forensic image into an extraction report, a user “can never … modify the content of a message,” or “edit anything.” (Tr. 752)

Landji argues, however, that the extraction reports can be altered at a later date, and cites Santos’s testimony that the extraction reports are PDFs that can be made “editable.” (Landji Br. (Dkt. No. 638) at 36-37; Landji Reply Br. (Dkt. No. 648) at 11-12) But Santos’s testimony was more limited than Landji suggests. Although Santos testified that someone using “the right software” could make a PDF extraction report editable, he also testified that the “default option” for Cellebrite PDF reports is that they are “read-only.” (Tr. 882-83) He explained that the only way to edit such a PDF is to “writ[e] over” the content in the PDF “like … a typewriter,” but that “it’s not like a Word document where you can … backspace and delete stuff.” (Tr. 883) Moreover, Santos repeatedly emphasized that the extraction reports he reviewed did not appear to have been altered or modified in any way, and thus accurately reflected the data contained in the corresponding forensic images. (Tr. 792-93, 833, 855-56, 884) Santos also testified that the amount of data contained in the extraction reports matches the amount

of data contained in the forensic images (Tr. 753-54, 885), indicating that the extraction reports reflect the data in the corresponding forensic images. In short, a reasonable jury could have concluded that the extraction reports had not been altered after the forensic images were created.

Landji also argues that the Government did not demonstrate that the forensic images and extraction reports were in fact derived from the Defendants' cell phones, noting Santos's testimony that the SIM card tray for iPhones – on which the unique IMEI number is printed – can be removed and replaced.¹⁷ (Landji Br. (Dkt. No. 637) at 37; see also Tr. 881) As discussed above, however, the “attribution evidence” found in the extraction reports provided a compelling basis for the jury to conclude that the extractions reports were in fact derived from data stored on the Defendants' cell phones. (See Tr. 796-801, 833-37, 856-57)

The Court concludes that the Government offered evidence sufficient to demonstrate that the cell phone extractions are what they “purport[] to be,” Pluta, 176 F.3d at 49. There was ample evidence that the cell phones belonged to the Defendants, and that the extraction reports reflect data that were stored on the Defendants' cell phones. There is no evidence that the evidence derived from the Defendants' cell phones was altered or manipulated in any way. Given that “[t]he bar for authentication of evidence is not particularly high,” Gagliardi, 506 F.3d at 151, and that the Government need not “rule out all possibilities inconsistent with **authenticity**,” Pluta, 176 F.3d at 49, the cell phone extractions were properly admitted. (See Oct. 13, 2021 Govt. Ltr., Ex. 1 (Sept. 14, 2017 transcript in United States v. Gayle, No. 16 Cr. 361 (CS)) (Dkt. No. 585-1) (admitting cell phone extractions through the testimony of Santos, who had not performed the extractions))

c. Whether the Admission of the Cell Phone Extractions Violated Defendants' Rights Under the Confrontation Clause

*23 Defendants argue that the admission of the cell phone extractions violated their rights under the Sixth Amendment's Confrontation Clause. (Landji Br. (Dkt. No. 638) at 38-40; Landji Reply Br. (Dkt. No. 648) at 16-18; Adamu Br. (Dkt. No. 639) at 13-14)

The Confrontation Clause bars admission of “testimonial statements” in a criminal case where the defendant does not

have the opportunity to cross-examine the author of such statements. See Crawford v. Washington, 541 U.S. 36 (2004). The Supreme Court has applied the “primary purpose” test in defining whether a given statement is “testimonial,” which requires that “the statement was made or procured with a primary purpose of ‘creating an out-of-court substitute for trial testimony.’ ” Washington v. Griffin, 876 F.3d 395, 404 (2d Cir. 2017) (quotation marks and alteration omitted) (quoting Ohio v. Clark, 576 U.S. 237, 245 (2015)); see also Garlick v. Lee, 1 F.4th 122, 129 (2d Cir. 2021) (defining the “ ‘core class’ ” of testimonial statements as those involving (1) “ ‘*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially’ ”; (2) “ ‘extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions’ ”; and (3) “ ‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial’ ” (quoting Crawford, 541 U.S. at 51-52)).

Landji contends that, under the Confrontation Clause, he was entitled to cross-examine the “technician who conducted the extractions.” (Landji Br. (Dkt. No. 638) at 38-39; Landji Reply Br. (Dkt. No. 648) at 16-18) In support of his Confrontation Clause claim, Landji cites Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), Bullcoming v. New Mexico, 564 U.S. 647 (2011), and United States v. Hajbeh, 565 F. Supp. 3d 773 (E.D. Va. Oct 5, 2021). (Landji Br. (Dkt. No. 638) at 38-39; Landji Reply Br. (Dkt. No. 648) at 16-18) These cases all involve an effort to substitute a certification or affidavit for live testimony regarding the results of a laboratory or forensic examination. None of these cases is on point, because the proof here did not involve an effort to offer proof by certification or affidavit. Instead, the Government offered a witness with specialized knowledge concerning Cellebrite, a cell phone forensic tool, and that witness testified about his own observations concerning the Cellebrite extraction reports and the conclusions that he could draw from those reports.

In Melendez-Diaz, the defendant objected to the admission of “certificates of analysis” stating that certain evidence seized from the defendant contained cocaine. The Supreme Court held that the trial court's admission of these “certificates” showing the results of a forensic analysis violated the defendant's Confrontation Clause rights, and that the

laboratory personnel who performed the analysis should have been required to testify in court regarding their findings. Melendez-Diaz, 557 U.S. at 307-09, 311. In so holding, the Supreme Court emphasized that the “certificates of analysis” “fall within the ‘core class of testimonial statements,’ ” because, *inter alia*, they were “solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact.” Id. at 310 (quotation marks and citation omitted). The Court also rejected the State’s analogy to certain records that were admissible at common law – including “clerk[] certificate[s] authenticating an official record[] or a copy thereof” – noting that, unlike the certificates at issue in Melendez-Diaz, the clerk certificates did not provide any interpretation of the record, or “certify to its substance or effect.” Id. at 322.

*24 Melendez-Diaz has no application here. That case involved an attempt to introduce the results of a laboratory analysis through a certification. Here, the Government offered live testimony from a witness with extensive experience in the use of Cellebrite and the cell phone extraction reports that it creates. As discussed above, the witness explained in detail why the extraction reports reflected data stored on the Defendants’ phones. Santos’s observations were based on, *inter alia*, his own comparison of the IMEI numbers contained on the cell phones and the extraction reports, the attribution data he found in the extraction reports, and his familiarity with the Cellebrite forensic tool and the extraction reports that Cellebrite generates. Defendants were free to, and did, cross-examine Santos regarding the bases for his conclusions.

In Bullcoming, the Supreme Court addressed the admissibility of a laboratory report certifying the results of a blood alcohol test. The analyst who certified the results did not testify. The prosecution instead offered the laboratory report through the testimony of an analyst who had not performed the test, but who was familiar with the process. Bullcoming, 564 U.S. at 651-52. The state court held that the report’s admission did not violate the Confrontation Clause because the certifying analyst “was a mere scrivener who simply transcribed the results generated by the gas chromatograph machine,” and the testifying analyst could testify regarding the machine and procedures used to perform the test. Id. at 657, 659-61 (quotation marks and citation omitted). The Supreme Court rejected this argument, noting that the analyst’s certification went beyond that of a scrivener because it addressed, among other things, (1) the integrity of the blood sample at issue, (2) that the sample number and the report number corresponded to each other, (3) that the

analyst performed a particular test, and (4) that the analyst adhered to certain protocols in performing that test. Id. at 660. The Court also held that “surrogate testimony” of an analyst who had not certified the results of the test could not satisfy the Confrontation Clause because such an analyst “could not convey what [the certifier of the report] knew or observed about the events [the] certification concerned.” Id. at 661; see also id. at 663 (“[W]hen the State elected to introduce [the] certification, [the author of the certification] became a witness [the defendant] had the right to confront.”). The Court also rejected the State’s argument that the laboratory report was not “testimonial,” noting that the report included a “certificate concerning the results of[the] analysis” and that the certificate was “ ‘formalized in a signed document.’ ” Id. at 663-65 (quotation marks and citations omitted).

Bullcoming is not on point for many of the same reasons discussed in connection with Melendez-Diaz. Unlike the laboratory analyst in Bullcoming, Santos was not certifying the accuracy of a forensic analysis performed by someone else. He did not make representations about the quality or the accuracy of the work performed by his counterpart in the Croatian National Police, Santos instead testified about his own knowledge of the Cellebrite forensic tool, the extraction reports it generates, and his own conclusions from his review of the extraction reports. He explained his reasons for concluding that (1) the cell phones belonged to the Defendants; (2) the extraction reports reflect data that were stored on the Defendants’ cell phones; and (3) the evidence derived from the Defendants’ cell phones was not altered or manipulated in any way. Santos’s conclusions are not premised on the accuracy or quality of the forensic work done in Croatia. Accordingly, his testimony is not comparable to that of a laboratory worker affirming that a test conducted by another laboratory worker is accurate and properly performed.

*25 Landji also cites United States v. Hajbeh, a child pornography case from the Eastern District of Virginia in which the prosecution, relying on Fed. R. Evidence 902, sought to authenticate images and videos obtained from the defendant’s phones through the affidavits of two agents who performed extractions on the defendant’s phones. Hajbeh, 565 F. Supp. 3d at 774-75. The court rejected the prosecution’s effort to offer these images and videos through the agents’ affidavits, finding that the affidavits were clearly testimonial and that their admission would “undoubtedly give rise to a Confrontation Clause issue.” Id. at 776. In so ruling, the court noted that “the affidavits fill an important evidentiary ... gap in

this matter: namely, to establish that the [child pornography] exhibits are indeed portions of the contents of Defendant's iPhones." *Id.* (quotation marks and citation omitted). The court concluded that, in order to admit the images and videos, the prosecution would have to call the authors of these affidavits as witnesses. *Id.* at 777.

Here, by contrast, the Government offered live testimony from Santos, a witness with extensive expertise in Cellebrite, the forensic tool used to prepare the extraction reports. Because of his expertise with Cellebrite, the witness recognized the extraction reports as having been generated from the Cellebrite forensic tool. Because of his knowledge of Cellebrite and the extraction reports that it generates, and his knowledge of the unique identifying numbers associated with each cell phone, Santos could testify regarding whether the cell phones at issue belonged to Defendants; whether the extraction reports were derived from these cell phones; and the likelihood as to whether the data contained on these cell phones had been altered or manipulated. In doing so, Santos did not make representations about the accuracy or quality of the forensic work performed in Croatia, or any findings made by his counterpart in Croatia. *Cf. Bullcoming*, 564 U.S. at 661 ("[S]urrogate testimony of the kind [the surrogate witness] was equipped to give could not convey what [the certifying analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed.").

In sum, the admission of the cell phone extractions did not violate the Defendants' Sixth Amendment rights.

* * * *

Because the extractions from the Defendants' cell phones were properly admitted under *Fed. R. Evidence 901* and the Sixth Amendment's Confrontation Clause, Defendants' motions for a new trial on this basis will be denied.

2. Jury Selection

Landji and Adamu argue that they are entitled to a new trial because the venire and petit jury did not reflect a fair cross-section of the community, in violation of the Sixth Amendment and the Jury Selection and Service Act of 1968 (the "JSSA"), 28 U.S.C. § 1861. (Landji Br. (Dkt. No. 638) at 42-44; Adamu Br. (Dkt. No. 639) at 9-13)

a. Background

Jury selection began on October 6, 2021. On that day, the Defendants filed a joint letter "to advise the Court of a concern" that, "[b]ased on defense counsel's observations," the venire "significant[ly] underrepresent[s] ... Black jurors." (Oct. 6, 2021 Jt. Ltr. (Dkt. No. 581) at 1-2) Counsel acknowledged that "the issue is not yet ripe" because additional potential jurors would be seated the next day to replace jurors who had been excused.¹⁸ (*Id.*) Jury selection continued on October 7, 2021, and Landji's counsel then challenged the racial composition of the venire. (Voir Dire Tr. 238) Landji's counsel complained that "about six of the 52 jurors appear to be black jurors, and that amounts to 11.5 percent of the venire." (Voir Dire Tr. 238-39) Counsel went on to argue that, based on the eligible jury population in the Southern District of New York, "there is between a 9 and 10 percent absolute disparity," which "raises a violation of the defendants' Sixth Amendment rights." (Voir Dire Tr. 239) Counsel requested that the venire "be struck until an appropriately representative venire can be composed." (*Id.*) This Court rejected this argument, citing its recent opinion in *United States v. Lawrence*, No. 21 Cr. 127 (PGG), which addressed similar arguments that Blacks and Hispanics are underrepresented in grand juries in this District. (Voir Dire Tr. 239-40; see *United States v. Lawrence*, No. 21 Cr. 127 (PGG), Dkt. No. 27. The Court then completed the jury selection process. (Voir Dire Tr. 240-45)

b. Applicable Law

*26 "The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community." *Berghuis v. Smith*, 559 U.S. 314, 319 (2010) (citation omitted). The JSSA provides that

all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.... [A]ll citizens shall have the opportunity to be considered for service on grand and petit juries ... and shall have an obligation to serve as jurors when summoned for that purpose.

No citizen shall be excluded from service as a grand or petit juror ... on account of race, color, religion, sex, national origin, or economic status.

[28 U.S.C. §§ 1861-62](#). Under the JSSA, a “defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of [the JSSA] in selecting the grand or petit jury.” [28 U.S.C. § 1867\(a\)](#).

In [Duren v. Missouri](#), [439 U.S. 357 \(1979\)](#), “[the Supreme Court described three showings a criminal defendant must make to establish a *prima facie* violation of the Sixth Amendment’s fair-cross-section requirement”:

He or she must show: “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.”

[Berghuis](#), [559 U.S. at 319](#) (quoting [Duren](#), [439 U.S. at 364](#)). “The [Duren](#) test ‘governs fair cross section challenges under both the [JSSA] and the sixth amendment.’ ” [United States v. Rioux](#), [97 F.3d 648, 660 \(2d Cir. 1996\)](#) (quoting [United States v. LaChance](#), [788 F.2d 856, 864 \(2d Cir. 1986\)](#)) (alteration in [Rioux](#)).

c. Analysis

Defendants contend that Blacks and Hispanics were underrepresented in the venire, and that statistics submitted to this Court in [United States v. Lawrence](#) demonstrate that Blacks and Hispanics are underrepresented in the overall Manhattan jury pool for this District. (Landji Br. (Dkt. No. 638) at 43-44 (citing [Lawrence](#), No. 21 Cr. 127 (PGG), Dkt. No. 13-2 (Martin Decl.)); Adamu Br. (Dkt. No. 639) at 12 (citing [Lawrence](#), No. 21 Cr. 127 (PGG), Dkt. No. 13-2 (Martin Decl.))) Defense counsel also complains that this District’s jury summons process is based on voter registration lists, and that Black people are “systematically underrepresented in voter registration lists as compared to the jury-eligible population.” (Landji Br. (Dkt. No. 638) at 43-44) Landji’s counsel further states that, as a result of the underrepresentation of Blacks and Hispanics in the venire, “only one Black juror and possibly one Hispanic juror” served on the jury. (Landji Br. (Dkt. No. 638) at 44)

The Government argues that Defendants have not made a *prima facie* showing of underrepresentation under the second [Duren](#) prong, because their claims are premised on (1) their personal observations of the venire and petit jury in this case – an inadequate sample size; and (2) outdated statistics from 2017 that this Court previously rejected as insufficient in [Lawrence](#). (Govt. Opp. (Dkt. No. 643) at 61, 63-65) The Government also argues that, under the third [Duren](#) prong, any underrepresentation of Blacks or Hispanics in the venire or petit jury is due to an external factor – namely, the different rates in voter registration across different races and ethnicities – and is not a feature of the jury selection process itself. (*Id.* at 61, 65-66)

*²⁷ In [United States v. Lawrence](#), this Court addressed the defendant’s claim that this District’s practices in creating the grand jury pool from voter registration lists cause the systematic exclusion of Blacks and Hispanics, in violation of the Sixth Amendment and the JSSA. [United States v. Lawrence](#), [553 F. Supp. 3d 131 \(S.D.N.Y. 2021\)](#). Lawrence argued that (1) the “master list” of eligible jurors is created from voter registration rolls, “which underrepresent jury-eligible Black and Latino New Yorkers,” (2) the master list is only “refill[ed] ... every four years,” which arbitrarily excludes 18-21 year olds from the prospective jury pool and disproportionately impacts Black and Hispanic voters, (3) the District removes inactive voters from the list, which also disproportionately impacts Black and Hispanic voters, and (4) the jury administrator did not reach out to prospective jurors who did not receive or respond to questionnaires that are used to determine juror eligibility. *Id.* at 143-44 (quotation marks and citations omitted). This Court rejected these arguments, holding that such practices “are facially neutral” or are the result of factors external to the jury selection process. *Id.* at 144-46, Concluding that Lawrence had not shown any systematic underrepresentation under the third [Duren](#) prong, this Court denied his motion to dismiss the indictment. *Id.* at 146.

Defendants in the instant case raise the same arguments and rely on the same statistical study regarding the Manhattan jury pool that this Court considered and rejected in [Lawrence](#). Neither Defendant has made a meaningful effort to distinguish [Lawrence](#), however, or to explain why this Court should rule differently here. (Landji Br. (Dkt. No. 638) at 43-44 (citing [Lawrence](#), No. 21 Cr. 127 (PGG), Dkt. No. 13-2 (Martin Decl.); Adamu Br. (Dkt. No. 639) at 12 (citing [Lawrence](#), No. 21 Cr. 127 (PGG), Dkt. No. 13-2 (Martin Decl.)))

For the reasons explained in [Lawrence](#), 553 F. Supp. 3d at 142-46, this Court concludes that Defendants have not made a sufficient showing of systematic underrepresentation of Blacks and Hispanics under the [Duren](#) test.¹⁹ To the extent that Defendants' motion for a new trial is premised on that claim, their motion will be denied.

3. The Presence of the Cocaine Evidence at Trial

Landji argues that he is entitled to a new trial because the package containing the alleged cocaine recovered from the Gulfstream II – GX 101 – was in the courtroom during trial until the Court ruled that the alleged cocaine was inadmissible because of a lack of evidence concerning chain of custody. (Landji Br. (Dkt. No. 638) at 40-42; [see also](#) Tr. 429-41 (bench ruling excluding purported cocaine on chain-of-custody grounds))

a. Background

On October 11, 2021 – the day before opening statements and long after the September 16, 2021 deadline for filing motions [in limine](#) ([see](#) Dkt. No. 536; [see also](#) Dkt. No. 467) – Landji moved to exclude the alleged cocaine (GX 101) recovered from the Gulfstream II. (Oct. 11, 2021 Jt. Def. Ltr. (Dkt. No. 583) at 1-2) In support of his motion, Landji cited the 20-month break in the chain of custody from October 31, 2018 – when the Croatian National Police officers who had recovered the alleged cocaine delivered it to Inspector Ivica Sestak of the Croatian National Police (Tr. 149, 185) – to June 24, 2020, when DEA Special Agent Kohut took custody of the alleged cocaine from Sestak (Tr. 99-100, 206, 210). (Oct. 11, 2021 Jt. Def. Ltr. (Dkt. No. 583) at 1)

The Court reserved decision on Landji's application (Tr. 49-55), and the parties proceeded to opening statements. During Landji's opening, counsel conceded that the Croatian National Police had recovered a kilogram of cocaine from Landji's Gulfstream II. Counsel told the jury that Cardona-Cardona had "smuggled a kilo of cocaine onto Mr. Landji's plane without Mr. Landji's knowledge"; that the jury was "going to see a kilogram of cocaine"; that "[a] lab analyst will explain that ... it is indeed cocaine"; and that "[w]e're not disputing that. We're not denying it. That is real, hard evidence." (Tr. 66, 68)

*28 After opening statements, Officer Tomislav Milunic of the Croatian National Police testified about the arrest of Landji and Adamu and the subsequent search of Landji's Gulfstream II. (Tr. 139) Milunic testified that Croatian police recovered a white plastic bag with red and yellow markings in the cargo area of the plane. (Tr. 141-43) Inside the white bag was a black bag, and inside the black bag was a rectangular package wrapped in brown tape. (Tr. 142-43) Milunic testified that the package contained "a white powder substance with characteristics of cocaine." (Tr. 143) Milunic identified GX 102 and GX 103 as – respectively – the original packaging of the alleged cocaine and the Croatian lab packaging of the alleged cocaine. (Tr. 143-44, 149-57, 179-85) Although the prosecutor showed GX 101 to Milunic during his testimony, he was not questioned about this exhibit. (Tr. 143) During Milunic's testimony, the Government introduced certain photographs taken by Croatian police officers; the photos show the white powder substance, its packaging, its weight, and the location on the plane where the package was found. (Tr. 145-47; GX 223-234)

Agent Kohut testified after Milunic. Kohut testified that he received "just under one kilogram of cocaine and some packaging" from Inspector Sestak in Zagreb on June 24, 2020. (Tr. 210; [see also](#) Tr. 211 ("I received a white powdery substance in a sealed Ziploc bag that was contained within some brown wrapping. I also received some other bags and packaging that was contained in some brown paper wrapping.... [O]ne of [the bags] had some markings on it, labeling, indicating that it had come from a forensic examination center in Zagreb.")) Kohut identified GX 101 as "the evidence bag in which I sealed the cocaine that I received on the 24th of June in Zagreb, Croatia." (Tr. 214; [see also](#) Tr. 215) Kohut identified GX 102 and 103 as packaging for GX 101. (Tr. 215-19, 227-28)

As discussed above, during the cross-examination of Agent Kohut, defense counsel introduced two DEA Form 7 reports stating that a package containing 992.23 grams of cocaine hydrochloride had been recovered from Landji's Gulfstream II aircraft at Zagreb International Airport. (DX AAA, DX BBB)

On October 18, 2021, in the midst of trial, this Court granted Landji's motion to exclude GX 101, ruling that "the [G]overnment has not offered an evidentiary foundation sufficient to demonstrate that the white powder found by the Croatian National Police on October 31, 2018 at the

Zagreb airport is the same powder that has been marked as Government Exhibit 101.” (Tr. 429-41)

After the Government rested (Tr. 899), counsel for Landji and Adamu requested that the Court give the following instruction to the jury:

You heard reference in Special Agent Kohut's testimony to an item received from the Croatian National Police and sent to a DEA laboratory. I caution you that there is no evidence in the record establishing that that item was recovered during the search of the aircraft. Nor is there any evidence of testing of that item to determine whether it is or is not a controlled substance. With respect to this item, I remind you of my instruction that to the extent the parties marked an exhibit for identification, but the exhibit was not received into evidence, it should not enter into your deliberations and you may not consider it in any way.

(Tr. 949)

Landji's counsel commented that he had “wrestled” with whether to request such an instruction, because “this is one of those situations where as a defense attorney you question [whether you] want to draw attention to this or not.” (Tr. 945; see also Tr. 947-48, 952)

In response to counsel's remark, the Court shared its perspective concerning the proposed instruction:

There was a clear plastic DEA evidence bag in the courtroom on the government table for some period of time. Within that clear plastic DEA evidence bag there was a white opaque plastic bag, which allegedly contained the powder that allegedly is cocaine. But having examined the bag closely myself, honestly, you couldn't tell what was in the bag. The powder itself was not visible because it was enclosed within an opaque white plastic bag.

*29 So while it's true that the evidence bag was in the courtroom for some period of time, and it was sitting on the government's desk for several days, I suspect, I am not sure that anybody focused on it.

So what I am telling you, for what it's worth, from my perspective, the presence of that bag in the courtroom seems innocuous to me, and I'm not sure anyone even remembers that it was here at this point because a lot of time has gone by since we heard from these witnesses from Croatia.

So, from my perspective, and of course it's ultimately defense counsel's decision, from my perspective, to draw the jury's attention to the fact that the bag was in the courtroom at an earlier point in the trial, I am not sure that that is in the interest of the defendants.

(Tr. 946)

The Government objected to defense counsel's proposed curative instruction, because it incorrectly stated that there was no evidence that cocaine had been recovered from the Gulfstream II aircraft. (Tr. 949-51) The Government noted that the defense had offered “two DEA evidence documents” – DX AAA and DX BBB – stating that a package containing 992.23 grams of cocaine had been recovered from the Gulfstream II aircraft after it landed in Zagreb. (Tr. 949-51) Defense counsel then acknowledged that the Government “may be right that those exhibits require some modification of the language [defense counsel had requested].” (Tr. 951) The Court took a recess to permit counsel to consider the matter more fully. (Tr. 953) When defense counsel returned from the recess, they informed the Court that they were “going to withdraw our request for the instruction.” (Tr. 956)

During his summation, Landji's counsel reminded the jury that Milunic had testified that he tested the white powder found on the Gulfstream II, but that

he did not tell you what the result of that test was. So you don't know what the result was, and you don't know whether that was, in fact, cocaine. Nor did the government ever present you with the cocaine that was found on the plane. In fact, in this drug case, strangely, there are no actual drugs in evidence.

(Tr. 1035)

Landji's counsel also addressed the concession in the defense opening that the Gulfstream II had contained a kilogram of cocaine (Tr. 1035-36):

... we were not in a position to dispute that because Mr. Landji did not know, and does not know, anything about these drugs. But as it turns out, the government didn't actually do their job of showing you the drugs that were supposedly discovered on the plane.... The test result, as I said, is not in evidence. There is no forensic proof in this case that what is depicted in these exhibits was actually determined forensically to be cocaine. The government's investigation was inadequate because, of course, they relied exclusively on Cardona. But getting back to the

white powdery substance that was found, whether or not it tested positive for cocaine, this item was actually found on the plane. We are not disputing that. You could see it for yourself in the photos and you heard about it in the testimony.

(Tr. 1036)

While the defense conceded that a package containing a “white powdery substance” had been recovered from Landji’s Gulfstream II aircraft, Landji and Adamu argued to the jury that someone else had planted the “cocaine” or “drugs” on Landji’s plane without their knowledge. (See, e.g., Tr. 1006, 1014-15, 1037, 1049-51, 1067, 1082-85)

***30** By contrast, the theme of the Government’s summation and rebuttal was that the jury need not conclude that the Defendants possessed cocaine in order to find the Defendants guilty of the charged narcotics conspiracy. (Tr. 962-63 (“You know there was cocaine on that plane, but let me be clear, even without that test shipment, even if that test shipment flight had never occurred or even if the defendants somehow did not know what was on board that test flight, the defendants still would be guilty. That is because they conspired for years about how to ship massive amounts of cocaine by plane. That is because they agreed to ship ton after ton of cocaine on the G-II airplane. That is enough because they are charged with a conspiracy, which is just an agreement.”); Tr. 985 (“[E]ven if the defendants didn’t actually know there were drugs on board the plane at this time, or even if there weren’t actually any drugs on board the plane when it landed in Croatia, it doesn’t matter. The defendants are still guilty.”); Tr. 1107 (“But you don’t need that flight to find the defendants guilty because they had made an agreement prior to that flight to distribute and possess with the intent to distribute tons of cocaine on board U.S. registered aircraft, aircraft owned by a U.S. citizen, and an aircraft on which a U.S. citizen would be present.”); Tr. 1108 (“Assume for a moment that the test kilogram was not actually on board the aircraft. The point of that flight was really not the single kilogram. The cost of the flight alone exceeded that. That flight was proof of concept. The purpose of that flight was to convince the potential buyers in Europe that Cardona and Fofana and Landji and Adamu could do what they said they would do and traffic drugs using that plane and others.”))

In the jury charge, this Court instructed the jury that “[t]he only exhibits that are evidence in this case are those that were received in evidence. Exhibits marked for identification but not admitted are not evidence....” (Tr. 1124) An index

reflecting all exhibits that were admitted into evidence was also provided to the jury. (Tr. 1156-57) As set forth above, GX 101 was not received in evidence.

b. Analysis

Landji argues that the presence of GX 101 in the courtroom was unfairly prejudicial because it “suggest[ed] that it was in fact the cocaine recovered from the plane.” (Landji Br. (Dkt. No. 638) at 40) This argument fails for numerous reasons.

As an initial matter, in Landji’s opening, counsel conceded that a kilogram of cocaine had been recovered from Landji’s Gulfstream II. (Tr. 68)

Moreover, as discussed above, defense counsel introduced exhibits stating that the package recovered from Landji’s Gulfstream II contained 992.23 grams of cocaine hydrochloride. (Tr. 229-33, 238-40; DX AAA, DX BBB)

And, as the Court noted, the package that for a time sat on the Government’s counsel table revealed only an opaque white plastic bag. No white powder was visible, (See Tr. 946 (“[Y]ou couldn’t tell what was in the bag. The powder itself was not visible because it was enclosed within an opaque white plastic bag... [T]he presence of that bag in the courtroom seems innocuous to me, and I’m not sure anyone even remembers that it was here at this point because a lot of time has gone by since we heard from [the Croatian] witnesses....”)) Landji’s counsel echoed the Court’s observations, stating that he did not want to “draw attention” to GX 101 through his proposed instruction, (Tr. 945; see also Tr. 947-48 (stating that the Court had presented “one side of our thinking” as to whether a curative instruction would draw attention to the alleged cocaine)) As discussed above, Landji’s counsel ultimately withdrew his request for a curative instruction concerning GX 101. (Tr. 956)

Given this record, Defendants have not demonstrated that they suffered unfair prejudice as a result of the presence of GX 101 in the courtroom during part of the trial.

Indeed, the Government’s inability to introduce GX 101 worked to its detriment. In the defense summations, counsel emphasized that no cocaine had been received in evidence. (Tr. 1035-36) And, as noted above, this Court instructed the jury that it could consider only exhibits that had been received in evidence. (Tr. 1124) There is no reason to believe that the

jury did not follow this instruction. See [United States v. Jones](#), 16 F.3d 487, 493 (2d Cir. 1994) (“[J]urors are presumed to follow instructions from the court.” (citing [United States v. Gilliam](#), 994 F.2d 97, 100 (2d Cir. 1993))); [United States v. Taveras](#), 584 F. Supp. 2d 535, 541 (E.D.N.Y. 2008) (“[W]e normally presume that a jury will follow an instruction....” (quotation marks and alteration omitted) (quoting [Greer v. Miller](#), 483 U.S. 756, 767 n.8 (1987))).

*31 In sum, the presence of GX 101 in the courtroom for part of the trial did not deprive Defendants of a fair trial.

4. Conditions of Confinement

Landji contends that he is entitled to a new trial because – as a result of the conditions of his confinement – he was denied a meaningful opportunity to participate in his defense. Landji complains that (1) at points during the trial he temporarily did not have access to his legal documents and discovery materials; and (2) on certain trial days he did not receive breakfast.²⁰ (Landji Br. (Dkt. No. 638) at 44-45)

Landji and Adamu were housed at the Metropolitan Correctional Center (the “MCC”) when jury selection began on October 6, 2021. On October 13, 2021, in the midst of trial, defense counsel informed the Court that the MCC was shutting down, and that Landji and Adamu would be moved to the Metropolitan Detention Center (the “MDC”). (Tr. 222-23) Defense counsel also informed the Court that, in anticipation of the move to the MDC, the Bureau of Prisons (“BOP”) had packed all of the Defendants’ belongings, including their legal papers. (Tr. 223-24) This Court directed the Government to contact the BOP to ensure that the Defendants’ legal papers were returned to them, and the Government assured the Court that it would look into the matter promptly. (Tr. 223-25)

The next day – October 14, 2021 – the jury did not sit, but the Court met with the parties, (See Tr. 296) At that conference, Landji’s counsel informed the Court that the Defendants had not yet been moved to the MDC because of a “security issue.” Landji’s counsel stated that Landji “has one envelope of legal papers,” but that certain “discovery materials” had not yet been returned to him. (Tr. 315) The Government stated that it had made arrangements for the Defendants’ legal papers to be returned to them when they arrived at the MDC. The Government stated that it would seek to determine when the Defendants would be moved to the MDC, and whether Defendants’ legal papers could be returned

to them while they remained at the MCC. (Tr. 316-17) Adamu’s counsel responded that Adamu’s legal papers had already been returned to him, and Landji’s counsel stated that he expected that Landji’s remaining legal papers would be returned to him that day. (See Tr. 317-18)

Later that day, Landji’s counsel submitted a letter stating that Landji had not received breakfast or lunch “on any of the trial days” due to a staffing shortage at the MCC. (Oct. 14, 2021 Landji Ltr. (Dkt. No. 592)) The letter stated that the lack of food “compromises [Landji’s] ability to focus during the trial and meaningfully participate in his own defense.” (*Id.*) This was the first time Landji’s counsel had raised an issue concerning Landji’s access to food.

The following day – October 15, 2021 – Landji’s counsel informed the Court that “the issue[s] of the paperwork and the food ... with everyone working together ... are getting resolved.” (Tr. 320) The parties did not raise any issue regarding these matters over the next several days.

On October 18, 2021, Adamu’s counsel informed the Court that the Defendants would be moving to the MDC that night and that “a good majority of their legal papers have been left behind.” (Tr. 441) Counsel stated that he would submit a proposed order later that day “in reference to trying to get those legal materials over to MDC.” (*Id.*) No such proposed order was ever submitted to the Court, however, and Defendants did not make any complaint regarding access to legal papers for the remainder of the trial.

*32 On October 21, 2021, in discussing whether the Defendants could be brought to court by 9:00 a.m. (rather than 9:30 a.m.), Landji’s counsel reported that “the MDC[] ... [does not] serve breakfast until 8:00, and if [the Defendants] are being prepared to be transported here on the early side, ... the MDC simply skips breakfast,” (Tr. 928) The Court directed the Government to coordinate with the BOP to ensure that Defendants received breakfast. (Tr. 929)

On October 22, 2021, prior to closing arguments, Landji’s counsel informed the Court that his client was “not given breakfast” that day. (Tr. 956) Adamu’s counsel likewise reported that Adamu had not been given breakfast that day. (*Id.*) The Court offered Defendants granola bars, and the Marshals permitted Defendants to eat food they had brought with them for lunch. (Tr. 956-57)

The Government argues that neither the occasional lack of breakfast, nor Landji's temporary lack of access to some of his legal documents, denied Landji a meaningful opportunity to participate in his defense. (Govt. Opp. (Dkt. No. 643) at 68-69) While the Government acknowledges that Landji faced "certain challenges during trial" – given the pandemic and the closure of the MCC – the Government contends that Landji has not "identif[ied] with any particularity how his ability to participate in his defense was actually curtailed." (*Id.* at 68)

This Court finds that Landji's occasional lack of breakfast, and his occasional lack of access to his legal papers, did not deprive Landji of a fair trial. The record shows that when defense counsel raised issues regarding food or access to legal papers, the Court directed the Government to work with the BOP to address these issues, and those issues were resolved. (*See* Tr. 223-25, 316-18, 320, 441, 929-30, 956-57) While it is regrettable that Landji sometimes missed breakfast, and occasionally did not have continuous access to his legal

papers, there has been no showing that these issues deprived Landji of his right to assist in his defense.

To the extent that Landji argues that he is entitled to a new trial because the conditions of his confinement prevented him from meaningfully participating in his defense, Landji's motion for a new trial will be denied.

CONCLUSION

For the reasons stated above, Defendants' motions for a judgment of acquittal under [Fed. R. Crim. P. 29](#), or for a new trial under [Fed. R. Crim. P. 33](#) (Dkt. Nos. 638-39), are denied.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2022 WL 2334509

Footnotes

- 1** Citations to page numbers of docketed material correspond to the pagination generated by this District's Electronic Case Files ("ECF") system. Citations to the trial transcript correspond to the pagination generated by the court reporter. Unless otherwise noted, references to "Tr." are to the trial transcript. (*See* Dkt. Nos. 606, 608, 612, 614, 616, 618, 620, 622, 624, 626, 628, 630) All references to "Voir Dire Tr." are to the separately paginated transcript of the *voir dire*.
- 2** Evidence concerning conduct that took place prior to October 2017 was received subject to a limiting instruction. The jury was instructed that conduct "prior to the October 2017 to October 2018 time period alleged in the indictment" could only be considered "for the purpose of deciding whether the defendant had the state of mind, knowledge, and intent necessary to commit the crime charged in the indictment." (Tr. 1155)
- 3** The jury concluded that each Defendant had had personal involvement with five kilograms or more of cocaine, or that it was reasonably foreseeable to him that the conspiracy involved five kilograms or more of cocaine. (Verdict (Dkt. No. 605))
- 4** In his closing, Landji's lawyer argued that the video evidence is "incomprehensible" and "ambiguous." (*See* Tr. 1018-19)
- 5** Landji argues that this exchange is "vague" as to the quantity of drugs involved in the alleged conspiracy, because the conspirators only address "the weight that various airplanes could carry and the frequency with which flights could occur." (Landji Br. (Dkt. No. 638) at 48 (emphasis in original)) But the jury could have concluded otherwise, given Landji's responses during this discussion ("Okay"; "Yeah, we can do two") and Cardona-Cardona's testimony at trial. (*See* GX 303B, at 8; Tr. 451-52)
- 6** In introducing DX AAA, defense counsel highlighted typographical errors regarding, *inter alia*, the date of the seizure. (Tr. 229-31, 238-39) While Agent Kohut's report refers to a seizure on October 30, 2019 (DX AAA), the seizure actually took place on October 31, 2018. (*See* Tr. 110, 133-34, 137, 145, 229-31)
- 7** [21 U.S.C. § 959\(c\)](#) provides that "[i]t shall be unlawful for any United States citizen on board any aircraft, or any person on board an aircraft owned by a United States citizen or registered in the United States, to – (1) manufacture or distribute a controlled substance or listed chemical; or (2) possess a controlled substance or listed chemical with intent to distribute."

- 8 GXs 104 and 105 are, respectively, an Apple iPhone 7 Plus and Samsung Galaxy S9+ cell phone that allegedly belonged to Landji. (Tr. 790, 830-31; see, e.g., Tr. 797-98, 800-01, 835-37 (describing attribution data contained on those devices)) GX 106 is a Samsung Galaxy J7 cell phone that allegedly belonged to Adamu. (Tr. 853; see, e.g., Tr. 856-57 (describing attribution data contained on this device)) GX 500 is a hard drive containing forensic images and reports regarding the contents of these phones. (Tr. 736-37) GX 500A is the extraction report corresponding to GX 104; GX 500B is the extraction report corresponding to GX 105; and GX 500C is the extraction report corresponding to GX 106. (Tr. 788, 831, 853)
- 9 Santos testified that the capabilities of the Cellebrite software have evolved over time, as cell phone manufacturers introduce new security features that can affect the types of data that can be retrieved from cell phones. In January 2019 – when the extractions in this case were performed – the Cellebrite software was able to recover “a lot of the data” commonly stored on cellphones, including “call histories, messages, photos, videos, web browsing history, notes, [and] voice messages.” (Tr. 748-49; see also Tr. 791, 859, 881-82 (testifying that a forensic image is not a copy of all data stored on a phone, unless a “physical extraction” is performed); Tr. 792, 832-33, 855 (testifying about the types of extractions performed on cell phones, and noting that a physical extraction had only been performed on the Samsung Galaxy J7 cell phone (GX 106)))
- 10 As discussed below, Santos testified that such identifying data, or “attribution” data, includes, inter alia, photos or “selfies” of the Defendants, as well as email addresses and user accounts associated with them. (See Tr. 796-801, 833-37, 856-57)
- 11 See GX 501, 501A, 501B, 501C, 501D, 501E, 501F, 501G, 501H, 501I, 501J, 501K, 501L, 501M, 501N, 501O, 501P, 501Q, 501R, 501S, 501T, 501U1, 501U2, 501U3, 501U4, 501V, 501W, 501X, 501AA, 501CC, 501DD, 501EE, 501FF, 502, 502A, 502B, 502C, 502D, 502E, 502F, 502G, 502H, 502I, 502J, 502K, 502L, 502M, 502N, 502O, 502P, 502Q1, 502R, 502S, 502T, 502U, 502V, 502W, 502X1, 502Z1, 502AA, 502AA1, 503, 503A, 503B, 503C, 503D, 503E, 503F, 503G, 503H, 503I, 503J, 503K, 503L, 503M, 503M1, 503N1, 503N2, 503N3, 503N4, 503N4A, 503N4B, 503N5, 503N5A, 503N5B, 503N5C, 503N5D, 503N5E, 503N5F, 503N5G, 503N5H, 503N5I, 503N6, 503N6A, 503N6B, 503N6C, 503O, 503P, 503Q, 503R1, 503R1A, 503R2, 503R3, 503R3A, 503R3B, 503R4, 503R4A, 503R5, 503S, 503T, 503U, 503X, 503Y, 503Z, and 503AA; see also GX 501Y2 to 501Y12, 501Z1 to 501Z5, 501BB, 502Q, 502X, 502Y, 502Z, 503 V, 503 W (exhibits that were already in evidence).
- 12 See Tr. 782 (“Mr. Santos’ testimony indicates that the Cellebrite software may not have resulted in an exact copy of data from the cell phones and that certain material on the cell phones may not have been reproduced in the forensic image.”).
- 13 Defendants also stipulated to this fact. (Tr. 795-96, 835, 854)
- 14 “Screenshots” had also been manually extracted from GXs 104-05. (Tr. 792, 832-33)
- 15 For example, the email addresses “backlandaviation@yahoo.fr,” “jclandji@oldandaviation.com,” and/or “oklandaviation@gmail.com” were associated with GXs 104 and 105, and “jjibril@gmail.com” was associated with GX 106 (Tr. 797, 836, 856; GX 501 A, 502B, 502C, 503C); “selfies” of Landji were found on GX 104 and GX 105, and one such “selfie” was used as the profile photo of the **Whatsapp** account on GX 104 (Tr. 798-801, 836; GX 501B, 501D, 502E to 502H); an incoming message on GX 105 states “Bonjour M LANDJI” (Tr. 835; GX 502A); documents with Landji’s name – including a photo of Landji’s passport – were found on GX 104 and GX 105 (Tr. 800-01, 837; GX 501C, 502J); and the **Whatsapp** ID name on GX 106 is “Jibril Adamu” (Tr. 856-57; GX 503B).
- 16 While the phone numbers themselves do not indicate who sent each message, when the phone numbers are considered together with the attribution data for each phone or **Whatsapp** account, the author of each **Whatsapp** message is clear. (See, e.g., Tr. 798, 801-02, 806, 812-13, 825-26, 839-40, 857 (testimony regarding phone numbers associated with Defendants’ cell phones, **Whatsapp** accounts, and **Whatsapp** messages))
- 17 This argument implicates only one of the three cell phones at issue – Landji’s Apple iPhone 7 Plus. The IMEI numbers for Landji’s Samsung Galaxy S9+ and Adamu’s Samsung Galaxy J7 are printed on each phone near the USB port or behind the battery. (Tr. 734-36)

- 18 Because of COVID-19 safety protocols, jury selection took place in the Jury Assembly Room at 500 Pearl Street, and only 42 venire members could be examined at any one time. Because that number of venire members is inadequate to select a jury in a criminal case of this nature, jury selection proceeded over two days with excused venire members being replaced by new panel members.
- 19 With respect to Landji's argument that "only one Black juror and possibly one Hispanic juror" served on the jury (Landji Br. (Dkt. No. 638) at 44), the Court notes that defense counsel exercised a peremptory challenge as to a Black female juror, and asked that another Black panel member be excused for cause. (See Voir Dire Tr. 233-37, 241-45)
- 20 At trial, the Court sat from 9:30 a.m. to 2:30 p.m. (Tr. 29)

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Mensah v. Mnuchin

United States District Court, S.D. Florida. | November 13, 2020 | Not Reported in Fed. Supp. | 2020 WL 6701926

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Outline

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Thaddeus A. MENSAH, Plaintiff,
v.

Steven MNUCHIN, Secretary, United
States Department of Treasury, Defendant.

CASE NO. 20-22876-CIV-ALTONAGA/Torres

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Signed 11/13/2020

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ORDER

CECILIA M. ALTONAGA, UNITED STATES DISTRICT JUDGE

*1 THIS CAUSE came before the Court on Defendant, Steven Mnuchin's Motion to Dismiss [ECF No. 8], filed on September 25, 2020. Plaintiff, Thaddeus A. Mensah, filed a Response [ECF No. 15] to the Motion, to which Defendant filed a Reply [ECF No. 21]. The Court has carefully considered the Complaint [ECF No. 1], the parties' written submissions, the record, and applicable law. For the following reasons, the Motion is granted in part and denied in part.

I. BACKGROUND

This is an employment discrimination and retaliation case. (*See generally* Compl.). Plaintiff was a tax compliance officer employed by the Internal Revenue Service (the "Agency"), part of the United States Department of Treasury, from 2008 to December 2017. (*See id.* ¶¶ 4, 13). Plaintiff is a black citizen of the United States whose country of origin is Ghana, Africa. (*See id.* ¶¶ 5, 14). Defendant is the current Secretary of the United States Department of Treasury. (*See id.* ¶ 7).

Plaintiff's employment background. In 2008, the Agency hired Plaintiff in California as a disabled individual under a workforce recruitment program for students with disabilities. (*See id.* ¶ 13). Plaintiff suffers from physical impairments, including glaucoma, diabetes, anxiety disorder, major depression, and attention deficit disorder ("ADD"). (*See id.* ¶ 6). Plaintiff was employed by Defendant for nearly 10 years. (*See id.* ¶ 13). He initially worked for Defendant in California but was transferred to Fort Myers, Florida in 2013. (*See id.* ¶ 15). At that office, Plaintiff's supervisor was Connelia Finn. (*See id.*). Plaintiff was able to meet his position's caseload and performance standards without any need for reasonable accommodations. (*See id.*).

In November 2014, Plaintiff was granted a hardship transfer to the Tax Compliance Office in Miami, Florida, where he was assigned to Group 5 and supervised by Patricia Benedetti. (*See id.* ¶ 16). At the time of transfer, Plaintiff had completed his probationary period and training in Fort Myers and was rated "fully successful" on his annual performance appraisal. (*Id.* (quotation marks omitted)). In Miami, however, the consistently higher caseload and lack of managerial support exacerbated Plaintiff's disabilities, making it increasingly difficult for Plaintiff to meet Benedetti's performance expectations. (*See id.* ¶ 17). Plaintiff's average weekly caseload in Miami was significantly greater than in Fort Myers and approximately 30 percent higher than Defendant's guidelines for GS-9 and GS-11 tax compliance officers. (*See id.*).

Between November 2015 and June 2016, the Agency temporarily assigned Benedetti to other duties, and Finn was appointed as acting manager of the Miami Tax Compliance Office. (*See id.* ¶ 18). When Plaintiff's disabilities began to affect his job performance, Plaintiff attempted to speak to Benedetti about certain issues. (*See id.* ¶ 19). Benedetti neither showed empathy for Plaintiff nor referred him to Defendant's Reasonable Accommodations Coordinator or the Equal Employment Opportunity ("EEO") Office. (*See id.*). Instead, Benedetti "mocked Plaintiff for seeking assistance and accused him of trying to use his disabilities as an excuse for not doing his job." (*Id.*).

*2 When Plaintiff turned to Finn for assistance regarding his increased caseload, Finn suggested he consider seeking assistance through Defendant's Employee Assistance Program. (*See id.* ¶ 20). In June 2016, Plaintiff received a fully successful rating of 3.0 from Finn in his annual evaluation,

doing so despite the significantly higher caseload. (*See id.* ¶ 21). Finn also completed a “departure evaluation” for the period of June 1, 2016 to September 17, 2016, in which Finn rated Plaintiff “fully successful.” (*Id.* ¶ 22 (quotation marks omitted)).

In September 2016, Benedetti resumed her day-to-day duties as Plaintiff’s manager. (*See id.* ¶ 23). Benedetti “increased Plaintiff’s caseload and renewed her harsh and unwarranted criticism of his job performance whenever he tried to seek guidance or assistance.” (*Id.*). At that same time, Plaintiff reached out to his union representative who agreed with Plaintiff that Benedetti’s assigned caseload exceeded the Agency’s guidelines and was unreasonable. (*See id.* ¶ 24).

On September 27, 2016, Plaintiff sent the following email to Benedetti and her supervisor, Debbie McMillan:

I would like to discuss a very personal and Important matter with you. I have a serious health issue and would like to schedule a conference call meeting and discuss it with you. I believe it is important to let you know what is going on with me so that you may able [sic] to help me with my work from now on. Please let me know what day is available this week for to [sic] discuss this Issue.

Thank you so much for your patience with me being here. (*Id.* ¶ 25). Plaintiff, Benedetti, and McMillan participated in a conference call, during which Plaintiff discussed his disabilities and asked Benedetti and McMillan to consider “some type of adjustment or reduction” of his high caseload and/or new case assignments. (*Id.* ¶ 26). Shortly thereafter, Benedetti advised Plaintiff that he needed to submit a formal written request in accordance with the Agency’s policies and procedures. (*See id.* ¶ 27).

On October 27, 2016, Plaintiff submitted a Treasury Form 13661 Reasonable Accommodations Request for multiple impairments, including [glaucoma](#), ADD, and diabetes. (*See id.* ¶ 28). Plaintiff requested a 20 to 30 percent reduction of his then-average caseload of more than 100 cases. (*See id.*). According to Plaintiff, his requested workload was “consistent with his job description and Agency guidelines that dictated an average caseload of 65 to 70 cases.” (*Id.*). Benedetti and McMillan had already decided in early October 2016 to deny Plaintiff’s request for reasonable accommodations. (*See id.* ¶ 29).

Benedetti and McMillan’s unilateral decision to deny Plaintiff’s request for accommodations was a clear violation

of Defendant’s EEO policies and procedures. (*See id.* ¶ 30). Specifically, the Agency neither conducted any meaningful interactive process with Plaintiff to discuss the accommodation requests, nor performed any formal review of essential functions to determine the appropriate caseload for Plaintiff’s position. (*See id.* ¶¶ 30–31). Benedetti also violated the Agency’s policies when she shared Plaintiff’s confidential information regarding his disabilities and accommodation requests with Domingo Antonio Jimenez, a group clerk. (*See id.* ¶ 33).

After the denial of Plaintiff’s initial request, Benedetti “reacted in an openly negative and hostile manner to Plaintiff’s [other] formal requests for accommodations and his subsequent attempts to discuss the issues as part of the interactive process.” (*Id.* ¶ 32 (alteration added)). Benedetti appeared annoyed by Plaintiff’s accommodation requests, viewing them “as an excuse to avoid doing his job and an attempt to undermine her managerial right and authority to assign his workload[.]” (*Id.* (alteration added)). Benedetti began to retaliate against Plaintiff for continuing to seek accommodations for his disabilities. (*See id.*). Her retaliation continued for nearly a year until she left the Miami office for another position in July 2017. (*See id.*).

*3 Plaintiff maintained a good working relationship with Jimenez during his first year in Miami. (*See id.* ¶ 33). Upon learning of Plaintiff’s accommodation requests, Jimenez’s attitude toward and treatment of Plaintiff changed. (*See id.*). Despite not holding any managerial or supervisory position, Jimenez openly berated Plaintiff in group meetings and singled him out for unfair treatment. (*See id.* ¶¶ 33–34). He refused to provide Plaintiff with the same administrative support extended to Plaintiff’s coworkers. (*See id.* ¶ 34). Jimenez “mocked Plaintiff’s national origin by making offensive jokes and negative references about the fact that Plaintiff was born in Ghana, Africa before he became a United States Citizen.” (*Id.*). Benedetti and McMillan took no remedial action to stop Jimenez’s “constant mocking and criticism” of Plaintiff. (*Id.* ¶ 35).

During the last three months of 2016, Benedetti inhibited and frustrated Plaintiff’s ability to complete his workload in a timely manner. (*See id.* ¶ 36). By way of example, Benedetti changed Plaintiff’s work schedule from eight hours per day, five days a week, to a compressed schedule of four, ten-hour days per week. (*See id.*). This compressed schedule caused more fatigue and increased Plaintiff’s difficulties with focus, concentration, and workload management. (*See id.*).

Benedetti continued to single Plaintiff out for harsh criticism, doing so even though Plaintiff treated her and others with the utmost respect and spoke in a calm, polite, and professional manner. (*See id.* ¶ 37).

Between October 2016 and July 2017, Group 5 implemented a manager rotation to make up for Benedetti's other, frequent management duties. (*See id.* ¶ 38). This manager rotation eroded Plaintiff's ability to communicate with Benedetti about his workload issues and accommodation requests. (*See id.*). On the rare occasions Benedetti was assigned to Group 5, she either denied or simply ignored Plaintiff's requests for periodic workload reviews or any additional training that would assist in managing his caseload. (*See id.* ¶ 39). Benedetti "spoke down to [Plaintiff] in an extremely harsh and unprofessional manner when he tried to seek her assistance or guidance." (*Id.* (alteration added)). Benedetti intensified her documentation of Plaintiff's mistakes and privately accused him "of using his disabilities as an excuse for the fact [] he was stupid and lazy." (*Id.* (alteration added)).

In December 2016, after nearly two months had passed without any interactive process or response to his formal request for accommodations, Plaintiff submitted a second Treasury Form 13661 Reasonable Accommodations Request for his anxiety disorder and ADD. (*See id.* ¶ 40). Plaintiff's form was completed by a licensed clinical social worker who had treated Plaintiff. (*See id.*). The social worker requested a "workload adjustment to achieve manageable stress levels." (*Id.* (quotation marks omitted)). Several weeks passed with no response to Plaintiff's formal request. (*See id.* ¶ 41). As a result, in January 2017, Plaintiff submitted a second Treasury Form 13661 Reasonable Accommodations Request for [glaucoma](#) and a third Treasury Form 13661 Reasonable Accommodations Request for his anxiety disorder and ADD. (*See id.*).

Sometime in early 2017, Plaintiff was formally notified his accommodation requests for [glaucoma](#) and diabetes had been granted. (*See id.* ¶ 42). Plaintiff received an ergonomic chair and keyboard along with noise-cancelling headphones and an assistive device to increase the size of the font on his computer screen. (*See id.*). He did not, however, receive a formal response regarding his "three separate requests for accommodations for his ADD, depression[,] and anxiety disorder[.]" (*Id.* (alterations added)). Instead of responding to Plaintiff's requests, Benedetti continued to criticize Plaintiff and document his job performance. (*See id.* ¶ 43).

*4 On June 22, 2020, Dr. Papiya Ray, an occupational medicine consultant, submitted a report to Defendant's reasonable accommodation coordinator, Brenda Kampe, concluding, based on her independent review of Plaintiff's initial request, that "a reduction in caseload would reduce one of [his] stressors, thereby improving his symptoms and relieving some of his limitations." (*Id.* ¶ 46 (alteration added)). On June 26, 2017, Kampe forwarded Dr. Ray's report to Plaintiff, Benedetti, and McMillan with a request for management to consider a 30 percent caseload reduction. (*See id.* ¶ 47). Benedetti and McMillan did not consider the caseload reduction or participate in any interactive process or discussion with Plaintiff regarding Dr. Ray's findings. (*See id.*).

On June 27, 2017 — over eight months after Plaintiff's submission of his first Treasury Form 13661 in October 2016 — McMillan completed Part IV of the form and denied Plaintiff's request for a "reduction of workload." (*Id.* ¶ 48 (quotation marks omitted)). In the Reasons for Denial section of the form, McMillan checked the following boxes: "Accommodation Ineffective/Inappropriate[;]" "Accommodation Would Require Removal of Essential Function[;]" and "Accommodation Would Require Lowering of Performance or Production Standard." (*Id.* (alterations added; quotation marks omitted)). She did not select the box for "Accommodation Would Cause Undue Hardship." (*Id.* (quotation marks omitted)).

In Section 4 of Part IV, McMillan provided a narrative explanation for her decision:

An employee with a disability must meet the same production standards, whether quantitative or qualitative, as a non-disabled employee in the same job. Lowering or changing a production standard because an employee cannot meet it due to a disability is not considered a reasonable accommodation.

However, a reasonable accommodation may be required to assist an employee in meeting a specific production standard. In this case, the employee has been provided with ergonomic chair and IRAP Equipment, including large monitor, large keyboard, noise canceling headphones and Zoom technology in order to assist him in meeting the performance and production standards of the position. He also has been provided with a mentor/coach for technical and procedural support.

(Id. ¶ 49). McMillan's form denial gave Plaintiff "critical notice of [his] rights to seek reconsideration of the denial

(within 15 days of receipt) and the right to challenge the decision through the Agency's EEO process (within 45 days of receipt)." (*Id.* ¶ 50 (alteration added)).

Plaintiff was unaware of these significant developments regarding his first Treasury Form 13661 request for accommodations. (*See id.* ¶ 45). Defendant's policies required that Plaintiff receive the formal denial of his accommodations request. (*See id.* ¶ 51). Plaintiff "never received a copy of Part IV of the Form 13661 that was purportedly completed by [] McMillan on June 27, 2017." (*Id.* (alteration added)). Defendant deprived Plaintiff of any notice of his right to seek reconsideration or avail himself of the EEO process. (*See id.*). Had Plaintiff received proper notice, he surely would have voiced concerns about the unreasonable delays in responding to his requests and Benedetti's unfair treatment after Plaintiff submitted his requests. (*See id.*).

In June 2017, Plaintiff anticipated receiving an annual performance appraisal from Benedetti. (*See id.* ¶ 44). Given Benedetti's harsh criticism in the prior months and recurring details to other duties in the office, Plaintiff "was highly concerned [] the review process would not be conducted fairly by [] Benedetti and instead would be used against him." (*Id.* (alterations added)). Benedetti was too busy to meet Plaintiff in June and finally met with him on July 23, 2017 to conduct his performance review. (*See id.* ¶ 52). At that time, Benedetti was in the process of transferring to a new position in Broward County, Florida. (*See id.*). Benedetti "seemed distracted and irritated during the brief meeting," speaking to Plaintiff "in an extremely rude and unprofessional manner concerning his job performance during the preceding year[.]" (*Id.* (alteration added)).

*5 Plaintiff received a 1.8 score on his annual performance appraisal. (*See id.* ¶ 53). Because of the score, the Agency's policies dictated that Plaintiff "be placed on a formal Performance Improvement Plan [] and that if [h]is performance did not improve or if he failed to find another position within the Agency[,] he could be involuntarily separated from his employment." (*Id.* (alterations added)). Plaintiff filed a written appeal with human resources, citing the "lack of fairness in the evaluation process" and disability discrimination. (*Id.* ¶ 54 (quotation marks omitted)). Plaintiff "never received any response from [h]uman [r]esources to either the appeal or his complaint of disability discrimination during the evaluation cycle, nor was he provided with any notice regarding his EEO rights." (*Id.* ¶ 55 (alterations added)).

Benedetti formally left the Miami office at the end of July 2017. (*See id.* ¶ 56). She was replaced by rotating group managers "who had no authority to consider or make decisions on accommodation requests and no desire to assist [Plaintiff] with his caseload issues." (*Id.* (alteration added)). At the direction of her supervisor, Kampe began to assist Plaintiff with his efforts to find an alternative position within the Agency. (*See id.* ¶ 57). If those efforts proved unsuccessful, Plaintiff would be placed on a Performance Improvement Plan. (*See id.*). Plaintiff did not find a suitable position, nor was he offered another job in the Agency between August and December 2017. (*See id.* ¶ 58). Kampe "never advised" Plaintiff "local management had formally denied his requests for accommodations and never provided him with a copy of Part IV of the Form 13661 that was purportedly completed by [] McMillan on June 27, 2017." (*Id.* ¶ 59 (alteration added)).

In September and October 2017, the Miami office's employees were instructed to work from home as a result of Hurricane Irma. (*See id.* ¶ 60). The employees' work-related communication moved to a WhatsApp group **chat**. (*See id.*). Group 5 was aware that Plaintiff was visiting Ghana from September 18, 2017 to October 23, 2017 due to a death in his family. (*See id.*). On October 20, 2017, Jimenez "posted an extremely offensive picture" to the WhatsApp group **chat**. (*Id.* ¶ 61). The picture "depicted an individual dressed in what appeared to [be] a ceremonial African tribal costume with feathers, spear and shield, under which [] Jimenez had typed the words 'TCO Returns Home.' " (*Id.* (alterations added)).

Upon becoming aware of Jimenez's post, Plaintiff was "extremely distressed by the incident" and Jimenez's "ongoing harassment." (*Id.* ¶ 62). Plaintiff reported Jimenez's discrimination to the acting group manager, Xavier Berros Rosero, and Kampe, both of whom advised Plaintiff to contact Defendant's EEO Office for counseling. (*See id.* ¶¶ 62–63). Plaintiff contacted the EEO Office on November 14, 2017. (*See id.* ¶ 64). At that time, Plaintiff "had still not been advised by the Agency of the formal denial of his accommodation[s] request and, in violation of Agency policies, had still never been provided with Part [IV] of the Form 13661 ... that was purportedly completed by [] McMillan on June 27, 2017." (*Id.* (alterations added)). Plaintiff therefore set forth allegations in his EEO request of (1) lack of reasonable accommodations; and (2) disparate treatment and hostile work environment based on his disabilities, race, and national origin. (*See id.*).

In November 2017, Plaintiff was suffering from acute anxiety and depression as a result of his workplace issues, seeking treatment from a mental-health provider, Dr. Stanley Seidman. (*See id.* ¶ 65). Dr. Seidman prepared a 24-page report detailing Plaintiff's diagnosis and treatment. (*See id.*). Dr. Seidman supported Plaintiff's request for an adjustment of his caseload as a reasonable accommodation. (*See id.*). Plaintiff submitted the report to Agency management and made his final request for a reduction of caseload. (*See id.* ¶ 66). McMillan denied Plaintiff's request in December 2017. (*See id.*).

*6 During the EEO counseling process, Plaintiff was never informed whether any disciplinary action or other remedial action was taken against Jimenez for the “offensive WhatsApp posting.” (*Id.* ¶ 67). Another incident involving Plaintiff and Jimenez occurred in early December 2017. (*See id.* ¶ 68). Plaintiff requested printer ink cartridges from Jimenez when he was handing out cartridges to employees. (*See id.*). Jimenez “aggressively yelled” at Plaintiff to go get the cartridges from the supply room if Plaintiff needed ink for his printer. (*Id.*).

On December 22, 2017, Dr. Seidman penned a note to the “Concerned IRS” stating: “[Plaintiff] is under my care for a severe stress disorder. As of December 22, 2017, due to the severity of his mental status, I am recommending that he cease performing case work with the [Agency] and that he apply for disability immediately.” (*Id.* ¶ 69 (alterations added; quotation marks omitted)). Plaintiff applied for disability retirement with the Office of Personnel Management on February 2, 2018. (*See id.* ¶ 70). In an August 2018 decision, the Office of Personnel Management determined Plaintiff was “eligible for disability retirement because he was disabled for [his] position as a Tax Compliance Officer due to [generalized anxiety disorder](#) and major [depressive disorder](#).” (*Id.* ¶ 71 (alteration added; quotation marks omitted)).

Defendant offered no legitimate reasons for the denial of Plaintiff's “requests for reasonable accommodations, the reprisal he endured from [] Benedetti following his requests for accommodations[,] or the discrimination to which he was subjected based on race and national origin.” (*Id.* ¶ 72 (alterations added)). Plaintiff felt “compelled to resign” because of: (1) “Defendant's denial of reasonable accommodations from October 2016 to December 2017[;]” (2) “the discrimination and hostile work environment created by [] Benedetti and ... Jimenez[;]” and

(3) the “intolerable” working conditions. (*Id.* ¶ 73 (alterations added)).

Plaintiff's EEO complaint. On January 31, 2016, Plaintiff filed a timely Formal EEO Complaint of Discrimination (“EEO Complaint”) with Defendant's EEO Office. (*See id.* ¶ 8). Plaintiff raised claims of race discrimination, national origin discrimination, disability discrimination, and reprisal. (*See id.*). Plaintiff has complied with all administrative prerequisites to pursue his claims in federal court. (*See id.* ¶¶ 9–11).

Plaintiff's Complaint. On July 13, 2020, Plaintiff filed his Complaint asserting four claims: disability discrimination in violation of the Rehabilitation Act of 1973 (“Rehabilitation Act”), [29 U.S.C. section 794 et seq.](#) (Count I) (*see id.* ¶¶ 74–77); retaliation for having requested reasonable accommodations under the Rehabilitation Act (Count II) (*see id.* ¶¶ 78–82); race discrimination in violation of Title VII, [42 U.S.C. section 2000e et seq.](#) (Count III) (*see id.* ¶¶ 83–87); and national origin discrimination in violation of Title VII (Count IV) (*see id.* ¶¶ 88–92).

Defendant's Motion. Defendant moves to dismiss the Complaint under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), arguing: (1) Plaintiff has failed to exhaust administrative remedies with respect to his claims of constructive discharge, failure to accommodate, and a negative performance evaluation (*see Mot.* 3, 5–10);¹ and (2) Plaintiff has failed to include enough factual allegations to support his retaliation claim under the Rehabilitation Act, and race and national origin discrimination claims under Title VII (*see id.* 3–4, 10–18).

II. ANALYSIS

A. Exhaustion of Remedies

*7 Defendant provides a copy of Plaintiff's EEO Complaint filed with the Department of Treasury (*see Mot.*, Ex. A, EEO Complaint [ECF No. 8-1]),² and contends Plaintiff did not exhaust his administrative remedies with respect to his allegations of constructive discharge, failure to accommodate, and a negative performance evaluation. (*See Mot.* 3, 5–10). The Court addresses each set of allegations.

Standard. Prior to filing a Title VII and Rehabilitation Act action, a federal employee must first exhaust his administrative remedies. *See Crawford v. Babbitt*, 186 F.3d

1322, 1326 (11th Cir. 1999) (Title VII) (citation omitted); *Gaillard v. Shinseki*, 349 F. App'x 391, 392 (11th Cir. 2009) (“A plaintiff asserting a private right of action under the Rehabilitation Act must satisfy the exhaustion of administrative remedies requirement in the manner prescribed by Title VII[.]” (alteration added; citations omitted)). As part of the exhaustion requirement, the aggrieved employee must “initiate administrative review of any alleged discriminatory or retaliatory conduct with the appropriate agency within 45 days of the alleged discriminatory act.” *Shiver v. Chertoff*, 549 F.3d 1342, 1344 (11th Cir. 2008) (citations omitted).

“Generally, when the claimant does not initiate contact within the 45-day charging period, the claim is barred for failure to exhaust administrative remedies.” *Id.* (citation omitted). Each discrete act “of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice” and “starts a new clock for filing charges alleging that act.” *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113–14 (2002) (quotation marks omitted). “[T]he 45-day time limit is not jurisdictional; rather, it functions like a statute of limitations, and, like a statute of limitations, it is subject to waiver, estoppel, and equitable tolling.” *Ramirez v. Sec'y, U.S. Dep't of Transp.*, 686 F.3d 1239, 1243 (11th Cir. 2012) (alteration added; other alteration adopted; quotation marks and citation omitted). “[T]he purpose of exhaustion is to give the agency the information it needs to investigate and resolve the dispute between the employee and the employer.” *Brown v. Snow*, 440 F.3d 1259, 1263 (11th Cir. 2006) (alteration added; quotation marks and citations omitted).

Considering that purpose, “a plaintiff's judicial complaint is limited by the scope of the [administrative agency's] investigation that can reasonably be expected to grow out of the charge” contained in the administrative complaint. *Litman v. Sec'y, of the Navy*, 703 F. App'x 766, 771 (11th Cir. 2017) (alteration added; citation omitted). “[J]udicial claims are allowed if they amplify, clarify, or more clearly focus the allegations in the EEO[] complaint,” but “allegations of new acts of discrimination are inappropriate.” *Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1279–80 (11th Cir. 2004) (alterations added; quotation marks and citation omitted). Nonetheless, courts are “extremely reluctant to allow procedural technicalities to bar claims” and do not “strictly interpret[]” the scope of an administrative complaint. *Litman*, 703 F. App'x at 771 (alteration added; citation omitted); see also *Ray v. Freeman*, 626 F.2d 439, 443 (5th Cir. 1980) (“As long as allegations in the judicial complaint and

proof are ‘reasonably related’ to charges in the administrative filing and ‘no material differences’ between them exist, the court will entertain them.” (citations omitted)).

***8 Constructive discharge.** Defendant contends Plaintiff's constructive discharge claim³ must be dismissed because he did not present it in his EEO Complaint. (*See* Mot. 6–8; Reply 1–4). According to Defendant, there is no allegation in Plaintiff's EEO Complaint that “the working conditions have become so intolerable that he was compelled to resign.” (Reply 3). Defendant insists Plaintiff's “constructive discharge claim, which is embedded in all counts of the Complaint, should [] be dismissed with prejudice.” (*Id.* 4 (alteration added)). The Court disagrees.

In his EEO Complaint, Plaintiff detailed his working conditions, explaining he “believe[d] that [he] ha[d] been subjected to[:]” (1) “continuous and ongoing discrimination by the [Agency] based on [his] disabilities, including the repeated denials of [his] requests for reasonable accommodations to [his] Group Manager beginning in or about mid-2015[;]” and (2) “reprisal by management for [his] accommodation requests and a hostile work environment by [his] co-workers, which include[d] the racially-insensitive and meaning [sic] WhatsApp post by [] Jimenez in October 2017.” (*Id.* 6 (alterations added); *see also id.* 2–6).⁴ Plaintiff stated Dr. Seidman “remove[d] [him] from work due to [his] severe stress disorder” and “deteriorat[ing]” “psychological condition[,]” both of which were caused by “the ongoing lack of accommodations to assist [him] with [his] caseload, and the racially-insensitive WhatsApp post by [] Jimenez[.]” (*Id.* 5 (alterations added)). Plaintiff concluded he “remained out of work on Dr. Seidman's orders.” (*Id.*).

Quite simply, the Court finds Plaintiff's allegations of constructive discharge are reasonably related and could reasonably be expected to grow out of the charges in the EEO Complaint.⁵ *See Gregory*, 355 F.3d at 1280 (“The proper inquiry ... is whether [the plaintiff's] complaint was like or related to, or grew out of, the allegations contained in h[is] EEO[] charge.” (alterations added)). In alleging constructive discharge (*see* Compl. ¶¶ 73, 77, 82, 87, 92), Plaintiff describes the same conduct set out in his filing with the Agency; discusses the same incidents and employment conditions; relies on the same acts claimed to constitute retaliation, discrimination, and hostile work environment; and identifies the same perpetrators.⁶ (*Compare id.*, with EEO Compl.). Stated differently, Plaintiff's descriptions

of constructive discharge do not involve distinct factual allegations from those investigated by the Agency. Plaintiff may thus pursue his allegations concerning constructive discharge.⁷ See *Medina v. Waste Connections of N.Y., Inc.*, No. 19-cv-291, 2019 WL 3532048, at *6 (S.D.N.Y. Aug. 2, 2019) (finding the plaintiff's constructive discharge "claim" was reasonably related to his administrative charge because it was based on "the same course of discrimination" described in the charge (quotation marks and citation omitted)); *Coppinger v. Wal-Mart Stores, Inc.*, No. 3:07-cv-458, 2009 WL 3163211, at *9 n.23 (N.D. Fla. Sept. 30, 2009) (concluding the investigation of constructive discharge could reasonably be expected to grow out of a hostile work environment claim).

*9 In sum, "[t]he purpose of th[e] exhaustion requirement is that the [administrative agency] should have the first opportunity to investigate the alleged discriminatory [or retaliatory] practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts." *Gregory*, 355 F.3d at 1279 (alterations added; quotation marks and citations omitted). That purpose was satisfied here. The Court will not bar Plaintiff's allegations of adverse employment action based on constructive discharge on this basis.

Failure to accommodate. Defendant contends Plaintiff's "disability discrimination claim based on a failure to accommodate (Count I) should be dismissed for failure to exhaust administrative remedies." (Mot. 10). Defendant maintains Plaintiff's failure-to-accommodate "claim" is time-barred because he did not raise it until more than 45 days after the denial of his request for accommodation. (See *id.* 8–10). According to Plaintiff, he was unaware of his EEO appeal rights and administrative exhaustion requirements because "he never received a copy of the Agency's formal denial of his request for workload accommodations in June 2017[.]" (Resp. 13 (alteration added)). Plaintiff insists the Agency accepted his failure-to-accommodate "claim" as timely. (See *id.* 12–13).

As noted, "[u]nder ... the Rehabilitation Act, federal employees are required to initiate administrative review of any alleged discriminatory or retaliatory conduct with the appropriate agency within 45 days of the alleged discriminatory act." *Shiver*, 549 F.3d at 1344 (alterations added). The 45-day limit is subject to extension if a plaintiff can show: (1) "that he or she was not notified of the time limits and was not otherwise aware of them[;]" (2) "that he or she did not know and reasonably should not have been

known that the discriminatory matter or personnel action occurred[;]" (3) "that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits[;]" or (4) "for other reasons considered sufficient by the agency or the Commission." 29 C.F.R. § 1614.105(a)(2) (alterations added). "This regulation codifies the doctrine of equitable tolling whereby the party seeking tolling must prove (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Saenz v. Wilkie*, No. 2:18-cv-01363, 2019 WL 3997077, at *6 (N.D. Ala. Aug. 23, 2019) (quotation marks and citations omitted).

The Court declines the parties' invitation to determine whether equitable tolling is (or is not) warranted at the motion-to-dismiss stage.⁸ Although "[e]quitable tolling is an extraordinary remedy which should be extended only sparingly[.]" *Bost v. Fed. Express Corp.*, 372 F.3d 1233, 1242 (11th Cir. 2004) (alterations added; quotation marks and citation omitted), Plaintiff alleges enough facts supporting his contention he neither knew nor had reason to know about the applicable time limit (see Compl. ¶¶ 45, 51, 55, 59, 64).

*10 By way of example, Plaintiff alleges he "never received a copy of Part IV of the Form 13661 that was purportedly completed by [] McMillan on June 27, 2017" (*id.* ¶ 51 (alteration added)); and that he was unaware of his "right to seek reconsideration or avail himself of the EEO process" (*id.*). Plaintiff further alleges he continued to diligently pursue his rights because, as of November 2017, he "still [had not] been provided with Part D of the Form 13661 Request for Accommodations that was purportedly completed by [] McMillan on June 27, 2017." (*Id.* ¶ 64 (alterations added)). While further proceedings may establish that equitable estoppel should not apply (see Mot. 9 (stating Plaintiff's "contentions are belied by the record")), at the motion-to-dismiss stage, Plaintiff alleges enough facts to support the application of equitable estoppel (see Compl. ¶¶ 45, 51, 55, 59, 64). See also *Saenz*, 2019 WL 3997077, at *6 (declining to determine whether equitable tolling is warranted at the motion-to-dismiss stage and instead giving "the parties an opportunity to conduct discovery and to sufficiently develop the record").

In short, Count I may proceed.⁹

Negative performance evaluation. Defendant contends Plaintiff's "annual performance rating" allegations raised in

Counts II, III, and IV are untimely because the evaluation occurred prior to 45 days before the filing of Plaintiff's EEO Complaint. (Mot. 10). To this, Plaintiff states "he was unaware of his EEO rights at the time he received the rating, which satisfies the timeliness requirements [of] 29 C.F.R. [section] 1614.105(a)(2)." (Resp. 14 (alterations added); *see also* Compl. ¶¶ 50–51, 55). The Court has already concluded it will not decide whether equitable tolling is (or is not) appropriate in this situation on a motion to dismiss. For the same reasons, the Court will not exclude Plaintiff's performance evaluation allegations as untimely.

Decision. The Court denies Defendant's Motion based on exhaustion of administrative remedies.

B. Failure to State a Claim

Defendant also argues Plaintiff fails to state claims for relief in Counts II, III, and IV. (*See* Mot. 10–18; Reply 8–10). The Court addresses each count.

Standard. "To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (alteration added; quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although this pleading standard "does not require 'detailed factual allegations,' ... it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (alteration added; quoting *Twombly*, 550 U.S. at 555). Pleadings must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation omitted). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679 (alteration added; citing *Twombly*, 550 U.S. at 556).

To meet this "plausibility standard," a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (alteration added; citing *Twombly*, 550 U.S. at 556). "The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009) (citation omitted), abrogated on other grounds by *Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012).

When considering a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take the factual allegations therein as true. *See Brooks v. Blue*

Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997) (citing *SEC v. ESM Grp., Inc.*, 835 F.2d 270, 272 (11th Cir. 1988)).

***11 Count II.** Count II asserts a retaliation claim under the Rehabilitation Act. (*See* Compl. ¶¶ 78–82). Defendant challenges the legal sufficiency of this claim. (*See* Mot. 10–13; Reply 8–9).

"The Rehabilitation Act prohibits retaliation in employment against disabled persons by the federal government[.]" *Allen v. U.S. Postmaster Gen.*, 158 F. App'x 240, 243 (11th Cir. 2005) (alteration added; citation omitted). To succeed on a retaliation claim under the Rehabilitation Act, a plaintiff must show: "(1) [he] engaged in statutorily protected expression; (2) [he] suffered a materially adverse employment action; and (3) there was some causal relationship between the two events." *Burgos-Stefanelli v. Sec'y, U.S. Dep't of Homeland Sec.*, 410 F. App'x 243, 246 (11th Cir. 2011) (alterations added; citing *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1277 (2008)); *see also Solloway v. Clayton*, 738 F. App'x 985, 988 (11th Cir. 2018) (stating courts in the Eleventh Circuit "assess retaliation claims under the Rehabilitation Act using the same framework as Title VII retaliation claims." (citation omitted)).

Defendant first contends Plaintiff does not allege a materially adverse employment action. (*See* Mot. 11–12). A plaintiff satisfies the materially adverse action element if he "show[s] that a reasonable employee would have found the challenged action materially adverse[.]" *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (alterations added; citations omitted). "The acts must be material and significant and not trivial." *Burgos-Stefanelli*, 410 F. App'x at 246 (citations omitted). "A materially adverse action is one that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Shannon v. Postmaster Gen. of U.S. Postal Serv.*, 335 F. App'x 21, 26 (11th Cir. 2009) (quotation marks and citation omitted). "[T]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *White*, 548 U.S. at 69 (alteration added).

Plaintiff sufficiently pleads he suffered an adverse employment action. (*See* Resp. 14–15 (citing Compl. ¶¶ 33–37, 52–54, 57–58); *see also* Compl. ¶¶ 80, 82). Plaintiff alleges he received a negative performance evaluation, unwarranted scrutiny and criticism of his job performance, an inequitable distribution of workload, and verbal harassment

following his initial request for reasonable accommodations. (See Compl. ¶¶ 80–81; *see also id.* ¶¶ 32, 34, 39, 57–58). He further alleges “Defendant’s unlawful conduct in violation of the Rehabilitation Act … resulted in Plaintiff’s constructive discharge from employment at the end of December 2017.” (*Id.* ¶ 82 (alteration added); *see also id.* ¶ 73). A reasonable employee could certainly find Defendant’s alleged conduct to be materially adverse.¹⁰ *See Boyle v. City of Pell City*, 866 F.3d 1280, 1289 (11th Cir. 2017) (evaluating constructive discharge as an adverse employment action under the Rehabilitation Act); *McNeal v. Duval Cnty. Sch. Bd.*, No. 3:11-cv-00498, 2011 WL 6010293, at *3 (M.D. Fla. Dec. 1, 2011) (declining to dismiss retaliatory-based claim under the Rehabilitation Act where the plaintiff alleged she was “demoted resulting in a substantial loss of pay, received poor performance reviews, and was denied merit pay and travel and training opportunities.”).

***12** Defendant next contends there is no causal connection between Plaintiff’s alleged protected activity and materially adverse actions. (See Mot. 12–13). A plaintiff satisfies the causal-relationship element if he “provides sufficient evidence that [his] employer had knowledge of the protected expression and that there was a close temporal proximity between this awareness and the adverse action.” *Burgos-Stefanelli*, 410 F. App’x at 246 (alteration added; other alteration adopted; quotation marks and citation omitted). “The causal link element is construed broadly so that a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated.” *Simpson v. State of Ala. Dep’t of Human Res.*, 501 F. App’x 951, 954 (11th Cir. 2012) (quotation marks and citation omitted).

“A close temporal proximity between the protected expression and an adverse action is sufficient circumstantial evidence of a causal connection for purposes of a prima facie case.” *Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004) (quotation marks and citation omitted). “However, a lapse in time beyond three or four months, in the absence of other evidence tending to show causation, is insufficient to show close temporal proximity.” *Simpson*, 501 F. App’x at 954 (citation omitted). “[I]n the absence of other evidence tending to show causation, if there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails as a matter of law.” *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) (alteration added; citations omitted); *see also McNeal*, 2011 WL 6010293, at *3 (explaining “a causal connection may

appear after a longer period between a protected act and an adverse action where the events were temporally linked by a chain of retaliatory events.” (citation omitted)).

Defendant asserts Plaintiff fails to adequately plead “a causal connection between his purported protected activity of seeking accommodations in September 2016 and the alleged adverse actions taken against him.” (Mot. 12). Defendant insists the alleged retaliatory acts either “began before Plaintiff engaged in protected activity” or “occurred long after Plaintiff’s alleged protected activity.” (*Id.* 13 (emphasis omitted)). The Court disagrees.

Plaintiff points to a series of retaliatory acts and circumstances to establish a causal link between the protected activity (the September 2016 request for accommodations) and the alleged adverse employment actions (notably, the December 2017 involuntary resignation). (*See Resp.* 14–16). Plaintiff alleges: (1) he requested reasonable accommodations from both Benedetti and McMillan on September 27, 2016 (*see Compl.* ¶ 25); Benedetti reacted in an “openly negative and hostile manner[,]” viewing that request (and other requests) “as an excuse to avoid doing his job and an attempt to undermine her managerial right and authority to assign his workload” (*id.* ¶ 32 (alteration added)); Benedetti increased her scrutiny and criticism of Plaintiff job performance during the last three months of 2016 (*see id.* ¶ 36); Benedetti frustrated Plaintiff’s ability to complete his workload in a timely manner by requiring him to work a “compressed schedule” (*id.* (quotation marks omitted)); Benedetti privately accused Plaintiff “of using his disabilities as an excuse for the fact that he was stupid and lazy” (*id.* ¶ 39); Benedetti continued to criticize and document Plaintiff’s job performance in January and February 2017 (*see id.* ¶¶ 42–43); Plaintiff was subjected to intensifying harsh criticism by Benedetti in the “prior months” before his June 2017 scheduled performance evaluation (*id.* ¶ 44); Benedetti issued Plaintiff a negative performance evaluation in July 2017, even though she spent most of 2017 assigned to other duties and not directly supervising Plaintiff (*see id.* ¶¶ 52, 57); in December 2017, Plaintiff felt compelled to resign given Defendant’s denial of reasonable accommodations (*see id.* ¶¶ 73, 82); and Plaintiff received multiple fully successful evaluation ratings prior to requesting accommodations from Benedetti and McMillan in September 2016 (*see id.* ¶¶ 21–22).

***13** These allegations make the inference of causation plausible on review of a motion to dismiss.¹¹ *See Dipietro v. City of Hialeah*, 424 F. Supp. 3d 1286, 1292–93 (S.D.

Fla. 2020) (declining to dismiss retaliation claim despite a nearly four-year gap between the plaintiff's alleged protected activity and his termination where the plaintiff alleged a series of retaliatory acts taken by the defendant and other circumstances to bridge the temporal gap); *Matamoros v. Broward Sheriff's Off.*, No. 0:18-cv-62813, 2019 WL 4731931, at *4 (S.D. Fla. June 8, 2019) (denying motion to dismiss despite substantial delay where the plaintiff alleged facts that could be considered other evidence of retaliation); *McNeal*, 2011 WL 6010293, at *3 (declining to dismiss retaliation claim under the Rehabilitation Act despite six-month gap because “[c]lose temporal proximity between the adverse employment action and the protected activity is one common method of establishing a causal connection, ... not the sole method.” (alterations added; citation omitted)); *see also Saridakis v. S. Broward Hosp. Dist.*, 681 F. Supp. 2d 1338, 1356 (S.D. Fla. 2009) (denying summary relief on the plaintiff's retaliation claim where the temporal gap was linked by a chain of retaliatory events).

In short, Plaintiff's retaliation claim survives Defendant's Motion.

Counts III and IV. Counts III and IV assert Title VII race and national origin discrimination claims.¹² (*See* Compl. ¶¶ 83–92). Defendant challenges the legal sufficiency of these claims. (*See* Mot. 14–18).

Title VII “prohibits employers from discriminating ‘against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.’” *Fernandez v. Trees, Inc.*, 961 F.3d 1148, 1152 (11th Cir. 2020) (quoting 42 U.S.C. § 2000e-2(a)(1)). “A claim under this statutory section is referred to as a ‘disparate treatment’ claim.” *Ortiz v. Sch. Bd. of Broward Cnty., Fla.*, 780 F. App'x 780, 783 (11th Cir. 2019) (citation omitted). “Disparate treatment can take the form either of a tangible employment action, such as a firing or demotion, or of a hostile work environment that changes the terms and conditions of employment, even though the employee is not discharged, demoted, or reassigned.” *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (quotation marks and citation omitted).

Plaintiff proceeds under a hostile work environment theory.¹³ To establish a hostile work environment claim, a plaintiff must establish: “(1) he belongs to a protected group; (2) he suffered unwelcome harassment; (3) the harassment was

based on a protected characteristic of the employee, such as national origin [or race]; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) the employer is responsible for that environment under a theory of either direct liability or vicarious liability.” *Fernandez*, 961 F.3d at 1153 (alteration added; citation omitted). “[A]n employee must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.” *Smelter v. S. Home Care Servs. Inc.*, 904 F.3d 1276, 1284 (11th Cir. 2018) (alteration added; quotation marks and citation omitted).

*14 The “severe or pervasive” requirement is objective and subjective, as the harassing “behavior must result in both an environment that a reasonable person would find hostile or abusive and an environment that the victim subjectively perceives to be abusive.” *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1276 (11th Cir. 2002) (alterations adopted; quotations marks and citation omitted). In considering the harassment's objective severity, factors include: “(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance.” *Id.* (citations omitted). Stated differently, “Title VII prohibits only the type of harassment that alters the conditions of the victim's employment.” *Lara v. Raytheon Tech. Serv. Co., LLC*, 476 F. App'x 218, 221 (11th Cir. 2012) (alteration adopted; quotation marks and citation omitted).

Defendant contends Plaintiff fails to allege harassment that is sufficiently severe or pervasive to alter the terms and conditions of his employment. (*See* Mot. 17–18; Reply 10). Yet, Plaintiff insists Jimenez “openly subjected” him to “mocking comments about his intelligence and national origin” and “posted an offensive racial image of Plaintiff on the employee WhatsApp chat group[.]” (*Resp.* 16 (alteration added)). According to Plaintiff, Defendant “ignores the totality of the evidence and the cumulative impact of the discrimination and harassment on Plaintiff's physical and mental health[.]” (*Id.* 18 (alteration added)). The Court agrees with Defendant.

Plaintiff alleges: (1) Jimenez “mocked Plaintiff's national origin by making offensive jokes and negative references about the fact that Plaintiff was born in Ghana, Africa

before” he became a U.S. citizen (Compl. ¶ 34); (2) Jimenez “constant[ly] mock[ed] and critici[zed]” Plaintiff (*id.* ¶ 35 (alterations added)); (3) Jimenez “posted an extremely offensive picture on the employee **chat** group, which depicted an individual dressed in what appeared to [be] a ceremonial African tribal costume with feathers, spear and shield, under which [] Jimenez had typed the words ‘TCO Returns Home’ ” (*id.* ¶ 61 (alterations added)); (4) Plaintiff “was extremely distressed by the [post] and [Jimenez’s] ongoing harassment” (*id.* ¶ 62 (alterations added)); and (5) Plaintiff suffered adverse employment actions and felt compelled to resign as a result of the discrimination and hostile work environment (*see id.* ¶¶ 73, 85–86, 90–91).

Plaintiff’s allegations are either conclusory or fall far short of alleging a hostile work environment. By way of example, Plaintiff alleges Jimenez constantly mocked him by making offensive jokes and negative references (*see id.* ¶¶ 34–35), but there are no factual allegations establishing what was said or when and how often this conduct occurred. Plaintiff also complains the verbal harassment and adverse actions “alter[ed] the terms and conditions of [his] employment” (*id.* ¶¶ 86, 91 (alterations added)); but many of Plaintiff’s allegations of harassment and adverse treatment — like the inequitable distribution of workload, negative performance rating, and questioning of his competence and job performance (*see id.* ¶¶ 34–35, 85, 90) — cannot plausibly be said to relate to non-supervisor Jimenez’s conduct and Plaintiff’s race or national origin.¹⁴ All in all, Plaintiff’s vague allegations a non-supervisor made offensive and negative comments and posted an extremely offensive picture do not raise the inference that he was subjected to a “workplace [] permeated with discriminatory intimidation, ridicule, and insult, that [was] sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment.”¹⁵ *Butler v. Ala. Dep’t of Transp.*, 536 F.3d 1209, 1214 (11th Cir. 2008) (alterations added; quotation marks and citation omitted).

*15 The Eleventh Circuit has found even more offensive conduct than Plaintiff alleges here insufficient to support a claim of hostile work environment. *See, e.g., Fortson*, 618 F. App’x at 604, 607–08 (concluding there was no racially hostile environment where the plaintiff cited nine incidents of coworkers calling him racial epithets during two-and-a-half years of employment, with the harassing statements apparently stemming from coworkers’ dissatisfaction with the plaintiff’s job performance); *Adams v. Austral, U.S.A., L.L.C.*, 754 F.3d 1240, 1254 (11th Cir. 2014) (finding that

conduct was not sufficiently severe or pervasive where the African-American plaintiff “saw his coworkers wear the Confederate flag on a regular basis,” “saw racist graffiti in the men’s restroom that he used on a daily basis[,]” “heard people say the slur ‘n[*****]’ … a ‘few times’ over two years,” “heard about [a] noose in the breakroom, []though he did not see it himself.” (alterations added)); *Barrow v. Ga. Pac. Corp.*, 144 F. App’x 54, 57–58 (11th Cir. 2005) (concluding the display of the rebel flag on tool boxes and hard hats, the letters “KKK” appearing on bathroom wall and block-saw console, the use of the “n” word three times in one year, a noose in another employee’s locker, and other isolated racial slurs were not severe or pervasive as to alter conditions of employment (quotation marks omitted)).

Perhaps aware of the weakness of his position, Plaintiff suggests the Court defer ruling “until further discovery is conducted and Defendant seeks summary judgment.” (Resp. 19). Plaintiff’s insufficient factual allegations accompanied by the expectation that discovery will produce evidence supporting his hostile work environment allegations cannot defeat Defendant’s Motion. Certainly “[d]iscovery should follow the filing of a well-pleaded complaint[,]” but “[i]t is not a device to enable a plaintiff to make a case when his complaint has failed to state a claim.” *Grimm v. City of Boca Raton*, No. 15-80608-Civ, 2015 WL 4483974, at *5 (S.D. Fla. July 22, 2015) (alterations added; quotation marks and citation omitted); *see also Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) (“Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should … be resolved before discovery begins.” (alteration added; footnote call number omitted)).

In sum, Plaintiff’s race and national origin discrimination claims are dismissed.

Decision. The Court grants Defendant’s Motion for failure to state claims for relief as to Counts III and IV but denies it as to Count II.

III. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that Defendant, Steven Mnuchin’s Motion to Dismiss [ECF No. 8] is **GRANTED in part** and **DENIED in part**. The Motion is **GRANTED** as to Counts III and IV. The Motion is **DENIED** as to Counts I and II. Defendant has

until and including **November 23, 2020** to file an answer to Plaintiff's Complaint [ECF No. 1].

All Citations

DONE AND ORDERED in Miami, Florida, this 13th day of November, 2020.

Not Reported in Fed. Supp., 2020 WL 6701926

Footnotes

- 1 Defendant does not specify he is seeking dismissal based on failure to exhaust administrative remedies under [Rule 12\(b\)\(6\)](#). (See Mot. 4). Because exhaustion of administrative remedies is not a jurisdictional prerequisite, courts review motions to dismiss for failure to exhaust administrative remedies under the [Rule 12\(b\)\(6\)](#) standard (see *infra* 19–20) rather than under [Rule 12\(b\)\(1\)](#). See, e.g., *Banks v. Ackerman Sec. Sys., Inc.*, No. 1:09-CV-0229, 2009 WL 974242, at *2 n.3 (N.D. Ga. Apr. 10, 2009) (citations omitted).
- 2 The Court considers the EEO Complaint because it is central to the Complaint and no question regarding its [authenticity](#) has been raised. (See Compl. ¶¶ 8–11); see also *Rogers v. Wilkie*, No. 3:18-cv-00846, 2019 WL 6698139, at *4 n.1 (M.D. Ala. Dec. 6, 2019) (“Plaintiff’s EEO Complaint is referenced in Plaintiff’s Complaint and is central to her claims. Thus, the Court may consider the EEO Complaint as part of the pleadings for purposes of Defendants’ motion to dismiss.” (citations omitted)); *Glover v. Dist. Bd. of Trs. of Palm Beach State Coll.*, No. 9:19-cv-80968, 2019 WL 6340087, at *1 (S.D. Fla. Nov. 27, 2019) (“A court may consider an [administrative] charge that is attached to a motion to dismiss without converting the motion to a summary judgment motion where, as is the case here, the complaint refers to the [administrative] action, [] exhaustion is central to the viability of the plaintiff’s claim, and the [authenticity](#) of the [] charge is not in dispute.” (alterations added; citations omitted)).
- 3 Plaintiff does not raise a stand-alone constructive discharge claim but rather alleges constructive discharge as a type of adverse employment action. (See Compl. ¶¶ 73, 77, 82, 87, 92); see also *Lackey v. La Petite Acad., Inc.*, No. 2:18-cv-00429, 2020 WL 1285828, at *6 (N.D. Ala. Mar. 17, 2020) (“While constructive discharge is sometimes described as a ‘claim,’ under Title VII ..., it is actually a type of adverse employment action.” (alteration added; collecting cases)).
- 4 The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.
- 5 Defendant insists Plaintiff’s constructive discharge “claim” must be dismissed because he neither used the precise words “constructive discharge” in his EEO Complaint (Mot. 6), nor alleged “that the working conditions ha[d] become so intolerable that he was compelled to resign” (Reply 3 (alteration added)). Defendant’s exacting standard is disfavored by the Eleventh Circuit. See *Gregory*, 355 F.3d at 1280; see also *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 465 (5th Cir. 1970) (“[T]he specific words of the charge of discrimination need not presage with literary exactitude the judicial pleadings which may follow.” (alteration added)).
- 6 (Compare EEO Compl. 5 (stating Plaintiff “remained out of work” as a result of his “severe stress disorder” and “deteriorat[ing]” “psychological condition” caused by “the ongoing lack of accommodations to assist [him] with [his] caseload, and the racially-insensitive [WhatsApp](#) post by [] Jimenez” (alterations added)); and *id.* 6 (writing Plaintiff believed he had been subjected to discrimination based on “the denials of ... reasonable accommodations” and “hostile work environment” created by “co-workers,” citing “the above factual allegations” (alteration added)), with Compl. ¶ 73 (alleging Plaintiff felt “compelled to resign” “[a]s a result of Defendant’s denial of reasonable accommodations ... and the discrimination and hostile work environment created by [] Benedetti and ... Jimenez” (alterations added))).
- 7 Defendant urges the Court to apply the Eleventh Circuit’s ruling in *Abram v. Fulton County Government*, 598 F. App’x 672 (11th Cir. 2015), to its exhaustion-of-remedies analysis. (See Reply 3–4). *Abram*, however, is off point. In *Abram*, the court held the plaintiff failed to exhaust administrative remedies for her allegations of constructive discharge because she “only” alleged that she “had to resign due to health reasons; not that she had been forced to resign.” 598 F. App’x at 678 (emphasis added; quotation marks omitted). Although alluring at first glance, a review of the district court record reveals the plaintiff’s administrative charge, unlike Plaintiff’s EEO Complaint here, contained scant factual detail and conclusory allegations. See *Abram v. Fulton Cnty. Gov’t*, No. 09-cv-03587, 2009 Charge of Discrimination [ECF No.

109-7] 2 (N.D. Ga. Aug. 7, 2013) ("[M]y employer became aware of my severe medical condition.... My request to work from home was never acknowledged. I had to resign due to health reasons. I believe that I have been discriminated against because of my disability in violation of Title I of the Americans with Disabilities Act of 1990[.]" (alterations added)). The administrative charge in *Abram* is not like Plaintiff's EEO Complaint here, and thus, Defendant's reliance on *Abram* is misplaced. *Compare id.*, with (EEO Compl.).

- 8 Plaintiff dedicates a good part of his argument to highlighting the fact the Agency received and investigated his charge of failure to accommodate. (See Resp. 12–13). Plaintiff contends Defendant waived his timeliness argument. (See *id.*). As Defendant rightly notes, "the investigation of an untimely administrative claim does not preclude [Defendant] from asserting untimeliness as a defense in federal court[.]" (Reply 5 (alterations added)); see also *Tonkyro v. Sec'y, Dep't of Veterans Affs.*, No. 8:16-cv-2419, 2018 WL 5830584, at *8 (M.D. Fla. Nov. 7, 2018) (noting the administrative agency's "acceptance of a claim for investigation is not necessarily the equivalent of an [] adjudication on the timeliness of the claim." (alteration added; citing *Fortson v. Carlson*, 618 F. App'x 601, 605 (11th Cir. 2015))).
- 9 Defendant provides no additional arguments in support of his request for dismissal of Count I. (See generally Mot.; Reply).
- 10 Defendant appears to concede Plaintiff's alleged involuntary resignation would constitute a materially adverse action if he can successfully show he was constructively discharged. In Defendant's words: "[O]ther than the [] constructive discharge claim, none of the other actions that Plaintiff alleges had any tangible, negative effect on his employment or otherwise would have dissuaded a reasonable worker from making or supporting a charge of discrimination." (Reply 9 (alterations added)). The Court need not discuss whether the remaining acts qualify as adverse employment actions at this juncture, especially given Defendant's concession Plaintiff's alleged constructive discharge satisfies the materially adverse action element of his claim.
- 11 Defendant maintains Plaintiff's alleged chain of events is "far too conclusory to support a claim of retaliation." (Reply 8 (citing *Twombly*, 550 U.S. 544; *Iqbal*, 556 U.S. 662)). The Court is unpersuaded by Defendant's general citation to *Twombly* and *Iqbal*.
- 12 "Because Plaintiff's race discrimination and national origin discrimination claims arise out of the same facts, and because courts have observed that the line between race and national origin is an extremely difficult one to trace, the Court will analyze these claims together." *Carter v. Fla. Auto. Servs. LLC*, No. 8:13-cv-143, 2014 WL 3385048, at *4 n. 3 (M.D. Fla. July 10, 2014) (quotation marks and citation omitted); *Bailey v. DAS N. Am., Inc.*, — F. Supp. 3d —, 2020 WL 4039193, at *6 (M.D. Ala. July 17, 2020) (analyzing the plaintiff's race and national origin discrimination claims together because "[t]he line between discrimination based on ancestry or ethnic characteristics, and discrimination based on place or nation of origin, is not a bright one." (alteration added; quotation marks and citation omitted)).
- 13 To be sure, in his Response, Plaintiff insists the Complaint's allegations create a "mosaic of discrimination" upon which a jury could find he was subjected to a "hostile and abusive" "work environment." (Resp. 19 (quotation marks omitted); see also *id.* (requesting that the Court defer ruling on his hostile work environment claim "until further discovery is conducted and Defendant seeks summary judgment")). Moreover, Plaintiff's failure to respond to Defendant's tangible employment action contentions evinces his acknowledgement he is not pursuing that theory. (*Compare* Mot. 14–17, with Resp. 16–19). Even if Plaintiff did not clarify his claim — and even if he had responded to Defendant's arguments — Plaintiff fails to plausibly allege a tangible employment action that would support his disparate treatment claim based on his race and national origin. Plaintiff alleges no employment-related consequences — save for the vague allegation "working conditions were so intolerable" (Compl. ¶ 73) — that he had to endure as a result of Jimenez's conduct directed at Plaintiff's race and national origin (see *id.* ¶ 34 (alleging Jimenez "did not hold any managerial or supervisory position")); see also *Hyde v. K.B. Home, Inc.*, 355 F. App'x 266, 271 (11th Cir. 2009) ("A tangible employment action is a significant hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." (alteration adopted; quotation marks and citations omitted))).
- 14 Plaintiff maintains "he was subjected to a series of discriminatory actions by ... Benedetti ..., including verbal harassment, unwarranted personal criticism[,] and concerted actions to undermine his ability to meet performance standards." (Resp. 16 (alterations added)). Plaintiff does not include any facts in his Complaint, nor does he provide any detail of Benedetti's conduct, supporting his assertion Benedetti engaged in discrimination against him based upon his race and national

origin. The only allegations Plaintiff cites in his Response are paragraphs 60 through 62, and 73 (see *id.* 16–19); yet, those allegations either discuss Jimenez's conduct (see Compl. ¶¶ 60–62) or contain undeveloped allegations Benedetti engaged in discrimination and created a hostile work environment (see *id.* ¶ 73).

- 15 The Response requests the Court impute Plaintiff's separate allegations of disability discrimination and retaliation to his Title VII hostile work environment claim. (See Resp. 18 (chiding Defendant for ignoring the “totality of the evidence and the cumulative impact of the discrimination and harassment on Plaintiff's physical and mental health, which were described in detail in the medical reports that [he] submitted during the administrative proceedings and in support of his disability retirement application.” (alteration added))). As Defendant correctly notes, “Title VII does not prohibit discrimination based in disability.” (Reply 9); see also *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1823 (2020) (Kavanaugh, J., dissenting) (“Title VII d[oes] not prohibit other forms of employment discrimination, such as ... disability discrimination[.]” (alterations added)); *Ruedas-Rojas v. McAleenan*, No. 19-cv-22522, 2020 WL 6143652, at *7 (S.D. Fla. June 1, 2020) (recognizing that disability discrimination claims are not cognizable under Title VII).

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Red Rock Sourcing LLC v. JGX LLC

United States District Court, S.D. New York. | March 22, 2024 | Slip Copy | 2024 WL 1243325

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Outline

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RED ROCK SOURCING LLC and
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v.

JGX LLC, et al., Defendants.

21 Civ. 1054 (JPC)

|

Signed March 22, 2024

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OPINION AND ORDER

JOHN P. CRONAN, United States District Judge:

*1 This case arises out of an alleged counterfeiting scheme related to the manufacture and distribution of hand sanitizer at the height of the coronavirus pandemic. In their twice amended, sixteen-Count, 589-paragraph Complaint, Plaintiffs Red Rock Sourcing (“Red Rock”) and Coronado Distributing LLC (“Coronado”) proceed against fifteen defendants, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961 *et seq.*; trademark infringement, contributory trademark infringement, unfair competition and false designation of origin, and false advertising under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*; deceptive business practices and civil conspiracy to engage in deceptive business practices under New York General Business Law (“N.Y. G.B.L.”)

Section 349; trademark infringement, tortious interference with prospective economic advantage, unfair competition, unjust enrichment, and negligence under New York common law; dilution by tarnishment under N.Y. G.B.L. Section 360-1, fraudulent conveyance under New York Debtor and Creditor Law (“N.Y. D.C.L.”) Sections 273 and 274; and alter ego liability.

Before the Court are motions filed by four groups of Defendants seeking dismissal of some or all of the Counts in the Second Amended Complaint (also referred to herein as the “Complaint”). The first group includes JGX, LLC (“JGX”), Isaac Import, Inc. (“Isaac Import”), Jack Grazi (“Grazi”), Dib Jaradeh, and Nouri Jaradeh, collectively referred to as the JGX Defendants. See Dkt. 342 (“JGX Defendants’ Motion”). The second group includes Don Ghermezian, as well as a subgroup of Defendants—collectively referred to as the Worldwide Defendants—consisting of Triple Five Worldwide, Isaac Saba, Eliezer Berkowitz (“Berkowitz”), David Ghermezian, and Yonah Ghermezian. See Dkt. 339 (“Worldwide Defendants’ Motion”). The third group includes Community Federal Savings Bank (“CFSB”) and Syd Ghermezian, together referred to as the Banking Defendants. See Dkt. 346 (“Banking Defendants’ Motion”). Plaintiffs assert the first twelve of their sixteen Counts against these three groups of Defendants, as well as against a Defendant that has yet to answer the Complaint, Liberty International Distributors, LLC (“Liberty”), and refers to these fourteen Defendants collectively as the Counterfeiting Defendants. And certain of the Counterfeiting Defendants also are named in the last four Counts of the Complaint. In a fourth motion to dismiss, Nader Ghermezian separately argues for dismissal of the two Counts brought against him. See Dkt. 333 (“Nader Ghermezian’s Motion”).

For the reasons provided below, the Court grants in full the motions brought by the Banking Defendants and Nader, and grants in part the motions brought by the JGX Defendants and Don Ghermezian and the Worldwide Defendants. As a result of these rulings, Count One (RICO) is dismissed as to all the Counterfeiting Defendants aside from Liberty, although Plaintiffs are put on notice of the Court’s intent to *sua sponte* dismiss that Count as to Liberty. In addition, the following Counts are dismissed with prejudice in their entirety: Counts Five (false advertising under the Lanham Act), Six (deceptive business practices), Eight (tortious interference with economic prospects), Ten (unjust enrichment), Twelve (negligence and gross negligence), Thirteen (fraudulent conveyance), Fourteen (alter ego liability as to Don, Syd, and

Nader Ghermezian with respect to Triple Five Worldwide), Fifteen (alter ego liability as to Grazi, Nouri Jaradeh, and Dib Jaradeh with respect to JGX), and Sixteen (alter ego liability as to Dib Jaradeh with respect to Isaac Import). The Court dismisses CFSB, Syd Ghermezian, Nader Ghermezian, and Isaac Import as Defendants in this matter. Conversely, the following Counts—which implicate the liability of JGX, Grazi, Dib Jaradeh, Nouri Jaradeh, Don Ghermezian, the Worldwide Defendants, and Liberty—survive dismissal: Count Two (trademark infringement under the Lanham Act), Count Three (contributory trademark infringement under the Lanham Act), Count Four (false designation of origin under the Lanham Act), Count Seven (trademark infringement under New York common law), Count Nine (unfair competition under New York common law), and Count Eleven (dilution by tarnishment).

I. Background

A. Facts¹

1. The Development of URBĀNE Brand Hand Sanitizer

*2 Plaintiffs Coronado and Red Rock are, respectively, Colorado-and Nevada-based limited liability companies engaged in the manufacture, marketing, sale, and distribution of bath and body products—often in collaboration. SAC ¶¶ 16-17, 33-34. Coronado is the registered holder of the following trademarks:

1. The “URBĀNE BATH & BODY” word mark (Registration No. 6,068,164), which was registered in connection with “Fragranced body care preparations, namely, shower gels, bath gel, body scrubs; Bath bombs; Bath salts, not for medical purposes; Bath and shower gels and salts not for medical purposes” on June 2, 2020, with a first use date of August 1, 2019, *id.* ¶ 35, Exh. A;
2. The “URBANE BATH & BODY” word mark (Registration No. 6,295,360), which was registered in connection with “Hand-sanitizing preparations” on March 16, 2021, with a first use date of at least as early as April 2020, *id.* ¶ 37, Exh. B; and
3. The related design mark (Registration No. 6,348,225), shown below, which was registered on May 11, 2021, in connection with “Hand-sanitizing preparations,” with a first use date of at least as early as April 2020, and in connection with “Fragranced body care preparations, namely, shower gels, bath gel, body scrubs; Bath bombs;

Bath salts, not for medical purposes; Bath and shower gels and salts not for medical purposes,” with a first use date of August 1, 2019, *id.* ¶ 38, Exh. C.



The URBĀNE Marks, together with the alleged common law rights and goodwill resulting from Coronado's use of these marks, comprise the “URBĀNE Brand.” *Id.* ¶ 42

In early 2020, Plaintiffs started developing hand sanitizer under the URBĀNE Brand, having determined that Red Rock would manage the product's development, sales, and distribution. *Id.* ¶¶ 44-50, 53-55. In Plaintiffs' view, their hand sanitizer was unique because “(1) it utilized a high-quality formula that was equally effective without the associated foul medicinal-smell of typical sanitizer; (2) it was ‘Made in America,’ which particularly appealed to U.S. consumers and retailers; and (3) a large portion of the product was packaged in a unique credit card-sized sprayer that was prized by consumers and retailers alike.” *Id.* ¶ 63. And because the URBĀNE Brand was already established through Coronado's brand-development and marketing efforts, Plaintiffs were able to bring their hand sanitizer product to market quickly at the onset of the COVID-19 pandemic. *Id.* ¶¶ 56-57, 60-61.

In April 2020, Plaintiffs began selling the product to Rigz, an Arizona-based distributor with whom Red Rock had developed a business relationship before the pandemic. *Id.* ¶¶ 72, 74-75, 77. These initial sales were robust. *Id.* ¶ 76. Indeed, in the first three months of sales, Red Rock sold more than \$2,000,000 worth of URBĀNE hand sanitizer to Rigz. *Id.* ¶ 77. Rigz, in turn, “successfully placed URBĀNE hand sanitizer in several national businesses, including Pilot Travel Centers (“Pilot”) and Love’s Travel Stops & Country Stores (“Love’s”), which had over 2,000 combined stores located across the country and were among the small number of essential businesses that remained open at the time.” *Id.* ¶ 78 (italics and bold removed). After this initial success, Rigz, through its principals Jarrett Portz and Anthony Carelli, began working with other vendors to produce counterfeit URBĀNE hand sanitizer. *Id.* ¶¶ 85-89.

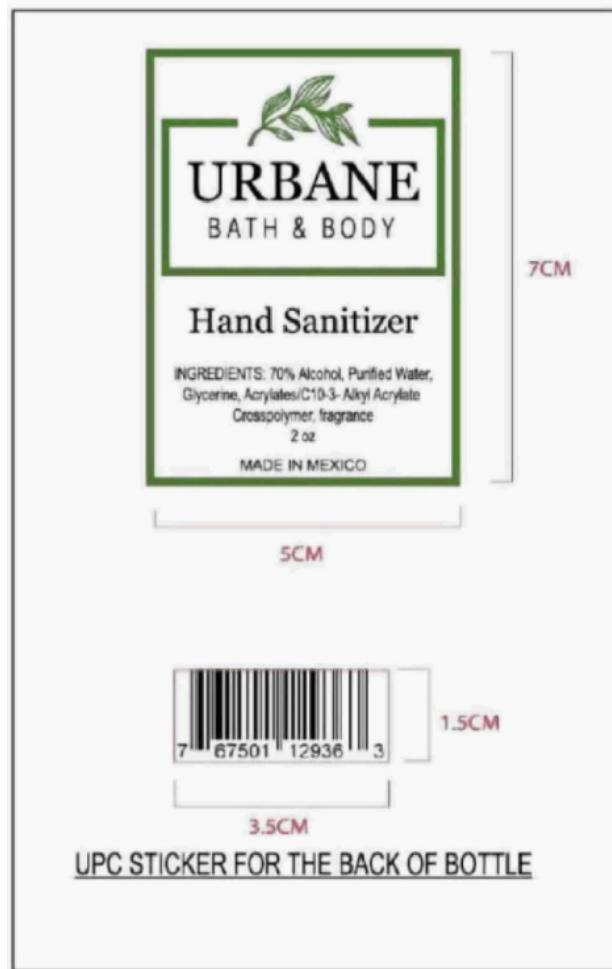
2. JGX and Isaac Import's Involvement in the Counterfeiting Scheme

*3 The JGX Defendants were the first to join Rigz in this scheme. *See id.* ¶¶ 90-91. Defendant JGX, an apparel company in New York, is owned by Defendant Grazi and Jaradeh LLC, whose managing members include Defendants Dib Jaradeh and Nouri Jaradeh. *Id.* ¶¶ 18, 92, 570-574. In addition, Dib Jaradeh is the sole shareholder and director of Defendant Isaac Import, a New York corporation. *Id.* ¶¶ 21, 95. Plaintiffs aver that JGX operates out of the Isaac Import office, fails to observe required corporate formalities, and “exists solely as a sham vehicle” to shield Grazi, Dib Jaradeh, and Nouri Jaradeh from liability. *Id.* ¶¶ 575-578. Plaintiffs also claim that Isaac Import fails to observe required corporate formalities and “exists solely as a sham vehicle which [Dib Jaradeh] uses in bad faith to shield himself from liability.” *Id.* ¶¶ 584-585.

In late April 2020, Carelli informed Grazi of Rigz's hand sanitizer needs, *id.* ¶ 90, and on April 23, 2020, Carelli sent Grazi an email with an image of the URBANE label, *id.* ¶ 91, Exh. F (April 23, 2020 email from Carelli to Grazi). As alleged, Carelli intended for JGX to produce hand sanitizer bearing that label. *Id.* ¶ 91; *see also id.* ¶¶ 93, 97. Despite JGX's “experience with and history of registering trademarks,” *id.* ¶ 99, JGX never contacted Coronado to confirm whether Rigz had the authority to contract for the manufacture, distribution, and sale of URBANE hand sanitizer, *id.* ¶ 98.

On April 27, 2020, Rigz issued an initial purchase order to JGX for over 300,000 bottles of hand sanitizer, which correspondence Grazi immediately forwarded to Dib Jaradeh. *Id.* ¶¶ 94-95; *see also* Dkt. 341, Exh. 2 (April 27, 2020 email exchange between Carelli and Grazi with purchase order attached). Grazi, Dib Jaradeh, and Carelli continued their discussions, including on an April 30, 2020 phone call, to finalize details related to the production and sale of the counterfeit URBANE hand sanitizers. *Id.* ¶ 96. Also on April 30, 2020, Dib Jaradeh sent Grazi proofs of two options for URBANE labels, as shown below, which Dib Jaradeh had himself created based on the image that Grazi had provided the week before:

OPTION A



OPTION B



Id. ¶ 105, Exh. G (April 30, 2020 email from Dib Jaradeh to Grazi). As shown in the above images, these counterfeit labels represented that the product was “Made in Mexico,” although

authentic URBĀNE was made only in the United States, *see id.* ¶ 63.

In early May, Grazi began soliciting the manufacture of counterfeit hand sanitizer, circulating the forged URBĀNE label for use to that end. *Id.* ¶ 110, Exh. H (May 5, 2020 email from Grazi). Nouri Jaradeh conducted research on Coronado and communicated his findings to Grazi in May 2020. *Id.* ¶ 103; *see also* Dkt. 341, Exh. 4 (May 26, 2020 email from Nouri Jaradeh to Grazi with “Coronado Distribution Company, Inc.” in the subject line and “look them up” in the email body). Despite knowing at least by then that Coronado was the registered owner of the URBĀNE marks, JGX persisted in furthering the counterfeiting scheme. SAC ¶ 104.

3. Liberty's Involvement in the Counterfeiting Scheme

Meanwhile, soon after it fulfilled Rigz's first order in late April 2020, JGX partnered with Defendant Liberty as a manufacturer, hoping to leverage Liberty's manufacturing contacts in Mexico. *Id.* ¶ 117. Formed in April 2020, Liberty had no significant prior experience in hand sanitizer production. *Id.* ¶ 116. On April 30, 2020, Grazi emailed Liberty's principal, David Amoyelle, the forged URBĀNE label that Dib Jaradeh had created. *Id.* ¶ 119, Exh. I (April 30, 2020 email from Grazi to Amoyelle). Liberty reached out to a manufacturer in Mexico, Tropicosméticos S.A. de C.V. (“Trop”), regarding the production and bottling of hand sanitizer with the forged URBĀNE label, and in late April or early May 2020, Liberty and JGX imported the first shipment of the counterfeit product into the United States. *Id.* ¶¶ 122-124. JGX ultimately sidelined Liberty and instead partnered with members of the Ghermezian family for their manufacturing needs. *Id.* ¶ 125.

4. The Ghermezian Family's Involvement in the Counterfeiting Scheme

*4 As alleged, multiple generations of the Ghermezian family were involved in the counterfeiting scheme. *Id.* ¶ 128. Defendant Nader Ghermezian, who appears to be the most senior member involved, is an uncle of Defendants Don and Syd Ghermezian, who are brothers. *Id.* ¶ 129. Defendants Yonah and David Ghermezian are cousins of Don and Syd. *Id.* Defendant Isaac Saba is married to Orly Ghermezian Saba, Don's daughter. *Id.* Finally, Defendant Berkowitz is a family acquaintance. *Id.* ¶ 131.

As investors in retail shopping malls including the Mall of America, American Dream, and the West Edmonton Mall,

the Ghermezians, as Plaintiffs aver, faced acute financial pressures at the onset of the pandemic due to the widespread lockdowns imposed during that period. *Id.* ¶ 134. Don Ghermezian thus contacted GHA Design Studios (“GHA”) on May 1, 2020, inquiring about hand sanitizer brands and designs. *Id.* ¶ 135. GHA provided Don Ghermezian and Berkowitz with a presentation of proposals for brand names and packaging designs, which included a credit-card style dispenser and a carabiner resembling the packaging used for URBĀNE hand sanitizer. *Id.* ¶¶ 137-138. On May 4, 2020, Don Ghermezian held a meeting in his home, at which he presented the GHA presentation to other members of the Ghermezian family, including David Ghermezian, Yonah Ghermezian, Isaac Saba, and Orly Ghermezian Saba, as well as to Berkowitz. *Id.* ¶¶ 130-131 139. Plaintiffs allege that video footage taken by Isaac Saba at that meeting shows bottles of Britz hand sanitizer, which Plaintiffs describe as Trop's “house brand,” on Don Ghermezian's table. *Id.* ¶ 140.

After this meeting, David Ghermezian, Yonah Ghermezian, Isaac Saba, Don Ghermezian, and Berkowitz began researching competitors in the hand sanitizer market, including URBĀNE, and directed others to do the same. *Id.* ¶¶ 143-144. That same day, Isaac Saba sent Don Ghermezian a sample design for hand sanitizer packaged in a credit-card style dispenser, and Don Ghermezian responded to Saba and Berkowitz that he wanted to mirror the design. *Id.* ¶¶ 145-146; *see also* Dkt. 337, Exh. 2 (copy of May 4, 2020 email exchange). At some time before May 6, 2020, Grazi and Berkowitz (“and/or” David Ghermezian) convened, agreeing to work together to obtain and sell hand sanitizer. SAC ¶ 148.

This collaboration entailed the members of the Ghermezian family coordinating the manufacture of the counterfeit URBĀNE hand sanitizer for the JGX Defendants, and acting, as portrayed by Plaintiffs, in frenzied urgency. *Id.* ¶¶ 147-156, 257. On May 6, 2020, Grazi sent Berkowitz the counterfeit URBĀNE label for use on 2-ounce, 8-ounce, and 16-ounce bottles of hand sanitizer. *Id.* ¶ 149, Exh. J. That same day, JGX issued purchase orders, which had been created by Dib Jaradeh and sent by Grazi to Berkowitz, for over 660,000 bottles of hand sanitizer, nearly 600,000 of which were to be shipped to JGX in Arizona. *Id.* ¶¶ 150-152. The next day, Berkowitz forwarded Grazi's email to David and Yonah Ghermezian. *Id.* ¶ 154. Also on May 7, 2020, Michael Oseen, who is described as the “Senior Vice President and/or Chief Financial Officer of the West Edmonton Mall,” and Alan Glazer, In-House Counsel for American Dream, conferred with Berkowitz, Don Ghermezian, David Ghermezian, and

Syd Ghermezian, and, as reflected in an email sent by Oseen after that convening, the group outlined plans to source and sell hand sanitizer globally. *Id.* ¶ 158, Exh. K (May 7, 2020 email from Oseen).

*5 That email refers to the putative creation of a “new Mexican domiciled and incorporated company … to operate the key aspects of the [hand sanitizer] business,” specifically the sourcing and distribution of the hand sanitizer. *Id.*, Exh. K at 2. As further reflected in the May 7, 2020 email, Defendant Triple Five Worldwide LLC was selected as the entity that the proposed Mexico-based company would use “to facilitate US sales” of the counterfeit URBĀNE hand sanitizer. *Id.* Plaintiffs allege that Triple Five Worldwide was to be made a subsidiary of that Mexico-based company to “further insulate Don Ghermezian, Syd Ghermezian, and Nader Ghermezian from liability,” but ultimately that Mexican company was never formed. *Id.* ¶ 554. Instead, Triple Five Worldwide operated as the direct corporate conduit for the counterfeit hand sanitizer scheme. *Id.* ¶ 157. Plaintiffs allege upon information and belief that Triple Five Worldwide fails to observe required corporate formalities, and “exists solely as a sham vehicle,” which Don, Syd, and Nader Ghermezian “are using in bad faith to shield themselves from liability.” *Id.* ¶¶ 562, 564.

While Triple Five Worldwide was originally founded in June 2000, it had “no activity or assets” as of May 2020. *Id.* ¶¶ 159, 162. Its original managers were Don, Nader, and Syd Ghermezian, but those individuals were replaced as managers with Berkowitz, Isaac Saba, and Orly Ghermezian Saba on or about May 7, 2020. *Id.* ¶¶ 163-165, Exhs. L, M. Glazer effectuated this change in leadership at the direction of the “senior members of the Ghermezian family,” *id.* ¶ 171, which includes Don, Syd, and David Ghermezian, along with Berkowitz, *id.* ¶ 158. Despite being formally replaced as managers, Don, Nader, and Syd Ghermezian remained *de facto* in charge of Triple Five Worldwide. *Id.* ¶¶ 177-178. As alleged, Isaac Saba and Orly Ghermezian Saba were not even aware that they were instated as managers of Triple Five Worldwide. *Id.* ¶¶ 166-167.

Rather, Don Ghermezian remained “consistently and intimately involved” with Triple Five Worldwide’s manufacturing of the counterfeit hand sanitizer, micromanaging all aspects of the business. *Id.* ¶¶ 180-197, 201-202. For instance, on at least three occasions, May 8, May 11, and May 18, 2020, Don Ghermezian directed wire payments for the counterfeit hand sanitizer to SoFlo

Urban Team, LLC, described by Plaintiffs as a corporate entity through which factories based in Mexico received payment for producing counterfeit URBĀNE hand sanitizer. *Id.* ¶¶ 183-195, 197, 251, n.2. And more broadly, Don Ghermezian “directed the movement of [the] counterfeit goods,” “communicated directly with potential customers to solicit sales,” and “spoke regularly with David Ghermezian and Berkowitz about branding, sourcing, importing, and sales efforts.” *Id.* ¶ 181.

Meanwhile, Berkowitz, Isaac Saba, David Ghermezian, and Yonah Ghermezian were the members regularly in contact with Grazi. *Id.* ¶ 257. Indeed, Grazi—desperate to fill Rigz's orders for hundreds of thousands of bottles of URBĀNE hand sanitizer and under “relentless pressure” from Portz and Carelli—directed his production-related inquiries to Berkowitz, Isaac Saba, and David Ghermezian, given their direct relationship with the factories manufacturing the counterfeit product. *Id.* ¶¶ 265-272. Yonah Ghermezian created the invoices that Triple Five Worldwide issued to JGX. *Id.* ¶ 258.

As early as May 8, 2020, counterfeit hand sanitizer bearing the forged URBĀNE label was being mass produced in Mexico. *Id.* ¶ 260. While this counterfeit hand sanitizer listed the same ingredients used in non-counterfeit URBĀNE hand sanitizer, the counterfeit product, “upon information belief,” did not contain those same ingredients. *Id.* ¶¶ 262-263. The product's label further showed Liberty as the distributor, when, according to Plaintiffs, Triple Five Worldwide was the actual distributor. *Id.* ¶ 264.

After setting up Triple Five Worldwide as the primary business entity to distribute the counterfeit hand sanitizer, Don Ghermezian, Syd Ghermezian, David Ghermezian, and Berkowitz began using Defendant CFSB as Triple Five Worldwide's banking partner. *Id.* ¶¶ 211-212. CFSB was founded in 2001 “as a vehicle to, *inter alia*, support the Ghermezian family businesses.” *Id.* ¶ 216. It is “wholly owned and controlled by members of the Ghermezian family,” *id.* ¶ 219, most notably Syd Ghermezian, who is the bank's Chairman and CEO, *id.* ¶ 215. “CFSB allowed Triple Five Worldwide to open and/or operate an account without providing necessary corporate documentation,” *id.* ¶ 232, granting Syd and Don Ghermezian direct access to the Triple Five Worldwide account, even though they were not at that point listed as either owners or managers of the company, *id.* ¶ 238. Triple Five Worldwide used its CFSB account to make transactions in connection with the counterfeit

hand sanitizer, including to the JGX Defendants, *id.* ¶¶ 250-251. Although several of those transactions exceeded \$10,000 (and thus purportedly triggered certain reporting requirements), Syd Ghermezian directed CFSB not to report these transactions. *Id.* ¶¶ 253-255.

*6 Ultimately, JGX delivered at least 200,000 bottles of counterfeit URBĀNE hand sanitizer to Rigz, which sold the products to third party merchants, including Pilot and Love's, for sale to the public. *Id.* ¶¶ 277-278, 280, 289-290. Triple Five Worldwide further sold at least 50,000 bottles of hand sanitizer bearing the forged URBĀNE label to a third party, Benzino (Benjamin) Tyberg. *Id.* ¶¶ 258, 286, Exh. R. And on or about May 26, 2020, Triple Five Worldwide received a wire transfer from Tyberg for \$115,900. *Id.* ¶ 287. Moreover, Plaintiffs assert upon information and belief that “the counterfeit URBĀNE hand sanitizer produced in Mexico was still available to consumers at nationwide chains, including *Pilot*, until as late as or around September 2020.” *Id.* ¶ 355.

Monetary transactions “in furtherance of the counterfeit sanitizer scheme” between JGX and Rigz extended to as late as June 2020, *id.* ¶¶ 413-414, and those between JGX and Triple Worldwide extended to as late as August 2020, *id.* ¶ 411.

5. The FDA Warns Against the Use of URBĀNE Brand Hand Sanitizer

In early July 2020, the United States Food and Drug Administration (the “FDA”) intercepted Trop’s attempted shipment of counterfeit URBĀNE hand sanitizer from Mexico to the United States. *Id.* ¶¶ 299-300. According to Plaintiffs, the FDA flagged all shipments from Trop because the company “had allegedly used methanol in hand sanitizer formulas for other brands it manufactured.” *Id.* ¶ 301. As a result, the FDA issued an order that placed even “Urbane Bath and Body Hand Sanitizer” (identifying Trop as the product’s manufacturer and Liberty as the product’s distributor) on its list of “hand sanitizers consumers should not use,” and further added the product to its “import alert” to block the product’s importation into the United States. *Id.* ¶¶ 303-304.² In connection with this order, the FDA warned consumers to “be vigilant about which sanitizers they use,” and expressed “concern[] about the potential serious risks of alcohol-based hand sanitizers containing methanol,” as they pose a “serious threat.” *Id.* ¶ 310. Plaintiffs assert that the FDA order warned that “[s]ubstantial methanol exposure can result in nausea,

vomiting, headache, blurred vision, permanent blindness, seizures, coma, permanent damage to the nervous system or death,” with “young children who accidentally ingest these products and adolescents and adults who drink these products as an alcohol (ethanol) substitute” as the individuals most at risk. *Id.* ¶ 311.

6. Aftermath of the FDA Order

Plaintiffs’ authentic URBĀNE hand sanitizer formula has never contained methanol. *Id.* ¶ 302. Nevertheless, explain Plaintiffs, the URBĀNE Brand “is, and will continue to be, irreparably tarnished by its association” with the warnings issued by the FDA, after which “[s]ales and consumer demand for hand sanitizer under the URBĀNE brand plummeted precipitously.” *Id.* ¶¶ 315-316. Indeed, as a direct result of the FDA order, several businesses called off their purchases of URBĀNE hand sanitizer, including national retailers like Rite Aid and Tractor Supply. *Id.* ¶¶ 317-346.

*7 Communications (which Plaintiffs cast as demonstrative of the Defendants’ “[c]ollective [c]allousness,” *id.* at 49) between certain Defendants persisted well after the issuance of the FDA order. For example, in August 2020, some unspecified “harm [was] done to JGX’s business relationship with *Ross Stores*” in connection with the FDA order, and Don Ghermezian thus “paid or approved the payment of \$100,000 to Grazi as compensation.” *Id.* ¶¶ 365-367. In October 2020, David and Syd Ghermezian exchanged correspondence with respect to a \$35,000 payment from SoFlo Urban Team to Triple Five Worldwide, with the wire payment to be received by CFSB, allegedly “concerning issues pertaining to the counterfeit hand sanitizer that Triple Five Worldwide had ordered and sought to manufacture.” *Id.* ¶ 420; Dkt. 337, Exh. 7 (October 2020 correspondence with attached communication from SoFlo Urban Team referring to a refund of a \$35,000 “for which no product was received”). On or around March 31, 2021, David Ghermezian tried to sell the counterfeit URBĀNE hand sanitizer to Tyberg, stating: “I’m [sic] still have lots and lots of stock even though the [sic] said it was false accusations about the methanol. Lmk [Let me know] if you need I’m glad to give to you a cheap price.” SAC ¶¶ 373-374, *see also* Dkt. 337, Exh. 5 (excerpts from March 21, 2021 WhatsApp chat). And finally, in June 2021, David Ghermezian and Isaac Saba discussed the existence of thousands of units of counterfeit URBĀNE sanitizer “[s]itting in American Dream storage,” SAC ¶ 375, and David Ghermezian further relayed to Isaac Saba that he had spoken to Grazi about the instant lawsuit, *id.* ¶¶ 376-378;

see also Dkt. 337 at Exh. 6 (excerpts from June 9, 2021 WhatsApp exchange).

B. Procedural History

On August 3, 2020, Plaintiffs and Rigz entered into a settlement agreement, under which Plaintiffs “release[d] and discharge[d] Rigz *et al.* and their past or present ... customers ... from any and all actions, claims, demands ... and causes of action from the beginning of time to the date of this Settlement Agreement ... arising under trademark infringement, counterfeiting, or theft of intellectual property.” See Dkt. 189.

Plaintiffs commenced this action on February 5, 2021, then proceeding against only JGX and Liberty under RICO, the Lanham Act, and New York common law in their initial eleven-Count Complaint. Dkt. 1. JGX answered and asserted crossclaims for equitable indemnity and equitable contribution against Liberty. Dkt. 22. Liberty failed to respond, and so, upon Plaintiffs’ request, Dkt. 19, the Clerk of Court entered a certificate of default against Liberty on March 5, 2021, Dkt. 20.

On June 11, 2021, Plaintiffs moved for default judgment against Liberty, Dkt. 43, and on July 13, 2021, the Court held a hearing attended by counsel for Plaintiffs and for JGX, Dkt. 51 (July 13, 2021 hearing transcript). David Amoyelle also appeared at the hearing as Liberty’s corporate representative, prompting the Court to adjourn the hearing on Plaintiffs’ default judgment motion by two weeks to allow Liberty additional time to seek counsel. *Id.* at 19:19-20:14. Additionally, the Court directed JGX to provide, in advance of the scheduled hearing, its views as to whether a default judgment should be entered against Liberty as to liability. *Id.* 13:9-15. On July 23, 2021, JGX requested that the Court stay its decision on Plaintiffs’ default judgment motion against Liberty pending a determination of the claims as to JGX. Dkt. 53. On July 27, 2021, the Court deferred ruling on the motion, and ordered Plaintiffs to provide a status update on discussions with Liberty, as the parties appeared to be working towards a potential resolution. *See* Dkts. 57, 61, 72. In light of Plaintiffs’ representation that they had reached a tentative agreement with Liberty that required several additional months to finalize, *see* Dkt. 72, on November 4, 2021, the Court denied Plaintiffs’ default judgment motion without prejudice to renewal. Dkt. 83 (November 4, 2021 hearing transcript) at 4:1-21.

Meanwhile, in April 2021, the Court had entered a Case Management Plan, providing for the close of all discovery by September 20, 2021. Dkt. 28. Discovery ensued, with the parties seeking multiple extensions of the discovery deadlines and raising a number of disputes requiring the Court’s intervention along the way. *See, e.g.*, Dkt. 54 (parties’ joint request made in July 2021 for sixty-day extension of discovery deadlines); Dkt. 59 (joint extension request made in September 2021); Dkt. 94 (joint extension request made in December 2021); *see also* Dkt. 63 (Plaintiffs’ request for pre-motion discovery conference regarding subpoenas to Orly Ghermezian Saba and Isaac Saba); Dkt. 68 (Plaintiffs’ motion to compel compliance with various subpoenas, including subpoenas served on Rigz, Tyberg, and David Ghermezian); Dkt. 79 (Plaintiffs’ motion to compel David Ghermezian to comply with a document subpoena); Dkt. 105 (Plaintiffs’ request for a pre-motion discovery conference again regarding subpoenas to Orly Ghermezian Saba and Isaac Saba).

*8 After conducting this extensive discovery, Plaintiffs moved in December 2021 for leave to amend their Complaint to add seven new Defendants (Triple Five Worldwide, Isaac Import, Grazi, Isaac Saba, Berkowitz, David Ghermezian, and Yonah Ghermezian) and a negligence claim. *See* Dkt. 102-1 (Plaintiffs’ opening memorandum in support of motion for leave to amend) at 3 (“Through the documents and testimony obtained in discovery, Plaintiffs have learned that entities and individuals beyond the Initial Defendants also share responsibility for the destruction of their URBĀNE Brand.”); 102-4 (proposed First Amended Complaint). The Court granted Plaintiffs’ motion at a conference held on January 27, 2022. Dkt. 118 at 21:11-12. Observing that the opposition had raised “a number of potentially meritorious arguments regarding the allegations in the proposed amended complaint,” *id.* at 21:14-16, the Court afforded Plaintiffs the opportunity to file a revised version of their proposed pleading, *id.* at 21:17-20. Plaintiffs filed their First Amended Complaint on February 10, 2022. Dkt. 122.

On February 24, 2022, JGX, Grazi, and Isaac Import requested leave to file a motion to dismiss, previewing their intent to argue that Plaintiffs failed to sufficiently plead their RICO, tortious interference, and unjust enrichment claims. Dkt. 141. Specifically, they argued that Plaintiffs had failed to state a RICO claim by not alleging two predicates for each Defendant and not alleging continuity; they argued for dismissal of Plaintiffs’ tortious interference claim based on the absence of any allegations that Defendants were aware

of Red Rock's contracts with various third parties; and they attacked the unjust enrichment claim because of the absence of allegations of a relationship causing reliance or inducement between Plaintiffs and Defendants. *Id.* David Ghermezian, Yonah Ghermezian, Berkowitz, and Triple Five Worldwide (*i.e.*, the Worldwide Defendants) also requested such leave on March 2, 2022, explaining that many of the arguments raised by JGX, Grazi, and Isaac Import applied with even greater force to them, and attacking the sufficiency of Plaintiffs' various trademark infringement claims for, among other reasons, Plaintiffs' failure to allege any infringing conduct after the first registration date of the URBĀNE mark. Dkt. 147. Plaintiffs responded to each of these pre-motion letters. Dkts. 146, 149. In the meantime, discovery continued, and so, too, did the parties' contentious discovery disputes, which included multiple requests by Plaintiffs for the imposition of sanctions against certain Defendants. *See, e.g.*, Dkt. 123 (February 11, 2022 joint letter from Plaintiffs and JGX describing a dispute regarding JGX's document production); Dkt. 150 (March 7, 2022 request from Plaintiffs for a pre-motion discovery conference in connection with the alleged spoliation of evidence by David Ghermezian, Berkowitz, and Triple Five Worldwide and a potential request for sanctions); Dkt. 167 (April 15, 2022 joint letter from Plaintiffs, David Ghermezian, Berkowitz, and Triple Five Worldwide describing a dispute regarding Defendants' alleged spoliation of evidence); Dkt. 225 (Plaintiffs' July 26, 2022 renewed request for sanctions against Triple Five Worldwide).

On April 14, 2022, Plaintiffs notified the Court of their intent to seek leave to file a Second Amended Complaint and made an unopposed request for the Court to stay Defendants' requests for a briefing schedule on their anticipated motions to dismiss pending the Court's decision on Plaintiffs' request to amend. Dkts. 166, 169. On April 20, 2022, after the Court granted Plaintiffs' stay request, Dkt. 170, Plaintiffs moved for leave to amend, attaching their proposed Second Amended Complaint. Dkt. 185. Defendants filed opposition briefs on June 3, 2022, Dkts. 198, 201, and Plaintiffs replied on June 10, 2022, Dkt. 203. Then, in November 2022, Plaintiffs requested leave to revise and refile their proposed Second Amended Complaint to make yet another addition—this time, “to incorporate newly adduced evidence stemming from defendants' discovery misconduct” in connection with “Don Ghermezian's management of the hand sanitizer business, the disregard for the corporate form across Triple Five entities, [and] the involvement of CFSB in Triple Five Worldwide's operations.” Dkt. 245 at 1. The Court granted the request

and provided Defendants with an additional opportunity to oppose amendment based on that revised version. Dkt. 249 at 3. Plaintiffs filed their revised proposed Second Amended Complaint on January 3, 2023, Dkt. 263, and Defendants filed replies addressing that proposed amendment on January 6, 2023, Dkts. 264-1, 266.³

*9 Among other amendments, Plaintiffs sought to add as defendants Don Ghermezian, Syd Ghermezian, Nader Ghermezian, CFSB, Dib Jaradeh, and Nouri Jaradeh, and further to add claims for fraudulent conveyance and of alter ego/veil piercing. *See* Dkt. 263. The Court authorized those proposed amendments on May 31, 2023. *See Red Rock Sourcing LLC v. JGX, LLC*, No. 21 Civ. 1054 (JPC), 2023 WL 3736442, at *8-12 (S.D.N.Y. May 31, 2023). Although Plaintiffs had also sought to add Pilot and Love's as defendants, the Court denied that portion of Plaintiffs' motion. *Id.* at *12-13. In its decision, the Court once again instructed Plaintiffs, when preparing the final version of their Second Amended Complaint, to consider and address the futility arguments that Defendants raised in opposing Plaintiffs' amendments. *Id.* at *14. Indeed, in addition to urging the futility of many of the claims, Defendants had more broadly attacked the allegations as conclusory recitations lacking supporting factual bases and lacking specification as to each Defendant's participation in the alleged counterfeiting scheme. *See generally* Dkts. 198, 201. The Court further cautioned, “Absent extraordinary circumstances, this will be Plaintiffs' final opportunity to amend their Complaint.” *Red Rock Sourcing*, 2023 WL 3736442, at *14. Also on May 31, 2023, the undersigned referred the case to the Honorable James L. Cott, United States Magistrate Judge, for general pretrial supervision. Dkt. 309.

On June 14, 2023, Plaintiffs filed their Second Amended Complaint, which, as earlier mentioned, includes sixteen Counts against various subsets of the fifteen Defendants. *See generally* SAC. Against the Counterfeiting Defendants, Plaintiffs bring in Count One a substantive civil RICO claim and, in the alternative, a civil RICO conspiracy claim. *Id.* ¶¶ 392-448. Against these same Defendants, Plaintiffs also bring four Counts under the Lanham Act, alleging: infringement of a registered mark (Count Two), *id.* ¶¶ 449-460; contributory trademark infringement (Count Three), *id.* ¶¶ 461-467; unfair competition and false designation (Count Four), *id.* ¶¶ 468-472; and false advertising (Count Five), *id.* ¶¶ 473-480.⁴ Finally, Plaintiffs bring seven causes of action under New York law once again against the Counterfeiting Defendants, alleging: deceptive business practices and civil conspiracy to

engage in the same (Count Six), *id.* ¶¶ 481-487; common law trademark infringement (Count Seven), *id.* ¶¶ 488-495; tortious interference with prospective economic advantage (Count Eight), *id.* ¶¶ 496-512; unfair competition (Count Nine), *id.* ¶¶ 513-518; unjust enrichment (Count Ten), *id.* ¶¶ 519-523; dilution by tarnishment (Count Eleven), *id.* ¶¶ 524-529; and negligence and gross negligence (Count Twelve), *id.* ¶¶ 530-539.⁵

Next, in Count Thirteen, Plaintiffs bring a claim for fraudulent conveyance against Triple Five Worldwide and against Don, Syd, and Nader Ghermezian. *Id.* ¶¶ 540-559. And, finally, Plaintiffs' last three Counts allege alter ego/veil piercing theories of liability against Don, Syd, and Nader Ghermezian with respect to Triple Five Worldwide (Count Fourteen), *id.* ¶¶ 560-568, against Grazi, Nouri Jaradeh, and Dib Jaradeh with respect to JGX (Count Fifteen), *id.* ¶¶ 569-581, and against Dib Jaradeh with respect to Isaac Import (Count Sixteen), *id.* ¶¶ 582-589.

In moving to dismiss certain of these Counts, Defendants proceed in four groups. Nader Ghermezian moves to dismiss Plaintiffs' fraudulent conveyance claim (Count Thirteen) and Plaintiffs' alter ego/veil piercing claim (Count Fourteen) against him. *See* Nader Ghermezian's Motion. Don Ghermezian moves to dismiss all Counts against him (Counts One through Fourteen), and in that same motion, the Worldwide Defendants move to dismiss all Counts asserted against them (Counts One through Thirteen), save for Count Four for "unfair competition and false designation of origin." *See* Worldwide Defendants' Motion. JGX, Isaac Import, Grazi, Nouri Jaradeh, and Dib Jaradeh move to dismiss all Counts asserted against them (Counts One through Twelve, as well as Counts Fifteen and Sixteen), except that they concede that Counts Four (unfair competition), Seven (common law trademark infringement) and Count Eleven (dilution by tarnishment) have been sufficiently pleaded against JGX alone. *See* JGX Defendants' Motion; *id.* at 2 n.2. Finally, Syd Ghermezian and CFSB move to dismiss Counts One through Fourteen. *See* Banking Defendants' Motion. To date, Liberty has not responded to the Second Amended Complaint. In fact, Liberty has yet to appear at all in this case.⁶

*¹⁰ On September 22, 2023, Plaintiffs filed their omnibus opposition to the four motions. Dkt. 357 ("Opposition"). Each group of the moving defendants then replied. Dkts. 363 ("Worldwide Defendants' Reply"), 364-366.

On September 14, 2023, while briefing on the various motions to dismiss was in progress, Plaintiffs requested leave from the Court to move for summary judgment on Counts Four (unfair competition and false designation of origin under the Lanham Act), Seven (trademark infringement under New York common law), and Eleven (dilution by tarnishment under [N.Y. G.B.L. Section 360-l](#)) against Triple Five Worldwide, David Ghermezian, and JGX. Dkt. 349. The Court denied Plaintiffs' request without prejudice to renewal after the Court's rulings on the instant motions to dismiss. Dkt. 372.

On November 6, 2023, Plaintiffs renewed their request for a pre-motion conference regarding the imposition of sanctions, including numerous adverse inference instructions, against Triple Five Worldwide, David Ghermezian, Don Ghermezian, Yonah Ghemezian, and Berkowitz, in connection with alleged noncompliance with discovery requests. Dkt. 367. Judge Cott denied the request also without prejudice to renewal after this Court's decision on the motions to dismiss. Dkt. 371.

II. Legal Standards

To survive a motion to dismiss for failure to state a claim, a complaint must contain more than mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Rather, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). These "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Indeed, the plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

Determining whether a complaint states a plausible claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Although the Court must "accept[] as true the factual allegations in the complaint and draw[] all inferences in the plaintiff's favor," *Biro v. Condé Nast*, 807 F.3d 541, 544 (2d Cir. 2015), it "need not consider conclusory allegations or legal conclusions couched as factual allegations," *Dixon v.*

von Blanckensee, 994 F.3d 95, 101 (2d Cir. 2021) (internal quotation marks omitted).

Moreover, on a motion to dismiss, a court's "task is to assess the legal feasibility of the complaint; it is not to assess the weight of the evidence that might be offered on either side." *Lynch v. City of New York*, 952 F.3d 67, 75 (2d Cir. 2020). To that end, a court generally limits its consideration to "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." *Samuels v. Air Transp. Local 504*, 992 F.2d 12, 15 (2d Cir. 1993). Yet "[e]ven where a document is not incorporated by reference, the court may nevertheless consider it where the complaint 'relies heavily upon its terms and effect', which renders the document 'integral' to the complaint." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). To be "integral" to a complaint, the plaintiff (1) must have had "actual notice" of the extraneous information and (2) must have "relied upon the[] documents in framing the complaint." *Id.* (internal quotation marks omitted). And even if a document meets these twin requirements of notice and reliance, a court still may not consider it on a motion to dismiss if there is a dispute "regarding the **authenticity** or accuracy of the document" or "the relevance of the document." *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006).

*11 "Where a district court considers material outside of the pleadings that is not attached to the complaint, incorporated by reference, or integral to the complaint, the district court, to decide the issue on the merits, must convert the motion into one for summary judgment." *United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 106 (2d Cir. 2021). This requirement "deters trial courts from engaging in factfinding when ruling on a motion to dismiss and ensures that when a trial judge considers evidence [outside] the complaint, a plaintiff will have an opportunity to contest [a] defendant's relied-upon evidence by submitting material that contradicts it." *Glob. Network Commc'n, Inc. v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006). A district court thus "errs when it consider[s] affidavits and exhibits submitted by defendants, or relies on factual allegations contained in legal briefs or memoranda" on a motion to dismiss for failure to state a claim. *Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000) (internal quotation marks omitted).

III. Discussion

A. Consideration of Extraneous Documents

Preliminarily, the Court addresses the various exhibits appended to the motions filed by the JGX Defendants, Don Ghermezian and the Worldwide Defendants, and the Banking Defendants. *See* Dkts. 337 (declaration of Martin Stein, counsel for Don Ghermezian and the Worldwide Defendants, with seven attached exhibits), 341 (declaration of Yvette Sutton, counsel for the JGX Defendants, with five attached exhibits, the first of which is a copy of the operative Complaint), 345 (declaration of Alexander Widell, counsel for the Banking Defendants, with four attached exhibits, the first three of which are portions of the operative Complaint). As earlier mentioned, the Court's consideration of Defendants' attached documents is appropriate on a motion to dismiss only if they are properly subject to judicial notice, incorporated by reference in the Complaint, or deemed integral to the Complaint. *Chambers*, 282 F.3d at 152-53.

Plaintiffs object to the Court's consideration of these extraneous materials at this stage, asserting broadly that "[n]one of the documents submitted by any of the Defendants are integral to the SAC." Opposition at 2. But Plaintiffs do not dispute Defendants' contention that Plaintiffs were in possession of the proffered documents before filing the Second Amended Complaint. *See* Dkt. 337 ¶ 2 (Stein attesting that Plaintiffs possessed the exhibits before they filed the Second Amended Complaint); Dkt. 341 ¶ 8 (Sutton attesting that Plaintiffs possessed the exhibits since February 11, 2022 at the latest). Moreover, in insisting that "Defendants have made no showing as to the **authenticity** of" the documents, Opposition at 3, Plaintiffs appear simply to disregard the attestations as to the **authenticity** of each of the documents, *see* Dkt. 337 ¶¶ 1-9 (Stein attesting that each attached exhibit, based on his personal knowledge of the facts, includes documents expressly referred to in the Second Amended Complaint); Dkt. 341 ¶¶ 3-7 (Sutton attesting that each attached exhibit contains "true and correct" copies of the cited materials); Dkt. 345 ¶ 1 (Widell attesting that the attached exhibit includes "true and correct" copies). In assessing the propriety of its consideration of these extraneous submissions, the Court thus assumes the absence of any dispute as to Plaintiffs' notice of the documents and as to their **authenticity**.

The JGX Defendants and Don Ghermezian and the Worldwide Defendants attach a number of exhibits to their dismissal motions, arguing that the documents contained therein—the vast majority of which are communications through email or **WhatsApp**, an instant messaging

application, between certain of the Defendants—are either integral to or have been incorporated by reference in the Second Amended Complaint. *See* JGX Defendants' Motion 5-7; Worldwide Defendants' Reply at 1-2.

*12 The JGX Defendants attach four exhibits, in addition to the Second Amended Complaint: (1) an April 27, 2020 email between Grazi and Carelli; (2) a set of documents “detailing the changes to the URBĀNE label ordered by Defendant Jack Grazi”; (3) a May 26, 2020 email from Nouri Jaradeh to Grazi; and (4) excerpts from 2020 and 2021 WhatsApp exchanges between Grazi, Berkowitz, and David Ghermezian. *See* Dkt. 341, Exhs. 2-5. The Court finds that the April 27, 2020 email, *id.*, Exh. 2, and the May 26, 2020 email, *id.*, Exh. 4, are incorporated by reference in the Complaint. “To be incorporated by reference, the Complaint must make a clear, definite, and substantial reference to the document[].” *White v. City of New York*, 206 F. Supp. 3d 920, 929 (S.D.N.Y. 2016) (quoting *Helpin v. Harcourt, Inc.*, 277 F. Supp. 2d 327, 330-31 (S.D.N.Y. 2003)). Plaintiffs have expressly referenced in their Complaint both these communications and their substance, and the contents of the documents attached by the JGX Defendants plainly align with the substance of Plaintiffs’ allegations. *See* SAC ¶¶ 94 (“The discussions between Grazi and Carelli led to Rigz issuing an initial purchase order to JGX, on or about April 27, 2020, for 331,250 bottles of hand sanitizer under trademarks and/or designations identical to or substantially indistinguishable from the URBĀNE Brand.”), 103 (“[Nouri] Jaradeh, an employee of Isaac Import and partner-owner and principal of JGX, conducted online research about Coronado, the registered owner of the URBĀNE Marks, in May 2020 and communicated his findings to Grazi.”). The Court thus considers these documents in deciding the present motion. *See, e.g., DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 112 (2d Cir. 2010) (holding that the district court correctly determined that the complaint incorporated by reference e-mails attached as exhibits to a declaration filed by defense counsel in support of a Rule 12(b)(6) motion to dismiss, where the plaintiff “referred in her complaint to [the] e-mails” but did not attach them as exhibits to her complaint); *Cromwell-Gibbs v. Staybridge Suites Times Square*, No. 16 Civ 5169 (KPF), 2017 WL 2684063, at *1 n.2 (S.D.N.Y. June 20, 2017) (holding that an email chain was incorporated by reference when the complaint made “direct reference to the e-mail chain [and] the contents of the e-mails exchanged”); *Worldwide Servs., Ltd. v. Bombardier Aerospace Corp.*, No. 14 Civ. 7343 (ER), 2015 WL 5671724, at *8 (S.D.N.Y. Sept. 22, 2015) (deeming eight documents, including four e-mails, incorporated by reference in the complaint, because the

“documents [were] clearly referenced by the Complaint” and “highly relevant”).

On the other hand, the Court declines to consider the group of documents “detailing the changes to the URBĀNE label ordered by Defendant Jack Grazi,” Dkt. 341, Exh. 3, or the excerpted 2020 to 2021 WhatsApp exchanges between Grazi, Berkowitz, and David Ghermezian, *id.* Exh. 5. As to the former set of documents, Plaintiffs do not reference these exchanges anywhere in their Complaint, nor do the JGX Defendants urge these documents’ integrality. In fact, it appears that the JGX Defendants seek to introduce this new information solely to undermine Plaintiffs’ allegation that Dib Jaradeh was the person responsible for creating the forged URBĀNE label. *See* JGX Defendants' Motion at 5-6 (explaining that the exhibit shows Grazi instructing an individual named “Gigi” to repurpose the URBĀNE label, which the JGX Defendants urge was not created by Dib Jaradeh). But the Court declines to engage in such factfinding at this stage of the litigation. *See Glob. Network Commc'n's*, 458 F.3d at 155. As to the latter set of documents, the JGX Defendants urge that the excerpted 2020 to 2021 WhatsApp exchanges are relied upon in paragraphs 430 and 432 of the Complaint. *See* JGX Defendants' Motion at 6. Plaintiffs’ reference to those specific communications are far from “clear” and “definite.” *White*, 206 F. Supp. 3d at 929; *see* SAC ¶¶ 430, 432 (discussing in vague terms certain defendants’ communications in November 2020, April 2021, and May 2021). Nor are the allegations in paragraphs 430 and 432 “integral” to Plaintiffs’ claims, which largely revolve around the Defendants’ actions in July to August 2020.

Next, Don Ghermezian and the Worldwide Defendants attach seven exhibits to their motion: (1) the list of Trop-manufactured hand sanitizer brands referred to in the July 2020 FDA order, purportedly referred to in paragraphs 9, 107, 303, and 304 of the Complaint; (2) a May 4, 2020 email exchange between Don Ghermezian and Isaac Saba, purportedly referred to and quoted from in paragraphs 145 and 146 of the Complaint; (3) May 8, 2020 emails from Don Ghermezian to David Ghermezian, purportedly referred to in paragraphs 184 and 185 of the Complaint; (4) May 18, 2020 emails to and from Don Ghermezian, invoices for Triple Five Worldwide’s first three shipments of hand sanitizer, and American Dream records of payments on May 11, 2020 and May 19, 2020, purportedly referred to in paragraphs 191 through 195 of the Complaint; (5) a March 31, 2021 WhatsApp exchange between David Ghermezian and Tyberg, purportedly quoted from and referred to in

paragraphs 373 and 374 of the Complaint; (6) a June 9, 2021 **WhatsApp** exchange between David Ghermezian and Isaac Saba, purportedly referred to in paragraphs 375 and 425 through 428 of the Complaint; and (7) a copy of the October 2020 correspondence between Syd Ghermezian and David Ghermezian concerning a \$35,000 payment from SoFlo Urban Team to Triple Five Worldwide, purportedly referred to in paragraph 420 of the Complaint. *See Dkt. 337, Exhs. 1-7.*

***13** Apart from the list of Trop-manufactured hand sanitizer brands included in the July 2020 FDA order, *id.*, Exh. 1, and the collection of May 18, 2020 emails to and from Don Ghermezian, invoices for Triple Five Worldwide's first three shipments of hand sanitizer, and American Dreams records of payments on May 11, 2020 and May 19, 2020, *id.*, Exh. 4, the Court finds that the proffered documents have been incorporated by reference in the Complaint. Those communications are expressly referenced with sufficient detail in the paragraphs cited by Don Ghermezian and the Worldwide Defendants, and, in fact, many of them are directly quoted in the Complaint. *See SAC ¶¶ 9, 107, 145-146, 184-185, 303-304, 373-375, 425-428.*

As to the first exhibit, the list of Trop-manufactured hand sanitizer brands included in the July 2020 FDA order is publicly available on the FDA's website. *See FDA Updates on Hand Sanitizers Consumers Should Not Use, U.S. Food & Drug Administration,* <https://www.fda.gov/drugs/drug-safety-and-availability/fda-updates-hand-sanitizers-consumers-should-not-use> (last visited Mar. 22, 2024). Accordingly, the Court need not determine whether such information has been incorporated by reference by or is integral to the Complaint. The Court may simply take judicial notice of that publicly available information. *See Simeone v. T. Marzetti Co., No. 21 Civ. 9111 (KMK), 2023 WL 2665444, at *1 (S.D.N.Y. Mar. 28, 2023)* (“As such, courts routinely take judicial notice of FDA guidance documents and documents which are publicly available on the FDA's website.”); *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 59-60 (2d Cir. 2016) (taking judicial notice of an FDA guidance document); *Simon v. Smith & Nephew, Inc.*, 990 F. Supp. 2d 395, 401 n.2 (S.D.N.Y. 2013) (taking judicial notice of “public records contained on the FDA website”).

As to the fourth exhibit, while it appears that the documents included therein may well correspond to Plaintiffs' allegations in paragraphs 191 through 195 of the Complaint, the

allegations are not detailed enough for the Court to find that the communications have been incorporated by reference. Nor is the framing of Plaintiffs' claims so heavily dependent on the terms or effect of these particular communications to meet the integrality requirement. Accordingly, the Court declines to consider this exhibit. The Court notes that the documents included in this exhibit add little in the way of context or substance to Plaintiffs' allegations, and their consideration would not, in any event, alter the Court's analysis of the motions to dismiss.

Finally, Syd Ghermezian and CFSB attach a July 13, 2011 “Notice of Change of Control” document purportedly marking the date on which the Ghermezian family acquired CFSB. *See Dkt. 345, Exh. 4;* Banking Defendants' Motion at 10-11. This document is publicly available on the website of the Office of the Comptroller of the Currency. *See Office of the Comptroller of the Currency,* <https://www.occ.gov/static/ots/directors-orders/do-2011-44.pdf> (last visited March 22, 2024). The Court thus takes judicial notice of this document. *See Byrd v. City of New York, No. 04-1396-cv, 2005 WL 1349876, at *1 (2d Cir. June 8, 2005)* (summary order) (“[M]aterial that is a matter of public record may be considered in a motion to dismiss.”).

Having thus clarified the scope of materials properly before the Court, the Court turns to Defendants' various challenges to the legal sufficiency of Plaintiffs' claims.

B. Civil RICO Claims (Count One)

As mentioned, in Count One, Plaintiffs bring a substantive civil RICO claim under [18 U.S.C. § 1962\(c\)](#)—and, in the alternative, a civil RICO conspiracy claim under [18 U.S.C. § 1962\(d\)](#)—against the fourteen Counterfeiting Defendants. *See SAC ¶¶ 392-448.* The Court dismisses these claims in their entirety as to the Counterfeiting Defendants who have appeared, and provides Plaintiffs with notice of its intent to dismiss *sua sponte* as to Liberty.

1. Substantive Civil RICO Claim

***14** To state a substantive civil RICO claim, Plaintiffs must sustain two pleading burdens. First, Plaintiffs must show that Defendants violated the substantive RICO statute by “alleg[ing] the existence of seven constituent elements: (1) that the defendant[s] (2) through the commission of two or more acts (3) constituting a ‘pattern’ (4) of ‘racketeering activity’ (5) directly or indirectly invest[] in, or maintain[] an interest in, or participate[] in (6) an ‘enterprise’ (7) the

activities of which affect interstate or foreign commerce.” *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir. 1983) (citing 18 U.S.C. § 1962(a)-(c)). Significantly, these requirements “must be established as to each individual defendant.” *DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001); cf. *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987) (“The focus of section 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise, which are proscribed by section 1962(d).”), cert. denied, 486 U.S. 1022 (1988). Second, Plaintiffs must allege an injury to their “business or property by reason of a violation of section 1962.” 18 U.S.C. § 1964(c); accord *Moss*, 719 F.2d at 17.

a. Predicate Acts

To plead a pattern of racketeering activity, Plaintiffs must allege at least two “predicate acts” of “racketeering activity” occurring within a ten-year period. 18 U.S.C. § 1961(5); accord *Azrielli v. Cohen L. Offs.*, 21 F.3d 512, 520 (2d Cir. 1994). “Racketeering activity” includes “any act or threat involving” certain enumerated state or federal offenses, including mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343, see 18 U.S.C. § 1961(1) (defining “racketeering activity”)—the offenses Plaintiffs allege as predicate acts for their civil RICO claims, see SAC ¶¶ 407-417. The elements of mail and wire fraud are “(i) a scheme to defraud (ii) to get money or property, (iii) furthered by the use of interstate mail or wires.” *United States v. Autuori*, 212 F.3d 105, 115 (2d Cir. 2000) (citation omitted). As to the first element, a plaintiff must demonstrate “(i) the existence of a scheme to defraud, (ii) the requisite scienter (or fraudulent intent) on the part of the defendant, and (iii) the materiality of the misrepresentations.” *Id.* Under these statutes, a plaintiff need not allege “that the defendants have personally used the mails or wires; it is sufficient that a defendant ‘causes’ the use of the mails or wires.” *Sobel v. Fleck*, No. 03 Civ. 1041 (RMB) (GWG), 2003 WL 22839799, at *6 (S.D.N.Y. Dec. 1, 2003) (citing 18 U.S.C. §§ 1341, 1343), report and recommendation adopted by 2004 WL 48877 (S.D.N.Y. Jan. 8, 2004); see also *United States v. Bortnovsky*, 879 F.2d 30, 36 (2d Cir. 1989) (“[I]t is not significant for purposes of the mail fraud statute that a third-party, rather than the defendant wrote and sent the letter at issue, provid[ed] ... the defendants could reasonably have foreseen that the third-party would use the mail in the ordinary course of business as a result of [the] defendants' act.”).

Civil RICO claims based on fraudulent predicate acts are subject to Federal Rule of Civil Procedure 9(b)’s more stringent pleading standard, which requires a plaintiff to “state with particularity the circumstances constituting fraud.” *Paul Hobbs Imports Inc. v. Verity Wines LLC*, No. 21 Civ. 10597 (JP), 2023 WL 374120, at *4 (S.D.N.Y. Jan. 24, 2023); accord *First Cap. Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 178 (2d Cir. 2004). Accordingly, where a plaintiff claims that specific mail or wire transmissions “were themselves fraudulent, i.e., themselves contained false or misleading information,” the plaintiff “should specify the fraud involved, identify the parties responsible for the fraud, and where and when the fraud occurred.” *Evercrete Corp. v. H-Cap Ltd.*, 429 F. Supp. 2d 612, 624 (S.D.N.Y. 2006). But where a plaintiff claims that the mail or wires were simply used in furtherance of a scheme to defraud, “the actual transmissions that use the mails and wires do not have to be false or contain misrepresentations—only the scheme must be fraudulent.” *Id.* at 623 (citation omitted). In such a case, although the plaintiff “need not allege that each defendant made a misrepresentation,” the plaintiff must still “allege sufficient facts showing each defendant's knowing or intentional participation in the alleged scheme to defraud.” *Williams v. Equitable Acceptance Corp.*, 443 F. Supp. 3d 480, 492 (S.D.N.Y. 2020) (emphasis added); see also *In re Sumitomo Copper Litig.*, 995 F. Supp. 451, 456 (S.D.N.Y. 1998) (“In complex civil RICO actions involving multiple defendants ... Rule 9(b) requires only that the plaintiff delineate with adequate particularity in the body of the complaint, the specific circumstances constituting the overall fraudulent scheme.”); *Serin v. N. Leasing Sys., Inc.*, No. 06 Civ. 1625, 2009 WL 7823216, at *7 (S.D.N.Y. Dec. 18, 2009) (“In applying Rule 9(b) to predicate acts of mail or wire fraud, Southern District of New York courts have articulated different requirements to apply in either a ‘per se’ or ‘in furtherance of fraud’ context.” (citations omitted)).

***15** Plaintiffs appear to proceed under this latter theory—urging that each of the fourteen Counterfeiting Defendants knowingly or intentionally participated in the counterfeit hand sanitizer scheme, furthered by mail or wire communications, even if not every one of those Defendants himself made a misrepresentation. See Opposition at 18-22. For instance, in listing the “numerous fraudulent statements and omissions” underlying their civil RICO claim, Plaintiffs refer to their allegations regarding: Grazi’s misrepresentations of his ownership of the URBĀNE brand to the “manufacturers” of the hand sanitizer; Grazi’s circulation of the URBĀNE label and accompanying representations

that he was entitled to use it; Grazi's written and telephonic communications "with Saba, among others, to facilitate the manufacture and distribution" of the counterfeit goods; Nouri Jaradeh's correspondence with Grazi concerning Nouri Jaradeh's research on Coronado in May 2020; transmissions of purchase orders among Nouri Jaradeh, Grazi, and Berkowitz, as well as transmission of purchase orders and invoices from Yonah Ghermezian to Tyberg and SoFlo Urban Team LLC; the "numerous messages and emails" by David Ghermezian, Berkowitz, and Isaac Saba; Don Ghermezian's authorized payments to JGX; and Syd Ghermezian and CFSB's banking services. *See* SAC ¶ 410. Plaintiffs further include a list of monetary transactions, including a May 26, 2020 wire transfer to Triple Five Worldwide from Tyberg, four April 2020 wire transfers from Rigz to JGX, a May 18, 2020 transfer from JGX to Liberty, and two check payments from JGX to Rigz. *Id.* ¶¶ 411-415. And while certain of these communications are alleged to contain falsehoods or misstatements (e.g., Grazi's representations of his ownership of the URBĀNE brand to the "manufacturers" of the hand sanitizer and Grazi's circulation of the URBĀNE label and accompanying representations that he was entitled to use it), the vast majority of the cited communications appear only to advance the counterfeit hand sanitizer scheme. The Court thus assesses not whether Plaintiffs have alleged that each Defendant made a misrepresentation—seemingly urged by certain of the Defendants in their motions to dismiss, *see* JGX Defendants' Motion at 13; Worldwide Defendants' Motion at 9—but whether Plaintiffs have "allege[d] sufficient facts showing each defendant's knowing or intentional participation" in the manufacture and distribution of counterfeit hand sanitizer.⁷ *Williams*, 443 F. Supp. 3d at 492.

Don Ghermezian, the Worldwide Defendants (Triple Five Worldwide, Isaac Saba, Berkowitz, David Ghermezian, and Yonah Ghermezian), and the Banking Defendants (Syd Ghermezian and CFSB) argue that Plaintiffs—in failing to plead facts suggesting that any of them knew or should have known that the URBĀNE mark was, in fact, owned by Coronado—have failed to allege the requisite fraudulent intent as to each of them. *See* Don Ghermezian and Worldwide Defendants' Motion at 9; Banking Defendants' Motion at 17 ("At most, [Plaintiffs] have alleged facts showing that [Syd Ghermezian] was aware that certain members of his family intended to enter the hand-sanitizer business at the outset of the COVID-19 pandemic."). The Court agrees.

"Although Rule 9(b) permits knowledge to be averred generally, plaintiffs must still plead the events which they claim give rise to an inference of knowledge." *Devaney v. Chester*, 813 F.2d 566, 568 (2d Cir. 1987). A sufficient factual basis for fraudulent intent may consist of allegations as to who "possessed ... knowledge" of the fraud, "when and how they obtained [that] knowledge," or even why they "should have known" of the fraud. *Id.* Additionally, "[t]he requisite strong inference of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *United States v. Strock*, 982 F.3d 51, 66 (2d Cir. 2020) (citation omitted). As earlier emphasized, "[i]n a case involving multiple defendants, plaintiffs must plead circumstances providing a factual basis for scienter for each defendant." *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 695 (2d Cir. 2009) (citation omitted). "[G]uilt by association is impermissible." *Id.*

Here, the Complaint is devoid of any factual allegations that these Defendants knew or even should have known of Coronado's ownership in the URBĀNE mark. At most, Plaintiffs allege that, "[u]pon information and belief," Syd Ghermezian was aware that the transactions with CFSB "were furthering a counterfeit sanitizer business," SAC ¶ 252, but they provide no factual bases in support of this bare allegation. *See Devaney*, 813 F.2d at 568 (explaining that Rule 9(b) requires plaintiffs to "plead the events which they claim give rise to an inference of knowledge"). And as to Don Ghermezian and the Worldwide Defendants, Plaintiffs do not allege even generally these Defendants' knowledge that the hand sanitizer operation involved counterfeit products.

Plaintiffs urge that their allegations evince each Defendant's motive and opportunity to commit fraud. Specifically, they contend that the "significant amounts of money [that] could be made by selling hand sanitizer" provide the "clear and simple motive to commit fraud," especially in light of the acute financial distress that had befallen the Ghermezian family at that time. Opposition at 19 (citing SAC ¶¶ 132, 134). But under the "motive and opportunity" approach, "allegations that a defendant stands to gain economically from fraud do not satisfy the heightened pleading requirements of Rule 9(b)." *ABF Cap. Mgmt. v. Askin Cap. Mgmt., L.P.*, 957 F. Supp. 1308, 1327, 1331 (S.D.N.Y. 1997); *cf. Colpitts v. Blue Diamond Growers*, 527 F. Supp. 3d 562, 586 (S.D.N.Y. 2021) (explaining that allegations evincing the defendant's "desire to profit from [a] misrepresentation" were insufficient

to allege a specific motive for fraud); *accord Negrete v. Citibank, N.A.*, 187 F. Supp. 3d 454, 464-65 (S.D.N.Y. 2016) (“[A] generalized profit motive ... does not create the requisite ‘strong inference’ of fraudulent intent.”) (citing *Chill v. G.E. Co.*, 101 F.3d 263, 268 (2d Cir. 1996)). In the glaring absence of any indicia of fraudulent intent on the part of these Defendants, the Court dismisses Plaintiffs' substantive civil RICO claim against Isaac Saba, Berkowitz, Don Ghermezian, David Ghermezian, Yonah Ghermezian, Syd Ghermezian, Triple Five Worldwide, and CFSB.

*16 In contrast, the Complaint contains sufficient factual allegations concerning the fraudulent intent on the part of the JGX Defendants. For instance, Plaintiffs allege that Grazi, Nouri Jaradeh, and Dib Jaradeh, as principals of JGX, should have known that Coronado, and not Rigz, was the proper owner of the URBĀNE mark, given that JGX was an apparel company with a history of and expertise in obtaining trademarks for their own products. *See, e.g.*, SAC ¶ 111 (“A simple Google search, let alone a trademark database search—as would be minimally expected of an experienced reseller like JGX that owns multiple trademark registrations—would have revealed the unlawfulness of its hand sanitizer business enterprise with Rigz.”); *see also id.* ¶ 112 (alleging that “JGX, Isaac Import, Grazi, [Nouri] Jaradeh, and [Dib Jaradeh] knew that they were counterfeiting the URBĀNE brand and acted with the specific intent of deceiving everyone outside the Counterfeiting Defendants, including Plaintiffs and the public at large, about the illicit nature of their product”). According to Plaintiffs, Dib Jaradeh personally repurposed the URBĀNE label provided by Carelli, creating a label for unauthorized use on sanitizer bottle and products, and emailed that counterfeit URBĀNE label to Grazi—conduct, which (if true) certainly gives rise to a plausible inference of fraudulent intent. *Id.* ¶ 105, Exh. G. And finally, Plaintiffs have pleaded “when and how” Nouri Jaradeh and Grazi, in particular, may have at the latest obtained knowledge of Coronado's rightful ownership of the URBĀNE mark: as alleged, in May 2020, Nouri Jaradeh researched Coronado and communicated his findings to Grazi that “Coronado was the proper owner of the URBĀNE brand, and not Rigz,” and JGX, despite knowing this, “knowingly and willingly used the URBĀNE brand on a massive scale in furtherance of the counterfeiting scheme.” *Id.* ¶¶ 103-104. These allegations provide sufficient factual bases for the individual JGX Defendants' fraudulent intent.

Rather than attack the sufficiency of the allegations as to their intent, the JGX Defendants argue that Plaintiffs' allegations regarding the nature and extent of Grazi's, Nouri Jaradeh's,

and Dib Jaradeh's involvement in the hand sanitizer scheme are insufficient as a matter of law to show that each of these Defendants committed the requisite predicate acts. JGX Defendants' Motion at 14. Specifically, they contend that Nouri Jaradeh's alleged involvement in the scheme involved only “ministerial acts”; that because Dib Jaradeh's only alleged involvement in the scheme was his creation of the URBĀNE label, his conduct cannot satisfy the requirement that each defendant commit *two* predicate acts; and that the “alleged fraudulent misrepresentations of ownership [of the URBĀNE mark] by Grazi never occurred.” *Id.* These arguments, based on an unreasonably narrow reading of the Complaint and an impermissible challenge to the veracity of its substance, are unavailing.

According to Plaintiffs, Grazi coordinated with Rigz to have JGX source the counterfeit hand sanitizer, SAC ¶¶ 90-91; he sent an image of the URBĀNE label to Dib Jaradeh, *id.* ¶ 105; he circulated the label created by Dib Jaradeh to further solicit the manufacture of counterfeit hand sanitizer both from Liberty and members of the Ghermezian family, *id.* ¶¶ 110, 119, 149; he sent out multiple purchase orders for the counterfeit product, *id.* ¶ 153; and he addressed manufacturers through video messages to encourage the speedy production of the counterfeit product, representing in those videos that he was “producing with Isaac Saba, David Ghermezian, and Eli Berkowitz the URBĀNE label,” *id.* ¶ 273. As further alleged, Dib Jaradeh, a principal of JGX and Isaac Import, created the copycat URBĀNE label used on all the counterfeit goods. *Id.* ¶ 105. And he participated in discussions with Grazi and Carelli “to finalize details related to the quantity of counterfeit hand sanitizer bearing the URBĀNE label to be produced, as well as pricing, manufacturing, and shipping of the bottles.” *Id.* ¶ 96. Finally, according to Plaintiffs, Nouri Jaradeh, an Isaac Import employee and part-owner and principal of JGX, created at least five purchase orders for more than 660,000 bottles of counterfeit hand sanitizer. *Id.* ¶ 150. He was kept regularly apprised of invoices that Triple Five Worldwide issued to JGX, *id.* ¶ 259, and regularly corresponded with Grazi and [Dib Jaradeh] throughout the counterfeiting scheme, *id.* ¶ 108. These allegations, paired with the earlier mentioned allegations regarding each of the JGX Defendants' specific intent to further the scheme, sufficiently demonstrate Grazi's, Nouri Jaradeh's, and Dib Jaradeh's “knowing and intentional participation” in the counterfeiting scheme. And although Plaintiffs do not allege that each of these Defendants personally used the mail or wires, their allegations sufficiently demonstrate that each of these Defendants “could reasonably have foreseen” that

the mail and wires would be used “in the ordinary course of business as a result of their acts.” See *Sobel*, 2003 WL 22839799, at *7 (citing *Bortnovsky*, 879 F.2d at 36).

*17 Of course, this conclusion does not mean that Plaintiffs’ substantive civil RICO claim against the JGX Defendants survives. Plaintiffs still must overcome several more hurdles.

b. Continuity

For instance, in addition to pleading adequately that each JGX Defendant committed at least two predicate acts, Plaintiffs must show that the alleged predicate acts are “related, and that they amount to or pose a threat of continued criminal activity” to establish the requisite pattern of racketeering activity. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). The continuity requirement reflects Congress’s “concern[] in RICO with long-term criminal conduct.” *Id.* at 242. To that end, the continuity required to prove a “pattern of racketeering activity” can be closed-ended or open-ended, “referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.” *Id.* at 241.

As an initial matter, the Second Circuit has cautioned that “RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it.” *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 489 (2d Cir. 2014) (internal quotation marks omitted); cf. *Tabas v. Tabas*, 47 F.3d 1280, 1290 (3d Cir. 1995) (*en banc*) (“The inclusion within the scope of civil RICO of [mail and wire fraud], more prevalent in the commercial world than in the world of racketeers, has caused concern that RICO sweeps too broad a swathe.”). That is so because mail and wire communications, which are not themselves inherently unlawful activities, are routinely used in business operations, and “even in connection with an actual fraudulent scheme, there may be substantial innocent or incidental use of the mail or wires that may not relate to the any unlawful activity of the enterprise or that involves no deception of the plaintiff.” *Gross v. Waywell*, 628 F. Supp. 2d 475, 493 (S.D.N.Y. 2009) (citation omitted). “[T]o find the necessary criminality in those activities requires substantive inquiry beyond the mere fact of the communication, ordinarily by reference to other relevant considerations such as the extent to which the mailings were part of an intentional scheme to

defraud, and in fact deceived, the victim.” *Id.* Accordingly, a mere multiplicity of wire or mail communications does not automatically satisfy the requisite continuity to establish a pattern of racketeering activity. *Id.*; cf. *Crawford*, 758 F.3d at 489 (discussing *Tellis v. United States Fidelity & Guar. Co.*, 826 F.2d 477, 478 (7th Cir. 1986)), and agreeing with the Seventh Circuit’s reasoning that “multiple acts of mail fraud in furtherance of a single episode of fraud involving one victim and relating to one basic transaction cannot constitute the necessary pattern” for a civil RICO claim).

With these considerations at the forefront, the Court proceeds to assess whether Plaintiffs have adequately pleaded either closed-ended or open-ended continuity as to the JGX Defendants.

i. Closed-Ended Continuity

Generally, “[t]o satisfy closed-ended continuity, the plaintiff must prove ‘a series of related predicates extending over a substantial period of time.’ ” *Cofacrédit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir. 1999) (quoting *H.J.*, 492 U.S. at 242). Closed-ended continuity “is primarily a temporal concept,” with the pertinent period concerning “the time during which RICO predicate activity occurred, not the time during which the underlying scheme operated or the underlying dispute took place.” *Spool v. World Child Int’l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008) (citations omitted). Although no bright-line rule defines which periods of time are “substantial,” “[p]redicate acts extending over a few weeks or months … do not satisfy this requirement.” *H.J.*, 492 U.S. at 242. Indeed, the Second Circuit “generally requires that the crimes extend over at least two years,” having never found a closed-ended pattern for racketeering activity spanning a shorter period. *Reich v. Lopez*, 858 F.3d 55, 60 (2d Cir. 2017) (citation omitted); *Spool*, 520 F.3d at 184 (“Since the Supreme Court decided *H.J. Inc.*, [the Second Circuit has] never held a period of less than two years to constitute a substantial period of time.” (emphasis added) (internal quotation marks omitted)).

*18 Still, “while two years may be the *minimum* duration necessary to find closed-ended continuity, the mere fact that predicate acts span two years is insufficient, without more, to support a finding of a closed-ended pattern.” *First Cap. Asset Mgmt.*, 385 F.3d at 181. “[O]ther factors such as the number and variety of predicate acts, the number of both participants and victims, and the presence of separate

schemes are also relevant in determining whether closed-ended continuity exists.” *De Falco*, 244 F.3d at 321.

The Court considers only properly pleaded predicate acts in determining the duration of the alleged racketeering activity. See *GICC Cap. Corp. v. Tech. Fin. Grp., Inc.*, 67 F.3d 463, 467 (2d Cir. 1995) (excluding inadequately pleaded predicate acts in evaluating the duration of the racketeering activity); *Paul Hobbs Imports*, 2023 WL 374120 at *11 (excluding allegations made only upon information and belief in evaluation of closed-ended continuity). Here, the Court thus considers only the allegations concerning the JGX Defendants’ participation in the scheme.⁸ Accordingly, the Court finds that the JGX Defendants’ alleged participation in the counterfeiting scheme at most, lasted from April 2020, SAC ¶ 90 (Carelli first contacts Grazi), to August 2020, *id.* ¶ 411 (describing August 2020 wire transfers between JGX and Triple Five Worldwide).

This five-month period is presumptively too short to establish a closed-ended pattern. See *Spool*, 520 F.3d at 184 (finding sixteen months insufficient for closed-ended continuity); see also *H.J.*, 492 U.S. at 242 (holding “[p]redicate acts extending over a few ... months” insufficient for closed-ended continuity). Recognizing as much, Plaintiffs nonetheless urge that they have pleaded the “rare” case, where short-lived conduct establishes closed-ended continuity due to the sheer complexity and breadth of the alleged criminal conduct. Opposition at 22-23; *Spool*, 520 F.3d at 184 (“Although we have not viewed two years as a bright-line requirement, it will be rare that conduct persisting for a shorter period of time establishes closed-ended continuity, particularly where ... the activities alleged involved only a handful of participants and do not involve a complex, multi-faceted conspiracy.” (cleaned up)). The Court disagrees.

With Plaintiffs’ claim stripped of the allegations in connection with the Banking Defendants’, the Worldwide Defendants’, and Don Ghermezian’s involvement in the hand sanitizer operation, Plaintiffs’ attempt to portray this months-long counterfeiting operation as a “complex, multi-faceted” criminal enterprise requiring “no less than a dozen actors” fails out of the gate. See Opposition at 23. But even setting aside the limited number of actors involved, Plaintiffs here at most allege a *single* scheme to counterfeit a *single* brand of hand sanitizer. These circumstances are insufficient to overcome the scheme’s unquestionably short-lived duration. See *DeFalco*, 244 F.3d at 321 (noting that “the presence of separate schemes” is relevant to closed-ended continuity).

Indeed, courts routinely “refuse[] to find a RICO violation in cases like this, where the plaintiffs attempt to transform [a] single scheme of limited duration into a RICO enterprise.” *Lynch v. Amoruso*, 232 F. Supp. 3d 460, 468 (S.D.N.Y. 2017) (internal quotation marks omitted) (collecting cases); see also *MinedMap, Inc. v. Northway Mining, LLC*, No. 21-1480-cv, 2022 WL 570082, at *2 (2d Cir. Feb. 25, 2022) (summary order) (“At most, there is one scheme here: Maranda forming his companies, collecting capital to execute the scheme, and contracting with MinedMap to host the Miners, despite knowing that the defendant companies did not have the capacity to fulfill this contract, and then refusing to return the Miners. Such a scheme can hardly be considered a large-scale fraud as generally seen in RICO cases.”).

*19 The Court thus concludes that Plaintiffs have failed to allege a closed-ended pattern of racketeering activity committed by the JGX Defendants.

ii. Open-Ended Continuity

Plaintiffs argue in the alternative that they have pleaded an open-ended scheme. Opposition at 24-26. “To satisfy open-ended continuity, the plaintiff need not show that the predicates extended over a substantial period of time but must show that there was a threat of continuing criminal activity beyond the period during which the predicate acts were performed.” *Cofacrédit*, 187 F.3d at 242. Such a threat generally arises from the commission of predicate acts that are themselves inherently unlawful. *Id.* at 242-43; see also *United States v. Aulicino*, 44 F.3d 1102, 1111 (2d Cir. 1995) (“[W]here the acts of the defendant or the enterprise were inherently unlawful, such as murder or obstruction of justice, and were in pursuit of inherently unlawful goals, such as narcotics trafficking or embezzlement, the courts generally have concluded that the requisite threat of continuity was adequately established”). Otherwise, “there must be some evidence from which it may be inferred that the predicate acts were the regular way of operating that business, or that the nature of the predicate acts themselves implies a threat of continued criminal activity.” *Cofacrédit*, 187 F.3d at 243. As with closed-ended continuity, open-ended continuity must be evaluated based only on adequately pleaded predicate acts. *Paul Hobbs Imports*, 2023 WL 374120, at *11.

First, as to the nature of the alleged predicate acts of mail and wire fraud, it is well established that offenses of fraud are not considered inherently unlawful acts that by their

very nature categorically carry the risk of recurrence. *See Aulicino*, 44 F.3d at 1111 (“[I]n cases concerning alleged racketeering activity in furtherance of endeavors that are not inherently unlawful, such as frauds in the sale of property, the courts generally have found no threat of continuing criminal activity arising from conduct that extended over even longer periods.”).

Turning next to the factual circumstances specific to the pattern of activity alleged, the Court finds no allegations suggesting a specific threat of repeated criminality. For one, there is no evidence that the JGX Defendants regularly operated their business by selling counterfeit goods. In fact, that inference is belied by Plaintiffs' allegation that JGX is “an apparel company with expertise in and a history of obtaining trademarks relating to athletic apparel.” SAC ¶ 92. Moreover, on Plaintiffs' telling, the JGX Defendants' fraudulent activities alleged here were not initiated internally as part of their regular course of operation; rather, the fraud was instigated by Rigz and its principals, themselves ostensibly driven by the unique opportunities arising out of the “once-in-a-lifetime” pandemic. *Id.* ¶¶ 42, 85-87. According to Plaintiffs, it was Rigz that “ordered the production of counterfeit URBĀNE hand sanitizer to capitalize on its brand recognition with Rigz's customers,” *id.* ¶ 352, and Rigz that “required JGX to use the URBĀNE Brand because Rigz's customer were expecting to purchase and receive hand sanitizer under the URBĀNE brand.” *Id.* ¶ 97. These circumstances are not suggestive of a continued threat of ongoing criminal activity on the part of the JGX Defendants.

***20** Notably, Plaintiffs do not even themselves contend that fraud underlies the regular operation of the JGX Defendants' businesses; rather, they attack the legitimacy only of those businesses associated with Don Ghermezian, the Worldwide Defendants, and the Banking Defendants. *See* Opposition at 25-26. But the allegations pertaining to these Defendants are, once again, excluded from the Court's continuity analysis. In a similar vein, Plaintiffs rely largely on allegations concerning the post-scheme conduct of Don Ghermezian, the Worldwide Defendants, and the Banking Defendants in attempting to manufacture a specific threat of repeated criminal conduct. *See id.* at 24-25. Of these, the single allegation at all implicating any of the JGX Defendants—that “in November 2020 and again[] in April 2021, Berkowitz corresponded with Grazi regarding the location of unused bottles of hand sanitizer to obtain compensation from persons in Mexico who had been involved in the production of counterfeit sanitizer,”

SAC ¶ 430; *see* Opposition at 24—also fails to raise the specter of recurring fraud.

* * *

Because Plaintiffs have failed to plead either closed-ended or open-ended continuity, their substantive civil RICO claim against the JGX Defendants also cannot stand.

2. Civil RICO Conspiracy Claim (Count One)

Plaintiffs have alleged in the alternative that each Counterfeiting Defendant violated section 1962(d) by conspiring to commit the very substantive RICO violation described in Count One of the Complaint—that is, the manufacture, distribution, and sale of the counterfeit URBĀNE hand sanitizer. SAC ¶¶ 439-440.

“To establish a conspiracy to violate the civil RICO statute pursuant to 18 U.S.C. § 1962(d) ... [a] plaintiff must prove (1) that there existed a conspiracy to commit acts that, if successful, would constitute a substantive civil RICO violation; (2) that defendant agreed to join in, and knowingly participated in, that conspiracy; and (3) that defendant acted in furtherance of the conspiracy in some manner (although not necessarily by the commission of any RICO predicate acts himself).” *Martin Hilti Fam. Tr. v. Knoedler Gallery, LLC*, 386 F. Supp. 3d 319, 340 (S.D.N.Y. 2019) (citation and quotation marks omitted). Plaintiffs' RICO conspiracy claim fails for two independent reasons.

First, because Plaintiffs' conspiracy claim is predicated entirely on an agreement to participate in the very counterfeiting scheme the Court has already concluded fails to constitute a substantive civil RICO violation, Plaintiffs' conspiracy claim necessarily fails as a matter of law. *Salinas v. United States*, 522 U.S. 52, 65 (1997) (“A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense.”); *Williams*, 889 F.3d at 126 (“The alleged conspiracy involved an agreement to commit the same substantive RICO violations we have deemed insufficiently pled, and the plaintiffs have not alleged any further acts that, if carried out, would have satisfied RICO's requirement of a pattern of racketeering. The plaintiffs therefore failed to plead the necessary agreement to violate RICO's substantive provisions.” (citation omitted)).

Second, even had Plaintiffs adequately pleaded a substantive civil RICO violation, the Complaint is still devoid of

nonconclusory allegations of “the existence of an agreement to violate RICO’s substantive provisions.” *Cofacredit*, 187 F.3d at 244 (internal quotation marks and citation omitted). Indeed, “[b]ecause the core of a RICO civil conspiracy is an agreement to commit predicate acts, a RICO civil conspiracy complaint, at the very least, must allege specifically such an agreement.” *Hecht v. Com. Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990). Conclusory, boilerplate allegations as to the existence of the relevant agreement are insufficient. *See, e.g.*, *4 K & D Corp. v. Concierge Auctions, LLC*, 2 F. Supp. 3d 525, 545 (S.D.N.Y. 2014) (dismissing a RICO conspiracy count when “[o]ther than one conclusory allegation that the defendants ‘agreed’ to commit the violations, the plaintiffs have alleged no facts to show specifically that the defendants had any ‘meeting of the minds’ in the alleged violations” (citation omitted)); *U.S. Fire Ins. Co. v. United Limousine Serv., Inc.*, 303 F. Supp. 2d 432, 453-454 (S.D.N.Y. 2004) (“Conclusory allegations that ‘all of the defendants conspired among themselves to further the scheme to defraud’ and ‘knowingly and willingly participated in the conspiracy’ are insufficient.”).

***21** Yet such boilerplate allegations are all that Plaintiffs here provide. *See, e.g.*, SAC ¶¶ 439 (“[E]ach of the Counterfeiting Defendants conspired to violate 18 U.S.C. §§ 1961 (a), (b), and/or (c) by, *inter alia*, agreeing to work with other Counterfeiting Defendants to source, import, distribute, and sell counterfeit URBĀNE hand sanitizer.”), 440 (“As alleged herein, each Counterfeiting Defendant knew about and agreed to facilitate the manufacture and sale of counterfeit sanitizer using mail and wire fraud.”). In the absence of any factual allegations supporting the existence of an agreement, Plaintiffs’ RICO conspiracy claim against the appearing Counterfeiting Defendants fails.

Accordingly, the Court dismisses Count One as to the JGX Defendants, Don Ghermezian, the Worldwide Defendants, and the Banking Defendants.

3. RICO Claims against Liberty

Liberty—the final Counterfeiting Defendant—has yet to appear in this case, as mentioned at *supra* I.B, and so has not moved to dismiss any of the claims asserted against it. To the extent Plaintiffs bring their RICO claims against Liberty—which is not clear from the Complaint⁹—the Court provides

Plaintiffs with notice of its intent to dismiss *sua sponte* any RICO claims against Liberty.

It is well established that a court may conclude on its own accord that a plaintiff has failed to state a claim against a non-appearing defendant, so long as the plaintiff was given “an opportunity to be heard” on the pertinent issue. *Antidote Int’l Films, Inc. v. Bloomsbury Pub., PLC*, 467 F. Supp. 2d 394, 399 (S.D.N.Y. 2006); *see also Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 26 n.6 (2d Cir. 1990) (finding proper the district court’s dismissal of the complaint with respect to all defendants, including a non-appearing defendant, “because the issues concerning [that defendant were] substantially the same as those concerning the other defendants” and the plaintiff “had notice and a full opportunity to make out his claim against” the non-appearing defendant). Indeed, for several Counts that are discussed *infra*, the Court dismisses them as to Liberty based on the same grounds that apply to other Defendants and because Plaintiffs had an opportunity to be heard on those arguments.

With respect to Count One, the Court’s analysis with respect to Plaintiffs’ failure to allege the requisite continuity (as well as its analysis on the consequent failure of Plaintiffs’ conspiracy claim) would appear to apply with equal, if not greater, force to Liberty, whose alleged participation in the hand sanitizer scheme was far more limited than that of the other Counterfeiting Defendants. Moreover, there is no question that Plaintiffs had the full opportunity to address the relevant arguments regarding the infirmities of their RICO claims—including those regarding the counterfeiting scheme’s temporal scope, its complexity, and any threat of repetition evinced by the specific circumstances of the scheme—in opposing the other Counterfeiting Defendants’ motions to dismiss. But since the elements of a RICO claim must be assessed as to each individual defendant, *see DeFalco*, 244 F.3d at 306, the Court will provide Plaintiffs with the opportunity to present any arguments unique to Liberty that preclude dismissal. Plaintiffs must make a submission identifying such reasons within fourteen days of this Opinion and Order. In doing so, Plaintiffs of course should be mindful of the Court’s preceding analysis as to why their RICO claims fail as to the other Counterfeiting Defendants.

C. Lanham Act Claims (Counts Two through Five)

***22** Against these same fourteen Defendants and based on substantially the same allegations, Plaintiffs bring four causes of action under Sections 32(1) and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114(1), 1125(a).

Section 32(1) of the Lanham Act protects registered trademarks from infringement, extending liability to:

Any person who shall, without the consent of the registrant ... use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

15 U.S.C. § 1114(1)(a). Section 43(a) covers both registered and unregistered trademarks, and “provides for two distinct causes of action: [1] false designation of origin or source, known as ‘product infringement,’ and [2] false description or representation, known as ‘false advertising,’ ” *Res. Devs., Inc. v. Statue of Liberty-Ellis Island Found., Inc.*, 926 F.2d 134, 139 (2d Cir. 1991) (quoting *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 188 (2d Cir. 1980)).¹⁰ Specifically, it extends liability to:

Any person who ... uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which –

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities.

15 U.S.C. § 1125(a)(1). These subsections of Section 43(a) provide “two distinct bases of liability,” *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1384 (2014), and are assessed under distinct analytical frameworks: whereas false designation of origin claims under **Section 1125(a)(1)(A)** act as a “vehicle for assertion of a claim of infringement of an unregistered mark,” false advertising claims under **Section 1125(a)(1)(B)** concern “whether an advertisement about a product has a tendency to deceive prospective purchasers about the nature or characteristics of the product.” *Parks, LLC v. Tyson Foods, Inc.*, 186 F. Supp. 3d 405, 414 (E.D. Pa. 2016), aff'd, 863 F.3d 220 (3d Cir. 2017) (citations omitted).

In Count Two, Coronado brings a claim for infringement of a registered trademark under Section 32(1), **15 U.S.C. § 1114(1)**, and in Count Four, both Plaintiffs bring a claim for false designation of origin (or “product infringement”) under Section 43(a), **15 U.S.C. § 1125(a)(1)(A)**.¹¹ In addition to and in connection with these two claims for direct infringement, Coronado brings in Count Three a claim for contributory trademark infringement, a judicially created doctrine extending liability to those who either intentionally induce others to infringe a trademark or knowingly continue to supply an infringing product. *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 103-04 (2d Cir. 2010); accord *Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc.*, 456 U.S. 844, 853-54 (1982). Finally, in Count Five, both Plaintiffs bring a false advertising claim under Section 43(a), **15 U.S.C. § 1125(a)(1)(B)**.

*23 The Court dismisses Counts Two and Four, the direct infringement claims, as to Isaac Import and the Banking Defendants; dismisses Count Three for contributory infringement against Isaac Import, the Banking Defendants, Don Ghermezian, and the Worldwide Defendants; and dismisses Count Five in its entirety.

1. Direct Infringement (Counts Two and Four)

“Under both the infringement section of the Lanham Act, **15 U.S.C. § 1114**, and the false designation of origin section, **15 U.S.C. § 1125**, the same test is applied to determine whether a particular activity violates the Act.” *Invicta Plastics (USA) Ltd. v. Mego Corp.*, 523 F. Supp. 619, 622 (S.D.N.Y. 1981). To state a direct infringement claim under either provision, a plaintiff must allege “that (1) it has a valid mark that is entitled to protection under the Lanham Act; and that (2) the defendant used the mark, (3) in commerce, (4) in connection with the sale[, offering for sale, distribution,] or advertising of goods or services ... without the plaintiff's consent.” *I-800 Contacts, Inc. v. WhenU.Com, Inc.*, 414 F.3d 400, 406-07 (2d Cir. 2005) (internal quotation marks omitted). The plaintiff must further demonstrate “that the defendant's use of that mark is likely to cause confusion as to the affiliation, connection, or association of defendant with plaintiff, or as to the origin, sponsorship, or approval of the defendant's goods, services, or commercial activities by plaintiff.” *Id.* at 407 (cleaned up). “Because the Lanham Act is a strict liability statute, a registrant need not prove knowledge or intent in order to establish liability.” *Spin Master Ltd. v. Alan Yuan's Store*, 325 F. Supp. 3d 413, 421 (S.D.N.Y. 2018); see also *Sunward Elec., Inc. v. McDonald*, 362 F.3d 17, 25 (2d Cir. 2004); *El*

Greco Leather Prods. Co. v. Shoe World, Inc., 806 F.2d 392, 396 (2d Cir. 1986) (explaining that the defendants' "claimed lack of knowledge of its supplier's infringement, even if true, provides no defense" to Section 1114 liability). Here, the Defendants do not dispute that Coronado's mark is entitled to protection or that the use of the mark on the counterfeit hand sanitizer caused consumer confusion. See JGX Defendants' Motion at 16-17; Worldwide Defendants' Motion at 14-16; Banking Defendants' Motion at 21-22.

a. False Designation of Origin (Count Four)

The Court begins with Plaintiffs' false designation of origin (or "product infringement") claim under Section 43(a) of the Lanham Act. In moving to dismiss this claim, the Banking Defendants argue that Plaintiffs have failed to allege that these Defendants have "used" the URBANE mark, Banking Defendants' Motion at 21-22, and Don Ghermezian contends that Plaintiffs have failed to allege that he was a "moving, active, conscious force" behind Triple Five Worldwide's alleged infringement, Worldwide Defendants' Motion at 17. The Worldwide Defendants do not move to dismiss this claim. See Worldwide Defendants' Motion at 17 (arguing that Count Four must be dismissed only as to Don Ghermezian). Although the JGX Defendants do not expressly move to dismiss Plaintiffs' Section 43(a) claim, certain of their arguments for dismissal of Coronado's Section 32(1) claim against them—namely, that Plaintiffs have failed to allege adequately that Isaac Import, Dib Jaradeh, and Nouri Jaradeh "used" the URBANE mark in commerce—apply equally to the false designation of origin claim. JGX Defendants' Motion at 17. The Court will thus consider these arguments in evaluating whether Plaintiffs have adequately alleged a claim for false designation of origin under Section 43(a) against these JGX Defendants.¹²

*²⁴ The Second Circuit has explained that "'use,' 'in commerce,' and 'likelihood of confusion' [are] three distinct elements of a trademark infringement claim," and that "'use' must be decided as a threshold matter because ... no such activity is actionable under the Lanham Act absent the 'use' of a trademark." *I-800 Contacts, Inc. v. WhenU.Com, Inc.*, 414 F.3d 400, 412 (2d Cir. 2005). In assessing this threshold "use" requirement for infringement claims, courts in this Circuit apply the definition of "use in commerce" found in 15 U.S.C. § 1127, which provides, in relevant part, that a mark is "in use in commerce" on goods when (1) "it is placed in any manner on the goods or their containers or the displays

associated therewith or on the tags or labels affixed thereto" and (2) "the goods are sold or transported in commerce." 15 U.S.C. § 1127; see *I-800 Contacts*, 414 F.3d at 407-08 (applying the "use in commerce" definition in 15 U.S.C. § 1127 to infringement claim); see also *Resuecom Corp. v. Google Inc.*, 562 F.3d 123, 139 (2d Cir. 2009) (undertaking a non-binding examination of the Lanham Act's legislative history and observing that "Congress did not intend that this definition [in 15 U.S.C. § 1127] apply to the sections of the Lanham Act which define infringing conduct" but rather only to those sections concerning trademark registration); *Can't Live Without It, LLC v. ETS Express, Inc.*, 287 F. Supp. 3d 400, 415 (S.D.N.Y. 2018) (concluding that courts in this Circuit are required to apply at least the second sentence of the definition in Section 1127, even though it is "'plainly apparent from context' that [it] does not apply to infringement claims"). A defendant need not have manufactured or itself affixed the subject trademark to the goods to be liable for the results of such infringement. *El Greco Leather Prods. Co., Inc. v. Shoe World, Inc.*, 806 F.2d 392, 396 (2d Cir. 1986). Mere sale of the infringing goods is sufficient to meet the "use" requirement. *Id.* Indeed, any member of the distribution chain may be held liable for trademark infringement. See *WM Int'l Inc. v. 99 Ranch Mkt. #601*, 329 F.R.D. 491, 497 (E.D.N.Y. 2019) (citing *Make Up For Ever, SA v. SOHO Forever, LLC*, 198 F.R.D. 56, 60 (S.D.N.Y. 2000)); cf. *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 358 (2d Cir. 2000) (explaining that "in ... copyright infringement cases, any member of the distribution chain can be sued as an alleged joint tortfeasor" (alteration in original) (citations omitted)).

Here, there is no indication in the Second Amended Complaint that Syd Ghermezian or CFSB "used" the URBANE mark. Plaintiffs do not allege that either Defendant manufactured, distributed, or sold the counterfeit products. Rather, as the aptly designated Banking Defendants point out, Syd Ghermezian's and CFSB's alleged involvement in the counterfeit hand sanitizer scheme is limited to their rendering of banking services to Triple Five Worldwide and its principals. SAC ¶¶ 211-255, 410; see Banking Defendants' Motion at 21-22. These allegations are insufficient to demonstrate either Defendant's "use" of the URBANE mark. See *Gucci Am., Inc. v. Frontline Processing Corp.*, 721 F. Supp. 2d 228, 247 (S.D.N.Y. 2010) (finding that the defendants who were alleged to have established credit card processing services used to complete the online sales of fake Gucci items could not be held directly liable for trademark infringement because they had not "used the mark in commerce").¹³ The Court thus dismisses Plaintiffs' claim

for false designation of origin under Section 43(a) as against Syd Ghermezian and CFSB. Because the Court's foregoing analysis also applies to Coronado's Section 32(1) claim, the Court dismisses that claim as to the Banking Defendants as well.

On the other hand, the Court finds that Plaintiffs have adequately alleged Don Ghermezian's liability for the infringing activity allegedly undertaken by Triple Five Worldwide, which has not moved to dismiss the claim for false designation of origin. *See* Worldwide Defendants' Motion at 17. A corporate officer may be held directly liable for trademark infringement and unfair competition if the officer is a "moving, active, conscious force behind the defendant corporation's infringement." *Innovation Ventures, LLC v. Ultimate One Distrib. Corp.*, 176 F. Supp. 3d 137, 155 (E.D.N.Y. 2016) (alterations omitted) (quoting *KatiRoll Co. v. Kati Junction, Inc.*, 33 F. Supp. 3d 359, 367 (S.D.N.Y. 2014)). "A corporate officer is considered a moving, active, conscious force behind a company's infringement when the officer was either the sole shareholder and employee, and therefore must have approved of the infringing act, or a direct participant in the infringing activity." *Mayes v. Summit Ent. Corp.*, 287 F. Supp. 3d 200, 212 (E.D.N.Y. 2018) (quoting *Innovation Ventures*, 176 F. Supp. 3d at 155).

*25 Plaintiffs here have pleaded a plausible basis for Don Ghermezian's direct participation in the infringing activity. For instance, Plaintiffs have alleged that "[u]pon information and belief, all sanitizer-related business conducted by Triple Five Worldwide, Berkowitz, David Ghermezian, Yonah Ghermezian, and Saba was overseen, approved, and/or performed at the behest, guidance, and/or direction of Don Ghermezian." SAC ¶ 202. That assertion is bolstered by specific allegations that Don Ghermezian both hosted and led the May 4, 2020 meeting in which he and other members of the Ghermezian family first discussed plans to enter the hand sanitizer business, *id.* ¶¶ 130, 139; participated in a meeting on May 7, 2020, outlining a business plan to sell hand sanitizer manufactured in Mexico, which plan designated Triple Five Worldwide as the corporate entity to facilitate sales in the United States, *id.* ¶¶ 158-159; "spoke regularly with David Ghermezian and Berkowitz about branding, sourcing, importing, and sales efforts," *id.* ¶ 181; and directed wire payments for hand sanitizer purchases, circulating at least on one occasion a purchase order from Triple Five Worldwide for 150,000 units for 2-ounce hand sanitizer under the URBĀNE Brand, *id.* ¶ 187.

Don Ghermezian urges that these allegations fail to connect him to the sale of counterfeit URBĀNE products specifically, inviting the Court to look beyond the face of the pleadings—and to rely on evidence attached to his motion that the Court has found is neither incorporated by reference nor integral to the Complaint, *see supra* III.A—to determine whether the payments he is alleged to have directed actually concerned counterfeit URBĀNE (as opposed to another brand of hand sanitizer) or whether any URBĀNE referenced in a purchase order was in fact shipped. *See* Worldwide Defendants' Motion at 6 (insisting that certain payments referred to in the Complaint concerned the purchase of Britz hand sanitizer, and that to the extent URBĀNE sanitizer was referenced in a purchase order, the products were "never shipped to or by anyone"), 14-16. But, once again, the Court's task on a motion to dismiss "is to assess the legal feasibility of the complaint"—"not to assess the weight of the evidence that might be offered on either side." *Lynch*, 952 F.3d at 75. And taking Plaintiffs' allegations as true and drawing all reasonable inferences in their favor, as it must, the Court finds that Plaintiffs have adequately pleaded Don Ghermezian's individual liability for Triple Five Worldwide's alleged infringing activity. Cf. *Pado, Inc. v. SG Trademark Holding Co. LLC*, 537 F. Supp. 3d 414, 428 (E.D.N.Y. 2021) (finding the allegations that the individual defendants had "personally directed and authorized the creation, distribution, and use of the infringing materials" sufficient at the pleading stage to establish that they were "direct participant[s] in the infringing activity").

Finally, although JGX and Grazi concede that Plaintiffs have stated a false designation of origin claim against them, Isaac Import, Nouri Jaradeh, and Isaac Jaradeh argue a failure to plead their "use" of the mark (albeit in connection with their arguments to dismiss Coronado's claim under 15 U.S.C. § 1114(1)). *See* JGX Defendants' Motion at 17.

The Court agrees that Plaintiffs have failed to adequately plead Isaac Import's role in the alleged counterfeiting operation. Plaintiffs do not allege any purchase or sale of the counterfeit goods or any wire transfer involving Isaac Import. Rather, they simply group Isaac Import in with the remaining JGX Defendants, seemingly treating that corporation as interchangeable either with JGX or with Dib Jaradeh himself. *See, e.g.*, SAC ¶¶ 108 ("Throughout the counterfeiting scheme, Grazi corresponded regularly with [Nouri] Jaradeh, [Dib Jaradeh], and Isaac Import"), 261 (alleging that the counterfeit labels were created by "JGX, Isaac Import, Grazi, [Nouri] Jaradeh, and [Dib Jaradeh]").¹⁴

Because the Court is unable to discern from the pleadings Isaac Import's specific role, if any, in the manufacture or distribution of the counterfeit URBĀNE, the Court dismisses Plaintiffs' false designation of origin claim against it. *See Adamou v. Cty. of Spotsylvania, Va., No. 12 Civ. 7789 (ALC), 2016 WL 1064608*, at *11 (S.D.N.Y. Mar. 14, 2016) (“Pleadings that fail to differentiate as to which defendant was involved in the alleged unlawful conduct are insufficient to state a claim.”); *cf. Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001) (observing that Rule 8's pleading standard “requires, at a minimum, that a complaint give each defendant fair notice of what the plaintiff's claim is and the ground upon which it rests,” and that a complaint fails to meet that minimum where it “lump[s] all the defendants together in each claim and provide[s] no factual basis to distinguish their conduct”). The Court's conclusion as to the deficiency of allegations specifying the role of Isaac Import also applies to Plaintiffs' other Lanham Act claims.

***26** As for Nouri Jaradeh and Dib Jaradeh, however, the Court finds that Plaintiffs have alleged sufficient facts for their liability for infringement at this stage of the litigation—at least as “moving, active, conscious” forces behind JGX's infringement. *See Innovation Ventures*, 176 F. Supp. 3d at 155. As to their role at JGX, Dib Jaradeh and Nouri Jaradeh are alleged to be managing members of Jaradeh, LLC, which is in turn alleged to hold a two-third ownership interest in JGX; according to the Complaint, they each “exercise complete dominion and control over JGX,” alongside Grazi himself. SAC ¶¶ 570, 572-573, 577. And as to their “direct participation” in the infringement, as earlier described *supra* III.B.1.a, Plaintiffs allege that Dib Jaradeh personally created the very label ultimately placed on all the counterfeit products, *id.* ¶ 105, and that he was involved in discussions with both Grazi and Carelli concerning “the quantity of counterfeit hand sanitizer bearing the URBĀNE label to be produced, as well as pricing, manufacturing, and shipping of the bottles,” *id.* ¶ 96. As further set out in the Complaint, Nouri Jaradeh allegedly created at least five purchase orders for more than 660,000 bottles of counterfeit hand sanitizer on behalf of JGX, was kept regularly apprised of invoices that Triple Five Worldwide issued to JGX, and regularly corresponded with both Dib Jaradeh and Grazi—even advising Grazi to “look [Coronado] up” sometime in May 2020. *Id.* ¶¶ 103, 108, 150-151, 259; *see* Dkt. 341, Exh. 4 (May 26, 2020 email from Nouri Jaradeh to Jack Grazi with subject line “Coronado Distribution Company, Inc.” and text body “look them up”). At this stage, the Court finds these

allegations plausibly plead Dib Jaradeh's and Nouri Jaradeh's liability for direct infringement.

The Court thus dismisses Coronado's false designation of origin claim as to Syd Ghermezian, CFSB, and Isaac Import. On the other hand, the Court rejects the arguments for dismissal raised by Don Ghermezian, Dib Jaradeh, and Nouri Jaradeh. Accordingly, Count Four against those three Defendants, as well as against the Worldwide Defendants, JGX, Grazi, and Liberty—who did not move for dismissal—survives.

b. Infringement of a Registered Mark (Count Two)

As discussed, although the analysis for infringement claims under Section 32(1) and Section 43(a) are the same, the former protects only registered trademarks. In urging specifically dismissal of Coronado's Section 32(1) claim, Don Ghermezian, the Worldwide Defendants, and the JGX Defendants contend that Plaintiffs have failed to allege any infringing activity after June 2, 2020—the earliest registration date for the URBĀNE mark. Worldwide Defendants' Motion at 14; JGX Defendants' Motion at 16. The Court disagrees.

Plaintiffs have alleged that “Berkowitz, Saba, David Ghermezian, and Yonah Ghermezian also corresponded regularly with Grazi during this period, with particular frequency during May and June 2020 so that Triple Five Worldwide and its principals could proceed as fast as they could to produce counterfeit product bearing the URBĀNE label” and that as late as June 24, 2020, David Ghermezian and Saba were still coordinating the importation of URBĀNE hand sanitizer into the United States. SAC ¶¶ 257, 292. Plaintiffs also allege upon information and belief that the counterfeit hand sanitizer was still available in large retailers as late as September 2020. *Id.* ¶ 355. Finally, Plaintiffs allege that “Triple Five Worldwide and JGX exchanged wire transfers in connection with their counterfeit sanitizer scheme” on June 25, 2020, August 12, 2020, and August 14, 2020, and that “JGX mailed Rigz check payments” on June 24, 2020. SAC ¶¶ 411, 414.

To be sure, these allegations are not overwhelmingly indicative of post-registration infringement activity by the JGX Defendants, the Worldwide Defendants, or Don Ghermezian. Taking these allegations as true (particularly in conjunction with the litany of pre-registration allegations specifying these Defendants' roles in the alleged

counterfeiting scheme) and drawing all reasonable inferences in Coronado's favor, as it must, the Court finds that Coronado has plausibly alleged that infringing conduct by JGX, Grazi, Nouri Jaradeh, Dib Jaradeh, Don Ghermezian, and the Worldwide Defendants continued into late August 2020.

Accordingly, the Court denies the JGX Defendants' and Don Ghermezian and the Worldwide Defendants' motions to dismiss Coronado's Section 32(1) claim. On the other hand, the Court incorporates its analysis on Coronado's false designation of origin claim, *see supra* III.C.1.a., and dismisses Coronado's Section 32(1) claim against the Banking Defendants and Isaac Import.

* * *

In sum, the direct infringement claims (Counts Two and Four) against JGX, Grazi, Dib Jaradeh, Nouri Jaradeh, Don Ghermezian, the Worldwide Defendants, and Liberty survive dismissal.

2. Contributory Infringement (Count Three)

***27** Next, in Count Three, Coronado also seeks to hold each of the Counterfeiting Defendants *contributorily* liable for trademark infringement. Contributory infringement is a theory of secondary liability that arises when “a manufacturer or distributor intentionally induces another to infringe a trademark, or ... continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement.” *Inwood Lab'y's*, 456 U.S. at 853-54. Although “*Inwood's* test for contributory trademark infringement applies on its face to manufacturers and distributors of goods,” other courts, including the Seventh and Ninth Circuits, have “extended the test to providers of services.” *Tiffany (NJ)*, 600 F.3d at 104 (citing *Hard Rock Café Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1148-49 (7th Cir. 1992) and *Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 984 (9th Cir. 1999)). In particular, the Ninth Circuit has determined that “contributory trademark infringement applies to a service provider if he or she exercises sufficient control over the infringing conduct.” *Id* at 104-05 (citing *Lockheed Martin Corp.*, 194 F.3d at 984). The Second Circuit has yet to determine that *Inwood* applies outside the context of manufacturers and distributors, but in *Tiffany (NJ)*, the Second Circuit—in assuming without deciding that *Inwood* applied to an online marketplace (eBay)—explained:

A service provider must have more than a general knowledge or reason to know that its service is being used to sell counterfeit goods. Some contemporary knowledge of which particular listings are infringing or will infringe in the future is necessary.

Id. at 107.

It is not entirely clear from the Complaint on what grounds Coronado bases its claim for contributory infringement. Nor is it clear whether these grounds include conduct distinct from Coronado's allegations describing the same Defendants' direct infringement. A consistent feature of the Complaint, the allegations merely touch upon the requirements of an asserted claim in conclusory fashion and, further obscuring any underlying factual bases, treat the fourteen Counterfeiting Defendants as an undifferentiated group. For instance, Coronado simply asserts in Count Three that “[b]y, *inter alia*, importing, distributing, offering for sale, and selling, despite knowing, or having reason to know, that they did not have the rights to the trademarks, the Counterfeiting Defendants induced third-parties to infringe Coronado's rights in and to the URBĀNE Marks.” SAC ¶ 463. Coronado fails to specify any Defendant's role in this purported inducement; it fails to identify the third parties whose infringement any Defendant allegedly induced; and it fails to describe these third parties' direct infringement, a prerequisite for contributory liability to lie. *See Solid 21, Inc. v. Richemont N. Am., Inc.*, No. 19 Civ. 1262 (LGS), 2020 WL 3050970, at *7 (S.D.N.Y. June 8, 2020) (“Contributory trademark infringement is predicated on the existence of direct infringement.”); *cf. Tiffany (NJ)*, 600 F.3d at 103 (describing “contributory trademark infringement” as “culpably facilitating the infringing conduct”).

Raising these deficiencies, among others, the Banking Defendants, Don Ghermezian, the Worldwide Defendants, and the JGX Defendants, all move to dismiss Count Three. *See* Banking Defendants' Motion at 23-25; Worldwide Defendants' Motion at 16; JGX Defendants' Motion at 17-19.

The Banking Defendants, implicated in this action as service providers, emphasize the utter dearth of allegations in the Complaint that they intentionally induced any entity of infringing the URBĀNE mark, noting in particular that Coronado's own allegations show that the JGX Defendants were already infringing the mark before any member of the Ghermezian family became involved in the alleged counterfeiting scheme. Banking Defendants' Motion at 23. They further argue that Coronado has failed to “plead any

facts to even remotely suggest that either CFSB or Syd had any knowledge or reason to know that its service was being used to infringe the URBĀNE Marks.” *Id.* at 24.

*28 Coronado does not oppose the former contention. And as to the latter, Coronado responds only that “the Banking Defendants knew or had reason to know that Triple Five Worldwide and its principals were engaged in trademark infringement,” but citing allegations in the Complaint that do not actually provide factual support for that assertion. *See* Opposition at 9 (citing SAC ¶¶ 183-185, 230-231, 251-252). Rather, these allegations describe the exchanges of invoices and wire payments for hand sanitizer, SAC ¶¶ 183-185, 251, assert that Syd Ghermezian’s control of CFSB furthered the alleged scheme, *id.* ¶ 230, and recite without any factual content that Syd “knew or had reason to know” that the banking services were furthering the counterfeit hand sanitizer scheme, *id.* ¶¶ 231, 252. Indeed, even were the Court to accept the latter, wholly conclusory allegations regarding Syd Ghermezian’s awareness that CFSB transactions “were furthering a counterfeit sanitizer business,” *id.* ¶ 252, those allegations demonstrate only a “general knowledge … [that Syd Ghermezian’s] service [was] being used to sell counterfeit goods,” *see Tiffany (NJ), 600 F.3d at 107*. Such generalized knowledge is insufficient for contributory liability to attach. *Id.* Accordingly, the Court grants the Banking Defendants’ motion as to Count Three.

The Court also grants as to Count Three the motion of Don Ghermezian and the Worldwide Defendants, which similarly raises arguments citing the absence of allegations of knowledge of the infringement of Coronado’s mark. Worldwide Defendants’ Motion at 16. In addressing their arguments, Plaintiffs respond that “in determining whether [an] officer’s acts render him individually liable, [it] is immaterial whether … [he] knows that his acts will result in an infringement”—quoting a proposition that refers to the scope of a corporate officer’s liability for direct trademark infringement. Opposition at 9 (alteration in original) (quoting *Bambu Sales, Inc. v. Sultana Crackers, Inc.*, 683 F. Supp. 899, 914 (E.D.N.Y. 1988)). This assertion is, of course, irrelevant to Defendants’ arguments on contributory infringement.

Coronado then insists that Don Ghermezian’s and the Worldwide Defendants’ argument “requires simply ignoring voluminous well plead [sic] allegations of intentionally inducing others to infringe,” once again listing a string of citations to allegations in the Complaint that do not, in fact, support that assertion. *Id.* (citing SAC ¶¶

156, 180, 187, 258, 260, 266-267, 273). Indeed, those cited allegations simply describe the participation of Don Ghermezian and the Worldwide Defendants in the hand sanitizer operation, without reference to any facts suggesting that these Defendants in fact knew that the hand sanitizer they were manufacturing and distributing bore counterfeit labels. *See* SAC ¶¶ 156 (explaining that the Worldwide Defendants began soliciting and taking orders for counterfeit URBĀNE hand sanitizer), 180 (explaining that Don Ghermezian was “involved in all aspects of the counterfeit sanitizer operation”), 187 (describing wire payments directed by Don Ghermezian), 258 (describing invoices for the counterfeit URBĀNE hand sanitizer), 260 (describing a May 8, 2020 shipment of counterfeit URBĀNE hand sanitizer), 266-267 (specifying the Worldwide Defendants responsible for interfacing with Grazi and JGX), 273 (alleging that Grazi leveraged his relationship with the Ghermezian family to expedite the manufacture and importation of the counterfeit hand sanitizer). In any event, the Court has already found that the Complaint lacks any allegations providing a factual basis for Don Ghermezian’s and the Worldwide Defendants’ knowledge that the hand sanitizer operations involved infringement of Coronado’s mark. *See supra* III.B.1.a. The Court thus grants Don Ghermezian and the Worldwide Defendants’ motion as to Count Three.

Finally, the Court turns to the JGX Defendants’ various arguments for dismissal. As a preliminary matter, the Court notes that its discussion on the absence of any specific allegations as to conduct undertaken by Isaac Imports applies equally to Coronado’s claim for contributory infringement, and thus dismisses Count Three against that Defendant. *See supra* III.C.1.a. The Court proceeds to assess the JGX Defendants’ arguments only as to JGX, Grazi, Nouri Jaradeh, and Dib Jaradeh.

*29 First, the JGX Defendants argue that contributory infringement must be predicated on direct infringement of a registered trademark, and, presumably relying on their contention that Coronado has failed to allege infringing conduct by the JGX Defendants after June 2, 2020, they thus contend that Coronado’s contributory infringement claim fails as a matter of law as against all of them. JGX Defendants’ Motion at 17-18. The Court has already identified allegations in the Complaint describing certain of the JGX Defendants’ continued participation in infringing activities after June 2, 2020, and thus rejects this argument. *See supra* III.C.1.b. The Court nonetheless addresses the JGX Defendants’ proposition that “no contributory liability lies based upon acts which

occurred prior to registration,” for which assertion they rely on *Sly Magazine, LLC v. Weider Publications L.L.C.*, 241 F.R.D. 527 (S.D.N.Y. 2007). JGX Defendants’ Motion at 17-18.

Sly Magazine involved a plaintiff’s motion for leave to add a claim specifically under Section 32(1) of the Lanham Act (governing registered marks) based on infringing acts undertaken by the defendant *before* registration of the mark. *Sly Mag.*, 241 F.R.D. at 530. The plaintiff there sought to circumvent the well-established principle that registration of a trademark cannot retroactively give rise to Section 32(1) liability for pre-registration infringement by advancing a theory of contributory liability. *Id.* The plaintiff thus sought to hold the defendant liable for post-registration activity conduct by third parties, which the plaintiff claimed had been induced by the defendant’s pre-registration actions. *Id.* The court rejected that theory, explaining that to “permit direct liability under § 32(1) based upon retroactive registration or, for that matter, contributory liability based upon acts which occurred in their entirety prior to registration, would obviate the[] elemental distinctions” between Section 32(1) and Section 43(a) infringement claims. *Id.* at 531.

Sly Magazine thus instructs that a theory of contributory liability for infringement of a *registered* trademark under Section 32(1) may arise only from actions undertaken by a defendant after registration of the trademark. It does not preclude contributory liability for infringement of an unregistered trademark for claims brought under Section 43(a) of the Lanham Act. Indeed, the Second Circuit has implicitly recognized the availability of a contributory liability infringement claims predicated on direct infringement of an unregistered trademark. See *Societe Des Hotels Meridien v. LaSalle Hotel Operating P'ship, L.P.*, 380 F.3d 126, 132-33 (2d Cir. 2004) (reinstating claims for “[c]ontributory [u]nfair [c]ompetition/[r]everse [p]alming [o]ff and [c]ontributory [f]alse [a]dvertising” after holding that the district court erred in dismissing the two direct Section 43(a) claims); cf. *Duty Free Ams., Inc. v. Estée Lauder Cos.*, 797 F.3d 1248, 1276-77 (11th Cir. 2015) (explaining “that the principles underlying the Lanham Act contemplate liability that extends beyond direct violators of the trademark provision of § 43(a)” and thus holding that “a plaintiff may bring a claim for contributory false advertising”).

Second, the JGX Defendants urge that Nouri Jaradeh’s May 26, 2020 email to Grazi establishes that JGX was not aware of Coronado until that date, that any alleged infringement

by JGX occurred *before* May 26, 2020, and that the JGX Defendants thus could not have intentionally induced any infringement. JGX Defendants’ Motion at 18-19. Coronado responds that even beyond the reference to the May 26, 2020 email (the JGX Defendants’ interpretation of which Coronado impugns as “implausible”), the Complaint includes allegations that the JGX Defendants should have known that Rigz was not the rightful owner of the URBĀNE mark (presumably given its experience in the apparel industry), and that the JGX Defendants “made unapproved modifications” to the label provided by Rigz “so that the [counterfeit product] could be misleadingly manufactured in Mexico.” Opposition at 8. The Court agrees with Coronado. Moreover, it has already found Coronado’s allegations sufficient to demonstrate (1) knowledge of the infringement on the part of Grazi, Nouri Jaradeh, and Dib Jaradeh, *see supra* III.B.1.a, and (2) conduct in furtherance of the alleged counterfeiting scheme extending into as late as August 2020, *see supra* III.C.1.b. The Court thus rejects the JGX Defendants’ arguments on this score.

*30 Finally, the JGX Defendants argue that the actions alleged as to Nouri Jaradeh and Dib Jaradeh do not constitute intentional inducement of infringement. JGX Defendants’ Motion at 19. Fair enough. But contributory infringement includes more than just intentional inducement: it also attaches where the defendant “continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement.” *Inwood Lab'y's*, 456 U.S. at 853-54. And at this stage of the litigation, the Court finds that the Coronado has plausibly alleged a claim for contributory infringement as to Nouri Jaradeh and Dib Jaradeh, given the Court’s findings as to their knowledge of the infringement, their alleged dominion over the affairs of JGX, and Coronado’s allegations regarding the shipments of the counterfeit product between JGX and Rigz and between JGX and Triple Five Worldwide. *See supra* III.C.1.a.

Accordingly, the Court dismisses Count Three as to all Defendants, save for JGX, Grazi, Dib Jaradeh, Nouri Jaradeh, and Liberty.

3. False Advertising (Count Five)

In Count Five, Plaintiffs bring a claim for false advertising, once again through a perfunctory recitation of the claim’s requirements aimed at the entire group of Counterfeiting Defendants without differentiation. SAC ¶¶ 473-480. All appearing Counterfeiting Defendants move to dismiss the claim, focusing their arguments on Plaintiffs’ failure to

specify any false or misleading statements made for the purpose of advertising the counterfeit product. *See* JGX Defendants' Motion at 19-20; Worldwide Defendants' Motion at 17-18; Banking Defendants' Motion at 25. In response, Plaintiffs clarify (for the first time) that its false advertising claim is predicated largely on the representations included on URBĀNE label. Opposition at 10-11. Specifically, Plaintiffs argue that the Counterfeiting Defendants misrepresented to consumers that authentic URBĀNE hand sanitizer is manufactured in Mexico (by including a "Made in Mexico" description on the counterfeit product); that the product was distributed by Liberty (rather than by JGX or Triple Five Worldwide); and that ingredients were identical to that of authentic URBĀNE. *Id.* at 11. Plaintiffs then add that the JGX Defendants and the Worldwide Defendants also "made [these] false representations with respect to the production process for the Counterfeit Products to their own consumers, including Rigz and Tyberg." *Id.* These allegations fail to make out a false advertising claim as a matter of law, and so the Court dismisses the claim as to all fourteen Defendants.

To state a claim for false advertising under the Lanham Act, a plaintiff must allege "(1) a false or misleading statement; (2) in connection with commercial advertising or promotion that (3) was material; (4) was made in interstate commerce; and (5) damaged or will likely damage the plaintiff." *Unlimited Cellular, Inc. v. Red Points Sols. SL*, No. 21 Civ. 10638 (NSR), 2023 WL 4029824, at *6 (S.D.N.Y. June 14, 2023) (citation omitted). Such a claim may be based on the theory "that the challenged advertisement is literally false, *i.e.*, false on its face," or "that the advertisement, while not literally false, is nevertheless likely to mislead or confuse consumers." *Tiffany (NJ)*, 600 F.3d at 112 (citation omitted). "Under either theory, the plaintiff must also demonstrate that the false or misleading representation involved an inherent or material quality of the product." *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153 n.3 (2d Cir. 2007); *accord* 15 U.S.C. § 1125(a)(1) (proscribing misrepresentations as to "the nature, characteristics, qualities, or geographic origin of his or her or another person's goods"). Moreover, such representation must be made for the purpose of influencing consumers to buy the defendant's goods or services, most commonly as "part of an organized campaign to penetrate the relevant market." *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 57 (2d Cir. 2002). "[A]lthough representations less formal than those made as part of a classic advertising campaign may suffice, they must be disseminated sufficiently to the relevant purchasing public." *Gmurzynska v. Hutton*, 355 F.3d 206, 210 (2d Cir. 2004) (citation omitted).

*31 Here, the "statements" on the counterfeit URBĀNE label, to the extent they are even false or misleading, do not involve an "inherent or material quality of the product" and so cannot give rise to a false advertising claim.

Take first the list of ingredients. Plaintiffs allege that the counterfeit product listed the same ingredients used in authentic URBĀNE, but that "upon information and belief" the counterfeit product "did not contain identical ingredients as the genuine URBĀNE hand sanitizer." SAC ¶ 263. This allegation is pure speculation and thus does not suffice to make out a plausible basis for the falsity of the ingredient list. Even setting aside that deficiency, Plaintiffs have pleaded no facts demonstrating the materiality of such a misrepresentation. Accepting the sufficiency of Plaintiffs' false advertisement claim as pleaded would require the Court to adopt the dubious premise that consumers base their hand sanitizer purchase decisions on the product's strict adherence to an ingredient list of "70% Alcohol, Purified Water, Glycerine, Acrylates C10-3-Alkyl Acrylate Crosspolymer, [and] Fragrance." Cf. *Telebrans Corp. v. Wilton Indus.*, 983 F. Supp. 471, 475 (S.D.N.Y. 1997) (explaining that a "material misrepresentation" under the Lanham Act is "one that would have an impact on a consumer's decision whether to purchase the product" (citation omitted)). This the Court will not do. Cf. *Vogel v. Boris*, No. 20 Civ. 9301 (VM), 2021 WL 1668072, at *5 (S.D.N.Y. Apr. 28, 2021) (explaining that courts "are not required to accept every strained interpretation proposed by the plaintiff" in the context of a motion to dismiss (citation omitted)).

Next, Plaintiffs complain that the counterfeit URBĀNE label falsely names Liberty as the product's distributor—not JGX or Triple Five Worldwide. Because a product's distributor does not involve "an inherent or material quality of the product," *Time Warner Cable*, 497 F.3d at 153 n.3, this misstatement falls short as a matter of law.

Finally, Plaintiffs maintain that the "Made in Mexico" designation on the counterfeit label misleads consumers into believing that authentic URBĀNE is manufactured in Mexico. Of course, that statement is not on its face false, given that the product *was* manufactured in Mexico, according to Plaintiffs. Any confusion arising out of the "Made in Mexico" designation on the counterfeit products stems from the presence of the URBĀNE mark on the same label, and the crux of Plaintiffs' claim is that the use of the URBĀNE mark on the counterfeit product "is likely to cause,

or to cause mistake, or to deceive as to the affiliation, connection, ... association ... [or] origin" of the product, **15 U.S.C. § 1125(a)(1)(A)**. In other words, Plaintiffs have merely recast their false designation of origin claim as a false advertising claim. But, as discussed at *supra* III.C, a false designation of origin claim is analytically distinct from a false advertising claim, and "to properly analyze a claim under [Section 43(a)] of the Lanham Act, the claim must [first] be correctly classified." *Parks*, 186 F. Supp. 3d at 414; see also *C.M.B. Prods., Inc. v. SRB Brooklyn, LLC*, No. 19 Civ. 2009 (ENV), 2022 WL 2704506, at *9-10 (E.D.N.Y. July 12, 2022) (recharacterizing the plaintiff's false advertising claim as a false association claim). Because this theory of liability is more appropriately assessed under the framework for false designation of origin, the Court dismisses Plaintiffs' false advertising claim against the appearing Counterfeiting Defendants. *Parks LLC v. Tyson Foods, Inc.*, 863 F.3d 220, 226 (3d Cir. 2017) ("[The plaintiff]'s false advertising claim fails because it is essentially [an infringement] claim in disguise."); cf. *Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.*, 277 F.3d 253, 260 (2d Cir. 2002) (holding that the district court properly dismissed the plaintiff's false designation of origin claim and noting that the plaintiff had "endeavor[ed] to blend its claim of false advertising with a claim of false designation of origin"). The above analysis also plainly warrants dismissal of Plaintiffs' Lanham Act false advertisement claim against Liberty, and Plaintiffs had the opportunity to be heard on this issue in opposing the appearing Counterfeiting Defendants' motions. See *Antidote Int'l Films*, 467 F. Supp. 2d at 399. Accordingly, the Court dismisses *sua sponte* Count Five as to Liberty.

D. State Law Claims (Counts Six through Sixteen)

***32** Plaintiffs also bring eight claims under state law, and in the final three Counts of their Complaint, urge the Court to pierce of the corporate veils of JGX (to hold Grazi, Dib Jaradeh, and Nouri Jaradeh individually liable), Triple Five Worldwide (to hold Don, Nader, and Syd Ghermezian individually liable), and Isaac Import (to hold Dib Jaradeh individually liable). Except for Coronado's claims for common law trademark infringement (Count Seven), common law unfair competition (Count Nine), and dilution by tarnishment under **N.Y. G.B.L. Section 360-1** (Count Eleven), the Court dismisses the remainder of these claims against the appearing Defendants.

1. Common Law Trademark Infringement and Unfair Competition (Counts Seven and Nine)

In Counts Seven and Nine, Coronado brings trademark infringement and unfair competition claims under New York common law against the Counterfeiting Defendants, all of whom, save for JGX (and Liberty), move to dismiss the claims.

New York common law on trademark infringement "developed as the remedy designed to protect technical trademarks," and it was later "supplemented by the formulation of a broader remedy of an action for unfair competition," which "was intended to protect nontechnical, common law trade-mark—marks used although not registered." *Allied Maintenance Corp. v. Allied Mechanical Trades, Inc.*, 42 N.Y.2d 538, 542 (1977). The legal standards for these two claims are "virtually identical" to their Lanham Act counterparts. *Now-Casting Econ., Ltd. v. Econ. Alchemy LLC*, 628 F. Supp. 3d 501, 516 (S.D.N.Y. 2022). Common law unfair competition claims, however, require an additional showing of bad faith. See *Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 35 (2d Cir. 1995); *Girl Scouts v. Bantam Doubleday Dell Publ'g Grp., Inc.*, 808 F. Supp. 1112, 1131 (S.D.N.Y. 1992) ("Under New York law, common law unfair competition claims closely resemble Lanham Act claims except insofar as the state law claim may require an additional element of bad faith or intent." (internal quotation marks omitted)), *aff'd*, 996 F.2d 1477 (2d Cir. 1993). "In analyzing whether a defendant has acted in bad faith, the question is whether the defendant attempted 'to exploit the good will and reputation of a senior user by adopting the mark with the intent to sow confusion between the two companies' products.' " *Shandong Shinho Food Indus. Co., Ltd. v. May Flower Int'l, Inc.*, 521 F. Supp. 3d 222, 251 (E.D.N.Y. 2021) (quoting *Tiffany & Co. v. Costco Wholesale Corp.*, 971 F.3d 74, 88 (2d Cir. 2020)). Bad faith is presumed where a defendant has willfully copied a plaintiff's mark. *Nike, Inc. v. Top Brand Co. Ltd.*, No. 00 Civ. 8179 (KMW), 2005 WL 1654859, at *8 (S.D.N.Y. July 13, 2005); cf. *Warner Bros. Inc. v. Am. Broad. Cos., Inc.*, 720 F.2d 231, 246-47 (2d Cir. 1983) ("We have recognized that evidence of intentional copying raises a presumption that a second comer intended to create a confusing similarity of appearance and succeeded.").

Because the Court has found that Coronado has stated claims for direct infringement claims under the Lanham Act against Grazi, Dib Jaradeh, and Nouri Jaradeh, and moreover that Coronado has alleged their fraudulent intent in using the counterfeit URBĀNE label, the Court denies the JGX Defendants' motion to dismiss Coronado's common law trademark infringement and unfair competition claims

against these Defendants. *See supra* III.C. Conversely, as the Court has already determined that Coronado's Lanham Act claims against the Banking Defendants and Isaac Import fail, the Court dismisses Coronado's common law trademark infringement and unfair competition claims against them. *See id.* Finally, because Coronado has failed to plausibly allege even knowledge of the infringement on the part of Don Ghermezian and the Worldwide Defendants, *see supra* III.B.1.a, III.C.2, it has necessarily failed to make the requisite showing of bad faith, and so the Court dismisses Coronado's unfair competition claim against them as well.

*33 The more difficult question raised here is whether the absence of allegations evincing bad faith on the part of Don Ghermezian and the Worldwide Defendants also requires dismissal of Coronado's common law trademark infringement claim against them. Don Ghermezian and the Worldwide Defendants, as well as the Banking Defendants, argue that common law trademark infringement claims, like common law unfair competition claims, require a showing of bad faith. Worldwide Defendants' Motion at 18; Banking Defendants' Motion at 27-28. Plaintiffs contend otherwise, pointing out that the cases relied upon by these Defendants speak only to the bad faith requirement for unfair competition claims. Opposition at 12 n.9.

Unfortunately, this area of the law is fraught with ambiguity. Although the Second Circuit has made it clear that bad faith is a requirement for common law unfair competition claims, *see Jeffrey Milstein*, 58 F.3d at 35, this Court is aware of no precedential authority expressly pronouncing that same requirement for common law trademark infringement claims. Moreover, while some judges in this District have required a showing of bad faith for common law trademark infringement claims, others have not. Compare *CFC Newburgh Inc. v. STM Bags, LLC*, No. 22 Civ. 1597 (NSR), 2023 WL 6066136, at *14 (S.D.N.Y. Sept. 18, 2023) (dismissing the counterclaim plaintiff's common law claim for trademark infringement for failure to show that the counterclaim defendant acted in bad faith); *Lopez v. Nike, Inc.*, No. 20 Civ. 905 (PGG) (JLC), 2021 WL 128574, at *14 (S.D.N.Y. Jan. 14, 2021) ("Therefore, to succeed on his common law trademark claim, Lopez must demonstrate a likelihood of confusion between the marks and additionally show that [the defendant] acted in bad faith."), *report and recommendation adopted by* 2021 WL 2207451 (S.D.N.Y. Feb. 16, 2021); and *SLY Mag., LLC v. Weider Publ'ns L.L.C.*, 529 F. Supp. 2d 425, 442-43 (S.D.N.Y. 2007) (explaining that the plaintiff's "claims for violations of trademark infringement, trade dress

infringement, misappropriation, and unfair competition under New York's common law" all fail because the plaintiff had failed to state claims under Lanham Act and because "the evidence raises no genuine issue of fact as to bad faith"), *aff'd*, 346 F. App'x 721 (2d Cir. 2009), *with Pearson Educ., Inc. v. Kumar*, 721 F. Supp. 2d 166, 191 (S.D.N.Y. 2010) ("Traditionally, there must be some element of bad faith in an unfair competition claim. However, with regard to trademark infringement under unfair competition, a showing of bad faith or fraudulent intent is not always a prerequisite." (internal quotation marks omitted)); *Pfizer Inc. v. Sachs*, 652 F. Supp. 2d 512, 526 (S.D.N.Y. 2009) (explaining that to prevail on a common law claim of trademark infringement, a plaintiff "need only present evidence sufficient to establish a violation of section 32(1) of the Lanham Act," and must present additional evidence of "bad faith or intent" only for unfair competition claims); and *Philip Morris USA Inc. v. Felizardo*, No. 03 Civ. 5891 (HB), 2004 WL 1375277, at *6 (S.D.N.Y. June 18, 2004) (same).

This split seems a natural consequence of pervasive inconsistency around the use of the term "unfair competition." *See* 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 4:6 (5th ed.) ("Perhaps no term of art in this field of law has over the years provoked such a confusion of definitions as 'unfair competition.'"). "[In the] pre-Lanham Act era, 'trademark law' concerned only registered marks, while 'unfair competition' law governed claims of infringement of unregistered marks under common law." *Id.* § 4:4. And in the early twentieth century, some courts required an intent to deceive for unfair competition, but *not* for trademark infringement. *Id.* Over time, however, the distinction between the two areas "was constantly being blurred because many courts, including the Supreme Court, stated that trademark law was merely a species of unfair competition law." *Id.* (citing, among other cases, *American Steel Foundries v. Robertson*, 269 U.S. 372, 380 (1926)). By the 1920s, "courts were holding that intent to deceive or confuse was not a required element of either trademark infringement or unfair competition," *id.*, including the Second Circuit itself, *see Coty, Inc., v. Parfums De Grande Luxe*, 298 F. 865, 870 (2d Cir. 1924) ("We think that the reasons for not requiring proof of a fraudulent intent in cases of infringement of trade-marks apply with equal force in cases of unfair competition, the basis of the remedy being substantially the same."). Indeed, it appears that under modern prevailing notions of trademark infringement law, a showing bad faith is not required for liability: "Although early cases of trademark infringement were brought as actions at law for deceit,

the element of fraud was later presumed, and eventually eliminated.” *Restatement (Third) of Unfair Competition § 20 cmt. c* (Am. L. Inst. 1994).

*34 But it is difficult to reconcile the absence of a bad faith requirement for common law trademark infringement with the express recognition of a bad faith requirement for unfair competition claims, *see Jeffrey Milstein*, 58 F.3d at 35, given “the well-established rule … that the law of trademarks is a part of the larger field of unfair competition,” *Safeway Stores, Inc. v. Safeway Props., Inc.*, 307 F.2d 495, 497 n.1 (2d Cir. 1962) (citing *Dell Pub. Co. v. Stanley Publ'ns, Inc.*, 9 N.Y.2d 126, 211 (1961)). From that principle, it necessarily follows that “there cannot be any trademark infringement without acts which amount to unfair competition.” 104 N.Y. Jur. 2d *Trade Regulation* § 138. And insofar as a showing of bad faith is a prerequisite for a common law unfair competition claim, presumably it would also have to be prerequisite for a common law trademark infringement claim.

The Court leaves the resolution of this thorny issue for another day. Because the Court has already dismissed Coronado's Lanham Act claims against the Banking Defendants and has found that Coronado has plausibly alleged fraudulent intent as to the JGX Defendants, the issue remains relevant only as to Don Ghermezian and the Worldwide Defendants. Given the complexity of the legal issue and the parties' only cursory treatment of it in their briefing, the Court declines at this juncture to dismiss Coronado's common law trademark infringement claim against Don Ghermezian and the Worldwide Defendants on this ground.

The Court thus dismisses Coronado's common law unfair competition claim as to the Banking Defendants, Don Ghermezian, the Worldwide Defendants, and Isaac Import, as well as Coronado's common law trademark infringement claim as to the Banking Defendants and Isaac Import. Count Nine thus proceeds against JGX, Grazi, Dib Jaradeh, Nouri Jaradeh, and Liberty, and Count Seven proceeds against JGX, Grazi, Dib Jaradeh, Nouri Jaradeh, Don, the Worldwide Defendants, and Liberty.

2. Dilution by Tarnishment Under New York Law (Count Eleven)

Next, the Court addresses Coronado's dilution by tarnishment claim under *N.Y. G.B.L. Section 360-1*, against the Counterfeiting Defendants. The Banking Defendants, Don Ghermezian, and the Worldwide Defendants move to dismiss

this claim. Banking Defendants' Motion at 31; Worldwide Defendants' Motion at 18. The JGX Defendants do not.¹⁵

Section 360-1 provides for injunctive relief¹⁶ in the event of “[l]ikelihood of injury to business reputation or of dilution of the distinctive quality of a mark or trade name … in cases of infringement of a mark registered or not registered or in cases of unfair competition, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.” *N.Y. G.B.L. § 360-1*. Under New York law, “a plaintiff may obtain injunctive relief if it can show a ‘[l]ikelihood of injury to business reputation or of dilution of the distinctive quality of a mark or trade name.’” *E.A. Sween Co. v. A & M Deli Express Inc.*, 787 F. App'x 780, 786 (2d Cir. 2019) (first alteration in original) (quoting *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 113-14 (2d Cir. 2009)); accord *N.Y. G.B.L. § 360-1*. To prevail on such a claim, a plaintiff must first show that it possesses a strong mark, which either “has a distinctive quality or has acquired a secondary meaning such that the trade name has become so associated in the public's mind with the [plaintiff] that it identifies goods sold by that entity as distinguished from goods sold by others.” *Biosafe-One, Inc. v. Hawks*, 639 F. Supp. 2d 358, 367 (S.D.N.Y. 2009) (citation omitted; first alteration in original). “Unlike federal trademark dilution law, … New York's trademark dilution law does not require a mark to be ‘famous’ for protection against dilution to apply.” *Starbucks Corp.*, 588 F.3d at 114. “[B]ut it must be an extremely strong mark either because of its inherently distinctive qualities or the fact that it has acquired secondary meaning.” *Mobileye, Inc. v. Picitup Corp.*, 928 F. Supp. 2d 759, 782 (S.D.N.Y. 2013) (citation omitted).

*35 Second, a plaintiff must show a likelihood of dilution by either blurring or tarnishment. Plaintiffs here advance a dilution by tarnishment theory. “Dilution through tarnishment occurs where the defendant uses the plaintiffs' mark in association with unwholesome or shoddy goods or services.” *Trs. of Columbia Univ. v. Columbia/HCA Healthcare Corp.*, 964 F. Supp. 733, 750 (S.D.N.Y. 1997). Indeed, “[t]he *sine qua non* of tarnishment is a finding that the plaintiff's mark will suffer negative associations through the defendant's use.” *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 507 (2d Cir. 1996).

The Banking Defendants contend that Coronado's dilution by tarnishment claim against them cannot stand because Coronado has not alleged their “use” of its mark. Banking Defendants' Motion at 31. In response, Coronado relies on

the same arguments regarding the Banking Defendants' "use" of the mark as relied on with respect to its infringement claims. Opposition at 32. The Court has already rejected those counterarguments, *see supra* III.C.1.a, and thus dismisses Coronado's dilution by tarnishment claim against the Banking Defendants. *See Tiffany (NJ)*, 600 F.3d at 112 (affirming the district court's dismissal of the plaintiff's dilution by tarnishment claims under both the Lanham Act and N.Y. G.B.L. Section 360-1 because the defendant "did not itself sell the [counterfeit] goods at issue" and thus "did not itself engage in dilution").

Don Ghermezian and the Worldwide Defendants appear to challenge the sufficiency of Coronado's allegations as to the strength of its mark, but it is unclear on what grounds. They merely assert that Coronado has failed to allege any facts suggesting that its mark was distinctive in the marketplace before May 2020, when Defendants are alleged to have first used the mark. Worldwide Defendants' Reply at 9. And they point to the first use date of April 2020 recorded in Coronado's registration application for its mark specifically in connection with hand sanitizer products, as well as the June 2, 2020 registration date of the URBĀNE mark, without elaborating on how these facts bear on whether the mark has inherently distinctive qualities or has acquired secondary meaning in the marketplace. *Id.* at 9 (citing SAC, Exh. B).

Defendants appear to be arguing that Coronado cannot establish secondary meaning as a matter of law, given the short period between April 2020, when Coronado first used the mark in connection with hand sanitizer products, and May 2020, when Defendants are alleged to have used the mark on the counterfeit products.

Initially, the Court notes that Coronado has alleged that it used its mark in commerce since August 1, 2019—albeit in connection with bath and body products and not hand sanitizer. *See* SAC ¶ 36. Defendants offer no explanation for why that earlier first use date should be disregarded here. To be sure, taking even that earlier first use date, the Court recognizes that commercial use during the brief period between August 2019 to May 2020 "may well weigh heavily against finding secondary meaning on summary judgment or at trial absent extraordinary circumstances." *Kaplan, Inc. v. Yun*, 16 F. Supp. 3d 341, 349 (S.D.N.Y. 2014). But dismissal solely for the brevity of commercial use is inappropriate at this stage—especially given that Coronado has alleged that it developed and marketed the URBĀNE brand before the onset pandemic in March 2020 such that the mark was

identifiable and considered trustworthy by consumers by the time Plaintiffs went to market with URBĀNE hand sanitizer, SAC ¶¶ 56-57, and that, as a result, in the first three months of hand sanitizer sales starting in April 2020, Plaintiffs had sold more than \$2,000,000 of URBĀNE hand sanitizer, *id.* ¶ 77. *See Kaplan*, 16 F. Supp. 3d at 348-49 (declining to hold as a matter of law that a seven-month period of commercial use of a mark was insufficient to show "secondary meaning").

*36 In any event, a failure to establish secondary meaning is not dispositive here: Coronado may demonstrate the strength of its mark *either* through the mark's acquisition of secondary meaning *or* the mark's inherently distinctive qualities, and Don Ghermezian and the Worldwide Defendants do not appear to challenge that the URBĀNE mark is inherently distinctive. Don Ghermezian and the Worldwide Defendants have thus failed to raise adequate grounds for dismissal of Coronado's dilution claim against them, and so the Court denies their motion to dismiss Count Eleven.

3. Deceptive Business Practices (Count Six)

The Court next considers Plaintiffs' claim for deceptive business practices under N.Y. G.B.L. Section 349 against the Counterfeiting Defendants.

Section 349 makes unlawful "'[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service.'" N.Y. G.B.L. § 349. "To make out a *prima facie* case under Section 349, a plaintiff must demonstrate that (1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result." *Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir. 2000). "Although the statute is, at its core, a consumer protection device, corporate competitors now have standing to bring a claim under this [statute] ... so long as some harm to the public at large is at issue." *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2d Cir. 1995) (internal quotation marks omitted; alterations in original). Indeed, whether the action is brought by a consumer or a competitor, "the gravamen of the complaint must be consumer injury or harm to the public interest." *Id.* (citation and internal quotation marks omitted).

Here, Plaintiffs submit that the Counterfeiting Defendants' infringing acts constitute deceptive business practices under Section 349. But "[i]t is well-established that trademark infringement actions alleging only general consumer confusion do not threaten the direct harm to consumers for purposes of stating a claim under section 349."

Perkins Sch. for the Blind v. Maxi-Aids, Inc., 274 F. Supp. 2d 319, 327 (E.D.N.Y. 2003) (internal quotation marks omitted). Rather, to state a cognizable Section 349 claim predicated on trademark infringement, a plaintiff must allege “specific and substantial injury to the public interest over and above the ordinary trademark infringement.” *Perfect Pearl Co., Inc. v. Majestic Pearl & Stone, Inc.*, 887 F. Supp. 2d 519, 543 (S.D.N.Y. 2012).

Plaintiffs have not done so. They claim that they have adequately alleged harms “concerning public health and safety” arising from the Counterfeiting Defendants’ scheme, pointing to allegations in the Complaint attacking the Counterfeiting Defendants’ “callous indifference to the public safety and health of the American people,” SAC ¶ 1; emphasizing certain Defendants’ “intent of deceiving … the public at large[] about the illicit nature of their product,” *id.* ¶ 112; and describing the FDA’s “targeting of hand sanitizer products containing or allegedly containing methanol more generally,” *id.* ¶¶ 308-311. But these allegations do not show any connection between the Counterfeiting Defendants’ deceptive business practices and public health and safety concerns. Significantly, nowhere in the Complaint do Plaintiffs allege that counterfeit URBĀNE hand sanitizer contained methanol or that any consumers were otherwise harmed through their purchase of the counterfeit product. As earlier mentioned, Plaintiffs’ only allegation as to any qualitative difference between authentic URBĀNE hand sanitizer and the counterfeit version is the bare assertion made upon information and belief that the latter “did not contain identical ingredients” as the former. *Id.* ¶ 263. And, in fact, on Plaintiffs’ telling, the FDA intercepted the shipment of counterfeit URBĀNE hand sanitizer because it had “flagged all products arriving from Trop because Trop had allegedly used methanol in hand sanitizer formulas for other brands it manufactured,” *id.* ¶ 301 (emphasis added)—and presumably *not* for the counterfeit URBĀNE brand it allegedly manufactured.

*37 On that score, Plaintiffs’ case is readily distinguishable from *Fischer v. Forrest*, Nos. 14 Civ. 1304 (PAE), 14 Civ. 1307 (PAE), 2015 WL 195822 (S.D.N.Y. Jan. 13, 2015), on which they attempt to rely for support. See Opposition at 12-13. In *Fischer*, as here, the gravamen of the plaintiff’s Section 349 claim was harm resulting from trademark infringement. 2015 WL 195822, at *13. But, in stark contrast from the instant case, the plaintiff there, an inventor and producer of a “honey harvesting aid for beekeepers,” had “provide[d] sufficient allegations of

a potential public impact,” by pleading that a bee keeper “duped into purchasing” the infringing product could face “drastic consequences,” including: “(a) health problems resulting from use of a product made with an ‘unknown mix of chemicals having unknown vaporization/evaporation/volatility properties,’ (b) ‘inedible and unsalable’ honey harvests caused by use of a product that is not food safe or FDA approved, and (c) loss of organic certification from using a product that is not organic.” *Id.* at *1, 13. The Complaint here is bereft of any allegations that consumers of counterfeit URBĀNE faced any health or safety risks.

In the absence of any allegations evincing “specific and substantial injury to the public interest over and above the ordinary trademark infringement,” *Perfect Pearl Co.*, 887 F. Supp. 2d at 543, Plaintiffs’ Section 349 claim cannot stand and is thus dismissed as to all the Counterfeiting Defendants, including Liberty, given that the Court’s foregoing analysis requires dismissal of the claim, irrespective of the Defendant against whom the claim is brought.

4. Tortious Interference with Prospective Economic Advantage (Count Eight)

Proceeding through Plaintiffs’ catalogue of claims, the Court next turns to their claim for tortious interference with prospective economic advantage under New York common law, asserted by Red Rock against the Counterfeiting Defendants.

In New York, to state a claim for tortious interference with prospective economic advantage, a plaintiff must adequately plead that “(1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant’s interference caused injury to the relationship.” *Carvel Corp. v. Noonan*, 350 F.3d 6, 17 (2d Cir. 2003). The second element requires “direct interference with [the] third party.” *Black Radio Network, Inc. v. NYNEX Corp.*, No. 96 Civ. 4138 (DC), 2000 WL 64874, at *4 (S.D.N.Y. Jan. 25, 2000). In other words, the defendant must have “direct[ed] some activities towards the third party and convince[d] the third party not to enter into a business relationship with the plaintiff.” *Id.* (citation omitted).

Red Rock’s tortious interference claim is premised on the Counterfeiting Defendants’ alleged interference with its prospective business relationships with Rite Aid, Pilot, Love’s, Tractor Supply Company, and Business Development

Center. SAC ¶ 509; *see also id.* ¶¶ 81, 332. The Banking Defendants, the JGX Defendants, Don Ghermezian, and the Worldwide Defendants contend that Red Rock has failed to plead any factual allegations that any of them had actual knowledge of Red Rock's business relations with these third parties, or that they had the specific intent to interfere with these relations. Banking Defendants' Motion at 28-29; JGX Defendants' Motion at 22-23; Worldwide Defendants' Motion at 19.

In response, Red Rock largely rests on the single allegation that “[t]he Counterfeiting Defendants knew of Red Rock's business with Pilot and Love's, either directly or indirectly,” SAC ¶ 506 (italics removed). *See* Opposition at 28.¹⁷ This conclusory allegation is insufficient to make out Defendants' actual knowledge of the subject business relations. *See DeJesus v. Sears, Roebuck & Co., Inc.*, 87 F.3d 65, 70 (2d Cir. 1996) (“A complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6).” (citation omitted)); *Lindberg v. Dow Jones & Co.*, No. 20 Civ. 8231 (LAK), 2021 WL 3605621, at *13 (S.D.N.Y. Aug. 11, 2021) (“With regard to tortious interference, allegations of actual knowledge may not consist of conclusory assertions of knowledge or pleadings based solely on information and belief.” (internal quotation marks omitted)). Plaintiffs further point to their allegation that the JGX Defendants “managed the relationship and sales to Pilot and Love's through Rigz,” *see* SAC ¶ 399 (italics removed), seemingly contending that this allegation provides the factual predicate for all the Counterfeiting Defendants' knowledge of Red Rock's business relations with those entities. At most, that allegation is suggestive of the JGX Defendants' knowledge of *Rigz's* business relations with Pilot and Love's, not *Red Rock's* business relations with them.

***38** Moreover, Plaintiffs do not even attempt to respond to the Defendants' arguments regarding the absence of allegations that any of them *intended* to interfere with Red Rock's relationships with the third parties. Nor could they. Even their boilerplate, conclusory allegations for their tortious interference claim fail to recite that Defendants “intentionally interfered” with Red Rock's business relations or directed any of their activities at the third parties. *See, e.g.*, SAC ¶ 510 (alleging only that the “Counterfeiting Defendants' actions in manufacturing, distributing, and attempting to import the Counterfeit Products were intentional”).

The foregoing analysis applies equally to the tortious interference claim as asserted against Liberty. Accordingly, the Court dismisses Count Eight in its entirety.

5. Unjust Enrichment (Count Ten)

Next, in Count Ten, Coronado brings a claim for unjust enrichment against the Counterfeiting Defendants, alleging that those Defendants were “wrongfully enriched” by “usurping Plaintiffs' business relationships and inserting the counterfeit hand sanitizer … into the supply of authentic URBĀNE sanitizer.” SAC ¶ 521.

Under New York common law, “[t]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties.” *Georgia Malone & Co. v. Rieder*, 973 N.E.2d 743, 746 (N.Y. 2012) (internal quotation marks omitted). A claim of unjust enrichment thus requires “a relationship between the parties that could have caused reliance or inducement.” *Mandarin Trading Ltd. v. Wildenstein*, 944 N.E.2d 1104, 1111 (N.Y. 2011). In addition, the plaintiff must allege “that they themselves conferred a direct benefit on the defendants.” *Kaplan*, 16 F. Supp. 3d at 353. To state a claim of unjust enrichment, “[a] plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.” *Mandarin Trading*, 944 N.E.2d at 1110 (internal quotation marks omitted; second alteration in original).

Coronado here attempts to recast its infringement claim as a claim for unjust enrichment simply by alleging that the Counterfeiting Defendants profited from using its mark. *See* SAC ¶¶ 520-522. But Coronado has not alleged that it performed any services for any of the Counterfeiting Defendants. Coronado has not alleged any relationship between these Defendants and itself, let alone one that would induce reliance. And Coronado has not alleged that it conferred a direct benefit on the Counterfeiting Defendants—only that these Defendants benefitted from copying its mark.

Accordingly, Coronado's unjust enrichment claim fails as a matter of law and is dismissed in its entirety, given that the Court's foregoing analysis applies with equal force to their claim as to Liberty. *See GeigTech E. Bay LLC v. Lutron Elecs. Co., Inc.*, 352 F. Supp. 3d 265, 286-87 (S.D.N.Y. 2018) (dismissing unjust enrichment claim that was predicated on the defendant's infringing use of the plaintiff's trade dress);

Kaplan, 16 F. Supp. 3d at 353 (dismissing unjust enrichment claim in a trademark infringement case, given the plaintiff's failure to allege conferral of a direct benefit).

6. Negligence (Count Twelve)

In Count Twelve, Plaintiffs bring a negligence (including gross negligence) claim against the Counterfeiting Defendants. To state a negligence claim under New York law, “a plaintiff must allege (1) that the defendant owed him or her a cognizable duty of care; (2) that the defendant breached that duty; and (3) that the plaintiff suffered damage as a proximate result of that breach.” *DeAngelis v. Corzine*, 17 F. Supp. 3d 270, 280 (S.D.N.Y. 2014) (internal quotation marks omitted).

*39 In attempting to plead these familiar elements, Plaintiffs allege that the Counterfeiting Defendants' duty of care to Plaintiffs arose out of Defendants' unlawful use of the URBĀNE Brand, and that these Defendants breached their duty by failing “to ensure the integrity of the manufacturing process” and “to attend to FDA requirements for hand sanitizer products.” SAC ¶¶ 532, 533. The JGX Defendants, Don Ghermezian, and the Worldwide Defendants challenge the allegations broadly as conclusory, formulaic recitations of the requisite elements without any differentiation as to each Defendant's conduct. JGX Defendants' Motion at 25; Worldwide Defendants' Motion at 20. The Banking Defendants direct their arguments for dismissal at the duty element, reiterating first that Plaintiffs have failed to plausibly allege their use of the brand and arguing second that their provision of banking services to Triple Five Worldwide does not give rise to a duty to Plaintiffs. Banking Defendants' Motion at 32. They also maintain that Plaintiffs have failed to allege that their conduct proximately caused the purported harm. *Id.*

The Court considers at the threshold whether Plaintiffs have pleaded a cognizable duty, the existence of which is appropriately determined as a matter of law. *Almeciga v. Ctr. for Investigative Reporting, Inc.*, 121 F. Supp. 3d 379, 383 (S.D.N.Y. 2015). Plaintiffs urge that “counterfeiting has been found to create a duty of care in this Circuit,” citing *Fagan v. AmerisourceBergen Corp.*, 356 F. Supp. 2d 198 (E.D.N.Y. 2004), for support. Opposition at 32. But they radically misstate the duty of care recognized in *Fagan*.

There, the plaintiff had received from his pharmacy a counterfeit version of the drug he was prescribed to aid his recovery from his liver transplant. *Fagan*, 356 F. Supp. 2d at 204. The counterfeit drug contained only one-twentieth the

dosage set forth on its label. *Id.* The plaintiff was treated with the counterfeit drug with weekly injections for two months—all the while suffering from continued anemia and excruciating side effects, with his recovery delayed. *Id.* As a result, he brought a negligence action against, among others, the distributor of the prescription drug, who the plaintiff alleged had also facilitated the existence of the “gray market” that traded in diverted or counterfeit drugs. *Id.* at 209. In considering whether the distributor of the prescription drug owed a duty of care to the plaintiff, the court focused on the distributor's affirmative actions in participating in the “gray market,” and additionally considered, *inter alia*, societal expectations that the heavy regulation of prescription drugs exists for the protection of its consumers, analogizing the circumstances to cases involving the manufacture, marketing, and distribution of illegally obtained handguns. *Id.* at 208-09.

That case provides no support for recognition of a duty in the instant circumstances. Hand sanitizer, unlike prescription drugs or guns, does not carry with it comparable dangers or the concomitant societal expectations around its regulation. Moreover, Plaintiffs do not bring suit as consumers of the hand sanitizer; rather they bring suit as commercial competitors in the hand sanitizer industry, of whose existence many of the Counterfeiting Defendants are not even alleged to have known. Plaintiffs ask this Court to recognize a duty of care wherever counterfeiting occurs, *see* Opposition at 32, without providing any apposite authority in support of such an expansive request. The Court is “unwilling to create a duty of care, where no sound basis for doing so has been provided,” however. *Mechigian v. Art Cap. Corp.*, 612 F. Supp. 1421, 1431 (S.D.N.Y. 1985). Accordingly, the Court dismisses Plaintiffs' negligence claim in its entirety, as, once again, the Court's analysis applies equally to the negligence claim as asserted against Liberty.

7. Fraudulent Conveyance (Count Thirteen)

Next, the Court turns to Plaintiffs' fraudulent conveyance claim against Triple Five Worldwide and against Don, Syd, and Nader Ghermezian. SAC ¶¶ 540-559. Plaintiffs base this claim on the change in Triple Five Worldwide's managers from Don, Syd, and Nader Ghermezian to David Ghermezian, Orly Ghermezian Saba, and Isaac Saba on May 7, 2020, alleging that this change was effectuated “with actual intent to hinder, delay or defraud future creditors of Triple Five Worldwide.” *Id.* ¶¶ 542, 558. Although the parties dispute whether New York, Nevada, or New Jersey law applies here, they agree that “there does not appear to be any significant applicable conflict” in the law in all three jurisdictions. *See*,

e.g., Opposition at 33 n.24. The Court thus analyzes Plaintiffs' claims under New York law.¹⁸

***40** To state a claim for actual fraudulent conveyance under New York law, Plaintiffs must plead that a defendant has transferred property with actual intent to hinder, delay, or defraud its creditors. N.Y. D.C.L. § 273(a)(1). Such a claim is thus subject to Rule 9(b)'s heightened pleading standards. See *Sharp Int'l Corp. v. State St. Bank & Trust Co.*, 403 F.3d 43, 56 (2d Cir. 2005) ("As actual intent to hinder, delay, or defraud constitutes fraud, it must be pled with specificity, as required by Fed. R. Civ. P. 9(b).") (internal quotation marks omitted). On the other hand, a transaction is voidable as constructively fraudulent "if the debtor did not receive reasonably equivalent value and the debtor either (i) was left with unreasonably small assets for a business or transaction in which it was engaged or about to engage or (ii) intended to incur or believed or reasonably should have believed that it would incur debts beyond its ability to repay as they came due." N.Y. D.C.L. § 273(a)(2); see also id. § 274(a) (describing constructively fraudulent transfers specifically as to present creditors).

Plaintiffs' fraudulent conveyance claim is deficient in several respects.

First, Plaintiffs have not alleged a transfer of any assets—a basic prerequisite of a fraudulent conveyance claim. See N.Y. D.C.L. §§ 270, 275. Indeed, their entire claim is predicated on the change of Triple Five Worldwide's managers, with no allegations that anything of value was transferred from the three previous managers to their three successors. Plaintiffs do not respond to this criticism; rather, they attempt to shrug off the attack as "inapposite" given that "these defendants are alleged to have transferred their ownership of Triple Five Worldwide." Opposition at 34 n.25. But in so doing, they misrepresent their own allegations that (1) "it is unclear whether this change in managers and/or members also effected a change in ownership," SAC ¶ 543, and (2) "[t]o the extent this change in managers and/or members also constituted a change in ownership, it should be set aside," id. ¶ 544. These speculative musings are insufficient to provide a factual basis for a transfer of assets necessary to state fraudulent conveyance claim.

Second, Don, Syd, and Nader Ghermezian—who are the alleged *transferors* of some unspecified assets—are not the appropriate defendants for such an action, in any event. "The New York Court of Appeals has made it clear that the

pertinent provisions of the New York Debtor and Creditor Law provide a creditor's remedy for money damages against parties who participate in the fraudulent transfer of a debtor's property and are *transferees* of the assets and *beneficiaries* of the conveyance." *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1172 (2d Cir. 1993) (emphasis added) (citing *FDIC v. Porco*, 552 N.E.2d 158, 159-60 (N.Y. 1990) (per curiam)). "Thus, the transferor of the property—that is, the debtor—is not the proper defendant in a fraudulent conveyance claim. Nor may a claim be brought against parties who merely participated in the transfer but did not benefit from it." *Amusement Indus., Inc. v. Midland Ave. Assocs., LLC*, 820 F. Supp. 2d 510, 527 (S.D.N.Y. 2011). Thus, even if they had alleged a viable fraudulent conveyance claim, Plaintiffs have failed to name the proper defendants for such a claim.

Third, Plaintiffs' allegation that "[u]pon information and belief" the change in managers was effectuated "with actual intent to hinder, delay or defraud future creditors of Triple Five Worldwide," SAC ¶ 558, is wholly conclusory, unsupported by any factual allegations in the Complaint, and fails to meet Rule 9(b)'s heightened pleading standard. And as for their constructive fraudulent conveyance claim, Plaintiffs have not alleged anywhere in their Complaint that the transferors failed to receive "reasonably equivalent value in exchange for the transfer." N.Y. D.C.L. § 273(a)(2).

***41** The Court thus dismisses Count Thirteen in its entirety.

8. Alter Ego/Piercing the Corporate Veil (Counts Fourteen through Sixteen)

Finally, in Counts Fourteen through Sixteen, Plaintiffs raise alter ego/veil piercing theories of liability for Don Ghermezian, Syd Ghermezian, and Nader Ghermezian with respect to Triple Five Worldwide, SAC ¶¶ 560-568, for Grazi, Nouri Jaradeh, and Dib Jaradeh with respect to JGX, id. ¶¶ 569-581, and for Dib Jaradeh with respect to Isaac Import, id. ¶¶ 582-589. The parties once again dispute the law that applies, with Plaintiffs urging the application of New York law and Defendants urging the application of Nevada law. Because Plaintiffs' claims must be dismissed even accepting their position that New York law applies, the Court will assume without deciding that New York law applies here.

As an initial matter, under New York law, there is no independent cause of action for alter ego liability. See *Morris v. N.Y. State Dep't of Tax'n & Fin.*, 623 N.E.2d 1157, 1160 (N.Y. 1993). Rather, "it is an assertion of facts

and circumstances which will persuade the court to impose the corporate obligation on its owners.” *Id.* Dismissal of Counts Fourteen through Sixteen is warranted on that ground alone. See *Ocampo v. 455 Hosp. LLC*, No. 14 Civ. 9614 (KMK), 2021 WL 4267388, at *10 (S.D.N.Y. Sept. 20, 2021) (“Courts in the Second Circuit routinely dismiss independent causes of action separately alleging alter ego or veil piercing liability.” (collecting cases)); *Network Enters., Inc. v. Reality Racing, Inc.*, No. 09 Civ. 4664 (RJS), 2010 WL 3529237, at *4 (S.D.N.Y. Aug. 24, 2010) (“Accordingly, to the extent Plaintiff attempts to allege alter ego liability as an *independent* cause of action, the claim fails without any need for further analysis.”).

Moreover, Plaintiffs have failed to allege sufficient facts to justify piercing the corporate veil with respect to Triple Worldwide or JGX.¹⁹ Under New York law, the corporate veil may be pierced, and the principal or a signatory held bound to the corporation's obligations, when the individual has used the corporate form “to achieve fraud, or when the corporation has been so dominated by an individual … and its separate identity so disregarded, that it primarily transacted the dominator's business rather than its own and can be called the other's alter ego.” *William Wrigley Jr. Co. v. Waters*, 890 F.2d 594, 600 (2d Cir. 1989) (quoting *Gartner v. Snyder*, 607 F.2d 582, 586 (2d Cir. 1979)); see also *William Passalacqua Build. v. Resnick Dev.*, 933 F.2d 131, 138 (2d Cir. 1991) (“The critical question is whether the corporation is a ‘shell’ being used by the individual shareowners to advance their own ‘purely personal rather than corporate ends.’” (citations omitted)). In determining whether to disregard the corporate form and to hold the individual liable to the corporation's obligations, courts consider “(1) the intermingling of corporate and personal funds, (2) undercapitalization of the corporation, and (3) failure to maintain separate books and records or other formal legal requirements of the corporation.” *Wrigley*, 890 F.2d at 600 (internal citations omitted). The standard for veil-piercing is “very demanding such that piercing the corporate veil is warranted only in extraordinary circumstances, and conclusory allegations of dominance and control will not suffice to defeat a motion to dismiss.” *Reynolds v. Lifewatch, Inc.*, 136 F. Supp. 3d 503, 525 (S.D.N.Y. 2015) (internal quotation marks omitted).

*⁴² Here, Plaintiffs' Complaint contains only conclusory assertions in support of their alter ego/veil piercing theories. See, e.g., SAC ¶¶ 562 (“Upon information and belief, Triple Five Worldwide has failed to observe the required corporate formalities including, *inter alia*, failing to properly issue

stock, hold meetings, and/or keep corporate records.”), 563 (“Upon information and belief, Triple Five Worldwide lacks any accounting, financial review or audit policies, or other mechanisms for ensuring the accuracy and/or legitimacy of its financial records.”), 564 (“Upon information and belief, Don Ghermezian, Syd Ghermezian, and Nader Ghermezian exercise complete dominion and control over Triple Five Worldwide and it exists solely as a sham vehicle which Don Ghermezian, Syd Ghermezian, and Nader Ghermezian are using in bad faith to shield themselves from liability.”), 575 (“JGX has failed to observe the required corporate formalities including, *inter alia*, failing to properly issue stock, hold meetings, and/or keep corporate records.”), 577 (“Grazi, [Dib Jaradeh], and [Nouri] Jaradeh exercise complete dominion and control over JGX and it exists solely as a sham vehicle which Grazi, [Dib Jaradeh], and [Nouri] Jaradeh are using in bad faith to shield themselves from liability.”). And the factual allegations Plaintiffs cite in defense of their pleading—primarily concerning the various individual Defendants' use of their personal messaging accounts, personal telephone numbers, and email accounts not affiliated with the corporation—are insufficient to meet the “very demanding” standard for invoking the extraordinary standard for piercing the corporate veil. *Reynolds*, 136 F. Supp. 3d at 525.

E. Leave to Amend

The Court's dismissals are all with prejudice and without leave to amend. While leave to amend should be freely granted where justice so requires, see Fed R. Civ. P. 15(a), even this liberal standard has its bounds. Indeed, “[a] district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party.” *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007).

Here, Plaintiffs have amended their Complaint twice already, see Dkts. 122, 310, and before each amended version was filed, the Court afforded Plaintiffs an additional opportunity to revise each of their proposed amended complaints to address to any arguments raised by Defendants as to the infirmity of their claims. See *Red Rock Sourcing*, 2023 WL 3736442, at *14; Dkt. 118 (transcript January 27, 2022 conference at which the Court granted Plaintiffs' motion for leave to file their first amended complaint) at 21:14-20. Plaintiffs have thus had, in effect, four opportunities to amend their Complaint to offer more than conclusory recitations of their claims' legal elements and to specify conduct as to each Defendant's conduct for any given cause of action—all the

while supported in their efforts by the extensive discovery taken over the course of years. Moreover, in granting leave to amend for a second time, the Court expressly cautioned that Plaintiffs would not be given another opportunity to amend their Complaint “[a]bsent extraordinary circumstances.” *Red Rock Sourcing*, 2023 WL 3736442, at *14.

Despite all this, Plaintiffs failed to plead adequately many of the claims asserted in their Second Amended Complaint. Considering these circumstances and given the nature of substantive deficiencies identified in the instant writing, the Court finds that granting Plaintiffs yet another bite at the apple would be futile. *Binn v. Bernstein*, No. 19 Civ. 6122 (GHW) (SLC), 2020 WL 4550312, at *34 (S.D.N.Y. July 13, 2020) (“To grant Plaintiffs leave to amend would be allowing them a third bite at the apple, which courts in this district routinely deny.” (internal quotation marks omitted)), *report and recommendation adopted by* 2020 WL 4547167 (S.D.N.Y. Aug. 6, 2020).

IV. Conclusion

Count	Cause of Action	Defendants
One	RICO (substantive and conspiracy)	Liberty ²⁰
Two	Infringement of a Registered Mark (Lanham Act)	JGX, Grazi, Dib Jabareh, Nouri Jaradeh, Don Ghermezian, the Worldwide Defendants, and Liberty
Three	Contributory Infringement (Lanham Act)	JGX, Grazi, Dib Jaradeh, Nouri Jaradeh, and Liberty
Four	False Designation of Original (Lanham Act)	JGX, Grazi, Dib Jabareh, Nouri Jaradeh, Don Ghermezian, the Worldwide Defendants, and Liberty
Seven	Trademark Infringement (New York Common Law)	JGX, Grazi, Dib Jaradeh, Nouri Jaradeh, Don Ghermezian, the Worldwide Defendants, and Liberty
Nine	Unfair Competition (New York Common Law)	JGX, Grazi, Dib Jaradeh, Nouri Jaradeh, and Liberty

For the foregoing reasons, the Courts grants the motions to dismiss filed by Syd Ghermezian and Community Federal Savings Bank and by Nader Ghermezian. The Court grants in part the motions to dismiss filed by the JGX Defendants and by Don Ghermezian and the Worldwide Defendants.

Pursuant to these rulings, Count One is dismissed as to the thirteen Counterfeiting Defendants who have appeared, and Plaintiffs shall submit any arguments as to why it should not be dismissed as to Liberty within fourteen days of this Opinion and Order. Counts Five, Six, Eight, Ten, Twelve, Thirteen, Fourteen, Fifteen, and Sixteen are dismissed in their entirety. Counts Two, Four, Seven, and Eleven are dismissed as to Isaac Import, Syd Ghermezian, and Community Federal Savings Bank. Counts Three and Nine are dismissed as to Isaac Import, Don Ghermezian, Triple Five Worldwide, Eliezer Berkowitz, Isaac Saba, Yonah Ghermezian, David Ghermezian, Syd Ghermezian, and Community Federal Savings Bank.

*43 For convenience, the Court therefore summarizes in the below chart the claims that have survived dismissal:

Eleven	Dilution by Tarnishment (New York Common Law)	JGX, Isaac Import, Grazi, Dib Jaradeh, Nouri Jaradeh, Don Ghermezian, the Worldwide Defendants, and Liberty
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SO ORDERED.

All Citations

Slip Copy, 2024 WL 1243325

Footnotes

- 1 The following facts, which are drawn primarily from Plaintiffs' Second Amended Complaint, Dkt. 310 ("SAC"), and the attached exhibits, are assumed as true only for the purposes of this Opinion and Order. See *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007) ("In considering a motion to dismiss for failure to state a claim upon which relief can be granted, the court is to accept as true all facts alleged in the complaint."). The Court additionally refers to a number of extraneous documents (attached to certain of the Defendants' motions to dismiss) that it has determined are either incorporated by reference in the Second Amended Complaint or are the proper subject of judicial notice. See *infra* at III.A.
- 2 The Court takes judicial notice, see *infra* at III.A, of the reference to "Urbane Bath and Body Hand Sanitizer" (manufactured by Trop) on the FDA's public website, which includes under "Product Status" the following information: "Product purported to be made at the same facility that produced methanol contaminated product; FDA recommended the company recall on 7/1/2020; added manufacturer to import alert to help stop their products from entering the U.S. on 7/10/2020; FDA issued a warning letter on 8/10/2021." See U.S. Food & Drug Administration, FDA Updates on Hand Sanitizers Consumers Should Not Use, <https://www.fda.gov/drugs/drug-safety-and-availability/fda-updates-hand-sanitizers-consumers-should-not-use> (last updated January 11, 2024).
- 3 While briefing was in progress on the motion to amend, Rigz sought leave to move to intervene. Dkt. 187. Pursuant to the Court's briefing schedule, Dkt. 202 at 1, Rigz filed its motion on June 13, 2022, Dkt. 205-207, Plaintiffs filed their opposition to Rigz's motion on June 21, 2022, Dkt. 213, and Rigz replied on June 27, 2022, Dkt. 215. In addition, the JGX Defendants (at the time, consisting only of JGX, Grazi, and Isaac Import) and the Worldwide Defendants each filed briefs in support of Rigz's intervention. Dkts. 212, 214. On February 1, 2023, the Court granted Rigz's motion, allowing permissive intervention under Federal Rule of Civil Procedure 24(b). See *Red Rock Sourcing LLC v. JGX, LLC*, No. 21 Civ. 1054 (JPC), 2023 WL 1468980, at *3-5 (S.D.N.Y. Feb. 2, 2023). Rigz then filed an opposition to Plaintiffs' motion to amend on February 13, 2023, Dkts. 283-284, and Plaintiffs filed a sur-reply responding to Rigz on February 23, 2023, Dkt. 289-1.
- 4 Counts Two and Three are brought only by Coronado. SAC at 66, 68.
- 5 Count Eight is brought only by Red Rock. SAC at 74. Counts Seven, Nine, Ten, and Eleven are brought only by Coronado. *Id.* at 73, 76-79.
- 6 While Amoyelle appeared at the July 13, 2021 conference as Liberty's corporate representative, and it appears that Amoyelle was deposed in this case on August 4, 2021, see Dkt. 104-7, a corporate entity must be represented by an attorney. See *Lattanzio v. COMTA*, 481 F.3d 137, 139-40 (2d Cir. 2007).
- 7 In so doing, the Court assumes without deciding that Plaintiffs, in describing the counterfeit hand sanitizer operation, have adequately pleaded the existence of a scheme to defraud.
- 8 As explained *infra* at III.B.3, Plaintiffs do not include any allegations regarding Liberty's participation in the counterfeit hand sanitizer scheme in attempting to show a pattern of racketeering activity. Based on the allegations in the Complaint, Liberty's role in the alleged scheme lasted only from April to May 2020. Consideration of Liberty's conduct is thus inconsequential to the Court's analysis on continuity. And, in any event, the Second Circuit has instructed that "[i]n

analyzing the issue of continuity," a court should "evaluate the RICO allegations with respect to each defendant individually." *First Cap. Asset Mgmt.*, 385 F.3d at 180.

- 9 Although Count One is brought against all the Counterfeiting Defendants, which unambiguously includes Liberty, see SAC at 2, Plaintiffs do not refer to Liberty in their allegations under Count One. For instance, they list each of the Counterfeiting Defendants *except for Liberty* as a culpable "person" for purposes of RICO, *id.* ¶ 393, and consistently exclude any mention of Liberty's role in the hand sanitizer operation in attempting to allege the existence of a RICO enterprise, *id.* ¶¶ 394-406, or a pattern of racketeering activity, *id.* ¶¶ 407-438. In an abundance of caution, the Court nonetheless assumes that Plaintiffs bring their RICO claims, as well as the eleven other claims asserted against the entire group of Counterfeiting Defendants, including Liberty.
- 10 In fact, "false designation of origin" claims under 15 U.S.C. 1125(a)(1)(A) may bear a multitude of labels, including "false association," "passing-off," and "reverse passing off"—all of which simply describe different methods of trademark infringement. See *George & Co. LLC v. Target Corp.*, No. 21 Civ. 4254 (DG) (SJB), 2022 WL 1407236, at *14 (E.D.N.Y. Jan. 27, 2022) (report and recommendation) (citations omitted).
- 11 Count Four is presented as a claim for "Unfair Competition and False Designation of Origin." SAC at 69. Because there is no independent federal cause of action for unfair competition (rather, the descriptor refers to a category of causes of action that includes false designation of origin), the Court refers to Count Four as a claim only for false designation of origin. Cf. *Tactica Int'l, Inc. v. Atl. Horizon Int'l, Inc.*, 154 F. Supp. 2d 586, 597 n.14 (S.D.N.Y. 2001) ("Because [the plaintiff]'s claims of unfair competition and trademark infringement (for unregistered marks) under Section 43(a) of the Lanham Act are one in the same, they need not be addressed as separate causes of action.") (citing *EMI Catalogue P'ship v. Hill, Holliday, Connors, Cosmopoulos, Inc.*, 228 F.3d 56, 61-63 (2d Cir. 2000)).
- 12 In urging the absence of any allegations showing those Defendants' "use" of the URB#NE mark under the section of their motion addressing Count Two (false designation of origin), the JGX Defendants explain that "[t]he same analysis is applicable to the remainder of Plaintiffs' Lanham Act and common law trademark infringement claims." See JGX Defendants' Motion at 16-17.
- 13 In opposing the Banking Defendants' motion, Plaintiffs counter that that they have alleged that "Syd was involved in Triple Five Worldwide's hand sanitizer business, and that without Syd and CFSB's involvement, the Worldwide Defendants would have been unable to produce and sell their infringing products" without any explanation as to how these allegations satisfy the "use" requirement for direct infringement. Opposition at 6. Curiously, Plaintiffs then cite *Gucci America*, 721 F. Supp. 2d at 251-53, for the Court's holding on *contributory* trademark infringement. See Opposition at 6. These arguments are entirely beside the point.
- 14 Plaintiffs elsewhere allege that Dib Jaradeh alone created the forged label. See SAC ¶¶ 105 ("[Dib Jaradeh] took the URB#NE label provided by Carelli and created a counterfeit version of the URB#NE label for use on various unauthorized sanitizer bottles and products."), 410(c) ("[Dib Jaradeh] knowingly created the fake URB#NE label"), 305 (alleging that the hand sanitizer bore the "URB#NE label artwork that Deb [sic] Jaradeh of Isaac Import created and first distributed").
- 15 The JGX Defendants assert that Count Eleven is sufficiently pleaded "as to JGX only," Opposition at 2 n.2, yet they do not provide any grounds for dismissal of Count Eleven for the remainder of the JGX Defendants. But because the lack of specificity as to Isaac Import's role in the scheme is also fatal to this claim, see *supra* III.C.1.a, the Court dismisses *sua sponte* Count Eleven as to Isaac Import. Cf. *Leonhard v. United States*, 633 F.2d 599, 609 n.11 (2d Cir. 1980) ("The district court has the power to dismiss a complaint *sua sponte* for failure to state a claim.").
- 16 Coronado seeks money damages in Count Eleven, SAC ¶ 529, but the only remedy available under N.Y. G.B.L. Section 360-l is injunctive relief. See *Scholastic, Inc. v. Stouffer*, 124 F. Supp. 2d 836, 848 (S.D.N.Y. 2000) ("Moreover, the sole relief possible on a dilution claim under either federal or state law is injunctive relief, rather than monetary damages." (citing N.Y. G.B.L. § 360-l)). The Court thus assumes Coronado seeks injunctive relief in this Count.
- 17 In their opposition, Plaintiffs assert that "Defendants dispute the SAC's allegation that they had knowledge of the business relationships they tarnished," and then cites paragraph 509 of the Complaint. Opposition at 28. That paragraph explains: "Therefore, the Counterfeiting Defendants interfered with Red Rock's relationship with, at a minimum, Rite Aid, Pilot,

Love's, Tractor Supply, and BDC by manufacturing, distributing, and attempting to import the unlicensed and unauthorized Counterfeit Products." SAC ¶ 509 (italics removed). The Court presumes that Plaintiffs meant to refer to paragraph 506, which concerns Defendants' supposed knowledge of the business relationships.

- 18 Plaintiffs bring their claims under provisions of the New York Debtor and Creditor Law (that is, under [Sections 273, 275](#), and [276](#)) that had been repealed and replaced by the time the alleged fraudulent conveyance occurred. Because the alleged fraudulent transaction occurred on May 7, 2020, after the amendment's April 4, 2020 effective date, the Court construes Plaintiffs' claims as arising under [Sections 273](#) and [274](#) as amended.
- 19 Because all claims against Isaac Import are dismissed, the Court need not address Plaintiffs' allegations to pierce Isaac Import's corporate veil.
- 20 Although, as discussed, the Court provides Plaintiffs notice of its intent to *sua sponte* dismiss Count One as to Liberty.

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United States v. Viloria-Sepulveda

United States Court of Appeals, First Circuit. | April 16, 2019 | 921 F.3d 5 | 2019 WL 1613923

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Outline

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921 F.3d 5

United States Court of Appeals, First Circuit.

UNITED STATES, Appellee,

v.

Fabian VILORIA-SEPULVEDA, a/k/a Fabian Vilora-Sepúlveda, Defendant, Appellant.

No. 18-1152

|

April 16, 2019

Synopsis

Background: After pleading guilty to illegal possession of machine gun, defendant was sentenced by the United States District Court for the District of Puerto Rico, [Juan M. Perez-Gimenez](#), J., to 60 months' imprisonment, and he appealed.

[Holding:] The Court of Appeals, [Lynch](#), Circuit Judge, held that district court did not abuse its discretion in relying on photographs and possessions indicative of defendant's associations with violent and illegal conduct in upwardly varying his sentence.

Affirmed.

West Headnotes (10)

[1] Criminal Law  Sentencing

Preserved claims of procedural and substantive sentencing error are reviewed under an abuse of discretion standard.

6 Cases that cite this headnote

[2] Criminal Law  Sentencing and Punishment

An unpreserved claim of sentencing error is reviewed for plain error.

3 Cases that cite this headnote

[3] Criminal Law  Necessity of Objections in General

Under the plain error standard, the appellant must show: (1) that an error occurred; (2) which was clear or obvious and which not only; (3) affected the defendant's substantial rights; but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings.

3 Cases that cite this headnote

[4] Sentencing and Punishment  Factors or Purposes in General

Sentencing and Punishment  Operation and effect of guidelines in general

A sentencing judge, drawing upon his familiarity with a case and weighing the statutory sentencing factors, may custom-tailor an appropriate sentence above the applicable guideline range. [18 U.S.C.A. § 3553\(a\)](#).

1 Case that cites this headnote

[5] Sentencing and Punishment  Nature, degree or seriousness of offense

Sentencing and Punishment  Factors Related to Offender

Sentencing and Punishment  Operation and effect of guidelines in general

When a sentencing court does depart from the guideline range, its reasons for doing so should typically be rooted either in the nature and circumstances of the offense or the characteristics of the offender. [18 U.S.C.A. § 3553\(a\)](#).

1 Case that cites this headnote

[6] Sentencing and Punishment  Admissibility in General

Congress left wide open the information available at sentencing; the only qualifier imposed is that the information be reliable. [18 U.S.C.A. § 3661](#).

1 Case that cites this headnote

- [7] **Sentencing and Punishment** ↗ Factors or Purposes in General

Sentencing and Punishment ↗ Admissibility in General

A sentencing court is invited to consider, broadly, any reliable information relevant not only to the history and characteristics of the defendant but also to factors such as the seriousness of the offense, the need to afford adequate deterrence to criminal conduct, and the need to protect the public from further crimes of the defendant. 18 U.S.C.A. § 3553(a).

3 Cases that cite this headnote

- [8] **Sentencing and Punishment** ↗ Documentary evidence

Sentencing court did not abuse its discretion in relying on photographs and possessions indicative of defendant's associations with violent and illegal conduct in upwardly varying his sentence for his machine gun possession conviction; defendant had saved numerous photographs, some including him, of firearms, drugs, and drug paraphernalia, evidence found in defendant's car, in which he was escorting known member of violent drug gang, included face mask, three cell phones, and drug ledger, and court did not ignore sentencing factors that were favorable to him, including that it was his first conviction and that he had three dependents. 18 U.S.C.A. §§ 922(o), 3553(a), 3661.

1 Case that cites this headnote

- [9] **Sentencing and Punishment** ↗ Protection of society

Community considerations such as the prevalence of weapons and of violent crime can justify upwardly varying a sentence for a gun possession conviction. 18 U.S.C.A. § 3553(a).

1 Case that cites this headnote

- [10] **Sentencing and Punishment** ↗ Discretion of court

Sentencing and Punishment ↗ Manner and effect of weighing or considering factors

A sentencing court has broad discretion in weighing and balancing the statutory sentencing factors. 18 U.S.C.A. § 3553(a).

2 Cases that cite this headnote

*6 APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO [Hon. Juan M. Perez-Gimenez, U.S. District Judge]

Attorneys and Law Firms

Mariem J. Paez, Miami, FL, on brief for appellant.

Rosa Emilia Rodríguez-Vélez, United States Attorney, Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, and Francisco A. Besosa-Martínez, Assistant United States Attorney, on brief for appellee.

Before Howard, Chief Judge, Lynch and Lipez, Circuit Judges.

Opinion

LYNCH, Circuit Judge.

Fabian Viloria-Sepulveda pled guilty to illegal possession of a machine gun in violation of 18 U.S.C. § 922(o). The district court sentenced Viloria-Sepulveda to sixty months' imprisonment, a sentence above the applicable guidelines sentencing range (GSR) but below the statutory maximum of ten years. 18 U.S.C. § 924(a)(2).

Viloria-Sepulveda challenges this sentence on procedural and substantive grounds. Procedurally, he contends that the district court erred in considering two types of evidence: (1) photographs found on the defendant's cell phone showing the defendant and others handling drugs, drug paraphernalia, and guns, including military-style assault weapons, and (2) information about the pervasiveness of guns and gun violence in Puerto Rico.

We affirm.

I.

Puerto Rico police officers from the Drug Division of San Juan had a member of a violent drug trafficking organization under physical surveillance on January 30, 2017. The officers conducting the surveillance saw a Toyota Corolla escorting the gang member's car. Viloria-Sepulveda was the driver of the Toyota, as the police would later discover.

The officers did a record check of the Toyota's license plates. Learning that the Toyota had been reported missing and should be recovered, the police stopped the car. As the officers neared the front driver's side window, they watched Viloria-Sepulveda (who was sitting in the driver's seat) attempt to put a firearm inside a bag on the front passenger seat. The officers ordered Viloria-Sepulveda to roll down the window, but he instead persisted in trying to hide the firearm. So the officers told Viloria-Sepulveda to step out of the car, *7 which he did, and they placed him under arrest.

The officers determined that the gun recovered from the bag was a Glock 34 pistol modified to shoot automatically and loaded with an extended magazine containing twenty-four bullets. Viloria-Sepulveda volunteered to the officers that the weapon was his.

A search of the Toyota uncovered another extended magazine (with twenty-four rounds of ammunition) for the Glock, a face mask, a drug ledger, walkie talkies, and three cell phones. A search (to which Viloria-Sepulveda consented) of one of the cell phones and its applications, including a messaging application called **WhatsApp**, uncovered multiple photographs of Viloria-Sepulveda and others carrying firearms of different types, including assault-style weapons; of drug ledgers; of a scale; and of substances in plastic bags and in vials.

A federal grand jury in Puerto Rico indicted Viloria-Sepulveda on one count of illegal possession of a machine gun. See 18 U.S.C. §§ 922(o), 924(a)(2). Viloria-Sepulveda entered a straight guilty plea. He also forfeited the firearm and the ammunition.

The Probation Office prepared a presentence report (PSR), which found a Total Offense Level of 15 and a Criminal History Category of I. Based on these calculations, the PSR calculated a GSR of eighteen to twenty-four months.

In its sentencing memorandum, the government agreed with the PSR's calculations but argued for an upwardly variant sentence of forty-eight to sixty months based on the nature of the offense, the defendant's characteristics, and the need for deterrence and for protection of the public from future crimes by the defendant. It stressed that Viloria-Sepulveda "was heavily armed with" a machine gun and "two extended magazines" and argued that Viloria-Sepulveda's proximity to the violent gang member under surveillance, as well as Viloria-Sepulveda's possession of the walkie talkies, drug ledger, and face mask were "all evidence that [Viloria-Sepulveda] was part of a violent criminal gang willing to conduct its operations, and protect one another, on a public street in broad daylight." Further, the memorandum argued that the nature of the offense and the photographs on the defendant's cell phone showed that he was "an individual with a penchant for high-capacity firearms, drugs, and criminal activity."

Finally, the government urged that the pervasiveness of guns and gun violence in Puerto Rico justified an upward variance to ensure adequate deterrence and to protect the public from future crimes by the defendant. The memorandum observed that the homicide rate from gun violence in Puerto Rico was among the highest in the world and stated, based on FBI statistics, that Puerto Rico's murder rate is the second-highest in the United States.

Viloria-Sepulveda's sentencing memorandum agreed with the PSR's guidelines sentencing calculations but argued that an upward variance was not warranted. Specifically, he objected to the government's reliance on any photographs sent to the defendant through a group **chat** he was a member of on **WhatsApp**, saying that it would be inappropriate to "presuppose[] that Mr. Viloria[-Sepulveda] personally participated in taking the photographs and video and that therefore he had access to the narcotics, firearms, and other items depicted in said photographs." The memorandum also claimed that many of the photographs depicted innocent conduct, as they were taken during the recording of music videos for local artists. Finally, Viloria-Sepulveda's memorandum highlighted *8 that he was a father, had a record of employment, and was a first-time offender.

At the sentencing hearing on January 26, 2018, the government reiterated its arguments for an upwardly variant sentence of between forty-eight and sixty months. The district court "recognize[d] that Puerto Rico is a hot spot for weapons,

especially those that contain the chips which make them fully automatic as machine guns.” It also rejected Viloria-Sepulveda’s objections to the photos.

The district court accepted the PSR’s guidelines calculations and GSR. It noted that it had “considered all of the [18 U.S.C. § 3553] sentencing factors,” emphasizing “the need to promote respect for the law and protect the public from further crimes by defendant” and “the issues of deterrence and punishment.” After describing the offense, the evidence in the Toyota, and the photographs, the district court observed that the defendant was connected to “what the Court consider[s] to be” criminal activity. Based on all of these considerations, the district court sentenced Viloria-Sepulveda to sixty months’ imprisonment with three years of supervised release. Viloria-Sepulveda’s counsel then “state[d] for the record that we object to the sentence imposed both on procedural and substantive grounds,” without further elaboration.

II.

[1] Preserved claims of procedural and substantive sentencing error are reviewed under an abuse of discretion standard. See Gall v. United States, 552 U.S. 38, 55, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007); United States v. Soto-Soto, 855 F.3d 445, 448 (1st Cir. 2017). Viloria-Sepulveda’s claim of substantive error, made in the district court, is undoubtedly preserved, and is reviewed under that standard.

[2] [3] Viloria-Sepulveda preserved only one of his two procedural objections. He argued in his sentencing memorandum and at the hearing that the photographs were not his or that they depicted scenes from music videos. The second of those objections was similar enough to the issue raised here -- that it had not been established that the photographs depicted illegal conduct -- to put the district court on fair notice, preserving the issue. See United States v. Ríos-Hernández, 645 F.3d 456, 462 (1st Cir. 2011). But Viloria-Sepulveda raises his objection to the consideration of community factors for the first time on appeal. See United States v. Matos-de-Jesús, 856 F.3d 174, 177 (1st Cir. 2017) (“A general objection to the procedural reasonableness of a sentence is not sufficient to preserve a specific challenge to any of the sentencing court’s particularized findings.” (quoting Soto-Soto, 855 F.3d at 448 n.1)). That unpreserved claim is reviewed for plain error.¹ Id.

We find no error, let alone plain error, and no abuse of discretion in the sentence. Turning first to the procedural challenges, we emphasize a few principles at the outset.

III.

[4] [5] A sentencing judge, “draw[ing] upon his familiarity with a case[and] weigh[ing] the factors enumerated in 18 U.S.C. § 3553(a),” may “custom-tailor an appropriate sentence” above the applicable *9 GSR. United States v. Flores-Machicote, 706 F.3d 16, 20 (1st Cir. 2013) (citing Kimbrough v. United States, 552 U.S. 85, 109, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007)). When a court does depart from the GSR, “its reasons for doing so ‘should typically be rooted either in the nature and circumstances of the offense or the characteristics of the offender.’ ” Id. at 21 (quoting United States v. Martin, 520 F.3d 87, 91 (1st Cir. 2008)); see also 18 U.S.C. § 3553(a) (calling for consideration of the “history and characteristics” of the defendant, among other factors).

[6] Congress has mandated that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” 18 U.S.C. § 3661. “The intent of Congress” in instructing this “was clearly to leave wide open the information ... at sentencing. The only qualifier imposed is that the information ... be reliable.” United States v. Rodriguez-Cardona, 924 F.2d 1148, 1155 (1st Cir. 1991); see also United States v. Acevedo-Lopez, 873 F.3d 330, 340 (1st Cir. 2017); United States v. Cintrón-Echaitegui, 604 F.3d 1, 6 (1st Cir. 2010).

[7] Section 3553(a) in particular “invite[s] the district court to consider, broadly,” United States v. Politano, 522 F.3d 69, 74 (1st Cir. 2008), any reliable information relevant not only to the “history and characteristics” of the defendant but also to factors such as the “seriousness of the offense,” the need “to afford adequate deterrence to criminal conduct,” and the need “to protect the public from further crimes of the defendant,” 18 U.S.C. § 3553(a); see also, e.g., United States v. Rivera-Berrios, 902 F.3d 20, 27 (1st Cir. 2018) (recognizing the “broad discretion” granted by § 3553(a)). This framework not only renders appropriate but actually encourages the sentencing court’s consideration of the evidence objected to here.

[8] The photographs, whose **authenticity** Viloria-Sepulveda does not challenge, conveyed reliable information about the defendant relevant to his sentence for illegal possession of a machine gun. The district court appropriately concluded that the fact that Viloria-Sepulveda had saved numerous photographs (some including him) of firearms, drugs, and drug paraphernalia, or had been sent such photographs on **WhatsApp**, signaled his past participation in or propensity for illegal or violent activities involving drugs and firearms. See [Acevedo-Lopez](#), 873 F.3d at 340 (no error in relying on text messages, photographs, video, and other evidence related to past violent incident to upwardly vary sentence). This conclusion was further supported by similar evidence found in Viloria-Sepulveda's car (in which he was escorting a known member of a violent drug gang) -- including not only the machine gun and ammunition but also a face mask, three cell phones, walkie talkies, and a drug ledger. In short, the district court certainly did not abuse its discretion in relying on photographs and possessions indicative of the defendant's associations with violent and illegal conduct in upwardly varying his sentence. See [Acevedo-Lopez](#), 873 F.3d at 340; [United States v. Quiñones-Meléndez](#), 791 F.3d 201, 205 (1st Cir. 2015) (no error in basing sentence on evidence in PSR and elsewhere indicating that the defendant was a "very dangerous individual"); [United States v. Gallardo-Ortiz](#), 666 F.3d 808, 815 (1st Cir. 2012) (similar).

In the district court, Viloria-Sepulveda argued that the images were either not his or that they depicted innocent conduct. But the district court was free to find otherwise, as it did. See, e.g., *10 [United States v. Oliveira](#), 907 F.3d 88, 91-92 (1st Cir. 2018) (sentencing court's factual finding reviewed for clear error). "[I]f he had nothing to do with it, why would somebody send him that; just for the fun of it?", the district court astutely said. "It's improbable[.]" And, as the district court rightly observed, it "stretch[es] ... credibility" to view images containing "all this weaponry" as innocent depictions of scenes from a music video shoot.

On appeal, Viloria-Sepulveda attempts to characterize the images as irrelevant or unreliable because "it cannot be established by the pictures that the firearms violated any federal statute." Not so, and the argument misses the point in any event. The district court did not err in finding that the pictured weapons, some of which looked like "high-powered AK-47s," were likely possessed illegally. Further, as we stated, images associating the defendant with drugs, drug-related items, and weapons (whatever the status of those weapons under federal law) could be used in upwardly

varying his sentence, as they are evidence of relevant history and characteristics. See [Gallardo-Ortiz](#), 666 F.3d at 815.

[9] The district court also did not err in considering the problem of gun violence in Puerto Rico and that "Puerto Rico is a hot spot for weapons." Community considerations such as the prevalence of weapons and of violent crime can justify upwardly varying a sentence for a gun possession conviction. See [Flores-Machicote](#), 706 F.3d at 22-23 (no error in relying on "Puerto Rico's escalating murder rate and other local criminal trends" in upwardly varying a sentence for gun possession); [United States v. Fuentes-Echevarria](#), 856 F.3d 22, 26 (1st Cir. 2017) (no error relying on the fact of an "arsenal [of weapons] out there in the streets" in upwardly varying a sentence for a conviction under § 922(o) (alteration in original)); [United States v. Millán-Roman](#), 854 F.3d 75, 79 (1st Cir. 2017) (similar); [United States v. Lozada-Aponte](#), 689 F.3d 791, 793 (sentencing judge's discussion of "incidence of crime in Puerto Rico" was a "permissible consideration[] in varying from the guidelines"); cf. [United States v. Landry](#), 631 F.3d 597, 607 (1st Cir. 2011) (no error in relying on the growth of identity theft in Maine to impose high-end guidelines sentence).

The pervasiveness of guns and the level of violence in the local community are connected to the determinations that a sentencing judge must make under § 3553(a)(2). As we explained in [United States v. Flores-Machicote](#), 706 F.3d 16 (1st Cir. 2013), "the incidence of particular crimes in the relevant community appropriately informs and contextualizes the relevant need for deterrence," a factor that must be weighed under § 3553(a)(2). *Id.* at 23; see also [Politano](#), 522 F.3d at 74. A sentencing judge may also reasonably conclude that the need to promote respect for the law and to protect the public from future crimes by the defendant is greater in areas hardest hit by guns and violence, see 18 U.S.C. § 3553(a)(2)(A)-(B) -- "and this may translate into a stiffer sentence," [Flores-Machicote](#), 706 F.3d at 23.

[10] The district court did not, as Viloria-Sepulveda argues, overemphasize these community concerns at the expense of individual ones. See *id.*; see also, e.g., [United States v. Rivera-González](#), 776 F.3d 45, 50-51 (1st Cir. 2015). A review of the district court's explanation makes this abundantly clear. The district court mentioned the community concerns only once. Otherwise, it considered the nature of this offense, particularly the fact that the defendant's weapon was "a machine gun, that is, a Glock pistol, .45 caliber, that had been modified to shoot automatically more than one shot without

manual reloading, and *11 that was by a single function of the trigger.” The district court also considered the images found on the defendant’s phone and the evidence in his car. It addressed Viloria-Sepulveda’s acceptance of responsibility, that this was his first conviction, that he had three dependents, and that he had “obtained his GED and was performing odd jobs before his arrest.”² The district court confirmed that it had “considered all of the” § 3553(a) factors as they related to the defendant.

Finally, the explanation just recounted justified the district court’s imposition of an upwardly variant sentence of

sixty months. That this five-year term of imprisonment is substantively reasonable is also evident from the fact that Congress has authorized a term of imprisonment of up to ten years for this offense. See 18 U.S.C. §§ 922(o), 924(a)(2). Viloria-Sepulveda’s sentence falls within the “universe of reasonable sentences.” *Rivera-González*, 776 F.3d at 52.

Affirmed.

All Citations

921 F.3d 5

Footnotes

- 1** “Under the plain error standard, the appellant must show ‘(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant’s substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings.’ ” *Soto-Soto*, 855 F.3d at 448 (quoting *United States v. Duarte*, 246 F.3d 56, 60 (1st Cir. 2001)).
- 2** Viloria-Sepulveda argues that the district court afforded too little importance to potentially mitigating personal characteristics like these. But the sentencing court has broad discretion in weighing and balancing the § 3553(a) factors, and we see no abuse of discretion in the weight assigned here. *United States v. Gierbolini-Rivera*, 900 F.3d 7, 15 (1st Cir. 2018).

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United States v. Thompson

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Outline

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Signed July 20, 2023

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MEMORANDUM OPINION

[MOLLOY](#), Chief Judge

*1 BEFORE THE COURT is Defendant Dean Thompson's ("Thompson") Motion for Judgment of Acquittal or, in the Alternative, Motion for a New Trial, filed on July 10, 2023. (ECF No. 81.) While Thompson was represented by Attorney Carl Williams at all stages of these proceedings, including the trial of this matter, Thompson filed these motions *pro se*. The United States ("Government") filed an opposition on July 14, 2023. (ECF No. 87.) For the reasons stated below, the Court will deny the motion.

I. FACTUAL AND PROCEDURAL HISTORY

On February 3, 2022, a grand jury returned an indictment charging Dean Thompson with two counts: (1) conspiracy to possess with intent to distribute marijuana, and (2) federal use of a communication facility to facilitate a felony. (ECF No. 13.) A jury trial for Thompson began on June 26, 2023. (ECF No. 70.)

During the trial, the Government moved to admit certain cell phone records from the phone of Thompson's alleged co-conspirator, Calvin Benjamin. (ECF No. 71.) According to the Government, portions of the records were intended to be used to explain the scope of the conspiracy and demonstrate that Thompson was an active participant in the conspiracy. (ECF Nos. 71 and 87.) While Thompson's attorney initially objected to the admission of Benjamin's cell phone records for lack of foundation and hearsay, counsel eventually withdrew the objection after a brief sidebar. *See* ECF No. 71. During the sidebar, defense counsel discovered that the Government had not only provided notice of its intent to offer the above-mentioned evidence but had provided a "certificate of **authenticity**" for the cell phone records as well. *See id.* Presumably seeing no other basis for objection, defense counsel withdrew his challenge, and the records were admitted into evidence.¹ Defense counsel did not object to the admission of the cell phone record evidence on the grounds that the evidence was highly prejudicial in nature. *See id.*

The trial continued, and on June 28, 2023, the jury found Thompson guilty of both counts. (ECF No. 78.)

Following his conviction, Thompson filed the instant motion *pro se* on July 10, 2023, seeking a judgment of acquittal, or alternatively, a new trial. (ECF No. 81.) In his motion, Thompson argues that he should be acquitted or at least receive a new trial due to, what Thompson believes, was ineffective assistance of counsel on the part of his attorney. *See id.* As the basis for this argument, Thompson claims that when the Government moved to introduce the cell phone record evidence during his trial, Thompson's attorney did not object to the evidence despite the "highly prejudicial" nature of the evidence. *Id.* at 2.² Thompson argues his defense attorney's failure to maintain an objection to the admission of this evidence on prejudice grounds constitutes ineffective assistance of counsel because, according to Thompson, the Court already excluded the same evidence in Thompson's previous criminal case, *United States v. Benjamin et al.*, 3:17-cr-00021.³ *See id.* at 1. In other words, Thompson contends that since the phone record evidence had already been excluded in a related case, there were obvious and meritorious grounds to object to the introduction of the phone evidence in the case at bar. Therefore, Thompson argues, defense counsel's failure to adequately challenge the admissibility of the phone record evidence in the instant case constituted ineffective assistance of counsel because, without the phone evidence, Thompson argues there would

be insufficient evidence to convict him on either Count One or Count Two. *See id.*

*2 The Government filed a response to Thompson's motion on July 14, 2023. (ECF No. 87.) The matter is now properly before the Court.

II. LEGAL STANDARD

A. Rule 29—Motion for Judgment of Acquittal

Under Rule 29 of the Federal Rules of Criminal Procedure, a defendant may move for a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. *See Fed. R. Crim. P. 29.* When ruling on a motion for judgment of acquittal made pursuant to Rule 29, the district court may grant the motion only if, after reviewing the record “ ‘in a light most favorable to the prosecution,’ ” the court determines that “ ‘no rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.’ ” *United States v. Tyler*, 956 F.3d 116, 122 (3d Cir. 2020) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The Rule 29 standard is highly deferential, and the court’s review under this standard is limited to consideration only of the sufficiency of the evidence admitted at trial. *See United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005); *United States v. John-Baptiste*, 747 F.3d 186, 201 (3d Cir. 2014) (“a defendant ‘challenging the sufficiency of the evidence’ pursuant to Rule 29 ‘bears a heavy burden.’ ”) (quoting *United States v. Casper*, 956 F.2d 416, 421 (3d Cir. 1992)); *United States v. Duvergel*, 629 F. Supp. 246 (D.N.J. 2022) (“The district court must view the evidence in its entirety and in the light most favorable to the government[.]”). Accordingly, district courts are only permitted to grant a judgment of acquittal in “cases where the prosecution’s failure is clear.” *United States v. Smith*, 294 F.3d 473, 477 (3d Cir. 2002). Therefore, the “evidence need not unequivocally point to the defendant’s guilt [to overcome a Rule 29 motion] as long as it permits the jury to find the defendant guilty beyond a reasonable doubt.” *United States v. Pungitore*, 910 F.2d 1084, 1129 (3d Cir. 1990).

B. Rule 33—Motion for a New Trial

While a defendant may move for a judgment of acquittal after being convicted, Rule 33 also allows a defendant to move for a new trial. *See Fed. R. Crim. P. 33.* A defendant may succeed on a Rule 33 motion if the defendant is able to show “there is newly discovered evidence or that there

was a reversible error at his trial.” *United States v. Benjamin*, Crim. No. 2013-32, 2014 WL 7156519, at *5 (D.V.I. Dec. 15, 2014). However, unlike Rule 29, where the court is limited in its scope of review, Rule 33 gives the court the discretion to “vacate any judgment and grant a new trial if the interest of justice so requires.” *Fed. R. Crim. P. 33(a).*⁴ Although the court is allowed a bit more discretion under Rule 33 than Rule 29, the court is still only permitted to grant a defendant’s motion for a new trial where the court “believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted.” *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002). Thus, “[s]uch motions are not favored and should be ‘granted sparingly and only in exceptional cases.’ ” *United States v. Silveus*, 542 F.3d 993, 1005 (3d Cir. 2008) (quoting *Gov’t of Virgin Islands v. Derrick*, 810 F.2d 50, 55 (3d Cir. 1987)).

*3 Moreover, although a defendant may technically base a Rule 33 motion on claims of ineffective assistance of counsel,⁵ the Third Circuit has made clear that such claims are highly disfavored at the Rule 33 stage, as ineffective assistance claims are almost always better addressed during a collateral proceeding following sentencing and direct appeal. *See United States v. Chorin*, 322 F.3d 274, n.4 (3d Cir. 2003) (“[T]his Court has expressed a preference that ineffective assistance of trial counsel claims be brought as collateral challenges under 28 U.S.C. § 2255, rather than as motions for new trials or on direct appeal ...”); *United States v. DeRewal*, 10 F.3d 100, 104-05 (3d Cir. 1993) (explaining why Rule 33 is not a particularly useful vehicle for bringing ineffective assistance of counsel claims); *United States v. Kennedy*, 354 Fed. App’x. 632, 637 (3d Cir. 2009) (“We note at the outset that rarely, if ever, should an ineffectiveness of counsel claim be decided in a motion for a new trial or on direct appeal.”).

Collateral proceedings are consistently more effective mechanisms for adjudicating ineffective assistance of counsel claims because they best accommodate finality and fairness. *See United States v. Ugalde*, 861 F.2d 802, 809 (5th Cir. 1988). During a collateral proceeding, unlike at other stages of a criminal case, “a factual record focused on the defendant’s claim can be developed in the district court, including by ‘taking testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance.’ ” *United States v. Oladimeji*, 463 F.3d 152, 154 (2d Cir. 2006) (quoting *Massaro v. United States*, 538 U.S. 500, 504–05 (2003))). Given the benefits of adjudicating these claims in a collateral proceeding, the Third Circuit has advised that a district court should only consider

an ineffective assistance of counsel claim in a motion for a new trial in the unique circumstance “[w]here the record is sufficient to allow determination of ineffective assistance of counsel, [and] an evidentiary hearing to develop the facts is not needed.” *United States v. Headley*, 923 F.2d 1079, 1083 (3d Cir. 1991).

C. Ineffective Assistance of Counsel Standard

If the record is sufficiently clear to adjudicate the ineffective assistance of counsel claim, then the defendant must satisfy the two-part *Strickland* test in order to prevail on his claims. “First, the petitioner must show that ‘counsel’s representation fell below an objective standard of reasonableness’ under ‘prevailing professional norms.’” *Collins v. Secretary of Penn. Dept. of Corrections*, 742 F.3d 528, 546 (3d Cir. 2014) (quoting *Strickland v. Washington*, 446 U.S. 668, 688 (1984)). During the step one analysis, the relevant inquiry is “whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Strickland*, 446 U.S. at 690. If defense counsel’s conduct fell below this standard, the court will then proceed to step two.

The second inquiry requires the defendant to “show prejudice such that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Collins*, F.3d at 546 (quoting *Strickland*, 446 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 446 U.S. at 694.

Only once both prongs of the *Strickland* test are satisfied may a defendant succeed on a claim of ineffective assistance of counsel. While a defendant may indeed prevail on his claim under the *Strickland* test, the test is “highly deferential” to attorneys, and “surmounting *Strickland*’s high bar is never an easy task” for a defendant. *Harrington v. Richter*, 562 U.S. 86, 105 (2001); *Padilla v. Kentucky*, 559 U.S. 356 371 (2010).

III. ANALYSIS

*4 After review, the Court will not reach the merits of Thompson’s ineffective assistance of counsel claim because the Court believes this type of claim should be brought in a collateral proceeding as opposed to a Rule 29 or Rule 33 motion.

The conclusion that a Rule 29 motion for judgment of acquittal is not an effective vehicle for bringing Thompson’s claims is self-evident. Here, Thompson essentially argues that absent the ineffective assistance he received from his attorney, the cell phone record evidence would not have been admitted, and consequently, there would not have been sufficient evidence to support his conviction. See ECF No. 81. But as previously mentioned, the sole focus of the Rule 29 inquiry is whether, after considering all the evidence admitted at trial, there was a sufficient basis to sustain the defendant’s conviction beyond a reasonable doubt. See Fed. R. Crim. P. 29; *United States v. Elcock*, Crim No. 2017-0005, 2019 WL 3577658, at *4 (D.V.I. Aug. 5, 2019) (noting that under rule 29, the Court considers “the totality of the evidence elicited in a case”) (citing *United States v. Pavulak*, 700 F.3d 651, 668 (3d Cir. 2012)). There is no dispute that the evidence admitted in Thompson’s case was sufficient to support a conviction on both counts.

Not only has the Government pointed to various other evidence demonstrating Thompson’s guilt,⁶ Thompson himself, effectively concedes that the evidence presented at trial was sufficient to support his conviction on both counts. See ECF No. 81.⁷ Thompson merely contends that if he had effective representation, the cell phone record evidence would have been excluded, and the Government’s remaining evidence would fail to support a conviction on either count. See id. However, under Rule 29, the Court is not permitted to reconsider whether evidence was properly admitted or whether the defendant’s attorney provided ineffective representation. The Court must simply consider all the evidence presented during the trial and determine whether the jury could have reasonably found the defendant guilty of the offenses alleged. Based on the evidence before the Court, there is more than enough evidence to support Thompson’s convictions. Accordingly, Thompson’s motion for judgment of acquittal on both counts must be denied.

*5 The Court also believes it is inappropriate for Thompson to bring his ineffective assistance of counsel claim under Rule 33.⁸ While it is true that when a defendant moves for a new trial under Rule 33, the Court may consider issues beyond the sufficiency of the evidence, including claims involving ineffective assistance of counsel, to do so here would be premature. See *United States v. Kennedy*, 682 F.3d 244, 250 n.3 (3d Cir. 2012).

As noted earlier, ineffective assistance of counsel claims may only be brought under Rule 33 in a rare and narrow set of

circumstances. To fit into this exception, the record in the case must already be sufficiently developed so that there is no need for an evidentiary hearing. *See Headley*, 923 F.2d at 1083. The Court believes the factual record here is not adequately developed so as to permit an effective review of the defendant's claims. For the record to be sufficient for immediate review, it must reflect not only the defendant's perception of events but defense counsel's perception and reasoning for his or her conduct as well. *See Government of the Virgin Islands v. Zepp*, 748 F.2d 125, 133 (3d Cir. 1984); cf. *United States v. Cocivera*, 104 F.3d 556, 571 (3d Cir. 1996) (allowing defendant's ineffective assistance claim to proceed on direct appeal because the district court already held an evidentiary hearing where defendant presented his claim and defense counsel explained the reasons for his actions). The record before the Court merely explains that defense counsel objected to the cell phone record evidence on foundation and hearsay grounds and then withdrew the objection. *See* ECF No. 71. Nothing in the record currently explains why defense counsel did not maintain his objection on those grounds or why he did not object to the admission of evidence for being unduly prejudicial. There certainly might have been a strategic reason for his actions, or as the Court suspects, defense counsel recognized that maintaining such

objections was likely frivolous. Regardless of the reason, without defense counsel's perspective, the Court is left to speculate as to the motivation behind the attorney's conduct. Accordingly, given that the record is underdeveloped and the matter at issue does not involve a situation where defense counsel committed "the type of egregious error that would leave the Court with 'no rational basis' to believe that [the attorney]'s conduct was strategic[.]," this matter would be better resolved in a collateral proceeding where a full factual record can be developed. *United States v. Alleyne*, Crim No. 2015-0012, 2017 WL 1043290, at *6 (D.V.I. Mar. 16, 2017) (citing *Headley*, 923 F.3d at 1083.)⁹

IV. CONCLUSION

***6** For the reasons stated above, the Court will deny Thompson's motion for judgment of acquittal and motion for new trial. An appropriate Order follows.

All Citations

Not Reported in Fed. Supp., 2023 WL 4637186

Footnotes

- 1 The cell phone records of Benjamin's phone were admitted as Government Exhibit 27. (ECF Nos. 64, 71, and 87.) A **WhatsApp chat** between Benjamin and Thompson taken from Benjamin's cell phone records was then admitted as Government Exhibit 10A. *See id.*
- 2 This allegation is contradicted by the record. *See* ECF No. 71. Defense counsel did, in fact, object to the admission of the cell phone record evidence. (ECF No. 71.) However, the objection was withdrawn shortly after. *See id.* Therefore, it would be more accurate for Thompson to say he is claiming he received ineffective assistance because counsel did not maintain an objection to the admission of the evidence or that he did not challenge the admission on the grounds that the evidence was highly prejudicial.
- 3 Thompson alleges that in *United States v. Benjamin et al.*, 3:17-cr-00021, this Court suppressed his and his codefendant's cellphones. He also claims that the Court prohibited any mention of the contents of those phones in any potential trial in that case. *See* ECF No. 81. However, Thompson did not cite to the record of the prior case nor was the Court able to find any orders supporting Thompson's contentions.
- 4 *See also United States v. Brown*, Crim No. 22-108, 2022 WL 16855129, at *2 (D.N.J. Nov. 10, 2022) (noting the broader scope of review under Rule 33 than Rule 29).
- 5 *See United States v. Brown*, 623 F.3d 104, 113 (2d Cir. 2010) (noting that "when a claim of ineffective assistance of counsel is first raised in the district court prior to the judgment of conviction, the district court may, and at times should, consider the claim at that point in the proceeding").
- 6 Along with the **WhatsApp** messages, the Government also submitted the "marijuana seized by Customs and Border Protection (CBP), surveillance video showing Defendant using his phone near the seized packages, [and] testimony from co-conspirator Calvin Benjamin that Defendant was part of the criminal activity." (ECF No. 87.) Additionally, the

Government provided testimony from United States Postal Inspector Eric Oram regarding an interview between Oram and Thompson wherein Thompson stated, “he knew Calvin Benjamin, admitted to taking a photo of the packages containing marijuana and showed it to his co-conspirator just minutes before Benjamin entered the Post Office to retrieve the packages.” *Id.* While the Court need not reach the issue today, it is likely that even without the cell phone record evidence, the Government presented enough other evidence to sustain convictions on both counts.

- 7 By using “but for” causation to argue that the exclusion of the cell phone record would have led to his acquittal, Thompson’s reasoning in the instant motion necessarily concedes there is sufficient evidence here for a conviction.
- 8 To the extent that Thompson makes a separate argument that a new trial is warranted because the Court admitted the cell phone record evidence in error, the Court will deny that request as well. Under Rule 33, a new trial will generally only be granted if there is new evidence or a reversible error occurred during the trial. See *Benjamin*, 2014 WL 7156519, at *5. Thompson points to no new evidence. Furthermore, the argument that the cell phone record evidence was admitted in error is plainly meritless. Thompson claims the cell phone record evidence should not have been admitted because it was “highly prejudicial.” (ECF No. 81 at 2.) However, the mere fact that evidence is highly prejudicial does not warrant excluding the evidence. See *United States v. Bailey*, 840 F.3d 99, 119 (3d Cir. 2016). The evidence must be *substantially* more prejudicial than probative. See *Fed. R. Evid. 403* (emphasis added). Here, the cell phone record evidence was clearly much more probative than prejudicial. Count Two required the Government to prove that Thompson used his cell phone to facilitate the commission of a felony. The cell phone record evidence went directly toward this issue by showing **WhatsApp** messages between Thompson and his fellow co-conspirators wherein the individuals planned the conspiracy and informed each other about the progress of the drug packages. Accordingly, this theory is frivolous. Moreover, the Court sees no other basis on the record which would indicate that the cell phone evidence should have been excluded during this trial. Therefore, to the extent Thompson is seeking to argue reversible error in his Rule 33 motion, it is denied.
- 9 The Court notes there was likely no error on defense counsel’s part, let alone an egregious error. The record offers no evidence which would suggest that defense counsel’s objection to the cell phone record evidence would have been sustained given the fact that the Government had given counsel notice of the evidence and provided a certificate of **authenticity** for the evidence. See ECF No. 71. Additionally, as noted in footnote 8, an objection for undue prejudice would likely have failed as well. See *supra* note 8. As such, this case is markedly distinguishable from *Headley* where there was no tactical reason for the attorney not to raise the issue. See *Headley*, 923 F.2d at 1083.

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Missouri v. Biden

United States District Court, W.D. Louisiana, Monroe Division. | July 4, 2023 | 680 F.Supp.3d 630 | 2023 WL 4335270

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680 F.Supp.3d 630

United States District Court, W.D. Louisiana,
Monroe Division.

State of MISSOURI, et al.

v.

Joseph R. BIDEN Jr., et al.

CASE NO. 3:22-CV-01213

|

Signed July 4, 2023

Synopsis

Background: States and individuals whose content had been removed from social media platforms filed putative class action alleging that federal officials violated their First Amendment free speech rights by encouraging and/or coercing social media companies into removing protected speech from their platforms. Plaintiffs moved for preliminary injunction and for class certification.

Holdings: The District Court, [Terry A. Doughty](#), J., held that:

[1] plaintiffs were likely to succeed on merits of their claim that White House officials violated First Amendment;

[2] plaintiffs were likely to succeed on their claim that officials jointly participated with social media companies so as to render them responsible for companies' decisions to censor;

[3] officials' statements to encourage social media companies to suppress purported misinformation did not constitute government speech;

[4] states had standing to bring action;

[5] individual plaintiffs satisfied injury-in-fact requirement for standing;

[6] plaintiffs were likely to succeed in establishing traceability element of standing;

[7] plaintiffs faced irreparable injury in absence of preliminary injunction;

[8] balance of equities and public interest favored issuance of preliminary injunction; and

[9] proposed classes were neither adequately defined nor clearly ascertainable.

Motions granted in part and denied in part.

West Headnotes (71)

[1] Constitutional Law  Purpose of constitutional protection

It is purpose of Free Speech Clause of First Amendment to preserve uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of market, whether it be by government itself or private licensee. [U.S. Const. Amend. 1](#).

[2] Injunction  Extraordinary or unusual nature of remedy

Injunction  Balancing or weighing hardship or harm

Injunction is extraordinary remedy never awarded of right; in each case, courts must balance competing claims of injury and must consider effect on each party of granting or withholding of requested relief.

[3] Injunction  Grounds in general; multiple factors

Standard for preliminary injunction requires movant to show: (1) substantial likelihood of success on merits; (2) that he is likely to suffer irreparable harm in absence of injunction; (3) that balance of equities tips in his favor; and (4) that injunction is in public interest.

[4] **Injunction** ↗ Grounds in general; multiple factors

Party seeking preliminary injunction must satisfy cumulative burden of proving all four elements enumerated before injunction can be granted.

[5] **Constitutional Law** ↗ Applicability to governmental or private action; state action

Free Speech Clause prohibits only governmental abridgment of speech; it does not prohibit private abridgment of speech. [U.S. Const. Amend. 1.](#)

[6] **Constitutional Law** ↗ Content-Based Regulations or Restrictions

First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over content of messages expressed by private individuals. [U.S. Const. Amend. 1.](#)

[7] **Constitutional Law** ↗ Freedom of Speech, Expression, and Press

At First Amendment's heart lies principle that each person should decide for himself or herself ideas and beliefs deserving of expression, consideration, and adherence. [U.S. Const. Amend. 1.](#)

[8] **Constitutional Law** ↗ Freedom of speech, expression, and press

Government action, aimed at suppression of particular views on subject that discriminates on basis of viewpoint, is presumptively unconstitutional under First Amendment free speech principles. [U.S. Const. Amend. 1.](#)

[9] **Constitutional Law** ↗ Content-Based Regulations or Restrictions

First Amendment guards against government action targeted at specific subject matter, a form

of speech suppression known as content-based discrimination. [U.S. Const. Amend. 1.](#)

[10] **Constitutional Law** ↗ Viewpoint or idea discrimination

Government must abstain from regulating speech when specific motivating ideology or perspective of speaker is rationale for restriction. [U.S. Const. Amend. 1.](#)

[11] **Constitutional Law** ↗ Viewpoint or idea discrimination

Strict scrutiny under First Amendment is applied to viewpoint discrimination. [U.S. Const. Amend. 1.](#)

[12] **Constitutional Law** ↗ Property and Events

Government may not grant use of forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. [U.S. Const. Amend. 1.](#)

[13] **Constitutional Law** ↗ Offensive, vulgar, abusive, or insulting speech

If there is bedrock principal underlying First Amendment, it is that government may not prohibit expression of idea simply because society finds idea itself offensive or disagreeable; benefit of any doubt must go to protecting rather than stifling speech. [U.S. Const. Amend. 1.](#)

[14] **Constitutional Law** ↗ Applicability to governmental or private action; state action

State can be held responsible for private decision that allegedly results in constitutional violation only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that choice must be deemed to be that of state; mere approval or acquiescence in private party's actions is not sufficient to hold state responsible for those actions.

[15] **Constitutional Law** Applicability to governmental or private action; state action

State may not induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish.

[16] **Constitutional Law** Retaliation in general

Oral or written statements made by public officials may give rise to valid First Amendment claim where comments of governmental official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow failure to accede to official's request. [U.S. Const. Amend. 1](#).

[17] **Civil Rights** Injunction

Constitutional Law Particular Issues and Applications in General

Public official's threat to stifle protected speech is actionable under First Amendment and can be enjoined, even if threat turns out to be empty. [U.S. Const. Amend. 1](#).

[18] **Constitutional Law** Particular Issues and Applications in General

In determining whether government's words or actions could reasonably be interpreted as implied threat to stifle protected speech, in violation of First Amendment, courts examine number of factors, including: (1) defendant's regulatory or other decision-making authority over targeted entities; (2) whether government actors actually exercised regulatory authority over targeted entities; (3) whether language of alleged threatening statements could reasonably be perceived as threat; and (4) whether any targeted entities reacted in manner evincing perception of implicit threat. [U.S. Const. Amend. 1](#).

[19] **Telecommunications** Programming and content

States and social media users were likely to succeed on merits of their claim that White House officials violated First Amendment by pressuring and encouraging social media companies to suppress speech, for purposes of evaluating their entitlement to preliminary injunction, despite officials' contention that they were merely trying to stem spread of COVID-19 misinformation; officials used communications with social media companies to pressure them to suppress speech, flagged posts and provided information on type of posts they wanted suppressed, followed up with directives to provide them with information as to action companies had taken with regard to flagged post, and threatened to revoke Communications Decency Act (CDA), and virtually all speech suppressed was "conservative" speech. [U.S. Const. Amend. 1](#); Communications Act of 1934 § 230, [47 U.S.C.A. § 230](#).

1 Case that cites this headnote

[20] **Telecommunications** Programming and content

States and social media users were likely to succeed on merits of their claim that Surgeon General and his office violated First Amendment by pressuring and encouraging social media companies to suppress free speech, for purposes of evaluating their entitlement to preliminary injunction, despite officials' contention that Surgeon General's role was primarily to draw attention to public health matters during COVID-19 pandemic; Surgeon General's advisory on misinformation publicly called on social media companies "to do more" against COVID misinformation superspreaders, officials kept pressure on companies with pre-rollout meetings, follow-up meetings, and requests for information about spread of misinformation, and "misinformation" to be suppressed was whatever they deemed misinformation. [U.S. Const. Amend. 1](#).

[21] **Telecommunications** Programming and content

States and social media users were likely to succeed on merits of their claim that Centers for Disease Control (CDC) violated First Amendment by engaging in censorship campaign, together with White House and other federal agencies, to have supposed misinformation about COVID-19 suppressed on social media platforms, for purposes of evaluating their entitlement to preliminary injunction, despite CDC's contention that its was responding to requests by social media companies for science-based public health information, proactively alerting companies about disinformation, or advising companies where to find accurate information; CDC became determiner of truth about COVID-19 statements on social media, and if CDC said statement was false, companies suppressed it, in spite of alternative views. [U.S. Const. Amend. 1.](#)

[22] **Telecommunications**  Programming and content

States and social media users were likely to succeed on merits of their claim that National Institute of Allergy and Infectious Diseases (NIAID) officials violated First Amendment by engaging in series of campaigns to discredit and procure censorship of disfavored viewpoints about COVID-19 on social media, for purposes of evaluating their entitlement to preliminary injunction, despite officials' contention that their statements were government speech in response to emergency public health threats; officials organized campaign to take down report criticizing lockdown policies and expressing concern about damaging physical and mental health impacts of lockdowns, and social media companies suppressed alternative medical theories in response. [U.S. Const. Amend. 1.](#)

[23] **Telecommunications**  Programming and content

States and social media users were likely to succeed on merits of their claim that FBI and its Foreign Influence Task Force (FITF) violated First Amendment by telling social

media companies to look out for Russian disinformation prior to 2020 Presidential election by failing to inform them that story regarding candidate's son was not Russian disinformation, and by covering up information about Chinese laboratory being possible source of COVID-19 virus, for purposes of evaluating their entitlement to preliminary injunction; FBI intrinsically involved itself in requesting companies to take action regarding content it considered to be misinformation and likely misled them about story regarding candidate's son's computer. [U.S. Const. Amend. 1.](#)

[24] **Telecommunications**  Programming and content

States and social media users were likely to succeed on merits of their claim that Cybersecurity and Infrastructure Security Agency (CISA) violated First Amendment by pressuring social media companies to increase censorship of speech disfavored by federal officials, and by acting as "switchboard" to route disinformation concerns to companies, for purposes of evaluating their entitlement to preliminary injunction, despite CISA's contention that it simply referred alleged election disinformation to social media companies, stating that it was not demanding censorship, and that companies made their own decisions to suppress content; CISA officials met with companies to both inform and pressure them to censor content, and apparently encouraged and pressured them to flag disfavored content. [U.S. Const. Amend. 1.](#)

[25] **Telecommunications**  Programming and content

States and social media users were likely to succeed on merits of their claim that State Department, through Global Engagement Center (GEC), violated First Amendment by pressuring and encouraging social media companies to suppress free speech, for purposes of evaluating their entitlement to preliminary injunction, despite State Department contention that it

did not flag specific content for social media companies and did not give any directives; State Department officials exercised significant encouragement with social media companies, and partnered with private organizations whose goals were to suppress protected speech from political figures, political organizations, alleged partisan media outlets, and social media all-stars associated with right-wing or conservative political views. [U.S. Const. Amend. 1.](#)

[1 Case that cites this headnote](#)

[26] Conspiracy ↗ Liability of Government Entities, Officials, and Employees

When plaintiff establishes existence of conspiracy involving state action, government becomes responsible for all constitutional violations committed in furtherance of conspiracy by party to conspiracy.

[27] Telecommunications ↗ Programming and content

States and social media users were likely to succeed on merits of their claim that officials from White House, Surgeon General's office, Centers for Disease Control (CDC), FBI, National Institute of Allergy and Infectious Diseases (NIAID), Cybersecurity and Infrastructure Security Agency (CISA), and State Department jointly participated with social media companies so as to render them responsible for companies' decisions to censor protected content, in violation of First Amendment, for purposes of evaluating states' entitlement to preliminary injunction; federal officials significantly involved themselves in companies' decisions by insinuating themselves into their private affairs and blurring between public and private action. [U.S. Const. Amend. 1.](#)

[28] Constitutional Law ↗ Government-sponsored speech

Traditional test used to differentiate government speech from private speech, for First Amendment purposes, discusses three relevant

factors: (1) whether medium at issue has historically been used to communicate messages from government; (2) whether public reasonably interprets government to be speaker; and (3) whether government maintains editorial control over speech. [U.S. Const. Amend. 1.](#)

[29] Constitutional Law ↗ Freedom of Speech, Expression, and Press

Constitutional Law ↗ Government-sponsored speech

Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. [U.S. Const. Amend. 1.](#)

[30] Constitutional Law ↗ Telecommunications and Computers

Federal officials' statements to encourage social media companies to suppress purported misinformation did not constitute government speech that was not subject to scrutiny under Free Speech Clause; officials did not just use public statements to coerce and/or encourage social media platforms to suppress speech, but rather used meetings, e-mails, phone calls, follow-up meetings, and power of government to pressure social media platforms to change their policies and to suppress speech. [U.S. Const. Amend. 1.](#)

[1 Case that cites this headnote](#)

[31] Federal Civil Procedure ↗ In general; injury or interest

Law of Article III standing, which is built on separation-of-powers principles, serves to prevent judicial process from being used to usurp political branches' powers. [U.S. Const. art. 3, § 2, cl. 1.](#)

[32] Federal Civil Procedure ↗ In general; injury or interest

Article III standing question is whether plaintiff has alleged such personal stake in controversy's outcome as to warrant its invocation of federal

court jurisdiction and to justify exercise of court's remedial powers on his behalf. [U.S. Const. art. 3, § 2, cl. 1.](#)

In context of preliminary injunction, merits required for plaintiff to demonstrate likelihood of success include not only substantive theories, but also establishment of jurisdiction.

[33] Declaratory Judgment Proper Parties

Article III standing requirements apply to claims for injunctive and declaratory relief. [U.S. Const. art. 3, § 2, cl. 1.](#)

[34] Federal Civil Procedure In general; injury or interest

Federal Civil Procedure Causation; redressability

To establish Article III standing, plaintiff must have (1) suffered injury-in-fact, (2) that is fairly traceable to defendant's challenged conduct, and (3) that is likely to be redressed by favorable judicial decision. [U.S. Const. art. 3, § 2, cl. 1.](#)

[39] Injunction Persons entitled to apply; standing

During preliminary injunction stage, movant is only required to demonstrate likelihood of proving standing.

[40] Federal Civil Procedure In general; injury or interest

Plaintiffs seeking to establish injury-in-fact required for standing must show that they suffered invasion of legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical; for injury to be particularized, it must affect plaintiff in personal and individual way.

[35] Federal Civil Procedure In general; injury or interest

Plaintiff, as party invoking federal jurisdiction, bears burden of establishing elements of standing.

[41] States *Parrens patriae*

“*Parrens patriae*,” which translates to “parent of the country,” traditionally refers to state's authority to bring actions in its role as sovereign and guardian for individuals with legal disabilities.

[36] Federal Civil Procedure In general; injury or interest

Plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.

[42] States *Parrens patriae*

To have *parrens patriae* injury, entitling states to bring actions in their role as sovereign and guardian for individuals with legal disabilities, states must show sovereign interest establishing likelihood of establishing injury to one or more of their quasi-sovereign interests.

[37] Federal Civil Procedure In general; injury or interest

Federal Courts Case or Controversy Requirement

Presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement. [U.S. Const. art. 3, § 2, cl. 1.](#)

[43] Constitutional Law Freedom of Speech, Expression, and Press

States adequately alleged injuries to their quasi-sovereign interests in protecting constitutional rights of their citizens to establish *parrens patriae* standing to bring action alleging that

[38] Injunction Likelihood of success on merits

federal officials violated Free Speech Clause by encouraging and/or coercing social media companies into removing protected speech from their platforms; federal and state constitutions guaranteed right to freedom of expression, and states demonstrated that they were likely to prove that federal agencies, actors, and officials in their official capacity were excluding them and their residents from this benefit. [U.S. Const. Amend. 1.](#)

[1 Case that cites this headnote](#)

[44] Constitutional Law 🔑 Freedom of Speech, Expression, and Press

States of Louisiana and Missouri adequately alleged injury-in-fact required to establish their standing to bring action on their own behalf alleging that federal officials violated their First Amendment free speech rights by encouraging and coercing social media companies into removing protected speech from their platforms; Louisiana's Department of Justice faced direct censorship on video sharing platform for sharing footage wherein Louisianans criticized mask mandates and COVID-19 lockdown measures, Louisiana state legislator experienced censorship on social media platform when he posted content addressing vaccination of children against COVID-19, and video sharing company removed videos of Missouri county meetings in which citizens expressed their view that masks were ineffective. [U.S. Const. Amend. 1.](#)

[45] Telecommunications 🔑 Programming and content

Authors of declaration criticizing federal government's lockdown policies during COVID-19 pandemic and expressing concern about damaging physical and mental health impacts of lockdowns satisfied injury-in-fact requirement for standing to seek preliminary injunctive relief in action alleging that federal officials violated their First Amendment free speech rights by coercing social media companies into removing protected speech from their platforms; one author was apparent victim

of ongoing campaign of social media censorship, another author attested to coordinated federal censorship campaign against declaration and claimed ongoing censorship experiences on his personal social media accounts, and third author claimed that shadow banning of his social media posts had intensified. [U.S. Const. Amend. 1.](#)

[46] Telecommunications 🔑 Programming and content

Operator of news website and co-director of consumer and human rights advocacy organization satisfied injury-in-fact requirement for standing to seek preliminary injunctive relief in action alleging that federal officials violated their First Amendment free speech rights by coercing social media companies into removing protected speech from their platforms; officials appeared to be currently involved in ongoing project that encouraged and engaged in censorship activities specifically targeting news website, and co-director's personal social media account was under ongoing restriction and was constantly at risk of being completely de-platformed. [U.S. Const. Amend. 1.](#)

[47] Federal Civil Procedure 🔑 Causation; redressability

To satisfy traceability required for standing, plaintiff must demonstrate direct relation between injury asserted and injurious conduct alleged.

[48] Federal Civil Procedure 🔑 Causation; redressability

To satisfy traceability required for standing, plaintiff must establish that it is substantially probable that challenged acts of defendant, not of some absent third party, caused or will cause injury alleged.

[49] Telecommunications 🔑 Programming and content

States and individuals whose content had been removed from social media platforms were likely to succeed in establishing traceability element of Article III standing to bring action alleging that federal officials violated their First Amendment free speech rights by coercing social media companies into removing protected speech from their platforms, despite officials' contention that companies would have censored plaintiffs or modified their content moderation policies even without any encouragement or coercion from them; drastic increase in censorship, deboosting, shadow-banning, and account suspensions directly coincided with officials' public calls for censorship and private demands for censorship. [U.S. Const. art. 3, § 2, cl. 1](#); [U.S. Const. Amend. 1](#).

1 Case that cites this headnote

[50] Federal Civil Procedure Causation; redressability

To determine whether injury is redressable, as required for standing, court will consider relationship between judicial relief requested and injury suffered.

[51] Telecommunications Programming and content

States and individuals whose content had been removed from social media platforms were likely to succeed in establishing redressability element of Article III standing to seek preliminary injunctive relief barring federal officials from violating their First Amendment free speech rights by coercing social media companies into removing protected speech from their platforms, despite officials' contention that any threat of future injury was merely speculative because plaintiffs relied on dated declarations and focused on long-past conduct; evidence indicated that officials had plans to continue their alleged censorship activities, and past censorship continued to inhibit individuals' speech. [U.S. Const. art. 3, § 2, cl. 1](#); [U.S. Const. Amend. 1](#).

1 Case that cites this headnote

[52] Federal Civil Procedure In general; injury or interest

Plaintiff's standing is evaluated at time of filing of initial complaint in which they joined.

[53] Injunction Irreparable injury

Injunction Recovery of damages

For injury to be irreparable, as required for preliminary injunction, plaintiffs need only show it cannot be undone through monetary remedies.

[54] Injunction Irreparable injury

Deprivation of procedural right to protect party's concrete interests is irreparable injury, as required for preliminary injunction.

[55] Civil Rights Preliminary Injunction

Violation of First Amendment constitutional right, even for short period of time, is always irreparable injury, as required for preliminary injunction. [U.S. Const. Amend. 1](#).

[56] Telecommunications Programming and content

States and social media users whose content had been removed faced irreparable injury in absence of preliminary injunction barring federal officials from violating their First Amendment free speech rights by coercing social media companies into removing protected speech from their platforms, despite officials' contentions that alleged suppression of social media content occurred in response to COVID-19 pandemic and attacks on election infrastructure, and therefore, was no longer occurring, and that there was no indication of imminent harm; individual users alleged that they were being subjected to ongoing campaign of censorship, and there was evidence that federal agencies planned to target "inaccurate information" on wide range of topics in future. [U.S. Const. Amend. 1](#).

[57] Federal Courts ➔ Weight and sufficiency

Defendant claiming that its voluntary compliance moots case bears formidable burden of showing that it is absolutely clear alleged wrongful behavior could not reasonably be expected to recur.

[58] Injunction ➔ Balancing or weighing hardship or injury

In weighing equities on motion for preliminary injunction, court must balance competing claims of injury and must consider effect on each party of granting or withholding requested relief.

[59] Injunction ➔ Public interest considerations

Public interest factor requires court to consider what public interests may be served by granting or denying preliminary injunction.

[60] Telecommunications ➔ Programming and content

Balance of equities and public interest favored issuance of preliminary injunction barring federal officials from violating Free Speech Clause by coercing social media companies into removing protected speech from their platforms, despite officials' contention that government's interest in being able to report misinformation and warn social media companies of foreign actors' misinformation campaigns outweighed states' and individuals' interest in right of free speech; public interest was served by maintaining constitutional structure and First Amendment free speech rights, and officials' alleged suppression potentially resulted in millions of free speech violations. [U.S. Const. Amend. 1](#).

[61] Injunction ➔ Specificity, vagueness, overbreadth, and narrowly-tailored relief

Injunction must be narrowly tailored to remedy specific action that gives rise to injunction.

[62] Federal Civil Procedure ➔ Discretion of court

Decision to certify class is within court's broad discretion, but that discretion must be exercised within framework of class action rule. [Fed. R. Civ. P. 23](#).

[63] Federal Civil Procedure ➔ Identification of class; subclasses

Existence of ascertainable class of persons to be represented by proposed class representative is implied prerequisite for class certification. [Fed. R. Civ. P. 23](#).

[64] Federal Civil Procedure ➔ Particular Classes Represented

Proposed classes of social media users whose speech had been or would be removed after their speech was flagged by federal officials or pursuant to change in social media company's policies or practices induced by federal officials were neither adequately defined nor clearly ascertainable, thus precluding class certification in action alleging that federal officials violated First Amendment by pressuring and encouraging social media companies to suppress protected speech; proposed class definitions were so broad that almost every person in America, and perhaps in many other countries, could fit within classes. [U.S. Const. Amend. 1](#); [Fed. R. Civ. P. 23](#).

[65] Federal Civil Procedure ➔ Identification of class; subclasses

Where class definition is too broad and ill-defined to be practicable, class should not be certified. [Fed. R. Civ. P. 23](#).

[66] Federal Civil Procedure ➔ Particular Classes Represented

Proposed classes of social media users whose speech had been or would be removed at behest

of federal officials likely contained thousands or millions of individuals, and thus satisfied numerosity requirement for class certification in action alleging that officials violated First Amendment by pressuring and encouraging social media companies to suppress free speech. [U.S. Const. Amend. 1; Fed. R. Civ. P. 23\(a\)\(1\)](#).

[67] Federal Civil Procedure ↗ Common interest in subject matter, questions and relief; damages issues

Test for commonality required for class certification is not demanding, and is met where there is at least one issue, resolution of which will affect all or significant number of putative class members. [Fed. R. Civ. P. 23\(a\)\(2\)](#).

[68] Federal Civil Procedure ↗ Particular Classes Represented

Action alleging that federal officials violated First Amendment by pressuring and encouraging social media companies to suppress free speech did not satisfy commonality requirement for class action, even though there was common question of First Amendment law that impacted each member of proposed classes; questions of law were broadly worded and might not have properly characterized specific issues being argued in case, making it difficult to provide single, class-wide answer. [U.S. Const. Amend. 1; Fed. R. Civ. P. 23\(a\)\(2\)](#).

[69] Federal Civil Procedure ↗ Representation of class; typicality; standing in general

Typicality requirement for class certification focuses on similarity between named plaintiffs' legal and remedial theories and theories of those whom they purport to represent. [Fed. R. Civ. P. 23\(a\)\(3\)](#).

[70] Federal Civil Procedure ↗ Particular Classes Represented

Action brought by social media users alleging that federal officials violated First Amendment

by pressuring and encouraging social media companies to suppress their posts did not satisfy typicality requirement for class action, even though general claims of each potential class member would arise from officials' alleged First Amendment violations; proposed class included social media users who "follow, subscribe to, are friends with, or are otherwise connected to the accounts of users" subject to censorship, and named plaintiffs did not clarify how they had been harmed by censorship of other users. [U.S. Const. Amend. 1; Fed. R. Civ. P. 23\(a\)\(3\)](#).

[71] Federal Civil Procedure ↗ Representation of class; typicality; standing in general

Differences between named plaintiffs and class members render named plaintiffs' inadequate representatives only if those differences create conflicts between named plaintiffs' interests and class members' interests.

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MEMORANDUM RULING ON REQUEST FOR PRELIMINARY INJUNCTION

TERRY A. DOUGHTY, UNITED STATES DISTRICT JUDGE

***640** At issue before the Court is a Motion for Preliminary Injunction [Doc. No. 10] filed by Plaintiffs.¹ The Defendants² oppose the Motion [Doc. No. 266]. Plaintiffs have filed a reply to the opposition [Doc. No. 276]. The Court heard oral arguments on this Motion on May 26, 2023 [Doc. No. 288]. Amicus Curiae briefs have been filed in this proceeding on behalf of Alliance Defending Freedom,³ the Buckeye Institute,⁴ and Children's Health Defense.⁵

***641 I. INTRODUCTION**

I may disapprove of what you say, but I would defend to the death your right to say it.

Evelyn Beatrice Hill, 1906, *The Friends of Voltaire*
 This case is about the Free Speech Clause in the First Amendment to the United States Constitution. The explosion of social-media platforms has resulted in unique free speech issues—this is especially true in light of the COVID-19 pandemic. If the allegations made by Plaintiffs are true, the present case arguably involves the most massive attack against free speech in United States' history. In their attempts to suppress alleged disinformation, the Federal Government, and particularly the Defendants named here, are alleged to have blatantly ignored the First Amendment's right to free speech.

[1] Although the censorship alleged in this case almost exclusively targeted conservative speech, the issues raised herein go beyond party lines. The right to free speech is not a member of any political party and does not hold any political ideology. It is the purpose of the Free Speech Clause of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of the market, whether it be by government itself or private licensee. *Red Lion Broadcasting Co., v. F.C.C.*, 395 U.S. 367, 89 S. Ct. 1794, 1806, 23 L.Ed.2d 371 (1969).

Plaintiffs allege that Defendants, through public pressure campaigns, private meetings, and other forms of direct

communication, regarding what Defendants described as “disinformation,” “misinformation,” and “malinformation,” have colluded with and/or coerced social-media platforms to suppress disfavored speakers, viewpoints, and content on social-media platforms. Plaintiffs also allege that the suppression constitutes government action, and that it is a violation of Plaintiffs’ freedom of speech under the First Amendment to the United States Constitution. The First Amendment states:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof: **or abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (emphasis added).

First Amendment, U.S. Const. amend. I.

The principal function of free speech under the United States’ system of government is to invite dispute; it may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533, 2542–43, 105 L.Ed.2d 342 (1989). Freedom of speech and press is the indispensable condition of nearly every other form of freedom. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 1986, 18 L.Ed.2d 1094 (1967).

The following quotes reveal the Founding Fathers’ thoughts on freedom of speech:

For if men are to be precluded from offering their sentiments on a matter, which may involve the most serious and alarming consequences, that can invite the consideration of mankind, reason is of no use to us; the freedom of speech may be taken away, and dumb and silent we may be led, like sheep, to the slaughter.

George Washington, March 15, 1783.

Whoever would overthrow the liberty of a nation must begin by subduing the free acts of speech.

Benjamin Franklin, *Letters of Silence Dogwood*.

*642 Reason and free inquiry are the only effectual agents against error.

Thomas Jefferson.

The question does not concern whether speech is conservative, moderate, liberal, progressive, or somewhere in between. What matters is that Americans, despite their views,

will not be censored or suppressed by the Government. Other than well-known exceptions to the Free Speech Clause, all political views and content are protected free speech.

The issues presented to this Court are important and deeply intertwined in the daily lives of the citizens of this country.

II. FACTUAL BACKGROUND

In this case, Plaintiffs allege that Defendants suppressed conservative-leaning free speech, such as: (1) suppressing the Hunter Biden laptop story prior to the 2020 Presidential election; (2) suppressing speech about the lab-leak theory of COVID-19’s origin; (3) suppressing speech about the efficiency of masks and COVID-19 lockdowns; (4) suppressing speech about the efficiency of COVID-19 vaccines; (5) suppressing speech about election integrity in the 2020 presidential election; (6) suppressing speech about the security of voting by mail; (7) suppressing parody content about Defendants; (8) suppressing negative posts about the economy; and (9) suppressing negative posts about President Biden.

Plaintiffs Bhattacharya and Kulldorff are infectious disease epidemiologists and co-authors of The Great Barrington Declaration (“GBD”). The GBD was published on October 4, 2020. The GBD criticized lockdown policies and expressed concern about the damaging physical and mental health impacts of lockdowns. They allege that shortly after being published, the GBD was censored on social media by Google, Facebook, Twitter, and others. Bhattacharya and Kulldorff further allege on October 8, 2020 (four days after publishing the GBD), Dr. Frances Collins, Dr. Fauci, and Cliff Lane proposed together a “take down” of the GBD and followed up with an organized campaign to discredit it.⁶

Dr. Kulldorff additionally alleges he was censored by Twitter on several occasions because of his tweets with content such as “thinking everyone must be vaccinated is scientifically flawed,” that masks would not protect people from COVID-19, and other “anti-mask” tweets.⁷

Dr. Kulldorff (and Dr. Bhattacharya⁸) further alleges that YouTube removed a March 18, 2021 roundtable discussion in Florida where he and others questioned the appropriateness of requiring young children to wear facemasks.⁹ Dr. Kulldorff also alleges that LinkedIn censored him when he reposted a post of a colleague from Iceland on vaccines, for stating that vaccine mandates were dangerous, for posting that natural

immunity is stronger than vaccine immunity, and for posting that health care facilities should hire, not fire, nurses.¹⁰

Plaintiff Jill Hines is Co-Director of Health Freedom Louisiana, a consumer and human rights advocacy organization. Hines alleges she was censored by Defendants because she advocated against the use of masks mandates on young children. She launched an effort called “Reopen Louisiana” on April 16, 2020, to expand Health Freedom Louisiana’s reach on social media. Hines alleges Health Freedom Louisiana’s social-media page began receiving *643 warnings from Facebook. Hines was suspended on Facebook in January 2022 for sharing a display board that contained Pfizer’s preclinical trial data.¹¹ Additionally, posts about the safety of masking and adverse events from vaccinations, including VAERS data and posts encouraging people to contact their legislature to end the Government’s mask mandate, were censored on Facebook and other social-media platforms. Hines alleges that because of the censorship, the reach of Health Freedom Louisiana was reduced from 1.4 million engagements per month to approximately 98,000. Hines also alleges that her personal Facebook page has been censored and restricted for posting content that is protected free speech. Additionally, Hines alleges that two of their Facebook groups, HFL Group and North Shore HFL, were de-platformed for posting content protected as free speech.¹²

Plaintiff Dr. Kheriaty is a psychiatrist who has taught at several universities and written numerous articles. He had approximately 158,000 Twitter followers in December 2021 and approximately 1,333 LinkedIn connections. Dr. Kheriaty alleges he began experiencing censorship on Twitter and LinkedIn after posting content opposing COVID-19 lockdowns and vaccine mandates. Dr. Kheriaty also alleges that his posts were “shadow banned,” meaning that his tweets did not appear in his follower’s Twitter feeds. Additionally, a video of an interview of Dr. Kheriaty on the ethics of vaccine mandates was removed from YouTube.¹³

Plaintiff Jim Hoft is the owner and operator of The Gateway Pundit (“GP”), a news website located in St. Louis, Missouri. In connection with the GP, Hoft operates the GP’s social-media accounts with Twitter, Facebook, YouTube, and Instagram. The GP’s Twitter account previously had over 400,000 followers, the Facebook account had over 650,000 followers, the Instagram account had over 200,000 followers, and the YouTube account had over 98,000 followers.

The GP’s Twitter account was suspended on January 2, 2021, again on January 29, 2021, and permanently suspended from Twitter on February 6, 2021. The first suspension was in response to a negative post Hoft made about Dr. Fauci’s statement that the COVID-19 vaccine will only block symptoms and not block the infection. The second suspension was because of a post Hoft made about changes to election law in Virginia that allowed late mail-in ballots without postmarks to be counted. Finally, Twitter issued the permanent ban after the GP Twitter account posted video footage from security cameras in Detroit, Michigan from election night 2020, which showed two delivery vans driving to a building at 3:30 a.m. with boxes, which were alleged to contain election ballots. Hoft also alleges repeated instances of censorship by Facebook, including warning labels and other restrictions for posts involving COVID-19 and/or election integrity issues during 2020 and 2021.

Hoft further alleges that YouTube censored the GP’s videos. YouTube removed a May 14, 2022 video that discussed voter integrity issues in the 2020 election. Hoft has attached as exhibits copies of numerous GP posts censored and/or fact checked. All of the attached examples involve posts relating to COVID-19 or the 2020 election.

In addition to the allegations of the Individual Plaintiffs, the States of Missouri and Louisiana allege extensive censorship by Defendants. The States allege that they have a sovereign and proprietary interest *644 in receiving the free flow of information in public discourse on social-media platforms and in using social-media to inform their citizens of public policy decisions. The States also claim that they have a sovereign interest in protecting their own constitutions, ensuring their citizen’s fundamental rights are not subverted by the federal government, and that they have a quasi-sovereign interest in protecting the free-speech rights of their citizens. The States allege that the Defendants have caused harm to the states of Missouri and Louisiana by suppressing and/or censoring the free speech of Missouri, Louisiana, and their citizens.

The Complaint,¹⁴ Amended Complaint,¹⁵ Second Amended Complaint,¹⁶ and Third Amended Complaint¹⁷ allege a total of five counts. They are:

Count One – Violation of the First Amendment against all Defendants.

Count Two – Action in Excess of Statutory Authority against all Defendants.

Count Three – Violation of the Administrative Procedure Act against HHS, NIAID, CDC, FDA, Peck, Becerra, Murthy, Crawford, Fauci, Galatas, Waldo, Byrd, Choi, Lambert, Dempsey, Muhammed, Jefferson, Murry, and Kimberly.

Count Four – Violation of the Administrative Procedure Act against DHS, CISA, Mayorkas, Easterly, Silvers, Vinograd, Jankowicz, Masterson, Protentis, Hale, Snell, Wyman, and Scully.

Count Five – Violation of the Administrative Procedure Act against the Department of Commerce, Census Bureau, Shopkorn, Schwartz, Molina-Irizarry, and Galemore.

Plaintiffs also ask for this case to be certified as a class action pursuant to [Federal Rules of Civil Procedure 23\(a\) and 23\(b\)\(2\)](#). For the reasons discussed herein, it is only necessary to address Count One and the Plaintiffs' request for class action certification in this ruling.

The following facts are pertinent to the analysis of whether or not Plaintiffs are entitled to the granting of an injunction.¹⁸

Plaintiffs assert that since 2018, federal officials, including Defendants, have made public statements and demands to social-media platforms in an effort to induce them to censor disfavored speech and speakers. Beyond that, Plaintiffs argue that Defendants have threatened adverse consequences to social-media companies, such as reform of Section 230 immunity under the Communications Decency Act, antitrust scrutiny/enforcement, increased regulations, and other measures, if those companies refuse to increase censorship. Section 230 of the Communications Decency Act shields social-media companies from liability for actions taken on their websites, and Plaintiffs argue that the threat of repealing Section 230 motivates the social-media companies to comply with Defendants' censorship requests. Plaintiffs also note that Mark Zuckerberg ("Zuckerberg"), the owner of Facebook, has publicly stated that the threat of antitrust enforcement is "an existential threat" to his platform.¹⁹

*645 A. White House Defendants²⁰

Plaintiffs assert that by using emails, public and private messages, public and private meetings, and other means, the White House Defendants have "significantly encouraged" and "coerced" social-media platforms to suppress protected free speech posted on social-media platforms.

(1) On January 23, 2021, three days after President Biden took office, Clarke Humphrey ("Humphrey"), who at the time was the Digital Director for the COVID-19 Response Team, emailed Twitter and requested the removal of an anti-COVID-19 vaccine tweet by Robert F. Kennedy, Jr.²¹ Humphrey sent a copy of the email to Rob Flaherty ("Flaherty"), former Deputy Assistant to the President and Director of Digital Strategy, on the email and asked if "we can keep an eye out for tweets that fall in this same genre." The email read, "Hey folks-Wanted to flag the below tweet and am wondering if we can get moving on the process of having it removed ASAP."²²

(2) On February 6, 2021, Flaherty requested Twitter to remove a parody account linked to Finnegan Biden, Hunter Biden's daughter and President Biden's granddaughter. The request stated, "Cannot stress the degree to which this needs to be resolved immediately," and "Please remove this account immediately."²³ Twitter suspended the parody account within forty-five minutes of Flaherty's request.

(3) On February 7, 2021, Twitter sent Flaherty a "Twitter's Partner Support Portal" for expedited review of flagging content for censorship. Twitter recommended that Flaherty designate a list of authorized White House staff to enroll in Twitter's Partner Support Portal and explained that when authorized reporters submit a "ticket" using the portal, the requests are "prioritized" automatically. Twitter also stated that it had been "recently bombarded" with censorship requests from the White House and would prefer to have a streamlined process. Twitter noted that "[i]n a given day last week for example, we had more than four different people within the White House reaching out for issues."²⁴

(4) On February 8, 2021, Facebook emailed Flaherty, and Humphrey to explain how it had recently expanded its COVID-19 censorship policy to promote authoritative COVID-19 vaccine information and expanded its efforts to remove false claims on Facebook and Instagram about COVID-19, COVID-19 vaccines, and vaccines in general. Flaherty responded within nineteen minutes questioning how many times someone can share false COVID-19 claims

before being removed, how many accounts are being flagged versus removed, and how Facebook handles “dubious,” but not “provably false,” claims.²⁵ Flaherty demanded more information from Facebook on the new policy that allows Facebook to remove posts that repeatedly share these debunked claims.

(5) On February 9, 2021, Flaherty followed up with Facebook in regard to its COVID-19 policy, accusing Facebook of *646 causing “political violence” spurred by Facebook groups by failing to censor false COVID-19 claims, and suggested having an oral meeting to discuss their policies.²⁶ Facebook responded the same day and stated that “vaccine-skeptical” content does not violate Facebook’s policies.²⁷ However, Facebook stated that it will have the content’s “distribution reduced” and strong warning labels added, “so fewer people will see the post.”²⁸ In other words, even though “vaccine-skeptical” content did not violate Facebook’s policy, the content’s distribution was still being reduced by Facebook.

Facebook also informed Flaherty that it was working to censor content that does not violate Facebook’s policy in other ways by “preventing posts discouraging vaccines from going viral on our platform” and by using information labels and preventing recommendations for Groups, Pages, and Instagram accounts pushing content discouraging vaccines. Facebook also informed Flaherty that it was relying on the advice of “public health authorities” to determine its COVID-19 censorship policies.²⁹ Claims that have been “debunked” by public health authorities would be removed from Facebook. Facebook further promised Flaherty it would aggressively enforce the new censorship policies and requested a meeting with Flaherty to speak to Facebook’s misinformation team representatives about the latest censorship policies.³⁰ Facebook also referenced “previous meetings” between the White House and Facebook representatives during the “transition period” (likely referencing the Biden Administration transition).³¹

(6) On February 24, 2021, Facebook emailed Flaherty about “Misinfo Themes” to follow up on his request for COVID and vaccine misinformation themes on Facebook. Some of the misinformation themes Facebook reported seeing were claims of vaccine toxicity, claims about the side effects of vaccines, claims comparing the COVID vaccine to the flu vaccine, and claims downplaying the severity of COVID-19. Flaherty responded by asking for details about

Facebook’s actual enforcement practices and for a report on misinformation that was not censored. Specifically, his email read, “Can you give us a sense of volume on these, and some metrics around the scale of removal for each? Can you also give us a sense of misinformation that might be falling outside your removal policies?”³² Facebook responded that at their upcoming meeting, they “can definitely go into detail on content that doesn’t violate like below, but could ‘contribute to vaccine hesitancy.’”³³

(7) On March 1, 2021, Flaherty and Humphrey (along with Joshua Peck (“Peck”), the Health and Human Services’ (“HHS”) Deputy Assistant Secretary) participated in a meeting with Twitter about misinformation. After the meeting, Twitter emailed those officials to assure the White House that Twitter would increase censorship of “misleading information” on Twitter, stating “[t]hanks again for meeting with us today. As we discussed, we are building on ‘our’ continued efforts to remove the most harmful COVID-19 ‘misleading information’ from the service.”³⁴

(8) From May 28, 2021, to July 10, 2021, a senior Meta executive reportedly copied *647 Andrew Slavitt (“Slavitt”), former White House Senior COVID-19 Advisor, on his emails to Surgeon General Murthy (“Murthy”), alerting them that Meta was engaging in censorship of COVID-19 misinformation according to the White House’s “requests” and indicating “expanded penalties” for individual Facebook accounts that share misinformation.³⁵ Meta also stated, “We think there is considerably more we can do in ‘partnership’ with you and your team to drive behavior.”³⁶

(9) On March 12, 2021, Facebook emailed Flaherty stating, “Hopefully, this format works for the various teams and audiences within the White House/HHS that may find this data valuable.”³⁷ This email also provided a detailed report and summary regarding survey data on vaccine uptake from January 10 to February 27, 2021.³⁸

(10) On March 15, 2021, Flaherty acknowledged receiving Facebook’s detailed report and demanded a report from Facebook on a recent Washington Post article that accused Facebook of allowing the spread of information leading to vaccine hesitancy. Flaherty emailed the Washington Post article to Facebook the day before, with the subject line: “You are hiding the ball,” and stated “I’ve been asking you guys pretty directly, over a series of conversations, for a clear accounting of the biggest issues you are seeing on your

platform when it comes to vaccine hesitancy and the degree to which borderline content as you define it – is playing a role.”³⁹

After Facebook denied “hiding the ball,” Flaherty followed up by making clear that the White House was seeking more aggressive action on “borderline content.”⁴⁰ Flaherty referred to a series of meetings with Facebook that were held in response to concerns over “borderline content” and accused Facebook of deceiving the White House about Facebook’s “borderline policies.”⁴¹ Flaherty also accused Facebook of being the “top driver of vaccine hesitancy.”⁴² Specifically, his email stated:

I am not trying to play ‘gotcha’ with you. We are gravely concerned that your service is one of the top drivers of vaccine hesitancy-period. I will also be the first to acknowledge that borderline content offers no easy solutions. But we want to know that you're trying, we want to know how we can help, and we want to know that you're not playing a shell game with us when we ask you what is going on. This would all be a lot easier if you would just be straight with us.⁴³

In response to Flaherty's email, Facebook responded, stating: “We obviously have work to do to gain your trust ... We are also working to get you useful information that's on the level. That's my job and I take it seriously – I'll continue to do it to the best of my ability, and I'll expect you to hold me accountable.”⁴⁴

Slavitt, who was copied on Facebook's email, responded, accusing Facebook of not being straightforward, and added more pressure by stating, “internally, we have been considering our options on what to do about it.”⁴⁵

*⁶⁴⁸ (11) On March 19, 2021, Facebook had an in-person meeting with White House officials, including Flaherty and Slavitt.⁴⁶ Facebook followed up on Sunday, March 21, 2021, noting that the White House had demanded a consistent point of contact with Facebook, additional data from Facebook, “Levers for Tackling Vaccine Hesitancy Content,” and censorship policies for Meta's platform **WhatsApp**.⁴⁷ Facebook noted that in response to White House demands, it was censoring, removing, and reducing the virality of content discouraging vaccines “that does not contain actionable misinformation.”⁴⁸ Facebook also provided a report for the

White House on the requested information on **WhatsApp** policies:

You asked us about our levers for reducing virality of vaccine hesitancy content. In addition to policies previously discussed, these include the additional changes that were approved last week and that we will be implementing over the coming weeks. As you know, in addition to removing vaccine misinformation, we have been focused on reducing the virality of content discouraging vaccines that do not contain actionable misinformation.⁴⁹

On March 22, 2021, Flaherty responded to this email, demanding more detailed information and a plan from Facebook to censor the spread of “vaccine hesitancy” on Facebook.⁵⁰ Flaherty also requested more information about and demanded greater censorship by Facebook of “sensational,” “vaccine skeptical” content.⁵¹ He also requested more information about **WhatsApp** regarding vaccine hesitancy.⁵² Further, Flaherty seemingly spoke on behalf of the White House and stated that the White House was hoping they (presumably the White House and Facebook) could be “partners here, even if it hasn't worked so far.”⁵³ A meeting was scheduled the following Wednesday between Facebook and White House officials to discuss these issues.

On April 9, 2021, Facebook responded to a long series of detailed questions from Flaherty about how **WhatsApp** was censoring COVID-19 misinformation. Facebook stated it was “reducing viral activity on our platform” through message-forward limits and other speech-blocking techniques.⁵⁴ Facebook also noted it bans accounts that engage in those that seek to exploit COVID-19 misinformation.⁵⁵

Flaherty responded, “I care mostly about what actions and changes you are making to ensure you're not making our country's vaccine hesitancy problem worse,” accusing Facebook of being responsible for the Capitol riot on January 6, 2021, and indicating that Facebook would be similarly responsible for COVID-related deaths if it did not censor more information.⁵⁶ “You only did this, however, after an election that you helped increase skepticism in, and an insurrection which was plotted, in large part, on your platform.”⁵⁷

(12) On April 14, 2021, Flaherty demanded the censorship of Fox News hosts Tucker Carlson and Tomi Lahren because

*649 the top post about vaccines that day was “Tucker Carlson saying vaccines don’t work and Tomi Lahren stating she won’t take a vaccine.”⁵⁸ Flaherty stated, “This is exactly why I want to know what ‘Reduction’ actually looks like – if ‘reduction’ means ‘pumping our most vaccine hesitant audience with Tucker Carlson saying it does not work’ ... then ... I’m not sure it’s reduction!”⁵⁹

Facebook promised the White House a report by the end of the week.⁶⁰

(13) On April 13, 2021, after the temporary halt of the Johnson & Johnson vaccine, the White House was seemingly concerned about the effect this would have on vaccine hesitancy. Flaherty sent to Facebook a series of detailed requests about how Facebook could “amplify” various messages that would help reduce any effects this may have on vaccine hesitancy.⁶¹

Flaherty also requested that Facebook monitor “misinformation” relating to the Johnson & Johnson pause and demanded from Facebook a detailed report within twenty-four hours. Facebook provided the detailed report the same day.⁶² Facebook responded, “Re the J & J news, we’re keen to amplify any messaging you want us to project about what this means for people.”⁶³

(14) Facebook responded to a telephone call from Rowe about how it was censoring information with a six-page report on censorship with explanations and screen shots of sample posts of content that it does and does not censor. The report noted that vaccine hesitancy content does not violate Facebook’s content-moderation policies, but indicated that Facebook still censors this content by suppressing it in news feeds and algorithms.⁶⁴ Other content that Facebook admitted did not violate its policy but may contribute to vaccine hesitancy are: a) sensational or alarmist vaccine misrepresentation; b) disparaging others based on the choice to or not to vaccinate; c) true but shocking claims or personal anecdotes; d) discussing the choice to vaccinate in terms of personal or civil liberties; and e) concerns related to mistrust in institutions or individuals.⁶⁵ Facebook noted it censors such content through a “spectrum of levers” that includes concealing the content from other users, “de-boosting” the content, and preventing sharing through “friction.”⁶⁶ Facebook also mentioned looking forward to tomorrow’s meeting “and how we can hopefully partner together.”⁶⁷

Other examples of posts that did not violate Facebook’s policies but would nonetheless be suppressed included content that originated from the Children’s Health Defense, a nonprofit activist group headed by Robert F. Kennedy, Jr. (labeled by Defendants as one of the “Disinformation Dozen”).⁶⁸

(15) On April 14, 2021, Slavitt emailed Facebook executive Nick Clegg (“Clegg”) with a message expressing displeasure with Facebook’s failure to censor Tucker Carlson. Slavitt stated, “Not for nothing but the last time we did this dance, it *650 ended in an insurrection.”⁶⁹ The subject line was “Tucker Carlson anti-vax message.”⁷⁰ Clegg responded the same day with a detailed report about the Tucker Carlson post, stating that the post did not qualify for removal under Facebook policy but that the video was being labeled with a pointer to authoritative COVID-19 information, not being recommended to people, and that the video was being “demoted.”⁷¹

After Brian Rice (“Rice”) of Facebook forwarded the same report on the Tucker Carlson post to Flaherty on April 14, 2021, Flaherty responded to Rice wanting a more detailed explanation of why Facebook had not removed the Tucker Carlson video and questioning how the video had been “demoted” since there were 40,000 shares.⁷² Flaherty followed up six minutes later alleging Facebook provided incorrect information through Crowd Tangle.⁷³

Two days later, on April 16, 2021, Flaherty demanded immediate answers from Facebook regarding the Tucker Carlson video.⁷⁴ Facebook promised to get something to him that night. Facebook followed up on April 21, 2021, with an additional response in regard to an apparent call from Flaherty (“thanks for catching up earlier”).⁷⁵ Facebook reported the Tucker Carlson content had not violated Facebook’s policy, but Facebook gave the video a 50% demotion for seven days and stated that it would continue to demote the video.⁷⁶

(16) On April 21, 2021, Flaherty, Slavitt, and other HHS officials, met with Twitter officials about “Twitter Vaccine Misinfo Briefing.” The invite stated the White House would be briefed by Twitter on vaccine information, trends seen generally about vaccine information, the tangible effects seen from recent policy changes, what interventions were being

implemented, previous policy changes, and ways the White House could “partner” in product work.⁷⁷

Twitter discovery responses indicated that during the meeting, White House officials wanted to know why Alex Berenson (“Berenson”) had not been “kicked off” Twitter.⁷⁸ Slavitt suggested Berenson was “the epicenter of disinfo that radiated outwards to the persuadable public.”⁷⁹ Berenson was suspended thereafter on July 16, 2021, and was permanently de-platformed on August 28, 2021.⁸⁰

(17) Also on April 21, 2021, Flaherty, Slavitt, and Fitzpatrick had a meeting with several YouTube officials. The invitation stated the purpose of this meeting was for the White House to be briefed by YouTube on general trends seen around vaccine misinformation, the effects of YouTube’s efforts to combat misinformation, interventions YouTube was trying, and ways the White House can “partner” in product work.⁸¹

In an April 22, 2021, email, Flaherty provided a recap of the meeting and stated his concern that misinformation on YouTube *651 was “shared at the highest (and I mean the highest) levels of the White House.”⁸² Flaherty indicated that the White House remains concerned that YouTube is “funneling people into hesitancy and intensifying people’s vaccine hesitancy.”⁸³ Flaherty further shared that “we” want to make sure YouTube has a handle on vaccine hesitancy and is working toward making the problem better.⁸⁴ Flaherty again noted vaccine hesitancy was a concern that is shared by the highest (“and I mean the highest”) levels of the White House.⁸⁵

Flaherty further indicated that the White House was coordinating with the Stanford Internet Observatory (which was operating the Virality Project): “Stanford” has mentioned that it’s recently Vaccine Passports and J&J pause-related stuff, but I’m not sure if that reflects what you’re seeing.”⁸⁶ Flaherty praised YouTube for reducing distribution of content: “I believe you said you reduced watch time by 70% on borderline content, which is impressive.”⁸⁷ However, Flaherty followed up with additional demands for more information from YouTube. Flaherty emphasized that the White House wanted to make sure YouTube’s work extends to the broader problem of people viewing “vaccine-hesitant content.”⁸⁸ Flaherty also suggested regular meetings with

YouTube (“Perhaps bi-weekly”) as they have done with other “platform partners.”⁸⁹

(18) On April 23, 2021, Flaherty sent Facebook an email including a document entitled “Facebook COVID-19 Vaccine Misinformation Brief” (“the Brief”), which indicated that Facebook plays a major role in the spread of COVID vaccine misinformation and found that Facebook’s policy and enforcement gaps enable misinformation to spread.⁹⁰ The Brief recommended much more aggressive censorship of Facebook’s enforcement policies and called for progressively severe penalties. The Brief further recommended Facebook stop distributing anti-vaccine content in News Feed or in group recommendations. The Brief also called for “warning screens” before linking to domains known to promote vaccine misinformation.⁹¹ Flaherty noted sending this Brief was not a White House endorsement of it, but “this is circulating around the building and informing thinking.”⁹²

On May 1, 2021, Facebook’s Clegg sent an email to Slavitt indicating Facebook and the White House met recently to “share research work.”⁹³ Clegg apologized for not catching and censoring three pieces of vaccine content that went viral and promised to censor such content more aggressively in the future:

I wanted to send you a quick note on the three pieces of vaccine content that were seen by a high number of people before we demoted them. Although they don’t violate our community standards, we should have demoted them before they went viral, and this has exposed gaps in our operational and technical process.

*652 Notably, these three pieces of information did not violate Facebook’s policies. Clegg told Slavitt that Facebook teams had spent the past twenty-four hours analyzing gaps in Facebook and were making several changes next week.⁹⁴

Clegg listed—in bold—demands that the White House had made in a recent meeting and provided a response to each. The demands were: a) address Non-English mis/disinformation circulating without moderation; b) do not distribute or amplify vaccine hesitancy, and Facebook should end group recommendations for groups with a history of COVID-19 or vaccine misinformation; c) monitor events that host anti-vaccine and COVID disinformation; and d) address twelve accounts that were responsible for 73% of vaccine misinformation.⁹⁵ Facebook noted that it was scrutinizing these accounts and censoring them whenever it could, but

that most of the content did not violate Facebook's policies.⁹⁶ Facebook referred to its new policy as their "Dedicated Vaccine Discouraging Entities."⁹⁷ Facebook even suggested that too much censorship might be counterproductive and drive vaccine hesitancy: "Among experts we have consulted, there is a general sense that deleting more expressions of vaccine hesitancy might be more counterproductive to the goal of vaccine uptake because it could prevent hesitant people from talking through their concerns and potentially reinforce the notion that there's a 'cover-up.'"⁹⁸

(19) On May 5, 2021, then-White House Press Secretary Jen Psaki ("Psaki") publicly began pushing Facebook and other social-media platforms to censor COVID-19 misinformation. At a White House Press Conference, Psaki publicly reminded Facebook and other social-media platforms of the threat of "legal consequences" if they do not censor misinformation more aggressively. Psaki further stated: "The President's view is that the major platforms have a responsibility related to the health and safety of all Americans to stop amplifying untrustworthy content, disinformation, and misinformation, especially related to COVID-19 vaccinations and elections."⁹⁹ Psaki linked the threat of a "robust anti-trust program" with the White House's censorship demand. "He also supports better privacy protections and a robust anti-trust program. So, his view is that there's more that needs to be done to ensure that this type of misinformation; disinformation; damaging, sometime life-threatening information, is not going out to the American public."¹⁰⁰

The next day, Flaherty followed up with another email to Facebook and chastised Facebook for not catching various COVID-19 misinformation. Flaherty demanded more information about Facebook's efforts to demote borderline content, stating, "Not to sound like a broken record, but how much content is being demoted, and how effective are you at mitigating reach, and how quickly?"¹⁰¹ Flaherty also criticized Facebook's efforts to censor the "Disinformation Dozen": "Seems like your 'dedicated vaccine hesitancy' policy isn't stopping the disinfo-dozen – they're being deemed as not dedicated – so it feels like that problem likely coming over to groups."¹⁰²

*⁶⁵³ Things apparently became tense between the White House and Facebook after that, culminating in Flaherty's July 15, 2021 email to Facebook, in which Flaherty stated: "Are

you guys fucking serious? I want an answer on what happened here and I want it today."¹⁰³

(20) On July 15, 2021, things became even more tense between the White House, Facebook, and other social-media platforms. At a joint press conference between Psaki and Surgeon General Murthy to announce the Surgeon General's "Health Advisory on Misinformation,"¹⁰⁴ Psaki announced that Surgeon General Murthy had published an advisory on health misinformation as an urgent public health crisis.¹⁰⁵ Murthy announced: "Fourth, we're saying we expect more from our technology companies. We're asking them to operate with greater transparency and accountability. We're asking them to monitor misinformation more closely. We're asking them to consistently take action against misinformation super-spreaders on their platforms."¹⁰⁶ Psaki further stated, "We are in regular touch with these social-media platforms, and those engagements typically happen through members of our senior staff, but also members of our COVID-19 team," and "We're flagging problematic posts for Facebook that spread disinformation."¹⁰⁷

Psaki followed up by stating that the White House's "asks" include four key steps by which social-media companies should: 1) measure and publicly share the impact of misinformation on their platforms; 2) create a robust enforcement strategy; 3) take faster action against harmful posts; and 4) promote quality information sources in their feed algorithms.¹⁰⁸

The next day, on July 16, 2021, President Biden, after being asked what his message was to social-media platforms when it came to COVID-19, stated, "[T]hey're killing people."¹⁰⁹ Specifically, he stated "Look, the only pandemic we have is among the unvaccinated, and that they're killing people."¹¹⁰ Psaki stated the actions of censorship Facebook had already conducted were "clearly not sufficient."¹¹¹

Four days later, on July 20, 2021, at a White House Press Conference, White House Communications Director Kate Bedingfield ("Bedingfield") stated that the White House would be announcing whether social-media platforms are legally liable for misinformation spread on their platforms and examining how misinformation fits into the liability protection granted by Section 230 of the Communications Decency Act (which shields social-media platforms from being responsible for posts by third parties on their sites).¹¹²

Bedingfield further stated the administration was reviewing policies that could include amending the Communication Decency Act and that the social-media platforms “should be held accountable.”¹¹³

(21) The public and private pressure from the White House apparently had its intended effect. All twelve members of the *654 “Disinformation Dozen” were censored, and pages, groups, and accounts linked to the Disinformation Dozen were removed.¹¹⁴

Twitter suspended Berenson’s account within a few hours of President Biden’s July 16, 2021 comments.¹¹⁵ On July 17, 2021, a Facebook official sent an email to Anita B. Dunn (“Dunn”), Senior Advisor to the President, asking for ways to “get back into the White House’s good graces” and stated Facebook and the White House were “100% on the same team here in fighting this.”¹¹⁶

(22) On November 30, 2021, the White House’s Christian Tom (“Tom”) emailed Twitter requesting that Twitter watch a video of First Lady Jill Biden that had been edited to make it sound as if the First Lady were profanely heckling children while reading to them.¹¹⁷ Twitter responded within six minutes, agreeing to “escalate with the team for further review.”¹¹⁸ Twitter advised users that the video had been edited for comedic effect. Tom then requested Twitter apply a “Manipulated Media” disclaimer to the video.¹¹⁹ After Twitter told Tom the video was not subject to labeling under its policy, Tom disputed Twitter’s interpretation of its own policy and added Michael LaRosa (“LaRosa”), the First Lady’s Press Secretary, into the conversation.¹²⁰ Further efforts by Tom and LaRosa to censor the video on December 9, 13, and 17 finally resulted in the video’s removal in December 2021.¹²¹

(23) In January 2022, Facebook reported to Rowe, Murthy, Flaherty, and Slavitt that it had “labeled and demoted” vaccine humor posts whose content could discourage vaccination.¹²² Facebook also reported to the White House that it “labeled and ‘demoted’ posts suggesting natural immunity to a COVID-19 infection is superior to vaccine immunity.”¹²³ In January 2022, Jesse Lee (“Lee”) of the White House sent an email accusing Twitter of calling the President a liar in regard to a Presidential tweet.¹²⁴

At a February 1, 2022, White House press conference, Psaki stated that the White House wanted every social-media platform to do more to call out misinformation and disinformation, and to uplift accurate information.¹²⁵

At an April 25, 2022, White House press conference, after being asked to respond to news that Elon Musk may buy Twitter, Psaki again mentioned the threat to social-media companies to amend Section 230 of the Communications Decency Act, linking these threats to social-media platforms’ failure to censor misinformation and disinformation.¹²⁶

On June 13, 2022, Flaherty demanded Meta continue to produce periodic COVID-19 insight reports to track COVID-19 misinformation, and he expressed a concern about misinformation regarding the upcoming authorization of COVID-19 vaccines for children under five years of age. Meta agreed to do so on June 22, 2022.¹²⁷

*655 (24) In addition to misinformation regarding COVID-19, the White House also asked social-media companies to censor misinformation regarding climate change, gender discussions, abortion, and economic policy. At an Axios event entitled “A Conversation on Battling Misinformation,” held on June 14, 2022, the White House National Climate Advisor Gina McCarthy (“McCarthy”) blamed social-media companies for allowing misinformation and disinformation about climate change to spread and explicitly tied these censorship demands with threats of adverse legislation regarding the Communications Decency Act.¹²⁸

On June 16, 2022, the White House announced a new task force to target “general misinformation” and disinformation campaigns targeted at women and LBGTQI individuals who are public and political figures, government and civic leaders, activists, and journalists.¹²⁹ The June 16, 2022, Memorandum discussed the creation of a task force to reel in “online harassment and abuse” and to develop programs targeting such disinformation campaigns.¹³⁰ The Memorandum also called for the Task Force to confer with technology experts and again threatened social-media platforms with adverse legal consequences if the platforms did not censor aggressively enough.¹³¹

On July 8, 2022, President Biden signed an Executive Order on protecting access to abortion. Section 4(b)(iv) of the order required the Attorney General, the Secretary of HHS, and the

Chair of the Federal Trade Commission to address deceptive or fraudulent practices relating to reproductive healthcare services, including those online, and to protect access to accurate information.¹³²

On August 11, 2022, Flaherty emailed Twitter to dispute a note added by Twitter to one of President Biden's tweets about gas prices.¹³³

(25) On August 23, 2021, Flaherty emailed Facebook requesting a report on how Facebook intended to promote the FDA approval of the Pfizer vaccine. He also stated that the White House would appreciate a “push” and provided suggested language.¹³⁴

B. Surgeon General Defendants¹³⁵

Surgeon General Murthy is the Surgeon General of the United States. Eric Waldo (“Waldo”) is the Senior Advisor to the Surgeon General and was formerly Chief Engagement Officer for the Surgeon General’s office. Waldo’s Deposition was taken as part of the allowed Preliminary Injunction-related discovery in this matter.¹³⁶

(1) Waldo was responsible for maintaining the contacts and relationships with representatives of social-media platforms. Waldo did pre-rollout calls with Twitter, Facebook, and Google/YouTube before the Surgeon General’s health advisory on misinformation was published on July 15, 2021.¹³⁷ Waldo admitted that Murthy used his office to directly advocate for social-media platforms to take stronger actions against health “misinformation” and that *656 those actions involved putting pressure on social-media platforms to reduce the dissemination of health misinformation.¹³⁸ Surgeon General Murthy’s message was given to social-media platforms both publicly and privately.¹³⁹

(2) At a July 15, 2021 joint press conference between Psaki and Murthy, the two made the comments mentioned previously in II A(19), which publicly called for social-media platforms “to do more” to take action against misinformation super-spreaders.¹⁴⁰ Murthy was directly involved in editing and approving the final work product for the July 15, 2021 health advisory on misinformation.¹⁴¹ Waldo also admitted that Murthy used his “bully pulpit” to talk about health

misinformation and to put public pressure on social-media platforms.¹⁴²

(3) Waldo’s initial rollout with Facebook was negatively affected because of the public attacks by the White House and Office of the Surgeon General towards Facebook for allowing misinformation to spread.¹⁴³ Clegg of Facebook reached out to attempt to request “de-escalation” and “working together” instead of the public pressure.¹⁴⁴ In the call between Clegg and Murthy, Murthy told Clegg he wanted Facebook to do more to censor misinformation on its platforms. Murthy also requested Facebook share data with external researchers about the scope and reach of misinformation on Facebook’s platforms to better understand how to have external researchers validate the spread of misinformation.¹⁴⁵ “Data about misinformation” was the topic of conversation in this call; DJ Patil, chief data scientist in the Obama Administration, Murthy, Waldo, and Clegg all participated on the call. The purpose of the call was to demand more information from Facebook about monitoring the spread of misinformation.¹⁴⁶

(4) One of the “external researchers” that the Office of Surgeon General likely had in mind was Renee DiResta (“DiResta”) from the Stanford Internet Observatory, a leading organization of the Virality Project.¹⁴⁷ The Virality Project hosted a “rollout event” for Murthy’s July 15, 2021 press conference.¹⁴⁸

There was coordination between the Office of the Surgeon General and the Virality Project on the launch of Murthy’s health advisory.¹⁴⁹ Kyla Fullenwider (“Fullenwider”) is the Office of the Surgeon General’s key subject-matter expert who worked on the health advisory on misinformation. Fullenwider works for a non-profit contractor, United States’ Digital Response.¹⁵⁰ Waldo, Fullenwider, and DiResta were involved in a conference call after the July 15, 2021 press conference where they discussed misinformation.¹⁵¹ The Office of the Surgeon General anticipated that social-media platforms would feel pressured by the Surgeon General’s health advisory.¹⁵²

*657 (5) Waldo and the Office of the Surgeon General received a briefing from the Center for Countering Digital Hate (“CCDH”) about the “Disinformation Dozen.” CCDH gave a presentation about the Disinformation Dozen and how CCDH measured and determined that the Disinformation

Dozen were primarily responsible for a significant amount of online misinformation.¹⁵³

(6) In his deposition, Waldo discussed various phone calls and communications between Defendants and Facebook. In August of 2021, Waldo joined a call with Flaherty and Brian Rice of Facebook.¹⁵⁴ The call was an update by Facebook about the internal action it was taking regarding censorship.¹⁵⁵ Waldo was aware of at least one call between Murthy and Facebook in the period between President Biden's election and assuming office, and he testified that the call was about misinformation.¹⁵⁶ Waldo was also aware of other emails and at least one phone call where Flaherty communicated with Facebook.¹⁵⁷

(7) The first meeting between the Office of the Surgeon General and social-media platforms occurred on May 25, 2021, between Clegg, Murthy, and Slavitt. The purpose of this call was to introduce Murthy to Clegg. Clegg emailed Murthy with a report of misinformation on Facebook on May 28, 2021.¹⁵⁸

Policy updates about increasing censorship were announced by Facebook on May 27, 2021.¹⁵⁹ The Office of the Surgeon General had a pre-rollout (i.e., before the rollout of the Surgeon General's health advisory on misinformation) call with Twitter and YouTube on July 12 and July 14, 2021.¹⁶⁰ The Office of the Surgeon General had a rollout call with Facebook on July 16, 2021. The July 16 call with Facebook was right after President Biden had made his “[T]hey're killing people” comment (II A (19), above), and it was an “awkward call” according to Waldo.¹⁶¹

Another call took place on July 23, 2021, between Murthy, Waldo, DJ Patil, Clegg, and Rice. Clegg shared more about the spread of information and disinformation on Facebook after the meeting. At the meeting, Murthy raised the issue of wanting to have a better understanding of the reach of misinformation and disinformation as it relates to health on Facebook; Murthy often referred to health misinformation in these meetings as “poison.”¹⁶² The Surgeon General's health advisory explicitly called for social-media platforms to do more to control the reach of misinformation.¹⁶³

On July 30, 2021, Waldo had a meeting with Google and YouTube representatives. At the meeting, Google and YouTube reported to the Office of the Surgeon General what

actions they were taking following the Surgeon General's health advisory on misinformation.¹⁶⁴

On August 10, 2021, Waldo and Flaherty had a call with Rice calling for Facebook to report to federal officials as to Facebook's actions to remove “disinformation” and to provide details regarding a vaccine misinformation operation Facebook had uncovered.¹⁶⁵

***658** Another meeting took place between Google/YouTube, Waldo, and Flaherty on September 14, 2021, to discuss a new policy YouTube was working on and to provide the federal officials with an update on YouTube's efforts to combat harmful COVID-19 misinformation on its platform.¹⁶⁶

(8) After the meetings with social-media platforms, the platforms seemingly fell in line with the Office of Surgeon General's and White House's requests. Facebook announced policy updates about censoring misinformation on May 27, 2021, two days after the meeting.¹⁶⁷ As promised, Clegg provided an update on misinformation to the Office of Surgeon General on May 28, 2021, three days after the meeting¹⁶⁸ and began sending bi-weekly COVID content reports on June 14, 2021.¹⁶⁹

On July 6, 2021, Waldo emailed Twitter to set up the rollout call for the Office of the Surgeon General's health advisory on misinformation and told Twitter that Murthy had been thinking about how to stop the spread of health misinformation; that he knew Twitter's teams were working hard and thinking deeply about the issue; and that he would like to **chat** over Zoom to discuss.¹⁷⁰ Twitter ultimately publicly endorsed the Office of the Surgeon General's call for greater censorship of health misinformation.¹⁷¹

Waldo sent an email to YouTube on July 6, 2021, to set up the rollout call and to state that the Office of the Surgeon General's purpose was to stop the spread of misinformation on social-media platforms.¹⁷² YouTube eventually adopted a new policy on combatting COVID-19 misinformation and began providing federal officials with updates on YouTube's efforts to combat the misinformation.¹⁷³

(9) At the July 15, 2021 press conference, Murthy described health misinformation as one of the biggest obstacles to ending the pandemic; insisted that his advisory was on an

urgent public health threat; and stated that misinformation poses an imminent threat to the nation's health and takes away the freedom to make informed decisions.¹⁷⁴ Murthy further stated that health disinformation is false, inaccurate, or misleading, based upon the best evidence at the time.¹⁷⁵

Murthy also stated that people who question mask mandates and decline vaccinations are following misinformation, which results in illnesses and death.¹⁷⁶ Murthy placed specific blame on social-media platforms for allowing "poison" to spread and further called for an "all-of-society approach" to fight health misinformation.¹⁷⁷ Murthy called upon social-media platforms to operate with greater transparency and accountability, to monitor information more clearly, and to "consistently take action against misinformation superspreaders on their platforms."¹⁷⁸ Notably, Waldo agreed in his deposition that the word "accountable" carries with it the threat of consequences.¹⁷⁹ Murthy further *659 demanded social-media platforms do "much, much, more" and take "aggressive action" against misinformation because the failure to do so is "costing people their lives."¹⁸⁰

(10) Murthy's July 15, 2021 health advisory on misinformation blamed social-media platforms for the spread of misinformation at an unprecedented speed, and it blamed social-media features and algorithms for furthering the spread.¹⁸¹ The health advisory further called for social-media platforms to enact policy changes to reduce the spread of misinformation, including appropriate legal and regulatory measures.¹⁸²

Under a heading entitled "What Technology Platforms Can Do," the health advisory called for platforms to take a series of steps to increase and enable greater social-media censorship of misinformation, including product changes, changing algorithms to avoid amplifying misinformation, building in "frictions" to reduce the sharing of misinformation, and practicing the early detection of misinformation superspreaders, along with other measures.¹⁸³ The consequences for misinformation would include flagging problematic posts, suppressing the spread of the information, suspension, and permanent de-platforming.¹⁸⁴

(11) The Office of the Surgeon General collaborated and partnered with the Stanford University Internet Observatory and the Virality Project. Murthy participated in a January 15, 2021 launch of the Virality Project. In his comments,

Murthy told the group, "We're asking technology companies to operate with great transparency and accountability so that misinformation does not continue to poison our sharing platforms and we knew the government can play an important role, too."¹⁸⁵

Murthy expressly mentioned his coordination with DiResta at the Virality Project and expressed his intention to maintain that collaboration. He claimed that he had learned a lot from the Virality Project's work and thanked the Virality Project for being such a great "partner."¹⁸⁶ Murthy also stated that the Office of the Surgeon General had been "partnered with" the Stanford Internet Observatory for many months.¹⁸⁷

(12) After President Biden's "[T]hey're killing people" comment on July 16, 2021, Facebook representatives had "sad faces" according to Waldo. On July 21, 2021, Facebook emailed Waldo and Fullenwider with CrowdTangle data and with "interventions" that created "frictions" with regard to COVID misinformation. The interventions also included limiting forwarding of WhatsApp messages, placing warning labels on fact-checked content, and creating "friction" when someone tries to share these posts on Facebook. Facebook also reported other censorship policy and actions, including censoring content that contributes to the risk of imminent physical harm, permanently banning pages, groups, and accounts that repeatedly broke Facebook's COVID-19 misinformation rules, and reducing the reach of posts, pages, groups, and accounts that share other false claims "that do not violate our policies but may present misleading or sensationalized *660 information about COVID-19 and vaccines."¹⁸⁸

On July 16, 2021, Clegg emailed Murthy and stated, "I know our teams met today to better understand the scope of what the White House expects of us on misinformation going forward."¹⁸⁹ On July 18, 2021, Clegg messaged Murthy stating "I imagine you and your team are feeling a little aggrieved—as is the [Facebook] team, it's not great to be accused of killing people—but as I said by email, I'm keen to find a way to deescalate and work together collaboratively. I am available to meet/speak whenever suits."¹⁹⁰ As a result of this communication, a meeting was scheduled for July 23, 2021.¹⁹¹

At the July 23, 2021 meeting, the Office of the Surgeon General officials were concerned about understanding the

reach of Facebook's data.¹⁹² Clegg even sent a follow-up email after the meeting to make sure Murthy saw the steps Facebook had been taking to adjust policies with respect to misinformation and to further address the "disinfo-dozen."¹⁹³ Clegg also reported that Facebook had "expanded the group of false claims that we remove, to keep up with recent trends of misinformation that we are seeing."¹⁹⁴ Further, Facebook also agreed to "do more" to censor COVID misinformation, to make its internal data on misinformation available to federal officials, to report back to the Office of the Surgeon General, and to "strive to do all we can to meet our 'shared' goals."¹⁹⁵

Evidently, the promised information had not been sent to the Office of the Surgeon General by August 6, 2021, so the Office requested the information in a report "within two weeks."¹⁹⁶ The information entitled "How We're Taking Action Against Vaccine Misinformation Superspreaders" was later sent to the Office of the Surgeon General. It detailed a list of censorship actions taken against the "Disinformation Dozen."¹⁹⁷ Clegg followed up with an August 20, 2021 email with a section entitled "Limiting Potentially Harmful Misinformation," which detailed more efforts to censor COVID-19 Misinformation.¹⁹⁸ Facebook continued to report back to Waldo and Flaherty with updates on September 19 and 29 of 2021.¹⁹⁹

(13) Waldo asked for similar updates from Twitter, Instagram, and Google/YouTube.²⁰⁰

(14) The Office of the Surgeon General also collaborated with the Democratic National Committee. Flaherty emailed Murthy on July 19, 2021, to put Murthy in touch with Jiore Craig ("Craig") from the Democratic National Committee who worked on misinformation and disinformation issues.²⁰¹ Craig and Murthy set up a Zoom meeting for July 22, 2021.

(15) After an October 28, 2021 Washington Post article stated that Facebook researchers had deep knowledge about how COVID-19 and vaccine misinformation ran through Facebook's apps, Murthy issued a series of tweets from his official Twitter *⁶⁶¹ account indicating he was "deeply disappointed" to read this story, that health misinformation had harmed people's health and cost lives, and that "we must demand Facebook and the rest of the social-media ecosystems take responsibility for stopping health misinformation on

their platforms."²⁰² Murthy further tweeted that "we need transparency and accountability now."²⁰³

(16) On October 29, 2021, Facebook asked federal officials to provide a "federal health contract" to dictate "what content would be censored on Facebook's platforms."²⁰⁴ Federal officials informed Facebook that the federal health authority that could dictate what content could be censored as misinformation was the CDC.²⁰⁵

(17) Murthy continued to publicly chastise social-media platforms for allowing health misinformation to be spread on their platforms. Murthy made statements on the following platforms: a December 21, 2021 podcast threatening to hold social-media platforms accountable for not censoring misinformation;²⁰⁶ a January 3, 2022 podcast with Alyssa Milano stating that "platformers need to step up to be accountable for making their spaces safer";²⁰⁷ and a February 14, 2022 panel discussion hosted by the Rockefeller Foundation, wherein they discussed that technology platforms enabled the speed, scale, and sophistication with which this misinformation was spreading.²⁰⁸

On March 3, 2022, the Office of the Surgeon General issued a formal Request for Information ("RFI"), published in the Federal Register, seeking information from social-media platforms and others about the spread of misinformation.²⁰⁹ The RFI indicated that the Office of the Surgeon General was expanding attempts to control the spread of misinformation on social media and other technology platforms.²¹⁰ The RFI also sought information about censorship policies, how they were enforced, and information about disfavored speakers.²¹¹ The RFI was sent to Facebook, Google/YouTube, LinkedIn, Twitter, and Microsoft²¹² by Max Lesko ("Lesko"), Murthy's Chief of Staff, requesting responses from these social-media platforms.²¹³ Murthy again restated social-media platforms' responsibility to reduce the spread of misinformation in an interview with GQ Magazine.²¹⁴ Murthy also specifically called upon Spotify to censor health information.²¹⁵

C. CDC Defendants²¹⁶

(1) Crawford is the Director for The Division of Digital Media within the CDC *⁶⁶² Office of the Associate

Director for Communications. Her deposition was taken pursuant to preliminary-injunction related discovery here.²¹⁷ The CDC is a component of the Department of Health and Human Services (“HHS”); Xavier Becerra (“Becerra”) is the Secretary of HHS.²¹⁸ Crawford’s division provides leadership for CDC’s web presence, and Crawford, as director, determines strategy and objectives and oversees its general work.²¹⁹ Crawford was the main point of contact for communications between the CDC and social-media platforms.²²⁰

Prior to the COVID-19 pandemic, Crawford only had limited contact with social-media platforms, but she began having regular contact post-pandemic, beginning in February and March of 2020.²²¹ Crawford communicated with these platforms via email, phone, and meetings.²²²

(2) Facebook emailed State Department officials on February 6, 2020, that it had taken proactive and reactive steps to control information and misinformation related to COVID-19. The email was forwarded to Crawford, who reforwarded to her contacts on Facebook.²²³ Facebook proposed to Crawford that it would create a Coronavirus page that would give information from trusted sources including the CDC. Crawford accepted Facebook’s proposal on February 7, 2020, and suggested the CDC may want to address “widespread myths” on the platform.²²⁴

Facebook began sending Crawford CrowdTangle reports on January 25, 2021. CrowdTangle is a social-media listening tool for Meta, which shows themes of discussion on social-media channels. These reported on “top engaged COVID and vaccine-related content overall across Pages and Groups.”²²⁵ This CrowdTangle report was sent by Facebook to Crawford in response to a prior conversation with Crawford.²²⁶ The CDC had privileged access to CrowdTangle since early 2020.²²⁷

Facebook emailed Crawford on March 3, 2020, that it intended to support the Government in its response to the Coronavirus, including a goal to remove certain information.²²⁸ Crawford and Facebook began having discussions about misinformation with Facebook in the Fall of 2020, including discussions of how to combat misinformation.²²⁹

The CDC used CrowdTangle, along with Meltwater reports (used for all platforms), to monitor social media’s themes of discussion across platforms.²³⁰ Crawford recalls generally discussing misinformation with Facebook.²³¹ Crawford added Census Bureau officials to the distribution list for CrowdTangle reports because the Census Bureau was going to begin working with the CDC on misinformation issues.²³²

*663 (3) On January 27, 2021, Facebook sent Crawford a recurring invite to a “Facebook weekly sync with CDC.”²³³ A number of Facebook and CDC officials were included in the invite, and the CDC could invite other agencies as needed.²³⁴ The CDC had weekly meetings with Facebook.²³⁵

(4) On March 10, 2021, Crawford sent Facebook an email seeking information about “Themes that have been removed for misinfo.”²³⁶ The CDC questioned if Facebook had info on the types of posts that were removed. Crawford was aware that the White House and the HHS were also receiving similar information from Facebook.²³⁷ The HHS was present at meetings with social-media companies on March 1, 2021,²³⁸ and on April 21, 2021.²³⁹

(5) On March 25, 2021, Crawford and other CDC officials met with Facebook. In an email by Facebook prior to that meeting, Facebook stated it would present on COVID-19 misinformation and have various persons present, including a Misinformation Manager and a Content-Manager official (Liz Lagone).²⁴⁰ Crawford responded, attaching a PowerPoint slide deck, stating “This is a deck Census would like to discuss and we’d also like to fit in a discussion of topic types removed from Facebook.”²⁴¹ Crawford also indicated two Census Bureau officials, Schwartz and Shopkorn, would be present, as well as two Census Bureau contractors, Sam Huxley and Christopher Lewitzke.²⁴²

The “deck” the Census Bureau wanted to discuss contained an overview of “Misinformation Topics” and included “concerns about infertility, misinformation about side effects, and claims about vaccines leading to deaths.”²⁴³ For each topic, the deck included sample slides and a statement from the CDC debunking the allegedly erroneous claim.²⁴⁴

(6) Crawford admits she began engaging in weekly meetings with Facebook,²⁴⁵ and emails verify that the CDC and

Facebook were repeatedly discussing misinformation back and forth.²⁴⁶ The weekly meetings involved Facebook's content-mediation teams. Crawford mainly inquired about how Facebook was censoring COVID-19 misinformation in these meetings.²⁴⁷

(7) The CDC entered into an Intra-Agency Agreement ("IAA") with the Census Bureau to help advise on misinformation. The IAA required that the Census Bureau provide reports to the CDC on misinformation that the Census Bureau tracked on social media.²⁴⁸ To aid in this endeavor, Crawford asked Facebook to allow the Census Bureau to be added to CrowdTangle.²⁴⁹

*664 (8) After the March 2021 weekly meetings between Facebook, the CDC, and Census Bureau began, Crawford began to press Facebook on removing and/or suppressing misinformation. In particular, she stated, "The CDC would like to have more info ... about what is being done on the amplification-side," and the CDC "is still interested in more info on how you view or analyze the data on removals, etc."²⁵⁰ Further, Crawford noted, "It looks like the posts from last week's deck about infertility and side effects have all been removed. Were these evaluated by the moderation team or taken down for another reason?"²⁵¹ Crawford also questioned Facebook about the CrowdTangle report showing local news coverage of deaths after receiving the vaccine and questioned what Facebook's approach is for "adding labels" to those stories.²⁵²

On April 13, 2021, Facebook emailed Crawford to propose enrolling CDC and Census Bureau officials in a special misinformation reporting channel; this would include five CDC officials and four Census Bureau officials. The portal was only provided to federal officials.²⁵³

On April 23, 2021, and again on April 28, 2021, Crawford emailed Facebook about a Wyoming Department of Health report noting that the algorithms that Facebook and other social-media networks are using to "screen out postings of sources of vaccine misinformation" were also screening out valid public health messages.²⁵⁴

On May 6, 2021, Crawford emailed Facebook a table containing a list of sixteen specific postings on Facebook and Instagram that contained misinformation.²⁵⁵ Crawford stated in her deposition that she knew when she "flagged"

content for Facebook, they would evaluate and possibly censor the content.²⁵⁶ Crawford stated CDC's goal in flagging information for Facebook was "to be sure that people have credible health information so that they can make the correct health decisions."²⁵⁷ Crawford continued to "flag" and send misinformation posts to Facebook, and on May 19, 2021,²⁵⁸ Crawford provided Facebook with twelve specific claims.

(9) Facebook began to rely on Crawford and the CDC to determine whether claims were true or false. Crawford began providing the CDC with "scientific information" for Facebook to use to determine whether to "remove or reduce and inform."²⁵⁹ Facebook was relying on the CDC's "scientific information" to determine whether statements made on its platform were true or false.²⁶⁰ The CDC would respond to "debunk" claims if it had an answer.²⁶¹ These included issues like whether COVID-19 had a 99.96% survival rate, whether COVID-19 vaccines cause *bells' palsy*, and whether people who are receiving COVID-19 vaccines are subject to medical experiments.²⁶²

Facebook content-mediation officials would contact Crawford to determine whether statements made on Facebook

*665 were true or false.²⁶³ Because Facebook's content-moderation policy called for Facebook to remove claims that are false and can lead to harm, Facebook would remove and/or censor claims the CDC itself said were false.²⁶⁴ Questions by Facebook to the CDC related to this content-moderation included whether spike proteins in COVID-19 vaccines are dangerous and whether *Guillain-Barre Syndrome* or heart inflammation is a possible side effect of the COVID-19 vaccine.²⁶⁵ Crawford normally referred Facebook to CDC subject-matter experts or responded with the CDC's view on these scientific questions.²⁶⁶

(10) Facebook continued to send the CDC biweekly CrowdTangle content insight reports, which included trending topics such as Door-to-Door Vaccines, Vaccine Side Effects, Vaccine Refusal, *Vaccination* Lawsuits, Proof of *Vaccination* Requirement, COVID-19 and Unvaccinated Individuals, COVID-19 Mandates, Vaccinating Children, and Allowing People to Return to Religious Services.²⁶⁷

(11) On August 19, 2021, Facebook asked Crawford for a Vaccine Adverse Event Reporting System ("VAERS") meeting for the CDC to give Facebook guidance on how

to address VAERS-related “misinformation.”²⁶⁸ The CDC was concerned about VAERS-related misinformation because users were citing VAERS data and reports to raise concerns about the safety of vaccines in ways the CDC found to be “misleading.”²⁶⁹ Crawford and the CDC followed up by providing written materials for Facebook to use.²⁷⁰ The CDC eventually had a meeting with Facebook about VAERS-related misinformation and provided two experts for this issue.²⁷¹

(12) On November 2, 2021, a Facebook content-moderation official reached out to the CDC to obtain clarity on whether the COVID-19 vaccine was harmful to children. This was following the FDA's emergency use authorization (“EUA”) related to the COVID-19 vaccine.²⁷² In addition to the EUA issue for children, Facebook identified other claims it sought clarity on regarding childhood vaccines and vaccine refusals.²⁷³

The following Monday, November 8, 2021, Crawford followed up with a response from the CDC, which addressed seven of the ten claims Facebook had asked the CDC to evaluate. The CDC rated six of the claims “False” and stated that any of these false claims could cause vaccine refusal.²⁷⁴

The questions the CDC rated as “false” were:

- 1) COVID-19 vaccines weaken the immune system;
- 2) COVID-19 vaccines cause auto-immune diseases;
- 3) Antibody-dependent enhancement (“ADE”) is a side effect of COVID-19 vaccines;
- 4) COVID-19 vaccines cause acquired immunodeficiency syndrome (AIDS);
- 5) Breast milk from a vaccinated parent is harmful to babies/children; and
- ***666** 6) COVID-19 vaccines cause multi-system inflammatory syndrome in children (MIS-C).

(13) On February 3, 2022, Facebook again asked the CDC for clarification on whether a list of claims were “false” and whether the claims, if believed, could contribute to vaccine refusals.²⁷⁵ The list included whether COVID-19 vaccines cause ulcers or neurodegenerative diseases such as Huntington's and Parkinson's disease; the FDA's possible

future issuance of an EUA to children six months to four years of age; and questions about whether the COVID-19 vaccine causes death, heart attacks, autism, birth defects, and many others.²⁷⁶

(14) In addition to its communications with Facebook, the CDC and Census Bureau also had involvement with Google/YouTube. On March 18, 2021, Crawford emailed Google, with the subject line “COVID Misinfo Project.” Crawford informed Google that the CDC was now working with the Census Bureau (who had been meeting with Google regularly) and wanted to set up a time to talk and discuss the “COVID Misinfo Project.”²⁷⁷ According to Crawford, the previous Census project referred to the Census' work on combatting 2020 Census misinformation.²⁷⁸

On March 23, 2021, Crawford sent a calendar invite for a March 24, 2021 meeting, which included Crawford and five other CDC employees, four Census Bureau employees, and six Google/YouTube officials.²⁷⁹ At the March 24, 2021 meeting, Crawford presented a slide deck similar to the one prepared for the Facebook meeting. The slide deck was entitled “COVID Vaccine Misinformation: Issue Overview” and included issues like infertility, side effects, and deaths. The CDC and the Census Bureau denied that COVID-19 vaccines resulted in infertility, caused serious side effects, or resulted in deaths.²⁸⁰

(15) On March 29, 2021, Crawford followed up with Google about using their “regular 4 p.m. meetings” to go over things with the Census.²⁸¹ Crawford recalled that the Census was asking for regular meetings with platforms, specifically focused on misinformation.²⁸² Crawford also noted that the reference to the “4 p.m. meeting” refers to regular biweekly meetings with Google, which “continues to the present day.”²⁸³ Crawford also testified she had similar regular meetings with Meta and Twitter, and previously had regular meetings with Pinterest. Crawford stated these meetings were mostly about things other than misinformation, but misinformation was discussed at the meetings.²⁸⁴

(16) On May 10, 2021, Crawford emailed Facebook to establish “COVID BOLO” (“Be on The Lookout”) meetings. Google and YouTube were included.²⁸⁵ Crawford ran the BOLO meetings, and the Census Bureau official arranged the meetings and prepared the slide deck for each meeting.²⁸⁶

***667** The first BOLO meeting was held on May 14, 2021; the slide deck for the meeting was entitled “COVID Vaccine Misinformation: Hot Topics” and included five “hot topics” with a BOLO note for each topic. The five topics were: the vaccines caused “shedding”; a report made on VAERS that a two-year old child died from the vaccine; other alleged misleading information on VAERS reports; statements that vaccines were bioweapons, part of a depopulation scheme, or contain microchips; and misinformation about the eligibility of twelve to fifteen year old children for the vaccine.²⁸⁷ All were labeled as “false” by the CDC, and the potential impact on the public was a reduction of vaccine acceptance.

The second BOLO meeting was held on May 28, 2021. The second meeting also contained a slide deck with a list of three “hot topics” to BOLO: that the Moderna vaccine was unsafe; that vaccine ingredients can cause people to become magnetic; and that the vaccines cause infertility or fertility-related issues in men. All were labeled as false by the CDC, and possibly impacted reduced vaccine acceptance.²⁸⁸

A third BOLO meeting scheduled for June 18, 2021, was cancelled due to the new Juneteenth holiday. However, Crawford sent the slide deck for the meeting. The hot topics for this meeting were: that vaccine particles accumulate in ovaries causing fertility; that vaccines contain microchips; and because of the risk of [blood clots](#) to vaccinated persons, airlines were discussing a ban. All were labeled as false.²⁸⁹

The goal of the BOLO meetings was to be sure credible information was out there and to flag information the CDC thought was not credible for potential removal.²⁹⁰

On September 2, 2021, Crawford emailed Facebook and informed them of a BOLO for a small but growing area of misinformation: one of the CDC's lab alerts was misinterpreted and shared via social media.²⁹¹

(17) The CDC Defendants also had meetings and/or communications with Twitter. On April 8, 2021, Crawford sent an email stating she was “looking forward to setting up regular [chats](#)” and asked for examples of misinformation. Twitter responded.²⁹²

On April 14, 2021, Crawford sent an email to Twitter giving examples of misinformation topics, including that vaccines were not FDA approved, fraudulent cures, VAERS data taken

out of context, and infertility. The list was put together by the Census Bureau team.²⁹³

On May 10, 2021, Crawford emailed Twitter to print out two areas of misinformation, which included copies of twelve tweets.²⁹⁴ Crawford informed Twitter about the May 14, 2021 BOLO meeting and invited Twitter to participate. The examples of misinformation given at the meeting included: vaccine shedding; that vaccines would reduce the population; abnormal bleeding; miscarriages for women; and that the Government was lying about vaccines. In a response, Twitter stated that at least some of the examples had been “reviewed and actioned.”²⁹⁵ Crawford ***668** understood that she was flagging posts for Twitter for possible censorship.²⁹⁶

Twitter additionally offered to enroll CDC officials in its “Partner Support Portal” to provide expedited review of content flagged for censorship.²⁹⁷ Crawford asked for instructions of how to enroll in the Partnership Support Portal and provided her personal Twitter account to enroll. Crawford was fully enrolled on May 27, 2021.²⁹⁸ Census Bureau contractor Christopher Lewitzke (“Lewitzke”) also requested to enroll in the Partner Support Portal.²⁹⁹

Crawford also sent Twitter a BOLO for the alleged misinterpretation of a CDC lab report.³⁰⁰

(18) Crawford testified in her deposition that the CDC has a strong interest in tracking what its constituents are saying on social media.³⁰¹ Crawford also expressed concern that if content were censored and removed from social-media platforms, government communicators would not know what the citizen's “true concerns” were.³⁰²

D. NIAID Defendants³⁰³

The NIAID is a federal agency under HHS. Dr. Fauci was previously the Director of NIAID. Dr. Fauci's deposition was taken as a part of the limited preliminary injunction discovery in this matter.³⁰⁴

1) Dr. Fauci had been the director of the NIAID for over thirty-eight years and became Chief Medical Advisor to the President in early 2021.³⁰⁵ Dr. Fauci retired December 31, 2022.

1. Lab-Leak Theory

Plaintiffs set forth arguments that because NIAID had funded “gain-of-function”³⁰⁶ research at Dr. Fauci’s direction at the Wuhan Institute of Virology (“Wuhan lab”) in Wuhan, China, Dr. Fauci sought to suppress theories that the SARS-CoV2 virus leaked from the Wuhan lab.³⁰⁷

(1) Plaintiffs allege that Dr. Fauci’s motive for suppressing the lab-leak theory was a fear that Dr. Fauci and NIAID could be blamed for funding gain-of-function research that created the COVID-19 pandemic. Plaintiffs allege Dr. Fauci participated in a secret call with other scientists on February 1, 2020, and convinced the scientists (who were proponents of the lab-leak theory) to change their minds and advocate for the theory that the COVID-19 virus originated naturally.³⁰⁸ A few days after the February 1, 2020 call, a paper entitled “The Proximal Origin of COVID-19” was published by Nature Medicine on March 17, 2020. The article concludes that SARS-CoV2 was not created in a lab but rather was naturally occurring.

On February 2, 2020, Dr. Fauci told the other scientists that “given the concerns of so many people and the threat of further distortions on social media it is essential *669 that we move quickly. Hopefully, we can get the WHO to convene.”³⁰⁹ Dr. Fauci emailed Dr. Tedros of the WHO and two senior WHO officials, urging WHO to quickly establish a working group to address the lab-leak theory. Dr. Fauci stated they should “appreciate the urgency and importance of this issue given the gathering internet evident in the science literature and in mainstream and social media to the question of the origin of this virus.” Dr. Fauci also stated WHO needed to “get ahead of … the narrative of this and not reacting to reports which could be very damaging.”³¹⁰ Numerous drafts of “The Proximal Origin of COVID-19” were sent to Dr. Fauci to review prior to the article being published in Nature Medicine.³¹¹

(2) On February 9, 2020, in a joint podcast with Dr. Peter Daszak of the Eco Health Alliance,³¹² both Drs. Fauci and Daszak discredited the lab-leak theory, calling it a “conspiracy theory.”³¹³

(3) Three authors of “The Proximal Origins of SARS-CoV2,” Robert Garry, Kristian Anderson, and Ian Lipkin, received grants from NIH in recent years.³¹⁴

(4) After “The Proximal Origins of SARS-CoV2” was completed and published in Nature Medicine, Dr. Fauci began discrediting the lab-leak theory. “This study leaves little room to refute a natural origin for COVID-19.” “It’s a shining object (lab-leak theory) that will go away in time.”³¹⁵

At an April 17, 2020 press conference, when asked about the possibility of a lab-leak, Dr. Fauci stated, “There was a study recently that we can make available to you, where a group of highly qualified evolutionary virologists looked at the sequences there and the sequences in bats as they evolve. And the mutations that it took to get to the point where it is now is totally consistent with jump of a species from animal to a human.”³¹⁶ “The Proximal Origin of SARS-CoV2” has since become one of the most widely read papers in the history of science.³¹⁷

(5) Twitter and Facebook censored the lab-leak theory of COVID-19.³¹⁸ However, Dr. Fauci claims he is not aware of any suppression of speech about the lab-leak theory on social media, and he claims he does not have a Twitter or Facebook account.³¹⁹

(6) On March 15, 2020, Zuckerberg sent Dr. Fauci an email asking for coordination between Dr. Fauci and Facebook on COVID-19 messaging. Zuckerberg asked Dr. Fauci to create a video to be used on Facebook’s Coronavirus Information Hub, with Dr. Fauci answering COVID-19 health questions, and for Dr. Fauci to recommend a “point person” for the United States Government “to get its message out over the platform.”³²⁰

Dr. Fauci responded the next day to Zuckerberg saying, “Mark your idea and proposal sounds terrific,” “would be happy *670 to do a video for your hub,” and “your idea about PSAs is very exciting.” Dr. Fauci did three live stream Facebook Q&A’s about COVID-19 with Zuckerberg.³²¹

2. Hydroxychloroquine

Plaintiffs further allege the NIAID and Dept. of HHS Defendants suppressed speech on hydroxychloroquine. On May 22, 2020, The Lancet published an online article

entitled “[Hydroxychloroquine or chloroquine](#) with or without a macrolide for treatment of COVID-19: a multi-national registry analysis.”³²² The article purported to analyze 96,032 patients to compare persons who did and did not receive this treatment. The study concluded that [hydroxychloroquine](#) and [chloroquine](#) were associated with decreased in-hospital survival and an increased frequency of [ventricular arrhythmias](#) when used for treatment of COVID-19.³²³

Dr. Fauci publicly cited this study to claim that “[hydroxychloroquine](#) is not effective against coronavirus.”³²⁴ He then publicly began to discredit COVID-19 treatment with [hydroxychloroquine](#) and stated whether the treatment of COVID-19 by [hydroxychloroquine](#) was effective could only be judged by rigorous, randomized, double-blind, placebo-based studies. He testified the same on July 31, 2020, before the House Select Subcommittee on Coronavirus Crisis.³²⁵

(2) When America's Frontline Doctors held a press conference criticizing the Government's response to the COVID-19 pandemic and spouting the benefits of hydroxychloroquine in treating the coronavirus,³²⁶ Dr. Fauci made statements on Good Morning America³²⁷ and on Andrea Mitchell Reports³²⁸ that hydroxychloroquine is not effective in treating the coronavirus. Social-media platforms censored the America's Frontline Doctors videos. Facebook, Twitter, and YouTube removed the video.³²⁹ Dr. Fauci does not deny that he or his staff at NIAID may have communicated with social-media platforms, but he does not specifically recall it.³³⁰

3. The Great Barrington Declaration

(1) The GBD was published online on October 4, 2020. The GBD was published by Plaintiffs Dr. Bhattacharja of Stanford and Dr. Kulldorff of Harvard, along with Dr. Gupta of Oxford. The GBD is a one-page treatise opposing reliance on lockdowns and advocating for an approach to COVID-19 called “focused protection.”³³¹ It criticized the social distancing and lockdown approaches endorsed by government experts. The authors expressed grave concerns about physical and mental health impacts of current government COVID-19 lockdown policies and called for an end to lockdowns.³³²

(2) On October 8, 2020, Dr. Francis Collins emailed Dr. Fauci (and Cliff Lane) stating:

Hi Tony and Cliff, See <https://gbdeclaration.org/>. This proposal from the three fringe epidemiologists who met with the Secretary seems to be *[671](#) getting a lot of attention – and even a co-signature from Nobel Prize winner Mike Leavitt at Stanford. There needs to be a quick and devastating published take down of its premises. I don't see anything like that online yet-is it underway? Francis.³³³
The same day, Dr. Fauci wrote back to Dr. Collins stating, “Francis: I am pasting in below a piece from Wired that debunks this theory. Best, Tony.”³³⁴

Dr. Fauci and Dr. Collins followed up with a series of public media statements attacking the GBD. In a Washington Post story run on October 14, 2020, Dr. Collins described the GBD and its authors as “fringe” and “dangerous.”³³⁵ Dr. Fauci consulted with Dr. Collins before he talked to the Washington Post.³³⁶ Dr. Fauci also endorsed these comments in an email to Dr. Collins, stating “what you said was entirely correct.”³³⁷

On October 15, 2020, Dr. Fauci called the GBD “nonsense” and “dangerous.”³³⁸ Dr. Fauci specifically stated, “Quite frankly that is nonsense, and anybody who knows anything about epidemiology will tell you that is nonsense and very dangerous.”³³⁹ Dr. Fauci testified “it's possible that” he coordinated with Dr. Collins on his public statements attacking the GBD.³⁴⁰

(3) Social-media platforms began censoring the GBD shortly thereafter. In October 2020, Google de-boosted the search results for the GBD so that when Google users googled “Great Barrington Declaration,” they would be diverted to articles critical of the GBD, and not to the GBD itself.³⁴¹ Reddit removed links to the GBD.³⁴² YouTube updated its terms of service regarding medical “misinformation,” to prohibit content about vaccines that contradicted consensus from health authorities.³⁴³ Because the GBD went against a consensus from health authorities, its content was removed from YouTube. Facebook adopted the same policies on misinformation based upon public health authority recommendations.³⁴⁴ Dr. Fauci testified that he could not recall anything about his involvement in seeking to squelch the GBD.³⁴⁵

(4) NIAID and NIH staff sent several messages to social-media platforms asking them to remove content lampooning or criticizing Dr. Fauci. When a Twitter employee reached out to CDC officials asking if a particular account associated with Dr. Fauci was “real or not,”³⁴⁶ Scott Prince of NIH responded, “Fake/Imposter handle. PLEASE REMOVE!!!”³⁴⁷ An HHS official then asked Twitter if it could “block” similar parody accounts: “Is there anything else you can also do to block other variations of his (Dr. Fauci's) name from impersonation so we don't have this occur again?”³⁴⁸ Twitter replied, “We'll freeze *672 this @handle and some other variations so no one can hop on them.”³⁴⁹

On April 21, 2020, Judith Lavelle of NIAID emailed Facebook, copying Scott Prince of NIH and Jennifer Routh (“Routh”), and stated, “We wanted to flag a few more fake Dr. Fauci accounts on FB and IG for you I have reported them from NIAID and my personal FB account.”³⁵⁰ Both Lavelle and Routh are members of Dr. Fauci's communications staff.³⁵¹ Six of the eight accounts listed were removed by Facebook on the same day.³⁵²

(5) On October 30, 2020, a NIAID staffer wrote an email connecting Google/YouTube with Routh, “so that NIAID and the ‘Google team’ could connect on vaccine communications—specifically misinformation.”³⁵³ Courtney Billet (“Billet”), director of the Office of Communications and Government Relations of NIAID, was added by Routh, along with two other NIAID officials, to a communications chain with YouTube.³⁵⁴ Twitter disclosed that Dina Perry (“Perry”), a Public Affairs Specialist for NIAID, communicates or has communicated with Twitter about misinformation and censorship.³⁵⁵

(6) Dr. Fauci testified that he has never contacted a social-media company and asked them to remove misinformation from one of their platforms.³⁵⁶

4. Ivermectin

(8) On September 13, 2021, Facebook emailed Carol Crawford of the CDC to ask whether the claim that “Ivermectin is effective in treating COVID is false, and if believed, could contribute to people refusing the vaccine or self-medicating.”³⁵⁷ The CDC responded the next day and

advised Facebook that the claim that Ivermectin is effective in treating COVID is “NOT ACCURATE.”³⁵⁸ The CDC cited the NIH's treatment guidelines for authority that the claims were not accurate.³⁵⁹

5. Mask Mandates

(9) Plaintiffs maintain that Dr. Fauci initially did not believe masks worked, but he changed his stance. A February 4, 2020 email, in which Dr. Fauci responded to an email from Sylvia Burwell, stated, “the typical mask you buy in a drugstore is not really effective in keeping out the virus, which is small enough to pass through mankind.”³⁶⁰ Dr. Fauci stated that, at that time, there were “no studies” on the efficacy of masking to stop the spread.³⁶¹ On March 31, 2020, Dr. Fauci forwarded studies showing that masking is ineffective.³⁶²

Plaintiffs allege that Dr. Fauci's position on masking changed dramatically on April 3, 2020, when he became an advocate for universal mask mandates.³⁶³ Dr. Fauci testified his position changed in part because “evidence began accumulating that masks actually work in preventing acquisition and transmission,”³⁶⁴ although Dr. Fauci could not identify those studies.³⁶⁵

*673 6. Alex Berenson

Alex Berenson (“Berenson”) was a former New York Times Science reporter and critic of government messaging about COVID-19 vaccines. He was de-platformed from Twitter on August 28, 2021.³⁶⁶

Dr. Fauci had previously sought to discredit Berenson publicly during an interview with CNN.³⁶⁷ Dr. Fauci does not deny that he may have discussed Berenson with White House or federal officials, but does not recall specifically whether he did so.³⁶⁸

E. FBI Defendants³⁶⁹

(1) The deposition of Elvis Chan (“Chan”) was taken on November 29, 2021.³⁷⁰ Chan is the Assistant Special Agent in charge of the Cyber Branch for the San Francisco Division

of the FBI.³⁷¹ In this role, Chan was one of the primary people communicating with social-media platforms about disinformation on behalf of the FBI. There are also other agents on different cyber squads, along with the FBI's private sector engagement squad, who relay information to social-media platforms.³⁷²

Chan graduated from the Naval Postgraduate School in 2020 with a M.A. in Homeland Security Studies.³⁷³ His thesis was entitled, "Fighting Bears and Trolls. An Analysis of Social Media Companies and U.S. Government Efforts to Combat Russian Influence Campaigns During the 2020 U.S. Elections."³⁷⁴ His thesis focuses on information sharing between the FBI, Facebook, Google, and Twitter.³⁷⁵ Chan relied on research performed by persons and entities comprising the Election Integrity Partnership, including Graphika,³⁷⁶ and DiResta of the Stanford Internet Observatory. Chan communicated directly with DiResta about Russian disinformation.³⁷⁷

Chan also knows Alex Stamos ("Stamos"), the head of the Stanford Internet Observatory, from when Stamos worked for Facebook.³⁷⁸ Chan and Stamos worked together on "malign-foreign-influence activities, on Facebook."³⁷⁹

(2) Chan stated that the FBI engages in "information sharing" with social-media companies about content posted on their platforms, which includes both "strategic-level information" and "tactical information."³⁸⁰

(3) The FBI, along with Facebook, Twitter, Google/YouTube, Microsoft, Yahoo!, Wikimedia Foundation, and Reddit, participate in a Cybersecurity and Infrastructure Security Agency ("CISA") "industry working group."³⁸¹ Representatives of CISA, the Department of Homeland Security's Intelligence & Analysis Division ("I&A"), the Office of Director of National Intelligence ("ODNI"), the FBI's FITF, *674 the Dept. of Justice National Security Division, and Chan participate in these industry working groups.³⁸²

Chan participates in the meetings because most social-media platforms are headquartered in San Francisco, and the FBI field offices are responsible for maintaining day-to-day relationships with the companies headquartered in its area of responsibility.³⁸³

Matt Masterson ("Masterson") was the primary facilitator in the meetings for the 2022 election cycle, and Brian Scully ("Scully") was the primary facilitator ahead of the 2022 election.³⁸⁴ At the USG-Industry ("the Industry") meetings, social-media companies shared disinformation content, providing a strategic overview of the type of disinformation they were seeing. The FBI would then provide strategic, unclassified overviews of things they were seeing from Russian actors.³⁸⁵

The Industry meetings were "continuing" at the time Chan's deposition was taken on November 23, 2022, and Chan assumes the meetings will continue through the 2024 election cycle.³⁸⁶

(4) Chan also hosted bilateral meetings between FBI and Facebook, Twitter, Google/YouTube, Yahoo!/Verizon, Microsoft/LinkedIn, Wikimedia Foundation and Reddit,³⁸⁷ and the Foreign Influence Task Force.³⁸⁸ In the Industry meetings, the FBI raised concerns about the possibility of "hack and dump" operations during the 2020 election cycle.³⁸⁹ The bilateral meetings are continuing, occurring quarterly, but will increase to monthly and weekly nearer the elections.³⁹⁰

In the Industry meetings, FBI officials meet with senior social-media platforms in the "trust and safety or site integrity role." These are the persons in charge of enforcing terms of service and content-moderation policies.³⁹¹ These meetings began as early as 2017.³⁹² At the Industry meetings, in addition to Chan and Laura Dehmlow ("Dehmlow"), head of the FITF, between three and ten FITF officials and as high as a dozen FBI agents are present.³⁹³

(5) On September 4, 2019, Facebook, Google, Microsoft, and Twitter along with the FITF, ODNI, and CISA held a meeting to discuss election issues. Chan attended, along with Director Krebs, Masterson, and Scully. Social media's trust and safety on content-moderation teams were also present. The focus of the meeting was to discuss with the social-media companies the spread of "disinformation."³⁹⁴

(6) Discovery obtained from LinkedIn contained 121 pages of emails between Chan, other FBI officials, and

LinkedIn officials.³⁹⁵ Chan testified he has a similar set of communications with other social-media platforms.³⁹⁶

*675 (7) The FBI communicated with social-media platforms using two alternative, encrypted channels, Signal and Teleporter.³⁹⁷

(8) For each election cycle, during the days immediately preceding and through election days, the FBI maintains a command center around the clock to receive and forward reports of “disinformation” and “misinformation.” The FBI requests that social-media platforms have people available to receive and process the reports at all times.³⁹⁸

(9) Before the Hunter Biden Laptop story breaking prior to the 2020 election on October 14, 2020, the FBI and other federal officials repeatedly warned industry participants to be alert for “hack and dump” or “hack and leak” operations.³⁹⁹

Dehmlow also mentioned the possibility of “hack and dump” operations.⁴⁰⁰ Additionally, the prospect of “hack and dump” operations was repeatedly raised at the FBI-led meetings with FITF and the social-media companies, in addition to the Industry meetings.⁴⁰¹

Social-media platforms updated their policies in 2020 to provide that posting “hacked materials” would violate their policies. According to Chan, the impetus for these changes was the repeated concern about a 2016-style “hack-and-leak” operation.⁴⁰² Although Chan denies that the FBI urged the social-media platforms to change their policies on hacked material, Chan did admit that the FBI repeatedly asked the social-media companies whether they had changed their policies with regard to hacked materials⁴⁰³ because the FBI wanted to know what the companies would do if they received such materials.⁴⁰⁴

(10) Yoel Roth (“Roth”), the then-Head of Site Integrity at Twitter, provided a formal declaration on December 17, 2020, to the Federal Election Commission containing a contemporaneous account of the “hack-leak-operations” at the meetings between the FBI, other natural-security agencies, and social-media platforms.⁴⁰⁵ Roth’s declaration stated:

Since 2018, I have had regular meetings with the Office of the Director of National Intelligence, the Department of

Homeland Security, the FBI, and industry peers regarding election security. During these weekly meetings, the federal law enforcement agencies communicated that they expected “hack-and-leak” operations by state actors might occur during the period shortly before the 2020 presidential election, likely in October. I was told in these meetings that the intelligence community expected that individuals associated with political campaigns would be subject to hacking attacks and that material obtained through those hacking attacks would likely be disseminated over social-media platforms, including Twitter. These expectations of hack-and-leak operations were discussed through 2020. *I also learned in these meetings that there were rumors that a hack-and-leak operation would involve Hunter Biden.*⁴⁰⁶

Chan testified that, in his recollection, Hunter Biden was not referred to in any of the CISA Industry meetings.⁴⁰⁷ The mention *676 of “hack-and-leak” operations involving Hunter Biden is significant because the FBI previously received Hunter Biden’s laptop on December 9, 2019, and knew that the later-released story about Hunter Biden’s laptop was not Russian disinformation.⁴⁰⁸

In Scully’s deposition,⁴⁰⁹ he did not dispute Roth’s version of events.⁴¹⁰

Zuckerberg testified before Congress on October 28, 2020, stating that the FBI conveyed a strong risk or expectation of a foreign “hack-and-leak” operation shortly before the 2020 election and that the social-media companies should be on high alert. The FBI also indicated that if a trove of documents appeared, they should be viewed with suspicion.⁴¹¹

(11) After the Hunter Biden laptop story broke on October 14, 2020, Dehmlow refused to comment on the status of the Hunter Biden laptop in response to a direct inquiry from Facebook, although the FBI had the laptop in its possession since December 2019.⁴¹²

The Hunter Biden laptop story was censored on social media, including Facebook and Twitter.⁴¹³ Twitter blocked users from sharing links to the New York Post story and prevented users who had previously sent tweets sharing the story from sending new tweets until they deleted the previous tweet.⁴¹⁴ Further, Facebook began reducing the story’s distribution on the platform pending a third-party fact-check.⁴¹⁵

(12) Chan further testified that during the 2020 election cycle, the United States Government and social-media companies effectively limited foreign influence companies through information sharing and account takedowns.⁴¹⁶ Chan's thesis also recommended standardized information sharing and the establishment of a national coordination center.

According to Chan, the FBI shares this information with social-media platforms as it relates to information the FBI believes should be censored.⁴¹⁷ Chan testified that the purpose and predictable effect of the tactical information sharing was that social-media platforms would take action against the content in accordance with their policies.⁴¹⁸ Additionally, Chan admits that during the 2020 election cycle, the United States Government engaged in information sharing with social-media companies.⁴¹⁹ The FBI also shared "indicators" with state and local government officials.⁴²⁰

Chan's thesis includes examples of alleged Russian disinformation, which had a number of reactions and comments from Facebook users, including an anti-Hillary Clinton post, a secure-border post, a Black Lives Matter post, and a pro-Second Amendment post.⁴²¹

Chan also identified Russian-aligned websites on which articles were written by freelance journalists. A website called NADB, alleged to be Russian-generated, was also identified by the FBI, and suppressed by social-media platforms, despite *677 such content being drafted and written by American users on that site.⁴²² The FBI identified this site to the social-media companies that took action to suppress it.⁴²³

(13) "Domestic disinformation" was also flagged by the FBI for social-media platforms. Just before the 2020 election, information would be passed from other field offices to the FBI 2020 election command post in San Francisco. The information sent would then be relayed to the social-media platforms where the accounts were detected.⁴²⁴ The FBI made no attempt to distinguish whether those reports of election disinformation were American or foreign.⁴²⁵

Chan testified the FBI had about a 50% success rate in having alleged election disinformation taken down or censored by social-media platforms.⁴²⁶ Chan further testified that although the FBI did not tell the social-media companies to modify their terms of service, the FBI would "probe" the

platforms to ask for details about the algorithms they were using⁴²⁷ and what their terms of service were.⁴²⁸

(14) Chan further testified the FBI identifies specific social-media accounts and URLs to be evaluated "one to five times a month"⁴²⁹ and at quarterly meetings.⁴³⁰ The FBI would notify the social-media platforms by sending an email with a secure transfer application within the FBI called a "Teleporter." The Teleporter email contains a link for them to securely download the files from the FBI.⁴³¹ The emails would contain "different types of indicators," including specific social-media accounts, websites, URLs, email accounts, and the like, that the FBI wanted the platforms to evaluate under their content-moderation policies.⁴³²

Most of the time, the emails flagging the misinformation would go to seven social-media platforms. During 2020, Chan estimated he sent out these emails from one to six times per month and in 2022, one to four times per month. Each email would flag a number that ranged from one to dozens of indicators.⁴³³ When the FBI sent these emails, it would request that the social-media platforms report back on the specific actions taken as to these indicators and would also follow up at the quarterly meetings.⁴³⁴

(15) At least eight FBI agents at the San Francisco office, including Chan, are involved in reporting disinformation to social-media platforms.⁴³⁵ In addition to FBI agents, a significant number of FBI officials from the FBI's Foreign Influence Task Force also participate in regular meetings with social-media platforms about disinformation.⁴³⁶

Chan testified that the FBI uses its criminal-investigation authority, national-security authority, the Foreign Intelligence Surveillance Act, the PATRIOT Act, *678 and Executive Order 12333 to gather national security intelligence to investigate content on social media.⁴³⁷

Chan believes with a high degree of confidence that the FBI's identification of "tactical information" was accurate and did not misidentify accounts operated by American citizens.⁴³⁸ However, Plaintiffs identified tweets and trends on Twitter, such as #Releasethememo in 2019, and indicated that 929,000 tweets were political speech by American citizens.⁴³⁹

(16) Chan testified that he believed social-media platforms were far more aggressive in taking down disfavored accounts and content in the 2018 and 2020 election cycles.⁴⁴⁰ Chan further thinks that pressure from Congress, specifically the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence, resulted in more aggressive censorship policies.⁴⁴¹ Chan also stated that congressional hearings placed pressure on the social-media platforms.⁴⁴²

Chan further testified that Congressional staffers have had meetings with Facebook, Google/YouTube, and Twitter and have discussed potential legislation.⁴⁴³ Chan spoke directly with Roth of Twitter, Steven Slagle of Facebook, and Richard Salgado of Google, all of whom participated in such meetings.⁴⁴⁴

(17) Chan testified that 3,613 Twitter accounts and 825 Facebook accounts were taken down in 2018. Chan testified Twitter took down 422 accounts involving 929,000 tweets in 2019.⁴⁴⁵

(18) Chan testified that the FBI is continuing its efforts to report disinformation to social-media companies to evaluate for suppression and/or censorship.⁴⁴⁶ “Post-2020, we've never stopped ... as soon as November 3 happened in 2020, we just pretty much rolled into preparing for 2022.”⁴⁴⁷

F. CISA Defendants⁴⁴⁸

The deposition of Brian Scully was taken on January 12, 2023, as part of the injunction-related discovery in this matter.

(1) The CISA regularly meets with social-media platforms in several types of standing meetings. Scully is the chief of CISA's Mis, Dis and Malinformation Team (“MDM Team”). Prior to President Biden taking office, the MDM Team was known as the “Countering Foreign Influence Task Force (“CFITF”).”⁴⁴⁹ Protentis is the “Engagements Lead” for the MDM Team, and she is in charge of outreach and engagement to key stakeholders, interagency partners, and private sector partners, which includes social-media platforms. Scully performed Protentis's duties while she was on maternity leave.⁴⁵⁰ Both Scully *679 and Protentis have

done extended detail at the National Security Council, where they work on misinformation and disinformation issues.⁴⁵¹

(2) Scully testified that during 2020, the MDM Team did “switchboard work” on behalf of election officials. “Switchboarding” is a disinformation-reporting system provided by CISA that allows state and local election officials to identify something on social media they deem to be disinformation aimed at their jurisdiction. The officials would then forward the information to CISA, which would in turn share the information with the social-media companies.⁴⁵²

The main idea, according to Scully, is that the information would be forwarded to social-media platforms, which would make decisions on the content based on their policies.⁴⁵³ Scully further testified he decided in late April or early May 2022 not to perform switchboarding in 2022. However, the CISA website states the MDM Team serves as a “switchboard for routing disinformation concerns to social-media platforms.”⁴⁵⁴ The switchboarding activities began in 2018.⁴⁵⁵

(3) The MDM Team continues to communicate regularly with social-media platforms in two different ways. The first way is called “Industry” meetings. The Industry meetings are regular sync meetings between government and industry, including social-media platforms.⁴⁵⁶ The second type of communication involves the MDM Team reviewing regular reports from social-media platforms about changes to their censorship policies or to their enforcement actions on censorship.⁴⁵⁷

(4) The Industry meetings began in 2018 and continue to this day. These meetings increase in frequency as each election nears. In 2022, the Industry meetings were monthly but increased to biweekly in October 2022.⁴⁵⁸

Government participants in the USG-Industry meetings are CISA, the Department of Justice (“DOJ”), ODNI, and the Department of Homeland Security (“DHS”). CISA is typically represented by Scully and Hale. Scully's role is to oversee and facilitate the meetings.⁴⁵⁹ Wyman, Snell, and Protentis also participate in the meetings on behalf of CISA.⁴⁶⁰ On behalf of the FBI, FITF Chief Dehmlow, Chan, and others from different parts of the FBI participate.⁴⁶¹

In addition to the Industry meetings, CISA hosts at least two “planning meetings:” one between CISA and Facebook and an interagency meeting between CISA and other participating federal agencies.⁴⁶² The social-media platforms attending the industry meetings include Facebook, Twitter, Microsoft, Google/YouTube, Reddit, LinkedIn, and sometimes the Wikipedia Foundation.⁴⁶³ At the Industry meetings, participants discuss concerns about misinformation and disinformation. The federal officials report their concerns over the *680 spread of disinformation. The social-media platforms in turn report to federal officials about disinformation trends, share high-level trend information, and report the actions they are taking.⁴⁶⁴ Scully testified that the specific discussion of foreign-originating information is ultimately targeted at preventing domestic actors from engaging in this information.⁴⁶⁵

(5) CISA has established relationships with researchers at Stanford University, the University of Washington, and Graphika.⁴⁶⁶ All three are involved in the Election Integrity Partnership (“EIP”).⁴⁶⁷

When the EIP was starting up, CISA interns came up with the idea of having some communications with the EIP. CISA began having communications with the EIP, and CISA connected the EIP with the Center for Internet Security (“CIS”). The CIS is a CISA-funded, non-profit that channels reports of disinformation from state and local government officials to social-media platforms. The CISA interns who originated the idea of working with the EIP also worked for the Stanford Internet Observatory, another part of the EIP. CISA had meetings with Stanford Internet Observatory officials, and eventually both sides decided to work together.⁴⁶⁸ The “gap” that the EIP was designed to fill concerned state and local officials’ lack of resources to monitor and report on disinformation that affects their jurisdictions.⁴⁶⁹

(6) The EIP continued to operate during the 2022 election cycle. At the beginning of the election cycle, the EIP gave Scully and Hale, on behalf of CISA, a briefing in May or June of 2022.⁴⁷⁰ In the briefing, DiResta walked through what the plans were for 2022 and some lessons learned from 2020. The EIP was going to support state and local election officials in 2022.

(7) The CIS is a non-profit that oversees the Multi-State Information Sharing and Analysis Center (“MS-ISAC”) and the Election Infrastructure Information Sharing and Analysis Center (“EI-ISAC”). Both MS-ISAC and EI-ISAC are organizations of state and/or local government officials created for the purpose of information sharing.⁴⁷¹

CISA funds the CIS through a series of grants. CISA also directs state and local officials to the CIS as an alternative route to “switchboarding.”⁴⁷² CISA connected the CIS with the EIP because the EIP was working on the same mission,⁴⁷³ and it wanted to make sure they were all connected. Therefore, CISA originated and set up collaborations between local government officials and CIS and between the EIP and CIS.

(8) CIS worked closely with CISA in reporting misinformation to social-media platforms. CIS would receive the reports directly from election officials and would forward this information to CISA. CISA would then forward the information to the applicable social-media platforms. CIS later began to report the misinformation directly to social-media platforms.⁴⁷⁴

*681 The EIP also reported misinformation to social-media platforms. CISA served as a mediating role between CIS and EIP to coordinate their efforts in reporting misinformation to the platforms. There were also direct email communications between the EIP and CISA about reporting misinformation.⁴⁷⁵ When CISA reported misinformation to social-media platforms, CISA would generally copy the CIS, who, as stated above, was coordinating with the EIP.⁴⁷⁶

(9) Stamos and DiResta of the Stanford Internet Observatory briefed Scully about the EIP report, “The Long Fuse,”⁴⁷⁷ in late Spring or early Summer of 2021. Scully also reviewed copies of that report. Stamos and DiResta also have roles in CISA: DiResta serves as “Subject Matter Expert” for CISA’s Cybersecurity Advisory Committee, MDM Subcommittee, and Stamos serves on the CISA Cybersecurity Advisory Committee, as does Kate Starbird (“Starbird”) of the University of Washington.⁴⁷⁸ Stamos identified the EIP’s “partners in government” as CISA, DHS, and state and local officials.⁴⁷⁹ Also, according to Stamos, the EIP targeted “large following political partisans who were spreading misinformation intentionally.”⁴⁸⁰

(10) CISA's Masterson was also involved in communicating with the EIP.⁴⁸¹ Masterson and Scully questioned EIP about their statements on election-related information. Sanderson left CISA in January 2021, was a fellow at the Stanford Internet Observatory, and began working for Microsoft in early 2022.⁴⁸²

(11) CISA received misinformation principally from two sources: the CIS directly from state and local election officials; and information sent directly to a CISA employee.⁴⁸³ CISA shared information with the EIP and the CIS.⁴⁸⁴

(12) CISA did not do an analysis to determine what percentage of misinformation was "foreign derived." Therefore, CISA forwards reports of information to social-media platforms without determining whether they originated from foreign or domestic sources.⁴⁸⁵

(13) The Virality Project was created by the Stanford Internet Observatory to mimic the EIP for COVID.⁴⁸⁶ As previously stated, Stamos and DiResta of the Stanford Internet Observatory were involved in the Virality Project. Stamos gave Scully an overview of what they planned to do with the Virality Project, similar to what they did with the EIP.⁴⁸⁷ Scully also had conversations with DiResta about the Virality Project.⁴⁸⁸ DiResta noted the Virality Project was established on the heels of the EIP, following its success in order to support government health officials' efforts to combat misinformation targeting COVID-19 vaccines.⁴⁸⁹

*682 (14) According to DiResta, the EIP was designed to "get around unclear legal authorities, including very real First Amendment questions" that would arise if CISA or other government agencies were to monitor and flag information for censorship on social media.⁴⁹⁰

(15) The CIS coordinated with the EIP regarding online misinformation and reported it to CISA. The EIP was using a "ticketing system" to track misinformation.⁴⁹¹ Scully asked the social-media platforms to report back on how they were handling reports of misinformation and disinformation received from CISA.⁴⁹² CISA maintained a "tracking spreadsheet" of its misinformation reports to social-media platforms during the 2020 election cycle.⁴⁹³

(16) At least six members of the MDM team, including Scully, "took shifts" in the "switchboarding" operation reporting disinformation to social-media platforms; the others were Chad Josiah ("Josiah"), Rob Schaul ("Schaul"), Alex Zaheer ("Zaheer"), John Stafford ("Stafford"), and Pierce Lowary ("Lowary"). Lowary and Zaheer were simultaneously serving as interns for CISA and working for the Stanford Internet Observatory, which was the operating the EIP.⁴⁹⁴ Therefore, Zaheer and Lowary were simultaneously engaged in reporting misinformation to social-media platforms on behalf of both CISA and the EIP.⁴⁹⁵ Zaheer and Lowary were also two of the four Stanford interns who came up with the idea for the EIP.⁴⁹⁶

(17) The CISA switchboarding operation ramped up as the election drew near. Those working on the switchboarding operation worked tirelessly on election night.⁴⁹⁷ They would also "monitor their phones" for disinformation reports even during off hours so that they could forward disinformation to the social-media platforms.⁴⁹⁸

(18) As an example, Zaheer, when switchboarding for CISA, forwarded supposed misinformation to CISA's reporting system because the user had claimed "mail-in voting is insecure" and that "conspiracy theories about election fraud are hard to discount."⁴⁹⁹

CISA's tracking spreadsheet contains at least eleven entries of switchboarding reports of misinformation that CISA received "directly from EIP" and forwarded to social-media platforms to review under their policies.⁵⁰⁰ One of these reports was reported to Twitter for censorship because EIP "saw an article on the Gateway Pundit" run by Plaintiff Jim Hoff.⁵⁰¹

(19) Scully admitted that CISA engaged in "informal fact checking" to determine whether a claim was true or not.⁵⁰² CISA would do its own research and relay statements from public officials to help debunk postings for social-media platforms. In debunking information, CISA apparently always assumed the government official was a reliable source; CISA would not do further research to determine whether the *683 private citizen posting the information was correct or not.⁵⁰³

(20) CISA's switchboarding activities reported private and public postings.⁵⁰⁴ Social-media platforms responded swiftly to CISA's reports of misinformation.⁵⁰⁵

(21) CISA, in its interrogatory responses, disclosed five sets of recurring meetings with social-media platforms that involved discussions of misinformation, disinformation, and/or censorship of speech on social media.⁵⁰⁶ CISA also had bilateral meetings between CISA and the social-media companies.⁵⁰⁷

(22) Scully does not recall whether "hack and leak" or "hack and dump" operations were raised at the Industry meetings, but does not deny it either.⁵⁰⁸ However, several emails confirm that "hack and leak" operations were on the agenda for the Industry meeting on September 15, 2020,⁵⁰⁹ and July 15, 2020.⁵¹⁰

(23) In the spring and summer of 2022, CISA's Protentis requested that social-media platforms prepare a "one-page" document that sets forth their content-moderation rules⁵¹¹ that could then be shared with election officials—and which also included "steps for flagging or escalating MDM content" and how to report misinformation.⁵¹² Protentis referred to the working group (which included Facebook and CISA's Hale) as "Team CISA."⁵¹³

(24) The Center for Internet Security continued to report misinformation to social-media platforms during the 2022 election cycle.⁵¹⁴

(25) CISA has teamed up directly with the State Department's Global Engagement Center ("GEC") to seek review of social-media content.⁵¹⁵ CISA also flagged for review parody and joke accounts.⁵¹⁶ Social-media platforms report to CISA when they update their content-moderation policies to make them more restrictive.⁵¹⁷ CISA publicly stated that it is expanding its efforts to fight disinformation-hacking in the 2024 election cycle.⁵¹⁸

(26) A draft copy of the DHS's "Quadrennial Homeland Security Review," which outlines the department's strategy and priorities in upcoming years, states that the department plans to target "inaccurate information" on a wide range of topics, including the origins of the COVID-19 pandemic, the efficacy of COVID-19 vaccines, racial justice, the United

States' withdrawal from Afghanistan, and the nature of the United States' support of Ukraine.⁵¹⁹

(27) Scully also testified that CISA engages with the CDC and DHS to help them in their efforts to stop the spread of *684 disinformation. The examples given were about the origins of the COVID-19 pandemic and Russia's invasion of Ukraine.⁵²⁰

(28) On November 21, 2021, CISA Director Easterly reported that CISA is "beefing up its misinformation and disinformation team in wake of a diverse presidential election a proliferation of misleading information online."⁵²¹ Easterly stated she was going to "grow and strengthen" CISA's misinformation and disinformation team. She further stated, "We live in a world where people talk about alternative facts, post-truth, which I think is really, really dangerous if people get to pick their own facts."⁵²²

Easterly also views the word "infrastructure" very expansively, stating, "[W]e're in the business of protecting critical infrastructure, and the most critical is our 'cognitive infrastructure.'"⁵²³ Scully agrees with the assessment that CISA has an expansive mandate to address all kinds of misinformation that may affect control and that could indirectly cause national security concerns.⁵²⁴

On June 22, 2022, CISA's cybersecurity Advisory Committee issued a Draft Report to the Director, which broadened "infrastructure" to include "the spread of false and misleading information because it poses a significant risk to critical function, like elections, public health, financial services and emergency responses."⁵²⁵

(29) In September 2022, the CIS was working on a "portal" for government officials to report election-related misinformation to social-media platforms.⁵²⁶ That work continues today.⁵²⁷

G. State Department Defendants⁵²⁸

1. The GEC

(1) Daniel Kimmage is the Principal Deputy Coordinator of the State Department's Global Engagement Center

(“GEC”).⁵²⁹ The GEC's front office and senior leadership meets with social-media platforms every few months, sometimes quarterly.⁵³⁰ The meetings focus on the “tools and techniques” of stopping the spread of disinformation on social media, but they rarely discuss specific content that is posted.⁵³¹ Additionally, GEC has a “Technology Engagement Team” (“TET”) that also meets with social-media companies. The TET meets more frequently than the GEC.⁵³²

(2) Kimmage recalls two meetings with Twitter. At these meetings, the GEC would bring between five and ten people including Kimmage, one or more deputy coordinators, and team chiefs from the GEC and working-level staff with relevant subject-matter expertise.⁵³³ The GEC staff would meet with Twitter's content-mediation teams, and the GEC would provide an overview of what it was seeing in terms of *685 foreign propaganda and information. Twitter would then discuss similar topics.⁵³⁴

(3) The GEC's senior leadership also had similar meetings with Facebook and Google. Similar numbers of people were brought to these meetings by GEC, and similar topics were discussed. Facebook and Google also brought their content-moderator teams.⁵³⁵

(4) Samaruddin Stewart (“Stewart”) was the GEC's Senior Advisor who was a permanent liaison in Silicon Valley for the purpose of meeting with social-media platforms about disinformation. Stewart set up a series of meetings with LinkedIn to discuss “countering disinformation” and to explore shared interests and alignment of mutual goals regarding the challenge.⁵³⁶

(5) The GEC also coordinated with CISA and the EIP. Kimmage testified that the GEC had a “general engagement” with the EIP.⁵³⁷

(6) On October 17, 2022, at an event at Stanford University, Secretary of State Anthony Blinken mentioned the GEC and stated that the State Department was “engaging in collaboration and building partnerships” with institutions like Stanford to combat the spread of propaganda.⁵³⁸ Specifically, he stated, “We have something called the Global Engagement Center that's working on this every single day.”⁵³⁹

(7) Like CISA, the GEC works through the CISA-funded EI-ISAC and works closely with the Stanford Internet Observatory and the Virality Project.

2. The EIP

(8) The EIP is partially-funded by the United States National Science Foundation through grants.⁵⁴⁰ Like its work with CISA, the EIP, according to DiResta, was designed to “get around unclear legal authorities, including very real First Amendment questions” that would arise if CISA or other government agencies were to monitor and flag information for censorship on social media.⁵⁴¹

The EIP's focus was on understanding misinformation and disinformation in the social-media landscape, and it successfully pushed social-media platforms to adopt more restrictive policies about election-related speech in 2020.⁵⁴²

The government agencies that work with and submit alleged disinformation to the EIP are CISA, the State Department Global Engagement Center, and the Elections Infrastructure Information Sharing and Analysis Center.⁵⁴³

(9) The EIP report further states that the EIP used a tiered model based on “tickets” collected internally and from stakeholders. The tickets also related to domestic speech by American citizens,⁵⁴⁴ including accounts belonging to media outlets, social-media influencers, and political figures.⁵⁴⁵ The EIP further emphasized that it wanted greater access to social-media *686 platform's internal data and recommended that the platforms increase their enforcement of censorship policies.⁵⁴⁶

The EIP was formed on July 26, 2020, 100 days before the November 2020 election.⁵⁴⁷ On July 9, 2020, the Stanford Internet Observatory presented the EIP concept to CISA. The EIP team was led by Research Manager DiResta, Director Stamos and the University of Washington's Starbird.⁵⁴⁸

(10) EIP's managers both report misinformation to platforms and communicate with government partners about their misinformation reports.⁵⁴⁹ EIP team members were divided into tiers of on-call shifts. Each shift was four hours long and led by one on-call manager. The shifts ranged from five to twenty people. Normal scheduled shifts ran from 8:00 a.m. to

8:00 p.m., ramping up to sixteen to twenty hours a day during the week of the election.⁵⁵⁰

(11) Social-media platforms that participated in the EIP were Facebook, Instagram, Google/YouTube, Twitter, TikTok, Reddit, Nextdoor, Discord, and Pinterest.⁵⁵¹

(12) In the 2020 election cycle, the EIP processed 639 “tickets,” 72% of which were related to delegitimizing the election results.⁵⁵² Overall, social-media platforms took action on 35% of the URLs reported to them.⁵⁵³ One “ticket” could include an entire idea or narrative and was not always just one post.⁵⁵⁴ Less than 1% of the tickets related to “foreign interference.”⁵⁵⁵

(13) The EIP found that the Gateway Pundit was one of the top misinformation websites, allegedly involving the “exaggeration” of the input of an issue in the election process. The EIP did not say that the information was false.⁵⁵⁶ The EIP Report cites The Gateway Pundit forty-seven times.⁵⁵⁷

(14) The GEC was engaging with the EIP and submitted “tickets.”⁵⁵⁸

(15) The tickets and URLs encompassed millions of social-media posts, with almost twenty-two million posts on Twitter alone.⁵⁵⁹ The EIP sometimes treats as “misinformation” truthful reports that the EIP believes “lack broader context.”⁵⁶⁰

(16) The EIP stated “influential accounts on the political right ... were responsible for the most widely spread of false or misleading information in our data set.”⁵⁶¹ Further, the EIP stated the twenty-one most prominent report spreaders on Twitter include political figures and organizations, partisan media outlets, and social-media stars. Specifically, the EIP stated, “All 21 of the repeat spreaders were associated with conservative or right-wing *687 political views and support of President Trump.”⁵⁶² The Gateway Pundit was listed as the second-ranked “Repeat Spreader of Election Misinformation” on Twitter. During the 2020 election cycle, the EIP flagged The Gateway Pundit in twenty-five incidents with over 200,000 retweets.⁵⁶³ The Gateway Pundit ranked above Donald Trump, Eric Trump, Breitbart News, and Sean Hannity.⁵⁶⁴

The Gateway Pundit’s website was listed as the domain cited in the most “incidents”; its website content was tweeted by others in 29,209 original tweets and 840,740 retweets.⁵⁶⁵ The Gateway Pundit ranked above Fox News, the New York Post, the New York Times, and the Washington Post.⁵⁶⁶ The EIP report also notes that Twitter suspended The Gateway Pundit’s account on February 6, 2021, and it was later de-platformed entirely.⁵⁶⁷

(17) The EIP notes that “during the 2020 election, all of the major platforms made significant changes to election integrity policies—policies that attempted to slow the spread of specific narratives and tactics that could ‘potentially mislead or deceive the public.’”⁵⁶⁸ The EIP was not targeting foreign disinformation, but rather “domestic speakers.”⁵⁶⁹ The EIP also indicated it would continue its work in future elections.⁵⁷⁰

(18) The EIP also called for expansive censorship of social-media speech into other areas such as “public health.”⁵⁷¹

(19) The EIP stated that it “united government, academic, civil society, and industry, analyzing across platforms to address misinformation in real time.”⁵⁷²

(20) When asked whether the targeted information was domestic, Stamos answered, “It is all domestic, and the second point on the domestic, a huge part of the problem is well-known influences ... you ... have a relatively small number of people with very large followings who have the ability to go and find a narrative somewhere, pick it out of obscurity and ... harden it into these narratives.”⁵⁷³

Stamos further stated:

We have set up this thing called the Election Integrity Partnership, so we went and hired a bunch of students. We’re working with the University of Washington, Graphika, and DFR Lab and the vast, vast majority we see we believe is domestic. And so, I think a much bigger issue for the platforms is elite disinformation. The staff that is being driven by people who are verified that are Americans who are using their real identities.⁵⁷⁴

(21) Starbird of the University of Washington, who is on a CISA subcommittee and an EIP participant, also verified the EIP was targeting domestic speakers, stating:

Now fast forward to 2020, we saw a very different story around disinformation in the U.S. election. It was largely domestic coming from inside the United States *688 ... Most of the accounts perpetrating this.... they're authentic accounts. They were often blue check and verified accounts. They were pundits on cable television shows that were who they said they were ... a lot of major spreaders were blue check accounts, and it wasn't entirely coordinated, but instead, it was largely sort of cultivated and even organic in places with everyday people creating and spreading disinformation about the election.⁵⁷⁵

3. The Virality Project

(22) The Virality Project targeted domestic speakers' alleged disinformation relating to the COVID-19 vaccines.⁵⁷⁶ The Virality Project's final report, dated April 26, 2022, lists DiResta as principal Executive Director and lists Starbird and Masterson as contributors.⁵⁷⁷

According to the Virality Project, "vaccine mis-and disinformation was largely driven by a cast of recurring [sic] actors including long-standing anti-vaccine influencers and activists, wellness and lifestyle influence, pseudo medical influencers, conspiracy theory influencers, right-leaning political influencers, and medical freedom influencers."⁵⁷⁸

The Virality Project admits the speech it targets is primarily domestic, stating "Foreign ... actor's reach appeared to be far less than that of domestic actors."⁵⁷⁹ The Virality Project also calls for more aggressive censorship of COVID-19 misinformation, calls for more federal agencies to be involved through "cross-agency collaboration,"⁵⁸⁰ and calls for a "whole-of-society response."⁵⁸¹ Just like the EIP, the Virality Project states that it is "multistakeholder collaboration" that includes "government entities" among its key stakeholders.⁵⁸² The Virality Project targets tactics that are not necessarily false, including hard-to-verify content, alleged authorization sources, organized outrage, and sensationalized/misleading headlines.⁵⁸³

(23) Plaintiff Hines of the Health Freedom Louisiana was flagged by the Virality Project to be a "medical freedom influencer" who engages in the "tactic" of "organized

outrage" because she created events or in-person gatherings to oppose mask and vaccine mandates in Louisiana.⁵⁸⁴

(24) The Virality Project also acknowledges that government "stakeholders," such as "federal health agencies" and "state and local public health officials," were among those that "provided tips" and "requests to access specific incidents and narratives."⁵⁸⁵

(25) The Virality Project also targeted the alleged COVID-19 misinformation for censorship before it could go viral. "Tickets also enabled analysts to qualify tag platform or health sector partners to ensure their situational awareness of high-engagement material that appeared to be going viral, so that those partners could determine whether something might merit a rapid public or on-platform response."⁵⁸⁶

*689 (26) The Virality Project flagged the following persons and/or organizations as spreaders of misinformation:

- i. Jill Hines and Health Freedom of Louisiana;⁵⁸⁷
- ii. One America News;⁵⁸⁸
- iii. Breitbart News;⁵⁸⁹
- iv. Alex Berenson;⁵⁹⁰
- v. Tucker Carlson,⁵⁹¹
- vi. Fox News;⁵⁹²
- vii. Candace Owens;⁵⁹³
- viii. The Daily Wire;⁵⁹⁴
- ix. Robert F. Kennedy, Jr.,⁵⁹⁵
- x. Dr. Simone Gold and America's Frontline Doctors; and⁵⁹⁶
- xi. Dr. Joyce Mercula.⁵⁹⁷

(27) The Virality Project recommends that the federal government implement a Misinformation and Disinformation Center of Excellence, housed within the federal government, which would centralize expertise on mis/disinformation within the federal government at CISA.⁵⁹⁸

III. LAW AND ANALYSIS

A. Preliminary Injunction Standard

[2] An injunction is an extraordinary remedy never awarded of right. *Benisek v. Lamone*, 585 U.S. 155, 138 S.Ct. 1942, 1943, 201 L.Ed.2d 398 (2018). In each case, the courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

[3] [4] The standard for an injunction requires a movant to show: (1) the substantial likelihood of success on the merits; (2) that he is likely to suffer irreparable harm in the absence of an injunction; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Benisek*, 138 S.Ct. at 1944. The party seeking relief must satisfy a cumulative burden of proving each of the four elements enumerated before an injunction can be granted. *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). None of the four prerequisites has a quantitative value. *State of Tex. v. Seatrain Int'l, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975).

B. Analysis

As noted above, Plaintiffs move for a preliminary injunction against Defendants' alleged violations of the Free Speech Clause of the First Amendment. Plaintiffs assert that they are likely to succeed on the merits of their First Amendment claims because Defendants have significantly encouraged and/or coerced social-media companies into removing protected speech from social-media platforms. Plaintiffs also argue that failure to grant a preliminary injunction will result in irreparable harm because the alleged First Amendment violations are continuing and/or there is a substantial risk that future harm is likely to occur. Further, Plaintiffs maintain that the equitable factors and public interest weigh in favor of protecting their First Amendment rights *690 to freedom of speech. Finally, Plaintiffs move for class certification under Federal Rule of Civil Procedure 23.

In response, Defendants maintain that Plaintiffs are unlikely to succeed on the merits for a myriad of reasons. Defendants also maintain that Plaintiffs lack Article III standing to bring the claims levied herein, that Plaintiffs have failed to show

irreparable harm because the risk of future injury is low, and that the equitable factors and public interests weigh in favor of allowing Defendants to continue enjoying permissible government speech.

Each argument will be addressed in turn below.

1. Plaintiffs' Likelihood of Success on the Merits

For the reasons explained herein, the Plaintiffs are likely to succeed on the merits of their First Amendment claim against the White House Defendants, Surgeon General Defendants, CDC Defendants, FBI Defendants, NIAID Defendants, CISA Defendants, and State Department Defendants. In ruling on a motion for Preliminary Injunction, it is not necessary that the applicant demonstrate an absolute right to relief. It need only establish a probable right. *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971). The Court finds that Plaintiffs here have done so.

a. Plaintiffs' First Amendment Claims

[5] [6] [7] [8] [9] The Free Speech Clause prohibits only governmental abridgment of speech. It does not prohibit private abridgment of speech. *Manhattan Community Access Corporation v. Halleck*, 587 U.S. 802, 139 S.Ct. 1921, 1928, 204 L.Ed.2d 405 (2019). The First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. *Id.* Government action, aimed at the suppression of particular views on a subject that discriminates on the basis of viewpoint, is presumptively unconstitutional. The First Amendment guards against government action "targeted at specific subject matter," a form of speech suppression known as "content-based discrimination." *National Rifle Association of America v. Cuomo*, 350 F. Supp. 3d 94, 112 (N.D. N.Y. 2018). The private party, social-media platforms are not defendants in the instant suit, so the issue here is not whether the social-media platforms are government actors,⁵⁹⁹ but whether the government can be held responsible for the private platforms' decisions.

[10] [11] [12] Viewpoint discrimination is an especially egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the perspective of the speaker is the rationale for the restriction. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). Strict scrutiny is applied to viewpoint discrimination. *Simon & Schuster, Inc. v. Members of the New York State Crime Victim's Board*, 502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991). The government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. *691 *Police Department of Chicago v. Moseley*, 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).

[13] If there is a bedrock principal underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. *Matal v. Tam*, 582 U.S. 218, 137 S. Ct. 1744, 1763, 198 L.Ed.2d 366 (2017); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). The benefit of any doubt must go to protecting rather than stifling speech. *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S. Ct. 876, 891, 175 L.Ed.2d 753 (2010).

i. Significant Encouragement and Coercion

To determine whether Plaintiffs are substantially likely to succeed on the merits of their First Amendment free speech claim, Plaintiffs must prove that the Federal Defendants either exercised coercive power or exercised such significant encouragement that the private parties' choice must be deemed to be that of the government. Additionally, Plaintiffs must prove the speech suppressed was "protected speech." The Court, after examining the facts, has determined that some of the Defendants either exercised coercive power or provided significant encouragement, which resulted in the possible suppression of Plaintiffs' speech.

[14] The State (i.e., the Government) can be held responsible for a private decision only when it has exercised coercive power or has provided such "significant encouragement," either overt or covert, that the choice must be deemed to be that of the State. Mere approval or acquiescence in the actions of a private party is not sufficient to hold the state responsible

for those actions. *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 1004–05, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982); *National Broadcasting Co. Inc. v. Communications Workers of America, AFL-CIO*, 860 F.2d 1022 (11th Cir. 1988); *Focus on the Family v. Pinellas Suncoast Transit Authority*, 344 F.3d 1263 (11th Cir. 2003); *Brown v. Millard County*, 47 Fed. Appx. 882 (10th Cir. 2002).

[15] [16] [17] In evaluating "significant encouragement," a state may not induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish. *Norwood v. Harrison*, 413 U.S. 455, 465, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973). Additionally, when the government has so involved itself in the private party's conduct, it cannot claim the conduct occurred as a result of private choice, even if the private party would have acted independently. *Peterson v. City of Greenville*, 373 U.S. at 247–48, 83 S.Ct. 1133. Further, oral, or written statements made by public officials could give rise to a valid First Amendment claim where the comments of a governmental official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request. *National Rifle Association of America*, 350 F. Supp. 3d at 114. Additionally, a public official's threat to stifle protected speech is actionable under the First Amendment and can be enjoined, even if the threat turns out to be empty. *Backpage.com, LLC v. Dart*, 807 F. 3d at 230–31.

The Defendants argue that the "significant encouragement" test for government action has been interpreted to require a higher standard since the Supreme Court's ruling in *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). Defendants also argue that Plaintiffs are unable to meet the test to show Defendants "significantly encouraged" social-media *692 platforms to suppress free speech. Defendants further maintain Plaintiffs have failed to show "coercion" by Defendants to force social-media companies suppress protected free speech. Defendants also argue they made no threats but rather sought to "persuade" the social-media companies. Finally, Defendants maintain the private social-media companies made independent decisions to suppress certain postings.

In *Blum*, the Supreme Court held the Government "can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice in law

must be deemed to be that of the state.” *Blum*, 457 U.S. at 1004, 102 S.Ct. 2777. Defendants argue that the bar for “significant encouragement” to convert private conduct into state action is high. Defendants maintain that *Blum*’s language does not mean that the Government is responsible for private conduct whenever the Government does more than adopt a passive position toward it. *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 615, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

Defendants point out this is a question of degree: whether a private party should be deemed an agent or instrument of the Government necessarily turns on the “degree” of the Government’s participation in the private party’s activities. 489 U.S. at 614, 109 S.Ct. 1402. The dispositive question is “whether the State has exercised coercive power or has provided such significant encouragement that the choice must in law be deemed to be that of the State.” *VDARE Foundation v. City of Colo. Springs*, 11 F.4th 1151, 1161 (10th Cir. 2021).

The Supreme Court found there was not enough “significant encouragement” by the Government in *American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). This case involved the constitutionality of a Pennsylvania worker’s compensation statute that authorized, but did not require, insurers to withhold payments for the treatment of work-related injuries pending a “utilization” review of whether the treatment was reasonable and necessary. The plaintiffs’ argument was that by amending the statute to grant the utilization review (an option they previously did not have), the State purposely encouraged insurers to withhold payments for disputed medical treatment. The Supreme Court found this type of encouragement was not enough for state action.

The United States Court of Appeal for the Fifth Circuit has also addressed the issue of government coercion or encouragement. For example, in *La. Div. Sons of Confederate Veterans v. City of Natchitoches*, 821 F. App’x 317 (5th Cir. 2020), the Sons of Confederate Veterans applied to march in a city parade that was coordinated by a private business association. The Mayor sent a letter asking the private business to prohibit the display of the Confederate battle flag. After the plaintiff’s request to march in the parade was denied, the plaintiff filed suit and argued the Mayor’s letter was “significant encouragement” to warrant state action. The Fifth Circuit found the letter was not “significant encouragement.”

[18] In determining whether the Government’s words or actions could reasonably be interpreted as an implied threat,

courts examine a number of factors, including: (1) the Defendant’s regulatory or other decision-making authority over the targeted entities; (2) whether the government actors actually exercised regulatory authority over the targeted entities; (3) whether the language of the alleged threatening statements could reasonably be perceived as a threat; and (4) whether any of the targeted entities reacted in a *693 manner evincing the perception of implicit threat. *Id.* at 114. As noted above, a public official’s threat to stifle protected speech is actionable under the First Amendment and can be enjoined, even if the threat turns out to be empty. *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230-31 (7th Cir. 2015); *Okwedy v. Molinari*, 333 F.3d 339, 340-41 (2d. Cir. 2003).

The closest factual case to the present situation is *O’Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023). In *O’Handley*, the plaintiff maintained that a California agency was responsible for the moderation of his posted content. The plaintiff pointed to the agency’s mission to prioritize working closely with social-media companies to be “proactive” about misinformation and the flagging of one of his Twitter posts as “disinformation.” The Ninth Circuit rejected the argument that the agency had provided “significant encouragement” to Twitter to suppress speech. In rejecting this argument, the Ninth Circuit stated the “critical question” in evaluating the “significant encouragement” theory is “whether the government’s encouragement is so significant that we should attribute the private party’s choice to the State ...” *Id.* at 1158.

Defendants cited many cases in support of their argument that Plaintiffs have not shown significant coercion or encouragement. See *VDARE Foundation v. City of Colo. Springs*, 11 F.4th 1151 (10th Cir. 2021), cert. denied, — U.S. —, 142 S. Ct. 1208, 212 L.Ed.2d 216 (2022) (city’s decision not to provide “support or resources” to plaintiff’s event was not “such significant encouragement” to transform a private venue’s decision to cancel the event into state action); *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, 499 F.3d 553 (6th Cir. 2007) (government officials’ requests were “not the type of significant encouragement” that would render agreeing to those requests to be state action); *Campbell v. PMI Food Equip., Grp., Inc.*, 509 F.3d 776 (6th Cir. 2007) (no state action where government entities did nothing more than authorize and approve a contract that provided tax benefits or incentives conditioned on the company opening a local plant); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442 (10th Cir. 1995) (payments under government contracts and the receipt of government grants and tax benefits are insufficient to establish a symbiotic relationship between the government

and a private entity). Ultimately, Defendants contend that Plaintiffs have not shown that the choice to suppress free speech must in law be deemed to be that of the Government. This Court disagrees.

The Plaintiffs are likely to succeed on the merits on their claim that the United States Government, through the White House and numerous federal agencies, pressured and encouraged social-media companies to suppress free speech. Defendants used meetings and communications with social-media companies to pressure those companies to take down, reduce, and suppress the free speech of American citizens. They flagged posts and provided information on the type of posts they wanted suppressed. They also followed up with directives to the social-media companies to provide them with information as to action the company had taken with regard to the flagged post. This seemingly unrelenting pressure by Defendants had the intended result of suppressing millions of protected free speech postings by American citizens. In response to Defendants' arguments, the Court points out that this case has much more government involvement than any of the cases cited by Defendants, as clearly indicated by the extensive facts detailed above. If there were ever a case where the "significant encouragement" theory should apply, this is it.

***694** What is really telling is that virtually all of the free speech suppressed was "conservative" free speech. Using the 2016 election and the COVID-19 pandemic, the Government apparently engaged in a massive effort to suppress disfavored conservative speech. The targeting of conservative speech indicates that Defendants may have engaged in "viewpoint discrimination," to which strict scrutiny applies. See *Simon & Schuster, Inc.*, 502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991).

In addition to the "significant encouragement" theory, the Government may also be held responsible for private conduct if the Government exercises coercive power over the private party in question. *Blum*, 457 U.S. at 1004, 102 S.Ct. 2777. Here, Defendants argue that not only must there be coercion, but the coercion must be targeted at specific actions that harmed Plaintiffs. *Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963) (where a state agency threatened prosecution if a distributor did not remove certain designated books or magazines it distributed that the state agency had declared objectionable); see also *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015) (where a sheriff's letter demanded that two credit card issuers prohibit the use of

their credit cards to purchase any ads on a particular website containing advertisements for adult services); *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003) (per curium) (where a municipal official allegedly pressured a billboard company to take down a particular series of signs he found offensive).

The Defendants further argue they only made requests to the social-media companies, and that the decision to modify or suppress content was each social-media company's independent decision. However, when a state has so involved itself in the private party's conduct, it cannot claim the conduct occurred as a result of private choice, even if the private party would have acted independently. *Peterson v. City of Greenville*, 373 U.S. 244, 247–248, 83 S.Ct. 1133, 10 L.Ed.2d 323 (1963).

Therefore, the question is not what decision the social-media company would have made, but whether the Government "so involved itself in the private party's conduct" that the decision is essentially that of the Government. As exhaustively listed above, Defendants "significantly encouraged" the social-media companies to such extent that the decision should be deemed to be the decisions of the Government. The White House Defendants and the Surgeon General Defendants additionally engaged in coercion of social-media companies to such extent that the decisions of the social-media companies should be deemed that of the Government. It simply makes no difference what decision the social-media companies would have made independently of government involvement, where the evidence demonstrates the wide-scale involvement seen here.

(1) White House Defendants

The Plaintiffs allege that by use of emails, public and private messages, public and private meetings, and other means, White House Defendants have "significantly encouraged" and "coerced" social-media platforms to suppress protected free speech on their platforms.

The White House Defendants acknowledged at oral arguments that they did not dispute the **authenticity** or the content of the emails Plaintiffs submitted in support of their claims.⁶⁰⁰ However, they allege that the emails do not show that the White House Defendants either coerced or significantly encouraged social-media platforms to suppress content of social-media postings. White House Defendants argue instead ***695** that they were speaking

with social-media companies about promoting more accurate COVID-19 information and to better understand what action the companies were taking to curb the spread of COVID-19 misinformation.

White House Defendants further argue they never demanded the social-media companies to suppress postings or to change policies, and the changes were due to the social-media companies' own independent decisions. They assert that they did not make specific demands via the White House's public statements and four "asks"⁶⁰¹ of social-media companies.⁶⁰² Defendants contend the four "asks" were "recommendations," not demands. Additionally, Defendants argue President Biden's July 16, 2021 "they're killing people" comment was clarified on July 19, 2021, to reflect that President Biden was talking about the "Disinformation Dozen," not the social-media companies.

Although admitting White House employee Flaherty expressed frustration at times with social-media companies, White House Defendants contend Flaherty sought to better understand the companies' policies with respect to addressing the spread of misinformation and hoped to find out what the Government could do to help. Defendants contend Flaherty felt such frustration because some of the things the social-media-companies told him were inconsistent with what others told him, compounded with the urgency of the COVID-19 pandemic.

Explicit threats are an obvious form of coercion, but not all coercion need be explicit. The following illustrative specific actions by Defendants are examples of coercion exercised by the White House Defendants:

- (a) "Cannot stress the degree to which this needs to be resolved immediately. Please remove this account immediately."⁶⁰³
- (b) Accused Facebook of causing "political violence" by failing to censor false COVID-19 claims.⁶⁰⁴
- (c) "You are hiding the ball."⁶⁰⁵
- (d) "Internally we have been considering our options on what to do about it."⁶⁰⁶
- (e) "I care mostly about what actions and changes you are making to ensure you're not making our country's vaccine hesitancy problem worse."⁶⁰⁷

(f) "This is exactly why I want to know what "Reduction" actually looks like – if "reduction" means pumping our most vaccine hesitance audience with Tucker Carlson saying it does not work ... then ... I'm not sure it's reduction."⁶⁰⁸

(g) Questioning how the Tucker Carlson video had been "demoted" since there were 40,000 shares.⁶⁰⁹

(h) Wanting to know why Alex Berenson had not been kicked off Twitter because Berenson was the epicenter of disinformation that *⁶⁹⁶ radiated outward to the persuadable public.⁶¹⁰ "We want to make sure YouTube has a handle on vaccine hesitancy and is working toward making the problem better. Noted that vaccine hesitancy was a concern. That is shared by the highest ('and I mean the highest') levels of the White House."⁶¹¹

(i) After sending to Facebook a document entitled "Facebook COVID-19 Vaccine Misinformation Brief, which recommends much more aggressive censorship by Facebook. Flaherty told Facebook sending the Brief was not a White House endorsement of it, but "this is circulating around the building and informing thinking."⁶¹²

(j) Flaherty stated: "Not to sound like a broken record, but how much content is being demoted, and how effective are you at mitigating reach and how quickly?"⁶¹³

(k) Flaherty told Facebook: "Are you guys fucking serious" I want an answer on what happened here and I want it today."⁶¹⁴

(l) Surgeon General Murthy stated: "We expect more from our technology companies. We're asking them to operate with greater transparency and accountability. We're asking them to monitor information more closely. We're asking them to consistently take action against misinformation super-spreaders on their platforms."⁶¹⁵

(m) White House Press Secretary Psaki stated: "we are in regular touch with these social-media platforms, and those engagements typically happen through members of our senior staff, but also members of our COVID-19 team. We're flagging problematic posts for Facebook that spread disinformation. Psaki also stated one of the

White House's "asks" of social-media companies was to "create a robust enforcement strategy."⁶¹⁶

- (n) When asked about what his message was to social-media platforms when it came to COVID-19, President Biden stated: "they're killing people. Look, the only pandemic we have is among the unvaccinated and that – they're killing people."⁶¹⁷
 - (o) Psaki stated at the February 1, 2022, White House Press Conference that the White House wanted every social-media platform to do more to call out misinformation and disinformation and to uplift accurate information.⁶¹⁸
 - (p) "Hey folks, wanted to flag the below tweet and am wondering if we can get moving on the process of having it removed. ASAP"⁶¹⁹
 - (q) "How many times can someone show false COVID-19 claims before being removed?"
 - (r) "I've been asking you guys pretty directly over a series of conversations if the biggest issues you are seeing on your platform when it comes to vaccine hesitancy and the degree to which borderline content-as you define it, is playing a role."⁶²⁰
- *⁶⁹⁷ (s) "I am not trying to play 'gotcha' with you. We are gravely concerned that your service is one of the top drivers of vaccine hesitancy-period."⁶²¹
- (t) "You only did this, however after an election that you helped increase skepticism in and an insurrection which was plotted, in large part, on your platform."⁶²²
 - (u) "Seems like your 'dedicated vaccine hesitancy' policy isn't stopping the disinfo dozen."⁶²³
 - (v) White House Communications Director, Kate Bedingfield's announcement that "the White House is assessing whether social-media platforms are legally liable for misinformation spread on their platforms, and examining how misinformation fits into the liability protection process by Section 230 of The Communication Decency Act."⁶²⁴

These actions are just a few examples of the unrelenting pressure the Defendants exerted against social-media companies. This Court finds the above examples demonstrate that Plaintiffs can likely prove that White House Defendants

engaged in coercion to induce social-media companies to suppress free speech.

With respect to [47 U.S.C. § 230](#), Defendants argue that there can be no coercion for threatening to revoke and/or amend [Section 230](#) because the call to amend it has been bipartisan. However, Defendants combined their threats to amend [Section 230](#) with the power to do so by holding a majority in both the House of Representatives and the Senate, and in holding the Presidency. They also combined their threats to amend [Section 230](#) with emails, meetings, press conferences, and intense pressure by the White House, as well as the Surgeon General Defendants. Regardless, the fact that the threats to amend [Section 230](#) were bipartisan makes it even more likely that Defendants had the power to amend [Section 230](#). All that is required is that the government's words or actions "could reasonably be interpreted as an implied threat." *Cuomo*, 350 F. Supp. 3d at 114. With the Supreme Court recently making clear that [Section 230](#) shields social-media platforms from legal responsibility for what their users post, *Gonzalez v. Google*, 598 U.S. 617, 143 S. Ct. 1191, 215 L.Ed.2d 555 (2023), [Section 230](#) is even more valuable to these social-media platforms. These actions could reasonably be interpreted as an implied threat by the Defendants, amounting to coercion.

Specifically, the White House Defendants also allegedly exercised significant encouragement such that the actions of the social-media companies should be deemed to be that of the government. The White House Defendants used emails, private portals, meetings, and other means to involve itself as "partners" with social-media platforms. Many emails between the White House and social-media companies referred to themselves as "partners." Twitter even sent the White House a "Partner Support Portal" for expedited review of the White House's requests. Both the White House and the social-media companies referred to themselves as "partners" and "on the same team" in their efforts to censor disinformation, such as their efforts to censor "vaccine hesitancy" spread. The White House and the social-media companies also demonstrated that they were "partners" by suppressing information that *⁶⁹⁸ did not even violate the social-media companies' own policies.

Further, White House Defendants constantly "flagged" for Facebook and other social-media platforms posts the White House Defendants considered misinformation. The White House demanded updates and reports of the results of their efforts to suppress alleged disinformation, and the social-

media companies complied with these demands. The White House scheduled numerous Zoom and in-person meetings with social-media officials to keep each other informed about the companies' efforts to suppress disinformation.

[19] The White House Defendants made it very clear to social-media companies what they wanted suppressed and what they wanted amplified. Faced with unrelenting pressure from the most powerful office in the world, the social-media companies apparently complied. The Court finds that this amounts to coercion or encouragement sufficient to attribute the White House's actions to the social-media companies, such that Plaintiffs are likely to succeed on the merits against the White House Defendants.

(2) Surgeon General Defendants

Plaintiffs allege that Surgeon General Murthy and his office engaged in a pressure campaign parallel to, and often overlapping with, the White House Defendants' campaign directed at social-media platforms. Plaintiffs further allege the Surgeon General Defendants engaged in numerous meetings and communications with social-media companies to have those companies suppress alleged disinformation and misinformation posted on their platforms.

The Surgeon General Defendants argue that the Surgeon General's role is primarily to draw attention to public health matters affecting the nation. The SG took two official actions in 2021 and in 2022. In July 2021, the Surgeon General issued a "Surgeon General's Advisory." In March 2022, the Surgeon General issued a Request For Information ("RFI"). Surgeon General Defendants argue that the Surgeon General's Advisory did not require social-media companies to censor information or make changes in their policies. Surgeon General Defendants further assert that the RFI was voluntary and did not require the social-media companies to answer.

Additionally, the Surgeon General Defendants contend they only held courtesy meetings with social-media companies, did not flag posts for censorship, and never worked with social-media companies to moderate their policies. Surgeon General Defendants also deny that they were involved with the Virality Project.

As with the White House Defendants, this Court finds that Plaintiffs are likely to succeed on the merits of their First Amendment free speech claim against the Surgeon

General Defendants. Through public statements, internal emails, and meetings, the Surgeon General Defendants exercised coercion and significant encouragement such that the decisions of the social-media platforms and their actions suppressing health disinformation should be deemed to be the decisions of the government. Importantly, the suppression of this information was also likely prohibited content and/or viewpoint discrimination, entitling Plaintiffs to strict scrutiny.

The Surgeon General Defendants did pre-rollout calls with numerous social-media companies prior to publication of the Health Advisory on Misinformation. The Advisory publicly called on social-media companies "to do more" against COVID misinformation Superspreaders. Numerous calls and meetings took place between Surgeon General Defendants and private social-media companies. The "misinformation" to be suppressed was whatever the government deemed misinformation.

*699 The problem with labeling certain discussions about COVID-19 treatment as "health misinformation" was that the Surgeon General Defendants suppressed alternative views to those promoted by the government. One of the purposes of free speech is to allow discussion about various topics so the public may make informed decisions. Health information was suppressed, and the government's view of the proper treatment for COVID-19 became labeled as "the truth." Differing views about whether COVID-19 vaccines worked, whether taking the COVID-19 vaccine was safe, whether mask mandates were necessary, whether schools and businesses should have been closed, whether vaccine mandates were necessary, and a host of other topics were suppressed. Without a free debate about these issues, each person is unable to decide for himself or herself the proper decision regarding their health. Each United States citizen has the right to decide for himself or herself what is true and what is false. The Government and/or the OSG does not have the right to determine the truth.

The Surgeon General Defendants also engaged in a pressure campaign with the White House Defendants to pressure social-media companies to suppress health information contrary to the Surgeon General Defendants' views. After the Surgeon General's press conference on July 15, 2021, the Surgeon General Defendants kept the pressure on social-media platforms via emails, private meetings, and by requiring social-media platforms to report on actions taken against health disinformation.

The RFI by the Surgeon General Defendants also put additional pressure on social-media companies to comply with the requests to suppress free speech. The RFI sought information from private social-media companies to provide information about the spread of misinformation. The RFI stated that the office of the Surgeon General was expanding attempts to control the spread of misinformation on social-media platforms. The RFI also sought information about social-media censorship policies, how they were enforced, and information about disfavored speakers.

[20] Taking all of this evidence together, this Court finds the Surgeon General Defendants likely engaged in both coercion and significant encouragement to such an extent that the decisions of private social-media companies should be deemed that of the Surgeon General Defendants. The Surgeon General Defendants did much more than engage in Government speech: they kept pressure on social-media companies with pre-rollout meetings, follow-up meetings, and RFI. Thus, Plaintiffs are likely to succeed on the merits of their First Amendment claim against these Defendants.

(3) CDC Defendants

Plaintiffs allege that the CDC Defendants have engaged in a censorship campaign, together with the White House and other federal agencies, to have free speech suppressed on social-media platforms. Plaintiffs allege that working closely with the Census Bureau, the CDC flagged supposed “misinformation” for censorship on the platforms. Plaintiffs further allege that by using the acronym “BOLO,” the CDC Defendants told social-media platforms what health claims should be censored as misinformation.

In opposition, Defendants assert that the CDC's mission is to protect the public's health. Although the CDC Defendants admit to meeting with and sending emails to social-media companies, the CDC Defendants argue they were responding to requests by the companies for science-based public health information, proactively alerting the social-media companies about *700 disinformation, or advising the companies where to find accurate information. The Census Bureau argues the Interagency Agreement, entered into with the CDC in regard to COVID-19 misinformation, has expired, and that it is no longer participating with the CDC on COVID-19 misinformation issues. The CDC Defendants further deny that they directed any social-media companies to remove posts or to change their policies.

[21] Like the White House Defendants and Surgeon General Defendants, the Plaintiffs are likely to succeed on the merits of Plaintiffs' First Amendment free speech claim against the CDC Defendants. The CDC Defendants through emails, meetings, and other communications, seemingly exercised pressure and gave significant encouragement such that the decisions of the social-media platforms to suppress information should be deemed to be the decisions of the Government. The CDC Defendants coordinated meetings with social-media companies, provided examples of alleged disinformation to be suppressed, questioned the social-media companies about how it was censoring misinformation, required reports from social-media companies about disinformation, told the social-media companies whether content was true or false, provided BOLO information, and used a Partner Support Portal to report disinformation. Much like the other Defendants, described above, the CDC Defendants became “partners” with social-media platforms, flagging and reporting statements on social media Defendants deemed false. Although the CDC Defendants did not exercise coercion to the same extent as the White House and Surgeon General Defendants, their actions still likely resulted in “significant encouragement” by the government to suppress free speech about COVID-19 vaccines and other related issues.

Various social-media platforms changed their content-moderation policies to require suppression of content that was deemed false by CDC and led to vaccine hesitancy. The CDC became the “determiner of truth” for social-media platforms, deciding whether COVID-19 statements made on social media were true or false. And the CDC was aware it had become the “determiner of truth” for social-media platforms. If the CDC said a statement on social media was false, it was suppressed, in spite of alternative views. By telling social-media companies that posted content was false, the CDC Defendants knew the social-media company was going to suppress the posted content. The CDC Defendants thus likely “significantly encouraged” social-media companies to suppress free speech.

Based on the foregoing examples of significant encouragement and coercion by the CDC Defendants, the Court finds that Plaintiffs are likely to succeed on the merits of their First Amendment claim against the CDC Defendants.

(4) NIAID Defendants

Plaintiffs allege that NIAID Defendants engaged in a series of campaigns to discredit and procure the censorship of disfavored viewpoints on social media. Plaintiffs allege that Dr. Fauci engaged in a series of campaigns to suppress speech regarding the Lab-Leak theory of COVID-19's origin, treatment using hydroxychloroquine, the GBD, the treatment of COVID-19 with Ivermectin, the effectiveness of mask mandates, and the speech of Alex Berenson.

In opposition, Defendants assert that the NIAID Defendants simply supports research to better understand, treat, and prevent infectious, immunologic, and *allergic diseases* and is responsible for responding to emergency public health threats. The NIAID Defendants argue that they had limited involvement with social-media platforms and did not meet *701 with or contact the platforms to change their content or policies. The NIAID Defendants further argue that the videos, press conferences, and public statements by Dr. Fauci and other employees of NIAID was government speech.

[22] This Court agrees that much of what the NIAID Defendants did was government speech. However, various emails show Plaintiffs are likely to succeed on the merits through evidence that the motivation of the NIAID Defendants was a “take down” of protected free speech. Dr. Francis Collins, in an email to Dr. Fauci⁶²⁵ told Fauci there needed to be a “quick and devastating take down” of the GBD—the result was exactly that. Other email discussions show the motivations of the NIAID were to have social-media companies suppress these alternative medical theories. Taken together, the evidence shows that Plaintiffs are likely to succeed on the merits against the NIAID Defendants as well.

(5) FBI Defendants

Plaintiffs allege that the FBI Defendants also suppressed free speech on social-media platforms, with the FBI and FBI's FITF playing a key role in these censorship efforts.

In opposition, Defendants assert that the FBI Defendants' specific job duties relate to foreign influence operations, including attempts by foreign governments to influence U.S. elections. Based on the alleged foreign interference in the 2016 U.S. Presidential election, the FBI Defendants argue that, through their meetings and emails with social-media

companies, they were attempting to prevent foreign influence in the 2020 Presidential election. The FBI Defendants deny any attempt to suppress and/or change the social-media companies' policies with regard to domestic speech. They further deny that they mentioned Hunter Biden or a “hack and leak” foreign operation involving Hunter Biden.

According to the Plaintiffs' allegations detailed above, the FBI had a 50% success rate regarding social media's suppression of alleged misinformation, and it did no investigation to determine whether the alleged disinformation was foreign or by U.S. citizens. The FBI's failure to alert social-media companies that the Hunter Biden laptop story was real, and not mere Russian disinformation, is particularly troubling. The FBI had the laptop in their possession since December 2019 and had warned social-media companies to look out for a “hack and dump” operation by the Russians prior to the 2020 election. Even after Facebook specifically asked whether the Hunter Biden laptop story was Russian disinformation, Dehmlow of the FBI refused to comment, resulting in the social-media companies' suppression of the story. As a result, millions of U.S. citizens did not hear the story prior to the November 3, 2020 election. Additionally, the FBI was included in Industry meetings and bilateral meetings, received and forwarded alleged misinformation to social-media companies, and actually mislead social-media companies in regard to the Hunter Biden laptop story. The Court finds this evidence demonstrative of significant encouragement by the FBI Defendants.

Defendants also argue that Plaintiffs are attempting to create a “deception” theory of government involvement with regards to the FBI Defendants. Plaintiffs allege the FBI told the social-media companies to watch out for Russian disinformation prior to the 2020 Presidential election and then failed to tell the companies that the Hunter Biden laptop was not Russian disinformation. The Plaintiffs further allege Dr. Fauci colluded with others to cover up the Government's involvement in “gain of function” *702 research at the Wuhan lab in China, which may have resulted in the creation of the COVID-19 pandemic.

Although this Court agrees there is no specified “deception” test for government action, a state may not induce private persons to accomplish what it is constitutionally forbidden to accomplish. *Norwood*, 413 U.S. at 455, 93 S.Ct. 2804. It follows, then, that the government may not deceive a private party either—it is just another form of coercion. The Court has evaluated Defendants' conduct under the “coercion”

and/or “significant encouragement” theories of government action, and finds that the FBI Defendants likely exercised “significant encouragement” over social-media companies.

[23] Through meetings, emails, and in-person contacts, the FBI intrinsically involved itself in requesting social-media companies to take action regarding content the FBI considered to be misinformation. The FBI additionally likely misled social-media companies into believing the Hunter Biden laptop story was Russian disinformation, which resulted in suppression of the story a few weeks prior to the 2020 Presidential election. Thus, Plaintiffs are likely to succeed in their claims that the FBI exercised “significant encouragement” over social-media platforms such that the choices of the companies must be deemed to be that of the Government.

(6) CISA Defendants

Plaintiffs allege the CISA Defendants served as a “nerve center” for federal censorship efforts by meeting routinely with social-media platforms to increase censorship of speech disfavored by federal officials, and by acting as a “switchboard” to route disinformation concerns to social-media platforms.

In response, the CISA Defendants maintain that CISA has a mandate to coordinate with federal and non-federal entities to carry out cybersecurity and critical infrastructure activities. CISA previously designated election infrastructure as a critical infrastructure subsector. CISA also collaborates with state and local election officials; as part of its duties, CISA coordinates with the EIS-GCC, which is comprised of state, local, and federal governmental departments and agencies. The EI-SSC is comprised of owners or operators with significant business or operations in U.S. election infrastructure systems or services. After the 2020 election, the EI-SSC and EIS-GCC launched a Joint Managing Mis/Disinformation Group to coordinate election infrastructure security efforts. The CISA Defendants argue CISA supports the Joint Managing Mis-Disinformation Group but does not coordinate with the EIP or the CIS. Despite DHS providing financial assistance to the CIS through a series of cooperative agreement awards managed by CISA, the CISA Defendants assert that the work scope funded by DHS has not involved the CIS performing disinformation-related tasks.

Although the CISA Defendants admit to being involved in “switchboarding” work during the 2020 election cycle, CISA maintains it simply referred the alleged disinformation to the social-media companies, who made their own decisions to suppress content. CISA maintains it included a notice with each referral to the companies, which stated that CISA was not demanding censorship. CISA further maintains it discontinued its switchboarding work after the 2020 election cycle and has no intention to engage in switchboarding for the next election.⁶²⁶ CISA further argues that *703 even though it was involved with USG-Industry meetings with other federal agencies and social-media companies, they did not attempt to “push” social-media companies to suppress content or to change policies.

[24] The Court finds that Plaintiffs are likely to succeed on the merits of their First Amendment claim against the CISA Defendants. The CISA Defendants have likely exercised “significant encouragement” with social-media platforms such that the choices of the social-media companies must be deemed to be that of the government. Like many of the other Defendants, the evidence shows that the CISA Defendants met with social-media companies to both inform and pressure them to censor content protected by the First Amendment. They also apparently encouraged and pressured social-media companies to change their content-moderation policies and flag disfavored content.

But the CISA Defendants went even further. CISA expanded the word “infrastructure” in its terminology to include “cognitive” infrastructure, so as to create authority to monitor and suppress protected free speech posted on social media. The word “cognitive” is an adjective that means “relating to cognition.” “Cognition” means the mental action or process of acquiring knowledge and understanding through thought, experiences, and the senses.⁶²⁷ The Plaintiffs are likely to succeed on the merits on its claim that the CISA Defendants believe they had a mandate to control the process of acquiring knowledge. The CISA Defendants engaged with Stanford University and the University of Washington to form the EIP, whose purpose was to allow state and local officials to report alleged election misinformation so it could be forwarded to the social-media platforms to review. CISA used a CISA-funded non-profit organization, the CIS, to perform the same actions. CISA used interns who worked for the Stanford Internal Observatory, which is part of the EIP, to address alleged election disinformation. All of these worked together to forward alleged election misinformation to social-media companies to view for censorship. They also worked together

to ensure the social-media platforms reported back to them on what actions the platforms had taken. And in this process, no investigation was made to determine whether the censored information was foreign or produced by U.S. citizens.

According to DiResta, head of EIP, the EIP was designed “to get around unclear legal authorities, including very real First Amendment questions that would arise if CISA or the other government agencies were to monitor and flag information for censorship on social media.”⁶²⁸ Therefore, the CISA Defendants aligned themselves with and partnered with an organization that was designed to avoid Government involvement with free speech in monitoring and flagging content for censorship on social-media platforms.

At oral arguments on May 26, 2023, Defendants argued that the EIP operated independently of any government agency. The evidence shows otherwise: the EIP was started when CISA interns came up with the idea; CISA connected the EIP with the CIS, which is a CISA-funded non-profit that channeled reports of misinformation from state and local government officials to social-media companies; CISA had meetings with Stanford Internet Observatory officials (a part of the EIP), and both agreed to “work together”; the EIP gave briefings to CISA; and the CIS (which CISA funds) oversaw the Multi-State Information Sharing and Analysis *704 Center (“MS-ISAC”) and the Election Infrastructure Information Sharing and Analysis Center (“EI-ISAC”), both of which are organizations of state and local governments that report alleged election misinformation.

CISA directs state and local officials to CIS and connected the CIS with the EIP because they were working on the same mission and wanted to be sure they were all connected. CISA served as a mediating role between CIS and EIP to coordinate their efforts in reporting misinformation to social-media platforms, and there were direct email communications about reporting misinformation between EIP and CISA. Stamos and DiResta of the EIP also have roles in CISA on CISA advisory committees. EIP identifies CISA as a “partner in government.” The CIS coordinated with EIP regarding online misinformation. The EIP publication, “The Long Fuse,”⁶²⁹ states the EIP has a focus on election misinformation originating from “domestic” sources across the United States.⁶³⁰ EIP further stated that the primary repeat spreaders of false and misleading narratives were “verified blue-checked accounts belonging to partisan media outlets, social-media influencers, and political figures, including President

Trump and his family.”⁶³¹ The EIP further disclosed it held its first meeting with CISA to present the EIP concept on July 9, 2020, and EIP was officially formed on July 26, 2020, “in consultation with CISA.”⁶³² The Government was listed as one of EIP’s Four Major Stakeholder Groups, which included CISA, the GEC, and ISAC.⁶³³

As explained, the CISA Defendants set up a “switchboarding” operation, primarily consisting of college students, to allow immediate reporting to social-media platforms of alleged election disinformation. The “partners” were so successful with suppressing election disinformation, they later formed the Virality Project, to do the same thing with COVID-19 misinformation that the EIP was doing for election disinformation. CISA and the EIP were completely intertwined. Several emails from the switchboarding operation sent by intern Pierce Lowary shows Lowary directly flagging posted content and sending it to social-media companies. Lowary identified himself as “working for CISA” on the emails.⁶³⁴

On November 21, 2021, CISA Director Easterly stated: “We live in a world where people talk about alternative facts, post-truth, which I think is really, really dangerous if people get to pick their own facts.” The Free Speech Clause was enacted to prohibit just what Director Easterly is wanting to do: allow the government to pick what is true and what is false. The Plaintiffs are likely to succeed on the merits of their First Amendment claim against the CISA Defendants for “significantly encouraging” social-media companies to suppress protected free speech.

(7) State Department Defendants

Plaintiffs allege the State Department Defendants, through the State Department’s GEC, were also involved in suppressing protected speech on social-media platforms.

In response, the State Department Defendants argue that they, along with the GEC, play a critical role in coordinating the U.S. government efforts to respond to foreign influence. The State Department Defendants argue that they did not flag *705 specific content for social-media companies and did not give the company any directives. The State Department Defendants also argue that they do not coordinate with or work with the EIP or the CIS.

[25] The Court finds that Plaintiffs are also likely to succeed on the merits regarding their First Amendment Free Speech Clause against the State Department Defendants. For many of the same reasons the Court reached its conclusion as to the CISA Defendants, the State Department Defendants have exercised “significant encouragement” with social-media platforms, such that the choices of the social-media companies should be deemed to be that of the government. As discussed previously, both CISA and the GEC were intertwined with the VP, EIP, and Stanford Internet Observatory.

The VP, EIP, and Stanford Internet Observatory are not defendants in this proceeding. However, their actions are relevant because government agencies have chosen to associate, collaborate, and partner with these organizations, whose goals are to suppress protected free speech of American citizens. The State Department Defendants and CISA Defendants both partnered with organizations whose goals were to “get around” First Amendment issues.⁶³⁵ In partnership with these non-governmental organizations, the State Department Defendants flagged and reported postings of protected free speech to the social-media companies for suppression. The flagged content was almost entirely from political figures, political organizations, alleged partisan media outlets, and social-media all-stars associated with right-wing or conservative political views, demonstrating likely “viewpoint discrimination.” Since only conservative viewpoints were allegedly suppressed, this leads naturally to the conclusion that Defendants intended to suppress only political views they did not believe in. Based on this evidentiary showing, Plaintiffs are likely to succeed on the merits of their First Amendment claims against the State Department Defendants.

(8) Other Defendants

Other Defendants in this proceeding are the U.S. Food and Drug Administration, U. S. Department of Treasury, U.S. Election Assistance Commission, U. S. Department of Commerce, and employees Erica Jefferson, Michael Murray, Wally Adeyemo, Steven Frid, Brad Kimberly, and Kristen Muthig. Plaintiffs confirmed at oral argument that they are not seeking a preliminary injunction against these Defendants. Additionally, Plaintiffs assert claims against the Disinformation Governance Board (“DGB”) and its Director Nina Jankowicz. Defendants have provided evidence that the DGB has been disbanded, so any claims against these

Defendants are moot. Thus, this Court will not address the issuance of an injunction against any of these Defendants.

ii. Joint Participation

The Plaintiffs contend that the Defendants are not only accountable for private conduct that they coerced or significantly encouraged, but also for private conduct in which they actively participated as “joint participants.” *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Although most often “joint participation” occurs through a conspiracy or collusive behavior, *Hobbs v. Hawkins*, 968 F.2d 471, 480 (5th Cir. 1992), even without a conspiracy, when a plaintiff establishes the government is responsible for private action arising out of “pervasive entwinement of public institutions and public officials in the private *706 entity’s composition and workings.” *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U. S. 288, 298, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001).

[26] Under the “joint action” test, the Government must have played an indispensable role in the mechanism leading to the disputed action. *Frazier v. Bd. Of Trs. Of N.W. Miss. Reg. ’1 Med. Ctr.*, 765 F.2d 1278, 1287-88 (5th Cir.), amended, 777 F.2d 329 (5th Cir. 1985). When a plaintiff establishes “the existence of a conspiracy involving state action,” the government becomes responsible for all constitutional violations committed in furtherance of the conspiracy by a party to the conspiracy. *Armstrong v. Ashley*, 60 F.4th 262, (5th Cir. 2023). Conspiracy can be charged as the legal mechanism through which to impose liability on each and all of the defendants without regard to the person doing the particular act that deprives the plaintiff of federal rights. *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir. 1990).

Much like conspiracy and collusion, joint activity occurs whenever the government has “so far insinuated itself” into private affairs as to blur the line between public and private action. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). To become “pervasively entwined” in a private entity’s workings, the government need only “significantly involve itself in the private entity’s actions and decision-making”; it is not necessary to establish that “state actors … literally ‘overrode’ the private entity’s independent judgment.” *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 751, 753 (9th Cir. 2020). “Pervasive

“intertwinement” exists even if the private party is exercising independent judgment. *West v. Atkins*, 487 U.S. 42, 52, n.10, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1454 (10th Cir. 1995) (holding that a “substantial degree of cooperative action” can constitute joint action).

For the same reasons as this Court has found Plaintiffs met their burden to show “significant encouragement” by the White House Defendants, the Surgeon General Defendants, the CDC Defendants, the FBI Defendants, the NIAID Defendants, the CISA Defendants, and the State Department Defendants, this Court finds the Plaintiffs are likely to succeed on the merits that these Defendants “jointly participated” in the actions of the private social-media companies as well, by insinuating themselves into the social-media companies’ private affairs and blurring the line between public and private action.⁶³⁶

However, this Court finds Plaintiffs are not likely to succeed on the merits that the “joint participation” occurred as a result of a conspiracy with the social-media companies. The evidence thus far shows that the social-media companies cooperated due to coercion, not because of a conspiracy.

[27] This Court finds the White House Defendants, the Surgeon General Defendants, the CDC Defendants, the NIAID Defendants, the FBI Defendants, the CISA Defendants, and the State Department Defendants likely “jointly participated” with the social-media companies to such an extent that said Defendants have become “pervasively entwined” in the private companies’ workings to such an extent as to blur the line between public and private action. Therefore, Plaintiffs are likely to succeed on the merits that the government Defendants are responsible for the private social-media companies’ decisions to censor protected content on social-media platforms.

*707 iii. Other Arguments

While not admitting any fault in the suppression of free speech, Defendants blame the Russians, COVID-19, and capitalism for any suppression of free speech by social-media companies. Defendants argue the Russian social-media postings prior to the 2016 Presidential election caused social-media companies to change their rules with regard to alleged misinformation. The Defendants argue the Federal Government promoted necessary and responsible actions to

protect public health, safety, and security when confronted by a deadly pandemic and hostile foreign assaults on critical election infrastructure. They further contend that the COVID-19 pandemic resulted in social-media companies changing their rules in order to fight related disinformation. Finally, Defendants argue the social-media companies’ desire to make money from advertisers resulted in change to their efforts to combat disinformation. In other words, Defendants maintain they had nothing to do with Plaintiffs’ censored speech and blamed any suppression of free speech on the Russians, COVID-19, and the companies’ desire to make money. The social-media platforms and the Russians are of course not defendants in this proceeding, and neither are they bound by the First Amendment. The only focus here is on the actions of the Defendants themselves.

Although the COVID-19 pandemic was a terrible tragedy, Plaintiffs assert that it is still not a reason to lessen civil liberties guaranteed by our Constitution. “If human nature and history teaches anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency.” *Does I-3 v. Mills*, — U.S. —, 142 S. Ct. 17, 20–21, 211 L.Ed.2d 243 (2021) (Gorsuch, J., dissenting). The “grave risk” here is arguably the most massive attack against free speech in United States history.

Another argument of Defendants is that the previous Administration took the same actions as Defendants. Although the “switchboarding” by CISA started in 2018, there is no indication or evidence yet produced in this litigation that the Trump Administration had anything to do with it. Additionally, whether the previous Administration suppressed free speech on social media is not an issue before this Court and would not be a defense to Defendants even if it were true.

[28] [29] Defendants also argue that a preliminary injunction would restrict the Defendants’ right to government speech and would transform government speech into government action whenever the Government comments on public policy matters. The Court finds, however, that a preliminary injunction here would not prohibit government speech. The traditional test used to differentiate government speech from private speech discusses three relevant factors: (1) whether the medium at issue has historically been used to communicate messages from the government; (2) whether the public reasonably interprets the government to be the speaker; and (3) whether the government maintains editorial control over the speech. *Pleasant Grove City, Utah v. Summum*, 555

[U.S. 460, 465–80, 129 S.Ct. 1125, 172 L.Ed.2d 853 \(2009\)](#). A government entity has the right to speak for itself and is entitled to say what it wishes and express the views it wishes to express. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. *Pleasant Grove City, Utah*, 555 U.S. at 468, 129 S.Ct. 1125.

[30] The Defendants argue that by making public statements, this is nothing but government speech. However, it was not the public statements that were the problem. It was the alleged use of government agencies and employees to coerce *708 and/or significantly encourage social-media platforms to suppress free speech on those platforms. Plaintiffs point specifically to the various meetings, emails, follow-up contacts, and the threat of amending Section 230 of the Communication Decency Act. Plaintiffs have produced evidence that Defendants did not just use public statements to coerce and/or encourage social-media platforms to suppress free speech, but rather used meetings, emails, phone calls, follow-up meetings, and the power of the government to pressure social-media platforms to change their policies and to suppress free speech. Content was seemingly suppressed even if it did not violate social-media policies. It is the alleged coercion and/or significant encouragement that likely violates the Free Speech Clause, not government speech, and thus, the Court is not persuaded by Defendants' arguments here.

b. Standing

[31] [32] [33] The United States Constitution, via Article III, limits federal courts' jurisdiction to "cases" and "controversies." *Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005) (citing U.S. Const. art. III, § 2). The "law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Town of Chester; N.Y. v. Laroe Ests., Inc.*, 581 U.S. 433, 435, 137 S.Ct. 1645, 198 L.Ed.2d 64 (2017) (citation omitted). Thus, "the standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant [its] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (citation and internal quotation marks omitted). The Article III standing requirements apply to claims for injunctive and declaratory relief. See *Seals v. McBee*, 898 F.3d

587, 591 (5th Cir. 2018), as revised (Aug. 9, 2018); *Lawson v. Callahan*, 111 F.3d 403, 405 (5th Cir. 1997).

[34] [35] [36] [37] Article III standing is comprised of three essential elements. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016), as revised (May 24, 2016) (citation omitted). "The plaintiff must have (1) suffered an injury-in-fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements." *Id.* (internal citations omitted). Furthermore, "[a] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y.*, 581 U.S. at 439, 137 S.Ct. 1645 (citations omitted). However, the presence of one party with standing "is sufficient to satisfy Article III's case-or-controversy requirement." *Texas v. U.S.*, 809 F.3d 134 (5th Cir. 2015) (citing *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006)).

[38] [39] In the context of a preliminary injunction, it has been established that "the 'merits' required for the plaintiff to demonstrate a likelihood of success include not only substantive theories but also the establishment of jurisdiction." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). In order to establish standing, the plaintiff must demonstrate that they have encountered or suffered an injury attributable to the defendant's challenged conduct and that such injury is likely to be resolved through a favorable decision. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Further, during the preliminary injunction stage, the movant is *709 only required to demonstrate a likelihood of proving standing. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020). Defendants raise challenges to each essential element of standing for both the Private Plaintiffs and the States. Each argument will be addressed in turn below. For the reasons stated herein, the Court finds that the Plaintiffs have demonstrated a likelihood of satisfying Article III's standing requirements.

i. Injury-in-fact

[40] Plaintiffs seeking to establish injury-in-fact must show that they suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent,

not conjectural or hypothetical.” *Spokeo*, 578 U.S. at 339, 136 S.Ct. 1540 (citations and internal quotation marks omitted). For an injury to be “particularized,” it must “affect the plaintiff in a personal and individual way.” *Id.* (citations and internal quotation marks omitted).

Plaintiffs argue that they have asserted violations of their First Amendment right to speak and listen freely without government interference.⁶³⁷ In response, Defendants contend that Plaintiffs’ allegations rest on dated declarations that focus on long-past conduct, making Plaintiffs’ fears of imminent injury entirely speculative.⁶³⁸ The Court will first address whether the Plaintiff States are likely to prove an injury-in-fact. Then the court will examine whether the Individual Plaintiffs are likely to prove an injury-in-fact. For the reasons explained below, both the Plaintiff States and Individual Plaintiffs are likely to prove an injury-in-fact.

(1) Plaintiff States

In denying Defendants’ Motion to Dismiss,⁶³⁹ this Court previously found that the Plaintiff States had sufficiently alleged injury-in-fact to satisfy Article III standing under either a direct injury or *parens patriae* theory of standing and that the States were entitled to special solicitude in the standing analysis.⁶⁴⁰ At the preliminary injunction stage, the issue becomes whether the Plaintiffs are likely to prove standing. *See Speech First, Inc.*, 979 F.3d at 330. The evidence produced thus far through discovery shows that the Plaintiff States are likely to establish an injury-in-fact through either a *parens patriae* or direct injury theory of standing.

[41] [42] *Parens patriae*, which translates to “parent of the country,” traditionally refers to the state’s role as a sovereign and guardian for individuals with legal disabilities. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600 n.8, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982) (quoting Black’s Law Dictionary 1003 (5th ed. 1979)). The term “*parens patriae* lawsuit” has two meanings: it can denote a lawsuit brought by the state on behalf of individuals unable to represent themselves, or a lawsuit initiated by the state to protect its “quasi-sovereign” interests. *Id.* at 600, 102 S.Ct. 3260; *see also Kentucky v. Biden*, 23 F.4th 585, 596–98 (6th Cir. 2022); *Chapman v. Tristar Prod., Inc.*, 940 F.3d 299, 305 (6th Cir. 2019). A lawsuit based on the former meaning is known as a “third-party” *parens patriae* lawsuit, and it is clearly established law that states cannot bring such lawsuits

against the federal government. *Kentucky*, 23 F.4th at 596. Thus, to have *parens patriae* standing, the Plaintiff States must *710 show a likelihood of establishing an injury to one or more of their quasi-sovereign interests.

In *Snapp*, the United States Supreme Court determined that Puerto Rico had *parens patriae* standing to sue the federal government to safeguard its quasi-sovereign interests. *Snapp*, 458 U.S. at 608, 102 S.Ct. 3260. The Court identified two types of injuries to a state’s quasi-sovereign interests: one is an injury to a significant portion of the state’s population, and the other is the exclusion of the state and its residents from benefiting from participation in the federal system. *Id.* at 607–608, 102 S.Ct. 3260. The Court did not establish definitive limits on the proportion of the population that must be affected but suggested that an indication could be whether the injury is something the state would address through its sovereign lawmaking powers. *Id.* at 607, 102 S.Ct. 3260. Based on the injuries alleged by Puerto Rico, the Court found that the state had sufficiently demonstrated harm to its quasi-sovereign interests and had *parens patriae* standing to sue the federal government. *Id.* at 609–10, 102 S.Ct. 3260.

In *Massachusetts v. E.P.A.*, 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), the United States Supreme Court further clarified the distinction between third-party and quasi-sovereign *parens patriae* lawsuits. There, the Court concluded that Massachusetts had standing to sue the EPA to protect its quasi-sovereign interests. The Court emphasized the distinction between allowing a state to protect its citizens from federal statutes (which is prohibited) and permitting a state to assert its rights under federal law (which it has standing to do). *Massachusetts*, 549 U.S. at 520 n.17, 127 S.Ct. 1438. Because Massachusetts sought to assert its rights under a federal statute rather than challenge its application to its citizens, the Court determined that the state had *parens patriae* standing to sue the EPA.

Here, the Plaintiff States alleged and have provided ample evidence to support injury to two quasi-sovereign interests: the interest in safeguarding the free-speech rights of a significant portion of their respective populations and the interest in ensuring that they receive the benefits from participating in the federal system. Defendants argue that this theory of injury is too attenuated and that Plaintiffs are unlikely to prove any direct harm to the States’ sovereign or quasi-sovereign interests, but the Court does not find this argument persuasive.

Plaintiffs have put forth ample evidence regarding extensive federal censorship that restricts the free flow of information on social-media platforms used by millions of Missourians and Louisianians, and very substantial segments of the populations of Missouri, Louisiana, and every other State.⁶⁴¹ The Complaint provides detailed accounts of how this alleged censorship harms “enormous segments of [the States’] populations.” Additionally, the fact that such extensive examples of suppression have been uncovered through limited *711 discovery suggests that the censorship explained above could merely be a representative sample of more extensive suppressions inflicted by Defendants on countless similarly situated speakers and audiences, including audiences in Missouri and Louisiana. The examples of censorship produced thus far cut against Defendants’ characterization of Plaintiffs’ fear of imminent future harm as “entirely speculative” and their description of the Plaintiff States’ injuries as “overly broad and generalized grievance[s].”⁶⁴² The Plaintiffs have outlined a federal regime of mass censorship, presented specific examples of how such censorship has harmed the States’ quasi-sovereign interests in protecting their residents’ freedom of expression, and demonstrated numerous injuries to significant segments of the Plaintiff States’ populations.

Moreover, the materials produced thus far suggest that the Plaintiff States, along with a substantial segment of their populations, are likely to show that they are being excluded from the benefits intended to arise from participation in the federal system. The U.S. Constitution, like the Missouri and Louisiana Constitutions, guarantees the right of freedom of expression, encompassing both the right to speak and the right to listen. *U.S. Const. amend. I; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). The United States Supreme Court has acknowledged the freedom of expression as one of the most significant benefits conferred by the federal Constitution. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”). Plaintiffs have demonstrated that they are likely to prove that federal agencies, actors, and officials in their official capacity are excluding the Plaintiff States and their residents from this crucial benefit that is meant to flow from participation in the federal system. See *Snapp*, 458 U.S. at 608, 102 S.Ct. 3260.

[43] Accordingly, the Court finds that the States have alleged injuries under a *parens patriae* theory of standing because they are likely to prove injuries to the States’ quasi-sovereign interests in protecting the constitutionally bestowed rights of their citizens.

[44] Further, Plaintiffs have demonstrated direct censorship injuries that satisfy the requirements of Article III as injuries in fact.⁶⁴³ Specifically, the Plaintiffs contend that Louisiana’s Department of Justice, which encompasses the office of its Attorney General, faced direct censorship on YouTube for sharing video footage wherein Louisianans criticized mask mandates and COVID-19 lockdown measures on August 18, 2021, immediately following the federal Defendants’ strong advocacy for COVID-related “misinformation” censorship.⁶⁴⁴ Moreover, a Louisiana state legislator experienced censorship on Facebook when he posted content addressing the *vaccination* of children against COVID-19.⁶⁴⁵ Similarly, during public meetings concerning proposed county-wide mask mandates held by St. Louis County, a political subdivision of Missouri, certain citizens openly expressed their opposition to mask mandates. However, YouTube censored the entire videos of four public meetings, removing the content because some *712 citizens expressed the view that masks are ineffective.⁶⁴⁶ Therefore, this Court finds that the Plaintiff States have also demonstrated a likelihood of establishing an injury-in-fact under a theory of direct injury sufficient to satisfy Article III.

Accordingly, for the reasons stated above and explained in this Court’s ruling on the Motion to Dismiss,⁶⁴⁷ the Plaintiff States are likely to succeed on establishing an injury-in-fact under Article III.

(2) Individual Plaintiffs

In *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (“*SBA List*”), the Supreme Court held that an allegation of future injury may satisfy the Article III injury-in-fact requirement if there is a “substantial risk” of harm occurring. (*quoting Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013)). In *SBA List*, the petitioner challenged a statute that prohibited making false statements during political campaigns. *Id.* at 151–52, 134 S.Ct. 2334. The Court considered the justiciability of the pre-enforcement challenge and whether it alleged a sufficiently imminent injury under

Article III. It noted that pre-enforcement review is warranted when the threatened enforcement is “sufficiently imminent.” *Id.* at 159, 134 S.Ct. 2334. The Court further emphasized that past enforcement is indicative that the threat of enforcement is not “chimerical.” *Id.* at 164, 134 S.Ct. 2334 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974)).

Likewise, in *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 302, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979), the Supreme Court found that the plaintiffs satisfied Article III’s injury-in-fact requirement because the fear of future injury was not “imaginary or wholly speculative.” There, the Court considered a pre-enforcement challenge to a statute that deemed it an unfair labor practice to encourage consumer boycotts through deceptive publicity. *Id.* at 301, 99 S.Ct. 2301. Because the plaintiffs had engaged in past consumer publicity campaigns and intended to continue those campaigns in the future, the Court found their challenge to the consumer publicity provision satisfied Article III. *Id.* at 302, 99 S.Ct. 2301. Similar pre-enforcement review was recognized in *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 386, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988), where the Supreme Court held that booksellers could seek review of a law criminalizing the knowing display of “harmful to juveniles” material for commercial purposes, as defined by the statute. *Virginia*, 484 U.S. at 386, 108 S.Ct. 636 (certified question answered sub nom. *Commonwealth v. Am. Booksellers Ass’n, Inc.*, 236 Va. 168, 372 S.E.2d 618 (1988)).

[45] Here, each of the Individual Plaintiffs are likely to demonstrate an injury-in-fact through a combination of past and ongoing censorship. Bhattacharya, for instance, is the apparent victim of an ongoing “campaign” of social-media censorship, which indicates that he is likely to experience future acts of censorship.⁶⁴⁸ Similarly, *713 Kulldorff attests to a coordinated federal censorship campaign against the Great Barrington Declaration, which implies future censorship.⁶⁴⁹ Kulldorff’s ongoing censorship experiences on his personal social-media accounts provide evidence of ongoing harm and support the expectation of imminent future harm.⁶⁵⁰ Kheriaty also affirms ongoing and anticipated future injuries, noting that the issue of “shadow banning” his social-media posts has intensified since 2022.⁶⁵¹

[46] Hoft and Hines present similar accounts of past, ongoing, and anticipated future censorship injuries. Defendants even appear to be currently involved in an

ongoing project that encourages and engages in censorship activities specifically targeting Hoft’s website.⁶⁵² Hines, too, recounts past and ongoing censorship injuries, stating that her personal Facebook page, as well as the pages of Health Freedom Louisiana and Reopen Louisiana, are constantly at risk of being completely de-platformed.⁶⁵³ At the time of her declaration, Hines’ personal Facebook account was under an ongoing ninety-day restriction. She further asserts, and the evidence supplied in support of the preliminary injunction strongly implies, that these restrictions can be directly traced back to federal officials.

Each of the Private Plaintiffs alleges a combination of past, ongoing, and anticipated future censorship injuries. Their allegations go beyond mere complaints about past grievances. Moreover, they easily satisfy the substantial risk standard. The threat of future censorship is significant, and the history of past censorship provides strong evidence that the threat of further censorship is not illusory or speculative. Plaintiffs’ request for an injunction is not solely aimed at addressing the initial imposition of the censorship penalties but rather at preventing any continued maintenance and enforcement of such penalties. Therefore, the Court concludes that the Private Plaintiffs have fulfilled the injury-in-fact requirement of Article III.

Based on the reasons outlined above, the Court determines that both the States and Private Plaintiffs have satisfied the injury-in-fact requirement of Article III.

ii. Traceability

[47] [48] To establish traceability, or “causation” in this context, a plaintiff must demonstrate a “direct relation between the injury asserted and the injurious conduct alleged.” *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992). Therefore, courts examining this element of standing must assess the remoteness, if any, between the plaintiff’s injury and the defendant’s actions. As explained in *Ass’n of Am. Physicians & Surgeons v. Schiff*, the plaintiff must establish that it is “‘substantially probable that the challenged acts of the defendant, not of some absent third party’ caused or will cause the injury alleged.” 518 F. Supp. 3d 505, 513 (D.D.C. 2021), aff’d sub nom. *Ass’n of Am. Physicians & Surgeons, Inc. v. Schiff*, 23 F.4th 1028 (D.C. Cir. 2022) (“AAPS II”) (quoting *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996)).

*714 [49] Plaintiffs argue that they are likely to prove that their injuries are fairly traceable to Defendants' actions of inducing and jointly participating in the social-media companies' viewpoint-based censorship under a theory of "but-for" causation, conspiracy, or aiding and abetting.⁶⁵⁴ In support, they cite the above-mentioned examples of switchboarding and other pressure tactics employed by Defendants.⁶⁵⁵ In response, Defendants assert that there is no basis upon which this Court can conclude that the social-media platforms made the disputed content-moderation decisions because of government pressure.⁶⁵⁶ For the reasons explained below, the Court finds that Plaintiffs are likely to prove that their injuries are fairly traceable to the conduct of the Defendants.

In *Duke Power Co. v. Carolina Envt. Study Grp.*, the United States Supreme Court found that a plaintiff's injury was fairly traceable to a statute under a theory of "but-for" causation. 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978). The plaintiffs, who were comprised in part of individuals living near the proposed sites for nuclear plants, challenged a statute that limited the aggregate liability for a single nuclear accident under the theory that, but for the passing of the statute, the nuclear plants would not have been constructed. *Id.* at 64–65, 98 S.Ct. 2620. The Supreme Court agreed with the district court's finding that there was a "substantial likelihood" that the nuclear plants would have been neither completed nor operated absent the passage of the nuclear-friendly statute. *Id.* at 75, 98 S.Ct. 2620.

In *Duke Power Co.*, the defendants essentially argued that the statute was not the "but-for" cause of the injuries claimed by the plaintiffs because if Congress had not passed the statute, the Government would have developed nuclear power independently, and the plaintiffs would have likely suffered the same injuries from government-operated plants as they would have from privately operated ones. *Id.* In rejecting that argument, the Supreme Court stated:

Whatever the ultimate accuracy of this speculation, it is not responsive to the simple proposition that private power companies now do in fact operate the nuclear-powered generating plants injuring [the plaintiffs], and that their participation would not have occurred but for the enactment and implementation of the Price-Anderson Act. Nothing in our prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in

order to demonstrate the likely effectiveness of judicial relief.

Id. at 77–78, 98 S.Ct. 2620. The Supreme Court's reluctance to follow the defendants *715 down a rabbit-hole of speculation and "what-ifs" is highly instructive.

Here, Defendants heavily rely upon the premise that social-media companies would have censored Plaintiffs and/or modified their content moderation policies even without any alleged encouragement and coercion from Defendants or other Government officials. This argument is wholly unpersuasive. Unlike previous cases that left ample room to question whether public officials' calls for censorship were fairly traceable to the Government; the instant case paints a full picture.⁶⁵⁷ A drastic increase in censorship, deboosting, shadow-banning, and account suspensions directly coincided with Defendants' public calls for censorship and private demands for censorship.⁶⁵⁸ Specific instances of censorship substantially likely to be the direct result of Government involvement are too numerous to fully detail, but a birds-eye view shows a clear connection between Defendants' actions and Plaintiffs injuries.

The Plaintiffs' theory of but-for causation is easy to follow and demonstrates a high likelihood of success as to establishing Article III traceability. Government officials began publicly threatening social-media companies with adverse legislation as early as 2018.⁶⁵⁹ In the wake of COVID-19 and the 2020 election, the threats intensified and became more direct.⁶⁶⁰ Around this same time, Defendants began having extensive contact with social-media companies via emails, phone calls, and in-person meetings.⁶⁶¹ This contact, paired with the public threats and tense relations between the Biden administration and social-media companies, seemingly resulted in an efficient report-and-censor relationship between Defendants and social-media companies.⁶⁶² Against this backdrop, it is insincere to describe the likelihood of proving a causal connection between Defendants' actions and Plaintiffs' injuries as too attenuated or purely hypothetical.

The evidence presented thus goes far beyond mere generalizations or conjecture: Plaintiffs have demonstrated that they are likely to prevail and establish a causal and temporal link between Defendants' actions *716 and the social-media companies' censorship decisions. Accordingly, this Court finds that there is a substantial likelihood that Plaintiffs would not have been the victims

of viewpoint discrimination but for the coercion and significant encouragement of Defendants towards social-media companies to increase their online censorship efforts.⁶⁶³

For the reasons stated above, as well as those set forth in this Court's previous ruling on the Motion to Dismiss,⁶⁶⁴ the Court finds that Plaintiffs are likely to succeed in establishing the traceability element of Article III standing.

iii. Redressability

[50] The redressability element of the standing analysis requires that the alleged injury is “likely to be redressed by a favorable decision.” *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130. “To determine whether an injury is redressable, a court will consider the relationship between ‘the judicial relief requested’ and the ‘injury’ suffered.” *California v. Texas*, 593 U.S. 659, 141 S. Ct. 2104, 2115, 210 L. Ed. 2d 230 (2021) (quoting *Allen v. Wright*, 468 U.S. 737, 753 n.19, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), abrogated by *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)). Additionally, courts typically find that where an injury is traceable to a defendant's conduct, it is usually redressable as well. See, e.g., *Scenic Am., Inc. v. United States Dep't of Transportation*, 836 F.3d 42, 54 (D.C. Cir. 2016) (“[C]ausation and redressability are closely related, and can be viewed as two facets of a single requirement.”); *Toll Bros. v. Twp. of Readington*, 555 F.3d 131, 142 (3d Cir. 2009) (“Redressability ... is closely related to traceability, and the two prongs often overlap.”); *El Paso Cnty. v. Trump*, 408 F. Supp. 3d 840, 852 (W.D. Tex. 2019).

[51] Plaintiffs argue that they are likely to prove that a favorable decision would redress their injuries because they have provided ample evidence that their injuries are imminent and ongoing.⁶⁶⁵ In response, Defendants contend that any threat of future injury is merely speculative because Plaintiffs rely on dated declarations and focus on long-past conduct of Defendants and social-media companies.⁶⁶⁶ For the reasons explained below, the Court finds that Plaintiffs are likely to prove that their injuries would be redressed by a favorable decision.

[52] As this Court previously noted,⁶⁶⁷ a plaintiff's standing is evaluated at the time of filing of the initial complaint in which they joined. *Lynch v. Leis*, 382 F.3d 642, 647 (6th Cir.

2004); *Davis v. F.E.C.*, 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (8th Cir. 2008); *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013). The State Plaintiffs filed suit on May 5, 2022,⁶⁶⁸ and the individual Plaintiffs joined on August 2, 2022.⁶⁶⁹ Both groups are likely to prove that threat of *717 future injury is more than merely speculative.

Plaintiff States have produced sufficient evidence to demonstrate a likelihood of proving ongoing injuries as of the time the Complaint was filed. For instance, on June 13, 2023, Flaherty still wanted to “get a sense of what [Facebook was] planning” and denied the company's request for permission to stop submitting its biweekly “Covid Insights Report” to the White House.⁶⁷⁰ Specifically, Flaherty wanted to monitor Facebook's suppression of COVID-19 misinformation “as we start to ramp up [vaccines for children under the age of five].”⁶⁷¹ The CDC also remained in collaboration with Facebook in June of 2022 and even delayed implementing policy changes “until [it got] the final word from [the CDC].”⁶⁷² After coordinating with the CDC and White House, Facebook informed the White House of its new and government-approved policy, stating: “As of today, [June 22, 2022], all COVID-19 vaccine related misinformation and harm policies on Facebook and Instagram apply to people 6 months or older.”⁶⁷³

Likewise, the individual Plaintiffs are likely to demonstrate that their injuries were imminent and ongoing as of August 2, 2022. Evidence obtained thus far indicates that Defendants have plans to continue the alleged censorship activities. For example, preliminary discovery revealed CISA's expanding efforts in combating misinformation, with a focus on the 2022 elections.⁶⁷⁴ As of August 12, 2022, Easterly was directing the “mission of Rumor Control” for the 2022 midterm elections,⁶⁷⁵ and CISA candidly reported to be “bee[ing] up [its] efforts to fight falsehoods[]” in preparation for the 2024 election cycle.⁶⁷⁶ Chan of the FBI also testified at his deposition that online disinformation continues to be discussed between the federal agencies and social-media companies at the USG Industry meetings, and Chan assumes that this will continue through the 2024 election cycle.⁶⁷⁷ All of this suggests that Plaintiffs are likely to prove that risk of future censorship injuries is more than merely speculative. Additionally, past decisions to suppress speech result in ongoing injury as long as the speech remains suppressed, and the past censorship experienced by individual Plaintiffs continues to inhibit their speech in the present. These injuries

are also affecting the rights of the Plaintiffs' audience members, including those in Plaintiff States, who have the First Amendment right to receive information free from Government interference.

Accordingly, and for the reasons stated above, the Court finds that Plaintiffs are likely to prove that a favorable decision would redress their injuries because those injuries are ongoing and substantially likely to reoccur.

iv. Recent United States Supreme Court cases of *Texas* and *Haaland*

Defendants cite to two recent cases from the Supreme Court of the United States which they claim undermine this Court's previous ruling about the Plaintiff States' likelihood of proving Article III standing.

*718 First, Defendants argue that *United States v. Texas*, No. 22-58, 599 U.S. 670, 143 S.Ct. 1964, 216 L.Ed.2d 624 (U.S. June 23, 2023), undermines the States' Article III standing. In *Texas*, Texas and Louisiana sued the Department of Homeland Security (the "Department"), as well as other federal agencies, claiming that the recently promulgated "Guidelines for the Enforcement of Civil Immigration Law" contravened two federal statutes. *Id.* at *2. The Supreme Court held that the states lacked Article III standing because "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." The Court further noted that the case was "categorically different" from other standing decisions "because it implicates only one discrete aspect of the executive power—namely, the Executive Branch's traditional discretion over whether to take enforcement actions against violators of federal law." *Id.* at *2, *8 (citations omitted).

Here, the Plaintiff States are not asserting a theory that the Defendants *failed* to act in conformity with the Constitution. To the contrary, the Plaintiff States assert that Defendants have affirmatively violated their First Amendment right to free speech. The Plaintiff States allege and (as extensively detailed above) are likely to prove that the Defendants caused direct injury to the Plaintiff States by significantly encouraging and/or coercing social-media companies to censor posts made on social-media. Further, as noted in this Court's previous ruling, the Plaintiff States are likely to have Article III standing because a significant portion of the

Plaintiff States' population has been prevented from engaging with the posts censored by the Defendants. The Supreme Court noted that "when the Executive Branch elects not to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property, and thus does not infringe upon interests that courts are often called upon to protect." *Id.* at *5. Here, federal officials allegedly did exercise coercive power, and the Plaintiffs are likely to prevail on their claim that the Defendants violated the First Amendment rights of the Plaintiff States, their citizens, and the Individual Plaintiffs.

Defendants contend that the Supreme Court in *Texas* narrowed the application of special solicitude afforded to states because the Supreme Court noted that the standing analysis in *Massachusetts* "d[id] not control" because "[t]he issue there involved a challenge to the denial of a statutorily authorized petition for rulemaking," rather than the exercise of enforcement discretion. *Id.* at *8 n.6. This Court disagrees with Defendants on that point. As noted by Plaintiffs, the majority opinion in *Texas* does not mention special solicitude. Further, this Court noted in its previous analysis of standing that the Plaintiff States could satisfy Article III's standing requirements without special solicitude. Therefore, even to the extent this Court "leaves that idea on the shelf," as suggested in Justice Gorsuch's concurrence, the Court nonetheless finds that the Plaintiff States are likely to prove Article III standing.

Defendants also argue that the Supreme Court's recent ruling in *Haaland v. Brackeen*, No. 21-376, 599 U.S. 255, 143 S.Ct. 1609, 216 L.Ed.2d 254 (U.S. June 15, 2023), undermines the Plaintiff States' Article III standing. In *Haaland*, the Supreme Court ruled that Texas did not possess standing to challenge the placement provisions of the Indian Child Welfare Act, which prioritizes Indian families in custody disputes involving Indian children. *Id.* at *19. The Supreme Court reasoned that the states in *719 *Texas* could not "assert equal protection claims on behalf of its citizens because '[a] State does not have standing as *parens patriae* to bring an action against the Federal Government.'" *Id.* (quoting *Snapp*, 458 U.S. at 610 n.16, 102 S.Ct. 3260). The Defendants argue that this statement precludes *parens patriae* standing in the present case.⁶⁷⁸ However, in its brief discussion regarding *parens patriae* standing, the *Haaland* Court quoted footnote 16 from *Snapp*, which, in turn, reiterated the "Mellon bar." *Haaland*, 2023 WL 4002951, at *19; *Snapp*, 458 U.S. at 610 n.16, 102 S.Ct. 3260 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 485–86, 43 S.Ct. 597, 67 L.Ed. 1078 (1923)).

Plaintiffs correctly note that, although both cases employ broad language, neither *Haaland* nor *Snapp* elaborate on the extent of the “Mellon bar.” Moreover, the Supreme Court has clarified in other instances that *parens patriae* suits are permitted against the federal government outside the scope of the Mellon bar. See *Massachusetts v. EPA*, 549 U.S. at 520 n.17, 127 S.Ct. 1438, (explaining the “critical difference” between barred *parens patriae* suits by Mellon and allowed *parens patriae* suits against the federal government).

Consistent with *Massachusetts v. EPA*, this Court has previously determined that the Mellon bar applies to “third-party *parens patriae* suits,” but not to “quasi-sovereign-interest suits.”⁶⁷⁹ In *Haaland*, Texas presented a “third-party *parens patriae* suit,” as opposed to a “quasi-sovereign-interest suit,” as it asserted the equal protection rights of only a small minority of its population (i.e., non-Indian foster or adoptive parents seeking to foster or adopt Indian children against the objections of relevant Indian tribes), which clearly did not qualify as a quasi-sovereign interest. See *Haaland*, 2023 WL 4002951, at *19 & n.11). Here, however, Louisiana and Missouri advocate for the rights of a significant portion of their populations, specifically the hundreds of thousands or millions of citizens who are potential audience members affected by federal social-media speech suppression.

Furthermore, when the *Haaland* Court determined that Texas lacked third-party standing, it stressed that Texas did not have either a “‘concrete injury’ to the State” or any hindrance to the third party’s ability to protect its own interests. *Id.* at *19 n.11 (quoting *Georgia v. McCollum*, 505 U.S. 42, 55–56, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992)). Here, by contrast, the Plaintiff States have demonstrated a likelihood of succeeding on their claims that they have suffered, and likely will continue to suffer, numerous concrete injuries resulting from federal social-media censorship.⁶⁸⁰ Additionally, the ability of the third parties in this case to protect their own interests is hindered because the diffuse First Amendment injury experienced by each individual audience member in Louisiana and Missouri lacks sufficient economic impact to encourage litigation through numerous individual lawsuits. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

Defendants further contend that *Haaland* rejected Texas’s argument regarding the ICWA’s placement provisions requiring Texas to compromise its commitment to being impartial in child-custody proceedings.⁶⁸¹ However, the Supreme Court *720 rejected this argument for a specific

reason: “Were it otherwise, a State would always have standing to bring constitutional challenges when it is complicit in enforcing federal law.” *Haaland*, 2023 WL 4002951, at *19. By contrast, Missouri and Louisiana do not assert that the federal government mandates their complicity in enforcing federal social-media-censorship regimes. The Plaintiff States instead assert that they, along with a substantial portion of their populations, have been injured by Defendants’ actions.

Neither *Texas* nor *Haaland* undermine this Court’s previous ruling that the Plaintiff States have Article III standing to sue Defendants in the instant case. Further, the evidence produced thus far through limited discovery demonstrates that Plaintiffs are likely to succeed on their First Amendment claims. Accordingly, the Court finds that Plaintiffs are likely to prove all elements of Article III standing, and therefore, are likely to establish that this Court has jurisdiction.

2. Irreparable Harm

[53] [54] [55] The second requirement for a Preliminary Injunction is a showing of irreparable injury: plaintiffs must demonstrate “a substantial threat of irreparable injury” if the injunction is not issued. *Texas*, 809 F.3d at 150. For injury to be “irreparable,” plaintiffs need only show it cannot be undone through monetary remedies. *Burgess v. Fed. Deposit Inc., Corp.*, 871 F.3d 297, 304 (5th Cir. 2017). Deprivation of a procedural right to protect a party’s concrete interests is irreparable injury. *Texas v. Equal Employment Opportunity Commission*, 933 F.3d 433, 447 (5th Cir. 2019). Additionally, violation of a First Amendment constitutional right, even for a short period of time, is always irreparable injury. *Elrod*, 427 U.S. at 373, 96 S.Ct. 2673.

Plaintiffs argue in their memorandum that the First Amendment violations are continuing and/or that there is a substantial risk that future harm is likely to occur. In contrast, Defendants argue that Plaintiffs are unable to show imminent irreparable harm because the alleged conduct occurred in the past, is not presently occurring, and is unlikely to occur in the future. Defendants argue Plaintiffs rely upon actions that occurred approximately one year ago and that it cannot be remedied by any prospective injunctive relief. Further, Defendants argue that there is no “imminent harm” because the COVID-19 pandemic is over and because the elections where the alleged conduct occurred are also over.

[56] The Court finds that Plaintiffs have demonstrated a “significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm.” *Humana, Inc., v. Jackson*, 804 F.2d 1390, 1394 (5th Cir. 1986). To demonstrate irreparable harm at the preliminary injunction stage, Plaintiffs must adduce evidence showing that the irreparable injury is likely to occur during the pendency of the litigation. *Justin Indus. Inc., v. Choctaw Secs., L.P.*, 920 F.2d 262, 268 n. 7 (5th Cir. 1990). This Plaintiffs have done.

Defendants argue that the alleged suppression of social-media content occurred in response to the COVID-19 pandemic and attacks on election infrastructure, and therefore, the alleged conduct is no longer occurring. Defendants point out that the alleged conduct occurred between one to three years ago. However, the information submitted by Plaintiffs was at least partially based on preliminary injunction-related discovery⁶⁸² and third-party subpoena requests that were submitted to five social-media *721 platforms on or about July 19, 2022.⁶⁸³ The original Complaint⁶⁸⁴ was filed on May 5, 2022, and most of the responses to preliminary injunction-related discovery provided answers to discovery requests that occurred before the Complaint was filed. Since completion of preliminary-injunction related discovery took over six months, most, if not all, of the information obtained would be at least one year old.

[57] Further, the Defendants’ decision to stop some of the alleged conduct does not make it any less relevant. A defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the alleged wrongful behavior could not reasonably be expected to recur. *Already, LLC v. Nike*, 568 U.S. 85, 91, 133 S.Ct. 721, 184 L.Ed.2d 553 (2013). Defendants have not yet met this burden here.

Defendants also argue that, due to the delay in the Plaintiffs seeking relief,⁶⁸⁵ the Plaintiffs have not shown “due diligence” in seeking relief. However, this Court finds that Plaintiffs have exercised due diligence. This is a complicated case that required a great deal of discovery in order to obtain the necessary evidence to pursue this case. Although it has taken several months to obtain this evidence, it certainly was not the fault of the Plaintiffs. Most of the information Plaintiffs needed was unobtainable except through discovery.

Defendants further argue the risk that Plaintiffs will sustain injuries in the future is speculative and depends upon the

action of the social-media platforms. Defendants allege the Plaintiffs have therefore not shown imminent harm by any of the Defendants.

In *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (“SBA List”), the Supreme Court held that, for purposes of an Article III injury-in-fact, an allegation of future injury may suffice if there is “a ‘substantial risk’ that the harm will occur.” (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408, 133 S.Ct. 1138, 185 L.Ed.2d 264, (2013)). In *SBA List*, a petitioner challenged a statute that prohibited making certain false statements during the course of a political campaign. *Id.* at 151–52, 134 S.Ct. 2334. In deciding whether the pre-enforcement challenge was justiciable—and in particular, whether it alleged a sufficiently imminent injury for purposes of Article III—the Court noted that pre-enforcement review is warranted under circumstances that render the threatened enforcement “sufficiently imminent.” *Id.* at 159, 134 S.Ct. 2334. Specifically, the Court noted that past enforcement is “good evidence that the threat of enforcement is not ‘chimerical.’ ” *Id.* at 164, 134 S.Ct. 2334 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974)).

Similarly, in *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 302, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979), the Supreme Court held that a complaint alleges an Article III injury-in-fact where fear of future injury is not “imaginary or wholly speculative.” In *Babbitt*, the Supreme Court considered a pre-enforcement challenge to a statute that made it an unfair labor practice to encourage consumers to boycott using “dishonest, untruthful, and deceptive publicity.” *Id.* at 301, 99 S.Ct. 2301. Because the plaintiffs had engaged in consumer publicity campaigns in the past and alleged an intention to continue those campaigns in the future, the Court held that their challenge to the consumer publicity provision presented an Article III *722 case or controversy. *Id.* at 302, 99 S.Ct. 2301; see also *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 386, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (where the Supreme Court held that booksellers could seek pre-enforcement review of a law making it a crime to “knowingly display for commercial purpose” material that is “harmful to juveniles,” as defined by the statute).

Therefore, the question is whether Plaintiffs have alleged a “substantial risk” that harm may occur, which is not “imaginary or wholly speculative.” This Court finds that the alleged past actions of Defendants show a substantial risk of

harm that is not imaginary or speculative. *SBA List*, 573 U.S. at 164, 134 S.Ct. 2334. Defendants apparently continue to have meetings with social-media companies and other contacts.⁶⁸⁶

Although the COVID-19 pandemic is no longer an emergency, it is not imaginary or speculative to believe that in the event of any other real or perceived emergency event, the Defendants would once again use their power over social-media companies to suppress alternative views. And it is certainly not imaginary or speculative to predict that Defendants could use their power over millions of people to suppress alternative views or moderate content they do not agree with in the upcoming 2024 national election. At oral arguments Defendants were not able to state that the “switchboarding” and other election activities of the CISA Defendants and the State Department Defendants would not resume prior to the upcoming 2024 election;⁶⁸⁷ in fact, Chan testified post 2020, “we’ve never stopped.”⁶⁸⁸ Notably, a draft copy of the DHS’s “Quadrennial Homeland Security Review,” which outlines the department’s strategy and priorities in upcoming years, states that the department plans to target “inaccurate information” on a wide range of topics, including the origins of the COVID-19 pandemic, the efficacy of COVID-19 vaccines, racial justice, the U.S. withdrawal from Afghanistan, and the return of U.S. Support of Ukraine.⁶⁸⁹

The Plaintiffs are likely to succeed on the merits in their claims that there is a substantial risk that harm will occur, that is not imaginary or speculative. Plaintiffs have shown that not only have the Defendants shown willingness to coerce and/or to give significant encouragement to social-media platforms to suppress free speech with regard to the COVID-19 pandemic and national elections, they have also shown a willingness to do it with regard to other issues, such as gas prices,⁶⁹⁰ parody speech,⁶⁹¹ calling the President a liar,⁶⁹² climate change,⁶⁹³ gender,⁶⁹⁴ and abortion.⁶⁹⁵ On June 14, 2022, White House National Climate Advisor Gina McCarthy, at an Axios event entitled, “A Conversation on Battling Disinformation,” was quoted as saying, “We have to get together; we have to get better at communicating, and frankly, the tech companies have to stop allowing specific individuals over and over to spread disinformation.”⁶⁹⁶

*723 The Complaint (and its amendments) shows numerous allegations of apparent future harm. Plaintiff Bhattacharya alleges ongoing social-media censorship.⁶⁹⁷

Plaintiff Kulldorff alleges an ongoing campaign of censorship against the GBD and his personal social-media accounts.⁶⁹⁸ Plaintiff Kheriaty also alleges ongoing and expected future censorship,⁶⁹⁹ noting “shadow-banning” his social-media account is increasing and has intensified since 2022.⁷⁰⁰ Plaintiffs Hoft and Hines also allege ongoing and expected future censorship injuries.⁷⁰¹ It is not imaginary or speculative that the Defendants will continue to use this power. It is likely.

The Court finds that Plaintiffs are likely to succeed on their claim that they have shown irreparable injury sufficient to satisfy the standard for the issuance of a preliminary injunction.

3. Equitable Factors and Public Interest

[58] [59] Thus far, Plaintiffs have satisfied the first two elements to obtain a preliminary injunction. The final two elements they must satisfy are that the threatened harm outweighs any harm that may result to the Federal Defendants and that the injunction will not undermine the public interest. *Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997). These two factors overlap considerably. *Texas*, 809 F.3d at 187. In weighing equities, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). The public interest factor requires the court to consider what public interests may be served by granting or denying a preliminary injunction. *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 997–98 (8th Cir. 2011).

[60] Defendants maintain their interest in being able to report misinformation and warn social-media companies of foreign actors’ misinformation campaigns outweighs the Plaintiffs’ interest in the right of free speech. This Court disagrees and finds the balance of equities and the public interest strongly favors the issuance of a preliminary injunction. The public interest is served by maintaining the constitutional structure and the First Amendment free speech rights of the Plaintiffs. The right of free speech is a fundamental constitutional right that is vital to the freedom of our nation, and Plaintiffs have produced evidence of a massive effort by Defendants, from the White House to federal agencies, to suppress speech based on its content. Defendants’ alleged suppression has

potentially resulted in millions of free speech violations. Plaintiffs' free speech rights thus far outweighs the rights of Defendants, and thus, Plaintiffs satisfy the final elements needed to show entitlement to a preliminary injunction.

4. Injunction Specificity

[61] Lastly, Defendants argue that Plaintiff's proposed preliminary injunction lacks the specificity required by **Federal Rule of Civil Procedure 65** and is impermissibly overbroad. **Rule 65(d)(1)** requires an injunction to "state its terms specifically" and to "describe in reasonable detail the acts or acts restrained or required." The specificity provisions of **Rule 65(d)** are designed to prevent uncertainty and confusion *724 on the part of those faced with injunction orders and to avoid possible contempt based upon a decree too vague to be understood. *Atiyeh v. Capps*, 449 U.S. 1312, 1316–17, 101 S.Ct. 829, 66 L.Ed.2d 785 (1981). An injunction must be narrowly tailored to remedy the specific action that gives rise to the injunction. *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016).

This Court believes that an injunction can be narrowly tailored to only affect prohibited activities, while not prohibiting government speech or agency functions. Just because the injunction may be difficult to tailor is not an excuse to allow potential First Amendment violations to continue. Thus, the Court is not persuaded by Defendants arguments here.

Because Plaintiffs have met all the elements necessary to show entitlement to a preliminary injunction, this Court shall issue such injunction against the Defendants described above.

IV. CLASS CERTIFICATION

In their Third Amended Complaint, the Individual Plaintiffs purport to bring a class action "on behalf of themselves and two classes of other persons similarly situated to them."⁷⁰² Plaintiffs go on to describe the two proposed classes, as well as state generally that each requirement for class certification is met.⁷⁰³ Defendants opposed Plaintiffs' request for class certification in their Response to Plaintiffs' Motion for Class Certification and for Leave to File Third Amended Complaint.⁷⁰⁴

The Court is obligated to analyze whether this litigation should proceed as a class action. See *Castano v. Am. Tobacco*

Co., 84 F.3d 734, 740 (5th Cir. 1996) ("A district court must conduct a rigorous analysis of the **rule 23** prerequisites before certifying a class."). Pursuant to this obligation, the Court questioned counsel at the hearing on the preliminary injunction as to the basis for class certification. As explained in further detail below, the Court finds that Plaintiffs failed to meet their burden of proof, and class certification is improper here.

A. Class Certification Standard under **FRCP 23**

[62] "The decision to certify is within the broad discretion of the court, but that discretion must be exercised within the framework of **rule 23**." *Id.* at 740. "The party seeking certification bears the burden of proof." *Id.*

Federal Rule of Civil Procedure 23(a) lays out the four key prerequisites for a class action. It states:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

[63] In addition to the enumerated requirements above, Plaintiffs must propose a class that has an objective and precise definition. "The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of **Federal Rule of Civil Procedure 23**." *725 *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007).

"In addition to satisfying **Rule 23(a)**'s prerequisites, parties seeking class certification must show that the action is maintainable under **Rule 23(b)(1), (2), or (3)**." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Here, Plaintiffs specifically bring this class action under **Rule 23(b)(2)**, which allows for maintenance of a class action where "the party opposing

the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” *Fed. R. Civ. P.* 23(b)(2). “Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples” of Rule 23(b)(2) class actions. *Amchem Prod., Inc.*, 521 U.S. at 614, 117 S.Ct. 2231.

Notably, the Fifth Circuit recently held that a standing analysis is necessary before engaging in the class certification analysis. *Angell v. GEICO Advantage Ins. Co.*, 67 F.4th 727, 733 (5th Cir. 2023). However, because this Court has already completed multiple standing analyses in this matter, and because the Court ultimately finds that the class should not be certified, the Court will not address which standing test should be applied to this specific issue.

B. Analysis

In order to certify this matter as a class action, the Court must find that Plaintiffs have established each element of Rule 23(a). See *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414–15 (5th Cir. 2004) (“All classes must satisfy the four baseline requirements of rule 23(a): numerosity, commonality, typicality, and adequacy of representation.”). The Court finds that Plaintiffs failed to meet their burden, and therefore, the Court will not certify the class action.

1. Class Definition

Plaintiffs propose two classes to proceed with their litigation as a class action. First, Plaintiffs define Class 1 as follows:

The class of social-media users who have engaged or will engage in, or who follow, subscribe to, are friends with, or are otherwise connected to the accounts of users who have engaged or will engage in, speech on any social-media company's platform(s) that has been or will be removed; labelled; used as a basis for suspending, deplatforming, issuing strike(s) against, demonetizing, or taking other adverse action against the speaker; downranked; deboosted; concealed; or otherwise suppressed by the platform after Defendants and/or those acting in concert with them flag or flagged the speech to the platform(s) for suppression.⁷⁰⁵

Next, Plaintiffs define Class 2 as follows:

The class of social-media users who have engaged in or will engage in, or who follow, subscribe to, are friends with, or are otherwise connected to the accounts of users who have engaged in or will engage in, speech on any social-media company's platform(s) that has been or will be removed; labelled; used as a basis for suspending, deplatforming, issuing strike(s) against, demonetizing, or taking other adverse action against the speaker; downranked; deboosted; concealed; or otherwise suppressed by the company pursuant to any change to the company's policies or enforcement practices that Defendants and/or those acting in concert with them have induced or will induce the company to make.⁷⁰⁶

*726 [64] [65] “It is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable.” *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). The Court finds that the class definitions provided by Plaintiffs are neither “adequately defined” nor “clearly ascertainable.” Simply put, there is no way to tell just how many people or what type of person would fit into these proposed classes. The proposed class definitions are so broad that almost every person in America, and perhaps in many other countries as well, could fit into the classes. The Court agrees with Defendants that the language used is simply too vague to maintain a class action using these definitions.⁷⁰⁷ Where a class definition is, as here, “too broad and ill-defined” to be practicable, the class should not be certified. See *Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n*, 70 F.4th 914, 933 (5th Cir. 2023).

Further, no evidence was produced at the hearing on the motion for preliminary injunction that “would have assisted the district court in more accurately delineating membership in a workable class.” *DeBremaecker*, 433 F.2d at 734. The Court questioned Plaintiffs’ counsel about the issues with the proposed class definitions, but counsel was unable to provide a solution that would make class certification feasible here. Counsel for Plaintiffs stated that “the class definition is sufficiently precise,” but the Court fails to see how that is so, and counsel did not explain any further.⁷⁰⁸ Counsel for Plaintiffs focused on the fact that the proposed class action falls under Rule 23(b)(2), providing for broad injunctive relief, and therefore, counsel argued that the Court would not need to “figure out every human being in the United States of American [sic] who was actually adversely affected.”⁷⁰⁹ Even if the Court does not need to identify every potential class member individually, the Court still needs to be able to

state the practical bounds of the class definition—something it cannot do with the loose wording given by Plaintiffs.

Without a feasible class definition, the Court cannot certify Plaintiffs' proposed class action. Out of an abundance of caution, however, the Court will address the other enumerated prerequisites of Rule 23(a) below.

2. Numerosity

The numerosity requirement mandates that a class be “so large that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “Although the number of members in a proposed class is not determinative of whether joinder is impracticable,” classes with a significantly high number of potential members easily satisfy this requirement. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (finding class of 100 to 150 members satisfied the numerosity requirement). Other factors, such as “the geographical dispersion of the class” and “the nature of the action,” may also support a finding that the numerosity element has been met. *Id.* at 624–25.

[66] Here, Plaintiffs state that both Class 1 and Class 2 are “sufficiently numerous that joinder of all members is impracticable.”⁷¹⁰ Plaintiffs reference the “content of hundreds of users with, collectively, hundreds of thousands or millions of followers” who were affected by Defendants’ alleged censorship.⁷¹¹ Thus, based on a surface-level look at potential class *727 members, it appears that the numerosity requirement would be satisfied because the class members’ numbers reach at least into the thousands, if not the millions.

However, the numerosity requirement merely serves to highlight the same issue described above: the potential class is simply too broad to even begin to fathom who would fit into the class. Joinder of all the potential class members is more than impractical—it is impossible. Thus, while the sheer number of potential class members may tend towards class certification, the Court is only further convinced by Plaintiffs’ inability to estimate the vast number of class members that certification is improper here.

3. Commonality

[67] The commonality requirement ensures that there are “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). “The test for commonality is not demanding and is met ‘where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.’ ” *Mullen*, 186 F.3d at 625 (quoting *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997)).

Here, Plaintiffs state that both classes share common questions of law or fact, including “the question whether the government is responsible for a social-media company’s suppression of content that the government flags to the company for suppression” for Class 1 and “the question whether the government is responsible for a social-media company’s suppression of content pursuant to a policy or enforcement practice that the government induced the company to adopt or enforce” for Class 2.⁷¹² These questions of law are broadly worded and may not properly characterize the specific issues being argued in this case.

[68] At the hearing for the preliminary injunction, Plaintiffs’ counsel clarified that the alleged campaign of censorship “involve[es] a whole host of common questions whose resolution are going to determine whether or not there’s a First Amendment violation.”⁷¹³ The Court agrees that there is certainly a common question of First Amendment law that impacts each member of the proposed classes, but notes Defendants’ well-reasoned argument that Plaintiffs may be attempting to aggregate too many questions into one class action.⁷¹⁴ The difficulty of providing “a single, class-wide answer,” as highlighted by Defendants, further proves to this Court that class certification is likely not the best way to proceed with this litigation.⁷¹⁵ Although commonality is a fairly low bar, the Court is not convinced Plaintiffs have met their burden on this element of Rule 23(a).

4. Typicality

[69] The typicality requirement mandates that named parties’ claims or defenses “are typical … of the class.” Fed. R. Civ. P. 23(a)(3). “Like commonality, the test for typicality is not demanding.” *Mullen*, 186 F.3d at 625. It “focuses on the similarity between the named plaintiffs’ legal and remedial theories and the theories of those whom they purport to represent.” *Lightbourn*, 118 F.3d at 426.

Here, Plaintiffs assert that the Individual Plaintiffs' claims are typical of both Class 1 and Class 2 members' claims because they "all arise from the same course of conduct by Defendants ... namely, the theory that such conduct violates the First Amendment."⁷¹⁶ Further, Plaintiffs state *728 that the Individual Plaintiffs "are not subject to any affirmative defenses that are inapplicable to the rest of the class and likely to become a major focus of the case."⁷¹⁷

[70] While the general claims of each potential class member would arise from the Defendants' alleged First Amendment violations, the Individual Plaintiffs have not explained how their claims are typical of each proposed class specifically. For example, Class 2 includes those social-media users who "follow, subscribe to, are friends with, or are otherwise connected to the accounts of users" subject to censorship.⁷¹⁸ While the Individual Plaintiffs detail at length their own censorship, they do not clarify how they have been harmed by the censorship of other users. Again, this confusion highlights the myriad issues with this proposed class action as a result of the ill-defined and over-broad class definitions. The Court cannot make a finding that the Individual Plaintiffs' claims are typical of all class members' claims, simply because the Court cannot identify who would fit in the proposed class. Merely stating that the Rule 23(a) requirements have been met is not enough to persuade this Court that the class should be certified as stated.

5. Adequate Representation

[71] The final element of a class certification analysis requires that the class representatives "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Differences between named plaintiffs and class members render the named plaintiffs' inadequate representatives only if those differences create conflicts between the named plaintiffs' interests and the class members' interests." *Mullen*, 186 F.3d at 626.

On this element, Plaintiffs state that they "are willing and able to take an active role in the case, control the course of litigation, and protect the interest of absentees in both classes."⁷¹⁹ Plaintiff also state that "[n]o conflicts of interest currently exist or are likely to develop" between themselves and the absentees.⁷²⁰ This element is likely met, without evidence to the contrary.

However, without a working class definition, and with the issues concerning the other Rule 23(a) elements discussed above, the Court finds class certification inappropriate here, regardless of the adequacy of the Individual Plaintiffs' representation. Thus, for the foregoing reasons, the Court declines to certify this matter as a class action.

V. CONCLUSION

Once a government is committed to the principle of silencing the voice of opposition, it has only one place to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear.

Harry S. Truman

The Plaintiffs are likely to succeed on the merits in establishing that the Government has used its power to silence the opposition. Opposition to COVID-19 vaccines; opposition to COVID-19 masking and lockdowns; opposition to the lab-leak theory of COVID-19; opposition to the validity of the 2020 election; opposition to President Biden's policies; statements that the Hunter Biden laptop story was true; and opposition to policies of the government officials in power. All were suppressed. It is quite telling that each example *729 or category of suppressed speech was conservative in nature. This targeted suppression of conservative ideas is a perfect example of viewpoint discrimination of political speech. American citizens have the right to engage in free debate about the significant issues affecting the country.

Although this case is still relatively young, and at this stage the Court is only examining it in terms of Plaintiffs' likelihood of success on the merits, the evidence produced thus far depicts an almost dystopian scenario. During the COVID-19 pandemic, a period perhaps best characterized by widespread doubt and uncertainty, the United States Government seems to have assumed a role similar to an Orwellian "Ministry of Truth."⁷²¹

The Plaintiffs have presented substantial evidence in support of their claims that they were the victims of a far-reaching and widespread censorship campaign. This court finds that they are likely to succeed on the merits of their First Amendment free speech claim against the Defendants. Therefore, a preliminary injunction should issue immediately against the Defendants as set out herein. The Plaintiffs Motion for Preliminary Injunction [Doc. No. 10] is **GRANTED IN PART and DENIED IN PART**.

The Plaintiffs' request to certify this matter as a class action pursuant to Fed. R. Civ. P. Article 23(b)(2) is **DENIED**.

All Citations

680 F.Supp.3d 630, 116 Fed.R.Serv.3d 559

Footnotes

1 Plaintiffs consist of the State of Missouri, the State of Louisiana, Dr. Aaron Kheriaty ("Kheriaty"), Dr. Martin Kulldorff ("Kulldorff"), Jim Hoft ("Hoft"), Dr. Jayanta Bhattacharya ("Bhattacharya"), and Jill Hines ("Hines").

2 Defendants consist of President Joseph R Biden ("President Biden"), Jr, Karine Jean-Pierre ("Jean-Pierre"), Vivek H Murthy ("Murthy"), Xavier Becerra ("Becerra"), Dept of Health & Human Services ("HHS"), Dr. Hugh Auchincloss ("Auchincloss"), National Institute of Allergy & Infectious Diseases ("NIAID"), Centers for Disease Control & Prevention ("CDC"), Alejandro Mayorkas ("Mayorkas"), Dept of Homeland Security ("DHS"), Jen Easterly ("Easterly"), Cybersecurity & Infrastructure Security Agency ("CISA"), Carol Crawford ("Crawford"), United States Census Bureau ("Census Bureau"), U. S. Dept of Commerce ("Commerce"), Robert Silvers ("Silvers"), Samantha Vinograd ("Vinograd"), Ali Zaidi ("Zaidi"), Rob Flaherty ("Flaherty"), Dori Salcido ("Salcido"), Stuart F. Delery ("Delery"), Aisha Shah ("Shah"), Sarah Beran ("Beran"), Mina Hsiang ("Hsiang"), U. S. Dept of Justice ("DOJ"), Federal Bureau of Investigation ("FBI"), Laura Dehmlow ("Dehmlow"), Elvis M. Chan ("Chan"), Jay Dempsey ("Dempsey"), Kate Galatas ("Galatas"), Katharine Dealy ("Dealy"), Yolanda Byrd ("Byrd"), Christy Choi ("Choi"), Ashley Morse ("Morse"), Joshua Peck ("Peck"), Kym Wyman ("Wyman"), Lauren Protentis ("Protentis"), Geoffrey Hale ("Hale"), Allison Snell ("Snell"), Brian Scully ("Scully"), Jennifer Shopkorn ("Shopkorn"), U. S. Food & Drug Administration ("FDA"), Erica Jefferson ("Jefferson"), Michael Murray ("Murray"), Brad Kimberly ("Kimberly"), U. S. Dept of State ("State"), Leah Bray ("Bray"), Alexis Frisbie ("Frisbie"), Daniel Kimmage ("Kimmage"), U. S. Dept of Treasury ("Treasury"), Wally Adeyemo ("Adeyemo"), U. S. Election Assistance Commission ("EAC"), Steven Frid ("Frid"), and Kristen Muthig ("Muthig").

3 [Doc. No. 252]

4 [Doc. No. 256]

5 [Doc. No. 262]

6 [Doc. No. 10-3 and 10-4]

7 [Doc. No. 10-4]

8 [Doc. No. 10-3]

9 [Id.]

10 [Id.]

11 [Doc. No. 10-12]

12 [Id.]

13 [Doc. No. 10-7]

14 [Doc. No. 1]

15 [Doc. No. 45]

16 [Doc. No. 84]

17 [Doc. No. 268]

18 The Factual Background is this Court's interpretation of the evidence. The Defendants filed a 723-page Response to Findings of Fact [Doc. No. 266-8] which contested the Plaintiffs' interpretation or characterizations of the evidence. At oral argument, the Defendants conceded that they did not dispute the validity or **authenticity** of the evidence presented.

19 [Doc. No. 212-3, citing Doc. No. 10-1, at 202]

20 White House Defendants consists of President Joseph R. Biden ("President Biden"), White House Press Secretary Karine Jean-Pierre ("Jean-Pierre"), Ashley Morse ("Morse"), Deputy Assistant to the President and Director of Digital Strategy Rob Flaherty ("Flaherty"), Dori Salcido ("Salcido"), Aisha Shah ("Shah"), Sarah Beran ("Beran"), Stuart F. Delery ("Delery"), Mina Hsiang ("Hsiang"), and Dr. Hugh Auchincloss ("Dr. Auchincloss")

21 [Doc. No. 174-1, Exh. A. at 1]

22 [Id. at 2]

23 [Doc. No. 174-1, Exh. A. at 4]

24 [Doc. No. 174-1 at 3]

25 [Id. at 5–8]

26 [Id. at 6–8]

27 [Id.]

28 [Id.]

29 [Id.]

30 [Id. at 6]

31 [Id. at 5]

32 [Doc. No. 214-9 at 2–3]

33 [Id.]

34 [Doc. No. 214-10 at 2, Jones Declaration, #10, Exh. H] SEALED DOCUMENT

35 [Doc. No. 71-4 at 6–11]

36 [Id. at 10] (emphasis added)

37 [Doc. No. 174-1 at 9]

38 [Id.]

39 [Id. at 11]

40 [Id. at 11–12]

41 [Id.]

42 [Id. at 11]

43 [Id. at 11]

44 [Id. at 11]

45 [Id. at 10]

46 [Id. at 15]

47 [Id.]

48 [Id. at 15]

49 [Id. at 15]

50 [Id.]

51 [Id.]

52 [Id.]

53 [Id. at 14]

54 [Id. at 17]

55 [Id. at 17]

56 [Id. at 17–21]

57 [Id. at 17]

58 [Id. at 22]

59 [Id. at 22]

60 [Id. at 23]

61 [Id. at 30–31]

62 [Id. at 31]

63 [Id. at 31–32]

64 [Id. at 24–25]

65 [Id.]

66 [Id. at 24–25]

67 [Id. at 24]

68 [Id. at 25–27]

69 [Id. at 34]

70 [Id. at 33]

71 [Id. at 36]

72 [Id. at 33–34]

73 [Id.]

74 [Id. at 33]

75 [Id.]

76 [Id. at 33, 36]

77 [Doc. No. 71-7 at 86].

78 [Doc. No. 212-14 at 2–5]

79 [Id.]

80 [Doc. No. 212-14, Exh. J, at 2–5]

81 [Doc. No. 212-15, Exh. K, at 1–4] SEALED DOCUMENT

82 [Doc. No. 174-1 at 39-40]

83 [Id.]

84 [Id.]

85 [Doc. No. 174-1 at 39–40]

86 [Id. at 39]

87 [Id.]

88 [Doc. No. 214-1 at 39–40]

89 [Id. at 39–40]

90 [Doc. No. 214-14 at 2–3]

91 [Id.]

92 [Doc. No. 214-14 at 2–3, Jones Declaration]

93 [Doc. No. 214-1]

94 [Doc. No. 214-1 at ¶ 116].

95 [Doc. No. 174-1 at 41–42]

96 [Doc. No. 174-1 at 41–42].

97 [Id.]

98 [Id. at 42]

99 [Doc. No. 266-6 at 374]

100 [Id.]

101 [Doc. No. 174-1 at 41]

102 [Id.]

103 [Id. at 55]

104 [Doc. No. 210-1 at 16 (Waldo Depo, Exh. 10)]

105 [Id. at 162]

106 [Doc. No. 10-1 at 370]

107 [Id. at 376–77]

108 [Id. at 377–78]

109 [Doc. No. 10-1 at 370]

110 [Id. at 436–37]

111 [Doc. No. 10-1 at 446]

112 [Doc. No. 10-1 at 477–78]

113 [Id.]

114 [Doc. No. 10-1 at 483–85]

115 [Doc. No. 214-12 at 2–5]

116 [Doc. No. 174-1 at 49]

117 [Doc. No. 174-1 at 59–67]

118 [Id.]

119 [Id.]

120 [Id.]

121 [Id. at 59–67]

122 [Doc. No. 71-3 at 10–11]

123 [Doc. No. 71-3 at 10–11]

124 [Doc. No. 174-1 at 69]

125 [Doc. No. 10-1 at 501–2]

126 [Id. at 62–63, ¶¶ 193–197]

127 [Doc. No. 71-3 at 5–6]

128 [Doc. No. 214-15]

129 [Doc. No. 214-15]

130 [Id.]

131 [Doc. No. 214-16]

132 [Doc. No. 214-18]

133 [Doc. No. 174-1 at 68]

134 [Id.]

135 Surgeon General Defendants consists of Dr. Vivek H. Murthy (“Murthy”) and Katharine Dealy (“Dealy”).

136 [Doc. No. 210]

137 [Doc. No. 210 at 11, 20]

138 [Id. at 25, 28]

139 [Id. at 11, 20, 25, 28]

140 [Id. at 33–35]

141 [Waldo depo at 14–17]

142 [Id. at 29]

143 [Id. at 91–94]

144 [Doc. No. 210 at 95–98]

145 [Id.]

146 [Doc. No. 210 at 95–98]

147 The Virality Project will be discussed later in greater detail.

148 [Id. at 36–38]

149 [Id. at 38]

150 [Id. at 39, 59, 85]

151 [Id.]

152 [Id. at 39, 59, 85]

153 [Id. at 43, 47]

154 [Id. at 66, 124–25]

155 [Id. at 66, 124–25]

156 [Id. at 55–56]

157 [Id. at 64–65]

158 [Doc. No. 210-4]

159 [Id. at 78, Exh. 3]

160 [Id. at 85]

161 [Id.]

162 [Id. at 95–98, 101, 105]

163 [Id. at 107–08]

164 [Doc. No. 210-4 at 33]

165 [Id.]

166 [Id. at 129]

167 [Doc. No. 210-1 at 138]

168 [Doc. No. 210-5 at 1–2]

169 [Doc. No. 210-6]

170 [Doc. No. 210-7 at 145–46]

171 [Id.]

172 [Doc. No. 210-8]

173 [Doc. No. 210-8].

174 [Doc. No. 210-11]

175 [Doc. No. 210-11]

176 [Doc. No. 210-11]

177 [Id.]

178 [Id.]

179 [Id.]

180 [Id.]

181 [Doc. No. 210-11]

182 [Id.]

183 [Id.]

184 [Id.]

185 [Doc. No. 210-13, Doc. No. 210, at 206–07].

186 [Doc. No. 210-1 at 213]

187 [Doc. No. 210-1 at 213]

188 [Doc. No. 210-15]

189 [Doc. No. 210-16]

190 [Doc. No. 210-17]

191 [Doc. No. 210-18]

192 [Id.]

193 [Id. at 4–5]

194 [Id.]

195 [Id.]

196 [Doc. No. 210-22 at 1–3]

197 [Doc. No. 210-21]

198 [Doc. No. 210-22 at 2]

199 [Doc. No. 210, Waldo depo. Exh 30, 31]

200 [Doc. No. 210, Waldo depo. at 257–58]

201 [Doc. No. 210, Exh. 22]

202 [Doc. No. 210, Exh. 31]

203 [Id.]

204 [Doc. No. 210, Exh. 33]

205 [Id.]

206 [Doc. No. 210, Exh. 38, Audio Transcript, at 7]

207 [Doc. No. 210–33]

208 [Doc. No. 210–34]

209 [Doc. No. 32. Ex. 42, 87 Fed. Reg. 12712]

210 [Id.]

211 [Id.]

212 [Id. Exh. 46, 47, 48, 49, 50, 51]

213 [Id.]

214 [Id. Exh. 51]

215 [Exh. 52]

216 The CDC Defendants consist of the Centers for Disease Control & Prevention, Carol Crawford (“Crawford”), Jay Dempsey (“Dempsey”), Kate Galatas (“Galatas”), United States Census Bureau (“Census Bureau”), Jennifer Shopkorn (“Shopkorn”), the Department of Health and Human Services (“HHS”), Xavier Becerra (“Becerra”), Yolanda Byrd (“Byrd”), Christy Choi (“Choi”), Ashley Morse (“Morse”), and Joshua Peck (“Peck”).

217 [Doc. No. 205-1]

218 [Doc. No. 266-5 at 57–61]

219 [Doc. No. 205-1 at 11]

220 [Id. at 249]

221 [Id. at 16–18]

222 [Id. at 20]

223 [Doc. 205-3 at 3]

224 [Id. at 1–2]

225 [Id. at 49–52]

226 [Doc. No. 205-1, Exh. 6 at 2]

227 [Id. at 49–52, 146–47]

228 [Doc. No. 205-4 at 1–2]

229 [Doc. No. 205-7 at 1–2]

230 [Doc. No. 205-1 at 154–55]

231 [Id. at 58]

232 [Id.]

233 [Doc. No. 205-1 at 226]

234 [Doc. No. 205-36]

235 [Doc. No. 205-1 at 226]

236 [Doc. No. 205-44 at 2–3]

237 [Doc. No. 205-1 at 258–61]

238 Twitter with White House

239 Twitter with White House

240 [Doc. No. 205-1 at 103]

241 [Id.]

242 [Doc. No. 205-34 at 3]

243 [Id. at 4]

244 [Id. at 6–14]

245 [Doc. No. 205-1 at 68–69]

246 [Doc. No. 205-9 at 1–4]

247 [Doc. No. 205-1 at 68–69]

248 [Doc. No. 205-1 at 71–72, 110]

249 [Doc. No. 205-9 at 1]

250 [Doc. No. 205-9 at 2]

251 [Id.]

252 [Doc. No. 205-9 at 1]

253 [Doc. No. 205-11 at 2]

254 [Doc. No. 205-38 at 2]

255 [Doc. No. 205-10 at 1–3]

256 [Doc. No. 205-1 at 88]

257 [[Id.](#)]

258 [Doc. No. 205-12 at 1]

259 [[Id.](#) at 2]

260 [Doc. No. 205-1 at 106]

261 [[Id.](#)]

262 [Doc. No. 205-12 at 1–2]

263 [Doc. No. 205-12 at 2]

264 [Doc. No. 205-26 at 1–4]

265 [Doc. No. 205-18]

266 [Doc. No. 205-1 at 140]

267 [Doc. No. 205-20 at 205–20]

268 [Doc. No. 205-21]

269 [Doc. No. 205-22]

270 [Doc. No. 205-21]

271 [Doc. No. 205-1 at 151–52]

272 [Doc. 205-23 at 1–2]

273 [[Id.](#)]

274 [Doc. No. 205–24]

275 [Doc. No. 205-26 at 1]

276 [[Id.](#) at 1–4]

277 [Doc. No. 205-28]

278 [Doc. No. 205-1 at 175]

279 [Doc. No. 214-22 Jones Dec. Exh. T] SEALED DOCUMENT

280 [[Id.](#)] SEALED DOCUMENT

281 [Doc. No. 205-1 at 179–82]

282 [Doc. No. 205-1 at 184–85]

283 [Doc. No. 205-1 at 180]

284 [Id. at 181]

285 [Doc. No. 205-40]

286 [Doc. No. 205-1 at 246, 265–66]

287 [Doc. No. 214-23 at 4–5] SEALED DOCUMENT

288 [Doc. No. 214-24 at 3–7] SEALED DOCUMENT

289 [Doc. No. 214-25 at 2–7] SEALED DOCUMENT

290 [Doc. No. 205-1 at 266]

291 [Doc. No. 205-22]

292 [Doc. No. 205-1 at 197, 205–33]

293 [Doc. No. 205-33]

294 [Doc. No. 205-34]

295 [Id.]

296 [Doc. No. 205-1 at 211]

297 [Id. at 211–12]

298 [Id. at 211–18]

299 [Doc. No. 201-34 at 2]

300 [Doc. No. 201-35]

301 [Doc. No. 201-1 at 57–58]

302 [Id. at 75]

303 The NIAID Defendants consist of the National Institute of Allergy and Infectious Disease and Dr. Hugh Auchincloss (“Dr. Auchincloss”).

304 [Doc. No. 206]

305 [Doc. No. 206-1 at 10 (Deposition of Dr. Anthony S. Fauci)]

306 “Gain-of-function” research involves creating a potentially dangerous virus in a laboratory.

307 [Doc. No. 212-3 at 151–85]

308 [Id. at 165]

309 [Doc. No. 206-9 at 2]

310 [Doc. No. 206-9 at 1]

311 [Doc. No. 206-13 at 1, 7-8; 206-11 at 2–3; and 206–20]

312 [Doc. No. 206-16 at 1]

313 [Doc. No. 206-16 at 1; 206-17 at 1]

314 [Doc. No. 214-30]

315 [Doc. No. 206-27 at 3–4]

316 (Video of April 17, 2020, White House Coronavirus Task Force Briefing, at <https://www.youtube.com/watch?v=brbArPX8=6I>)

317 [Doc. No. 214-30]

318 [Doc. No. 206-32 at 1–2; Doc. No. 206-33 at 3]

319 [Doc. No. 206-1 at 210]

320 [Doc. No. 206-24 at 3]

321 [Doc. No. 201-1 at 177]

322 [Doc. No. 206-36 at 1]

323 [*Id.*]

324 [Doc. No. 206-35 at 1]

325 <https://www.youtube.com/watch?v=RUNCQD2UE>

326 [Doc. No. 207-2 at 5]

327 [Doc. No. 207-1 at 2]

328 [Doc. No. 207-1 at 2–3]

329 [Doc. No. 207-2 at 6]

330 [Doc. No. 206-1 at 238]

331 [Doc. No. 207-5 at 3]

332 [*Id.*]

333 [Doc. No. 207-6]

334 [Doc. No. 207-7]

335 [Doc. No. 207-9]

336 [Doc. No. 206-1 at 272]

337 [Doc. No. 207-10]

338 [Doc. No. 207-11 at 1]

339 [*Id.* at 3]

340 [Doc. No. 206-1 at 279]

341 [Doc. No. 207-12 at 4]

342 [Id. at 4–5]

343 [Doc. No. 207-13 at 4–5]

344 [Doc. No. 207-15]

345 [Doc. No. 206-1 at 251–52, 255–58]

346 [Doc. No. 207-17 at 2]

347 [Id.]

348 [Id. at 1]

349 [Id.]

350 [Doc. No. 207-19 at 3]

351 [Doc. No. 206-1 at 308]

352 [Doc. No. 207-19 at 3]

353 [Doc. No. 207-20 at 1]

354 [Id.]

355 [Doc. No. 214-8 at 1]

356 [Doc. No. 206-1 at 151]

357 [Doc. No. 207-22 at 2]

358 [Id. at 1]

359 [Id.]

360 [Doc. No. 206-1 at 314]

361 [Id. at 316]

362 [Id. at 318]

363 [Id. at 317]

364 [Id.]

365 [Id. at 318]

366 [Doc. No. 207-23 at 4]

367 [Doc. No. 207-24 at 1–2]

368 [Doc. No. 206-1 at 341–43]

369 FBI Defendants include Elvis Chan (“Chan”), the Federal Bureau of Investigation (“FBI”), Lauren Dehmlow (“Dehmlow”), and the U.S. Department of Justice (“DOJ”).

370 [Doc. No. 204-1]

371 [Id. at 8]

372 [Id. at 105]

373 [Id. at 10]

374 [Doc. No. 204-2 at 1]

375 [Id. at 18]

376 [Doc. No. 204-1 at 145]

377 [Doc. No. 204-1 at 51–52, 85]

378 [Id. at 54]

379 [Id. at 55]

380 [Id. at 16–19]

381 [Id. at 18, 23–24]

382 [Id. at 24, 171]

383 [Id. at 24]

384 [Id. at 25–26]

385 [Id. at 156–57]

386 [Id. at 285–86]

387 [Id. at 23–24]

388 [Id. at 39]

389 [Id.]

390 [Id. at 40]

391 [Id. at 43–44]

392 [Id. at 87–89]

393 [Id. at 109–10]

394 [Id. at 151]

395 [Doc. No. 204-3]

396 [Doc. No. 204-1 at 288]

397 [Id. at 295–296]

398 [Id. at 301]

399 [Doc. No. 204-1 at 172, 232–34]

400 [Id. at 175]

401 [Id. at 177–78]

402 [Id. at 205]

403 [Id. at 206]

404 [Id. at 249]

405 [Doc. No. 204-5, ¶¶ 10-11, at 2–3]

406 (emphasis added)

407 [Doc. No. 204-1 at 213, 227–28].

408 [Doc. No. 106-3 at 5–11]

409 [Doc. No. 209]

410 [Id. at 247]

411 [Doc. 204-6 at 56]

412 [Doc. No. 204-1 at 215]

413 [Doc. No. Doc 204-5 at ¶ 17]

414 [Id.]

415 [Doc. No. 204-6 at 2]

416 [Doc. No. 204-2 at 3]

417 [Id.]

418 [Id. at 32–33]

419 [Id. at 19]

420 [Id. at 50]

421 [Id.]

422 [Id. at 144–46]

423 [Doc. No. 204-1 at 141-43]

424 [Id. at 162]

425 [Id. at 163]

426 [Id. at 167]

427 [Id. at 88]

428 [Id. at 92]

429 [Id. at 96]

430 [Id. at 98]

431 [Id.]

432 [Id. at 99]

433 [Id. at 100–01]

434 [Id. at 102–03]

435 [Id. at 105–08]

436 [Id. at 108]

437 [Id. at 111–12]

438 [Id. at 112]

439 [Doc. No. 204-2 at 71]

440 [Id. at 115–16]

441 [Id. at 116]

442 [Id. at 117–18]

443 [Id. at 118]

444 [Id. at 123–26]

445 [Id. at 133–34, 149–50]

446 [Doc. No. 204-8 at 2–3]

447 [Doc. No. 204-8 at 2]

448 CISA Defendants consist of the Cybersecurity and Infrastructure Security Agency (“CISA”), Jen Easterly (“Easterly”), Kim Wyman (“Wyman”), Lauren Potentis (“Potentis”), Geoffrey Hale (“Hale”), Allison Snell (“Snell”), Brian Scully (“Scully”), the Department of Homeland Security (“DHS”), Alejandro Mayorkas (“Mayorkas”), Robert Silvers (“Silvers”), and Samantha Vinograd (“Vinograd”).

449 [Doc. No. 209-1 at 12]

450 [Id. at 18–20]

451 [Id. at 19]

452 [Id. at 16–17]

453 [Id. at 17]

454 [Doc. No. 209-19 at 3]

455 [Id.]

456 [Doc. No. 209-1 at 21]

457 [Id.]

458 [Id. at 24]

459 [Id. at 25]

460 [Id. at 28]

461 [Id. at 29]

462 [Id. at 36–37]

463 [Id. at 39]

464 [Id. at 39–41]

465 [Id. at 41]

466 [Id. at 46, 48]

467 [Id. at 48]

468 [Id. at 49–52]

469 [Id. at 57]

470 [Id. at 53–54]

471 [Id. at 59–61]

472 [Id. at 61–62]

473 [Id. at 62–63]

474 [Id. at 63–64]

475 [Id. at 63–66]

476 [Id. at 67–68]

477 [Doc. 209-2]

478 [Doc. No. 209-1, at 72, 361; Doc. No. 212-36 at 4 (Jones Deposition-SEALED DOCUMENT)]

479 [Doc. No. 209-4 at 4]

480 [Scully depo. Exh. at 17]

481 [Doc. No. 209-1 at 76]

482 [Id. at 88–89]

483 [Id. at 119–20]

484 [Id. at 120–21]

485 [Id. at 122–23]

486 [Id. at 134]

487 [Id. at 134–36]

488 [Id. at 139]

489 [Doc. No. 209-5 at 7]

490 [Id. at 4]

491 [Doc. No. 209-1 at 159]

492 [Doc. No. 209-6 at 11]

493 [Doc. No. 209-1 at 165–66]

494 [Id. at 166–68, 183]

495 [Id.]

496 [Id. at 171, 184–85]

497 [Id. at 174–75]

498 [Id. at 75]

499 [Doc. No. 209-6 at 61–62]

500 [Doc. No. 214-35 at 5–6, Column C]

501 [Id. at 4–5, Column F, Line 94]

502 CISA also became the “ministry of truth.”

503 [Doc. No. 209-1 at 220–22]

504 [Doc. No. 209-7 at 45–46]

505 [Doc. No. 209-1 at 291–94; 209–49]

506 [Doc. No. 209-9 at 38–40]

507 [Doc. No. 209-1 at 241]

508 [Id. at 236–37]

509 [Doc. No. 209-13 at 1]

510 [Doc. No. 209-14 at 16]

511 [Doc. No. 209-14]

512 [Doc. No. 209-15 at 41, 44–45]

513 [Doc. No. 209-15 at 39]

514 [Doc. No. 209-1 at 266]

515 [Doc. No. 209-15 at 1–2]

516 [Id. at 11–12]

517 [Id. at 9]

518 [Doc. No. 209-20 at 1–2]

519 [Doc. No. 209-23 at 1–4]

520 [Doc. No. 209-1 at 323–25]

521 [Doc. No. 209-1 at 335–36]

522 [Doc. No. 209-18 at 1–2]

523 [Id.]

524 [Doc. No. 209-1 at 341]

525 [Doc. No. 209-25 at 1]

526 [Doc. No. 210-22]

527 [Id.]

528 The State Department Defendants consist of the United States Department of State, Leah Bray (“Bray”), Daniel Kimmage (“Kimmage”), and Alex Frisbie (“Frisbie”).

529 Kimmage’s deposition was taken and filed as [Doc. No. 208-1].

530 [Doc. No. 208-1 at 29, 32]

531 [Id. at 30]

532 [Id. at 37]

533 [Id. at 130–31]

534 [Id. at 133–36]

535 [Id. at 141–43]

536 [Id. at 159–60]

537 [Id. at 214–215]. The details surrounding the EIP are described in II 6(5)(6)(7)(8)(9)(10)(15) and (16). Scully Ex. 1 details EIPS work carried out during the 2020 election.

538 [Doc. No. 208-17 at 5]

539 [Id.]

540 [Id. at 17]

541 [Doc. No. 209-5 at 4]

542 [Doc. No. 209-5, Exh. 1; Ex. 4 at 7, Audio Tr. 4]

543 [Doc. No. 209-2 at 30]

544 [Id. at 11]

545 [Id. at 12]

546 [Id. at 14]

547 [Id. at 20]

548 [Id.]

549 [Id. at 27–28]

550 [Id. at 28]

551 [Id. at 35]

552 [Id. at 45]

553 [Id. at 58]

554 [Id. at 27]

555 [Id. at 53]

556 [Id. at 51]

557 [Id. at 51, 74, 76, 101, 103, 110, 112, 145, 150–51, 153, 155–56, 172, 175, 183, 194–95, 206–09, 211–12, 214–16, and 226]

558 [Id. at 60]

559 [Id. at 201]

560 [Id. at 202]

561 [Id. at 204–05]

562 [Id. at 204–05]

563 [Id.]

564 [Id. at 246]

565 [Id. at 207]

566 [Id.]

567 [Id. at 224]

568 [Id. at 229]

569 [Id. at 243–44]

570 [Id. at 243–44]

571 [Id. at 251]

572 [Id. at 259]

573 [Doc. No. 276-1 at 12]

574 [Id.]

575 [Doc. No. 276-1 at 42]

576 [Doc. No. 209-3]; Memes, Magnets, Microchips, Narrative Dynamics Around COVID-19 Vaccines.

577 [Doc. No. 209-3 at 4]

578 [Id. at 9]

579 [Id.]

580 [Id. at 12]

581 [Id.]

582 [Id. at 17]

583 [Id. at 19]

584 [Id. at 9, 19]

585 [Id. at 24]

586 [Id. at 37]

587 [Id. at 59]

588 [Id. at 60]

589 [Id.]

590 [Id. at 54, 57, 49, 50]

591 [Id. at 57]

592 [Id. at 91]

593 [Id. at 86, 92]

594 [Id.]

595 [Id.]

596 [Id. at 87–88]

597 [Id. at 87]

598 [Id. at 150]

599 This is a standard that requires the private action to be “fairly attributable to the state.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

600 [Doc. No. 288 at 164–65]

601 The White House four “asks” are: (1) measure and publicly share the impact of misinformation on their platform; (2) create a robust enforcement strategy; (3) take faster action against harmful posts; and (4) promote quality information sources in their feed algorithm.

602 [Doc. No. 10-1 at 377–78]

603 [II. A.]

604 [Id. A. (5)]

605 [Id. A. (10)]

606 [Id.]

607 [Id. A. (11)]

608 [Id. A. (12)]

609 [Id. A. (15)]

610 [Id. A. (16)]

611 [Id. A. (17)]

612 [Id.]

613 [Id. at A. (19)]

614 [Id.]

615 [Id.]

616 [Id.]

617 [Id.]

618 [Id. at A. (24)]

619 [Doc. No. 174-1 at 1]

620 [Id. at 11]

621 [Id.]

622 [Doc. No. 174-1 at 17–20]

623 [Id. at 41]

624 [Doc. No. 10-1 at 477–78]

625 [Doc. No. 207-6]

626 However, at oral argument, CISA attorneys were unable to verify whether or not CISA would be involved in switchboarding during the 2024 election. [Doc. No. 288 at 122]

627 Google English Dictionary

628 [Doc. No. 209-5 at 4]

629 [Doc. No. 209-2]

630 [Id. at 9]

631 [Id. at 12]

632 [Id. at 20–21]

633 [Id. at 30]

634 [Doc. No. 227-2 at 15, 23, 42, 65 & 78]

635 [Doc. No. 209-5 at 4]

636 It is not necessary to repeat the details discussed in the “significant encouragement” analysis in order to find Plaintiffs have met their initial burden.

637 See [Doc. No. 214, at 66]

638 See [Doc. No. 266, at 151]

639 [Doc. No. 128]

640 [Doc. No. 224, at 20–33]

641 See *supra*, pp. 644–94 (detailing the extent and magnitude of Defendants’ pressure and coercion tactics with social-media companies); See also [Doc. No. 214-1, at ¶¶ 1348 (noting that Berenson had nationwide audiences and over 200,000 followers when he was de-platformed on Twitter), 1387 (noting that the Gateway Pundit had more than 1.3 million followers across its social-media accounts before it was suspended), 1397–1409 (noting that Hines has approximately 13,000 followers each on her Health Freedom Louisiana and Reopen Louisiana Facebook pages, approximately 2,000 followers on two other Health Freedom Group Louisiana pages, and that the former Facebook pages have faced increasing censorship penalties and that the latter pages were de-platformed completely), etc.]

642 [Doc. No. 266, at 151]

643 [Doc. No. 214-1, at ¶¶1428–1430]

644 [Id. at ¶1428]

645 [Id. at ¶1429]

646 [Id. at ¶ 1430]

647 [Doc. No. 214, at 20–33]

648 See [Doc. No. 214-1, ¶787 (an email from Dr. Francis Collins to Dr. Fauci and Cliff Lane which read: “Hi [Dr. Fauci] and Cliff, See <https://gbdeclaration.org>. This proposal from the three fringe epidemiologists who met with the Secretary seems to be getting a lot of attention – and even a co-signature from Nobel Prize winner Mike Leavitt at Stanford. There needs to be a quick and devastating published take down of its premises. I don’t see anything like that online yet – is it underway?”), ¶¶1368–1372 (describing the covert and ongoing censorship campaign against him)]

649 See [Id. at ¶¶1373–1380 (where Kulldorff explains an ongoing campaign of censorship against his personal social-media accounts, including censored tweets, censored posts criticizing mask mandates, removal of LinkedIn posts, and the ongoing permanent suspension of his LinkedIn account)]

650 [Id.]

651 [Id. at ¶¶1383–1386]

652 See [Id. at ¶¶1387–1396 (describing the past and ongoing campaign against his website, the Gateway Pundit, which resulted in censorship on Facebook, Twitter, Instagram, and YouTube)]

653 See [Id. at ¶¶1397–1411]

654 [Doc. No. 204, at 67–68]

655 [Id. at 69–71 (*citing* Doc. No. 214-1, ¶¶57, 64 “promising the White House that Facebook would censor “often-true” but “sensationalized” content”); ¶ 73 “imposing forward limits on non-violative speech on WhatsApp”); ¶ 89-92 “(assuring the White House that Facebook will use a “spectrum of levers” to censor content that “do[es] not violate our Misinformation and Harm policy, including “true but shocking claims or personal anecdotes, or discussing the choice to vaccinate in terms of personal and civil liberties”””; ¶ 93-100 “(agreeing to censor Tucker Carlson’s content at the White House’s behest, even though it did not violate platform policies)”, ¶ 103-104 (“Twitter deplatforming Alex Berenson at White House pressure”); ¶ 171 “(Facebook deplatformed the Disinformation Dozen immediately after these comments). Facebook officials scrambled to get back into the White House’s good graces. Id. ¶ 172, 224 (pleading for “de-escalation” and “working together”).”]

656 [Doc. No. 266, at 131–136]

657 See [Doc. No. 204, at 41-44 (where this Court distinguished this case from cases that “left gaps” in the pleadings)]

658 See, e.g., [Doc. No. 241-1, ¶¶1, 7, 17, 164 (examples of Government officials threatening adverse legislation against social-media companies if they do not increase censorship efforts); ¶¶ 51, 119, 133, 366, 424, 519 (examples of social-media companies, typically following up after an in-person meeting or phone call, ensuring Defendants that they would increase censorship efforts)]

659 [Doc. No. 214-1, ¶1]

660 See, e.g., [Id. at ¶ 156 (Psaki reinforcing President Biden’s “They’re killing people” comment); ¶166 (media outlets reporting tense relations between the Biden administration and social-media companies)]

661 See, e.g., [Doc. No. 174-1, at 3 (Twitter employees setting up a more streamlined process for censorship requests because the company had been “recently bombarded” with censorship requests from the White House)]

662 See, e.g., [Doc. Nos. 174-1, at 3 (Twitter employees setting up a more streamlined process for censorship requests because the company had been “recently bombarded” with censorship requests from the White House); at 4 (Twitter suspending a Jill Biden parody account within 45 minutes of a White House official requesting twitter to “remove this account immediately”); 214-1, at ¶799 (Drs. Bhattacharya and Kulldorff began experienced extensive censorship on social media shortly after Dr. Collins emailed Dr. Fauci seeking a “quick and devastating take down” of the GBD.); ¶1081 (Twitter removing tweets within two minutes of Scully reporting them for censorship.); ¶¶1266-1365 (Explaining how the Virality Project targeted Hines and health-freedom groups.); 214-9, at 2-3 (Twitter ensuring the White House that it would increase censorship of “misleading information” following a meeting between White House officials and Twitter employees.); etc.]

663 Because this Court finds that Plaintiffs have successfully shown a likelihood of success under a “but for” theory of causation, it will not address Plaintiffs arguments as to other theories of causation. However, the Court does note that caselaw from outside of the Fifth Circuit supports a more lenient theory of causation for purposes of establishing traceability. See, e.g., *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 71 (2d Cir. 2019); *Parsons v. U.S. Dep’t of Justice*, 801 F.3d 701, 714 (6th Cir. 2015).

664 [Doc. No. 204, at 67–71]

665 [Doc. No. 214, at 71–74]

666 [Doc. No. 266, at 152–157]

667 [Doc. No. 204, at 62–65]

668 [Doc. No. 1]

669 [Doc. No. 45]

670 [Doc. No. 214-1, at ¶425]

671 [Id.]

672 [Doc. Nos. 71-7, at 6; 214-1, ¶424]

673 [Doc. Nos. 71-7, at 6; 71-3, at 5; 214-1, ¶¶424–425]

674 [Doc. No. 71-8, at 2; Doc. 86-7, at 14]

675 [Doc. No. 86-7, at 14]

676 [Doc. No. 214-1, at ¶1106] (see also [Doc. No. 71-8, at 2 (CISA “wants to ensure that it is set up to extract lessons learned from 2022 and apply them to the agency’s work in 2024.”])

677 [Id. at ¶ 866]

678 [Doc. 289, at 2].

679 [Doc. 224, at 215–26], quoting *Kentucky v. Biden*, 23 F.4th 585, 598 (6th Cir. 2022).

680 See, e.g., [Doc. 214-1, ¶¶ 1427–1442]

681 [Doc. 289, at 3] quoting *Haaland*, 2023 WL 4002951, at *19.

682 [Doc. No. 34]

683 [Doc. No. 37]

684 [Doc. No. 1]

685 Plaintiffs allege actions occurring as far back as 2020.

686 [Doc. No. 204-1 at 40]

687 [Doc. No. 208 at 122]

688 [Chan depo. at 8–9]

689 [Doc. No. 209-23 at 4]

690 [Doc. No. 212-3 at 65–66, ¶ 211]

691 [Id. at 58-60, ¶¶ 180–188]

692 [Id. at 61, ¶ 190]

693 [Id. at 63-64, ¶¶ 200–203]

694 [Id. at 64-64, ¶¶ 204–208]

695 [Id. at 65, ¶¶ 209–210]

696 [Doc. No. 214-15]

697 [Doc. No. 45-3, ¶¶ 15–33]

698 [Doc. No. 45-4, ¶¶ 14–16]

699 [Doc. No. 45-7, ¶¶ 12–18]

700 [Id. at ¶ 15]

701 [Doc. No. 45-7 at ¶¶ 12–18]; [Doc. No. 84 at ¶¶ 401–420]; [Doc. No. 45-12 at ¶ 4, 12]

702 [Doc. No. 268 at ¶489].

703 [Id. at ¶¶490–501].

704 [Doc. No. 244].

705 [Doc. No. 268 at ¶490]

706 [Id. at ¶491]

707 [Doc. No. 244 at 7]

708 Hearing Transcript at 181, line 15.

709 [Id. at lines 16–18]

710 [Doc. No. 268 at ¶¶492–93]

711 [Id. at ¶¶492]

712 [Id. at ¶¶494–95]

713 Hearing Transcript, at 183, lines 19–21.

714 [Doc. No. 244 at 10]

715 [Id. at 13]

716 [Doc. No. 268 at ¶496–97]

717 [Id.]

718 [Id. at ¶491]

719 [Id. at ¶498]

720 [Id.]

721 An “Orwellian ‘Ministry of Truth’ ” refers to the concept presented in George Orwell’s dystopian novel, ‘1984.’ In the novel, the Ministry of Truth is a governmental institution responsible for altering historical records and disseminating propaganda to manipulate and control public perception.

Two Canoes LLC v. Addian Inc.

United States District Court, D. New Jersey | April 30, 2024 | Slip Copy | 2024 WL 2939178

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Civil Action No. 21-cv-19729 (SDW) (JRA)

|

Signed April 30, 2024

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REPORT AND RECOMMENDATION

José R. Almonte, United States Magistrate Judge

*1 Plaintiff Two Canoes LLC (“Two Canoes” or “Plaintiff”) asks the Court to find that Defendant Addian Inc. d/b/a Media Fulfillment (“Addian” or “Defendant”) spoliated evidence by failing to preserve WeChat messages. ECF Nos. 87-92, 94 (the “Motion”). Plaintiff seeks sanctions, pursuant to [Rule 37\(e\)\(2\) of the Federal Rules of Civil Procedure](#), including adverse inferences to be applied at the summary judgment stage. *Id.* Defendant opposes the Motion, arguing in part that no relevant WeChat messages existed while Defendant had a duty to preserve. ECF No. 93. The Honorable Susan D. Wigenton, U.S.D.J., referred the Motion to me for a Report and Recommendation. I have considered the Motion on the papers without oral argument. *See Fed. R. Civ. P. 78(b); L. Civ. R. 78.1(b).* For the reasons stated below, I respectfully recommend that the Motion be **GRANTED IN PART AND DENIED IN PART**.

I. Background

This case arises out of the chaos caused by the COVID-19 pandemic. People in the United States, and worldwide, were desperate for Personal Protective Equipment (“PPE”), including N-95 masks manufactured by the company 3M. Those masks were in high demand and short supply. It is

against this backdrop that Addian, through intermediaries, allegedly sold counterfeit 3M masks to Two Canoes. *See generally* Second Am. Compl., ECF No. 60.

It is important to understand the nature of the relationship between Two Canoes and Addian. Addian is a small, family-owned company with Addam Wolworth as its principal. *Id.* ¶ 27; Wolworth Decl. ¶ 2, ECF No. 93-1. According to Addian, its business model centers around providing logistic services to its customers. Wolworth Decl. ¶ 2. One of those customers was Aobvious Studio LLC (“Aobvious”), who, in turn, provided brokerage or logistical services to its customers, including Two Canoes. *Id.* ¶ 4; Second Am. Compl. ¶¶ 22-25; *see generally* Third Party Compl., ECF No. 4.

In 2020, Wolworth reached out to Robert Fisher, a contact in China who Wolworth understood could supply N-95 masks from a 3M manufacturer in China. Wolworth Decl. ¶¶ 5-6. Fisher supplied masks to Addian (through Wolworth as his main contact). *Id.* ¶¶ 5-7. Addian supplied the masks to Aobvious, which then supplied the masks to Two Canoes, which further supplied the masks to resellers who sold the masks to end-users. *Id.* ¶ 4; Second Am. Compl. ¶ 2.

Eventually, on November 5, 2020, 3M filed a lawsuit against different entities, including Addian, alleging that the masks being sold were counterfeited (hereinafter, “3M Lawsuit” or “3M Litigation”). Wolworth Decl. ¶ 8; Second Am. Compl. ¶ 7; ECF Nos. 88 at 9, 93 at 5. Wolworth was aware that he had a legal obligation to retain information related to the 3M Lawsuit. ECF No. 89-7 at 92:20-94:8. 3M and Addian settled that lawsuit in June 2021, with Addian agreeing to enter into a consent judgment and a permanent injunction. Wolworth Decl. ¶ 11; Henner Decl. ¶ 12, ECF No. 93-2; ECF Nos. 88 at 10, 89-15; *see also* Consent Judgment and Permanent Injunction at ¶ 6, *3M Co. v. Addian Inc., et al.*, No. 20-cv-04515 (N.D. Ga. June 17, 2021), ECF No. 98. The 3M Lawsuit was officially terminated on February 28, 2022. ECF Nos. 88 at 10, 89-15. In the interim, on July 14, 2021, Two Canoes’ counsel threatened litigation against Aobvious, the intermediary between Two Canoes and Addian. ECF Nos. 88 at 10, 89-16. On July 16, 2021, Aobvious’s counsel forwarded that email to Addian’s counsel, asking whether Addian had “any update.” Goldberg Decl. ¶¶ 18-19, ECF No. 89; ECF Nos. 89-16, 89-17. After being unable to resolve their dispute, Two Canoes filed this lawsuit against Aobvious on November 4, 2021, ECF No. 1, and Aobvious, in turn, filed a third-party complaint against Addian on January 7, 2022. *See generally* Third Party Compl.¹

*2 Important to the current dispute is what happened with the communications between Addian's principal, Wolworth, and his contact in China, Fisher. No one disputes that Addian collected and produced to Two Canoes: (i) e-mails to, from, or copying, Fisher; (ii) documents provided to Addian by Fisher; (iii) text messages with Fisher; and (iv) a couple of e-mails Addian received, which Addian believes were sent by one of Fisher's "upstream" contacts with whom Addian had no other contact.² ECF No. 93 at 1-2; Henner Decl. ¶ 14. What is missing, and what appears to be at issue, are communications between Wolworth and Fisher through a platform known as "WeChat." WeChat is an ephemeral messaging application that allows messages to disappear from WeChat's servers

Once 72 hours has lapsed since you sent your **chat** message, or 120 hours for images, audio, videos, and files, WeChat permanently deletes the content of the message on our servers. Upon deletion, neither WeChat nor any and [sic] third party will be able to view the content of your message.

ECF No. 93-7. Once the message disappears from the WeChat servers, it remains within a user's application only on the user's device, such as a cellphone, ECF No. 93-8, unless it has been backed up otherwise.

According to Wolworth, he communicated with Fisher primarily via live phone calls and secondarily by email and text messages; however, he did communicate with Fisher via WeChat "a couple of times." Wolworth Decl. ¶ 7; ECF No. 93-3 at 64:24-65:15. Unfortunately, those WeChat messages are not available through Wolworth's phone. Two Canoes points to Wolworth's own testimony as evidence that he discarded at least three cellphones in the span of approximately a year and a half: the first one in September 2020 (ECF No. 89-7 at 83:10-84:16), the second in October 2021 (ECF No. 89-7 at 87:16-24, 102:4-25), and the third in February 2022 (ECF No. 89-7 at 94:21-25, 103:16-105:10). ECF No. 88 at 5-6. It is worth noting, however, that the first phone, *i.e.*, the one he used until September 2020, broke before this or any other litigation began. The breaking of the first phone is nonetheless important because Wolworth testified that the "things on the old phone" did not transfer to the second phone. ECF No. 89-7 at 90:13-22. Thus, he was aware that certain data from one phone would not automatically transfer to a new phone.

According to Wolworth, around October 2021—before this lawsuit was filed but after Addian had been named as a

defendant in the 3M Litigation—he accidentally dropped his cellphone on concrete stairs, rendering that phone inoperable.³ Wolworth Decl. ¶ 13. When Wolworth went to replace this phone, he learned that the phone that he wanted as a replacement was not available at the time, so he purchased a flip phone as a temporary replacement and reordered the same phone that he had broken. *Id.* ¶ 14; ECF No. 93-3 at 103:16-104:5. Thereafter, he was shipped the wrong phone, at which time he learned that the phone that he ordered had been discontinued. Wolworth Decl. ¶ 14; ECF No. 93-3 at 104:6-25. The phone company advised him that he could trade in the incorrect phone, so he preordered the phone that he currently uses. *Id.* He picked it up in February 2022. *Id.* While it is not clear whether or when Wolworth used "the incorrect phone," he testified at his deposition that he used "three or four" phones between October 2021 and February 2022. ECF No. 88 at 7 (citing ECF No. 89-7 at 103:16-105:10 ("in that period of time, I used three or four phones")). At some point during this process, Wolworth left the inoperable phone (broken in October 2021) at the store for proper electronics recycling (hereinafter, the "Recycled Phone"). Wolworth Decl. ¶ 15. At no point were the WeChat messages from the Recycled Phone transferred to any other phone. The parties dispute whether Wolworth made reasonable efforts to recover any lost WeChat messages, to the extent they existed.

*3 The only other person who might have these messages is Fisher. Plaintiff has served a subpoena to Fisher via electronic means,⁴ but he has not responded, and Plaintiff is unable to locate him physically. *See generally* ECF No. 90. The Court must, therefore, resolve whether Wolworth, and Addian by extension, spoliated WeChat messages and, if so, what sanctions should be imposed, if any.

II. Legal Standard

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Manning v. Safelite Fulfillment, Inc. (Manning II)*, No. 17-cv-2824, 2021 WL 3542808, at *1 (D.N.J. Aug. 11, 2021) (quotation omitted); *Manning v. Safelite Fulfillment, Inc. (Manning I)*, No. 17-cv-2824, 2021 WL 3557582, at *4 (D.N.J. Apr. 29, 2021) *report and recommendation adopted in relevant part*, 2021 WL 3542808 (D.N.J. Aug. 11, 2021). Rule 37(e) of the Federal Rule of Civil Procedure governs the spoliation of Electronically Stored Information ("ESI").⁵ Rule 37(e) states:

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court [may fashion appropriate sanctions].

Accordingly, for the Court to make a finding that spoliation occurred, the moving party bears the burden of showing that (1) the ESI should have been preserved in anticipation or conduct of litigation; (2) the ESI was lost; (3) the information was lost because the party failed to take reasonable steps to preserve it; and, (4) the information cannot be recovered elsewhere, restored, or replaced. *Manning I*, 2021 WL 3557582, at *5 (citations omitted).⁶ “When a district court finds that a party has spoliated evidence, it has the authority to fashion an appropriate sanction to remedy the damage.” *Manning II*, 2021 WL 3542808, at *2 (citation omitted). Rule 37(e) provides for two levels of sanctions for spoliating ESI. First, the Court, “upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice.” Fed. R. Civ. P. 37(e)(1). To find prejudice, the moving party must offer “plausible, concrete suggestions as to what [the lost] evidence might have been.” *GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76, 83 (3d Cir. 2019) (alteration in original) (citation omitted). Second, the Court,

only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

- (A) presume that the lost information was unfavorable to the party;
- (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
- (C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e)(2).

*4 The spoliation analysis is not a balancing test; rather, the movant must satisfy each element. *Davis v. Healthcare Servs. Grp., Inc.*, No. 16-cv-2401, 2017 WL 11723674, at *3 (E.D. Pa. Sept. 5, 2017), opinion clarified, 2018 WL 11484946 (E.D. Pa. Nov. 30, 2018). The failure to satisfy one element dooms the finding of spoliation. *Id.* Each element is analyzed below.

III. Analysis

A. Spoliation

1. Whether the ESI should have been preserved in anticipation or conduct of litigation

The first element that the Court must analyze is whether ESI should have been preserved in anticipation of litigation or conduct of litigation. *Manning I*, 2021 WL 3557582, at *6.

“Rule 37(e) does not redefine the duty to preserve; rather, it incorporates the common-law duty to preserve relevant information when litigation is reasonably foreseeable.” *Nagy v. Outback Steakhouse*, No. 19-cv-18277, 2024 WL 712156, at *3 (D.N.J. Feb. 21, 2024) (quoting *Bistrian v. Levi*, 448 F. Supp. 3d 454, 467-68 (E.D. Pa. 2020)). “A litigant is under an obligation to preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation.” *Id.* In applying the rule, “a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant.” *Manning I*, 2021 WL 3557582, at *6 (quoting Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment). The determination of whether and when a duty to preserve arose is governed by a “flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry.” *Bull v. United Parcel Serv., Inc.*, 665 F.3d 68, 77-78 (3d Cir. 2012) (citation omitted).

Two Canoes argues that “there is little doubt that Addian's duty to preserve documents began by November 5, 2020 [with the filing of the 3M Lawsuit] and continued without interruption through the instant litigation.” ECF No. 88 at 15 n.9. Addian does not quite concede this point but refers to November 5, 2020, as the first time when “any arguable duty to preserve arose.” ECF No. 93 at 12-13.

The Court agrees that Addian's duty to preserve began on November 5, 2020, at which point Addian had been named a defendant in the 3M Litigation, and Wolworth was on notice of his legal duty to preserve all relevant information in that litigation. See *Bistrian*, 448 F. Supp. at 454, 468 (“The duty to preserve arises no later than when a lawsuit is filed[.]” (citation omitted)). Given that the 3M Litigation arose out of the same course of conduct as this litigation —i.e., the selling of allegedly counterfeited 3M N-95 masks —Wolworth had an obligation then, and it continued here, to

preserve communications about the masks with his supplier, Fisher.

Addian's duty to preserve continued into this litigation because the two litigations overlapped: the third-party complaint against Addian was filed on January 7, 2022, *see generally* Third Party Compl., and the 3M Litigation did not officially end until February 28, 2022, ECF No. 89-15. The fact that Addian had reached a settlement with 3M in June 2021 (Wolworth Decl. ¶ 11; Henner Decl. ¶ 12; ECF No. 89-15) did not end its obligation to preserve information. The case had not yet closed, and that court maintained continuing jurisdiction over 3M's claims against Addian to enforce the consent agreement, settlement agreement, and permanent injunction. *See* Consent Judgment and Permanent Injunction at ¶ 6, *3M Co. v. Addian Inc., et al.*, No. 20-cv-04515 (N.D. Ga. June 17, 2021), ECF No. 98. And, importantly, the settlement only resolved the claims between 3M and Addian, *id.* ¶ 5—but other parties were involved in the subject transactions. Even if Addian had considered the date of settlement as the end of the 3M Litigation, Addian should have anticipated that Aobvious or Two Canoes would file suit if Two Canoes was not reimbursed the money it paid for masks it had returned to Addian and therefore could not sell. *See* Second Am. Compl. ¶¶ 49-59; Third Party Compl. ¶¶ 1-25. And, in fact, on July 16, 2021, Addian received an email that made it clear that Two Canoes was threatening litigation against Aobvious, the intermediary between Addian and Two Canoes; Aobvious, in turn, emailed Addian asking whether it had “any update.” Goldberg Decl. ¶¶ 18-19; ECF Nos. 89-16, 89-17. Clearly, July 16, 2021, was not the first time that Addian was aware of Two Canoes’ insistence on being reimbursed by Aobvious, who, in turn, was seeking reimbursement from Addian. Therefore, I find that the duty to preserve relevant information, including any WeChat messages, began November 5, 2020, and continued through this litigation.

2. Whether the ESI was lost

*5 Next, the Court considers whether WeChat messages were lost. This question is not so simple to answer and requires that I place the dispute in context. In a short time span, Wolworth traded several phones for new ones. It started in September 2020, when his phone broke, and he obtained a new one. Wolworth Decl. ¶ 24; ECF No. 93-3 at 101:3-10. Any communications, including WeChat messages, that may have been on that phone did not transfer to the new phone.

Wolworth Decl. ¶ 24; ECF No. 93-3 at 101:3-10. Because that phone broke prior to the 3M Litigation and this litigation, the Court will not impose on Wolworth a duty to preserve information that might have been on that phone.⁷ Thus, any information lost with the phone that broke in September 2020 will not be subject to a spoliation analysis. *See Bistrian, 448 F. Supp. 3d at 467 (Rule 37(e))* “does not apply to information that was lost or destroyed before a duty to preserve it arose.” (citing Fed. R. Civ. P. 37(e) advisory committee’s note to 2015 amendment)).

A few months later, on November 5, 2020, 3M filed its lawsuit against Addian and others. Wolworth, as Addian’s principal, had a duty to preserve then. *See id.* at 468 (“The duty to preserve arises no later than when a lawsuit is filed[.]” (citation omitted)). Within a year, in October 2021, Wolworth’s phone broke again. Wolworth Decl. ¶ 13; ECF No. 93-3 at 101:12-15, 102:15-20. He left that phone at the store for proper electronic recycling (the “Recycled Phone”). Wolworth Decl. ¶ 15. The phone that he wanted was not available, so he went through several transactions resulting in his use of “three or four phones.” ECF No. 89-7 at 103:16-105:10. One of them was a flip phone that he used as a temporary replacement. Wolworth Decl. ¶ 14. Ultimately, in February 2022, he obtained the phone that he has now. *Id.*

To prove spoliation occurred, the moving party must prove that ESI was “lost.” *Williams v. First Student Inc.*, No. 20-cv-1176, 2024 WL 1132237, at *2 (D.N.J. Mar. 15, 2024) (citation omitted). “In other words, the moving party bears the burden of proof in establishing that the evidence at issue actually existed.” *Id.*; *see also Flint Grp. Packaging Inks N. Am. Corp. v. Fox Indus. Inc.*, No. 16-cv-3009, 2023 WL 4633925, at *17 (D.N.J. June 29, 2023) (“The moving party must necessarily show that the evidence at issue actually existed, since spoliation sanctions can be imposed only when the party seeking such sanction demonstrates that relevant evidence has been lost.” (citation omitted)). And, as a preliminary matter, a party may only “lose” ESI within that party’s “possession, custody, or control.” *Eisenband v. Pine Belt Auto., Inc.*, No. 17-cv-8549, 2020 WL 1486045, at *8 (D.N.J. Mar. 27, 2020) (citation omitted).

Wolworth purportedly began communicating with Fisher about the reselling of masks in early 2020. Wolworth Decl. ¶ 6. They used several modes of communications: live phone calls, emails, and text messages. ECF No. 93-3 at 64:24-65:15; Wolworth Decl. ¶ 7; Henner Decl. ¶ 14. According to Wolworth, they communicated via WeChat only

“a couple of times.” ECF No. 93-3 at 64:24-65:15; Wolworth Decl. ¶ 7 (“I communicated with Mr. Fisher by... infrequent messages on the WeChat mobile messaging application.”). Regarding WeChat messages, there are two relevant time periods: (1) November 5, 2020 through October 2021; and (2) October 2021 through February 2022.

i. ESI from November 5, 2020 to October 2021

*6 Regarding the first time period, Plaintiff cites to the following testimony from Wolworth's deposition:

Q. Did you have any WeChat **chats** between September 2020 and late [October]⁸ 2021 with Robert Fisher?

A. I would assume so.

Q. Did any of those WeChat communications with Robert Fisher between September of 2020 and [October] 2021 pertain to 3M products?

A. I believe so.

ECF No. 89-7 at 89:22-90:4.

Addian argues that Wolworth's testimony is insufficient to establish that relevant WeChat messages existed. First, Addian argues that Wolworth's testimony conveys, “at most, a mere possibility that [he] used WeChat to talk to Mr. Fisher a small number of times during a timeframe that includes time prior to the duty to preserve about business not related to the Masks at issue in this case.” ECF No. 93 at 19. Second, Addian argues that “[h]ad Addian been in possession of WeChat messages with Robert Fisher in November and December of 2020,” they would have been collected by counsel in relation to the 3M Lawsuit and produced to Plaintiff in the instant case. *Id.* at 5 (citing Henner Decl. ¶¶ 10-11). Finally, Addian argues that all relevant WeChat messages between Fisher and Wolworth would have predicated November 2020, at which time a temporary restraining order was entered in the 3M Lawsuit, prohibiting Addian from conducting 3M-related business. *Id.* at 4-5; Wolworth Decl. ¶ 9. After this temporary restraining order was entered, Wolworth asserts that he “stopped talking to anyone about the substance of the case.” Wolworth Decl. ¶ 16. Wolworth asserts that he communicated with Fisher by telephone call “to share that [he] could no longer communicate about the issues in the case, and [he] did not communicate with [Fisher] again for a longtime thereafter.” *Id.* ¶ 9. Wolworth further asserts that he does not recall having any particular WeChat

communications with Fisher after the temporary restraining order but acknowledges that he stated in deposition that “it is possible that there were a few unrelated to this case.” *Id.* ¶ 16.

Although Addian makes persuasive arguments, on balance I am persuaded that WeChat messages between Wolworth and Fisher likely existed during a time when Addian had a duty to preserve information, between November 5, 2020 and October 2021. Wolworth's own deposition testimony cited above is sufficient to convince me. When asked whether he communicated via WeChat with Fisher between September 2020 and October 2021, he said “I assume so.” EFC No. 89-7 at 89:22-25. And when asked whether the WeChat communications related to 3M products, he said, “I believe so.” *Id.* at 90:1-4.⁹ In contrast, when he was asked whether he communicated with Fisher between October 2021 and February 2022 about the transactions in this lawsuit, he was definitive and answered, “no.” *Id.* at 100:6-8. Comparing these responses to similar questions about different time periods leads me to believe that Wolworth understood how to be precise with his response. Considering the totality of the circumstances, I find that that relevant WeChat messages likely existed.¹⁰

*7 Those messages would have existed in Wolworth's Recycled Phone;¹¹ however, because he turned it in to the cellphone provider after it was damaged, the phone is no longer available for inspection and imaging. Moreover, Defendant does not dispute that there is no way to retrieve WeChat messages that might have existed. See Henner Decl. ¶ 16. And, Fisher, the only other person who might have saved those messages is unresponsive to a subpoena, and Two Canoes cannot locate his physical address to enforce the subpoena. See generally ECF No. 90. The Court is satisfied that relevant ESI from the November 5, 2020 to October 2021 time period was lost.

ii. ESI from October 2021 to February 2022

Next, I will turn my attention to any potential WeChat messages that were exchanged between the disposal of the Recycled Phone in October 2021 and when Wolworth obtained his current phone in February 2022. Plaintiff again points to Mr. Wolworth's own deposition testimony in support of its assertion that WeChat messages existed during this period. Specifically, when asked if he had “any **communications**” with Mr. Fisher “between [October] 2021

and February 2022,” Mr. Wolworth replied: “Minimal.” ECF No. 89-7 at 99:8-101:1 (revised to reflect correction of July to October discussed *supra* note 8) (emphasis added). As Defendant points out, Plaintiff has only established that Wolworth and Fisher had “communications.” ECF No. 93 at 9. Plaintiff has not established that there were WeChat messages exchanged in this time period.¹² Because Plaintiff has not established that the alleged spoliated WeChat messages ever existed, I find that Plaintiff has not met its burden of establishing spoliation. The failure to establish spoliation of WeChat messages ends the analysis for the period October 2021 to February 2022.

3. Whether Addian Failed to Take Reasonable Steps to Preserve ESI during the Time Period November 5, 2020 to October 2021

A party's duty to preserve may require “that he take reasonable affirmative steps such as backing up the ESI on an external device or in a separate, secure location.” *Goldrich I*, 2018 WL 4492931, at *9. Here, the Court finds that Addian failed to take reasonable steps to preserve ESI during the period of November 5, 2020 to October 2021.

*8 Having already experienced the loss of a phone in September 2020, before he had a duty to preserve ESI, Wolworth learned the hard way that WeChat messages would not automatically transfer to a new phone. Wolworth Decl. ¶ 24; ECF No. 89-7 at 90:13-22. After November 5, 2020, when 3M filed its lawsuit, he knew that he had a duty to preserve information. When his other phone broke in October 2021, he should have known that leaving the phone with the cellphone provider would result in the loss of information. In his declaration, Wolworth claims that he “understood that [his] phone was automatically regularly backing up to [his] Google Account.” Wolworth Decl. ¶ 15. Nothing in the record shows what, if anything, he did to ensure that the Google Account was in fact preserving his WeChat messages. The Court is satisfied that Addian did not take reasonable steps to preserve ESI. See *Moody v. CSX Transportation, Inc.*, 271 F. Supp. 3d 410, 429 (W.D.N.Y. 2017) (“[D]efendants destroyed or recycled [the] laptop despite knowing that it likely contained relevant evidence that they never confirmed had been properly uploaded to another repository... I find that defendants did not take reasonable steps to preserve the [data].”); *Brewer v. Leprino Foods Co., Inc.*, No. 16-cv-1091, 2019 WL 356657, at *10 (E.D. Cal. Jan. 29, 2019) (“The Court further finds that [plaintiff] failed to take reasonable

steps to preserve the text messages. As [defendant] highlights, and [plaintiff] fails to dispute, [plaintiff] made no effort to back-up or preserve the [phone] prior to its loss[.]” (citation omitted)).¹³

4. Whether the information cannot be recovered elsewhere, restored, or replaced

No one disputes that the information at issue, WeChat messages during the period November 5, 2020 to October 2021, cannot be recovered elsewhere, restored, or replaced. Therefore, this prong is satisfied.

B. Sanctions

Having concluded that Two Canoes met its burden as to each prong of the spoliation test for WeChat messages during the period of November 5, 2020 to October 2021, the Court next considers whether sanctions are appropriate. Rule 37(e) prescribes the sanctions that may be appropriate, depending on the circumstances of the case. To determine appropriate sanctions, the Court must find either prejudice to Plaintiff or that Defendant acted with the intent to deprive Plaintiff's use of the ESI in the litigation. *Goldrich I*, 2018 WL 4492931, at *8. If the Court finds “prejudice to another party from loss of the information,” it “may order measures no greater than necessary to cure the prejudice.” Fed. R. Civ. P. 37(e)(1). If the Court finds that a party “acted with the intent to deprive another party of the information's use in the litigation” the Court may “(A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.” Fed. R. Civ. P. 37(e)(2). As the moving party, it is Plaintiff's burden to show what sanctions are appropriate. *Goldrich I*, 2018 WL 4492931, at *7.

1. Prejudice

*9 In order to find prejudice, the moving party must offer “plausible, concrete suggestions as to what [the lost] evidence might have been,” *GN Netcom, Inc.*, 930 F.3d at 83 (alteration in original) (citation omitted); *see also Eisenband*, 2020 WL 1486045, at *9 (“speculation... is insufficient for a finding of prejudice”), and “must show that its ability

to prepare effectively a full and complete trial strategy has been impeded,” *Manning I*, 2021 WL 3557582, at *7 (citation omitted). “An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information’s importance in the litigation.” Fed. R. Civ. P. 37(e)(1) advisory committee’s note to 2015 amendment; See also *Manning II*, 2021 WL 3542808, at *3 (moving party had not met its burden of establishing prejudice where it “speculate[d] that there must be more information and that information must be harmful to [the spoliating party’s] case.”).

Plaintiff argues that the prejudice it suffers from “the loss of the communications between Addian and Mr. Fisher (liaison to Addian’s upstream suppliers) is manifest.” ECF No. 88 at 18. Plaintiff further argues that the communications “inevitably” concern

critical (and likely dispositive) issues in this litigation, including whether the masks at issue were counterfeit, Addian’s knowledge regarding their **authenticity**, and Addian’s communications with Mr. Fisher regarding Addian’s obligation to issue a refund for the returned goods to Aobvious (who owed that refund to [Two Canoes]) and Topway’s reciprocal obligation to provide a refund to Addian for the counterfeit goods. As noted above, this is more than mere supposition: Mr. Wolworth conceded at his deposition that during this timeframe he discussed with Mr. Fisher the masks’ **authenticity** and the possibility of Topway issuing Addian a refund.

ECF No. 88 at 18 (citing ECF No. 89-7 at 160:9-161:4, 194:23-195:9). Addian argues that Two Canoes’ explanation is “highly implausible.” ECF No. 93 at 20. Addian reasons that if such messages existed, they logically would have existed before the 3M Litigation, and thus were lost with the first broken phone that is not the subject of the spoliation analysis. ECF No. 93 at 20-21. Moreover, Wolworth himself contests Two Canoes’ explanation. He states: “I did not know any products were counterfeit in 2020 and I still do not know if any products were counterfeit. I’m not qualified to make that assessment and I have never acknowledged that any of the masks at issue in this case were counterfeit in any communication.” Wolworth Decl. ¶ 28.

On the record before it, the Court finds it difficult to ascertain the extent to which Plaintiff suffered prejudice, if any, from Defendant’s spoliation. Wolworth has testified that he primarily communicated with Fisher by live phone call. Wolworth Decl. ¶ 7; ECF No. 93-3 at 64:24-65:15. Indeed, a text message between Wolworth and Fisher shows that they

were texting to coordinate a time to speak on the phone. Henner Decl. ¶ 3; ECF No. 93-4. According to Wolworth, he communicated with Fisher on WeChat only a couple of times. Wolworth Decl. ¶ 7; ECF No. 93-3 at 64:24-65:15. Moreover, as discussed above, the spoliated messages are limited to the period of November 5, 2020 through October 2021. For this time period, it is unclear the extent of the prejudice Two Canoes has suffered, if any. That is particularly so for two reasons. First, Addian has persuasively argued that most of the communications, including WeChat messages, between Wolworth and Fisher occurred before 3M filed its litigation on November 5, 2020, and that information was lost with the first broken phone, which is not the subject of the spoliation analysis. After November 5, 2020, the court in the 3M Litigation issued a temporary restraining order, effectively barring Wolworth and Fisher from engaging in 3M-related business. Wolworth Decl. ¶ 9. Wolworth declared that he stopped doing business with Fisher and that, to the extent that he communicated with Fisher, it was to let him know that he could no longer communicate about the issues in the litigation. *Id.* Thus, I am persuaded that, although WeChat messages were lost from November 5, 2020 to October 2021, the loss was minimal. Second, Addian preserved and produced to Two Canoes other ESI and documents, including: (1) emails in which Fisher was a recipient or sender; (2) documents that Fisher provided to Addian; and (3) text messages between Wolworth and Fisher. Henner Decl. ¶ 14. It is not as if Two Canoes is without evidence. Two Canoes has not persuaded this Court that the likely minimal WeChat messages that are missing—post 3M Litigation—has impeded “its ability to prepare effectively a full and complete trial strategy.” *Manning I*, 2021 WL 3557582, at *7.

***10** In similar situations, where the extent of prejudice resulting from spoliated evidence has been called into question, courts have deferred a decision as to the appropriate sanction until the time of trial. See *Manning II*, 2021 WL 3542808, at *4 (reserving judgment on appropriate sanctions, if any, for both prejudicial and non-prejudicial spoliation, and submitting question regarding intent to deprive to the jury). At trial, the Court will be in a better position to evaluate Two Canoes’ evidence and determine what the missing WeChat messages could plausibly establish. For these reasons, I recommend that the issue of prejudice to Two Canoes be deferred until the time of trial to determine whether sanctions are appropriate under Rule 37(e)(1).

2. Intent

Where spoliation of ESI occurs, the Court may issue sanctions pursuant to [Rule 37\(e\)\(2\)](#) “only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation.” [Fed. R. Civ. P. 37\(e\)\(2\)](#); *see also Manning II*, 2021 WL 3542808, at *2 (“A showing of bad faith, or an intent to deprive, requires that the spoliating party intended to impair the ability of the potential defendant to defend itself.” (citations omitted)).¹⁴ It is the movant’s burden to demonstrate that the spoliating party acted with the intent to deprive. A showing of negligence or even gross negligence will not do the trick. *Friedman v. Philadelphia Parking Auth.*, No. 14-cv-6071, 2016 WL 6247470, at *8 (E.D. Pa. Mar. 10, 2016) (citing [Fed. R. Civ. P. 37 \(e\)\(2\)](#) advisory committee’s note to 2015 amendment); *CIGNEX Datamatics, Inc. v. Lam Rsch. Corp.*, No. 17-cv-320, 2019 WL 1118099, at *2 (D. Del. Mar. 11, 2019) (Rule 37(e)(2) deals with intentional destruction or loss of ESI and “negligent or grossly negligent failure to preserve ESI,” is addressed by [Rule 37\(e\)\(1\)](#)); *Pelino v. Gilmore*, No. 18-cv-1232, 2020 WL 2572361, at *5 (W.D. Pa. May 21, 2020) (same); *see also Manning I*, 2021 WL 3557582, at *10 (sanctions are unavailable under [Rule 37\(e\)\(2\)](#) where “at most the loss was due to plaintiff’s inadvertence or negligence, not bad faith”) *report and recommendation adopted in relevant part*, 2021 WL 3542808; *Lombardo v. Flynn*, No. 11-cv-2220, 2017 WL 11716404, at *2 (M.D. Pa. Sept. 5, 2017) (“mere negligent conduct is not an appropriate basis to impose the issuance of an adverse inference jury instruction” (citing *Bull*, 665 F.3d at 79)). Courts may look to circumstantial evidence to determine intent. *Goldrich II*, 2018 WL 4489674, at *2.

*11 Here, Two Canoes asks for sanctions that would effectively end this litigation. Specifically, Two Canoes asks the Court to find at the summary judgement stage

that the spoliated communications between Mr. Wolworth and Mr. Fisher indicate that the masks at issue were counterfeit, Addian knew the masks were counterfeit, Addian understood it had valid breach of contract and warranty claims against its direct supplier, and took the position that it was owed a refund from [a supplier in China].

ECF No. 88 at 5. Plaintiff points to both Defendant’s failure to take reasonable steps to preserve WeChat messages after experiencing data loss in September 2020, and the subsequent “intentional[] dispos[al] of the physical phones” as proof of

Defendant’s bad faith. ECF No. 88 at 7, 20-21. Elsewhere, Plaintiff points to Wolworth’s testimony at his deposition to establish his lack of credibility. *See ECF No. 94 at 2 n.1* (“Mr. Wolworth’s ‘evolving’ sworn testimony and lack of documentary evidence on these critical issues reveals all the Court needs to know about Mr. Wolworth’s credibility.”). The record before me does not support a finding of bad faith.

Although it is uncontested that the Recycled Phone (containing the spoliated messages) was discarded, Addian denies intentionally deleting ESI. Wolworth Decl. ¶¶ 17-19, 27. The record that has been presented shows that, while Addian failed to take reasonable steps to preserve, it did take some steps to preserve or recover the spoliated ESI, including by immediately undertaking a litigation hold when the 3M Litigation commenced, *id.* ¶ 10, and continuing the litigation hold through the filing of this case, *id.* ¶ 18. Moreover, Wolworth certifies that after losing ESI in September 2020, he ensured that his applications were backing up to his Google Account, and that it was not until this lawsuit was filed (and after the messages were spoliated) that he learned that the Google Account did not remotely save WeChat messages. *Id.* ¶ 25. And, although Wolworth admits that he discarded the Recycled Phone, he certifies that he “did not believe anything further could be done to recover information from the phone” because (1) he believed that the information therein was backed up to his Google Account and (2) the device was “in multiple pieces and completely inoperable.” *Id.* ¶ 15. Finally, Addian attempted to recover the spoliated messages by engaging a professional discovery vendor to examine both Wolworth’s Google Account and a complete forensic image of his phone. *Id.* ¶ 25; Henner Decl. ¶ 16. Although these efforts proved insufficient, I find that Addian’s collective efforts weigh against a finding of bad faith.

It is also important to note that, according to Addian, because the spoliated evidence was in the form of WeChat messages, efforts to recover them from a broken phone may have been futile. Addian explained that, to transfer WeChat messages from one device to another, a user must log into WeChat on the “original mobile phone,” navigate into the settings, select **chats** to transfer, and then follow instructions displayed on the screen. ECF No. 93 at 19; ECF No. 93-9. Thus, if the Recycled Phone was “catastrophically damaged and broken into multiple pieces,” as Wolworth claimed, it is unclear that WeChat messages could have been retrieved even if he had preserved the phone. *See* Wolworth Decl. ¶ 13; *see also supra* note 13.

*12 To be clear, I do not condone Wolworth's decision to discard the Recycled Phone. The more prudent course of action would have been to preserve the phone so that Two Canoes could examine it and make its own assessment. Because Addian did preserve and produce several other forms of ESI, including communications with Fisher, and because it took certain steps to try and preserve information, I cannot find that Addian acted in bad faith. Perhaps it acted negligently, but not necessarily with the intent to deprive Two Canoes of its claims. See *EBIN New York, Inc. v. SIC Enter., Inc.*, No. 19-cv-1017, 2022 WL 4451001, at *11 (E.D.N.Y. Sept. 23, 2022) (considering the "technological limitations" of preserving application-based messages in finding that spoliating party did not act with an intent to deprive). Nonetheless, because the issue of intent is one that might hinge on credibility, I recommend that Two Canoes be given the opportunity at trial to inquire about Wolworth's intent, so that the Court or the jury may determine what sanction, if any, is appropriate after evaluating Wolworth's credibility. See *Manning II*, 2021 WL 3542808, at *4. This process is outlined in the 2015 Advisory Notes:

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

Footnotes

- ¹ Two Canoes eventually resolved its case against Aobvious, and Aobvious assigned its claims against Addian to Two Canoes. ECF No. 56.
- ² Two Canoes' moving brief also appears to argue that Wolworth failed to preserve relevant WhatsApp messages. ECF No. 88 at 3-4, 6. But Wolworth testified during his deposition that he did not communicate with Fisher through WhatsApp. ECF No. 93-3 at 65:6-65:13. Moreover, Two Canoes does not appear to argue that the WhatsApp communications that Wolworth may have had with others could not be recovered through some other means. In fact, Two Canoes admits that "although Mr. Wolworth's copies of the communications between himself [and other businessmen] were lost, those communications were properly preserved and produced by [those other individuals]." ECF No. 88 at 8. Thus, the focus of this opinion is on the WeChat messages between Wolworth and Fisher.

Fed. R. Civ. P. 37(e)(2) advisory committee's note to 2015 amendment (emphasis added); *see also Manning II*, 2021 WL 3542808, at *4.

For these reasons, I recommend that Two Canoes' request for adverse inferences against Addian at the summary judgment stage be **DENIED WITHOUT PREJUDICE**; however, I recommend that Two Canoes be given the opportunity to examine witnesses at trial to determine whether Addian acted in bad faith.

IV. Conclusion

For the foregoing reasons, I recommend that Judge Wigenton **GRANT** Plaintiff's request in part and **DENY** it in part. Specifically, I recommend that Judge Wigenton **GRANT** Plaintiff's Motion by finding that Addian spoliated evidence during the period of November 5, 2020 to October 2021, and at the time of trial, the Court may assess whether sanctions are appropriate depending on whether Plaintiff suffered any prejudice or Defendant acted in bad faith. I recommend that all other aspects of the motion be **DENIED WITHOUT PREJUDICE**.¹⁵

The parties have fourteen (14) days to file and serve objections to this Report and Recommendation. See 28 U.S.C. § 636(b)(1)(C); L. Civ. R. 72.1(a)(2), (c)(2). It is further **ORDERED** that the Clerk of Court shall **TERMINATE** the Motion pending at ECF No. 87 and activate this Report and Recommendation for the District Court's review.

All Citations

Slip Copy, 2024 WL 2939178

- 3 Plaintiff highlights the inconsistency in the record as to the exact date that Wolworth broke this phone, but states as an “undisputed” fact, that “Mr. Wolworth **claims** to have broken a second phone in October 2021 that contained admittedly relevant communications, including with Mr. Fisher, and to have discarded the second phone so that there could be no forensic recovery of those communications.” ECF No. 94 at 1-2 (emphasis added and omitted).
- 4 See ECF Nos. 72-73 (granting leave to serve subpoenas on Fisher by alternative means).
- 5 The 2015 amendments to [Federal Rule of Civil Procedure 37\(e\)](#) created a uniform standard in determining whether spoliation of ESI has occurred. See [Fed. R. Civ. P. 37\(e\)](#) advisory committee’s note to 2015 amendment. Where [Rule 37\(e\)](#) applies, it provides the exclusive remedy for spoliation of ESI. *Manning I*, 2021 WL 3557582, at *4 (D.N.J. Apr. 29, 2021); see also *Industria de Alimentos Zenu S.A.S. v. Latinfood U.S. Corp.*, No. 16-cv-6576, 2022 WL 1683747, at *8, n.2 (D.N.J. May 26, 2022), *objections overruled*, 2023 WL 4197114 (D.N.J. June 27, 2023).
- 6 The parties do not address whether Plaintiff’s burden of proof is a preponderance of the evidence or clear and convincing evidence. See *Goldrich v. City of Jersey City (Goldrich I)*, No. 15-cv-885, 2018 WL 4492931, at *7 (D.N.J. July 25, 2018) (comparing cases) *report and recommendation adopted as modified*, 2018 WL 4489674 (D.N.J. Sept. 19, 2018) (Wigenton, J.). The Court need not decide which standard of proof applies because the Court’s conclusions would be the same under either standard. *Id.* (citing *Kavanagh v. Refac Optical Grp.*, No. 15-cv-4886, 2017 WL 6395848, at *2 n.5 (D.N.J. Dec. 14, 2017)).
- 7 Plaintiff has not presented sufficient information for the Court to conclude that Addian should have been on notice of the 3M Litigation prior to suit.
- 8 Initially, Wolworth testified that he communicated with Fisher via WeChat between “September 2020 and late July 2021,” but he later clarified that instead of July, he meant October. ECF No. 89-7 at 102:15-20.
- 9 In its Reply Brief, Plaintiff disputes Defendant’s characterization that Wolworth’s testimony “is only that the WeChat communications concern ‘3M products’ (as opposed to the masks at issue).” ECF No. 94 at 4 n.3 (citing ECF No. 93 at 7). However, the portion of Defendant’s Opposition cited by Plaintiff is limited to the September 2020 through October 2021 time period. To dispute Defendant’s characterizations regarding this limited time period, Plaintiff points to Wolworth’s testimony that he would have received a certain invoice from Fisher by way of WeChat message. ECF No. 94 at 4 n.3. (citing ECF No. 94-2 at 134:13-17). However, the excerpted testimony contains no references to any date or time when the invoice might have been sent. It is therefore unclear what relevance, if any, the testimony has to the September 2020 through October 2021 time period.
- 10 As Plaintiff convincingly argues, messages related to the sale of other 3M products, even if not the exact masks at issue, would be relevant to this litigation and responsive to its discovery requests. ECF No. 94 at 4 n.3.
- 11 Aside from pointing out that the September 2020 to October 2021 time period encapsulates time when Defendant was not under a duty to preserve, ECF No. 93 at 19, Defendant offers no reason for me to believe that all relevant messages were both created and destroyed before Defendant’s duty to preserve arose. See Wolworth Decl. ¶ 16 (“After the 3M Lawsuit was filed, I do not recall having any particular WeChat communications with Robert Fisher, although as I stated in my deposition it is possible that there were a few unrelated to this case.”).
- 12 It appears that much of the confusion lies in the distinction between “communications” and “WeChat messages.” Plaintiff asserts spoliation of *WeChat messages*. The question that Plaintiff asked Wolworth was much broader, i.e., about communications. Communications may take variable forms, including telephone calls, text messages, emails, or messages sent via application-based platforms. The record before this Court shows that Wolworth and Fisher communicated primarily by live telephone call. ECF No. 93-3 at 64:24-65:15; Wolworth Decl. ¶ 7; Henner Decl. ¶ 3. Moreover, all communications with Fisher were not lost, as demonstrated by Defendant’s production of communications with Fisher in the form of text messages, emails, and documents. See ECF No. 93 at 2; Henner Decl. ¶ 14. Therefore, in context, the fact that Wolworth admitted that during this time period he had minimal “communications” with Fisher is not sufficient to establish that those communications were in the form of WeChat messages.

- 13 In conjunction with its argument that Defendant failed to take reasonable steps to preserve ESI, Plaintiff states that Addian “falsely” claims that “WeChat does not automatically back up, so any efforts by Mr. Wolworth to recover those **chats** would have been futile.” ECF No. 94 at 5. Plaintiff continues: “a perfunctory Google search would have offered a simple, step-by-step process for backing up Mr. Wolworth’s WeChat... data,” and accuses Wolworth and his counsel of failing to undertake “such a basic preservation measure, notwithstanding the litigation hold in effect.” *Id.* In support, Plaintiff submits a few internet printouts that appear to provide instructions on how to create manual back-ups of WeChat files and transfer the same to a secondary device. ECF Nos. 94-3, 94-4, 94-5. Plaintiff seems to argue that Defendant should have backed up Wolworth’s WeChat messages on a separate device before his phone broke. As discussed above, I have considered as much in finding that Defendant failed to take reasonable steps to preserve certain WeChat messages. However, because Plaintiff also seems to tie this argument to attempts to recover the spoliated documents (which I address in the context of the bad faith analysis below), I will note that I am unconvinced that the foregoing is indicative of an intent to deprive. In fact, it does not appear that any of the cited internet printouts (ECF Nos. 94-3, 94-4, 94-5) provide a mechanism for automatic/continual backup of WeChat messages, and each seems to require access to the original mobile device. It is therefore unclear how this undercuts a claim that “WeChat does not automatically back up, so any efforts by Mr. Wolworth to recover those **chats** would have been futile.” ECF No. 94 at 5 (Plaintiff’s characterization of Defendant’s argument). Even taking Plaintiff’s argument as true, it would, at best, support a finding of negligence or gross negligence, not bad faith or intent. See *infra*. § III-B-2.
- 14 Rule 37(e)(2)’s “intent to deprive” is also referred to as “bad faith.” See, e.g., *GN Netcom, Inc.*, 930 F.3d at 83 (finding that the district court reasonably concluded that a spoliating party “acted in bad faith” where “intentional step[s]” were taken “to interfere with” its adversary’s “prosecution of its claims” against the spoliating party.); *Goldrich v. City of Jersey City (Goldrich II)*, No. 15-cv-885, 2018 WL 4489674, at *2 (D.N.J. Sept. 19, 2018) (finding that Rule 37(e)(2) sanctions were appropriate “because the circumstantial evidence strongly supports a finding that [the spoliating party] acted in bad faith, intentionally depriving his adversaries of ESI.”) (Wigenton, J.); *Manning II*, 2021 WL 3542808, at *2 (“A showing of bad faith, or an intent to deprive, requires”).
- 15 This recommendation is based on the record as it currently exists. If admissible evidence is developed at trial demonstrating or further supporting prejudice or intentional spoliation, it is respectfully recommended that the trial judge should then consider whether sanctions are appropriate under Rule 37(e).

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United States v. Glatz

United States District Court, E.D. Tennessee, AT KNOXVILLE. | May 1, 2023 | Not Reported in Fed. Supp. | 2023 WL 4503981

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AT KNOXVILLE.

UNITED STATES of America, Plaintiff,

v.

Glenn Fred GLATZ, Defendant.

No. 3:19-CR-218-TAV-DCP

|

Signed May 1, 2023

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REPORT AND RECOMMENDATION

Debra C. Poplin, United States Magistrate Judge

*1 This case is before the undersigned for report and recommendation on Defendant Glenn Glatz's Motion to Suppress All Evidence Obtained by May 3, 2018 Jefferson County Search Warrant, a June 6, 2018 Federal Search Warrant, and a November 2019 Federal Search Warrant [Doc. 20], Motion for a "Franks" Hearing [Doc. 34], and pro se motion relating to irregularities with the November 2019 search warrant [Doc. 99 pp. 4–6]. *See 28 U.S.C. § 636(b).* Defendant asks the Court to suppress all evidence obtained from three searches of his cellular telephone and SD card pursuant to a May 3, 2018 state search warrant ("state search warrant"); a June 6, 2018 federal search warrant ("first federal search warrant"); and a November 19, 2019 federal search warrant ("second federal search warrant"). Defendant argues that the searches of his cellular phone and SD card pursuant to these warrants violated the Fourth Amendment because the affidavits supporting all three search warrants fail to provide probable cause for their issuance. Defendant also requests an evidentiary hearing to challenge statements in the three affidavits supporting the search warrants, arguing the affidavits contain false statements and omissions that are

material to probable cause. Defendant asserts that the three search warrants fail to allege the items to be seized with particularity. He challenges the execution of the state search warrant, which he contends did not permit the search of his SD card, and the second federal search warrant, which he asserts was unduly delayed. Finally, Defendant contends the second federal search warrant was never signed by the issuing judge.

For the reasons discussed below, the Court finds that the supporting affidavits provide probable cause for the issuance of the two federal search warrants and that although the state search warrant is lacking in a sufficient nexus, the executing officers acted in good faith. The Court also finds that Defendant fails to establish that the affidavits contain material false statements or omissions requiring a *Franks* hearing and that all three search warrants are sufficiently particular. The Court finds that the state search warrant permitted the search of the SD card contained within the cellphone, and that the execution of the second federal search warrant was timely. Finally, the Court finds that the second federal search warrant was signed and issued and that its delayed return does not require suppression of the evidence obtained in the search. Accordingly, the Court respectfully recommends that Defendant's motions to suppress evidence and for a *Franks* hearing [Docs. 20, 34, and 99] be DENIED.

I. BACKGROUND

Defendant is charged [Doc. 1] with four counts of inducing a minor to engage in sexually explicit conduct to produce child pornography (Counts 1, 4, 6, & 8), one count of receiving child pornography (Count 2), three counts of transfer of obscene materials to a minor (Counts 3, 5, & 7), and one count of possession of child pornography (Count 9). These charges are alleged to have occurred between December 2015 through May 2, 2018. Count 1 relates to minor A.A., and Counts 3 through 6 and Count 8 relate to minor F.R. Counts 3, 5, and 7 relate to a minor under age sixteen, and Count 9 relates to a minor under age twelve. These charges all arise from the data extracted from Defendant's cellular telephone and SD card, which were seized on May 2, 2018, by the Jefferson County Sheriff's Office ("JCSO").

*2 On May 2, 2018, JCSO Detectives Richard Collins and Pamela Taylor interviewed Defendant Glatz at the Jefferson County Justice Center and seized his cellular telephone, which contained a 16-gigabyte micro-SD card.¹ The following day, May 3, 2018, Detective Taylor applied for

and received a search warrant for Defendant's LG cellphone and "16 gigabyte sim card" [Doc. 20-1 p. 1].²

In her supporting affidavit, Detective Taylor alleges the following as probable cause to search Defendant's cellphone and "sim card" for evidence of solicitation of a minor and violation of the sex offender registration law: On April 28, 2018, law enforcement received a complaint from Samantha Taveras, a user of the DeviantArt website, who reported that Glenn Glatz, a registered sex offender, was using the username TennesseeTomcat on DeviantArt and was "chatting and 'role-playing'" with a thirteen-year-old girl, who used the username Nolifelady [*Id.* at 2]. Detective Taylor also stated that Glatz was sending "inappropriate" photographs of himself and asking the minor to send photographs of herself to him [*Id.*]. Detective Taylor alleged that Glatz failed to report using the TennesseeTomcat username on the DeviantArt website [*Id.*]. Detective Taylor stated that "Mr. Glatz was interviewed on 5/2/18 and did admit to using the username, TennesseeTomcat and also chatting with the minor child and requesting a photograph" [*Id.*]. Detective Taylor stated that based upon this evidence and her knowledge, training, and experience, she believes Glatz's cellphone will contain text messages, photographs, unreported website usage, and unreported usernames, all "depicting illegal activity," namely solicitation of a minor in violation of [Tennessee Code Annotated § 39-13-528](#) and violation of the Tennessee sex offender registration laws at § 40-39-208 [*Id.* at 4]. A judge issued the search warrant on May 3, 2018 [*Id.* at 1].

According to Detective Richard Collins, who testified at the April 14, 2021 evidentiary hearing in this case, Glatz's cellphone was submitted to Detective Michael Stallings, forensic examiner, for a Cellebrite analysis [Doc. 44, Transcript, p. 66]. Detective Collins testified that the execution of the May 3, 2018 search warrant resulted in the seizure of child pornography [*Id.* at 40].

*3 On June 6, 2018, Federal Bureau of Investigation ("FBI") Special Agent Bianca Pearson ("SA Pearson") sought and obtained a federal search warrant for the contents of Defendant's LG cellular phone and SD card "previously installed inside the cellular telephone" [Doc. 35-1, p. 1].³ The warrant permits the search of the cellphone and SD card for "visual depictions ... of minors engaged in sexually explicit conduct," child erotica, passwords and security devices, and evidence of who was using the cellphone at the time the aforementioned items were created, all of which constitute evidence of violations of the receipt and possession of

child pornography in violation of [18 U.S.C. § 2252A](#) and enticement of minors to engage in sexual activity in violation of [18 U.S.C. § 2422\(b\)](#) [*Id.* at 5 (Attachment B)].

In her affidavit in support of the June 6, 2018 search warrant, SA Pearson states that she met with JCSO Detective Richard Collins on May 23, 2018, and learned that based on a May 2, 2018 interview of Glatz, he was arrested for violation of the Tennessee Sex Offender Registration law for failing to report "a [chat](#) application and email address" on the registry [Doc. 35-1 ¶17]. The affidavit relates that in May 2018, Detective Michael Stallings of the Jefferson City Police Department examined Glatz's cellphone and SD card pursuant to a May 2018 search warrant issued by Jefferson County Circuit Court Judge Duane Slone [*Id.* at ¶18]. Detective Stallings was not able to search the cellphone's memory, which was "pass code encrypted," but he searched the SD card and seized images of a nude minor female [*Id.* at ¶¶18–19]. The affidavit describes four of the images seized from the SD card, stating three images were focused on the minor's face and naked breasts and one on her naked vagina [*Id.* at ¶19]. The words "Glenny's Bitch" are superimposed over and just above image of the minor's vagina [*Id.*].

SA Pearson's affidavit states the SD card also contained an image of three SIM cards and one SD card taped to a note from "Mindy" asking "Rainna" to forward the attached SIM and SD cards to another female [*Id.* at ¶21]. In the same image with the note is an envelope addressed to Rainna Nelson in Alaska with a return address to Mindy Parks in Dandridge, Tennessee [*Id.*]. The affidavit relates that Postal Inspector John Wallace Bowden believes that the parties mentioned in the note and on the envelope "are attempting to hide their true identity by using fictitious names in order to exchange digital storage media" [*Id.* at ¶21]. SA Pearson states that based upon her "training, experience, and discussions with FBI computer forensic examiners, the FBI has the capability to examine the internal memory of the device by bypassing the pass-code lock features of this phone" [*Id.* at ¶22]. Finally, the affidavit states that Glatz was arrested for child molestation and sentenced to twenty years of incarceration "on May 24, 2005" [*Id.* at ¶23] and was indicted in Sevier County, Tennessee, on September 11, 2017, for possessing items in an attempt to lure a minor to engage in sexual activity, violation of the sex offender registry, and contributing to the delinquency of a minor [*Id.* at ¶16]. The affidavit relates that Defendant's SD card also contained photographs of the clothed minor involved in the Sevier County charges while she was inside Defendant's camper [*Id.* at ¶20].

*⁴ On November 19, 2019, FBI Special Agent Kristina L. Norris (“SA Norris”) sought and obtained a federal search warrant for four Blu-ray discs containing the extracted data from the Defendant’s cellphone and SD card [Doc. 102-1 pp. 1–5].⁴ The search warrant permits the search of four Blu-ray discs, containing the extractions from Defendant’s LG cellphone and micro-SD card for the items in Attachment B, which are images of child pornography as defined in 18 U.S.C. § 2256; data reflecting the transfer of obscene material to minors under age sixteen; communications concerning child pornography, transferring obscene materials to minors under age sixteen, or soliciting minors for sex; child erotica; data on ownership of the devices used in the commission of these offenses; passwords and data security devices; and data revealing the presence of malware or viruses on the devices [Id. at pp. 1, 3].

In her affidavit in support of the second federal search warrant, SA Norris states that on May 22, 2018, JCSO Detective Richard Collins contacted SA Pearson for assistance with an investigation of Glenn Glatz, who was in custody for violating the Tennessee sex offender registration law and sexual exploitation of a minor [Doc. 35-2 ¶15]. The affidavit relates that SA Pearson met with Detective Collins on May 23, 2018, and learned Collins “had received a report that Glatz was using social media to communicate with a 13[-]year-old girl” [Id. at ¶16]. Detective Collins asked Defendant to come for a “sex offender compliance check” and interviewed Defendant on May 2, 2018 [Id.]. “Based on [this] interview,” Defendant “was subsequently arrested for violation of the Tennessee Sex Offender Registration law because [he] was using a **chat** application and e-mail address that were not listed on his sex offender registry as required” [Id. at ¶16]. The affidavit states that the JSCO obtained a search warrant for Defendant’s LG cellphone “containing a micro SD card, 16GB,” but law enforcement was able to search only the SD card because the cellphone was “password encrypted” [Id. at ¶17].

SA Norris’s affidavit relates that pursuant to a federal search warrant, the FBI accessed Defendant’s cellphone in February 2019, extracted the contents of the cellphone, and placed the results of the forensic examination of the cellphone on four Blu-ray discs [Id.]. The affidavit alleges that probable cause for the first federal search warrant relied in part on the evidence gained from the state search warrant and “[u]pon further review, the facts set forth in the affidavit in support of the state search warrant arguably may not sufficiently

establish probable cause for the state search warrant” [Id. at ¶18]. SA Norris states that “out of an abundance of caution,” she seeks “to search the same data without relying on the information obtained through” the prior state and federal search warrants [Id.].

*⁵ Agent Norris’s affidavit provides the facts in support of this separate probable cause as follows: Beginning shortly after his arrest, Defendant made over sixty recorded jail telephone calls to a telephone number that law enforcement identified as that of a minor female (“V1”) from Hawthorne, Florida [Id. at ¶19]. Identifying information (V1’s unique first name, that she lives in Florida, and that she moved to Florida from Alaska) disclosed during the recorded calls allowed law enforcement to identify V1 and her parents [Id. at ¶20]. On January 31, 2019, FBI agents contacted V1 and her parents and interviewed V1, who said she met Defendant on DeviantArt, Defendant was her boyfriend, she knew Defendant was “much older” than her, and she told Defendant she was eighteen, although she had recently turned fourteen [Id. at ¶21]. V1 told agents that Defendant gave her a SIM card to use in communicating with him, and she confirmed that she sent naked pictures of herself to Defendant over the internet shortly before his arrest in May 2018 [Id. at ¶22].

SA Norris’s affidavit further relates that on July 18, 2019, FBI agents contacted a second minor (“V2”), who was communicating with Defendant and V1 [Id. at ¶23]. V2’s parents permitted the FBI to perform a forensic evaluation of V2’s cellphone, which revealed that V2 communicated with Defendant and V1 on the **WhatsApp** messaging application at Defendant’s direction, “because it has end to end encryption” preventing others from viewing the conversations [Id. at ¶23]. The affidavit recounts several conversations taken from V2’s cellphone in which Defendant tells V1 and V2 that the application they are using is “safe for perverts” [Id. at ¶24(b)], Defendant tells V2 that V1 is only thirteen so V2 will need to “take the lead” in lesbian “rp” (role-play) [Id. at ¶24(e)], V1 tells V2 that she is concerned and embarrassed about police finding pictures of “her body” after Defendant’s arrest [Id. at ¶26], V1 tells V2 that she wished her cellphone did not delete the “hottt” [sic] pictures Defendant sent her and that she knows Defendant sent V2 and others “dick pics or vids or something” once when he was mad at V1 [Id. at ¶27], and after Defendant’s arrest, V1 told V2 that she deleted her pictures and videos from Defendant, changed her password, and “locked [her] apps” in case the police seized her cellphone, knowing that

she could get “new stuff” if Defendant got out of jail [*Id.* at ¶28(c)]. The affidavit states V2’s contact lists for both WhatsApp and her cellphone contain Defendant’s cellphone number [*Id.* at ¶29].

SA Norris’s affidavit provides the following additional information in support of probable cause: Defendant was arrested for child molestation and sentenced by a Georgia criminal court to twenty years of incarceration “on May 24, 2005” [*Id.* at ¶30]. Defendant’s adult male roommate told the manager of the trailer park where they lived that Defendant tried to convince girls, aged thirteen or fourteen, from North Carolina to come to his trailer [*Id.* at ¶31]. The trailer park manager saw Defendant throw a laptop computer and cellphones into a dumpster, after Defendant was approached by law enforcement and after his LG cellphone was seized by officers [*Id.* at ¶31]. The FBI reviewed Defendant’s correspondence, written while in state custody, in which he discussed his online friendships with teenage girls he met on DeviantArt and that he was accused of being a “pedophile” by users of DeviantArt website [*Id.* at ¶32]. Defendant also used an adult friend to send V2 handwritten correspondence professing his love for V2 and discussing “sexual matters” [*Id.* at ¶33]. SA Norris submitted that based upon this information, probable cause exists to believe evidence of violations of 18 U.S.C. §§ 1470, 2252A, and 2422(b) would be found in the data on the four Blu-ray discs [*Id.* at ¶39].

II. PROCEDURAL HISTORY

At Defendant’s initial appearance on January 28, 2020, the Court appointed Assistant Federal Defender Jonathan A. Moffatt and the Federal Defender Services of Eastern Tennessee (“FDS”) to represent him. On June 19, 2020, counsel filed a Motion to Suppress All Evidence Resulting from the Warrantless Seizure of Defendant’s LG Cellphone and an SD Card [Doc. 19]⁵ and the instant Motion to Suppress All Evidence Obtained by a May 3, 2018 Jefferson County Search Warrant, a June 6, 2018 Federal Search Warrant, and a November 2019 Federal Search Warrant [Doc. 20]. Thereafter, counsel asked to delay the evidentiary hearing on these motions, while counsel reviewed the voluminous discovery and researched legal matters, all while hampered by limitations relating to the Covid-19 pandemic [Docs. 25, 28, & 37]. Counsel also requested and was granted leave [Doc. 32] to file a third dispositive motion, the Motion for a “Franks” Hearing [Doc. 34].⁶ The Government responded in opposition to Defendant’s suppression motions [Docs. 23,

24, & 35]. The Court held an evidentiary and suppression hearing on these motions on April 14, 2021, at the conclusion of which the parties asked to file post-hearing briefs [Doc. 44, Transcript, pp. 110–12].

*6 Defendant subsequently asserted his right to represent himself and asked to file his own post-hearing briefs [Doc. 41]. On June 8, 2021, the undersigned found Defendant knowingly and voluntarily waived his right to counsel, permitted him to represent himself, and appointed Mr. Moffatt to serve as elbow counsel [Doc. 48]. Defendant filed post-hearing briefs [Docs. 96, 97 & 100] and exhibits [Doc. 98] on September 24, 2021.⁷ The Government filed responding post-hearing briefs on October 15, 2021 [Docs. 103–05], and Defendant filed replies on October 25, 2021 [Docs. 112 & 113].

On October 1, 2021, the Court denied [Doc. 101] Defendant’s motion for disciplinary action against Government’s counsel [Doc. 99] but reserved ruling on the issue of irregularities with the November 19, 2019 search warrant and other documents in case number 3:19-MJ-1117 [Doc. 99 pp. 4–6]. The Government responded to the assertion of irregularities [Doc. 102], and Defendant filed a reply [Doc. 111]. Defendant also addressed this issue in his post-hearing brief [Doc. 97] and reply [Doc. 113].⁸ On September 20, 2022, Defendant filed a motion for leave to correct references to exhibit numbers, a citation, and a date in his post-hearing briefs and to add a missing page to two exhibits [Doc. 151]. The Government did not respond to this motion, which the Court subsequently granted [Doc. 157].

III. POSITIONS OF THE PARTIES

Defendant Glatz asks the Court to dismiss all evidence obtained from the execution of the state search warrant and the two federal search warrants because they were issued without probable cause [Doc. 20 pp. 8–10]. Defendant further contends that all three affidavits contain false statements and/or material omissions necessary for probable cause [Doc. 34 pp. 1–5; Doc. 100 p. 1]. He argues that the three search warrants fail to state the items to be seized with sufficient particularity [Doc. 97 pp. 7–8]. He also maintains that law enforcement exceeded the scope of the state search warrant, which did not permit the search of his SD card [Doc. 20 pp. 8–9]. He asserts that the information used to provide probable cause for the two federal search warrants stems from the search of his SD card in May 2018 [Doc. 20 p. 9]. Defendant also contends that law enforcement “unreasonably delayed”

seeking the second federal search warrant [Doc. 20 pp. 9–10]. Finally, Defendant argues that the second federal search warrant was never issued by a judge based upon irregularities in format, disclosure in discovery, and docketing [Doc. 97 pp. 1, 4; Doc. 99 pp. 4–6; Doc. 113].

*7 The Government responds that Defendant's cellphone and SD card and the data contained thereon were lawfully searched pursuant to three valid search warrants [Doc. 24]. It contends that the state and federal search warrants are supported by ample probable cause, including information from Defendant's consensual interview [Doc. 24 p. 1]. The Government argues that even if probable cause was lacking for the issuance of the state search warrant, the second federal search warrant is based upon probable cause independent of the investigation and fruits of the state search warrant [Doc. 24 p. 9]. The Government alleges that Defendant has failed to make a substantial preliminary showing that the affiants deliberately or recklessly included false information or made material omissions necessary to probable cause [Doc. 35 pp. 1–2; Doc. 105 p. 1]. It contends that the state search warrant is sufficiently particular because it directs the executing officers to search for evidence of a specific crime or crimes [Doc. 104 pp. 6–7]. The Government also asserts that the state search warrant's reference to the SD card as a "SIM" card was a clerical mistake, which does not affect the authority of law enforcement to search the SD card contained within the cellphone [Doc. 24 p. 2 n.2; Doc. 35 pp. 7–8]. Finally, it maintains that suppression of the evidence seized from the execution of the search warrants is not the appropriate remedy because law enforcement acted in good faith reliance on the search warrants [Doc. 24 pp. 1, 10–12].

IV. ANALYSIS

The Fourth Amendment protects the right to be free from unreasonable searches and seizures. In this respect, a judge shall not issue a warrant for the search of a person, home, or personal property except upon a finding of "probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Defendant Glatz argues that his Fourth Amendment rights were violated by the issuance and execution of three search warrants for his cellphone, SD card, and the data extracted from his cellphone and SD card and saved on four Blu-ray discs. First, he argues that the affidavits supporting each of these search warrants fail to provide probable cause and that each of the three affidavits contained false statements and omissions necessary to probable cause. Second, Defendant argues that the search

warrants do not state the items to be seized with sufficient particularity. Third, Defendant challenges the execution of the state and second federal search warrants. Finally, he contends that the second federal search warrant was never actually issued. The Court examines each of these issues, along with the Government's argument that suppression of evidence is not appropriate because the executing officers relied on the search warrants in good faith.

A. Probable Cause

A search warrant issued in compliance with the Fourth Amendment must be based on "particularized facts" that demonstrate "a fair probability that evidence of a crime will be located on the premises of the proposed search." *United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006) (quoting *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005)). Defendant argues that the affidavits supporting the three search warrants failed to provide probable cause for the following reasons: (1) He contends the state search warrant is not supported by probable cause because the complainant Samantha Taveras was not sufficiently reliable and failed to allege a crime, his unwarned statement cannot be considered in the probable cause analysis, and Detective Taylor's affidavit fails to establish a nexus between his cellphone and SD card and the alleged crimes. (2) Defendant contends that both federal search warrants also lack probable cause because they rely on evidence seized pursuant to the invalid state search warrant and fail to state a nexus between criminal activity and his cellphone. (3) Finally, Defendant asserts that all three affidavits contain false statements and/or omissions that are necessary to probable cause.

The Court begins by observing that an issuing judge's determination that probable cause exists is entitled to "great deference." *United States v. Allen*, 211 F.3d 970, 973 (6th Cir. 2000) (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)). This deferential standard promotes the preference for the use of search warrants as opposed to warrantless searches. *Id.* "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238. The "duty of a reviewing court is simply to ensure that the magistrate [judge] had a substantial basis for concluding that probable cause existed." *Id.* at 238-39. In making this determination, the Court considers only the information that was before the issuing judge—in other words, only what is contained within the four corners of the supporting affidavit. *United States v.*

Brooks, 594 F.3d 488, 492 (6th Cir.), cert. denied, 560 U.S. 959 (2010); see also *Whiteley v. Warden*, 401 U.S. 560, 565 n.8 (1971).

*8 Probable cause “requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.” *Gates*, 462 U.S. at 244 n.13. Thus, the Supreme Court has observed that “probable cause is a flexible, common-sense standard,” causing a person “of reasonable caution” to believe that the items are evidence of a crime. *Texas v. Brown*, 460 U.S. 730, 742 (1983). In other words, probable cause is “reasonable grounds for belief supported by less than *prima facie* proof but more than mere suspicion.” *United States v. Bennett*, 905 F.2d 931, 934 (6th Cir. 1990). Whether probable cause to issue a search warrant exists is evaluated by looking at the totality of the circumstances. *Gates*, 462 U.S. at 238. With these principles in mind, the Court turns to the affidavits in this case.

(1) Probable Cause for State Search Warrant

Defendant raises three primary challenges to probable cause for the issuance of the state search warrant. He contends that Samantha Taveras's report was not reliable and did not allege a crime. He asserts that his unwarned statement cannot be considered in the probable cause analysis, and he maintains that Detective Taylor's affidavit fails to establish a nexus between the alleged crimes and his cellphone and SD card.

(a) Reliability of Complainant

Detective Taylor's affidavit in support of the state search warrant provides the following information relating to a report from Samantha Taveras: “On 4/4/18 it was reported from a website user, Samantha Taveras that a registered sex offender, Glenn Glatz was using the website ‘Deviantart’, and chatting and ‘role-playing’ with a 13 year old girl with the username ‘nolifelady’. The username Mr. Glatz was using was ‘Tennesseetomcat’ ” [Doc. 20-1 p. 2]. Defendant Glatz argues that Detective Taylor's affidavit fails to show that the information from Samantha Taveras was sufficiently reliable [Doc. 20 p. 3]. He contends that Taveras lacked direct knowledge of the information she provided to JCSO and did not allege that he committed any criminal acts [Id. at 8]. The Government responds that law enforcement need not corroborate information from a known citizen complainant and that Taveras's complaint provided probable cause to believe Defendant violated the Tennessee sex offender registration law [Doc. 24 p. 8].

Typically, if probable cause to issue a search warrant is gained from information provided by a confidential source, the issuing judge must have a basis for finding that the source is reliable or credible and was in a position to know the information provided. *United States v. Dyer*, 580 F.3d 386, 390 (6th Cir. 2009); see also *Gates*, 462 U.S. at 233 (holding that a confidential informant's reliability and basis of knowledge are “relevant considerations in the totality-of-the-circumstances analysis”); *Allen*, 211 F.3d at 972–73. An informant's reliability may be established by a statement that the informant previously provided reliable information or by independent corroboration of the informant's information. *United States v. Coffee*, 434 F.3d 887, 893 (6th Cir. 2006); *United States v. McCraven*, 401 F.3d 693, 697 (6th Cir. 2005) (observing that facts permitting the reviewing judge to determine the informant's reliability “need not take any particular form”).

However, when an affidavit identifies the complainant by name and states that person observed evidence of a crime, independent corroboration of the complaint is not necessary for the observation to provide probable cause. See *United States v. Braden*, 248 F. App'x 700, 703 (6th Cir. 2007). Here, the Court finds the information from Taveras was reliable because she gave her name to law enforcement, which would allow the officers to prosecute her if her report proved to be false. *United States v. May*, 399 F.3d 817, 824–25 (6th Cir. 2005) (holding that a report from an informant whose identity is known to law enforcement, thus, subjecting the informant to prosecution for making a false report, is “entitled to far greater weight than … an anonymous source”); see also *Navarette v. California*, 572 U.S. 393, 400 (2014) (observing that the 911 emergency system “has some features that allow for identifying and tracing callers, and thus providing some safeguards against making false reports with immunity”).

*9 Also, although not necessary, additional information in the affidavit provides some corroboration of Taveras's report. The affidavit states that Glatz “failed to report” the Tennesseetomcat username, and the fact he had reporting requirements supports Taveras's claim that Glatz is a sex offender [See Doc. 20-1 p. 2]. The affidavit provides that Glatz was using the DeviantArt website [Id.]. The affidavit also contains Glatz's admissions in the May 2, 2018 interview that he was using the Tennesseetomcat account and chatting with a minor, which corroborate Taveras's report that Glatz was chatting with a minor using the Tennesseetomcat username [See id.].

Defendant also argues that the information in the affidavit on Taveras's complaint does not allege he engaged in any criminal conduct [Doc. 20 p. 8]. However, Defendant cites no authority, nor is the Court aware of any, requiring that probable cause come from a single source or complaint. Instead, Taveras's report that Defendant was using the Tennesseeetomcat username on the DeviantArt website, in combination with Detective Taylor's statement that he failed to report that username on his sex offender registration and Defendant's admission that he used "Tennesseeetomcat" together provide probable cause that Defendant Glatz violated the Tennessee sex offender registration law.⁹

Finally, Defendant contends Taveras "did not have direct knowledge through her own observations of any crime" [Doc. 34 p. 1]. He alleges that, instead, Taveras was only "surfing the web" and reading entries on DeviantArt, and, thus, had no firsthand information of any criminal activity [Doc. 100 p. 4]. However, the Court can infer from the affidavit's characterization of Taveras as a user of the DeviantArt website, that Taveras's report is based on her observation of communications on the DeviantArt website. Defendant contends that all parts of DeviantArt are open for observation by the public [Doc. 100 p. 16]. Thus, the issuing judge could reasonably infer that Taveras's information came from her own observations of communications she viewed on the DeviantArt website.

(b) Defendant's Statements

Defendant argues that information from his May 2, 2018 interview at the JCSO cannot be considered in support of probable cause for the state search warrant because his statements were unwarned and involuntary [Doc. 20 p. 4, 7–8; Doc. 100 pp. 11, 19–20]. The Court analyzed the admissibility of Defendant's statements made during the May 2, 2018 interview in its Report and Recommendation on Defendant's Motion to Suppress All Evidence Resulting from the Warrantless Seizure of Defendant's LG Cellphone and an SD Card [Doc. 175]. There, the undersigned found that although Defendant's statements during the May 2, 2018 interview were obtained in violation of the prophylactic requirements of *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966), due to the detectives' failure to provide the *Miranda* warnings, they were voluntary [*Id.* at 49–50, 62]. The fruits of an un-Mirandized statement are not "inherently tainted," *Oregon v. Elstad*, 470 U.S. 298, 307 (1985), and need not be suppressed, *Vega v. Tekoh*, 142 S. Ct. 2095, 2103 (2022).

***10** Both the Supreme Court and our appellate court have permitted other uses of evidence derived from voluntary but unwarned statements, which cannot be admitted in the government's case-in-chief. *United States v. Patane*, 542 U.S. 630, 636–37 (2004) (holding *Miranda* violation does not require suppression of physical evidence—a gun—gained through defendant's voluntary statement); *Michigan v. Tucker*, 417 U.S. 433, 450–52 (1974) (admitting testimony of witness whom police discovered through defendant's unwarned statement); *Harris v. New York*, 401 U.S. 222 (1971) (voluntary statement obtained in violation of *Miranda* can be used to impeach defendant's testimony at trial); *Elstad*, 470 U.S. 306–09 (permitting use of second statement after *Miranda* warning); *United States v. Sangineto-Miranda*, 859 F.2d. 1501, 1518 (6th Cir. 1988) (holding "cocaine found in Sangineto's truck was admissible, even though knowledge of the existence and whereabouts of the truck were proximately derived from a *Miranda* violation"); *see also United States v. Pacheco-Alvarez*, 227 F. Supp. 3d 863, 886 n.10 (S.D. Ohio Dec. 29, 2016) (noting *Miranda* violation does not require suppression of physical evidence—defendant's fingerprints—gained through his voluntary statements) (collecting cases).

In *United States v. Stark*, the court declined to suppress physical evidence (a computer containing child pornography) seized pursuant to a search warrant based on defendant's voluntary statement, given in violation of *Miranda*. No. 09-cr-20317, 2009 WL 3672103, at *3–4 (E.D. Mich. Nov. 2, 2009). While on parole for convictions of felony eavesdropping, officers questioned Stark in his driveway about violating his curfew, without providing the *Miranda* warnings, and Stark made incriminating statements, which were used to provide probable cause for a search warrant for his residence. *Id.* at *1. The court found that Stark's unwarned statements were made while he was in police custody and, thus, prohibited the government's use of the statements in its case-in-chief at trial. *Id.* at *2. Stark argued that "if his statements are suppressed, so also should be the evidence seized pursuant to the warrant predicated on his statements." *Id.* at *3. Relying on the Supreme Court's analysis in *Patane*, the district court held "although the physical evidence obtained by police [from the use of defendant's unwarned but voluntary statement in the search warrant affidavit] would technically [be] the fruit of the poisonous tree, this conclusion does not warrant suppression of the evidence, because the fruit doctrine does not apply to physical evidence seized as a result of a *Miranda* violation." *Id.* (citing *Patane*, 542 U.S. at 634); *see also Vega*, 142 S. Ct. at 2104 (observing

that the fruit-of-the-poisonous-tree doctrine does not apply to *Miranda* violations).

Like the defendant in *Stark*, Defendant Glatz also argues that his unwarned statements cannot form the basis for probable cause for the issuance of the state search warrant. The Court has already determined that Defendant's statements at the May 2, 2018 interview were voluntary. Accordingly, the Court finds that the *Miranda* violation does not create a barrier to the use of Defendant's statements in support of probable cause. Moreover, the Court observes that nothing within the four corners of Detective Taylor's affidavit would permit the reviewing judge to find the Defendant's statement was not properly obtained.¹⁰

(c) Nexus

***11** Defendant also argues that Detective Taylor's affidavit fails to provide a nexus between his cellular phone and a suspected crime [Doc. 20 p. 8; Doc. 97 p. 8]. "To justify a search, the circumstances must indicate why evidence of illegal activity will be found 'in a particular place.'" *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (*en banc*). In other words, probable cause requires a " 'nexus between the place to be searched and the evidence sought.' " *Id.* (quoting *United States v. Van Shutters*, 163 F.3d 331, 336–37 (6th Cir. 1998)). "The connection between the residence and the evidence of criminal activity must be specific and concrete, not 'vague' or 'generalized.'" *United States v. Brown*, 828 F.3d 375, 382 (6th Cir. 2016) (quoting *Carpenter*, 360 F.3d at 595). Assessing whether an affidavit establishes a nexus turns upon the facts of a particular case and requires examination of the totality of the circumstances. *Id.* The Court must assess " 'whether the [issuing judge] had a substantial basis for finding that the affidavit established probable cause to believe that the evidence would be found at the place cited.'" *United States v. Merriweather*, 728 F. App'x 498, 504 (6th Cir. 2018) (quoting *United States v. Davidson*, 936 F.2d 856, 859 (6th Cir. 1991)).

In her affidavit, Detective Taylor states that the LG cellphone was in the custody of Defendant and is now in the custody of the JCSO [Doc. 20-1 p. 2]. The affidavit states that Taveras reported that while Defendant was on the DeviantArt website and using the TennesseeTomcat username, Defendant chatted and "role play[ed]" with a minor female [*Id.*]. The affidavit further provides that in an interview on May 2, 2018, Defendant admitted using the TennesseeTomcat username, chatting with a minor, and requesting a photograph [*Id.*].

Finally, the affidavit relates that the affiant "believes based on her knowledge, training, and experience that evidence of violations of Tenn. Code Ann. § 39-13-528 Solicitation of a minor[and §] 40-39-208 Violation of sex offender registration laws, will be found in the mobile device to be searched" [*Id.* at 4]. "Specifically," the affiant believes the cellphone "will contain evidence of text messaging, photographs, unreported website usage and username[]s not report[ed as] required by law, [all] depicting illegal activity" [*Id.*].

The Court finds Detective Taylor's affidavit fails to establish that Defendant used his cellphone to access the DeviantArt website, to **chat** with a minor, or to send or request photographs. The affidavit does not state that based upon her training and experience, Detective Taylor knows that sex offenders use their cellphones to access the internet and to send texts and photographs. Instead, the affiant asks the issuing judge "to simply take [her] word for it" that Defendant's cellphone would contain evidence of solicitation of a minor or violations of the sex offender registry laws. *United States v. White*, 874 F.3d 490, 499 (6th Cir. 2017). "'[A] mere affirmation of suspicion and belief without any statement of adequate supporting facts'" is insufficient for probable cause. *Id.* at 498 (quoting *Nathanson v. United States*, 290 U.S. 41, 46 (1933)).

In *White*, the court distinguished a conclusory, "bare-bones" affidavit with no nexus, from the affidavit before it, in which the affiant "showed his work" by stating that defendant, who had a history of drug offenses, engaged in a recorded drug deal in the driveway of the premises to be searched. *Id.* at 499. The court found the controlled buy at the residence "provided a concrete factual link between defendant, his criminal activity, and the residence" and, along with defendant's criminal history of drug offenses and the presence of guard dogs at the residence, stated a sufficient nexus. *Id.* at 498. Here, Detective Taylor's affidavit does not state that Defendant used his cellphone to perform any of the actions —accessing the DeviantArt website, chatting, or sending or receiving photographs—alleged in the affidavit. Accordingly, the Court finds the affidavit fails to establish a nexus between Defendant's cellphone and the evidence sought.¹¹

***12** The Government argues that even if Detective Taylor's affidavit fails to provide probable cause, the executing officer, here Detective Mark Stallings, reasonably relied on the state search warrant and believed in good faith that it authorized him to search Defendant's cellphone and SD card [See Doc. 24 pp. 10–12]. "When police act under a warrant that is

invalid for lack of probable cause, the exclusionary rule does not apply if the police acted ‘in objectively reasonable reliance’ on the subsequently invalidated search warrant.” *United States v. Herring*, 555 U.S. 135, 701 (quoting *United States v. Leon*, 468 U.S. 897, 922 (1984)) (rejecting automatic exclusion of evidence and, instead, asking whether exclusion will provide “appreciable deterrence”). This is because “[p]enalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.” *White*, 874 F.3d at 505–06 (quoting *Leon*, 468 U.S. at 921).

However, the *Leon* “good faith exception” to the exclusionary rule does not apply in the following circumstances:

- (1) if the issuing magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth;
- (2) if the issuing magistrate wholly abandoned his judicial role;
- (3) if the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or in other words, where the warrant application was supported by [nothing] more than a ‘bare bones’ affidavit;
- (4) if the warrant may be so facially deficient—i.e., failing to particularize the place to be searched or the things to be seized—the executing officers cannot reasonably presume it to be valid[.]

United States v. Bullard, 659 F. App’x 288, 293–94 (6th Cir. 2016) (quoting *Van Shutters*, 163 F.3d at 337 (internal quotation omitted)). Here, Defendant argues that Detective Taylor’s affidavit was a “bare bones” affidavit such that no officer could reasonably believe it contained probable cause for the search of his cellphone and SD card [Doc. 100 pp. 2–4].¹²

A “bare bones affidavit” is one that “‘states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge[.]’” *United States v. Laughton*, 408 F.3d 744, 748 (6th Cir. 2005) (quoting *United States v. Weaver*, 99 F.3d 1372, 1378 (6th Cir. 1996)). To find the affidavit qualifies as bare bones, the Court must find more than the search warrant was not supported by probable cause; instead, it must determine that “‘there were no reasonable grounds for

believing that the warrant was properly issued.’” *White*, 874 F.3d at 506 (quoting *Leon*, 468 U.S. at 922–23). Thus, the Court asks “‘whether a reasonably well-trained officer would have known that the search was illegal despite the [issuing judge’s] authorization.’” *United States v. Leake*, 998 F.2d 1359, 1367 (6th Cir. 1993) (quoting *Leon*, 468 U.S. at 922 n.23).

In making this determination, the Court must keep in mind that affidavits are drafted by law enforcement officers, not lawyers, “in the midst and haste of a criminal investigation,” and, thus, should not be interpreted in a “hypertechnical manner.” *Weaver*, 99 F.3d at 1378 (internal quotation omitted); *see also Merriweather*, 728 F. App’x at 504 (observing the court should look to the affidavit as a whole, rather than conducting “‘a line-by-line scrutiny’”) (internal quotation omitted). In assessing whether the officer relied on the search warrant in good faith, the Court must take into “account … the inferences [the officer] may draw from the affidavit.” *Merriweather*, 728 F. App’x at 505. “[R]easonable inferences that are not sufficient to sustain probable cause in the first place may suffice to save the ensuing search as objectively reasonable.” *White*, 874 F.3d at 500. “[A] minimally sufficient nexus exists if the reviewing court is able to identify in the averring officer’s affidavit *some* connection, regardless of how remote it may have been—some modicum of evidence, however slight—between the criminal activity at issue and the place to be searched. *United States v. Tucker*, 741 F. App’x 994, 999 (6th Cir. 2018) (internal quotations omitted); *see United States v. Washington*, 380 F.3d 236, 241 (6th Cir. 2004) (observing that an affidavit that lacks sufficient probable cause may still permit the officer’s good-faith reliance).

*13 In *Merriweather*, the Court found the officer acted in reasonable reliance on the search warrant permitting the search of the defendant’s cellphone. 728 F. App’x at 505–06. In that case, the affidavit stated that a confidential informant conducted two controlled drug buys from defendant, both of which were arranged by cellphone. *Id.* at 505. The cellphone to be searched was seized from the car driven by defendant and the car also contained controlled substances. Finally, the affiant stated that based upon “his training and experience, drug dealers use cell phones to coordinate with conspirators, customers, and suppliers.” *Id.* Based on this information, the court found the officer could infer that defendant’s cellphone would contain evidence of drug trafficking: “[W]hile rote recitations about officers’ ‘training and experience’ might in some instances ring hollow, … such a claim is consistent

with common sense in this case: it seems obvious there is a good chance Merriweather at times used his cell phone to carry out the goals of this distribution conspiracy, given the manner in which the controlled purchases were coordinated and the further fact that he had his phone with him as he traveled around with drugs.” *Id.* The court in *Merriweather* distinguished *United States v. Ramirez*, 180 F. Supp. 3d 491, 495–96 (W.D. Ky. 2016), in which the affiant stated only that defendant had a cellphone on his person at the time of his arrest for participating in a drug conspiracy and the affiant said in his training and experience, drug conspiracies are often conducted via cellphone. *Merriweather*, 728 F. App’x at 506.

In *United States v. Smith*, our appellate court recently examined whether officers reasonably relied on a search warrant to search two cellphones for evidence that defendant was involved in a shooting, despite the affidavit’s failure to state the defendant used a cellphone in connection with the shooting. No. 21-1457, 2022 WL 4115879, at *8–9 (6th Cir. Sept. 9, 2022). The court rejected a finding that the affidavit was conclusory, bare bones, or “devoid of any factual allegations for probable cause” or that it failed to provide “some connection, regardless of how remote, between the illegal activity and the place searched.” *Id.* at 9. Instead, it found that although the affidavit did not “directly implicate” defendant’s cellphones in the shooting, a “connection may be reasonably inferred based on the affiant officer’s training and experience, consistent with common sense.” *Id.* (internal quotation omitted). The affidavit’s information that defendant and a codefendant fired guns at the victim in an apparently coordinated effort, the seizure of a loaded gun and two cellphones from defendant’s person at the time of his arrest, and the affiant’s training and experience that people involved in illegal activity use their cellphones to plan crimes permitted the executing officer to “reasonably infer that [defendant’s] cell phones contained communications” between the defendant and his codefendant about the shooting. *Id.* Accordingly, the court found the search was permitted under the good faith exception and the exclusionary rule did not apply. *Id.*

The instant case resembles *Merriweather* and *Smith* more than *Ramirez*. Here, a cellphone was seized from Defendant, who admitted using the Tennesseeetomcat username to **chat** with minors and to request a photograph from the minor, both activities that were conducted over the internet. A citizen complainant stated she observed Defendant communicating with and sending “inappropriate” photographs to a minor on the DeviantArt website. A reasonable officer could

infer that Defendant was using his cellphone to access the Tennesseeetomcat account and to contact minors. Detective Taylor’s belief, based on her training and experience, that the cellphone would contain evidence, such as texts and photographs, of solicitation of a minor or violations of the sex offender reporting requirements, further supports a reasonable reliance on the search warrant. Accordingly, the Court finds Detective Taylor’s affidavit is “not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” *Merriweather*, 728 F. App’x at 504 (internal quotation omitted). Detective Stallings, the executing officer, reasonably relied on the warrant in good faith and evidence seized from the search of Defendant’s cellphone and SD card pursuant to the state search warrant should not be suppressed.

(2) Probable Cause for Federal Search Warrants

*14 Defendant also asserts three primary reasons that the affidavits supporting the two federal search warrants lack probable cause. First, he contends they are based on information illegally obtained from the invalid state search warrant [Doc. 97 p. 13]. As a part of this analysis, the Court also addresses the Government’s argument that the second federal search warrant is based on independent probable cause [Doc. 24 pp. 9–10]. Second, Defendant contends that the two federal affidavits fail to establish a nexus between his cellphone and the items to be seized [Doc. 97 pp. 8, 14]. Third, Defendant argues that the federal affidavits fail to provide probable cause because they rely on stale information, specifically his prior conviction [*Id.* at 15–16].

(a) Information from State Search Warrant

Relying on *Murray v. United States*, 487 U.S. 533, 540 (1988), Defendant argues that information gained from an illegal search cannot form the basis for a search warrant [*Id.* at 13]. He contends that SA Pearson’s affidavit relies on images seized from the SD card in the execution of the state search warrant and that if the evidence gained from the execution of the state search warrant is stricken, the remaining allegations fail to provide probable cause [*Id.* at 14].¹³ With regard to SA Norris’s affidavit, Defendant alleges that the allegations necessarily turn on the search of his SD card pursuant to the state search warrant because he would have never made the alleged jail telephone calls if it were not for the initial search [*Id.* at 17–18].¹⁴ The Government denies that information seized from the search of Defendant’s cellphone and SD card was illegally gained but argues that even if it was, the second

federal search warrant is supported by “independent probable cause” [Doc. 24 p. 9].

In *Murray*, the Supreme Court explained that the exclusionary rule generally prohibits the introduction of evidence seized during an unlawful search as well as evidence derived from the illegally obtained evidence. 487 U.S. at 36–37. However, when evidence obtained from the execution of a search warrant lacking in probable cause is used to provide the probable cause for a second search warrant, “each warrant must be sought and executed by law enforcement in good faith as prescribed by *Leon*.” *Tucker*, 742 F. App’x at 1003. As discussed above, the Court finds that the evidence seized from the execution of the state search warrant need not be suppressed because the executing officer acted in good-faith reliance on the state search warrant. The Court also finds that the executing officers relied on both the first and second federal search warrants in good faith because both contain ample probable cause to believe evidence of solicitation of a minor would be found on Defendant’s cellphone. Thus, the photographs obtained from the search of Defendant’s SD card pursuant to the state search warrant could properly form the basis for the subsequent federal search warrants. See *Tucker*, 742 F. App’x at 1003.

*15 Moreover, the Court agrees with the Government that the second federal search warrant contains probable cause separate from the evidence seized from Defendant’s cellphone and SD card pursuant to the state search warrant and the first federal search warrant. The Government contends that without relying on information gained in the prior searches of Defendant’s cellphone and SD card, SA Norris’s affidavit provides probable cause that evidence of sending and receiving child pornography, transfer of obscene material to a minor under age sixteen, and solicitation of a minor would be on the data from the cellphone and SD card [Doc. 24 p. 9]. Thus, it contends that evidence seized from the search of the data pursuant to the second federal search warrant was obtained independently from the evidence seized pursuant to the two prior search warrants [*Id.* at 9–10].

Evidence initially seized in an unlawful search may still be admissible if later obtained through a lawful “independent source.” *Murray*, 487 U.S. at 537. The independent source doctrine applies if the illegally obtained evidence “was discovered through sources ‘wholly independent of any constitutional violation.’ ” *United States v. Jenkins*, 396 F.3d 751, 757 (6th Cir. 2005) (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)). In the case of a search warrant that relies in

part on unlawfully obtained information, the evidence seized from the execution of the search warrant “may nevertheless be admissible under the independent-source doctrine ... ‘[i]f the application for a warrant contains probable cause apart from the improper information ... [and] the officers were not prompted to obtain the warrant by what they observed during the initial [improper search].’ ” *United States v. Chapman-Sexton*, 758 F. App’x 437, 441 (6th Cir. 2018) (quoting *Jenkins*, 396 F.3d at 758 (internal quotations omitted)); *United States v. Williams*, 656 F. App’x 751, 753 (6th Cir. 2016) (observing the court must inquire whether the initial illegal search is what prompted the subsequent search warrant and whether probable cause existed for issuing the search warrant in the absence of evidence from the illegal search). The independent source doctrine seeks to return the government to the same position it would have enjoyed without the illegal search, rather than a worse position. *Jenkins*, 396 F.3d at 757; see also *United States v. Whipple*, No. 3:20-CR-31-TAV-HBG-1, 2020 WL 7241058, at * 2 (E.D. Tenn. Dec. 9, 2020) (citing *Murray*, 487 U.S. at 542).

To find whether the judge would have issued the second federal search warrant in the absence of the prior illegality, the Court “ ‘excis[es] the illegally obtained information from the affidavit and then decid[es] whether the remaining legally obtained information sufficiently supports a finding of probable cause to search.’ ” *Id.* at *2 (quoting *Williams*, 656 F. App’x at 753–54) (internal alterations omitted). Here, SA Norris’s affidavit expressly does not rely on information obtained through the execution of the state or first federal search warrants to provide probable cause to search Defendant’s cellphone and SD card for evidence of transferring obscene materials to a minor under age sixteen, receipt and possession of child pornography, and enticing a minor to engage in sexual activity constituting a criminal offense [Doc. 35-2 ¶18]. Instead, the affidavit states that through review of the recordings of Defendant’s jail telephone calls, law enforcement learned the unique first name and telephone number of a minor female (“V1”) along with information that V1 had moved from Alaska to Florida, where she currently resided [*Id.* at ¶¶19–20]. This information along with the subscriber information linked to V1’s telephone number allowed law enforcement to identify V1’s parents and subsequently to interview V1 [*Id.* at ¶¶19–21]. V1 told agents that she met Defendant on the DeviantArt website, she had recently turned fourteen, Defendant gave her a SIM card to use when communicating with him, and she sent naked pictures of herself to Defendant just before his arrest in May 2018 [*Id.* at ¶¶19–20].

*¹⁶ SA Norris's affidavit relates that on July 18, 2019, agents contacted a second minor victim ("V2"), whom they "discovered [was] in communication with Glatz and V1" [*Id.* at ¶23]. V2's parents permitted agents to conduct a forensic review of V2's cellphone [*Id.*]. The review of V2's cellphone revealed conversations between V2 and V1 after Defendant was arrested in May 2018, in which V1 told V2 she was concerned about the police obtaining pictures of "her body" that she had sent to Defendant [*Id.* at ¶26]. V1 told V2 that she knew Defendant sent V2 pictures of his genitalia and that V1 had to delete all her pictures from Defendant in case the police seized her cellphone [*Id.* at ¶¶ 27–28]. V2 had the number to Defendant's LG cellphone saved in her contact lists both for her cellphone and on the What's App application [*Id.* at ¶29]. The Court finds that this information provides probable cause to search the data extracted from Defendant's cellphone and SD card. Thus, SA Norris's affidavit provides probable cause without relying on evidence seized pursuant to the two prior search warrants.

For the independent source doctrine to apply, the Court must also find that law enforcement would have sought the second federal search warrant without knowing about the photographs and other evidence seized pursuant to the state and first federal search warrant. See *Jenkins*, 396 F.3d at 758. In conducting this analysis, the Court should not give "dispositive effect to officer assurances that a warrant would have been sought in the absence of the illegal search" but must examine the totality of the circumstances to determine whether the officer's assurance is plausible. *Williams*, 656 F. App'x at 751, 753.

Defendant argues that the information used to obtain the second federal search warrant is derived from the investigation launched pursuant to the initial search of his cellphone and SD card [Doc. 20 p.10]. Specifically, Defendant contends that law enforcement discovered and identified V2 from the evidence on his cellphone [Doc. 97 pp. 17–18].¹⁵ However, the investigation of Defendant began with a citizen complaint, Detective Taylor's review of Tennesseeetomcat's activity on the DeviantArt website, and Defendant's admissions during the May 2, 2018 interview [Doc. 44, Transcript, pp. 18–19, 36, 39], all of which occurred before his cellphone was searched by law enforcement. Defendant was arrested on May 3, 2018, the day Detective Taylor obtained the state search warrant and before Detective Stallings began his forensic review of the cellphone and SD card [*Id.* at 40, 65]. According to SA

Norris's affidavit, the jail telephone calls between Defendant and V1 began "almost immediately" following Defendant's arrest.¹⁶ Detective Collins contacted federal authorities for assistance, when the state forensic analyst was not able to unlock and search Defendant's cellphone [see Doc. 35-1, Pearson Affidavit, ¶¶15, 18]. Based on this information, the Court finds that law enforcement would have continued to attempt to search Defendant's cellphone based upon their investigation of the Taveras complaint and Defendant's admissions in the May 2, 2018 interview, even if sexually explicit photographs had not been seized from Defendant's SD card.

As to Defendant's argument that law enforcement never would have discovered V2 without the illegal search of his cellphone, the Court finds that the contact with V2 and her parents, who permitted the search of her phone, was sufficiently attenuated from the allegedly illegal search of his SD card pursuant to the state search warrant to permit the evidence of the identity of V2. "[T]he attenuation doctrine states that if evidence seized is sufficiently 'attenuated' from the initial Fourth Amendment wrongdoing, the taint may also be so attenuated as to permit the admission of the evidence." *United States v. Powell*, 943 F. Supp. 2d 759, 788 (E.D. Mich. 2013) (quoting *United States v. Williams*, 615 F.3d 657, 668–69 (6th Cir. 2010)). Application of the attenuation doctrine involves examining the "temporal proximity" of the illegal search to the discovery of the particular evidence, whether intervening circumstances exist, and "the purpose and flagrancy of the official misconduct." *Id.* (internal quotations omitted). Here, each of these three factors weigh in favor of permitting the use of the information from V2's cellphone.

*¹⁷ First, the FBI report cited by Defendant shows approximately one year elapsed between the alleged illegal search of Defendant's SD card by Detective Stallings in May 2018 and the identification of V2 in May 2019 [See Doc. 98-42]. Defendant provides a May 8, 2019 FBI Report by SA Pearson stating that V2 was identified through obtaining the subscriber information for her cellphone number, which was found on Defendant's cellphone [Doc. 98-42 pp. 2–3]. Second, the Court finds that the first federal search warrant and the identification and interview of V1 both are intervening circumstances between the initial search of Defendant's SD card and law enforcement's contacting V2 on July 18, 2019. Moreover, V2's parents' consent to the examination of her cellphone is yet a third intervening circumstance between Agent Stallings's execution of the

state search warrant and the location of the What's App conversations on V2's cellphone. Finally, the Court finds that that the “official misconduct” in Detective Taylor's affidavit (i.e., her failure to provide a nexus between the alleged illegal activity and Defendant's cellphone) was not flagrant. Instead, as the Court found above, the exclusionary rule should not apply to the evidence seized pursuant to the state search warrant because Detective Stallings reasonably relied on it. Moreover, law enforcement sought another search warrant, the first federal search warrant, in order to search Defendant's cellphone, which indicates officers were trying to comport with the Fourth Amendment, rather than circumvent it.

Thus, the Court finds that even if law enforcement's identification of V2 stemmed from its review of Defendant's cellphone, rather than an independent source, the contact with V2 and consensual examination of her cellphone was sufficiently attenuated from the initial alleged illegality (the lack of nexus in Detective Taylor's affidavit) as to permit the use of this evidence in support of probable cause in the second federal search warrant.

In summary, the Court finds that the independent source and attenuation doctrines permit the search of Defendant's cellphone and SD card wholly apart from the evidence gleaned from the initial search of the SD card pursuant to the state search warrant or the cellphone pursuant to the first federal search warrant.

(b) Nexus in Federal Search Warrants

Defendant also contends that the affidavits supporting the first and second federal search warrants fail to establish a nexus between his cellphone and the alleged crimes [Doc. 97 p. 8]. He summarily argues that SA Pearson's affidavit fails to show a nexus between the suspected crimes and his LG cellphone [Doc. 97 p. 14]. Defendant also denies that the conversations described in SA Norris's affidavit demonstrate that he used his cellphone in connection with the crimes alleged [*Id.* at 8 (citing paragraph 28 of SA Norris's affidavit)].

As discussed above, probable cause requires a specific and concrete connection between the place to be searched and the evidence sought. *Brown*, 828 F.3d at 382; *Carpenter*, 360 F.3d at 594. Defendant argues that boilerplate language on the characteristics or habits of collectors of child pornography is insufficient to show that he is such a collector [Doc. 97 pp. 14, 16 (citing SA Pearson's affidavit at ¶¶24–38 and SA Norris's affidavit at ¶¶34–38)]. See *United States v. Walling*, No. 1:16-cr-250, 2017 WL 1313898, at *4–5

(W.D. Mich. Apr. 10, 2017) (finding affidavit, which stated characteristics common to collectors of child pornography based on affiant's knowledge, experience, and training, lacked any information that defendant shared characteristics of collectors of child pornography), *aff'd* 747 F. App'x 382 (6th Cir. 2018). But see *United States v. Shesso*, 730 F.3d 1040, 1045 (9th Cir. 2013) (rejecting trial court's finding that the affidavit failed to link general statements about child pornography collectors to defendant where defendant downloaded a specific pornographic video of a minor to a file sharing site). Thus, he argues that neither federal affidavit provides a nexus to search his cellphone and SD card for evidence of child pornography.

Both federal affidavits contain a section describing the characteristics of collectors of child pornography, which are gleaned from the affiant's knowledge, training, and experience [Doc. 35-1 ¶¶24–26, Doc. 35-2 ¶34]. However, unlike in *Walling*, cited by Defendant, the affidavits contain evidence of nexus beyond this language. SA Pearson's affidavit relates that photographs of a minor's naked breasts and vagina were seized from Defendant's SD card [Doc. 35-1 ¶19]. The affidavit also relates that the SD card was “installed inside of [Defendant's] cellular phone” [*Id.* at ¶18] and that “because child pornography was stored on the micro SD card, as discussed above, it is probable that child pornography and other evidence related to the identity of the victims will be found on the cellular telephone's internal memory” [*Id.* at ¶22]. Thus, SA Pearson's affidavit provides specific and concrete connection between the place to be searched (the internal memory of Defendant's cellphone) and the evidence to be seized (child pornography).

*18 Similarly, in her affidavit, SA Norris states that “[c]onversations between V1 and V2 related to when Glatz was arrested further support the fact that Glatz used the LG cell phone to send and receive pornographic photographs to/from minors” [Doc. 35-2 ¶28]. SA Norris then describes a conversation in which V1 tells V2 that she deleted all her photographs from Glatz in case the police got her cellphone [*Id.*]. SA Norris also describes a conversation between the minor victims in which V1 tells V2 that Defendant admitted to her that he sent V2 “dick pics or vids” [*Id.* at ¶27(b)]. Additionally, V1 told law enforcement that Defendant sent her a Subscriber Identification Module (SIM) card to use when communicating with him on her cellphone and that she sent Defendant naked pictures of herself to Defendant just before his arrest in May 2018 [*Id.* at ¶22]. SA Norris's affidavit explains that Defendant directed V1 and V2 to

communicate with him through the **WhatsApp** application because it was encrypted and “safe for perverts” [Id. at ¶¶23–24] and that V2 had the number to Defendant’s cellphone in her **WhatsApp** contacts list [Id. at ¶29]. Based on this specific and concrete information from SA Norris’s affidavit, the Court finds it reasonable to infer that evidence of child pornography would be found on Defendant’s cellphone and SD card.

In summary, the Court finds that both federal affidavits provide a nexus showing that evidence of child pornography would be found on Defendant’s cellphone and SD card.

(c) Staleness

Both federal affidavits state that Defendant was arrested for child molestation, convicted in 2005, and sentenced to twenty years of incarceration [Docs. 35-1 ¶23, 35-2 ¶30]. Defendant argues that the evidence regarding his prior conviction for child molestation is stale, whether the Court considers the actual year of conviction (1995) or the year of conviction stated in the affidavits (2005), and irrelevant because a conviction for child molestation does not indicate a propensity to possess child pornography or to commit crimes involving child pornography [Doc. 97 pp. 15–16]. See *United States v. Hodson*, 543 F.3d 286, 290–92 (6th Cir. 2008) (observing that evidence of child molestation and illicit online activity with minors does not establish probable cause to search for child pornography).

The Court finds that both federal search warrants contain ample probable cause based upon recent evidence without relying on the reference to Defendant’s prior conviction. See *United States v. Neuhard*, 770 F. App’x 251, 253 (6th Cir. 2019) (while evidence of child molestation alone does not provide probable cause to search electronic devices for child pornography, the affidavit contained additional information of defendant showing child pornography stored on his computer to the minor and producing child pornography with his cellphone). SA Pearson’s affidavit describes a sexually explicit photograph of a minor’s naked genitalia and photographs of a minor’s naked breasts found on the SD card installed within Defendant’s cellphone [Doc. 35-1 ¶19]. SA Norris’s affidavit describes evidence gleaned from an interview of V1 and the review of V2’s cellphone that near the time of Defendant’s arrest on May 3, 2018, V1, a minor, sent Defendant naked and “embarrassing” photographs of her body [Doc. 35-2 ¶¶22, 26]. SA Norris’s affidavit also recounts conversations between V1 and V2 discussing Defendant sending photographs or videos of his penis to V2, a minor

[*Id.* at ¶27(b)]. Thus, the Court finds the probable cause in both federal affidavits goes beyond his child molestation conviction and is not stale.

Additionally, the Court disagrees with Defendant’s characterization of his prior conviction of child molestation as irrelevant. While Defendant’s prior conviction alone may not provide probable cause to believe his cellphone and SD card would contain evidence of child pornography, Defendant’s prior conviction does indicate his sexual interest in minors. *United States v. Libbey-Tipton*, 948 F.3d 694, 702 (6th Cir. 2020) (discussing Fed. R. Evid. 414 and observing prior convictions for child molestation “create the logical inference that the defendant has a sexual interest in children that is strong enough to cause him to break the law”) (internal quotations omitted). Moreover, both federal search warrants seek evidence of enticing a minor to engage in sexual activity as well as evidence of child pornography. Thus, the Court finds that both federal affidavits provide probable cause despite Defendant’s prior conviction being for child molestation and purportedly occurring in 2005.

(3) Franks Challenge

*19 Defendant argues that all three affidavits¹⁷ contain false statements and/or material omissions necessary for probable cause [Doc. 34 pp. 1–5; Doc. 100 p. 1]. He contends that “material information was either deliberately or recklessly omitted from the affidavit[s], consequently undermining the showing of probable cause” [Doc. 34 pp. 5–6]. According to Defendant, an evidentiary hearing is necessary for the Court to make findings of fact regarding the falsehoods and omissions in the affidavits [Doc. 34 p. 5].

The Government contends that Defendant fails to make a preliminary showing that the specified parts of the affiants’ statements are deliberately or recklessly false or that the affidavits would lack probable cause if the allegedly false statements were removed [Doc. 35 pp. 1–2; Doc. 105 p. 1]. It maintains that Defendant is not entitled to a *Franks* hearing because the affiants did not misrepresent or omit material information [Doc. 35 p. 1]. The Government argues that, instead, the three affidavits were based upon information that Defendant corroborated in his May 2, 2018 interview [Doc. 35 p. 1].

*20 As discussed above, the reviewing court’s evaluation of whether an affidavit establishes probable cause is typically limited to only the information that was before the issuing

judge, i.e., only what is contained within the four corners of the supporting affidavit. *Brooks*, 594 F.3d at 492. “In a *Franks* hearing, a court determines whether to suppress the fruits of an executed search warrant, where the warrant was the result of a false statement.” *United States v. Crawford*, 943 F.3d 297, 309 (6th Cir. 2019) (citing *Franks v. Delaware*, 438 U.S. 154, 171 (1978)). “A defendant challenging the validity of a search warrant’s affidavit bears a heavy burden.” *United States v. Bateman*, 945 F.3d 997, 1008 (6th Cir. 2019). The affidavit supporting a search warrant is presumed to be valid. *Franks*, 438 U.S. at 171. A defendant seeking a *Franks* hearing, “must make a ‘substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit.’” *Crawford*, 943 F.3d at 309 (quoting *Franks*, 438 U.S. at 171). “‘The allegedly false statement,’ moreover, must be ‘necessary to the finding of probable cause.’” *Id.*

In *Crawford*, our appellate court described the “two questions of fact, and one of law,” upon which “[a] *Franks* analysis turns.”

The two questions of fact: One, is there a false statement included in an affidavit? If so, then two, how culpable is the affiant officer in including that statement in the affidavit? Where the affidavit does include a false statement, and where the officer making the statement was culpable in doing so, then the court turns to a question of law: After excising the false statement, is there sufficient information in the affidavit to constitute probable cause to issue a warrant?

943 F.3d at 309. Moreover, the defendant seeking a *Franks* hearing, must make a substantial showing of the affiant’s culpability:

The bottom line [in *Franks* was] that an evidentiary hearing on the affidavit’s truthfulness was required *only* if the defendant alleged “deliberate falsehood or ... reckless disregard for the truth.” [*Franks*, 438 U.S. at 171]. “Allegations of negligence or innocent mistake,” the Court emphasized, would be “insufficient.” *Id.* And the allegations of deliberate or reckless falsehood “must be accompanied by an offer of proof.” *Id.* Even having satisfied these steps, a defendant must still show that “when material that is the subject of the alleged falsity or reckless disregard is set to one side,” the affidavit’s remainder no longer demonstrates probable cause. *Id.* at 171–72. Only then is a defendant entitled to a *Franks* hearing to prove his allegations. *Id.* at 172. *Franks* thus drew an evidentiary line with reference to the well-known common-law scienter

standards: negligence, recklessness, and willfulness. See Restatement (Second) of Torts §§ 8A, 282, 500 (1965). Only “substantial” evidence tending to show one of the two more culpable mental states, *Franks* said, would do.

Butler v. City of Detroit, 936 F.3d 410, 418 (6th Cir. 2019). An officer’s statement is only considered to be issued with “reckless disregard for the truth” if the defendant shows the affiant subjectively entertained “serious doubts as to the truth” of his allegations. *Bateman*, 945 F.3d at 1008 (6th Cir. 2019). “Allegations of [an officer’s] negligence or innocent mistake are insufficient.” *Franks*, 438 U.S. at 171.

Material omissions may also merit a *Franks* hearing in certain circumstances; however, “an affidavit which omits potentially exculpatory information is less likely to present a question of impermissible official conduct than one which affirmatively includes false information.” *United States v. Adkins*, 107 F.3d 1213, 1217 (6th Cir. 1997). An affidavit does not have to include all facts gathered in the course of an investigation. *Id.* Thus, “except in the very rare case where the defendant makes a strong preliminary showing that the affiant with an intention to mislead excluded critical information from the affidavit, and the omission is critical to the finding of probable cause, *Franks* is inapplicable to the omission of disputed facts.” *Mays v. City of Dayton*, 134 F.3d 809, 816 (6th Cir.), cert. denied, 524 U.S. 942 (1998). The purpose of this heightened standard for omissions is to prevent “‘endless conjecture about investigative leads, fragments of information, or other matter that might, if included, have redounded to defendant’s benefit.’” *United States v. Martin*, 920 F.2d 393, 398 (6th Cir. 1990) (quoting *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990)). “If the defendant does succeed in making a preliminary showing that the government affiant engaged in ‘deliberate falsehood’ or ‘reckless disregard for the truth’ in omitting information from the affidavit, the court must then consider the affidavit including the omitted portions and determine whether probable cause still exists.” *Adkins*, 107 F.3d at 1217.

*21 To demonstrate entitlement to a *Franks* hearing, Defendant must “point out specifically the portion of the warrant affidavit that is claimed to be false.” *Franks*, 438 U.S. at 170; see *United States v. Green*, 572 F. App’x 438, 442 (6th Cir. 2014) (observing that “this court’s well-settled framework for *Franks* hearings requires a defendant to ‘point to specific false statements.’”) (quoting *United States v. Cummins*, 912 F.2d 98, 103 (6th Cir. 1990)). Here, Defendant Glatz asserts that Detective Taylor’s affidavit contains one false statement and several omissions, SA Pearson’s affidavit contains six

false statements and two omissions, and SA Norris's affidavit contains seven false statements and one omission.

(i) *Taylor Affidavit*

Defendant alleges that Detective Taylor's affidavit contains a false statement, a false inference, and omissions in relation to the report by Samantha Taveras. He contends the affidavit's statement that Taveras was a "user" of DeviantArt is false because her report to the police does not indicate she was a user or had an account [Docs. 34 p. 2; 100 pp. 15–16]. Additionally, he argues that the inference that Defendant knowingly "chatted" with a minor was not true [Doc. 20 p. 8]. Defendant also contends that Detective Taylor's affidavit contains material omissions with regard to the Taveras report because it fails to provide information that Taveras had no direct knowledge of any crimes, did not know Nolifelady, her information came from her reading a third-party's online journal, and no role-playing was corroborated by the detectives' investigation or other evidence in this case [Doc. 34 pp. 1–2; Doc. 100 p. 4].¹⁸ Defendant argues that the report by Taveras is material to probable cause because the facts contained in the affidavit are "primarily attributed to Samantha Taveras" [Doc. 34 p. 6].

The Government responds that the affidavit's omission of information that Taveras did not know the "backstory" or have firsthand knowledge is immaterial to probable cause because Defendant admitted Taveras's allegations were true in the May 2, 2018 interview [Doc. 35 p. 2, 6; Doc. 105 p. 2]. It asserts that Detective Taylor's affidavit would still provide probable cause for a registry violation if it contained only her knowledge of Defendant's failure to disclose the Tennesseeetomcat username and Defendant's admission that he used that account [Doc. 36 p. 6]. Thus, the Government maintains that Defendant has not shown that any omissions regarding information by Taveras were material or that the information was deliberately or recklessly false or omitted [Doc. 35 p. 1].

The Court agrees with the Government that Defendant's allegations of false statements or material omissions have no impact on probable cause in light of Defendant's admission in the May 2, 2018 interview that he used the Tennesseeetomcat account on DeviantArt to talk with and request pictures from a minor. The Court also finds the information that Taveras was a "website user" is not false. Defendant asserts that any visitor to DeviantArt may view all pages, journals, and messages

regardless of whether the individual has an account [Doc. 100 p. 16]. The JCSO police report documenting Taveras's call states that Taveras saw the post on the DeviantArt website [Doc. 98-19, JCSO Preliminary Investigative Report, p. 1]. Accordingly, the Court finds that the affidavit properly characterizes Taveras as a website user.

*22 Similarly, with regard to the information from Taveras's complaint, Defendant contends that the affidavit fails to inform the judge that Taveras did not have firsthand information, i.e., that she saw the information in a "journal" from an unknown user and that she does not know NoLifeLady [Doc. 100 pp. 16–17]. However, as stated above, the Court finds this omitted information is not essential to probable cause because the affidavit states that Defendant admitted to using the Tennesseeetomcat account and "chatting with *the* minor child," referring to the "13[-]year[-]old girl with the username 'nolifelady'" reported by Taveras [See Doc. 20-1 p. 2 (emphasis added)].

Defendant also asserts that Detective Taylor's affidavit creates the false inference that he *knowingly* "chatted" with a minor because it omits that he told the detectives during the May 2 interview that he did not know Nolifelady was a minor [Doc. 20 p. 8]. However, the Court observes that Defendant also told the detectives that at some point during their conversations he learned Nolifelady was a minor and that he did not know what more they discussed after that point [Doc. 98-1, unofficial Transcript of May 2, 2018 Interview, p. 23]. Thus, the Court finds that to the extent that the affidavit creates the alleged inference, it is not false.

Defendant also argues that Detective Taylor omitted the fact that the Tennesseeetomcat username was "registered to" someone other than Defendant and that agents had interviewed that individual [Doc. 34 p. 2]. He contends that the affidavit fails to inform the reviewing judge that the Tennesseeetomcat account "was owned and operated solely by Jaycee Corum" [Doc. 100 p. 3]. Defendant asserts that JCSO had "multiple sources" from which they learned Corum owned and operated the account [*Id.*]. Defendant lists five "reasons that JCSO knew that Tennesseeetomcat was solely owned and operated by Jaycee Corum": (1) Corum's identity, address, and social security number appear on the police report stating Taveras's complaint from April 24, 2018 [Doc. 100 pp. 5–6; *see* Doc. 98-19].¹⁹ (2) Collins testified that JCSO tried to interview Corum before the May 2 interview [Doc. 100 p. 6; *see* Doc. 44, Transcript, p. 49]. (3) JCSO had no information that Defendant owned or used Tennesseeetomcat

at the start of the May 2 interview [Doc. 100 p. 6; *see* Doc. 44, Transcript, p. 48]. (4) Defendant repeatedly stated during the May 2 interview that only Corum owned and operated Tennesseeetomcat [Doc. 100 p. 6; *see* Doc. 44 p. 48 & 98-1, unofficial Transcript of May 2, 2018 Interview, pp. 11, 12, 24, 43, 44, 49]. (5) During the May 2 interview, Defendant gave the detectives Corum's name and telephone number so they could verify this [Doc. 100 p. 7; *see* Doc. 98-1 p. 37]. Defendant asserts that Detective Taylor contacted Corum, who confirmed that Tennesseeetomcat was her account and that Defendant was never authorized to use it [Doc. 100 p. 7]. He argues that Detective Taylor should have disclosed this potentially exculpatory information in the affidavit [*Id.*].

***23** The Government responds that the “suspected originator” of the Tennesseeetomcat account was interviewed on May 23, 2018, after the issuance of the state search warrant, and Defendant’s friend did not state that she had “originated the [Tennesseeetomcat] account on Deviant[]Art” [Doc. 35 p. 6]. It contends that the affiant’s failure to disclose that Defendant’s friend and former roommate created the Tennesseeetomcat account on DeviantArt is not necessary to probable cause because the statute ([Tenn. Code Ann. § 40-39-203](#)) requires sex offenders to report all usernames or identities that the offender “uses or intends to use” [Doc. 105 p. 1]. The Government argues that Defendant admitted in the May 2 interview that he used the Tennesseeetomcat account [Doc. 35 p. 6–7; Doc. 105 p. 1]. Thus, the fact that someone else “established” the account is not a defense [*Id.*].

The JCSO Preliminary Investigative Report states that on May 3, 2018, Detective Taylor spoke with Corum by telephone, and Corum said she created the Tennesseeetomcat account, that she never used it with Glatz, and that she did not give him permission to use it [Doc. 98-19 p. 3]. Detective Taylor’s notes on her conversation with Corum appear after her entry stating she obtained a search warrant for Defendant’s phone [*Id.*]. According to the report, although Corum agreed to give a written statement the following day, Corum did not return Detective Taylor’s calls after Glatz’s arrest on May 3, 2018 [*Id.*]. The report notes that on May 10, 2018, Corum finally replied to a text message from Detective Taylor that she would not come to the JCSO and that she “pleads the [F]ifth” [*Id.*].

The Court finds the fact that Corum created and maintained the Tennesseeetomcat account is not necessary to probable cause. The affidavit states that in the May 2, 2018 interview,

Defendant admitted using the Tennesseeetomcat account [Doc. 20-1 p. 2]. Under Tennessee law, sex offenders are required to report all online identities that they *use*, not just those they create. *See Tenn. Code Ann. § 40-39-208*. Thus, Corum’s creation and ownership of the Tennesseeetomcat account was not a material omission.

(ii) Pearson Affidavit

Defendant argues that SA Pearson’s affidavit contains six false statements and two omissions [Doc. 100 pp. 21–27]. First, Defendant contends SA Pearson falsely states that the micro-SD card was located inside or previously located inside his cellphone and that Detective Michael Stallings examined the SD card that was located inside the cellphone [Doc. 100 pp. 21, 26]. As proof of this alleged falsehood, he points to two reports by SA Pearson, stating the LG cellphone and SD card were seized from his person [*Id.*; Doc. 98-22²⁰ & Doc. 98-26²¹]. He also argues that Detective Collins and Detective Stallings both testified that they did not know who removed the SD card from Defendant’s cellphone prior to the forensic analysis by Stallings [Doc. 100 p. 26; *see* Doc. 44 p. 66; Doc. 98-2, unofficial Transcript of Sept. 21, 2018 Prelim. Hg in Jefferson Co. Gen’l Sessions Ct, p. 83]. As discussed in the Court’s Report and Recommendation relating to the warrantless seizure of Defendant’s cellphone and SD card, the Court finds that the SD card was located inside the SD card at the time it was seized [Doc. 175 pp. 2, 33, 65–66 & n.32]. Accordingly, these statements in SA Pearson’s affidavit are not false.

***24** Second, Defendant argues that SA Pearson’s affidavit falsely states that he communicated via Skype with K.G., the alleged victim of his Sevier County charges for possession of items in an attempt to lure a minor into sexual activity, violation of sex offender reporting requirement, and contributing to delinquency of minor [Doc. 100 pp. 21–22; *see* Doc. 35-1 ¶16]. He contends that no evidence of Skype communications exist and that his conviction stemming from the Sevier County charges related to K.G. was later reversed due to insufficient evidence [Doc. 100 p. 21]. Defendant asserts that the statement about Skype erroneously implies that he and K.G. had an online friendship, when they were only “neighborhood friend[s],” which creates an erroneous parallel to his alleged online relationship with Nolifelady [*Id.* at 22]. None of Defendant’s arguments demonstrate that the information in the affidavit about K.G. and the Sevier County charges is false, much less knowingly or recklessly so. SA

Pearson presented her sworn affidavit on June 6, 2018, well before Defendant's conviction on the Sevier County charges and reversal of same on appeal.²²

Third, Defendant maintains that SA Pearson falsely states that “ ‘Detective Collins requested Glatz meet with him for a sex offender compliance check’ ” [Doc. 34 p. 3; Doc. 100 pp. 22–23 (quoting affidavit [Doc. 35-1 ¶17])]. Defendant contends that Detective Collins admitted in his testimony at the April 14, 2021 evidentiary hearing that he asked Defendant to come to JCSO to “update some paperwork” but did not tell Glatz they were investigating potential registry violations or other wrongdoing [Doc. 34 p. 3; Doc. 100 p. 22 (citing transcript [Doc. 44 p. 42])]. Defendant argues that his compliance checks occur quarterly in March, June, September, and December, not in May [Doc. 100 p. 22]. The Court finds that Defendant fails to demonstrate that the term “compliance check” was false or was used to deceive the issuing judge. Moreover, whether Defendant was called in for a “compliance check” or to “update paperwork” is not necessary to probable cause.²³

Fourth, Defendant asserts that SA Pearson's statement that he was arrested for a violation of the registry law for “using a **chat** application and email address that were not listed on his sex offender registry as required” [Doc. 35-1 p. 14 ¶17] is false because DeviantArt does not offer **chat** applications and the username and email address belonged to Corum [Doc. 100 pp. 8–9, 23]. However, Defendant makes no showing that this statement was knowingly or recklessly false. Instead, Defendant's admission in the May 2, 2018 interview that he used the Tennesseeetomcat account, which was set up by Corum, to talk to Nolifelady supports a finding that at most SA Pearson negligently characterized the notes feature on DeviantArt website as a **chat** application [*See* Doc. 98-2, unofficial Transcript, pp. 13, 23 (Defendant states he knew Nolifelady was thirteen “near the end of our notes. We were sending notes.”), 25 (Defendant states, “[a]ll I did was talk to her.”), 34 (Defendant says Nolifelady told him “in notes that she was thirteen.”), 39 (Defendant states that he used the Tennesseeetomcat account in response to question about account he used when “chatting” with Nolifelady), & 41–43]. In the interview, Defendant states he did not know what email address Corum used to create the Tennesseeetomcat account [*Id.* at 13, 49]. However, Defendant also stated that Corum created the Tennesseeetomcat account to tell his “side of things” with regard to the individuals accusing him of being a pedophile and to assist him in using DeviantArt website [*Id.* at 44, 49]. Thus, the interview supports an inference

that Corum used her email address to create the account for Defendant. Moreover, the Court finds the statement about the email address is not necessary to probable cause.

*²⁵ Fifth, Defendant argues that paragraph 21 of SA Pearson's affidavit, describing an image of a note from “Mindy Parks” with three SIM cards and an SD card taped to it and giving Postal Inspector John Wallace Bowden's opinion that the image depicts individuals exchanging digital media with false names, “is an entirely false paragraph” [Doc. 100 p. 23–24]. Defendant contends that Mindy Parks is a former “roommate and good friend” and that both JCSO Detectives Collins and Taylor met her when Defendant brought her to his March 2018 meeting on his sex offender registration form [*Id.* at 24]. Defendant argues that because SA Pearson, Detective Collins, and Inspector Bowden all attended a meeting on May 22, 2018, SA Pearson and Inspector Bowden could have asked Detective Collins about the image and learned “Mindy Parks” was not a false name [*Id.*].

The Court finds that Defendant's assertion that Mindy Parks is an actual person, rather than an alias as opined by Inspector Bowden, does not demonstrate that paragraph 21 is false. The significance of the paragraph, that Defendant was sending digital media to others—whether using a false name or through a third party—is the same. Finally, Defendant's assertion that Detective Collins had met Mindy Parks is unsubstantiated.²⁴ Thus, Defendant also fails to show that SA Pearson knowingly or recklessly included false information in the affidavit.

Sixth, Defendant contends that SA Pearson's affidavit falsely states that he had “lengthy criminal history” and that his prior conviction for child molestation was from “May 24, 2005” [Doc. 34 p. 3; Doc. 100 p. 27]. Defendant alleges that he had a single prior conviction from 1995 [*Id.*]. He summarily argues that this ten-year discrepancy in the dates is material to probable cause [Doc. 34 p. 3]. The Government responds that inclusion of the incorrect year of conviction—2005, rather than 1995—was a typographical error [Doc. 35 p. 8]. It contends that Defendant presents no evidence that the inclusion of the incorrect date was deliberate or reckless and that, in any event, the erroneous date is not relevant to probable cause [*Id.*].

The Court agrees with the Government on both points. First, the mere fact that the date is incorrect is not proof that SA Pearson knowingly or recklessly included a false statement in the affidavit. *See Bateman*, 945 F.3d at 1008 (observing

a defendant must show the officer subjectively held “serious doubts” about the truth of a matter in order to show reckless disregard); *Franks*, 438 U.S. at 171 (“Allegations of [an officer’s] negligence or innocent mistake are insufficient.”). Second, the date of the Defendant’s prior conviction is not necessary to probable cause when the affidavit describes nude photographs of a child’s breasts and vagina seized from Defendant’s SD card, that was located inside the cellphone, and explains that evidence of crimes would be located on the cellphone’s internal memory [Doc. 35-1 ¶¶18–19, 22]. SA Pearson’s affidavit states that Defendant is required to register as a sex offender and that he has pending charges of online child exploitation and violation of the Tennessee sex offender registry laws stemming from his online communications with a minor on June 27, 2017 [*Id.* at ¶¶15–18]. These allegations establish probable cause to search Defendant’s cellphone without need for Defendant’s prior conviction.

*26 Finally, Defendant challenges two alleged omissions from SA Pearson’s affidavit. He contends SA Pearson failed to mention the complaint by Taveras and failed to inform court that the search of Defendant’s SD card was a warrantless search because the state search warrant did not authorize the search of the SD card [Doc. 34 p. 2; 100 p. 27]. Defendant argues that the omission of the Taveras complaint, including the facts that Taveras did not know Nolifelady and received her information by reading an online journal, is material to probable cause because the Taveras complaint was the central information leading to the state search warrant [Doc. 34 p. 2]. He argues the omission of the warrantless search of his SD card is material because the issuing judge was not told that illegally obtained information was being offered as the basis for a new search warrant [*Id.* at 6–7].

The Court finds neither of these alleged omissions warrant a *Franks* hearing. The Court finds the Taveras complaint is not material to probable cause in light of Defendant’s admission in the May 2, 2018 interview that he used the Tennesseeetomcat account on DeviantArt to talk with and request pictures from a minor. Additionally, the Court does not find the search of Defendant’s SD card was warrantless. The Court has already found that the SD card was inside Defendant’s cellphone at the time the cellphone was seized [See Doc. 175 pp. 2, 33, 65–66 & n.32]. As discussed fully in the execution section C(1) below, Detective Taylor’s erroneous description of the SD card as a “16GB sim card” in her affidavit did not render the search of the SD card “warrantless.” Thus, SA Pearson’s statement that the SD card was searched pursuant to a search warrant is not false.

After examining each of Defendant’s allegations about SA Pearson’s affidavit, the Court finds that Defendant fails to make a *prima facia* showing that a *Franks* hearing is warranted.

(iii) Norris Affidavit

Defendant argues that SA Norris’s affidavit contains seven false statements and one omission.²⁵ First, Defendant challenges the statement that the manager of the trailer park where Defendant resided saw Defendant throw a laptop computer and cellphones into a dumpster at the trailer park after Defendant was approached by law enforcement and SA Norris’s assertion that the manager observed this after Defendant’s LG cellphone had been seized [Doc. 34 p. 3–4; Doc. 100 p. 28; *see* Doc. 35-2 ¶31]. Defendant argues that this statement is false because the only time he was approached by law enforcement in early 2018 was when he was arrested on May 3, 2018, and taken to jail [Doc. 34 p. 4; Doc. 100 pp. 28–30]. Defendant asserts that it would be impossible for him to have disposed of a laptop and cellphones as alleged because he was continuously detained after his arrest by law enforcement at the trailer park [*Id.*].

The Court finds this information in the affidavit is neither false, nor impossible. The Government attaches to its response a June 2018 FBI report by SA Pearson and another agent describing their interview of residents of the trailer park where Defendant resided [Doc. 35-3]. This report states that a resident told the agents that “[t]he day after Glatz was approached by law enforcement,” the resident “observed the [sic] Glatz throwing away several items in the trash dumpster at the trailer park, including the laptop computer, mobile telephones and items contained in trash bags” [*Id.* at 1]. The identity of the persons interviewed is redacted from the Government’s attachment, but Defendant agrees it was the trailer park manager [Doc. 100 pp. 28–30]. Defendant argues that it was physically impossible for him to dispose of these items following the seizure of his LG cellphone during the interview on May 2, 2018, and after he was approached by officers who immediately arrested him on May 3, 2018. While Defendant maintains that his May 3 arrest was the only time he was approached by law enforcement in early 2018, the Court observes there was also a noted encounter in April. At the beginning of Defendant’s May 2 interview, he told the detectives that he recently called the police to come to the trailer park due to a conflict with his neighbors [Doc. 98-1,

unofficial Transcript of May 2, 2018 Interview, pp. 3–4; *see also* Doc. 100 p. 28 (Defendant acknowledges police came to his campground on April 25, 2018, in response to his 911 call)]. In any case, Defendant could have disposed of items following his interview on May 2, 2018, and before his arrest on May 3, 2018, and therefore, Defendant fails to demonstrate the information in paragraph 31 is false.²⁶

*²⁷ Second, Defendant challenges SA Norris's statement that that “[t]he FBI was able to gain access to the contents of the cellular telephone[in] February 2019” [Doc. 100 p. 31–32 (quoting 35-2 ¶17)]. Defendant alleges that multiple pieces of evidence reveal that the FBI had access to the contents of his cellphone in June 2018 and began a “full-fledged multi-prong investigation... on June 26, 2018” [Id. at 32; *see also* Doc. 34 p. 3 (arguing SA Norris's affidavit omits that SA Pearson reviewed the SD card prior to the execution of the first federal search warrant)²⁷]. He contends that FBI SA Stephen McFall (“SA McFall”) accessed the contents of his cellphone pursuant to the June 6, 2018 search warrant and provided the results to SA Pearson on June 25, 2018 [Doc. 100 p. 32]. However, the Court finds that whether the FBI first gained access to the contents of Defendant's cellphone in June 2018, following the issuance of the first federal search warrant, or in February 2019 is not material to probable cause for the second federal search warrant. The challenged statement occurs in SA Norris's description of the prior state and federal investigation of Defendant, including the execution of the state search warrant and the first federal search warrant. SA Norris's affidavit expressly relates that she is “seeking another search warrant to search the same data without relying on the information obtained through the aforementioned state search warrant or federal search warrants” [Doc. 35-2 ¶18].²⁸ Accordingly, even assuming, *but not finding*, that the FBI was able to review the contents of Defendant's cellphone prior to February 2019, the Court concludes this is not a basis for a *Franks* hearing.²⁹

Defendant's also raises an omission in relation to the FBI's investigation, arguing that SA Norris's affidavit omits the fact that the FBI learned about V2 from law enforcement's seizure of his cellphone and review of its data [Doc. 100 p. 32; *see also* Doc. 34 p. 4]. He argues that, instead, the affidavit states only that the FBI “made contact with an underage minor victim hereinafter referred to as Victim 2 (V2)” [Doc. 100 p. 32 (quoting Doc. 35-2 ¶23)]. He asserts that this omission is material because the affidavit fails to inform the issuing judge that the information on V2 and her What's App conversations

is fruit of the illegal seizure and search of his cellphone in the state and first federal search warrants [*Id.*].

The Court finds that while the specific details of how law enforcement first learned of V2 and the What's App conversations are not included in SA Norris's affidavit, the affidavit details the earlier investigation and the prior searches pursuant to the state and first federal search warrants and states that it is not relying on information gleaned from those searches [Doc. 35-2 ¶¶17–18]. Instead, SA Norris endeavors to show that probable cause exists to search the data extracted from Defendant's cellphone and SD card separate from the information discovered from the execution of the state and first federal search warrants [*Id.* at ¶18]. To that end, SA Norris relates how law enforcement gained the What's App conversations through a separate investigation by conducting a consensual forensic examination and review of V2's cellphone [*Id.* at ¶23]. While V1 was identified through review of Defendant's jail telephone calls,³⁰ obtaining subscriber information for her cellphone, and conducting online searches, the affidavit states that V2 “was discovered as being in communication with Glatz and V1” [*Id.* at ¶¶19–20, 23]. The affidavit does not state that V1 told law enforcement about the conversations with V2, but the section discussing the involvement of V2 occurs immediately after the section discussing V1 [*Id.* at ¶¶21–23]. Also, law enforcement interviewed V1 on January 31, 2019, and contacted V2 and her parents on July 18, 2019 [*Id.* at ¶¶21, 23]. Thus, SA Norris's affidavit permits the reasonable inference that law enforcement learned about V2 through its investigation of V1. Nevertheless, even if law enforcement located V2 exclusively through information on Defendant's cellphone, the Court has found that law enforcement executed the state search warrant in good faith, that the first federal search warrant was validly issued based upon probable cause, and that the identification of V2 and review of her cellphone was attenuated from any illegality in the initial state search. The omission of this information (that law enforcement identified V2 through review of Defendant's cellphone pursuant to a search warrant) is not material to probable cause.

*²⁸ Third, Defendant contends that the affidavit's statement that the FBI learned V1's unique first name from reviewing Defendant's jail telephone calls is false because neither he nor V1 said her name during the jail telephone calls [Doc. 100 pp. 32–33 (citing Doc. 35-2, SA Norris's Affidavit, ¶20)]. He also contends that SA Norris's affidavit falsely contends that law enforcement learned V1's parents' names through

open-source searches of V1's first name and her two states of residence Alaska and Florida [*Id.* at 32]. Defendant argues this statement is false because a relative of his was not able to duplicate this result with open-source searches using these terms [*Id.* at 33]. The Court finds Defendant's bare assertions do not show the challenged portions of the affidavit to be false.

Fourth, Defendant argues that SA Norris's affidavit falsely states that conversations between V1 and V2 show that he used his "LG cell phone to send and receive pornographic photographs to/from minors" [Doc. 100 p. 33 (quoting Doc. 35-2 ¶28)]. The affidavit relates a conversation between V1 and V2 in which V1 states she deleted photographs and videos from Defendant, changed her password, and "locked" her applications in case the police seized her cellphone [*Id.* at ¶28(c)]. Defendant denies that this conversation shows that he used his LG cellphone to do anything. However, the following paragraph states that Defendant's telephone number for his LG cellphone was found in V2's contact lists for her cellphone and her What's App application [*Id.* at ¶29]. The affidavit also states that a review of V2's cellphone shows that Defendant was communicating with V1 and V2 on the What's App application [*Id.* at ¶¶23, 25]. Accordingly, Defendant fails to show this statement is false.

Fifth, Defendant argues SA Norris's affidavit falsely states that he has a "lengthy criminal history" [Doc. 100 p. 33 (quoting Doc. 35-2 ¶30)]. Defendant denies that a single felony conviction is a lengthy criminal history. The Court observes that at the time that SA Norris sought the second federal search warrant in November 2019, Defendant had felony convictions for attempted sexual exploitation of a minor and contributing to the delinquency of a minor in addition to his 1995 conviction for child molestation, which is specifically mentioned in the affidavit but with the incorrect date of conviction. See *State v. Glatz*, No. E2019-00431-CCA-R3-CD, 2020 WL 865071, *1 (Tenn. Crim. App. Feb. 21, 2020) (reversing conviction for attempted sexual exploitation). Regardless of whether three criminal convictions involving minors is fairly deemed "lengthy," the Court finds the statement that Defendant has a lengthy criminal history is not necessary to probable cause.

Sixth, Defendant summarily asserts that SA Norris's affidavit falsely states that he communicated with V2 about "sexual matters" and professed his love for her after his arrest [Doc. 100 p. 33 (referencing Doc. 35-2 ¶33); *see also* Doc. 34 p. 4 (arguing none of the correspondence or messages related

in the affidavit involve a discussion of "sexual matters")]. The affidavit states that the FBI reviewed Defendant's correspondence that he wrote while in state custody [Doc. 35-2 ¶32]. It relates that "[w]hile detained, [Defendant] has used an adult intermediary who was not in custody to exchange handwritten ... correspondence with V2 in which [Defendant] has professed his love for V2, and vice-versa and discussed sexual matters" [*Id.* at ¶33]. Defendant fails to demonstrate that this sworn statement by SA Norris is false. Moreover, the Court finds that it is not critical to probable cause.

Seventh, Defendant maintains that SA Norris's statement of her involvement in the investigation in May 2018 is false. The affidavit states that Detective Collins contacted SA Pearson on May 22, 2018, asking for assistance with an investigation [*Id.* at ¶15]. The affidavit then states, "I spoke to Detective Collins who stated that [Defendant] was in custody at their agency for a violation of sex offender registration T.C.A., 40-39-208, and sexual exploitation of a minor, T.C.A., 39-17-1003" [*Id.*]. Defendant argues that the discovery in this case does not show that SA Norris was involved in the investigation on May 22, 2018, and he argues this statement shows that SA Norris merely "cop[ied] and pasted" this paragraph into her affidavit. The Court finds that SA Norris's typographical error in failing to change "I" to "SA Pearson" has no bearing on probable cause.³¹ See *Frazier*, 423 F.3d at 538 (holding that a typographical error in an affidavit is not a basis for a *Franks* hearing).

*29 In summary, the Court has reviewed all of Defendant's allegations of false statements and material omissions in the affidavits of Detective Taylor, SA Pearson, and SA Norris and finds that Defendant has failed to establish a basis for a *Franks* hearing. Accordingly, the Court recommends that Defendant's Motion for a "*Franks*" Hearing [Doc. 34] should be denied.

B. Particularity

Defendant also argues that the three search warrants lack particularity in the items to be seized [Doc. 97 pp. 2, 7-8]. He contends that the state search warrant is a general warrant because it authorizes the seizure of all digital evidence and improperly authorizes the search for photographs, which he asserts are not evidence of either a registry violation or solicitation of a minor [*Id.* at 2, 5]. Defendant asserts that the first federal search warrant lacks sufficient particularity because it fails to incorporate the affidavit [*Id.* at 12]. He maintains that the second federal search warrant is also

insufficiently particular because it does not state the alleged crimes or list the items to be seized [*Id.* at 4]. Defendant argues that the Court should maintain a “heightened sensitivity to the particularity requirement in the context of digital searches,” *United States v. Galpin*, 720 F.3d 436, 447 (2d Cir. 2013), and, thus, should suppress the evidence seized pursuant to the three search warrants in this case.

The Fourth Amendment requires that search warrants “particularly describe[e] the place to be searched, and the persons or things to be seized.” *U.S. Const. amend. IV*. “The particularity requirement forecloses the opportunity for a general search and ‘prevents the seizure of one thing under a warrant describing another,’ by restricting the discretion of the executing officer.” *United States v. Hanson*, 2018 WL 4223320, at * 9 (E.D. Tenn. Sept. 5, 2018) (quoting *Marron v. United States*, 275 U.S. 192, 196 (1927)). In this Circuit, “the degree of specificity required is flexible and will vary depending on the crime involved and the types of items sought.” *United States v. Henson*, 848 F.2d 1374, 1383 (6th Cir. 1988). A search warrant is sufficiently particular if the description of items to be seized “is as specific as the circumstances and the nature of the activity under investigation permit.” *Id.* (internal quotation omitted). The particularity requirement is satisfied if the text of the warrant limits the search to evidence of a particular crime. *United States v. Castro*, 881 F.3d 961, 965 (6th Cir. 2018).

(I) State Search Warrant

The state search warrant authorizes law enforcement to search for evidence of *Tennessee Code Annotated* § 39-13-528, prohibiting solicitation of a minor and § 40-39-208, prohibiting violation of the sex offender registration requirements [Doc. 20-1 p. 1]. The warrant permits officers to search Defendant's cellphone for

[a]ny digital and/or electronic evidence including but not limited to stored electronic communications, records, files, directories, address books, call logs, or data in other forms, stored on the device to be searched that constitutes evidence of [s]olicitation of minors, and [v]iolation of sex offender registration laws. Such evidence may include text messaging or photographs depicting illegal activity.

[*Id.*].

Defendant contends the state search warrant is a “general warrant” because it fails to describe the items to be seized with sufficient particularity to guide the executing officers and, instead, is too broad in including items that should not

be seized [Doc. 97 p. 5]. See *United States v. Richardson*, 659 F.3d 527, 537 (6th Cir. 2012). Defendant asserts that the authorization to seize photographs is overly broad because photographs are not evidence of either a registry violation or solicitation of a minor [*Id.* at 2–3]. He contends that pursuant to this overly broad language, Detective Michael Stallings seized evidence of child pornography, which was not a crime listed in the search warrant [*Id.* at 5]. Defendant argues that “catch-all terms” like “illegal activity” and “including but not limited to” turn the state search warrant into a general warrant [*Id.* at 6]. He also maintains that the search of his cellphone should have been limited to a specific time period [*Id.* at 7]. See *United States v. Lazar*, 604 F.3d 230, 238 (6th Cir. 2010) (observing “‘the failure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render a warrant overbroad’ ” (quoting *United States v. Ford*, 184 F.3d 566, 576 (6th Cir. 1999))).

*30 The Court finds the state search warrant is sufficiently particular. First, it limits the items to be seized to communications, photographs, and other digital materials that are evidence of two specific crimes, solicitation of a minor and violation of the sex offender registration requirements. *Castro*, 881 F.3d at 965 (holding a warrant permitting officers to search defendant's cellphones for evidence of aggravated burglary was sufficiently particular because it constrained the officers to evidence of a specific crime). The Court disagrees with Defendant's assertion that that photographs cannot be evidence of solicitation of a minor. *Tennessee Code Annotated* § 39-13-528 prohibits soliciting a minor for any one of a number of sexual crimes, including aggravated sexual exploitation of a minor, which involves exchanging material (including photographs) depicting a minor engaged in sexual activity or “patently offensive” simulated sexual activity in violation of *Tenn. Code Ann* § 39-17-1004. Moreover, photographs can be used to identify a minor victim who is the subject of the solicitation. Additionally, screenshots of Defendant's communications on the DeviantArt website could be “photographs” evidencing a registry violation. The Court observes that photographs are but one of a list of examples of evidence that could be seized. The affidavit does include terms like “any” and “including but not limited to” but these catch-all phrases are circumscribed by the specific crimes.

Finally, Defendant challenges the particularity of the state search warrant because it did not limit the seizure of electronic evidence to a specific timeframe. The Court finds the failure to time limit the seizure of electronic evidence does not turn

state search warrant into a general warrant. Instead, “a subject matter limitation,” such as the limitation provided by the specific crime can “fulfill[] the same function as a time limitation would have done[.]” *United States v. Ford*, 184 F.3d 566, 578 (6th Cir. 1999). In *United States v. Sullivan*, our appellate court rejected defendant’s argument that the search warrant for his laptop computer was not sufficiently particular because it contained no time limitation, holding that the “warrant specified a subject-matter limitation sufficient to limit the warrant to evidence of the crimes described in the affidavit—namely, files related to child pornography.” 751 F. App’x 799, 805 (6th Cir. 2018). The same is true here with regard to the specified crimes of solicitation of a minor and registry violation. Accordingly, the Court finds the state search warrant is sufficiently particular.

(2) First Federal Search Warrant

Defendant argues that the first federal search warrant fails to incorporate the affidavit, which renders it facially defective and invalid [Doc. 97 p. 12]. See *United States v. Blakeney*, 942 F.2d 1001, 1025–26 (6th Cir. 1991). However, the first federal search warrant authorizes the executing officers to search Defendant’s cellphone and SD card for the items listed in Attachment B [Doc. 35-1 p. 1]. Attachment B to the search warrant authorizes law enforcement to search Defendant’s cellphone and SD card for items that are “contraband, fruits, instrumentalities, and evidence of violations of 18 U.S.C. § 2252A relating to the receipt and possession of visual depictions of minors engaged in sexually explicit conduct, and 18 U.S.C. § 2422(b), enticement of minors to engage in sexual activity for which any person can be charged with a criminal offense” [Id. at 5]. Attachment B contains a list of four categories of items limited by that language: Visual depictions of minors engaged in sexually explicit conduct, child erotica, passwords or security devices designed to restrict access to data, and evidence of user attribution showing who owned the electronic device at the time the aforementioned items were created, edited, or deleted [Id.].

The particularity requirement may be satisfied by the warrant’s cross referencing of separate documents that identify the property or items to be seized in sufficient detail. See *Groh v. Ramirez*, 540 U.S. 551, 557 (2004). Defendant argues the warrant is insufficiently particular because it incorporates an attachment, rather than the affidavit. However, Attachment B was a part of the search warrant, attached thereto and expressly incorporated therein. *United States v. Evans Landscaping, Inc.*, 850 F. App’x 942, 948 (6th Cir. 2021) (holding particularity requirement was

satisfied by incorporation of an attachment that accompanies the warrant). But see *Baranski v. Fifteen Unknown Agents*, 452 F.3d 433, 444 (6th Cir. 2006) (holding failure to bring incorporated affidavit to execution of the search warrant did not render the search warrantless) (*en banc*). The first federal search warrant incorporates Attachment B, which describes with particularity the items to be seized. Thus, the Court finds the first federal search warrant is sufficiently particular.

(3) Second Federal Search Warrant

*31 Defendant contends that the second federal search warrant is not sufficiently particular because it fails to state on its face the place to be searched or the evidence to be seized [Doc. 97 p. 4]. He contends that it also fails to state the suspected crimes [Id.].

The second federal search warrant authorizes the search of four Blu-ray disks “containing the forensic examination extractions of” Defendant’s cellphone and SD card located inside the cellphone, as described in Attachment A [Doc. 102-1 p. 1]. Attachment A describes the location to be searched as the same Blu-ray discs, which are stored in the FBI evidence room in Knoxville, Tennessee [Id. at 3]. The second federal search warrant states the “property to be searched, described above, is believed to conceal: Please see Attachment B, hereto” [Id. at 1]. Attachment B provides for the concealed items as being “[m]aterial reflecting the following conduct, which constitute contraband, fruits, instrumentalities, and evidence of crimes to describe [sic].”

1. All files or data reflecting the distribution, receipt or possession of visual depictions, including still images, videos, films, or other recordings, of minors engaged in sexually explicit conduct, as defined in 18 U.S.C. § 2256;
2. All files or data reflecting the transfer of obscene material, including still images, videos, films, or other recordings, to any person who had not attained the age of 16 years;
3. All files or data reflecting communications, including emails, **chat** messages, text/SMS messages, concerning child pornography, sending obscene material to persons under the age of 16 years; the receipt, distribution, or possession of child pornography; or the solicitation of minors for sex;
4. All files or data constituting any child erotica;

5. All files or data relating to possession, use, or ownership of any device used in the commission of any such offenses;
6. Any and all computer passwords and other data security devices designed to restrict access to or hide computer software, documentation or data; [and]
7. Any and all computer data that would reveal the presence of malware, viruses or malicious codes located on the computer storage media.

[*Id.* at 4].

The Court finds the second federal search warrant describes the location to be searched with particularity. It authorizes the search of four specific, labeled Blu-ray disks containing the extracted data from Defendant's cellphone and SD card. Attachment A gives the location of the disks at the FBI office in Knoxville. "The test for determining whether a search warrant describes the premises to be searched with sufficient particularity 'is not whether the description is technically accurate in every detail,' [*United States v.]Prout*, 526 F.2d [380,] 387–88[(5th Cir. 1976)], but rather whether the description is sufficient 'to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premises might be mistakenly searched[,]']' *United States v. Gahagan*, 865 F.2d 1490, 1496 (6th Cir. [1989])." *United States v. Pelayo-Landero*, 285 F.3d 491, 496 (6th Cir. 2002). As discussed above, a search warrant may appropriately incorporate an attachment. *Evans Landscaping*, 850 F. App'x at 948. Here, the Court finds that the second federal search warrant and Attachment A describe the items to be searched with sufficient particularity that the executing officer could locate them with reasonable effort. Given the particular labels and location identified, the Court also finds there was no reasonable probability that the wrong disks would be searched.

*32 With regard to the items to be seized, Defendant is correct that the second federal search warrant on its face does not limit the search of the disks to evidence of specific crimes [See Doc. 102-1 p. 1]. The warrant, however, incorporates Attachment B. *United States v. Hurwitz*, 459 F.3d 463, 469, 471 (4th Cir. 2006) (determining words "See Attachment to Affidavit" were sufficient to incorporate the attachment describing the items to be seized). The Court finds that Attachment B limited the executing officers' discretion by permitting a search for "contraband, fruits,

instrumentalities, and evidence of crimes" described in the subsequent categories, which describe child pornography, transferring obscene materials to minors, and solicitation of minors for sex. See *United States v. Richards*, 659 F.3d 527, 535, 541–42 (6th Cir. 2011) (determining search of entire server for evidence of child pornography, listed in an attachment, was not overly broad). Thus, the Court finds that the second federal search warrant is sufficiently particular both with regard to the location to be searched and the items to be seized.

C. Execution of Search Warrants

Defendant also challenges the execution of the state and second federal search warrants. He argues that Detective Stallings's search of his SD card exceeded the scope of the state search warrant, which authorized the search of his cellphone and "SIM card," not his SD card [Doc. 20 p. 4, 8–9]. He asserts that the FBI violated his rights by accessing the data on his cellphone and SD card multiple times after obtaining the first federal search warrant [Doc. 97 p. 12]. Finally, Defendant contends that law enforcement "unduly delayed" seeking the second federal search warrant eighteen months after the first federal search warrant [Doc. 20 p. 9; Doc. 97 p. 27].

(1) Search of SD Card

The state search warrant directs the executing officer to search Defendant's LG cellphone and his "16GB sim card" [Doc. 20-1 p. 1]. Detective Collins subsequently testified that Defendant's cellphone and SD card were submitted to Detective Mark Stallings of the Jefferson City Police Department for a forensic examination [Doc. 44, Transcript of April 14, 2021 Hearing, p. 66]. The Court previously determined that the SD card was located inside Defendant's cellphone at the time it was seized by JCSO detectives on May 2, 2018 [Doc. 175 pp. 65–66 & n.32]. Detective Stallings performed a search of Defendant's SD card but was not able to search the cellphone's memory because he could not unlock the passcode [Doc. 35-1 ¶18]. Detective Stallings seized several photographs of a nude minor female from the SD card [Id. at 19].

Defendant argues that law enforcement's search of his SD card exceeded the scope of the state search warrant, which only permitted the search of his cellphone and SIM card [Doc. 20 p. 4, 7]. Defendant contends that a SIM card is "a smart card inside a mobile phone, carrying an identification number unique to the owner, storing personal data, and preventing

operation if removed [*Id.* at 4]. He asserts that an SD card, on the other hand, “is a storage device” [*Id.*]. He argues that the state search warrant did not authorize the search of his SD card and that all evidence seized from the SD card must be suppressed [*Id.* at 8–9].

The Government responds that Detective Taylor “misidentified” the SD card as a SIM card in her application and that this typographical error was carried over to the search warrant [Doc. 24 p. 2 n.2; Doc. 35 p. 7]. It contends that the SD card was installed in Defendant’s cellphone at the time it was seized, and, thus, the state search warrant authorized the search of the SD card as well as the cellphone [Doc. 35 p. 2]. The Government argues that even if the SD card was wrongly described as a “sim card” in the state search warrant, the erroneous description would not have caused the executing officer to search the wrong location, because the SD card was contained within the cellphone [*Id.* at 8].

*33 The Court finds that law enforcement could properly search Defendant’s SD card, although it was not listed as a location to be searched in the warrant. The SD card was contained within the cellphone at the time the JCSO detectives seized it. The search warrant permits the search of Defendant’s cellphone for “digital and/or electronic evidence, including but not limited to stored electronic communications, records, files, directories, address books, call logs, or data in other forms, stored on the device to be searched” that are evidence of solicitation of minors or violation of the sex offender registration laws, and specifies that “[s]uch evidence may include text messaging or photographs depicting illegal activity” [Doc. 20-1 p. 1]. The Court finds that the state search warrant permitted the seizure of evidence of solicitation of a minor and evidence of a registry violation from either the cellphone’s internal memory or the SD card, which was a storage device within the cellphone. “[T]he SD card, which was installed inside the cellphone at the time it was seized, is a component part of the cellphone.” *United States v. Whipple*, No. 3:20-CR-31-KAC-HBG, 2021 WL 9456475, at *16 (E.D. Tenn. Dec. 1, 2021) (holding search of SD card seized within cellphone was not a separate search from the search of the cellphone authorized by the warrant), *report & recommendation adopted by*, 2022 WL 3684593 (E.D. Tenn. Aug. 25, 2022) (appeal filed Feb. 14, 2023); see *United States v. Wilson*, No. 17-04106-01-CR-C-SRB, 2019 WL 4740509, *4 (W.D. Mo. Sept. 27, 2019) (holding search warrant for cellular telephone included installed micro SD card, because SD card “amounted to a component part of the HTC phone”) (Report and Recommendation adopted);

United States v. Archambault, No. 13-CR-100-A(Sr), 2014 WL 6908884, *4-5 (WDNY Dec. 9, 2014) (holding consent to search cellular telephone extended to SD card installed inside phone) (Report and Recommendation adopted).

The Court finds the authority to search Defendant’s cellphone granted by the state search warrant also permitted the search of the SD card, which was located inside the cellphone and a component part thereof. Accordingly, the search of the SD card did not exceed the scope of the state search warrant.

(2) Repeated Access Pursuant to First Federal Search Warrant

Defendant argues that the FBI searched his cellphone and SD card twice after obtaining the first federal search warrant [Doc. 97 p. 12]. He contends that SA McFall extracted data from his cellphone and SD card on June 25, 2018, and again on February 14, 2019 [*Id.*]. He argues that because the February 2019 extraction represents all the evidence on the four Blu-ray disks that are the subject of the second federal search warrant, this Fourth Amendment violation requires the suppression of all the evidence in this case [*Id.*].

Defendant provides as an exhibit to his post-hearing briefs a CART request by SA Pearson dated June 15, 2018, asking SA McFall to search Defendant’s cellphone and the SD card previously installed inside the cellphone pursuant to a search warrant [Doc. 98-17; *see also* Doc. 98-18 (electronic communication of CART request on June 20, 2018)]. Defendant also provides a Report of Examination by SA McFall to SA Pearson, dated February 26, 2019, which states that SA McFall performed a physical extraction of the contents of Defendant’s cellphone and also a Cellebrite report was generated [98-23 p. 1]. The Report states that both the cellphone and the SD card “contain images consistent with child pornography” [*Id.*]. The Report states that SA McFall “imaged, processed, and made available for Case Agent review” the data from Defendant’s SD card, which he also found contained “images consistent with child pornography” [*Id.* at 2]. SA McFall placed two “raw physical extraction[s]” of the cellphone (one encrypted and the other unencrypted), the Cellebrite report, and a forensic image of the SD card on four Blu-ray disks, which were placed in evidence storage [*Id.*]. SA McFall gave a “working copy” of the Cellebrite report to the case agent [*Id.*]. Finally, Defendant provides a single page of an FBI FD-302 entry, dated June 29, 2018, stating SA Pearson received a “cell phone search warrant return from SA Stephen McFall” for Defendant’s cellphone and the “return is attached to this FD-302” [Doc.

98-28]. Defendant argues that multiple requests for subpoenas and other FBI reports containing data such as V1 and V2's phone numbers that predate the February 2019 extraction show that law enforcement gained access to his cellphone in June 2018 [Doc. 100 p. 32 (listing exhibits)]. However, the Court finds it is not clear that the FBI performed two extractions because the June 29, 2018 return" could be for SA McFall's receipt of the cellphone and the record is not clear how law enforcement obtained information in the intervening investigation [See 98-34, May 14, 2019 Report of SA Pearson (stating SA McFall was able to "bypass the encryption" of Defendant's cellphone on February 19, 2019)].

***34** In any event, even if SA McFall performed two searches of Defendant's cellphone pursuant to the first federal search warrant, the Court finds this repeated access did not violate the Fourth Amendment. "A repeated search of an electronic device" that is seized 'and permissibly secured by the police as evidence of a crime differs in degree and kind' from the search of a home." *Whipple*, No.: 3:20-CR-31-KAC-JEM, 2022 WL 3684593, *5 (E.D. Tenn. Aug. 25, 2022) (quoting *Castro*, 991 F.3d at 968) (appeal filed Feb. 14, 2023). The Federal Rules of Criminal Procedure provide with regard to a search warrant for electronically stored information that law enforcement are authorized to perform "a later review of the media or information consistent with the warrant." Fed. R. Crim. P. 41(e)(2)(B); see also *Whipple*, 2022 WL 3684593, *5. "The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure ..., and not to any later off-site copying or review." Fed. R. Crim. P. 41(e)(2)(B); *Whipple*, 2022 WL 3684593, *5 (quoting Rule). Accordingly, the court in *Whipple* concluded that extraction of data from a cellphone and SD card in November 2020, following an initial extraction in March 2020 under the authority of the same search warrant did not contravene the Fourth Amendment. *Id.* "To conclude otherwise would be to allow law enforcement's lawful, permitted access to cellphone data to be undercut in any case where a password prevents law enforcement from immediately accessing the data it is permitted to seize. That is not the law." *Id.* Thus, the Court finds that two extractions of data from Defendant's cellphone and SD card, if such occurred, would not exceed the scope of the first federal search warrant.³²

(3) Timing of Second Federal Search Warrant

Defendant also contends that law enforcement unreasonably delayed seeking the second federal search warrant for over eighteen months after the execution of the state search warrant

and continued to investigate leads from Defendant's SD card during this time [Doc. 20 p. 9]. The seizure of an item "that is 'lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests.' " *United States v. Sykes*, 2023 WL 3051733, *5 (6th Cir. Apr. 24, 2023) (quoting *United States v. Jacobsen*, 466 U.S. 109, 124 (1984)). Thus, a seizure of extended duration can violate the Fourth Amendment, if unjustified. *Id.* To determine whether the delay is reasonable, the Court must balance "the individual's possessory interest in the object seized against the law-enforcement interests justifying the seizure and retention." *Id.*

Here, the Court finds Defendant's possessory interest in his cellphone and SD card was low because both items were properly in law enforcement custody as instrumentalities of the state crimes with which he was charged. Defendant was in state custody during this time and could not have possessed his cellphone. Thus, any delay in bringing the second federal search warrant did not interfere with Defendant's possessory interest. See *Sykes*, 2023 WL 3051733, at * 6 (determining that defendant "had a limited possessory interest in the phone because he was not permitted to have the phone while he was in custody). On the other hand, law enforcement had a strong interest in retaining custody of the cellphone and SD card because the SD card contained sexually explicit images of minors and probable cause existed to believe that the internal memory of the cellphone also contained child pornography and potential evidence of solicitation of a minor. See *id.*

While the record before the Court does not provide the reason for the delay in seeking the second federal search warrant, the Court observes that between the execution of the state search warrant in May 2018 and the access to the internal memory of Defendant's cellphone following the first federal search warrant³³ issued in June 2018 and then the execution of the second federal search warrant in November 19, 2019, law enforcement was identifying and interviewing the minor victims to include a minor female in Bulgaria [See 98-22, Letter to Bulgarian General Directorate for Combating Organized Crime (dated September 13, 2018)]. Accordingly, the Court finds that the period between the execution of the state search warrant and the execution of the second federal search warrant was not unreasonable.

***35** The Court has examined the Defendant's allegations of errors in the execution of the three search warrants and finds no basis to exclude evidence.³⁴

D. Irregularities with the Second Federal Search Warrant

Defendant argues that the second federal search warrant was never issued by a judge because it was not signed and contains irregularities in format [Doc. 97 pp. 1–2; Doc. 99 pp. 4–6; Doc. 113 pp. 2–3]. He also alleges irregularities in production of the second federal search warrant in discovery and in docketing [Doc. 97 pp. 1–2; Doc. 99 pp. 4–6; Doc. 113 pp. 2–3]. Defendant asks for a copy of the return and for the undersigned to confirm that she issued the second federal search warrant [Doc. 97 p. 2].

Defendant doubts that the second federal search warrant was ever issued by the undersigned first because the initial copy he received in discovery, along with the copy the Government filed as an attachment to its response to his suppression motion, does not have a signature [Doc. 99 p. 5]. Although the Government subsequently produced a signed copy of the second federal search warrant, Defendant continues to doubt its **authenticity** due to irregularities in formatting [*See id.* at 5–6]. First, he points out that the issuing judge's signature appears on a second page above the return [*Id.* at 6]. He notes that the spot where the name of the judge to whom the search warrant should be returned is placed is blank on the search warrant [*Id.*]. He also contends that the font in the caption is enlarged, a “white line” has been inserted in the center of the search warrant, some text is “whited out,” and the form appears to have been altered from that of an original AO93 form [*Id.*].

The Court finds that the copy of the search warrant appended to the Government's response [Doc. 102-1] is a copy of the search warrant in case number 3:19-MJ-117, and it is signed by the undersigned on the second page above the return. The undersigned issued this search warrant as evidence by the undersigned's signature thereon.

Defendant also argues that he did not receive a signed copy of the second federal search warrant or a copy of the search warrant return in his initial discovery in this case [Doc. 97 p. 1; Doc. 99 p. 5]. Defendant alleges that in February 2020, he received in discovery a twenty-page packet, that purported to contain the second federal search warrant and all related documents [Doc. 99 p. 5].³⁵ The copy of the second federal search warrant in this packet is not signed by the issuing judge [Doc. 97 p. 1; Doc. 99 p. 5]. Defendant's elbow counsel sought a signed copy of the search warrant by looking up the case number on the documents, 3:19-MJ-1117, but no documents

were filed in that case [Doc. 99 p. 5]. At Defendant's request, elbow counsel asked for a signed copy of the second federal search warrant from the Government, which when produced had a twenty-first page with a blank return and the Judge's signature on the top [*Id.* at 5–6]. Defendant suspects that the signature page provided by the Government is fraudulent because it was not provided in the original discovery, nor was it attached to the Government's response to his motion to suppress [Doc. 97 p. 1 (*see Doc. 35-2*)]. He also contends that none of the documents received in either the original or the later provided discovery packets were stamped as filed [Doc. 99 p. 6].

***36** The Government responds that on August 27, 2021, elbow counsel requested a signed copy of the second federal search warrant, informing Government's counsel that he believed he had received an unsigned copy in discovery [Doc. 102 p. 1]. On August 30, 2021, the Government provide a copy of its “file copy” of the search warrant, application, and affidavit in case number 3:19-MJ-1117 [*Id.*]. The Government alleges that “due to an apparent formatting issue, the Magistrate Judge's signature on the Warrant is on the second page, above the return portion of the warrant” [*Id.* at 2]. The Government relates that its file copy is consistent with the court-filed copy of the original warrant [*Id.*]. The Government notes that the search warrant's return on its copy “is not complete because, due to an oversight, the warrant was returned by the executing agent on September 13, 2021” [*Id.* at 2 n.2].

The Court finds that Defendant now has access to a complete, signed copy of the search warrant and that he received access well in time to prepare for trial.

Defendant contends that he asked elbow counsel to obtain a copy of the second federal search warrant and all related documents from case number 3:19-MJ-1117, and counsel responded that no documents were filed under that case number and that the case is closed [Doc. 97 p. 1; Doc. 99 p. 5]. Defendant contends that documents were not filed in case number 3:19-MJ-1117 until September 22, 2021, at which time “back-dated files” were filed in the case [Doc. 111 p. 2; Doc. 113 p. 2]. Defendant asserts that the return lists the four Blu-ray disks as the inventory, rather than what was seized from the disks [Doc. 111 p. 2]. Defendant argues that suppression of all of the evidence gained from the second federal search warrant is the remedy for the Government's attempt to mislead the Court as indicated by the irregularities with the warrant [Doc. 97 pp. 25–26].

The Court observes that the documents in case number 3:19-MJ-1117 were docketed after the Court received the returned search warrant, which is consistent with the Court's procedures for docketing search warrants and related documents at that time.

Defendant also argues that a return was never made for the second federal search warrant [Doc. 97 p. 4]. However, SA Norris returned the second federal search warrant on September 13, 2021 [3:19-CR-1117, Doc. 3]. The return states that the second federal search warrant was executed on November 19, 2019, at 1600 hours [*Id.*]. Delay in returning a valid search warrant is not a basis for suppression of the evidence. *United States v. Lanier*, No. 1:18CR749, 2021 WL 5353932, at *7 (N.D. Ohio Nov. 17, 2021) (holding “any technical violation in failing to return a search warrant does not mean suppression is mandatory absent some additional finding of prejudice”); *see also United States v. Dudek*, 530 F.2d 684, 691 (6th Cir. 1976) (holding “the failure to make a prompt return and to verify the inventory in this case have no relation at all to the command of the Fourth Amendment which bars unreasonable searches and seizures”).

In summary, the Court finds that the undersigned issued the second federal search warrant on November 19, 2019, and signed it on the second page above the return. The original search warrant is docketed as document number three in case number 3:19-MJ-1117. The second federal search warrant was returned by SA Norris on September 13, 2021. The Defendant has received a complete copy of the second federal search warrant and related supporting documents. Finally, the Court finds that the delay in returning the second federal search warrant is not a basis to suppress the evidence seized pursuant to that warrant.

E. Good Faith

“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” *Herring*, 555 U.S. at 702 (citations omitted). Here, the Government argues that even if the Court determines the search warrants were invalid, due to the lack of probable cause or faulty execution, suppression of the evidence seized from the searches of Defendant’s cellphone and SD card is not the appropriate remedy [Doc. 24 pp. 10–11]. It contends that law enforcement relied in good faith on search warrants issued by state and federal judges. The Government also contends that suppression of

the evidence would not deter law enforcement misconduct, because none occurred. Thus, the Government maintains that suppression of the evidence is not warranted in this case.

*37 Defendant argues that barebones affidavits, like the ones in this case after the material misrepresentations are omitted, negate good faith [Doc. 100 p. 3 (citing *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (no good faith when affidavit is so lacking in probable cause that officer’s reliance on warrant is unreasonable)]. Defendant also asserts that the good faith exception cannot apply when the executing officers failed to act within the scope and terms of the search warrant and, thus, the illegally obtained evidence from the SD card must be suppressed [Doc. 97 p. 11].

The Supreme Court recognized that “the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional,” such as breaking into an individual’s house without a search warrant or even any basis on which to obtain one, seizing all the papers in an office “without a shadow of authority,” or a search accomplished by handcuffing the homeowner and waiving a “false warrant.” *Herring*, 555 U.S. at 702 (citations omitted). As discussed in relation to probable cause above, the Court finds that Detective Stallings acted in good-faith reliance on the state search warrant and finds no Fourth Amendment violations with its execution. The Court does not find any Fourth Amendment violations with respect to the issuance or execution of the first and second federal search warrants. The Court finds that, to the extent that the District Judge disagrees with any of the conclusions in this case, the evidence seized from the three search warrants should not be suppressed because law enforcement acted in reasonable reliance on the search warrants issued. The Court finds that the affidavits in support of the federal search warrants are lengthy and that probable cause to search Defendant’s cellphone and SD card is readily apparent from the sexually explicit images seized from his SD card pursuant to the state search warrant and from the information from V1 and V2. Accordingly, the Court finds that exclusion of evidence in this case would not serve the deterrent purposes of the exclusionary rule and would come at high price for our system of justice. *See id.*

V. CONCLUSION

After carefully considering the parties’ arguments and the relevant legal authorities, the Court finds that although Detective Taylor’s affidavit failed to provide a nexus between the alleged criminal activity and Defendant’s cellphone and SD card, the good faith exception permits the search of his

SD card pursuant to the state search warrant. The Court also finds that law enforcement properly searched Defendant's cellphone and SD card based upon the two valid federal search warrants. Accordingly, the undersigned respectfully **RECOMMENDS** that that Defendant's motion to suppress evidence obtained from the three search warrants [Doc. 20], Motion for a "Franks" Hearing [Doc. 34], and pro se motion

relating to irregularities with the November 2019 search warrant [Doc. 99 pp. 4–6] be denied.³⁶

***38** Respectfully submitted,

All Citations

Not Reported in Fed. Supp., 2023 WL 4503981

Footnotes

- 1** In a Report and Recommendation issued on February 21, 2023, the Court found that the micro SD card was located inside Defendant's cellphone at the time JCSO detectives seized the cellphone [Doc. 175 pp. 65–66 & n.32].
- 2** A copy of the May 3, 2018 Jefferson County search warrant and affidavit is attached to Defendant's motion [Doc. 20-1]. A copy of this search warrant and affidavit was also introduced at the April 14, 2021 evidentiary hearing [Doc. 40, Witness and Exhibit List, Exh. 6] and is provided in Defendant's exhibits to his post-hearing brief [Doc. 98-7], as supplemented [Doc. 151-2 p. 2, Search Warrant; see Doc. 157 p. 3 (permitting Defendant to supplement exhibit 98-7 with the May 3, 2018 search warrant)]. For ease of reference, the Court will cite to the copy of the state search warrant and affidavit attached to Defendant's motion [Doc. 20-1], finding it identical to the copy received as evidence at the evidentiary hearing, with the exception that Defendant's copy does not include the attached photograph of the cellphone and SD card and the search warrant return appears as page 3, rather than page 2.
- 3** The June 6, 2018 search warrant and the accompanying documents are filed in case number 3:18-MJ-1069, as follows: Application for a Search Warrant [Doc. 1], Affidavit of Bianca L. Pearson [Doc. 2], Search and Seizure Warrant [Doc. 3] with attached return and attachments. Defendant also filed this search warrant [Doc. 98-8] and SA Pearson's affidavit [Doc. 98-10], as exhibits to his post-hearing briefs [Docs. 97 & 100] in this case. The Court notes a page from another exhibit is erroneously filed as page 2 of the search warrant [Doc. 98-8 p. 2; see Doc. 157 p. 2]. Comparing Defendant's exhibit [Doc. 98-8] with the search warrant in case number 3:18-CR-1069, document 3, the Court finds that Defendant's exhibit is missing the return, which is page two of the search warrant. The Government attaches a complete copy of the first federal search warrant [Doc. 35-1 p. 1] with attached return [*Id.* at 2] and attachments [*Id.* at 3–5], the application and attachments [*Id.* at 6–9], and SA Pearson's affidavit with attachments [*Id.* at 10–25] to its response to the *Franks* motion [Doc. 35]. For ease of reference, the Court will cite to the copy of the search warrant and affidavit provided by the Government as exhibits to its response.
- 4** The November 19, 2019 search warrant and the accompanying documents are filed in case number 3:19-MJ-1117, as follows: Application for a Search Warrant [Doc. 1], Affidavit in Support of Search Warrant [Doc. 2], Search and Seizure Warrant [Doc. 3] with attached return and attachments. Defendant also filed this search warrant as an exhibit [Doc. 98-9], but Defendant's exhibit is missing page 2, which contains the judge's signature at the top above the return, and page 4, which is Attachment B, describing the items to be seized. Defendant also filed Agent Norris's application and affidavit with attachments as an exhibit [Doc. 98-11], but this exhibit is missing pages 9–10 and the remaining pages are out of order. The Government attaches the search warrant and related documents to its response to the *Franks* motion [Doc. 35-2]; however, this copy of the search warrant is also missing page 2, which bears the judge's signature above the return. The Government's affidavit of SA Norris is complete [Doc. 35-2, pp. 5–20 (includes attachments)]. The Government attaches a complete copy of the search warrant [Doc. 102-1] to its response to Defendant's allegations regarding irregularities with the search warrant. For ease of reference, the Court will cite to the Government's copy of the affidavit from its response to the *Franks* motion [Doc. 35-2] and the Government's copy of the search warrant from its response to Defendant's motion challenging the issuance of second federal search warrant [Doc. 102-1]. Defendant's argument that the second federal search warrant was never issued is discussed in Part D. of the analysis below.
- 5** The undersigned prepared a separate Report and Recommendation on this motion [Doc. 75].

- 6 Counsel was also granted leave [Doc. 32] to file a Motion to Suppress Evidence Obtained from a Google Drive Cloud Storage Service [Doc. 33] ("Google Cloud motion"). At the April 14, 2021 evidentiary hearing, Mr. Moffatt moved to withdraw the Google Cloud motion, based upon the Government's representation that it did not access Defendant's Google Cloud accounts [Doc. 44 pp. 5–7]. When Defendant assumed his own representation, the Court held counsel's withdrawal of this motion in abeyance [Doc. 48]. Although Defendant stated that he wanted to pursue this motion [Doc. 87], the Government stipulated that it would not use any evidence from Defendant's Google Cloud storage accounts at trial [Docs. 124 & 134]. Accordingly, the Court found the Google Cloud motion to be moot [Doc. 124].
- 7 Defendant Glatz initially filed post-hearing briefs [Docs. 69 & 80], which together exceeded the page limitation in Local Rule 7.1(b) by nearly seventy-five pages, exclusive of Defendant's forty-five exhibits [Docs. 80-1 through 80-45]. The Court required Defendant to refile his post-hearing briefs, limited to a combined page limit of one hundred pages and to resubmit his exhibits, omitting exhibits 43 and 44 [Doc. 87].
- 8 Defendant has filed numerous other motions relating to the irregularities in the second federal search warrant: On October 19, 2021, Defendant sought to reargue this issue in a second motion for disciplinary action [Docs. 106, 106-1, 106-2], which the Government opposed [Doc. 108]. On April 26, 2022, Defendant moved the Court for leave [Doc. 139] to file a supplemental brief on the irregularities in the November 19, 2019 search warrant [Doc. 139-2] and a Motion to Correct the Record and/or Docket Sheet with regard to that search warrant [Doc. 139-4]. The Government opposed these untimely filings, arguing the proposed brief and motion seek to reallege issues that have been fully briefed [Doc. 140]. On November 28, 2022, Defendant filed yet another motion for leave to file a motion to correct the record with regard to the November 19, 2019 search warrant [Doc. 160], which the Government again opposed as duplicative and frivolous [Doc. 168]. On December 19, 2022, Defendant filed a reply brief [Doc. 169] and a motion for leave to correct errors in an attachment to his motion [Doc. 170].
- 9 Tennessee Code Annotated § 40-39-208(a)(3) provides that "[i]t is an offense for an offender to knowingly violate any provision of this part. Violations shall include, ... Failure to timely disclose required information to the designated law enforcement agency[]." "Within three (3) days, excluding holidays, of a[sex] offender changing the offender's electronic mail address information, any instant message, **chat** or other internet communication name or identity information that the person uses or intends to use, whether within or without this state, the offender shall report the change to the offender's designated law enforcement agency." [Tenn. Code Ann. § 40-39-203\(a\)\(7\)](#) (discussing contents of sex offender registration forms).
- 10 Alternatively, the Government argues that even if Defendant's statements from the May 2, 2018 interview are excluded, Detective Taylor's affidavit still provides probable cause to issue the search warrant [Doc. 24 p. 8]. It contends that the information from Taveras that Defendant was using the Tennesseeetomcat account to **chat** and role-play with a minor on the DeviantArt website along with information that Defendant did not report the Tennesseeetomcat account on his sex offender registration form provides probable cause to believe Defendant violated the Tennessee sex offender registration law, [Tenn. Code Ann. § 40-39-208](#) [*Id.*]. The Government argues that even removing Defendant's admissions that he used the Tennesseeetomcat account, chatted with a minor, and asked for a picture, the remaining information is sufficient to provide probable cause. However, the Court has already determined that Taveras's report alone provides reasonable suspicion, not probable cause, to believe Defendant used the Tennesseeetomcat account [Doc. 175, pp. 36–37]. As discussed above, the Court, however, finds that Defendant's admissions from the interview were properly included in the affidavit and properly form the basis for probable cause.
- 11 Defendant argues that during the May 2, 2018 interview, he never said he used his cellphone to access DeviantArt or that his cellphone was his only means of accessing the internet [Doc. 97 pp. 8–9]. Instead, he contends that he told the detectives that he uses computers and a "phone" but did not specify which cellphone or for what purpose he used the electronic devices [*Id.*]. The Government responds that during the interview, Defendant told the detectives that he "used to use" computers but that now all he has is a cellphone [Doc. 104 p. 2]. However, neither interpretation of Defendant's statement regarding his cellphone is included in Detective Taylor's affidavit. In assessing probable cause, the Court is constrained to look only at the four corners of Detective Taylor's affidavit to determine whether a nexus exists. Comments made in the May 2, 2018 interview but not presented to the judge in the affidavit are not relevant to the Court's analysis.

- 12 Defendant also argues that Detective Taylor's affidavit contained deliberately false statements and material omissions that misled the issuing judge [Doc. 100 p. 10]. The Court examines the merits of this argument in section (A)(3) below.
- 13 Defendant also argues that the allegations in paragraph 16, relating to Sevier County charges, should not be considered in the probable cause analysis because the Tennessee Court of Criminal Appeals subsequently reversed his conviction for these charges due to insufficient evidence [Doc. 97 p. 15 (citing *State v. Glatz*, E2019-00431-CCA-R3-CD, 2020 WL 865071 (Tenn. Crim. App. Feb. 21, 2020))]. First, the Court observes that the Tennessee appellate court reversed Defendant's conviction for attempted sexual exploitation of a minor but affirmed his conviction for contributing to the delinquency of a minor. *Glatz*, 2020 WL 865071, at *5–6. Moreover, the Court must consider whether probable cause exists based upon the four corners of SA Pearson's affidavit and cannot consider either Defendant's subsequent conviction for contributing to the delinquency of a minor or the reversal of his conviction for attempted solicitation of a minor in assessing whether the affidavit provides a sufficient basis for the issuing judge to find probable cause.
- 14 Defendant also makes several arguments that ask the Court to look outside the four corners of SA Norris's affidavit: He contends that the affidavit's explanation of how agents identified F.R. (V1) and E.B. (V2) is implausible [Doc. 97 pp. 17–18]. He asserts that F.R.'s first name was never mentioned in the sixty jail telephone calls, an open-source search of F.R.'s first name along with the states of Florida and Alaska does not yield F.R.'s parents' names, and that agents did not rely on information from F.R. to identify E.B. [*Id.* at 18]. As stated above, the Court is limited to the four corners of the affidavit in determining whether probable cause exists. Defendant's assertions are unsupported and wander far afield of the four corners of SA Norris's affidavit.
- 15 Defendant provides a May 8, 2019 FBI Report by SA Pearson stating that V2 was identified through obtaining the subscriber information for her cellphone number, which was found on Defendant's cellphone [Doc. 98-42 pp. 2–3]. The report also shows that SA Pearson obtained V2 and Defendant's WhatsApp conversations that were cited in SA Norris's affidavit from a review of Defendant's cellphone prior to their interview of V2 or review of her cellphone [*Id.* at 3; see also Doc. 35-2 ¶24].
- 16 With regard to V1, Defendant also argues that V1's name was never mentioned during the sixty jail telephone calls and that an open-source search of V1's first name, Florida, and Alaska does not yield V1's parent's names [Doc. 97 p. 18]. These arguments are unsupported.
- 17 In his post-hearing brief, Defendant also alleges the May 3, 2018 affidavit of Detective Collins in support of an arrest warrant contains false statements and material omissions, which, if excluded or, in the case of omissions included, would negate any probable cause [Doc. 100 pp. 2–15]. The Court finds that Defendant's attack of the specific language in the May 3, 2018 Affidavit of Complaint exceeds the scope of his motion for a *Franks* hearing [Doc. 34] and cannot be determined without recourse to exhibits not properly in the record [See Doc. 175 p. 70 n.35 (declining to address Defendant's allegations of false statements in Detective Collins's Affidavit of Complaint to the arrest warrant)].
- Additionally, even aside from the improper filing and evidentiary issues, Defendant cannot prevail. Our appellate court has applied the test from *Franks v. Delaware* to analyze alleged false statements in an affidavit supporting an arrest warrant. *United States v. Holmes*, 503 F. App'x 383, 386 (6th Cir. 2015). However, here, no evidence was seized from Defendant Glatz at the time of his arrest. Defendant argues that the evidence gleaned from his jail telephone calls and used in the second federal search warrant must be suppressed because that evidence stems from his illegal arrest [See Doc. 96 p. 30]. The Supreme Court has "declined to adopt a 'per se', or 'but for,' rule that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest." *United States v. Ceccolini*, 435 U.S. 268, 276 (1978). Here, the Court finds that the jail telephone calls are sufficiently attenuated from Defendant's arrest that suppression of those calls is not warranted because they are separated in time at least by days and the circumstances of Defendant's arrest did not influence the statements made in the calls. See *United States v. Gross*, 662 F.3d 393, 401–02 (6th Cir. 2011) (observing suppression of the "indirect fruits" of an illegal arrest is only warranted if the fruits "bear a sufficiently close relationship to the underlying illegality") (internal quote omitted); see also *United States v. Houston*, No. 3:13-10-DCR, 2013 WL 5595405, at *8 (E.D. Tenn. Oct. 10, 2013) (holding "the fruit of the poisonous tree doctrine did not apply to the defendant's ... jail telephone conversation" when defendant was warned that calls were recorded and monitored). Thus, even if the matter of the legality of Defendant's arrest warrant were properly before the Court and even if it found Detective Collins's affidavit did

not provide probable cause for the issuance of an arrest warrant, the Court would find that the information gleaned from Defendant's jail telephone calls should not be suppressed.

- 18 Defendant also asserts that JCSO failed to investigate properly because they did not issue a subpoena to the DeviantArt website to learn who owned the Tennesseeetomcat account [Doc. 100 p. 5]. The Court agrees with the Government that Defendant's dissatisfaction with the JDSO's investigation of his case does not factor into the *Franks* analysis [Doc. 105 p. 2]. As the Government observes, Defendant admitted using the Tennesseeetomcat account on DeviantArt, and this admission establishes a nexus between the account and Glatz, as stated in the affidavits [*Id.*].
- 19 The JCSO Preliminary Investigative Report that Defendant provided as an exhibit [Doc. 98-19] does not contain Corum's identifying information. However, the notes in the report state that Detective Taylor called Corum on May 3, 2018 [*Id.* at 3], so the Court finds Detective Taylor had Corum's telephone number. Defendant speculates that the JCSO must have gained Corum's contact information illegally because there was not time for a subpoena, the journal entry on DeviantArt does not mention Corum, and the Tennesseeetomcat account was deactivated before the JCSO received the Taveras complaint [Doc. 100 p. 6]. However, as Defendant notes, he gave the detectives Corum's contact information during the May 2, 2018 interview [*Id.* at 7].
- 20 Defendant provides what appears to be an evidence log sheet for a "16GB Micro SD card located inside LG smart phone" with a "Specific" "Discovery Location" of "on person" of Glenn Glatz [Doc. 98-21; see Doc. 156 (permitting substitution of Doc. 138-1)]. This log does not state that the SD card was seized separately from the cellphone. At the April 14, 2021 evidentiary hearing, Detective Collins testified that Defendant had his cellphone on his person when he came to the JCSO on May 2, 2018 [Doc. 44 p. 64].
- 21 Defendant provides an FBI Collected Item Log dated May 30, 2018, by SA Pearson, stating she received an LG smart phone and a "16GB Micro SD card located inside LG smart phone" from Detective Collins on May 23, 2018 [Doc. 98-25 p. 1]. The second page of this log states that both items were taken from the "Specific Location" of Defendant's person [*Id.* at 2]. This log does not state that the SD card was seized separately from the cellphone. As stated in the above footnote, Detective Collins testified Defendant had his cellphone on his person when he came to the JCSO for the May 2 interview [Doc. 44 p. 64].
- 22 Footnote 12 above discusses Defendant's Sevier County conviction and appeal.
- 23 Defendant also argues that SA Pearson's statement in the affidavit that he was "'subsequently arrested'" based upon his May 2, 2018 interview creates a false inference that he was arrested at the end of the interview [Doc. 100 p. 23 (quoting affidavit [Doc. 35-1 ¶17])]. The Court finds that Defendant was arrested the day after his interview and that his arrest was based, at least in part, on his statements in the May 2, 2018 interview. The Court also finds the omitted fact that Defendant was arrested the day after his interview is not necessary to probable cause.
- 24 At the beginning of the May 2, 2018 interview, Detective Taylor told Defendant she met him when he came in to register and his girlfriend came with him [Doc. 98-1, unofficial Transcript of May 2, 2018 Interview, p. 1]. Defendant responded that the woman was not his girlfriend but, instead, was his roommate and good friend [*Id.* at 1-2]. He states she moved to Pigeon Forge, "chasing her boyfriend" [*Id.*]. Defendant does not name the woman [*Id.*]. Detective Collins does not state that he was present when Detective Taylor met Glatz and the woman [*Id.*]. Detective Taylor is listed as the reporting officer on Defendant's March 28, 2018 sex offender registration form, which was introduced as Exhibit 1 at the April 14, 2021 evidentiary hearing. Accordingly, Defendant fails to demonstrate that Detective Collins knew Mindy Parks was a person, rather than an alias.
- 25 As a part of his *Franks* argument, Defendant contends that the second federal search warrant was never issued by a judge and, thus, the Government's arguments in support of the issuance of the second federal search warrant are themselves false and "fraudulent" [Doc. 100 p. 28]. As discussed in section D. below, the second federal search warrant was signed and issued on November 19, 2023, at 10:53 a.m. *In re Search Warrant for Four Blu-Ray Disks*, No. 3:19-MJ-1117, Doc. 3 p. 2 (E.D. Tenn. Sept. 13, 2021) (Original search warrant issued November 19, 2019, and docketed upon its return on September 13, 2021).

- 26 Defendant also challenges another statement in paragraph 31 of SA Norris's affidavit that he had a short-term male roommate in January or February 2018, who related to the trailer park manager that Defendant tried to persuade thirteen or fourteen-year-old girls from North Carolina to come to his trailer [Doc. 34 p. 4; Doc. 100 p. 30]. Defendant asserts this information about the roommate is false and the source of the trailer park manager's information is unknown and unreliable [Doc. 34 p. 4; Doc. 100 p. 30]. Again, the Court finds this information is supported by the June 26, 2018 FBI report [Doc. 35-3] and is not contradicted by Defendant's referenced exhibits [Doc. 98-35, June 26, 2018 FBI Report; Doc. 98-36, Notes from May 31, 2018; Doc. 98-38, June 18, 2018 FBI Report (May 31, 2018 interview of trailer park resident); see Doc. 157 (permitting Defendant's chart renumbering exhibits)]. Additionally, Defendant told the detectives during the May 2, 2018 interview at JCSO that he rented a room in his camper as a source of income [Doc. 98-1 p. 7]. Defendant fails to demonstrate the information from the trailer park manager is false.
- 27 In her affidavit, SA Pearson states that she "review[ed] files stored on the micro SD card" and she also describes images "extracted from the SD card" [Doc. 35-1 ¶¶20–21]. It is not clear from these statements whether SA Pearson looked through the entire SD card or examined the pictures extracted by Detective Stallings. However, even if the former is true, a Fourth Amendment violation is not apparent. With regard to electronically stored information, "the time for executing the warrant ... refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review." *Fed. R. Crim. P. 41(e)(2)(B)*. Generally, a search warrant authorizes a single search of the premises that is the subject of the warrant. *United States v. Keszthelyi*, 308 F.3d 557, 568–69 (6th Cir. 2002). However, the repeated search of an electronic device properly seized as evidence in a case does not run afoul of this rule, which was created in the context of searches of residences. *United States v. Castro*, 881 F.3d 961, 967–68 (6th Cir. 2018). "Officers may conduct a more detailed search of an electronic device after it was properly seized so long as the later search does not exceed the probable cause articulated in the original warrant and the device remained secured." *Id.* at 967.
- 28 Defendant also faults SA Norris's affidavit for failing to state the source of Taveras's information [Doc. 34 p. 3]. The affidavit's mention of "a report that [Defendant] was using social media to communicate with a 13 year-old girl" is present merely to relate the chronology of the investigation [See Doc. 35-2 ¶¶16, 18]. The Court finds the omission of Taveras's source is not material to probable cause.
- 29 The Court discusses Defendant's argument that the FBI exceeded the scope of the first federal search warrant by accessing his cellphone multiple times in the section relating to the execution of the search warrants in part C(2) below.
- 30 The Court notes that SA Norris's affidavit states that the FBI reviewed Defendant's correspondence, which he drafted while in custody, and learned that Defendant sent correspondence to V2 through an adult intermediary [*Id.* at ¶¶32–33]. The affidavit does not give a time frame for the review of Defendant's correspondence or state whether law enforcement discovered the letters to V2 before it contacted her on July 18, 2019.
- 31 Defendant also contends that SA Norris includes several false statements that are also in SA Pearson's affidavit: That his SD card was located inside his cellphone at the time it was seized [Doc. 35-2 ¶12], that Detective Collins asked him to come to the JCSO for a sex offender "compliance check" [*Id.* at ¶16]; that Defendant was arrested at the end of the May 2, 2018 interview [*Id.* at ¶16], and that he was using a "[chat](#) application and email address" on DeviantArt website [*Id.*] [Doc. 100 p. 31]. Defendant also argues that SA Norris's affidavit falsely states the wrong date of 2005, rather than 1995, for his child molestation conviction [Doc. 34 p. 4]. Defendant refers the Court to his arguments on these statements in SA Pearson's affidavit and raises no additional grounds [*Id.*; Doc. 100 p. 31]. The Court has analyzed these statements in its discussion of SA Pearson's affidavit above and finds Defendant fails to make a *prima facie* showing for a *Franks* hearing.
- 32 Defendant also argues that it was unreasonable for the FBI to wait eight months after obtaining the first federal search warrant to perform the Cellebrite extraction in February 2019 [Doc. 97 p. 27]. The Court finds no Fourth Amendment violation for this eight-month delay for the same reasons as for the longer delay discussed in section (3).
- 33 Defendant contends that documents provided in discovery suggest that the FBI accessed his cellphone prior to the extraction of data and Cellebrite analysis in February 2019 [Doc. 34 pp. 4–5; Doc. 100 p. 32 (referencing numerous exhibits in Doc. 98)]. However, whether the memory of Defendant's cellphone was accessed in May or June 2018, as suggested by Defendant or February 2019, as related by the FBI Report of Examination [Doc. 98-23], the Court still finds law enforcement's seeking and obtaining the second federal search warrant on November 19, 2019 was reasonable.

- 34 Defendant also asserts that an extraction of data from a cellphone using the Cellebrite software is overly broad and the equivalent of a general warrant because it seizes the entire contents of the cellphone [Doc. 97 p. 20]. He argues that a Cellebrite extraction cannot be limited to search certain file types, applications, or time frames [*Id.*]. Relying on “blog” entry, Defendant also contends that the Cellebrite software is capable of being “hacked” and manipulated [*Id.* at 21]. The Court finds Defendant’s argument that Cellebrite program could be adulterated is not a basis for finding any improper conduct in this case. Nor has Defendant shown that concerns about the Cellebrite report would require suppression of the evidence in this case. See *United States v. Hawkins*, No. 5:18-CR-063-2-JMH, 2019 WL 542286, at *2 (E.D. Ky. Feb. 11, 2019) (declining to exclude evidence of text messages due to “inconsistencies” with the “Cellbrite report,” observing that the inconsistencies do not render the text messages “unreliable or unfairly prejudicial”).
- 35 Defendant contends that the same twenty-page packet appears in the record as an attachment to the Government’s response to his Franks motion [Doc. 35-2].
- 36 Any objections to this report and recommendation must be served and filed within fourteen (14) days after service of a copy of this recommended disposition on the objecting party. Fed. R. Crim. P. 59(b)(2) (as amended). Failure to file objections within the time specified waives the right to review by the District Court. Fed. R. Crim. P. 59(b)(2); see *United States v. Branch*, 537 F.3d 582, 587 (6th Cir. 2008); see also *Thomas v. Arn*, 474 U.S. 140, 155 (1985) (providing that failure to file objections in compliance with the required time period waives the right to appeal the District Court’s order). The District Court need not provide *de novo* review where objections to this report and recommendation are frivolous, conclusive, or general. *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986). Only specific objections are reserved for appellate review. *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370, 1373 (6th Cir. 1987).

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Zaftr Inc. v. Lawrence

United States District Court, E.D. Pennsylvania. | January 20, 2023 | Not Reported in Fed. Supp. | 2023 WL 349256

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Outline

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United States District Court, E.D. Pennsylvania.

ZAFTR INC., Plaintiff,

v.

Kevin Jameson LAWRENCE, BVFR
& Associates, LLC, John Kirk,
and [Kirk Law PLLC](#), Defendants.

CIVIL ACTION NO. 21-2177

|

Filed January 20, 2023

Attorneys and Law Firms

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OPINION

[WENDY BEETLESTONE](#), District Judge

*1 Plaintiff Zaftr, Inc. (“Zaftr”)’s attempt to purchase 10,000 Bitcoin between August and November 2020 was foiled not once, not twice, but three times. Across the failed attempts at the transaction, Zaftr paid \$5.6 million and did not receive a single Bitcoin in return. The purported seller of the Bitcoin is not a party to this lawsuit, but the persons and entities who facilitated the transaction, *i.e.*, Defendants Kevin Jameson Lawrence and his company BVFR & Associates, LLC (the “Lawrence Defendants”) and Defendants John Kirk and his law firm Kirk Law PLLC (the “Kirk Defendants”), are. Plaintiff maintains that the Defendants have retained nearly \$1 million of the money it paid. Seeking to recoup these amounts and other damages alleged to be in excess of \$32 million, Zaftr asserts claims for breach of contract, unjust enrichment, conversion, fraudulent and negligent misrepresentation (including omission and non-disclosure),

and civil conspiracy. It also seeks a declaratory judgment regarding Defendants’ liability and its alleged damages. The Kirk Defendants raise a crossclaim for indemnification and contribution against the Lawrence Defendants.

Zaftr now moves for summary judgment pursuant to [Federal Rule of Civil Procedure 56](#) on its first breach of contract claim (Count I), the Kirk Defendants move for summary judgment on all of Zaftr’s claims, and the Lawrence Defendants move for summary judgment on all of Zaftr’s claims—except that for declaratory judgment (Count IX)—as well as the Kirk Defendants’ crossclaim. For the reasons that follow, each of the parties’ summary judgment motions shall be granted in part and denied in part.

I. FACTUAL BACKGROUND

Plaintiff Zaftr is a Canadian company based in Calgary engaged in the business of buying and selling digital currency, primarily Bitcoin (sometimes referred to as “BTC”). Zaftr’s CEO is Nathan Montgomery. Zaftr is regulated by FINTRAC, a Canadian regulator for financial institutions. Zaftr’s business in Bitcoin involves borrowing Bitcoin through a line of credit from one of its shareholders and liquidating that Bitcoin to fund new purchases of Bitcoin. When Zaftr receives new Bitcoin from such a purchase, it replenishes the line of credit and profits from the difference in the purchase price of the new Bitcoin and the sale proceeds of the credited Bitcoin.

Defendant Kevin Jameson Lawrence is an attorney, once licensed to practice law in Pennsylvania but whose license has been administratively suspended. Lawrence is the CEO and managing member of Defendant BVFR & Associates, LLC (“BVFR”), a Pennsylvania LLC.

Defendant John Kirk is an attorney licensed to practice law in Pennsylvania and the founding shareholder of Defendant Kirk Law PLLC (d/b/a Distributed Law Group) (“Kirk Law”), based in Pennsylvania.

A. The Contemplated Transaction

Around mid-August 2020, Montgomery was introduced by non-party brokers to Defendants Lawrence and Kirk, kicking off the process for Zaftr’s potential purchase of Bitcoin. During a call with Montgomery set up by the brokers, Lawrence mentioned a potential third-party seller whom he knew and had worked with previously, one James Smith,

and the parties discussed the procedure for the purchase. Montgomery was told that Smith had relationships with Bitcoin miners and that through those relationships his company Bulk Bitcoin Trader, Ltd. (“BBT”) was in a position to sell Bitcoin. After the parties’ initial encounter, Montgomery was under the impression he was dealing with two American lawyers—one of whom (Lawrence) was also represented to be a doctor, a former federal prosecutor, and an alumnus of the “Clinton administration”—as well as a seller (Smith) who had experience selling Bitcoin. As it turned out, “James Smith” appears not to be a real person and the purported seller’s true identity remains a mystery. Additionally, Zaftr later discovered that Lawrence is not a medical doctor, his law license was administratively suspended, he was never a federal prosecutor, and he did not ever work in the Clinton administration.

***2** After the initial call, the roles of the parties were set forth: Smith would provide the Bitcoin; Zaftr would provide the funds; Kirk Law, through Kirk, would hold the funds in escrow and act as counsel for BVFR; and BVFR, through Lawrence, would act as liaison with Smith, acting, in Montgomery’s words, as the “face and the voice of the seller.” The arrangement was such that Montgomery did not communicate with the purported seller during the transactions.

Before proceeding with any transaction, Zaftr attempted to conduct a due diligence review to confirm the identities of James Smith and BBT, as well as their ability to complete the contemplated transaction. A corporate records search revealed that Smith was listed as sole owner and director of BBT, a company registered in the United Kingdom and in good standing at the time. Kirk provided a copy of Smith’s passport in an email to Zaftr on behalf of Lawrence, who provided it to Kirk on behalf of Smith. Zaftr then ran a report on Smith through Trulioo, a service for watchlist screening and ID verification. According to Montgomery, Zaftr did not, at the time it ran the report, have a subscription enabling it to validate U.K. passports. So while the Trulioo report indicated no red flags for Smith, it did not validate Smith’s passport. As it turned out, the passport was fake.

B. Identity Verification

Beyond Zaftr’s own due diligence, the parties also decided to use Lawrence as a professional agent to attest to Smith’s identity through a limited purpose agency agreement (the

“ID Verification Agreement”). Pursuant to the ID Verification Agreement—signed by BVFR and Zaftr—Lawrence, on behalf of BVFR, represented he had prior dealings with Smith and verified that the individual he had spoken with in past video conferences was the same individual as described and pictured in the passport.

C. First Transaction (“August Tranche”)

To execute the transaction, Zaftr entered into the “First Purchase Agreement” with BBT, which set forth a plan to purchase Bitcoin through a number of tranches, beginning with 200 BTC and concluding at an aggregate of 10,000 BTC. The First Purchase Agreement also includes a 10% non-performance fee, due by Zaftr or BBT to the other in the event one party failed to perform. It also provides for a “Seller Mandate Fee” to be separated from the purchase funds and paid to BVFR (as the “Seller’s Mandate”). Specifically, under the First Purchase Agreement, the Seller Mandate Fee was to be “segregated and payable by Mandate Counsel [Kirk Law]” to BVFR.

Zaftr also entered into the “First Escrow Agreement” with Kirk Law and BBT. This agreement affirms that Kirk Law (specifically, Kirk) was engaged by BVFR to serve as its counsel and provides for a 1% “Mandate Counsel Fee” for Kirk Law. Both the First Purchase and First Escrow Agreements provide that Kirk Law, as the party maintaining the escrow account, could only release Zaftr’s purchase funds to BBT *after* the Bitcoin was delivered to Zaftr.

The third and final agreement in this first set is the “First Addendum” between Zaftr, Kirk Law, and BVFR. The First Addendum provides that Kirk Law would not release funds in the escrow account before the receipt of Bitcoin to any party except the Seller Mandate Fee to BVFR. It further provides that if the Bitcoin were not delivered within 24 hours of Zaftr’s funds being sent to Kirk Law and being successfully cleared (the “Default Period”), funds sent to Kirk Law would be returned to Zaftr within one day. Importantly, the First Addendum also provided that, in the event the transaction failed, BVFR would return its Seller Mandate Fee to the Kirk Law IOLTA to be returned to Zaftr, minus a conditional “Breakup Fee” of \$50,000 to be retained by BVFR.

***3** Lawrence, on behalf of Smith and BBT, fixed the purchase price for the first tranche of 200 BTC (“August Tranche”) at \$2,254,514. On August 25, 2020, Zaftr sent that

amount to Kirk Law and Kirk confirmed receipt of those funds. But Zaftr did not receive any Bitcoin in return.

During this time, Smith and Lawrence shared **WhatsApp** communications about the transaction, during which Smith stated there was a delay in performance due to a “timing” issue, apparently related to the Bitcoin miner(s). This information was relayed by Lawrence to Kirk and then from Kirk to Montgomery.

i. Transfers to Third-Party Bank Accounts

As completion of the August Tranche stalled, Kirk Law, at the Lawrence Defendants’ direction, made transfers of a portion of the August Tranche funds sent by Zaftr to Kirk Law’s IOLTA to two third-party bank accounts held under the names “A.E. Consult LLC” and “Nationwide Finance LLC.” Communications between Lawrence and Smith suggest the purpose of these payments was to facilitate the stalled transaction, and Lawrence testified he directed these payments based on Smith’s requests. Kirk Law first sent \$40,000 to A.E. Consult LLC but soon recalled the payment at Lawrence’s direction. Despite the recall, however, the \$40,000 was not recovered. Lawrence then instructed Kirk Law to send \$40,000 to the Nationwide Finance LLC account. This payment was also recalled, but only a portion of the funds were recovered (\$20,000). Zaftr was unaware of these payments to third-party accounts at the time.

ii. Aftermath of the Failed August Tranche

On August 28, in light of the failed attempt, Zaftr requested return of its funds, including the Seller Mandate Fee. Zaftr repeated its request on September 2, asking the Kirk Defendants to prepare to return the funds, and again on September 4. Kirk Law returned \$1,886,977.60 to Zaftr on September 4, an amount that included Kirk Law’s 1% Mandate Counsel Fee for the August Tranche.

At the end of the failed August Tranche, Zaftr was short \$367,536.40, the amount claimed by BVFR as its Seller Mandate Fee, which BVFR was allowed to keep heading into the next transaction attempt (although the conditions on its keeping those funds are disputed). The amount actually retained by the Defendants, however, appears to be \$367,536.40 minus the \$60,000 that was sent but not

recovered from the two third-party accounts, thus equaling \$307,536.40.

D. Second Transaction (“September Tranche”)

The Lawrence Defendants next advised Zaftr that the purported seller would perform if a different procedure was utilized. The new procedure involved a Malaysian law firm, Sabarudin, Othman & Ho (“SOH”), represented by one Kenneth Gomes. Lawrence advised Zaftr that he had previously worked with Gomes and that Gomes was managing partner at SOH. Zaftr also performed its own due diligence on Gomes and SOH, engaging local counsel in Malaysia to assist. As it turned out, Gomes, or the person purporting to be Gomes, was not managing partner at SOH.

Under this arrangement and as set forth in a new set of agreements—the “Second Purchase Agreement” (signed by BBT and Zaftr) and the “Second Escrow Agreement” (signed by Kirk Law, SOH, BBT, and Zaftr)—SOH would serve as an escrow intermediary and SOH’s Malaysian bank account would serve as the escrow account. Similar to the first set of agreements, the second set also set forth a plan to purchase Bitcoin through multiple tranches in order to reach an aggregate of 10,000 BTC. For the first tranche, Zaftr would pay \$2,051,479.08 in exchange for 205 BTC from Smith (“September Tranche”), which represented 200 BTC from the failed August Tranche plus 5 BTC towards the non-performance fee for the August Tranche. Three additional payments of 5 BTC were promised to be delivered to Zaftr for the three subsequent tranches.

*4 The Second Escrow Agreement set forth a general plan by which Zaftr would send money first to Kirk Law, which would then send the money to SOH, at which point Smith would provide the Bitcoin. But for the initial tranche of 205 BTC, Zaftr was to send funds *directly* to SOH—bypassing Kirk Law.

On this basis, Zaftr sent \$1,683,942.68 to the designated SOH account for the September Tranche, reflecting the agreed-upon amount for the September Tranche minus the \$367,536.40 BVFR claimed from the August Tranche as its Seller Mandate Fee. Once again, Zaftr did not receive any Bitcoin in exchange, nor were the funds sent to SOH returned to Zaftr.

At the end of the failed September Tranche, Zaftr was out \$2,051,479.08; the Defendants retained \$307,536.40 (with the remaining \$60,000 of the amount claimed by BVFR as its Seller Mandate Fee in the possession of the two third-party accounts); and SOH/Gomes had \$1,683,942.68 of Zaftr's funds.

E. Third Transaction (“October Tranche”)

After the failure of the September Tranche, either the Lawrence Defendants (on behalf of Smith) or Gomes proposed another adjustment to the plan. Zaftr was told that if it would send funds for a further tranche of 305 BTC (including 5 BTC towards the non-performance fee for the September Tranche), then BBT would deliver the full 510 BTC owed (“October Tranche”).

To effectuate the new plan, Zaftr entered into a final agreement (the “Second Addendum”—signed by Kirk Law, BVFR, BBT, Zaftr, and SOH—which resumed the procedure by which Zaftr would send funds to Kirk Law, and Kirk Law would forward the funds to SOH—now through a bank account in Singapore.

Lawrence set the price for the October Tranche at \$3,668,745. Zaftr sent the funds to Kirk Law. Kirk Law wired \$3,095,120.70 to the Singapore account, retaining \$573,624.30 of the funds for BVFR's Seller Mandate Fee (an amount that included \$36,687.45 for Kirk Law's 1% Mandate Counsel Fee). Again, no Bitcoin was delivered. Between October 27 and November 5, 2020, although Zaftr sent numerous communications to Lawrence and Gomes requesting delivery of the 510 BTC, it never received any of the Bitcoin.

On November 14, 2020, Zaftr requested Defendants return all of the funds sent by Zaftr in their possession, calculating the amount not sent to Gomes to be \$941,160.70. In response, Kirk Law returned its 1% Mandate Counsel Fee related to the October Tranche (\$36,687.45).

At the end of the failed October Tranche, then, Zaftr was out \$5,683,536.63. BVFR claims \$904,473.25 as its Seller Mandate Fee from the August and October Tranches.¹ The Defendants appear to retain \$844,473.25 of that amount, the remaining \$60,000 having been sent and not recovered from the two third-party accounts. Those funds are distributed between the Kirk Defendants and

the Lawrence Defendants. At present, the Kirk Defendants retain \$111,312.35, treating that amount as funds disputed in this litigation.² The Lawrence Defendants apparently retain the remainder (roughly \$733,160.90³). Gomes retained \$4,779,063.38 of Zaftr's funds.

*5 Zaftr filed a lawsuit in Singapore related to the account funds remaining in Gomes's bank account there and obtained a judgment in its favor, recovering \$2,145,120.70, which has since been paid to its Singapore law firm. Litigation concerning amounts remaining in Singapore is ongoing. Zaftr also continues to seek recovery of stolen funds in the courts of Malaysia.

II. PRELIMINARY MATTERS

A. Which Parties Are Bound by Which Agreements

Before turning to the breach of contract claims, a recap of who signed what, and a determination of which entity is bound by which agreements.

There is no dispute that BBT signed and is bound by the First Purchase Agreement, the First Escrow Agreement, the Second Purchase Agreement, the Second Escrow Agreement, and the Second Addendum. There is also no disagreement that only BVFR and Zaftr are signatories to the ID Verification Agreement. But the question is not so straightforward with respect to whether Kirk Law and BVFR are bound by all of the first set of agreements (governing the August Tranche)—the First Purchase Agreement, the First Escrow Agreement, and the First Addendum—and all of the second set of agreements (governing the September and October Tranches)—the Second Purchase Agreement, the Second Escrow Agreement, and the Second Addendum.

Kirk Law and BVFR both signed the First Addendum and Second Addendum, both of which expressly incorporate other agreements. Specifically, the First Addendum expressly incorporates the First Escrow Agreement, which in turn expressly incorporates the First Purchase Agreement. The Second Addendum expressly incorporates both the Second Escrow Agreement and Second Purchase Agreement. Given that, the question is whether Kirk Law and BVFR are bound by the agreements incorporated into the First and Second Addenda. The answer is yes. “[A] party is bound by all of the provisions in the written agreement that it signs as well as the provisions that are expressly incorporated by reference into

the contract.” *Friedman v. Yula*, 679 F. Supp.2d 617, 624 n.15 (E.D. Pa. 2010) (quoting *Pro. Sports Tickets & Tours, Inc. v. Bridgeview Bank Grp.*, 2001 WL 1090148, at *4 (E.D. Pa. Sept. 13, 2001)). Similarly, “where a contract refers to and incorporates the provisions of another, both shall be construed together.” *Trombetta v. Raymond James Fin. Servs., Inc.*, 907 A.2d 550, 560 (Pa. Super. 2006). Because Kirk Law and BVFR signed the outer, incorporating agreements, they are bound by the terms of the inner, incorporated agreements.

B. Indemnification and Hold-Harmless Provisions

Another preliminary issue to be addressed is the Defendants’ argument that two indemnification and hold-harmless clauses, appearing in the First and Second Escrow Agreements, operate to protect them⁴ from suits associated with BBT or SOH’s failure to perform and, in effect, bar Zafr’s claims against them here.⁵

*6 The First Escrow Agreement states: “Both Seller and Buyer hereby agree and acknowledge to look exclusively to each other for all remedies, in both law and equity, for any failure to perform, and further indemnify and hold harmless Mandate Counsel [Kirk Law]⁶ and Seller’s Mandate [BVFR].” The Second Escrow Agreement, which also includes SOH as “Escrow Counsel,” states: “Each of Seller, Buyer, and Escrow Counsel hereby agree and acknowledge to look exclusively to one another for all remedies, in both law and equity, for any failure to perform, and further indemnify and hold harmless Mandate Counsel and Seller’s Mandate.” But, as discussed below, neither of these provisions contains language which indemnifies the Kirk Defendants or the Lawrence Defendants from either their own breaches of any agreement to which they were a party or their own tortious conduct.

“It is well settled, under Pennsylvania law that ‘[i]ndemnity agreements are to be narrowly interpreted in light of the parties’ intentions as evidenced by the entire contract.’ ” *Cottman Ave. PRP Grp. v. AMEC Foster Wheeler Env’t Infrastructure Inc.*, 439 F. Supp.3d 407, 438 (E.D. Pa. 2020) (citing *Consol. Rail Corp. v. Delaware River Port Auth.*, 880 A.2d 628, 632 (Pa. Super. 2005)). “The construction of an indemnity contract is a question of law for the court to decide,” and “the court must strictly construe the scope of an indemnity contract against the party seeking indemnification.” *Jacobs Constructors, Inc. v. NPS Energy*

Servs., Inc., 264 F.3d 365, 371 (3d Cir. 2001). The intention of the parties “should be ascertained primarily by looking to the language used in the agreement.” *Fallon Elec. Co., Inc. v. Cincinnati Ins. Co.*, 121 F.3d 125, 127 (3d Cir. 1997).

Whether the agreements’ indemnification provisions apply here differs depending on which type of claim is being considered. Those claims by which Zafr seeks to hold the Lawrence Defendants and the Kirk Defendants liable for Zafr, BBT, or SOH’s failure to perform their (Zafr, BBT, or SOH’s) obligations under the contracts must be seen through a different lens from those in which Zafr seeks to hold the Lawrence Defendants and the Kirk Defendants liable for their own (the Lawrence Defendants and the Kirk Defendants’) obligations under the parties’ agreements. And another turn of the kaleidoscope is required to consider whether the indemnification provisions cover the Lawrence Defendants and the Kirk Defendants for their own tortious acts.

The plain language of the two provisions supports the Lawrence Defendants and the Kirk Defendants’ argument that the indemnification and hold-harmless provisions protect them from liability for Zafr, BBT, or SOH’s failure to perform.⁷ In this regard, the provisions require Zafr (the Buyer) to look exclusively to BBT (the Seller) or SOH (the Escrow Counsel under the Second Escrow Agreement) for all remedies for their own (Zafr, BBT, or SOH’s) failure to perform and to indemnify and hold harmless Kirk Law and BVFR for any such failure to perform. To the extent that Zafr’s Complaint maintains that “Defendants have breached their obligations” by “failing to deliver any of the required BTC” or, more broadly, is premised on either BBT or SOH’s failure to perform their own obligations under the agreements, the indemnification and hold-harmless clauses put paid to Zafr’s claims against the Kirk Defendants and the Lawrence Defendants.⁸

*7 The indemnification and hold-harmless provisions do not, however, bear on any claims that arise from the Lawrence Defendants or the Kirk Defendants’ own alleged breach of the parties’ agreements. Specifically, there is no language in the clauses that purports to extend indemnification or hold-harmless protections to the Kirk Defendants or the Lawrence Defendants for such breaches.⁹ Thus, for example, Zafr’s contentions that the Lawrence Defendants breached the ID Verification Agreement; that the Kirk Defendants and the Lawrence Defendants improperly retained funds from the transaction; and that the Kirk Defendants and the Lawrence Defendants violated the parties’ agreements by sending funds

to third-party bank accounts before any Bitcoin was delivered are not covered by the provisions.

The same applies to claims based on alleged tortious acts of the Kirk Defendants or the Lawrence Defendants. (Here, Zaftr's tort claims are for conversion, fraudulent and negligent misrepresentation and omission, and civil conspiracy.) "It is well-settled in Pennsylvania that an indemnity agreement that covers loss due to the indemnitee's own negligence must be clear and unequivocal." *Jacobs Constructors*, 264 F.3d at 371; *see also Dansko Holdings, Inc. v. Benefit Tr. Co.*, 991 F.3d 494, 503 (3d Cir. 2021), as revised (Mar. 25, 2021) ("In Pennsylvania, a prospective release for negligence is 'unenforceable' unless it does so 'with the greatest particularity.' " (quoting *Topp Copy Prod., Inc. v. Singletary*, 533 Pa. 468, 626 A.2d 98, 99 (Pa. 1993))).¹⁰ Moreover, a release from suits based on a party's own future reckless, grossly negligent, or intentional conduct generally violates public policy. *See Tayar v. Camelback Ski Corp.*, 616 Pa. 385, 47 A.3d 1190, 1203 (Pa. 2012) (provision releasing reckless conduct invalid as against public policy); *Hackerman v. Demeza*, 2016 WL 1295036, at *12 (M.D. Pa. Mar. 31, 2016) (provision releasing grossly negligent conduct unenforceable as against public policy); *see also* 8 Williston on Contracts § 19:24 (4th ed.) ("A party may not, for public policy reasons, exempt itself from liability for gross negligence, reckless conduct, or intentional wrongdoing."). Here, there is no clear language purporting to release, indemnify, or hold-harmless the Kirk Defendants or the Lawrence Defendants for their own tortious conduct, and any interpretation extending the two clauses to cover intentional tortious conduct would violate public policy.

In short, the main flaw in the Lawrence Defendants and the Kirk Defendants' arguments is that they are premised on the assumption that Zaftr's claims rest only on BBT and/or SOH's failure to perform. But Zaftr's claims against these Defendants reach further in that they concern the Kirk Defendants or the Lawrence Defendants' own alleged breaches of the agreements as well as their own alleged tortious conduct.¹¹

C. The Kirk Defendants' Crossclaim for Indemnification and Contribution

*8 In their Answer, the Kirk Defendants raise a crossclaim against the Lawrence Defendants for common law indemnification and contribution. The Lawrence Defendants

move for summary judgment on this crossclaim on grounds that it fails to allege a cause of action under Pennsylvania law.

As a preliminary matter, "common law indemnity is only available for liability sounding in tort and is not available for breach of contract." *Baum v. Schlesinger*, 2022 WL 3716682, at *14 (W.D. Pa. May 26, 2022). Further, common law indemnity is not available where the party seeking indemnity is found to be an intentional tortfeasor. *Bank v. City of Philadelphia*, 991 F. Supp.2d 523, 530-31 (E.D. Pa. 2014).

With those strictures comes a further restriction that, absent a contractual provision, indemnity under Pennsylvania law is only available where the party seeking indemnity is "vicariously or secondarily liable for the indemnitor's acts." *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 448 (3d Cir. 2000) (citation omitted); *Ruggieri v. Quaglia*, 2008 WL 5412058, at *9 (E.D. Pa. Dec. 24, 2008) ("Once secondary or vicarious liability is established, the indemnitee, who was legally obliged to pay damages solely because of its legal status, may seek reimbursement from the party who is primarily liable."). The "classic example of such a legal relationship is that of principal and agent, employer and employee." *Bachtell v. Gen. Mills, Inc.*, 422 F. Supp.3d 900, 907 (M.D. Pa. 2019) (quoting *City of Wilkes-Barre v. Kaminski Bros.*, 804 A.2d 89, 92 (Pa. Commw. 2002)). "One way to think of indemnification is considering whether the indemnitee properly delegated one of its legal responsibilities to a party whose failure to carry out that duty resulted in the plaintiff's injury." *Id.* at 908. An example of such a relationship would be a municipality delegating the "authority to maintain a public walkway to a nearby property owner": if a pedestrian suffered injury due to the walkway not being shoveled, say, the municipality and property owner "would both be liable, as a matter of law, but the municipality could seek indemnification from the property owner." *Id.* In other words, the principal, liable only because of a legal construct (e.g., vicarious liability) can seek indemnification from the agent whose actions were the primary cause of the harm.

In this situation, the Kirk Defendants are, if anything, the "agent" in their relationship to the Lawrence Defendants, who serve as the analogous principal. Kirk Law (specifically, Kirk) served as counsel to the client BVFR during the transaction, and an attorney-client relationship is generally recognized to be a principal-agent relationship under Pennsylvania law whereby the attorney is the agent of the client. *See McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 853 (3d Cir. 1996).

The problem with the Kirk Defendants' indemnification claim, then, is that it turns the typical situation in which a party would be entitled to common law indemnification on its head. Rather than a principal seeking indemnification from an agent, whose actions make the agent primarily liable for the harm, the Kirk Defendants, as the analogous agent, seek indemnification from the Lawrence Defendants, the principal. The Kirk Defendants point to no authority suggesting that common law indemnification should be extended to encompass the inverse of cases in which it would normally apply. Put another way, the Kirk Defendants have not demonstrated that they would be "liable for the [Lawrence Defendants'] conduct as a matter of law" (e.g., vicariously liable for the conduct of the Lawrence Defendants) such that they could then seek indemnification from the Lawrence Defendants as the party whose conduct "actually gave rise to liability." *Bachtell*, 422 F. Supp.3d at 907.

***9** Because the criteria for common law indemnification are not met, the Lawrence Defendants motion for summary judgment shall be granted against the Kirk Defendants' crossclaim in respect to its claim for indemnity.

Contribution, however, is "distinct from an indemnity claim" and applies in a situation where "a party seeks to *share* blame with a joint tortfeasor." *Id.*; see *EQT Prod. Co. v. Terra Servs., LLC*, 179 F. Supp.3d 486, 495 n.5 (W.D. Pa. 2016); see also 42 Pa. C.S. § 8324(a) ("Right of contribution"). Joint tortfeasors are defined as parties who are "jointly or severally liable in tort for the same injury to persons or property." 42 Pa. C.S. § 8322. As yet, no party is liable under any of the tort theories in this matter—the case is still in the thick of litigation. Accordingly, in that any ruling on the Kirk Defendants' demand for contribution would be premature before the resolution of the outstanding tort claims, see *Pittsburgh Logistics Sys., Inc. v. Landstar Ranger, Inc.*, 2018 WL 4096282, at *2 (W.D. Pa. Aug. 28, 2018) (listing cases holding that contribution claims are premature before the plaintiff has been held liable, judgment has been made, and plaintiff suffers the damages sought), summary judgment will be denied in respect to the contribution demand in the Kirk Defendants' crossclaim.

III. SUMMARY JUDGMENT STANDARDS

With the brush now cleared, the discussion turns to the thicket of the substance of the claims. A party is entitled to summary judgment if it shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "By its very

terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "Inferences to be drawn from the underlying facts contained in the evidential sources must be viewed in the light most favorable to the party opposing the motion." *Peters Twp. Sch. Dist. v. Hartford Acc. & Indem. Co.*, 833 F.2d 32, 34 (3d Cir. 1987).

"A genuine issue is present when a reasonable trier of fact, viewing all of the record evidence, could rationally find in favor of the non-moving party in light of his burden of proof." *Doe v. Abington Friends Sch.*, 480 F.3d 252, 256 (3d Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-26, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson*, 477 U.S. at 248-52, 106 S.Ct. 2505). "The non-moving party may not merely deny the allegations in the moving party's pleadings; instead he must show where in the record there exists a genuine dispute over a material fact." *Id.* (citation omitted). The standard does not change when, as here, the parties have filed cross-motions for summary judgment: "[t]he court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." *Auto-Owners Ins. Co. v. Stevens & Ricci Inc.*, 835 F.3d 388, 402 (3d Cir. 2016) (citation omitted). A moving party is entitled to judgment as a matter of law where the "nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548.

A. Breach of Contract Claims

***10** Counts I and II of Zaftr's Complaint are for breach of the various contracts. Count I alleges breach of not one, not two, not three, but four of them: the First Purchase and Escrow Agreements, the First Addendum, and the ID Verification Agreement. Count II alleges breach of the Second Escrow Agreement and Second Addendum.¹² Zaftr moves for summary judgment as to Count I, and Defendants move for summary judgment as to both counts.

In Pennsylvania a breach of contract claim is premised on: "(1) the existence of a contract, (2) a breach of a duty imposed by the contract, and (3) resultant damages." *Siematic Mobelwerke GmbH & Co. KG v. Siematic Corp.*,

643 F. Supp.2d 675, 685 (E.D. Pa. 2009) (citing *Williams v. Nationwide Mut. Ins. Co.*, 750 A.2d 881, 884 (Pa. Super. 2000)). “To withstand summary judgment on a claim for breach of contract, the non-moving party must demonstrate the existence of a genuine issue of fact regarding those three elements.” *Id.*¹³

No party disputes the existence of the contracts nor that there were damages. The focus of all parties is whether or not the contracts were breached.

Zaftr seeks summary judgment as to Count I on the grounds that: the Lawrence Defendants breached the ID Verification Agreement; Defendants breached the first set of agreements (governing the August Tranche) by sending funds to third-party accounts before any Bitcoin was delivered; and Defendants failed to return all of Zaftr's funds after the failed transaction.¹⁴

***11** In turn, the Kirk Defendants move for summary judgment as to Count I on the basis that they were entitled to send funds to the third-party accounts (arguing they constituted a portion of BVFR's Seller Mandate Fee) and were not party to the ID Verification Agreement. They also move for summary judgment as to Counts I and II on the basis that that they have returned all purchase funds in their possession —other than those disputed in the instant case (which remain in Kirk Law's escrow account)—including their own Mandate Counsel Fee, and have complied with all other obligations under the parties' agreements in their role as escrow counsel.

The Lawrence Defendants move for summary judgment as to Count I on the grounds that the ID Verification Agreement is unenforceable for lack of consideration and, in any case, they complied with their contractual obligations under it. They also move for summary judgment as to Counts I and II on the basis they are entitled to retain funds claimed as part of their Seller Mandate Fee from the August and October Tranches.

i. ID Verification Agreement

Turning first to the ID Verification Agreement, as discussed *supra*, it was signed only by Zaftr and BVFR and not the Kirk Defendants. Given that the Kirk Defendants did not sign it, without more they are not bound by it. While the ID Verification Agreement includes a provision referring to actions undertaken by the Kirk Defendants (“[t]he month, and year of birth of [Smith] as provided on the Passport

are identical to those which are further listed on the official documents of [BBT], which was directed to BVFR's attention through its [sic] counsel, John A. Kirk, Esq., of Kirk Law PLLC”), it does not bind the Kirk Defendants. Thus, summary judgment will be granted in favor of the Kirk Defendants to the extent Count I concerns the ID Verification Agreement.

The analysis is more involved as it concerns BVFR. The ID Verification Agreement provides in relevant part:

BVFR ... examined one current original government issued identification document ... the Passport ... and reviewed the Passport and confirmed that it is the same as the Individual [James Smith] which BVFR has (1) direct personal knowledge and business dealings with, for the past several years; and (2) has been confirmed the name, person, likeness, and features of the Individual, in his dealings with BVFR and the Individual in the video **chat** sessions verifying the name and authentic features of the Individual, which accurately are represented in the Passport.

BVFR separately represents in the agreement that it “was introduced to [Smith] ... a few years ago and has since then worked with [Smith]” who is referred to in the agreement as a citizen of the United Kingdom and director of BBT. The agreement then describes in some detail Smith's purported passport including its issuance number and expiration date. It ends with the statement: the “foregoing is true and accurate to the best of my knowledge,” referring to Lawrence (signing on behalf of BVFR).

Zaftr contends that the Lawrence Defendants breached the ID Verification Agreement by providing a fraudulent passport and by failing to verify the identity of the purported seller, James Smith. The Lawrence Defendants counter that the ID Verification Agreement is not enforceable for lack of valid consideration, and, in the alternative, they have nonetheless fully complied with the agreement because it did not require BVFR, through Lawrence, to guarantee the validity of the passport (or run the passport through an authentication service) or do anything more than confirm that the person represented in the passport appeared to be the person with whom BVFR/Lawrence had prior business dealings. For the reasons set forth below, the ID Verification Agreement is supported by valid consideration, and whether BVFR breached it can be resolved at summary judgment in favor of Zaftr.

***12** With respect to consideration, the Pennsylvania Uniform Written Obligations Act (“UWOA”) states: “A written release or promise, hereafter made and signed by

the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.” 33 P.S. § 6. “Under the UWOA, a written agreement may not be avoided for lack of consideration if it contains a provision expressing the intent of the parties to be legally bound by the agreement.” *InterDigital Commc'n Corp. v. Fed. Ins. Co.*, 392 F. Supp.2d 707, 712 (E.D. Pa. 2005); *see also Socko v. Mid-Atl. Sys. of CPA, Inc.*, 633 Pa. 555, 126 A.3d 1266, 1277 (Pa. 2015) (similar); *Electra Realty Co. Inc. v. Kaplan Higher Educ. Corp.*, 825 F. App'x 70, 73 (3d Cir. 2020) (similar).

The statute has been construed quite broadly and does not prescribe a set of magic words for its application. *See, e.g., Capitol Presort Servs., LLC v. XL Health Corp.*, 2014 WL 4467840, at *4 (M.D. Pa. Sept. 9, 2014) (holding an agreement valid under the UWOA even where the promise was illusory); *InterDigital Commc'n Corp.*, 392 F. Supp.2d at 712 (“The requirements of the UWOA are met by ‘an additional express statement, *in any form of language*, that the signer intends to be bound.’” (quoting 33 P.S. § 6 (emphasis added))); *see also 4 Williston on Contracts* § 8:9 (4th ed.) (“By its terms, the statute applies to any signed written release or promise provided that the writing contains an express statement that the signer intends legally to be bound. Its avowed purpose is to permit the parties to enter into solemn undertakings without the need for consideration, and it has been so construed by the courts.”).

The ID Verification Agreement contains a statement to this effect: “BVFR and Zaftr ... fully consent to the provisions of this agreement, for good and valuable consideration, the sufficiency of which is hereby acknowledged as accepted by signing herein.” This statement is sufficient to meet the statute's requirements. *See, e.g., Harrisburg Auth. v. CIT Cap. USA, Inc.*, 869 F. Supp.2d 578, 598 (M.D. Pa. 2012) (finding sufficient the clause “now, therefore, in consideration of the mutual premises set forth herein, and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged” (emphasis omitted)). Pursuant to the UWOA, there is therefore valid consideration to support the enforceability of the ID Verification Agreement.

Regardless, BVFR argues that it has complied with the terms of the ID Verification Agreement, contending that it is not required, as a contractual matter, to undertake additional verification of the passport (*i.e.*, through a verification or authentication service provider) or to guarantee

the **authenticity** of the passport. But the ID Verification Agreement mandates that BVFR “examine[] one current original government issued identification document.” Thus, the first question is whether the document it examined was in fact an “original government issued identification document.” The summary judgment record contains two reports regarding the **authenticity** of the passport which suggest that it was not: the “Veritas Report” and the “Jumio Report.” Both reports conclude that the passport is fraudulent and counterfeit.

The Jumio Report, prepared by Zaftr through Jumio, an identification verification service, determined that the passport is indisputably fraudulent although provides little in support of this assessment. The report displays the image of Smith's purported passport and states that the report was “DENIED” due to “FRAUD” while listing some extraneous transaction details.

***13** The Veritas Report arrives at the same result but provides greater support for its conclusion. Zaftr engaged Veritas Investigations Ltd. to investigate the **authenticity** of the passport. Having done so, the Veritas investigator reported that the image in the passport appears to be of another person (likely a third party not connected with this litigation named Jose Carlos Riveira) and the passport number belongs to another named person, making the passport counterfeit. The Veritas Report also concludes that there was no U.K. birth record for James Smith under the purported birth date on the passport. It thus determines that: “It would therefore seem impossible that BVFR could have had face to face contact with the male pictured, believing him to be James Smith, especially given that the male pictured speaks very little English. It is not believable that the real man in the images, Jose Carlos Riveira, has presented himself to BVFR as James SMITH.” In a footnote, Defendants dispute the findings of the Veritas Report and maintain that the private investigator should have been offered as an expert witness but offer little argument as to why. Absent reasoned argument in the body of the brief as to why the report's conclusions should not be considered,¹⁵ its findings, along with the Jumio Report, ineluctably lead to the conclusion that summary judgment should be granted with respect to the claim regarding the breach of the ID Verification Agreement. Specifically, given the statements in the record that the passport was fake, BVFR cannot have examined a “current original government issued identification document.” Accordingly, summary judgment shall be granted in favor of Zaftr and against BVFR on Count I to the extent that it concerns BVFR's breach of the ID Verification Agreement.¹⁶

ii. Purchase Funds Sent to Third-Party Bank Accounts

Zaftr next argues that it is entitled to summary judgment on its claim that the Defendants breached the first set of agreements (the First Purchase Agreement, the First Escrow Agreement and the First Addendum) by releasing funds to third-party bank accounts before any Bitcoin was delivered. Plaintiff argues that each of these agreements contained a provision preventing Defendants from releasing any of its purchase funds to the Seller until after the Bitcoin was delivered but that notwithstanding these provisions Defendants, once they received the funds from Zaftr, promptly transferred some of the money to third-party bank accounts before Zaftr received any Bitcoin. The Kirk Defendants argue to the contrary, that they are entitled to summary judgment because Kirk Law was entitled to send such funds on the basis they constituted a portion of BVFR's Seller Mandate Fee and BVFR directed it to send the funds.

The terms of the provisions upon which this theory is based each refer to restraints on Mandate Counsel (*i.e.*, Kirk Law). The First Purchase Agreement states that “payment for the BTC shall not be released to the Seller *by the Mandate Counsel* ... until Buyer receives the BTC” (emphasis added). The First Escrow Agreement spells out that “*Mandate Counsel* shall be permitted to release the funds to Seller and Brokers after BTC delivery to Buyer” (emphasis added). And the First Addendum provides: “*Mandate Counsel* ... has agreed in the [First Escrow Agreement] not to release any of the funds sent by Zaftr to [Kirk Law's] IOLTA ... to any parties, excepting BVFR for its Mandate Fee, until the BTC has been sent” (emphasis added). Thus, although Plaintiff refers to “Defendants” transferring funds to third-party accounts, the provisions concern only Kirk Law's, *i.e.* Mandate Counsel's, actions and not the Lawrence Defendants.

Although the Lawrence Defendants never undertook in any of the agreements the obligation to transfer money to the Seller and, in fact, were never in a position to directly do so in that Kirk Law acted as escrow counsel in the first transaction and handled the distribution of funds, Zaftr maintains that the Lawrence Defendants nevertheless breached the parties' agreements because they directed Kirk Law to make the payments. Zaftr does not provide any legal citation in support of its proposition—which, shorn of the facts here, is that a party to a contract may be found to have breached that contract if it instructs another party to take action that arguably

breaches that other party's obligations under the contract. Given that the contractual obligations restricting the release of funds apply only to the Kirk Defendants and not to the Lawrence Defendants, summary judgment will be granted in favor of the Lawrence Defendants and against Zaftr to the extent that Zaftr's first breach of contract claim is premised on the contention that the Lawrence Defendants' prematurely released funds to third parties.

*14 To review the undisputed facts with respect to Kirk Law and this claim: Kirk Law, at the Lawrence Defendants' direction, sent \$80,000 to two third-party accounts: \$40,000 to A.E. Consult LLC and \$40,000 to Nationwide Finance LLC. The payments were recalled, but only \$20,000 was recovered—from Nationwide Finance LLC. It is not disputed that these accounts are controlled by a third party and, most importantly, are *not* controlled by BVFR. It is not disputed that the Lawrence Defendants' directed Kirk Law to release such funds. Nor is it disputed that Lawrence was directed to make these transfers by Smith.¹⁷

The Kirk Defendants set forth a number of theories as to why these transfers did not violate the parties' agreements: (1) the Seller did not directly tell the Kirk Defendants to make the transfers (*i.e.*, communicate directly with Kirk Law) but rather engaged directly only with Lawrence; (2) the transfers consisted of Seller Mandate Fee funds, which are excepted from the prohibition on sending funds before receipt of the Bitcoin; and (3) the prohibition only applies to transfers to the Seller or parties to the agreements.

With respect to the first argument, it is not dispositive whether the direction to make the transfers came to Kirk Law directly from the Seller or through Lawrence as an intermediary. While the agreements contain restrictions on the release of funds to the Seller and to other parties, there is no carve-out (putting aside the Seller Mandate Fee) in any of the provisions that allows Kirk Law to ignore these restrictions and release funds so long as it was directed to do so by the Seller, the Lawrence Defendants, or anyone else. So while the record evidence supports that Lawrence directed Kirk Law to make the transfers on behalf of the Seller, this fact has no bearing—at least on the record presented and positions argued to the Court—on whether Kirk Law breached the agreements by prematurely releasing funds.

As to the second argument, while Lawrence testified that the \$80,000 transferred “technically would have been part of [BVFR's Seller Mandate Fee],” that some of it was to serve as

“a trigger for the release of BTC for a … different miner,” and that the remainder was “to trigger the release of the BTC,” the parties’ agreements are silent as to the purposes for or the amount of the Seller Mandate Fee and thus do not help in determining whether these stated purposes warranted the transfer.¹⁸ But even if the \$80,000 did constitute part of the Seller Mandate Fee and assuming that the Seller Mandate Fee was properly distributed prior to Zaftr’s receipt of the Bitcoin, the First Addendum provides that the Seller Mandate Fee was to be released to “BVFR.” Here, the money was not sent directly to BVFR or to a BVFR account. Rather it was sent to two bank accounts neither of which BVFR controlled.¹⁹

***15** The Kirk Defendants’ final argument arises from their misstatement of the language of the First Addendum. In their briefs, the Kirk Defendants argue that the prohibition on sending funds before the receipt of Bitcoin only applies to transfers to the Seller or “parties to the agreements” and that because Kirk Law transferred the funds to the two bank accounts they “never transferred any funds to the Seller or to any parties to the agreements.” But the First Addendum’s provision does not just limit transfer to the Seller and to “parties to the agreements.”²⁰ Transfer is limited in respect to the Seller and “**to any parties**” regardless as to whether they are parties to the agreements: “Mandate Counsel [] further has agreed … not to release any of the funds sent by after … **to any parties**, excepting BVFR for its Mandate Fee, until the BTC has been sent....”²¹

Accordingly, the undisputed facts are that Kirk Law released funds to third-party accounts before Zaftr received any Bitcoin and that neither the \$40,000 transferred to A.E. Consult LLC nor \$20,000 of the \$40,000 transferred to Nationwide Finance LLC was recovered. Given that, summary judgment shall be granted in favor of Zaftr and against Kirk Law on Zaftr’s breach of contract claim to the extent that it relies on Kirk Law’s premature release of funds to third-party accounts in violation of the First Addendum.²² Further, for the reasons set forth above, Zaftr’s motion for summary judgment against the Lawrence Defendants shall be denied to the extent it is predicated on the Lawrence Defendants’ releasing purchase funds to third parties. The Lawrence Defendants’ motion for summary judgment shall be granted in its favor on the same claim in respect to releasing purchase funds to third parties.

iii. Failure to Return Funds from the August and October Tranches

Zaftr’s third breach of contract theory rests on two grounds: that the Defendants did not return Zaftr’s purchase funds after the failed August Tranche within the time following the Default Period—one business day—required by the First Addendum; and, further, that they failed to return funds related both to the August Tranche and October Tranche²³ claimed by BVFR as its Seller Mandate Fee.²⁴

***16** The Kirk Defendants move for summary judgment on the grounds that they have returned all of Zaftr’s purchase funds in their possession except for funds that are disputed in this case and that they were entitled and obligated to send BVFR’s Seller Mandate Fee as directed by BVFR. The Lawrence Defendants move for summary judgment on the grounds that the funds retained constitute BVFR’s Seller Mandate Fee and they are entitled to retain the funds under the parties’ agreements.

a. Sending BVFR’s Seller Mandate Fee Before Delivery of Bitcoin

In deciding the competing motions, the first question is whether the agreements provide that BVFR’s Seller Mandate Fee could be delivered to BVFR before the delivery of Bitcoin to Zaftr.

The answer to that question is yes. The First Purchase Agreement provides that the Seller Mandate Fee is “separate and distinct” from the purchase funds that would go to the Seller and “shall be segregated and payable by Mandate Counsel upon receipt of said funds.” The Second Purchase Agreement features the same language. This language is copied and repeated in the First Addendum, which also provides that “the funds being sent to [Kirk Law’s] IOLTA—excepting the Mandate Fee—shall be held … and that none of the Mandate Counsel fee, broker fees, or any of Seller’s funds shall be moved from the IOLTA until the BTC has been successfully sent … to Zaftr[].”

These provisions unambiguously provide that Kirk Law was entitled to send Seller Mandate Fee funds to BVFR before Zaftr’s receipt of Bitcoin.

b. Provisions Governing Return of Zaftr's Funds

The next issue to be addressed is whether the contractual provisions governing return of Zaftr's funds were the same or different in respect to the August and October Tranches.

The First Addendum, governing the August Tranche, has three provisions bearing on the return of Zaftr's funds, which distinguish between general purchase funds and BVFR's Seller Mandate Fee. The first requires Kirk Law to return purchase funds separate from the Seller Mandate Fee in the event the transaction failed: “[Kirk Law] represents and warrants to Zaftr that should the BTC not be sent within 24 hours of Zaftr's funds being sent to the Firm's IOLTA ... all funds sent to the IOLTA—excepting the Mandate Fee—shall be returned to the account which Zaftr originated its funds from *within one business day*” (emphasis added). The second provision requires BVFR to “return the Mandate Fee to [Kirk Law's] IOLTA, less the Breakup Fee ... within one business day of the Default Period in the event the BTC is not sent as provided ... in order to allow [Kirk Law] to separately return the balance of the Mandate Fee to Zaftr.” And the third provision—relevant here—of the First Addendum requires Kirk Law to return “all of BVFR's Mandate Fee funds returned to the IOLTA ... promptly” to Zaftr “within one business day of [Kirk Law] receiving them back from BVFR in the event the Default Period occurs.”

In short, with respect to purchase funds separate from the Seller Mandate Fee, the First Addendum requires that Kirk Law return such funds within one business day of the Default Period if the Bitcoin were not delivered. With respect to the Seller Mandate Fee funds, the First Addendum first requires BVFR to return them to Kirk Law within one business day of the Default Period if default occurred, and then requires Kirk Law to return “all of [the Seller] Mandate Fee funds” to Zaftr within one business day of receipt from BVFR.

However, the Second Addendum, which governs the October Tranche, does not include any return provision for the Seller Mandate Fee, nor do the Second Purchase or Escrow Agreements, which are incorporated into the Second Addendum. Rather the second set of agreements are silent on the issue of return of the Seller Mandate Fee. Moreover, the second set of agreements do not address their relationship to the first set, are not expressly integrated by a merger clause, and do not expressly waive or rescind the return requirements of the First Addendum or have inconsistent provisions.

*17 Despite this silence, Zaftr suggests that the return provisions of the First Addendum apply with equal force to the October Tranche Seller Mandate Fee. The Lawrence Defendants, on the other hand, argue that the silence confirms that Zaftr waived any return requirement after allowing BVFR to retain the claimed Seller Mandate Fee after the failed August Tranche. Neither party, however, in making their arguments complies with Rule 7.1 of the Local Rules of Civil Procedure of the Eastern District of Pennsylvania, which provides that: “*Every motion* not certified as uncontested, or not governed by Local Civil Rule 26.1(g), shall be accompanied by a brief containing a concise statement of the *legal contentions and authorities relied upon* in support of the motion.” E.D. Pa. R. Civ. P. 7.1(c) (emphases added). Briefs that are not accompanied by citations to legal authority or adequate explanations of the bases for the party's arguments may be denied as being legally deficient. See *Griffin-El v. Beard*, 2009 WL 678700, at * 4 (E.D. Pa. Mar. 16, 2009) (failure to cite to relevant case law warrants denial of motion under Local Rule 7.1(c)) (citing *Purcell v. Universal Bank*, N.A., No. 01-CV-02678, 2003 U.S. Dist. LEXIS 547, at *9 (E.D. Pa. Jan. 3, 2003) (denying motion for summary judgment because, *inter alia*, the movant's brief did not “contain the basis for its legal contentions” under Local Rule 7.1(c)); see also *Moore v. Vangelo*, 2004 WL 292482 (E.D. Pa. Feb. 12, 2004) (denying defendants' motion to dismiss where defendants “failed to set forth a factual or legal basis in support of their contention,” contrary to the requirements of Local Rule 7.1(c)).

The parties, having provided no legal argument—and *no* citations to any relevant case law—to support their respective provisions, leave the Court without any argument on any of the potential key issues presented by the silence of the second set of agreements on return of the October Tranche Seller Mandate Fee. Without any legal argument on such issues, the Court cannot reach a determination as to whether the Seller Mandate Fee for the October Tranche was subject to any ongoing effect of the First Addendum's return provision.

In light of this deficiency in the briefing of all of the parties, the Court will deny summary judgment on the issue of whether Defendants' failure to return funds claimed as the October Tranche Seller Mandate Fee violates the parties' agreements.

c. Kirk Law's Timely Return of the August Tranche Purchase Funds

The next issue is whether Kirk Law failed to return Zaftr's purchase funds separate from the Seller Mandate Fee within one day of the Default Period after the failed August Tranche. Although—and this is not disputed—Kirk Law returned Zaftr's purchase funds (\$1,886,977.60) from the August Tranche, Zaftr argues that it did not do so in a timely manner, *i.e.*, within one day of the Default Period. The Kirk Defendants respond that the one-day return requirement was modified by the parties.

There are two issues of fact that preclude summary judgment on the issue of whether Kirk Law failed to return the purchase funds within one day in breach of the First Addendum. First, *no party* clarifies when the Default Period began and started the clock on return of the August Tranche funds after the attempt failed. While it is undisputed that Zaftr sent the August Tranche purchase funds to Kirk Law on August 25, 2020, no party demonstrates when those funds “successfully cleared” such that the 24-hour countdown began. Without that piece of information, the question of when the Default Period of the August Tranche began remains open.

Additionally, while it is undisputed that Kirk Law did not return the purchase funds until September 4, 2020—10 days after Zaftr sent the August Tranche funds to Kirk Law on August 25—there is a live dispute as to whether the parties’ course of dealing modified the return requirement. Specifically, Zaftr points to evidence that Montgomery requested return of the August Tranche funds by email on August 28, 2020 and the funds were not returned until September 4. But the Kirk Defendants highlight **WhatsApp** communications between the parties between August 25 and September 4 that they say show Montgomery “effectively modifying the agreement” by his conduct “as to the expected timing of the return of funds.”

The salient details of the **WhatsApp** communications are as follows: While Montgomery requested return of the funds on August 28 “as soon as possible today,” he also sent these messages in the **WhatsApp chat** thread with Kirk and Lawrence:

*18 • “I propose we suspend pricing out new tranches until we can close what we have outstanding.” (August 27);

- “[A]s I haven’t seen the BTC hit our wallet yet, I expect that the Seller will not be delivering the BTC today. Is that a fair expectation?” (August 28);
- “Good morning gents, the 205 BTC has not been sent to our wallet yet and I understood the seller confirmed the transaction would be submitted … this morning. Is there any update on that?” (September 2);
- “Given that [Smith] hasn’t provided any additional information … and he has had almost a week to deliver, it is reasonable to assume that he will not be able to deliver the coins based on the deal terms we agreed to. If there is another hindrance in his ability to deliver that I’m not aware of, then (given what I’ve seen over the past week) I suspect it is not something that will be resolved in short order. In either case, please prepare to return the funds and then we can regroup to figure out the best path forward for everyone’s benefit. I have hedges in place based on the pricing we locked in last week, so getting the funds returned to close those out would be helpful.” (September 2); and
- “I spoke with [Kirk] and understand there still may be a path forward to successful transactions here. I’m happy to play ball, so I’ll continue to be patient as the elements are sorted out.” (September 3).

It is hornbook law that an agreement may be subsequently modified by oral agreement or by conduct. *See, e.g., First Nat. Bank of Pennsylvania v. Lincoln Nat. Life Ins. Co.*, 824 F.2d 277, 280 (3d Cir. 1987) (listing Pennsylvania cases on subsequent modification); *Consol. Tile & Slate Co. v. Fox*, 410 Pa. 336, 189 A.2d 228, 230 (Pa. 1963); 11 Williston on Contracts § 32:14 (4th ed.) (“Even when the terms of a contract are clear and unambiguous, the subsequent conduct of the parties may evidence a modification of their contract.”). But whether subsequent conduct of the parties amounts to a modification of the contract is generally a matter to be decided by the factfinder—here, a jury. *See, e.g., Dora v. Dora*, 392 Pa. 433, 141 A.2d 587, 590 (Pa. 1958). Thus whether the purchase funds for the August Tranche should have been returned at an earlier date is an issue that cannot be resolved at summary judgment.

d. Kirk Law and BVFR's Return of BVFR's Seller Mandate Fee for the August Tranche

The final issue is whether Kirk Law and/or BVFR have violated the parties' agreements by failing to return the amount claimed by BVFR as its Seller Mandate Fee for the August Tranche.

As a preliminary matter, it is unclear from the record and the parties' briefing if Kirk Law retains any amount of the funds claimed by BVFR as its Seller Mandate Fee for the August Tranche, or if all of those funds (apart from the \$60,000 sent to third parties and never recovered) were transferred to BVFR and remain with BVFR. On that basis, both possibilities are addressed below.

1. Kirk Law

At the outset, Kirk Law's retention in its escrow account of disputed funds is consistent with the rules of professional conduct for attorneys (Kirk Law being BVFR's counsel) in Pennsylvania. *See Model Rules Prof'l Conduct r. 1.15; Pa. R.P.C. 1.15(f)* ("When in possession of funds or property in which two or more persons, one of whom may be the lawyer, claim an interest, the funds or property shall be kept separate by the lawyer until the dispute is resolved.").²⁵ Kirk Law therefore properly holds funds claimed by BVFR as part of its Seller Mandate Fee as disputed in this litigation.

*19 As for any amount of the August Tranche Seller Mandate Fee still in BVFR's possession, it has already been established, *see supra*, that Kirk Law was entitled to send BVFR's Seller Mandate Fee before Zaftr received any Bitcoin. The remaining question is whether Kirk Law had any responsibility to somehow return Seller Mandate Fee funds still in BVFR's possession to Zaftr in the event the transaction failed. The answer is no. Kirk Law was not required by the First Addendum to return Seller Mandate Fee funds in the event of a failed transaction until BVFR returned them first to Kirk Law:

In regard to the [Seller] Mandate Fee, BVFR separately represents and warrants by way of this Addendum that it shall return the Mandate Fee to [Kirk Law's] IOLTA ... within one business day of the Default Period in the event the BTC is not sent as provided in the Transaction Documents in order to allow [Kirk Law] to separately return the balance of the Mandate Fee to Zaftr. [Kirk Law] represents and warrants that all of BVFR's Mandate Fee funds **returned to the IOLTA** shall be promptly returned to the account which Zaftr originated its funds from within

one business day of the Firm receiving them back from BVFR in the event the Default Period occurs. (emphasis added)

Under the First Addendum, Kirk Law was not obligated to return BVFR's Seller Mandate Fee funds that were not first returned to its IOLTA account. There is, on the face of the agreement, therefore no breach by Kirk Law on any account it failed to return Seller Mandate Fee funds that were not first returned to it by BVFR.

There is, however, one final issue to address in respect to Kirk Law—the \$60,000 that is not in the possession of either Kirk Law or BVFR but rather in the possession of unknown third parties, the owners of the two third-party bank accounts. Although summary judgment will be granted in Zaftr's favor against Kirk Law to the extent it is premised on premature release of funds to third parties, *see supra*, there is a question regarding whether Kirk Law also breached the parties' agreements by failing to return amounts sent to third parties.

The issue turns on whether the \$60,000 is part of BVFR's Seller Mandate Fee. If the \$60,000 constituted a portion of Zaftr's purchase funds separate from any Seller Mandate Fee, then Kirk Law had to return such amounts directly to Zaftr in the event of transaction failure and made it impossible for itself to do so here, amounting to a breach of the return requirement. *See, e.g., Thuemler v. Brown*, 18 Pa. Super. 117, 120-21 (1901) ("[W]here the party to the contract by his own act makes it impossible for him to perform his covenant, the plaintiff is entitled to compensation."). If, on the other hand, the \$60,000 constituted a portion of BVFR's Seller Mandate Fee, then, under the First Addendum, BVFR was obligated to return such amount to Kirk Law such that Kirk Law could then return it to Zaftr in the event of a failed transaction.

But whether the \$60,000 constituted part of the Seller Mandate Fee or not is disputed. While Kirk and Lawrence both testified that the \$80,000 sent to the third-party accounts constituted a portion of what would have been BVFR's Seller Mandate Fee, Montgomery testified he "never saw anything related to how the mandate fee was calculated...." The issue is thus disputed and cannot be resolved at summary judgment.

2. BVFR

Turning now to BVFR, it is undisputed that BVFR kept²⁶ what it deems the Seller Mandate Fee from the August

Tranche.²⁷ The parties dispute, however, whether any conditions were placed on BVFR's retention of the funds.

***20** BVFR maintains that Zaftr let it keep the August Tranche Seller Mandate Fee following the failure of the August Tranche and, by failing to include a provision requiring return of such funds in the agreements governing the September and October Tranches, waived the return requirement in the First Addendum. Zaftr counters that, while it let BVFR retain that amount after the failed August Tranche, those funds remained subject to a return requirement (*i.e.*, that of the First Addendum) in the event further attempts to complete the transaction failed.

Whether the \$367,536.40 was subject to return in the event the transaction failed is disputed and cannot be determined at summary judgment. As discussed *supra*, nothing in the second set of agreements describes the return of the Seller Mandate Fee in the event the transaction failed. Moreover, the Second Addendum, as well as the Second Purchase and Escrow Agreements, do not describe their relationship to the prior set of agreements, are not integrated, do not expressly rescind the prior set of agreements, and do not address the issue of return of the Seller Mandate Fee in the event of non-performance. There is no express waiver or rescission of the return provision appearing in the First Addendum. Nevertheless, Montgomery testified that he allowed BVFR to retain the amount "subject to a future transaction." Lawrence testified, on the other hand, "My fee was earned when that fee hit my ... counsel's account, period."

In this light, given the silence in the second set of agreements regarding return of the Seller Mandate Fee and the dispute between the parties as to how the funds were to be treated, the Court cannot make a determination as to the return of the Seller Mandate Fee for the August Tranche, and summary judgment on this issue must be denied.

B. Unjust Enrichment

Zaftr's contentions underpinning its unjust enrichment claim—that Defendants have the benefit of purchase funds paid by Zaftr with respect to the August, September, and October Tranches and have improperly maintained possession of those funds—essentially repeat those made in support of its breach of contract claims. Since there are valid contracts governing the parties' relationship, summary judgment is warranted on Zaftr's unjust enrichment claim. See *Wilson Area Sch. Dist.*

v. Skepton, 586 Pa. 513, 895 A.2d 1250, 1254 (Pa. 2006) ("[U]njust enrichment is inapplicable when the relationship between parties is founded upon a written agreement or express contract....").

Zaftr responds that the Defendants have already, in their motion to dismiss, made the argument that its unjust enrichment claim must be dismissed as it is barred by its breach of contract claim and that the argument was rejected by the Court. In so doing, the Court balanced the Pennsylvania rule that an unjust enrichment claim cannot survive if the claim is premised on a written agreement against *Federal Rule of Civil Procedure 8(d)*, which allows plaintiffs to plead inconsistent claims in the alternative. But, as the Court pointed out, the unjust enrichment claim could survive only if the plaintiff "fail[ed] to establish that the contract governs certain claims" in which case "unjust enrichment may yet provide a remedy." *Zaftr Inc. v. Lawrence*, 2021 WL 4989769, at *4 (E.D. Pa. Oct. 27, 2021).

Now, having determined there are valid contracts governing the parties' relationship, the unjust enrichment claim, in accordance with long-standing Pennsylvania Supreme Court precedent, is not viable. *Benefit Tr. Life Ins. Co. v. Union Nat. Bank of Pittsburgh*, 776 F.2d 1174, 1177 (3d Cir. 1985) (listing Pennsylvania state cases concluding that unjust enrichment does not apply where the parties' relationship is based on a written agreement); *see also Schott v. Westinghouse Elec. Corp.*, 436 Pa. 279, 259 A.2d 443, 448 (Pa. 1969) ("[W]e note that this Court has found the quasi-contractual doctrine of unjust enrichment inapplicable when the relationship between parties is founded on a written agreement or express contract."); *Third Nat. Bank & Tr. Co. of Scranton v. Lehigh Val. Coal Co.*, 353 Pa. 185, 44 A.2d 571, 574 (Pa. 1945) ("Nor ... does any question of 'unjust enrichment' arise, for that principle of quasicontract is not applicable to agreements deliberately entered into by the parties however harsh the provisions of such contracts may seem in the light of subsequent happenings.").

***21** Zaftr cites to *TZE Glob. Dis Ticaret A.S. v. Papers Unlimited, Inc.*, to argue that its unjust enrichment claim should, nevertheless, survive along with its breach of contract claims. 2021 WL 6066014 (E.D. Pa. Nov. 8, 2021). Quite apart from *TZE Glob. Dis Ticaret A.S.*'s non-precedential value—it is an unpublished footnote opinion from a sister court—it is distinguishable. The plaintiff's claims were premised on what it alleged were oral contracts between the parties. There appeared to be some question as to whether

in fact the parties had entered into a contract and, even assuming so, the court determined that the terms of any such contracts were ambiguous and thus to be interpreted by the fact finder. *Id.* The circumstances were entirely different than those present here, where there is no question that the parties have in fact entered into the contracts and that such contracts were written rather than oral. Accordingly, the Pennsylvania rule that an unjust enrichment claim cannot proceed “when the relationship between parties is founded upon a written agreement or express contract ...” governs, *Wilson Area Sch. Dist.*, 895 A.2d at 1254, and Zaftr's unjust enrichment claim shall be dismissed at summary judgment.

C. Plaintiff's Tort Claims

Both the Kirk Defendants and the Lawrence Defendants move for summary judgment on all of Zaftr's tort claims: conversion, fraudulent misrepresentation and omission, negligent misrepresentation and nondisclosure, and civil conspiracy. For the reasons that follow, Zaftr's claims for fraudulent misrepresentation (except in respect to its omission theory) and civil conspiracy survive summary judgment, but summary judgment shall be granted in favor of Defendants on its claims for conversion, for negligent misrepresentation, and for fraudulent misrepresentation (to the extent it relies on a theory of omission).

i. Gist of the Action

Defendants argue that Zaftr's claims for conversion, fraudulent and negligent misrepresentation, and civil conspiracy must be dismissed under the gist of the action doctrine. As explained below, Defendants are correct as to Zaftr's conversion claim, but Zaftr's other tort claims are not barred by the doctrine because they are not predicated on contractual duties.

Whether the gist of the action doctrine applies in any particular setting is a question of law. *Bohler-Uddeholm Am.*, 247 F.3d at 106. “Under Pennsylvania law, the gist of the action doctrine prevents a purely contractual duty from serving as the basis for a tort claim.” *SodexoMAGIC, LLC v. Drexel Univ.*, 24 F.4th 183, 216 (3d Cir. 2022) (citing *Bruno v. Erie Ins. Co.*, 630 Pa. 79, 106 A.3d 48, 65 (Pa. 2014)). “[T]he doctrine precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims.” *eToll, Inc. v. Elias/Savion Advert., Inc.*, 811 A.2d 10, 14 (Pa. Super. 2002).

Although “it is possible that a breach of contract also gives rise to an actionable tort,” *id.*, a claim “should be limited to a contract claim when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied in the law of torts.” *Bohler-Uddeholm Am.*, 247 F.3d at 104 (internal quotation omitted). The Pennsylvania Supreme Court addressed the doctrine in *Bruno*, where it reaffirmed a duty-based approach to determining the nature of a claim:

The general governing principle which can be derived from our prior cases is that our Court has consistently regarded the nature of the duty alleged to have been breached, as established by the underlying averments supporting the claim in a plaintiff's complaint, to be the critical determinative factor in determining whether the claim is truly one in tort, or for breach of contract. In this regard, the substance of the allegations comprising a claim in a plaintiff's complaint are of paramount importance, and, thus, the mere labeling by the plaintiff of a claim as being in tort, e.g., for negligence, is not controlling. If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract—*i.e.*, a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract—then the claim is to be viewed as one for breach of contract.... If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort.

*22 *Bruno*, 106 A.3d at 68 (citations omitted).

a. Gist of the Action re: Conversion

Zaftr's conversion claim is premised on the Defendants' wrongful exercise of control over Zaftr's property: to wit, Defendants' retention of the amount claimed as BVFR's Seller Mandate Fee.

“[W]here a tortious claim for conversion is based solely on the failure to perform under a contract, it is barred by the gist of the action doctrine.” *Wen v. Willis*, 117 F. Supp.3d 673, 683 (E.D. Pa. 2015) (quoting *Vives v. Rodriguez*, 849 F. Supp.2d 507, 516 (E.D. Pa. 2012)); *see also Tray, Inc. v. Devon Int'l Grp., Inc.*, 2021 WL 1734845, at *9 (E.D. Pa. May 3, 2021) (finding gist of the action lay in contract rather than tort regarding a failure to deliver personal protective

equipment under an agreement and consequently dismissing conversion claim). Because the funds retained by Defendants are addressed by contractual provisions and turn solely on the resolution of Zaftr's contractual claims, Zaftr's claim for conversion (Count IV) is barred by the gist of the action doctrine and shall be dismissed on summary judgment.²⁸

b. Gist of the Action re: Misrepresentation

Zaftr's fraudulent and negligent misrepresentation claims rely on a theory of inducement, namely that Defendants made multiple misrepresentations to induce Zaftr to enter into the parties' agreements and to continue to pursue the transaction after the initial failed attempt.

Claims for fraud in the inducement have proved thorny to resolve under the gist of the action doctrine, and there is no clear, single statement from the Pennsylvania Supreme Court outlining application of the doctrine to such claims. *See Downs v. Andrews*, 639 F. App'x 816, 820 (3d Cir. 2016) (non-precedential) ("Pennsylvania state and federal courts have reached different conclusions about whether the gist of the action doctrine applies to fraudulent inducement claims."). That being said, the principles adopted by the Pennsylvania Supreme Court in *Bruno* and the reasoning of lower state courts as well as federal courts in Pennsylvania are helpful here.

Under the duty-based approach of *Bruno*,²⁹ the issue is whether Zaftr's misrepresentation claims are predicated on broader duties created by society or duties created only by the parties' contractual obligations.

*23 Fraudulent inducement claims are not necessarily based on duties separate from those created by the contract itself. *See, e.g., Vives*, 849 F. Supp.2d at 520-21 (concluding that fraudulent inducement claims predicated on representations as to a party's intent to perform under an agreement were barred by the doctrine); *Integrated Waste Sols., Inc. v. Goverdhanam*, 2010 WL 4910176, at *13 (E.D. Pa. Nov. 30, 2010) (concluding misrepresentation claims were barred by gist of the action doctrine where they concerned precontractual representations specifically outlined in subsequent agreements and thus created contractual duties); *eToll*, 811 A.2d at 19 (fraud claims concerning only the performance of contractual duties are barred by the doctrine).

But such claims may also be based on broader duties imposed by society, in which case they are not barred by the doctrine. *eToll*, 811 A.2d at 14 ("Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals." (quotation omitted)). Numerous cases following *Bruno* have affirmed that when the duty claimed to be breached is not one created by the terms of the contract, but rather broader social duties, then an action lies in tort, including as to fraudulent inducement claims. *See, e.g., SodexoMAGIC*, 24 F.4th at 217 (concluding that fraudulent inducement claim could proceed in tort since it did not depend on the breach of a contractual duty but rather implicated a broader duty not to deceive through precontractual misrepresentation); *Dansko Holdings*, 991 F.3d at 501 (fraudulent inducement claim held to be "a true fraud claim" where party "lied about a side issue" and thus "violated not the contract, but (if anything) a social duty not to lie to business partners"); *Earl v. NVR, Inc.*, 990 F.3d 310, 315 (3d Cir. 2021) (false representations made prior to formation of contract were collateral to the contract itself and not barred by the doctrine); *Norfolk S. Ry. Co. v. Pittsburgh & W. Virginia R.R.*, 870 F.3d 244, 256 (3d Cir. 2017) (concluding that fraudulent misrepresentations and omissions involved a "broader social duty" and were not barred by the doctrine); *Graham Packaging Co., L.P. v. Transplace Tex., L.P.*, 2015 WL 8012970, at *4 (M.D. Pa. Dec. 7, 2015) (fraudulent misrepresentation and negligent misrepresentation claims not barred where they breached "an independent social duty" rather than contractual obligation); *KMB Shamrock, Inc. v. LNR Transportation, Inc.*, 2015 WL 13779752, at *6-7 (Pa. Com. Pl. Sept. 25, 2015) ("KMB's claim ... involves the breach of duties imposed by social policies embodied by the law of torts, rather than by specific executory promises contained in the parties' agreement.").

Here, Zaftr's fraudulent misrepresentation claims, based on alleged fraudulent inducement, are not based on duties set forth in the parties' agreements but rather duties imposed by society (*i.e.*, the duty not to lie to business partners, *Dansko Holdings*, 991 F.3d at 501, a duty of honesty, *Mendelsohn, Drucker & Assocs. v. Titan Atlas Manufacturing, Inc.*, 885 F. Supp.2d 767, 790 (E.D. Pa. 2012); *KMB Shamrock*, 2015 WL 13779752, at *7, and a duty not to affirmatively mislead, *Telwell Inc. v. Grandbridge Real Estate Capital*, 143 A.3d 421, 429 (Pa. Super. 2016)). Accordingly, they are not barred by the gist of the action doctrine.

The same conclusion applies with respect to Zaftr's negligent misrepresentation claim in that negligent misrepresentation claims predicated on a theory of inducement are treated similarly to fraudulent misrepresentation claims premised on inducement—*i.e.*, in that where the claim implicates broader social duties, it is not barred by the gist of the action doctrine. *See, e.g., Howe v. LC Philly, LLC*, 2011 WL 1465446, at *4 (E.D. Pa. Apr. 15, 2011) (not barring fraudulent and negligent misrepresentation claims); *84 Lumber, L.P. v. Gregory Mortimer Builders*, 2012 WL 13029570, at *3 (W.D. Pa. Apr. 6, 2012) (concluding that fraudulent and negligent misrepresentation claims sounded in “fraud rather than performance of the []contracts” and the negligent misrepresentation claim was not barred by the gist of the action doctrine); *Victor Buyck Steel Const. v. Keystone Cement Co.*, 2010 WL 1223594, at *2 (E.D. Pa. Mar. 30, 2010) (“Courts discussing the gist of the action doctrine’s applicability to fraud in the inducement claims, also discuss negligent misrepresentation claims.”); *U.S. Claims, Inc. v. Saffren & Weinberg, LLP*, 2007 WL 4225536, at *12 (E.D. Pa. Nov. 29, 2007) (declining to dismiss both fraud in the inducement and negligent misrepresentation claims). Accordingly, Zaftr’s negligent misrepresentation claims are also not barred by the gist of the action doctrine.

*24 There is, however, a small wrinkle posed by representations in the ID Verification Agreement that requires further analysis.

c. Gist of the Action re: ID Verification Agreement and Misrepresentations as to Purported Seller

That wrinkle concerns Zaftr’s claims that the Lawrence Defendants misrepresented various facts as to Smith’s identity and prior dealings with Smith because such representations are *also* included in the terms of the ID Verification Agreement. For the reasons below, however, these claims are not barred by the gist of the action doctrine because, while they are based on the alleged breach of contractual duties, they also arise from alleged transgressions of broader societal duties.

The ID Verification Agreement includes representations as to BVFR/Lawrence’s prior dealings with Smith and Smith’s identity, not to mention a description of Smith’s purported passport. As to such representations, the Agreement states that they are “true and accurate to the best of [Lawrence’s] knowledge” (Lawrence signing on behalf of BVFR). The ID

Verification Agreement thus serves as an attestation by the Lawrence Defendants that they have not misrepresented the identity of Smith to the best of their knowledge. In this way, the statements in the ID Verification Agreement, while bound up in a valid contract, also implicate broader social duties, *i.e.*, duties not to lie to business partners or affirmatively mislead. *Dansko Holdings*, 991 F.3d at 501; *Telwell*, 143 A.3d at 429. The issue thus posed by these representations in the ID Verification Agreement is whether the gist of the action doctrine bars claims that are based on *both* contractual terms and also broader social duties.

The Third Circuit recently encountered a similar situation in *SodexoMAGIC, LLC v. Drexel University*, 24 F.4th 183 (3d Cir. 2022). While the district court below concluded that a fraudulent inducement claim was barred because there was a contract with terms addressing the same matters as the precontractual representations at issue, the Third Circuit concluded that, because the plaintiff’s fraud claim would “exist with or without a later-in-time contract,” the gist of the action doctrine did not bar that claim. *Id.* at 217. In other words, “a precontractual duty not to deceive through misrepresentation or concealment exists independently of a later-created contract.” *Id.*

SodexoMAGIC specifically addressed how the gist of the action doctrine applies in an instance where both contractual *and* broader societal duties are alleged to be breached: “When a contractual duty duplicates an obligation generally owed to another in society, the gist of the action doctrine does not bar a tort claim; it prevents only the contractual duty from serving as a basis for a tort claim.” *Id.* “Under the doctrine, it is still possible for the same act to breach both a duty under tort law and a contractual duty.” *Id.* (citing case examples).

Applying the reasoning of *SodexoMAGIC* here, the Lawrence Defendants’ alleged misrepresentations in regards to Smith’s identity and prior dealings with Smith, while they would constitute a breach of the ID Verification Agreement, could independently constitute a violation of a broader societal duty. For that reason, Zaftr’s fraudulent and negligent misrepresentation claims are not barred by the gist of the action doctrine even to the extent they rely on representations that are included in the ID Verification Agreement.³⁰

ii. *Misrepresentations and Omissions*

a. Expert Testimony re: Negligence

*25 A preliminary issue to be addressed before turning to the substance of the misrepresentation claims is the Kirk Defendants' argument that Zaftr *must* provide expert testimony to support its negligent misrepresentation claim against the Kirk Defendants. The Kirk Defendants argue that, because Zaftr has not and “likely could not” produce an expert opinion demonstrating that the Kirk Defendants were negligent in performing their duties as escrow counsel, Zaftr's negligence claim must be dismissed. They first argue that legal malpractice claims in Pennsylvania require expert testimony and this amounts to a legal malpractice claim. They then suggest, citing *Lentino v. Fringe Emp. Plans, Inc.*, 611 F.2d 474, 480-83 (3d Cir. 1979), that negligence claims against an attorney require expert testimony. And finally, they argue that expert testimony is proper “where formation of an opinion on a subject requires knowledge, information, or skill beyond what is possessed by the ordinary juror” and such circumstances are present here, citing *Ovitsky v. Cap. City Econ. Dev. Corp.*, 846 A.2d 124, 126 (Pa. Super. 2004).

For the same reasons set forth in this Court's Order excluding the report and testimony of Gavin Lentz, produced in part below, the Kirk Defendants' first argument has no traction because Zaftr has not sued them for legal malpractice:

The first issue with this argument is that it is at odds with a fundamental axiom of litigation—as defendants, Kirk and his law firm do not have the power to decide what claims Plaintiff asserts against them. Indeed, Plaintiff repeatedly explains in its briefs that it has not: “(i) alleged any attorney-client relationship between Plaintiff and the Kirk Defendants; (ii) asserted any legal malpractice claims against the Kirk Defendants; or (iii) claimed that the Kirk Defendants failed to conduct any due diligence as escrow agents.” As Plaintiff is “the party who brings a suit,” it “is master to decide what law [it] will rely upon” and what claims it will assert. *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 57 L.Ed. 716 (1913). The second problem is that though the Kirk Defendants maintain that any claims asserted against them when they were “acting as counsel in the applicable transactions” must be “viewed through that lens” of a legal malpractice claim, they cite no authority in support of this position.... On top of this procedural faux pas, the Kirk Defendants' third issue is that their position does not sound in logic. It cannot be the case that any and all claims brought against

a lawyer or a law firm somehow transform into ones for legal malpractice.

Order, *Zaftr Inc. v. Lawrence et al.*, No. 21-2177 (August 26, 2022) (ECF No. 57).

The second argument also fails. *Lentino*, the case cited in support, involved a *legal malpractice* claim. 611 F.2d at 480-83. The Kirk Defendants point to no authority stating that, as they argue, “[e]xpert testimony is required when purporting to plead a negligence claim against an attorney.” Indeed, in Pennsylvania, even in some cases involving professional legal malpractice claims, expert testimony may not be necessary. See *Rizzo v. Haines*, 520 Pa. 484, 555 A.2d 58, 67 (Pa. 1989) (listing cases).

The third argument also fails. The Kirk Defendants misquote their primary authority, *Ovitsky*, which actually states “expert opinion testimony is proper *only* where formation of an opinion on a subject requires knowledge, information, or skill beyond what is possessed by the ordinary juror.” *Ovitsky*, 846 A.2d at 126 (citation omitted and emphasis added for operative word omitted by the Kirk Defendants). Similarly, the two authorities cited for the Kirk Defendants' proposition that “expert testimony is required in claims against attorneys” “[u]nless the issue ... be within the range of an ordinary layperson's experience,” *Rizzo*, 555 A.2d at 67; and *Storm v. Golden*, 371 Pa.Super. 368, 538 A.2d 61, 64 (Pa. Super. 1988), are inapposite. Both cases were legal malpractice actions. See *Rizzo*, 555 A.2d at 65; *Storm*, 538 A.2d at 64. Further, the opinion in *Rizzo* merely applied the “general rule that expert testimony is essential where it would help the finder of fact understand an issue that is beyond the knowledge of the average person” and—unhelpful for the Kirk Defendants—concluded that, under the circumstances of that case, the issue of an attorney's “duty to investigate, and to inform one's client of, settlement offers” did not require expert testimony and also that “expert testimony was not needed to detail the fiduciary obligations of an attorney who engages in financial transactions with his client.” 555 A.2d at 66-67.³¹

*26 Zaftr's tort claims against the Kirk Defendants do not present issues beyond the capabilities of “the average person” to resolve but instead present simple issues where “the ordinary experience and comprehension of lay persons can establish the standard of care.” *Rizzo*, 555 A.2d at 66. The claims are not predicated on the Kirk Defendants' duties as escrow counsel or as counsel to BVFR. Rather, they focus on run-of-the-mill misrepresentation and conspiracy claims well within the wheelhouse of a layperson. A

reasonable juror can determine, for instance, whether Kirk made alleged misrepresentations (explained in greater detail *infra*) to induce Zaftr to enter into or continue to pursue the contemplated transaction. This is a case where “expert opinions are not necessary to determine whether the [Kirk Defendants] were negligent” because “lay persons may determine any negligence based upon their own common sense and experience.” *Bethea v. Bristol Lodge Corp.*, 2002 WL 31859434, at *8 (E.D. Pa. Dec. 18, 2002); *see also Quinn Constr., Inc. v. Skanska USA Bldg., Inc.*, 2010 WL 11550010, at *2 (E.D. Pa. Aug. 26, 2010) (“This Court has held that negligent misrepresentation involves an ordinary reasonable person standard, and does not require expert testimony or proof related to a professional standard of care.”).³²

Appearing to contend that Zaftr’s *contract* claims also require expert testimony, the Kirk Defendants further argue that the “scope of an attorney’s duty as defined by contract ‘is a question of fact outside the normal range of the ordinary experience of laypersons,’ ” citing *Hemphill v. Siegel*, 2016 WL 266587, at *5 (Pa. Super. Jan. 21, 2016). Unlike in *Hemphill*, however, where the court determined that “[w]hether an attorney failed to exercise a reasonable degree of care and skill related to common professional practice in handling a real estate transaction is a question of fact outside the normal range of the ordinary experience of laypersons,” *id.* at *5, here, Zaftr’s contract claims do not involve any issues that would be outside of the ken of an ordinary juror.³³

In sum, Zaftr has not alleged any attorney-client relationship between itself and the Kirk Defendants (as the Kirk Defendants themselves admit) and brings no legal malpractice claims in its Complaint. In these circumstances, expert testimony is not required to support Zaftr’s negligence claims against the Kirk Defendants—a conclusion the Kirk Defendants even appear to concede at one point in their briefing: “While expert testimony is not *required* for these causes of action, it may still be admissible to help the trier of fact.”

b. Omissions³⁴

*27 Zaftr contends that Kirk and Lawrence made various omissions that induced it to enter the parties’ agreements—to wit, that: (1) Defendants did not inform it that Lawrence, while held out by Defendants as an attorney, was administratively suspended from the practice of law;

and (2) Defendants did not inform Zaftr that Lawrence was operating BVFR out of Maryland during the events at issue or that BVFR was not in good standing as a foreign LLC in Maryland.³⁵ For the reasons following, Zaftr’s negligent and fraudulent misrepresentation claims must be dismissed to the extent they rely on a theory of omission because Zaftr has failed to identify that any Defendant owed it a duty.

Misrepresentation claims based on omissions must be based on a duty to disclose the omitted information. *See N. Penn Towns, LP v. Concert Golf Partners, LLC*, 554 F. Supp.3d 665, 701, 705 (E.D. Pa. 2021); *State Coll. Area Sch. Dist. v. Royal Bank of Canada*, 825 F. Supp.2d 573, 589 (M.D. Pa. 2011); Restatement (Second) of Torts § 551 (1977) (“One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.”); *see also Gibbs v. Ernst*, 538 Pa. 193, 647 A.2d 882, 892 (Pa. 1994); *N. Penn Towns*, 554 F. Supp.3d. at 701; Restatement (Second) of Torts § 551 (1977).

To determine whether a duty to disclose arises, Pennsylvania state and federal courts have often looked to the Restatement (Second) of Torts, which sets forth particular instances in which the duty to disclose applies. Restatement (Second) of Torts § 551(2) (1977); *see Hamilton v. Speight*, 2019 WL 161731, at *2 (E.D. Pa. Jan. 10, 2019). Section 551(2) (e) of the Restatement provides that a “party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated ... facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them ... would reasonably expect a disclosure of those facts.” Restatement (Second) of Torts § 551(2)(e) (1977).³⁶ “[F]acts basic to the transaction” are limited:

A basic fact is a fact that is assumed by the parties as a basis for the transaction itself. It is a fact that goes to the basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with. Other facts may serve as important and persuasive inducements to enter into the transaction, but not go to its essence.

Restatement (Second) of Torts § 551 cmt.j (1977).

As a preliminary matter, while Pennsylvania lower state courts and federal courts have often relied on *Restatement (Second) of Torts* Section 551 to define the scope of a party's duty to disclose, *Hamilton*, 2019 WL 161731, at *2; *Youndt v. First Nat. Bank of Port Allegany*, 868 A.2d 539, 550 (Pa. Super. 2005), whether the Pennsylvania Supreme Court has adopted Section 551 is unclear. See *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 611-12 (3d Cir. 1995) ("But while Pennsylvania courts have adopted the duty to speak requirement, the cases leave us uncertain of the extent to which Pennsylvania law includes the Restatement's discrete criteria for when a duty to speak arises."); *Nova Design Techs., Ltd. v. Walters*, 875 F. Supp.2d 458, 471 (E.D. Pa. 2012), as amended (June 29, 2012) ("Pennsylvania appellate courts have not explicitly identified the circumstances under which the duty to speak arises."); see also *Gibbs*, 647 A.2d at 892 (merely citing Section 551).

*28 Regardless, Pennsylvania cases have, on the whole, failed to find a duty to speak where the parties are sophisticated business entities with no fiduciary relationship to each other. See *N. Penn Towns*, 554 F. Supp.3d at 705 (listing cases); *Duquesne Light Co.*, 66 F.3d at 612 ("[T]here is virtually no Pennsylvania case in which a defendant has been held to have a duty to speak when both the plaintiff and defendant were sophisticated business entities, entrusted with equal knowledge of the facts."). "Pennsylvania courts analyzing whether there was a duty to speak rely almost exclusively on the nature of the contract between the parties and the scope of one party's reliance on the other's representations." *Duquesne Light Co.*, 66 F.3d at 612.

Here, quite rightly, no party challenges that all involved are sophisticated business entities, nor maintains that any Defendant owes a fiduciary duty to Zaftr. Specifically, Zaftr is a Canadian company subject to financial regulation and engages in the business of buying and selling digital currency. Montgomery, the CEO, himself graduated from law school in Canada and is a practicing attorney. Kirk is a licensed attorney and founding shareholder of Kirk Law. Lawrence was a licensed attorney (now administratively suspended) and CEO and managing member of BVFR. Zaftr engaged in an arms-length transaction with Defendants. See *N. Penn Towns*, 554 F. Supp.3d at 705; *Marcum v. Columbia Gas Transmission, LLC.*, 423 F. Supp.3d 115, 121 (E.D. Pa. 2019) (a special relationship creating a fiduciary duty "generally does not arise in a typical, arms-length business transaction unless 'one party surrenders substantial control over some portion of its affairs to the other'" (citation omitted)).

Even if that were not the case, the two omissions identified in Zaftr's briefing are not "basic to the transaction" under Section 551(2)(e) because they do not go to the "basis, or essence," of the transaction and are not "an important part of the substance of what is bargained for." *Restatement (Second) of Torts* § 551 cmt.j (1977). First, while the record supports Zaftr's contention that neither Lawrence nor Kirk informed Zaftr that Lawrence, while held out as an attorney, was administratively suspended from the practice of law, that omission is not a fact "basic to the transaction" because Lawrence was not serving in his capacity as a practicing attorney (only Kirk Law served as counsel to BVFR) and his attorney licensure status was not part of the "substance of what is bargained for." Similarly, the fact that Defendants did not inform Zaftr that Lawrence was operating out of Maryland and that BVFR was not in good standing in Maryland is not "basic to the transaction." While Zaftr argues that BVFR's business status in Maryland would have been relevant to its decision to engage with Defendants, the fact still does not go to the essence of the transaction or the substance of the bargain and instead is at most an "important [or] persuasive" fact, which Section 551 does not recognize as basic to the transaction.³⁷ *Restatement (Second) of Torts* § 551 cmt.j (1977).

*29 In light of the uncertainty as to the scope of the duty to disclose doctrine under Pennsylvania law and Pennsylvania state courts' marked tendency to find no duty to disclose where parties are sophisticated business entities, the Court concludes that a Pennsylvania state court would not impose liability in respect to the two omissions above under a duty to disclose theory. See *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 2022 WL 1592444, at *5, 603 F.Supp.3d 195 (E.D. Pa. May 19, 2022) ("[W]here uncertainty in state law exists, this Court must choose 'the interpretation that restricts liability, rather than expands it, until the [Pennsylvania Supreme Court] decides differently.' " (citation omitted)). For that reason, summary judgment is granted in respect to Zaftr's omission theory under its negligent and fraudulent misrepresentation claims.

c. Negligent Misrepresentation

Similarly, Zaftr's negligent misrepresentation claim fails because Zaftr has failed to identify a duty on which to rest the claim.

Pennsylvania common law requires that negligent misrepresentation claims—as with other negligence claims—be founded upon a duty between the alleged tortfeasor and the injured party. *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 581 Pa. 454, 866 A.2d 270, 280 (Pa. 2005) (“The primary element in any negligence cause of action is that the defendant owes a duty of care to the plaintiff.” (quoting *Althaus ex rel. Althaus v. Cohen*, 562 Pa. 547, 756 A.2d 1166, 1168 (Pa. 2000)); *Gibbs*, 647 A.2d at 890 (“Any action in negligence is premised on the existence of a duty owed by one party to another.”). “There is no universal duty not to make a negligent misrepresentation.” *Sheridan v. Roberts L. Firm*, 2019 WL 6726469, at *4 (E.D. Pa. Dec. 11, 2019).

The existence of a duty is a question of law to be decided by the court. *R.W. v. Manzek*, 585 Pa. 335, 888 A.2d 740, 746 (Pa. 2005). To determine whether to impose a duty, Pennsylvania law looks to a five-factor test: “(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.” *Bilt-Rite Contractors*, 866 A.2d at 281.

Typically, under these five factors, the relationship between parties who are engaged in arm's-length business relationships does not give rise to such a duty. *See, e.g., Bucci v. Wachovia Bank, N.A.*, 591 F. Supp.2d 773, 783 (E.D. Pa. 2008) (surveying cases); *see also Abdul-Rahman v. Chase Home Fin. Co., LLC*, 2014 WL 3408564, at *5 (E.D. Pa. July 11, 2014); *Tanksley v. Daniels*, 259 F. Supp.3d 271, 303 (E.D. Pa. 2017), aff'd, 902 F.3d 165 (3d Cir. 2018). Here, the parties were engaged in arm's-length business transactions, and Zaftr has not adduced evidence that it stood in any special relationship to Defendants that might otherwise create such a duty. Cf. *Gibbs*, 647 A.2d at 891 (holding that an adoption agency “assumed a duty to tell the truth when it volunteer[ed] information to prospective parents”).

To the extent that Zaftr can be understood to root its negligent misrepresentation claim in *Restatement (Second) of Torts Section 552*—adopted by the Pennsylvania Supreme Court, *see, e.g., Rempel v. Nationwide Life Ins. Co.*, 471 Pa. 404, 370 A.2d 366 (Pa. 1977); *Bilt-Rite Contractors*, 866 A.2d at 285-86—which provides in relevant part:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject

to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

***30 Restatement (Second) of Torts § 552 (1977)**—that theory fails as well. *Section 552* “sets forth the parameters of a duty owed when one supplies information to others, for one's own pecuniary gain, where one intends or knows that the information will be used by others in the course of their own business activities.” *Bilt-Rite Contractors*, 866 A.2d at 285-86. It does not “supplant[] the common law tort of negligent misrepresentation” but merely “clarify[ies] the contours of the tort as it applies to those in the business of providing information to others.” *Id.* at 287. *Section 552* is applied “narrowly,” *i.e.* “only to those businesses which provide services and/or information that they know will be relied upon by third parties in their business endeavors.” *Id.* at 286.

Zaftr fails to demonstrate that any Defendant fits within the narrow confines of *Section 552*. *Bilt-Rite* limits its application to certain types of professionals (*i.e.*, “architects and other design professionals,” *id.* at 286). Subsequently, its contours have been delineated to apply only to cases involving “reliance on the advice of professionals,” *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 178 (3d Cir. 2008), as being “typically limited to those who are ‘hired to advise’ ” such as “attorneys, surveyors, inspectors of goods, architects, designers, accountants, and insurance agencies.” *Personavera, LLC v. Coll. of Healthcare Info. Mgmt. Executives*, 2021 WL 1313108, at *10 (E.D. Pa. Apr. 8, 2021) (citations omitted); *see also Elliott-Lewis Corp. v. Skanska USA Bldg., Inc.*, 2016 WL 2346737, at *4-*6 (E.D. Pa. May 4, 2016). Zaftr has not demonstrated that any Defendant functioned in such a role vis-à-vis the contemplated sale of Bitcoin at the heart of this case.

Moreover, because *Section 552* does not supplant Pennsylvania common law on negligent misrepresentation, it does not override the long-standing principle that arm's-length transactions between business parties generally do not give rise to a duty between them in the absence of a special relationship or other circumstance recognized by Pennsylvania law. *See Boardakan Rest. LLC v. Gordon Grp. Holdings, LLC*, 2016 WL 6213035, at *22 (E.D. Pa. Oct. 24, 2016) (concluding that *Section 552* did “not afford ... relief” to the plaintiffs where the defendants did not “accept the role of advisor and provide guidance” and where the “parties ... were merely parties to a contract” and the “deal was an arm's length

transaction"); *see also Battle Born Munitions, Inc. v. Dick's Sporting Goods, Inc.*, 2019 WL 1978429, at *8 (W.D. Pa. May 3, 2019) ("[N]umerous courts have recognized that *Bilt-Rite* does not apply in a situation involving the sale of goods or services between two sophisticated entities.") (listing cases). In short, Zaftr has not demonstrated that [Section 552](#) is applicable to the circumstances of this case.

In light of the foregoing, Zaftr has failed to demonstrate that any Defendant owed Zaftr a duty. In the absence of a duty, Zaftr cannot prove a necessary element of its negligent misrepresentation claim, on which, accordingly, summary judgment must be granted in favor of Defendants.

d. Fraudulent Misrepresentation

Both the Kirk Defendants and the Lawrence Defendants move for summary judgment on Zaftr's fraudulent misrepresentation claim.³⁸

The elements of fraudulent misrepresentation in Pennsylvania are:

(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

*³¹ *Overall v. Univ. of Pa.*, 412 F.3d 492, 498 (3d Cir. 2005) (quoting *Gibbs*, 647 A.2d at 889). Fraudulent misrepresentation must be proved by clear and convincing evidence, and determinations at summary judgment must be made in light of this higher evidentiary standard. *Browne v. Maxfield*, 663 F. Supp. 1193, 1206 (E.D. Pa. 1987); *Anderson*, 477 U.S. at 254-55, 106 S.Ct. 2505.

1. Representation

There is no genuine dispute that the following affirmative representations were made to Zaftr:

- Lawrence and Kirk represented Lawrence as an attorney although he was administratively suspended from the practice of law;

- Kirk referred to Lawrence as a medical doctor, former Marine, former federal prosecutor, and former Clinton administration member while none of these were true;
- two of the parties' agreements represented that BVFR was located in Harrisburg, Pennsylvania, but Lawrence operated BVFR from his home in Maryland at the time, BVFR was not in good standing in Maryland, and Zaftr's service at the Pennsylvania address failed;
- BVFR/Lawrence and Kirk represented they were involved in prior transactions with Smith where he delivered Bitcoin;
- Lawrence provided a fraudulent passport to Kirk, who then passed it on to Zaftr, holding it out to be Smith's passport, and BVFR/Lawrence made representations as to the passport and Smith's identity in the ID Verification Agreement;
- Kirk represented that the reasons Smith did not provide Bitcoin on time in the August Tranche transaction was due to a "timing" issue with another party even as Kirk Law released funds to third-party bank accounts at Lawrence's direction; and
- Lawrence represented he had vetted the SOH bank account and that Gomes was a managing partner of SOH, whereas Gomes, or the person purporting to be Gomes, was not in fact managing partner of SOH.

2. Materiality

A misrepresentation is material if the party would not have entered into the agreement but for the misrepresentation. *Eigen v. Textron Lycoming Reciprocating Engine Div.*, 874 A.2d 1179, 1186 (Pa. Super. 2005); *see also Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa.Super. 90, 464 A.2d 1243, 1252 (Pa. Super. 1983).

Here, viewing all the record evidence, a reasonable juror could rationally find misrepresentations as to Lawrence's credentials material inasmuch they implicate Zaftr's understanding of Lawrence's credibility, experience, and trustworthiness. While the Kirk Defendants argue Lawrence's status as an attorney is immaterial because Lawrence did not serve as an attorney in his role in the failed transaction, that is too cramped a view of materiality. As Montgomery testified, "there were a number of areas

where we relied on what BVFR was saying or doing ... that was informed by my knowledge of him as an upstanding lawyer ... [s]o the knowledge that he's a suspended lawyer would have been relevant to that." Similarly, in respect to BVFR's location, Montgomery testified, had he known that BVFR was not at the Harrisburg address but rather at a home address in Maryland, "then there would have been more questions about how BVFR was operating at the time."

A rational juror could also find that representations as to Lawrence's prior business dealings with Smith, Smith's passport, and Smith's identity were material: these were basic assumptions underlying the viability of the transaction, as demonstrated by the ID Verification Agreement—the first agreement of the contemplated transaction—where BVFR was obligated to make representations as to Smith's identity and passport. As Montgomery testified, the representations as to prior business dealings impacted his decision to move forward with the transaction—"one thing that gives me great comfort is confirmation from someone that I trust that they have performed in the past." As to the ID Verification Agreement, he testified "we were relying on the representations made within that contract for us to validate and verify that James Smith was a real person, and his passport was an accurate and valid passport."

***32** A reasonable juror could also find that Kirk's representation that the August Tranche was delayed solely due to a "timing" issue is material because it concealed the fact that Kirk Law had sent Zafr's purchase funds—in contravention of the parties' agreements, as discussed above—to two third-party accounts. Montgomery testified that he would have ceased the transaction had he known that funds were sent prior to the receipt of Bitcoin ("I would have walked immediately").

Similarly, Montgomery testified that representations as to Gomes's credentials were material to Zafr's decision to engage with Gomes and SOH and enter agreements with them, stating "most of the representations around Gomes were provided by Lawrence ... all of those things informed our decision."

3. Knowledge of Falsity or Recklessness

"Summary judgment is inappropriate when a case will turn on credibility determinations ... and ... on state of mind." *Coolspring Stone Supply, Inc. v. Am. States Life Ins. Co.*, 10

F.3d 144, 148 (3d Cir. 1993) (citing *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505; *Riehl v. Travelers Ins. Co.*, 772 F.2d 19, 24 (3d Cir. 1985)). "[I]ssues of knowledge and intent are particularly inappropriate for resolution by summary judgment, since such issues must often be resolved on the basis of inferences drawn from the conduct of the parties." *Riehl*, 772 F.2d at 24.

Kirk and Lawrence's intent behind the misrepresentations is disputed and will turn largely on the credibility of their testimony (e.g., such as to their knowledge of Smith's identity, past transactions with Smith, and the validity of Smith's passport), making the issue one for the jury.

4. Intent to Mislead into Reliance

Under similar reasoning as set forth above, a juror could make a reasonable inference based on the conduct of the parties and circumstances of the transaction that each representation was made with the intent to induce Zafr to enter into the parties' agreements. Viewing the facts in the light most favorable to Zafr, the nonmoving party, there is sufficient evidence by which a juror could conclude that the representations were intended to lead Zafr to rely on Lawrence's credibility and trustworthiness, BVFR's bona fide business status and credentials, Smith's identity and experience in delivering Bitcoin, and Gomes's identity and credibility. Especially given the evidence that the Defendants provided a fraudulent passport to Zafr—to kick off the entire transaction—the "Court cannot conclude that no reasonable jury could find that the [Defendants] had the intent to mislead [Zafr]." *Paramount Fin. Commc'n, Inc. v. Broadridge Inv. Commc'n Sols., Inc.*, 2019 WL 3022346, at *17 (E.D. Pa. May 23, 2019).

5. Justifiable Reliance

Similar to issues of intent, whether a party reasonably relied on a representation is typically a question of fact for the jury. See, e.g., *EUSA-Allied Acquisition Corp. v. Teamsters Pension Tr. Fund of Philadelphia & Vicinity*, 2012 WL 1033012, at *5 (D.N.J. Mar. 26, 2012). The question of whether a party's reliance upon a representation was justifiable "is one that should be decided by a jury on the basis of all of the facts and permissible inferences which may be drawn from the evidence presented at trial." *Myers v. McHenry*, 398 Pa.Super. 100, 580 A.2d 860, 865 (Pa.

Super. 1990); *see also Toy v. Metro. Life Ins. Co.*, 593 Pa. 20, 928 A.2d 186, 208 (Pa. 2007) (“[J]ustifiable reliance is typically a question of fact for the fact-finder to decide, and requires a consideration of the parties, their relationship, and the circumstances surrounding their transaction.”).

***33** There is sufficient evidence that Zaftr reasonably relied on the representations above to send the issue to the jury. While the Defendants argue that Zaftr's own due diligence in respect to Smith and Gomes vitiates any reliance on representations by the Defendants, the issue is disputed and the weighing of the evidence is a task for the jury.

6. Injury

No Defendant disputes that Zaftr could show injury caused by the alleged misrepresentations.

For the foregoing reasons, Defendants' motions for summary judgment shall not be granted as to Zaftr's claim for fraudulent misrepresentation.

iii. Civil Conspiracy

Zaftr's civil conspiracy claim is based on the theory that the Defendants acted intentionally and with a common purpose to induce Zaftr to enter into the series of agreements which they had neither the intention nor the ability to perform. Specifically, Zaftr contends that BVFR and Lawrence together provided false information about Lawrence's relationship with Smith and provided the fraudulent passport to Zaftr. Zaftr also alleges that Kirk, acting together with Kirk Law, conspired to induce Zaftr to enter into the agreements when they agreed to act as “Mandate Counsel” for the Lawrence Defendants and when they retained Zaftr's funds for the benefit of the Lawrence Defendants.

In moving for summary judgment on the claim, the Defendants state quite correctly that to establish a civil conspiracy under Pennsylvania law the Plaintiff must prove: “1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; 2) an overt act done in pursuance of the common purpose; and 3) actual legal damage.” *Goldstein v. Phillip Morris, Inc.*, 854 A.2d 585, 590 (Pa. Super. 2004). In addition, plaintiff must prove a separate,

underlying tort as a predicate for civil conspiracy. *Boyanowski v. Cap. Area Intermediate Unit*, 215 F.3d 396, 407 (3d Cir. 2000).

Here, a predicate underlying intentional tort (fraudulent misrepresentation) has survived summary judgment and Zaftr furthermore has provided evidence by which a reasonable juror could conclude that the Defendants acted with a common purpose to do an unlawful act, committed an overt act in pursuance of such, and caused actual damage. Thus, summary judgment shall not be granted on the civil conspiracy claim.

D. Plaintiff's Declaratory Judgment Claim

Zaftr seeks declaratory judgment, asking the Court to declare the following:

- (a) Defendants have breached their duties to Plaintiffs with respect to the Purchase Agreement, Escrow Agreement, BVFR Side Letter, ID Verification Agreement, Second Escrow Agreement, and Addendum; (b) Plaintiff is entitled to a return of all of the funds it paid to Defendants, pursuant to the parties' Agreements for the BTC that Defendants never delivered to Plaintiff; (c) As a direct and proximate result of Defendants' breaches of their duties to Plaintiff with respect to the Purchase Agreement, Escrow Agreement, BVFR Side Letter, ID Verification Agreement, Second Escrow Agreement, and Addendum, Plaintiff is entitled to the Non-Performance Fee for each of the August Tranche, September Tranche, and October Tranche, in the amount of 71 BTC; (d) As a direct and proximate result of Defendants' breaches of their duties to Plaintiff with respect to the Purchase Agreement, Escrow Agreement, BVFR Side Letter, ID Verification Agreement, Second Escrow Agreement, and Addendum, Plaintiff has suffered direct and consequential damages in an amount in excess of \$32,826,500.00; (e) Plaintiff is entitled to an award of its attorney's fees and costs incurred in connection with bringing this action pursuant to the Escrow Agreement and the Second Escrow Agreement; (f) Plaintiff is entitled to an award treble damages, punitive damages, prejudgment interest, and post-judgment interest; and (g) Plaintiff is entitled to such other and further relief that this Honorable Court deems proper.

***34** “Declaratory judgments are meant to define the legal rights and obligations of the parties in the anticipation of some

future conduct.” *Andela v. Admin. Off. of U.S. Cts.*, 569 F. App’x 80, 83 (3d Cir. 2014). They “are not meant simply to proclaim that one party is liable to another.” *Id.* Here, Zaftr is simply asking the Court to find that Defendants were liable for the past conduct alleged against them in the other counts of Zaftr’s Complaint and to calculate damages it believes it is due. *See, e.g., LM Gen. Ins. Co. v. LeBrun*, 2020 WL 7640927, at *3 (E.D. Pa. Dec. 23, 2020).

Furthermore, it is duplicative of Zaftr’s other claims, especially its breach of contract claims. *See Butta v. GEICO Casualty Co.*, 400 F. Supp.3d 225, 231 (E.D. Pa. 2019) (courts should “exercise their discretion to decline proceeding with declaratory judgments when they duplicate other claims.”). While the “existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate,” declaratory judgments are generally inappropriate when they duplicate other claims. *Id.* Here, the declaratory relief sought by Zaftr is predicated on alleged breaches of the parties’ agreements, essentially restating Zaftr’s breach of contract claims.

Footnotes

- 1** This amount might not take account of various wire fees, but it is used here as the amount relied upon by the parties in their briefing and as supported by the record.
- 2** Answers to interrogatories suggest that the Kirk Defendants might maintain that some of the \$111,312.35 is not claimed by BVFR as the Seller Mandate Fee but is instead due to them as being “allocated towards general legal work.” This issue has not been addressed by the parties in the briefing, so \$111,312.35 will be used as the presumptive amount.
- 3** It is unclear if this amount fails to take account of various wire fees.
- 4** The Defendants appear to argue that the indemnification provisions cover both the individuals and entities, referring broadly to the “Kirk Defendants” and “BVFR Defendants” in their briefing. But they have not addressed specifically whether the individuals, in addition to the entities, would also be covered by the indemnification provisions. The conclusions that follow as to the two indemnification provisions, however, remain the same in either case.
- 5** The parties do not distinguish between the terms “indemnify” and “hold harmless.” The two are often treated as two sides of the same coin. See, e.g., *Indemnify*, Black’s Law Dictionary (11th ed. 2019) (“To reimburse (another) for a loss suffered because of a third party’s or one’s own act or default; HOLD HARMLESS.”); *Hold Harmless*, Black’s Law Dictionary (11th ed. 2019) (“To absolve (another party) from any responsibility for damage or other liability arising from the transaction; INDEMNIFY.”); *Waynesborough Country Club of Chester Cnty. v. Diedrich Niles Bolton Architects, Inc.*, 2008 WL 4916029, at *3 (E.D. Pa. Nov. 12, 2008) (“A clause which contains the words ‘indemnify’ and ‘hold harmless’ is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons.” (citation omitted)). *But see Korn v. Kertesz*, 2008 WL 11513249, at *2 (E.D. Pa. Jan. 30, 2008) (treating indemnity and hold-harmless clauses differently, apparently on the grounds that to hold harmless would prevent suit in the first place whereas to indemnify refers to a right of reimbursement following payment); *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 202 n.6 (3d Cir. 1995) (“Generally, an indemnity agreement also includes a ‘hold harmless’ clause by which the indemnitor agrees ‘to indemnify and hold harmless’ the indemnitee. A hold harmless agreement is [a] contractual arrangement whereby one party assumes the liability inherent in the undertaking, thereby

Moreover, to the extent that Zaftr seeks a determination of attorney’s fees and costs under the terms of the First and Second Escrow Agreements, any such determination would be premature since the agreements condition attorney’s fees and costs on prevailing in the suit. Similarly, the requests for a determination of treble damages, punitive damages, and pre- and post-judgment interest are either the province of the jury or are premature.

For these reasons, summary judgment on Zaftr’s declaratory judgment claim shall be granted in favor of the Kirk Defendants.

An appropriate order follows.

All Citations

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relieving the other party of the responsibility.' " (citing Black's Law Dictionary 658 (5th ed. 1979))). The parties in this case have not suggested that there is a difference that would affect the analysis here.

- 6 There is some ambiguity in the First and Second Escrow Agreements as to whether "Mandate Counsel," as used in those agreements, refers to Kirk Law or Kirk. Kirk, however, signs the agreements on behalf of Kirk Law and is expressly treated in his role as the founding shareholder of Kirk Law, and Kirk Law is clearly treated as the "Mandate Counsel" in the First and Second Addenda, which incorporate the First and Second Escrow Agreements, respectively, as discussed *supra*. On that basis, and without specific argument on the issue by the parties, "Mandate Counsel" is treated here as referring to Kirk Law.
- 7 Specifically, the Lawrence Defendants argue that Zaftr has "broadly and unequivocally relieved [them] from any liability related to Buyer and/or Seller's failure to perform under the agreements" and liability relating to SOH's failure to perform. The Kirk Defendants similarly argue that the clauses render them indemnified and held harmless "from any loss associated with Smith's failure to perform and/or deliver Bitcoin." Further, the Kirk Defendants argue that "[s]ince Zaftr's unsupported claims clearly arise from Smith's alleged failure to perform and deliver the subject bitcoin, those claims are barred...." As to the last argument, while the Kirk Defendants use the language "arise from," which might otherwise be read expansively in the context of indemnification or other contractual contexts, see, e.g., *Nitterhouse Concrete Prod., Inc. v. Molders*, 2016 WL 827131, at *3 (M.D. Pa. Mar. 3, 2016) (interpreting a provision including the phrase "may arise by reason of" broadly); *Allstate Ins. Co. v. Masco Corp.*, 2008 WL 183651, at *2 (E.D. Pa. Jan. 22, 2008) (treating an arbitration clause featuring the language "arise under the terms of [an agreement]" as having a "broad scope"), the two provisions at issue do not feature this language, and the Kirk Defendants may not write terms into the contract that are not there.
- 8 Zaftr does not provide any argument that the two provisions would not also protect the individual Defendants, who signed the agreements on behalf of their respective entities, from liability in this respect.
- 9 The lack of such language can be seen by comparison to the case cited by the Lawrence Defendants, *Booth v. Bower*, 2008 WL 220067 (D.V.I. Jan. 10, 2008). In *Booth*, there was broad exculpatory language in the contract at issue: "further release and hold harmless ... from any claim or lawsuit...." *Id.* at *2 (emphasis added). Here, there is no such language releasing Defendants from all potential claims by Zaftr.
- 10 To the extent that the Kirk Defendants and the Lawrence Defendants argue that the indemnification and hold-harmless provisions apply to their own tortious action or breach of contract, that would essentially treat the two provisions as releases from liability or exculpation clauses. After all, if the indemnification and hold-harmless provisions did apply to the Defendants' own conduct, the provisions would functionally release them from liability to Zaftr. See, e.g., *Dansko Holdings*, 991 F.3d at 503 ("If Dansko had to indemnify Benefit against its own negligence suits against Benefit, that would effectively release Benefit from negligence liability to Dansko."). Along these lines, it is worth noting that exculpatory clauses must be "expressed in clear and unequivocal terms." *Topp Copy Prod.*, 626 A.2d at 101. Here, the contracts contain nothing that could be read as an exculpatory clause.
- 11 The Kirk Defendants and Lawrence Defendants' proposed interpretation of the indemnification provisions—that they cover all suits in contract or tort, including their own breaches of the contracts and their own tortious actions—also ignores the Pennsylvania Supreme Court's admonition that "a contract must be interpreted to give effect to all of its provisions." See *Commonwealth ex rel. Kane v. UPMC*, 634 Pa. 97, 129 A.3d 441, 464 (Pa. 2015). Specifically, the remainder of the paragraphs in which the two indemnification clauses appear require Zaftr, BBT, and, in the case of the Second Escrow Agreement, SOH to consent to the jurisdiction of Pennsylvania courts "for any and all claims" against Kirk Law (as "Mandate Counsel") and BVFR (as "Seller's Mandate"). This language expressly acknowledges the possibility of suits by Zaftr against both entities.
- 12 Per the analysis *supra*, the terms of the Second Purchase Agreement are incorporated into the Second Addendum, for which reason it is also discussed in the context of Zaftr's breach of contract claims.
- 13 To the extent that evaluation of whether there is a breach depends on interpretation of contract terms, the first task is to determine whether the language of the contractual provision at issue is clear or ambiguous. *Polish Am. Mach. Corp. v. R.D. & D. Corp.*, 760 F.2d 507, 512 (3d Cir. 1985). The initial determination of a contract's ambiguity is a question of law

to be resolved by the court at summary judgment. *Silvis v. Ambit Energy L.P.*, 674 F. App'x 164, 167 (3d Cir. 2017). If the relevant provisions are unambiguous, the Court proceeds to address whether summary judgment is warranted. But where the language of a provision at issue is ambiguous, i.e. "it is reasonably susceptible of different constructions and capable of being understood in more than one sense," *Hutchison v. Sunbeam Coal Corp.*, 513 Pa. 192, 519 A.2d 385, 390 (Pa. 1986), its interpretation is for the jury and summary judgment must be denied. See *id.*; *Silvis*, 674 F. App'x at 167 ("Deciding whether a term is ambiguous is a question of law but deciding the meaning of an ambiguous contract clause is an issue of fact.").

- 14 At the outset it must be noted that the parties do not rigorously separate out the potential liability of the Defendant entities that did sign the Agreements and the individuals who signed on the entities' behalf (specifically Lawrence who signed on behalf of BVFR in his capacity as CEO and Managing Director and Kirk who—signing on behalf of Kirk Law—did so in his capacity as Founding Shareholder of Kirk Law). Maddeningly in their briefs the parties tend to refer to "Defendants" generally or to "the Kirk Defendants" or "the Lawrence Defendants" with no distinction being made between the various Defendants.

This penchant—by all parties—of not carefully connecting each Defendant separately to each claim (or explaining why separation is unwarranted) runs throughout the briefs untrammeled by any conventional approach to legal argument.

- 15 See *Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("[A] passing reference to an issue ... will not suffice to bring that issue before [the] court." (citation omitted)).
- 16 The parties' have not addressed the issue of whether Lawrence, signing the agreement on behalf of BVFR, can be individually liable for breach of the ID Verification Agreement. As a result, the Court cannot address the issue at this time.
- 17 Lawrence states in his testimony that Smith made these requests. In respect to the Nationwide Finance LLC transfer, Lawrence suggests the instruction may have come originally from a Bitcoin miner but states that Smith ultimately made the request to Lawrence.
- 18 Some of Lawrence's communications with Smith, not referenced by the parties in their briefing, further suggest that Lawrence considered the funds sent to the two third-party accounts as constituting part of his Seller Mandate Fee. For instance, he writes to Smith: "BVFR [...]mmediately sent some of its Mandate Fee to the designated recipient ... which was the wrong LLC ... we were then told that LLC would return funds and then it didn't so I needed to recall the wire; we then sent Mandate Fee to Nationwide...." Kirk also testified that the amounts sent to the third-party accounts were part of BVFR's Seller Mandate Fee, but Kirk treated the "specifics" discussed with BVFR as to the distribution of its Seller Mandate Fee as privileged.
- 19 For example, Lawrence testified that the Nationwide Finance LLC account was related to a "reputable ... Florida-based businessperson."
- 20 The provisions in the First Purchase and Escrow Agreements, however, as laid out *supra*, are limited to the Seller (and Brokers). In respect to whether Kirk Law's actions breached those provisions, which specifically prohibit premature release of funds to the Seller, the Court cannot determine if release of the funds to the two third-party accounts was a violation because it is disputed whether the third-party accounts were controlled by the Seller. While the record evidence supports that Smith directed Lawrence to make such payments to those accounts, the record leaves it unclear if those accounts were actually controlled by the purported Seller. Zaftr's motion for summary judgment shall therefore be denied as to premature release of funds with respect to the First Purchase and Escrow Agreements. The Kirk Defendants' motion shall be denied in the same respect.
- 21 Moreover, this reading of the prohibition on sending funds to third parties is consistent with the First Addendum's provision requiring BVFR (through Kirk Law) to return its Seller Mandate Fee to Zaftr in the event the Bitcoin was not delivered. It is hard to see how BVFR could comply with that provision if Seller Mandate Fee funds could be directly distributed to third parties (even if at the direction of BVFR), from whom it might be difficult or impossible to retrieve such funds—which is precisely what occurred in this case.

- 22 While summary judgment is granted against Kirk Law in this respect, the Court cannot make a determination at this time as to any individual liability for Kirk. The provision in the First Addendum prohibiting release “to any parties” except for BVFR for its Seller Mandate Fee applies to “Mandate Counsel,” defined as Kirk Law in the first paragraph of the First Addendum. Zaftr, while referring broadly to “the Kirk Defendants,” has not made any legal argument that Kirk, as an individual, can also be liable for release of funds to third parties.
- 23 Any Seller Mandate Fee from the September Tranche does not appear to form the basis of Zaftr’s claims regarding return of the Seller Mandate Fee Funds.
- 24 Zaftr does not contend that Defendants failed to return purchase funds apart from the Seller Mandate Fee within one business day in respect to the October Tranche—this argument is limited to the August Tranche. Thus the only issue raised in respect to the October Tranche is return of the amount claimed as BVFR’s Seller Mandate Fee.
- 25 Zaftr argues Kirk Law has no basis for retaining these funds but merely rests on its argument that BVFR is not entitled to retain the Seller Mandate Fee funds. Zaftr’s argument only serves to highlight that the funds in Kirk Law’s possession are disputed in the current litigation.
- 26 As discussed above, however, it is not clear from the record or briefing how the funds claimed by BVFR as the August Tranche Seller Mandate Fee are currently distributed between BVFR and Kirk Law.
- 27 Montgomery testified as to the circumstances of BVFR’s retaining the Seller Mandate Fee, stating that he “initially asked him [Lawrence] to return it,” but that he was “met with resistance on that request.” He went on: “At the time, I still believed that this was—had a possibility, and it just got too complicated in terms of what they were trying to do. So I made a—I made a decision of, okay, am I going to push to get that money back, or do I think it will be better for the business to let this continue to sit in the U.S. with a reputable lawyer and a successful investment banker who’s holding onto it so that we can close out another deal.”
- 28 As with its unjust enrichment claim *supra*, Zaftr argues that its conversion claim should not be dismissed given this Court’s motion to dismiss opinion in which it concluded that the conversion claim would not be dismissed because on the allegations alone, viewed through a motion to dismiss standard, it was plausible that the conversion claim was not merely duplicative of Zaftr’s breach of contract claims. *Zaftr Inc.*, 2021 WL 4989769, at *5. Since it has been determined here that BVFR and Kirk Law are both bound by the agreements governing the funds still in their possession, see discussion *supra*, the concerns set forth in this Court’s opinion on the motions to dismiss are no longer applicable.
- 29 The duty-based approach of *Bruno* can be understood to differ from the “inextricably intertwined” standard invoked by the Kirk Defendants, which is ultimately drawn from *eToll*, 811 A.2d at 21. As the Third Circuit explained, “While the *Bruno* court did not explicitly overrule *eToll* or its progeny, it explained that *eToll* creates a divide in the gist of the action jurisprudence, did not rely on any of the *eToll* factors in reaffirming the duty-based standard from which *eToll* departs, and cabined reliance on *eToll*’s ‘inextricably intertwined’ language.” *Dommel Properties LLC v. Jonestown Bank & Tr. Co.*, 626 F. App’x 361, 366 (3d Cir. 2015) (citations omitted) (non-precedential).
- 30 The Kirk Defendants argue that Zaftr’s civil conspiracy claim is in effect barred by the gist of the action doctrine on the basis that the underlying torts should be dismissed under the doctrine. But because Zaftr’s fraudulent misrepresentation claim is not dismissed under the gist of the action doctrine or any other theory, see *infra*, there is an underlying tort to support Zaftr’s conspiracy claim, as discussed in more detail *infra*.
- 31 Other case citations in the Kirk Defendants’ briefing are also out of place here. See *Schmidt v. Currie*, 217 F. App’x 153, 157 (3d Cir. 2007) (unpublished opinion) (involving claims under the Dragonetti Act, 42 Pa. Con. Stat. § 8351, which were treated as “analogous to a legal malpractice action,” *id.* at 156); *Vadovsky v. Treat*, 2010 WL 3766810, at *1 n.5 (M.D. Pa. Sept. 21, 2010) (a legal malpractice action); *Kia v. Imaging Scis. Int’l, Inc.*, 2010 WL 3516850, at *5 (E.D. Pa. Sept. 2, 2010) (concluding that an expert could not testify as to factual issues involving whether an oral agreement was entered into or make credibility determinations, which were “within the purview of the jury”).
- 32 Whether Zaftr reasonably relied on the Kirk Defendants’ “alleged due diligence” is also within the province of the jury. Indeed, reasonable reliance is typically a question for a jury. *Romeo v. Unumprovident Corp.*, 2008 WL 375161, at *7

(E.D. Pa. Feb. 11, 2008) (“Whether reliance on a representation is reasonable is generally a question of fact to be decided by a jury.”).

- 33 While the Kirk Defendants specifically argue that whether the Kirk Defendants are “properly holding disputed funds” is an issue requiring expert testimony, whether an attorney properly holds funds disputed in litigation is merely an obligation established by the rules of professional conduct, and no expert testimony is required for that issue. See *Rizzo*, 555 A.2d at 67 (“We further believe that expert testimony was not needed to detail the fiduciary obligations of an attorney who engages in financial transactions with his client, since these obligations are established by law, the Code of Professional Responsibility, and the Model Rules of Professional Conduct.”).
- 34 Zaftr refers to both omission and nondisclosure in its Complaint. Each term appears to relate to the same theory in Zaftr’s briefing (*i.e.*, a duty to disclose) and both will be treated under the term “omission” here. See *Elbeco Inc. v. Nat'l Ret. Fund*, 128 F. Supp.3d 849, 860 (E.D. Pa. 2015) (referring to “omission” claims in respect to both fraudulent and negligent conduct). As framed in the briefing, the claims that Zaftr has made do not include any allegations that any Defendant engaged in fraudulent concealment, which is treated distinctly under Pennsylvania law from mere nondisclosure. “Rather, the common law clearly distinguishes between concealment and nondisclosure. The former is characterized by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter. The latter is characterized by mere silence.” *Gnagey Gas & Oil Co. v. Pennsylvania Underground Storage Tank Indemnification Fund*, 82 A.3d 485, 501 (Pa. Commw. 2013). For instance, Zaftr, while referring to Restatement (Second) of Torts Section 551 (“Liability for Nondisclosure”), fails to raise Section 550 (“Liability for Fraudulent Concealment”). See *Gnagey Gas & Oil Co.*, 82 A.3d at 500 (comparing the two sections).
- 35 Zaftr does not specify which of the misrepresentations qualify as omissions in its briefing, but the two here appear to be the only ones phrased in terms of an omission. Otherwise, Zaftr’s alleged misrepresentations are framed as affirmative misrepresentations.
- 36 Zaftr does not cite to or make argument regarding any other subsection of [Section 551\(2\)](#) in support of its omissions theory besides [Section 551\(2\)\(e\)](#).
- 37 Moreover, Zaftr did not “surrender[] substantial control” to Defendants in respect to information regarding Lawrence’s attorney licensure status and BVFR’s business location and status as facts within the unique possession of any Defendant. *Marcum*, 423 F. Supp.3d at 121. Rather, this information can be accessed through online public databases—exhibits in the Joint Appendix illustrate how BVFR’s business location and status can be found through the Maryland governmental website and how Lawrence’s status as an attorney status can be found on the Pennsylvania Supreme Court Disciplinary Board’s website.
- 38 As with Zaftr’s contract claims, Zaftr often refers to the actions of “Defendants” without clearly distinguishing between the individual and corporate defendants or even between the two individual defendants.

United States v. Gonzalez-Gonzalez

United States Court of Appeals, Eleventh Circuit. | March 1, 2023 | Not Reported in Fed. Rptr. | 2023 WL 2301444

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Outline

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UNITED STATES of
America, Plaintiff-Appellee,
v.
Gilberto GONZALEZ-
GONZALEZ, Defendant-Appellant.

No. 22-10433

|

Filed March 1, 2023

Appeal from the United States District Court for the Southern District of Alabama, D.C. Docket No. 1:21-cr-00062-002-TFM

Attorneys and Law Firms

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Before [Rosenbaum](#) and [Lagoa](#), Circuit Judges, and [Wetherell](#),* District Judge.

Opinion

[WETHERELL](#), District Judge:

*1 Following a jury trial, Gilberto Gonzalez-Gonzalez was convicted of possession with intent to distribute a controlled substance (cocaine) in violation of [21 U.S.C. § 841\(a\)\(1\)](#). Gonzalez's primary argument on appeal is that the evidence was insufficient to support his conviction. He also argues that the trial court erred in admitting certain evidence, excluding other evidence, and instructing the jury on "joint possession." And, finally, Gonzalez contends that the cumulative effect of these errors deprived him of a fair trial.

After a thorough review of the record and with the benefit of oral argument, we affirm Gonzalez's conviction.

I. BACKGROUND

A. Facts

In the early afternoon of January 25, 2021, Baldwin County Sheriff's Office Corporal Jason Kolbe observed a white Ford F-650 flatbed work truck with a sleeper compartment driving north-bound on Interstate 65 in Baldwin County, Alabama. The truck had a large wooden crate haphazardly strapped to its bed. The truck slowed down as it approached Kolbe, and it maintained a slower speed for an unusually long time after it passed by him, rather than speeding back up as most motorists would. After Kolbe pulled out onto the highway to track the truck, he observed it drift over the white line on the righthand side of the road. Accordingly, Kolbe initiated a traffic stop.

Kolbe approached the truck and began to interact with Gonzalez, the driver. The passenger, Daniel Corona, was lying down in the sleeper compartment at the time, and Gonzalez stated that Corona was not a truck driver.

Gonzalez told Kolbe that he and Corona were transporting the crate of broken transmissions from Houston to Atlanta, but Gonzalez was unsure of the exact destination. Kolbe testified that Gonzalez appeared exceedingly nervous—much more so than a typical motorist—and that his nervous demeanor did not abate even after Kolbe assured Gonzalez that he did not intend to write him a ticket.

Kolbe requested paperwork for the load from Gonzalez, and Gonzalez provided a bill of lading that was several months out of date. The bill of lading listed "Edwin Martinez" as the driver and gave an address in Houston as the origin of the trip and an address in Atlanta as the destination. Kolbe's online search of the Atlanta address revealed that it corresponded with a produce store.

Gonzalez also provided Kolbe paperwork related to the truck. The "cab card" Gonzalez produced was for a company called Cheetah Transportation Systems, but the door of the truck displayed "Pure Power Logistics." Gonzalez was unfamiliar with those companies and the other companies and individuals referenced on other paperwork he provided to Kolbe. The DOT number on the truck's door was associated with Pure Power Logistics, but the insurance card Gonzalez provided to Kolbe was in Cheetah's name and had long since expired. Gonzalez also did not have a logbook, which is typically required of commercial truck drivers and is used to track driving hours and rest breaks.

Kolbe asked Gonzalez to accompany him to his police vehicle. Before doing so, Gonzalez requested—and was granted—permission to perform a safety inspection of his truck. Kolbe testified that in his many years of experience as an officer patrolling the highways, he could not remember ever receiving a similar request from a truck driver.

*2 Gonzalez's purported safety inspection was conducted in a manner atypical of an experienced commercial truck driver and seemed to Kolbe to be designed to “buy time.” When conducting the inspection, Gonzalez began by going immediately to the passenger side storage box, but he did not open it, even though that box typically would contain essential safety equipment. Gonzalez hit two of the truck's tires with his hands, rather than a hammer, which Kolbe testified a commercial truck driver would typically use to check tire pressure. Gonzalez also “slapped” the straps holding down the crate on the back of the truck, but he did not check the hooking mechanisms or do anything to actually test the integrity of the straps. As Gonzalez made his way around the truck, he got back into the cab, where Corona was still located, and remained there for more than a minute.

When Gonzalez finally made his way to Kolbe's police vehicle, Kolbe asked Gonzalez if there were any drugs inside the truck, to which Gonzalez first replied “huh?” and then replied “no” when asked again. Gonzalez then told Kolbe—in contrast with his earlier representation—that Corona was a truck driver. Gonzalez also claimed that he did not own the truck.

Kolbe asked Gonzalez, in English and in Spanish, for consent to search the truck, which Gonzalez gave. Kolbe testified that Gonzalez appeared “apprehensive” and “nervous.” When Kolbe opened the crate on the back of the truck, he found an engine block and a transmission, which he described as “broken,” “junk,” and “not something you would transport from Houston to Atlanta.”

When Kolbe asked for the keys to the truck's storage boxes, both Gonzalez and Corona said they didn't have keys. Kolbe found a “scarred up” knife blade wedged between the skirting around the bottom of the truck and the back wall of the sleeper berth. Kolbe testified that the door and locking pin of the passenger side storage box was “extremely toolled,” meaning that someone used an item to pry open the locking mechanism. Kolbe suspected that the knife blade was used in this manner to open the storage box.

At this point, Gonzalez requested—and was granted—permission to walk to a nearby line of trees to urinate. While Gonzalez was doing so, Kolbe used a screwdriver to pop open the door to the passenger side storage box. Inside, he observed a black duffel bag. When Kolbe opened the bag, he found sixteen “bricks” of cocaine inside, wrapped in cellophane and covered in grease to mask the smell. The cocaine weighed a total of 15.86 kilograms.

After discovering the cocaine, Kolbe and his partner detained Gonzalez and Corona. Kolbe testified that Gonzalez seemed calm and unsurprised, and that Gonzalez complied with his commands without question or confrontation.

Special Agent Matthew Chakwin interviewed Gonzalez after his arrest. Gonzalez told Chakwin that he was an experienced truck driver and that he owned his own business, Gonzalez Trucking. Gonzalez further told Chakwin that he was asked by “Neto,” a mutual friend of his and Corona's, to drive the truck. Gonzalez claimed to have had limited-to-no conversations with Corona prior to the trip. Gonzalez also mentioned to Chakwin that he noticed something wasn't right about the bill of lading.

B. Pre-Trial Proceedings

A grand jury indicted Gonzalez and Corona on two counts related to a conspiracy to distribute cocaine. In Count One, the Indictment charged both defendants with conspiracy to possess with intent to distribute approximately 16 kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 846. In Count Two, the Indictment charged both defendants with possession with intent to distribute approximately 16 kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1).

Corona filed a motion to suppress challenging the traffic stop and search that led to inculpatory physical evidence and statements. The district court permitted Gonzalez to join in that motion, but then denied it on the merits. Following that ruling, Corona entered a guilty plea, which the district court accepted. Gonzalez proceeded to trial.

*3 Before trial, Gonzalez filed a motion in limine seeking to exclude certain communications (particularly images) found on his cell phone. The district court orally denied that motion without much discussion but left open the possibility of Gonzalez objecting to individual pieces of evidence at trial.

C. Trial

1. The Government's Case

At trial, the Government presented its case over the course of nearly three days, calling seven witnesses. Kolbe and Chakwin testified as to the circumstances leading up to the discovery of the cocaine as laid out above. The Government also presented evidence from Gonzalez's and Corona's cell phones, as well as evidence pertaining to the drug trade.

The evidentiary rulings challenged by Gonzalez on appeal relate to the cell phone evidence and an exhibit that Gonzalez sought to introduce during his cross-examination of the witness called by the Government to testify about the drug trade. That evidence is summarized below.

i. Cell Phone Evidence

Gonzalez consented to having his cell phone searched, and forensics experts were able to extract data from both Gonzalez's and Corona's phones. The Government called several witnesses to discuss what was found on the phones.

When the Government sought to introduce evidence from Gonzalez's phone, Gonzalez renewed the argument from his motion in limine that the evidence was not relevant, violated [Federal Rule of Evidence 403](#), and was improper character evidence. The district court ruled that the evidence was admissible as part of the "res gestae" of the case—that is, closely connected to the case—because it was on Gonzalez's phone and that it was up to the jury to determine what weight to ascribe to it.

The cell phone data showed 35 calls between Gonzalez and "Neto" between November 11, 2020, and January 25, 2021.¹ Gonzalez's phone also showed calls (both native and through **WhatsApp**) in late 2020 and January 2021 to and from someone named Tukan and to and from Ricardo La Mula. Finally, Gonzalez's phone showed four incoming calls from an unsaved number (identified to be Corona) in the late evening of January 24 and early morning of January 25, 2021. All of these individuals had phone numbers corresponding to the Houston area.

Gonzalez's phone also contained messages (both native and through **WhatsApp**) between Gonzalez and Tukan, La Mula, "Rene Exxtreme," Ezequiel Rojas, and Julio Cesar

Tampaon. Rene Exxtreme and Tampaon had Mexican phone numbers.

The messages between Gonzalez and Rene Exxtreme discuss the formation of "Gonzalez Trucking" and reference deliveries and pickups occurring at an address in Matamoros, Mexico. Messages between Gonzalez and Neto direct Gonzalez to "make arrangements" with Rene Exxtreme, give an address in Matamoros, Mexico, and state "they will take you the things later if you are going to be there." Several of the calls between Rene Exxtreme and Neto and Gonzalez occurred during these text conversations. In one of these exchanges, Tukan stated "they owe me two thousand by tomorrow," Gonzalez referenced "expensive" "kilos," and Tukan commented that they had become even more expensive because of the COVID-19 pandemic. Gonzalez replied, "I know dude they are at 37 38 [thousand dollars]."

*⁴ Some of these messages contained images (both memes² and actual pictures) that appeared to depict or reference cocaine and were sent or received by Gonzalez between March 2019 and January 2021. Gonzalez's phone also contained ostensibly legitimate images pertaining to his trucking business.

The Government also introduced evidence from Corona's phone. In addition to his calls to Gonzalez, Corona's phone showed numerous **chats** and calls between himself and "La Nanita" and "Edwin M." Messages between Corona and Edwin M. discuss "meet[ing] up" and "do[ing] the run," and reference travel to the border. Messages between Corona and Neto from the day before the traffic stop show that Neto put Corona in contact with Gonzalez for the purpose of making the trip from Houston to Atlanta.

Corona's phone showed calls between himself and Neto on the morning of the traffic stop, and calls and messages between himself and Edwin M. while the truck was on the road. Corona's phone also contained sent images of currency, a black duffel bag, a panel on the side of a truck matching the truck stopped by Kolbe, as well as a news article link discussing cocaine seized during a traffic stop. Corona sent the images of bulk currency and a duffel bag to Neto on the same day that Neto was supposed to pick up legitimate items related to Gonzalez Trucking from Rene Exxtreme.

ii. Testimony of David Noe

The Government called David Noe, a veteran law enforcement officer with extensive training and experience working with drug trafficking organizations, specifically Mexican cartels transporting cocaine. Without objection, Noe was designated as an expert in drug-trafficking organizations.

Noe testified that the price of cocaine increased because of the COVID-19 pandemic. According to Noe, one kilogram of cocaine was worth \$37,000 or more wholesale, but could be diluted with other substances such that what began as one kilogram of cocaine could be worth up to \$400,000 on the street. Noe opined that the cocaine seized in this case was intended for distribution, and that it had been wrapped in such a way as to conceal the odor and to avoid fingerprints.

Noe testified that Atlanta is a “hub city” for drug trafficking, meaning a location to which drugs are transported from the southwest border to be distributed to customers in the United States. He testified that Houston to Atlanta (through Mobile) is a roughly 800 mile and 11-to-12-hour drive and is a common drug trafficking route. Noe testified that Matamoros, Mexico, is across the border from Brownsville, Texas, and is a common location for cocaine to cross into the U.S. from Mexico.

Noe further testified that drug shipments often utilize tractor-trailers or “transportation-type vehicles” with “cover loads” to disguise the fact that they’re hauling contraband. Drugs are often stored in hidden compartments within the truck. Noe opined that the crate on Gonzalez’s truck was a cover load because transmission and engine parts are often used as cover loads and it would usually cost more to send them away for repairs than it would to buy new ones.

*⁵ Noe further testified that individuals hauling contraband tend to drive the speed limit, unlike most other motorists on the interstates, in an effort to avoid being pulled over and discovered. And when they do get pulled over, drug traffickers tend to be over-cooperative with the officer.

Noe testified that couriers, referred to as “mules,” often provide transportation, but typically are not involved in selling the drugs. Rather, couriers are typically people within the driving business who have a reason to go to the destination city. Couriers are typically paid in cash upon completion of their trip, and instead of making several hundred dollars for a trip from Houston to Atlanta, they could be paid \$10,000 or more for the trip.

Noe testified that couriers typically know that drugs are in the vehicle, and that “blind mules” are only seen through courier agencies (e.g., UPS or FedEx) delivering packages via unwitting delivery drivers. Noe explained that drug traffickers typically do not use unknowing or unaffiliated people to transport drugs because that increases the likelihood of getting caught and/or losing the drugs. Noe testified that he had never encountered drug traffickers using a truck driver as a blind mule during his thirty-plus years of experience.

According to Noe, while transporting drugs, couriers typically communicate with the drug trafficking organizations via telephone, and have increasingly moved to “coded and blocked” applications (such as WhatsApp) in an attempt to avoid detection. Noe opined that the calls and messages in this case were consistent with the communications of a drug trafficking group.

On cross-examination of Noe, in support of the defense theory that Gonzalez was an unwitting blind mule, defense counsel attempted to introduce what the parties refer to as the “blind mule letter”—a 2011 letter written by an Assistant U.S. Attorney in the Western District of Texas, which described an instance in which drug traffickers utilized individuals in their personal vehicles with access to commuter lanes to carry drugs³ into the United States by placing duffel bags into the vehicles’ trunks. The Government objected on hearsay grounds, and the district court ruled: “I don’t think right now you can introduce [the letter itself] because I don’t think you can do that extrinsic on cross... I’ll let you ask him questions about it. I’m not going to let you offer it.”

Consistent with that ruling, the district court permitted defense counsel to show the letter to Noe and to question him about it. Noe ultimately admitted that it was possible that drug traffickers could use individual drivers who were not commercial package carriers as blind mules. The district court did not permit defense counsel to admit the letter into evidence or publish it to the jury, and the district court also prohibited references to the letter in closing arguments.

2. Defendant's Motion for Judgment of Acquittal

At the conclusion of the Government’s case, Gonzalez moved for a judgment of acquittal, arguing that the Government failed to establish Gonzalez’s knowledge of the drugs that were hidden in the truck and that mere presence of the drugs in the truck Gonzalez was driving was not sufficient for a conviction. The district court denied the motion, reasoning

that the testimony of Kolbe was alone sufficient to sustain a guilty verdict and that the messages on Gonzalez's phone and the totality of the circumstances combined with Kolbe's testimony provide sufficient evidence for a reasonable jury to convict Gonzalez.

3. Defendant's Case

***6** The defense called two witnesses, Emilia Fuentes and Jose Pena. Fuentes testified that Gonzalez formerly worked for her husband, where he was honest, responsible, and friendly, and that she helped him set up his trucking business and file his taxes. Pena testified that he used to work with Gonzalez, that he knew Gonzalez to have a reputation for honesty, integrity, and hard work, and that Gonzalez had never communicated with him about drugs. Pena also testified that he was an experienced truck driver, and on cross-examination, he testified that he would have been "in big trouble" if he was driving without an accurate bill of lading. Gonzalez did not testify.

4. Closing Arguments

In closing arguments, the Government argued that the evidence—including Gonzalez's evasive driving, nervous behavior, inconsistent statements, inaccurate or missing paperwork, an illogical load, an unusual roadside inspection, distancing himself from the truck while it was searched, the large quantity of cocaine found in the truck, the lack of surprise when the cocaine was found and he was arrested, and the communications found on his cell phone—showed that Gonzalez's knowledge and intent were that of a knowing drug courier. The defense played a portion of the dash cam video of the traffic stop and argued that driving alone was not enough to convict Gonzalez and that he was merely an unknowing blind mule set up by Corona and their mutual contacts to help them by driving their truck to Atlanta.

5. Jury Instructions

The district court instructed the jury that "[t]he defendant can be found guilty of [possession with intent to distribute] only if all of the following facts are proven beyond a reasonable doubt: first, that the defendant knowingly possessed cocaine and, secondly, that the defendant intended to distribute the cocaine."

The court instructed the jury on the different types of possession (actual, constructive, sole, and joint), and with respect to "joint possession," the court stated that: "Joint

possession of a thing occurs if two or more people share possession of it. So if my wife and I are driving in my car, we both are in joint possession of the car." The second sentence was not a part of the written jury instructions agreed upon by the parties, and it followed a series of other examples involving a car and car keys that the district court provided with the instructions on the other types of possession.

The district court also instructed the jury that it "must find beyond a reasonable doubt the defendant was a willful participant and not merely a knowing spectator" and that the jury "may find that a defendant knew about the possession of a controlled substance if you determine beyond a reasonable doubt that the defendant actually knew about the controlled substance or had every reason to know but deliberately closed their eyes." And the district court "emphasize[d] that negligence, carelessness, or foolishness is not enough to prove that a defendant knew about the possession of a controlled substance."

Gonzalez did not object to the district court's "impromptu" joint possession example, nor did he ask for a curative supplemental instruction. In fact, after the district court finished instructing the jury and asked the attorneys for both sides (at side bar) whether they were "satisfied with the instructions," defense counsel responded in the affirmative.

6. Verdict

The jury found Gonzalez not guilty of Count One (conspiracy) and guilty of Count Two (possession with intent to distribute). The jury made a specific drug quantity finding as to Count Two that is not relevant to the issues on appeal.

D. Defendant's Post-Verdict Motion

***7** Gonzalez renewed his motion for judgment of acquittal or for a new trial on Count Two, arguing that there was insufficient evidence to support the guilty verdict. He also argued that introduction of communications from his cell phone was improper character evidence; that the district court's refusal to give a Rule 404(b) limiting instruction was error; that the joint possession jury instruction was erroneous because it misled the jury to believe if it found Gonzalez possessed the truck then he also possessed the drugs; and that district court's failure to admit the "blind mule" letter violated his right to a fair trial. The district court orally denied the motion, relying on its prior rulings on each of these issues, and further explaining:

I believe the jury concluded that Mr. Gonzalez-Gonzalez's involvement was on this occasion, and I believe that they saw him as being involved in this transaction and it had not been established to their satisfaction that he had involved himself in other transactions. And so I find what they ruled was consistent. True, they could have said his involvement, his knowing involvement with his codefendant, would be a basis to establish the conspiracy. But laypeople sometimes miss the finer points of law.

E. Sentencing and Appeal

The district court sentenced Gonzalez to 121 months' imprisonment, which was the low end of the guideline range and one month above the mandatory minimum. After the district court entered judgment, Gonzalez timely filed his notice of appeal.

II. STANDARDS OF REVIEW

We review the district court's evidentiary rulings under the deferential abuse of discretion standard. *See United States v. Maurya*, 25 F.4th 829, 838 (11th Cir. 2022). We review unpreserved claims of error in the district court's jury instructions for plain error. *See United States v. Merrill*, 513 F.3d 1293, 1305 (11th Cir. 2008) *abrogated on other grounds by Ruan v. United States*, 142 S. Ct. 2370 (2022). We review the sufficiency of the evidence and the denial of a motion for judgment of acquittal *de novo*. *See Maurya*, 25 F.4th at 841.

III. ANALYSIS

We will begin our analysis with Gonzalez's challenges to the district court's evidentiary rulings because the resolution of those issues may impact (or moot) his primary issue on appeal —the sufficiency of the evidence. Next, we will consider Gonzalez's challenge to the joint possession jury instruction. Then, we will consider Gonzalez's argument that the evidence is insufficient to support his conviction. Finally, we will consider Gonzalez's claim of cumulative error.

A. Evidentiary Rulings

Gonzalez challenges two evidentiary rulings: the exclusion of the blind mule letter and the admission of certain evidence from his cell phone. Each will be discussed in turn, after a

brief summary of the applicable abuse of discretion standard of review.

The abuse of discretion standard affords "considerable leeway" to the district court in making evidentiary rulings, and we will only reverse a district court's evidentiary ruling when the ruling is "manifestly erroneous." *See United States v. Barton*, 909 F.3d 1323, 1330 (11th Cir. 2018). Thus, regardless of whether we would have made a different decision in the first instance, "the abuse of discretion standard allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (cleaned up). Put differently, we "must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." *Barton*, 909 F.3d at 1330 (quoting *Frazier*, 387 F.3d at 1259). "However, basing an evidentiary ruling on an erroneous view of the law constitutes an abuse of discretion per se." *United States v. Henderson*, 409 F.3d 1293, 1297 (11th Cir. 2005).

*8 Further, we may affirm on any ground that finds support in the record and the law, *United States v. Campbell*, 26 F.4th 860, 879 (11th Cir. 2022) (en banc), and we will not reverse a decision of the district court if an error committed below was harmless, *see Barton*, 909 F.3d at 1337. In other words, we will only require a new trial if the district court's decision caused "substantial prejudice" to the affected party, and we will not reverse if the error did not have a substantial effect on the verdict. *See Peat, Inc. v. Vanguard Rsch., Inc.*, 378 F.3d 1154, 1162 (11th Cir. 2004).

1. Blind mule letter

Gonzalez contends that the district court abused its discretion by excluding the "blind mule" letter, arguing that the letter was self-authenticating, that it was proper rebuttal evidence which directly addressed the defense's theory of the case, and that it was relevant, probative, and admissible under the Federal Rules of Evidence. Gonzalez further argues that exclusion of the letter impaired his constitutional right to present a complete defense.

We find no abuse of discretion in the district court's decision to exclude the blind mule letter for two reasons.

First, the letter was not properly authenticated. *Federal Rule of Evidence 901* requires that the proponent of an item of evidence "produce evidence sufficient to support a finding that the item is what the proponent claims it is." *Fed. R. Evid.*

[901\(a\)](#). For instance, a witness with firsthand knowledge can authenticate an item. [Fed. R. Evid. 901\(b\)\(1\)](#). Other documents are “self-authenticating,” so they do not require extrinsic evidence of **authenticity** to be admitted. [Fed. R. Evid. 902](#). For example, documents that have (a) a seal “purporting to be” that of a governmental unit and (b) a signature attesting to the seal are self-authenticating. [Fed. R. Evid. 902\(1\)\(A\)–\(B\)](#).

Here, Noe did not prepare the letter and was unfamiliar with it, so he was not in a position to authenticate the letter. *See Fed. R. Evid. 901(b)(1)*. Moreover, the letter was not self-authenticating simply because it was on letterhead bearing an image of the logo of the U.S. Attorney for the Western District of Texas since the letterhead is not a “seal” within the meaning of Rule 902(1), *cf. United States v. Hampton*, 464 F.3d 687, 689 (7th Cir. 2006) (“[S]eals are used to attest the **authenticity** of the document on which the seal is stamped, and no seal was stamped on the copies. The copies were copies of sealed documents rather than sealed documents themselves. The rationale of Rule 902(1) ... is that a seal is difficult to forge. But that is not true of a copy of a seal.”)⁴ and the seal was not attested to in the letter or otherwise certified by a custodian of records, *cf. United States v. Weiland*, 420 F.3d 1062, 1073 (9th Cir. 2005) (“[T]he records were certified as correct by Greene, who also stated that he was the legal custodian of the records and that he had compared the certified copies to their originals.”).

*⁹ Second, as the district court ruled, a party may not introduce extrinsic evidence on a collateral matter when attempting to impeach a witness. *See United States v. Adams*, 799 F.2d 665, 671 (11th Cir. 1986); *United States v. Russell*, 717 F.2d 518, 520 (11th Cir. 1983). The letter was collateral because it went to the issue of whether drug cartels had used blind mules to smuggle marijuana across the United States-Mexican border. Noe said he was unaware of drug cartels using blind mules; the letter said drug cartels had used blind mules (at least as to marijuana-smuggling over the border). But that issue is collateral to Gonzalez’s defense—whether Gonzalez knew that there was *cocaine* in the truck on his *intra-United States* trip. Thus, although the letter was relevant to Gonzalez’s defense insofar as it impeached Noe’s testimony that drug cartels didn’t use blind mules, the district court did not abuse its discretion by refusing to admit the letter as evidence because the circumstances described in the letter were considerably different from the circumstances of this case.

Moreover, even if the district court had abused its discretion by excluding the letter, the error would have been harmless because the district court allowed defense counsel to impeach Noe by making the point through cross-examination that blind mules may occur in more circumstances than commercial package carriers. Specifically, defense counsel asked Noe, “So having read the letter, would you now agree that there are instances where the cartel may use unwitting mules,” and Noe responded, “Again, it is possible that they may use it. Based on reading this letter it is based on somebody else’s opinion. I don’t have any further information about that opinion.” And Noe agreed (in defense counsel’s words) that there “must be some reason for writing [the letter]” because (in Noe’s words) “I would believe there is a possibility that they had credible information that this happened. It’s a 2011 letter.”

Admitting the letter itself into evidence would have had little or no further probative value beyond the facts that were elicited on cross-examination of Noe. Therefore, exclusion of the blind mule letter was harmless and did not deprive Gonzalez of the opportunity to present his defense.

2. Evidence from Gonzalez’s cell phone

Gonzalez argues that the district court abused its discretion when it admitted certain text messages from his cell phone that were sent or received beginning in 2019 and continuing until days before the traffic stop. We agree in part but find that the error was harmless.

i. Text messages between Gonzalez and Tuckan

Of the dozens of text messages from Gonzalez’s phone that the district court admitted at trial, the only ones specifically challenged on appeal are the November 2020 messages between Gonzalez and Tuckan. In that exchange, which occurred two months before the traffic stop and during period of the conspiracy charged in Count One of the Indictment, Gonzalez and Tuckan discuss “kilos,” which Gonzalez stated were “very expensive.” Tuckan replied that the increase in price was due to the pandemic, and Gonzalez said, “I know my dude they are at 37 38.” Gonzalez argues that the Government did not introduce any evidence tying this conversation to the charged offenses, and that these communications do not show Gonzalez’s knowledge or intent.

We disagree. It is common knowledge (and Kolbe and Noe confirmed) that trafficking quantities of cocaine are typically

measured in kilograms, or “kilos,” and that cocaine is often trafficked in bricks weighing roughly that amount. Noe further testified that the wholesale price of cocaine in the Atlanta area had risen to more than \$37,000 per kilogram during the COVID-19 pandemic. Noe also opined that the messages on Gonzalez’s phone concerned drugs and drug trafficking. Thus, these messages are evidence of Gonzalez’s familiarity with trafficking quantities of cocaine and the price of a kilogram of cocaine in the Atlanta area, which is relevant to his knowledge in this case. See *United States v. Colston*, 4 F.4th 1179, 1191 (11th Cir. 2021) (text messages discussing prior sale of prescription pills “rebutted the suggestion that [the defendant] was not familiar with drug trafficking” and “could have allowed a jury to infer knowledge”); *United States v. Contreras*, 602 F.2d 1237, 1240 (5th Cir. 1979)⁵ (evidence of the defendant’s prior cocaine use “demonstrated [his] familiarity with illicit drugs and was therefore relevant on the question of knowledge”).

*¹⁰ Therefore, the district court did not abuse its discretion in admitting the November 2020 text message exchange between Gonzalez and Tuckan.

ii. Memes found on Gonzalez’s cell phone.

Gonzalez also contends that the district court abused its discretion in admitting memes that he sent or received from his cell phone. The challenged images depicted or referenced cocaine (except for one that referenced marijuana), most often intending to be humorous. The images were found in Gonzalez’s conversations with La Mula, Rojas, and Tuckan, not Corona or Neto. The images were sent or received by Gonzalez as far back as March 2019 (well before the timeframe of the charged conspiracy), and the most recent one was sent or received in January 2021, days before the traffic stop. The district court ruled that these images were not inadmissible character evidence, but rather were part of the res gestae of the case because they were inextricably intertwined with the charged offenses.

Evidence is admissible as res gestae when “it is (1) part of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense.” *United States v. Nerey*, 877 F.3d 956, 974 (11th Cir. 2017). Here, most of the challenged memes were sent or received months or years before the charged offenses and none were directly tied to the charged offenses

or inextricably intertwined with evidence of the charged offenses. Thus, the district court erred in admitting the memes as res gestae.

However, under the circumstances, we find that the admission of the memes was harmless.

“[E]rroneous admission of evidence does not warrant reversal if the ... error had no substantial influence on the outcome and sufficient evidence uninfected by error supports the verdict.” *United States v. Fortenberry*, 971 F.2d 717, 722 (11th Cir. 1992). We reverse “only if [the error] resulted ‘in actual prejudice because it had substantial and injurious effect or influence in determining the jury’s verdict.’ ” *United States v. Guzman*, 167 F.3d 1350, 1353 (11th Cir. 1999) (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)).

We have previously held that a district court’s erroneous admission of evidence was harmless when the evidence’s lack of probative value diminished the potential for undue prejudice. See *United States v. Sanders*, 668 F.3d 1298, 1315 (11th Cir. 2012) (“[T]he paucity of probative value creates an additional problem for Sanders—the remoteness and dissimilarity of the prior conviction not only decreases the probative value to show intent but also diminishes the potential for unfair prejudice.”). Here, the memes had limited probative value, given their remoteness to the charged offenses and the fact that Gonzalez had no part in creating them and merely shared images that were readily available online. Indeed, Gonzalez’s counsel emphasized these shortcomings by vigorously challenging the significance of the memes on cross-examination and during closing argument.

We have also held that the erroneous admission of evidence was harmless when it was mentioned to the jury only in passing and it described actions that were “trivial” in comparison to the other conduct in the case, see *United States v. Lehder-Rivas*, 955 F.2d 1510, 1518 (11th Cir. 1992), and when substantial or overwhelming evidence of guilt remained even disregarding the erroneous evidence, see *United States v. Phaknikone*, 605 F.3d 1099, 1109–11 (11th Cir. 2010); *United States v. Chavez*, 204 F.3d 1305, 1317 (11th Cir. 2000).

*¹¹ Here, the Government did not emphasize the memes over the other evidence in this case: discussion of the memes on direct examination totals only a few pages of the trial transcript, and the Government mentioned the memes only briefly in its closing argument.⁶ Moreover, sharing memes

is a ubiquitous activity in today's world and Gonzalez's sharing of drug-related memes is trivial when compared to the conduct charged in the case—trafficking a significant quantity of cocaine from Houston to Atlanta—and the substantial other evidence of Gonzalez's consciousness of guilt that is summarized below.

At bottom, there was substantial evidence unrelated to the memes from which a reasonable jury could find Gonzalez's knowledge or consciousness of guilt. Indeed, as the district court pointed out, the jury very well could have convicted Gonzalez based on Kolbe's testimony alone. Therefore, any error committed by the district court in admitting the memes from Gonzalez's cell phone was harmless.

We did not overlook Gonzalez's suggestion that the district court's failure to give a Rule 404(b) limiting instruction concerning the cell phone evidence was reversible error. However, putting aside the fact that Gonzalez did not develop this argument in his initial brief and only mentioned it in passing in his reply brief,⁷ we have held that refusal to give a requested Rule 404(b) limiting instruction warrants reversal only when: "(1) the requested instruction correctly stated the law; (2) the actual charge to the jury did not substantially cover the proposed instruction; and (3) the failure to give the instruction substantially impaired the defendant's ability to present an effective defense." *United States v. Fulford*, 267 F.3d 1241, 1245 (11th Cir. 2001). Here, Gonzalez was not precluded from presenting an effective defense because, as discussed above, his counsel attacked the significance of the memes on cross-examination and in closing arguments, and the Government even conceded in its own closing and in rebuttal that the memes were introduced simply as evidence of Gonzalez's knowledge and intent.

For these reasons, we conclude that any error in admitting evidence from Gonzalez's phone is not a basis for reversal of his conviction.

B. Joint possession jury instruction

Gonzalez challenges the district court's instruction to the jury on joint possession. He conceded (in his brief and at oral argument) that he must show plain error because he did not object to the instruction before the jury retired to deliberate. See *Merrill*, 513 F.3d at 1305.

Under the plain error standard, a defendant must show "an error that is plain; that affects substantial rights; and that 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Holt*, 777 F.3d 1234, 1261 (11th Cir. 2015) (quoting *United States v. Madden*, 733 F.3d 1314, 1322 (11th Cir. 2013)). An error is plain when it is clear and obvious under current law. *Madden*, 733 F.3d at 1322 (quoting *United States v. Dortch*, 696 F.3d 1104, 1112 (11th Cir. 2012)). An error affects substantial rights when it is "prejudicial" (i.e., when it "affect[s] the outcome of the ... proceedings"). *Id.* at 1323 (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). Whether an error affects the fairness, integrity, or public reputation of judicial proceedings is "a case-specific and fact-intensive inquiry," which is met when, for example, the error risks unnecessary deprivation of liberty. See *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908–09 (2018) (internal quotation marks omitted).

*12 Here, immediately following the pattern instruction for joint possession, the district court told the jury: "So if my wife and I are driving in my car, we both are in joint possession of the car." Gonzalez contends that this "impromptu example" "improperly focused the jury's attention on possession of the truck, rather than the drugs, which is contrary to the law of this circuit." According to Gonzalez, the district court's instructions "misle[d] the jury to believe if it found [Gonzalez] was in possession of the truck, then he also possessed the drugs hidden in the truck."

In *United States v. Cochran*, relied on by Gonzalez, we expressed our disapproval of a constructive possession jury instruction "stat[ing] that control over the *premises*—rather than control over the contraband itself—is sufficient to convict." 683 F.3d 1314, 1320 (11th Cir. 2012) (emphasis in original). In addition to the pattern language, the challenged instruction in *Cochran* stated that "[c]onstructive possession of a thing also occurs if a person exercises ownership, dominion, or control over a thing or premises concealing the thing." *Id.* (emphasis added).

However, when applying the plain error standard to a challenged jury instruction, we have held that

we do not consider the asserted errors in isolation. Instead we consider the totality of the charge as a whole and determine whether the potential harm caused by the jury charge has been neutralized by the other instructions given at the trial such that reasonable jurors would not have been misled by the error. ... If another instruction the court gave

neutralized the error, then it was not an error at all, let alone a reversible plain error.

United States v. Iriele, 977 F.3d 1155, 1178 & n.12 (11th Cir. 2020) (cleaned up). The panel in *Cochran* reached that same conclusion, holding that despite the erroneous instruction, when the instructions were read as a whole, they laid out the proper elements of the offense, and thus, there was no doubt that the jury was properly guided. See 683 F.3d at 1320–21.

Here, the district court gave the challenged instruction as part of a series of examples illustrating different types of possession with reference to a car and car keys. However, the district court also instructed the jury that the Government had to “prove[] beyond a reasonable doubt ... that the defendant knowingly possessed cocaine”; that he “was a willful participant and not merely a knowing spectator”; and that he “actually knew about the controlled substance or had every reason to know but deliberately closed [his] eyes.”

As in *Cochran*, we find that the instructions in this case, when read as a whole, laid out the correct elements of the offense and properly instructed the jury on the issues of possession and knowledge. Thus, even if the district court’s joint possession car example was imperfect and ill-advised,⁸ it was clarified and neutralized by the correct instructions, which provided the jurors with the requisite elements of the crime, including possession of cocaine and knowledge (or deliberate avoidance) of the fact that he possessed cocaine, which ensured that a finding that Gonzalez possessed the truck would not itself result in a conviction. See *Iriele*, 977 F.3d at 1182; *United States v. Whyte*, 928 F.3d 1317, 1332–33 (11th Cir. 2019); *Cochran*, 683 F.3d at 1320–21. Accordingly, the district court did not commit plain error when instructing the jury on the issue of joint possession.

C. Sufficiency of the evidence

***13** Gonzalez contends that the evidence was insufficient to sustain his conviction. We disagree.

When reviewing for sufficiency of evidence, we must “view the evidence in the light most favorable to the verdict and draw all reasonable inferences and make all credibility choices in favor of the verdict.” *United States v. Howard*, 28 F.4th 180, 187 (11th Cir. 2022). “A guilty verdict cannot be overturned if any reasonable construction of the evidence would have allowed the jury to find the defendant guilty beyond a reasonable doubt.” *Iriele*, 977 F.3d at 1168 (cleaned up). Moreover, “because a jury can freely choose among

reasonable constructions of the evidence, ‘it is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt.’” *Howard*, 28 F.4th at 188 (quoting *Iriele*, 977 F.3d at 1168). We must view the evidence in its totality, not each piece in isolation. See *United States v. Prince*, 883 F.2d 953, 958 (11th Cir. 1989); *United States v. Meester*, 762 F.2d 867, 881 (11th Cir. 1985). Moreover, the test is the same regardless of whether the evidence is direct or circumstantial, and neither category of evidence receives special weight. *United States v. Isnadin*, 742 F.3d 1278, 1303 (11th Cir. 2014).

To convict Gonzalez for possession with intent to distribute cocaine, the Government had to prove “knowing possession” of and “an intent to distribute” the cocaine. *United States v. Cruickshank*, 837 F.3d 1182, 1189 (11th Cir. 2016). “[A] defendant may constructively possess a controlled substance if he exercises some measure of control over the contraband, either exclusively or in association with others” and “[t]he defendant’s intent to distribute may be inferred from a variety of factors, including whether the government seized a large quantity of controlled substances.” *Id.* In situations where drugs are hidden in a vehicle, this Court has required that “in addition to mere presence in the vehicle, or control over it, there be circumstances evidencing a consciousness of guilt on the part of the defendant.” *United States v. Stanley*, 24 F.3d 1314, 1320 (11th Cir. 1994) (quoting *United States v. Gonzalez-Lira*, 936 F.2d 184, 192 (5th Cir. 1991)).

Gonzalez argues that there is not sufficient evidence to sustain the jury’s guilty verdict because there is no direct evidence of his knowledge of the cocaine in the truck and that the circumstantial evidence of his consciousness of guilt is insufficient. The Government responds that the jury reasonably found that Gonzalez knowingly possessed the cocaine in the truck’s storage box. We agree with the Government.

The evidence presented at trial shows that Gonzalez drove a type of truck that was not typically used on long-haul interstate routes for hours across multiple states along a common drug trafficking route; that Gonzalez engaged in suspicious driving after passing a law enforcement officer; that Gonzalez appeared unusually nervous during the traffic stop, even after being assured he would not receive a ticket; that, unlike the experienced truck driver that he claimed to be, Gonzalez performed an unorthodox and perfunctory “safety inspection” of the truck, including noticeably focusing on, but not opening, the cargo box that would typically

contain safety equipment and that turned out to contain a duffel bag full of cocaine; that the engine parts Gonzalez was hauling was likely a “cover load” because they would cost more to transport cross-country for repair than it would cost to buy new ones; that Gonzalez had limited knowledge of what he was hauling, produced irregular documentation for the load (including an incorrect bill of lading which listed a produce stand as the destination), and lacked proper paperwork for the truck; that Gonzalez did not recognize the names on most of the paperwork he presented, knew little to nothing about Pure Power Logistics (the company named on the side of the truck), and lacked knowledge of other features of his trip; that Gonzalez made inconsistent statements, including a shifting account of Corona's role; that Gonzalez and Corona both claimed that they lacked a key to open the storage box where the cocaine was found; that Gonzalez tried to distance himself from the search of the truck by going to relieve himself in the trees when the officers began attempting to open the storage box; that Gonzalez was not surprised when the cocaine was found and he was arrested; that the storage box contained sixteen bricks of cocaine, each worth approximately \$37,000 wholesale and up to \$400,000 on the street once diluted; that drug traffickers do not typically use non-commercial-package-carrier blind mules, nor do they entrust such large high-value quantities of drugs to someone unaffiliated and unknowing, because that would risk losing valuable drugs; that Gonzalez's phone contained communications about drugs interspersed with communications about trucking and his trucking business, and some of the people with whom Gonzalez communicated were located in a known cocaine trafficking hub in Mexico; that Gonzalez expressed knowledge of the wholesale value of cocaine; and that Neto, Gonzalez and Corona's mutual connection, traveled to Matamoros to pick up items associated with Gonzalez's trucking business on the same day that Corona sent Neto photographs of bulk cash.

*14 This evidence, construed in the light most favorable to the jury's verdict, is more than sufficient to meet each of the elements of possession with intent to distribute cocaine, including Gonzalez's knowing possession and consciousness of guilt. Indeed, we have found similar evidence sufficient to uphold a conviction under analogous circumstances. *See, e.g., United States v. Almanzar, 634 F.3d 1214, 1222–23 (11th Cir. 2011)* (evidence was sufficient to find knowledge via “consciousness of guilt” when defendant was openly unnerved during the traffic stop, provided an implausible story about retrieving the truck from a boyfriend whose address she did not know, lied about who gave her the truck,

provided phony proof of ownership, and was in control of the trip and dominated the conversation with the officer); *United States v. Leonard, 138 F.3d 906, 909 (11th Cir. 1998)* (government brought sufficient evidence to meet the “consciousness of guilt” prong with evidence of inconsistent stories and lack of surprise when the drugs were found in the car); *United States v. Quilca-Carpio, 118 F.3d 719, 721–22 (11th Cir. 1997)* (“[A] reasonable jury could conclude beyond a reasonable doubt that a person who is caught with luggage containing a significant amount of drugs [in a hidden compartment] knew of the presence of the drugs [and] could infer from the quantity of drugs seized that a ‘prudent smuggler’ is not likely to entrust such valuable cargo to an innocent person without that person's knowledge.”); *United States v. Bustos-Guzman, 685 F.2d 1278, 1280–81 (11th Cir. 1982)* (defendants had been onboard what was ostensibly a fishing vessel for days, but the boat “contained no ice, tackle, refrigeration equipment, nets, or bait,” the paperwork and license for the boat did not match up, and marijuana was found locked up below deck).

In sum, because the evidence was sufficient to sustain Gonzalez's conviction, the district court correctly denied Gonzalez's motions for judgment of acquittal.

D. Cumulative error

Gonzalez argues that the cumulative effect of the errors he alleges deprived him of a fair trial. However, having found only one harmless error in admitting the memes on Gonzalez's phone, we find no cumulative error. *See United States v. Walden, 363 F.3d 1103, 1110 (11th Cir. 2004)* (“[B]ecause no individual errors under-lying the district court's [challenging ruling] have been demonstrated, no cumulative error can exist.”); *United States v. Allen, 269 F.3d 842, 847 (7th Cir. 2001)* (“If there are no errors or a single error, there can be no cumulative error.”) (cited in *Walden*).

IV. CONCLUSION

For the above reasons, we affirm Gonzalez's conviction for possession with intent to distribute cocaine.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr. 2023 WL 2301444

Footnotes

- * Honorable T. Kent Wetherell, II, United States District Judge for the Northern District of Florida, sitting by designation.
- 1 This timeframe corresponded to the temporal scope of the conspiracy, as alleged in Count One of the Indictment.
- 2 A “meme” is “an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media.” Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/meme>.
- 3 The letter specifically pertained to one instance in which drug traffickers had placed a bag containing marijuana, not cocaine, in an unknowing individual’s vehicle.
- 4 Even though the Seventh Circuit in *Hampton* ultimately affirmed the admission of the documents at issue in that case under *Fed. R. Evid. 1003* (permitting duplicates), it did so because the original documents were stamped with a seal and employees of the banks at issue “testified that they recognized the copies shown them by the prosecutor as copies of the certificates possessed by or posted in their banks.” *464 F.3d at 689–90*. Here, there is no indication that the original blind mule letter was stamped with a seal attesting to its **authenticity**, and Noe (who did not write the letter, had no knowledge of the case to which the letter referred, and had never seen the letter before) was not in the same position as the bank employees in *Hampton* to be able to testify knowledgeably as to the letter’s **authenticity**.
- 5 Decisions of the former Fifth Circuit issued on or before September 30, 1981, are binding precedent in the Eleventh Circuit. See *Bonner v. City of Prichard*, *661 F.2d 1206, 1209* (11th Cir. 1981) (en banc).
- 6 In fact, in rebuttal, the Government explained to the jury that “[Gonzalez] is not in that chair because he sent memes from his phone,” reiterated Gonzalez’s First Amendment right to send such memes, and again clarified to the jury that the memes were introduced simply as evidence of his knowledge and intent.
- 7 See *United States v. Woods*, *684 F.3d 1045, 1064 n.23* (11th Cir. 2012) (explaining that a party abandons an issue “by failing to develop any argument on it in his opening brief”); *United States v. Coy*, *19 F.3d 629, 632 n.7* (11th Cir. 1994) (“Arguments raised for the first time in a reply brief are not properly before a reviewing court.”).
- 8 Although we understand that the district court was attempting to provide clarification of the somewhat esoteric concept of possession, it would have been better practice for the district court to stick to the jury instructions agreed to by the parties and avoid impromptu hypotheticals that might create an issue for appeal that would otherwise not exist.

Plesha v. Wolf

United States District Court, D. Puerto Rico. | April 30, 2021 | Not Reported in Fed. Supp. | 2021 WL 1731693

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Outline

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v.

Chad F. WOLF, Sec'y of U.S. Dep't
of Homeland Sec., Defendant.

CIVIL NO. 20-1012 (GAG)

|

Signed 04/30/2021

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OPINION AND ORDER

GUSTAVO A. GELPI, United States District Judge

*1 Miodrag Plesha (“Mr. Plesha” or “Plaintiff”) filed the above-captioned complaint against Chad F. Wolf, former¹ Secretary of the U.S. Department of Homeland Security (“DHS” or “Defendant”), alleging discrimination based on his national origin, gender, and age as well as retaliation in violation of Title VII of the Civil Rights Act of 1964, [42 U.S.C. § 2000e et seq.](#) (“Title VII”), the Age Discrimination in Employment Act of 1963, [29 U.S.C. § 621 et seq.](#) (“ADEA”), and the Notification and Federal Employee Anti-Discrimination and Retaliation Act of 2002, [5 U.S.C. § 2301 et seq.](#) (“No FEAR Act”). (Docket No. 1). Plaintiff seeks compensatory damages and reinstatement into the Joint Terrorism Task Force, among other remedies. *Id.*

Presently before the Court is DHS' motion to dismiss the instant complaint for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to [Fed. R. Civ. P. 12\(b\)\(1\), \(6\).](#) (Docket No. 20). Plaintiff opposed. (Docket No. 28). For the ensuing reasons, the Court **DENIES** DHS's motion to dismiss at Docket No. 20.

I. Relevant Factual and Procedural Background

Mr. Plesha, a 51-year old male, who is of Croatian nationality, began working for DHS's Immigration and Customs Enforcement (“ICE”) agency in January 2009 as a deportation officer assigned to ICE's Enforcement and Removal Operations (“ERO”). (Docket No. 1 ¶¶ 5, 9-10).

Around mid-September 2018, Mr. Plesha applied to the position of “temporary long-term detail” with the Federal Bureau of Investigations (“FBI”)’s Joint Terrorism Task Force (“JTTF”) whereby Mr. Plesha would serve a 4-year term as ICE’s liaison. *Id.* ¶¶ 12-13. Mr. Plesha interviewed for the position with Homeland Security Investigations (“HSI”) Group Supervisor (“HSI GS”) Shea Warner (“Warner”) who informed him that if he were to be selected, he would be under her immediate supervision and would also be required to work for HSI’s Human Smuggling Group (“HSI HSG”) in addition to the JTTF detail. *Id.* ¶ 14. In November of that same year, Mr. Plesha received an email informing him that he had been selected for the position by Jim Martin—Acting Field Office Director for the JTTF in San Juan, P.R. *Id.* ¶¶ 12-15.

On November 14, 2018, Mr. Plesha requested the office space that had been assigned to previous ICE liaisons with the JTTF and Assistant Field Office Director (“AFOD”) Carmen Figueroa (“Figueroa”) agreed to provide the office as soon as it was vacated. *Id.* ¶¶ 16, 18. About a week later, Mr. Plesha reached out to AFOD Figueroa to inquire about the vacant JTTF office space and inform her that he would be moving in, but she denied the move without an explanation. *Id.* ¶ 18.

On November 28, 2018, HSI GS Warner personally instructed Mr. Plesha during a meeting that she would be his immediate supervisor as part of the HSI HSG and added to the HSI HSG duty call roster. *Id.* ¶ 20. In addition, HSI GS Warner instructed him to immediately move into the HSI designated cubicle and join the HSI [WhatsApp](#) group-chat. *Id.* Mr. Plesha objected stating that the aforementioned instructions were not part of the job description for the JTTF detail; nevertheless, he was willing to volunteer for HSI HSG tasks. (Docket No. 1 ¶¶ 21, 23). Moreover, Mr. Plesha also told her that he needed to clarify this misunderstanding with his ERO chain of command, for which HSI GS Warner responded, “she had discussed it already, and that it was clear and defined, and that [Mr.] Plesha should consider resigning the JTTF detail if not in agreement.” *Id.* ¶ 21. HSI GS Warner also informed Mr. Plesha that if he were to continue with the JTTF detail, then his spouse—a forensic auditor in HSI GS Warner’s office —would be moved and reassigned from said office. *Id.* ¶ 22.

Mr. Plesha was also told to step down from his position as Union Steward² because he allegedly could not be part of a bargaining unit employee while on the JTTF detail. *Id.* ¶ 23. Lastly, HSI GS Warner presented to Mr. Plesha an interagency agreement, which had never before been mentioned, stating that HSI has oversight over ERO officers assigned to task forces. *Id.*

*2 On December 17, 2018, Mr. Plesha reached a mutual agreement with AFOD Figueroa and Union representatives resolving the issues concerning his JTTF detail. *Id.* ¶¶ 26-28. Said agreement was reached after two meetings that were part of the collective bargaining agreement (“CBA”)-negotiated grievance procedure. *Id.* The agreement determined that Mr. Plesha would be assigned the office of ICE's liaison with the JTTF as well as a take-home vehicle and would not be formally assigned to HSI HSG. *Id.* ¶ 28.

Two days later, HSI Task Force Officer Capriccioni asked Mr. Plesha to assist in nighttime surveillance. *Id.* ¶ 30. After Mr. Plesha accepted, HSI GS Warner confronted him in front of the entire HSI HSG as to the nighttime surveillance assistance that he had accepted and prohibited him from getting involved in any HSI assignments until HSI management cleared the issue with ERO management. (Docket No. 1 ¶ 30). During the interaction, HSI GS Warner instructed HSI JTTF agent Israel Aledo to cancel the scheduled meeting with Mr. Plesha's soon-to-be FBI supervisor. *Id.* ¶ 31. Mr. Plesha asked HSI GS Warner whether AFOD Figueroa informed her of the aforementioned mutual agreement to which she responded that she did not care of any ERO agreements and that Mr. Plesha would soon be informed of HSI's decision on this matter. *Id.*

Later that afternoon on December 19, Mr. Plesha received an email from AFOD Gareth Ripa (“Ripa”) corroborating HSI GS Warner's decision, apologizing for making a mistake in the EROJTTF assignment, and requesting a “yes or no” answer on either declining the JTTF and returning to ERO or else resuming all duties with HSI HSG. *Id.* ¶ 32. The following day before Mr. Plesha responded to the email, he was removed from the HSI WhatsApp group-chat and had his access card privileges to the HSI premises revoked. *Id.* ¶ 33. Mr. Plesha has not had any further communications with HSI GS Warner since that interaction. *Id.*

The following day, AFOD Figueroa informed Mr. Plesha that HSI revoked his JTTF designation and that he would resume his previous duties. *Id.* ¶ 34. Mr. Plesha requested

an explanation as to whom made the decision contravening the assurances of the mutual agreement and Supervisory Detentions and Deportations Officer (“SDDO”) Ileana Aguilar stated, “I don't know ... the higher management, possibly [AFOD Figueroa].” *Id.* ¶¶ 35-36.

Notwithstanding these events, Mr. Plesha applied to two job openings for SDDO in St. Thomas, U.S.V.I., and in San Juan, P.R., respectively. *Id.* ¶¶ 52-53. Although he was listed as qualified and referred to the selecting officer for the St. Thomas SDDO job opening, Mr. Plesha was neither given an interview nor a reason why none was granted. *Id.* ¶ 52. Moreover, Mr. Plesha was not selected for the SDDO position in San Juan after interviewing with AFOD Figueroa. *Id.* ¶ 53. On April 2019, Mr. Plesha found out that two officers from Puerto Rico were instead promoted to the SDDO positions in San Juan. (Docket No. 1 ¶ 53).

In his complaint Mr. Plesha alleges he is the only foreign national employed with ICE in Puerto Rico and that his supervisors & managers are all female and younger than him. *Id.* ¶¶ 11, 44, 54. Mr. Plesha claims his coworkers call him “the Russian” and “the Ukrainian” in Spanish to associate him with communists and national socialists. *Id.* ¶ 44.

Defendant presently moves to dismiss all of Plaintiff's claims for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(1), (6). (Docket No. 20).

II. Motion to Dismiss for Lack of Subject-Matter Jurisdiction: 12(b)(1)

a. Standard of Review

*3 A defendant may move to dismiss an action for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). *Marrero v. Costco Wholesale Corp.*, 52 F. Supp. 3d 437, 439 (D.P.R. 2014). When considering a 12(b)(1) motion, the Court may consider all pleadings submitted by the parties. *Aversa v. U.S.*, 99 F.3d 1200, 1210 (1st Cir. 1996). The Court “is not restricted to the face of the pleadings but may consider extraneous materials, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction.” *Fernández Molinary v. Industrias La Famosa, Inc.*, 203 F. Supp. 2d 111, 114-15 (D.P.R. 2002) (citing *Land v. Dollar*, 330 U.S. 731, 735 (1947)). The pertinent inquiry is whether the challenged pleadings set forth allegations sufficient to

demonstrate that the subject matter jurisdiction of the Court is proper. Marrero, 52 F. Supp. 3d at 439; Casey v. Lifespan Corp., 62 F. Supp. 2d 471, 474 (D.R.I. 1999).

The burden of proof in a 12(b)(1) motion falls on the party asserting jurisdiction. Thomson v. Gaskill, 315 U.S. 442, 446 (1942). In reviewing the motion, the Court must construe the complaint liberally and the pleadings are to be taken as true and read in a light most favorable to the party opposing the motion. Murphy v. U.S., 45 F.3d 520, 522 (1st Cir. 1995); Brown v. Rhode Island, 160 F. Supp. 2d 233, 235 (D.R.I. 2001). Dismissal would be proper if the facts alleged reveal a jurisdictional defect not otherwise remediable. Sumitano Real Estate Sales (N.Y.) Inc. v. Quantum Dev. Corp., 434 F. Supp. 2d 93, 95 (D.P.R. 2006).

b. Discussion

Defendant argues that Plaintiff's invocation of the Union's CBA-negotiated grievance procedure precludes him from pursuing his claims in any other forum. (Docket No. 20 at 5-7). Defendant cites to 5 U.S.C. § 7121(d), which states: an aggrieved employee affected by a prohibited personnel practice under 5 U.S.C. § 2302(b)(1) (forbidding discrimination against employee based on national origin, gender, and age as well as retaliation) that also falls under the coverage of a CBA-negotiated grievance procedure may raise the matter under either a statutory or the CBA-negotiated procedure, but not both. An employee exercises his option to raise the matter under either the statutory or CBA-negotiated procedure when the employee either timely initiates an action under the applicable statutory procedure or timely files a grievance in writing and in accordance with the parties' CBA-negotiated procedure, whichever occurs first. 5 U.S.C. § 7121(d). The choice "between the statutory scheme or the negotiated grievance process is an irrevocable one." Romero-Pérez v. U.S. Dep't of Just., 780 F. Supp. 2d 162, 169 (D.P.R. 2011). Once the employee elects a procedure, then he or she must exhaust his or her claim in the chosen forum. See Stoll v. Principi, 449 F.3d 263, 265-66 (1st Cir. 2006).

Here, Plaintiff commenced the first step of the CBA-negotiated grievance procedure on November 21, 2018, when Mr. Plesha sent a written meeting request to AFOD Figueroa regarding his denial of the move into the vacant JTTF office space for ICE's liaisons. (Docket Nos. 1 ¶¶ 17-18, 26-28; 20-1; 28 ¶¶ 6-8, 19). On December 17, Mr. Plesha met with AFOD Figueroa and reached a mutual agreement with

ERO management through the CBA-negotiated grievance procedure determining that Mr. Plesha would be assigned the JTTF office as well as a take-home vehicle and would not be formally assigned HSI HSG tasks. (Docket No. 1 ¶¶ 26-28, 47). Then, on December 21, Plaintiff contacted EEO counselor Sabrina Noel regarding the discrimination and retaliation he endured when AFOD Figueroa, AFOD Ripa, and HSI GS Warner informed Mr. Plesha that HSI revoked his JTTF detail. (Docket No. 20-3 at 3). Subsequently, on January 14, 2019, Plaintiff filed the second step of the CBA-negotiated grievance procedure in connection with his revoked JTTF detail. (Docket Nos. 20-2; 28 ¶ 6). Afterwards, on April 5, 2019, Plaintiff filed the formal EEO complaint and raised Mr. Plesha's allegations of discrimination and retaliation in relation to the SDDO job openings in St. Thomas, U.S.V.I., and San Juan, P.R., for the first time. (Docket Nos. 20-3 at 4-20; 28 ¶¶ 18-19).

*4 Thus, Plaintiff first elected to resolve his JTTF claims through the CBA-negotiated grievance procedure by filing a written grievance on November 21, 2018, which happened before Mr. Plesha filed his formal EEO complaint on April 5, 2019.³ Plaintiff timely filed a written grievance in accordance with a CBA-negotiated procedure that permits resolving discrimination claims before initiating a statutory action. Consequently, Mr. Plesha must exhaust all administrative remedies established in the CBA-negotiated grievance procedure for the claims that stem out of Mr. Plesha's issues with the JTTF detail before they can be asserted in this Court.

Evidently so, when Plaintiff claimed multiple accounts of discrimination and retaliation originating from the JTTF detail in his EEO complaint, DHS/ICE Office of Diversity and Civil Rights ("DHS/ICE ODCR") dismissed them pursuant to 29 C.F.R. § 1614.107(a)(4) because Mr. Plesha first raised these claims in a CBA-negotiated grievance procedure. (Docket No. 20-4 at 3-5); see also 29 C.F.R. § 1614.301(a). Nevertheless, DHS/ICE ODCR accepted his failure-to-promote and retaliation claims that spawn from the SDDO job openings in St. Thomas, U.S.V.I., and San Juan, P.R. (Docket No. 20-4 at 5).

After waiting one hundred-and-eighty (180) days, Plaintiff filed the instant complaint and subsequently exhausted his administrative remedies. (Docket Nos. 1 ¶ 2, 58). As noted by DHS/ICE ODCR, Plaintiff has the right to exhaust this administrative remedy by filing a civil action in this Court any time after one hundred-and-eighty (180) days have elapsed

from the filing of the EEO complaint. (Docket No. 20-4 at 5-6).

Plaintiff's response clarifies that Plaintiff's discrimination and retaliation claims that stem out of the JTTF detail are not the subject of this action. (Docket No. 28 ¶¶ 6-8). Mr. Plesha is only advancing claims for failure-to-promote discrimination and retaliation claims that originate from the SSDO job applications, which emerged after the conclusion of the CBA-negotiated grievance procedure. *Id.* ¶¶ 6, 8, 12-13. "Plaintiff did mention his grievance procedure (which is different indeed of the discrimination and retaliation administrative charges [sic] filed in connection to the allegation submitted to this Court in this action) as a background information to establish that he indeed engaged in protected activity that warrants legal protection against retaliation." *Id.* ¶ 19.

Considering that Plaintiff's SSDO claims were raised for the first time in the EEO complaint, Mr. Plesha elected to proceed with the EEO administrative process instead of a CBA-negotiated grievance procedure and has properly exhausted his administrative remedy due to filing this legal action after one hundred-and-eighty (180) days. Consequently, Plaintiff's discrimination and retaliation claims arising out of the SSDO job openings may proceed in this forum.

III. Motion to Dismiss: 12(b)(6)

a. Standard of Review

When considering a motion to dismiss for failure to state a claim upon which relief can be granted under *Fed. R. Civ. P. 12(b)(6)*, the Court analyzes the complaint in a two-step process using the current context-based "plausibility" standard established by the Supreme Court. *See Schatz v. Republican State Leadership Comm'n*, 669 F.3d 50, 55 (1st Cir. 2012) (citing *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 12 (1st Cir. 2011), which discusses *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). First, the Court must "isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements." *Schatz*, 669 F.3d at 55. A complaint does not need detailed factual allegations, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Second, the Court must then "take the complaint's well-pled (i.e., non-conclusory, non-speculative) facts as true,

drawing all reasonable inferences in the pleader's favor, and see if they plausibly narrate a claim for relief." *Schatz*, 669 F.3d at 55. Plausible means something more than merely possible, and gauging a pleaded situation's plausibility is a context-specific job that compels the Court to draw on its judicial experience and common sense. *Id.* (citing *Iqbal*, 556 U.S. at 679). This "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of" the necessary element. *Twombly*, 550 U.S. at 556.

*5 "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' " *Iqbal*, 556 U.S. at 679 (quoting *Fed. R. Civ. P. 8(a)(2)*). If, however, the "factual content, so taken, 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,' the claim has facial plausibility." *Ocasio-Hernández*, 640 F.3d at 12 (quoting *Iqbal*, 556 U.S. at 678).

Moreover, at the motion to dismiss stage, "the Court may consider: [1] 'implications from documents' attached to or fairly 'incorporated into the complaint,' [2] 'facts' susceptible to 'judicial notice,' and [3] 'concessions' in plaintiff's 'response to the motion to dismiss.' " *Nieto-Vicenty v. Valledor*, 984 F. Supp. 2d 17, 20 (D.P.R. 2013) (quoting *Schatz*, 669 F.3d at 55-56). At the Court's discretion, if it chooses to consider materials outside the pleadings, a motion to dismiss should be converted to a motion for summary judgment under *Fed. R. Civ. P. 56*. *See Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 321 (1st Cir. 2008). Under certain "narrow exceptions," some extrinsic documents may be considered without converting a motion to dismiss into a motion for summary judgment. *Freeman v. Town of Hudson*, 714 F.3d 29, 36 (1st Cir. 2013) (citing *Waterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993)). These exceptions include "documents the **authenticity** of which are not disputed by the parties; ... official public records; ... documents central to plaintiffs' claim; [and] ... documents sufficiently referred to in the complaint." *Freeman*, 714 F.3d at 36 (quoting *Waterson*, 987 F.2d at 3).

b. Discussion

Defendant argues that the facts alleged do not support a claim for either discrimination or retaliation for both the JTTF and the SSDO job openings. (Docket No. 20 at 8-9). The Court notes that Plaintiff abandoned his age and sex discrimination

claims, limiting his action to his national origin discrimination and retaliation claims. (Docket No. 28 ¶ 49).

Title VII prohibits discrimination against “any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... national origin,” and provides a cause of action for discrimination as well as retaliation. [42 U.S.C. § 2000e-2\(a\)\(1\)](#); [Petitti v. New England Tel. & Tel. Co.](#), 909 F.2d 28, 31 (1st Cir. 1990). “National origin” refers to the country where a person was born or the country from which his or her ancestors came. [Abravanel v. Starwood Hotels and Resorts Worldwide, Inc.](#), 94 F. Supp. 3d 134, 142 (D.P.R. 2015) (citing [Espinoza v. Farah Mfg. Co., Inc.](#), 414 U.S. 86, 88 (1973)). The plaintiff carries the initial burden under the statute of establishing a prima facie case of national origin discrimination. [Feliciano de la Cruz v. El Conquistador Resort and Country Club](#), 218 F.3d 1, 5 (1st Cir. 2000) (quoting [McDonnell Douglas Corp. v. Green](#), 411 U.S. 792, 802 (1973)). The prima facie case serves an important function in the litigation: it eliminates the most common non-discriminatory reasons for the plaintiff's rejection. [Rivera v. DHL Solutions \(USA\)](#), Civil No. 07-1950 (GAG), 2009 WL 1974289, at *2 (D.P.R. July 8, 2009) (quoting [Texas Dep't of Cmty. Affairs v. Burdine](#), 450 U.S. 248, 254 (1981)).

i. Failure to promote/national origin discrimination

*6 Under the [McDonnell Douglas framework](#), 411 U.S. at 802, plaintiff's initial burden of adducing a prima facie case of unlawful discrimination is to show that: (1) plaintiff is a member of a protected class; (2) plaintiff's employer took an adverse employment action against him; (3) plaintiff was qualified for the employment he held; and (4) plaintiff's position remained open or was filled by a person whose qualifications were similar to his. See [Rodríguez-Cuervos v. Wal-Mart Stores, Inc.](#), 181 F.3d 15, 19 (1st Cir. 1999); [Abravanel](#), 94 F. Supp. 3d at 142. When a failure-to-promote claim constitutes the adverse employment action, the elements of the prima facie claim vary depending on the nature of the claim. [Rivera](#), 2009 WL 1974289, at *3. Therefore, in order to prove his failure-to-promote claim, plaintiff must establish: (1) that he is a member or a protected class who (2) was qualified for an open position for which he applied, but (3) was rejected (4) in favor of someone possessing similar qualifications. [Id.](#); see also [Rathbun v. Autozone, Inc.](#), 361 F.3d 62, 71 (1st Cir. 2004).

Defendant argues that Plaintiff cannot meet the third and fourth prongs of a prima facie failure-to-promote claim as it relates to the JTTF job opening. (Docket No. 20 at 8-9). Since the claims that develop out of Plaintiff's JTTF detail are not being litigated in this Court, [see supra](#) Part II, this argument is hence **MOOT**.

Turning to Plaintiff's claims from the SDDO job application, Defendant contends that Plaintiff “was not selected for the two vacancies because he was not the best candidate. Mr. Plesha failed to show any discriminatory/retaliatory animus for his non-selection and did not even allege if the selectees did not belong to a protected class and/or were unqualified for the position.” (Docket No. 20 at 9). The Court disagrees with Defendant's argument. On its face, Plaintiff does establish a prima facie case of national origin discrimination. The Court finds that Plaintiff has shown that: (1) Mr. Plesha is of Croatian nationality, a protected class; (2) was qualified for the open SDDO positions that he applied due to his nine years of experience as a deportation officer; (3) was rejected from the same; (4) in favor of native deportation officers. Plaintiff's position is that Mr. Plesha was discriminated on account of his Eastern European origin when he was singled out and treated differently than comparable local deportation officers. (Docket No. 28 ¶ 10). As an example, Mr. Plesha recounts being called “the Russian” or “the Ukrainian” in the local language to associate him with communists and national socialists. [Id.](#) As the only foreign national working with ICE in Puerto Rico, Plaintiff claims the reason he was not promoted to SDDO was because of his Croatian nationality associating him with extremist groups from Eastern Europe. Plaintiff alleges he was treated differently than similarly qualified native deportation officers because Mr. Plesha has been labeled by his peers as an outcast, which has hindered his potential to obtain a promotion and advance his career. Taking the factual allegations in the light most favorable to Plaintiff, Mr. Plesha meets his prima facie burden of a national origin failure-to-promote discrimination claim.

ii. Retaliation

Defendant posits that Plaintiff cannot establish a prima facie case of retaliation under Title VII. (Docket No. 28 at 9). Title VII makes it unlawful for an employer to retaliate against a person who has opposed discriminatory employment practices “or has ‘made a charge, testified, assisted, or participated in’ a Title VII ‘investigation, proceeding, or hearing.’ ” [Burlington Northern & Santa Fe Ry. v. White](#),

548 U.S. 53, 59 (2006) (citing 42 U.S.C. § 2000e-3(a)). To prove a claim of retaliation, a plaintiff must establish that he: (1) engaged in protected conduct under Title VII; (2) suffered a materially adverse employment action that harmed the plaintiff inside or outside the workplace enough to dissuade a reasonable worker from making or supporting a charge of discrimination, and; (3) that the adverse action taken against her was causally connected to his protected activity. Fantini v. Salem State College, 557 F.3d 22, 32 (1st Cir. 2009); see also Rodríguez-Candelario v. MVM Sec. Inc., 238 F. Supp. 3d 240, 254-55 (D.P.R. 2017). The First Circuit has repeatedly acknowledged that the plaintiff's prima facie burden is not onerous and is easily satisfied. Rodríguez-Candelario, 238 F. Supp. 3d at 255; see, e.g., Calero-Cerezo v. U.S. Dep't of Just., 355 F.3d 6, 26 (1st Cir. 2004).

*7 Defendant argues that Plaintiff cannot establish whether DHS carried out a materially adverse employment action nor can he establish a causal connection. (Docket No. 20 at 9). "Plaintiff has failed to show that the reassignment to his previous position was an adverse action. The Agency's decision not to continue with the JTTF detail was based on the needs of the Agency." Id. Again, the Court disagrees. The Court finds that: (1) Mr. Plesha engaged in protected conduct when he filed his written grievances opposing the discrimination he endured during his JTTF detail; (2) suffered a materially adverse employment action that would dissuade a

reasonable worker from making accusations of discrimination when he was not selected for the vacant SDDO positions, and; (3) these denials are causally connected to the written grievances because AFOD Figueroa—interviewer for the SDDO position in San Juan, P.R.—knew about them and the same implication can be made for the selecting officer who decided not to interview Mr. Plesha for the SDDO position in St. Thomas, U.S.V.I. Consequently, Plaintiff meets his prima facie burden by alleging that he was not promoted to SDDO in retaliation for filing written grievances concerning the alleged national origin discrimination he endured during his short tenure with the JTTF.

IV. Conclusion

For the foregoing reasons, the Court **DENIES** Defendant's motion to dismiss at Docket No. 20. Moreover, the Court lifts the stay of discovery proceedings at Docket No. 30. This case is referred to Magistrate Judge Marcos E. López for a further scheduling conference.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2021 WL 1731693

Footnotes

- 1 Alejandro Mayorkas is the current Secretary of DHS when he was sworn in on February 2, 2021. See Fed. R. Civ. P. 25(d).
- 2 The Union's name is "American Federation of Government Employees, ICE Local 527." (Docket Nos. 20 at 2; 20-1; 20-2).
- 3 An election to proceed with the EEO Commission "is indicated only by the filing of a written complaint; use of the pre-complaint process ... does not constitute an election[.]" 29 C.F.R. 1614.301(a).

Baarbé v. Syrian Arab Republic

United States District Court, E.D. North Carolina, Western Division. | June 28, 2023 | 679 F.Supp.3d 303 | 2023 WL 4236184

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679 F.Supp.3d 303
United States District Court, E.D. North Carolina,
Western Division.

Cameron Cain BAARBÉ, et al., Plaintiffs,
v.
The SYRIAN ARAB REPUBLIC, Defendant.

CASE NO. 5:20-CV-230-BO

|
May 30, 2023

|
Signed June 28, 2023

Synopsis

Background: Estates and family members of United States nationals killed in terror attacks in Paris, Brussels, Istanbul, and Jerusalem brought civil action against Syria to recover damages pursuant to the Foreign Sovereign Immunities Act (FSIA). Syria did not answer or otherwise appear, and plaintiffs, who consisted of both U.S. and non-U.S. citizens, then moved for default judgment.

Holdings: The District Court, Terrence W. Boyle, J., held that:

[1] FSIA's state-sponsored-terrorism exception to sovereign immunity applied;

[2] certain U.S. citizen plaintiffs would be awarded pain-and-suffering damages pursuant to FSIA's private-action provision;

[3] certain U.S. citizen plaintiffs would be awarded economic damages pursuant to FSIA's private-action provision;

[4] certain U.S. citizen plaintiffs would be awarded solatium damages pursuant to FSIA's private-action provision;

[5] certain U.S. citizen plaintiffs would be awarded punitive damages pursuant to FSIA's private-action provision;

[6] under North Carolina's choice-of-law rules, laws of France, Belgium, Turkey, and Israel would govern the tort claims asserted by non-U.S. citizen plaintiffs; and

[7] those non-U.S. citizen plaintiffs would be awarded damages under those foreign laws governing their claims.

Ordered accordingly.

West Headnotes (166)

[1] **Evidence** Federal records in general

The contents of United States government records, reports, and statements are admissible to prove facts in dispute under the Federal Rules of Evidence's (FRE) hearsay exception for public documents containing factual finding unless the sources of information or other circumstances indicate lack of trustworthiness. [Fed. R. Evid. 803\(8\)](#).

[2] **Evidence** Hearsay issues in general

Evidence Official Records and Reports

As an exception to prohibition on hearsay evidence, public records or reports, by virtue of their being based on legal duty and authority, contain sufficient circumstantial guarantees of trustworthiness to justify their use at trial. [Fed. R. Evid. 803\(8\)](#).

[3] **Evidence** Hearsay issues in general

Public statements issued by government agencies are admissible under Federal Rules of Evidence's (FRE) hearsay exception for public documents. [Fed. R. Evid. 803\(8\)](#).

[4] **International Law** Default; proceedings and judgment thereon

Even when a plaintiff seeks a default judgment in a case under the Foreign Sovereign Immunities Act (FSIA), the plaintiff must establish a right to the relief. [28 U.S.C.A. § 1608\(e\)](#).

[5] International Law Default; proceedings and judgment thereon

Although a court receives evidence from only the plaintiff when a foreign sovereign defendant has defaulted, the Foreign Sovereign Immunities Act (FSIA) does not require a court to demand more or different evidence than it would ordinarily receive in order to render a decision on a motion for default judgment. [28 U.S.C.A. § 1608\(e\)](#).

[6] International Law Default; proceedings and judgment thereon

In evaluating the plaintiff's proofs on a motion for default judgment in a case under the Foreign Sovereign Immunities Act (FSIA), a court may accept as true the plaintiff's uncontested evidence, and a plaintiff may establish proof by affidavit. [28 U.S.C.A. § 1608\(e\)](#).

[7] International Law Exclusive and concurrent laws and remedies

Foreign Sovereign Immunities Act (FSIA) provides sole basis for obtaining jurisdiction over foreign state in courts of United States. [28 U.S.C.A. § 1602 et seq.](#)

[8] International Law Terrorism and Related Activity

Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception to sovereign immunity applied to give the district court jurisdiction over private rights of action asserted against Syria by estate and family members of United States nationals killed in terror attacks abroad; U.S. had designated Syria to be a state sponsor of terrorism, plaintiffs were U.S. nationals, and right to arbitrate was not an issue since the acts did not occur in Syria. [28 U.S.C.A. §§ 1605A\(a\)\(2\)\(A\)\(ii\)\(I\), 1605A\(c\)](#).

[9] International Law Terrorism and Related Activity

State law claims are not available for persons covered by the private right of action provided by the Foreign Sovereign Immunities Act (FSIA) against state sponsors of terrorism. [28 U.S.C.A. § 1605A\(c\)](#).

[10] International Law Terrorism and Related Activity

To support a private right of action under the Foreign Sovereign Immunities Act (FSIA) against a state sponsor of terrorism, a plaintiff must prove a theory of liability and justify the damages s/he seeks, generally through the lens of civil tort liability. [28 U.S.C.A. §§ 1605A\(a\)\(1\), 1605A\(c\)](#).

[11] International Law Terrorism and Related Activity

Foreign Sovereign Immunities Act (FSIA) has a low bar for establishing proximate cause in cases based on private right of action against state sponsor of terrorism, i.e., defendant's actions must be a substantial factor in the sequence of events that led to the plaintiff's injury, and plaintiff's injury must have been reasonably foreseeable or anticipated as a natural consequence of the defendant's conduct. [28 U.S.C.A. §§ 1605A\(a\)\(1\), 1605A\(c\)](#).

[12] International Law Terrorism and Related Activity

Estates and family members of United States nationals killed in terror attacks in Paris, Brussels, Istanbul, and Jerusalem established Syria's role in the attacks as the proximate cause of their injuries, as would support private cause of action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception to sovereign immunity; death and injury to innocent people and the suffering of their families were reasonably foreseeable by Syria with its material support to the known violent terrorist organization that committed the attacks. [28 U.S.C.A. §§ 1605A\(a\)\(1\), 1605A\(c\)](#).

[13] International Law Default; proceedings and judgment thereon

When deciding motion for default judgment in action brought against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception to sovereign immunity by estate and family members of United States nationals killed in terror attacks in Paris and Brussels, the district court would take judicial notice of the evidence admitted and relied upon in other cases with respect to Syria's material support to known terrorist organization and that organization's responsibility for the terror attacks at issue without plaintiffs having to present such evidence again. [28 U.S.C.A. §§ 1605A\(a\)\(1\), 1605A\(c\)](#).

[14] International Law Extrajudicial killing

As is relevant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception to sovereign immunity, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. [28 U.S.C.A. §§ 1350, 1605\(e\)\(1\), 1605A\(h\)\(7\)](#).

[15] International Law Extrajudicial killing

Terror attacks at issue in Foreign Sovereign Immunities Act (FSIA) action brought against Syria, which had been designated as a state sponsor of terrorism, by estate and family members of United States nationals killed in the attacks were "extrajudicial killings," as would support application of FSIA's state-sponsored-terrorism exception to sovereign immunity; victims were not authorized killings but were murders of innocent persons. [28 U.S.C.A. §§ 1350, 1605\(a\)\(1\), 1605\(e\)\(1\), 1605A\(c\), 1605A\(h\)\(7\)](#).

[16] International Law Terrorism and Related Activity

To determine whether a defendant sovereign has provided material support to terrorism, as is relevant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception to sovereign immunity, courts consider whether a particular terrorist group committed the terrorist act and whether the defendant foreign state generally provided material support or resources to the terrorist organization which contributed to its ability to carry out the terrorist act. [28 U.S.C.A. § 1605A\(h\)\(3\)](#).

[17] International Law Terrorism and Related Activity

Estates and family members of United States nationals killed in terror attacks in Paris, Brussels, Istanbul, and Jerusalem established that Syria provided material support to terrorism, as would support private cause of action pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; evidence showed that Syria's actions included training members of terrorist organization that carried out the attacks, provided a location where organization could openly recruit members, provided financial support to organization, and assisted in funneling weapons shipments. [28 U.S.C.A. §§ 1605A\(a\), 1605A\(h\)\(3\), 1605A\(c\)](#).

[18] International Law Extent of Liability in Absence of Immunity

In determining the appropriate amount of compensatory damages in a private action under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act (FSIA), the court may look to prior decisions awarding damages for pain and suffering. [28 U.S.C.A. § 1605A\(c\)](#).

[19] Assault and Battery Amount awarded

Victim of terrorist attack in Jerusalem, which occurred when a truck driven by a supporter

of a terrorist organization ran over a group of soldiers and those nearby, would be awarded \$1,500,000 in pain-and-suffering damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; victim presented a physician's expert report regarding minor physical injuries sustained in the attack, and physician's diagnosis, which was reached after examining victim and reviewing his emergency room records, consisted of post terror attack, right leg, flank, and arm bruising—resolved after one month and superficial head trauma. [28 U.S.C.A. § 1605A\(c\)](#).

[20] Death 🔑 Measure and Amount Awarded

Estate of victim of terrorist attack in Jerusalem, which occurred when a truck driven by a supporter of a terrorist organization ran over a group of soldiers and those nearby, would be awarded \$1,000,000 as pain-and-suffering damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; estate presented evidence that victim suffered severe physical trauma before passing away as a result of the terror attack, along with immense fright when the truck accelerated toward him. [28 U.S.C.A. § 1605A\(c\)](#).

[21] Assault and Battery 🔑 Measure and Amount awarded

Victim of terrorist bombing in Istanbul would be awarded \$10,000,000 in pain-and-suffering damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; victim suffered substantial physical injuries, which included multiple surgeries, vision limitation, and hearing loss. [28 U.S.C.A. § 1605A\(c\)](#).

[22] Death 🔑 Measure and Amount Awarded

Estate of victim of terrorist bombing in Istanbul would be awarded \$1,000,000 in pain-and-suffering damages in private action against Syria

pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; since victim's body was intact after the bombing, it was reasonable to infer that victim died due to internal injuries due to the sheer force of the blast from the bomb being detonated so close to him, and since internal bleeding did not cause a person's death instantaneously, victim felt pain for a period of time before his death, brief though that period of time may have been. [28 U.S.C.A. § 1605A\(c\)](#).

[23] Assault and Battery 🔑 Amount awarded

Victim of terrorist bombing in Istanbul would be awarded \$7,000,000 in pain-and-suffering damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; victim suffered severe permanent physical injuries as a result of the attack, and those injuries included constant pain in foot that suffered shrapnel injury, "buzzing" in both ears, and gait abnormalities. [28 U.S.C.A. § 1605A\(c\)](#).

[24] Death 🔑 Measure and Amount Awarded

Estate of victim of terrorist attack in Istanbul would be awarded \$2,000,000 in pain-and-suffering damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; according to the autopsy report, victim suffered two gunshot wounds—one to the chest and the other to the left lower limb—and physician explained that spinal cord injuries might well have paralyzed victim and that it was possible that victim was aware of that. [28 U.S.C.A. § 1605A\(c\)](#).

[25] Death 🔑 Measure and Amount Awarded

Estate of victim of terrorist attack in Istanbul would be awarded \$1,493,216 in economic damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; forensic accountant's expert report calculated the present

value of the cumulative economic loss to the estate to be \$1,493,216. [28 U.S.C.A. § 1605A\(c\)](#).

[26] Death  **Measure and Amount Awarded**

Estate of victim of terrorist attack in Jerusalem would be awarded \$1,679,788 in economic damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; forensic accountant's expert report calculated the present value of the cumulative economic loss to the estate to be between \$1,091,238 and \$1,679,788. [28 U.S.C.A. § 1605A\(c\)](#).

[27] Assault and Battery  **Amount awarded**

Victim of terrorist attack in Istanbul would be awarded \$237,875 in economic damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; victim presented report of expert who calculated the recoverable economic loss to victim as a result of the injuries he sustained in the terror attack that left him unable to work again with future losses adjusted to present value, and that expert calculated the present value of the cumulative economic loss to be \$237,875. [28 U.S.C.A. § 1605A\(c\)](#).

[28] Evidence  **Personal injuries**

When determining economic damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception, the district court would find that individual was qualified to be an expert in forensic accounting; individual had served as an expert in forensic accounting in similar cases. [28 U.S.C.A. § 1605A\(c\)](#).

[29] Death  **Loss of services of child**

Parents of victim's widow would be awarded \$42,806.49 in economic damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; in supporting

widow after the terror attack, parents incurred financial expenses as widow was unable to return to her work, and parents submitted an itemized declaration of expenses as well as copies of bills and receipts. [28 U.S.C.A. § 1605A\(c\)](#).

[30] Death  **Measure and Amount Awarded**

Widow of victim in terror attack in Brussels would be awarded \$13,000,000 in solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; as a result of victim's death, widow was unable to return to work, and psychiatric expert's opinion was that widow developed persistent complex bereavement disorder with traumatic bereavement, post-traumatic stress disorder (PTSD), and other specified anxiety disorder. [28 U.S.C.A. § 1605A\(c\)](#).

[31] Damages  **Parent and child**

Father of widow of victim in terror attack in Brussels would be awarded \$2,500,000 in solatium damages; father ended up flying to Belgium to search for victim, and in the wake of the tragedy, father, along with mother, had to support widow, as she was unable to return to work due to the incident's emotional toll. [28 U.S.C.A. § 1605A\(c\)](#).

[32] Damages  **Parent and child**

Mother of widow of victim in terror attack in Brussels would be awarded \$2,500,000 in solatium damages; mother ended up flying to Europe to search for victim, and in the wake of the tragedy, mother, along with father, had to support widow, as widow was unable to return to work due to the incident's emotional toll. [28 U.S.C.A. § 1605A\(c\)](#).

[33] Damages  **Particular cases**

Victim of terror attack in Jerusalem, which occurred when a truck driven by a supporter of a terrorist organization ran over a group of

soldiers and those nearby, would be awarded \$1,500,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; psychiatric expert opined that victim had post-traumatic stress disorder (PTSD) and persistence depressive disorder, and expert expected that victim's mood and anxiety issues affecting many areas of his functioning to continue to affect him for a long term. 28 U.S.C.A. § 1605A(c).

[34] Damages ↗ Particular cases

Relative of victim of terror attack in Jerusalem, which occurred when a truck driven by a supporter of a terrorist organization ran over a group of soldiers and those nearby, would be awarded \$4,000,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; psychiatric expert stated that relative suffered from unspecified anxiety disorder as a direct result of victim's near death and that relative's resulting anxiety levels affected her occupational function and family and her enjoyment of experiences. 28 U.S.C.A. § 1605A(c).

[35] Damages ↗ Particular cases

Minor daughter of victim of terror attack in Jerusalem, which occurred when a truck driven by a supporter of a terrorist organization ran over a group of soldiers and those nearby, would be awarded \$2,500,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; victim reported that over time after the attack, daughter, who was almost nine years old at the time of the attack, developed major anxiety to various stimuli, including an extreme anxiety response/reaction to strangers and dogs. 28 U.S.C.A. § 1605A(c).

[36] Damages ↗ Particular cases

Minor daughter of victim of terror attack in Jerusalem, which occurred when a truck driven by a supporter of a terrorist organization ran over a group of soldiers and those nearby, would be awarded \$2,500,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; victim reported that daughter, who was five years old at the time of the attack, ended up receiving treatment from a therapist and that her treatment surrounded stress and frustration management, and how to deal with low mood and fears surrounding the attack. 28 U.S.C.A. § 1605A(c).

[37] Damages ↗ Particular cases

Minor daughter of victim of terror attack in Jerusalem, which occurred when a truck driven by a supporter of a terrorist organization ran over a group of soldiers and those nearby, would be awarded \$2,500,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; although daughter, who was seven years old at the time of the attack, appeared to be in remission following her initial intense anxiety response, psychiatric expert expected that many aspects of victim's near death in the attack would continue to affect daughter for a long time. 28 U.S.C.A. § 1605A(c).

[38] Damages ↗ Particular cases

Mother of victim of terror attack in Jerusalem, which occurred when a truck driven by a supporter of a terrorist organization ran over a group of soldiers and those nearby, would be awarded \$8,000,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; psychiatric expert's opinion was that mother had persistent complex bereavement disorder with traumatic bereavement, post-traumatic stress disorder (PTSD), and persistent depressive disorder

—moderate severity, late onset, with pure dysthymic syndrome. [28 U.S.C.A. § 1605A\(c\)](#).

[39] Damages ↗ Particular cases

Relative of victim of terror attack in Jerusalem, which occurred when a truck driven by a supporter of a terrorist organization ran over a group of soldiers and those nearby, would be awarded \$4,000,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; psychiatric expert opined that relative had persistent complex bereavement disorder with traumatic bereavement and persistent depressive disorder —moderate severity, late onset, with pure dysthymic syndrome. [28 U.S.C.A. § 1605A\(c\)](#).

[40] Damages ↗ Particular cases

Relative of victim of terror attack in Jerusalem, which occurred when a truck driven by a supporter of a terrorist organization ran over a group of soldiers and those nearby, would be awarded \$4,000,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; psychiatric expert opined that despite treatment, he expected that relative's resulting sadness, depressed mood, and complicated grief issues would continue to affect him for a long time. [28 U.S.C.A. § 1605A\(c\)](#).

[41] Damages ↗ Particular cases

Sister of victim of terror attack in Jerusalem, which occurred when a truck driven by a supporter of a terrorist organization ran over a group of soldiers and those nearby, would be awarded \$4,000,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; talking about day of attack caused her to experience flashbacks, and psychiatric expert opined that he expected sister's resulting anxiety and grief

issues to continue to affect her long term. [28 U.S.C.A. § 1605A\(c\)](#).

[42] Damages ↗ Particular cases

Brother of victim of terror attack in Jerusalem, which occurred when a truck driven by a supporter of a terrorist organization ran over a group of soldiers and those nearby, would be awarded \$4,000,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; brother was 11 years old at time of attack, and psychiatric expert opined that brother's resulting sad mood and complicated grief issues would affect him for a long time. [28 U.S.C.A. § 1605A\(c\)](#).

[43] Damages ↗ Particular cases

Brother of victim of terror attack in Jerusalem, which occurred when a truck driven by a supporter of a terrorist organization ran over a group of soldiers and those nearby, would be awarded \$4,000,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; brother was eight years old at time of attack, he was referred to psychotherapy due to anxieties and insecurities after the attack, and psychiatric expert who reviewed a report from cognitive behavioral therapist and clinical social worker who saw brother stated that it appeared that brother exhibited an expression of ongoing Unspecified Anxiety Disorder. [28 U.S.C.A. § 1605A\(c\)](#).

[44] Damages ↗ Particular cases

Widow of victim of terror attack in Istanbul would be awarded \$14,000,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; psychiatric expert opined that, despite treatments, widow's resulting anxiety, mood and complicated grief

issues would affect her in the long term. 28 U.S.C.A. § 1605A(c).

[45] Damages ↗ Particular cases

Daughter of victims of terror attack in Istanbul would be awarded \$6,000,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; after attack, which killed father and injured mother, daughter had to deal with mother's care as well as needs of her own family, she ended up missing two months of work, she experienced anxiety, flashbacks to her father's coffin and the hospital, and difficulty sleeping, and psychiatric expert opined that her anxiety issues would continue to affect her in the long term. 28 U.S.C.A. § 1605A(c).

[46] Damages ↗ Particular cases

Daughter of victims of terror attack in Istanbul would be awarded \$6,000,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; attack killed father and injured mother, psychiatric expert opined that daughter had persistent complex bereavement disorder; with traumatic bereavement, PTSD, and persistent depressive disorder—mild severity, late onset, with pure dysthymic syndrome, and expert expected daughter's depressive issues to continue to affect her in the long term. 28 U.S.C.A. § 1605A(c).

[47] Damages ↗ Particular cases

Sister of victim of terror attack in Istanbul would be awarded \$4,500,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; upon learning of victim's death, sister experienced an emotional breakdown from which she had still not recovered, treating psychiatrist reported that sister showed symptoms of severe anxiety

with physical manifestations, depressed mood, low energy, poor concentration, catastrophic thinking, suicidal ideation, and significant impairment of her daily functioning, and psychiatric expert expected sister's anxiety, mood, and complicated grief issues would continue to affect her indefinitely. 28 U.S.C.A. § 1605A(c).

[48] Damages ↗ Particular cases

Brother of victim of terror attack in Istanbul would be awarded \$4,500,000 as solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; after the attack, brother lost trust in people, lived in constant fear, and experienced nightmares, psychiatric expert opined that brother had persistent complex bereavement disorder with traumatic bereavement and persistent depressive disorder with pure dysthymic syndrome. 28 U.S.C.A. § 1605A(c).

[49] Damages ↗ Particular cases

Victim of terrorist bombing in Istanbul would be awarded \$4,000,000 in solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; shortly after the attack, victim experienced post-traumatic symptoms, including nightmares, difficulty sleeping, avoidance of leaving the house for months after the attack for non-essential activities, hypervigilance when he went out into public places, hypersensitivity to noises and loud sounds, and physiological reactions whenever he was reminded of the attack, including sweating and hyperventilation, and psychiatric expert expected that victim's mood and anxiety issues would continue to affect him in the long term. 28 U.S.C.A. § 1605A(c).

[50] Damages ↗ Particular cases

Daughter of victims injured in terrorist bombing in Istanbul would be awarded \$2,500,000 in

solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; daughter had an anxiety attack after learning of victims' injuries, psychiatric expert opined that daughter had post-traumatic stress disorder (PTSD) and other specific anxiety disorder, and expert also expected daughter's anxiety issues to affect her for a long time. [28 U.S.C.A. § 1605A\(c\)](#).

[51] **Damages** ↗ Particular cases

Daughter of victims injured in terrorist bombing in Istanbul would be awarded \$2,500,000 in solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; about a year after the attack, daughter began psychotherapy treatment that lasted for three years, psychiatric expert opined that daughter had post-traumatic stress disorder (PTSD) and other specific anxiety disorder, and expert also expected daughter's anxiety issues to affect her for a long time. [28 U.S.C.A. § 1605A\(c\)](#).

[52] **Damages** ↗ Particular cases

Daughter of victims injured in terrorist bombing in Istanbul would be awarded \$3,500,000 in solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; since attack, daughter experienced significant anxiety and panic attacks with news of a terror attack, daughter missed a year of work to care for victims well also caring for her newborn baby, psychiatric expert opined that daughter had post-traumatic stress disorder (PTSD) and other specific anxiety disorder, and expert also expected daughter's anxiety issues to affect her for a long time. [28 U.S.C.A. § 1605A\(c\)](#).

[53] **Damages** ↗ Particular cases

Son of victims injured in terrorist bombing in Istanbul would be awarded \$2,500,000 in solatium damages in private action against Syria

pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; son had to leave work for six months to care for victims, psychiatric expert opined that son had post-traumatic stress disorder (PTSD) and unspecific anxiety disorder, and expert also expected son's mood and anxiety issues to affect him in the long term. [28 U.S.C.A. § 1605A\(c\)](#).

[54] **Damages** ↗ Particular cases

Mother of victim in terror attack in Paris would be awarded \$7,000,000 in solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; for months after victim's death, mother functioned poorly and had frequent nightmares, psychiatric expert opined that mother had persistent complex bereavement disorder with traumatic bereavement and persistent depressive disorder with pure dysthymic syndrome, and expert expected that mother's mood and complicated grief issues would continue to affect her indefinitely. [28 U.S.C.A. § 1605A\(c\)](#).

[55] **Damages** ↗ Particular cases

Brother of victim in terror attack in Paris would be awarded \$3,500,000 in solatium damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; brother experienced nightmares and flashbacks for year after victim's death, psychiatric expert opined that brother had persistent complex bereavement disorder with traumatic bereavement, post-traumatic stress disorder (PTSD), and other specified anxiety disorder, and expert thought that brother's anxiety and traumatic issues would affect him in the long term. [28 U.S.C.A. § 1605A\(c\)](#).

[56] **Damages** ↗ Particular cases

Brother of victim in terror attack in Paris would be awarded \$3,500,000 in solatium damages in private action against Syria pursuant to

Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; it took brother about two years after victim's death to reengage socially, psychiatric expert opined that brother had persistent complex bereavement disorder with traumatic bereavement and persistent depressive disorder, and expert expected brother's mood and grief issues to affect him in the long term. 28 U.S.C.A. § 1605A(c).

[57] International Law 🔑 Punitive damages in general

Purpose of punitive damages under Foreign Sovereign Immunities Act (FSIA), which allows an award of punitive damages for personal injury or death resulting from an act of state-sponsored terrorism, is to punish those who engage in outrageous conduct and to deter others from similar conduct in future. 28 U.S.C.A. § 1605A(c).

[58] Death 🔑 Exemplary damages

Awards of punitive damages against Syria were warranted in private action in which estates and relatives of United States nationals killed in terror attacks in Paris, Brussels, Istanbul, and Jerusalem were seeking damages from Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; Syria's support for terrorist activities of terrorist organization behind the attacks was horrific and condemnable, Syria clearly intended to cause significant harm in multiple ways when it provided material support to terrorist organization, which routinely carried out brutal attacks on innocent civilians, prior damages had been awarded to deter Syria from related actions against civilians, and prior awards of punitive damages against Syria had noted that it was a nation of significant wealth. 28 U.S.C.A. § 1605A(c).

[59] Death 🔑 Measure and Amount Awarded

Families of victims of deadly terror attack in Istanbul would each be awarded \$150,000,000 in

punitive damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; their lives had never been the same since the attack and remained negatively impacted. 28 U.S.C.A. § 1605A(c).

[60] Death 🔑 Measure and Amount Awarded

Family of deceased victim of deadly terror attack in Brussels airport would be awarded \$150,000,000 in punitive damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; it was clear that terrorists targeted the crowded international airport to maximize the harm inflicted on as many individuals and their families as possible. 28 U.S.C.A. § 1605A(c).

[61] Death 🔑 Measure and Amount Awarded

Family of deceased victim of deadly terror attack in Jerusalem, which occurred when a truck driven by a supporter of a terrorist organization ran over a group of soldiers and those nearby, would be awarded \$150,000,000 in punitive damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; the loss remained devastating for family of victim, who was 20 years old and was one of the soldiers killed in the attack. 28 U.S.C.A. § 1605A(c).

[62] Assault and Battery 🔑 Amount awarded

Family of victim injured in terror attack in Jerusalem, which occurred when a truck driven by a supporter of a terrorist organization ran over a group of soldiers and those nearby, would be awarded \$150,000,000 in punitive damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; victim was a tour guide and witnessed a soldier die in the attack, victim still suffered from psychological injuries due to the attack, and victim's life and the

life of his family had never been the same since the attack. [28 U.S.C.A. § 1605A\(c\)](#).

[63] Death **Measure and Amount Awarded**

Family of deceased victim of deadly terror attack in Paris would be awarded \$150,000,000 in punitive damages in private action against Syria pursuant to Foreign Sovereign Immunities Act's (FSIA) state-sponsored-terrorism exception; victim, who was shot in chest and leg, felt conscious pain and suffering before her death, and victim's family had struggled ever since her death. [28 U.S.C.A. § 1605A\(c\)](#).

[64] International Law **Extent of Liability in Absence of Immunity**

Foreign Sovereign Immunities Act's (FSIA) provision that a foreign state stripped of its immunity "shall be liable in the same manner and to the same extent as a private individual under like circumstances" ensures that, if an FSIA exception abrogates immunity, plaintiffs not covered by FSIA provision on a private right of action against foreign state that has been stripped of its sovereign immunity may bring state or foreign law claims that they could have brought if the defendant were a private individual. [28 U.S.C.A. §§ 1605A\(c\), 1606](#).

[65] Federal Courts **Particular cases, contexts, and questions**

International Law **What law governs**

United States District Court for the Eastern District of North Carolina would apply North Carolina's choice of law rules to determine which jurisdiction's substantive law governed claim by non-United States citizens against Syria in action that was brought under the Foreign Sovereign Immunities Act (FSIA) and that concerned terror attacks that a terrorist organization supported by Syria carried out in Paris, Brussels, Istanbul, and Jerusalem. [28 U.S.C.A. § 1606](#).

[66] Torts **What law governs**

North Carolina applies the lex loci delicti rule, i.e., the law of the place of the injury governs tort claims.

[67] Torts **What law governs**

Under North Carolina law, which follows the lex loci delicti rule, i.e., the law of the place of the injury governs tort claims, the tort for personal injury is deemed to have occurred where the last event took place that is necessary to render an actor liable.

[68] Death **What law governs**

Under North Carolina law, which followed the lex loci delicti rule, i.e., the law of the place of the injury governed tort claims, Israeli law would apply to non-United States citizen plaintiff's tort claims against Syria in Foreign Sovereign Immunities Act (FSIA) action concerning terror attack that a terrorist organization supported by Syria carried out in Jerusalem; plaintiff was an Israeli citizen, his son was killed in the attack, and there was no legal relationship between plaintiff and Syria or the terrorist organization. [28 U.S.C.A. § 1606](#).

[69] International Law **What law governs**

Under North Carolina law, which followed the lex loci delicti rule, i.e., the law of the place of the injury governed tort claims, Turkish law would apply to non-United States citizen plaintiffs' tort claims against Syria in Foreign Sovereign Immunities Act (FSIA) action concerning terror attack that a terrorist organization supported by Syria carried out in Istanbul; there was no legal relationship between plaintiffs and Syria or the terrorist organization. [28 U.S.C.A. § 1606](#).

[70] International Law **What law governs**

Under North Carolina law, which followed the lex loci delicti rule, i.e., the law of the place of the injury governed tort claims, Turkish

law would apply to tort claims that estate of non-United States citizen asserted against Syria in Foreign Sovereign Immunities Act (FSIA) action concerning terror attack that a terrorist organization supported by Syria carried out in Istanbul; decedent was an Israeli citizen, and there was no legal relationship between decedent and Syria or the terrorist organization. 28 U.S.C.A. § 1606.

[71] International Law What law governs

Under North Carolina law, which followed the lex loci delicti rule, i.e., the law of the place of the injury governed tort claims, Belgian law would apply to tort claims that estate of non-United States citizen asserted against Syria in Foreign Sovereign Immunities Act (FSIA) action concerning terror attack that a terrorist organization supported by Syria carried out in Brussels; decedent was a Dutch citizen, and there was no legal relationship between decedent and Syria or the terrorist organization. 28 U.S.C.A. § 1606.

[72] International Law What law governs

Under North Carolina law, which followed the lex loci delicti rule, i.e., the law of the place of the injury governed tort claims, French law would apply to tort claims that victim's stepfather, who was a non-United States citizen residing in the U.S., asserted against Syria in Foreign Sovereign Immunities Act (FSIA) action concerning terror attack that a terrorist organization supported by Syria carried out in Paris; there was no legal relationship between stepfather, who was a Mexican citizen, and Syria or the terrorist organization. 28 U.S.C.A. § 1606.

[73] Negligence Reasonable care

Torts Intent or malice

First type of negligence under Israeli law is a type of harm that is careless or negligent conduct, which consists of failure to act as a reasonable, prudent person would under the circumstances;

second type of negligence includes harms caused knowingly, intentionally, and maliciously.

[74] Negligence Nature and form of remedy

Israeli law places negligence under what the common law of the United States would consider an intentional tort.

[75] Negligence Elements in general

Torts Nature and elements of torts in general

The elements of negligence under Israeli law include (1) duty, (2) breach, (3) cause, and (4) harm, and those elements apply to both types of negligence, i.e., type of harm that is careless or negligent conduct and type of harm caused knowingly, intentionally, and maliciously.

[76] Negligence Necessity and Existence of Duty

Under Israeli law, the first element of negligence recognizes that a duty of care exists not to harm others.

[77] Negligence Foreseeability

Under Israeli law of negligence, a court asks if a reasonable person could have foreseen the likelihood of damage when determining duty-in-fact.

[78] Negligence Necessity and Existence of Duty

Under Israeli law of negligence, if a duty-in-fact exists but the risk of harm as it occurred was already taken into account by normal society when engaged in a particular action, a defendant will not be liable under the tort of negligence.

[79] War and National Emergency Private Remedies

As would support non-United States citizen plaintiff's negligence claim under Israeli law in Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Jerusalem, that plaintiff demonstrated that driver owed a duty to the victims; it was foreseeable that his intentional act of ramming a truck into people and running over those people would cause injuries or death. 28 U.S.C.A. § 1606.

[80] War and National Emergency ➔ Private Remedies

As would support non-United States citizen plaintiff's negligence claim under Israeli law in Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Jerusalem, Syria was under a duty to the victims; injuries and death of the victims were foreseeable consequences of providing material support to terrorist organization and supporting that organization's efforts to further extremist propaganda against countries against terrorism. 28 U.S.C.A. § 1606.

[81] Negligence ➔ Balancing and weighing of factors

Negligence ➔ Breach of Duty

Under Israeli law of negligence, breach of duty of care occurs when party with duty fails to take reasonable precautionary measures; reasonable precautions are determined by balancing interests of plaintiff with that of tort-feasor and considering public interest in continuation or cessation of alleged tortious actions.

[82] War and National Emergency ➔ Private Remedies

As would support non-United States citizen plaintiff's negligence claim under Israeli law in Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a

terrorist organization supported by Syria carried out in Jerusalem, driver breached his duty of care to victims; a reasonable person could foresee that a person intentionally ramming a truck into people would cause great harm to those at or around them. 28 U.S.C.A. § 1606.

[83] War and National Emergency ➔ Private Remedies

As would support non-United States citizen plaintiff's negligence claim under Israeli law in Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Jerusalem, Syria breached its duty of care to the victims, where Syria continuously supported and financed terrorist organization, despite knowledge of organization's terrorist actions. 28 U.S.C.A. § 1606.

[84] Negligence ➔ "But-for" causation; act without which event would not have occurred

Israeli law of negligence uses the "but for" test for causation.

[85] Negligence ➔ Foreseeability

Under Israeli law of negligence, if a reasonable person could have foreseen that a harm of the kind that happened might happen, the legal causation requirement is met.

[86] War and National Emergency ➔ Private Remedies

Non-United States citizen plaintiff demonstrated the causation element of negligence claim under Israeli law in Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Jerusalem; plaintiff demonstrated that but for the material support that Syria provided the terrorist organization, organization would not have been able to develop into the organized and deadly organization that it was at the time of the attack. 28 U.S.C.A. § 1606.

[87] Negligence  Nature of injury

Element of “harm” under Israeli law of negligence includes loss of life, or loss of, or detriment to, any property, comfort, bodily welfare, reputation, or other similar loss of detriment.

[88] War and National Emergency  Private Remedies

Non-United States citizen plaintiff demonstrated the harm element of negligence claim under Israeli law in Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Jerusalem; one victim died as a result of injuries from the attack, and another sustained physical and emotional injuries due to the attack. 28 U.S.C.A. § 1606.

[89] War and National Emergency  Private Remedies

Under Israeli law, to establish a claim of negligent support of terrorism, a plaintiff must show that (1) support for terrorism constitutes knowingly, intentionally, and maliciously doing something that causes an unreasonable risk of harm, (2) defendants had a duty of care not to support terrorism or create an unreasonable risk of harm from terrorism, and they breached this duty by supporting terrorism, and (3) defendants’ support was both the but-for cause and proximate cause of the attack.

[90] War and National Emergency  Private Remedies

Non-United States citizen plaintiff established claim of negligent support of terrorism under Israeli law in Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Jerusalem; plaintiff detailed the material support that Syria provided to

terrorist organization in the years leading up to the attack. 28 U.S.C.A. § 1606.

[91] Infliction of Emotional Distress

Distress  Relationship to other torts, theories, or causes of action; exclusive and concurrent remedies

Intentional infliction of emotional harm under Israeli law is part of negligence because intentional torts are blended with the tort of negligence under Israeli law.

[92] Infliction of Emotional Distress

Distress  Negligent infliction of emotional distress

Infliction of Emotional Distress

Distress  Relationship of Plaintiff to Third Person

Under Israeli law, the four elements of intentional infliction of emotional distress are (1) whether plaintiffs enjoy a close relationship to the primary victim; (2) whether plaintiffs directly perceived the tortious act; (3) plaintiff’s degree of spatial and temporal proximity to the injurious event; and (4) the severity of mental injury.

[93] Infliction of Emotional Distress

Distress  Terrorism, hostage-taking, and torture

Infliction of Emotional Distress  Particular relationships

As victim’s father, non-United States citizen plaintiff had the required “close relationship” with victim in order to support claim of intentional infliction of emotional distress under Israeli law in Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Jerusalem. 28 U.S.C.A. § 1606.

[94] Infliction of Emotional

Distress ↗ Terrorism, hostage-taking, and torture

Non-United States citizen plaintiff established that he directly perceived the terrorist attack, as required to support claim of intentional infliction of emotional distress under Israeli law in Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Jerusalem; plaintiff was father of one of the victims, and although plaintiff was not present at scene at time of attack, his mental injuries were foreseeable. 28 U.S.C.A. § 1606.

[95] Infliction of Emotional Distress ↗ Direction of conduct at plaintiff; physical presence

As to the degree of a plaintiff's spatial and temporal proximity to the injurious event, which is an element of tort of intentional infliction of emotional distress under Israeli law, the plaintiff must experience the tragic event, or in an exceptional case, learn about the event in such circumstances that the emotional damage is expectable. 28 U.S.C.A. § 1606.

[96] Infliction of Emotional

Distress ↗ Terrorism, hostage-taking, and torture

Infliction of Emotional Distress ↗ Spatial or temporal proximity to injurious event

Non-United States citizen plaintiff established that he had the requisite degree of spatial and temporal proximity to the injurious event, as would support claim of intentional infliction of emotional distress under Israeli law in Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Jerusalem; although plaintiff was not at scene at time of attack, he was father of one of the victims, he ended being diagnosed with psychological injury, and he received grief counseling. 28 U.S.C.A. § 1606.

[97] Infliction of Emotional Distress ↗ Severity and verifiability in general

To show severity of mental injury, which is an element of tort of intentional infliction of emotional distress under Israeli law, a plaintiff needs to establish a "mental illness" with physiological effects or severe mental injury.

[98] Infliction of Emotional

Distress ↗ Terrorism, hostage-taking, and torture

Infliction of Emotional Distress ↗ Particular injuries

Non-United States citizen plaintiff established that he had the severe mental injury required to support claim of intentional infliction of emotional distress under Israeli law in Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Jerusalem; although plaintiff was not at scene at time of attack, he was father of one of the victims killed, plaintiff was diagnosed with physiological effects such as lack of sleep due to victim's death, and psychiatric expert stated that plaintiff would endure his mental trauma for the foreseeable future.

[99] Assault and Battery ↗ Battery in general

The elements of a battery under Israeli law are as follows: (1) the defendant knowingly, (2) used force, directly or indirectly, (3) against the body of another person, (4) without the consent of that person.

[100] Assault and Battery ↗ Assault in general

The elements of assault under Israeli law are: (a) a defendant knowingly (b) attempted or threatened by any act or gesture to use force against another person, (c) making the other believe upon reasonable grounds that he has the present intention and ability to affect his purpose.

[101] International Law Terrorism and Related Activity

Non-United States citizen plaintiff established claims of assault and battery under Israeli law in Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Jerusalem; attack consisted of a truck ramming a group of soldiers and those nearby. [28 U.S.C.A. § 1606](#).

[102] Infliction of Emotional Distress Relationship of Plaintiff to Third Person

Under Israeli law, immediate family member of tort victim is entitled to compensatory damages for psychological and emotional harm resulting from tort to primary victim.

[103] Damages Nature and theory of compensation

Under Israeli tort law, harm suffered by secondary victim is compensable if (1) family member witnessed event or its consequences, (2) there is time and space proximity between two harms, and (3) secondary victim suffers severe harm that disrupts daily function.

[104] Damages Natural and probable consequences of torts

Israeli tort law does not allow damages to secondary victims unless harm is so severe that it disrupts daily function.

[105] Death Elements of Compensation

Non-United States citizen plaintiff, who was administrator of terror victim's estate and who had established claims of battery, intentional infliction of emotional distress, and negligence under Israeli law in Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out

in Jerusalem, was entitled under Israeli law to recover compensatory damages for physical injuries that victim sustained as well as for wrongful death of victim, who was run over by a truck. [28 U.S.C.A. § 1606](#).

[106] Death Measure and Amount Awarded

Pursuant to framework established in *Estate of Heiser v. Islamic Republic of Iran*, 466 F.Supp.2d 229, even though it was not binding on the United States District Court for the Eastern District of North Carolina, \$8,000,000 in solatium damages would be awarded to non-United States citizen plaintiff, who was father of terror victim, who was administrator of victim's estate, and who had established claims of battery, intentional infliction of emotional distress, and negligence under Israeli law in Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Jerusalem; some of plaintiff's post-traumatic symptoms included difficulty sleeping and frequent flashbacks, and psychiatric expert expected that plaintiff's mood and complicated grief issues would continue to affect him indefinitely. [28 U.S.C.A. §§ 1605A, 1606](#).

[107] Torts Duty, breach, or wrong independent of contract

Torts Weight and sufficiency

Under Belgian law, civil extra-contractual liability requires (i) a tortious act or omission, (ii) damages, and (iii) a factual causal relationship between the tortious act or omission and the damage; the burden of proof as to these elements lies on the plaintiff, who must evidence each of the elements with reasonable certainty, but if the nature of the elements to be proven makes it unreasonable to demand reasonable certainty, the elements may be proven with likelihood.

[108] Torts Questions of law or fact

In exceptional circumstances as to a claim of civil extra-contractual liability under Belgian law, the judge may decide by a specific reasoning that the normal burden of proof on the plaintiff to prove the claim's elements, i.e., (i) a tortious act or omission, (ii) damages, and (iii) a factual causal relationship between the tortious act or omission and the damage, would be unreasonable and must shift on the defendant, but that shift may occur only if the judge does not have sufficient evidence despite the evidencing measures taken and the parties' offering of evidence.

[109] Torts Duty, breach, or wrong independent of contract

A tortious act or omission that would give rise to a claim of civil extra-contractual liability under Belgian law can consist either of a breach of a rule that mandates or prevents a specific behavior or of a breach of the general duty of care.

[110] Torts Duty, breach, or wrong independent of contract

As is relevant to a claim of civil extra-contractual liability under Belgian law, the breach of the general duty of care requires an analysis in abstracto to assess whether the defendant acted as a reasonably prudent person put in the same circumstances: if the behavior of the defendant deviates from this standard, the breach is established.

[111] Torts Duty, breach, or wrong independent of contract

As is relevant to a claim of civil extra-contractual liability under Belgian law, a person must take the reasonable measures required in the circumstances given to avoid damages to others.

[112] International Law Torts

Under Belgian law, the Belgian State can commit a tort through its executive power and bears liability accordingly, but the liability does not

require the identification of the precise organ of the State involved in the tortious act.

[113] Torts Duty, breach, or wrong independent of contract

Under Belgian law, the commission of a criminal offense is always a tortious act for civil extra-contractual liability purposes because it is a breach of a rule that prevents a certain criminal behavior.

[114] Criminal Law Principals, Aiders, Abettors, and Accomplices in General

Under the Belgian law, an “accomplice” is, among others, the person who knowingly provides an aid to the primary actor to facilitate, prepare or commit the crime; in principle, the accomplice must have a precise knowledge of the crime that will be committed, i.e., the nature and the goal of the crime and the factual circumstances that characterize the act as a crime.

[115] Damages Nature and theory of pecuniary reparation

Under Belgian law, “damages” are defined as harm to a legitimate and stable interest of the victim.

[116] Torts Proximate cause

The causation between the tortious act and the damage, as required to support a claim of civil extra-contractual liability under Belgian law, relates to the cause in fact and is assessed under the theory of the “equivalence of conditions,” which holds that causation exists if, but for the tortious act, the damage would not have occurred or not in the same manner.

[117] Torts Proximate cause

Torts Injury and causation

If evidence shows that the damage would have occurred as it occurred if the tortious act was not committed, there is no causation between the tortious act and the damage, as otherwise required to support a claim of civil extra-contractual liability under Belgian law.

[118] **Torts** ↗ Proximate cause

Causation between the tortious act and the damage must be certain, but the certainty must be reasonable, not absolute, in order support a claim of civil extra-contractual liability under Belgian law.

[119] **Assault and Battery** ↗ Weight and Sufficiency

Evidence ↗ Due care and proper conduct

International Law ↗ Weight and sufficiency

In Foreign Sovereign Immunities Act (FSIA) action against Syria concerning bomb attack that a terrorist organization supported by Syria carried out at Brussels' international airport, estate of non-United States citizen killed in the attack demonstrated Syria's liability under Belgian law for civil extra-contractual liability; expert's opinion was that Syria did not act as a reasonable State by supporting terrorist organization and therefore committed tortious acts under Belgian law, and expert's declaration concluded that Syria's support of terrorist organization bore a causal connection to the attacks. [28 U.S.C.A. § 1606](#).

[120] **Death** ↗ Right of action of person injured **Executors and Administrators** ↗ Right of action for death of decedent

Under Belgian law, only "ex haerede damages," i.e., damages suffered by the decedent itself from the tortious act until death, can give rise to a claim of the estate of the decedent.

[121] **International Law** ↗ What law governs

Syria could not raise France's rules on jurisdictional immunity of States as a defense to non-United States citizen plaintiff's tort claims under French law in Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Paris; France's rules on jurisdictional immunity only applied before French courts. [28 U.S.C.A. § 1606](#).

[122] **Negligence** ↗ Proximate Cause

Torts ↗ Proximate cause

Under French law, a person's liability for harm caused by his fault is extremely broad, and wherever the defendant is alleged to have committed a fault, and whatever the type of harm that has been caused, a claim will be brought under corresponding statute, regardless of whether the defendant was negligent or inflicted harm intentionally.

[123] **Labor and Employment** ↗ Relation of Parties

French civil code's provision on liability of masters and employers for harm caused by their servants and employees can only apply where there exists a relationship of subordination between the principal and the agent; such a relation requires that the principal can give orders to the agent and instruct the latter on how to perform the task that was entrusted to him.

[124] **International Law** ↗ Terrorism and Related Activity

In Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Paris, non-United States citizen stepfather of deceased victim established that Syria was liable under France's statute providing for a person's liability for harm caused by his fault; victim's murder undoubtedly was a "harm," expert opined that Syria's support of terrorist organization and the fact that Syria

or Syrian agents willingly let members of terrorist organizations go through the border were “faults,” and expert stated that, given Syria's clear moral wrongdoings, a French judge would likely accept the existence of a causal link between Syria's fault and victim's death. 28 U.S.C.A. § 1606.

[125] Damages ↗ Natural and probable consequences of torts

Death ↗ Elements of Compensation

Under France's statute providing for a person's liability for harm caused by his fault, death and personal injury are types of “harm” which must be compensated when they have been wrongfully inflicted.

[126] Negligence ↗ Breach of Duty

Negligence ↗ Violations of statutes and other regulations

“Fault,” in the sense of France's statute providing for a person's liability for harm caused by his fault, can consist in two different types of violations: either a violation of a legislative requirement or a violation of the general duty of care or diligence.

[127] Negligence ↗ Violations of statutes and other regulations

Under France's statute providing for a person's liability for harm caused by his fault, the breach of any statutory duty is regarded as a “fault,” regardless of whether it is a civil or criminal duty and regardless of the legislator's or the State's intent when establishing the duty.

[128] Negligence ↗ Violations of statutes and other regulations

As is relevant to rule that the breach of any statutory duty is regarded as a fault under France's statute providing for a person's liability for harm caused by his fault, it is not necessary that the statute which has been violated should

indicate that its violation will give rise to civil liability, nor that this violation be the result of negligence.

[129] Negligence ↗ Violations of statutes and other regulations

As is relevant to rule that the breach of any statutory duty is regarded as a fault under France's statute providing for a person's liability for harm caused by his fault, it is not necessary that the statute that was violated should have been specifically intended to protect persons in the claimant's situation or to avoid the very type of harm which the claimant suffered.

[130] Negligence ↗ Violations of statutes and other regulations

Violation of foreign statutory duties or international rules can constitute a “fault” under France's statute providing for a person's liability for harm caused by his fault.

[131] Negligence ↗ Foreseeability

Under French law there exists a general duty of care whereby everybody must act carefully so as to avoid causing any type of foreseeable harm to others, and it is therefore not necessary to establish the existence of a specific duty of care to characterize a fault when applying France's statute providing for a person's liability for harm caused by his fault; rather, any unreasonable conduct is a “fault.”

[132] Negligence ↗ Breach of Duty

Under France's statute providing for a person's liability for harm caused by his fault, it is a “fault” for someone in charge of controlling an activity not to operate that control correctly.

[133] Negligence ↗ Public policy considerations

Negligence ↗ Proximate Cause

When applying France's statute providing for a person's liability for harm caused by his fault, French courts enjoy great discretion in assessing causation, and policy considerations play a great role in that assessment.

[134] Torts Joint and several liability

Under French law, all tortfeasors are jointly and severally liable to the victim.

[135] Death Parent

Negligence Right of action; standing

Under French law, stepparents have standing to sue when they suffer losses resulting from their stepchild's death or personal injury.

[136] Damages Natural and probable consequences of torts

Damages Pecuniary Losses

Death Elements of Compensation

In cases of death or personal injury under French law, it is normally not the harm itself that gets compensated, but the losses resulting from it, which can be pecuniary or non-pecuniary.

[137] Damages Natural and probable consequences of torts

Death Elements of Compensation

In cases of death or personal injury under French law, compensable losses can be suffered by the primary victim or by persons sufficiently close to him so as to suffer losses which are direct consequences of the primary victim's harm.

[138] Death Medical and funeral expenses

Death Pecuniary loss to plaintiff or beneficiary in general

Under French personal-injury law, relatives of the dead primary victim can seek pecuniary losses, including funeral expenses, loss of income and various other costs, such as

transportation and housing costs that the indirect victims may have incurred following the primary victim's death.

[139] Death Mental suffering or emotional distress of plaintiff or beneficiary

Under French personal-injury law, when death causes more than grief and directly results in an alteration of the claimant's medical condition, such as when the claimant suffers a depression, for example, that alteration constitutes itself a new personal injury, the consequences of which, both pecuniary and non-pecuniary, must be compensated by the defendant liable for the primary harm.

[140] Damages Particular cases

In Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Paris, non-United States citizen stepfather of victim killed in attack would be awarded \$2,500,000 in solatium damages upon establishing Syria's liability under France's statute providing for a person's liability for harm caused by his fault; stepfather suffered psychological trauma due to victim's death, psychiatric expert opined that stepfather had persistent complex bereavement disorder with traumatic bereavement and persistent depressive disorder, and expert also opined that stepfather's mood and grief issues would affect him in the long term. [28 U.S.C.A. § 1606](#).

[141] Damages Nature and theory of compensation

Death Measure and Amount Awarded

To calculate damages in cases of death or personal injury, French law uses the full compensation rule, whereby damages awarded to the claimant must compensate the harm he suffered, without his getting any poorer or richer from it; damages must compensate for the damage in full, and nothing but the damage.

[142] Assault and Battery  Acting in concert

As was relevant to damages awarded to non-United States citizens on their claims under Turkish tort law in their Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Istanbul, the fact that Syria's obligation was indirect did not preclude the fault ratio from being 100% under Turkish tort law.

[143] War and National Emergency  Private Remedies

As was relevant to Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack that a terrorist organization supported by Syria carried out in Istanbul, non-United States citizen family members of victim and estate of a non-citizen family member had standing under Turkish law to assert tort claims against Syria; the tort took place in Turkey, and the family members were directly affected by the tortious act. [28 U.S.C.A. § 1606](#).

[144] International Law  Violent or criminal acts in general

Under international law, as is in turn relevant to Turkish tort law on the liability of a state for terrorist activities, if a sovereign state acts unlawfully against another it shall be held liable, and the grounds for such liability could arise from an international agreement or a tort.

[145] International Law  Violent or criminal acts in general

Under international law, as is in turn relevant to Turkish tort law on the liability of a state for terrorist activities, if certain conditions are satisfied, the state where the unlawful act took place or a state whose act transcended its borders and harmed a citizen of another state may be held internationally liable, and such liability shall be

to compensate for the damages, or in other words civil liability.

[146] International Law  Violent or criminal acts in general

Under international law, as is in turn relevant to Turkish tort law on the liability of a state for terrorist activities, a state is responsible for the actions of its organs and persons or authorities that are legally bound to it.

[147] International Law  Violent or criminal acts in general

Under international law, as is in turn relevant to Turkish tort law on the liability of a state for terrorist activities, if a terrorist act is committed by a person who has de jure relation with a state, the state will be responsible for that terror act.

[148] International Law  Terrorism and Related Activity

As was relevant to Foreign Sovereign Immunities Act (FSIA) action against Syria concerning terror attack in Istanbul, Turkey, Syria, by supporting the terrorist organization that committed the attack, was liable under Turkish law as to tort claims asserted by non-United States citizen family members of victim and estate of a non-citizen family member. [28 U.S.C.A. § 1606](#).

[149] Damages  Nature and theory of compensation

Damages  Mental Suffering and Emotional Distress

Under Turkish tort law, the only claimable damages are real damages and generally enrichment via compensation is not accepted under Turkish law; solatium damages may be considered as an exception to that principle, but solatium damages in Turkey are not high, compared to other jurisdictions, especially the United States.

[150] Damages ↗ Nature and Theory of Damages
Additional to Compensation

Punitive damages are not available under Turkish tort law.

[151] Death ↗ Persons Entitled to Sue

Tort claims related to death can be made by successors of the deceased and persons deprived from his support.

[152] Death ↗ Persons Entitled to Sue

Death ↗ Heirs and next of kin

Death ↗ Mental suffering or emotional distress of plaintiff or beneficiary

Executors and Administrators ↗ Debts and Rights of Action

In case of death, Turkish tort law does not permit successors to make an emotional-damages claim on behalf of deceased person's estate; however, if the situation fulfills the conditions required by the law, inheritors or persons that were deprived of a deceased person's financial and/or emotional support can make their own emotional-damages claims.

[153] Damages ↗ Loss of earnings or services

Damages ↗ Medical treatment and care of person injured

Under Turkish tort law, claims arising from damages related to personal injury are: (i) medical treatment expenses, (ii) losses of future income, (iii) losses occurred from decline or loss of work ability, and (iv) losses occurred from collapsing of economic future.

[154] Damages ↗ Mental Suffering and Emotional Distress

Under Turkish tort law, the injured may raise emotional-damages claims for the pain and suffering that they had to go through.

[155] Damages ↗ Medical treatment and care of person injured

Under Turkish tort law, pursuant to which the only claimable damages are real damages, medical treatment expenses are real damages occurred due to medical treatment, which would include anything that is related to medical treatment of the damage from the tortious act; the judge may order damages for future medical treatment expenses if the treatment needs to continue.

[156] Damages ↗ Mental suffering and emotional distress

Under Turkish tort law, the judge must determine a monetary amount for emotional-damages claims that would not enrich the claimant but somehow fairly compensates his emotional losses.

[157] Damages ↗ Medical treatment and care of person injured

Death ↗ Medical and funeral expenses

Under Turkish tort law, funeral and related expenses are claimable in case of death; medical expenses are claimable in case of injury.

[158] Death ↗ Persons for whose benefit suit may be maintained

As is relevant to future damages under Turkish tort law, spouses and infant children are accepted as persons who are deprived of the support of a decedent; other claimants need to prove their deprivation of the support of the decedent.

[159] Damages ↗ Nature and theory of compensation

Under Turkish tort law, monetary compensation aims to provide a sort of relief to the harmed person; therefore, the judge should consider each claimant's situation and decide how they should

be compensated so that their pain could be relieved, at least to a reasonable point.

[160] Damages ↗ Mental suffering and emotional distress

Under Turkish tort law, comparative fault of the claimant is seen as a reason for reduction of emotional damages.

claims against that country under Turkish law, be awarded \$6,000,000 in solatium damages in Foreign Sovereign Immunities Act (FSIA) action against Syria; amount awarded would maintain consistency among family members, and psychiatric expert expected that son's resulting anxiety, mood, and complicated grief issues would affect him for a long time. [28 U.S.C.A. § 1606](#).

[161] Damages ↗ Mental suffering and emotional distress

Under Turkish tort law, the significance of the event as well as the status and special condition of each of the claimants must be taken into consideration when determining emotional damages.

[162] Assault and Battery ↗ Amount awarded

Damages ↗ Particular cases

Evidence ↗ Damages

Non-United States citizen victim of terror attack that a terrorist organization supported by Syria carried out in Istanbul would, due to Syria's liability on victim's tort claims against that country under Turkish law, be awarded \$5,000,000 in compensatory damages and \$4,000,000 in solatium damages in Foreign Sovereign Immunities Act (FSIA) action against Syria; attack left victim with shrapnel in her left foot, victim walked with a limp on that foot and was unable to run due to the limp, psychiatric expert expected that, despite treatment, victim's mood and anxiety issues would continue to affect her for a long time, and awarded amounts would maintain consistency of awards amongst family members. [28 U.S.C.A. § 1606](#).

[164] Damages ↗ Mental Suffering and Emotional Distress

Pursuant to Turkish tort law, non-United States citizen who was brother of victim of terror attack that a terrorist organization supported by Syria carried out in Istanbul could only make emotional-damages claims against Syria in Foreign Sovereign Immunities Act (FSIA) action; victim survived the attack. [28 U.S.C.A. § 1606](#).

[165] Damages ↗ Particular cases

Non-United States citizen who was brother of surviving victim of terror attack that a terrorist organization supported by Syria carried out in Istanbul would be awarded \$3,000,000 in solatium damages against Syria as to tort claims asserted under Turkish law in Foreign Sovereign Immunities Act (FSIA) action; after the attack, brother developed anxiety, which became chronic over time, and psychiatric expert opined that brother suffered from persistent depressive disorder, moderate severity, late onset, with pure dysthymic syndrome and persistent complex bereavement disorder with traumatic bereavement. [28 U.S.C.A. § 1606](#).

[163] Damages ↗ Parent and child

Damages ↗ Particular cases

Non-United States citizen son of deceased victim of terror attack that a terrorist organization supported by Syria carried out in Istanbul would, due to Syria's liability on son's tort

[166] Damages ↗ Particular cases

Estate of non-United States citizen who was sister of surviving victim of terror attack that a terrorist organization supported by Syria carried out in Istanbul would be awarded \$3,000,000 in solatium damages against Syria as to tort claims asserted under Turkish law in Foreign Sovereign Immunities Act (FSIA) action; before

the attack, sister was highly active, happy, and healthy, but after the attack, which killed victim's husband too, sister developed severe depression that became treatment resistant, and she died from heart failure accompanied by deep sadness and depression. [28 U.S.C.A. § 1606](#).

FSIA, [28 U.S.C. § 1605A\(c\)](#), as well as causes of action for wrongful death, battery, survival damages, intentional infliction of emotional distress and negligence under Israeli law. *Id.* at ¶¶ 191-318 (Dkt. 44). Syria did not answer or otherwise appear. Plaintiffs moved for entry of default by the Court against Syria and the Clerk noted the default of Syria on February 25, 2022. (Dkt. 53, 55).

Attorneys and Law Firms

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

TERRENCE W. BOYLE, UNITED STATES DISTRICT JUDGE

Plaintiffs respectfully submit the following Proposed Findings of Fact and Conclusions of Law in support of their Motion for Default Judgment against the Syrian Arab Republic (“Syria”) pursuant to [28 U.S.C. § 1608\(e\)](#); and their request to refer the assessment of damages to a special master pursuant to [28 U.S.C. § 1605A\(e\)](#).

I.

PROCEDURAL POSTURE

This is a civil action for damages pursuant to the Foreign Sovereign Immunities Act (“FSIA”) [28 U.S.C. § 1602 et seq.](#). Plaintiffs are the estate and family of U.S. national Nohemi Gonzalez murdered in a terror attack on November 13, 2015, the family and estate of U.S. national Abvraham¹ Goldman murdered in a terror attack on March 19, 2016, the estate and family of Alexander Pinczowski murdered in a terror attack on March 22, 2016, and the estate and family of U.S. national Erez Orbach murdered in a terror attack on January 8, 2017. Plaintiffs are also the survivors of the terror attacks on March 19, 2016 and January 8, 2017 and their families. Plaintiffs filed this action on June 2, 2020 against Syria. (Dkt. 1). Plaintiffs amended the complaint on October 13, 2020. (Dkt. 44). Plaintiffs assert a cause of action under the

[1] [2] [3] Plaintiffs have presented evidence in the form of an expert declaration by Dr. Daveed Gartenstein-Ross (“Gartenstein-Ross Decl.”) regarding Syria’s material support to ISIS, as well as ISIS’s responsibility for the terror attacks in Istanbul, *[327](#) Paris and Brussels and an expert declaration by Arieh Dan Spitzen, Israel Defense Forces Colonel (ret.) (“Spitzen Decl.”) regarding the responsibility of ISIS for the terror attack in Jerusalem. (Dkt. 75, 78). Plaintiffs also rely upon the testimony and reports of Dr. Gartenstein-Ross and Dr. Matthew Levitt in *Sotloff v. Syrian Arab Republic*, [525 F. Supp. 3d 121 \(D.D.C. 2021\)](#) (Dkt. 34-1, 34-2, 41, 42), the expert reports by Dr. Gartenstein-Ross in *Doe v. Syrian Arab Republic*, [2020 WL 5422844 \(D.D.C. Sept. 10, 2020\)](#) (Dkt. 31-6) and in *Fields v. Syrian Arab Republic*, [2021 WL 9244135 \(D.D.C. Sept. 29, 2021\)](#) (Dkt. 16-2), as well as Dr. Levitt’s expert report in *Winternitz v. Syrian Arab Republic*, [2022 WL 971328 \(D.D.C. March 31, 2022\)](#). (Dkt. 14-2) (Dkt. 98, Ex. 2, 5-8, 10-11). From *Sotloff*, [525 F. Supp. 3d 121](#), Plaintiffs further rely upon Ex. 1-11, Ex. 15-25, Ex. 27 from Docket 38 and Docket 37-1, which include government reports, records, and statements about Syria’s material support of ISIS.² (Dkt. 98, Ex. 9, 9A-9S). Plaintiffs further rely upon the declarations of Dr. Boaz Shnoor in *Force v. Islamic Republic of Iran, et al.*, [464 F. Supp. 3d 323 \(D.D.C. 2020\)](#) (Dkt. 34) and *Borochov v. Islamic Republic of Iran, et al.*, [589 F. Supp. 3d 15 \(D.D.C. 2022\)](#)) and the declaration of Dr. Israel Gilead in *Henkin v. Islamic Republic of Iran*, [2021 WL 291403 \(D.D.C. July 12, 2021\)](#) (Dkt. 56-2) regarding the application of Israeli law to the claims of a non-U.S. family member of a U.S. national victim, the declaration of Dr. Jean Sébastien Borghetti regarding the application of French law to the claims of José Hernandez, the declaration of Dr. N. Can Isiktac regarding the application of Turkish law to the claims of Pnina Greenfield, Yoseff Goldman, Tamar Choresh’s estate and Israel Gorenzsky and the declaration of Dr. Rafaël Jafferali regarding the application of Belgian law to the claims of Alexander Pinczowski’s estate. (Dkt. 77, 80, 81, 98, Ex. 15-17, 98, Ex. 15-17). Moreover, Plaintiffs have submitted declarations from each adult Plaintiff regarding the attack as well as their damages and sworn reports from Dr. Rael Strous, a psychiatric expert, regarding Plaintiffs’

psychological and emotional damages, and sworn reports by Dr. Alan Friedman regarding Ron Greenfield's, Pnina Greenfield's, Nitzachya Goldman's and Eytan Rund's physical injuries, as well as Nohemi's and Alexander's conscious pain and suffering before death. (Dkt. 79, 82, Ex. N, Q, R, W, 83-85, 88, 89-95, 100-116). Finally, Plaintiffs rely upon an economist to project the economic losses due to the terror attacks that murdered Nohemi and Erez and injured Ron Greenfield. (Dkt. 76). From the entire record, this Court makes the following findings of fact and conclusions of law.

*328 II.

FINDINGS OF FACT

A. The Evolution of ISIS

The Islamic State - Background

The “Islamic State” (IS) organization also known as ISIS/ ISIL (Islamic State of Iraq and Syria/Levant), and DAESH³ is an Al-Qa'ida splinter group with a militant Sunni Islamist ideology.⁴ (Spitzen Decl. ¶ 19) (Dkt. 78).

ISIS is a radical Sunni organization that seeks to restore what they imagine was the era of Prophet Muhammad through holy war (Jihad) against its enemies. (Spitzen Decl. ¶ 21) (Dkt. 78). ISIS maintains that a supranational Islamic Caliphate, modeled after the regimes of the first Caliphs who ruled following the death of Muhammad, should be established. (Spitzen Decl. ¶ 21) (Dkt. 78). It would be ruled by Islamic religious law (the *Sharia*), according to its strictest interpretation. (Spitzen Decl. ¶ 21) (Dkt. 78). The Caliphate would arise on the ruins of the nation states established in the Middle East after World War I.⁵ (Spitzen Decl. ¶ 21) (Dkt. 78).

For ISIS, the establishment of the Caliphate and the change of the organization's name to the “Islamic State,” created the sole legitimate religious and political framework for Muslims in the 21st century.⁶ (Spitzen Decl. ¶ 22) (Dkt 78). IS deems anyone who is not devoted to its ideology as a “Murtad,” meaning, an apostate, someone who had believed in Islam but abandoned it, or as a “Kafir,” meaning, an infidel. (Spitzen Decl. ¶ 24) (Dkt. 78). IS views those organizations that do not accept its ideology and way of life as illegitimate organizations, against whom a war of annihilation must be waged. (Spitzen Decl. ¶ 24) (Dkt. 78). Categorizing someone

who does not accept the ways of IS as an apostate or as an infidel, in effect, is a call for murder. (Spitzen Decl. ¶ 25) (Dkt. 78).

Groups Designated as Foreign Terrorist Organizations

Over the years, the U.S. State Department has designated ISIS-affiliated individuals and entities as terrorists and terror organizations.⁷ (Spitzen Decl. ¶ 27) (Dkt. 78). In August 2017, the U.S. State Department designated over 30 ISIS leaders and operatives in an effort to curtail the terror activity of ISIS.⁸ (Spitzen Decl. *329 ¶ 27) (Dkt. 78). For years, the U.S. Treasury worked to strike at ISIS's sources of funding.⁹ (Spitzen Decl. ¶ 27) (Dkt. 78).

Background: Abu Musab al-Zarqawi

Abu Musab al-Zarqawi is considered ISIS's founder. (Gartenstein-Ross Decl. ¶ 29) (Dkt. 75). ISIS is the most recent iteration of the “Zarqawi organization,” a militant group that has undergone name changes since its founding in 1993. (Gartenstein-Ross Decl. ¶ 28) (Dkt. 75). Zarqawi and his network were responsible for some of the worst atrocities committed in Iraq's civil war. (Gartenstein-Ross Decl. ¶ 29) (Dkt. 75).

In 1989, Zarqawi traveled to Afghanistan after undergoing a religious awakening.¹⁰ (Gartenstein-Ross Decl. ¶ 30) (Dkt. 75). Zarqawi went to Afghanistan hoping to fight the Soviet Union but was too late. (Gartenstein-Ross Decl. ¶ 31) (Dkt. 75). While in Afghanistan Zarqawi joined the jihadist movement. (Gartenstein-Ross ¶ 31) (Dkt. 75). Al-Qaeda leader Osama bin Laden was in Afghanistan during Zarqawi's time there, and Zarqawi trained for combat in al-Qaeda's Sada camp, which bin Laden ran.¹¹ (Gartenstein-Ross Decl. ¶ 32) (Dkt. 75). Zarqawi also met fellow Jordanian Abu Muhammad al-Maqdisi in Afghanistan. (Gartenstein-Ross Decl. ¶ 32) (Dkt. 75). Maqdisi is a renowned Salafist cleric who became Zarqawi's ideological mentor. (Gartenstein-Ross Decl. ¶ 32) (Dkt. 75). Zarqawi also built relationships with other jihadists in Afghanistan that allowed him to form the “Zarqawi organization,” which became known as ISIS after his death. (Gartenstein-Ross Decl. ¶ 32) (Dkt. 75).

Bayat al-Imam / Tawhid wa-Jihad

While in Afghanistan, Zarqawi and Maqdisi established their own militant Islamist group, known as Bayat al-Imam. (Gartenstein-Ross Decl. ¶ 33) (Dkt. 75). But members of

the group reportedly referred to it instead as Tawhid wa-l-Jihad (Monotheism and Jihad, or TwJ). (Gartenstein-Ross Decl. ¶ 33) (Dkt. 75). The group wanted to overthrow Jordan's monarchy and replace it with an Islamic government. (Gartenstein-Ross Decl. ¶ 33) (Dkt. 75).

Zarqawi and Maqdisi returned to Jordan in 1993 and authorities arrested them in 1994. (Gartenstein-Ross Decl. ¶ 34) (Dkt. 75). Both men were convicted on terrorism charges and sentenced to 15 years in prison.¹² (Gartenstein-Ross Decl. ¶ 34) (Dkt. 75). The Zarqawi organization was very influential in prison.¹³ (Gartenstein-Ross Decl. ¶ 35) (Dkt. 75). In 1999, King Abdullah II declared a general amnesty for Jordanian prisoners, and Zarqawi and Maqdisi were released. (Gartenstein-Ross ¶ 37) (Dkt. 75).

Two weeks after his arrival in Kandahar, Zarqawi met with Saif al-Adl, who was al-Qaeda's security chief.¹⁴ (Gartenstein-Ross Decl. ¶ 38) (Dkt. 75). Adl played an important role in al-Qaeda's partnership with Zarqawi.¹⁵ (Gartenstein-Ross *330 Decl. ¶ 38) (Dkt. 75). According to Adl, bin Laden and Ayman al-Zawahiri were reluctant to associate with Zarqawi. (Gartenstein-Ross Decl. ¶ 38) (Dkt. 75). But Adl counseled al-Qaeda's leadership to work with Zarqawi to enable al-Qaeda to gain a foothold in Palestine and Jordan.¹⁶ (Gartenstein-Ross Decl. ¶ 38) (Dkt. 75).

With bin Laden's consent, Adl met with Zarqawi and discussed plans to establish a military camp in western Afghanistan.¹⁷ (Gartenstein-Ross Decl. ¶ 39) (Dkt. 75). Bin Laden indirectly provided funding and equipment for the camp.¹⁸ (Gartenstein-Ross Decl. ¶ 39) (Dkt. 750). Al-Qaeda and Zarqawi also worked together to plot terror attacks before the 9/11 attacks.¹⁹ (Gartenstein-Ross Decl. ¶ 39) (Dkt. 75).

Jund al-Sham

The Zarqawi organization's network in Herat became known as Jund al-Sham, though the banner above the entrance to the Herat camp still read *Tawhid wa-l-Jihad*—which is the name that insiders called the group during this period.²⁰ (Gartenstein-Ross Decl. ¶ 40) (Dkt. 75). Graduates of the Herat camp took part in terror plots.²¹ (Gartenstein-Ross Decl. ¶ 40) (Dkt. 75).

After the establishment of the Herat camp, Zarqawi tasked Abu Abdel Rahman al-Shami, a fellow Jordanian

militant, with expanding his network into northern Iraq.²² (Gartenstein-Ross Decl. ¶ 41) (Dkt. 75). On September 1, 2001, Shami helped form the group Jund al-Islam with Kurdish jihadist leader Abu Abdullah al-Shafi'i and Iraqi militant Abu Wa'il. (Gartenstein-Ross Decl. ¶ 41) (Dkt. 75). Following the 9/11 attacks, Jund al-Islam merged with a Kurdish jihadist organization operating in northern Iraq known as Ansar al-Islam.²³ (Gartenstein-Ross Decl. ¶ 41) (Dkt. 75). The U.S. invasion of Afghanistan in late 2001 forced Zarqawi and Jund al-Sham members to relocate from Herat to Iran and then to Iraq.²⁴ (Gartenstein-Ross Decl. ¶ 42) (Dkt. 75). Zarqawi expanded his organization into other countries in the region, but his main focus was in Iraq. (Gartenstein-Ross Decl. ¶ 42) (Dkt. 75).

Al-Qaeda in Iraq

In October 2004, Zarqawi pledged *bayah* (an oath of allegiance) to bin Laden, thus making his organization al-Qaeda's first official affiliate group. (Gartenstein-Ross Decl. ¶ 44) (Dkt. 75). Zarqawi intended to become a key player for al-Qaeda in Iraq, and his declaration served “as a recruiting statement for the Iraqi insurgency.”²⁵ (Gartenstein-Ross Decl. ¶ 44) (Dkt. 75). With Zarqawi's public declaration of *bayah*, his organization became known as *331 al-Qaeda in Iraq (AQI), but the Zarqawi organization's leadership structure and membership ranks remained intact. (Gartenstein-Ross Decl. ¶ 45) (Dkt. 75).

Mujahedin Shura Council (MSC)

On January 15, 2006, AQI's deputy emir, Abu Maysarah al-Iraqi, announced the establishment of MSC, an umbrella group composed of six Iraqi Sunni militant factions. (Gartenstein-Ross Decl. ¶ 46) (Dkt. 75). These factions were AQI, the Victorious Sect Army, the Monotheism Supporters Brigades (Saraya Ansar al-Tawhid), the Islamic Jihad Brigades (Saraya al-Jihad al-Islami), the Al-Gurib (Foreigners) Brigades, and the Al-Ahwal (Fear) Brigades.²⁶ (Gartenstein-Ross Decl. ¶ 46) (Dkt. 75). ISIS's eventual “caliph” Abu Bakr al-Baghdadi formally came into AQI's orbit weeks later, when the group Jaysh Ahl al-Sunnah wa-l-Jama'a, in which Abu Bakr served as the emir of the Sharia Committee, joined MSC.²⁷ (Gartenstein-Ross Decl. ¶ 46) (Dkt. 75). The MSC's establishment came about due to the formalization of prior relationships. (Gartenstein-Ross Decl. ¶ 46) (Dkt. 75).

Though MSC purported to function as a coalition, the group was AQI's brainchild. (Gartenstein-Ross Decl. ¶ 47) (Dkt. 75). At the time, AQI faced criticism from Iraqis for representing a foreign agenda and attacking civilians. (Gartenstein-Ross Decl. ¶ 47) (Dkt. 75). AQI envisioned MSC as a way to rebrand, highlighting its local origins and connections in an effort to regain the support of other Iraqi factions and the population. (Gartenstein-Ross Decl. ¶ 47) (Dkt. 75). Attacks in Iraq claimed by MSC during its brief existence did not invoke AQI's name, in order to downplay AQI's involvement in the insurgency and to draw attention instead to Iraqi militants. (Gartenstein-Ross Decl. ¶ 47) (Dkt. 75). Though the MSC was designed to provide cover to AQI and showcase the "Iraqi-led" insurgency, AQI quietly remained the dominant player. (Gartenstein-Ross Decl. ¶ 48) (Dkt. 75).

Islamic State of Iraq (ISI)

On October 15, 2006, MSC announced its establishment of the ISI.²⁸ (Gartenstein-Ross Decl. ¶ 50) (Dkt. 75). Zarqawi died prior to ISI's creation, but its establishment advanced AQI's objectives in keyways. (Gartenstein-Ross Decl. ¶ 50) (Dkt. 75). According to Saif al-Adl, establishing an Islamic state was one of Zarqawi's core goals when he relocated to Iraq.²⁹ (Gartenstein-Ross Decl. ¶ 50) (Dkt. 75).

Brian Fishman notes ISI "immediately set out to build a scalable bureaucratic framework that would eventually define the IS during the Syrian civil war."³⁰ (Gartenstein-Ross Decl. ¶ 52) (Dkt. 75). Fishman outlines a number of steps that ISI took during this period that would later define ISIS's bureaucracy, including: (1) naming a cabinet; (2) implementing small public works projects; and (3) implementing health and safety regulations.³¹ (Gartenstein-Ross *332 Decl. ¶ 52) (Dkt. 75). By late 2006, the Zarqawi organization-controlled territory in Iraq that was larger in size than New England.³² (Gartenstein-Ross Decl. ¶ 53) (Dkt. 75).

ISI encountered a challenge that produced the group's defeat but it reemerged in the post-Arab Spring environment as ISIS. (Gartenstein-Ross Decl. ¶ 54) (Dkt. 75). Though the Zarqawi organization had tried to mask its activities in Iraq under the pretense of an Iraqi-led insurgent coalition, many Sunni tribal leaders saw the jihadist organization as brutal, foreign in its conception, and forcibly imposing an oppressive form of the Islamic faith that was alien to Iraq. (Gartenstein-Ross Decl. ¶ 54) (Dkt. 75). In September 2006, around 30 of these

leaders held a meeting to voice their opposition to the Zarqawi organization, and formed a coalition called *Majlis Inqadh al-Anbar*, or the Anbar Salvation Council, to combat al-Qaeda elements in their midst.³³ (Gartenstein-Ross Decl. ¶ 54) (Dkt. 75). This became known as the Awakening movement, which was key in the Zarqawi organization's defeat during this period. (Gartenstein-Ross Decl. ¶ 54) (Dkt. 75).

The U.S. also made two major changes in its military strategy that contributed to the Zarqawi organization's setbacks: increasing the number of soldiers on the ground and shifting the way the troops were used. (Gartenstein-Ross Decl. ¶ 55) (Dkt. 75). America's focus shifted toward protecting Iraqi civilians from insurgents and other dangers, and American forces were better integrated with the Iraqis through the use of outposts in the districts they patrolled.³⁴ (Gartenstein-Ross Decl. ¶ 55) (Dkt. 75). These changes, coupled with the turning of tribes, as well as former insurgents, to cooperate with coalition forces made a difference on the ground. (Gartenstein-Ross Decl. ¶ 56) (Dkt. 75).

In April 2010, U.S. and Iraqi forces raided a safe house north of Baghdad and killed ISI's emir and its minister of war. (Gartenstein-Ross Decl. ¶ 58) (Dkt. 75). On May 16, 2010, ISI announced the selection of a new emir, Abu Bakr al-Baghdadi al-Husayni al-Qurashi, who would become ISIS's first caliph.³⁵ (Gartenstein-Ross Decl. ¶ 58) (Dkt. 75).

Abu Bakr al-Baghdadi and the Rise of ISIS

Abu Bakr al-Baghdadi came from Iraq. (Gartenstein-Ross Decl. ¶ 60) (Dkt. 75). After high school, he enrolled in a doctorate program at Saddam University for Islamic Studies and became a member of the Muslim Brotherhood.³⁶ (Gartenstein-Ross Decl. ¶ 60) (Dkt. 75). In 2004, U.S. forces arrested Abu Bakr in Fallujah, and sent him to the notorious Camp Bucca prison. (Gartenstein-Ross Decl. ¶ 61) (Dkt. 75). By the time of his release at the end of that year, Abu Bakr had built a network of jihadists from among his fellow prisoners. (Gartenstein-Ross Decl. ¶ 61) (Dkt. 75). Abu Bakr then worked with several militant *333 groups, including AQI. (Gartenstein-Ross Decl. ¶ 61) (Dkt. 75).

Abu Bakr was a member of Jaysh al-Mujahideen in Iraq in 2005 before becoming the emir of the Sharia Committee of the Jaysh Ahl al-Sunnah wa-l-Jama'a, which is a jihadist outfit that aligned ideologically with Zarqawi and bin Laden and joined the MSC on January 26, 2006. (Gartenstein-Ross Decl. ¶ 62) (Dkt. 75).

As unrest in Syria mounted in 2011, Abu Bakr began laying the groundwork for ISI's western expansion. (Gartenstein-Ross Decl. ¶ 64) (Dkt. 75). In August 2011, Abu Bakr dispatched Abu Muhammad al-Julani and a small group of ISI members into Syria to establish a new branch of ISI.³⁷ (Gartenstein-Ross Decl. ¶ 64) (Dkt. 75). In January 2012, Julani's group announced the establishment of Jabhat al-Nusra. (Gartenstein-Ross Decl. ¶ 65) (Dkt. 75). Seeking to gain more moderate Syrian rebels, Jabhat al-Nusra obscured its ties to ISI and al-Qaeda. (Gartenstein-Ross Decl. ¶ 65) (Dkt. 75). In December 2012, the U.S. Treasury designated the group as a foreign terrorist organization (FTO) connected to AQI. (Gartenstein-Ross Decl. ¶ 65) (Dkt. 75).

The dynamics between Abu Bakr and Julani were troubled, as Julani was not an obedient and deferential deputy. (Gartenstein-Ross Decl. ¶ 66) (Dkt. 75). The two leaders had different strategic and tactical outlooks, and Julani disobeyed some of Abu Bakr's orders.³⁸ (Gartenstein-Ross Decl. ¶ 66) (Dkt. 75). In late 2012, Haji Bakr traveled to Syria to restore the relationship between Jabhat al-Nusra and ISI.³⁹ (Gartenstein-Ross Decl. ¶ 66) (Dkt. 75).

Abu Bakr began publicizing the link between ISI and Jabhat al-Nusra, emphasizing ISI's control over the Syria-based group.⁴⁰ (Gartenstein-Ross Decl. ¶ 67) (Dkt. 75). On April 9, 2013, Abu Bakr announced the dissolution of Jabhat al-Nusra. (Gartenstein-Ross Decl. ¶ 68) (Dkt. 75). In its place, he said the IS of Iraq and al-Sham (ISIS) would be the name of a new entity under his leadership. (Gartenstein-Ross Decl. ¶ 68) (Dkt. 75). Abu Bakr's move to unite the two groups ruined his group's relationship with Jabhat al-Nusra and al-Qaeda's senior leadership. (Gartenstein-Ross Decl. ¶ 69) (Dkt. 75). When Julani rejected Abu Bakr's merger, Zawahiri tried to resolve their dispute through mediation, but al-Qaeda decided to disown ISIS. (Gartenstein-Ross Decl. ¶ 69) (Dkt. 75).

By the time of this dissociation, ISIS had already begun its expansion throughout Iraq and Syria. (Gartenstein-Ross Decl. ¶ 70) (Dkt. 75). On January 4, 2014, ISIS seized control of Fallujah. (Gartenstein-Ross Decl. ¶ 70) (Dkt. 75). Less than two weeks later, ISIS gained control of the Syrian city of Raqqa.⁴¹ (Gartenstein-Ross *334 Decl. ¶ 70) (Dkt. 75). ISIS opened June 2014 with a shocking offensive from Syria into Iraq, seizing control of the major cities of Mosul and Tikrit in two days. (Gartenstein-Ross Decl. ¶ 70) (Dkt. 75). By the end of June 2014, the group's spokesman, Abu Muhammad

al-Adnani, claimed that ISIS had re-established the caliphate, thus becoming—in the group's eyes—the legitimate political and spiritual leader of the world's Muslims.⁴² (Gartenstein-Ross Decl. ¶ 70) (Dkt. 75).

ISIS then managed to establish branches or persuade other militant groups to declare their allegiance to it, in various places. (Gartenstein-Ross Decl. ¶ 71) (Dkt. 75). After the conquest of territories in Syria and Iraq, the IS adopted an efficient governmental pyramid structure; it established ad hoc state-like institutions; and it expanded the range of its non-violent activities. (Gartenstein-Ross Decl. ¶ 39) (Dkt. 75).

Data published in December 2015 disclosed the Islamic State's sources of funding in 2014: independent profits of two billion dollars. (Gartenstein-Ross Decl. ¶ 40) (Dkt. 75). Its "soldiers" earned \$400 to \$1,200 a month, plus a \$50 stipend for their wives and \$25 for each child. (Gartenstein-Ross Decl. ¶ 40) (Dkt. 75). Engineers and technicians earned \$1,500 a month. (Gartenstein-Ross Decl. ¶ 40) (Dkt. 75). Over \$360 million was collected annually in taxes from citizens under its control. (Gartenstein-Ross Decl. ¶ 40) (Dkt. 75). The takeover of oil wells and refineries within the area of the organization's control brought in over \$500 million dollars in revenue. (Gartenstein-Ross Decl. ¶ 40) (Dkt. 75). ISIS sold a portion of the oil and its products to its enemies. (Gartenstein-Ross Decl. ¶ 40) (Dkt. 75). ISIS stole between \$500 million and \$1 billion from banks. (Gartenstein-Ross Decl. ¶ 40) (Dkt. 75). Kidnapping brought in \$20-45 million. (Gartenstein-Ross Decl. ¶ 40) (Dkt. 75).

One factor in ISIS's growth was its powerful propaganda machine. (Gartenstein-Ross Decl. ¶ 72) (Dkt. 75). With the power of social media and significant advances in DIY video production, ISIS spread horrific imagery throughout the globe. (Gartenstein-Ross Decl. ¶ 72) (Dkt. 75).

B. Syrian Support for the Zarqawi Organization

Syria's relationship with ISIS during the time period most relevant to this case—the post-Arab Spring period—is best understood in the context of support that Bashar al-Assad's regime provided to previous iterations of the Zarqawi organization before the Arab Spring. (Gartenstein-Ross Decl. ¶ 73) (Dkt. 75). Syria's considerable support for AQI was intended to undermine coalition efforts in Iraq. (Gartenstein-Ross Decl. ¶ 73) (Dkt. 75). Addressing the Syrian parliament in March 2003—the month of the U.S. invasion—Syrian

foreign minister Farouq al-Sharra said that “Syria has a national interest in the expulsion of the invaders from Iraq.”⁴³ (Gartenstein-Ross Decl. ¶ 73) (Dkt. 75). Though Syria’s involvement with the Zarqawi organization went between tacit approval and blatant support, evidence of such support from 2002 to around 2010 is well documented and has been established by analysts and court opinions.⁴⁴ (Gartenstein-Ross Decl. ¶¶ 73–75) (Dkt. 75).

***335 Transit Point for Militants**

Syria’s role as the primary transit point for militants heading to Iraq, as well as a permissive operating environment for Zarqawi network operatives stationed there, is well documented. (Gartenstein-Ross Decl. ¶ 74) (Dkt. 75). America invaded Iraq in March 2003, and before the end of that month, U.S. Secretary of Defense Donald Rumsfeld had “accused Syria of allowing military supplies to be transported across its border to Iraq.”⁴⁵ (Gartenstein-Ross Decl. ¶ 76) (Dkt. 75). A month later, on *Face the Nation*, Secretary Rumsfeld described “busloads of people coming out of Syria into [Iraq].”⁴⁶ (Gartenstein-Ross Decl. ¶ 77) (Dkt. 75). The U.S. tried to pressure the Syrian regime, but the regime’s response was designed to maintain its support for the insurgency, as it shifted its posture from a policy of blatant facilitation of insurgents to one of tacit acceptance masked by disingenuous crackdowns. (Gartenstein-Ross Decl. ¶¶ 76–79) (Dkt. 75).

A March 2007 Department of Defense report found that Syria’s tacit support, including safe haven, border transit and logistical support, for the Iraqi insurgency had continued well into that year. (Gartenstein-Ross Decl. ¶ 80) (Dkt. 75). In October 2007, U.S. forces killed AQI’s emir of the Iraq and Syria border area and obtained documents that further revealed AQI’s cross-border operations. (Gartenstein-Ross Decl. ¶ 81) (Dkt. 75). The documents obtained in the raid, which became known as the “Sinjar records,” were studied in a 2008 report by the Combating Terrorism Center at West Point (CTC)⁴⁷ and it concluded that “all of the fighters listed in the Sinjar Records crossed into Iraq from Syria.”⁴⁸ (Gartenstein-Ross Decl. ¶ 82) (Dkt. 75). CTC released a follow-up report in 2008 that concluded “hundreds of fighters passed through Abu Kamel and Hasake just before the US invasion” and that “the Syrian authorities monitored the flow but made no move to stop it.”⁴⁹ (Gartenstein-Ross Decl. ¶ 82) (Dkt. 75). The U.S. State Department’s annual *Country Reports on Terrorism* in 2008, 2009, and 2010

identified Syria as the main conduit for foreign fighters entering Iraq. (Gartenstein-Ross Decl. ¶ 83) (Dkt. 75). A former senior ISIS official, Abu Ahmed, confirmed to *The Guardian* newspaper in 2014 that “the mujahideen all came through Syria.”⁵⁰ *336 (Gartenstein-Ross Decl. ¶ 85) (Dkt. 75). Concerned about possible military action against the Syrian regime, Syria opted to support insurgents and terrorists wreaking havoc in Iraq.⁵¹ (Gartenstein-Ross Decl. ¶ 82) (Dkt. 75). The logistics and facilitation networks established during this time would have later consequences for ISIS. (Gartenstein-Ross Decl. ¶ 82) (Dkt. 75). Indeed, a major 2014 report from the U.S. Department of State, its annual *Country Reports on Terrorism*, discussed how Syria served as a “key hub” for foreign fighters traveling to Iraq and noted that “those very networks were the seedbed for the violent extremist elements that terrorized the Syrian population in 2013.”⁵² (Gartenstein-Ross Decl. ¶ 82) (Dkt. 75).

Safe Haven for Militants

Syria served as a safe haven for key AQI operatives and ex-Baathist insurgents. (Gartenstein-Ross Decl. ¶ 86) (Dkt. 75). For example, one of AQI’s leaders, Abu al-Ghadiyah (born Sulayman Khalid Darwish) was based in Syria. (Gartenstein-Ross Decl. ¶ 86) (Dkt. 75). The U.S. Treasury Department designated Abu al-Ghadiyah in 2005 for his role in the Zarqawi network, which included fundraising and recruiting. (Gartenstein-Ross Decl. 86) (Dkt. 75).

Following Darwish’s death in 2005, his *kunya* (Abu al-Ghadiya) reappeared with Badran Turki Hishan al-Mazidih.⁵³ (Gartenstein-Ross Decl. ¶ 87) (Dkt. 75). Mazidih had his own distinguished jihadist career until his death in 2008, reportedly serving as AQI’s Syrian commander for logistics as early as 2004. (Gartenstein-Ross Decl. ¶ 87) (Dkt. 75). He “obtained false passports for foreign terrorists, provided weapons, guides, safe houses, and allowances to foreign terrorists in Syria and those preparing to cross the border into Iraq.”⁵⁴ (Gartenstein-Ross Decl. ¶ 87) (Dkt. 75). To assist his recruitment and fundraising, Mazidih cultivated a small familial network of AQI operatives in Syria. (Gartenstein-Ross Decl. ¶ 88) (Dkt. 75). For example, one of Mazidih’s cousins was integral to the transfer of funds, fighters, and suicide bombers from Syria into Iraq. (Gartenstein-Ross Decl. ¶ 88) (Dkt. 75). Mazidih’s familial network of operatives demonstrates the freedom of movement and operation allowed to key AQI members in Syria. (Gartenstein-Ross Decl. ¶ 88) (Dkt. 75).

Syria at times provided more active support to the insurgency in Iraq. (Gartenstein-Ross Decl. ¶ 89) (Dkt. 75). Regime defector Nawaf Fares claimed that during his time working for the Syrian government, he was part of “an operation to *337 smuggle jihadist volunteers into Iraq from Syria after the 2003 invasion.”⁵⁵ (Gartenstein-Ross Decl. ¶¶ 89-90) (Dkt. 75). The regime felt threatened and believed that its policies of supporting insurgent groups could help prevent a military intervention to topple it. (Gartenstein-Ross Decl. ¶ 91) (Dkt. 75). The Syrian government’s apparent hopes in pursuing these policies included: 1) to tie down the U.S. in Iraq; 2) to allow the Iraq conflict to serve as an outlet for domestic jihadists, thus preventing them from causing trouble at home; and 3) to gain “street cred” by being one of the few Arab governments to sanction armed opposition to the American presence in Iraq. (Gartenstein-Ross Decl. ¶ 91) (Dkt. 75).

Former Levant country director for the Office of the Secretary of Defense David Schenker testified in *Gates v. Syrian Arab Republic* that “in the months prior to the [U.S.] invasion, the Assad regime allowed the establishment of an office across the street from the U.S. Embassy in Damascus where would-be insurgents could sign up and board a bus to travel to Baghdad.”⁵⁶ (Gartenstein-Ross Decl. ¶ 93) (Dkt. 75). Then-U.S. Ambassador to Syria Ted Kattouf complained to the Syrian government about these activities but after months of complaints Damascus only moved the sign-up to Damascus Fairgrounds—a government-owned property—where it continued its work for several more months.⁵⁷ (Gartenstein-Ross Decl. ¶ 93) (Dkt. 75).

Further, a senior official in the Obama administration said that Fares’s account of Syrian policy toward militant groups, including AQI, was “broadly consistent” with the Obama administration’s understanding. (Gartenstein-Ross Decl. ¶ 94) (Dkt. 75). The official said that “since 2003, al-Assad allowed al Qaeda and associates to facilitate weapons, money and fighters to al Qaeda’s Iraq-based affiliate.”⁵⁸ (Gartenstein-Ross Decl. ¶ 94) (Dkt. 75). The Bush administration also fingered active Syrian support for AQI. (Gartenstein-Ross Decl. ¶ 94) (Dkt. 75). In 2005, the U.S.’s ambassador to Iraq, Zalmay Khalilzad, said publicly that state-run Syrian newspapers “glorify the terrorists as resistance fighters,” and that Syrian authorities “allow youngsters misguided by Al Qaeda” to fly into Damascus International Airport, “to attend

training camps and then cross into Iraq.”⁵⁹ (Gartenstein-Ross Decl. ¶ 94) (Dkt. 75).

Syria’s Relationships with Key Zarqawi Organization Members

Syria supported AQI recruiter Abu Qaqaa. (Gartenstein-Ross Decl. ¶ 95) (Dkt. 75). By the time of his assassination in 2007, Abu Qaqaa was considered to be an agent of the Syrian state. (Gartenstein-Ross Decl. ¶ 95) (Dkt. 75). Abu Qaqaa gave “regular sermons at Aleppo’s al-Tawabin mosque, something normally done only with the permission of Syria’s Al-Awqaf Ministry.”⁶⁰ (Gartenstein-Ross Decl. ¶ 95) *338 (Dkt. 75). The BBC reported that Abu Qaqaa had been “appointed head of a religious school by the Syrian government” in the year prior to his death.⁶¹ (Gartenstein-Ross Decl. ¶ 95) (Dkt. 75). Scholar Charles Lister described in his book *The Syrian Jihad* Abu Qaqaa’s “relationship with Syrian intelligence” as “almost certain” and noted that Syrian officials attended Abu Qaqaa’s funeral—which Lister notes was described as having “all the trappings of a state occasion”—as indicative of this relationship.⁶² (Gartenstein-Ross Decl. ¶ 95).

Abu Qaqaa’s ties to the Syrian regime were further validated in 2009, when Iraq aired the confession of Mohammed Hassan al-Shemari, the head of AQI in Diyala province. (Gartenstein-Ross Decl. ¶ 96) (Dkt. 75). Shemari said that he had received training from “a Syrian intelligence agent called Abu al-Qaqaa.” (Gartenstein-Ross Decl. ¶ 96) (Dkt. 75). According to his confession, Shemari travelled from Saudi Arabia to “an al Qaeda training camp in Syria.” (Gartenstein-Ross Decl. ¶ 96) (Dkt. 75). Shemari said that Abu al-Qaqaa ran the training camp, which was “well known to Syrian intelligence.”⁶³ (Gartenstein-Ross Decl. ¶ 96) (Dkt. 75). In an interview with the *Daily Beast* in 2016, regime defector and former intelligence official Mahmud al-Naser confirmed that Abu Qaqaa was “one of dozens” of imams who were “commissioned” by Syrian intelligence.⁶⁴ (Gartenstein-Ross Decl. ¶ 96) (Dkt. 75).

Fawzi Mutlaq al-Rawi, appointed by President Assad as “leader of the Iraqi wing of the Syrian Ba’ath party” in 2003, was designated by the U.S. Department of the Treasury in 2007 “for providing financial and material support to AQI.”⁶⁵ (Gartenstein-Ross Decl. ¶ 97) (Dkt. 75). Fawzi’s activities, along with his relationship to the Syrian state, are proof that Assad sided with the Iraqi insurgency. (Gartenstein-Ross

Decl. ¶ 97) (Dkt. 75). According to Nawaf Fares, Assad's brother-in-law, Assaf Shawkat, ran an al-Qaeda training camp struck by U.S. forces in October 2008. (Gartenstein-Ross Decl. ¶¶ 98-99) (Dkt. 75). In 2006, the U.S. Treasury named Shawkat, the director of Syrian military intelligence, a Specially Designated National "for directly furthering the Government of Syria's support for terrorism and interference in the sovereignty of Lebanon." (Gartenstein-Ross Decl. ¶ 100) (Dkt. 75). The designation outlines how Shawkat's career in government progressed even as he collaborated with numerous designated FTOs from 1997 onward.⁶⁶ (Gartenstein-Ross Decl. ¶ 100) (Dkt. 75).

Following the August 2009 bombings in Baghdad, Iraqi officials aired their conclusions about the Syrian regime's ties to the *339 Zarqawi organization.⁶⁷ (Gartenstein-Ross Decl. ¶ 101) (Dkt. 75). Iraqi Prime Minister Nouri al-Maliki detailed Syria's reluctance to respond to Iraqi intelligence reports about jihadists operating in Syria. (Gartenstein-Ross Decl. ¶ 101) (Dkt. 75). In December 2009, the Iraqi minister of defense Abd al-Qadir al-Ubaydi stated that "most of the weapons seized by his ministry's forces" were arriving from Syria, and the regime was "financing armed groups in Iraq."⁶⁸ (Gartenstein-Ross Decl. ¶ 102) (Dkt. 75).

C. Syrian Regime Support for ISIS Post-Arab Spring

Following the onset of the Arab Spring, Bashar al-Assad's government provided tacit and explicit support for ISIS, even though ISIS was fighting the regime. (Gartenstein-Ross Decl. ¶ 104) (Dkt. 75). The main reason the regime supported ISIS was the regime's desire to make anti-Assad elements appear extreme, and hence unpalatable, to the outside world. (Gartenstein-Ross Decl. ¶ 104) (Dkt. 75). Assad feared foreign military intervention—a fear that drove his support for AQI during the Iraq war, and one that grew after the NATO intervention that brought down Muammar al-Qaddafi's regime in Libya. (Gartenstein-Ross Decl. ¶ 104) (Dkt. 75). The mechanisms for maintaining a relationship with ISIS were well established due to the Assad regime's prior support for the Zarqawi organization. (Gartenstein-Ross Decl. ¶ 104) (Dkt. 75).

The 2018 U.S. State Department's *Country Reports on Terrorism* outlines how the relationship between Assad and ISIS's predecessor organizations continues to have consequences today: "Over the past decade, the Assad regime's permissive attitude towards al-Qa'ida and other terrorist groups' foreign terrorist fighter facilitation efforts

during the Iraq conflict in turn fed the growth of al-Qa'ida, ISIS, and affiliated terrorist networks inside Syria. The Syrian government's awareness and encouragement for years of terrorists' transit through Syria to enter Iraq for the purpose of fighting Coalition Forces is well documented. Those very networks were among the terrorist elements that brutalized the Syrian and Iraqi populations in 2017. Additionally, the Syrian regime has purchased oil from ISIS through various intermediaries, adding to the terrorist group's revenue."⁶⁹ (Gartenstein-Ross Decl. ¶ 105) (Dkt. 75).

Jihadist Prisoner Releases

In 2011, Assad began releasing inmates from Sednaya prison. (Gartenstein-Ross Decl. ¶ 107) (Dkt. 75). Sednaya prison has been home to many of the "battle-hardened Syrian jihadis" who returned to Syria from the war in Iraq in the early 2000s and was regarded as an "incubator for jihadism."⁷⁰ (Gartenstein-Ross Decl. ¶ 107) *340 (Dkt. 75). Following Assad's May 2011 general pardon, hundreds of Sednaya's extremist prisoners were released unconditionally despite no signs of rehabilitation. (Gartenstein-Ross Decl. ¶ 108) (Dkt. 75). They were free to join the fight against the regime, an outcome that Mohammed Habash, a former member of Syria's parliament, is "certain" the regime knew would happen.⁷¹ (Gartenstein-Ross Decl. ¶ 108) (Dkt. 75).

Speaking anonymously to the U.A.E.-based newspaper *The National*, one former regime official described the releases as part of "a policy on the part of Mr. Al Assad's forces to create violence and terrorism to legitimize a crackdown on the opposition." (Gartenstein-Ross Decl. ¶ 109) (Dkt. 75). The former official claimed that "weapons were made available to radical elements of the opposition in key hotspots." (Gartenstein-Ross Decl. ¶ 109) (Dkt. 75). He further told *The National* that he heard the orders come down from [Military Intelligence] headquarters in Damascus.⁷² (Gartenstein-Ross Decl. ¶ 109) (Dkt. 75).

In 2015, U.S. Secretary of State John Kerry described ISIS as, at least in part, "created by Assad releasing 1,500 prisoners from jail." (Gartenstein-Ross Decl. ¶ 110) (Dkt. 75). Kerry attributed the move to a calculation on Assad's part that he could create a choice between Assad and the terrorists.⁷³ (Gartenstein-Ross Decl. ¶ 110) (Dkt. 75). Many of the prisoners released were known jihadists and extremists, who have since become leaders in militant groups, including ISIS.⁷⁴ (Gartenstein-Ross Decl. ¶ 111). Some of the notable

ISIS leaders whom the Syrian government released from Sednaya prison during this period, include Ali al-Shawaq (a/k/a Abu Luqman), Fiwaz Muhammad al-Kurdi al-Hiju, and Amr al Absi. (Gartenstein-Ross Decl. ¶ 111). Dr. Gartenstein-Ross details in his declaration the rise of each of these men in the ranks of ISIS after their release from Sednaya prison and their importance in the leadership of ISIS, including but not limited to recruitment, oil trade, detention of foreign hostages, executions, and media propaganda. (Gartenstein-Ross Decl. ¶¶ 112-125) (Dkt. 75).

The U.S. Department of State's 2014 *Country Reports on Terrorism* highlights how Syria's actions with respect to the insurgency in Iraq years prior aided ISIS's rise in Syria from 2013-14: "The Syrian government had an important role in the growth of terrorist networks in Syria through the permissive attitude the Assad regime took towards al-Qa'ida's foreign fighter facilitation efforts during the Iraq conflict.... Those very networks were the seedbed for the violent extremist elements, including ISIL, which terrorized the Syrian and Iraqi population in 2014 and—in addition to other terrorist organizations within Syria—continued to attract thousands *341 of foreign terrorist fighters to Syria in 2014."⁷⁵ (Gartenstein-Ross Decl. ¶ 127) (Dkt. 75).

As early as 2012, regime defector Fares indicated to the *Telegraph* that he was familiar with "several Syrian government 'liaison officers' who still dealt with al-Qaeda."⁷⁶ (Gartenstein-Ross Decl. ¶ 128) (Dkt. 75). At the time, ISIS had not yet been expelled from al-Qaeda. (Gartenstein-Ross Decl. ¶ 128) (Dkt. 75). According to regime defector and former intelligence officer Mahmud Naser, after the outbreak of civil war in Syria, the regime circulated two sets of instructions for dealing with insurgents. (Gartenstein-Ross Decl. ¶ 129) (Dkt. 75). The first instructed officials in writing to "arrest and kill" jihadists listed on the communique, but there was a second message ordering officials to do the opposite.⁷⁷ (Gartenstein-Ross Decl. ¶ 129).

In August 2014, French President Francois Hollande declared Assad to be a "de facto ally of jihadists."⁷⁸ (Gartenstein-Ross Decl. ¶ 130) (Dkt. 75). While testifying before the House Foreign Affairs Committee in September 2014, U.S. Secretary of State Kerry described the Assad regime as having "played footsie" with ISIS, saying that Assad "has used them as a tool of weakening the opposition. (Gartenstein-Ross Decl. ¶ 130). He never took on their headquarters, which were open and obvious, and other assets that they have.

(Gartenstein-Ross Decl. ¶ 130) (Dkt. 75). So we have no confidence that Assad is either capable of or willing to take on ISIL."⁷⁹ (Gartenstein-Ross Decl. ¶ 130) (Dkt. 75).

Assad-ISIS Oil Sales

As for Syria's second major kind of support for ISIS, oil sales were an important source of revenue for ISIS. (Gartenstein-Ross Decl. ¶ 131) (Dkt. 75). Al-Qaeda in Iraq and the IS in Iraq used the sale of stolen oil to finance themselves as early as 2005, though these previous iterations of the group did not draw as much revenue as ISIS later would, as they did not control as much oil production.⁸⁰ (Gartenstein-Ross Decl. ¶ 131) (Dkt. 75). By late 2008, financial records from the Zarqawi organization's show that 39 percent of its revenue, or roughly \$1.87 million, was derived from oil-related activities.⁸¹ (Gartenstein-Ross Decl. ¶ 131) (Dkt. 75). After this, the Zarqawi organization experienced significant battlefield losses so the group's oil sales declined. (Gartenstein-Ross Decl. ¶ 132) (Dkt. 75). The group's involvement in oil sales returned with the rise of ISIS. *342 (Gartenstein-Ross Decl. ¶ 132) (Dkt. 75). In 2014, ISIS made between \$150 million to \$450 million from oil, with its "peak earnings estimates ranging from \$1-3 [million] a day."⁸² (Gartenstein-Ross Decl. ¶ 132) (Dkt. 75).

In October 2014, the U.S. Treasury Department's Under Secretary for Terrorism and Financial Intelligence David S. Cohen stated:

Our best understanding is that ISIL has tapped into a long-standing and deeply rooted black market connecting traders in and around the area.... So who, ultimately, is buying this oil? According to our information, as of last month, ISIL was selling oil at substantially discounted prices to a variety of middlemen, including some from Turkey, who then transported the oil to be resold. It also appears that some of the oil emanating from territory where ISIL operates has been sold to Kurds in Iraq, and then resold into Turkey. And in a further indication of the Assad regime's depravity, it seems the Syrian government has made an arrangement to purchase oil from ISIL.⁸³

(Gartenstein-Ross ¶ 133) (Dkt. 75). The U.S. government noted the regime's oil trading relationship with ISIS in the State Department's 2017 *Country Reports on Terrorism*, which states "the Syrian regime has purchased oil from ISIS through various intermediaries, adding to the terrorist group's revenue."⁸⁴ (Gartenstein-Ross Decl. ¶ 133) (Dkt. 75).

In January 2014, London's *Telegraph* published an investigative report revealing that Jabhat al-Nusra and ISIS had "both been financed by selling oil and gas from wells under their control to and through the regime."⁸⁵ (Gartenstein-Ross Decl. ¶¶ 134-135) (Dkt. 75). According to a Syrian businessman who spoke on condition of anonymity to *Time* in 2015: "Even from the early days the regime purchased fuel from ISIS-controlled oil facilities, and it has maintained that relationship throughout the conflict."⁸⁶ (Gartenstein-Ross Decl. ¶ 136) (Dkt. 75). The source, who had close ties to the Syrian government, described the regime's oil trade and provision of other goods and services—such as food and the preservation of mobile phone service providers—as consistent with the Syrian government's "pragmatic approach" to *343 dealing with ISIS. (Gartenstein-Ross Decl. ¶ 136) (Dkt. 75).

A significant portion of the Assad regime's purchase of ISIS's oil was distinct from its other purchases from ISIS. (Gartenstein-Ross Decl. ¶ 137) (Dkt. 75). In an on-the-record interview, Gen. (ret.) Terry Wolff, who served as the U.S.'s Deputy Special Presidential Envoy for the Global Coalition to Defeat ISIS, explained this unique dynamic to Dr. Gartenstein-Ross. (Gartenstein-Ross Decl. ¶ 137) (Dkt. 75). He explained that while there was a free flow of commerce via the black market in Syria, he assessed that ISIS's oil pipelines continued to facilitate the flow of oil to Damascus during this period. (Gartenstein-Ross Decl. ¶ 137) (Dkt. 75). Per Gen. Wolff, the fact that Damascus purchased oil from ISIS through its pipelines rather than the black market means that the Assad regime had a *direct* financial relationship with ISIS. (Gartenstein-Ross Decl. ¶ 138) (Dkt. 75). The use of oil pipelines also cemented the Assad regime as ISIS's key oil customer, given the far larger volumes of oil that can be moved more efficiently and at lower cost through pipelines as opposed to black-market tankers. (Gartenstein-Ross Decl. ¶ 138) (Dkt. 75)

ISIS had an elaborate bureaucratic structure. (Gartenstein-Ross Decl. ¶ 139) (Dkt. 750). According to an October 2015 *Financial Times* report, at the ISIS-controlled Tuweinan gas plant, the group appointed emirs to "monitor operations and negotiate with the regime through mediators."⁸⁷ (Gartenstein-Ross Decl. ¶ 139) (Dkt. 75). For example, ISIS carved out a deal wherein the group would reap 70 megawatts of electricity from Tuweinan each day, while providing 50 megawatts to the regime.⁸⁸ (Gartenstein-Ross Decl. ¶ 139)

(Dkt. 75). That ISIS organized these deals while employing regime and private employees further speaks to the group's relationship with the regime. (Gartenstein-Ross Decl. ¶ 139) (Dkt. 75). Since the jihadists lacked the technical expertise to operate the machinery, they typically served as managers, while employees—still paid by the regime, or by their former companies—continued their jobs under new management.⁸⁹ (Gartenstein-Ross Decl. ¶ 139) (Dkt. 75).

In 2016, U.S. Special Forces gave the *Wall Street Journal* exclusive access to a portion of documents recovered during a May 2015 raid on ISIS "oil tycoon" Abu Sayyaf.⁹⁰ (Gartenstein-Ross Decl. ¶ 140) (Dkt. 75). According to the *Wall Street Journal*, the documents revealed the magnitude of ISIS's "multinational oil operation," and described how ISIS "deals with the Syrian regime," including trade agreements between ISIS and the Syrian regime suggesting the regime was a significant trade partner. (Gartenstein-Ross Decl. ¶¶ 140-142) (Dkt. 75). Dr. Gartenstein-Ross in his declaration details a key Assad-ISIS intermediary, Hussam al-Katerji, for trade between ISIS and Syria. (Dkt. 75 ¶¶ 143-146).

Since 2015, the U.S. has designated several individuals and entities for trading with ISIS on behalf of the regime. (Gartenstein-Ross *344 Decl. ¶ 148) (Dkt. 75). For example, in November 2015, the U.S. Treasury designated Russian-Syrian businessman George Haswani and his company HESCO for "materially assisting and acting for or on behalf of the Government of Syria."⁹¹ (Gartenstein-Ross Decl. ¶ 148) (Dkt. 75). According to the designation, Haswani served "as a middleman for oil purchases by the Syrian regime from ISIL."⁹² (Gartenstein-Ross Decl. ¶ 148) (Dkt. 75). Another of Haswani's companies, International Pipeline Construction, was designated in September 2018.⁹³ (Gartenstein-Ross Decl. ¶ 148).

In September 2018, the U.S. Treasury designated Muhammad al-Qatirji and Qatirji Company. (Gartenstein-Ross Decl. ¶ 149) (Dkt. 75). According to the designation, "Qatirji maintains strong ties to the Syrian regime and facilitates fuel trade between the regime and ISIS, including providing oil products to ISIS-controlled territory. Qatirji is responsible for import and export activities in Syria and assists with transporting weapons and ammunition under the pretext of importing and exporting food items. These shipments were overseen by the U.S. designated Syrian General Intelligence Directorate. The Syria-based Qatirji Company is a trucking company that has also shipped weapons from Iraq to Syria.

Additionally, in a 2016 trade deal between the Government of Syria and ISIS, the Qatirji Company was identified as the exclusive agent for providing supplies to ISIS-controlled areas, including oil and other commodities.”⁹⁴ (Gartenstein-Ross Decl. ¶ 149) (Dkt. 75).

D. ISIS's Responsibility for the Paris Terror Attacks

On November 13, 2015, a cell of ISIS operatives working in three teams carried out a coordinated wave of terror attacks in Paris. (Gartenstein-Ross Decl. ¶ 151) (Dkt. 75). The first team of three attackers wore suicide vests, which they detonated at entrances to the Stade de France, where people were watching a soccer match. (Gartenstein-Ross ¶ 151) (Dkt. 75). The suicide bombs killed one person and wounded another 50. (Gartenstein-Ross Decl. ¶ 150) (Dkt. 75). At 9:25 p.m., minutes after the first attack, a second team of attackers opened fire on the Le Carillon bar and Le Petit Cambodge restaurant, killing 15. (Gartenstein-Ross ¶ 152) (Dkt. 75). The team of gunmen then moved on to attack À La Bonne Bière cafe and Casa Nostra pizzeria, killing 5. (Gartenstein-Ross Decl. ¶ 152) (Dkt. 75). They ended their attacks by opening fire on diners at La Belle Équipe restaurant, killing 19, including Nohemi Gonzalez. (Gartenstein-Ross Decl. ¶ 152) (Dkt. 75). While fleeing the scene, one of the gunmen, Ibrahim Abdeslam, detonated a suicide bomb at Le Comptoir Voltaire. (Gartenstein-Ross Decl. ¶ 152) (Dkt. 75). A third team of gunmen wearing suicide belts opened fire on concertgoers at Bataclan concert hall, which killed 90 people. (Gartenstein-Ross ¶ 152) (Dkt. 75).

*345 ISIS claimed responsibility for the attacks the next day in a communiqué posted on Telegram, which was then circulated by pro-ISIS Telegram channels and Twitter accounts. (Gartenstein-Ross Decl. ¶ 154) (Dkt. 75). ISIS subsequently laid claim to the attacks on multiple other occasions and featured it repeatedly in the group's propaganda. (Gartenstein-Ross Decl. ¶ 154) (Dkt. 75). Dr. Gartenstein-Ross in his declaration details the **authenticity** of these posts by ISIS. (Dkt. 75 ¶¶ 170-178).

Official French Statement Regarding ISIS's Culpability

The French government's investigation concluded ISIS was culpable. (Gartenstein-Ross ¶ 174) (Dkt. 75).

The Amniyat al-Kharji's Role in the Paris Attacks

A third substantiation of ISIS's claim of responsibility for the Paris attacks is the involvement of ISIS's external operations

division, the Amniyat al-Kharji. (Gartenstein-Ross Decl. ¶ 175) (Dkt. 75). The Amniyat al-Kharji (*External Security*) is a component of ISIS's broader Amniyat (Security Services).⁹⁵ (Gartenstein-Ross ¶ 176) (Dkt. 75). The Amniyat al-Kharji is responsible for training external operatives and planning terror attacks in areas outside of ISIS's core territory.⁹⁶ (Gartenstein-Ross Decl. ¶ 176) (Dkt. 75). The Amniyat al-Kharji relied on a multi-layered command structure, which includes what can be regarded as “theater commanders,” or individuals responsible for planning operations in various regions that ISIS is targeting. (Gartenstein-Ross Decl. ¶ 177) (Dkt. 75). They tend to originate from the regions they command.⁹⁷ (Gartenstein-Ross Decl. ¶ 177). After receiving training in ISIS territory, some Amniyat al-Kharji commanders travel back to their regions to coordinate attacks. (Gartenstein-Ross Decl. ¶ 177) (Dkt. 75). Abdelhamid Abaaoud, a Belgian of Moroccan descent, was one such commander. (Gartenstein-Ross Decl. ¶ 178) (Dkt. 75).

Abaaoud is sometimes described as the attack's ringleader and was an ISIS member involved in the Amniyat al-Kharji. (Gartenstein-Ross Decl. ¶ 189) (Dkt. 75). After receiving training in Syria, Abaaoud was able to go between Syria and Europe. (Gartenstein-Ross Decl. ¶ 178) (Dkt. 75). Once in Europe, Belgian police say that Abaaoud “identified, recruited, and trained other individuals to carry out the attacks in Paris.”⁹⁸ (Gartenstein-Ross Decl. ¶ 178) (Dkt. 75). Dr. Gartenstein-Ross produced a social network analysis in April 2016 about the militants associated with the Paris attackers and their accomplices. (Gartenstein-Ross Decl. ¶ 178) (Dkt. 75). The analysis in graphic form shows Abaaoud's central role in coordinating the attack as the primary connection between individuals and other ISIS cells *346 in Europe, including the perpetrators of the March 22, 2016, Brussels attack. (Gartenstein-Ross Decl. ¶ 178) (Dkt. 75).

Other members of ISIS's Amniyat al-Kharji who were involved in the Paris attacks have also been named publicly. (Gartenstein-Ross Decl. ¶ 178) (Dkt. 75). For example, on November 22, 2016, the U.S. Department of State designated Abdelilah Himich a Specially Designated Global Terrorist. (Gartenstein-Ross Decl. ¶ 180) (Dkt. 75). The designation described Himich's membership in ISIS's external operations division and noted that he was involved in planning the Paris and Brussels attacks.⁹⁹ (Gartenstein-Ross Decl. ¶ 175) (Dkt. 75). A number of individuals were convicted of the Paris terror attacks and some of those individuals are on trial for the 2016 Brussels terror attacks, including Salah Abdeslam,

Mohamed Abrini, Osama Krayem, Sofien Ayari, Mohamed Bakkali and Oussama Atar. (Dkt. 98, Ex. 1).¹⁰⁰

Conclusions About ISIS and the Paris Attacks

The importance of ISIS's Syria-Iraq safe haven for the success of the Paris plot is established by a number of factors: (1) Training in a physical safe haven increased the chances of a plot's success. (Gartenstein-Ross Decl. ¶ 182) (Dkt. 75). Cell members, including ringleader Abaaoud, trained in ISIS's Syria-Iraq caliphate territory. (Gartenstein-Ross Decl. ¶ 182) (Dkt. 75). (2) The Amniyat al-Kharji oversaw and played a significant role in the Paris attacks. (3) The Syria-Iraq safe haven enabled Abaaoud to flee to safety following a thwarted attack in 2015. (Gartenstein-Ross Decl. ¶ 182) (Dkt. 75). ISIS's control of that territory allowed these operatives to gain expertise through constant experimentation that would not have been possible in a different geographic space where they would have to worry about detection by law enforcement. (Gartenstein-Ross Decl. ¶ 182) (Dkt. 75).

Finally, per Dr. Gartenstein-Ross¹⁰¹, it also provided an ease of communication that would not have existed were they in a place where they had to worry about law enforcement pursuing them. (Gartenstein-Ross Decl. ¶ 182) (Dkt. 75).

E. ISIS's Responsibility for the Brussels Suicide Bombings

On March 22, 2016, Ibrahim el-Bakraoui, Najim Aachari, and Mohamed Abrini exited a taxi and entered the main terminal of the Brussels airport, using luggage trolleys to push large bomb-laden suitcases. (Gartenstein-Ross Decl. ¶ 183) (Dkt. 75). At 7:58 a.m., Bakraoui detonated his bomb at row 11 of the departure hall. (Gartenstein-Ross Decl. ¶ 183) (Dkt. 75). Nine *347 seconds later, Laachraoui detonated his bomb at row 2. (Gartenstein-Ross Decl. ¶ 183) (Dkt. 75). Unable to detonate his bomb, Abrini fled, leaving his suitcase behind. (Gartenstein-Ross Decl. ¶ 183) (Dkt. 75). Over an hour later, Khalid el-Bakraoui detonated a bomb inside a train in the Maelbeek metro station.¹⁰² (Gartenstein-Ross Decl. ¶ 183) (Dkt. 75). The three explosions claimed 32 lives and injured 340 people.¹⁰³ (Gartenstein-Ross Decl. ¶ 183) (Dkt. 75). Ten men are on trial for the 2016 Brussels attacks, including some that were convicted for the 2015 Paris attacks.¹⁰⁴ (Dkt. 98, Ex. 1).

The Brussels attack was carried out by an ISIS cell operating in France and Belgium. (Gartenstein-Ross Decl. ¶ 199) (Dkt. 75). On the day of the attacks, ISIS claimed responsibility for the attacks. (Gartenstein-Ross Decl. ¶ 186) (Dkt. 75). Dr.

Gartenstein-Ross in his declaration details the **authenticity** of the various posts by ISIS claiming responsibility for the attacks. (Gartenstein-Ross Decl. ¶¶ 188-199) (Dkt. 75). There are additional indicators of ISIS's culpability for the attacks, including repeated publications celebrating, promoting, and laying claim to the attacks. (Gartenstein-Ross Decl. ¶¶ 184, 200, 201, 204, 219) (Dkt. 75).

The Amniyat al-Kharji's Role in the Brussels Attacks

Many of the Paris-Brussels cell members and attackers maintained direct connections to ISIS leaders in Syria. (Gartenstein-Ross Decl. ¶ 208) (Dkt. 75). After receiving training in ISIS territory, some individuals in the Amniyat al-Kharji travel back to their areas of responsibility, as was the case with Abdelhamid Abaaoud who French authorities concluded was key to orchestrating the 2015 Paris attacks. (Gartenstein-Ross Decl. ¶ 210) (Dkt. 75). Abaaoud and Salah Abdeslam, his childhood friend, connected the network of terrorists that would carry out the Brussels attacks in March 2016.¹⁰⁵ (Gartenstein-Ross Decl. ¶ 210) (Dkt. 75). Other Amniyat al-Kharji commanders would carry out their roles remotely. (Gartenstein-Ross Decl. ¶ 210) (Dkt. 75). This gave rise to a phenomenon known as *virtual plotters*—operatives who, through encrypted communications, could serve many of the same functions of physical terrorist networks. (Gartenstein-Ross Decl. ¶ 210) (Dkt. 75). Most of ISIS's virtual planners appear to be based in Syria and Iraq, in large part due to proximity and access to ISIS's top leadership. (Gartenstein-Ross Decl. ¶ 210) (Dkt. 75). Virtual planners can offer operatives the same services once provided by physical networks. (Gartenstein-Ross Decl. ¶ 210) (Dkt. 75).

Abaaoud served as the tactical theater commander for this cell, receiving orders from Syria-based Amniyat al-Kharji members. *348 (Gartenstein-Ross Decl. ¶ 212) (Dkt. 75). German federal prosecutors drew this connection, naming Osama Atar as a key Syria-based contact. (Gartenstein-Ross Decl. ¶ 212) (Dkt. 75). Atar is also known by his *kunya*¹⁰⁶ Abu Ahmad. (Gartenstein-Ross Decl. ¶ 212) (Dkt. 75). The German newspaper *Deutsche Welle* reported that “a laptop found near the safehouse used for the airport attack shows that the jihadists had been in close contact with Atar.”¹⁰⁷ (Gartenstein-Ross Decl. ¶ 212) (Dkt. 75). Abaaoud's French-Belgian network conducted several operations, including the 2015 Paris attacks. (Gartenstein-Ross Decl. ¶ 212) (Dkt. 75). Although Abaaoud and some other members of the network were killed during and after the Paris attacks, other members

carried out the Brussels attacks. (Gartenstein-Ross Decl. ¶ 212) (Dkt. 75).

Members of the French-Belgian network that Abaaoud led include Najim Laachraoui—one of the Brussels Airport attackers and bomb maker for the Paris and Brussels attacks—and Salah Abdeslam. (Gartenstein-Ross Decl. ¶ 213) (Dkt. 75). Laachraoui and Abdeslam traveled to Syria around the same time as Abaaoud to join MSC, which was led by Amr al-Absi—who was one of the militants Assad freed from Sednaya prison in 2011. (Gartenstein-Ross Decl. ¶ 213) (Dkt. 75).

Another member of the French-Belgian network was a childhood associate of Abaaoud, Mohamad Abrini, who traveled to Syria to join ISIS in mid-2015. (Gartenstein-Ross Decl. ¶ 228) (Dkt. 75). According to Abrini's statement to Belgian authorities, Abaaoud met with Abrini in Syria and gave him instructions before sending him back to Europe, where Abrini participated in the Paris and Brussels attacks.¹⁰⁸ (Gartenstein-Ross Decl. ¶ 213) (Dkt. 75).

Some of the French-Belgian network's members were involved operationally or logistically in the Paris and Brussels attacks. (Gartenstein-Ross Decl. ¶ 219) (Dkt. 75). Abrini rented an apartment used by several of the Paris attackers, and was seen by French authorities on security camera footage with Abdeslam two days before the attack, driving a car that was later used to drop off the Stade de France attackers.¹⁰⁹ (Gartenstein-Ross Decl. ¶ 219) (Dkt. 75). In the Brussels attack, Abrini was an airport suicide bomber, but he failed to detonate his bomb.¹¹⁰ (Gartenstein-Ross Decl. ¶ 219) (Dkt. 75). Laachraoui, according to Belgian authorities, served as the bombmaker for at least two of the suicide bombs used in the Stade de *349 France and Bataclan attacks before wearing his own vest as one of the suicide bombers at the Brussels Airport.¹¹¹ (Gartenstein-Ross Decl. ¶ 219) (Dkt. 75).

Direct Connections to ISIS: Najim Laachraoui Case Study

Numerous individuals in the Brussels cell maintained direct ties to ISIS. (Gartenstein-Ross Decl. ¶ 215) (Dkt. 75). This further indicates ISIS's responsibility for the Brussels attacks, as well as the importance of the safe haven that the group had obtained in Syria and Iraq. (Gartenstein-Ross Decl. ¶ 215) (Dkt. 75). Dr. Gartenstein-Ross illustrated this connection in his declaration through the examination of one attacker's connections, those of Najim Laachraoui. (Dkt. 75 ¶ 215). He worked at the Brussels Airport for five years until

2012.¹¹² (Gartenstein-Ross Decl. ¶ 216) (Dkt. 75). During this period, Laachraoui was radicalized by jihadist recruiter Khalid Zerkani.¹¹³ (Gartenstein-Ross Decl. ¶ 216) (Dkt. 75).

Laachraoui left to join the jihad in Syria in 2013.¹¹⁴ (Gartenstein-Ross Decl. ¶ 217) (Dkt. 75). He joined Majlis Shura al-Mujahedin, led by Amr al-Absi. (Gartenstein-Ross Decl. ¶ 217) (Dkt. 75). Thereafter, he pledged *bayah*¹¹⁵ to al-Baghdadi and joined ISIS.¹¹⁶ (Gartenstein-Ross Decl. ¶ 217) (Dkt. 75). Through *Dabiq*, ISIS claimed that during Laachraoui's time with ISIS in Syria, he served as a foreign fighter, then trained to carry out an attack in Europe and prepared the explosives for the Paris and Brussels attacks.¹¹⁷ (Gartenstein-Ross Decl. ¶ 217) (Dkt. 75). Laachraoui also served as an ISIS guard,¹¹⁸ as well as an interrogator. (Gartenstein-Ross Decl. ¶ 218) (Dkt. 75).¹¹⁹

Authorities found Laachraoui's DNA on the explosives in a rental house in Auvelais, which was used as a safehouse prior to the Paris attacks, and also in another safehouse used prior to the Brussels attacks.¹²⁰ (Gartenstein-Ross Decl. ¶ 219) *350 (Dkt. 75). On September 9, 2015, Laachraoui, carrying forged Belgian identification documents that employed a fake name, was stopped at a checkpoint between Hungary and Austria while travelling in a rental car with Mohamed Belkaid and Salah Abdeslam.¹²¹ (Gartenstein-Ross Decl. ¶ 220) (Dkt. 75). Thereafter, Laachraoui built the TATP explosives for the Paris and Brussels attacks. (Gartenstein-Ross Decl. ¶ 221) (Dkt. 75). From Europe, he was in contact with Abu Ahmad (the aforementioned Osama Atar), "a French-speaking 'emir' of foreign fighters in Syria," through encrypted messaging platforms, including Telegram.¹²² (Gartenstein-Ross Decl. ¶ 221) (Dkt. 75). Laachraoui reportedly requested that Ahmad reach out to Syria-based explosives experts to provide him with technical assistance. (Gartenstein-Ross Decl. ¶ 221) (Dkt. 75). According to a Belgian counterterrorism official, Laachraoui had the Syria-based experts "check different mixtures," which allowed him to adjust "his work based on what they tell him."¹²³ (Gartenstein-Ross Decl. ¶ 221) (Dkt. 75). Ahmad oversaw the plot from Syria and provided guidance on the targets, as well as provided technical guidance on bomb making and received the attackers' last wills. (Gartenstein-Ross Decl. ¶ 222) (Dkt. 75).

Conclusions About ISIS and the Brussels Suicide Bombings

The importance of Syrian support, and also ISIS's Syria-Iraq safe haven, for the success of the Brussels plot is established by a number of factors: (1) Assad's prisoner releases are directly connected to how the Brussels plotters joined ISIS. (Gartenstein-Ross Decl. ¶ 225) (Dkt. 75). Assad released the militant leader Amr al-Absi from Sednaya prison in 2011. (Gartenstein-Ross Decl. ¶ 225) (Dkt. 75). Thereafter, Laachraoui, Abdeslam and Abaaoud joined his militant group Majlis Shura al-Mujahedin in Syria, and then followed al-Absi's lead in joining ISIS. (Gartenstein-Ross Decl. ¶ 225) (Dkt. 75). (2) Training in a physical safe haven increases the chances of a plot's success. (Gartenstein-Ross Decl. ¶ 225) (Dkt. 75). Cell members, including bombmaker Laachraoui, trained in ISIS's Syria-Iraq caliphate territory. (Gartenstein-Ross Decl. ¶ 225) (Dkt. 75). (3) The Amniyat al-Kharji oversaw and played a significant role in the Brussels attacks. (Gartenstein-Ross Decl. ¶ 225) (Dkt. 75). Absent the physical safe haven that ISIS enjoyed spanning from Syria into Iraq, the Amniyat al-Kharji could not have been erected with the sophisticated bureaucracy that it boasted. (Gartenstein-Ross Decl. ¶ 225) (Dkt. 75). (4) The Brussels cell was overseen by an operative based in ISIS's Syria-Iraq territory, Abu Ahmad. (Gartenstein-Ross Decl. ¶ 225) (Dkt. 75). His presence in the group's caliphate territory allowed him to plan relatively calmly, in the absence of being hunted by law enforcement. (Gartenstein-Ross Decl. ¶ 225) (Dkt. 75). (5) The Syria-Iraq safe haven enabled Laachraoui to reach out to ISIS explosives experts for technical assistance. (Gartenstein-Ross Decl. ¶ 225) (Dkt. 75). ISIS's control of that territory allowed these operatives to gain expertise through constant *351 experimentation that would not have been possible in a different space where they would have to worry about detection by law enforcement. (Gartenstein-Ross Decl. ¶ 225) (Dkt. 75). It also provided an ease of communication that would not have existed were they in a geographic space where they had to worry about law enforcement pursuing them. (Gartenstein-Ross Decl. ¶ 225) (Dkt. 75).

F. ISIS's Responsibility for the Istanbul Suicide Bombing
 Closed-circuit television footage released by authorities after the attack shows that on March 19, 2016, Mehmet Öztürk followed a group of Israeli tourists from their hotel to a nearby restaurant before detonating his bomb next to them on a street in Istanbul.¹²⁴ (Gartenstein-Ross Decl. ¶ 220) (Dkt. 75). The blast killed Öztürk and 4 others and injured at least 39 more. (Gartenstein-Ross Decl. ¶ 220) (Dkt. 75).

No group claimed responsibility for the attack, but various external indicia point to ISIS's culpability. (Gartenstein-Ross Decl. ¶ 227) (Dkt. 75). A number of attacks in Turkey attributed to ISIS during this period went unclaimed. (Gartenstein-Ross Decl. ¶ 227) (Dkt. 75). The likely reason that claims of responsibility were not made in these cases is that ISIS relied on Turkey as a major transit point for foreign fighters bound for its Syria-based caliphate, and claiming responsibility for attacks in Turkey risked a major crackdown by Turkish authorities.¹²⁵ (Gartenstein-Ross Decl. ¶ 227) (Dkt. 75).

Identification of the Istanbul Attacker as a Member of ISIS

Turkish authorities confirmed the attacker as Öztürk based on DNA.¹²⁶ (Gartenstein-Ross Decl. ¶ 229) (Dkt. 75). Turkey's Interior Minister revealed that Öztürk was an ISIS member.¹²⁷ (Gartenstein-Ross Decl. ¶ 229) (Dkt. 75). After the attack, Turkish authorities disclosed that Öztürk had traveled to Syria in 2013. (Gartenstein-Ross Decl. ¶ 230) (Dkt. 75). Öztürk disappeared in 2013 from his family home in Gaziantep, prompting his family to file a missing person's report. (Gartenstein-Ross Decl. ¶ 230) (Dkt. 75). A subsequent police investigation found that he had joined *352 ISIS.¹²⁸ (Gartenstein-Ross Decl. ¶ 230) (Dkt. 75). After leaving for Syria, Öztürk made frequent trips between Turkey and Syria, which were noted at the time by Turkey's national intelligence agency, which placed Öztürk on Turkey's list of supporters of a terrorist group.¹²⁹ (Gartenstein-Ross Decl. ¶ 230) (Dkt. 75). The U.S. State Department's Bureau of Counterterrorism attributed the attack to ISIS in its 2016 *Country Reports on Terrorism*. (Gartenstein-Ross Decl. ¶ 232) (Dkt. 75).¹³⁰ Finally, the conclusions of Turkish authorities are reinforced by testimony given to Kurdish forces by an ISIS member connected to Öztürk. (Gartenstein-Ross Decl. ¶ 231) (Dkt. 75). Captured ISIS fighter Savas Yildiz described how he and his accomplices would cross back and forth into Syria from Turkey.¹³¹ (Gartenstein-Ross Decl. ¶ 231). Yildiz was sought by Turkish police along with Öztürk and two other ISIS operatives from the Dokumacılar group (an ISIS cell) after they were believed by authorities to have re-entered Turkey to carry out attacks.¹³² (Gartenstein-Ross Decl. ¶ 231) (Dkt. 75).

The Attack Was Consistent with ISIS's TTPs

The Istanbul attack was consistent with ISIS's choice of civilian targets, particularly tourists and foreign nationals, in

Turkey in 2016. (Gartenstein-Ross Decl. ¶ 233). For example, on January 12, 2016, a suicide bomber killed 13 people in Istanbul's Sultanahmet district, which has two tourist attractions, the Blue Mosque and Hagia Sophia. (Gartenstein-Ross Decl. ¶ 233) (Dkt. 75). Most of the victims were German tourists.¹³³ (Gartenstein-Ross Decl. ¶ 233) (Dkt. 75). ISIS did not claim responsibility for this attack, but Turkish authorities attributed it to ISIS.¹³⁴ (Gartenstein-Ross *353 Decl. ¶ 233) (Dkt. 75). The U.S. Department of State's *2016 Country Reports on Terrorism* highlighted ISIS's 2016 Istanbul attacks as evidence of a pattern in ISIS's efforts to reach beyond its territorial holdings. (Gartenstein-Ross Decl. ¶ 235) (Dkt. 75).

Conviction of ISIS Members for Supporting the March 19, 2016 Istanbul Bombing

After the attack, Turkish authorities tied Öztürk to other suspects: Ercan Çapkin, Hüseyin Kaya, Ibrahim Gürler, and Mehmet Mustafa Çevik.¹³⁵ (Gartenstein-Ross Decl. ¶ 236) (Dkt. 75). Çapkin and Kaya were both charged with murder and attempting to abolish the constitutional order. (Gartenstein-Ross Decl. ¶ 237) (Dkt. 75). Çevik and Gürler were charged with terrorism-related charges stemming from their ISIS membership. (Gartenstein-Ross Decl. ¶ 237) (Dkt. 75). Turkish courts convicted all four individuals in connection with the March 19, 2016, suicide bombing in Istanbul, finding each to have been a member of, or acting on the orders of, ISIS. (Gartenstein-Ross Decl. ¶ 237) (Dkt. 75). During the trial, prosecutors offered proof that Çapkin and Kaya assisted Öztürk with the plot, and that ISIS executed the bombing. (Gartenstein-Ross Decl. ¶ 237) (Dkt. 75). The prosecution also offered proof that Gürler and Çevik were members of ISIS and had trained and prepared for future suicide bombings.¹³⁶ (Gartenstein-Ross Decl. ¶ 237) (Dkt. 75).

The Turkish government had previously placed Çevik on a list of wanted ISIS terrorists with a reward for information.¹³⁷ (Gartenstein-Ross Decl. ¶ 238) (Dkt. 75). Çapkin was referred to as the head of an ISIS cell in Gaziantep by Turkish media outlets.¹³⁸ (Gartenstein-Ross Decl. ¶ 238) (Dkt. 75). Following a police raid on Çapkin's residence, investigators discovered the names of several other individuals, which led them to the city of Adiyaman and an ISIS cell, along with suicide vests, weapons, and ammunition.¹³⁹ (Gartenstein-Ross *354 Decl. ¶ 238) (Dkt. 75). They were being trained by ISIS to be suicide bombers.¹⁴⁰ (Gartenstein-Ross Decl. ¶ 243) (Dkt. 75).

Mehmet Öztürk's Connections to a Larger Turkish ISIS Cell

The Federal Bureau of Investigation ("FBI") aided Turkish authorities in an investigation that led to ISIS. (Gartenstein-Ross Decl. ¶ 242) (Dkt. 75). The FBI assessed that ISIS's Dokumacılar cell, which was based in Adiyaman, was connected to the Istanbul attack.¹⁴¹ (Gartenstein-Ross Decl. ¶ 242) (Dkt. 75). Citing a U.S. Department of Justice letter sent to Turkish authorities, the Turkish newspaper *Hurriyet* reported that the Dokumacılar cell was believed to have crossed into Syria to train with ISIS and that the cell was involved in the March 19 attack and other attacks in Turkey.¹⁴² (Gartenstein-Ross Decl. ¶ 242) (Dkt. 75).

Öztürk made visits to Gaziantep and Adiyaman in between trips to Syria.¹⁴³ (Gartenstein-Ross Decl. ¶ 243) (Dkt. 75). A teahouse in Adiyaman, which featured the ISIS flag inside, played host to meetings of the Dokumacılar cell.¹⁴⁴ (Gartenstein-Ross Decl. ¶ 243) (Dkt. 75). Surveillance footage showed Öztürk purchasing a bus ticket from Adiyaman to Istanbul on March 18, the day before the attack.¹⁴⁵ (Gartenstein-Ross Decl. ¶ 243) (Dkt. 75). Police believed that Öztürk received assistance from someone in Adiyaman in plotting *355 the attack.¹⁴⁶ (Gartenstein-Ross Decl. ¶ 243) (Dkt. 75).

Öztürk reportedly attended the Muslim Youth Association ("MYA"), a religious organization founded in 2012 by Yunus Durmaz, a Turkish citizen who later became a leader of ISIS cells in Turkey. (Gartenstein-Ross Decl. ¶ 240) (Dkt. 75). According to a profile of Durmaz published in *Hurriyet*, the MYA was a hub and training center for ISIS supporters in southern Turkey.¹⁴⁷ (Gartenstein-Ross Decl. ¶ 240) (Dkt. 75). Durmaz and other attendees would later travel to Syria to join ISIS, where Durmaz participated in ISIS executions.¹⁴⁸ (Gartenstein-Ross Decl. ¶ 240) (Dkt. 75).

Durmaz was ISIS's "emir of Gaziantep" as he prepared the members of his cell, which totaled 19 recruits, including Öztürk, for attacks. (Gartenstein-Ross Decl. ¶ 241) (Dkt. 75). This preparation involved religious indoctrination, pledging allegiance to ISIS, and combat training. (Gartenstein-Ross Decl. ¶ 241) (Dkt. 75). Durmaz then leveraged ISIS's smuggling networks in Syria to acquire materials for suicide vests, which were in turn assembled in Gaziantep warehouses.¹⁴⁹ (Gartenstein-Ross Decl. ¶ 241) (Dkt. 75).

This demonstrates the training and material support that Öztürk likely received when preparing for his attack, and also shows the key role that Syria-connected smuggling routes played in such preparation. (Gartenstein-Ross Decl. ¶ 241) (Dkt. 75).

Conclusions About ISIS and the Istanbul Suicide Bombing

Syrian support for ISIS, and its role in helping ISIS to attain a Syria-Iraq safe haven, was causally related to the Istanbul attack: (1) Beginning with how Öztürk was drawn to ISIS, the group's territorial safe haven helped it to erect a sophisticated media apparatus for a jihadist group. (Gartenstein-Ross Decl. ¶ 245) (Dkt. 75). This media apparatus raised ISIS's international profile, helped to radicalize people to ISIS's cause, and prodded many to join ISIS networks or carry out attacks in its name. (Gartenstein-Ross Decl. ¶ 245) (Dkt. 75). Further, the group's military victories in the Syria-Iraq theater produced more pro-ISIS furor, thus additionally aiding its recruitment efforts. (Gartenstein-Ross Decl. ¶ 245) (Dkt. 75). (2) ISIS's control of territory was causally linked to the attacker's recruitment in another way. (Gartenstein-Ross Decl. ¶ 245) (Dkt. 75). Öztürk traveled to Syria to join ISIS. (Gartenstein-Ross Decl. ¶ 245) (Dkt. 75). He was one of several members of the MYA who *356 received training from ISIS in Syria. (Gartenstein-Ross Decl. ¶ 245) (Dkt. 75). ISIS's Syria safe haven allowed Öztürk to deepen his relationship with the group through the time he spent with it physically; evidence suggests that militants build bonds most effectively in person. (Gartenstein-Ross Decl. ¶ 245) (Dkt. 75). ISIS's safe haven and battlefield successes also allowed it to make Gaziantep a hub that would not have been possible absent its successes in Syria. (Gartenstein-Ross Decl. ¶ 245) (Dkt. 75). (3) Training in a physical safe haven increases the chances of a plot's success. (Gartenstein-Ross Decl. ¶ 245) (Dkt. 75). (4) ISIS's Syria safe haven allowed it to erect robust smuggling networks. (Gartenstein-Ross Decl. ¶ 245) (Dkt. 75). Durmaz maintained a robust network of connections with ISIS in Syria that enabled him to smuggle in the explosives that were assembled into suicide vests in a Gaziantep warehouse. (Gartenstein-Ross Decl. ¶ 245) (Dkt. 75). (5) The size of ISIS's cell in Turkey further evidences a causal relationship to ISIS's Syria safe haven. (Gartenstein-Ross Decl. ¶ 245) (Dkt. 75). There existed a web of connections that tied Öztürk to a 60- to 70-member ISIS cell. (Gartenstein-Ross Decl. ¶ 245) (Dkt. 75). A cell of this size, per Dr. Gartenstein-Ross, is highly unlikely to have formed as quickly as it did absent the group's Syria safe haven, which enabled its reach back into Turkey. (Gartenstein-Ross Decl. ¶ 245) (Dkt. 75).

G. Vehicular Terror Attack at the Armon Hanatziv Promenade in Jerusalem

ISIS, Gaza and the West Bank

Abu Bakr al-Baghdadi's self-appointment as Caliph and the establishment of the IS have inspired and driven tens of thousands of Muslim volunteers from all over the world to join the ranks of IS and perpetrate acts of terror in its name, including Israel's Arab citizens. (Spitzen Decl. ¶ 46) (Dkt. ¶ 78). Terror organizations that have operated in the Gaza Strip since the end of the first decade of the 21st century, were drawn to the concept of the IS. (Spitzen Decl. ¶ 47) (Dkt. 78). The strengthening of the IS since the summer of 2014 has instilled renewed momentum among Salafi Jihadist activists in Gaza, and has led to a cluster of organizations from this camp declaring their support for the radical stream.¹⁵⁰ (Spitzen Decl. ¶ 47) (Dkt. 78). A prominent figure involved in the connection between the Gaza Strip and the IS was Husayn Juaythini, who was designated by the US Treasury in April 2016 for aiding foreign terrorists' communication and movement, and for participating in the financing of ISIS. (Spitzen Decl. ¶ 48) (Dkt. 78). In September 2014, Juaythini traveled to Syria to pledge allegiance to ISIS and was tasked by ISIS leadership to return to Gaza to establish an ISIS foothold. (Spitzen Decl. ¶ 48) (Dkt. 78). Juaythini was the link between Abu Bakr al-Baghdadi and armed groups in Gaza, and he financed their activities.¹⁵¹ *357 (Spitzen Decl. ¶ 48) (Dkt. 78).

In July 2015, a report was published concerning an ISIS-affiliated network in the Gaza Strip calling itself the Sheikh Omar Hadid - Bayt al-Maqdis Brigade, which launched rockets at Ashqelon.¹⁵² (Spitzen Decl. ¶ 49) (Dkt. 78). In November 2014, the Ansar Bayt al-Maqdis, the Egyptian organization leading the terror campaign against the Egyptian regime, issued a formal statement via its Twitter account, in which it announced it had sworn allegiance to ISIS.¹⁵³ (Spitzen Decl. ¶ 50). (Dkt. 78).

The Work Methods Used by the Islamic State in its Terror Operations

Since its founding, the IS has operated primarily on two fronts:

The war front in Iraq and Syria: In an effort to preserve its conquests and expand the borders of the Islamic caliphate,

the IS engaged in fighting that included consolidation of the territories over which the organization had taken control, efforts to enlist operatives in the service of the organization (including from Western countries) and action against anyone who sought to eradicate IS control. (Spitzen Decl. ¶ 52) (Dkt. 78). The war began in 2014 and ended (at least, for now) in March 2019. (Spitzen Decl. ¶ 52) (Dkt. 78).

Terror operations in Western countries: The IS called for its operatives and supporters to plan and engage in terror activity. (Spitzen Decl. ¶ 52) (Dkt. 78). Activity, in whose inspiration and as a result of which, acts of terror causing multiple casualties and much destruction were perpetrated in the U.S. and other Western countries, as well as against “enemies of the Islamic State” in various countries of the world.¹⁵⁴ (Spitzen Decl. ¶ 52) (Dkt. 78). For execution of terror activity around the world, ISIS developed work methods based on conventional communications, media, Internet, and social media skills, that it used for recruitment and employment of ISIS supporters to carry out acts of terror, destruction and killing, marked by a range of characteristics. (Spitzen Decl. ¶ 53) (Dkt. 78).

The Islamic State: Use of Internet and Media for Operations and Mobilization of Activists

Use of the media, websites, and social networks for recruitment and mobilization of operatives for terror is ISIS's primary tool for execution of terror acts. (Spitzen Decl. ¶ 56) (Dkt. 78). In his statement before the Senate Homeland Security and Governmental Affairs Committee in October 2018,¹⁵⁵ the Director of the FBI addressed ISIS's use of the media for its terror operations and touched on the following points:

- a. ISIS uses high-quality, traditional media platforms, as well as widespread social media campaigns to propagate its extremist ideology.
 - b. With the broad distribution of social media, terrorists can spot, assess, recruit, and radicalize vulnerable *358 persons of all ages in the U.S. either to travel or to conduct an attack on the homeland.
- (Spitzen Decl. ¶ 55) (Dkt. 78).

The fact that ISIS command centers were located in Syria and Iraq, far from the targets of terror and perpetrators of terror, without the ability to directly communicate with their operatives throughout the world, led ISIS to develop work methods for recruitment and guidance of operatives

throughout the world via the media and the Internet. (Spitzen Decl. ¶ 57) (Dkt. 78). ISIS, its supporters, and operatives took advantage of the Twitter and Telegram networks for conveying messages and directing terror activity.¹⁵⁶ (Spitzen Decl. ¶ 57) (Dkt. 78). Encrypted message channels, such as Telegram, gave ISIS a very powerful, operative tool to encourage, plan, coordinate and broadcast attacks.¹⁵⁷ (Spitzen Decl. ¶ 57) (Dkt. 78). An additional means that ISIS uses is on-line magazines, such as “Dabiq”, that was published between June 2014 and August 2016 and disseminated ISIS propaganda, with an emphasis on the recruitment of foreign fighters through the use of advanced technology both for graphics and text.¹⁵⁸ (Spitzen Decl. ¶ 58) (Dkt. 78). ISIS used the Internet as a strategic platform to intimidate its enemies and to sow fear throughout the world. (Spitzen Decl. ¶ 59) (Dkt. 78). Without the use of advanced Internet technology, ISIS would not have been able to deliver its terror worldwide.¹⁵⁹ (Spitzen Decl. ¶ 59). (Dkt. 78).

The fact that the terror cells of ISIS were spread out over wide territories and that some of them were located in active fighting zones presented a challenge to their ability to conduct a centralized campaign of mobilization of forces and terror activity. (Spitzen Decl. ¶ 61) (Dkt. 78). Research from 2015¹⁶⁰ shows that ISIS chose a strategy of decentralization for its mode of operation in the field of mobilizing force. (Spitzen Decl. ¶ 61) (Dkt. 78). ISIS's propaganda was conducted primarily via local media outlets of the various districts in the Islamic State's caliphate.¹⁶¹ (Spitzen Decl. ¶ 61) (Dkt. 78). This decentralization is part of a strategy to disseminate content over and maintain presence on the Internet.¹⁶² (Spitzen Decl. ¶ 61) (Dkt. 78). ISIS operates dozens of platforms for production and distribution.¹⁶³ (Spitzen Decl. ¶ 61) *359 (Dkt. 78). Central control is exercised through the Central Media Office, subject to its leadership. (Spitzen Decl. ¶ 61) (Dkt. 78). The various districts in Syria, Iraq, and throughout the world operate local propaganda offices, subject to the Central Propaganda Office, and enable maintenance of the hierachal structure and a uniform propaganda strategy.¹⁶⁴ (Spitzen Decl. ¶ 61) (Dkt. 78).

The terror attacks of ISIS can be divided into a few categories according to the extent of the connection of the campaigns to the organization's headquarters. (Spitzen Decl. ¶ 62) (Dkt. 78). Only a small portion of the terror activities are completely controlled, from the perspective of classic control

that includes recruiting, funding, planning, training, and sending instructions for execution. (Spitzen Decl. ¶ 62) (Dkt. 78). Another portion is carried out by individuals, who receive their inspiration from ISIS propaganda and its calls on the Internet to carry out attacks. (Spitzen Decl. ¶ 62) (Dkt. 78). Between these two extremes there are many gradations of connection of one kind or another to the central terror cells.¹⁶⁵ (Spitzen Decl. ¶ 62) (Dkt. 78).

The Islamic State's Threat of Terror against Targets Throughout the World

ISIS relies on the recruitment and direction of operatives via the media and social networks. (Spitzen Decl. ¶ 65) (Dkt. 78). Instruction of operatives to perform terror acts is given in an exact manner (including recommendations as to the means of action). (Spitzen Decl. ¶ 65) (Dkt. 78). Supporters and operatives of ISIS throughout the world influence each other by dissemination of ideas, suggestions and examples that integrate with the organization's ideology via the Internet and also directly, in their places of residence, under the method of, "A friend brings a friend." (Spitzen Decl. ¶ 65) (Dkt. 78). The geographic distance between the command centers from the operatives and the terror targets does not allow for direct contact with those who carry out the attacks, and, therefore, in most cases, the method of operation is decentralized and is performed by transferring content regarding what is appropriate and what must be done via the various means available on the Internet. (Spitzen Decl. ¶ 66) (Dkt. 78).

Vehicular Terror Attack at the Armon Hanatziv Promenade in Jerusalem¹⁶⁶

On January 8, 2017, a terrorist, Fadi Ahmad Hamdan al-Qanbar, who was a supporter of ISIS, ran over a group of soldiers and those with them that had just stepped off a bus at the Armon Hanatziv Promenade.¹⁶⁷ (Spitzen Decl. ¶ 68) (Dkt. 78). Fadi drove his truck from his village in the direction of Jerusalem, spotted the group of soldiers, veered from his route, accelerated, and ran over the soldiers. (Spitzen Decl. ¶ 68) (Dkt. 78). After he ran over the soldiers, Fadi reversed and drove his truck backwards, right back over the *360 soldiers again. (Spitzen Decl. ¶ 68) (Dkt. 78).

The terrorist was determined to strike as many people as possible, to kill and injure them, and it only ended after he was shot and killed. (Spitzen Decl. ¶ 69) (Dkt. 78). A number of soldiers and civilians opened fire on the terrorist as soon as they realized a terror attack was underway. (Spitzen

Decl. ¶ 69) (Dkt 78). This did not stop the terrorist, who was determined to carry out his scheme and even die as a Shahid (Martyr) during the attack. (Spitzen Decl. ¶ 69) (Dkt. 78). The police ballistics lab report noted that there were dozens of bullet holes in the truck. (Spitzen Decl. ¶ 69) (Dkt. 78). As a result of the attack, four soldiers were killed, including Erez, and at least 13 others were injured, including Eytan. (Spitzen Decl. ¶ 69) (Dkt. 78).

Profile of the Terrorist

Fadi worked in delivery of building materials as the driver of a crane truck, the same truck he used in the attack. (Spitzen Decl. ¶ 70) (Dkt. 78). He purchased the truck from a building material business owner a year before the attack.¹⁶⁸ (Spitzen Decl. ¶ 70) (Dkt. 78). According to media reports, the terrorist was previously convicted of the criminal charge of purchase of a stolen vehicle and was sentenced to community service.¹⁶⁹ (Spitzen Decl. ¶ 71) (Dkt. 78). The terrorist's family and people with whom he was in regular contact with at work described him as a radically devout, religious Muslim. (Spitzen Decl. ¶ 72) (Dkt. 78). The terrorist repented and became devoutly observant of the religion's precepts a few years before the attack.¹⁷⁰ (Spitzen Decl. ¶ 73) (Dkt. 78). In their statements to the police, his family and other acquaintances described the terrorist's radicalization of religious behavior and his penchant for preaching to those around him.¹⁷¹ (Spitzen Decl. ¶ 75) (Dkt. 78). The terrorist's religious radicalization was also manifested in his outward appearance; he started to grow a beard and dress in the traditional garb, which characterizes activists of ISIS. (Spitzen Decl. ¶ 75) (Dkt. 78).

Intent to Perpetrate a Terror Attack

It is not possible to learn from the statements to the police of those closest to the terrorist that any one of them knew that an attack was supposed to be executed and that they did not inform the police in order to prevent it because such an admission *361 would mean complicity with the crime and self-incrimination as well as an increased risk that their homes would be demolished. (Spitzen Decl. ¶ 76) (Dkt. 78). However, a review of the decision of the High Court of Justice, in the terrorist's family's appeal against the decision to demolish their home, shows that secret information, which was filed with the Israel Supreme Court, sitting as the High Court of Justice, indicated that the terrorist's family apparently did know of his intention to perpetrate an attack.¹⁷² (Spitzen Decl. ¶ 77) (Dkt. 78).

An examination of the terrorist's Facebook pages shows that Fadi hinted all too clearly how Jews should be handled, and that he intended to die as a shahid. (Spitzen Decl. ¶ 78) (Dkt. 78). The posting of the choice of death ("the life of the afterworld") as the preferred option, one week before the attack shows that the terrorist had already made plans and was intending to die as a shahid during the attack that he planned to execute. (Spitzen Decl. ¶ 81) (Dkt. 78).

The Terrorist's Identification with and Support of the Islamic State

Statements taken by the Israel Police from relatives and acquaintances of the terrorist portray the terrorist as being a public supporter of ISIS.¹⁷³ (Spitzen Decl. ¶¶ 84-87) (Dkt. 78). Two years before the attack, the terrorist sought to leave for Turkey and from there to reach ISIS territories to join its fighters. (Spitzen Decl. ¶ 87) (Dkt. 87). The terrorist's intentions seemed so serious to his family that his mother hid his Jordanian passport that she had renewed and did not tell him the passport was still valid. (Spitzen Decl. ¶ 87) (Dkt. 87). In his statement to the police, Mussa Sharaf, who sold the truck to the terrorist and employed him as a driver, stated that the terrorist would at work preach the importance of supporting ISIS, distribute propaganda for it and try to convince others of ISIS's merits. (Spitzen Decl. ¶ 85) (Dkt. 75).

The Terrorist's Connection to the Islamic State—Social Network

Spitzen was apprised of the terrorist's Facebook content as well as his list of friends.¹⁷⁴ (Spitzen Decl. ¶ 89) (Dkt. 78). The terrorist's Facebook pages begin on November 16, 2016 and reveal he identifies with IS. (Spitzen Decl. ¶ 90) (Dkt. 78). The reason for the late start date of the Facebook profile can be found in the statement to the police of the terrorist's cousin, Muhammad al-Qanbar: "I would see his posts on ISIS, Mosul, and Aleppo and such. He made a lot of Facebooks, and they would be shut down."¹⁷⁵ (Spitzen Decl. ¶ 90) (Dkt. 78). Thus, it appears the terrorist opened prior Facebook pages, but these were closed likely because he posted inciteful and violent content that supported the IS. (Spitzen Decl. ¶ 90) (Dkt. 78).

Many of the terrorist's Facebook page friends based on their accompanying photos were violent, ISIS supporters who did *362 not want to expose their faces. (Spitzen Decl. ¶ 91)

(Dkt. 78). The photos depict violence, weapons, involvement of children in fighting, affiliation with ISIS (a caption in praise of the Caliphate, images of ISIS fighters), adoption of ISIS's flag (for example, the organization's flag on the top of the Eiffel Tower), use of ISIS symbols, such as 'lions' or 'lion' as a nickname for the fighters, and, 'a horseman on a horse' holding a sword and to its side, is the caption: "The Caliphate is coming." (Spitzen Decl. ¶ 91) (Dkt. 78).

The cover picture of Fadi's Facebook page (which he updated on November 11, 2016) depicted a tank with fighters on it. (Spitzen Decl. ¶ 93) (Dkt. 78). The caption for the picture was: "The Lions of Sunna (Usud a-Suna) are coming from a place you don't know (coming by surprise)."¹⁷⁶ (Spitzen Decl. ¶ 93) (Dkt. 78). There was wide use of the 'lions' designation (including dubbing the terrorist himself 'lion') as well as a picture of a horseman on a horse on the terrorist's Facebook pages and in the announcements that were published in his memory. (Spitzen Decl. ¶ 93) (Dkt. 78). These are conspicuous motifs and symbols of ISIS.¹⁷⁷ (Spitzen Decl. ¶ 93) (Dkt. 78). On January 1, 2016, the terrorist uploaded a post that emphasized ISIS's concern for its citizens in areas of civilian life as part of positive propaganda for the work of ISIS. (Spitzen Decl. ¶ 95) (Dkt. 78). The terrorist dedicated a good deal of space on his Facebook pages to an attack on the enemies of ISIS and the disparagement of those who fight against it. (Spitzen Decl. ¶ 97) (Dkt. 78).

Islamic State Responsibility for the Terror Attack

The day after the attack, an Arabic article published that: "a source close to the 'State' organization is celebrating the Al-Quds Operation and is claiming that the Shahid Fadi belongs to the organization."¹⁷⁸ (Spitzen Decl. ¶ 103) (Dkt. 78). The article emphasized that the day of the attack, January 8, was the anniversary of the killing of another terrorist who had executed a terror attack in January 2016 in Tel Aviv. (Spitzen Decl. ¶ 103) (Dkt. 78). This terrorist and the attack he executed were identified with ISIS.¹⁷⁹ (Spitzen Decl. ¶ 103) (Dkt. 78). Shortly after that attack, the Prime Minister of Israel, Benjamin Netanyahu, indicated that the terrorist belonged *363 to ISIS.¹⁸⁰ (Spitzen Decl. ¶ 104) (Dkt. 78).

The nature of the attack, a multiple-victim, vehicular attack, by means of a truck, that resembled attacks that were perpetrated in Europe (in Nice on July 14, 2016, and in Berlin, on December 19, 2016) by terrorists of ISIS, also strengthens the assertion that this was an attack by ISIS. (Spitzen Decl.

¶ 105) (Dkt. 78). The Commissioner of the Israel Police at the time made statements to the same effect.¹⁸¹ (Spitzen Decl. ¶ 105) (Dkt. 78). Depicted as one of the methods used to “punish the Jews,” the vehicular attack was published in a diagram that appeared on the Facebook page of A'maq, the ISIS news agency, in October 2015.¹⁸² (Spitzen Decl. ¶ 105) (Dkt. 78). ISIS-supporting propaganda websites in Gaza publicized statements on social media, praising and extolling the terrorist and toting him as an operative of ISIS, dubbing him, the “Lion of the Caliphate,” an appellation reserved for ISIS fighters. (Spitzen Decl. ¶ 106) (Dkt. 78).

Summary and Conclusions

The terror attack on January 8, 2017, by the terrorist Fadi al-Qanbar was a premeditated terror attack of the IS. (Spitzen Decl. ¶ 108) (Dkt. 78). The attack was executed by a terrorist, who identified with ISIS and its ideas. (Spitzen Decl. ¶ 108) (Dkt. 78). The attack was executed under the inspiration of ISIS ideology. (Spitzen Decl. ¶ 108) (Dkt. 78).

III.

CONCLUSIONS OF LAW

A. Burden of Proof

[4] [5] [6] Even when a plaintiff seeks a default judgment, the plaintiff must establish a right to the relief. 28 U.S.C. § 1608(e); see *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 232 (D.C. Cir. 2003) (“The court still has an obligation to satisfy itself that plaintiffs have established a right to relief.”).¹⁸⁴ Section 1608(e) provides protection to foreign states from unfounded default judgments rendered solely upon a procedural default. See *Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 950-51 (11th Cir. 1996). Although a court receives evidence from only the plaintiff when a foreign sovereign defendant has defaulted, § 1608(e) does not require a court to demand more or different evidence than it would ordinarily receive in order to render a decision. See *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 242 (2d Cir. 1994). In evaluating the plaintiff’s proofs, a court may “accept *364 as true the plaintiff’s uncontested evidence,” *Estate of Botvin v. Islamic Republic of Iran*, 510 F. Supp. 2d 101, 103 (D.D.C. 2007), and a plaintiff may establish proof by affidavit. See *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 19 (D.D.C. 2002). By its failure to appear

and defend itself, Syria put itself at risk that the Plaintiffs’ uncontested evidence would be satisfactory to the Court to prove their allegations. In fact, the Court finds that Plaintiffs have presented satisfactory evidence to prove liability and damages against the Defendant.

B. Service

Service under the FSIA is governed by 28 U.S.C. § 1608. Subsection (a) provides for service on a foreign state and subsection (b) provides for service on an agency or instrumentality of a foreign state. In this case, service upon the Defendant was perfected under § 1608(a), which governs service on foreign states. Obviously, Syria is a foreign state. Specifically, service upon Syria was attempted via 28 U.S.C. § 1608(a)(3) through delivery of the required documents (translated into Arabic) to its agent via international courier service, but DHL was not providing service to Syria at the time. (Dkt. 41). Subsequently, service via 28 U.S.C. § 1608(a)(4) through diplomatic channels on Syria was accomplished on May 9, 2021 and May 13, 2021. (Dkt. 45, 51). The diplomatic notes provide proof of service as to Syria. (Dkt. 51).

C. Jurisdiction

[7] [8] The FSIA provides “the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.” *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). Accordingly, this Court lacks jurisdiction over Syria unless one of the FSIA’s enumerated exceptions applies. Here, the state-sponsored terrorism exception to sovereign immunity applies. 28 U.S.C. § 1605A(a). Additionally, the FSIA was amended in 2008 to provide a private cause of action by which a foreign state that sponsors terrorism can be held liable for certain enumerated damages arising from terrorist activities: economic damages, solatium, pain and suffering, and punitive damages. *Id.* § 1605A(c). A foreign state that is or was a state sponsor of terrorism shall be liable to—

- (1) a national of the United States,
- (2) a member of the armed forces,
- (3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee’s employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3), for personal injury or death caused by acts described in subsection (a)(1) [i.e., the provision of material support or resources for hostage taking, torture, or extrajudicial killing].... In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

See U.S.C. § 1605(A)(c).

[9] For persons covered by the private right of action in § 1605A(c) state law claims are not available. By providing for a private right of action and precisely enumerating the types of damages recoverable, Congress has eliminated the inconsistencies that arise in cases decided under state law. Compare *Jackovich v. Gen. Adjustment Bureau, Inc.*, 119 Mich.App. 221, 326 N.W.2d 458, 464 (1982) (under Michigan *365 law, exemplary damages are available but punitive damages are not) with *Todd v. Byrd*, 283 Ga.App. 37, 640 S.E.2d 652, 661 (2006) (noting that punitive damages are available under Georgia law).

A U.S. court will hear a claim under FSIA if: (1) “the foreign state was designated as a state sponsor of terrorism at the time the act occurred, or was so designated as a result of such act”; (2) “the claimant or the victim was, at the time the act ... occurred” a national of the United States, a member of the armed forces, or “otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment”; and (3) if the act occurred in the foreign state against which the claim has been brought, the foreign state has been afforded “a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration.” *Id.* § 1605A(a)(2)(A).

Because the victims or claimants of the terror attacks were U.S. nationals,¹⁸⁵ § 1605A(a)(2)(A)(ii)(I) provides that the sovereign immunity of Syria is waived, and the victims, the estates of the victims and their families’ claims can be heard. Plaintiffs are the victims, as well as the mothers, fathers, siblings, spouses, and children of U. S. citizens and, therefore, liability and damages are assessed under § 1605A(c), providing a private right of action for U.S. nationals. (Dkt. 70, Ex. 1-30, U.S. Passport of Anne¹⁸⁶ Cameron Baarbé, U.S. Passport of James Cain, U.S. Passport

of Helen Cain, U.S. Passport of Nohemi Gonzalez, U.S. Passport of Beatriz Gonzalez, U.S. Passport of Paul Gonzalez, Proof of U.S. residency for Reynaldo Gonzalez, U.S. Passport of Erez Orbach, U.S. Passport of Eitan Orbach, U.S. Passport of Alon Orbach, U.S. Passport of Caryn Orbach, U.S. Passport of A.O., U.S. Passport of E.O., Certificate of U.S. Citizenship for O.O., U.S. Passport of Eytan Rund, U.S. Passport of Tamar Rund, U.S. Passport of S.A.R., U.S. Passport of H.H.R., U.S. Passport of Y.M.R., U.S. Passport of Ron Greenfield, U.S. Passport of Liron Greenfield, U.S. Passport of Shere Greenfield, U.S. Passport of Gili Greenfield, U.S. Passport of Shye Greenfield, U.S. Passport of Nitzhia Goldman, U.S. Passport of Avraham Goldman, U.S. Passport of Gila Nissenbaum, U.S. Passport of Nathan Goldman, U.S. Passport of Maya Goldman Cohen and U.S. Passport of Sharon Goldman).

Additionally, the right to arbitrate is not an issue here because the acts of terrorism did not occur in Syria. Moreover, as discussed below, Syria was designated a sponsor of terrorism at the time of each of these terror attacks. Therefore, this Court can hear this FSIA claim.

D. Liability to U.S. Citizen Plaintiffs

As detailed, there are five elements necessary to establish liability under FSIA’s state-sponsored terrorism exception. *See Bodoff v. Islamic Republic of Iran*, 907 F. Supp. 2d 93, 101 (D.D.C. 2012) (quoting 28 U.S.C. § 1605A(a)(1), (c)). Here, Plaintiffs are seeking money damages so the fifth element has been met. (Dkt. 44).

*366 [10] [11] [12] The third and fourth elements are satisfied when a plaintiff proves a theory of liability and justifies the damages s/he seeks, generally “through the lens of civil tort liability.” *Rimkus v. Islamic Republic of Iran*, 750 F. Supp. 2d 163, 176 (D.D.C. 2010); *see also Roth v. Islamic Republic of Iran*, 78 F. Supp. 3d 379, 399-401 (D.D.C. 2015). Plaintiffs need not show Syria specifically “knew of or intended its support to cause the particular attacks in question or even that Syria’s material support was a ‘but for’ cause of their injuries.” *See Force*, 464 F. Supp. 3d at 368; *Owens*, 864 F.3d 751, 798; *Kilburn v. Socialist People’s Libyan Arab Jamahiriya*, 376 F.3d 1123, 1128 (D.C. Cir. 2014). Instead, FSIA only requires a “showing of ‘proximate cause’ which is satisfied where a plaintiff can show ‘some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.’” *Kilburn*, 376 F.3d at 1128 (quoting Prosser & Keeton on the Law of Torts 263 (5th ed. 1984)). FISA has a low bar for establishing

proximate cause. See *Roth*, 78 F. Supp. 3d at 394. “Defendant’s actions must be a substantial factor in the sequence of events that led to the plaintiff’s injury” (quoting *Rothstein v. UBS*, 708 F.3d 82 91 (2d Cir. 2013)) and plaintiff’s injury “must have been reasonably foreseeable or anticipated as a natural consequence of the defendant’s conduct.” *Force*, 464 F. Supp. 3d 323, 368. Here, just as in *Force* and *Owens*, the death and injury to innocent people and the suffering of their families were reasonably foreseeable by Syria with its material support of ISIS, a known violent terrorist organization. See *Fraenkel v. Islamic Republic of Iran*, 248 F. Supp. 3d 21, 37-38 (D.C. Cir. 2017); *Braun v. Islamic Republic of Iran*, 228 F. Supp. 3d 64 (D.D.C. 2017); *Wyatt v. Syrian Arab Republic*, 908 F. Supp. 2d 216, 228 (D.D.C. 2012).

[13] This Court may rely on the evidence produced in *Doe*, 2020 WL 5422844, *Winternitz*, 2022 WL 971328, and *Fields*, 2021 WL 9244135, without requiring the Plaintiffs here to re-submit and re-establish that same evidence, to reach its own findings as to those elements that *Doe*, *Winernitz* and *Fields* found to be demonstrated with clear and convincing evidence. *Fain v. Islamic Republic of Iran*, 856 F. Supp. 2d 109, 115-16 (D.D.C. 2012). The Court in *Doe*, 2020 WL 5422844, at **1, 8-14, found the following as to the March 22, 2016, Brussels terror attack: (1) Syria has been designated a state sponsor of terrorism since 1979 and had been at the time of the terror attack; (2) Syria provided material support and resources to ISIS that caused the plaintiffs’ personal injuries; (3) such personal injuries were the result of an extrajudicial killing; (4) the material support and resources Syria provided to ISIS were “a legally sufficient cause of the terrorist attack”; (5) plaintiffs presented sufficient evidence that ISIS was responsible for the Brussels terror attack; (6) having materially supported ISIS and its predecessor, AQI, it was reasonably foreseeable that ISIS would commit violent terror attacks as it was common knowledge ISIS and AQI were violent organizations that committed terror attacks against civilians; (7) the evidence of the terror attack was sufficient to establish the claims of assault, battery, and intentional infliction of emotional distress; and (8) Syria’s aid to ISIS “was essential to strengthening the group’s operating capacity and this was the legally sufficient cause of the terror attack.” See also *Winternitz*, 2022 WL 971328, at *4-9. In *Fields*, 2021 WL 9244135, at **4-5, 7-9, the Court found the following as to the Paris terror attack: (1) ISIS operatives killed Nohemi Gonzalez; (2) ISIS took responsibility for the attack; (3) the French government’s investigation *367 concluded that ISIS was responsible for the attack; (4) Syria for decades provided safe haven to terror groups within its borders; (5)

Syria has a long standing relationship with ISIS, including its precursor terror groups; (6) Nohemi was a U.S. citizen; (7) Syria has been a state sponsor of terrorism since December 29, 1979; (8) the deaths in the attack were extrajudicial killings; (9) Syria provided material support to ISIS, including a safe haven for recruiting and training militants, allowing safe passage of jihadists from Syria into Iraq and purchasing stolen oil from ISIS; (10) Syria’s material support of ISIS caused extrajudicial killings; (11) Syria’s material support was a substantial factor in the sequence of events that led to the death of the victims; and (12) the extrajudicial killings were a reasonably foreseeable consequence of Syria’s material support of ISIS. (Dkt. 98, Ex. 14). In light of *Doe*, *Fields* and *Winternitz*, the Court should review and take judicial notice of the evidence admitted and relied upon in these cases with respect to Syria’s material support to ISIS and ISIS’s responsibility for the Brussels and Paris terror attacks without Plaintiffs having to present such evidence again. See *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 59 (D.D.C. 2010) (holding courts in FSIA terrorism cases may review and take judicial notice of the evidence admitted and relied upon in other cases without requiring such evidence to be reintroduced).

[14] [15] The term “extrajudicial killing,” both when *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258 (D.D.C. 2003) was decided in 2003 and now, means “a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” 28 U.S.C. § 1350 note; 28 U.S.C. § 1605A(h)(7); 28 U.S.C. § 1605(e)(1) (2002). Here, the first and fourth elements are met because Alexander, Abrahams, Nohemi and Erez all died at the hands of terrorists in terror attacks. These were not authorized killings but were murders of innocent persons. The terror attacks here at issue constitute “extrajudicial killing.” *Id.* at 270.

This is a claim against Syria, which is a foreign state. Syria is and was, at all pertinent times, designated a state sponsor of terrorism as that term is defined by § 1605A(h) (6). See U.S. Dep’t of State, State Sponsors of Terrorism, <https://www.state.gov/j/ct/list/c14151.htm> (last visited May 24, 2023); *Campuzano*, 281 F. Supp. 2d at 270.

[16] Section 1605A(h)(3) defines “material support or resources” to have “the meaning given that term in section 2339A of title 18.” Section 2339A provides:

“material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel ..., and transportation, except medicine or religious materials.

[18 U.S.C. § 2339A\(b\)\(1\)](#). To determine whether a defendant sovereign has provided material support to terrorism, courts consider whether a particular terrorist group committed the terrorist act and whether the defendant foreign state generally provided material support or resources to the terrorist organization which contributed to its ability to carry out the terrorist act. *See e.g., Ben Rafael v. Islamic Republic of Iran*, 540 F. Supp. 2d 39, 46 (D.D.C. 2008). The types of support *368 that have been identified as “material” have included, for example, financing and running camps that provided military and other training to terrorist operatives, *see, e.g., Wachsmann ex rel. Wachsmann v. Islamic Republic of Iran*, 537 F. Supp. 2d 85, 90 (D.D.C. 2008); *Sisso v. Islamic Republic of Iran*, No. 05-0394, 2007 WL 2007582, at *5-6 (D.D.C. July 5, 2007); allowing terrorist groups to use its banking institutions to launder money, *see, e.g., Rux v. Republic of Sudan*, 495 F. Supp. 2d 541, 549-50 (E.D. Va. 2007); and allowing terrorist groups to use its territory as a meeting place and safe haven,¹⁸⁷ *see, e.g., id.* Such support has been found to have contributed to the actual terrorist act that resulted in a plaintiff's damages when experts testify that the terrorist acts could not have occurred without such support, *see, e.g., Ben-Rafael*, 540 F. Supp. 2d at 47; that a particular act exhibited a level of sophistication in planning and execution that was consistent with the advanced training that had been supplied by the defendant state, *see, e.g., Sisso*, 2007 WL 2007582, at *6; or when the support facilitated the terrorist group's development of the expertise, networks, military training, munitions, and/or financial resources necessary to plan and carry out the attack, *see, e.g., Rux*, 495 F. Supp. 2d at 553 (expert testimony that the “attack might have been possible, but it would not have been as easy” without defendant's support).¹⁸⁸ In *Sotloff*, 525 F. Supp. 3d 121, 139-140 (D.D.C. 2021) and *Doe*, 2020 WL 5422844, at *11, the plaintiffs relied upon government reports, expert reports and expert testimony to establish that Syria provided material support to ISIS in the form of financial assistance, safe haven, releasing key ISIS members from Syrian prisons, military training and allowing jihadsts to use its borders to cross into Iraq and that such

material support was key to ISIS strengthening its operating capacity. (Dkt. 98, Ex. 2, 5-8, 9, 9A-9S). *See also Winternitz*, 2022 WL 971328, (Dkt. 17 in *Winternitz*). (Dkt. 98, Ex. 10).

[17] Here, the evidence demonstrates that during the time leading up to the terror attacks in this case, Syria supported ISIS by:

- (1) Providing a safe haven for ISIS and locations for its headquarters in Damascus, where they could engage in open meetings and fundraising;
- (2) Training members of ISIS in the use of terrorist tactics;
- (3) Providing a location where ISIS could openly recruit members;
- (4) Providing a public political platform and legitimacy due to ISIS's presence in Damascus;
- (5) Providing financial support directly through funds transmitted to the ISIS' headquarters in Damascus; and
- (6) Assisting in funneling weapons shipments by allowing them to be transported through Syria.

(Dkt. 75). *See also Sotloff*, 525 F. Supp. 3d at 128-130, 138-139; *Doe*, 2020 WL 5422844, at *1, 8, 10-11; *Winternitz*, 2022 WL 971328; and *Fields*, 2021 WL 9244135, for the reports of Dr. Gartenstein-Ross and Dr. Levitt, as well as their testimony. *369 (Dkt. 98, Ex. 2, 5-8, 10-11). In *Foley v. Syrian Arab Republic*, 249 F. Supp. 3d 186, 193-95 (D.D.C. 2017), the Court found that Syria supported various incarnations of ISIS precursor groups. In *Thuneibat*, 167 F. Supp. 3d 22, 36, the Court found that Syria provided material support to Zarqawi's terror organization. *See also Gates*, 580 F. Supp. 2d 53, 59-63, 119, 127 (finding Syria provided a critical entry point for Zarqawi's fighters into Iraq and served as a base for Zarqawi). Recently, in *Colvin v. Syrian Arab Republic*, 363 F. Supp. 3d 141, 147 (D.D.C. 2019), the Court relying upon Dr. Levitt noted that the Assad regime in response to the Arab Spring uprising in Syria allowed ISIS to grow within Syria so the U.S. and its allies would have a choice between ISIS and the Assad regime. *See also Winternitz*, 2022 WL 971328; *Doe* 2020 WL 5422844; and *Fields*, 2021 WL 9244135, as well Dr. Gartenstein-Ross' declaration. (Dkt. 75, pp. 11-47).

Plaintiffs' evidence establishes that ISIS carried out the terror attacks in this case that caused extrajudicial killings. Plaintiffs evidence demonstrates that Syria provided material support to ISIS and that such material support bears a causal

connection to the success of the Paris, Brussels, Istanbul, and Jerusalem terror attacks. Plaintiffs further provided satisfactory evidence that Syria is legally responsible for each terror attack due to the longstanding material support Syria provided to ISIS that allowed this group to grow and flourish into a terrorist organization. The evidence demonstrates that each of the victims in these attacks was injured or murdered as part of an intentional ISIS plan to injure or murder citizens in order to intimidate a civilian population and/or affect government policies. Moreover, the evidence establishes the extrajudicial killings were a reasonably foreseeable consequence of Syria's material support of ISIS, especially since Syria was well aware that ISIS is a violent terrorist organization. In sum, jurisdiction over Syria is consistent with § 1605A(a), the state-sponsored terrorism exception to sovereign immunity, and the U.S. citizen Plaintiffs have provided evidence satisfactory to the Court in support of their private cause of action for damages under § 1605A(c).

E. Damages for U.S. Citizen Plaintiffs

Damages for a private action for proven acts of terrorism by foreign states under FSIA § 1605A(c) may include pain and suffering, economic damages, solatium, and punitive damages. 28 U.S.C. § 1605A(c).

1. Pain and Suffering

[18] In determining the appropriate amount of compensatory damages, the Court may look to prior decisions awarding damages for pain and suffering. *Haim v. Islamic Republic of Iran*, 425 F. Supp. 2d 56, 71 (D.D.C. 2006). Courts have awarded varying amounts of pain and suffering damages, depending upon the length of the suffering. See, e.g., *Braun v. Islamic Republic of Iran*, 228 F.Supp.3d 64, 83–84 (D.D.C. 2017) (awarding \$1,000,000 for pain and suffering lasting two hours); *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C. 2007) and *Cohen v. Islamic Republic of Iran*, 268 F. Supp. 3d 19, 24 (D.D.C. 2017) (finding the baseline award for individuals who suffered severe injuries in terror attacks are entitled to \$5 million in compensatory damages); *Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286, 300 (D.D.C. 2003) (citing authorities awarding \$1,000,000 for pain and suffering lasting between thirty seconds and several hours). Substantial injuries include “compound fractures” severe flesh wounds, and wounds and scars from shrapnel, as well as lasting and severe psychological pain.” *370 *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 84 (D.D.C. 2010). Victims who suffer “severe emotional injury” accompanied by minor physical injuries receive \$1,500,000-

\$3,000,000. See *Barry v. Islamic Republic of Iran*, 410 F. Supp. 3d 161, 180 (D.D.C. 2019).

a. Eytan Yair Rund

[19] Plaintiffs present Dr. Friedman's expert report regarding the physical injuries sustained by Eytan in the attack, along with Eytan's declaration. (Dkt. 79, Ex. B, 95). On June 16, 2022, Dr. Friedman evaluated Eytan in person. (Dkt. 79, Ex. B). On January 8, 2017, Eytan was working as a tour guide for a group of soldiers on a tour. (Dkt. 95). They were standing around discussing the day's agenda when an old friend saw him and called his name. (Dkt. 95). Eytan turned around to look at her and was sent flying in the air. (Dkt. 95). Eytan was either struck by the truck or by one of the soldiers that had been hit by the truck. (Dkt. 95). Eytan landed on his right side. (Dkt. 95). He struck his head but did not lose consciousness. (Dkt. 79, Ex. B). Eytan was bleeding from his nose. (Dkt. 79, Ex. B). He was transferred by EMS to Hadassah Hospital and discharged that same day. (Dkt. 79, Ex. B). Eytan had severe bruising on his right side from his thigh to his shoulder. (Dkt. 79, Ex. B). The bruising remained for one month and made it difficult to walk and sleep during that time. (Dkt. 79, Ex. B, 95). After examining Eytan and reviewing his Emergency Room records, Dr. Friedman's diagnoses as to the attack is post terror attack, right leg, flank, and arm bruising—resolved after one month and superficial head trauma. (Dkt. 79, Ex. B).

The Court finds Dr. Friedman's methods to be reliable, that he is a qualified expert in his field, that his expert testimony and report are relevant to the issue in this case. Plaintiffs have presented evidence to the Court's satisfaction that Eytan sustained minor physical injuries as a result of the terror attack. The Court will award \$1,500,000 in compensatory damages to Eytan Rund. See *Barry*, 410 F. Supp. 3d 161, 180.

b. Erez Orbach

[20] One of the soldiers Eytan witnessed get run over by the terrorist was Erez. (Dkt. 95). When Eytan saw Erez, he ran over to Erez, along with another tour guide who was also a medic. (Dkt. 95). Erez was unconscious and strewn on the ground and without his eyeglasses on. (Dkt. 95). There was dirt and grass in Erez's mouth. Eytan removed the dirt and grass from Erez's mouth so the medic could perform CPR, but it was no use. (Dkt. 95). Eytan thought Erez's head must have been run over because he could not imagine how else dirt and grass got into Erez's mouth. (Dkt. 95).

Plaintiffs have presented evidence to the Court's satisfaction that Erez experienced and suffered severe physical trauma before passing away as a result of the terror attack, along with immense fright when the truck accelerated toward him. See *Hamen v. Islamic Republic of Iran*, 407 F. Supp. 3d 1, 7 (D.D.C. 2019); *Force v. Islamic Republic of Iran, et al.*, 617 F. Supp. 3d 20, 35-36 (D.D.C. 2022). The Court therefore grants Erez Orbach's estate \$1,000,000 as being run over would have caused a great amount of pain and suffering. See *Stern*, 271 F. Supp. 2d 286, 300 (D.D.C. 2003).

c. Nitzhia Goldman

[21] Plaintiffs presented Dr. Friedman's report regarding Nitzhia's physical injuries sustained in the attack, along with Nitzhia's declaration. (Dkt. 79, Ex. E, 116). *371 On July 22, 2022, Dr. Friedman examined Nitzhia by video. (Dkt. 79, Ex. E). Nitzhia and her husband were in Istanbul walking through the streets with their tour when she heard "a loud boom" and fell down. (Dkt. 116). She could not see as she had shrapnel in her eyes. (Dkt. 116). Nitzhia cleared her eyes out and saw her husband lying on the ground. (Dkt. 116). Somebody from a nearby store came out, saw she was bleeding from her right leg and placed a *tourniquet* on Nitzhia's leg. (Dkt. 116). EMS arrived and transported her to a public hospital where they sutured the bleeding vessel without using *anesthesia*. (Dkt. 116). Nitzhia was transferred to a private hospital where they performed a right talus fixation for a comminuted fracture of the medial talus. (Dkt. 79, Ex. E).

The next morning, Nitzhia was transferred by an Israeli military plane to Israel. (Dkt. 116). Nitzhia was taken to Sheba Hospital Tel Ha'Shomer. (Dkt. 79, Ex. E). She was there for the next month and during that time had three surgeries. (Dkt. 79, Ex. E). The last surgery was a skin and *nerve graft* (the skin was taken from the left thigh and grafted to the right ankle). (Dkt. 79, Ex. E). After the surgeries, Nitzhia received physical rehabilitation at home. (Dkt. 116). Due to her injuries in the attack, Nitzhia was awarded Israeli disability benefits. (Dkt. 116).

Nitzhia's medical records reveal an injury to the tibialis posterior nerve which was lacerated in the explosion and sutured in the hospital in Turkey. (Dkt. 79, Ex. E). Currently, Nitzhia has constant pain in her right leg. (Dkt. 79, Ex. E). She uses a cane to walk and now needs a second cane because she has developed elbow and neck pain from the use of a cane. (Dkt. 79, Ex. E). Nitzhia has been told that she has "no cartilage" in her right knee but because of the prior ankle surgery she is not a surgical candidate for a knee replacement.

(Dkt. 79, Ex. E). She is using a cannabis cream and Optalgin for pain relief. (Dkt. 79, Ex. E). Nitzhia also has pain in the lower back, especially when she walks. (Dkt. 79, Ex. E). According to Dr. Friedman, these all appear to be a result of her biomechanical changes. (Dkt. 79, Ex. E). Because of her altered gait, Nitzhia's left leg has begun to hurt. (Dkt. 79, Ex. E). Nitzhia has decreased sensation and numbness in the right leg and the right ankle. (Dkt. 79, Ex. E).

Dr. Friedman's examination revealed discoloration over the entire medial portion of the right medial ankle. (Dkt. 79, Ex. E). There was also disfigurement of the lateral malleolus. (Dkt. 79, Ex. E). Nitzhia's gait was normal with the use of the cane but without the use of the cane the right ankle pronates causing Nitzhia to lose balance. (Dkt. 79, Ex. E). Nitzhia is unable to stand one legged on the right, but she is able to do so on the left. (Dkt. 79, Ex. E). She is unable to walk on her toes or her heels because of pain. (Dkt. 79, Ex. E). Nitzhia has a well healed scar on the left thigh, which is the skin graft donor site. (Dkt. 79, Ex. E). There is a 9 cm linear scar on the medial left thigh where they took muscle for a procedure (the gracilis flap most likely), there is a 3.5 cm scar on the posterior right leg and a 2 cm scar on the posterior right ankle. (Dkt. 79, Ex. E).

Nitzhia reported to Dr. Friedman visual issues, which are documented in her medical records. (Dkt. 79, Ex. E). For example, the discharge summary from the *plastic surgery* department from Sheba Hospital dated April 7, 2016 noted that an ophthalmologist examined Nitzhia during her stay at the hospital and found a foreign body in the cornea. (Dkt. 79, Ex. E). On April 29, 2016, Dr. Yoav Berger removed a foreign body from Nitzhia's right eye. (Dkt. 79, Ex. E). On May 24, 2016, Dr. Berger *372 instructed Nitzhia to continue her medications for the eye. (Dkt. 79, Ex. E). Dr. Alon Saka'at in an undated note indicated Nitzhia had dry eyes and a *pterygium*. (Dkt. 79, Ex. E). He recommended artificial tears and referral to a corneal specialist for definitive treatment. (Dkt. 79, Ex. E). On January 29, 2017, Nitzhia complained to Dr. Iris Ben-Bast about double vision and right eye *esotropia* (turning inward). (Dkt. 79, Ex. E). On July 21 2017, Dr. Ben-Bast again noted right eye *esotropia*. (Dkt. 79, Ex. E).

On May 20, 2016, Dr. Edo Tradler wrote a report concerning Nitzhia's injuries and noted that she injured her right foot and ankle and suffered right *eardrum perforation* with subsequent hearing loss. (Dkt. 79, Ex. E). During her hospitalization, Nitzhia had a hearing test, which revealed decreased hearing.

(Dkt. 79, Ex. E). Dr. Tradler noted that Nitzhia's right ear had a decreased light reflex. (Dkt. 79, Ex. E). He listed the following diagnoses regarding the terror attack injuries: **fracture ankle closed—unstable**; blast injury to ear; adjustment difficulty to terrorism and **Post-Traumatic Stress Disorder** (“PTSD”). (Dkt. 79, Ex. E).

Based on his examination of Nitzhia and his review of her medical records, Dr. Friedman rendered the following diagnoses: post right femur fixation secondary to blast injury, shrapnel wounds to the eyes with residual vision limitations, post skin, blood vessel, and nerve grafting to the right ankle, disfigurement and decreased range of motion in the right ankle following the above surgeries, gait abnormality and pain in the right knee, pain, neck, lower back, and elbows. (Dkt. 79, Ex. E). Nitzhia's gait was significant for not planting the right heel on the ground. (Dkt. 79, Ex. E). This is important in providing stability and proper gait mechanics, per Dr. Friedman. (Dkt. 79, Ex. E). This is contributing to her altered gait biomechanics leading to the knee, back, spine, and neck pains. (Dkt. 79, Ex. E). It is Dr. Friedman's opinion that Nitzhia's symptoms are causally related to the terror attack. (Dkt. 79, Ex. E). Given the time since the injury and her age, per Dr. Friedman, no improvement can be expected. (Dkt. 79, Ex. E). Rather, a progressive exacerbation of Nitzhia's symptoms is expected, per Dr. Friedman. (Dkt. 79, Ex. E). Because of the condition of her legs Nitzhia is not a candidate for a knee replacement. (Dkt. 79, Ex. E). Therefore, the expected outcome is continued pain, and slow deterioration of her function coupled with an increase in her **degenerative joint disease**. (Dkt. 79, Ex. E).

Plaintiffs have presented evidence to the Court's satisfaction that Nitzhia experienced and suffered severe permanent physical injuries as a result of the terror attack. The Court will depart upward from the baseline amount of \$5,000,000 and grant Nitzhia Goldman \$10,000,000 in compensatory damages in light of her substantial physical injuries (e.g., multiple surgeries, vision limitation, and hearing loss). *See Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 37-39 (D.D.C. 2012).

d. Abvraham Goldman

[22] Plaintiffs presented Nitzhia's declaration regarding the terror attack. (Dkt. 116). Nitzhia felt and heard a blast. (Dkt. 116). After orientating herself after the blast, Nitzhia saw her husband lying on the ground. (Dkt. 116). Nitzhia called out to her husband, but he did not respond. (Dkt. 116). Someone else checked for a pulse but Abvraham had no pulse.

(Dkt. 79, Ex. E). Plaintiffs have presented evidence to the Court's satisfaction that Abvraham experienced and suffered severe physical trauma before dying as a result of the attack. Significantly, Nitzhia observed *373 no external wounds to her husband's body, which means Abvraham's body was intact, despite the suicide bombing blast. (Dkt. 79, Ex. E, 116). Since Abvraham's body was intact after the suicide bombing, it is reasonable to infer that Abvraham died due to internal injuries due to the sheer force of the blast from the bomb being detonated so close to him. Internal bleeding does not cause a person's death instantaneously. As such, Abvraham felt pain for a period of time before his death, brief though that period of time may have been. Accordingly, the Court grants Abvraham Goldman's estate \$1,000,000 in light of the manner of Mr. Goldman's death. *See Stern*, 271 F. Supp. 2d 286, 300 (D.D.C. 2003).

e. Ron Greenfield

[23] Plaintiffs present Dr. Friedman's report regarding the physical injuries Ron sustained in the terror attack, as well as Ron's declaration. (Dkt. 79, Ex. C, 108). On July 11, 2022, Dr. Friedman examined Ron in person. (Dkt. 79, Ex. C). Ron and his wife were in Istanbul walking through the streets with their guided tour when he heard “a terrible boom.” (Dkt. 79, Ex. C, 108). Ron fell down, turned around and saw that everybody was on the ground. (Dkt. 108). Ron's wife and her sister, who was also on the tour, called to him and he limped to where they were standing in a side alley. (Dkt. 108).

Ron's right foot was bleeding because shrapnel had pierced the medial right ankle and exited at the lateral malleolus. (Dkt. 108). Ron was taken by ambulance to a hospital where the wound was cleaned, a **CT scan** was performed, and surgery may have been recommended but he refused. (Dkt. 79, Ex. C). He was transferred to Israel and taken to Sheba Medical Center at Tel HaShomer, near Tel Aviv. (Dkt. 79, Ex. C). Ron was hospitalized for a week. (Dkt. 108). Ron was placed in a walking boot he wore for 6 months. (Dkt. 79, Ex. C). Ron had physical therapy at least twice a week for 3 to 4 months. (Dkt. 79, Ex. C).

Ron continues to suffer constant right foot pain and he limps when he walks. (Dkt. 79, Ex. C). The pain is exacerbated with weight bearing or when he walks without shoes. (Dkt. 79, Ex. C). Ron has numbness in the lateral right thigh and the right foot. (Dkt. 79, Ex. C). Ron had significant hyper-sensitivity in the anterior ankle but this has slowly resolved. (Dkt. 79, Ex. C). This correlates with Dr. Tannebaum's note of sensitivity over the superficial peroneal nerve distribution. (Dkt. 79, Ex. C).

C). Ron was receiving [acupuncture](#) and alternative medicine every two weeks but receives such treatment less frequently now. (Dkt. 79, Ex. C). Ron is now able to go up and down stairs but this only started recently. (Dkt. 79, Ex. C).

Ron has right knee pain. (Dkt. 79, Ex. C). Ron thinks the pain is related to his gait pattern that has been altered as a result of the foot pain and injury. (Dkt. 79, Ex. C). Ron has “buzzing” in both ears 24 hours a day every day. (Dkt. 79, Ex. C). He is very sensitive to background noise. (Dkt. 79, Ex. C). A hearing aid has never been prescribed, but Ron did have special headphones to use when watching TV (but these have since broken). (Dkt. 79, Ex. C). These did help to partially filter out some background noise. (Dkt. 79, Ex. C). Ron has lower back pain. (Dkt. 79, Ex. C). He did have a history of back pain prior to the terror attack but it is now significantly worse. (Dkt. 79, Ex. C). Ron thinks that it is worse because of his [limping](#) and abnormal gait. (Dkt. 79, Ex. C).

Ron has a 5 cm scar on the medial right malleolus and a 4 cm scar on the antero-lateral portion. (Dkt. 79, Ex. C). Ron has decreased range of motion of the right ankle. (Dkt. 79, Ex. C). He was able to *374 walk on his toes but had difficulty on his heels. (Dkt. 79, Ex. C). Ron was able to squat but with difficulty. (Dkt. 79, Ex. C). His balance was very limited when trying to stand one legged on the right. (Dkt. 79, Ex. C). There was mild hypersensitivity over the right ankle scar on the right lateral malleolus. (Dkt. 79, Ex. C). The right ankle plantarflexion range of motion was 10/50 degrees and dorsiflexion was 5/20 degrees. (Dkt. 79, Ex. C).

Before the terror attack, Ron enjoyed running, going to the gym, sporting activities and a social life, but all this ended after the attack. (Dkt. 108). At the time of the terror attack, Ron was working as a bookkeeper at a gas company, but he was unable to return to work after the attack because of his physical limitations and emotional struggles. (Dkt. 79, Ex. C). Ron was deemed 49% disabled by the Israeli disability insurance program. (Dkt. 79, Ex. C).

After evaluating Ron and reviewing his medical records, Dr. Friedman's diagnoses include shrapnel injury to the right ankle, right talus and [medial malleolus fractures](#), right sinus tarsi injury, fracture of the right great toe, residual gait abnormality secondary to referenced diagnoses, right foot pain—chronic, lower back pain—chronic and range of motion limitations—lumbar spine and right ankle. (Dkt. 79, Ex. C). It is Dr. Friedman's opinion that Ron's symptoms are causally related to the terror attack. (Dkt. 79, Ex. C). Ron

continues to suffer from pain and gait abnormalities, despite years of physical rehabilitation. (Dkt. 79, Ex. C). The other pains are related to the altered gait biomechanics, per Dr. Friedman. (Dkt. 79, Ex. C). Due to the time since the injury and Ron's age, no significant improvement can be expected in the future. (Dkt. 79, Ex. C).

Plaintiffs have presented evidence to the Court's satisfaction that Ron experienced and suffered severe permanent physical injuries as a result of the attack. The Court will grant Ron Greenfield an upward adjustment from the basic baseline amount of \$5,000,000 to \$7,000,000 in compensatory damages. See [Wultz](#), 864 F. Supp. 2d 24, 37-39.

f. Nohemi Gonzalez

[24] Plaintiffs presented the final death certificate for Nohemi, as well as the Medical Examiner's report. (Dkt. 19, 98, Ex. 13). According to the autopsy report, per Dr. Friedman, Nohemi suffered two gunshot wounds—one to the chest and the other to the left lower limb. (Dkt. 79, Ex. F). There were fractures of left ribs, the T6 vertebra left transverse process, spinous processes of vertebrae T5, T6, and T7. (Dkt. 79, Ex. F). There was a [subarachnoid hemorrhage](#) of the spinal cord and a thoracic [spinal-cord contusion](#) at the level of the T7 vertebra. (Dkt. 79, Ex. 79). There was no damage to the major blood vessels or to the heart, which would have caused almost instantaneous death. (Dkt. 79, Ex. F). The left [lung lacerations](#) are likely secondary injuries due to the [rib fractures](#). (Dkt. 79, Ex. F). Based upon the review of these records, it is Dr. Friedman's opinion that Nohemi survived the initial gunshot wounds for a period of at least two minutes. (Dkt. 79, Ex. F). During this time, in Dr. Friedman's opinion Nohemi likely suffered extreme pain from her injuries. (Dkt. 79, Ex. F). The [spinal cord injuries](#) may well have paralyzed her, and it is possible that she was aware of this, per Dr. Friedman. (Dkt. 79, Ex. F). Plaintiffs have presented evidence to the Court's satisfaction that Nohemi experienced and suffered severe physical trauma before passing away as a result of the terror attack. The Court will grant Nohemi Gonzalez's estate \$2,000,000. See [Stern](#), 271 F. Supp. 2d 286, 300 (D.D.C. 2003).

*375 2. Economic Damages

Ron Greenfield, James and Helen Cain and the Estates of Nohemi Gonzalez and Erez Orbach seek economic damages for financial losses, pursuant to 28 U.S.C. § 1605A.

a. The Estate of Nohemi Gonzalez

[25] Plaintiffs have presented the expert report of forensic accountant Michael Soudry, M.B.A., calculating the recoverable economic loss to the estate as a result of the murder of Nohemi with future losses adjusted to present value in 2023. (Dkt. 76, Ex. C). Mr. Soudry calculated the present value of the cumulative economic loss to the estate to be \$1,493,216. (Dkt. 76, Ex. C). The Court accepts and adopts Mr. Soudry's findings and the report in full and finds that the estate of Nohemi Gonzalez is entitled to an award of \$1,493,216 for economic loss against the Defendant.

b. The Estate of Erez Orbach

[26] Plaintiffs have presented the expert report of Mr. Soudry calculating the recoverable economic loss to the estate as a result of the murder of Erez with future losses adjusted to present value in 2023. (Dkt. 76, Ex. D). Mr. Soudry calculated the present value of the cumulative economic loss to the estate to be between \$1,091,238 and \$1,679,788. (Dkt. 76, Ex. D). The Court accepts and adopts Mr. Soudry's findings and the report in full and finds that the estate of Erez Orbach is entitled to an award of \$1,679,788 for economic loss against the Defendant.

c. Ron Greenfield

[27] [28] Plaintiffs have presented the expert report of Mr. Soudry calculating the recoverable economic loss to Ron as a result of the injuries he sustained in the terror attack that left him unable to work again with future losses adjusted to present value in 2023. (Dkt. 76, Ex. B). Mr. Soudry calculated the present value of the cumulative economic loss Ron to be \$237,875. (Dkt. 76, Ex. B). The Court accepts and adopts Mr. Soudry's¹⁸⁹ findings and the report in full and finds that Ron Greenfield is entitled to an award of \$237,875 for economic loss against the Defendant.

d. James and Helen Cain

[29] In supporting Cameron after the terror attack, Helen and James incurred financial expenses as Cameron was unable to return to her work at The Asia Society. (Dkt. 92). Attached to James' declaration as Ex. C is an itemization of those expenses. (Dkt. 92). Attached to James' declaration as Ex. D-M are copies of the bills and receipts for payment for those expenses. (Dkt. 92). Based on James' declaration, as well as the bills and receipts, the Court will award James and Helen Cain \$42,806.49 in economic damages.

3. Solatium

The Plaintiffs herein, all U.S. nationals are the parents, spouses, siblings, in-laws, stepparents and children of the decedents or survivors of the terror attacks. (Dkt. 70, Ex. 1-30). The Plaintiffs bring this action to recover their damages for loss of solatium, as authorized by 28 U.S.C. § 1605A(c). The evidence presented establishes that the violent circumstances surrounding the terror attacks, and the trauma of their loved one's horrific death or attempted murder caused and continues to cause the families severe grief and pain.

***376 a. Alexander Pinczowski's Family**

The family members claiming solatium are Anne Cameron Cain Baarbé, James Cain and Helen Cain. All are U.S. citizens. (Dkt. 70, Ex. 1-3).

[30] **Anne Cameron Cain-Baarbé:** Plaintiffs presented Dr. Strous' report regarding the psychological trauma suffered by Cameron when her husband was murdered, as well as Cameron's declaration. (Dkt. 82, Ex. B, 93). On March 22, 2016, Cameron woke up to a BBC alert on her cell phone that there had been a terror attack at the Brussels airport with several deaths. (Dkt. 93). Alexander's mother called Cameron and told her that she was not able to reach him on his phone. (Dkt. 93). Alexander was at the Brussels airport to board a plane to New York to accompany Cameron to a wedding in North Carolina. (Dkt. 93). Cameron thought Alexander was not available because he was helping other people, but as the hours passed that day Cameron was overwhelmed with fear and dread. (Dkt. 93). Cameron was frantic to locate Alexander and his sister, Sascha, who was traveling to New York City with Alexander that day to visit friends. (Dkt. 93). Cameron made calls to anyone she could in Brussels to try and locate them and she sent messages via social media to others to help find them. (Dkt. 93).

On March 23, 2016, Cameron flew with her parents to Brussels to try and find Alexander and Sascha. (Dkt. 93). Cameron, along with her parents, searched the local hospitals and Cameron went on television to try and help find them. (Dkt. 93). After searching and wondering for a day and a half, on March 25, 2016, the hospital released a survivors list and indicated that anyone not on the list should be presumed dead. (Dkt. 93). It was highly traumatic and emotional for Cameron to search for Alexander and Sacha. (Dkt. 93). Cameron went through a very public anguish and torment as the news

covered the attack and her search for Alexander and Sacha. (Dkt. 93).

On March 25, 2006, the Brussels authorities allowed Cameron to visit her husband's body in a morgue. (Dkt. 93). Alexander had sustained a head gash and his legs were badly injured in the bombing blast. (Dkt. 93). Cameron had nightmares for months about Alexander's injuries. (Dkt. 93). That image still haunts Cameron to this day. (Dkt. 93).

Once Alexander and Sascha's funeral was held, Cameron had no will to live. (Dkt. 93). Cameron was numb for weeks after Alexander's death. (Dkt. 93). Cameron returned to North Carolina with her parents. (Dkt. 93). She began psychological treatment on April 25, 2016 with Dr. Jessica Tischner and continued therapy with Dr. Tischner until May 25, 2017. (Dkt. 93). During the initial visit, Dr. Tischner indicated that Cameron was not psychologically stable enough to return to work and recommended Cameron take a medical leave from work. (Dkt. 93). Dr. Tischner diagnosed Cameron with PTSD. (Dkt. 93). While Dr. Tischner recommended Cameron take prescription medication, Cameron declined to do so. (Dkt. 93). Instead, Cameron joined a grief support group in Florida led by a registered nurse from July 11, 2016-August 11, 2016. (Dkt. 93). Cameron also tried to cope with the loss by writing and reading, as well as doing daily exercise and outdoor activities. (Dkt. 93). On September 5, 2016, Cameron returned to Florida to rejoin the same grief support group and was in the group until November 2, 2016. (Dkt. 93). Cameron restarted therapy with Dr. Tischner in 2018 on an intermittent basis and now sees a psychologist in Canada, Jo Hodgson. (Dkt. 93).

*377 At the time of the attack, Cameron was an Executive Associate for The Asia Society, a non-profit in New York City. (Dkt. 93). Cameron was unable to return to work at The Asia Society because of her extreme grief as she had difficulty concentrating and focusing. (Dkt. 93). Cameron filed for and was granted disability benefits through The Asia Society's disability insurer starting June 21, 2016 but those benefits were terminated on May 20, 2017. (Dkt. 93). Cameron's employment at The Asia Society officially ended on July 1, 2016. (Dkt. 93).

Cameron's parents helped her with the many administrative things she had to deal with due to Alexander's death, including filling out her disability claim form, scheduling therapy sessions, dealing with the disability insurer, packing up and storing Alexander's possessions from their apartment in New

York. (Dkt. 93). Cameron appointed her father to deal with all legal matters due to Alexander's death. (Dkt. 93).

In May 2016, Cameron returned to Brussels with her father for meetings with the medical examiner, the coroner, first responders, U.S. Ambassador, attorneys and to lay flowers at Zaventum Airport in Brussels. (Dkt. 93). On May 19, 2016, Cameron went to Frankfurt, Germany to attend a Memorial Service at Frankfurt International School, which Alexander and Sascha had attended, and dedication of monuments for them. (Dkt. 93). For the one-year anniversary of the attack, Cameron returned to Belgium for a memorial for Alexander and Sascha's passing. (Dkt. 93).

Cameron met Alexander through a mutual friend in July 2010. (Dkt. 93). Alexander fell in love with Cameron at first sight. (Dkt. 93). Three days after they met, Alexander told Cameron he loved her. (Dkt. 93). They moved in together in New York after six months of dating. (Dkt. 93). Alexander and Cameron had lots of things to look forward to that they had discussed, including travel, children and opening a small business together. (Dkt. 93).

Alexander was Cameron's rock. (Dkt. 93). He was supportive and encouraging of her life goals. (Dkt. 93). Their families got along and loved each other. (Dkt. 93). Alexander had a part-time job at an art gallery in Maastricht so he could go back and forth from their apartment in Manhattan and the Netherlands as he was unable to obtain a work visa. (Dkt. 93). Alexander was a highly intelligent person who wanted to make a positive difference in the world. (Dkt. 93). He dreamed of being a writer, scientist, and blacksmith. (Dkt. 93).

Before Alexander's death, Cameron was a social person but after his murder she would only speak with her friends by telephone for almost a year. (Dkt. 82, Ex. B). Cameron experiences daily anxiety and fear of losing another loved one. (Dkt. 82, Ex. B). Cameron was not an anxious person before Alexander's murder. (Dkt. 82, Ex. B). Cameron reported to Dr. Strous post-traumatic symptoms, including an inability to sleep with constant thoughts of the blast that killed Alexander and Sascha, nightmares, which continue to this day, flashbacks to the initial week after the attack, chest tightening when she speaks about the attack, anxiety over large crowds and guilt that Alexander was at the airport to be her guest at her friend's wedding. (Dkt. 82, Ex. B). Cameron told Dr. Strous that although she remarried in 2019, the death of Alexander remains very much a factor in her life. (Dkt. 82,

Ex. B). Cameron remains very close with Alexander's parents and will never stop loving Alexander. (Dkt. 82, Ex. B).

It is Dr. Strous' opinion that Cameron suffers from persistent complex bereavement disorder with traumatic bereavement, PTSD, and other specified anxiety *378 disorder. (Dkt. 82, Ex. B). Despite treatment, Dr. Strous expects Cameron's anxiety, mood, and grief issues that affect many areas of her functioning to continue for a long period of time. (Dkt. 82, Ex. B).

[31] James Cain: Plaintiffs presented James' declaration regarding the murder of his son-in-law. (Dkt. 92). On Tuesday March 22, 2016, James was at the Raleigh-Durham International Airport preparing to board a scheduled flight to New York when his daughter, Cameron, who was living in New York, texted and called him. (Dkt. 92). James did not answer his cell phone or look at Cameron's text because he was engaged in a conversation with a friend he had just run into in the airport. (Dkt. 92). When James was able to read Cameron's text, he learned that Alexander and his sister Sascha had a scheduled flight out of the Brussels airport to New York. (Dkt. 92). There had been a terrorist attack perpetrated by ISIS at the Brussels airport. (Dkt. 92). Cameron was quite concerned as she knew Alexander's travel schedule and could not reach him on the phone. (Dkt. 92).

James flew to New York on his scheduled flight to join Cameron in her search for Alexander, and Helen joined them in New York later that day. (Dkt. 92). Working from Cameron and Alexander's apartment in Manhattan, they reached out to every authority and source they could think of as they tried to learn anything about Alexander and Sascha's whereabouts. (Dkt. 92). The Belgian authorities were not helpful and they had no one on the ground to assist them. (Dkt. 92). As the long hours passed without any confirmation or reliable information, Cameron made the decision that she had to travel to Belgium to try and locate Alexander. (Dkt. 92). The next day, Wednesday March 23, Cameron, Helen, and James flew to Brussels to help search for Alexander and Sascha. (Dkt. 92). Arriving in Brussels early morning on Thursday March 24 and quickly joining Alexander and Sascha's parents Ed and Marjan Pinczowski who were residing in Belgium, James, Helen and Cameron spent the next twelve hours searching local hospitals of Brussels for Alexander and Sascha or any news of them. (Dkt. 92). Hearing rumors that unidentified victims, some still alive, were in the Astrid Military Hospital, Helen and James held a press conference in front of the facility imploring the Belgian authorities to let the dozen-

plus families gathered there have access to the unidentified victims; declaring that regardless of the condition of the bodies, any mother or father would recognize their son or daughter. (Dkt. 92). Belgian authorities refused to heed their pleas. (Dkt. 92). James worked the phones to appeal to the US Embassy, international media, and other US authorities for help, and Helen and Cameron went through the corridors of the Belgian military hospital handing out pictures of Alexander and Sascha, begging for any news of either sibling. (Dkt. 92).

Eventually, around 9:30 p.m. on Thursday evening, in the basement of Astrid Hospital, with dozens of similarly distraught families looking for their lost loved ones, the hospital released a list of surviving victims and told the families to presume that anyone not on that list was dead. (Dkt. 92). Neither Alexander nor Sascha's name was on that list. (Dkt. 92).

Plaintiffs subsequently learned that Alexander and Sascha were killed in the first of the two bomb blasts that occurred in the Zaventum Airport, the bomb being detonated directly behind Alexander while he and Sascha were standing in line at a Delta Airlines ticket counter. (Dkt. 92). They also learned that Belgium's first responders were aware of Alexander and Sascha's identities within an hour or two of the blast. (Dkt. 92). Therefore, even before *379 they left New York for Brussels the first responders knew that Alexander and Sascha had been murdered but the Belgian bureaucracy did not allow them to inform their family for over two and a half days. (Dkt. 92).

Those anguishing days in March of 2016 during which Cameron frantically searched the hospitals of Brussels for her husband Alexander and Sascha were highly traumatic and scarring for Cameron. (Dkt. 92). She felt as if her world had collapsed, and no one was able to assist her in her panic, desperation, and anguish. (Dkt. 92). On Easter Monday, March 28, while in Maastricht, The Netherlands, where Alexander and Sascha were to be buried, James confirmed to the world during a live morning broadcast of the "NBC Today Show" the loss of Alexander and Sascha Pinczowski. (Dkt. 92).

On Friday, April 1, 2016, James attended the funeral of Alexander and Sascha in Maastricht, along with Cameron and Helen. (Dkt. 92). The sadness and despair of the double ceremony is almost too difficult to put into words. (Dkt. 92). James was asked to speak at the funeral and he gave a heartfelt

eulogy for Alexander. (Dkt. 92). In the days and weeks after the murder of Alexander, as Cameron's father, James' focus, along with Cameron's mother's, was to provide Cameron with love and support. (Dkt. 92). For James, witnessing Cameron's pain and mental anguish led to moments of extreme anxiety and a sense of hopelessness. (Dkt. 92).

The murder of Alexander and Sascha had a devastating and profound effect on Cameron. (Dkt. 92). In the wake of the tragedy, Cameron was unable to deal with the administrative and procedural matters related to Alexander's murder. (Dkt. 92). Helen and James had to step in and fulfill these tasks. (Dkt. 92). James has tried to support Cameron in any way he can, including receiving from her a power of attorney to deal with any litigation and criminal matters arising from the murder of Alexander. (Dkt. 92). On May 7, 2016, he went to Brussels with Cameron to attend meetings with the medical examiner, coroner, first responders, U.S. Ambassador, and attorneys and to lay flowers at the memorial at the Belgium airport. (Dkt. 92). The first week of December, 2022, James attended the first few days of the criminal trial of the nine terrorists who are standing trial for the March 22 attacks, including the lone survivor of the attack in the airport who dropped his bomb and fled the scene. (Dkt. 92). James and Helen dealt with the disability insurer, Cameron and Alexander's apartment in New York City and the storage of Alexander's belongings from their apartment. (Dkt. 92). Helen and James also provided financial support to Cameron after the murder of Alexander as she was unable to return to work at The Asia Society due to the emotional toll his murder took on her. (Dkt. 92).

Watching Cameron in her darkest times was brutal. (Dkt. 92). It caused James at times to feel utter hopelessness. (Dkt. 92). Even to this day, it is difficult for Cameron to answer questions from lawyers for litigation involving the terror attack and James does what he can to minimize Cameron's involvement in such litigation because it stirs up Cameron's emotions regarding the loss of her husband and Sascha. (Dkt. 92).

James and Helen considered Alexander a son. (Dkt. 92). James had a very close relationship with Alexander, and they had deep conversations, including about the freeing of Europe from Nazis during the Second World War and the sacrifices that were required for that to happen. (Dkt. 92). James and Helen enjoyed family trips with Alexander to various places, including Vermont, Pennsylvania, and Scotland. *380 (Dkt. 92). James and Helen loved having Alexander join them

for family holidays, including birthdays, Christmas, and Thanksgiving. (Dkt. 92). Alexander enjoyed making family meals during the holidays for them. (Dkt. 92). The meals were of Alexander's own creation and would take a long time to make but he really did enjoy cooking. (Dkt. 92).

Alexander was very curious about the world and a clever student of international studies. (Dkt. 92). One of James' most fond memories, and an example of Alexander's worldly knowledge and insight, occurred in New York one summer evening, when Alexander and Cameron, Helen and James went to see the play "War Horse" at the Lincoln Center in New York. (Dkt. 92). At intermission James spotted the president of the European Union, Jose Barroso. (Dkt. 92). James had never met President Barroso before, but James knew he had been friends with us former boss President George W. Bush. (Dkt. 92). James introduced himself to him and they engaged in a brief, polite conversation about President Bush. (Dkt. 92). Then James waved Alexander over, introduced him to President Barroso as a "proud citizen of the EU," and then James stood back and witnessed Alexander engage the President of the EU in a ten minute, highly technical, conversation about EU policy. (Dkt. 92). James was exceedingly proud of Alexander, and, not for the first time, awed by his intellect and insight. (Dkt. 92). Alexander was an ideal son-in-law and was taken much too soon and much too tragically. (Dkt. 92). Cameron and Alexander had a bright future together that was abruptly and cruelly cut short. (Dkt. 92). Alexander was hopeful and optimistic for the future. (Dkt. 92).

[32] Helen Cain: Plaintiffs presented Helen's declaration regarding the murder of her son-in-law. (Dkt. 91). On March 22, 2016, Helen was home in Raleigh, North Carolina when she received a telephone call from Cameron. (Dkt. 91). Cameron told Helen Alexander had been scheduled to fly out of the Brussels airport to meet her in New York City and there had been, according to media reports, a devastating terror attack at the Brussels airport. (Dkt. 91). Cameron was panicked because she was unable to reach Alexander by phone and the news reports were stating that there had been many casualties and injured passengers. (Dkt. 91). Alexander's sister Sascha had been traveling with him, as well. (Dkt. 91). Cameron was gravely afraid for Alexander's safety and the hours were passing by without any communication from him. (Dkt. 91). They began to fear that something terrible had occurred. (Dkt. 91). There was no one to contact on the ground in Brussels as the massacre had plunged the city into chaos. (Dkt. 91).

Unable to stand idly by Helen flew from Raleigh to New York where she joined Cameron and her husband James to continue from afar the search for Alexander and Sascha, and to provide emotional support for Cameron. (Dkt. 91). The next day, March 23, Helen flew with Cameron and James to Amsterdam, landing in the early morning on March 24. (Dkt. 91). The city was still in utter confusion and no one was available to assist them. (Dkt. 91). Cameron, Helen and James spent the day searching local hospitals for the siblings. (Dkt. 91). Helen and Cameron made flyers with Alexander and Sascha's photographs which they handed out through the corridors of Astrid Military Hospital, where news reports indicated most of the victims had been taken. (Dkt. 91). Eventually, late that night, one of the hospitals released a list of surviving victims and told the families to presume that anyone not on that list was dead. (Dkt. 91). Helen was the first one into the curtained-off room where the list was posted on a table; a dozen individuals *381 representing other families in a similar situation were lined up behind her. (Dkt. 91). Filled with emotion Helen checked the list over twice, and then turned to her husband to shake her head, indicating that neither Alexander nor Sascha's name was on the list. (Dkt. 91). Helen, James and Cameron were devastated by the news that Alexander and Sascha were among the murdered victims of the attack. (Dkt. 91). Alexander had been twenty-nine years old at the time of his murder and Sascha was just twenty-six years old. (Dkt. 91).

It took many days to straighten out the situation, receive official notice of what had happened to Alexander and his sister and deal with the bureaucracy. (Dkt. 91). On April 1, 2016, Helen attended the funeral of Alexander and Sascha in Maastricht, The Netherlands. (Dkt. 91). Helen was accompanied at the funeral by Cameron, James, and her and James' other daughter Laura. (Dkt. 91). The ceremony was extremely tragic and emotional as everyone was grieving the senseless loss of these two young people. (Dkt. 91). James provided a eulogy for Alexander because Cameron was unable to do so due to her emotional state. (Dkt. 91).

In the days and weeks following the murders of Alexander and Sascha, Helen supported Cameron as she mourned the sudden and violent death of Alexander and his sister. (Dkt. 91). Cameron was so deep in her grief that Helen worried she would leave them and begged her to stay with them. (Dkt. 91).

Cameron wanted to stay in the Netherlands to be close to Alexander's parents and his remains, but Helen insisted she

return to Raleigh with her so she and James could give her the love and support she needed to cope with her horrific loss. (Dkt. 91). On April 9, 2016, Cameron and Helen left Maastricht. (Dkt. 91). When they returned to North Carolina Helen scheduled weekly psychologist sessions for Cameron. (Dkt. 91).

On August 14, 2016, James and Helen travelled to New York to pack up Cameron and Alexander's apartment and store their belongings. (Dkt. 91). James and Helen had to attend to the apartment because it was too painful for Cameron to be in the home they had shared. (Dkt. 91).

Alexander was Cameron's support system for nearly six years. (Dkt. 91). He loved her, encouraged her, challenged her, and supported her dreams. (Dkt. 91). Cameron and Alexander had a bright future together that was abruptly and cruelly cut short. (Dkt. 91).

The murder of Alexander and Sascha had a devastating effect on Cameron. (Dkt. 91). She was unable to deal with the administrative and procedural matters related to Alexander's murder. (Dkt. 91). Helen has tried to be there since the tragedy to support Cameron in any way she can. (Dkt. 91). For example, Helen, along with James, dealt with the disability insurance to assist Cameron. (Dkt. 91). In addition, Helen, along with James, assisted Cameron in many different aspects of her trying to get resettled, plan a new future and restart her life after this overwhelming upheaval and loss. (Dkt. 91). Besides the above emotional support and assistance, James and Helen provided financial support to Cameron after the murder of Alexander as she was unable to return to work at The Asia Society, where she had been employed, due to the emotional toll his murder took on her. (Dkt. 91).

Alexander's transition into the Cain family was effortless. (Dkt. 91). He was a welcomed, appreciated and loved addition to the family. (Dkt. 91). The family enjoyed family trips with him to various places, including Vermont, Pennsylvania, Scotland, and Alexander's favorite, the mountains *382 of North Carolina. (Dkt. 91). The Cain family also loved having Alexander join them for family holidays, including birthdays, Christmas, and Thanksgiving. (Dkt. 91). Alexander enjoyed making family meals during the holidays for us and it was a real treat to enjoy the meals that Alexander prepared for the family. (Dkt. 91). He was well-educated, knowledgeable, confident and well-traveled. (Dkt. 91). Most importantly, he made Cameron happy and was a stable, supportive, and loving pillar in her life. (Dkt. 91).

All agree Alexander was a wonderful person with a bright future with Cameron and seeing Cameron in such pain after his death was very difficult. (Dkt. 91). It continues to impact Cameron, Helen and James until this day. (Dkt. 91). Much as they all try to put the tragedy behind them, it still continues to remain beneath the surface of their relationships. (Dkt. 91). It is still so hard for the family to accept that Alexander was taken from Cameron, his own family and Helen and James in this horrific manner. (Dkt. 91).

The severe emotional and psychological effects on each of these members of Alexander's family is in their declarations and Cameron's medical diagnosis is detailed in Dr. Strous' report, which this Court accepts and adopts in full. The Court finds Dr. Strous' methods to be reliable, that he is a qualified expert in his field and that his expert testimony and report are relevant to the issue in this case.

Based upon the foregoing, the Court orders that the Defendant shall pay \$13,000,000 in solatium damages to Anne Cameron Cain Baarbé, \$2,500,000 in solatium damages to James Cain and \$2,500,000 in solatium damages to Helen Cain.

b. Rund Family

Eytan and his family members Tamar Rund, S.A.R., Y.M.R. and H.H.R. claim solatium damages. All are U.S. citizens. (Dkt. 70, Ex. 13-17).

[33] **Eytan Rund:** Plaintiffs presented Eytan's declaration regarding the psychological trauma he suffered due to the attack, along with Dr. Strous' report. (Dkt. 82, N, 95). Eytan told Dr. Strous that as soon as he turned to his left, he saw a truck coming and smashing straight into his acquaintance. (Dkt. 82, Ex. N). Eytan initially thought it was an accident. (Dkt. 82, Ex. N, 95). Eytan was thrown to the side, and he rolled six or seven meters. (Dkt. 82, Ex. N, 95). Eytan was frightened because he thought he was going to be paralyzed. (Dkt. 82, Ex. N, 95). After regaining his senses, Eytan tried to get up and felt relieved that he could feel his feet. (Dkt. 82, Ex. N, 95). Eytan then saw the truck reverse and continue to plow into people. (Dkt. 82, Ex. N, 95). That is when Eytan realized it was a terror attack. (Dkt. 82, Ex. N, 95). The driver of the truck was driving in circles running over the injured. (Dkt. 82, Ex. N, 95). Eytan pulled out his gun and ran towards the cabin of the truck. (Dkt. 82, Ex. N, 95). He shot at the truck's wheels. (Dkt. 82, Ex. N, 95). He then ran behind the truck and shot at the driver with the remaining bullets. (Dkt. 82, Ex. N, 95). He felt frustrated that the driver was still running over

people and that he had run out of bullets. (Dkt. 82, Ex. N, 95). A soldier then appeared on the scene and shot the terrorist. (Dkt. 82, Ex. N, 95).

Eytan ran to the wounded on the ground. (Dkt. 82, Ex. N, 95). There were people under the truck's wheels. (Dkt. 82, Ex. N, 95). One girl's face was disfigured from being run over by the truck. (Dkt. 82, Ex. N, 95). His acquaintance had a badly **dislocated shoulder** and she was mumbling to herself. (Dkt. 82, Ex. N, 95). Eytan saw a soldier unconscious strewn on the ground *383 and ran toward him with another tour guide who was also a medic to try and help him. (Dkt. 82, Ex. N, 95). As medics arrived, Eytan was needed less, so he tended to less injured soldiers and helped pick up the guns that had been dropped in the melee. (Dkt. 82, Ex. N, 95).

Long-term, Eytan experiences sadness and frustration, especially when he has flashbacks to the attack. (Dkt. 82, Ex. N, 95). After the attack, Eytan became closed off as he felt that he could not share the experience with his family and friends as they could not understand the trauma. (Dkt. 82, Ex. N, 95). Eytan was also disappointed by some of the soldiers who did not run at the truck and shoot the terrorist because three of the four killed by the terrorist were killed so while the truck was in reverse. (Dkt. 82, Ex. N, 95). Eytan suffered from PTSD symptoms after the attack, including hypervigilance in public places, avoidance of public places as much as possible, easily startled, difficulty relaxing, stressful feelings when there is a slow-moving truck near him, difficulty falling asleep with sleepiness during the day, and when he has to speak about the attack or is reminded of it he tenses up, sweats and his heart rate increases. (Dkt. 82, Ex. N, 95). Two weeks after the attack, Eytan consulted a therapist. (Dkt. 82, Ex. N, 95).

Dr. Strous opines that Eytan suffers from PTSD and persistence **depressive disorder**; mild severity, late onset, with pure dysthymic syndrome. (Dkt. 82, Ex. N). Eytan's PTSD symptoms have continued to last years after the attack. (Dkt. 82, Ex. N). Despite the psychological treatment Eytan received and the years that have passed since the attack, Dr. Strous expects Eytan's mood and anxiety issues affecting many areas of his functioning to continue to affect him for a long time. (Dkt. 82, Ex. N).

[34] **Tamar Rund:** Plaintiffs present Dr. Strous' report, along with Tamar's declaration regarding the psychological trauma she experienced due to the terror attack. (Dkt. 82, Ex. O, 94). When Eytan spoke by phone to Tamar to let her know he was in a terror attack, Tamar was in shock. (Dkt. 82, Ex.

O, 94). Eytan told Tamar he was about to be interviewed by police and then he would be sent to the hospital to be checked out. (Dkt. 82, Ex. O, 94). Tamar had family watch the children and she went to the hospital. (Dkt. 82, Ex. O, 94). When Tamar saw Eytan at the hospital he was irritable, confused, and very tired. (Dkt. 82, Ex. O, 94). Tamar tried to convince Eytan to drink something since she felt he was dehydrated as he was fasting. (Dkt. 82, Ex. O, 94). Eytan's face was bashed up and full of blood. (Dkt. 82, Ex. O, 94). Tamar and her children were very scared about what happened as they almost lost Eytan. (Dkt. 82, Ex. O, 94).

Tamar had to deal with and manage Eytan's medical checkups, along with his lowered mood, fears, and his intimacy problems due to stress after the attack. (Dkt. 82, Ex. O, 94). Eytan never had these issues before the attack. (Dkt. 82, Ex. O, 94). Whenever Eytan speaks about the attack and how it has affected him, this affects Tamar's mood negatively as well. (Dkt. 82, Ex. O, 94). Tamar is constantly thinking about how she can ease Eytan's pain and help him. (Dkt. 82, Ex. O, 94). This stresses her out. (Dkt. 82, Ex. O, 94). In order to deal with the trauma, Tamar feels she has developed a level of disconnect from Eytan so that if she loses him in the future she will be prepared emotionally. (Dkt. 82, Ex. O, 94). Since the attack, Tamar has not slept as well as she feels constantly on edge. (Dkt. 82, Ex. O, 94). Tamar is constantly concerned for the safety of her family. (Dkt. 82, Ex. O, 94). Tamar is not as motivated at her job and her migraines have increased from once *384 per month to twice a week. (Dkt. 82, Ex. O, 94).

According to Dr. Strous, Tamar suffers from unspecified anxiety disorder as a direct result of Eytan's near death in a terror attack. (Dkt. 82, Ex. O). Tamar's empathy for Eytan has affected her anxiety levels and this in turn affects her occupational function and family and her enjoyment of experiences. (Dkt. 82, Ex. O). It is Dr. Strous' opinion that Tamar will continue to suffer from anxiety. (Dkt. 82, Ex. O).

[35] **S.A.R.:** S.A.R. is Eytan and Tamar's minor child.¹⁹⁰ Plaintiffs presented Dr. Strous' report, as well as the declarations of Tamar and Eytan regarding the psychological trauma S.A.R. suffered as a result of the attack that injured Eytan. (Dkt. 82, Ex. P). Eytan reported that S.A.R., Y.M.R. and H.H.R. were each very much affected following the attack. (Dkt. 82, Ex. P). Eytan also indicated that their mother had to spend time assisting in his care and rehab. (Dkt. 82, Ex. P). Thus, due to these factors Dr. Strous did not have the opportunity to examine the children and perform a formal psychiatric evaluation on them. (Dkt. 82, Ex. P). Dr. Strous

agrees with Eytan and Tamar that speaking with their children could cause harm. (Dkt. 82, Ex. P).

Eytan indicated that S.A.R. was affected by the attack even though at the time she did not appear to have reacted abnormally. (Dkt. 82, Ex. P). Over time S.A.R. developed major anxiety to various stimuli. (Dkt. 82, Ex. P). S.A.R.'s anxiety surrounds various fears including an extreme anxiety response/reaction to strangers and dogs. (Dkt. 82, Ex. P). According to Eytan, S.A.R. was a "normal child" before the attack and her anxiety is due to his near death in the attack. (Dkt. 82, Ex. P).

Due to S.A.R.'s problems related to anxiety; she was referred for psychological treatment. (Dkt. 82, Ex. P). This included cognitive behavioral treatment for six months which helped S.A.R. but the effects were not long-lasting. (Dkt. 82, Ex. P). S.A.R. was also helped by the Center for Resilience—an organization which assists victims of terror attacks. (Dkt. 82, Ex. P). Eytan believes that with treatment S.A.R. is 20% improved. (Dkt. 82, Ex. P). S.A.R. is still unable to leave the house alone. (Dkt. 82, Ex. P). S.A.R. is also unable to touch, pick-up or play with various small animals. (Dkt. 82, Ex. P). All of these functions are normally carried out by children of S.A.R.'s age but she remains unable to perform these functions due to her anxieties. (Dkt. 82, Ex. P). S.A.R. insists on travelling always in a bullet proof bus to school and out of the town from where she lives. (Dkt. 82, Ex. P). If terrorist rioters throw stones at the bus, S.A.R. becomes more distressed than is expected for her age. (Dkt. 82, Ex. P).

Tamar indicated that S.A.R. was almost nine at the time of the attack. (Dkt. 82, Ex. P). According to Tamar, after the attack, S.A.R. suffered from significant anxiety out of character compared to how she behaved prior to the attack. (Dkt. 82, Ex. P). Tamar stated that S.A.R. kept up an outward appearance of no problems, but whenever she would be confronted with any anxiety provoking situation, such as *385 strangers, new environment etc., she would react in an extreme anxious manner. (Dkt. 82, Ex. P). Tamar describes S.A.R.'s responses as being "extreme reactions to normal everyday situations—both social and academic." (Dkt. 82, Ex. P).

[36] **Y.M.R.:** Y.M.R. is Eytan and Tamar's minor child. Plaintiffs presented Dr. Strous' report, as well as the declarations of Eytan and Tamar regarding the psychological trauma Y.M.R. suffered as a result of the attack. (Dkt. 82, Ex. P, 94, 95). Eytan reported that Y.M.R. had "major trouble in coping with her knowledge of her father's near death." (Dkt.

82, Ex. P). Y.M.R.'s symptoms were expressed in poor sleep and "bad nightmares." (Dkt. 82, Ex. P). Y.M.R. "became scared of everything." (Dkt. 82, Ex. P). Y.M.R. for weeks after the attack was not functioning. (Dkt. 82, Ex. P). Eytan and Tamar attended therapy in order to learn how to manage Y.M.R.'s difficulties after the attack. (Dkt. 82, Ex. P). Eytan and Tamar were told by the therapist to discuss with Y.M.R. her anxieties and to encourage her to speak about what had transpired. (Dkt. 82, Ex. P). Following this advice, Eytan discussed the attack with Y.M.R. (Dkt. 82, Ex. P). Eytan believes as a result of the parental therapy for his children that he and Tamar received, Y.M.R. improved over time. (Dkt. 82, Ex. P).

Tamar told Dr. Strous that Y.M.R. was five years old at the time of the attack. (Dkt. 82, Ex. P). Even though Y.M.R. was very young at the time, she is intelligent, and she realized that something happened around her and that her family had become insecure. (Dkt. 82, Ex. P). Y.M.R. became very afraid. (Dkt. 82, Ex. P). Y.M.R.'s behavior changed and she started "throwing tantrums with extreme meltdowns." (Dkt. 82, Ex. P). Y.M.R. would not let her father out of her sight. (Dkt. 82, Ex. P). Due to Y.M.R.'s extreme reaction and change in behavior, Tamar turned to the local authorities and requested psychotherapy treatment for Y.M.R. (Dkt. 82, Ex. P). They were provided with a psychologist who in turn gave Eytan and Tamar guidelines over how to deal with their daughter in her best interests. (Dkt. 82, Ex. P). Y.M.R. received treatment from the therapist and her treatment surrounded stress and frustration management, and how to deal with low mood and fears surrounding the attack. (Dkt. 82, Ex. P). Tamar describes that initially Y.M.R.'s treatment consisted of parental guidance and reassurance. (Dkt. 82, Ex. P). However, a few years after the attack, when Y.M.R.'s anxieties reignedited to a major extent around her fear of bee stings, she was referred again for psychotherapy and dealt with issues including re-traumatization after not completely resolving her previous anxiety issues. (Dkt. 82, Ex. P).

[37] **H.H.R.:** H.H.R. is Eytan and Tamar's minor child. Plaintiffs presented Dr. Strous' report and the declarations of Eytan and Tamar regarding the psychological trauma H.H.R. suffered as a result of the attack. (Dkt. 82, Ex. P, 94, 95). According to Eytan, H.H.R. at the time of the attack dealt with it in a robust emotional manner and this attitude helped her cope and overcome any subsequent anxieties and insecurities. (Dkt. 82, Ex. P). Tamar reported to Dr. Strous that H.H.R. was seven years old at the time of the attack. (Dkt. 82, Ex. P). Tamar recalls that H.H.R. was the most emotional and

responsive of all her children after the attack. (Dkt. 82, Ex. P). H.H.R. expressed how worried she was for her father. (Dkt. 82, Ex. P). H.H.R. cried at the time and was very expressive of her concerns. (Dkt. 82, Ex. P). H.H.R. calmed down after a few months and has appeared to be the most resilient of Tamar's older children to the anxieties surrounding the attack. (Dkt. 82, Ex. P).

*386 Dr. Strous opines that S.A.R., Y.M.R. and H.H.R. all appear to have been affected by the injury of their father and his near death in an attack. (Dkt. 82, Ex. P). Although they are very young and their development is not complete, the trauma their father's injuries and near death in the attack wreaked on the family unit including the disruption and upheaval in various extremes to their lives, can clearly be noted in their anxious behavior, both in the initial period after the attack and after—a notable change from before the attack. (Dkt. 82, Ex. P). While H.H.R. appears to be in remission following her initial intense anxiety response, S.A.R. and Y.M.R. appear to exhibit an expression of ongoing Unspecified Anxiety Disorder, per Dr. Strous. (Dkt. 82, Ex. P). Dr. Strous expects that many aspects of their father's sudden involvement in an attack, along with him almost being killed, and associated injury and its repercussions on their lives and growing up in such a family, will continue to affect these children for a long time. (Dkt. 82, Ex. P).

While Eytan's physical injuries sustained in the terror attack have healed, the psychological injuries to Eytan and his family remain. The severe emotional and psychological effects on Eytan and each of his family members and their individual medical diagnoses are detailed in the reports of Dr. Strous, which this Court accepts and adopts in full. Plaintiffs have presented evidence to the Court's satisfaction that Eytan and his family have experienced severe psychological trauma as a result of the terror attack. The Court will award \$1,500,000 to Eytan Rund in solatium damages, \$4,000,000 in solatium damages to Tamar Rund, \$2,500,000 in solatium damages to S.A.R., \$2,500,000 in solatium damages to Y.M.R. and \$2,500,000 in solatium damages to H.H.R.

c. Orbach Family

The family members claiming solatium are Caryn Orbach, Eitan Orbach, Alon Orbach, A.O., E.O. and O.O. All are U.S. citizens. (Dkt. 70, Ex. 18-24).

[38] **Caryn Orbach:** Plaintiffs presented Dr. Strous' report, as well as Caryn's declaration regarding the psychological trauma she suffered due to Erez's murder. (Dkt. 82, Ex. G, 90).

The mourning of Erez was difficult as Caryn felt vulnerable and like she had no defenses. (Dkt. 90). Everything that was important before Erez's death was no longer important after his death. (Dkt. 82, Ex. G, 90). To this day, Caryn has a hard time with the fact that Erez was murdered at only twenty years old, especially since he was so good and innocent, and he was not allowed to realize his dreams. (Dkt. 90). Caryn is unable to this day to speak about Erez at home because she will cry. (Dkt. 90). Since Erez's death, everything is no longer simple but "turmoiled." (Dkt. 82, Ex. G, 90). Caryn remembers the last time she saw Erez before he was murdered. (Dkt. 82, Ex. G, 90). Erez was leaving the house and he turned left and said I love you to Caryn and she said I love you back to him. (Dkt. 82, Ex. G, 90).

Some of Caryn's post-traumatic symptoms include nightmares of Erez traveling near her in a car and waving goodbye to her, flashbacks of the soldiers giving her the news, the *shiva*,¹⁹¹ including with all the visitors such as the President of Israel and head of the army, and avoidance of news of violence and the attack site. (Dkt. *387 82, Ex. G). If Caryn has to go near the attack location, she experiences strong anxiety to the point she almost has a panic attack. (Dkt. 82, Ex. G). Caryn began psychotherapy, but she refused medication. (Dkt. 82, Ex. G, 90). Instead, Caryn tried alternative treatments. (Dkt. 82, Ex. G, 90). Caryn went to therapy because she had to return to some level of function for her other children. (Dkt. 82, Ex. G, 90). Caryn was unable to work for a year after Erez's death. (Dkt. 90). While Caryn sat at her sewing machine she just stared off into space as she was not present mentally due to the loss of her son. (Dkt. 90). Caryn feels she no longer has the potential for happiness and enjoyment in her life due to the loss of Erez. (Dkt. 90).

Caryn had a special relationship with Erez. (Dkt. 90). Erez required extra care as he had congenital *dyserythropoietic anemia*, a rare *blood disorder*. (Dkt. 90). Erez was not obligated to do mandatory army service due to his condition, but he insisted on volunteering and even participated in an officer's course. (Dkt. 90). Erez planned a career as a military officer. (Dkt. 90). Erez was sweet natured and fought for what he achieved in life. (Dkt. 90). Caryn feels Erez is still very much part of her life and time has not brought her any relief from her grief. (Dkt. 90). Because of Erez's violent death, Caryn is more anxious about the wellbeing of her other children and tries not to control their lives but the stress of worrying about them is something she did not experience before the attack. (Dkt. 82, Ex. G, 90).

Caryn withdrew from her friends after Erez's death. (Dkt. 82, Ex. G, 90). Some of her friends looked at her with pity and she could not handle being around people who felt sorry for her. (Dkt. 82, Ex. G, 90). Other friends of Caryn's distanced themselves from her because they did not understand what she was going through after Erez's death. (Dkt. 82, Ex. G, 90). Caryn's physical health has deteriorated since Erez's death in that she has general body weakness and pain in her legs and back. (Dkt. 82, Ex. G, 90). Caryn had to have pelvic surgery as she had a long-term pelvis problem that became exacerbated after Erez's death. (Dkt. 82, Ex. G, 90).

Dr. Strous is of the opinion that Caryn has persistent complex bereavement disorder with traumatic bereavement, PTSD, and persistent *depressive disorder*; moderate severity, late onset, with pure dysthymic syndrome. (Dkt. 82, Ex. G). Despite the treatment Caryn received and the years that have passed, Dr. Strous expects that her low mood, and complicated grief issues affecting many areas of her functioning to continue to do so for a long period of time. (Dkt. 82, Ex. G).

[39] **Eitan Orbach:** Plaintiffs presented Dr. Strous' report, as well as Eitan's declaration regarding his psychological trauma due to Erez's murder. (Dkt. 82, Ex. I, 101). Upon hearing the news, Eitan called his mother to find out if Erez was in the attack, but she did not have news. (Dkt. 101). When Eitan returned home later that day from work, the military support team was at the house and had just informed his parents that Erez was killed in the attack. (Dkt. 101). When his father told him the news, Eitan was shocked. (Dkt. 82, Ex. I, 101).

Erez's funeral was extremely traumatic for the family as they lost him so suddenly and violently. (Dkt. 82, Ex. I, 101). The funeral and *shiva* were also difficult because Eitan's parents had divorced months before Erez's death, so Eitan had to deal with the tension between his parents and going between two houses for *shiva*. (Dkt. 82, Ex. I, 101). Erez and Eitan were very close and had a tight friendship. (Dkt. 82, Ex. I, 101). Eitan sought advice in life about adversities and deep personal matters *388 from Erez. (Dkt. 82, Ex. I, 101). Eitan feels lost at times without Erez, as he was a good listener and did not judge Eitan. (Dkt. 82, Ex. I, 101). Eitan's social life was affected negatively by Erez's death because Eitan does not spend time with friends when he returns home because he does not like people to feel sorry for him. (Dkt. 82, Ex. I, 101). Eitan also is forced to grieve for Erez when he makes new friends because new friends ask how many siblings he

has and that makes Eitan think of Erez. (Dkt. 82, Ex. I, 101). After Erez's death, Eitan told his parents and siblings that he refused to take on the eldest child's functions because no one can replace Erez. (Dkt. 101). Eitan treated with a psychologist for four months after Erez's death but stopped because it was not helping him much. (Dkt. 82, Ex. I, 101).

Dr. Strous opines that Eitan has persistent complex bereavement disorder with traumatic bereavement and persistent **depressive disorder**; mild severity, late onset, with pure dysthymic syndrome. (Dkt. 82, Ex. I). Eitan has been closed off since Erez's murder as a defense mechanism in order to manage his grief. (Dkt. 82, Ex. I). Despite the treatment Eitan received and the years that have passed since Erez's death, Dr. Strous expects that Eitan's sad mood and complicated grief issues that affect many areas of his functioning to continue to affect him for a long time. (Dkt. 82, Ex. I).

[40] Alon Orbach: Plaintiffs presented Dr. Strous' report and Alon's declaration regarding the emotional trauma he suffered due to Erez's murder. (Dkt. 82, Ex. J, 100). Alon reported that within five minutes of returning home from volunteering in Jerusalem that day soldiers came to his mother's home. (Dkt. 82, Ex. J, 100). Alon's father came to the house and told him that Erez had died in the attack. (Dkt. 82, Ex. J, 100). The news was shocking to Alon. (Dkt. 82, Ex. J, 100). Alon wanted to be alone and went to write an obituary for Erez to read at the funeral. (Dkt. 82, Ex. J, 100). The *shiva* period was very difficult because he had to tell stories about Erez to his friends and hear stories about Erez. (Dkt. 82, Ex. J, 100). Alon was in his final year of high school when Erez was killed, and he missed several weeks of school. (Dkt. 82, Ex. J, 100). When Alon returned to school his mind was not present because he missed Erez, and his house was full of sorrow. (Dkt. 82, Ex. J, 100).

Erez and Alon were very close as they were only two years apart and they shared a room. (Dkt. 82, Ex. J, 100). To this day, Alon feels the loss of his best friend, Erez, very much, especially when he returns home and goes into his room where Erez's things remain as he left them. (Dkt. 82, Ex. J, 100). Alon's parents' homes are sad places. (Dkt. 82, Ex. J, 100). At times, Alon's father bursts into tears while eating a meal with Alon and his siblings at his father's home. (Dkt. 82, Ex. J, 100). Alon finds that his friends after Erez's death are more sensitive to him. (Dkt. 82, Ex. J, 100). Since Erez' death Alon prefers to be alone rather than with a group of friends. (Dkt. 82, Ex. J, 100). Since Erez's death, Alon does

not enjoy festivals and other happy occasions as he used to before Erez's death. (Dkt. 82, Ex. J, 100). After Erez's death, Alon did attempt psychotherapy, but he did not find such sessions helpful. (Dkt. 82, Ex. J, 100). To this day, Alon experiences flashbacks whenever he sees a minibus because Erez used a minibus to get to work the day he was killed, and he also experiences flashbacks when he is reminded of Erez's death, or any attack details. (Dkt. 82, Ex. J, 100).

Dr. Strous opines that Alon suffers from persistent complex bereavement disorder with traumatic bereavement and persistent **depressive disorder**; moderate severity, ***389** early onset, with pure dysthymic syndrome. (Dkt. 82, Ex. J). Despite the treatment Alon received and the years that have passed since Erez's murder, Dr. Strous expects Alon's sadness, depressed mood and complicated grief issues that affect many areas of his functioning to continue to affect him for a long time. (Dkt. 82, Ex. J).

[41] A.O.: Plaintiffs presented Dr. Strous' report and A.O.'s declaration regarding the psychological trauma she suffered due to Erez's murder. (Dkt. 82, Ex. K, 99). A.O. was thirteen years old when her brother was killed in an attack. (Dkt. 82, Ex. K, 99). Upon learning of her brother's murder, A.O. was in shock and started to cry. (Dkt. 82, Ex. K, 99). After a short time of intense emotion, A.O. "cut off." (Dkt. 82, Ex. K, 99). Later, A.O. cried on and off. (Dkt. 82, Ex. K, 99). A.O. returned to school soon after Erez's murder but feels that she should have taken more time off from school. (Dkt. 82, Ex. K, 99). While on the outside it looked like that A.O. was managing her grief, on the inside she was falling apart. (Dkt. 82, Ex. K, 99).

It took A.O. about two years to come to terms with the loss. (Dkt. 82, Ex. K, 99). A.O. had anxiety and panic attacks after Erez's death as she was unable to deal with the loss. (Dkt. 82, Ex. K, 99). The anxiety attacks lasted for some time but are not so prominent anymore. (Dkt. 82, Ex. K, 99). Since Erez's death, A.O. feels lonely, and she feels distant even from her other brothers since it is more difficult to speak to them since Erez's loss. (Dkt. 82, Ex. K, 99). A.O. experiences flashbacks to the terror attack day when she speaks about it. (Dkt. 82, Ex. K, 99). Since A.O. struggled with anxiety after Erez's murder, A.O. was referred to a psychotherapist to help her cope with her grief and she continues to treat with the psychotherapist. (Dkt. 82, Ex. K, 99). Erez's death has caused A.O. to struggle with her religion. (Dkt. 82, Ex. K, 99). Before Erez's death, A.O. was religiously observant but now she does not know if she believes in God anymore. (Dkt. 82, Ex. K, 99).

A.O. was very close to Erez, and he always gave her time and was there to answer questions and support her. (Dkt. 82, Ex. K, 99). Erez used to write a lot so after Erez's death A.O. began to write a lot as a form of escape. (Dkt. 82, Ex. K, 99). A.O. was inspired to try her best to move forward with her life despite Erez's death by a social media post by Erez she found after his death in which Erez said he was a good person who strives to improve all the time. (Dkt. 82, Ex. K, 99).

Dr. Strous opines that A.O. has persistent complex bereavement disorder; with traumatic bereavement and unspecified anxiety disorder. (Dkt. 82, Ex. K). Despite the psychotherapy A.O. has received and the time that has passed, Dr. Strous expects A.O.'s anxiety and grief issues affecting several areas of her life to continue to affect her long term. (Dkt. 82, Ex. K).

[42] E.O.: Plaintiffs presented Dr. Strous' report and E.O.'s declaration regarding the psychological trauma he suffered due to Erez's murder. (Dkt. 82, Ex. L, 102). E.O. was eleven years old when Erez was murdered. (Dkt. 82, Ex. L). E.O. was on his way home from watching a movie with friends when a friend said he just heard that there had been an attack in Jerusalem. (Dkt. 82, Ex. L, 102). E.O. did not think the attack involved anyone in his family but when he arrived at his street, the area near E.O.'s home was blocked off and there were military cars, an ambulance, and police vehicles on the road. (Dkt. 82, Ex. L, 102). Police did not allow E.O. down the road to go home but once he told the police he lived there he was allowed to return home with his friend. (Dkt. 82, Ex. L, 102). When E.O. got inside *390 his home, he saw his mother sitting with two army officers and crying. (Dkt. 82, Ex. L, 102). E.O. went to the kitchen to get water but overheard a military officer telling his mother that Erez had been killed in the attack. (Dkt. 82, Ex. L, 102).

After hearing the news, E.O. was confused. (Dkt. 82, Ex. L, 102). E.O. knew that his life had just changed, but he did not realize the extent to which it would influence him and his family. (Dkt. 82, Ex. L, 102). It was only at the traditional 30-day post death memorial ceremony, that E.O. accepted that Erez had been murdered in a "violent and unjust manner." (Dkt. 82, Ex. L, 102). E.O. realized then that he now "had only five siblings." (Dkt. 82, Ex. L, 102).

After the initial shock and massive outpouring of support that E.O. and his family received from friends, family, and the community, E.O. recalls that reality began to set in. (Dkt. 82,

Ex. L, 102). E.O. became very sad. (Dkt. 82, Ex. L, 102). Losing an elder brother with whom E.O. was so close, was a sudden reality that E.O. did not know or understand. (Dkt. 82, Ex. L, 102). E.O. suffered very much from the loss and he "had to mature and grow up in one sweep" whereas his "friends were allowed to gradually grow up." (Dkt. 82, Ex. L, 102). This was not easy for E.O. and caused him a "great deal of hardship." (Dkt. 82, Ex. L, 102).

Since his parents demanded that routine continue as much as possible after *shiva* was completed, E.O. returned to school. (Dkt. 82, Ex. L, 102). At school, everyone had pity on E.O. and were sensitive around him. (Dkt. 82, Ex. L, 102). The attention was uncomfortable for E.O. (Dkt. 82, Ex. L, 102). E.O. recalls that his scores dropped, and he was not able to concentrate in class anymore. (Dkt. 82, Ex. L, 102). While E.O. sat in class, his mind was still on the loss of Erez. (Dkt. 82, Ex. L, 102).

E.O. suffered from insomnia for weeks after Erez's death. (Dkt. 82, Ex. L, 102). E.O.'s appetite was also negatively affected for a few years. (Dkt. 82, Ex. L, 102). After the attack, some of E.O.'s friends became distant from him and this is painful for E.O. (Dkt. 82, Ex. L, 102). Since Erez's death, E.O. has had dreams of being at the attack and speaking to Erez during the attack. (Dkt. 82, Ex. L, 102). E.O. tries to avoid the site of the attack but he did return to it twice since the attack and he felt anxious and tense there both times. (Dkt. 82, Ex. L, 102). E.O. avoids movies that may remind him of the trauma of losing a brother and he avoids any film clips of the attack and its aftermath. (Dkt. 82, Ex. L, 102). When E.O. speaks about the attack and losing Erez, he feels shaky and "full of goosebumps." (Dkt. 82, Ex. L, 102). E.O. still experiences flashbacks around the trauma and of his time with Erez. (Dkt. 82, Ex. L, 102).

Because E.O. was suffering after the loss of Erez, he began psychotherapy four months after Erez's death and continued psychotherapy for about two years until he left to attend high school in a dormitory. (Dkt. 82, Ex. L, 102). E.O. still misses Erez very much and he does not enjoy life as much as his friends. (Dkt. 82, Ex. L, 102). Erez was a special big brother as he would take E.O. along with his friends even though there was an age gap. (Dkt. 82, Ex. L, 102). E.O. sought any way to remember Erez. (Dkt. 82, Ex. L, 102). E.O. recently started learning guitar and is using Erez's guitar. (Dkt. 82, Ex. L, 102). In ways like this E.O. tries to keep the connection with Erez and his memory. (Dkt. 82, Ex. L, 102).

Dr. Strous opines that E.O. has persistent complex bereavement disorder with traumatic bereavement and persistent depressive *391 disorder, mild severity, early onset, with pure dysthymic syndrome. (Dkt. 82, Ex. L). Despite the treatment E.O. has received and the years that have past, Dr. Strous expects E.O.'s sad mood and complicated grief issues affecting many areas of his functioning to continue to affect him for a long time. (Dkt. 82, Ex. L).

[43] **O.O.:** Plaintiffs presented Dr. Strous' report and the declarations of Caryn and Uri Orbach regarding O.O.'s emotional trauma due to Erez's death. (Dkt. 82, Ex. M, 89, 90). Dr. Strous interviewed Caryn and Uri and reviewed corroborating information from O.O.'s mental health care provider. (Dkt. 82, Ex. M). Dr. Strous was unable to conduct a formal psychiatric evaluation of O.O. because Caryn thought it was best not to expose O.O. to the potential trauma of discussing Erez's death. (Dkt. 82, Ex. M, 90). Dr. Strous agreed that speaking with O.O. may cause some harm. (Dkt. 82, Ex. M).

Caryn reported that O.O. is the youngest of her six children and he was eight years old at the time of the attack. (Dkt. 82, Ex. M). O.O. was very much affected following Erez's death, and the disruption to their family life. (Dkt. 82, Ex. M). Caryn was not as available for O.O. because she was grieving after Erez's death. (Dkt. 82, Ex. M). Caryn indicated that O.O. remembers the soldier and his father talking to him, but he does not remember much after. (Dkt. 82, Ex. M). O.O. was in shock and did not know how to make sense of what was going on around him. (Dkt. 82, Ex. M). The morning of the funeral O.O. refused to go to the cemetery, and he stayed at home with a teacher. (Dkt. 82, Ex. M). A short time after the funeral, O.O. developed severe separation anxiety. (Dkt. 82, Ex. M). O.O. fears that others in the family may die and leave him alone to fend for himself. (Dkt. 82, Ex. M). Caryn and O.O.'s siblings were unable to leave the house without O.O. asking several times where they were going and when they would be back. (Dkt. 82, Ex. M). O.O. refused to stay alone at home, and it took him a very long time to be able to leave the house by himself and feel safe wherever he went. (Dkt. 82, Ex. M). For a long time when going places in the car, O.O. used to ask Caryn to stop and wait until whoever was getting out of the car would walk away or arrive at the nearest sidewalk before he let Caryn drive away. (Dkt. 82, Ex. M). Caryn attributes this change in behavior to Erez being murdered by a terrorist driving a vehicle. (Dkt. 82, Ex. M).

O.O. always wants to make sure everyone in the family is safe and healthy. (Dkt. 82, Ex. M). For about a year or so, O.O. used to come to Caryn crying while asking her what he will do if she dies. (Dkt. 82, Ex. M). During this period, O.O. spoke of death a great deal. (Dkt. 82, Ex. M). O.O. often speaks about Erez, at times asking what Caryn what he was like or what would have been different had Erez still been alive. (Dkt. 82, Ex. M). Caryn thinks that they would have been close and that O.O. would have been able to learn from Erez and would have spent much time with him. (Dkt. 82, Ex. M). Due to O.O.'s anxieties and insecurities after Erez's death, O.O. was referred for psychotherapy. (Dkt. 82, Ex. M).

Uri indicated Erez's death was traumatic for O.O. (Dkt. 82, Ex. M). Uri has tried to give O.O. the message that life has to continue. (Dkt. 82, Ex. M). It is for that reason that Uri feels that O.O. did not share too much of his struggles and difficulties coping with Erez's death. (Dkt. 82, Ex. M). Uri said that O.O. expressed grief for Erez, but over time O.O. became closed off and did not share much with him. (Dkt. 82, Ex. M). It was for that purpose that O.O. was sent for psychotherapy in order *392 to cope with the loss of Erez as well as the stress of the divorce. (Dkt. 82, Ex. M). Uri said that occasionally O.O. "throws" a question at him regarding death and asks about Erez. (Dkt. 82, Ex. M). Uri feels that the loss and grief for Erez remains in the background at all times. (Dkt. 82, Ex. M).

Dr. Strous reviewed a report from Yiska Landau, a cognitive behavioral therapist and clinical social worker, and her report confirms that O.O. was in treatment with her for a year and was referred for treatment by his parents. (Dkt. 82, Ex. M). Initially, O.O. would only enter into therapy sessions with his mother. (Dkt. 82, Ex. M). After several sessions, O.O. was able to attend alone. (Dkt. 82, Ex. M). Issues which were dealt with included how to deal with friends, the divorce of his parents and the loss of Erez. (Dkt. 82, Ex. M). O.O. exhibited considerable anxiety regarding the wellbeing and health of his mother to the extent that his anxiety affected his ability to fall asleep at night. (Dkt. 82, Ex. M). At times, O.O. would even stay awake in the living room of their home in order to prevent a situation of waking up at night from anxiety—which falling asleep in his own bed often led him to experience. (Dkt. 82, Ex. M). The therapist noted that O.O. decided not to attend memorial services on Memorial Day. (Dkt. 82, Ex. M). Ms. Landau indicated that it is clear that O.O.'s anxiety is related to his insecurity and fear of death and associated with Erez's death in a violent attack. (Dkt. 82, Ex. M).

According to Dr. Strous, the sudden trauma of losing Erez caused O.O. significant anxiety and grief. (Dkt. 82, Ex. M). It also led to considerable disruption and upheaval within his family. (Dkt. 82, Ex. M). This can be noted in O.O.'s anxious behavior after the attack. (Dkt. 82, Ex. M). O.O.'s anxiety was expressed particularly in his fear of falling asleep and waking up with anxiety as well as in social situations and fear for his mother's wellbeing. (Dkt. 82, Ex. M). All these are not expected for a young boy of his age and indicate significant anxiety. (Dkt. 82, Ex. M). Dr. Strous indicated that it appears that O.O. exhibits an expression of ongoing Unspecified Anxiety Disorder. (Dkt. 82, Ex. M). Dr. Strous expects that many aspects of Erez's violent death in an attack and its repercussions on his personal and family life and growing up in such a family, will continue to affect O.O. in the long term. (Dkt. 82, Ex. M).

The severe emotional and psychological effects on each of these members of Erez's family and their individual medical diagnoses are detailed in the reports of Dr. Strous, which this Court accepts and adopts in full.

Based upon the foregoing, the Court will depart upward from the *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 269 (D.D.C. 2006) baseline amounts due to the nature of Erez's death, his young age and the severe negative impact his death still has on his family and orders that the Defendant shall pay \$8,000,000 in solatium damages to Caryn Orbach, \$4,000,000 in solatium damages to Eitan Orbach, \$4,000,000 in solatium damages to Alon Orbach, \$4,000,000 in solatium damages to A.O., \$4,000,000 in solatium damages to E.O. and \$4,000,000 in solatium damages to O.O.

d. Goldman Family

The family members claiming solatium are Abvraham Goldman's widow Nitzhia Goldman, his daughters Maya Cohen and Sharon Goldman, his sister Gila Nissenbaum and his brother Nathan Goldman. All are U.S. citizens. (Dkt. 70, Ex. 25-30). His son Yoseff Goldman, not a U.S. citizen is discussed below in the section regarding non-U.S. citizen Plaintiffs.

***393 [44] Nitzhia Goldman:** Plaintiffs have presented Dr. Strous' report and Nitzhia's declaration regarding the psychological trauma she endured due to the attack. (Dkt. 82, Ex. W, 116). On the morning of the attack, the tour group was told to eat breakfast at a "special restaurant" outside of the hotel. (Dkt. 116). After regaining her senses after the attack, Nitzhia noticed a head and leg near her that she was told

later belonged to the terrorist. (Dkt. 82, Ex. W, 116). While at the scene a friend called her and Nitzhia told her friend there had been an attack and that Abvraham was dead. (Dkt. 116). Nitzhia's daughter called and asked what was going on, so Nitzhia told her that she had an injury and Abvraham had been taken to the hospital to protect their daughter. (Dkt. 116). Nitzhia was taken to the hospital, and she had intense pain and was emotional. (Dkt. 116).

While in the hospital, Nitzhia called her daughter Maya who came with a friend from Israel to the hospital to try to comfort and assist her. (Dkt. 116). While in the hospital in Turkey two psychologists from the Jewish community visited Nitzhia. (Dkt. 116). The rabbi from the local Jewish community came to the hospital to inform Nitzhia that her husband had been killed. (Dkt. 116). Nitzhia felt sad, shocked, and devastated to lose Abvraham, her husband of over fifty years. (Dkt. 116). An airplane provided by the Israeli government transported her back to Israel and Nitzhia recalls seeing the three coffins on the tarmac. (Dkt. 116). Nitzhia's daughter saluted the coffins. (Dkt. 116). Nitzhia was taken to the cemetery by ambulance when Abvraham was buried. (Dkt. 116).

For months and years Nitzhia had difficulty sleeping and to this day she does not sleep through the night. (Dkt. 82, Ex. W). Nitzhia received psychological treatment from Dr. Shai Greenstein after the attack. (Dkt. 82, Ex. W). Dr. Greenstein prescribed medication to help Nitzhia sleep, and she also prescribed an anti-depressant and anti-anxiety medication that Nitzhia took. (Dkt. 82, Ex. W). Since the attack, milestones and holidays have been particularly difficult for Nitzhia, especially since Abvraham used to take charge of such events. (Dkt. 116). For the first year after Abvraham's death Nitzhia wrote him a letter every day. (Dkt. 82, Ex. W). Nitzhia misses her husband's hugs, travelling with him, Friday night family Sabbath dinners and going to plays with him. (Dkt. 116).

Because of her immense grief and pain, Nitzhia believes she developed cognitive impairment, as well as anxiety. (Dkt. 82, Ex. W, 116). Nitzhia has become disconnected from many of her friends since the attack and she does not feel comfortable being with other couples as doing so compounds her memories of being with Abvraham (Dkt. 82, Ex. W, 116). Nitzhia has experienced post-traumatic symptoms following the attack, including nightmares, frequent flashbacks, physiological reaction when she has to recount the attack, avoidance of news or movies with violence, guilt that despite having had a premonition about the Turkey trip she did not cancel it, hypervigilance with

struggling to go to crowded places, hypersensitivity to loud noises, and feeling constantly on edge, which takes away from the enjoyment of activities. (Dkt. 82, Ex. W).

Dr. Strous opines that Nitzhia has persistent complex bereavement disorder with traumatic bereavement, PTSD, and persistent depressive disorder; moderate, late onset, with pure dysthymic syndrome. (Dkt. 82, Ex. W). According to Dr. Strous, despite treatments over the years, Nitzhia's anxiety, mood and complicated grief issues that affect many areas of her functioning will continue to affect her long term. (Dkt. 82, Ex. W).

***394 [45] Maya Goldman Cohen:** Plaintiffs have presented Dr. Strous' report and Maya's declaration regarding the psychological trauma she suffered as a result of the murder of her father and the injuries her mother sustained in the attack. (Dkt. 82, Ex. X, 110). Maya received a news alert on her phone about an attack in Turkey. (Dkt. 110). Maya called her father, but he did not answer. (Dkt. 110). Maya then called her mother three times and on the third try her mother answered and confirmed that they were involved in the attack. (Dkt. 110). Maya's mother told her that she did not know about her father, but Maya found out later that her mother suspected that her father had been killed in the attack. (Dkt. 110). Maya went home and started making calls to find out about her father. (Dkt. 110). A few hours later, the Rabbi of Istanbul called to let her know that her father had been killed in the attack. (Dkt. 110). Maya was devastated and flew to Turkey to support her mother. (Dkt. 110).

When she arrived in Istanbul, Maya went to the hospital. (Dkt. 110). Maya's mother required emergency surgery on her leg. (Dkt. 110). Maya traveled back to Israel with her mother, along with her father's coffin. (Dkt. 110). Maya recalls covering her father's coffin before it was placed on the plane. (Dkt. 110). The flight to Israel was very difficult as her mother was in a great deal of physical pain and Maya and her mother cried during the flight. (Dkt. 110). When they arrived in Israel, Maya helped arrange for her mother to go to the hospital directly for treatment of her injuries. (Dkt. 110). Maya organized her father's funeral, which was very distressing. (Dkt. 82, Ex. X, 110). Maya had to identify her father's body at the cemetery prior to his burial. (Dkt. 82, Ex. X, 110). At that moment Maya felt she was going to collapse. (Dkt. 82, Ex. X, 110). Due to her distress, Maya took medication to calm her down. (Dkt. 82, Ex. X, 110). Maya had to arrange for her mother to be brought to the funeral by ambulance from the hospital. (Dkt. 82, Ex. X, 110). Maya's

mother's leg was fractured and had metal rods in it. (Dkt. 82, Ex. X, 110). The week of *shiva* had its challenges because Maya had to travel between her mother in the hospital and the rest of the family who were at their home to receive visits from friends and family to offer condolences. (Dkt. 82, Ex. X, 110).

Maya had to deal with her mother's care and home, as well as the needs of her own nuclear family. (Dkt. 82, Ex. X, 110). Maya missed two months of work as a Pilates instructor and lost \$5,000 in earnings. (Dkt. 110). Maya felt guilty that she was barely available to her husband and children during this time. (Dkt. 82, Ex. X). While caring for her mother, Maya also had to deal with the loss of her father. (Dkt. 82, Ex. X). Maya was very close to her father, and they spoke by phone at least once a day. (Dkt. 110). Her father was a wonderful grandfather. (Dkt. 110). Maya's father would babysit her children, say prayers on Friday nights for the family and tell stories to her kids. (Dkt. 110). Maya's father was always available to her to listen, give advice and provide security in her life. (Dkt. 110).

Due to the trauma of losing her father and almost losing her mother in the attack, Maya started to experience anxiety, flashbacks to her father's coffin and the hospital in Turkey, and difficulty sleeping. (Dkt. 82, Ex. X, 110). Due to the attack, Maya avoids speaking about the loss and she will not visit Turkey. (Dkt. 82, Ex. X, 110). Maya no longer likes to leave her home and when she is reminded of the attack she has a physical reaction that includes palpitations, difficulty breathing, crying and a sensation of suffocating with a feeling of a mass in her throat. (Dkt. 82, Ex. *395 X, 110). Six months after the attack, Maya attended several grief therapy sessions with a psychologist but three to four years after the attack she went for further psychotherapy sessions to help her more. (Dkt. 82, Ex. X, 110). Ever since the attack Maya has lost all trust in people, and she has become overly protective of her children and husband. (Dkt. 82, Ex. X, 110). Since the attack Maya has developed a fear of flying and requires a sedative to fly. (Dkt. 82, Ex. X, 110). Maya is anxious that something is going to happen, and she no longer participates in sports, and she does not allow her husband to participate in extreme sports, which has placed a barrier in their relationship. (Dkt. 82, Ex. X, 110). Maya feels she has lost safety and happiness in her life. (Dkt. 82, Ex. X, 110).

Dr. Strous opines that Maya has persistent complex bereavement disorder with traumatic bereavement, PTSD, and other specified anxiety disorder. (Dkt. 82, Ex. X). Dr.

Strous expects Maya's anxiety issues affecting many areas of her functioning to continue to affect her long term. (Dkt. 82, Ex. X).

[46] Sharon Goldman Najman: Plaintiffs presented Dr. Strous' report and Sharon's declaration regarding her psychological trauma due to the murder of her father and the injuries her mother sustained in the attack. (Dkt. 82, Ex. Y, 111). Sharon had conversed with her father via the video app Facetime the night before the attack and he told her that the tour group had thrown her parents a party. (Dkt. 111). Sharon recalls her parents looked so happy during the Facetime **chat**. (Dkt. 111). After waking up the next day, Sharon's sister called and told her something happened to their parents. (Dkt. 111). Sharon received a call from her mother informing her that she did not know where her father was but that they both had been injured in the attack. (Dkt. 111). An hour or two later a rabbi of the Istanbul Jewish community informed her that their father had been killed in the attack. (Dkt. 111). The rabbi also asked for permission for the doctors at the hospital to perform emergency surgery on her mother's leg. (Dkt. 111).

Upon hearing the news, Sharon was devastated. (Dkt. 82, Ex. Y, 111). Sharon recalls crying and yelling from the grief. (Dkt. 82, Ex. Y, 111). Sharon flew to Israel but had to take sedative in order to fly. (Dkt. 82, Ex. Y, 111). The flight was very difficult as she cried the entire flight. (Dkt. 82, Ex. Y, 111). Sharon helped her mother in the hospital and helped plan her father's funeral. (Dkt. 111). Sharon also had to deal with her father's siblings, who required extra attention because they were very emotional. (Dkt. 111). Within 24 hours of landing in Israel, Sharon was attending her father's funeral, which was traumatic. (Dkt. 111). *Shiva* was distressing and tiring as Sharon had to travel between the hospital and the family home to receive visitors to offer their condolences. (Dkt. 82, Ex. Y).

Sharon spent most of her time by her mother's side at the hospital. (Dkt. 111). Sharon's immediate family returned to the U.S. a week after her father's funeral. (Dkt. 111). Sharon's mother's treatment and rehab was lengthy, painful, and required a lot of support from Sharon. (Dkt. 82, Ex. Y). In the weeks after her father's death, Sharon slept and ate little. (Dkt. 82, Ex. Y, 111). Sharon felt like she was on the verge of an emotional collapse. (Dkt. 82, Ex. Y, 111). It took Sharon weeks to be able to enter her father's office in her parents' home. (Dkt. 82, Ex. Y, 111). Sharon spent her days looking at photo albums and crying. (Dkt. 82, Ex. Y, 111). Sharon focused on her mother's health and sat outside the surgery room for all of her mother's surgeries. (Dkt. 82, Ex. Y, 111).

***396** Almost six weeks after the attack, Sharon returned to the U.S., but she still struggled to get a good night's sleep and get up in the morning. (Dkt. 82, Ex. Y, 111). Sharon did the bare minimum she had to do to take care of her family and she spent her days speaking on the phone with her mother and sister. (Dkt. 82, Ex. Y, 111). After a year of barely functioning, Sharon realized that her family needed her to return to her function level she had been at before her father's death. (Dkt. 82, Ex. Y, 111).

Sharon's father's death at the hands of a terrorist caused her to become disillusioned with life and she lost faith in people. (Dkt. 82, Ex. Y, 111). After the attack Sharon experienced PTSD symptoms, including nightmares about the call she received about her parents being injured and her father's death, flashbacks to the airplane ride to Israel to bury her father and take care of her mother, avoidance of challenging situations such as situations that remind her of the challenges after the attack and when asked about her loss Sharon experiences palpitations and breathlessness. (Dkt. 82, Ex. Y, 111). After the attack, Sharon became much more worried about her children and separation from them remains difficult for her. (Dkt. 82, Ex. Y, 111). Due to her grief, Sharon met with a psychologist from One Family Foundation, and she participated in all the ceremonies related to the terror victims. (Dkt. 82, Ex. Y, 111). Sharon speaks about her father at home daily. (Dkt. 82, Ex. Y, 111).

Dr. Strous opines that Sharon suffers from persistent complex bereavement disorder; with traumatic bereavement, PTSD, and persistent **depressive disorder**; mild severity, late onset, with pure dysthymic syndrome. (Dkt. 82, Ex. Y). Dr. Strous expects Sharon's depressive issues affecting many areas of her functioning to continue to affect her in the long term. (Dkt. 82, Ex. Y).

[47] Gila Nissenbaum: Plaintiffs presented Dr. Strous' report and Gila's declaration regarding her psychological trauma due to the terror attack. (Dkt. 82, Ex. AA, 112). Upon learning of her brother's murder, Gila experienced an emotional breakdown from which she has still not recovered. (Dkt. 82, Ex. AA, 112). Gila returned to Israel for Avraham's funeral. (Dkt. 82, Ex. AA, 112). Gila became depressed after Avraham's death, and she experienced intense anxiety. (Dkt. 82, Ex. AA, 112). Gila at one point had no desire to live and considered suicide. (Dkt. 82, Ex. AA, 112). Gila's children were so worried about her that they would not leave her alone for months after Avraham's death. (Dkt. 82, Ex. AA,

112). Gila had no history of mental illness before Abvraham's murder. (Dkt. 82, Ex. AA, 112). Abvraham's death was very difficult for Gila because he was like a father to her. (Dkt. 112). Abvraham helped Gila with her problems in life and he was her guiding light. (Dkt. 112).

For years after Abvraham's death, Gila was unable to go out to do simple tasks like grocery shopping because she was afraid of an attack. (Dkt. 82, Ex. AA, 112). Gila would start to sweat and become too anxious. (Dkt. 82, Ex. AA). It was only a year ago that Gila started to go back to the grocery store. (Dkt. 82, Ex. AA). For months after Abvraham's death, Gila experienced nightmares that would wake her up. (Dkt. 82, Ex. AA). When she woke up from a nightmare Gila had sweated so much that she had to change her bed sheets. (Dkt. 82, Ex. AA). Gila experiences flashbacks to a photograph of Abvraham's lifeless body after the attack on the street. (Dkt. 82, Ex. AA). Gila will never visit Turkey and she avoids violent movies. (Dkt. 82, Ex. AA). Gila also avoids leisure trips for fear of an attack. (Dkt. 82, Ex. *397 AA). Gila feels guilt for not convincing Abvraham not to travel to Turkey. (Dkt. 82, Ex. AA). Before the attack, Gila was very social but after the attack she withdrew from her friends. (Dkt. 82, Ex. AA).

Gila received psychiatric treatment for years after Abvraham's death. (Dkt. 82, Ex. AA). Dr. Strous reviewed records from Gila's treating psychiatrist, Dr. Amy Aloysi, who indicated that Gila has been a patient under her care since January 17, 2019, and that Gila suffers from [major depressive disorder](#) and PTSD. (Dkt. 82, Ex. AA). Dr. Aloysi indicated that when Gila presented to her that Gila was in a severe refractory [depressive episode](#). (Dkt. 82, Ex. AA). Gila's symptoms, per Dr. Aloysi, included severe anxiety with physical manifestations, depressed mood, low energy, poor concentration, catastrophic thinking, [suicidal ideation](#), and significant impairment of her daily functioning. (Dkt. 82, Ex. AA). One of the triggers to Gila's illness, according to Dr. Aloysi, was the sudden death of Gila's brother in an attack and this was compounded by Gila's father's experiences in the Holocaust. (Dkt. 82, Ex. AA). Gila took prescription medications for depression that did not work. (Dkt. 82, Ex. AA). Gila also tried electro-convulsive shock therapy and medical marijuana. (Dkt. 82, Ex. AA). After six years of treatment, Gila underwent pharmacogenetic testing and a combination of medications was prescribed that Gila takes that help partially. (Dkt. 82, Ex. AA). Gila still misses Abvraham very much and dreams about him every night. (Dkt. 82, Ex. AA, 112).

Gila's son, Lee, told Dr. Strous that for years after the attack Gila would wake up in the morning with a panic attack. (Dkt. 82, Ex. AA). The death of Abvraham took Lee's mother to a state of depression that his mother has treated for since the attack. (Dkt. 82, Ex. AA). For years Gila was in a state of panic and Lee feared his mother would jump out her window each morning. (Dkt. 82, Ex. AA). While his mother's current medications have helped somewhat, Lee's mother is not back to where she was before Abvraham's death, and she is still hypersensitive and gets emotional and overwhelmed easily. (Dkt. 82, Ex. AA). According to Lee, his mother's focus is still not there, and she is unable to handle the normal stressors of life like she used to before the attack. (Dkt. 82, Ex. AA).

Dr. Strous opines that Gila has persistent complex bereavement disorder with traumatic bereavement, [major depressive disorder](#), and PTSD, partial. (Dkt. 82, Ex. AA). Dr. Strous expects Gila's anxiety, mood, and complicated grief issues affecting many areas of her functioning to continue to affect her indefinitely. (Dkt. 82, Ex. AA).

[48] Nathan Goldman: Plaintiffs presented Dr. Strous' report and Nathan's declaration regarding his psychological trauma due to Abvraham's murder. (Dkt. 82, Ex. BB, 115). Nathan learned that his oldest brother, Abvraham, had been killed in an attack in Istanbul when he received a call that day from his sister-in-law. (Dkt. 115). Nathan was in shock and began shaking. (Dkt. 115). Nathan traveled to Israel to attend Abvraham's funeral. (Dkt. 115). The funeral was traumatic and overwhelming for Nathan, especially since he had to identify Abvraham's body. (Dkt. 82, Ex. BB, 115). Nathan will never forget seeing his brother's lifeless body lying on the slab of stone. (Dkt. 82, Ex. BB, 115). Nathan frequently has flashbacks to his brother's lifeless body. (Dkt. 82, Ex. BB, 115).

For a few years after Abvraham's death, Nathan was depressed. (Dkt. 82, Ex. BB, 115). There are still days Nathan's mood is low, but he pushes through for the sake of his children and grandchildren. (Dkt. 82, Ex. BB, 115). Abvraham and Nathan were very close. (Dkt. 115). From 1994 to 2014, *398 Abvraham and Nathan worked together in Nathan's business. (Dkt. 115). While grief therapy was recommended, Nathan declined it and decided to throw himself into his business. (Dkt. 82, Ex. BB, 115).

When Nathan hears about a terror attack or news about Turkey, he experiences anxiety and emotional panic. (Dkt.

82, Ex. BB, 115). Due to the death of Abvraham in an attack in Turkey Nathan will never visit Turkey. (Dkt. 82, Ex. BB, 115). Since the attack, Nathan has lost trust in people, and he lives in constant fear. (Dkt. 82, Ex. BB, 115). For four years after the attack Nathan experienced nightmares. (Dkt. 82, Ex. BB, 115). Nathan would dream about the explosion and wake up in a state of panic. (Dkt. 82, Ex. BB, 115). This affected Nathan's sleep for years and he was tired for years after the attack. (Dkt. 82, Ex. BB, 115).

Since Abvraham's death, Nathan no longer feels safe in public places and he looks for potential danger in public places. (Dkt. 82, Ex. BB, 115). Nathan avoids groups of tourists and people who appear to potentially be terrorists due to Abvraham's death in a terror attack. (Dkt. 82, Ex. BB, 115). Whenever Nathan talks about the attack, he sweats and experiences palpitations. (Dkt. 82, Ex. BB, 115). Nathan's nightmares about the attack occur at night but his flashbacks to identifying Abvraham's body occur at any moment. (Dkt. 82, Ex. BB, 115). Nathan also feels guilt for not having discouraged his brother more forcefully from going to Turkey. (Dkt. 82, Ex. BB, 115). Nathan struggles with enjoying life because Abvraham was murdered. (Dkt. 82, Ex. BB, 115). Nathan is angry with God but his family is the reason he chooses life. (Dkt. 82, Ex. BB, 115).

Dr. Strous opines that Nathan has persistent complex bereavement disorder with traumatic bereavement and persistent **depressive disorder** with pure dysthymic syndrome. (Dkt. 82, Ex. BB). Dr. Strous expects Nathan's mood, and complicated grief issues affecting many areas of his functioning to continue to affect him indefinitely. (Dkt. 82, Ex. BB).

The severe emotional and psychological effects on Nitzhia and each of member of her and Abvraham's family and their individual medical diagnoses are detailed in the reports of Dr. Strous, which this Court accepts and adopts in full.

Based upon the foregoing, the Court will depart upward from the **Heiser** baseline amounts due to the long lasting psychological impact on the family members of Abvraham and Nitzhia due to the terror attack and orders that the Defendant shall pay \$14,000,000 in solatium damages to Nitzhia Goldman, especially since she witnessed her husband die and continues to suffer severe psychological trauma, \$6,000,000 in solatium damages to Maya Goldman Cohen, \$6,000,000 in solatium damages to Sharon Goldman,

\$4,500,000 in solatium damages to Gila Nissenbaum, and \$4,500,000 in solatium damages to Nathan Goldman.

e. Greenfield Family

The family members claiming solatium are Ron Greenfield, who was injured in the attack along with his wife Pnina Greenfield who is addressed in the section below regarding non-citizen Plaintiffs, their son Liron Greenfield, and their daughters Shere Greenfield, Sheye Greenfield, and Gili Greenfield. All are U.S. citizens. (Dkt. 70, Ex. 8-12).

[49] Ron Greenfield: Plaintiffs presented Ron's declaration and Dr. Strous' report regarding Ron's psychological trauma due to the terror attack. (Dkt. 82, Ex. Q, 108). Shortly after the attack, Ron experienced post-traumatic symptoms, including *399 nightmares, difficulty sleeping, avoidance of leaving the house for months after the attack for non-essential activities, hypervigilance when he goes out into public places, hypersensitivity to noises and loud sounds and physiological reactions whenever he is reminded of the attack, including sweating and hyperventilation. (Dkt. 82, Ex. Q, 108). Ron to this day struggles to enjoy activities outside his home in communal places. (Dkt. 82, Ex. Q, 108). Since Ron lives in a city, the noises and loud sounds that occur there are difficult for him and affect his function at times. (Dkt. 82, Ex. Q).

As Ron became a homebound person, he was with his wife all day and tensions rose with them. (Dkt. 82, Ex. Q). Ron treated with a psychologist for six months and he also met with a psychiatrist after the attack who prescribed sleep medication and medication for Ron's low mood and post-traumatic anxiety. (Dkt. 82, Ex. Q, 108). The attack and its' aftermath have affected Ron's entire life. (Dkt. 82, Ex. Q).

Dr. Strous opines that Ron suffers from PTSD and persistent **depressive disorder**; moderate severity, late onset, with pure dysthymic syndrome. (Dkt. 82, Ex. Q). Despite Ron's treatment and the years that have passed, Dr. Strous expects that Ron's mood and anxiety issues affecting many areas of his functioning to continue to affect him long term. (Dkt. 82, Ex. Q).

[50] Shye Greenfield: Plaintiffs presented Dr. Strous' report and Shye's declaration regarding the psychological trauma she suffered as a result of the terror attack. (Dkt. 82, Ex. V, 105). Shye received a **WhatsApp** message from her father informing her that he was injured in an attack. (Dkt. 105). Upon reading the message, Shye had an anxiety attack. (Dkt. 82, Ex. V). After calming down, Shye spoke with her mother,

but she could not stop crying. (Dkt. 105). Shye's anxiety and fear were increased because she did not know how badly her parents were injured. (Dkt. 82, Ex. V). Shye was relieved to see her parents a day after the attack after being flown back to Israel. (Dkt. 105).

Shye could not cope with seeing her father cry when he heard who had died in the attack. (Dkt. 82, Ex. V, 105). The attack very much affected Shye's sense of safety and stability. (Dkt. 82, Ex. V, 105). Because of the attack Shye is now tense and has a difficult time relaxing. (Dkt. 105). Because of the attack, Shye, a dancer, missed a major career-changing dance performance and never felt she could get back to where she was in her dance career, so it ended. (Dkt. 105). The weeks, months and years since the attack were very frustrating to Shye, especially since she lived in her parents' apartment and helped with all of their medical issues, including her father's urinary problems and showered her father as well. (Dkt. 82, Ex. V, 105). Shye had to cook the meals for the household, manage her parents' anxiety and reassure them, as well as try to manage her own anxiety, and she had to take her parents to medical appointments and rehabilitation, which was difficult because they were both wheelchair bound for a period of time. (Dkt. 82, Ex. V, 105). It has been difficult for Shye to see how her parents are now as they have aged substantially since the attack, and they never returned to the level of energy they had before the attack. (Dkt. 82, Ex. V, 105).

Shye's post-traumatic symptoms include nightmares of attacks, riots, avoidance of areas where there could be terror attacks, hypervigilance in public places and feeling disconnected from her surroundings with a physical response of her throat closing. (Dkt. 82, Ex. V). Shye began psychotherapy treatment in September 2017 and ended such treatment recently. (Dkt. 82, Ex. V, 105).

***400** Dr. Strous opines that Shye suffers from PTSD and other specified anxiety disorder. (Dkt. 82, Ex. V). Dr. Strous expects Shye's anxiety issues that affect various areas of her functioning to continue to affect her for a long time. (Dkt. 82, Ex. V).

[51] Shere Greenfield: Plaintiffs presented Dr. Strous report and Shere's declaration regarding the psychological trauma she suffered as a result of the terror attack. (Dkt 82, Ex. T, 104). Shere's father sent her a text that there had been an attack, but it did not occur to her that her parents were the target of the attack. (Dkt. 104). Shere had been walking her sister's dog and when she went back inside her sister's

house her brother-in-law told her that her parents had been in an attack. (Dkt. 104). Shere was devastated. (Dkt. 82, Ex. T). Shere called her father and he told them that he and her mother had been injured. (Dkt. 104). Shere's brother travelled to Turkey to support her parents. (Dkt. 104). Shere's parents returned the next day and were transferred to a hospital in Israel. (Dkt. 104).

It was only when she saw her parents that Shere realized how bad physically and emotionally they were. (Dkt. 82, Ex. T, 104). Shere was overwhelmed to think two elderly innocent people could go on a trip that was a gift for her mother and that trip became a nightmare. (Dkt. 82, Ex. T, 104). The first few months after the attack, Shere felt the need to be with her parents all the time, especially since they were in wheelchairs. (Dkt. 82, Ex. T, 104). As a result, Shere cancelled a ski trip and lost 2,000 Euros. (Dkt. 82, Ex. T, 104). Shere missed worked for a few months after the attack to help take care of her parents but when she returned to work she could only return part-time because she had to continue to help with her parents' physical and emotional needs. (Dkt. 82, Ex. T, 104).

Shere became less social with friends after the attack as her friends cannot understand what she and her family had gone through. (Dkt. 82, Ex. 104). Since the attack, Shere spends her energy and time on her parents in a way she did not anticipate before the attack. (Dkt. 82, Ex. T, 104). For example, after the attack it was Shere and not her mother that was with her sister when she delivered her baby because her mother was still in a wheelchair. (Dkt. 82, Ex. T, 104). Shere feels it is not safe to leave her child alone with her parents. (Dkt. 82, Ex. T, 104). Her father is not happy, and he has lost his passion for life. (Dkt. 82, Ex. T, 104). Shere's mother has become less capable and gets hysterical in the face of stress. (Dkt. 82, Ex. T, 104). Since Shere's parents do not work anymore, her parents being always at home together creates a negative stress dynamic that is not healthy for them or the family. (Dkt. 82, Ex. T, 104). Some of Shere's post-traumatic symptoms after the attack include hypervigilance in public places, avoidance of public places like concerts, guilt that she needs to be around and take care of the family, always on edge, memories of the attack cause a physical response with her heart pounding, and she tenses up whenever she has to talk about it. (Dkt. 82, Ex. T). About a year after the attack, Shere began psychotherapy treatment that lasted for three years. (Dkt. 82, Ex. T, 104).

Dr. Strous opines that Shere suffers from PTSD and other specified anxiety disorder. (Dkt. 82, Ex. T). Dr. Strous expects Shere's anxiety issues that affect various areas of her

functioning to continue to affect her for a long time. (Dkt. 82, Ex. T).

[52] **Gili Greenfield:** Plaintiffs presented Dr. Strous' report and Gili's declaration regarding the psychological trauma she suffered due to the terror attack. (Dkt. *401 82, Ex. U, 106). On the day of the attack Gili received a **WhatsApp** message from her father informing her that there had been an attack during their visit and that he had been injured. (Dkt. 106). Gili had an anxiety attack. (Dkt. 82, Ex. U). When Gili was able to speak to her parents, she felt somewhat calmer. (Dkt. 106). Gili's parents were injured from bomb fragments that hit their legs. (Dkt. 106). Gili's brother flew to Turkey to organize their parents' return to Israel. (Dkt. 106). Gili went to the hospital to meet her parents on their arrival in Israel. (Dkt. 106). Gili was worried for their wellbeing. (Dkt. 82, Ex. U, 106). Gili was also concerned for her unborn baby and what the excessive sudden extreme worrying, and shock of the moment may have done to affect the wellbeing of her baby. (Dkt. 82, Ex. U, 106).

Gili's first year of motherhood was filled with the stress of managing her parents' medical problems. (Dkt. 82, Ex. U, 106). Gili moved in with her parents to become the 24-hour medical care giver for her parents. (Dkt. 106). Gili was designated with this task in her family since she was about to go on maternity leave. (Dkt. 106). Gili had to look after all her parents' needs including bathing them, cleaning them, dressing them, changing their bandages, feeding them, and escorting them to medical appointments. (Dkt. 106). Gili also needed to take them to visit with other family members. (Dkt. 106). Much of this caring work was very physical and Gili recalls how difficult and painful it was for her body pushing them both around in a wheelchair. (Dkt. 106). Gili ended up living with her parents for over six months. (Dkt. 106). After she gave birth, Gili stayed with her parents several more months along with her baby until her parents were able to walk and move without her assistance and without wheelchairs. (Dkt. 106).

Gili felt torn between her duties to her parents and her duties to her baby and husband. (Dkt. 82, Ex. U, 106). Gili did not work for a year while dedicating herself to her parents. (Dkt. 104). Before the attack, Gili had considered taking off three months for maternity leave and then returning to work. (Dkt. 106). Gili feels that she missed out on the positive bonding experience every mother deserves with their baby. (Dkt. 82, Ex. U, 106). Gili's husband tried to be supportive from a distance as he did not move in with her parents. (Dkt. 82, Ex. U, 106). Gili's post-partum months were also characterized by

having to care for her baby alone without the help, assistance, and guidance of her mother which she had previously thought she could rely upon. (Dkt. 82, Ex. U, 106). This was due to the fact that her mother was preoccupied with her own physical and mental challenges after the attack. (Dkt. 82, Ex. U, 106).

Due to the terror attack, Gili is not able to simply get up and travel and enjoy life as she used to. (Dkt. 82, Ex. U, 106). Gili knows that this is associated with the intense pain and suffering she observed her parents experience after the attack. (Dkt. 82, Ex. U, 106). They acted somewhat on a whim by travelling in the manner they did. (Dkt. 82, Ex. U, 106). Gili knows how frustrating and disastrous the outcome was in their situation. (Dkt. 82, Ex. U, 106). Gili is thus scared for herself and her family. (Dkt. 82, Ex. U, 106). Gili recalls how much her father changed after the attack. (Dkt. 106). He changed in function from someone always in control to someone dependent on others and unable to work. (Dkt. 106).

Since the attack, Gili experiences significant anxiety and panic attacks with news of a terror attack. (Dkt. 82, Ex. U, 106). Whenever Gili is asked to speak about what she experienced after the attack and *402 how she reacted, she experiences anxiety symptoms with her "body tightening up, tension, palpitations and general unease." (Dkt. 82, Ex. U). Gili is unable to attend large social or family events or stay long in public areas where there are many people. (Dkt. 82, Ex. U). This is as a result of Gili developing hypervigilance after the attack. (Dkt. 82, Ex. U). Gili jumps to any loud noise and is unable to relax. (Dkt. 82, Ex. U). All this is a major change from Gili's behavior prior to the attack. (Dkt. 82, Ex. U).

While Gili did not attend any psychotherapy at the time, she had been taking a selective serotonin reuptake inhibitor (SSRI) since age 23 prescribed by her doctor for stress management. (Dkt. 82, Ex. U, 106). More recently, due to Gili's residual anxiety from her parent's traumatic experience and the increase in her anxiety from the worsening state of attacks in Israel, Gili's doctor increased the dose of the medication to its maximum dose. (Dkt. 82, Ex. U, 106).

Dr. Strous opines that Gili suffers from PTSD (partial) and other specified anxiety disorder. (Dkt. 82, Ex. U). Dr. Strous expects that her anxiety issues affecting many areas of her functioning to continue to affect her for a long time. (Dkt. 82, Ex. U).

[53] **Liron Greenfield:** Plaintiffs presented Dr. Strous' report and Liron's declaration regarding the psychological

trauma he suffered as a result of the terror attack. (Dkt. 82, Ex. S, 103). On the third day of his parents' trip to Istanbul, Liron received on the family's **WhatsApp** group a message from his father that his parents had been injured in an attack. (Dkt. 82, Ex. S, 103). Liron thought his father was joking that they had exploded from eating on their food tour. (Dkt. 82, Ex. S, 103). However, Liron's aunt called shortly after the **WhatsApp** message, and she shouted his name and was crying. (Dkt. 82, Ex. S, 103). The phone call was then disconnected. (Dkt. 82, Ex. S, 103). A few minutes later various news outlets reported on an attack in Istanbul. (Dkt. 82, Ex. S, 103). Liron tried calling his parents and after a few attempts he was able to speak to them. (Dkt. 82, Ex. S, 103). Liron flew to Turkey and went to the hospital to see his parents. (Dkt. 82, Ex. S, 103). It was devastating for Liron to see his parents in the hospital. (Dkt. 82, Ex. S, 103). Liron had to arrange with his parents' insurer a special flight back to Israel for his parents. (Dkt. 82, Ex. S, 103).

Liron had to leave work for six months to care for his parents. (Dkt. 82, Ex. S, 103). Liron had to help his parents with showers, going to the toilet, dressing, and attending medical appointments. (Dkt. 82, Ex. S, 103). Liron became depressed that his parents were in an attack, and he had to care for them as they were no longer the same after the attack. (Dkt. 82, Ex. S, 103). It was very difficult and emotional to see his parents disabled for months after the attack, especially since Liron's mother is his best friend. (Dkt. 82, Ex. S, 103). Because Liron was unable to work for six months while caring for his parents this was a stress on Liron, especially since he had extra expenses associated with caring for his parents, including travel, rent, and parking fees. (Dkt. 82, Ex. S, 103).

Socially, Liron had no time for his friends and his girlfriend because his parents needed him. (Dkt. 82, Ex. S, 103). Liron became anxious after the attack. (Dkt. 82, Ex. S, 103). Liron had symptoms of PTSD, including nightmares about explosions, flashbacks to the phone call telling him about the attack, guilt about failing to impress upon his parents the danger of terror despite the travel alert for Turkey before they left on the tour. When he speaks about the attack, he shivers. (Dkt. *403 82, Ex. S, 103). Liron used to be a calm person but now he is much more suspicious of his surroundings. (Dkt. 82, Ex. S, 103). While psychological was recommended to Liron, he declined it and instead had a tattoo put on his forearm with a replica of the passport stamp he received when he entered Turkey. (Dkt. 82, Ex. S, 103).

According to Dr. Strous, Liron suffers from PTSD, partial and unspecific anxiety disorder. (Dkt. 82, Ex. S, 103). Dr. Strous is of the opinion that Liron's mood and anxiety issues affecting his outlook on life and function in various situations will continue to affect him long term. (Dkt. 82, Ex. S, 103).

Plaintiffs have presented evidence to the Court's satisfaction that Ron experienced and suffered severe permanent psychological trauma as a result of the terror attack. The Court will award Ron Greenfield \$4,000,000 in solatium damages.

The severe emotional and psychological effects on each of these members of Ron's family and their individual medical diagnoses are detailed in the reports of Dr. Strous, which this Court accepts and adopts in full. Based upon the foregoing, the Court orders that the Defendant shall pay \$2,500,000 in solatium damages to Liron Greenfield, \$2,500,000 in solatium damages to Shere Greenfield and \$2,500,000 in solatium damages to Shye Greenfield. The Court will award enhanced solatium damages in the amount of \$3,500,000 to Gili Greenfield as she missed a year of work to care for her parents, while also caring for her newborn baby, and was forced to be separated from her husband for several months while caring for her parents and her newborn baby.

f. Gonzalez Family

The family members claiming solatium damages are decedent Nohemi Gonzalez's mother Beatriz Gonzalez, and her brothers Reynaldo Gonzalez and Paul Gonzalez. All are U.S. citizens or U.S. legal residents. (Dkt. 70, Ex. 4-7). Nohemi's father, who was a non-custodial parent and former spouse of Beatriz, sued separately as a plaintiff in *Fields, 2021 WL 9244135*, (Dkt. 98-34).

[54] Beatriz Gonzalez: Plaintiffs presented Dr. Strous' report and Beatriz's declaration regarding her psychological trauma due to Nohemi's murder. (Dkt. 82, Ex. C, Dkt. 85). Beatriz learned that her daughter, whom everyone called "Mimi," had been murdered in the Paris terror attack while working at her hair salon from Nohemi's boyfriend, Tim. (Dkt. 85). Beatriz was shocked and could not comprehend the meaning of what he was telling us. (Dkt. 85). Beatriz could not accept what Tim was saying had actually occurred. (Dkt. 85). Upon learning of Nohemi's murder, Beatriz fell to the ground crying. (Dkt. 85). Beatriz and her husband, José Hernandez, tried to obtain accurate information but the police in Paris were in total chaos in the aftermath of the attack which took so many French lives. (Dkt. 85). The next day the police and agents of the FBI visited to officially inform Beatriz that

Nohemi had been killed in the Paris terror attack. (Dkt. 85). Beatriz and José wanted to travel to Paris to be with Nohemi but they were told to remain in the U.S. and await her return. (Dkt. 85). While Beatriz remained in the U.S., this period was emotionally unbearable. (Dkt. 85). Beatriz could not even bury her daughter. (Dkt. 85). It took the authorities 17 days to return Nohemi's body home and only then could Beatriz plan her daughter's funeral. (Dkt. 85).

For many months Beatriz had a tough time accepting that someone so special and young could be taken away from her, especially ***404** in such a senseless, violent, and cruel manner. (Dkt. 85). Beatriz sacrificed a lot to give Nohemi an education and complete her career studies. (Dkt. 85). Nohemi was the one in the family that had made it, that was such a shining success. (Dkt. 85). Nohemi was the first person in the family to attend college. (Dkt. 85). Nohemi was in her last year of college studying industrial design at California State University. (Dkt. 85). Nohemi had been so excited to have been chosen to study abroad for six months in order to strengthen and broaden her academic experience. (Dkt. 85). For her, going to Paris to study at the State College of Design in Sevres and pursuing her dreams and career goals was the highlight of her life. (Dkt. 85). It was validation that all the years of studying, working hard, and disciplining herself had paid off. (Dkt. 85). She felt certain this was going to be an important steppingstone of what she was determined would be a life of great meaning and accomplishment. (Dkt. 85).

Before her death, Nohemi had been a teacher's aide in industrial design for three years. (Dkt. 85). Nohemi moved out of Beatriz's house at age 17 and attended Rio Hondo Community College while still in high school before transferring to California State University in Long Beach after graduating high school. (Dkt. 85). During college, Nohemi worked during the week as a teacher's aide and on the weekends at an Armani store. (Dkt. 85). Despite their busy lives, Nohemi and Beatriz were very close. (Dkt. 85). Beatriz and Nohemi enjoyed hiking, camping, talking over coffee and doing their nails together. (Dkt. 85).

Everything Nohemi set out to achieve in the fields of sports, academics, and social involvement she had earned through her energy and grit. (Dkt. 85). Nohemi planned to obtain a master's degree in industrial design to advance her career. (Dkt. 85). If Nohemi had not been murdered, she would have no doubt become a teacher of industrial design as she frequently stated she intended to be. (Dkt. 85). Nohemi was a very driven person with a good work ethic. (Dkt. 85). As her

mother, Beatriz was robbed of seeing Nohemi achieve all her goals in life because she was killed so young. (Dkt. 85).

California State University raised money after Nohemi's death to renovate the room she in which she taught as a teacher's aide, and they named the room on the campus to be called "The Nohemi Gonzalez Room" in her memory. (Dkt. 85).

In her personal life, Nohemi planned on moving in with Tim and eventually marrying him. (Dkt. 85). Nohemi and Tim discussed having children when they were settled in their careers. (Dkt. 85). Nohemi wanted to have one biological child and one adopted child because Beatriz had been a foster mom when Nohemi was a teenager. (Dkt. 85). She loved the idea of sharing her home and her love with an unfortunate child and helping them build their life. (Dkt. 85).

Growing up, Nohemi enjoyed sports, including swimming and running. (Dkt. 85). She was a natural athlete and took part in many competitions over the years. (Dkt. 85). Nohemi was passionate about animals and travel as well. (Dkt. 85). Instead of an elaborate quinceañera (a big celebration for turning fifteen years old, which is customary in their culture), Nohemi went on a trip through Rio Hondo College to Greenland. (Dkt. 85).

For her college graduation, Nohemi wanted a Jeep and Beatriz planned to help her purchase the car as a college graduation gift. (Dkt. 85). Sadly, instead of accompanying Mimi to her graduation ceremony and celebrating this gigantic accomplishment, Beatriz attended a posthumous ceremony to receive Nohemi's diploma for her college graduation and a ***405** ceremony for the awards she had been given. (Dkt. 85).

For weeks and months after Nohemi's death, Beatriz functioned poorly, and she had frequent nightmares about Nohemi's death. (Dkt. 82, Ex. C). Despite Beatriz's grief, she had to keep running her hair salon because she had to support her family. (Dkt. 82, Ex. C, 85). Beatriz felt very disconnected from the world and would not take calls from anyone after Nohemi's death. (Dkt. 82, Ex. C, 85). Beatriz cut herself off from her friends as she preferred to be alone because no one could understand her pain. (Dkt. 82, Ex. C 85). While alone Beatriz was flooded with the emptiness of losing Nohemi and with memories of her daughter. (Dkt. 82, Ex. C, 85).

While time has passed since Nohemi's death, Beatriz still feels at times that Nohemi is coming back to her. (Dkt. 85). Any

talk about the terror attack makes Beatriz feel anxious and she cries frequently. (Dkt. 82, Ex. C). Before the terror attack, Beatriz was not an anxious person. (Dkt. 82, Ex. C). Beatriz tries very hard to keep her pain and anxiety to herself because people come to a hair salon, like the one she operates, to be pampered and cared for and not to hear about her problems. (Dkt. 85). While Beatriz rarely speaks about the terrorist attack or Nohemi's death it hovers over her every hour of every day. (Dkt. 85).

Over the past seven years since the attack, Beatriz has been depressed and her life has centered around an overwhelming feeling of the loss of Nohemi, despite trying to focus on her living children and grandchild. (Dkt. 82, Ex. C). Beatriz attended many therapy sessions with a psychologist in order to try and cope with her grief and pain. (Dkt. 85). Beatriz feels a hole in her heart, and it feels like she lost half her life when Nohemi was murdered. (Dkt. 82, Ex. C). Beatriz is just waiting for the day when she will be with Mimi again. (Dkt. 82, Ex. C).

José has supported Beatriz throughout her struggle to come to grips with Nohemi's death. (Dkt. 85). In the early days, José dealt with the various media inquiries and to this day he tries to deal with anything involving Nohemi's estate, including this litigation because discussing Nohemi is too painful for Beatriz. (Dkt. 85). Outside of her sons, José is the only family Beatriz has in the U.S., and he has been Beatriz's main support since Nohemi's death. (Dkt. 85). Without José Beatriz could not have survived this tragedy. (Dkt. 85).

José had a good relationship with Nohemi. (Dkt. 85). He was truly like a father to her. (Dkt. 85). That is how Nohemi saw him. (Dkt. 85). José would help Beatriz with Nohemi and drive her places and run errands with her while Beatriz busy at her hair salon. (Dkt. 85). Nohemi was happy Beatriz had found a partner that made her happy because she was busy with her education and work. (Dkt. 85).

Beatriz started a non-profit organization in Nohemi's name to honor her and focus on her life's goals and achievements, and less on the way she died. (Dkt. 85). After Nohemi's death, the city of Norwalk, CA was very supportive and many in the community brought flowers and food for Beatriz and her family. (Dkt. 85). A local church donated Nohemi's coffin, flowers, and coffee, as well as organized her funeral service. (Dkt. 85). Nohemi Mimi Gonzalez's non-profit is a way to give back to the children of Norwalk. (Dkt. 85). Beatriz provides about 120 haircuts annually as a donation for the

non-profit and the non-profit also partners with other charity groups to give children backpacks with school supplies. (Dkt. 85). The non-profit aims to help inspire children in the Hispanic community to work hard in school *406 just as Nohemi did, so they can fulfill their dreams as Nohemi was inspired to do. (Dkt. 85). José helps Beatriz with the non-profit by donating his time to help make calls and organize events, like the one held in Norwalk in 2020. (Dkt. 85).

Dr. Strous opines that Beatriz has persistent complex bereavement disorder with traumatic bereavement and persistent depressive disorder with pure dysthymic syndrome. (Dkt. 82, Ex. C). Dr. Strous expects that Beatriz's mood and complicated grief issues affecting many areas of her functioning to continue to affect her indefinitely. (Dkt. 82, Ex. C).

[55] Reynaldo Hernandez: Plaintiffs have presented Dr. Strous' report and Reynaldo's declaration regarding the psychological trauma he suffered due to Nohemi's death. (Dkt. 82, Ex. E, 88). Reynaldo learned about Nohemi's murder when his brother Paul called him. (Dkt. 88). Reynaldo was shocked, and he froze for several days. (Dkt. 88). After trying to pull himself together for a few days, Reynaldo left Mexico where he was working and returned to Los Angeles to attend Nohemi's funeral. (Dkt. 88). Reynaldo felt a strong sense of regret because Nohemi had a bright future as she had been successful so far in life. (Dkt. 88). Reynaldo also experienced regret over the time he no longer would have with Nohemi. (Dkt. 88). It was very traumatic for Reynaldo to lose Nohemi so suddenly and in such a violent way. (Dkt. 82, Ex. E). Reynaldo was very close to his sister, and she was, according to Reynaldo, "the best of the family." (Dkt. 82, Ex. E, 88). Reynaldo told Dr. Strous that the trauma of losing Nohemi has left emotional scars that will never go away, especially since he never got to say goodbye to her. (Dkt. 82, Ex. E).

Since Nohemi's death, Reynaldo's life has been negatively impacted in various ways, including being angry with everyone and with life in general, frequent irritability, acting out the first few years after Nohemi's death, guilt over not being able to hold the family together as the eldest child, ceased personal relationships outside the family and turning to alcohol as a way to escape the emotional pain. (Dkt. 82, Ex. E). For years after Nohemi's death, Reynaldo experienced nightmares and flashbacks to the day he learned of her death and to her funeral. (Dkt. 82, Ex. E). Due to his pain, Reynaldo avoided his family and did not discuss his pain with his family. (Dkt. 82, Ex. E). It was only recently that the family has felt

more unified. (Dkt. 88). Following Nohemi's death, Reynaldo experienced anxiety and avoided crowded places out of fear. (Dkt. 82, Ex. E). He even experienced panic attacks with cold sweats and palpitations in crowded places. (Dkt. 82, Ex. E). To this day, it is very painful for Reynaldo to speak about Nohemi's death. (Dkt. 82, Ex. E).

Dr. Strous opines that Reynaldo suffers from persistent complex bereavement disorder with traumatic bereavement, PTSD, and other specified anxiety disorder. (Dkt. 82, Ex. E). According to Dr. Strous, Reynaldo's anxiety and traumatic issues affecting his functioning will continue to affect him long term. (Dkt. 82, Ex. E).

[56] Paul Gonzalez: Plaintiffs presented Dr. Strous' report and Paul's declaration regarding the psychological trauma he suffered as a result of Nohemi's death. (Dkt. 82, Ex. F, 83). Upon learning of his sister's murder from his mother, Paul was broken up. (Dkt. 83). Paul fell down onto his couch and stayed there the entire night but did not sleep at all. (Dkt. 82, Ex. F). Paul remained in shock without functioning for a day. (Dkt. 83). Nohemi and Paul were very close as they were only two and a half years apart. (Dkt. 82, Ex. F). The next day the FBI arrived at Paul's door and officially informed him that Nohemi *407 had been killed in the Paris attack. (Dkt. 83). Paul was unable to function for weeks to months after Nohemi's murder. (Dkt. 82, Ex. F). Paul went to Mexico for a short period of time to try and recover from Nohemi's death but alone at night he continued to cry. (Dkt. 82, Ex. F, 83).

Paul's ability to focus was impaired following Nohemi's death and this affected his ability to hold a job. (Dkt. 82, Ex. F). Paul turned to alcohol in an attempt to try to dull his pain. (Dkt. 82, Ex. F). The fact that Paul would never see Nohemi again and he was unable to say goodbye to her is incredibly painful for him. (Dkt. 82, Ex. F). Paul wished it was him and not Nohemi that had died in the attack as he deemed her more worthy of life. (Dkt. 82, Ex. F, 83). A year after Nohemi's murder, Paul traveled to Paris for a commemorative ceremony, and this provided some closure for him. (Dkt. 82, Ex. F, 83). While in Paris for the ceremony Paul visited the place where Nohemi was murdered and he broke down and felt he could not leave the spot. (Dkt. 82, Ex. F, 83). Nohemi was a strong and dominant personality and the jewel of the family. (Dkt. 82, Ex. F, 83). Although Nohemi was younger than Paul she assisted and guided him in life. (Dkt. 82, Ex. F, 83). Following Nohemi's death, Paul did not have any desire to maintain social relationships. (Dkt. 82, Ex. F). Everyone in the family dealt with their pain on an individual level and did

not grieve together as a family. (Dkt. 82, Ex. F). Therefore, the family after Nohemi's death fell apart and only recently has the family slowly started getting together again as a unit. (Dkt. 82, Ex. F, 83). It took Paul about two years after Nohemi's death to reengage socially. (Dkt. 82, Ex. F).

Dr. Strous opines that Paul has persistent complex bereavement disorder with traumatic bereavement and persistent **depressive disorder**. (Dkt. 82, Ex. F). Dr. Strous expects Paul's mood and grief issues that affect his functioning to continue to affect Paul long term. (Dkt. 82, Ex. F).

The severe emotional and psychological effects on each of these members of Nohemi's family and their individual medical diagnoses are detailed in the reports of Dr. Strous, which this Court accepts and adopts in full.

Based upon the foregoing, the Court will depart upward from the **Heiser** baseline amounts due to the severe permanent psychological impact Nohemi's death has had on her family members and orders that the Defendant shall pay \$7,000,000 in solatium damages to Beatriz Gonzalez, \$3,500,000 in solatium damages to Reynaldo Gonzalez and \$3,500,000 in solatium damages to Paul Gonzalez.

4. Punitive Damages

[57] [58] The FSIA allows an award of punitive damages for personal injury or death resulting from an act of state-sponsored terrorism. 28 U.S.C. § 1605A(c). The purpose of punitive damages is two-fold: to punish those who engage in outrageous conduct and to deter others from similar conduct in the future. *See Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 9 (D.D.C. 2000). "This cost functions both as a direct deterrent, and also as a disabling mechanism: if several large punitive damage awards issue against a foreign state sponsor of terrorism, the state's financial capacity to provide funding will be curtailed." *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 33 (D.D.C. 1998). Considering these factors, the Court finds an award of punitive damages is warranted. First, Syria's support for ISIS' terrorist activities is horrific and condemnable. Second, the Defendant clearly intended to cause significant harm in multiple ways when it provided material support to ISIS, a known terrorist organization that routinely *408 carries out brutal attacks on innocent civilians. Third, prior damages have been awarded to deter Syria from related actions against civilians. *See Gates*, 580 F. Supp. 2d at 75 (awarding \$150 million each to the estates of two victims); *Colvin*, 363 F. Supp. 3d at 163 (awarding \$300

million in punitive damages); *Doe*, 2020 WL 5422844, at *17-18 (awarding \$31,500,000 in punitive damages because the plaintiff survived). Fourth, prior awards of punitive damages against Syria have noted that Syria is a nation of significant wealth. *SeeFields*, 2021 WL 9244135 (Dkt. 20 in *Fields*) (Dkt. 98, Ex. 14); *Colvin*, 363 F. Supp. 3d at 163.

a. Goldman and Greenfield Families

[59] On March 19, 2016, Nitzhia and Abvraham and Ron and Pnina were with their tour group walking in a tourist area when a terrorist detonated a bomb near them. Nitzhia, Abvraham, Ron and Pnina were all injured in the attack. Nitzhia witnessed her husband die. Nitzhia, Ron and Pnina have never been the same since the terror attack and the lives of their families are still negatively impacted to this day. The Court will award \$150,000,000 to each family in punitive damages against Syria.

b. Alexander Pinczowski's Family

[60] Alexander was on his way home to Cameron when a terror attack occurred at the Brussels airport. Alexander and Cameron were robbed unexpectedly of fulfilling their dreams and sharing their lives together. Alexander's loss was also a deep loss for Cameron's parents who supported Cameron in the aftermath of Alexander's murder. While the Court awarded \$31,500,000 in punitive damages in *Doe*, 2020 WL 5422844, at *17-18, here, unlike in *Doe*, Alexander did not survive. It is clear the terrorists targeted a crowded international airport to maximize the harm inflicted on as many individuals and their families as possible. *SeeDoe*, 2020 WL 5422844, at *17-18. As such, the need to deter terrorism is high and Syria is a wealthy sovereign. *Id.*; *Colvin*, 363 F. Supp. 3d at 163. The Court will award Plaintiffs \$150,000,000 in punitive damages against Syria.

c. Orbach and Rund Families

[61] [62] On January 8, 2017, a terrorist deliberately rammed a truck into a group of Israeli soldiers in a tour group in Jerusalem. He then reversed the truck to run over the soldiers again. The attack only stopped because the terrorist was shot. Erez Orbach was one of the Israeli soldiers that was murdered in the terror attack. Erez was only twenty years old and had his whole life in front of him. Erez had a medical condition that excused him from compulsory military service but he chose to join the military despite his medical condition. His loss is still devastating for his family. Eytan Rund was a tour guide who sustained injuries in the terror attack and

witnessed Erez's death at the hands of the terrorist that day. Eytan to this day suffers from psychological injuries due to the terror attack. Eytan's life and the life of his family has never been the same since the attack. The Court will award Plaintiffs \$150,000,000 per family in punitive damages against Syria.

d. Gonzalez Family

[63] Nohemi was studying abroad in Paris when she was murdered in a terror attack. Nohemi was shot in the chest and leg. She felt conscious pain and suffering before her death. Nohemi was a kind and hardworking person with the goal of becoming a teacher in industrial design. Nohemi and her boyfriend were discussing getting married and having children later on after they were settled in their careers. *409 Nohemi's family has struggled ever since her death but her mother started a non-profit to help other young Hispanic children so they can, like Nohemi, become successful in life. (Dkt. 85). The Court will award Plaintiffs \$150,000,000 in punitive damages against Syria.

F. Liability to Non-U.S. Citizen Plaintiffs

[64] The FSIA does not contain an express choice-of-law provision for plaintiffs not covered by § 1605A(c). FSIA § 1606 does provide that a foreign state stripped of its immunity "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. This section ensures that, if an FSIA exception abrogates immunity, plaintiffs not covered by § 1605A(c) may bring state or foreign law claims that they could have brought if the defendant were a private individual.

[65] [66] [67] Here, the Court must apply North Carolina's choice of law rules to determine which jurisdiction's substantive law governs. North Carolina applies the *lex loci delicti* rule—the law of the place of the injury governs tort claims. *SeeWorley Claims Services, LLC v. Jefferies*, 429 F. Supp. 3d 146, 158 (W.D.N.C. 2019); *Martinez v. National Fire Ins. Co.*, 911 F. Supp. 2d 331, 336 (E.D.N.C. 2012); *Blankenship v. Sprint Corp.*, N. 3:03-cv-221, 2007 WL 1387971, at *3 (W.D.N.C. 2007); *Gbye v. Gbye*, 130 N.C. App. 585, 503 S.E.2d 434 (1998). The tort for personal injury is deemed to have occurred where the last event took place that is necessary to render an actor liable. *Worley*, 429 F. Supp. 3d at 158; *Martinez*, 911 F. Supp. 2d at 336. *See alsoGiblin v. National Multiple Sclerosis Soc., Inc.*, 2008 WL 4372787 (W.D.N.C. 2008).

[68] Uri Orbach is an Israeli citizen whose son, Erez, was murdered by a terrorist in Israel. There is no legal relationship between Uri and the Defendant or ISIS. Accordingly, as to Uri's claims, the Court finds that Israeli law will apply.

[69] Pnina Greenfield was injured in the terror attack in Istanbul. Pnina is a citizen of Israel. There is no legal relationship between Pnina and the Defendant or ISIS. Accordingly, applying the *lex loci delicti* rule, the Court finds that Turkish law will apply to Pnina's claims.

[70] Concerning the claims of Israel Gorenzky, Nitzhia's brother, the terror attack that injured Nitzhia and murdered her husband occurred in Turkey. Likewise, Tamar Choresh, the sister of Nitzhia, was an Israeli citizen whose sister was injured and who lost her brother-in-law Abvraham in the attack in Turkey. Further, Yoseff Goldman is an Israeli citizen who lost his father in the attack in Turkey. There is no legal relationship between Israel, Tamar and Yoseff and the Defendant or ISIS. Accordingly, the Court finds that Turkish law will apply to the claims of Israel, Yoseff, and Tamar Choresh's estate.

[71] Regarding the claims of the estate of Alexander Pinczowski, Alexander was a citizen of Netherlands and his murder occurred in the terror attack at the Brussels airport in Belgium. There is no legal relationship between Alexander and the Defendant or ISIS. The Court finds that Belgian law will apply to the claims of Alexander Pinczowski's estate.

[72] Lastly, José Hernandez, stepfather of Nohemi Gonzalez, is a citizen of Mexico but resides in the U.S. Nohemi was a U.S. citizen studying abroad in Paris when ISIS terrorists murdered her. There is no legal relationship between José and the Defendant or ISIS. Accordingly, the Court finds that French law will apply to José's claims.

*410 Foreign Laws

In determining the scope of applicable foreign law, a court may "consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1; *see also* *Thuneibat*, 167 F. Supp. 3d 22, 44.

Israeli Law

Plaintiffs rely upon the expert declarations of Dr. Boaz Shnoor ("Shnoor Decl."), an attorney and law professor in Israel relied upon by the court in *Force*, Dkt. 34, 464 F. Supp. 3d

at 374-376 and in *Borochov*, Dkt. 60-1, 589 F.Supp.3d 15, 37-41, as well as the expert declaration of Dr. Israel Gilead ("Gilead Decl.") relied upon by the court in *Henkin*, 2021 WL 291403, *8-13 (Dkt. 98, Ex. 15-17).

Negligence

[73] [74] Plaintiffs asserted a claim of negligence under Israeli law. (Dkt. 44 ¶¶ 303-318). The Israeli civil tort of negligence is codified in the Civil Wrongs Ordinance (CWO) at § 35, 2 LSI (New Version) 14-15 (1972); *see also* *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 57-58 (D.D.C. 2010). As discussed in *Henkin*, 2021 WL 291403, at *8, there are two types of negligence under Articles 35-36 of the CWO. The first type of negligence is "a type of harm that is careless or negligent conduct, which consists of failure to act as a reasonable, prudent person would under the circumstances." Gilead Decl. at pages. 6-8 in *Henkin*, Dkt. 56-2, 2021 WL 291403, at *8. (Dkt. 98, Ex. 17). The second type of negligence includes "harms caused knowingly, intentionally, and maliciously." *See* Gilead Decl. at pages 6-8 in *Henkin*, Dkt. 56-2, 2021 WL 291403, at *7. (Dkt. 98, Ex. 17). Therefore, Israeli law places negligence under what the common law of the U.S. would consider an intentional tort. *See* Gilead Decl. at pages 6-8 in *Henkin*, Dkt. 56-2, 2021 WL 291403, at *7. (Dkt. 98, Ex. 17).

[75] As Dr. Shnoor discussed in his declaration in *Force*, Dkt. 34 ¶¶ 50-60, 464 F. Supp. 3d at 374-376, the elements required under either type of negligence under Israeli law include (1) duty, (2) breach, (3) cause (4) harm. (Dkt. 98, Ex. 15). *See also* *Weinstock v. Islamic Republic of Iran*, 2019 WL 1507255 (S.D. Fla. April 4, 2019); *Estate of Botvin v. Islamic Republic of Iran*, 873 F. Supp. 2d 232, 241 (D.D.C. 2012).

[76] [77] [78] Under Israeli law, the first element of negligence "recognizes that a duty of care exists not to harm others." *Estate of Botvin*, 873 F. Supp. 2d at 241 (relying on Dr. Shnoor and CA 243/83 *City of Jerusalem v. Gordon*, P.D. 39(1) 113 128 (1985)); *Wultz*, 755 F. Supp. 2d 1, 58-59. Duty under Israeli law is divided into "duty in fact and notional duty." *Id.*, 755 F. Supp. 2d at 58. "[E]very person owes a duty to all persons whom ... a reasonable person ought in the circumstances to have contemplated as likely in the usual course of things to be affected by an act, or failure to do an act." CWO § 36, 2 LSI (New Version) 15 (1972). A court asks if a reasonable person could have foreseen the likelihood of damage when determining duty-in-fact. *See* *Wultz*, 755 F. Supp. 2d at 58. Furthermore, if a duty-in-fact exists but the risk of harm as it occurred was already "taken into account

by normal society when engaged in a particular action,” a defendant will not be liable under the tort of negligence. *Id.* at 58-59. Normative duty considers “whether a reasonable person ought, as a matter of policy, to have foreseen the occurrence of the particular damage.” *CA 145/80 Vaknin v. Beit Shemesh Local Council* 37(1) PD 113, 125-26 (1982) (Isr.); see also *Wultz*, 755 F. Supp. 2d at 59.

***411 [79] [80]** Here, a reasonable person could foresee that ramming a truck into people and running them over would cause damage to them. The Court finds that Uri Orbach has demonstrated the terrorist was under a duty to the victims as it was foreseeable that his intentional act of ramming a truck into people and running over those people would cause injuries and/or death to the victims. The Court also finds that the Defendant was under a duty to the victims because, as discussed above, the injuries and death of the victims were foreseeable consequences of providing material support to ISIS and supporting ISIS's efforts to further extremist propaganda against countries against terrorism. For the same reasons that the Court finds sufficient evidence to tie Syria to ISIS terrorist actions, it finds that a duty existed between Syria and the Plaintiffs and their families because their injuries were foreseeable consequences of the aid and support.

[81] [82] [83] A breach of the duty of care occurs when a party with a duty fails to take “reasonable precautionary measures.” *Vaknin*, 37(1) PD at 131. Reasonable precautions are determined by balancing the interests of the plaintiff with that of the tortfeasor and considering the public interest in the continuation or cessation of the alleged tortious actions. See *Wultz*, 755 F. Supp. 2d at 62. Here, a reasonable person could foresee that a person intentionally ramming a truck into people would cause great harm to those at or around them. See *Estate of Botvin*, 873 F. Supp. 2d at 241 (citing CA 796/80 *Ohana v. Abraham P.D.* 37(4) 337 (1983) (concluding that intentional killings breached the duty of care)). The Court finds the terrorist breached his duty of care to the Plaintiffs by intentionally ramming his truck into people and then running them over for the purpose of killing or causing serious bodily injury to them. The Court finds Syria breached its duty of care to the Plaintiffs by engaging in the continuous support and financing of ISIS, despite knowledge of ISIS's terrorist actions.

[84] [85] [86] Israeli law uses the “but for” test causation. See Shnoor Decl. in *Force*, Dkt. 34 ¶ 21, 464 F. Supp. 3d at 374-376, relying on CA 145/80 *Va'aknin v. The City of Beit Shemesh*, P.D. 37(1) 113, 144). (Dkt. 98, Ex.

15). “If a reasonable person could have foreseen that a harm of the kind that happened might happen, the legal causation requirement is met.” See Shnoor's Decl. in *Force*, Dkt. 34 ¶ 22, 464 F. Supp. 3d at 374-376. (Dkt. 98, Ex. 15). Here, just like in *Force*, it is clear that the ISIS terrorist foresaw that ramming his truck into a crowd of people and running those people over would cause serious bodily injury and/or death to those individuals. The ISIS terrorist sped up his truck before ramming into the people and even circled back to run over his victims again. (Spitzen Decl. ¶¶ 68-69) (Dkt. 78). Defendant provided material support to ISIS in the years leading up to the January 8, 2017 terror attack, including financial and military support. (Gartenstein-Ross Decl. at pages 22-39) (Dkt. 75). See the testimony and reports of Dr. Gartenstein-Ross and Dr. Levitt from *Sotloff*, Dkt. 34-1, 34-2, 41, 42, 525 F. Supp. 3d 121, as well as Dr. Gartenstein-Ross' report from *Doe*, 2020 WL 5422844 (Dkt. 31-6 in *Doe*) (Dkt. 98, Ex. 2, 5-8). Plaintiff Uri Orbach has demonstrated that but for the material support provided by Syria, ISIS would not have been able to develop into the organized and deadly organization it was at the time of the attack.

[87] [88] Harm under Israeli law includes “loss of life, or loss of, or detriment to, any property, comfort, bodily welfare, reputation or other similar loss of detriment.” See CWO (New Version), 5728-1968, *412 2 LSI 5, § 2 (1972) (Isr.). Here, Erez died as a result of his injuries from the attack and Eytan sustained physical and emotional injuries due to the attack. (Spitzen Decl. ¶¶ 68-69) (Dkt. 78) (Dkt. 82, Ex. H, 95).

Uri Orbach has established the negligence by ISIS and Syria under Israeli law. Israeli law would hold the ISIS terrorist liable for the harm to victims caused by his attack, as well as Syria because it breached its duty, provided material support to ISIS and it was reasonably foreseeable that innocent persons would become victims of ISIS's terrorism. See Shnoor's Decl. in *Force*, Dkt. 34 ¶¶ 23-24, ¶¶ 53-60, 464 F. Supp. 3d at 374-376. (Dkt. 98, Ex. 15).

[89] [90] Under Israeli law there is also the tort of “[N]egligent Support of Terrorism” that is a judicially created theory of liability set forth in CivA 2144/13 *Mantin v. Estate of PLO* (6/12/2017) that can be used against Syria. In *Mantin*, the Israeli Supreme Court “recognized that establishing an infrastructure for assisting and encouraging terrorist acts is in for itself a negligent act.” *Henkin*, 2021 WL 291403, at *16-17. To establish such a claim a plaintiff must show that “(1) support for terrorism constitutes knowingly, intentionally, and maliciously doing something that causes an unreasonable

risk of harm, (2) defendants had a duty of care not to support terrorism or create an unreasonable risk of harm from terrorism, and they breached this duty by supporting terrorism, and (3) defendants' support was both the but-for cause and proximate cause" of the attack. *Henkin*, 2021 WL 291403, at *8. While in *Henkin*, 2021 WL 291403, at *8, the plaintiffs did not establish the but-for and proximate cause element of this theory of liability, the plaintiffs relied upon *Mantin v. PLO*, which shifted the burden to defendants to show they were not the cause because the plaintiffs had shown the defendants supported terrorism and had asserted but-for and proximate causation. Since the defendants defaulted in *Heinken*, defendants did not meet their burden and the Court found the defendants primarily liable for negligent support of terrorism. See Gilead Decl. at pages 17-18 in *Henkin*, Dkt. 56-2, 2021 WL 291403, at *8. Here, Plaintiffs have detailed the material support the Defendant provided to ISIS in the years leading up to the attack that injured Eytan and killed Erez. (Gartenstein-Ross Decl. at pages 22-39) (Dkt. 75). See also the testimony and reports of Dr. Gartenstein-Ross and Dr. Levitt from *Sotloff*, 525 F. Supp. 3d 121 (Dkts. 34-1, 34-2, 41, 42 in *Sotloff*) (Dkt. 98, Ex. 5-8) as well as Dr. Gartenstein-Ross' report from *Doe*, 2020 WL 9244135 (Dkt. 31-6 in *Doe*) (Dkt. 98, Ex. 2, 5-8). These experts have established that Syria provided a safe haven for ISIS that allowed ISIS to train, recruit, fundraise, plan attacks, and communicate throughout the world with respect to terrorism and that Syria funded ISIS with its purchase of oil from ISIS. Here, the Defendant defaulted so the Defendant has failed to show it was not the cause because Plaintiffs have demonstrated Defendant's negligent support of terrorism.

Intentional Infliction of Emotional Distress

[91] [92] Intentional infliction of emotional harm under Israeli law is part of negligence because intentional torts are blended with the tort of negligence under Israeli law. See Gilead Decl. ¶ 25 in *Henkin*, Dkt. 56-2, 2021 WL 291403, at *8. (Dkt. 98, Ex. 17). As Prof. Gilead noted in his Decl. ¶ 25 in *Henkin*, Dkt. 56-2, 2021 WL 291403, at *8, negligence overlaps with intentional torts because "reasonable persons do not cause unreasonable harm knowingly, intentionally, and maliciously, *413 and when they do, courts recognize a "duty" not to do so." (Dkt. 98, Ex. 17). In *Leibovitch v. The Syrian Arab Republic*, 25 F. Supp. 3d 1071 (N.D. Ill. 2014), the Court discussed the elements for intentional infliction of emotional distress under Israeli law relying on the Israeli case LCA 444/87 *Munhar Alsoucha v. Dehan*, at 56 [1990] (Isr.). Under Israeli law, the four elements are as follows:

1. Whether plaintiffs enjoy a close relationship to the primary victim;
2. Whether plaintiffs directly perceived the tortious act;
3. Plaintiff's degree of spatial and temporal proximity to the injurious event; and
4. The severity of mental injury.

Alsoucha at 62-73.

[93] [94] Here, it is submitted that the terrorist's act of ramming a truck into a group of people on an educational tour would have a foreseeable consequence of mental injury. In *Alsoucha*, the Israeli Court stated that parents, spouses, children, and other first-degree relatives automatically meet the closeness requirement. *Id.* at 63 cited in *Leibovitch*, 25 F. Supp. 3d at 1082-1083. Uri Orbach was Erez's father so Uri has met the first element of this claim.

Concerning the second element of this cause of action, the Israeli Court in *Alsoucha* "held that witnessing a tortious act is not determinative, but the foreseeability of mental injury increases when one witnesses the act." *Leibovitch*, 25 F. Supp. 3d at 1083. Here, while Uri was not present at the scene at the time of the attack, his mental injuries, which are discussed in detail in his declaration and in Dr. Strous' report were foreseeable. (Dkt. 82, Ex. H, 89). A review of Uri's declaration and Dr. Strous' report for Uri reveal he suffered mental injuries as Erez's father. (Dkt. 82; Ex. H, 89). Uri has demonstrated the negative impact the attack has had on his life and the toll the attack has taken on his family.

[95] [96] The third element of this claim is implicated when the mental injury is 'the product of a continuous process of exposure to the consequences of the injurious event' as opposed to mental injury resulting from a one-time experience." *Leibovitch*, 25 F. Supp. 3d at 1083 citing LCA 444/87 *Munhar Alsoucha*, at 46. In *Alsoucha*, the Israeli Court decided that the "distinction should be based upon the extent of the damage, or 'clear proof of real and definite mental injury'" because the 'distinction between mental injury caused on the spot ... and damage caused at a later stage' is arbitrary." *Leibovitch*, 25 F. Supp. 3d at 1083 citing *Alsoucha* at 69. Under Israeli law, the plaintiff must experience the "tragic event, or in an exceptional case, learns about the event in such circumstances that the emotional damage is foreseeable." *See Leibovitch*, 25 F. Supp. 3d at 1083-1804; *Estate of Botvin*, 873 F. Supp. 2d at 245 (quoting *Goldberg v.*

UBS AG, 660 F. Supp. 2d 410, 423 (E.D.N.Y. 2009)). Here, Uri has been diagnosed by Dr. Strous with a psychological injury and Uri has received *grief counseling*. (Dkt. 82, Ex. H, 89). The Court finds that the decline of Uri's mental health is proof of injury that meets the third element of this claim.

[97] [98] The fourth element concerns the severity of the mental injury, and a plaintiff needs to establish a mental illness with physiological effects or severe mental injury. See *Leibovitch*, 25 F. Supp. 3d at 1083 relying on LCA 444/87 *Munhar Alsoucha*, at 69. Uri has established his mental injuries diagnosed by Dr. Strous with physiological effects (e.g., lack of sleep,) due to Erez's death. (Dkt. 82, Ex. H, 89). Per Dr. Strous, Uri will continue to endure *414 his mental trauma for the foreseeable future. (Dkt. 82, Ex. H). The Court finds Uri has established severe mental injury. Therefore, Uri has established the intentional infliction of emotional distress claims under Israeli law. See *Henkin*, 2021 WL 291403, at *12.

Battery and Assault

[99] The civil torts of battery and assault are governed by Article 23 of the CWO under Israeli law. The elements of a battery are as follows:

1. The defendant knowingly;
2. Used force-directly or indirectly;
3. Against the body of another person;
4. Without the consent of that person.

[100] [101] The elements of assault under Israeli law are as follows:

- a. A defendant knowingly;
- b. Attempted or threatened by any act or gesture to use force against another person;
- c. Making the other believe upon reasonable grounds that he has the present intention and ability to affect his purpose.

See Shnoor Decl. at pages 8-9 in *Force*, Dkt. 34, 464 F. Supp. 3d at 374-376. (Dkt. 98, Ex. 15). Here, the terrorist deliberately used a truck as a weapon with the intent to kill and/or seriously injure as many individuals as possible as evidenced by the terrorist speeding up and running over individuals and then reversing the truck to run over those

individuals again. (Spitzen Decl. ¶¶ 68-69) (Dkt. 78). The terrorist ran over Erez, and he died from his injuries. (Spitzen Decl. ¶¶ 68-69) (Dkt. 78). Eytan was injured in the attack. (Spitzen Decl. ¶¶ 68-69) (Dkt. 78). Eytan and Erez did not consent to being physically injured. (Dkt. 78). The only reason the attack stopped was because the terrorist was shot dead. (Spitzen Decl. ¶¶ 68-69) (Dkt. 78). Therefore, pursuant to Article 23 of the CWO of Israeli law, the Court finds Plaintiffs have established a battery and assault took place.

Israeli Damages

[102] [103] [104] Israeli law provides that an immediate family member of a tort victim is entitled to compensatory damages for psychological and emotional harm resulting from the tort to the primary victim. See Shnoor Decl. at ¶ 59, Dkt. 34, in *Force*, 464 F. Supp. 3d at 374-376. (Dkt. 98, Ex. 15). The harm suffered by a secondary victim is compensable if (1) the family member witnessed the event or its consequences, (2) there is a time and space proximity between the two harms, and (3) the secondary victim suffers severe harm that disrupts daily function. *Id.* Israeli law does not allow damages to secondary victims unless the harm is so severe that it disrupts daily function. Shnoor Decl. ¶ 59, Dkt. 34, in *Force*, 464 F. Supp. 3d at 374-376 (Dkt. 98, Ex. 15); see also *Estate of Botvin*, 873 F. Supp. 2d at 245.

The Court in *Henkin*, 2021 WL 2914030, at *9, relying on Prof. Gilead's declaration, found that the wife and children all of which were Israeli citizens suffered severe emotional injury as a result of the terror attack. (Dkt. 98, Ex. 17). The Court in *Henkin*, 2021 WL 2914030, at *10, further indicated that bereavement is a theory of recovery that is equivalent to solatium damages in the U.S. law. (Dkt. 98, Ex. 17). Therefore, in *Henkin*, the Court noted that even if the widow and children had not suffered severe mental harm, they could still recover damages under the theory of bereavement. 2021 WL 2914030, at *10. Under Israeli law, Uri Orbach has the same range of damages available to him as U.S. plaintiffs proceeding under the FSIA have under the category of solatium damages. See Gilead Decl. ¶¶ 60-64 in *Henkin*, *415 Dkt. 56-2, 2021 WL 291403, at *8-13. (Dkt. 98, Ex. 17).

Compensatory Damages

[105] As Plaintiffs have established claims for battery, intentional infliction of emotional distress and negligence under Israeli law, Erez's estate, via its administrator Uri, is entitled to recover for the physical injuries Erez suffered in

the attack. In *Henkin*, 2021 WL 291403, at *12, the widow, an Israeli citizen, and her children, also Israeli citizens, recovered under Israeli law for the negligently inflicted wrongful death of her husband who was the children's father. *Id.* (Dkt. 98, Ex. 17). The Court in *Henkin* further held that if Eitam had survived he could have asserted causes of action for assault and negligence under Israeli law. *Id.* at * 12, 15. (Dkt. 98, Ex. 17). Here, Erez was run over by a truck. (Spitzen Decl. ¶¶ 68-69) (Dkt. 78). Accordingly, pursuant to Israeli law, Uri Orbach is entitled to recover on behalf of Erez's estate compensatory damages for the physical injuries Erez sustained in the attack, as well as for the wrongful death of Erez. The Court will enter judgments of liability for Uri Orbach against the Defendant consistent with the above findings of fact and conclusions of law.

Solatium Damages

[106] Plaintiffs presented Dr. Strous' report and Uri's declaration regarding the psychological trauma he suffered as a result of Erez's murder. (Dkt. 82, Ex. H, 89). The day before Erez's death, Erez spent the Sabbath with his mother and returned in the morning of his death to say goodbye to Uri before returning to his army service. (Dkt. 89). Erez was supposed to be working in Hebron the day he was murdered. (Dkt. 89). Caryn called Uri and told her about the attack and told Uri that she could not reach Erez. (Dkt. 89). Uri told Caryn not to worry because Erez was in Hebron and not Jerusalem. (Dkt. 89). Uri called a few people to investigate what happened. (Dkt. 89). Uri's son, Alon, called him to tell him that soldiers were at the house and to come over to Caryn's place right away. (Dkt. 89). Uri went over to Caryn's home and was informed by the military officers that Erez had been killed in the attack. (Dkt. 89). Uri's body tensed up and he was almost "convulsing." (Dkt. 89). Uri tried to keep control of himself because he had to go and tell his mother about Erez's death. (Dkt. 89).

It was very difficult and painful for Uri to bury his son. (Dkt. 89). Uri declined an offer to identify Erez's body as he wanted to remember him as he was alive and not as a murdered disfigured son. (Dkt. 89). During *shiva* he was told many stories about Erez he was not aware of that only reinforced how special Erez was as a person. (Dkt. 89). Uri was unable to work for four months after Erez's death because he was in a dreamlike state. (Dkt. 89). It took Uri months before he felt that he could "return to the world." (Dkt. 82, H, 89). Time has not helped lessen Uri's grief. (Dkt. 89). While *grief counseling* allows Uri to function for his children, he does not enjoy life as he did before Erez's death. (Dkt. 82, Ex. H, 89).

Uri and Erez were very close. (Dkt. 89). Uri reaches out to a grief therapist when he needs support to help him cope with the loss of his son. (Dkt. 82, Ex. H, 89). The loss of Erez affected Uri's social life and he became identified as a bereaved father. (Dkt. 82, Ex. H, 89). Uri feels his friends cannot understand the trauma of losing a child, especially so suddenly and violently. (Dkt. 82, Ex. H, 89). Some of Uri's post-traumatic symptoms include difficulty sleeping for three to four months after Erez's murder and frequent flashbacks to his time with Erez. (Dkt. 82, Ex. H).

*416 Dr. Strous opines that Uri suffers from persistent complex bereavement disorder with traumatic bereavement and persistent *depressive disorder*; mild severity, late onset, with pure dysthymic syndrome. (Dkt. 82, Ex. H). Dr. Strous expects that Uri's mood and complicated grief issues affecting many areas of his functioning to continue to affect him indefinitely. (Dkt. 82, Ex. H).

Amount of Awards to Israeli Plaintiffs

Israeli Courts have not rendered awards for victims of terrorism in cases such as this because Israel does not have diplomatic relations with Syria and Iran, but Israeli procedural law requires that service of process on a foreign state be by diplomatic channels. See Shnoor Decl. at ¶ 10 in *Borochov*, 589 F.Supp.3d 15 *12-15. (Dkt. 60-1 in *Borochov*) (Dkt. 98, Ex. 16). Without the ability to serve process on such countries, including Syria, such lawsuits cannot proceed in Israeli Courts. See *LCA 1104/09 AG v. Steen* (12/8/2011). In *Leibovitch*, 25 F. Supp. 3d at 1086, the plaintiffs and their Israeli law expert did not set forth what the amount of damages would be awarded under Israeli law for the Israeli plaintiffs. The Court in *Leibovitch* used the law of the forum in "assessing the proper damages award" because to conduct "further research would unduly burden both Plaintiffs and the Court." *Id.* The Court indicated that using the law of the forum would be "in the interests of justice" for a damages assessment. See *Estate of Botvin v. Islamic Republic of Iran*, 772 F. Supp. 2d 220, 228 (D.D.C. 2011); *Oveissi*, 768 F. Supp. 2d 16 (D.D.C. 2011) (applying French law to the tort claims and federal law to the damages assessment). In *Fraenkel v. Islamic Republic of Iran*, 892 F.3d 348, 358 (D.C. Cir. 2018), the Court noted that when there is a lack of information about the proper calculation of damages under a foreign law, the Court defaults to the application of federal law. See also *Force*, 617 F. Supp. 3d at 37, (D.D.C. 2022) *Jakubowicz v. Islamic Republic of Iran, et al.*, 2022 WL 3354719, at *10 (D.D.C. Aug. 9, 2022). In *Fraenkel*, the Court applied the Section

1605A framework to damages where liability was established under Jordanian law. *Id.* See also *Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16, 25-26 (D.D.C. 2011) (applying the federal standard for solatium damages where liability was established under French law); *Thuneibat*, 167 F. Supp. 2d 22, 47 (collecting cases where courts assessed liability under foreign or state law but applied federal standard to damages calculation). In *Weinstock*, 2019 WL 1507255, the Court used Israeli law to impute negligence to the defendants but used the *Heiser* framework under federal case law to assess damages for an Israeli father whose U.S. son died in a terror attack when it awarded the Israeli father \$5,000,000 in solatium damages. In *Cohen v. Islamic Republic of Iran et al.*, 238 F. Supp. 3d 71, 86 (D.D.C. 2017), the Court used D.C. law for an intentional infliction of emotional distress claim for Shalom Cohen, an Israeli citizen, and awarded him the same amount of solatium damages as his wife, a U.S. citizen. See also *Kirschenbaum v. Islamic Republic of Iran*, 572 F. Supp. 2d 200, 212-13 (D.D.C. 2008) (applying federal law to damages award); *Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40, 59-60 (D.D.C. 2006) (applying federal law to damages award).

Although the “*Heiser* framework is non-binding, it provides baseline figures and a basic methodology by which to ascertain the ‘appropriate measure of damages’ both for directly-injured victims and for ‘the family members of victims who died’ or were injured in a terrorist attack.” *Lelchook v. Syrian Arab Republic*, 2019 WL 4673849, at *4-5 (D.D.C. Jan. 31, 2019) (quoting *Peterson*, 515 F. Supp. 2d 25, 51 (internal citations omitted)); see also, e.g., *417 *Valore*, 700 F. Supp. 2d 52, 85-86 (noting “strong precedential support” for framework); *Brewer v. Islamic Republic of Iran*, 664 F. Supp. 2d 43, 57-58 (D.D.C. 2009); *Heiser v. Islamic Republic of Iran*, 659 F. Supp. 2d 20, 27 n.4 (D.D.C. 2009). “Decisions to deviate from the starting points provided by the *Heiser* framework are committed to the discretion of the particular court in each case.” *Oveissi*, 768 F. Supp. 2d 16, 26. As the Court held in *Fraenkel*, “[w]hile past solatium awards from comparable cases are appropriate sources of guidance for district courts, ‘different plaintiffs (even under FSIA) will prove different facts that may well (and should) result in different damage awards.’” *Fraenkel*, 892 F.3d at 362 (quoting *Fraenkel v. Islamic Republic of Iran*, 258 F. Supp. 3d 77, 82 (D.D.C. 2017)). Moreover, utilizing *Heiser* as a guideline for the amount of damages furthers the policy interest of avoiding “the problem of ‘disparity among the various state laws regarding the recovery of emotional

distress by immediate family members.’” *Barry v. Islamic Republic of Iran*, 437 F. Supp. 3d 15, 49 (D.D.C. 2020).

Since Uri has established that he would be entitled to recover solatium damages under Israeli law, the Court will calculate damages under the *Heiser* damages framework but depart upward and award \$8,000,000 in solatium damages to Uri Orbach for his severe and continuing psychological trauma over losing his first-born child.

Punitive Damages

In *Henkin*, 2021 WL 2914036, at *10, the Court determined relying on Prof. Gilead's declaration (Dkt. 56-2 at page 22) that Israeli law does provide for punitive damages. (Dkt. 98, Ex. 17). Professor Gilead cited Civil File 4332-02 (Jerusalem) *Shemesh v. PLO* (2.11.2020) in which an Israeli Court stated “in cases of terrorists attack, punitive damages should be triple the amount of compensatory damages. *Henkin*, 2021 WL 2914036, at *10. (Dkt. 98, Ex. 17). Here, because an ISIS terrorist intentionally used a truck as a weapon against Israeli soldiers to seriously injury and/or kill them, Plaintiffs respectfully submit that the attack was indeed an “immoral and outrageous act” warranting punitive damages to punish such vile violent attacks against innocent people. As indicated, the Orbach family members request \$150,000,000 in punitive damages.

Belgian Law

[107] Plaintiffs retained Dr. Rafaël Jafferali,¹⁹² a Professor in Belgium of contract law and tort law, to prepare a declaration (“Jafferali Decl.”) regarding what claims Alexander Pinczowski's estate could bring under Belgian law. (Dkt. 81) Article 1382 of the Belgian Old Civil Code provides the principle of civil extra-contractual liability pursuant to which any tortious act or omission causing a damage to another person entails the obligation for the tortfeasor to repair the damage caused. (Jafferali Decl. ¶ 11) (Dkt. 81). Such liability requires three elements: (i) a tortious act or omission, (ii) damages, and (iii) a factual causal relationship between the tortious act or omission and the damage.¹⁹³ (Jafferali Decl. ¶ 11) (Dkt. 81).

*418 [108] The burden of the proof of the tortious act or omission, the damage and the causation lies on the plaintiff, who must evidence each of these elements with reasonable certainty (new Belgian Civil Code (“B.C.C.”), art. 8.4 and 8.5). (Jafferali Decl. ¶ 12) (Dkt. 81). If the

nature of the elements to be proven makes it unreasonable to demand reasonable certainty, the elements may be proven with likelihood (B.C.C., art. 8.6, § 2). (Jafferli Decl. ¶ 12) (Dkt. 81). Finally, in exceptional circumstances, the judge may decide by a specific reasoning that the normal burden of proof would be unreasonable and must shift on the defendant (B.C.C., art. 8.4, § 5). (Jafferli Decl. ¶ 12) (Dkt. 81). This shift may occur only if the judge does not have sufficient evidence despite the evidencing measures taken and the parties' offering of evidence. (Jafferli Decl. ¶ 12) (Dkt. 81).

[109] [110] [111] A tortious act or omission can consist either of a breach of a rule that mandates or prevents a specific behavior or of a breach of the general duty of care.¹⁹⁴ (Jafferli Decl. ¶ 13) (Dkt. 81). The breach of the general duty of care requires an analysis *in abstracto* to assess whether the defendant acted as a reasonably prudent person put in the same circumstances: if the behavior of the defendant deviates from this standard, the breach is established.¹⁹⁵ (Jafferli Decl. ¶ 13) (Dkt. 81). A person must take the reasonable measures required in the circumstances given to avoid damages to others.¹⁹⁶ (Jafferli Decl. ¶ 13) (Dkt. 81).

[112] Under Belgian law the Belgian State can commit a tort through its executive power and bears liability accordingly.¹⁹⁷ (Jafferli Decl. ¶ 14) (Dkt. 81). The liability does not require the identification of the precise organ of the State involved in the tortious act.¹⁹⁸ (Jafferli Decl. ¶ 14) (Dkt. 81).

[113] The commission of a criminal offense is always a tortious act for civil extra-contractual liability purposes because it is a breach of a rule that prevents a certain criminal behavior.¹⁹⁹ (Jafferli *419 Decl. ¶ 15) (Dkt. 81). The Supreme Court also held that the person who, by negligence, commits a criminal offence that requires intent, may be criminally acquitted but yet commits a civil tortious act.²⁰⁰ (Jafferli Decl. ¶ 15) (Dkt. 81).

[114] The Belgian Penal Code ("B.P.C.") sanctions several crimes related to terrorism (B.P.C., art. 137-141 *ter*), including terrorist murder and terrorist destruction of public transport premises (B.P.C., art. 137) or participating in the activity of a terrorist organization, e.g., by financing it²⁰¹ (B.P.C., art. 140). (Jafferli Decl. ¶ 116) (Dkt. 81). The B.P.C. also contains a section related to co-conspirators and accomplices (B.P.C., art. 66-69). (Jafferli Decl. ¶ 16)

(Dkt. 81). An accomplice is among others the person who knowingly provides an aid to the primary actor to facilitate, prepare or commit the crime (B.P.C., art. 67). (Jafferli Decl. ¶ 16) (Dkt. 81). In principle, the accomplice must have a precise knowledge of the crime that will be committed, i.e., the nature and the goal of the crime and the factual circumstances that characterize the act as a crime.²⁰² (Jafferli Decl. ¶ 16) (Dkt. 81). Finally, criminal liability applies to legal persons (B.P.C., art. 5) for all crimes.²⁰³ (Jafferli Decl. ¶ 16) (Dkt. 81).

[115] Damages are defined as harm to a legitimate and stable interest of the victim.²⁰⁴ (Jafferli Decl. ¶ 17) (Dkt. 81). Damages are usually classified between harms to property interests, non-lethal personal injury, and death. (Jafferli Decl. ¶ 17) (Dkt. 81). Within these classifications, a distinction is made between material harm and moral harm and between damage suffered by the victim itself and damage suffered consequently by relatives. (Jafferli Decl. ¶ 17) (Dkt. 81).

[116] [117] [118] The causation between the tortious act and the damage relates to the cause in fact and is assessed in Belgium under the theory of the "equivalence of conditions."²⁰⁵ (Jafferli Decl. ¶ 118) (Dkt. *420 81). It holds that causation exists if, but for the tortious act, the damage would not have occurred or not in the same manner.²⁰⁶ (Jafferli Decl. ¶ 18) (Dkt. 81). The foregoing has the remarkable consequence that no additional distinction is made between the causes of the damage, e.g., between direct or indirect tortious acts causing the damage,²⁰⁷ or between tortious acts for which the damage was or was not a foreseeable consequence.²⁰⁸ (Jafferli Decl. ¶ 18) (Dkt. 81). By contrast, if evidence shows that the damage would have occurred as it occurred if the tortious act was not committed, there is no causation.²⁰⁹ (Jafferli Decl. ¶ 18) (Dkt. 81). Causation must be certain, but the certainty must be reasonable, not absolute.²¹⁰ (Jafferli Decl. ¶ 18) (Dkt. 81).

[119] Here, in Dr. Jafferli's opinion Alexander's estate has a claim for the harm suffered by Alexander before his death and caused by the explosion. (Jafferli Decl. ¶ 23) (Dkt. 81). The acts ascribed to Syria in Dr. Gartenstein-Ross' declaration would qualify as tortious under Belgian law. (Jafferli Decl. ¶ 23) (Dkt. 81). A Belgian judge facing the situation would probably analyze Syria's actions in view of the standard of a reasonably prudent State in the same circumstances. (Jafferli Decl. ¶ 23) (Dkt. 81). From that point of view,

the acts noted in Dr. Gartenstein-Ross' declaration constitute support to ISIS, a terrorist organization. (Jafferali Decl. ¶ 23) (Dkt. 81). By giving support to ISIS, Syria took part in the terrorist activities of this group and knew its support would contribute to the commission of crimes or felonies of ISIS. (Jafferali Decl. ¶ 24) (Dkt. 81). This may qualify as a criminal offence under article 140 of the B.P.C. and thereby automatically qualify as tortious. (Jafferali Decl. ¶ 24) (Dkt. 81). However, because Syria did not seem to specifically know in advance of the attacks of March 22, 2016, Syria probably cannot be considered as an accomplice of the attacks in the meaning of article 67 of the B.P.C. (Jafferali Decl. ¶ 24) (Dkt. 81). It is Dr. Jafferali's opinion that a reasonable State in the same circumstances would have avoided acts that were likely to lead to terror attacks by the support of a terrorist organization. (Jafferali Decl. ¶ 24) (Dkt. 81). Therefore, Dr. Jafferali believes that a judge would consider that Syria, by deviating from this standard, did not act as a reasonable State by supporting ISIS and therefore committed tortious acts. (Jafferali Decl. ¶ 25) (Dkt. 81).

The question of whether these torts bear a causal relationship with the terror attack at the Brussels airport on March 22, 2016 requires a factual assessment by the court *421 hearing the claim. (Jafferali Decl. ¶ 26) (Dkt. 81). The court will assess whether, without the support of Syria, the terrorist suicide bombings that struck the Brussels airport would have occurred or would have occurred in the same manner. (Jafferali Decl. ¶ 26) (Dkt. 81). Dr. Gartenstein-Ross in his declaration concludes that Syria's support of ISIS bears a causal connection to the attacks. (Jafferali Decl. ¶ 26) (Dkt. 81).

The Court will enter judgments of liability for Alexander Pinczowski's estate against the Defendant consistent with the above findings of fact and conclusions of law.

Belgian Damages

[120] Once liability is established, the liable person must remedy the damage. (Jafferali Decl. ¶ 22) (Dkt. 81). The indicative table 2020 lists and values several damages, including the damage arising from death.²¹¹ (Jafferali Decl. ¶ 22) (Dkt. 81). It includes: (i) funeral expenses, which are a claim of the person paying for them, (ii) *ex haerede* damages, i.e., damages suffered by the decedent itself from the tortious act until death, e.g., because of the suffering endured by the injuries or the anguish suffered because of the prospect of death, and (iii) damages to relatives. Only *ex haerede*

damages can give rise to a claim of the estate of the decedent. (Jafferali Decl. ¶ 22) (Dkt. 81).

Assuming proof of liability, Alexander's estate would be able to recover monetary damages covering the moral harm suffered by the decedent between the time of the terrorist attack and his death. Such harm may include fear, distress, and pain. (Jafferali Decl. ¶ 27) (Dkt. 81). The general rule that damages must compensate the harm would be applicable. (Jafferali Decl. ¶ 27) (Dkt. 81). No specific factor would apply to the determination of the amount awarded to the estate: the valuation would be made *ex aequo et bono* by the judge, according to what the judge believes is adequate to compensate the harm. (Jafferali Decl. ¶ 27) (Dkt. 81).

The evidence shows that Alexander did not die instantaneously. (Dkt. Ex. 79, Ex. G, 98, Ex. 18, 20). The authorities in Brussels advised Cameron that Alexander had sustained bad injuries to his legs and he had a gash on his head. (Dkt. 93). The Brussels authorities allowed Cameron to visit her husband's body in a morgue. (Dkt. 93). Cameron recalls seeing a gash on Alexander's head. (Dkt. 93). Dr. Friedman reviewed the autopsy report for Alexander and opined that Alexander did not die immediately. (Dkt. 79, Ex. G, 98, Ex. 18). Alexander, per Dr. Friedman, sustained a *skull fracture* in the blast and injuries to his legs. (Dkt. 79 Ex. G). It is possible that Alexander experienced pain and suffering before dying. (Dkt. 79, Ex. G). With this showing, a Belgian court would most probably admit damages for the mental and physical harm suffered until death. (Jafferali Decl. ¶ 27) (Dkt. 81). The valuation of damage to compensate for this harm would be *ex aequo et bono*. (Jafferali Decl. ¶ 27) (Dkt. 81).

To maintain consistency in monetary awards, per *Heiser*, and in light of the evidence, Plaintiffs request \$1,000,000 in compensatory damages be awarded to Alexander Pinczowski's estate as it has been established that he did not die immediately and that he sustained a *skull fracture* and serious injuries to his legs in the bombing.

French Law

[121] Plaintiffs retained Dr. Jean-Sébastien Borghetti,²¹² a French law Professor, *422 to prepare a declaration ("Borghetti Decl.") regarding what civil liability Syria could have for Nohemi's murder under French law. Whether Syria can be held liable in tort under French law raises two initial issues. (Borghetti Decl. ¶ 10) (Dkt. 77). The first one is whether French rules on jurisdictional immunity of

foreign States should apply. (Borghetti Decl. ¶ 11) (Dkt. 77). According to the *Cour de cassation*, France's highest court, a foreign State enjoys limited jurisdictional immunity. (Borghetti Decl. ¶ 11) (Dkt. 77). French rules on jurisdictional immunity only apply before French courts. (Borghetti Decl. ¶ 11) (Dkt. 77). Syria cannot therefore raise the French rules on the jurisdictional immunity of States as a defense before a U.S. court. (Borghetti Decl. ¶ 11) (Dkt. 77). The second initial issue is which *substantive* law applies to a liability claim against a foreign State. (Borghetti Decl. ¶ 12) (Dkt. 77). When a claim governed by French law is directed against a foreign State, it is the rules of civil law apply. (Borghetti Decl. ¶ 12-13) (Dkt. 77).

Available Causes of Action

[122] Here, a claim against Syria for harm caused in France is governed by the rules of French civil law on tort liability. (Borghetti Decl. ¶ 12) (Dkt. 77). The basic provision of French law on civil liability is article 1240 of the *code civil*. (Borghetti Decl. ¶ 15) (Dkt. 77). It states: "Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it." (Borghetti Decl. ¶ 15) (Dkt. 77). Thus, a person is liable for harm caused by his fault. (Borghetti Decl. ¶ 16) (Dkt. 77). Liability based on article 1240 is extremely broad, which explains why there are no intentional torts in French law. (Borghetti Decl. ¶ 17) (Dkt. 77). Wherever the defendant is alleged to have committed a fault, and whatever the type of harm that has been caused, a claim will be brought under article 1240 of the *code civil*, regardless of whether the defendant was negligent or inflicted harm intentionally. (Borghetti Decl. ¶ 17) (Dkt. 77).

[123] [124] Article 1240 of the *code civil* can be combined with article 1242(5) of the same code, which renders principals liable for damage caused by their agent's fault. (Borghetti Decl. ¶ 18) (Dkt. 77). It provides: "Masters and employers [are liable] for harm caused by their servants and employees within the functions for which they employed them." (Borghetti Decl. ¶ 18) (Dkt. 77). This provision can only apply where there exists a relationship of subordination between the principal and the agent. (Borghetti Decl. ¶ 19) (Dkt. 77). Such a relation requires that the principal can give orders to the agent and instruct the latter on how to perform the task that was entrusted to him. (Borghetti Decl. ¶ 19) (Dkt. 77). Here, based on Dr. Gartenstein Ross' declaration, Syria did not directly instruct the terrorists to commit an attack in Paris. (Borghetti Decl. ¶ 19) (Dkt. 77). However, any fault committed by Syrian civil servants when performing

their functions, or more generally by any person acting under the orders of Syrian officials, can be attributed to Syria in application of article 1245(2) of the *code civil*. (Borghetti Decl. ¶ 20) (Dkt. 77). Here, the question is whether Syria, either directly or through its agents, committed faults giving rise to liability under article 1240 of the *code civil*. (Borghetti Decl. ¶ 21) (Dkt. 77).

Conditions of Liability Under Article 1240 of the Civil Code

It is undisputed that there are three conditions for the application of article 1240 of the *code civil*: the existence a harm, a fault, and a causal relationship *423 between these two elements. (Borghetti Decl. ¶ 22) (Dkt. 77).

a. Harm

[125] Article 1240 of the *code civil* does not define harm and there are no other provisions in the *code civil* or elsewhere giving any indication as to what types of harm can be compensated, and how damages should be calculated. (Borghetti Decl. ¶ 23) (Dkt. 77). Death and personal injury are types of harm which must be compensated when they have been wrongfully inflicted. (Borghetti Decl. ¶ 23) (Dkt. 77). There is no doubt that Nohemi's murder constitutes a harm. (Borghetti Decl. ¶ 23) (Dkt. 77).

b. Fault

[126] There is no official definition of fault in French law. (Borghetti Decl. ¶ 25) (Dkt. 77). However, a reform bill of civil liability law was published by the French Ministry of Justice, which gives a definition of fault.²¹³ (Borghetti Decl. ¶ 25) (Dkt. 77). This definition is intended and recognized by authors generally as reflecting the notion of fault as it is currently understood in French law, especially by the courts. (Borghetti Decl. ¶ 25) (Dkt. 77). Article 1242 of the bill reads: A violation of a legislative requirement or a failure in the general duty of care or diligence constitutes a fault. (Borghetti Decl. ¶ 25) (Dkt. 77). Fault, in the sense of article 1240 of the *code civil*, can therefore consist in two different types of violations: either a violation of a legislative requirement or a violation of the general duty of care or diligence. (Borghetti Decl. ¶ 26) (Dkt. 77).

1. Violation of a Statutory Duty

[127] In French law, violation of a statutory duty is included within the broad cause of action of article 1240 of the *code civil*. (Borghetti Decl. ¶ 27) (Dkt. 77). The breach of *any* statutory duty is regarded as a fault, regardless of whether it is a civil or criminal duty and regardless of the legislator's or the State's intent when establishing this duty. (Borghetti Decl. ¶ 27) (Dkt. 77). Thus, any violation of a criminal statute automatically constitutes a fault under article 1240 of the *code civil*, but this is also true of any violation of a civil statute. (Borghetti Decl. ¶ 27) (Dkt. 77).

[128] [129] It is not necessary that the statute which has been violated should indicate that its violation will give rise to civil liability, nor that this violation be the result of negligence. (Borghetti Decl. ¶ 28) (Dkt. 77). It is also not necessary that the statute that was violated should have been specifically intended to protect persons in the claimant's situation or to avoid the very type of harm which the claimant suffered. (Borghetti Decl. ¶ 28) (Dkt. 77). The mere fact of violating a statute constitutes a fault, which may be relied on by any person who suffered harm because of this violation. (Borghetti Decl. ¶ 28) (Dkt. 77).

[130] Case-law offers examples of violations of French statutory duty, but the violation of foreign statutory duties or international rules can also constitute a fault under French law. (Borghetti Decl. ¶ 29) (Dkt. 77). For example, in one case, the Paris appellate court ruled that the violation of the US embargo against Iran constituted *424 a fault.²¹⁴ (Borghetti Decl. ¶ 29) (Dkt. 77). Here, any violation of an international law rule, including a United Nations' rule or resolution, committed by Syria or a Syrian agent would thus constitute a fault under French law. (Borghetti Decl. ¶ 30) (Dkt. 77).

2. Violation of the General Duty of Care and Diligence

[131] Under French law there exists a general duty of care whereby everybody must act carefully, so as to avoid causing any type of foreseeable harm to others. (Borghetti Decl. ¶ 31) (Dkt. 77). It is therefore not necessary to establish the existence of a specific duty of care to characterize a fault. (Borghetti Decl. ¶ 31) (Dkt. 77). Rather, any unreasonable conduct is a fault. (Borghetti Decl. ¶ 31) (Dkt. 77). Basically,

it is a fault not to behave as a reasonable person, under any circumstances.²¹⁵ (Borghetti Decl. ¶ 31) (Dkt. 77).

[132] Professor Borghetti opines that there can be no doubt that dealing with a terror organization like ISIS and knowingly supporting such an organization constitutes an unreasonable behavior, and therefore a fault, under French law. (Borghetti Decl. ¶ 32) (Dkt. 77). Also, it is a fault for someone in charge of controlling an activity not to operate this control correctly.²¹⁶ (Borghetti Decl. ¶ 33) (Dkt. 77). In particular, French courts have accepted that mere negligence in border control constitutes a fault that can give rise to the State's liability.²¹⁷ (Borghetti Decl. ¶ 33) (Dkt. 77). Under French law, the fact that Syria or Syrian agents have willingly let ISIS members go through the border, per Dr. Gartenstein-Ross' declaration,²¹⁸ constitutes a fault. (Borghetti Decl. ¶ 33) (Dkt. 77).

c. Causation

[133] French law does not define causation and does not set a clear test for assessing it. (Borghetti Decl. ¶ 34) (Dkt. 77). It also does not make a difference between what some legal systems call factual and legal causation. (Borghetti Decl. ¶ 34) (Dkt. 77). The *Cour de cassation* sometimes suggests that the causation between fault and harm should be direct, but this requirement is not applied consistently. (Borghetti Decl. ¶ 34) (Dkt. 77). In effect, French courts enjoy great discretion in assessing causation and policy considerations play a great role in this assessment.²¹⁹ (Borghetti Decl. ¶ 34) (Dkt. 77).

While there are some cases in which causation was denied on the ground that the relationship between fault and harm was indirect, there are also many cases where French courts, including the *Cour de cassation*, have accepted the existence of a causal relationship between an event and the harm, even though the harm was quite remote from the fault. (Borghetti Decl. ¶ 35) (Dkt. 77). For example, it is now a well-established rule in caselaw that where the victim of a traffic accident must receive a **blood transfusion** and is given contaminated blood, the person liable for *425 the traffic accident is also liable for the harm resulting from the transfusion of contaminated blood.²²⁰ (Borghetti Decl. ¶ 36) (Dkt. 77). Likewise, the *Cour de cassation* has ruled that there was a causal link between the fault of the owner of a dangerous building, who had not taken sufficient measures to forbid access to that building, and the harm suffered by a

teenager while playing in that building.²²¹ (Borghetti Decl. ¶ 36) (Dkt. 77).

The *Cour de cassation* has also accepted that the intervention of a decision by a third party between the fault and the occurrence of harm does not necessarily sever the causal relationship between these two elements. (Borghetti Decl. ¶ 37) (Dkt. 77). In one case, where a man had committed suicide three weeks after having lost his wife in an accident, out of despair, the Court held that the fault of the defendant that had caused the wife's death was also the cause of the husband's suicide.²²² (Borghetti Decl. ¶ 37) (Dkt. 77).

As a rule, the court's opinion on the defendant's moral wrongdoing is likely to have an impact on the assessment of causation: the greater the moral wrongdoing, the more willing a French court will be to accept the existence of causation between that wrongdoing and damage. (Borghetti Decl. ¶ 38) (Dkt. 77). Here, the relationship between the fault of Syria or Syrian agents and the terror attacks in Paris is not an immediate one. (Borghetti Decl. ¶ 39) (Dkt. 77). However, given the discretion French judges have when assessing causation, and given their greater willingness to accept the existence of a causal link when the defendant is guilty of clear moral wrongdoing, given the clear moral wrongdoings of Syria and Syria's agents, per Professor Borghetti, a French judge would likely accept the existence of a causal link between their faults and the death of Nohemi. (Borghetti Decl. ¶ 39) (Dkt. 77).

[134] Under French law, all tortfeasors are jointly and severally liable to the victim, per article 1265(1) of the civil liability reform bill. (Borghetti Decl. ¶ 40) (Dkt. 77). The fact that the harm caused to Nohemi was not caused exclusively by Syria or Syria's agents would not prevent Syria from being fully liable for Nohemi' death, should causation between these faults and her death be accepted. (Borghetti Decl. ¶ 41) (Dkt. 77).

José Hernandez's Claim

a. Standing to Sue

[135] Under French law, stepparents have standing to sue when they suffer losses resulting from their stepchild's death or personal injury. (Borghetti Decl. ¶ 45) (Dkt. 77). There is no doubt that, under French law, José Hernandez has standing

to sue and claim compensation for the losses he suffered due to Nohemi's death. (Borghetti Decl. ¶ 46) (Dkt. 77).

The Court will enter judgments of liability for José Hernandez against the Defendant consistent with the above findings of fact and conclusions of law.

French Damages

[136] [137] In cases of death or personal injury, a distinction should be made between harm, and the losses that flow from it. (Borghetti Decl. ¶ 47) (Dkt. 77). It is *426 normally not the harm itself that gets compensated, but the losses resulting from it, which can be pecuniary or non-pecuniary. (Borghetti Decl. ¶ 47) (Dkt. 77). Under French law that compensable losses can be suffered by the primary victim or by persons sufficiently close to him so as to suffer losses which are direct consequences of the primary victim's harm. (Borghetti Decl. ¶ 47) (Dkt. 77). Persons claiming damages for losses flowing from the harm suffered by someone else are called indirect victims. (Borghetti Decl. ¶ 47) (Dkt. 77).

In 2005, a working group established by the French Ministry of Justice published a classification of the heads of losses that can arise in case of death or bodily injury, known as *nomenclature Dintilhac*.²²³ (Borghetti Decl. ¶ 47) (Dkt. 77). The *nomenclature Dintilhac* enumerates the heads of pecuniary and non-pecuniary losses that may be suffered by the primary victim, as well as those that may be suffered by indirect victims. (Borghetti Decl. ¶ 47) (Dkt. 77). While the *nomenclature* has no official value, it has been widely adopted by French courts, and the *Cour de cassation* even requires lower courts to use it in certain circumstances.²²⁴ (Borghetti Decl. ¶ 47) (Dkt. 77). Courts are free to identify new heads of loss not mentioned by the *nomenclature*. (Borghetti Decl. ¶ 47) (Dkt. 77).

[138] [139] Relatives of the dead primary victim can seek pecuniary losses, including funeral expenses, loss of income and various other costs (such as transportation and housing costs that the indirect victims may have incurred following the primary victim's death). (Borghetti Decl. ¶ 48) (Dkt. 77). Non-pecuniary losses include emotional harm. (Borghetti Decl. ¶¶ 48-49) (Dkt. 77). Emotional harm is intended to capture the moral pain and suffering that the claimant experiences due to the primary victim's death. (Borghetti Decl. ¶ 49) (Dkt. 77). When that death causes more than grief and directly results in an alteration of the claimant's medical condition, for example when the claimant suffers a

depression, that alteration constitutes itself a new personal injury, the consequences of which, both pecuniary and non-pecuniary, must be compensated by the defendant liable for the primary harm. (Borghetti Decl. ¶ 49) (Dkt. 77).

[140] Here, Plaintiffs presented Dr. Strous' declaration and José's declaration regarding the psychological trauma he suffered due Nohemi's death. (Dkt. 82, Ex. DD, 84). José learned Nohemi was murdered by terrorists when her boyfriend, Tim, came into Beatriz's hair salon and asked to speak to José at the back of the hair salon. (Dkt. 84). Tim told José that Nohemi was dead. (Dkt. 84). José was in shock, as Nohemi was like a daughter to him. (Dkt. 84). José took Beatriz from the front of her hair salon and brought her to the back of the salon and told Beatriz that Nohemi had an accident and she needed to prepare for the worst. (Dkt. 84). Tim told Beatriz that Nohemi was dead. (Dkt. 84). Beatriz became hysterical and started hitting José in his chest to relieve her pain. (Dkt. 84). Beatriz threw herself on the ground crying uncontrollably. (Dkt. 84). In *427 the days, weeks, months and years after Nohemi's death, José has supported his wife and suppressed his own emotional anguish from Nohemi's death. (Dkt. 84). When the FBI and other government officials reached out to Beatriz, José managed those matters on her behalf, as well as the media contacts. (Dkt. 84). Beatriz was too distraught to deal with the large number of journalists and José declined media requests. (Dkt. 84). Beatriz simply was unable to manage these tasks relating to Nohemi's death, they are far too painful. (Dkt. 84). To this day, José tries to address any questions, including regarding legal matters, on behalf of Beatriz because she becomes emotional when she has to talk about the loss of Nohemi. (Dkt. 84).

José had a very close relationship with Nohemi as Nohemi was happy that her mother met someone that made her happy. (Dkt. 84). Nohemi would often thank José for caring for her mother. (Dkt. 84). Nohemi often invited José to join her and Beatriz on outings. (Dkt. 84). Just having Nohemi around made Beatriz happy. (Dkt. 84). Nohemi treated José like a father, and this is why it was so painful to lose such a special young lady. (Dkt. 84). Beatriz became a "zombie" for years after Nohemi's murder and has not returned to herself. (Dkt. 84). After Nohemi's death, José had difficulty sleeping for weeks and ate more to calm himself. (Dkt. 82, Ex. D, 84). Therefore, José gained a great deal of weight since the terror attack. (Dkt. 82, Ex. D, 84). Due to his grief, José saw a psychologist for several weeks after Nohemi's death. (Dkt. 82, Ex. D, 84).

Dr. Strous opines that José has persistent complex bereavement disorder with traumatic bereavement and persistent depressive disorder. (Dkt. 82, Ex. D). Dr. Strous expects José's mood and grief issues that affect his functioning to continue to affect him in the long term. (Dkt. 82, Ex. D).

[141] To calculate damages, French law uses the full compensation rule, whereby damages awarded to the claimant must compensate the harm he suffered, without his getting any poorer or richer from it.²²⁵ (Borghetti Decl. ¶ 50) (Dkt. 77). Damages must compensate for the damage in full, and nothing but the damage. (Borghetti Decl. ¶ 50) (Dkt. 77). Therefore, the assessment of damages is an issue of fact, which must be decided by lower courts. (Borghetti Decl. ¶ 52) (Dkt. 77). It cannot be reviewed by the *Cour de cassation*, which only reviews issues of law. (Borghetti Decl. ¶ 52) (Dkt. 77). This means that lower courts have full discretion in assessing the actual losses suffered by the claimant and in setting the amount of damages. (Borghetti Decl. ¶ 52) (Dkt. 77). Only if lower judges openly violate the full compensation rule, for example by awarding explicitly a lump sum instead of measuring the actual loss suffered by the claimant, can their decision be subject to review. (Borghetti Decl. ¶ 52) (Dkt. 77).

French lower courts usually do not disclose the elements they take consider when assessing non-pecuniary losses. (Borghetti Decl. ¶ 53) (Dkt. 77). However, Dr. Borghetti observes that if one looks at the amounts awarded in different cases, the following elements seem to be relevant to the courts when setting damages for emotional suffering:

1. The actual closeness between the deceased and the claimant—This appears to be the main factor taken into account by the courts. It is not *428 cohabitation as such that is decisive, nor the degree of kinship, but the actual impact of the primary victim's death on the life of the claimant. Some authors express this by saying that damages should be proportional to the disruption that the primary victim's death has caused in the claimant's life.²²⁶ It is therefore not just about grief, but about the extent to which the claimant saw his life changed, or even turned upside down, by that death.
2. The circumstances of the primary victim's death—The more tragic and violent the death, the greater the emotional suffering of the relatives is likely to be. The Primary victim's age, though probably not a decisive circumstance as such, may also play a role in this respect

since, as a rule, the younger the victim and the more shocking her death, the greater the damages.

(Borghetti Decl. ¶ 53) (Dkt. 77).

Here, José has clearly suffered emotionally, per Dr. Strous. (Dkt. 82, Ex. D). He had a good relationship with Nohemi and considered her to be like a daughter. (Dkt. 88). Nohemi was a young woman studying abroad in an effort to better herself and her life was abruptly and violently cut short by a terrorist. (Dkt. 85). In *Fields*, 2021 WL 9244135, at * 10-12, 14-15, the Court noted that the governing law in France allows for the assessment of damages using the *Heiser* range. The Court in *Fields* relied upon the legal expert declaration of Henri Daudet who noted that moral damages can be adjusted based on the circumstances of the case. See Dkt. 16-4 in *Fields*. (Dkt. 98, Ex. 12). In *Oveissi*, 768 F. Supp. 2d 16, 24-27, the Court applied the *Heiser* range to a French solatium claim. In light of the violent circumstances of Nohemi's death and her relationship with José, the Court will grant José Hernandez \$2,500,000 in solatium damages.

Turkish Law

Plaintiffs retained Dr. N. Can Isiktac²²⁷ as an expert in Turkish tort law to prepare a declaration ("Isiktac Decl.") regarding the potential claims against Syria by Pnina Greenfield, Yoseff Goldman, Tamar Choresh's estate and Israel Gorenzky. (Dkt. 80).

A. Liability

Turkey is a civil law country that adopted the Swiss Civil Code. (Isiktac Decl. 10) (Dkt. 80). Under Turkish law, the monetary claims related to wrongful death, personal injury and related torts are all codified under Turkish Code of Obligations. (Dkt. 80). Articles related to torts can be found between Articles 49 to 76 and death and personal injury are under Articles 53 and 54. (Isiktac Decl. ¶ 11) (Dkt. 80). Codification related to torts are also supported with Turkish high courts' precedents. (Isiktac Decl. ¶ 11) (Dkt. 80).

The torts are defined under Article 49 of the Turkish Obligations Code ("TOC") as: "person²²⁸, who cause damage and loss to another person by culpable and unlawful action, is obliged to compensate his damage or loss. Even if there is not a legal rule to prohibit the detrimental action, *429 person who deliberately cause damage or loss to another person by an immoral act, is also obliged to compensate this damage or loss." (Isiktac Decl. ¶ 12) (Dkt. 80). The claims to be raised

according to Turkish law can be divided into two categories. (i) The claims to be raised by people that are directly affected from the tort and (ii) the claims of people that were deprived of the support of the victim that lost his life due to the tort. (Isiktac Decl. ¶ 13) (Dkt. 80). For tort claims to be legally acceptable, the rule is "the party who has been damaged is obliged to prove the damage and the fault of the other party who has caused the damage" according to Article 50/1 of the TOC. (Isiktac Decl. ¶ 14) (Dkt. 80).

[142] The judge may reduce the compensation due to (i) the other party's fault or partake in the arising or increase of the damage and/or (ii) if compensation of a damage would put the responsible party in poverty. (Isiktac Decl. ¶ 15) (Dkt. 80). Regarding the latter, since the defendant is a sovereign country poverty reduction is not possible. (Isiktac Decl. ¶ 15) (Dkt. 80). Regarding the fault reduction, in this case, Dr. Isiktac is certain that no elaboration is needed to prove the 100% fault of the person who committed the attack. (Isiktac Decl. ¶ 15) (Dkt. 80). Also, it is obvious that the victims did not partake in the tort. (Isiktac Decl. ¶ 15) (Dkt. 80). Thus, Dr. Isiktac does not see a reason a reduction would be made from the compensation to be calculated under Turkish law. (Isiktac Decl. ¶ 15) (Dkt. 80).

Defendant not being directly the committing party but instead being an alleged sponsor of such hideous action, on the other hand, needs to be analyzed from a torts theory perspective and will be done below. (Isiktac Decl. ¶ 16) (Dkt. 80). Syria's obligation being indirect does not change the fault ratio being 100%. (Isiktac Decl. ¶ 16) (Dkt. 80).

1. Standing

[143] There is no doubt that persons directly affected by the tortious act and (if they are deceased) their successors can sue in Turkey since the tort took place in Turkey.²²⁹ (Isiktac Decl. ¶ 26) (Dkt. 80).

2. Chances of Prevailing in a Turkish Court

The Constitutional Court of Turkey accepts individual applications regarding the right to fair trial, respect for family life, personal liberty, and security etc. (Isiktac Decl. ¶ 32) (Dkt. 80). The Constitutional Court's decisions have a strong tendency to seek effective examination and compensation for cases where there is a breach of right to live.²³⁰ (Isiktac Decl. ¶ 33) (Dkt. 80). In a directly relevant case, a terror attack victim, Cemal Uçar, was severely injured and the vehicle he

was driving was damaged beyond repair by a C-4 explosive planted by a terrorist group called PKK. (Isiktac Decl. ¶ 33) (Dkt. 80). After claiming his damages from first instance courts and latter at appeal he found the court's decision unsatisfying and in breach of his basic rights and liberties and applied to the Constitutional Court as an individual applicant²³¹ for retrial. (Isiktac Decl. ¶ 33) *430 (Dkt. 80). The Constitutional Court's decision established that (i) a victim can make claims in line with the general principles of torts, (ii) can make solatium claims;²³² and (iii) ruled a retrial. (Isiktac Decl. ¶ 33) (Dkt. 80).

Dr. Isiktac opines that the Constitutional Court's precedent demonstrates that claims of injured people and people who are deprived from support of the dead have a strong chance to prevail. (Isiktac Decl. ¶ 34) (Dkt. 80). Regarding the case of claimants who were not directly affected with the attack and have a rather distant relationship with the victim, must prove their deprivation of support and/or emotional damages so that their claims could be accepted. (Isiktac Decl. ¶ 34) (Dkt. 80).

[144] [145] From a Turkish law perspective, the person who committed the attack, Mehmet Öztürk, is responsible. (Isiktac Decl. ¶ 35) (Dkt. 80). As for Syria, the liability of a state is a matter that related to national and international law. (Isiktac Decl. ¶ 35) (Dkt. 80). Under international law, if a sovereign state acts unlawfully against another it shall be held liable.²³³ (Isiktac Decl. ¶ 36) (Dkt. 80). The grounds for such liability could arise from an international agreement or a tort. (Isiktac Decl. ¶ 36) (Dkt. 80). If certain conditions are satisfied, the state where the unlawful act took place or a state whose act transcended its borders and harmed a citizen of another state may be held internationally liable. (Isiktac Decl. ¶ 36) (Dkt. 80). Such liability shall be to compensate for the damages, or in other words civil liability. (Isiktac Decl. ¶ 36) (Dkt. 80).

[146] [147] **Responsibility of states from the terrorist activities:** A state is responsible for the actions of its organs and persons or authorities that are legally bound to it.²³⁴ (Isiktac Decl. ¶ 37) (Dkt. 80). Article 4 of the draft articles on *Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission in 2001 states:

1. **The conduct of any State organ shall be considered an act of that State under international law**, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization

of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Id. Therefore, if a terrorist act is committed by a person who has *de jure* relation with a state, the state will be responsible for that terror act.²³⁵ (Isiktac Decl. ¶ 37) (Dkt. 80). In the Istanbul attack the person *431 that committed the act does not have a *de jure* connection. (Isiktac Decl. ¶ 38) (Dkt. 80). But instead, by accepting the actions and/or through controlling or managing the private persons that committed the act, Syria established a *de facto* connection with the act. (Isiktac Decl. ¶ 38) (Dkt. 80). In this case, the person who committed the act is considered to be acting on behalf of the state, or in other words a *de facto* agent of Syria. (Isiktac Decl. ¶ 38) (Dkt. 80). This concept is explained under Articles 8 and 11 of the *Responsibility of States for Internationally Wrongful Acts* text.

Article 8 is as follows:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Id. And Article 11 is as follows:

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Id. The articles indicate that, if its involvement is proven, Syria should be held responsible for the acts that are committed by private parties that are *de facto* controlled/managed/supported by the state and/or acts that the state acknowledges and adopts the conduct in question as its own. (Isiktac Decl. ¶ 39) (Dkt. 80). A subtle acknowledgement would fulfill this condition. (Isiktac Decl. ¶ 39) (Dkt. 80).

[148] Under international law, there are two liabilities for the sovereign states. (Isiktac Decl. ¶ 40) (Dkt. 80). First is to prevent similar terrible acts to be committed and the second is to compensate for the damages (that shall be a monetary compensation) related to those acts. (Isiktac Decl. ¶ 40) (Dkt. 80). Only the latter is relevant to this case. (Isiktac Decl. ¶ 40) (Dkt. 80). Accepting Dr. Gartenstein-Ross' declaration as fact, then by supporting the terrorist

organization that committed the Istanbul attack, Syria can be held liable according to international law and Turkish law's understanding of it. (Isiktac Decl. ¶ 41) (Dkt. 80).

Immunity from Jurisdiction: Since this case is filed in a U.S. court, Turkish law or the authority of Turkish courts does not need to be analyzed here regarding the immunity of a sovereign state from jurisdiction. (Isiktac Decl. ¶ 42) (Dkt. 80).

The Court will enter judgments of liability for Tamar Choresh's estate, Israel Gorenzky, Yoseff Goldman and Pnina Greenfield against the Defendant consistent with the above findings of fact and conclusions of law.

3. Damages

[149] [150] Under Turkish law the only claimable damages are real damages and generally enrichment via compensation is not accepted under Turkish law. (Isiktac Decl. ¶ 17) (Dkt. 80). Solatium damages may be considered as an exception to that principle, but solatium damages in Turkey are not high, compared to other jurisdictions, especially the U.S. (Isiktac Decl. ¶ 17) (Dkt. 80). The reason for that is Article 50/2 of the TOC, which states “[i]f the measure of the damage cannot be exactly proved, the judge determines the measure of the damage according to equity by considering the normal course of events and precautions taken by the injured party.” (Isiktac Decl. ¶ 17) (Dkt. 80). Due to the wording of the article, (i) the compensation of the real measure of the damage must be decided, (ii) if such determination *432 is not possible, then the judge shall order a compensation by the assessment of the damage considering the equity and precautions taken by the injured party. (Isiktac Decl. ¶ 17) (Dkt. 80). The judge will order compensation that is based on the expected *real damages*. (Isiktac Decl. ¶ 17) (Dkt. 80). Punitive damages are not available under Turkish law. (Isiktac Decl. ¶ 17) (Dkt. 80).

[151] [152] Claims related to death can be made by successors of the deceased and persons deprived from his support. (Isiktac Decl. ¶ 20) (Dkt. 80). According to article 53 of TOC the damages related to death are: (i) “funeral expenses,” (ii) “medical treatment expenses and losses resulting from decline or loss of the work ability,” (if death did not occur immediately) and (iii) “losses of individuals who are deprived of support of dead because of that.” (Isiktac Decl. ¶ 19) (Dkt. 80). Medical expenses and funeral expenses are simpler to calculate, and they are the exact amount, plus interest, of such expense. (Isiktac Decl. ¶ 20) (Dkt. 80). In case of death, the successors cannot make an emotional damages

claim on behalf of deceased person's estate. (Isiktac Decl. ¶ 21) (Dkt. 80). However, if the situation fulfills the conditions required by the law, inheritors or persons that deprived of a deceased person's financial and/or emotional support can make their own emotional damages claims.²³⁷ (Isiktac Decl. ¶ 21) (Dkt. 80).

[153] [154] [155] Claims arising from damages related to personal injury are: (i) medical treatment expenses, (ii) losses of future income, (iii) losses occurred from decline or loss of work ability, and (iv) losses occurred from collapsing of economic future. (Isiktac Decl. ¶ 22) (Dkt. 80). Moreover, the injured may raise emotional damage claims for the pain and suffering that they had to go through. (Isiktac Decl. ¶ 22) (Dkt. 80). Medical treatment expenses are real damages occurred due to medical treatment, which would include anything that is related to medical treatment of the damage from the tortious act. (Isiktac Decl. ¶ 23) (Dkt. 80). The judge may order damages for future medical treatment expenses if the treatment needs to continue. (Isiktac Decl. ¶ 23) (Dkt. 80). All these damages must be provable damages. (Isiktac Decl. ¶ 23) (Dkt. 80).

[156] It is hard to calculate emotional damages. (Isiktac Decl. ¶ 25) (Dkt. 80). The wording of the Article 56 of TOC is “[i]n case of damages to body integrity, the judge may decide an amount of money as an emotional damage, to be paid to injured party by considering circumstances of the situation.” (Isiktac Decl. ¶ 25) (Dkt. 80). The wording seems to give room for the judge's consideration when determining a monetary amount for emotional damages. (Isiktac Decl. ¶ 25) (Dkt. 80). However, the judge must determine a monetary amount for emotional damage claims that would not enrich the claimant but somehow fairly compensates his emotional losses. (Isiktac Decl. ¶ 25) (Dkt. 80).

4. Factors/Laws Used to Determine the Amount of Damages

[157] **Damages That Already Took Place Before an Official Claim is Made:** In case of death, funeral, and related expenses; in case of injury, medical expenses are claimable. (Isiktac Decl. ¶ 44) (Dkt. 80). The claims related to these should be proven by the claimant with a bill, proof of payment or similar document. See Articles 53, 54 and 55 of TOC. (Isiktac Decl. ¶ 44) (Dkt. 80).

*433 [158] **Future Damages of individuals deprived of support of a decedent:** Spouses and infant children are

accepted as persons who are deprived of the support of a decedent. (Isiktac Decl. ¶ 53) (Dkt. 80). Other claimants need to prove their deprivation of the support of the decedent. (Isiktac Decl. ¶ 53) (Dkt. 80). For instance, if the decedent was sending a certain amount of money yearly to his nephew for his college studies the nephew may claim the total money he was expecting to get until his graduation. (Isiktac Decl. ¶ 54) (Dkt. 80).

Intangible Claims (Emotional Damages/Solatium

Damages: Damages related to psychological injury, emotional harm, etc. fall under this category. (Isiktac Decl. ¶ 61) (Dkt. 80). The reference article of the TOC is Article 56.

Article 56. – “In case of damages to body integrity, the judge may decide an amount of money as an emotional damage, to be paid to injured party by considering circumstances of the situation.

In case of major personal injury or death, the judge may rule that a reasonable monetary compensation to be paid as an emotional damage to the acquaintances of the harmed. *Id.* In Dr. Isiktac's opinion, the article allows for the injured and the acquaintances of the injured or the dead to assert emotional damages claims according to Turkish law. (Isiktac Decl. ¶ 62) (Dkt. 80).

[159] The Constitutional Court has found determining a monetary compensation amount for emotional damages claims is a difficult task.²³⁸ (Isiktac Decl. ¶ 63) (Dkt. 80). The mere reason for compensations being monetary is that there is no other reasonable and humane tool other than money that can be used for relief.²³⁹ (Isiktac Decl. ¶ 63) (Dkt. 80). Monetary compensation aims to provide a sort of relief to the harmed person.²⁴⁰ (Isiktac Decl. ¶ 63) (Dkt. 80). Therefore, the judge should consider each claimant's situation and decide how they should be compensated so that their pain could be relieved, at least to a reasonable point. (Isiktac Decl. ¶ 64) (Dkt. 80). This gives large room for judicial discretion. (Isiktac Decl. ¶ 64) (Dkt. 80).

[160] [161] There are some widely accepted standards for determining emotional damages. (Isiktac Decl. ¶ 65) (Dkt. 80). Comparative fault of the claimant is seen as a reason for reduction.²⁴¹ (Isiktac Decl. ¶ 65) (Dkt. 80). The significance of the event²⁴² as well as the status and special condition of each of the claimants²⁴³ must be taken into consideration. (Isiktac Decl. ¶ 65) (Dkt. 80). Here, the victims and claimants

do not have any fault regarding the tortious action. (Isiktac Decl. ¶ 65) (Dkt. 80). There is no doubt that a terror attack that caused such damage is a significant event. (Isiktac Decl. ¶ 65) (Dkt. 80). Thus, there is no reason to deduct or dismiss the emotional damages claims of the claimants. (Isiktac Decl. ¶ 65) (Dkt. 80). Status and special condition of the claimants should be analyzed by the court and emotional damages must be determined accordingly. (Isiktac Decl. ¶ 66) (Dkt. 80).

5. Award Amount

As for the amount of a potential award, Dr. Isiktac discussed in his declaration *434 several Turkish cases filed against the Turkish government for its failure to protect its citizens lives from terror attacks where the Turkish government had no involvement whatsoever. (Isiktac Decl. ¶¶ 67-70) (Dkt. 80). In those cases, Turkey was held responsible due to its negligence. (Isiktac Decl. ¶¶ 67-70) (Dkt. 80). Here, considering the fault of Syria and how the attack took place are accepted criteria for determining an amount of compensation for emotional damages, Dr. Isiktac would expect a much higher compensation to be granted to victims if there was an involvement of Syria in the terror acts. (Isiktac Decl. ¶ 71) (Dkt. 80). Furthermore, there is a widely used precedent where the courts quote that the nature of emotional damages requires the consideration of the permanent injuries and health problems when determining the monetary compensation²⁴⁴. (Isiktac Decl. ¶ 72) (Dkt. 80). If the Court decides the Syrian government was not only negligent but was involved in the Istanbul terror attack, the compensation would and should be much higher. (Isiktac Decl. ¶ 73) (Dkt. 80).

Application of Turkish Law to Plaintiffs' Claims

[162] **Pnina Greenfield:** Pnina is Ron's wife, and she was injured in the Istanbul attack. Pnina's solatium and emotional distress, mental anguish and physical pain and suffering claims do fall under emotional damages claims under Turkish law. (Isiktac Decl. ¶ 76) (Dkt. 80). Pnina, if applicable, also has claims for loss of income and medical expenses for her injuries but she must prove such damages. (Isiktac Decl. ¶ 76) (Dkt. 80). Since, Pnina did not take part in the attack and the attack is a significant event for the injured as well as society the emotional damages should be determined by the Court at a higher rate compared to other torts. (Isiktac Decl. ¶ 76) (Dkt. 80).

Plaintiffs presented the reports of Dr. Friedman and Dr. Strous, as well as Pnina's declaration regarding the trauma she

suffered as a result of the terror attack. (Dkt. 79, Ex. D, 82, Ex. R, 107). On July 11, 2022, Dr. Friedman evaluated Pnina via telemedicine. (Dkt. 79 Ex. D). Pnina was on a food tour with Ron and her sister in Istanbul walking through the streets in March 2016. (Dkt. 79, Ex. D). She was walking slightly ahead of the group, walking backwards so that she was able to take photos of the group. (Dkt. 107). There was a large explosion. (Dkt. 107). Pnina heard a whistle, felt “little stones and wind near” her foot and then heard a boom. (Dkt. 79, Ex. D, 107). She felt a hot sensation in her left foot. (Dkt. 79, Ex. D, 107). Pnina went to a nearby small mall and found Ron there. (Dkt. 79, Ex. D, 107).

Pnina had shrapnel embedded in her left foot. (Dkt. 79, Ex. D, 107). Specifically, the head of a screw was lodged in her foot—the entry was in the middle of the foot and ended near the small toe. (Dkt. 79, Ex. D, 107). Pnina was taken by ambulance to a hospital where the wound was irrigated. (Dkt. 79, Ex. D, 107). She was transferred back to Israel by an Israeli government plane. (Dkt. 107). She went from the airport to Sheba Medical Center at Tel Ha'Shomer, near Tel Aviv. (Dkt. 79, Ex. D, 107). Pnina was hospitalized for a week during which the shrapnel was removed. (Dkt. 79, Ex. D, 107). A vacuum assisted closure was used for wound healing, and she used it for a number of months. (Dkt. 79, Ex. D, 107). She received physical therapy at least twice a week for 3 to 4 months. (Dkt. 79, Ex. D, 107).

***435** Pnina reported to Dr. Friedman that she walks with a limp of the left foot and is unable to run due to the limp. (Dkt. 79, Ex. D). Sometimes she gets swelling in the left foot. (Dkt. 79, Ex. D). Pnina experiences intermittent numbness in both legs for a few seconds. (Dkt. 79, Ex. D). Upon examination, when trying to stand one legged on the left, Pnina was unable to do so. (Dkt. 79, Ex. D). Her balance was poor and she was unable to maintain standing on one leg. (Dkt. 79, Ex. D). Pnina has a linear scar along the lateral left foot that she said is 2-3 cm. (Dkt. 79, Ex. D). Based on his exam, Dr. Friedman's diagnoses of Pnina is post shrapnel injury to the left foot, gait abnormality, balance deficit and scar—left foot. (Dkt. 79, Ex. D). Dr. Friedman's opinion is that Pnina's symptoms are causally related to the terror attack. (Dkt. 79, Ex. D). Due to the time since the injury and in light of Pnina's age, no significant improvement can be expected in the future. (Dkt. 79, Ex. D).

Pnina told Dr. Strous that she experienced a “strong blast” close to her and that she was thrown to the ground. (Dkt. 82, Ex. R). Pnina dealt with the trauma at the scene by having an

“out of body experience.” (Dkt. 82, Ex. R, 107). Pnina saw dead members of her tour group and pieces of bones and body parts on the ground. (Dkt. 82, Ex. R, 107). An ambulance took her and Ron to the hospital and when they arrived at the hospital, Pnina noticed a pool of her blood on the ambulance's floor. (Dkt. 82, Ex. R, 107).

Pnina and Ron were initially in wheelchairs and they both were in pain. (Dkt. 82, Ex. R, 107). Over time, Pnina became more irritable, and she lost all patience. (Dkt. 82, Ex. R, 107). This affected her relationship with Ron, her family, and friends. (Dkt. 82, Ex. R, 107). Before the attack they both had active lives. (Dkt. 82, Ex. R, 107). After the attack, they were in their apartment together 24 hours a day and this became a difficult and traumatic time for them. (Dkt. 82, Ex. R, 107). After the attack, Pnina experienced post-traumatic symptoms, including avoidance of crowds and speaking about the trauma, hypervigilance in public places, nightmares, hypersensitivity to loud noises and physiological responses, including palpitations and stress, when reminded of the attack. (Dkt. 82, Ex. R). Pnina also withdrew socially from family and friends after the attack. (Dkt. 82, Ex. R). Pnina treated with a psychiatrist, and she was prescribed medication for her mental state. (Dkt. 82, Ex. R). Pnina also received psychotherapy for several months after the attack. (Dkt. 82, Ex. R). Pnina finds less enjoyment in life than she did before the attack. (Dkt. 82, Ex. R).

Dr. Strous opines that Pnina suffers from PTSD and [major depressive disorder](#), single episode, in partial remission. (Dkt. 82, Ex. R). Despite the treatment Pnina has received and the years that have passed, Dr. Strous expects Pnina's mood and anxiety issues that affect various areas of her functioning to continue to affect her for a long time. (Dkt. 82, Ex. R).

In light of Pnina's permanent physical injuries and severe psychological injuries due to the terror attack and given the lack of fault on Pnina's part for the attack, and to maintain consistency of awards in such cases amongst family members, per [Heiser](#) and [Wultz](#), the Court will award Pnina Greenfield \$5,000,000 in compensatory damages and \$4,000,000 in solatium damages.

[163] Yoseff Goldman: Yoseff is Nitzhia and Abvraham's son. He has a claim for deprivation of support and for emotional damages suffered due to Abvraham's death in the Istanbul terror attack. (Isiktac Decl. ¶ 77) (Dkt. 80). He must prove the financial and emotional support of Abvraham

*436 to his life since he is over eighteen years old. (Isiktac Decl. ¶ 78) (Dkt. 80).

Plaintiffs presented Dr. Strous' report and Yoseff's declaration regarding the psychological trauma he suffered as a result of the murder of his father and the injuries his mother sustained in the attack. (Dkt. 82, Ex. Z, 114). When Yoseff learned of his father's murder, he was in shock and began to cry, but he wanted to write his father's eulogy right away to honor his father and keep his mind from falling apart, especially since Yoseff was diagnosed with **bipolar disorder** at age 15. (Dkt. 82, Ex. Z, 114). Yoseff's father was his best friend and his emotional rock. (Dkt. 82, Ex. Z, 114). Abvraham took care of Yoseff's rent and financial issues. (Dkt. 82, Ex. Z, 114). Yoseff was overcome with the thought of having to live without his father. (Dkt. 82, Ex. Z, 114). The sudden death of his father forced Yoseff to become more independent, but he still struggles. (Dkt. 82, Ex. Z, 114). Yoseff returned to work for the last few days of *shiva* so he could distract himself from the loss with busy work. (Dkt. 82, Ex. Z, 114). Yoseff decided to throw himself into his work for a year after his father's death until exhaustion. (Dkt. 82, Ex. Z, 114). Yoseff then met with his case worker and asked for a different type of work, assisting someone else in need, in an effort to try and help him cope with his father's death. (Dkt. 82, Ex. Z, 114). Despite being an assistant for the elderly, the pain Yoseff experiences due to the loss of his father has not lessened. (Dkt. 82, Ex. Z, 114).

Over the years since his father's death, Yoseff has withdrawn from his friends. (Dkt. 82, Ex. Z, 114). Yoseff has a recurring dream of sitting with his father at a restaurant, hugging his father and his father going out to sea after telling Yoseff that he loves him. (Dkt. 82, Ex. Z, 114). When Yoseff has a life decision to make or needs advice, he often thinks about what his father would tell him. (Dkt. 82, Ex. Z, 114). Because Yoseff struggles with his grief from losing his father, Yoseff has received **grief counseling** with therapists. (Dkt. 82, Ex. Z, 114).

Dr. Strous opines that Yoseff suffers from persistent complex bereavement disorder with traumatic bereavement and persistent **depressive disorder**; moderate severity, late onset, with pure dysthymic syndrome due to his father's murder. (Dkt. 82, Ex. Z). Dr. Strous expects Yoseff's anxiety, mood, and complicated grief issues affecting many areas of Yoseff's functioning to continue to affect him for a long time. (Dkt. 82, Ex. Z).

Dr. Strous' report demonstrates Yoseff's special vulnerable condition and his connection with and need for his father. (Dkt. 82, Ex. Z). The worsening of his mental and physical condition and all the changes in his life due to losing his father's emotional support should be considered while determining Yoseff's claims for deprivation of support. (Dkt. 82, Ex. Z). Additionally, Yoseff relied upon his father financially. (Dkt. 82, Ex. Z, 114). Accordingly, in light of the fact that Yoseff's father was his emotional rock and provided financial support to Yoseff, the Court will depart upward from the *Heiser* baseline, which the Court is utilizing as a reference to maintain consistent in award amounts among family members, and award Yoseff Goldman \$6,000,000 in solatium damages.

[164] [165] **Israel Gorenzky:** Israel is Nitzhia's brother. Since Nitzhia survived the terror attack, Israel can only make emotional damages claims. (Isiktac Decl. ¶ 80) (Dkt. 80). Israel needs to prove his special connection with Nitzhia and Abvraham. (Isiktac Decl. ¶ 80) (Dkt. 80).

Plaintiffs presented Dr. Strous' report and Israel's declaration regarding the psychological *437 trauma he suffered due to the murder of Abvraham and the injuries Nitzhia sustained in the terror attack. (Dkt. 82, Ex. CC, 113). On March 19, 2016, Israel heard on the news that there had been an attack in Istanbul. (Dkt. 82, Ex. CC, 113). He knew that Nitzhia and Abvraham were in Istanbul so he called Nitzhia. (Dkt. 82, Ex. CC, 113). Nitzhia answered the call in a hysterical state and told Israel that she had been injured and that her husband had been killed. (Dkt. 82, Ex. CC, 113). Israel was in shock and fell to the floor. (Dkt. 82, Ex. CC, 113). Nitzhia and Abvraham had a special relationship and everyone in the family loved Abvraham. (Dkt. 82, Ex. CC, 113). Abvraham was the strong one in the family and the tragic nature of the sudden loss was huge. (Dkt. 82, Ex. CC, 113).

Israel met Nitzhia on her arrival from Turkey at the hospital. (Dkt. 82, Ex. CC, 113). Israel tried to support Nitzhia while keeping his own anxiety in check which was "boiling up inside him." (Dkt. 82, Ex. CC, 113). The weeks and months, which became years, after the loss became a difficult time for Israel. (Dkt. 82, Ex. CC, 113). Israel was very close to Abvraham and they used to spend a lot of time together. (Dkt. 82, Ex. CC, 113). Their families were very close with each other. (Dkt. 82, Ex. CC, 113). Abvraham was like a brother. (Dkt. CC, Ex. CC, 113). They respected each other a lot and did so much together, including close business interactions. (Dkt. 82, Ex. CC, 113).

The shock of Nitzhia being injured and becoming initially helpless and so reliant on others, as well as the sudden loss of Abvraham, led Israel to experience a “long chronic period of low mood, irritability and hypersensitivity.” (Dkt. 82, Ex. CC, 113). Israel became an extreme “worrier”, both regarding Nitzhia and his own family. (Dkt. 82, Ex. CC, 113). Israel used to visit Nitzhia every day for months after the attack. (Dkt. 82, Ex. CC, 113). Israel used to babysit Nitzhia’s grandchildren and go with her to follow-up medical appointments. (Dkt. 82, Ex. CC, 113).

After the attack, Israel developed anxiety which became chronic over time. (Dkt. 82, Ex. CC, 113). This together with a chronic low mood lasted from the attack until now. (Dkt. 82, Ex. CC, 113). In mid-2019, Israel had a sudden neurological event in which he lost consciousness and was diagnosed with a CVA (cerebrovascular event). (Dkt. 82, Ex. CC, 113). Israel believes that the CVA that he had was as a result of the terror attack since he was so stressed and anxious. (Dkt. 82, Ex. CC, 113). The CVA affected him in several ways including his memory and mobility. (Dkt. 82, Ex. CC, 113).

Due to his depression, Israel was referred to a psychiatrist and took antidepressant medication for a year. (Dkt. 82, Ex. CC, 113). The medication did not help much, so Israel stopped taking it. (Dkt. 82, Ex. CC, 113). Because Israel was depressed after the attack, he had no interest in friendships anymore so he distanced himself from his friends. (Dkt. 82, Ex. CC, 113). Israel experienced PTSD symptoms post attack, including nightmares, avoidance of Turkey, dreams about Abvraham, refusal to swim in the sea anymore as he did that with Abvraham and tension when speaking about the attack and loss, along with stress. (Dkt. 82, Ex. CC). The family has never been the same since the attack and even at family gatherings the loss of Abvraham is felt. (Dkt. 82, Ex. CC, 113).

Dr. Strous opines that Israel suffers from persistent depressive disorder, moderate severity, late onset, with pure dysthymic syndrome and persistent complex bereavement disorder with traumatic bereavement. (Dkt. 82, Ex. CC). The court will rely upon *Heiser* to maintain consistent *438 in awards among family members but depart upward from the *Heiser* baseline due to Israel's severe and continued psychological trauma and award Israel Gorenzky \$3,000,000 in solatium damages.

[166] Tamar Choresh: Tamar was Nitzhia's sister and she had a claim for emotional damages. (Isiktac Decl. ¶ 80) (Dkt.

80). Since Tamar has passed away, her son, Alon Horesh, has presented a declaration detailing the negative impact the terror attack had on his mother. (Dkt. 109). Alon and Nitzhia both spoke with Dr. Strous about the negative impact of the terror attack on Tamar and based on that conversation, as well as a review of Tamar's pertinent medical records, Dr. Strous issued a report regarding the psychological trauma Tamar experienced due to Abvraham's death and the serious injuries Nitzhia sustained in the attack. (Dkt. 82, Ex. DD).

Tamar grew up very close to her younger sister Nitzhia. (Dkt. 82, Ex. DD, 109). Tamar was for an extended period of time like a mother to Nitzhia. (Dkt. 82, Ex. DD, 109). They both married men with the same name. (Dkt. 82, Ex. DD, 109). Their families were very close over the years. (Dkt. 82, Ex. DD, 109). They would spend almost every weekend together with the weekly highlight of their interaction occurring on Friday nights to which everyone would look forward. (Dkt. 82, Ex. DD, 109). Nitzhia's husband, Abvraham was dynamic and charismatic. (Dkt. 82, Ex. DD, 109). Abvraham was very close to Tamar and her husband. (Dkt. 82, Ex. DD, 109). Abvraham was the person who kept everyone together and was the go-to person\ if anyone needed any help or advice in any matter. (Dkt. 82, Ex. DD, 109). When Tamar's husband died, Nitzhia and Abvraham became even closer to Tamar and they would spend hours and hours together. (Dkt. 82, Ex. DD, 109).

Alon told Dr. Strous that while his mother experienced depression after his father died, she was able to function and find happiness in spending time with family, exercising and sewing. (Dkt. 82, Ex. DD, 109). After Tamar became a widow, Abvraham and Nitzhia became Tamar's main support system. (Dkt. 82, Ex. DD, 109). Abvraham would take care of Tamar and be the principal source of advice and direction after her husband died. (Dkt. 82, Ex. DD, 109). Alon recalls his mother was against Nitzhia and Abvraham's trip to Turkey. (Dkt. 82, Ex. DD, 109). When his mother learned about the attack, she immediately called Nitzhia and learned Nitzhia was still lying on the ground at the scene of the attack. (Dkt. 82, Ex. DD, 109). Alon recalls his mother and Nitzhia were hysterical. (Dkt. 82, Ex. DD, 109). Alon's mother was devastated upon learning of Abvraham's death. (Dkt. 82, Ex. DD, 109). Alon remembers that his mother continued to worry about Nitzhia's wellbeing while she was in Turkey. (Dkt. 82, Ex. DD, 109). Tamar tried to give Nitzhia all the support and help that Nitzhia needed, thus turning the tables on the previous help and support that she had received from Nitzhia and Abvraham. (Dkt. 82, Ex. DD, 109).

Before the attack, Tamar was highly active, happy, and healthy, despite losing her husband. (Dkt. 82, Ex. DD, 109). After the attack, Tamar became depressed. (Dkt. 82, Ex. DD, 109). Long-term, Alon's mother was deeply affected and tormented by the tragedy. (Dkt. 82, Ex. DD, 109). Tamar's depression was severe and became treatment resistant. (Dkt. 82, Ex. DD, 109). Tamar began meeting with a psychiatrist and a psychologist. (Dkt. 82, Ex. DD, 109). Alon's mother had never been in such a severely depressed state ever in her life. (Dkt. 82, Ex. DD, 109). Alon noted that after the attack, his mother lost interest in social activities, stopped exercising and she *439 was not sleeping so she started taking sleeping medication. (Dkt. 82, Ex. DD, 109). Alon's mother's appetite was also drastically affected and she lost a great deal of weight. (Dkt. 82, Ex. DD, 109). She stopped caring about her health. (Dkt. 82, Ex. DD, 109). Alon's mother remained at home, withdrawn, sad and tense. (Dkt. 82, Ex. DD, 109). In the case of any family event or celebration, Alon's mother had to be dragged along since she became resistant to participating in any activity outside her home. (Dkt. 82, Ex. DD, 109). Alon's mother's depression became so extreme that she would even express suicidal ideation. (Dkt. 82, Ex. DD, 109). In the last year of her life, Alon's mother expressed to him that she just wanted to go to heaven to be with his father. (Dkt. 82, Ex. DD, 109). Alon's mother's depression brought her to a place where her body failed her. (Dkt. 82, Ex. DD, 109). While his mother died from **heart failure**, Alon knows that this was all connected in some manner to her increasing depression since the attack. (Dkt. 82, Ex. DD, 109).

Nitzhia told Dr. Strous that Tamar was very much affected by the terror attack. (Dkt. 82, Ex. DD). Tamar gradually slid into a deep depression from which she never was able to recover. (Dkt. 82, Ex. DD, 116). After Nitzhia returned from Turkey, Tamar would visit Nitzhia daily in the hospital and bring food for her. (Dkt. 82, Ex. DD, 116). This was not easy for Tamar since she had a long bus ride she had to take to get to the hospital. (Dkt. 82, Ex. DD, 116). Tamar would help Nitzhia with all her needs in the hospital and feed her. (Dkt. 82, Ex. DD, 116). Tamar would also try and comfort Nitzhia even though Nitzhia could see how devastated Tamar was from the loss of Abvraham and from seeing how much Nitzhia was affected physically with her injuries. (Dkt. 82, Ex. DD, 116). Even after Nitzhia returned home, Tamar continued to visit her almost every day. (Dkt. 82, Ex. DD, 116).

Nitzhia witnessed how Tamar became increasingly depressed. (Dkt. 82, Ex. DD, 116). While Tamar was affected by the

loss of her own husband ten years prior to the attack and was somewhat down for some time as a result, nothing came close to how she reacted after the sudden loss of Abvraham in a terror attack. (Dkt. 82, Ex. DD, 116). Tamar loved Abvraham very much and they were all very close. (Dkt. 82, Ex. DD, 116). Abvraham was like the father of the family and his sudden death was traumatic to Tamar. (Dkt. 82, Ex. DD, 116). Nitzhia stated that Tamar's low mood affected her physically as well. (Dkt. 82, Ex. DD, 116). After the attack, Tamar gave up so much in her life, including caring for herself physically, sewing, exercising and social activities. (Dkt. 82, Ex. DD, 116). Tamar weakened and declined to the deteriorated physical state she was in at the end of her life. (Dkt. 82, Ex. DD, 116). Nitzhia feels that Tamar just gave up. (Dkt. 82, Ex. DD, 116). This was all a marked change from the dynamic, caring, extroverted, outgoing and happy person Tamar used to be before the attack. (Dkt. 82, Ex. DD, 116).

Dr. Strous in his report summarizes Tamar's medical records that span several years and reveal a diagnosis of anxiety and depression and list various medications for depression with a poor response to the anti-depressants, as well as a prescription to help Tamar sleep. (Dkt. 82, Ex. DD). Those medical notes document the terror attack that injured Nitzhia and killed Abvraham and noted that a psychiatrist was treating Tamar. (Dkt. 82, Ex. DD). The medical notes document Tamar's thoughts about death, low motivation, and her withdrawal from society. (Dkt. 82, Ex. DD).

According to medical notes, Tamar had been suffering from depression prior to *440 the attack and carried a diagnosis of "**Depressive Disorder**" dated 03/07/2008. (Dkt. 82, Ex. DD). This diagnosis was updated again on 23/10/2015 to "Anxiety and Depression." (Dkt. 82, Ex. DD). It thus appears, per Dr. Strous, that Tamar was suffering from depression prior to the attack that was treated with medication. (Dkt. 82, Ex. DD). However, the depression did not interfere with Tamar's function, and she continued to participate and function in all activities. (Dkt. 82, Ex. DD). However, after the attack, per Dr. Strous, Tamar was markedly affected and her depression worsened. (Dkt. 82, Ex. DD). It appears that Tamar "fell apart" and her function deteriorated significantly. (Dkt. 82, Ex. DD). Attempts to treat Tamar failed and she tried several different medications without success. (Dkt. 82, Ex. DD). Tamar died from **heart failure** accompanied by deep sadness and depression. (Dkt. 82, Ex. DD). Tamar was never able to find any relief from her depression and she spent her final days suffering from a deep depression. (Dkt. 82, Ex. DD).

The Court will use *Heiser* as a reference in determining the amount of damages to award Tamar Choresh's estate and will depart upward from the baseline award for several reasons. Abvraham was very close to Tamar and Tamar relied heavily on him after her own husband died. In fact, her sister Nitzhia and Abvraham before their trip to Istanbul spent a lot of time with Tamar, especially after her husband passed away. Due to their close relationship, Abvraham's death caused Tamar to spiral into a deep depression from which she never recovered at the time of her death, along with the fact that Abvraham and Nitzhia were Tamar's stability after the death of her own husband and that stability was shattered with the terror attack that killed Abvraham and severely injured her sister Nitzhia. Based on the record, the Court will award Tamar Choresh's estate \$3,000,000 in solatium damages.

CONCLUSION

Erez Orbach was murdered by a terrorist that used a truck as a weapon. Erez was only twenty years old when his life was cut short unexpectedly. His parents and siblings were devastated when they learned of his murder. Erez's family tries its best to move forward but they will never get over his death. Eytan Rund was also a victim of the Jerusalem attack. While Eytan recovered from his physical injuries sustained in the terror attack, he continues to struggle with his emotional injuries from the attack. Eytan, his wife and their children continue to struggle as a family to this day.

Abvraham and Nitzhia Goldman were on a vacation in Turkey when a terrorist blew himself up right next to their tour group. While Nitzhia sustained serious permanent physical injuries in the bombing, she witnessed her husband die. The death of Abvraham was a tragic event for which money can never compensate his family. Abvraham's murder forever changed the family with severe and long-lasting effects, and the resultant emotional trauma can also never be fully compensated. Ron and Pnina Greenfield survived the Istanbul suicide bombing but sustained physical and emotional injuries from which they still struggle to overcome. Their children have emotional scars from the attack and its aftermath as well.

Footnotes

- 1** This unusual spelling is, nevertheless, the spelling of decedent's name that appears on his legal documents.
- 2** The contents of U.S. government records, reports and statements are admissible to prove facts in dispute under **F.R.E. 803(8)** which has a hearsay rule exception for public documents containing factual finding 'unless the sources of

The death of Nohemi Gonzalez in Paris while studying abroad shattered her family. Nohemi was a kind and hardworking young woman with a bright future that was tragically and abruptly cut short. Nohemi's family was immensely proud of her and they very much looked forward to seeing her fulfill her dreams.

***441** The death of Alexander Pinczowski at the Brussels airport devastated Cameron. Cameron and Alexander had a loving marriage that was abruptly cut short. James and Helen provided the love and support Cameron needed in the days, weeks, months, and years that have followed Alexander's murder, but seeing Cameron emotionally tortured by Alexander's death has taken its emotional toll on James and Helen.

In light of the entire record, the Court finds that Syria provided material support to the ISIS and facilitated the murder of Alexander Pinczowski, Abvraham Goldman, Erez Orbach and Nohemi Gonzalez and facilitated the infliction of bodily injuries upon Ron Greenfield, Pnina Greenfield, Eytan Rund and Nitzhia Goldman. Damages will be awarded in accordance with these findings.

When a state such as Syria chooses to use terror as a policy tool that state forfeits its sovereign immunity and deserves unadorned condemnation. Barbaric acts like those alleged in this action have no place in civilized society and represent a moral depravity that knows no bounds. In stark contrast to the terrorist thugs and their Syrian sponsors stand the courageous Plaintiffs in this action, who have resolved to fight injustice with whatever tools are at their disposal, and their patient determination in this case is a credit to both them and to the memory of their decedents. This Court hopes that the Plaintiffs may take some measure of solace in this Court's final judgment.

All Citations

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information or other circumstances indicate lack of trustworthiness.' " *Owens v. Republic of Sudan*, 864 F.3d 751, 792-93 (D.C. Cir. 2017). "[P]ublic records or reports, by virtue of their being based on legal duty and authority, contain sufficient circumstantial guarantees of trustworthiness to justify their use at trial." *U.S. v. Am. Tel. & Tel. Co.*, 498 F. Supp. 353, 360 (D.D.C. 1980) (citing *Melville v. American Home Assurance Co.*, 443 F. Supp. 1064 (E.D. Pa. 1977)) (rev'd on other grounds, 584 F.2d 1306 (3d Cir. 1978)). Rule 803(8) also includes public statements issued by government agencies to be admissible. See, e.g., *Washington-El v. Beard*, 2013 WL 1314528, at * 10 (W.D. Pa. Feb. 26, 2013). The Ex. being relied upon are admissible under the public records exception to the hearsay rule. See, e.g., *Fritz v. Islamic Republic of Iran*, 320 F. Supp.3d 48, 59 n.3 (D.D.C. 2018); *Karcher v. Islamic Republic of Iran*, 396 F. Supp. 3d 12, 16 (D.D.C. 2019).

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- 174 See the Israel Police Activity Report, dated January 9, 2017, that lists the material that the cyber unit of the police downloaded from al-Qanbar's Facebook profile. The Police downloaded Facebook profile contents, as well as a friends list and six videos that the terrorist had uploaded to his Facebook profile.
- 175 Statement to the police of Muhammad al-Qanbar, on January 8, 2017.
- 176 The terrorist's Facebook pages reveals that he followed the events in the territories in which ISIS was fighting. According to the statement to the police of Hamza al-Qanbar, on January 22, 2017, a relative of the terrorist by the name of Khalid Ibrahim al-Qanbar, who resided in the U.S. and who visited Jabl al-Mukabbir in 2015 (staying there for over one and a half months) joined the forces in Syria that supported ISIS.
- 177 On the issue of the Islamic State's use of these symbols, see the Memri Research Institute reference: "The songs ... of the Islamic State (hereinafter 'ISIS') are an important tool for conveying the narrative and the messages of the organization [1]. These songs include praise for ISIS fighters, who are dubbed "lions" or "horsemen," as well as expressions of pride and joy over the establishment of the Islamic caliphate that stands up against all its enemies with pride and power."<http://www.memri.org.il/cgi-webaxy/item?4076> (last accessed May 25, 2023).
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- 179 The terrorist, Nahs'at Milham, was killed on January 8, 2016, one year before the attack at the Armon Hanatziv Promenade. Selection of anniversary dates, that commemorate terrorists who executed terror acts, or organization leaders who were killed or eliminated, and anniversary dates that mark symbolically significant events or the founding of organizations, is a common practice among terrorists affiliated with established terror organizations.
- 180 <https://tinyurl.com/3ynd2sh7> (last accessed May 25, 2023); <https://www.cnn.com/2017/01/08/middleeast/jerusalem-vehicle-attack/index.html> (last accessed May 25, 2023).
- This statement of the Israeli Prime Minister was later softened, and he was quoted as saying that the terrorist was an ISIS supporter.
- 181 <https://web.archive.org/web/20171203140613/http://www.onlinejihadexposed.com/2017/> (last accessed May 30, 2023).
- 182 See above: <http://www.memri.org.il/cgi-webaxy/item?3989> (last accessed May 25, 2023).
- 183 The Court finds that Spitzen is a qualified expert in terrorism, including with respect to ISIS and its precursors and the terror attack in Jerusalem at issue in this case. Spitzen has qualified as an expert in other terrorism cases. See *Force*, 464 F. Supp. 3d 323, and *Fraenkel*, 248 F. Supp. 3d 21.

- 184 See also *Hill v. Republic of Iraq*, 328 F.3d 680, 684 (D.C. Cir. 2003) (holding an FSIA default winner must prove damages like any other default winner).
- 185 Under the FSIA, a U.S. national is defined as “a citizen of the United States.” See 28 U.S.C. § 1605A(h)(5) (citing 8 U.S.C. § 1101(a)(22)).
- 186 The caption in this case inadvertently omits Anne Cameron Cain Baarbé’s first name. Plaintiffs respectfully request that the caption be corrected, and that any judgment be entered herein include Anne Cameron Cain.
- 187 See *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 108 (D.D.C. 2006) (finding that insofar as the Sudan “affirmatively allowed and/or encouraged al Qaeda and Hezbollah to operate their terrorist enterprises within its borders,” it provided a safe haven).
- 188 In cases regarding the state-sponsored terrorism exception to the FSIA such as this one, courts rely extensively on expert testimony. See, e.g., *Wachsmann*, 537 F. Supp. 2d at 90; *Valore v. Islamic Republic of Iran*, 478 F. Supp. 2d 101, 105 (D.D.C. 2007).
- 189 The Court finds Mr. Soudry is qualified to be an expert in forensic accounting. Mr. Soudry has served as an expert in forensic accounting in similar cases. See *Ben-Yishai v. The Syrian Arab Republic*, 18-cv-3150 (D.D.C. Nov. 25, 2022).
- 190 Courts have awarded solatium damages to younger children who experience long term effects of the loss of a family member. See *Bathian v. Islamic Republic of Iran*, 2020 U.S. Dist. LEXIS 72513, at *17-18 (D.D.C. 2020) (awarding solatium damages to a minor child who was eleven months old at the time of her father’s death because the minor child grew up in a family experiencing extreme grief); *Amidus v. Republic of Sudan*, 61 F. Supp. 3d 42, 51 (D.D.C. 2014) (awarding a two-year-old of an injured victim the same amount of solatium damages as her two older siblings).
- 191 *Shiva* is the traditional Jewish mourning period when friends and relatives comfort the bereaved.
- 192 The Court finds Dr. Jafferli is a qualified expert in his field and that his expert testimony is relevant to the issue in this case.
- 193 See for example: P. Van Ommeslaghe, *Traité de droit civil belge*, t. II, Les obligations, Bruxelles, Bruylant, 2013, p. 1167, n 800; Cass., 6 December 2013, *Pas.*, 2013, n 661, p. 2457; Cass., 5 June 2008, *Pas.*, 2008, n 350, p. 1425; Cass., 14 December 2006, *Pas.*, 2006, n 650, p. 2667; Cass., 12 October 2005, *Pas.*, 2005, n 507, p. 1913; Cass., 1^{er} avril 2004, *Pas.*, 2004, n 174, p. 527.
- 194 P. Van Ommeslaghe, *Traité de droit civil belge*, t. II, Les obligations, Bruxelles, Bruylant, 2013, pp. 1219 sqq., n 830; on the breach of a rule that mandates or prevents a behavior, see for instance: Cass., 9 February 2017, *Pas.*, 2017, n 97, p. 337; Cass., 16 May 2011, *Pas.*, 2011, n 320, p. 1139; on the general duty of care, see for instance: Cass., 5 June 2003, *Pas.*, 2003, n 337, p. 1125; Cass., 21 March 1986, *Pas.*, I, 1986, n 458, p. 911.
- 195 See for example: E. Montero et B. Goffaux, «La référence au paradigme du “bon père de famille” en responsabilité extracontractuelle», *For. Ass.*, 2014, pp. 2 sqq.
- 196 J.-L. Fagnart, «Principe de précaution et responsabilité civile», *Bull. Ass.*, 2011, p. 124, n 17; R. O. Dalcq, *Traité de la responsabilité civile*, t. I: *Les causes de responsabilité*, Nouvelles, Droit civil, t. V, vol. I, Bruxelles, Bruylant, 1959, p. 167, n 312, pp. 172 sqq., n^{os} 335 sqq; Cass., 15 January 1953, *Pas.*, 1953, I, p. 331.
- 197 P. Van Ommeslaghe, *Traité de droit civil belge*, t. II: *Les obligations*, Bruxelles, Bruylant, 2013, pp. 1253 sqq., nos 854 sqq; see for instance: Cass., 9 February 2017, *Pas.*, 2017, n 98, p. 349; Cass., 19 March 2010, *Pas.*, 2010, n 200, p. 892; Cass., 21 December 2007, n 661, p. 2491; Cass., 27 March 2003, *Pas.*, 2003, n 211, p. 673; Cass., 8 November 2002, *Pas.*, 2002, n 591, p. 2136; Cass., 21 December 2001, *Pas.*, 2001, n 719, p. 2204. Based on Dr. Gartenstein-Ross’ report the behavior of Syria is attributable to its executive power only.
- 198 P. Van Ommeslaghe, *Traité de droit civil belge*, t. II: *Les obligations*, Bruxelles, Bruylant, 2013, p. 1319, no 883; briefs of the General Prosecutor. Velu before Cass. 19 December 1991, *Pas.*, I, 1992, p. 355.

- 199 P. Van Ommeslaghe, *Traité de droit civil belge*, t. II, Les obligations, Bruxelles, Bruylant, 2013, p. 1183, n 809; B. Dubuisson, V. Callewaert, B. De Coninck et G. Gathem, *La responsabilité civile, Chronique de jurisprudence 1996-2007*, vol. 1: *Le fait génératrice et le lien causal*, Bruxelles, Larcier, 2009, p. 21, n 1; R. O. Daclq, «Faute civile—Faute pénale», *Ann. Dr. Louvain*, 1983, p. 82; see for medical liability: G. Genicot, *Droit médical et biomédical*, 2^e édition, Bruxelles, Larcier, 2016, p. 374; see on the fact that criminal liability necessarily implies a breach of a legal or regulatory provision of criminal nature: F. Kuty, *Principes généraux de droit pénal belge*, t. III: *L'auteur de l'infraction pénale*, 2^e édition, Bruxelles, Larcier, 2020, p. 41, n 1618.
- 200 Cass., 21 avril 1921, *Pas.*, 1921, I, p. 302.
- 201 The activities that qualify as a participation are broad and include: advising on how to reach a war zone, creating, and managing a jihadist website, collecting money in mosques for financing terrorist activities, etc; see I. de la Serna, «Des infractions terroristes», *Les infractions*, vol. 5, H. Bosly, et Ch. De Valkeneer (dir.), Bruxelles, Larcier, 2012, pp. 191 sqq.
- 202 F. Kuty, *Principes généraux de droit pénal belge*, t. III: *L'auteur de l'infraction pénale*, 2^e édition, Bruxelles, Larcier, 2020, pp. 311 sqq., n^{os} 2048 sqq; Cass., 18 May 2022, R.G. n P.22.0113.F; Cass., 17 October 2018, *Pas.*, 2018, n 562, p. 1940; Cass., 7 September 2005, *Pas.*, 2005, n 414, p. 157; Cass., 16 December 2003, *Pas.*, 2003, n 647, p. 2021.
- 203 Cass., 1^{er} October 2014, *Pas.*, 2014, n 566, p. 2025; Cass., 14 November 2007, *Pas.*, 2007, n 553, p. 2030.
- 204 See e.g.: P. Van Ommeslaghe, *Traité de droit civil belge*, t. II: Les obligations, Bruxelles, Bruylant, 2013, pp. 1542-1543, no 1063; Cass., 5 June 2020, n C.19.0396.F; Cass., 17 October 2016, *Pas.*, 2016, n 577, p. 1978; Cass., 3 October 1997, *Pas.*, 1997, I, n 387, p. 965.
- 205 P. Van Ommeslaghe, *Traité de droit civil belge*, t. II: Les obligations, Bruxelles, Bruylant, 2013, p. 1608, n 1092 and p. 1612, n 1095; Cass., 30 May 2001, *Pas.*, 2001, n 319, p. 994.
- 206 See for instance: Cass., 28 June 2018, *Pas.*, 2018, n 423, p. 1472; Cass., 23 September 2011, *Pas.*, 2011, n 496, p. 2034.
- 207 Cass., 10 November 2020, n P.20.0659.N; Cass., 9 December 2015, *Pas.*, 2015, n 734, p. 2810; Cass., 28 May 1991, *Pas.*, 1991, I, n 497, p. 843.
- 208 Cass., 15 November 2006, *Pas.*, 2006, n 561, p. 2336; Cass., 17 avril 1975, *Pas.*, 1975, I, p. 820.
- 209 Cass., 11 June 2009, *Pas.*, 2009, n 397, p. 1501; Cass., 28 June 2018, *Pas.*, 2018, n 423, p. 1472.
- 210 B. Dubuisson, V. Callewaert, B. De Coninck et G. Gathem, *La responsabilité civile, Chronique de jurisprudence 1996-2007*, vol. 1: *Le fait génératrice et le lien causal*, Bruxelles, Larcier, 2009, p. 365, n 433; P. Van Ommeslaghe, *Traité de droit civil belge*, t. II: Les obligations, Bruxelles, Bruylant, 2013, p. 1613, n 1095; briefs of the General Attorney T. Werquin in Cass. (ch. réunies), 1^{er} avril 2004, *Pas.*, 2004, n 174, specifically p. 534; Art. 8.5 of the Belgian Civil Code provides that except when the law provides otherwise, evidence must be brought with a reasonable degree of certainty.
- 211 Tableau indicatif 2020, J.J. Pol., 2021, pp. 82 sqq.
- 212 The Court finds Professor Borghetti is a qualified expert in his field and that his expert testimony is relevant to the issue in this case.
- 213 French Ministry of Justice, Projet de réforme de la responsabilité civile, March 2017, available at http://www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf (last accessed May 25, 2023). The official translation of the bill by S. Whittaker, commissioned by the French Ministry of Justice is available at http://www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf (last accessed May 25, 2023).
- 214 CA Paris, 19 December 2013, n. 12/00948.

- 215 See, e.g., Ph. Le Tourneau (ed.), *Droit de la responsabilité et des contrats, Régimes d'indemnisation*, 12th ed., 2021, ¶ 2212-11.
- 216 See, e.g., Ph. Le Tourneau (ed.), *Droit de la responsabilité et des contrats, Régimes d'indemnisation*, 12th ed., 2021, ¶ 2212-151.
- 217 See, e.g., Conseil d'Etat, 26 April 2017, n. 394651.
- 218 See, e.g., Declaration by Dr. Gartenstein-Ross, ¶ 76 (Dkt. 75).
- 219 See, e.g., M. Bacache-Gibeili, *Les Obligations. La responsabilité civile extracontractuelle*, 3rd ed., 2016, ¶ 501; J. Knetsch, *Tort Law in France*, 2021, ¶ 233.
- 220 See, e.g., Cour de cassation, Première chambre civile, 4 December 2001, n. 99-19.197, Bull. civ. I, n. 310.
- 221 Cour de cassation, Deuxième chambre civile, 5 October 2006, n. 05-14.825. 7
- 222 Cour de cassation, Chambre criminelle, 24 November 1965, D. 1966. 104.
- 223 J.-P. Dintilhac (ed.), *Rapport du groupe de travail chargé d'élaborer une nomenclature des préjudices corporels (nomenclature Dintilhac)*, available at [https://www.vie-publique.fr/rapport/28092-rapport-du-groupe-de-travail-chage-delaborer-une-nomenclature-des-prej](https://www.vie-publique.fr/rapport/28092-rapport-du-groupe-de-travail-charge-delaborer-une-nomenclature-des-prej) (last accessed 12/21/21).
- 224 Cour de cassation, deuxième chambre civile, 28 February 2013, no. 11-21015, Bull. civ. II, no. 48.
- 225 See, e.g., Cour de cassation, deuxième chambre civile, 8 July 2004, no. 02-14854, Bull. civ. II, no. 393: "Les dommages-intérêts alloués à une victime doivent réparer le préjudice subi sans qu'il résulte pour elle ni perte ni profit".
- 226 Y. Lambert-Faivre & S. Porchy-Simon, *Droit du dommage corporel. Systèmes d'indemnisation*, 6th ed., 2009, ¶ 201.
- 227 The Court finds Dr. Isiktac is a qualified expert in his field and that his expert testimony is relevant to the issue in this case.
- 228 Meaning of the term "person" include legal entities as well as real persons.
- 229 Article 16 of Civil Procedure Code (Code no. 6100) with the reference of Article 40 of International Private and Civil Procedure Law (Code no. 5718).
- 230 Sample cases: Constitutional Court: Application no: 2017/19418, Applicant: Sibel Çapraz; Application no: 2017/15128, Ümmühan Seçil Sucu; Application no: 2018/6183, Applicant: Tochukwu Gamaliah Ogu; Application no: 2018/35775, Applicant: Mehmet Kökta#, Application no: 2018/22085, Applicant: Hasan K#\#ç etc.
- 231 Constitutional Court: Application no: 2015/9608, Applicants: Cemal Uçar and İbrahim Uçar.
- 232 First instance courts overruled applicants claims for solatium, but the Constitutional Court found that in breach of the right to access to a justice and against the constitution.
- 233 Shaw, Malcom N., *International Law*, Cambridge University Press, 2021, p. 677 ff.
- 234 Barnidge, Robert P, *Due Diligence Principle Under International Law*, International Community Law Review, Vol. 8, 2006, p. 86.
- 235 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <https://www.refworld.org/docid/3ddb8f804.html> (last accessed May 25, 2023).
- 236 Conderelli, Luigi, *The Imputability to States of Acts of International Terrorism*, Israel Yearbook on Human Rights, Vol. 19, Tel Aviv University, Martinus Nijhoff Publications; Dupuy, Pierre—Marie, "State Sponsors of Terrorism: Issues of

International Responsibility, Enforcing International Law Norms Against Terrorism, Andrea, Bianchi (Edit.), Hart Pub., Oxford, 2004.

237 See ¶¶ 65-70.

238 Constitutional Court case no: 1968/33 E, date: 11.02.1969.

239 Supra footnote.

240 Supra footnote.

241 Ero#lu Durkal, Ibid, p. 189.

242 Ero#lu Durkal, Ibid, p. 191, 192.

243 Ero#lu Durkal, Ibid, p. 192, 193.

244 Court of Cassation Assembly of Civil Chamber, case no: 1966/9-1267 E., date: 27.09.1967, Council of State 10th Chamber, case no: 1997/324 E., date: 12.10.1999, Ero#lu Durkal, Ibid, p. 203.

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Larreal v. Telemundo of Florida, LLC

United States District Court, S.D. Florida. | September 25, 2020 | 489 F.Supp.3d 1309 | 2020 WL 5750099

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489 F.Supp.3d 1309
United States District Court, S.D. Florida.

Merwin LARREAL, Plaintiff,
v.
TELEMUNDO OF
FLORIDA, LLC, Defendant.

Case No. 19-22613-Civ-COKE/GOODMAN
|
Signed 09/25/2020

Synopsis

Background: Adult entertainment club worker brought defamation action against news organization, alleging that organization published false statements about him by implying that he was arrested in connection with trafficking of cocaine and other controlled substances during late-night raid of club, when he was arrested on a traffic-related bench warrant not related to the drug raid. News organization moved for summary judgment.

Holdings: The District Court, [Marcia G. Cooke](#), J., adopting the report and recommendation of [Jonathan Goodman](#), United States Magistrate Judge, held that:

[1] news report was shielded under Florida's fair report privilege, and

[2] plaintiff's undocumented status precluded his recovery of lost future earnings.

Motion granted.

West Headnotes (21)

- [1] **Summary Judgment**  Essential elements; burden of proof at trial
District court may enter summary judgment against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

[2] **Summary Judgment**  Favoring nonmovant; disfavoring movant

When conflicts arise between the facts evidenced by the parties on motion for summary judgment, courts must credit the nonmoving party's version.

[3] **Summary Judgment**  Weighing evidence, resolving conflicts, and determining credibility
On motion for summary judgment, the court cannot weigh conflicting evidence to resolve factual disputes.

[4] **Summary Judgment**  Defamation

Because of the importance of free speech, summary judgment is the rule, and not the exception, in defamation cases. [U.S. Const. Amend. 1.](#)

1 Case that cites this headnote

[5] **Libel and Slander**  Reports

Florida's fair report privilege for defamation claims is news media's qualified privilege to report accurately on information received from government officials.

7 Cases that cite this headnote

[6] **Libel and Slander**  Privilege

Application of Florida's fair report privilege for defamation claims is a question of law.

3 Cases that cite this headnote

[7] **Libel and Slander**  Reports

Under Florida law, the fair report privilege for defamation claims is a qualified one, and it broadly extends to the publication of the contents of public records and statements from government officials.

2 Cases that cite this headnote

[8] **Libel and Slander**  Reports

Once Florida's fair report privilege for defamation claims attaches, it can be defeated only where the challenged report is not reasonably accurate and fair in describing the contents of government records and information.

2 Cases that cite this headnote

[9] **Libel and Slander**  Reports

Under Florida law, qualification for fair report privilege for defamation claims simply requires the publication or broadcast be a substantially correct account of information contained in public records or from a government source.

4 Cases that cite this headnote

[10] **Libel and Slander**  Reports

Courts assessing Florida's qualified fair report privilege for defamation claims acknowledge that it is not necessary that the publication or broadcast be exact in every immaterial detail or that it conform to the precision demanded in technical or scientific reporting, as it is enough that it conveys to the persons who read it a substantially correct account of the proceedings; therefore, a plaintiff's claim that the information derived from the government records is false is irrelevant to the court's analysis.

[11] **Libel and Slander**  Reports

Because Florida's fair report privilege for defamation claims is broad and because its fair and accurate bar is a low standard, there are several practical ramifications arising from its applicability, which include: (1) the protection is not lost by colorful language or a failure to look beyond the government documents for verification; (2) editorial style is expected, and news media can phrase their coverage to catch the reader's attention; (3) the media can also select the focus of a piece and have no duty to further investigate

or verify government-produced information; (4) a publication's language does not have to be technically precise in discussing legal proceedings; (5) media defendants can add color; (6) media defendants are not required to regurgitate the exact, precise language of their government sources; (6) media defendants can also summarize and focus publications as they choose; (7) media defendants are under no obligation to include additional information that would portray the plaintiff in a more favorable light; and (8) the press can select the focus of their own publications, without regard to presenting both sides of every issue.

[12] **Libel and Slander**  Reports

Florida's fair report privilege for defamation claims is a common law one, and it exists largely enshrined in state and federal court jurisprudence alone; therefore, it is only as strong as the courts that enforce it.

1 Case that cites this headnote

[13] **Libel and Slander**  Executive and legislative proceedings and investigations

Broadcast news report about those arrested in late-night narcotics raid on adult entertainment clubs was fair and accurate summary of information received from police department and therefore was shielded from defamation under Florida's fair report privilege, even though report lumped worker who was arrested on a non-drug charge, a traffic-related bench warrant, in with the arrests made on drug charges and presented his mugshot before showing the club, thereby allegedly implying that worker was arrested for drug trafficking; it was police department that connected worker's arrest to the drug raid by including his mugshot and arrest report with information sent to media, and report accurately reported that worker was arrested during and as part of drug raid.

1 Case that cites this headnote

[14] **Libel and Slander**  Matter imputed

Defamation by implication claims are governed under Florida law by the same privileges and protections afforded traditional defamation claims.

[15] Libel and Slander  Reports

Florida's fair report privilege for defamation claims does not turn on the nature of the defamatory statement alleged; instead, it simply depends on whether any such statement accurately conveyed information provided by a government source.

[16] Libel and Slander  Reports

Under Florida law, the broad fair report privilege for defamation claims requires only that the publication be substantially correct in its representation of the information received.

[1 Case that cites this headnote](#)

[17] Libel and Slander  Reports

Under Florida law, the fair report privilege for defamation claims does not dictate that news organizations report on the contents of official files in sterile language; rather, news reporting may be phrased to catch the readership's attention without losing the protection afforded by the privilege.

[1 Case that cites this headnote](#)

[18] Libel and Slander  Reports

Under Florida law, the media is free to select the focus of its reporting without losing the protection of the fair report privilege for defamation claims.

[1 Case that cites this headnote](#)

[19] Libel and Slander  Reports

Fair abridgment of underlying information can occur, for purposes of Florida's fair report privilege for defamation claims, when media

defendants accurately summarize separable portions of government records.

[1 Case that cites this headnote](#)

[20] Aliens, Immigration, and

Citizenship  Eligibility verification; document abuse

Congress enacted the Immigration Reform and Control Act (IRCA) with an extensive employment verification system to discourage the employment of undocumented workers. Immigration and Nationality Act § 274A, 8 U.S.C.A. § 1324a.

[1 Case that cites this headnote](#)

[21] Aliens, Immigration, and

Citizenship  Employment

Libel and Slander  Elements of Compensation

Club worker's immigration status as an undocumented overstayer precluded his recovery of lost future earnings from news organization that allegedly defamed him by implying his arrest during narcotics raid on club was for drug charges, when in reality he was arrested on a traffic-related bench warrant unrelated to the drug raid; front pay award would assume that worker would continue to work for club in the future, which was against the law for undocumented employees, pursuant to the Immigration Reform and Control Act (IRCA). Immigration and Nationality Act § 274A, 8 U.S.C.A. § 1324a.

[1 Case that cites this headnote](#)

Attorneys and Law Firms

***1311** [Augusto Ramon Lopez](#), [Gustavo Daniel Lage](#), Sanchez-Medina, Gonzalez, Quesada, Lage, Crespo, et al., Coral Gables, FL, for Plaintiff.

[Giselle M. Girones](#), Shullman Fugate PLLC, Jacksonville, FL, [Lynn Diane Carrillo](#), Hialeah, FL, [Deanna Kendall](#)

[Shullman](#), Shullman Fugate PLLC, West Palm Beach, FL, for Defendant.

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

[MARCIA G. COOKE](#), United States District Judge

THIS MATTER is before me upon the Report and Recommendation (“R&R”) of the Honorable Jonathan Goodman, U.S. Magistrate Judge [ECF No. 148], issued September 21, 2020, regarding Defendant's Motion for Summary Judgment [ECF No. 64].

In his R&R, Judge Goodman recommends that I grant Telemundo's summary judgment motion on the fair report privilege. Objections to Judge Goodman's R&R are due by October 5, 2020; however, on September 22, 2020, the Parties filed a Joint Notice of Non-Objection and Request *1312 for Adoption of Magistrate Judge Goodman's Report and Recommendation (the “Joint Notice”) [ECF No. 149]. In their Joint Notice, the Parties request that I adopt Judge Goodman's R&R and enter summary judgment in Defendant's favor. Accordingly, Judge Goodman's R&R [ECF No. 148] is **APPROVED and ADOPTED** as the Order of this Court. It is therefore **ORDERED and ADJUDGED** that summary judgment is entered in favor of Defendant Telemundo of Florida, LLC. The Clerk is directed to **CLOSE** this case solely for administrative purposes.

DONE and ORDERED in Chambers, at Miami, Florida, this 25th day of September 2020.

REPORT AND RECOMMENDATIONS ON DEFENDANT TELEMONDO'S SUMMARY JUDGMENT MOTION

[JONATHAN GOODMAN](#), UNITED STATES MAGISTRATE JUDGE

Plaintiff Merwin Alexander Garcia Larreal is a Venezuelan citizen who overstayed his six-month visa to the United States and therefore became undocumented on August 6, 2016. Nevertheless, he illegally lived and worked in the United States after that date. Larreal worked as a head waiter at LaBare, an adult entertainment club featuring male dancers. LaBare is located in the same building as The Booby Trap, a so-called gentlemen's club featuring female dancers.

In April 2018, as part of a long-term undercover narcotics investigation, state and federal law enforcement officers conducted a late-night raid of The Booby Trap and LaBare. Several employees from both clubs were arrested, including Larreal. Unlike the other arrestees, however, Larreal was arrested on a non-drug charge -- an outstanding bench warrant issued after he failed to appear in Court on a charge of driving without a license.

After obtaining mugshots and arrest reports from the Miami-Dade Police Department, which also confirmed the accuracy of an earlier Miami Herald news article about the raid, Defendant Telemundo of Florida, LLC broadcast a news report about the raid. Telemundo identified the individuals arrested during the raid (including Larreal) but did not expressly identify and link specific charges for any of the arrestees.

Larreal filed a one-count defamation lawsuit against Telemundo. He alleged that Telemundo published false statements about him by implying that he was arrested in connection with the trafficking of cocaine and other controlled substances. Although he is not able to legally work in the United States, Larreal seeks to recover economic damages. He also seeks emotional damages. Larreal alleges that the broadcast has caused him mental anguish, loss of sleep, crying spells, headaches and depression.

Telemundo filed a summary judgment motion against Larreal's claim. [ECF No. 64]. It argues that the “fair report privilege” completely bars Larreal's action. At bottom, Telemundo says that the privilege applies because its broadcast was a substantially correct summary of information provided by an official government source (i.e., the police department). But Larreal contends that Telemundo abused the limited fair report privilege because the arrest report forwarded by the police indicated that Larreal was arrested on a traffic-related charge, having nothing to do with drug-dealing.

For the reasons outlined below, the Undersigned **respectfully recommends** that United States District Judge Marcia G. Cooke, who referred this motion to the Undersigned [ECF No. 120], **grant** Telemundo's summary judgment motion on the *1313 fair report privilege. In the event that Judge Cooke does not adopt this Recommendation, then the Undersigned also recommends the following, *alternative* rulings (but *only* if the Court disagrees with the conclusion that the fair

report privilege applies): (1) Larreal cannot obtain economic damages because his immigration status precludes recovery of lost future profits; and (2) although his evidence is weak and a jury may well reject the claim, Larreal should be permitted to at least seek non-economic damages for mental anguish, humiliation and reputational injury. The evidentiary shortcomings pinpointed by Telemundo (and there are several) are more appropriate at trial; they are ill-suited for summary adjudication.

I. Comprehensive Undisputed Factual Background¹

a. Undisputed Facts Highlighted by Telemundo

Larreal is a Venezuelan citizen. While in Venezuela, Larreal served as Commissioner of the Governor of Merida for Sexual Diversity, Gender and HIV from 2014 through 2016.

In February 2016, Larreal arrived in the United States on a tourist visa, which allowed him to visit the United States as a non-immigrant for a period of six months. At that time, Larreal leased a bedroom in Miami, Florida from Doris and Francisco Acosta. Larreal lived with the Acosta family until late October 2017.

As of August 6, 2016, Larreal has been undocumented and illegally residing in the United States. Due to his undocumented status, Larreal understands he is not allowed to procure work in the United States.

Larreal has never filed any tax returns or otherwise declared his income and has never paid taxes on his earnings from work in the United States.

Larreal has never possessed a valid driver's license issued by any state in the United States. On July 21, 2016, Larreal was pulled over while operating a vehicle in Miami, Florida and charged with driving without a driver's license. As a result of Larreal's failure to appear for a hearing on November 18, 2016, a bench warrant was issued for his arrest.

In his Complaint, Larreal alleges he was an employee of The Booby Trap on April 20, 2018. The Booby Trap is a gentleman's club in Miami-Dade County, Florida.

Larreal is actually not an employee of The Booby Trap, despite the allegations of his complaint. Larreal began to work as a waiter at LaBare, an adult entertainment club located at 5325 NW 77th Avenue, in July 2016. LaBare is located *within* the same building and at the same address as The Booby

Trap. In his response to Telemundo's Statement of Facts (filed in support of its summary judgment motion), Larreal said a scrivener's error was responsible for the incorrect designation of The Booby Trap (instead of LaBare) as his place of employment.

***1314** Three months after he began working at LaBare, Larreal was promoted to head waiter. Larreal is an independent contractor for LaBare, and he earns only cash tips.

On August 5, 2016, Larreal contacted Diego Rincon, expressing interest in extra work opportunities. Diego Rincon is a talent agent who operated the Media Luna Productions LLC and All Cast Background Talents LLC agencies. Through these agencies, Mr. Rincon procured extras for various programs produced by Telemundo and Univision. Mr. Rincon stopped working with Telemundo in April or May 2019 and stopped working with Univision in July 2019. Mr. Rincon ceased operations altogether in November 2019. Mr. Rincon's agencies were the only agencies through which Larreal secured extra work.

Larreal obtained his first job opportunity through Mr. Rincon's agency on August 13, 2016, when he appeared as a prison guard on a soap opera produced by Telemundo.

Eventually, Larreal obtained a Florida Identification Card issued to Alexis Acosta and began to use this identification and name to procure work at Telemundo. Larreal last worked as an extra for Telemundo on October 11, 2017. Through Mr. Rincon's agency, Larreal was also able to procure work as an extra on Univision's Republica Deportiva program. Mr. Rincon testified Larreal was removed from his position at the program when complaints were made regarding Larreal being rude towards other extras on set.

Mr. Rincon also maintained a **WhatsApp** group **chat** with all extras working for his agency. Mr. Rincon removed Larreal from the general extras **WhatsApp** group **chat**, along with 17 others, on December 12, 2018. Mr. Rincon removed Larreal and the others then because they had not sought work in some time.

On April 20, 2018, state and federal law enforcement authorities conducted a late-night raid of The Booby Trap and LaBare complex in connection with a narcotics investigation.

Larreal was arrested because he had an outstanding bench warrant. Larreal was released from custody on April 21, 2018. Larreal returned to work at LaBare that night. On April 21, 2018, the Miami Herald published an article entitled “Drug Detectives Raid Booby Trap to Arrest Strippers, Spoiling Bachelorette Parties,” which reported that Miami Dade Police Department (“MDPD”) officers had raided The Booby Trap and LaBare complex to “arrest dancers and employees believed to have dealt cocaine, marijuana and other drugs.” [ECF No. 65, ¶ 49].

Telemundo contacted the MDPD to verify that the information reported in the Miami Herald’s article was accurate. Telemundo obtained confirmation that all of the information in the Miami Herald’s article was accurate. Relying on information published in the Miami Herald, which was subsequently confirmed by the MDPD, on April 21, 2018, Telemundo published a report concerning the raid.

On April 23, 2018, Telemundo made a public records request to the MDPD to obtain “the mug shots and arrest reports regarding the operation at Bobby [sic] Trap.” *Id.* at ¶ 53. The MDPD provided eight mugshots, including Larreal’s, and a single PDF file titled “Booby Trap Arrests.” Telemundo published a follow-up broadcast on April 23, 2018 (“the News Report”). *Id.*

The News Report identified the individuals arrested during the raid, including Larreal. The News Report did not state Larreal had been arrested for the sale of *1315 drugs. The News Report did not identify Larreal’s country of citizenship or his former position with the Venezuelan government.

Various Venezuelan social media sources picked up on the news story. One social media account used stills from Telemundo’s reporting without permission, credited them as their own, and reported that Larreal, the Venezuelan ex-Commissioner of the Governor of Merida for Sexual Diversity, Gender and HIV, had been arrested “for the sale of drugs.” *Id.* at ¶ 63. Other Venezuelan social media accounts picked up these photos and information to report Larreal had been arrested for the sale of drugs.

After the Venezuelan social media accounts began to publish these posts, Larreal began to experience difficulty sleeping, depression, and occasional head pressure accompanied by loss of appetite and dizzy spells.

Larreal never sought treatment for any emotional-type symptoms and they subsided about a month after the social media posts surfaced.

On March 19, 2019, Larreal’s counsel sent correspondence to Telemundo concerning the News Report. Telemundo aired a clarification on March 27, 2019 that clarified the reason Larreal had been arrested during the raid. At that time, Telemundo removed the News Report from its website and replaced it with the clarification, where it remains today.

Larreal initiated this action on April 18, 2019. In the Complaint, Larreal alleges a single count for defamation per se, alleging Telemundo published “false statements” about him by implying Larreal was arrested in connection with the trafficking of cocaine and other controlled substances while employed at The Booby Trap complex. [ECF No. 1-1, pp. 6-11]. Larreal seeks to recover economic damages and emotional damages.

b. Undisputed Facts Highlighted by Larreal

In April 2018, reports aired by Telemundo, and the individuals who worked on them, were governed by Telemundo’s Policies. The second page of Telemundo’s Policies, under a heading titled “Accuracy and Fairness,” provides, in relevant part, “Accuracy and fairness are fundamental principles of journalism. As we routinely rely on information and pictures coming from various sources, we must make every effort to verify accuracy and **authenticity** and to ensure fairness. Accuracy requires ensuring all of the facts are correct and presenting them in proper context.” [ECF No. 131, ¶ 74].

The same page of Telemundo’s Policies, under a heading titled “Accuracy and Fairness,” provides, in relevant part:

Fairness is keeping an open mind about the nature of a story, making good faith and timely efforts to seek out and present all relevant facts and points of view and avoiding a rush to judgment. We should not enter a story with a preconceived notion. In meeting this standard, it is helpful to apply this test: if you were the subject of a story, would you be satisfied that you had been treated fairly? We should always attempt to contact the subject(s) of our reporting for comment giving them sufficient detail of our report and allowing reasonable time to respond.

Id. at ¶ 75.

Page 4 of Telemundo’s Policies, under a heading titled “Sources of Information,” provides, in relevant part, “NBC

News and MSNBC are responsible for the elements of our news reports, whether obtained through our own reporting or from others. Therefore, you must verify information *1316 and material, whether visuals or documents, regardless of the source and present that information with as much transparency as possible.” *Id.* at ¶ 76.

Page 7 of Telemundo's Policies, under a heading titled “Use of Documents,” provides, in relevant part, “Make sure to read the entire document and present it in context.” *Id.* at ¶ 77.

Page 11 of Telemundo's Policies, under a heading titled “Editing,” provides, in relevant part:

When editing, the final product must represent the original material fairly and in context. The edited, final product version must reflect the spirit and tone of the unedited material and must not alter or misrepresent the original meaning. This guideline applies to documents, interviews, photographs, audio and video – whether recorded by us or obtained from outside sources.

Id. at ¶ 78.

Telemundo's Policies required that at least Mr. Gonzalez, the reporter who prepared the News Report, ensure that all the facts to be presented in the News Report were presented in the proper context.

Telemundo's Policies required that the edited, final product version must reflect the spirit and tone of the unedited material and must not alter or misrepresent the original meaning. This guideline applies to documents, interviews, photographs, audio and video -- whether recorded by us or obtained from outside sources.

Breaking News is news that is unfolding or happening in real time and has to be reported on with urgency. The News Report was not breaking news.

Telemundo knew that Larreal had been “arrested for a bench warrant pertaining to a traffic violation” as early as December 2018, and no later than January 9, 2019, more than two months before it aired the Clarification on March 27, 2019. *Id.* at ¶ 89.

Seven of the eight arrest reports contain the word “COCAINE” in all caps, but Larreal's arrest report does not. *Id.* at ¶ 92.

Larreal's arrest report lists the charges with which he was charged, in all caps, as “WARRANT TYPE: BENCH WARRANT BW,” and below that on the same page it states in all caps, “WARRANT# / CASE# A2752PP,” “WARRANT DATE: 12/20/2016, TOTAL BOND: 2000.00,” and “REF CHARGE: BOND AMT: NO DR LICENSE.” *Id.* at ¶ 94.

After the News Report aired and was available on Telemundo's website, accessible to the general public, Larreal says, he began to be harassed and mocked at work as a “drug dealer” and was derisively called “El Chapo.” *Id.* at ¶ 96. According to Larreal, he also experienced shame from his family and friends both in Miami and in Venezuela after they saw the News Report, and he suffered abuse on social networking sites that he was a part of, as well as by phone from people calling to insult and abuse him. As a result, Larreal says, he began experiencing mental anguish, loss of sleep, crying spells, headaches, and depression.

No one working on the News Report, including Mr. Gonzalez, was required to identify in the News Report all eight individuals arrested in the raid, and Telemundo could have elected to identify in the News Report only the seven individuals arrested in connection with drugs.

Gina Montaner, the Managing Editor who directly oversaw Mr. Gonzalez's work as the reporter of the News Story, never saw the finished News Story before it aired. She also never read the Arrest Reports before the News Story aired, even though she received them at the same time *1317 that Mr. Gonzalez did and even though Mr. Rodriguez testified that it was at least her and Mr. Gonzalez's responsibility to read the Arrest Reports.

Telemundo received the Mugshots and Arrests Reports almost three hours prior to the News Report airing on April 23, 2018.

II. Applicable Legal Principles and Analysis

a. Summary Judgment

[1] Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (citation omitted). Thus, the Court may enter summary judgment “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's

case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The moving party must “show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial.” *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). If the movant does so, then “the burden shift[s] to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.” *Id.* A genuine factual dispute exists “if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999). The opposing party must proffer more than “a mere scintilla of evidence” to show “that the jury could reasonably find for that party.” *Brooks v. Cty. Comm'n of Jefferson Cty.*, 446 F.3d 1160, 1162 (11th Cir. 2006); *Abbes v. Embraer Servs., Inc.*, 195 F. App'x 898, 899-900 (11th Cir. 2006) (internal quotations omitted).

[2] When deciding whether summary judgment is appropriate, the Court views all facts and resolves all doubts in favor of the nonmoving party. *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1247 (11th Cir. 2013) (affirming order denying defendant's summary judgment motion on qualified immunity because of factual issue). And when conflicts arise between the facts evidenced by the parties, courts must “credit the nonmoving party's version.” *Id.* at 1252.

[3] If there are any factual issues, the Court must not decide them; it must deny the summary judgment motion, and the case then proceeds to trial. See *Whelan v. Royal Caribbean Cruises Ltd.*, No. 1:12CV-22481, 2013 WL 5583970, at *2 (S.D. Fla. Aug. 14, 2013) (citing *Env'l. Def. Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981)). The Court cannot weigh conflicting evidence to resolve factual disputes. See *Skop v. City of Atlanta, Ga.*, 485 F.3d 1130, 1140 (11th Cir. 2007) (citation omitted) (reversing in part summary judgment). Even when the parties “agree on the basic facts, but disagree about the inferences that should be drawn from these facts[,]” summary judgment “may be inappropriate.” *Whelan*, 2013 WL 5583970, at *2. See generally *Johnson v. NCL (Bahamas) Ltd.*, No. 16-21762, 2017 WL 1293770, at *2 (S.D. Fla. Feb. 3, 2017) (denying summary judgment motion in passenger's slip and fall lawsuit against cruise ship operator).

Nevertheless, as the Eleventh Circuit has recognized, summary dismissal of *defamation* cases is particularly

appropriate *1318 because “there is a powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless litigation.” *Michel v. NYP Holdings*, 816 F.3d 686, 702 (11th Cir. 2016) (explaining that publishers must be given the “breathing space” necessary to ensure “robust reporting” on public figures and public events and noting that “forcing publishers to defend inappropriate suits” would “constrict that breathing space”).

[4] In other words, according to at least some courts, “because of the importance of free speech, summary judgment is the ‘rule,’ and not the exception, in defamation cases.” *Guitar v. Westinghouse Elec. Corp.*, 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975) (citing *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970)), aff'd, 538 F.2d 309 (2d Cir. 1976); see also *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 275 n.56 (3d Cir. 1980) (affirming summary judgment in defamation action in favor of media defendants and citing *Guitar*); cf. *Torgerson v. Journal, Inc.*, 210 Wis.2d 524, 563 N.W.2d 472, 479 (Wis. 1997) (affirming appellate court's order reversing trial court order denying defendant newspaper's summary judgment motion in defamation action and affirming trial court's dismissal of action, citing *Guitar* and citing *Time, Inc. v. Hill*, 385 U.S. 374, 401-02, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (Douglas, J. concurring) for the rule that “summary judgment may be particularly appropriate in defamation actions in order to mitigate the potential ‘chilling effect’ on free speech and the press that might result from lengthy and expensive litigation”); see also *Terry v. Journal Broadcast Corp.*, 351 Wis.2d 479, 840 N.W.2d 255, 263 (Wis. Ct. App. 2013) (affirming summary judgment for media defendant and using standards articulated in *Guitar* and in Justice Douglas' concurrence in *Time*).

b. The Fair Report Privilege

[5] The fair report privilege is news media's qualified privilege “to report accurately on information received from government officials.” *Rasmussen v. Collier Cty. Publ'g Co.*, 946 So. 2d 567, 570-71 (Fla. 2d DCA 2006). Florida courts have borrowed from the Restatement (Second) of Torts § 611 in describing the privilege. See, e.g., *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 502 (Fla. 3d DCA 1993) (quoting Restatement (Second) of Torts § 611 cmt. b (Am. Law Inst. 1977)) (“If the report of a public official proceeding is accurate or a fair abridgement, an action cannot constitutionally be maintained, either for defamation or for invasion of the right of privacy.”).

Although its first uses were related to official proceedings -- like court proceedings -- the privilege has since been expanded to cover a wide range of government-derived sources. *Folta v. New York Times Co.*, Case No. 1:17-cv-246, 2019 WL 1486776, at *2 (N.D. Fla. Feb. 27, 2019).

[6] The privilege's application is a question of law. *Id.* at *1 (citing *Huszar v. Gross*, 468 So. 2d 512, 515-16 (Fla. 1st DCA 1985)); cf. *Nix v. ESPN, Inc.*, 772 F. App'x 807 (11th Cir. 2019) (applying New York law² and affirming order dismissing with prejudice statements protected by fair report privilege and holding that trial court may determine applicability of fair report doctrine as a matter of law).

*1319 [7] The privilege in Florida is a qualified one, and it broadly extends to the publication of the contents of public records and statements from government officials. *Woodard*, 616 So. 2d at 502-03 (finding that the fair report privilege covers information reporter received from Attorney General's Office and contained in a report from the Florida Department of Law Enforcement); *Stewart v. Sun Sentinel Co.*, 695 So.2d 360, 362 (Fla. 4th DCA 1997) (finding that the fair report privilege covers information in press releases issued by the sheriff's office); *Rasmussen*, 946 So. 2d at 570-71 (determining that the fair report privilege covers "reports by government officials"); *Huszar*, 468 So. 2d at 516 (concluding that "remarks" of a government attorney relating to a possible action by the comptroller's office are privileged).

[8] Once the fair report privilege attaches, it can be defeated only where the challenged report is not "reasonably accurate and fair" in describing the contents of government records and information. *Woodard*, 616 So. 2d at 502 (citations omitted).

[9] This qualification simply requires the publication or broadcast be a **substantially correct** account of information contained in public records or from a government source. See, e.g., *Rasmussen*, 946 So. 2d at 570 (finding that the privilege applied because the publications were "substantially truthful" accounts of public records); *Alan v. Palm Beach Newspapers, Inc.*, 973 So. 2d 1177, 1180 (Fla. 4th DCA 2008) (finding that the privilege applied because reporting of official proceeding was correct); *Stewart*, 695 So. 2d at 362 (finding that the privileged applied because there were "no material differences" between reports and information contained in government files); *Ortega v. Post-Newsweek Stations, Florida, Inc.*, 510 So. 2d 972, 977 (Fla. 3d DCA 1987) (finding that the privilege applied to "substantially accurate" report of official proceeding); *Jamason v. Palm*

Newspapers, Inc., 450 So. 2d 1130, 1132 (Fla. 4th DCA 1984) (citations omitted) (privilege requires "that the report of the judicial proceeding must be correct").

[10] Courts assessing Florida's qualified fair report privilege acknowledge that "[i]t is not necessary that [the publication or broadcast] be exact in every immaterial detail or that it conform to the precision demanded in technical or scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceedings." *Woodard*, 616 So. 2d at 502-03. Therefore, a plaintiff's claim that the information derived from the government records is false is irrelevant to the Court's analysis. *Id.* at 502 (privilege applies "even if the official documents contain erroneous information"); *Ortega*, 510 So. 2d at 976 (finding that the press has no duty to independently determine accuracy of government records).

[11] Because the fair report privilege is broad and because "its fair and accurate bar is a low standard," there are several practical ramifications arising from its applicability, which are summarized by *Folta*: (1) the protection is not lost by "colorful language or a failure to look beyond the government documents for verification"; (2) "editorial style is expected, and news media can phrase their coverage to catch ... the reader's attention"; (3) the media can also "select the focus of a piece and have no duty to further investigate or verify government-produced information"; (4) a "publication's language does not have to be technically precise in discussing legal proceedings"; (5) media defendants "can add color"; (6) media defendants are "not required to regurgitate the exact, precise language of their government sources"; (6) *1320 media defendants can also "summarize and focus publications as they choose"; (7) media defendants are "under no obligation to include additional information that would portray the Plaintiff in a more favorable light"; and (8) the press can "select the focus of their own publications, without regard to presenting both sides of every issue." *Folta*, 2019 WL 1486776, at *4, *7-8 (citations omitted).

c. Context Is Critical: The Media and the First Amendment in 2020

Before assessing the fair report privilege at the heart of Telemundo's summary judgment motion, the Undersigned believes it appropriate to flag some of the policy considerations underlying the fair report privilege.

[12] As explained in *Folta*, Florida's fair report privilege is a common law one, and it exists "largely enshrined in state

and federal court jurisprudence alone.” *Id.* at *9. Therefore, it is “only as strong as the courts that enforce it.” *Id.* Both Florida’s Constitution and its statutory Public Records law “indicate a weighty significance placed on citizen oversight of their government – oversight that is assisted and largely effectuated by reliance on a free press to investigate and report on government action.” *Id.*

Given these critical perspectives, “a cramped reading of the fair report privilege would undercut its very purpose.” *Id.* Indeed, a crabbed view of the privilege would “open the door” to less-than-meritorious suits and would “contribute to the ongoing chipping-away of the rights and privileges necessary to the press’s ability to play its intended role as government watchdog.” *Id.*

d. Has Telemundo Established the Fair Report Privilege Here?

As noted above, Telemundo’s report did not expressly say that Larreal was arrested on drug charges during the raid on a drug charge. Instead, it reported – **accurately** -- that he was arrested during a drug raid at The Booby Trap/LaBare. Nevertheless, for purposes of its summary judgment motion, Telemundo is not seeking summary judgment on the ground that the report it broadcast is not defamatory as a matter of law.

[13] Larreal focuses on the fact that the Telemundo broadcast included him as an individual arrested during the raid (a true fact communicated by MDPD) when his arrest actually arose from a traffic-related bench warrant having absolutely nothing to do with drugs. While correct, this reality does not render the fair report privilege unavailable for Telemundo.

Telemundo is not the person or entity who created the connection between his arrest and the implication that he was arrested on drug charges during a drug raid. **MDPD** lumped Larreal’s mugshot and arrest report in between the mugshots and arrest reports for the seven persons who had been arrested at the complex for drug offense charges. Telemundo reported that he was arrested during the raid, an indisputable fact. And it did so after confirming an earlier Miami Herald Story and in response to a request for information about **the operation**.

To be sure, Telemundo did not *also* say that he was arrested on a traffic-related bench warrant. But that does not invalidate the fair report privilege, nor does it establish Larreal’s theory that Telemundo manipulated the facts.

For all practical purposes, Larreal focuses on the fact that he believes Telemundo improperly grouped him in with the other arrestees. But this is similar to the scenario in *Folta*, where a university professor claimed he was inaccurately ***1321** “lumped in” with other academics who received defamatory statements. The *Folta* Court had sympathy for the Plaintiff professor, but it ultimately held that the fair report privilege protected “a summary statement that more precisely described the situation of other[s] similarly situated ..., even despite it being technically inaccurate as to the plaintiff.” *Id.* at *7. (emphasis added).

In upholding the fair report privilege, the *Folta* Court relied on *Rasmussen*, where the appellate court, based on the fair report privilege, affirmed summary judgment in favor of a newspaper publisher and explained that a media defendant “need not describe legal proceedings in technically precise language.” 946 So. 2d at 570. And *Rasmussen* relied on *Clark v. Clark*, No. 93-47-CA, 1993 WL 528464 (Fla. 4th DCA June 22, 1993) for the principle that “journalists should have certain leeway in their choice of language when covering the criminal justice system.” *Id.*

Honing in on the fact that Telemundo did not expressly say that he was arrested on a bench warrant unconnected to the drug raid in which he was arrested, Larreal contends that Telemundo cannot successfully invoke the fair report privilege because it omitted this critical fact and actively manipulated other facts.

The Undersigned is not persuaded and disagrees.

Telemundo had no duty to independently investigate information provided to it by MDPD in response to a request for arrest reports and mugshots regarding the raid. See *Ortega*, 510 So. 2d at 976 (finding that a broadcaster’s only responsibility was to accurately report the statements contained in government records **even if it knew or should have known the contents of those statement was inaccurate**).

Moreover, Telemundo was similarly not required to include the specifics of Plaintiff’s arrest. For example, the plaintiff in *Carson v. News Journal Corp.*, argued that omitting the fact that plaintiff’s discharge was for reasons other than misconduct and that he was ultimately awarded unemployment compensation benefits (facts that **could be gleaned from the records provided**) rendered a newspaper’s report that he was discharged for “unsatisfactory work

performance” outside the scope of the fair report privilege. [790 So. 2d 1120, 1122 n.1 \(Fla. 5th DCA 2001\)](#). Despite these omissions, the court affirmed summary judgment on fair report grounds. *Id.* at 1122.

[14] Although *Carson* is not a defamation by implication case, defamation by implication claims are governed under Florida law by the same privileges and protections afforded traditional defamation claims. *Jews for Jesus, Inc. v. Rapp*, [997 So. 2d 1098, 1108 \(Fla. 2008\)](#) (“All of the protections of defamation law that are afforded to the media and private defendants are therefore extended to the tort of defamation by implication.”); *Jeter v. McKeithen*, No. 5:14-cv-189, [2014 WL 4996247](#), at *1 (N.D. Fla. Oct. 7, 2014) (finding fair report privilege applied to defamation by implication claim and noting that “the press need not investigate the accuracy of official statements before reporting their contents”).

[15] Furthermore, Larreal's focus on the type of defamation he is asserting -- i.e., one based on an implication theory -- as a legally sufficient distinction is unconvincing for yet another reason: the fair report privilege does not turn on the nature of the defamatory statement alleged. Instead, it simply depends on whether any such statement accurately conveyed information provided by a government source. See [*1322](#) *Jamason v. Palm Beach Newspapers, Inc.*, [450 So. 2d 1130 \(Fla. 4th DCA 1984\)](#) (finding headline that accused police chief of taking bribes to be protected by fair report privilege).

Telemundo did not expressly mention the specifics of any of the individuals arrested. (It did briefly show portions of Johanni Cortez's arrest report). But regardless of the charges against the other individuals, the fact that Larreal was arrested on a bench warrant alone does not rebut or undermine Telemundo's accurate reporting about the operation's arrests or change the gist of the story. See *Folta*, [2019 WL 1486776](#), at *8 (“Defendants are under no obligation to include additional information that would portray the Plaintiff in a more favorable light.”). At bottom, Telemundo accurately reported the gist of the information provided by MDPD: Larreal was one of several people arrested during a drug raid.

For all practical purposes, Larreal's primary concern is that he was somehow grouped together with several other employees who were specifically charged with drug offenses. But this dynamic does not destroy the fair report privilege. For example, the *Folta* Court, in rejecting Plaintiff's argument that he was inaccurately and improperly “lumped in” with defamatory statements about other academics, explained:

Plaintiff's involvement with industry groups was different in kind from that of some other professors. This Court understands Plaintiff's frustration with being ‘lumped in’ with others and arguably being touted as the poster child for such quid pro quo transactions when others had notably deeper and more involved relationships.

[2019 WL 1486776](#), at *8.

Nonetheless, the *Folta* Court found the fair report privilege applicable to protect the publication.

And to the extent that Larreal was lumped in, it was MDPD who, for all practical purposes, connected his arrest to the drug raid by including his mugshot and arrest report with the pdf file sent in connection with The Booby Trap drug raid arrests.

[16] The “broad” fair report privilege “requires only that the publication be ‘substantially’ correct in its representation of the information received.” *Id.* at *4 (internal citation omitted). And “[d]etermining whether a report is fair and accurate requires a close comparison of the report and the documents and information from which it is drawn.” *Id.* (emphasis added).

The “report” here is one about the undercover raid and the arrests, not a news story about Larreal or a broadcast focusing on Larreal. From Larreal's perspective, the most important part of the “report” might be the brief mention of his name, but the report itself involved a far-broader topic. Larreal's involvement as one of eight arrestees was one of many details. Moreover, Telemundo's request for additional information from MDPD (after first confirming the accuracy of the Miami Herald story with MDPD) was for “the mug shots and arrest reports regarding the operation at Bobby [sic] Trap.” [ECF No. 65, ¶ 53 (emphasis added)].

Comparing Telemundo's reporting about the undercover operation and subsequent arrests to the information provided by MDPD demonstrates that there are no material differences. Accordingly, Telemundo's reporting is a “substantially correct account” of information provided by government sources and is covered by the fair report privilege. *Woodard*, [616 So. 2d at 502-03](#); see also *Stewart*, [695 So.2d at 362](#) (emphasis added) (“[O]ur comparison of the defamatory information with the official documents or press releases issued by [*1323](#) the sheriff's office leads us to conclude that there are no material differences.”); see also *Carson*, [790 So. 2d 1120](#) (finding omission of information did not defeat the privilege).

Larreal was not the focus of the story. The news report was substantially correct in providing the gist of what Telemundo received from MDPD in response to a request for information about the operation.

Telemundo accurately reported on the information received from MDPD: that Larreal was arrested during and as part of the drug raid. So the broadcast is a substantially correct version of what MDPD provided. *See, e.g., Carson*, 790 So. 2d at 1122 (discussing that the focus of report was the explanation from Plaintiff's former employer about the reasons for his discharge, not whether he was entitled to unemployment compensation benefits). Additionally, in *Woodard*, 616 So. 2d at 502-03, the Court affirmed summary judgment in favor of the news broadcaster on the fair report privilege even though the report stated that Plaintiff had served four years in jail for murder when he was convicted only of *attempted* murder and served only *two* years of a four-year sentence. The investigative reporter obtained the information from the Florida Department of Law Enforcement, which stated that Plaintiff had been convicted of "homicide – willful kill," had received a four-year sentence and had been paroled approximately two years later. *Id.* at 502.

Larreal accuses Telemundo of actively manipulating the story because it did not present the *mugshots* exactly as they were provided by MDPD. But there is no evidence that Telemundo *altered* the mugshots. Instead, it merely used visual effects, such as moving the first four mugshots into the screen and then have them fade out with a copy of The Booby Trap in the background. Larreal's mugshot appeared on the screen and the last three mugshots were presented together on the full screen. His mugshot was the only one shown when his arrest was mentioned.

Larreal may have *preferred* that Telemundo did not use visual effects when presenting his mugshot, but his "preference is not the yardstick by which statements in a news report are measured." *Folta*, 2019 WL 1486776, at *5. Moreover, Telemundo was not required to display the mugshots in the exact manner they were provided by MDPD. *See Woodard*, 616 So. 2d at 502-03 ("It is not necessary that [the publication or broadcast] be exact in every immaterial detail....").³

[17] [18] Likewise, the fair report privilege does not dictate that news organizations report on the contents of official files in sterile language. Rather, news reporting may be "phrased

to catch the ... readership's attention" without losing the protection afforded by the privilege. *See Alan v. Palm Beach Newspapers, Inc.*, 973 So. 2d 1177, 1180 (Fla. 4th DCA 2008). And the media is free to select the focus of its reporting without losing the protection of the fair report privilege. As the *Folta* Court explained, the privilege's "fair and accurate bar is a low standard." 2019 WL 1486776, at *7 (internal citation omitted). The presentation of Larreal's mugshot -- even if it did capture the viewership's attention -- does not defeat the fair report privilege.

Larreal also emphasizes Telemundo's internal policies and guidelines, contending that it violated those policies. Telemundo disagrees, contending that it did not violate *1324 its own policies and guidelines. But this debate is legally irrelevant for Telemundo's summary judgment motion. The issue is whether Telemundo met the elements of the fair report privilege, not whether it violated an internal guideline. In other words, the issue is whether the information obtained from MDPD was accurately reported (i.e., was the report substantially correct).

As one well-known case (in the niche area of fair report privilege) decided by a Florida state appellate court explained:

The newspaper, had it wished, could have devoted the entire issue to the statement without any effort to neutralize the accusation by giving the accused the opportunity to deny. The question then becomes how well does the editor sleep with his own conscience, which again is our concern as human beings desirous of a fair world, not as judges resolving a legal issue.

Jamason, 450 So. 2d at 1133.

MDPD did not flag for Telemundo the point that Larreal (but not the other seven arrestees) was not arrested on drug charges. It did not forward the information with an email or other communication warning Telemundo that Larreal was in a class of one and was different than the other seven arrestees. Likewise, MDPD did not disclose that the undercover drug "operation" resulted in seven employees arrested on drug charges and one employee arrested on an unrelated bench warrant for failing to appear for a traffic citation for no driver's license. Instead, it merely forwarded all the information together, lumping together all arrestees as part of an MDPD response to a request for information about the undercover drug "operation."

[19] As explained in *Folta*, "Florida's fair report privilege requires that a report be "accurate and complete or a fair

abridgment” of the underlying information. *See, e.g., Huszar*, 468 So. 2d at 516 (quoting Restatement (Second) of Torts § 611). Fair abridgment can occur when media defendants accurately summarize separable portions of government records. *Folta*, 2019 WL 1486776, at *8 (citing *Carson*, 790 So. 2d at 1122).

Telemundo's broadcast was a fair and accurate summary of information received from MDPD about those arrested in the undercover drug operation.

Similar to the *Folta* Court's analysis, the Undersigned acknowledges Larreal's likely frustration, and I am sympathetic to his situation. But the fair report privilege applies, and the news broadcast is not actionable for defamation.

To deny Telemundo's summary judgment motion would be tantamount to depriving a television news broadcaster with the “breathing space” which our appellate court has held is necessary to ensure robust reporting. *Michel*, 816 F.3d at 702.

Telemundo is therefore entitled to summary judgment on the fair report privilege, and the Undersigned **respectfully recommends** that Judge Cooke grant Telemundo's summary judgment motion. *See generally Rasmussen*, 946 So.2d at 570 (finding fair report privilege provides protection when the news story is based on information from government officials and is “reasonably accurate and fair” and that fair report privilege “shielded the Daily News from libel” even though it published a clarification).

e. An Undocumented Worker's Economic Damages for Future Work

Given that Telemundo is entitled to summary judgment, there would be no need to analyze other issues if Judge Cooke were to adopt this Report and Recommendations. I do not have a legal crystal ball, *1325 though, so it is prudent to provide an analysis of other issues, in the event that the Court were to rule otherwise on the fair report privilege.

In his Complaint, Plaintiff alleges that “[a]s a direct and proximate cause of Defendant's actions, Plaintiff lost his employment.” [ECF No. 1-1, p. 9]. Significantly, Larreal seeks damages for **future work he has not yet performed**, as opposed to a claim for wages for work he has already done.

Telemundo highlights the fact that Larreal was not eligible for employment in the United States at the time of the police raid

and the Telemundo news broadcast (and is still not eligible to legally work in the United States). Therefore, Telemundo argues, any claim predicated on lost future wages must be rejected as a violation of the United States' immigration laws. [ECF No. 64, pp. 10-13].

[20] Congress enacted the Immigration Reform and Control Act (“the IRCA”), 8 U.S.C. § 1324a, with an extensive employment verification system to discourage the employment of undocumented workers. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002) (precluding an award of lost wages and reinstatement to an undocumented worker because the job was obtained by a criminal fraud and the lost wages could not lawfully have been earned in the first place).

The employment verification system requires employers to verify the identity and eligibility of all new hires by examining specified documents, such as a social security card, before they may begin working. *See generally* 8 U.S.C. § 1324a(b); *see also Hoffman*, 535 U.S. at 148, 122 S.Ct. 1275. If an undocumented applicant does not present the requisite documentation, then he or she cannot be hired. *Id.* Undocumented employees attempting to undermine the employer verification system, as well as employers violating the IRCA's employment verification system, are subject to civil fines and criminal prosecution. *See* § 1324a(e)(4)(A); § 1324(a)(f)(1); § 1324c(a); 18 U.S.C. § 1546(b); *see also Hoffman*, 535 U.S. at 148, 122 S.Ct. 1275.

With the IRCA in place, the United States Supreme Court has noted that “it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies.” *Hoffman*, 535 U.S. at 148, 122 S.Ct. 1275.

Here, Larreal does not dispute his status as an undocumented alien, unauthorized to work in the United States. [ECF No. 130, p. 18]. The record demonstrates that Plaintiff has been unlawfully residing in the United States since August 2016 when he overstayed a temporary visitor visa. [ECF No. 65 at ¶¶ 3, 5]. During his time in the United States, Larreal has not attempted to obtain legal status -- but he has unlawfully procured work from various employers, including through the fraudulent use of the names and identities of various individuals to procure some of that work. *Id.* at ¶¶ 3, 5, 12, 20, 27-31, 34-36, 48. Larreal has also intentionally failed to file tax returns, report his earnings, or pay taxes. *Id.* at ¶ 6.

In following *Hoffman's* line of reasoning, the Court in *Veliz v. Rental Serv. Corp. USA*, 313 F. Supp. 2d 1317, 1335-36 (M.D. Fla. 2003), held that an undocumented worker could not recover lost wages for work to be performed, as such an award would be “tantamount to violating the IRCA.” *Id.* at 1336. While *Veliz* is not binding on this Court, the Undersigned agrees with the Court’s reasoning in denying an undocumented worker’s claim for future lost wages or an award for work never to be legally performed.

*1326 In *Veliz*, after an undocumented worker was killed in a workplace forklift accident, the worker’s personal representative of his estate brought a products liability suit, seeking to recover lost wages for unperformed work. *Id.* at 1319. The Court granted the defendants’ summary judgment motion, finding that the plaintiff could not recover lost wages because the undocumented worker was, as an initial matter, ineligible for employment in the United States. *Id.* at 1334-35.

[21] The same result must occur here. “The policies that motivated the enactment of the IRCA are certainly subject to debate, but the IRCA is the law of the land, and the Supreme Court has made it clear that awarding back pay to undocumented aliens contravenes the policies embodied in that law. An award of front pay would be inappropriate for the same reason: front pay essentially assumes that the worker will continue to work for the employer in the future, which is against the law for an undocumented alien.” *Renteria v. Italia Foods, Inc.*, No. 02 C 495, 2003 WL 21995190, at *6 (N.D. Ill. Aug. 21, 2003); *Hernandez-Cortez v. Hernandez*, No. 01-1241-JTM, 2003 WL 22519678, at *7 (D. Kan. Nov. 4, 2003) (“Accordingly, the court finds that Benito Hernandez-Cortez’s status as an illegal alien precludes his recovery for lost income based on projected earnings in the United States.”).

At the hearing on Telemundo’s summary judgment motion, Larreal conceded that he was unaware of any legal authority (binding or otherwise) which would entitle an undocumented alien like Larreal to obtain damages for future lost wages in the absence of a physical injury. Although he cited to cases in which undocumented workers could collect for unpaid wages for work *already* performed⁴ or for *physical injuries* sustained while illegally working,⁵ he could point to no legal authority on the controlling question here. And, as noted, there is ample authority (albeit not binding) which undermines and rejects his claim.

The Undersigned finds that Plaintiff’s immigration status as an undocumented overstayer precludes recovery of lost future earnings as a matter of law, and therefore **respectfully recommends** that the District Court (assuming it even needs to reach the issue in the first place) **grant** Telemundo’s summary judgment motion on the Plaintiff’s claim for economic damages -- lost wages for unperformed work.⁶

*1327 f. Non-Economic Damages

Telemundo’s summary judgment motion also advances the theory that Larreal cannot recover non-economic damages because he “cannot carry his burden of proving these damages [i.e., for mental anguish, personal humiliation and reputational injury] were caused by the News Report.” [ECF No. 64, pp. 17-18]. Telemundo brands his testimony about loss of sleep, occasional pressure in his head, accompanied by dizzy spells and depression as “self-serving assertions.” *Id.* at p. 18. They may well be, but that would not entitle Telemundo to a summary judgment in its favor. See *Feliciano*, 707 F.3d at 1253 (observing that Plaintiff’s self-serving assertions are “no more conclusory, self-serving or unsubstantiated by objective evidence” than the assertions of the police officers and holding that the nature of sworn statements “alone does not permit us to disregard them at the summary judgment stage”).

In addition, the mere fact that Larreal has tried to establish teasing through what Telemundo says is inadmissible hearsay does not mean that his entire claim must be rejected through an adverse summary judgment ruling. First, it is not clear that all the evidence would be inadmissible hearsay. Some of it might be admitted under the rule that the evidence is not being used to establish the truth of the matter asserted. And second, it might mean that he could not use this *specific* testimony at trial but could use other evidence which would be admissible.

Therefore, if Judge Cooke were to reach this issue, the Undersigned **respectfully recommends** that the Court **deny** this portion of Telemundo’s motion concerning Larreal’s claim for non-economic damages.

III. Objections

The parties will have fourteen (14) calendar days from the date of being served with a copy of this Report and Recommendations within which to file written objections, if any, with the District Judge. Each party may file a response to the other party’s objection within fourteen (14) calendar days of the objection. Failure to timely file objections shall bar the

parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); Henley v. Johnson, 885 F.2d 790, 794 (11th Cir. 1989); 11th Cir. R. 3-1 (2016).*

Footnotes

- 1** Telemundo filed a Statement of [Purportedly] Undisputed Facts. [ECF No. 65]. Larreal filed a response, contending that some of those facts were disputed. [ECF No. 131]. He then added his own supposedly undisputed facts, and Telemundo filed a response, asserting that some of Larreal's additional facts were actually disputed. [ECF No. 136]. The undisputed facts section in this Report is from the undisputed facts which remain after eliminating those which the other side challenged as actually being disputed. For some of these undisputed facts, the opposing party argued that they were legally immaterial to the pending motions. But the mere fact that a party raised a *legal* argument about materiality or relevancy did not prevent an undisputed fact from being listed here as a fact.
- 2** The parties here do not dispute the applicability of Florida law concerning the qualified fair report privilege.
- 3** Plaintiff was named fifth in the News Report, corresponding to the fact that his was the fifth arrest report provided by MDPD in the group of eight.
- 4** See, e.g., *Patel v. Quality Inn South*, 846 F.2d 700, 705-06 (11th Cir. 1988) (reversing summary judgment in favor of employer in claim for unpaid minimum wages and overtime under the Fair Labor Standards Act and emphasizing distinction between claim for work **already performed** and claims for back pay requested by deported alien employees who were deported -- and who could not recover in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984)).
- 5** See, e.g., *Cano v. Mallory Mgmt.*, 195 Misc.2d 666, 760 N.Y.S. 2d 816 (N.Y. Sup. Ct. 2003) (denying motion to dismiss filed by electric meter owner in personal injury lawsuit brought by unlawful alien for burns allegedly sustained when meter exploded during his employment and holding that plaintiff's undocumented status may be presented to the jury on lost wages but not on the issue of pain and suffering).
- 6** Telemundo also contends that Larreal has not presented any evidence of economic loss, which means that it would be entitled to summary judgment even if his immigration status did not bar his recovery. Assuming that Judge Cooke would even reach this argument (which would happen only if Judge Cooke were to reject the fair report privilege *and* also reject the undocumented alien rule), the Undersigned views this additional argument to be based on disputed issues of material fact, thereby rendering it unavailable for summary judgment resolution. At his deposition, Larreal testified about his economic damages. Telemundo may have evidence-based arguments to undermine his testimony and may even have evidence to suggest that it is false or exaggerated, but this type of contest creates a dispute best reserved for trial. See *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1253-54 (11th Cir. 2013) (affirming denial of defendants' summary judgment motion and noting that "as a general principle, a plaintiff's testimony cannot be discounted on summary judgment unless it is blatantly contradicted by the record, blatantly inconsistent, or incredible as a matter of law"); see also *D/S Ove Skou v. Hebert*, 365 F.2d 341, 346 (5th Cir. 1966) (stating factual disputes "are the stuff of which lawsuits are made").

Marriott International, Inc. Customer Security Breach Litigation

United States District Court, D. Maryland. | March 15, 2021 | Not Reported in Fed. Supp. | 2021 WL 961066

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Outline

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**In re: MARRIOTT INTERNATIONAL,
INC. CUSTOMER SECURITY
BREACH LITIGATION**

MDL NO. 19-MD-2879

|

Signed 03/15/2021

REPORT AND RECOMMENDATION

John Facciola, Special Master

**THIS DOCUMENT RELATES TO THE CONSUMER
TRACT**

I. The nature of the controversy

*1 The latest controversy between Marriott and Plaintiffs in the consumer track stems from Marriott's desire to have a forensic scientist scan the content of Plaintiffs' digital devices.

II. The warring protocols

Plaintiffs' Protocol

The controversy began with Marriott's Request for Production, which demanded the following:

3. The results of a forensic examination of the Plaintiff's devices that connect to the internet and contain electronically stored information, including a list of the indicators of compromise, to include malicious files, historical evidence of malicious files, and events logs of any antivirus software that may have removed the malware prior to examination, as identified via a forensic examination conducted in accordance with industry-standard best practices by an expert selected by Plaintiff,

and using a methodology and program to be agreed upon by Plaintiff and Marriott.

Plaintiffs' Exhibit A.

Plaintiffs objected (Plaintiffs' Exhibit B). Plaintiffs explained that the parties negotiated a compromise "whereby an expert would perform a forensic examination of a random sample of Plaintiffs' devices to search for evidence of any attack and, if no such evidence was found, the parties would move on." Letter of March 2, 2021, at 1. Plaintiffs then proposed a protocol for the forensic examination as follows:

Specifically, the protocol provided that the vendor would create a forensic image of the selected devices and run automated scans looking for evidence of malware and viruses that could result in data exfiltration (as Marriott's request specifically delineated). If such malware was present, a "root cause" analysis would then be performed to determine when and how the malware was installed and whether it could have resulted in the exfiltration of sensitive information.

Id.

Marriott's Protocol

The intended examination by the forensic scientist

Marriott was dissatisfied and proposed a radically different approach. Under this proposed approach, the forensic scientist would not merely forensically examine the device to look for malware or viruses; it would examine the actual content on the device.

Marriott's demand led to further discussions, and under its most recent suggested protocol, requested the examination of:

1. Evidence of malware and other viruses. (Ex. A § III.5.a.)
2. Web browsing history and bookmarked pages. (Id. § III.5.b.)
3. Installed programs and applications. (Id. § III.5.C.)
4. Identification of the location of personal information on the devices, e.g., in emails, text messages, or text files. (Id. §§ III.5.d-h & 1.)

5. Evidence of Plaintiffs' information security habits, such as wireless and Bluetooth connectivity and security. (Id. §§ III.5.i-k.)

Letter of March 8, 2021

The forensic scientist will conduct the examinations under paragraphs 2, 3, 4, and 5 as follows:

1. Web browsing history and bookmarked pages:

I would recommend a remote-inspection approach where Plaintiffs' experts or other consultants would host a remotely accessible platform where I could remotely access and analyze web browsing activity on Plaintiffs' devices without the ability to save or download any information. Any data sought for production from Plaintiffs to Defendant would be marked in the course of this analysis and reviewed by Plaintiffs' counsel for privilege prior to production.

*2 2. Installed programs and applications:

Programs and applications can store, process, or transmit personal information and may have allowed personal information to be either publicly exposed or used for identity theft or fraud if those areas of the devices or the applications themselves were compromised. I understand Plaintiffs also object to providing a full listing of applications and programs installed on their devices. As such, I would recommend a similar remote-inspection approach.

3. Identification of the location of personal information on the devices, e.g., in emails, text messages, or text files.

c) Notes/Documents/Text Files

i. Documents in many different formats can contain personal information. If the location in which these documents were stored, or any other platform, system, or application that stored or transferred the documents was compromised, that could have allowed personal information to be either publicly exposed or used for identity theft or fraud.

f) Chats & Messages

i. Individuals often share personal information through chat and messaging platforms on their devices and may have allowed this sensitive information to be inadvertently

publicly exposed if those areas of the devices or the messaging platforms themselves were compromised.

g) Email

i. Personal information in email accounts can be sent to other people; email accounts can be compromised, or locally stored email data can be stolen if a device storing the data is compromised. As such, any personal information stored in email on the devices or in accounts associated with the devices could have allowed personal information to be either publicly exposed or used for identity theft or fraud.

4. Evidence of Plaintiffs' information security habits, such as wireless and Bluetooth connectivity and security.

h) Wireless Device Connectivity

i. Wireless devices used while traveling can be subject to interception or access by third parties when connecting to insecure or unofficial wireless networks. Connection to insecure or otherwise questionable wireless networks may have allowed personal information to be either publicly exposed or used for identity theft or fraud.

i) Bluetooth Data Transfer

i. Sharing or transferring information via Bluetooth can result in inadvertent disclosure of information to unknown third parties if the security of Bluetooth connections are not carefully verified before sending data. Even accidental sharing of information with an unknown third party can cause personal information to be either publicly exposed or used for identity theft or fraud.

Marriott's Exhibit B, Declaration of Kevin T. Poindexter.

There is now, therefore, a quantum difference between the parties. They have gone from a malware/virus scan to a new demand that Plaintiffs disclose to this scientist the content they have created on their electronic devices in the areas I have just specified.

II. Recommendation

I recommend that the Court reject Marriott's proposed protocol and direct the parties to use the Plaintiffs' proposed protocol. I find that Marriott's protocol seeks inadmissible evidence and that even if that evidence is admissible, the

demand for the information Marriott seeks is premature in certain respects and disproportionate in others.

The evidence sought by Marriott's demand is inadmissible.

*3 When I first saw Marriott's proposed protocol at a conference with counsel, I told Marriott's counsel that I was concerned that the demand was based on an incorrect premise. In my view, its theory of the admissibility of Plaintiffs' use of the internet was flawed. Marriott was trying to elicit evidence of Plaintiffs' character or a character trait to establish a propensity to be negligent in their use of the internet. Marriott would then argue that it was Plaintiffs' negligence that caused the breach.

Unfortunately, counsel for both parties have ignored the question that I find most troubling: Isn't Marriott attempting to find evidence that is not admissible based on the prohibition against [Fed. R. Evid. 404\(a\)](#)? The Rule provides:

Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

Marriott is saying that Plaintiffs carelessly shared their email addresses with their friends in unencrypted text messages or emails or provided their PPI¹ to providers of goods and services on the internet. From that use, Marriott will ask the jury to find that the Plaintiffs were equally careless and negligent in 2014–2018, and therefore the Plaintiffs, not Marriott, caused the data breach.

However, this argument claims that Plaintiffs have what the Rule calls “the character trait” of being negligent and careless, and therefore, they must have been just as negligent and careless in 2014–2018 and caused the breach. That, however, is precisely the inference the Rule prohibits.

Take a simple car accident case. Driver A and driver B collide at an intersection. A says B was negligent. At trial, A offers into evidence B's prior traffic violations for reckless driving to show that B is a terrible driver. Assume that Judge Grimm used that hypothetical in his Evidence class and asked a student whether the evidence of the violations for reckless driving is admissible. If the student said yes, you could offer the violations to show what kind of a driver B is, I am certain the judge would flunk him on the spot because that is exactly

what the Rule prohibits. However, in my view, that is what Marriott is seeking to do by drawing a propensity from a party's prior behavior to prove that she acted in accordance with that trait.²

Even if the evidence was admissible, the demands made by Marriott's protocol are premature and disproportionate.

I also appreciate that [Fed. R. Civ. P. 26\(b\)\(1\)](#) provides that “[i]nformation within the scope of discovery need not be admissible in evidence to be discoverable.” This does not mean that the court cannot consider the inadmissibility of evidence in determining whether the evidence is within the scope of discovery. Rather, the contrary is true.

The Advisory Committee notes accompanying the 2015 amendment of [Fed. R. Civ. P. 26](#) indicated that the amendment was intended to replace the troubling language in an earlier version of the Rule that allowed the discovery of inadmissible evidence if its discovery was reasonably calculated to lead to admissible evidence. Adv. Comm. Notes to [Rule 26](#) (2015). The Committee then stated,

*4 The “reasonably calculated” phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that “Information within this scope of discovery need not be admissible in evidence to be discoverable.” Discovery of nonprivileged information not admissible remains available so long as it is otherwise within the scope of discovery.

Id.

[F.R. Civ. P. 26\(b\)\(1\)](#) then defines the scope of discovery as “any nonprivileged matter that is relevant to any party's claim or defense” and proportional to the needs of the case. The latter determination requires balancing the factors in that Rule, including “the importance of the discovery in resolving the issues.” Obviously, inadmissible evidence cannot aid in the resolution of the issues in a case. It would be a strange civil procedure system that would find the discovery of evidence to be proportional to the needs of the case when that evidence will never see the evidentiary light.

Nevertheless, I am obliged to be comprehensive in this Report and allow for the possibility that Judge Grimm will disagree with my opinion that Marriott seeks inadmissible evidence. I will therefore assume the contrary—the evidence

may be admissible—and indicate why Marriott's demands are premature and disproportionate.

Relevance to causality

Marriott argues that Plaintiffs' present use of Plaintiffs' digital devices to interface with the internet may show that their profligate disclosure of their PPI to others on the internet may permit the jury to conclude that there was another cause for the breach that is the subject of this case. Letter of March 8, 2021, at 3 ("Moreover, the less securely and sensitively Plaintiffs treat their personal information—e.g., by not securing it on their electronic devices and by providing to other third parties—the less likely a juror is to believe Plaintiffs claim that Marriott caused fraud or the risk of fraud.")

First, as to causation, Marriott does not explain how Plaintiffs' use of their digital devices in, let us say, 2020 could bear on the cause of a breach that occurred no later than 2018. Thus, Marriott has to be once again suggesting that Plaintiffs' present use of the internet is evidence of how they used the internet in 2014–2018. In that case, we are back to the issue of the admissibility of character evidence.

In any event, there is, at most, a theoretical possibility that, for example, Plaintiffs' indicating their names and credit card numbers to buy something from an internet vendor or their visiting a particular website might have caused a subsequent breach. But that possibility cannot justify the extensive demand that Marriott makes to have a third party see (1) every website Plaintiffs visited and (2) every text message or email they sent that contained their PPI. As Justice Frankfurter once put it, albeit in a different context: "Surely, this is to burn the house to roast the pig." Butler v. Michigan, 353 U.S. 383 (1957).

I should note that, in this context of proportionality, courts have permitted such forensic screening, and Marriott indicates that Plaintiffs agree to its legitimacy here. Letter of March 8, 2021, at 5. No matter how those courts use the words "forensic screening," I take them to mean, in the context of this case, a scientific exploration to detect the presence of a virus, malware, or any other tool designed to capture data from a device without the knowledge of its owner. While that kind of examination may or may not prove causality in any given case, it is light years away from Marriott's proposal that

a third party read, for example, every one of Plaintiffs' email and text messages to search for their disclosure of their PPI.

Prematurity of the demand

*5 Marriott also argues that it should be able to show that Plaintiffs' negligent use of the internet, thereby jeopardizing Plaintiffs' PPI, would contradict and weaken the claim that their PPI has a value. Thus, Marriott asks why the jury should award Plaintiffs' damages for the loss of their PPI when Plaintiffs have shown so little interest in safeguarding it from being hacked and stolen. Letter of March 8, 2021, at 4.³

During our discovery conferences, Plaintiffs have explained that they will make the information bearing on the loss of their PPI value available to their experts. Those experts will, in turn, create a damages model supporting the claim that there is a monetary value to their PPI and that the breach has deprived them of that value.

Whether Plaintiffs' PPI has value and the related questions of what will or will not diminish that value will be addressed by Judge Grimm.

Judge Grimm has indicated that he intends to subject Plaintiffs' experts' opinions to rigorous analysis under Fed. R. Evid. 702 to the point of hiring a technical expert to guide him on the science underlying those opinions. His resolution of whether Plaintiffs' experts can present a damages model that attributes, for example, a value to Plaintiffs' PPI or their ability to use credit cards to make purchases⁴ will clarify whether evidence of Plaintiffs' present use of their computers diminishing the value of their PPI is admissible. Moreover, if Marriott succeeds in having Judge Grimm reject the experts' damage model, the jury will never consider the value of Plaintiffs' PPI. The issue of whether Plaintiffs' behavior on the internet diminished the value of their PPI will be irrelevant if Judge Grimm rejects as unfounded Plaintiffs' theory that Plaintiffs' PPI has a monetary value.

Marriott would counter that Plaintiffs could prevail, and their need for the information would then ripen, but fact discovery will be closed. I appreciate that and would recommend that Judge Grimm revisit (or direct me to revisit) this issue after he has resolved whether he will permit expert testimony on the Plaintiffs' damage model. The alternative—permitting the extraordinary disclosure to a third person of every email or text message containing PPI the Plaintiffs wrote or every

website they visited when the evidence yielded by that disclosure may never be relevant—makes no sense at all.

Relevance to injunctive relief

Marriott, noting that Plaintiffs seek injunctive relief, argues:

Plaintiffs also seek injunctive relief, arguing that an injunction is necessary to prevent them from injury due to further cyber-attacks. (See, e.g., id. ¶ 352.) Whether the Court issues an injunction should turn, in part, on the degree to which Plaintiffs protect their own information. If, for example, Plaintiffs do not protect their information, then an injunction would do nothing to prevent the harm they argue an injunction would protect against.

*⁶ Letter of March 8, 2021, at 8.

The Fourth Circuit, quoting a Supreme Court decision, has identified the factors that bear on the award of injunctive relief as follows:

Under the traditional equitable analysis, a plaintiff seeking injunctive relief must demonstrate:

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)

S.A.S. Inst., Inc. v. World Programming Ltd., 952 F.3d 513, 527 (4th Cir. 2020). See also *Beacon Theatres v. Westover*, 359 U.S. 500, 506–507 (U.S. 1959) (“The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.”)

Plaintiffs' use of their computers and their access is not one of these factors, nor does it relate to any of them.

First, Plaintiffs' negligent use of their devices does not render whatever damages they win an inadequate remedy for the harm done them by the breach. Additionally, the existence of those damages militates against a finding that they are threatened with irreparable harm. The Fourth Circuit has stated,

The possibility that adequate compensatory or other corrective relief will be available at a later date ... weighs heavily against a claim of irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974). A plaintiff must overcome the presumption that a preliminary injunction will not issue when the harm suffered can be remedied by money damages at the time of judgment. *Hughes Network Sys., Inc. v. Interdigital Commc'n Corp.*, 17 F.3d 691, 693 (4th Cir. 1994).

Di Biase v. S.P.X. Corp., 872 F.3d 224, 230 (4th Cir. 2017)

Moreover, the award of those damages means that Plaintiffs are not threatened with irreparable harm post-verdict. “[G]enerally ‘irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate.’” *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994). “Irreparable,” after all, means “impossible to rectify or repair.” *Compact Oxford English Dictionary* 592 (2d rev. ed 2003). The availability of the damages Plaintiffs may win indicates that the harm to them from another breach is not irreparable.

Finally, there may be a profound public interest in how Marriott, one of the largest hoteliers in the world, manages the PPI that its guests make available to Marriott when they make a reservation or check into their room. Whether that interest is served by an injunction ordering Marriott to do or not do something to safeguard that PPI will require a careful, scientific evaluation of the state of Marriott's cybersecurity protection system when the injunction is sought. That Plaintiffs are not as careful as they should be in using the internet has nothing to do with the Marriott cybersecurity system's strength or weakness when Judge Grimm may have to determine whether the public interest in cybersecurity will be advanced or retarded by an injunction.

*⁷ Therefore, I conclude that Marriott's demand for the information has nothing to do with Plaintiffs' potential demand for injunctive relief, even if that demand was not premature.

III Conclusion

For the reasons stated in this Report, I recommend that the forensic examination of Plaintiffs' devices be done in accordance with Plaintiffs' proposed protocol, Plaintiffs'

Exhibit A. I further recommend that all Plaintiffs make their devices available as required by that protocol and that the forensic examinations be conducted promptly. Under the Plaintiffs' protocol, they only need to deliver the devices to the forensic scientist, and I see no unreasonable invasion of their privacy from a search for malware and viruses.

Attachment

March 2, 2021

The Honorable John M. Facciola (Ret.),
facciola@georgetown.edu

Re: *In re Marriott*, MDL No. 2879 (D. Md.), Inspection of Consumer Plaintiffs' Devices

Plaintiffs move for a protective order prohibiting Marriott's from obtaining a highly-invasive forensic analysis of nearly every file on—and the entire history of—Plaintiffs' personal cell phone and computer use. Marriott's unprecedented and brazen discovery request seeks information that is not relevant to the case. Plaintiffs are not aware of any other court in a data breach case allowing the types of overly broad and unfettered personal device searches as Marriott is proposing here. Indeed, in the one case from which Marriott apparently patterned its discovery request, that court *rejected* Marriott's approach, allowed only limited discovery, and later expressed regret over the decision. Plaintiffs ask Your Honor to follow the weight of authority and reject Marriott's intrusive, unnecessary, and wholly disproportionate request.

agreed upon by Plaintiff and Marriott. (Ex. A, emphases added)

Plaintiffs objected to this request on numerous grounds. (Ex. B) The parties conferred and, while Plaintiffs maintained their objections to any discovery at all, to avoid burdening the Court with additional discovery disputes, Plaintiffs negotiated a compromise whereby an expert would perform a forensic examination of a random sample of Plaintiffs' devices to search for evidence of any attack and, if no such evidence was found, the parties would move on.

After the parties selected the custodians and prepared a list of eligible devices for selection, Plaintiffs provided a proposed Remote Collection and Examination Protocol ("Protocol"). (Ex. C) The Protocol was consistent with industry-standard collection methods, consistent with the scope of Marriott's request, and similar to protocols adopted in the small number of other cases which allowed such device inspection. Specifically, the Protocol provided that the vendor would create a forensic image of the selected devices and run automated scans looking for evidence of malware and viruses that could result in data exfiltration (as Marriott's request specifically delineated). If such malware was present, a "root cause" analysis would then be performed to determine when and how the malware was installed and whether it could have resulted in the exfiltration of sensitive information. Following the inspection, the vendor would produce a report for each plaintiff's devices which would detail the examination findings. The Protocol provided that the vendor would not view any additional files or data copied from the device unless it was necessary to perform a root cause analysis and only after obtaining permission.

A. Discovery Sought and Relevant History.

On September 20, 2020, Marriott requested:

The results of a forensic examination of the Plaintiff's devices that connect to the internet and contain electronically stored information, including a list of the indicators of compromise, to include ***malicious files, historical evidence of malicious files, and events logs of any anti-virus software that may have removed the malware prior to examination***, as identified via a forensic examination conducted in accordance with industry standard best practices by an expert selected by Plaintiff, and ***using a methodology and program to be***

*8 On February 16, 2021, Marriott sent nearly 10 pages of proposed "revisions" to the Protocol, drastically broadening the scope of the proposed examination. (Ex. D) Marriott's revisions *far exceeded the scope of its own request*, which was limited to things like evidence of malware. Marriott now seeks, in part, examination and reports pertaining to *all* of the following: Web Browsing History and Bookmarked Pages; Installed Programs/Applications; Notes/Documents/Text Files; Photos/Digital Images of Personal Information or Passwords; Cloud Storage Accounts (Google Drive, OneDrive, DropBox, etc.); Apple/Google/Microsoft Account IDs; **Chats** & Message; Email; Wireless Device Connectivity; Bluetooth Data Transfer; and Passwords—in other words, *every* sensitive file that could ever exist on

one's computer or cellular phone (including personal pictures, emails, passwords, and internet history).

Marriott's initial discovery request, already overbroad and objectionable, has now morphed into an unprecedented dive into Plaintiffs' personal data. Not only does this proposed discovery have no relevance to the parties' claims and defenses, but granting this discovery may result in several of the plaintiffs dropping out of the litigation entirely, as they would be a subject to a forensic search that is more intrusive and violative than the actual data breach at issue. This is not reasonable discovery; it is retaliation.

B. Legal Standard.

[Rule 26\(c\)](#) governs protective orders. Under that rule, the Court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... forbidding the disclosure or discovery" of certain items or "prescribing a discovery method other than the one selected by the party seeking discovery." [Fed. R. Civ. P. 26\(c\)\(1\)\(A\), \(C\)](#). Additionally, [Federal Rule of Civil Procedure 26\(b\)\(1\)](#) limits discovery to matters that are (1) "relevant to any party's claim or defense" and (2) "proportional to the needs of the case[.]" [Fed. R. Civ. P. 26\(b\)\(1\)](#).

C. Argument.

There is more than good cause to issue a protective order in this case. The sweeping forensic search Marriott seeks is untethered to the issues in the case, is much broader than Marriott's actual discovery request as written (which required Plaintiffs' agreement), and implicates significant privacy concerns that are disproportional to the needs of this case. While a few courts have allowed very limited and targeted searches of some devices when tied to the case at issue, no prior data breach case has ever allowed the type of oppressive discovery Marriott seeks here.

1. Marriott's Proposed Discovery is Irrelevant.

Marriott has proffered two reasons for needing this discovery: 1) to show that other events may have triggered the loss of Plaintiffs' information; and 2) to contest the inherent value

Plaintiffs place on their data. Neither argument can justify the discovery Marriott seeks.

For Marriott's proposed discovery to have any possible relevance to causation, a series of remote and highly-speculative steps would have had to occur: a plaintiff would have had to experience a fraud event allegedly tied to the Marriott breach; then used a specific device at the time the fraud event took place; and then a forensic inspection would have had to reveal unauthorized access to the device and the same data at issue. But that could only provide a potential alternative basis for the fraud if Marriott limited the scope of its request to devices in use at the time of the fraud event (it did not) or there was a whole separate round of third-party discovery into that other breach. With discovery ending, these highly theoretical and unlikely occurrences cannot justify the intrusive nature of the Marriott's request.

Marriott's second justification fares no better. Marriott's suggestion that this discovery may reveal that Plaintiffs were careless with their personal information somehow demonstrating that they do not value privacy is fatally flawed because it has nothing to do with the claims or defenses in this case. One of Plaintiffs' damages measures relates to the *objective* value of their personal information. Importantly, this has no bearing on any individual plaintiffs' *subjective* feelings about their information. This is as if Marriott had wrongfully let a thief steal a car from each of the plaintiffs and plaintiffs claimed the "value" of the stolen cars. The relevant question is not how much each plaintiff loved her car, but how much the car is worth in the market. The same holds true here: as Your Honor already ruled, Plaintiffs will submit expert testimony establishing the *objective* market value of their data on an aggregate, classwide basis. Plaintiffs will *not* base damages claims on their *subjective* feelings about their personal information.

2. Marriott's proposed discovery is unlikely to shed light on a Plaintiff's subjective privacy valuation even if it were relevant.

*9 Even if every sensitive file on a Plaintiffs' computer was somehow relevant to the damages analysis, Marriott cannot explain how the information it seeks would actually shed light on that topic. As noted above, Marriott's proposed search protocol includes recent internet search history, personal images, photographs, and documents, personal emails and **chat** messages, login IDs and passwords, and even files stored

on cloud storage accounts that are not physically present on the device. Marriott offers no substance behind what this information could reasonably be expected to show. For example, Marriott contends that a plaintiff's recent internet search history could show that he or she visited a "vulnerable" website. But how does Marriott show whether a website is "vulnerable"? And how does that devalue their data?

The additional information Marriott seeks is even more untethered to this case. Why would a Plaintiff's private internet search history from last week have any bearing on a breach that occurred seven years ago? What relevance do personal photographs or a Google search history on a plaintiff's computer have to their data security practices or value of their data? Why would a plaintiff's most personal text messages or emails have any bearing on the issues raised in this case? Stripped of the dubious pretense that this information could show plaintiffs did not value their data, it appears that the purpose of this discovery is to harass, embarrass, and call into question the plaintiffs' character by digging through their most sensitive information.

3. The proposed discovery would be wildly disproportionate to the needs of the case, even if some of the information sought were somehow relevant.

Plaintiffs are aware of no precedent allowing this type of inspection of plaintiffs' personal cell phone and computer devices simply because they were victims of a data breach. Two previous cases are particularly relevant: *In re Anthem* and *Henson v. Turn*.

In *Anthem*, the defendants initially sought the same type of discovery as Marriott requests here (essentially full forensic images of devices). The magistrate judge *rejected* that request, holding:

The Court finds that the burden of providing access to each plaintiff's computer system greatly outweighs its likely benefit. There is an Orwellian irony to the proposition that in order to get relief for a theft of one's personal information, a person has to disclose even more personal information, including an inspection of all his or her devices that connect to the internet. If the Court were to grant Anthem's request, it would further invade plaintiffs' privacy interests and deter current and future data theft victims from pursuing relief.

In re Anthem, Inc. Data Breach Litig., 2016 WL 11505231, at *1 (N.D. Cal. Apr. 8, 2016) (Ex. E) (holding that the device discovery sought was "unreasonably intrusive and disproportional to the present needs of the case").

The magistrate judge in that case later allowed a much narrower forensic examination of certain plaintiffs' devices. It *excluded* handheld devices such as cell phones, and it was limited to the *exact* scope as the one Plaintiffs suggested here in an effort to compromise with Marriott. (Ex. F) Judge Lucy H. Koh, who presided over the litigation, said that even the more limited search—which had caused a plaintiff to drop out of the litigation—was not warranted. Judge Koh stated, "I would just say that—had this issue come to me as a first instance, I probably would not have compelled the discovery." *In re Anthem, Inc. Data Breach Litig.*, Dkt. No. 700, 6:3-13 (N.D. Cal. 2016) (Ex. G) This was so, she explained, because "the discovery is burdensome" and it is "pretty invasive." *Id.*¹

***10** Perhaps the most detailed analysis on the question of whether to permit forensic analysis in a data privacy case is contained in *Henson v. Turn, Inc.*, 2018 WL 5281629 (N.D. Cal. Oct. 22, 2018). (Ex. H) In that case, a class of subscribers to cellular and data services filed a data-privacy class action against the defendant for surreptitiously tracking their web history. *Id.*, at *1. Like Marriott, the defendant submitted a request that plaintiffs produce: (1) their mobile devices for inspection or complete forensic images of their devices; (2) their full web browsing history from their devices; and (3) all cookies (lines of software code that monitor and gather information about users' browsing and app use) stored on or deleted from their devices. See *id.*

Magistrate Judge Laurel Beeler rejected the "request to inspect the plaintiffs' mobile devices or for complete forensic images" as it "call[s] for information that is not relevant and is disproportional to the needs of the case." *Id.* at *5. She explained:

- The breadth of the search "threatens to sweep in documents and information that are not relevant to the issues in this case, such as the plaintiffs' private text messages, emails, contact lists, and photographs." *Id.* (collecting cases rejecting broad discovery of irrelevant documents).
- The question of discovery proportionality "is not limited to ... financial considerations. Courts and commentators have recognized that privacy interests can be a consideration in evaluating proportionality, particularly

in the context of a request to inspect personal electronic devices.” Id. (collecting cases, emphasis added).²

- “[I]n light of the fact that the plaintiffs' devices likely contain information not relevant to this case, may contain privileged information, and implicate significant privacy concerns, [defendant's] request for the plaintiffs to allow it to directly inspect their devices (or produce complete forensic images of their devices) is not relevant or proportional to the needs of this case.” *Id.* at *7.
- “[R]equiring the plaintiffs to produce their full browsing history presents significant privacy concerns” and that the defendant “has not shown that its request for the plaintiffs' full browsing history and cookies ... is relevant or proportional to the needs of this case.” *Id.* at *8.

*11 There is even less of a need for discovery in this case than in *Henson*, which was actually about a defendant who tracked Plaintiffs' browsing history.

D. Conclusion

There is good cause to issue a protective order. Marriott seeks discovery no court in a similar matter has *ever* ordered (although other defendants have tried)—not to prosecute claims or support its defenses, but to “punish” and harass individuals for daring to sue it. Marriott has no proper basis—much less a proportionate one—for seeking Plaintiffs' web browsing habits, personal photographs, emails and text messages, or passwords. And as Your Honor has already recognized, Plaintiffs' damages claim that Marriott owes them the “value” of their personal information does not turn on any individual plaintiff's *subjective* feelings about his or her data. Plaintiffs respectfully request that Your Honor prohibit this irrelevant, overly broad, intrusive, and disproportionate discovery.

Respectfully,

/s/ Amy E. Keller

/s/ Andrew N. Friedman

Co-Lead Counsel, Consumer Track

/s/ James J. Pizzirusso

Exhibit A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Southern Division

**IN RE: MARRIOTT INTERNATIONAL, INC.
CUSTOMER DATA SECURITY BREACH
LITIGATION**

**THIS DOCUMENT RELATES TO THE CONSUMER
TRACK**

MDL No.: 19-md-2879

Judge Grimm

DEFENDANT MARRIOTT'S SECOND SET OF REQUESTS FOR PRODUCTION TO BELLWETHER PLAINTIFF ROGER CULLEN

Pursuant to [Rules 26](#) and [34 of the Federal Rules of Civil Procedure](#), defendants Marriott International, Inc. and Starwood Hotels and Resorts Worldwide, LLC (collectively, “Marriott”) hereby serve the following request for the production of documents.

INSTRUCTIONS

1. If, in responding to this request, the meaning of the request is not clear on its face, or you encounter any ambiguity in construing the request or instructions, you shall make your best effort to interpret the request within the context of this litigation and shall explain in your response the matter deemed ambiguous and the construction or interpretation chosen or used in responding to the request.
2. For the purposes of this discovery request, the singular includes the plural, and vice versa; the conjunctive shall also be construed in the disjunctive, and vice versa; and the past tense includes the present tense where the clear meaning is not distorted by change of tense.

3. This request for production is continuing in nature and, pursuant to **Rule 26(e) of the Federal Rules of Civil Procedure**, you are under a duty to seasonably supplement your response.

4. If you refuse to respond to this request for production, in whole or in part, state clearly the basis for such refusal. If a privilege is claimed, identify the information for which the privilege is claimed and set forth the nature of the privilege asserted.

REQUEST FOR PRODUCTION

3. The results of a forensic examination of the Plaintiff's devices that connect to the internet and contain electronically stored information, including a list of the indicators of compromise, to include malicious files, historical evidence of malicious files, and events logs of any anti-virus software that may have removed the malware prior to examination, as identified via a forensic examination conducted in accordance with industry standard best practices by an expert selected by Plaintiff, and using a methodology and program to be agreed upon by Plaintiff and Marriott.

***12** Date: September 29, 2020

/s/ Lisa M. Ghannoum

Daniel R. Warren (*pro hac vice*)

Lisa M. Ghannoum (*pro hac vice*)

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Consumer Defendant's Co-Lead Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 29th of September, 2020, I served the foregoing document on the Consumer Plaintiffs' Co-Lead Counsel—James Pizzirusso (jpizzirusso@hausfeld.com), Andrew Friedman (afriedman@cohenmilstein.com), and Amy Keller (akeller@dicellevitt.com)—and Ariana Tadler (atadler@tadlerlaw.com) via electronic mail.

/s/ Lisa M. Ghannoum

One of the Consumer Defendant's Co-Lead Counsel

Exhibit B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

SOUTHERN DIVISION

IN RE: MARRIOTT INTERNATIONAL INC., CUSTOMER
DATA SECURITY BREACH LITIGATION

MDL No. 19-md-2879

Hon. Paul W. Grimm

**CONSUMER PLAINTIFF ROGER CULLEN'S
OBJECTIONS TO DEFENDANT MARRIOTT'S**

SECOND SET OF REQUESTS FOR PRODUCTION TO CONSUMER PLAINTIFF ROGER CULLEN

Pursuant to [Rules 26 and 34 of the Federal Rules of Civil Procedure](#), Plaintiff Roger Cullen (“Plaintiff”) sets forth herein answers and objections (collectively, “Responses”) to Marriott Defendant’s (“Marriott” or “Defendants”) Second Set of Requests for Production (“RFPs”) to Plaintiffs, dated September 29, 2020.

No incidental or implied admissions are intended in these Responses. Plaintiff’s Response to all or any part of the RFPs should not be taken as an admission that (1) Plaintiff accepts or admits the existence of any fact(s) set forth or assumed by the RFPs; (2) Plaintiff has possession, custody or control of information responsive to that RFP; or (3) documents exist that are responsive to the RFPs.

PLAINTIFF’S RESPONSES AND OBJECTIONS TO MARRIOTT’S SECOND SET OF REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION:

The results of a forensic examination of the Plaintiff’s devices that connect to the internet and contain electronically stored information, including a list of the indicators of compromise, to include malicious files, historical evidence of malicious files, and events logs of any anti-virus software that may have removed the malware prior to examination, as identified via a forensic examination conducted in accordance with industry standard best practices by an expert selected by Plaintiff, and using a methodology and program to be agreed upon by Plaintiff and Marriott.

RESPONSE TO REQUEST FOR PRODUCTION:

Plaintiff objects to this Request because it is vague and ambiguous, highly invasive, harassing and intrusive, overbroad, overly burdensome, seeks entirely irrelevant information, and there are substantially less burdensome and less intrusive means of obtaining the information Marriott seeks. Plaintiff further objects because the discovery sought in this Request is disproportional to the needs of this case as Plaintiff’s privacy interests in the information contained on his/her devices and the burden and expense of complying with this Request far outweigh any likely benefit.

*¹³ This Request is vague and ambiguous because Marriott fails to explain which of Plaintiff’s devices it seeks to

have forensically examined, and fails to explain or provide definitions for any of the technical terms it uses in its Request, leaving Plaintiff to guess at the precise scope of Marriott’s Request.

This Request is highly invasive, harassing, and intrusive because it would require Plaintiff to submit his/her most personal devices such as cell phones, iPads, laptop and desktop computers to be forensically examined, which might contain sensitive personal and financial information including, but not limited to, private photos of and communications with non-parties to this litigation. These devices may also contain personal browsing history, protected health information, attorney-client communications, and other personal and financial information that serves no purpose in this case.

This Request is overbroad because it provides no limitation on the scope of devices potentially subject to forensic examination, meaning Plaintiff may be subject to providing personal devices that were used prior to or subsequent to the events giving rise to this litigation. This Request is further overbroad because it does not limit the request to Plaintiff’s personal devices, thus any devices used for employment or other purposes would be included, which could implicate the privacy rights of non-parties to this litigation. Any personal or employment devices that are forensically examined may further have confidential and proprietary information which would require the consent of these third parties.

This Request is overly burdensome because requiring Plaintiff to locate and produce his/her Personal devices without limitation would require Plaintiff to spend significant time searching for all such devices, even in cases where they may not be easily accessible. For instance, it is common for Plaintiff, like all consumers, to periodically replace his/her devices, often times requiring him/her to trade in or donate the device to a third party. Plaintiff may not even own the device, requiring Plaintiff to locate and review the terms of the contract with the provider of the device, further subjecting Plaintiff to significant time and effort, which is simply disproportionate with any likely benefit to be obtained from this discovery. To the extent a device is no longer in the possession of Plaintiff, then Plaintiff further objects that this discovery is improper and not directed toward the proper party. In addition and given the COVID-19 pandemic, Plaintiff objects to the extent this discovery would require Plaintiff to either provide the personal devices to third parties to conduct the forensic examination or require

third parties to meet with Plaintiff in person, potentially increasing the risk of transmission and/or subjecting Plaintiff to COVID-19, especially for discovery that would bear little to no relevance on this case. Plaintiff also objects to the extent that conducting a forensic examination of Plaintiff's devices would interfere with Plaintiff's daily use of those devices for an undisclosed amount of time and would unduly interrupt Plaintiff's personal and/or work life in a manner that is disproportional to the needs of the case. This Request seeks information that is entirely irrelevant because it requires the forensic examination of all Plaintiff's devices without limitation, even where there is no indication that such devices maintain any of the Personal Information provided to Starwood or Marriott and even where such devices may have been obtained prior to or well after the Data Breach and misuse occurred, bearing no relevance on Plaintiff's claims or Marriott's defenses. Moreover, many of Plaintiff's alleged injuries, such as "loss of the benefit of the bargain," are not premised upon the theory that Plaintiff's PII (which was accessed in the Data Breach) has already been used for illicit gain. For such categories of harm, evidence that Plaintiff's PII might possibly have also been stolen from his/her own computer systems is completely irrelevant. Further, the discovery sought in this Request is not proportional to the needs of this case because any benefit the inspection might provide is far outweighed by Plaintiff's privacy and confidentiality interests in the information contained on his/her devices. Finally, this Request is objectionable because there are significantly less burdensome and intrusive means to obtain the information Marriott seeks. For instance, Marriott can propound interrogatories or requests for admission upon Plaintiff, or question Plaintiff at his/her deposition, requiring Plaintiff to response under penalty of perjury whether Plaintiff is aware of any malware or other malicious files on Plaintiff's personal devices.

***14** Given that this Request is vague and ambiguous, highly invasive, harassing, and intrusive, overbroad, overly burdensome, seeks entirely irrelevant information and information that is disproportional to the needs of this case, and given that there are substantially less burdensome and intrusive means of obtaining the information Marriott seeks, Plaintiff will not produce any documents or devices in response to this request.

Dated: October 29, 2020

/s/ Amy E. Keller

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CERTIFICATE OF SERVICE

I, Daniel S. Robinson, hereby certify that on October 29, 2020, I served the above and foregoing responses by causing true and accurate copies of such document to be transmitted via electronic mail to counsel of record as follows:

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Dated: October 29, 2020

/s/ Daniel S. Robinson

Daniel S. Robinson

Exhibit C

**IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND**

SOUTHERN DIVISION

**IN RE: MARRIOTT INTERNATIONAL CUSTOMER
DATA SECURITY BREACH LITIGATION**

**THIS DOCUMENT RELATES TO: ALL CONSUMER
ACTIONS**

MDL NO. 19-md-2879

Judge Paul W. Grimm

**REMOTE COLLECTION AND EXAMINATION
PROTOCOL**

Consumer Plaintiffs and Defendants (collectively, the "Parties") in the above-captioned matter stipulate and agree to the following protocol for the collection, examination, and production of data concerning Marriott's Request for Results of Examination of Plaintiffs' Devices, as the parties agreed to on or around January 6, 2021.

I. Device Identification

*15 1. Prior to scheduling any remote collections or preservations, each Custodian shall provide a detailed schedule of electronic devices to be forensically imaged and a secure address to send a remote collection kit containing the necessary hardware. This schedule will, at a minimum, include the following information:

- a. Custodian Name
- b. Device Description
- c. Make/Model/Serial #
- d. Estimated total storage capacity (used and available for use)

II. Collection and Imaging

2. Respective to each Custodian, upon receiving the schedule of devices 4Discovery shall propose dates and times for a remote collection kit to arrive at each Custodian's provided address. A signature will be required at the time of delivery. Within 2 days of delivery, each Custodian will participate in a virtual meeting with a 4Discovery collection specialist at an agreed upon time to facilitate collection and preservation of the specified devices. Collections will be performed using industry standard tools and methodology. This methodology will vary per device. If any encryption or passcodes are being used to protect the device(s), these codes will be provided by the Custodian to 4Discovery at the time of imaging.

3. 4Discovery shall create a full and complete forensic image of each device prior to starting any analysis. These forensic images will be shipped to the 4Discovery lab and shall reside solely in 4Discovery's custody for the length of the matter. The original device(s) will remain in the control of each Custodian. 4Discovery will ensure that the devices are not altered or harmed in any way.

4. While data responsive to the analysis steps described below will be sent to Counsel for review, copies of original data and forensic images collected shall not be released to counsel or experts for the parties and shall not be released from 4Discovery's custody for any reason absent written permission from the Custodian.

III. Analysis and Production

5. 4Discovery will perform automated scans on the forensic image to look for evidence of malware and review the log files of any antivirus or antivirus programs that have been installed on the Custodian's device. This review will be performed using various anti-virus scans, a review of file lists for suspicious files, analysis of any previously executed command line strings, and a review of system registry hives and event logs. 4Discovery will not view any additional files or data copied from the device unless necessary to perform a root cause analysis.

6. If there is evidence of malware on a device, 4Discovery will determine whether the malware is of the type that could result in the exfiltration of sensitive user data stored on the device. If it is, 4Discovery will perform a root cause analysis to determine when and how the malware was installed and whether it resulted in the exfiltration of sensitive information. For purposes of performing the root cause analysis, 4Discovery will not view any pictures or other files on the device until after it has discussed the nature of the analysis with counsel for the parties and obtained permission from the Custodian to do so.

7. 4Discovery shall then produce a forensic examination report for each Custodian's devices which details the examination findings.

IV. Data Disposition

8. Upon receiving written authorization provided by Counsel, 4Discovery will securely delete all collected data.

Exhibit D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

SOUTHERN DIVISION

*16 IN RE: MARRIOTT INTERNATIONAL CUSTOMER DATA SECURITY BREACH LITIGATION

THIS DOCUMENT RELATES TO: ALL CONSUMER ACTIONS

MDL NO. 19-md-2879

Judge Paul W. Grimm

REMOTE COLLECTION AND EXAMINATION PROTOCOL

Consumer Plaintiffs and Defendants (collectively, the “Parties”) in the above-captioned matter stipulate and agree to the following protocol for the collection, examination, and production of data concerning Marriott’s Request for Results of Examination of Plaintiffs’ Devices, as the parties agreed to on or around January 6, 2021.

I. Device Identification

1. Prior to scheduling any remote collections or preservations, each Custodian (as agreed to by the Parties) shall provide 4Discovery a detailed schedule of electronic devices to be forensically imaged and a secure address to send a remote collection kit containing the necessary hardware. This schedule will, at a minimum, include the following information:

- a. Custodian Name
- b. Device Description
- c. Make/Model/Serial #
- d. Estimated total storage capacity (used and available for use)

II. Collection and Imaging

2. Respective to each Custodian, upon receiving the schedule of devices 4Discovery shall propose dates and times for a remote collection kit to arrive at each Custodian’s provided address. A signature will be required at the time of delivery. Within 2 days of delivery, each Custodian will participate in a virtual meeting with a 4Discovery collection specialist at an agreed upon time to facilitate collection and preservation of the specified devices. Collections will be performed using industry standard tools and methodology. This methodology will vary per device. If any encryption or passcodes are being used to protect the device(s), these codes will be provided by the Custodian to 4Discovery at the time of imaging. To the extent any of the devices store information in a cloud-based storage location, the cloud storage will be included in the data being collected by 4Discovery.

3. 4Discovery shall create a full and complete forensic image of each device prior to starting any analysis. These forensic images will be shipped to the 4Discovery lab and shall reside solely in 4Discovery’s custody for the length of the matter. The original device(s) will remain in the control of each Custodian and will be preserved consistent with the plaintiffs’ obligations to preserve evidence. 4Discovery will ensure that the devices are not altered or harmed in any way during the imaging process.

4. While responsive data will be sent to counsel for the Parties for review, copies of original data and forensic images collected shall not be released to counsel or experts for the Parties and shall not be released from 4Discovery’s custody for any reason absent written permission from the Custodian or Court order.

III. Analysis and Production

5. 4Discovery will conduct a forensic examination of the agreed upon devices and produce a report containing the following items:

a. Malware Scans

i. 4Discovery will perform automated scans on the forensic images to look for evidence of viruses or malware and identify and review the log files of any antivirus or anti-malware programs that have been installed on the devices. This review will be performed using various antivirus scans, a review of file lists for suspicious files, analysis of any previously executed command line strings, and a review of system registry hives and event logs.

*¹⁷ ii. 4Discovery will produce a report identifying any evidence any viruses and/or malware found on each device, including both the current antivirus and malware findings, as well as any historical information. The report will also identify the methodology or methodologies used to scan the forensic images.

b. Web Browsing History and Bookmarked Pages

i. 4Discovery will examine the active web history information for any internet browsers found on the devices and carve or search for any deleted internet history as well. In addition, any bookmarked or otherwise saved websites in any browser or format will be examined.

ii. The report will include any analytics available on internet history and bookmarked/saved websites, such as frequency of visit, first and most recent visit, etc. The report will also include the full parsed internet history (both active and deleted-recovered) showing the full list of all available entries and all parsed metadata in an industry standard format. Additionally, the report will include all information about any bookmarked or saved websites including the location where it was found, website it points to and/or was from, and any associated dates.

c. Installed Programs/Applications

- i. This examination will include the identification of all installed programs or applications, and any artifacts indicative of programs or applications that were previously installed or used that are no longer installed.
- ii. The report will include a list of all installed programs and applications with the context of when and where they were installed and any relevant configuration options. Any artifacts related to previously installed programs and applications should include the location the artifact was found, any contextual details, and the program or application to which the artifact relates.

d. Notes/Documents/Text Files

- i. 4Discovery will examine and/or search all notes, documents, and text files on the devices and identify any on the devices or a synchronized cloud-based account, that contain personal information or usernames, passwords, passcodes, pins, passphrases, and/or other types of security keys (e.g., answers to security questions) that the Custodian used to secure personal information or access any website, program, application, or account (as used in this protocol “passwords”). As used in this protocol, the term “personal information” is information concerning a single person, including but not limited to a person's name, gender, address, electronic mail address, telephone number, social security number, driver's license information, state identification information, passport information, telephone number, financial information, information about a person's banking or other type of account, payment card information, date of birth, place of birth, nationality, employer information, membership or loyalty

program information, geolocation information, mother's maiden name, and social media account ID or profile information (including username and photo or other data from social media accounts).

- ii. The report will identify all documents found that contained any personal information or passwords, including the location, dates, and metadata from the documents. Any documents found in an application, platform, cloud-based storage, or email system should include the context of where the item was found and any transfer or send/receive artifacts about the item. The report will also include a copy of any notes, documents, or text files found to contain personal information or passwords.

***18 e. Photos/Digital Images of Personal Information or Passwords**

- i. 4Discovery will conduct a search for all images of items revealing personal information or passwords. While 4Discovery may start by asking the Custodians if they have any such images, this examination will also include a search and review designed to identify such images on the devices or any related online accounts. The type of images to be reported upon include photographs, screen shots, or any images of passports, drivers' licenses, social security cards, birth certificates, credit cards, or a screenshot, image or photograph of any application, website, document, or anything else that shows personal information or passwords of the Custodian.
- ii. 4Discovery will include in their report information about all images of personal information or passwords, including the details and context of how/where they were found, where they were transferred or sent to/from, and include copies of the images.

f. Cloud Storage Accounts (Google Drive, OneDrive, DropBox, etc.)

- i. This examination will include identifying any and all cloud storage or file transfer platforms that were connected to the devices, synced with the devices, or that the devices accessed and with which the devices may have transferred data. Each of the cloud storage platforms identified should be collected and their data included in this overall examination. The data stored in any cloud storage platforms should be examined

to determine if any of the data contains personal information or passwords.

- ii. The report will include a list of all cloud storage accounts identified in the examination with contextual information and metadata, as well as a copy of any files found on cloud storage platforms found to contain personal information or passwords.

g. Apple/Google/Microsoft Account IDs

- i. On each device, 4Discovery will examine any login information or accounts that are connected to the device and provide a list of any identified accounts. This shall include accounts such as Microsoft accounts being used to login to Windows computers, Apple accounts (iCloud or other) being used with any iPhones, iPads, or Mac computers, and any Google accounts being used on Android based phones, Google Chromebooks, or Windows computers.
- ii. 4Discovery will include in their report a list of any accounts found to be in use as well as any accounts that may have been used historically based on any artifacts or findings on the devices examined, including the context of where and how each was found.

h. Chats & Messages

- i. 4Discovery will examine all **chat** and messaging applications on the Custodians devices to identify any persistent or ephemeral messaging applications. For any applications identified, all extant messages will be parsed into readable form and searched for any personal information or passwords in the message content or as included as attachments.
- ii. The reporting on this area will include a list of all **chat** and messaging applications found, details around where the applications reside as well as their account information and configuration. Any messages that include personal information or passwords in the message or an attachment should be included in the report as well.

***19 i. Email**

- i. This examination will include identifying any email content, both messages and attachments, that may contain or refer to any personal information or passwords. This should include both email data stored

on the devices and email in any online email accounts that are connected to any of the devices.

- ii. This report will include any and all available metadata as well as a copy of the email messages and/or any attachments where the message or any attachment contains personal information or passwords.

j. Wireless Device Connectivity

- i. 4Discovery will examine any artifacts relating to Wi-Fi network connections to determine what wireless networks were connected to, when, and using what type of security.
- ii. The report will include a list of all artifacts related to connecting to wireless networks including all available metadata.

k. Bluetooth Data Transfer

- i. 4Discovery will examine any artifacts related to Bluetooth connections that could facilitate data transfer, including Apple AirDrop and Android Nearby Share, or any other Bluetooth transfer applications or technologies.
- ii. The report will include a list of all artifacts related to connecting to and/or transferring data with Bluetooth devices capable of data transfer, including all available metadata.

l. Passwords

- i. On each device, 4Discovery will search for and identify any information they can determine may be passwords or other account credentials stored on the devices, or in any cloud storage or email platform connected to or used by the Plaintiffs on the devices. This analysis should also capture any context to the passwords/credentials such as any notes around them or site, service, or username noted with them.
- ii. 4Discovery will include in their report a list of any identified passwords, account information, or other credentials as well as the context of how and where each was found. The report should be encrypted, and password protected to secure and protect this password related information as well as other sensitive information being reported upon.

m. General Search

- i. In addition to the specific analysis included in the examination to attempt to locate personal information or passwords, a general non-targeted search will be run to identify personal information or passwords stored anywhere else on the devices. This search will leverage tools designed to identify personal information or passwords or search patterns designed to identify personal information or passwords.
 - ii. The report will include a list of all files, artifacts, or fragments containing potential personal information or passwords that were identified through this process. Any items already identified in any other analysis focus areas in this protocol may be withheld from reporting in this focus area as long as all the same information is being reported. The report should include all metadata and contextual information about what was found, where, bearing what dates, and any other metadata or information about each item. The identified items themselves should also be included in the report. The report will also identify the methodology or methodologies used to conduct this search.
7. 4Discovery shall provide its report to counsel for Plaintiffs and Defendants simultaneously and as soon as possible but in no event more than 14 days following the date of this agreement.
 8. 4Discovery's report shall be provided to counsel for Plaintiffs and Defendants without any screening review by Plaintiffs' counsel.
 9. If requested by either Plaintiffs' counsel or Defendants' counsel, 4Discovery shall make itself available to discuss its report and the methodologies used to complete it with counsel or any expert for Plaintiffs or Defendants following 4Discovery's production of the report.

IV. Data Disposition

10. Upon receiving written authorization provided by counsel for Plaintiffs and Defendants, 4Discovery will securely delete all collected data in its possession.

Exhibit E

***20 n. Other Analysis**

- i. Any other analysis, evaluation, or steps 4Discovery deems appropriate to serve the purpose of this examination should also be performed.
 - ii. Forensic investigators performing an examination commonly identify other items of interest while carrying out a predetermined protocol even if not explicitly written into the protocol. If this occurs, or if 4Discovery has other ideas it believes should be included, these tasks or items will be added as additional analysis focus areas.
 - iii. Any additional work being performed will be included in the report describing the work and any findings or observations.
6. 4Discovery shall produce a forensic examination report for all analysis focus areas listed above including all Custodians' devices and accounts. To the extent the information described above to be included in the report can fit and makes sense to include inline in the report, it may be included inline. But for larger sets of data that would not fit well inline, those information sets should be included as attachments to the report and/or can be produced in native form.

In re Anthem, Inc. Data Breach Litigation, Not Reported in Fed. Supp. (2016)
2016 WL 11505231

2016 WL 11505231
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

IN RE ANTHEM, INC. DATA
BREACH LITIGATION

Case No. 15-md-02617 LHK (NC)
|
Signed 04/08/2016

**ORDER DENYING ANTHEM'S
REQUEST TO COMPEL DISCOVERY
OF PLAINTIFFS' COMPUTER SYSTEMS**

Re: Dkt. No. 479

NATHANAEL M. COUSINS, United States Magistrate Judge

*1 The Anthem Defendants seek a discovery order compelling each of the named plaintiffs either to provide access to, or produce forensically sound images of, their "computer systems that connect to the internet." According to Anthem, the information it seeks is relevant to causation. By exploring plaintiffs' computers, tablets, and smartphones, Anthem asserts that it may determine whether the plaintiffs' computer systems contain malware, viruses, or other electronic indicators suggesting that their personally identifiable information or personal health information was compromised before the cyberattack on Anthem. Plaintiffs, on the other hand, object to the discovery as highly invasive, intrusive, and burdensome.

The Court, on referral from District Court Judge Lucy H. Koh, heard the motion on April 6, 2016. At the beginning of the hearing, and again near the end, the Court encouraged the parties to confer and cooperate in an effort to resolve the dispute. The parties conferred but were unable to agree. After considering all the arguments presented, the Court DENIES the requested discovery, finding that it is unreasonably intrusive and disproportional to the present needs of the case.

Under recently revised **Federal Rule of Civil Procedure 26**, parties may obtain discovery regarding any nonprivileged matter that is "relevant to any party's claim or defense and proportional to the needs of the case ...".

Here, Anthem asserts that inspection of plaintiffs' computer systems is relevant to causation. The Court agrees with Anthem that if there was information that plaintiffs' personally identifiable information and personal health information was compromised before the Anthem attack, that information might be probative of causation.

But under the revised discovery rules, not all relevant information must be discovered. The Court also considers whether the discovery is "proportional to the needs of the case." **Fed. R. Civ. P. 26(b)(1)**. This means the Court must consider "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.*

The Court finds that the burden of providing access to each plaintiff's computer system greatly outweighs its likely benefit. There is an Orwellian irony to the proposition that in order to get relief for a theft of one's personal information, a person has to disclose even more personal information, including an inspection of all his or her devices that connect to the internet. If the Court were to grant Anthem's request, it would further invade plaintiffs' privacy interests and deter current and future data theft victims from pursuing relief.

On the other hand, Anthem might seek other, less intrusive and more targeted means, to explore whether the cyberattack on Anthem caused plaintiffs' harm. For example, if Anthem has evidence of a specific data compromise by a specific plaintiff, then it might focus its discovery on that intrusion, rather than a blanket request for all plaintiffs' computer systems.

*2 At the hearing, Anthem's counsel analogized to cases in which a plaintiff seeks damages for injuries and the Court compels a medical examination, which certainly is invasive and personally burdensome discovery. But in a case with a plaintiff with a *broken finger*, the Court would be unlikely to compel inspection of every body system. Here, as there, the discovery must be targeted and proportional to the needs of the case.

Because Anthem's requested discovery is disproportional to the needs of the case, the Court DENIES the motion.

In re Anthem, Inc. Data Breach Litigation, Not Reported in Fed. Supp. (2016)
2016 WL 11505231

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 11505231

End of Document

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Exhibit F

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

IN RE ANTHEM, INC. DATA BREACH LITIGATION

Case No. 15-md-02617 LHK (NC)

ORDER GRANTING ANTHEM'S REQUEST TO COMPEL DISCOVERY OF PLAINTIFFS' COMPUTER SYSTEMS, SUBJECT TO PROTOCOL

Re: Dkt. No. 549

The Anthem Defendants seek a discovery order compelling each of the named plaintiffs to provide the results of a forensic analysis of certain of their devices that connect to the internet (desktop computers, laptop computers, and tablets, but not mobile phones such as iPhones). The forensic analysis by a third party examiner is proposed to identify malicious files,

historical evidence of malicious files, and event logs of anti-virus software that may have removed the malware prior to examination.

According to Anthem, the information it seeks is relevant to causation. By exploring plaintiffs' devices, Anthem asserts that it may determine whether the plaintiffs' computer systems contain malware, viruses, or other electronic indicators suggesting that their personally identifiable information or personal health information was compromised before the cyberattack on Anthem. Plaintiffs, on the other hand, object to the discovery as highly invasive, intrusive, and burdensome.

***21** The Court, on referral from District Court Judge Lucy H. Koh, heard the motion on October 26, 2016. The Court at a previous hearing determined that Anthem's request for plaintiffs to produce their devices to Anthem directly was not proportional to the needs of the case. Dkt. No. 502. In that order, the Court suggested that Anthem needed a more targeted approach, and rejected Anthem's request as overly intrusive of plaintiffs' privacy.

The Court finds that Anthem's narrowed proposal seeks relevant information and is proportional to the needs of the case. The protocol described in this order is less intrusive than Anthem's first proposal for three reasons: (1) the devices will be provided to a third party examiner, not Anthem; (2) handheld devices are excluded; and (3) the Court will limit the production to the devices of 30 plaintiffs, to be selected by Anthem.

The protocol follows. The costs of the Independent Forensic Examiner will be paid by defendants.

I. SELECTIONS OF PLAINTIFFS AND INDEPENDENT FORENSIC EXAMINER

By November 4, Anthem must identify the 30 plaintiffs who will be subject to the forensic examination. By that same date, plaintiffs must select an expert Independent Forensic Examiner ("the Independent Forensic Examiner") from among those proposed by Anthem, that has the capacity to conduct the entire data acquisition, data preservation, and forensic review in accordance with industry standards as described in resources such as the National Institute of Standards and Technology (NIST) draft Scale-Invariant Feature Transform protocols and procedures.

This analysis will include a forensic scan of device data for the limited purpose of identifying malware or malicious

files, undertaking root cause analysis of select malware when identified, and the generation of a summary report for the Defendants and their experts, as described below. At no time will Defendants or their experts be provided a copy of any forensic image collected from the Plaintiffs.

II. FORENSIC IMAGING

First, the Independent Forensic Examiner will access the selected Plaintiffs' devices to acquire and preserve its data by creating a forensic image. The Court recommends that this data acquisition be conducted by the Independent Forensic Examiner at a location and a convenient time selected by each Plaintiff. The Independent Forensic Examiner will acquire a forensic image of each of the Plaintiffs' devices. A forensic image is a bit by bit duplicate of the physical sectors of a device's storage media. The Independent Forensic Examiner will perform the imaging process by using industry-standard tools—AccessData FTK Imager Lite for Windows computers and Paladin 7 Boot CD/USB for Apple computers—that have been tested and validated for use in forensic examinations. The images will be captured and stored by the Independent Forensic Examiner using industry-standard methods to preserve evidentiary chain of custody and verify the forensic copy's **authenticity** against the original device. These methods also ensure that Plaintiffs' devices and operating systems will not be altered or harmed. After acquiring the forensic images, the Independent Forensic Examiner will not require any further access to Plaintiffs' devices.

III. FORENSIC REVIEW AND SCAN

After acquisition, the Independent Forensic Examiner will undertake the following steps to determine if indicators of compromise are on Plaintiffs' devices that connect to the internet and contain electronically stored information relating to any Plaintiff. The Independent Forensic Examiner will first conduct a scan for indicators of compromise, to include malicious files, historical evidence of malicious files, and event logs of any anti-virus software that may have removed the malware prior to examination, using select tools that are tailored to the operating systems installed on the hard disks of the devices. Those tools will include commercial, off-the-shelf software, such as Malwarebytes for Windows and Windows Defender for Windows-based operating systems and Malwarebytes for Mac and Clam A/V for Apple-based operating systems.

***22** If malware or malicious files are discovered during the initial scan of a device, the Independent Forensic Examiner will confer with Defendants' experts regarding the findings to determine whether an additional root cause analysis is necessary. A root cause analysis determines the type of malware that was installed on the device, the date it was first installed, the method by which it was installed, and the malware's mode of operation to include whether data or credentials were stolen from the device. The Independent Forensic Examiner will conduct this root cause analysis on the same device images which were collected from Plaintiffs and subjected to the initial scan.

IV. GENERATION OF SUMMARY REPORT

At the conclusion of the analysis, the Independent Forensic Examiner will generate a report for the Parties that will contain a summary of the scans conducted on Plaintiffs' devices, the results of those scans to include any malware or malicious files that were identified, and the results of any root cause analyses conducted on that malware or malicious files. The Independent Forensic Examiner will provide this report in an industry-standard encrypted format, with the decryption key provided through separate means. The Parties and their experts will destroy the report at the conclusion of the litigation.

V. DESTRUCTION OF FORENSIC IMAGES

The forensic images of Plaintiffs' devices will never be supplied to the Defendants or their experts. These forensic images will be destroyed in accordance with forensic industry standards after the conclusion of the Independent Forensic Examiner's analysis.

VI. MEET AND CONFER REQUIRED

If the parties have any disputes about this Protocol, they must promptly meet and confer in an effort to resolve the dispute.

IT IS SO ORDERED.

Dated: October 31, 2016

NATHANAEL M. COUSINS

United States Magistrate Judge

Exhibit G

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE ANTHEM, INC. DATA BREACH LITIGATION

15-MD-02617-LHK

SAN JOSE, CALIFORNIA

JANUARY 25, 2017

PAGES 1-50

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE LUCY H. KOH UNITED STATES DISTRICT JUDGE

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CERTIFICATE NUMBER 13185

PROCEEDINGS RECORDED BY MECHANICAL
STENOGRAPHY TRANSCRIPT PRODUCED WITH
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*23

04:04:21 1 LIKE WE WILL WITH REGARD TO PLAINTIFF ZAND, WE WOULD BE USING
04:04:24 2 THAT WITH REGARD TO PLAINTIFF CERRO ON CLASS CERTIFICATION.
04:04:29 3 THE COURT: WELL, YOU KNOW, I WOULD JUST SAY THAT --
04:04:31 4 HAD THIS ISSUE COME TO ME AS A FIRST INSTANCE, I PROBABLY WOULD
04:04:35 5 NOT HAVE COMPELLED THE DISCOVERY. BUT BECAUSE IT CAME TO ME AS
04:04:38 6 AN OBJECTION TO A DISCOVERY MAGISTRATE JUDGE'S RULING, THE
04:04:43 7 STANDARD IS DIFFERENT.
04:04:47 8 I ACTUALLY DO THINK THE DISCOVERY IS BURDENOME, AND I
04:04:50 9 THINK IT'S APPROPRIATE FOR SOMEONE TO SAY, YOU KNOW, LOOK AT
04:04:54 10 WHAT ANTHEM HAS DONE WITH HOW WELL THEY PROTECTED THESE
04:04:57 11 PEOPLE'S MEDICAL INFORMATION AND PERSONALLY IDENTIFYING
04:05:01 12 INFORMATION. I THINK IT'S PRETTY INVASIVE TO MAKE THEM TURN
04:05:04 13 OVER ALL THEIR DEVICES. I WOULD ALLOW THEM TO GET OUT.
04:05:08 14 NOW WHETHER THAT SHOULD BE A DISMISSAL WITH PREJUDICE, I
04:05:10 15 THINK THAT'S FAIR. BUT WHETHER THAT WOULD THEN CREATE SOME
04:05:13 16 ADVERSE INFERENCE THAT THERE ACTUALLY IS DISCOVERY TO THE
04:05:17 17 CONTRARY ON THESE DEVICES, I THINK THAT'S REALLY A STRETCH.
04:05:27 18 SO, YOU KNOW, THERE ARE A LOT OF DISCOVERY THINGS WHERE, AT
04:05:30 19 THE FIRST INSTANCE, I MIGHT COME UP DIFFERENTLY THAN
04:05:32 20 JUDGE COUSINS.
04:05:34 21 FOR EXAMPLE, I'M MORE OPEN TO HAVING CEO'S BE DEPOSED. I
04:05:38 22 DON'T UNDERSTAND, THESE PLAINTIFFS HAVE TO GET ALL OF THEIR
04:05:41 23 DEVICES REVIEWED AND THEN THE CEO IS IN CHARGE OF 80 MILLION
04:05:45 24 USERS' DATA BEING BREACHED, DOESN'T GET DEPOSED?
04:05:47 25 I MEAN, IN THE FIRST INSTANCE, AND I PROBABLY WOULD HAVE

Exhibit H

Henson v. Turn, Inc., Not Reported in Fed. Supp. (2018)
2018 WL 5281629

 KeyCite Yellow Flag - Negative Treatment
Distinguished by *In re Apple Inc. Device Performance Litigation*, N.D.Cal., August 22, 2019

2018 WL 5281629

Only the Westlaw citation is currently available.
United States District Court, N.D. California,
San Francisco Division.

Anthony HENSON, et al., Plaintiffs,

v.

TURN, INC., Defendant.

Case No. 15-cv-01497-JSW (LB)
Signed 10/22/2018

Attorneys and Law Firms

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Michael H. Rubin, Melania Marilyn Blunschi, Latham & Watkins LLP, San Francisco, CA; Serrin A. Turner, Latham & Watkins LLP, New York, NY, for Defendant.

ORDER ADJUDICATING DISCOVERY DISPUTE REGARDING REQUESTS FOR (1) INSPECTION OR FORENSIC IMAGES OF MOBILE DEVICES, (2) WEB BROWSING HISTORY, AND (3) COOKIES

Rc: ECF No. 87, 90

LAUREL BEELER, United States Magistrate Judge

INTRODUCTION

*1 Plaintiffs Anthony Henson and William Cintron, subscribers to Verizon's cellular and data services, bring this data-privacy class action against defendant Turn, Inc. The plaintiffs' allegations center around "cookies": lines of software code that monitor and gather information about users' browsing and app use. Web browsers, computers, and

mobile devices have settings that allow users to block or delete cookies from their devices. The plaintiffs allege Turn engaged in a practice of placing so-called "zombie cookies" on users' devices: cookies that users either cannot delete or block or that, when users try to delete them, "respawn" to continue tracking users across the web. The plaintiffs, both

New York residents, bring claims for (1) violations of New York General Business Law § 349, which makes unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York]," and (2) trespass to chattels.

Turn issued a number of discovery requests for production ("RFPs") to the plaintiffs. Among other things, Turn requested that the plaintiffs (1) produce their mobile devices for inspection or produce complete forensic images of their devices (RFP 1), (2) produce their full web browsing history from their devices (RFP 32), and (3) produce all cookies stored on or deleted from their devices (RFP 33).¹ The plaintiffs argue that Turn's requests are overbroad and invade their privacy rights. The plaintiffs propose instead that they produce (1) their web browsing history and cookies associated with Turn partner websites (contingent on Turn's identifying such sites) and (2) the date fields (but not the content) of all other cookies on their mobile devices.² The plaintiffs oppose allowing Turn to inspect their devices or producing complete forensic images of their devices.³

Judge White referred all discovery matters to the undersigned.⁴ The undersigned can decide the parties' dispute without a hearing. N.D. Cal. Civ. L.R. 7-1(b). For the following reasons, the undersigned adopts the plaintiffs' proposals, as slightly modified below.

STATEMENT

1. The Plaintiffs' Allegations

Users increasingly use a single mobile device — a smartphone or a tablet — for their online activities, including web browsing, reading the news, listening to radio content, accessing their banking information and managing their finances, shopping online, using GPS for directions and traffic updates, communicating over email and social networks, and reading sites like WebMD to assess their medical condition.⁵ Marketing companies like Turn have developed ways to place "tracking beacons" on these devices —

Henson v. Turn, Inc., Not Reported in Fed. Supp. (2018)
2018 WL 5281629

lines of code called "cookies" — through web browsers or other smartphone apps.⁶ Cookies monitor and gather information about a user's website browsing and app use, which includes personal information regarding the user's daily routines.⁷ The resulting data is analyzed and used to target advertisements that match the user's profile.⁸

*2 Consumers have expressed discomfort at the idea of an unknown third party surreptitiously monitoring their online activity for commercial purposes.⁹ As one academic study reported:

Web browsing history is inextricably linked to personal information. The pages a user visits can reveal her location, interests, purchases, employment status, sexual orientation, financial challenges, medical conditions, and more. Examining individual page loads is often adequate to draw many conclusions about a user; analyzing patterns of activity allows yet more inferences.... In mid-2011, we discovered that an advertising network, Epic Marketplace, had publicly exposed its interest segment data, offering a rare glimpse of what third-party trackers seek to learn about users. User segments included menopause, getting pregnant, repairing bad credit, and debt relief. Several months later we found that the free online dating website OkCupid was sending to the data provider Lotame how often a user drinks, smokes, and does drugs. When Krishnamurthy et al. tested search queries on ten popular health websites, they found a third party learned of the user's query on nine of them.¹⁰

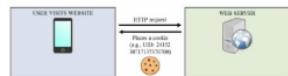
In a 2013 white paper issued in conjunction with Forbes, Turn surveyed Americans' attitudes about online tracking.

marketing, and privacy.¹¹ The survey found that, among other things, 69% of participants deleted cookies in order to "shield their online privacy," 56% of participants "are generally uncomfortable with the amount of information companies know about them or could learn about them through their activities," and 54% of participants felt that "their privacy concerns outweigh[ed] any benefits derived from sharing information with businesses."¹² In light of privacy concerns, manufacturers and software companies developed functions for clearing and blocking cookies, which have long been standard features on all smartphones, tablets, computers, and web browsers.¹³

Turn developed a method that allegedly made an "end-run" around users' cookie-blocking-and-deleting technologies.¹⁴ Turn allegedly did so through a Verizon function that created a persistent, unique identifier header ("X-UIDH" or "X-UIDH") for Verizon subscribers.¹⁵ Each Verizon customer had a unique X-UIDH value.¹⁶ Verizon embedded this unique X-UIDH value into the header of every HTTP request that its customers made from their mobile devices.¹⁷ Turn monitored the web traffic of its partner websites, searching for HTTP requests from Verizon customers (and the attendant X-UIDH values embedded in the requests).¹⁸ Upon receiving an HTTP request, Turn would check the X-UIDH value in the request against a database of values that it had stored from previous cookies.¹⁹ If there was a match, it would place a new cookie on the user's device that contained all of the values from the old cookies in its database that were associated with the same X-UIDH — even if the user had previously deleted cookies from her device in an effort to not be tracked.²⁰ Turn refers to this as "responsible," which led security experts to refer to these cookies as "zombie cookies" because they have the ability to regenerate and continue to track users despite users' attempts to not be tracked.²¹

*3 The plaintiffs alleged the following example of this process at work, citing in part an analysis conducted by Stanford professor Jeremy Mayer.²² Without a Verizon X-UIDH, when a user visits a Turn partner website, the website might place a cookie in her browser with a certain ID number (the example ID number used in the complaint of the cookie placed in the user's browser was 2415230717135370700).²³

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As long as the cookie remains in the browser, it allegedly transmits the user's browsing history back to the third party that first generated the cookie.²⁴



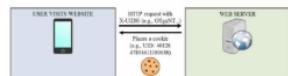
If the user then deletes her cookies:



and then visits another Turn partner website, the website would place a new cookie in her browser with a new ID number (the new example ID number used in the complaint was 4425321986559530189).²⁵



With a Verizon X-UIDH, however, when a user visits a Turn partner website, the website might place a cookie in her browser with a certain ID number (the example X-UIDH used in the complaint was "0TgjNNT..." and the example ID number of the cookie placed in the user's browser was 401284789161109688).²⁶



If the user then deletes her cookies:



and visits another Turn partner website, the website recognizes the Verizon X-UIDH and places a cookie in her browser with the same ID as before and all of the values from the user's old cookie that Turn stored within its database.²⁷



2. The Parties' Discovery Dispute

The parties raise disputes with respect to three of Turn's requests for production: RFP 1, RFP 32, and RFP 33.²⁸ RFP 1 is a request for the plaintiffs to produce "[a]ll mobile devices with which You accessed the internet via the Verizon network during the alleged Class Period" (or complete forensic images of the devices).²⁹ RFP 32 is a request for the plaintiffs to produce "[a]ll data from each Mobile Device reflecting or regarding the user's web browsing history, including web pages viewed either through a dedicated browser application or an 'in-app' browser embedded in another type of application".³⁰ RFP 33 is a request for the plaintiffs to produce "[a]ll data from each Mobile Device reflecting or regarding any cookies stored on and/or deleted from the device, including the filenames, contents, and creation/modification/deletion dates of each cookie."³¹

2.1 RFP 1: Inspection or Complete Forensic Images of the Plaintiffs' Mobile Devices

²⁴ Turn argues that the plaintiffs' mobile devices "are at the very heart of this case."³² Specifically, with respect to the plaintiffs' New York unfair-business-practices claim, Turn argues that the claim "is wholly dependent on allegations about the content of Plaintiffs' phones, including whether Turn placed (and replaced) cookies on the phones, what kind of cookies Turn placed on the phones (if any) and when, whether Plaintiffs regularly deleted cookies and

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their browsing history from their phones, whether Turn 'circumvented device settings' on the phones, and what information (if any) was gathered from the phones."³³ With respect to the plaintiffs' trespass-to-chattels claim, Turn argues that "the phones are the very 'chattels' that Plaintiffs allege Turn 'trespassed' [on]"³⁴ Turn argues that "[i]t's hard to imagine a closer connection between plaintiffs' claims and their phones to justify allowing Turn's digital forensics experts to analyze them directly."³⁵

The plaintiffs respond that allowing Turn to inspect their devices or producing a complete forensic image would allow Turn to "access to Plaintiffs' entire phone and thus access to their private text messages, emails, contact lists, photographs and web browsing histories unrelated to Turn."³⁶ The plaintiffs represent that they objected to RFP 1 and invited Turn to make requests for specific information, which prompted Turn to issue a second, more specific set of requests — RFPs 27–35 — for which (aside from RFPs 32 and 33) the plaintiffs have produced responsive information.³⁷ The plaintiffs argue that Turn's request for the full contents of their devices "flies in the face of Rule 26(b)'s relevancy and proportionality requirements."³⁸

2.3 RFP 33: Production of Cookies on the Plaintiffs' Devices
²⁵ Turn argues that it is entitled to review all cookies stored on the plaintiffs' mobile devices "to technically examine what Turn cookies (if any) are on Plaintiffs' devices and compare them to standard browser cookies — including other non-Turn cookies that Plaintiffs even visited websites that worked with Turn cookies; (2) to test Plaintiffs' claim that they regularly deleted their browsing history in order to protect their privacy; and (3) to show that it does not constitute personally identifiable information implicating a protected privacy interest in any event."³⁹ Turn also argues that the plaintiffs alleged that its cookies "transmit[] a user's web-browsing history back to the third party that generated the cookie, thus allowing the third party to glean valuable information about the user and her (presumed) interests" and that it "is entitled to discovery into all evidence that would provide these allegations untrue."⁴⁰ Turn also argues that "if the devices have cookies dated *after* the complaint, it suggests a failure to preserve key evidence in its original condition."⁴¹

The plaintiffs respond that their cookies implicate the same privacy interests as their web browsing history.⁴² The plaintiffs state that they are willing to produce cookie data related to any Turn partner website, to identify the date fields (but not the contents) of all other cookies, and to meet and confer to consider requests for specific cookies.⁴³

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ANALYSIS

1. Inspection or Complete Forensic Images of the Plaintiffs' Mobile Devices

The undersigned denies Turn's request to require the plaintiffs to produce their mobile devices for Turn's inspection or, in the alternative, to produce complete forensic images of their mobile devices. Federal Rule of Civil Procedure 26(b)(1) limits discovery to matters that are (1) "relevant to any party's claim or defense" and (2) "proportional to the needs of the case." Turn's request to inspect the plaintiffs' mobile devices or for complete forensic images call for information that is not relevant and is disproportional to the needs of the case.

With respect to relevance, as the plaintiffs correctly point out (and as Turn does not address), Turn's request to directly inspect the plaintiffs' mobile devices or for complete forensic images of the devices threatens to sweep in documents and information that are not relevant to the issues in this case, such as the plaintiffs' private text messages, email contact lists, and photographs. Just as a hypothetical request from the plaintiffs for Turn to allow them to directly inspect its email servers (or produce complete forensic image of its servers) would likely sweep in numerous emails that are not relevant to that action, Turn's request for the plaintiffs to allow it to directly inspect their mobile devices (or produce complete forensic images of their devices) would likely sweep in numerous irrelevant documents as well. See [John B. v. Goetz](#), 531 F.3d 448, 457–58 (6th Cir. 2008) (noting that "imaging of these computers and devices will result in the duplication of confidential and private information unrelated to the [] litigation"); [Salazar v. Bocanegra](#), No. 12cv0053 MV/LAM, 2012 WL 12893938, at *2 (D.N.M. July 27, 2012) (noting that forensic images, due to their broad nature, may include information irrelevant to the parties' claims or defenses); [Sony BMG Music Entm't v. Arefflunes](#), No. 4:05-CV-328, 2006 WL 8201075, at *1 (E.D. Tex. Oct. 27, 2006) (finding meritorious responding party's argument that a full forensic image of her computer hard drive would sweep in irrelevant documents).⁵²

With respect to proportionality, Turn's request for the plaintiffs to allow it to inspect their mobile devices (or produce complete forensic images of their devices) is disproportional to the needs of the case. While questions of proportionality often arise in the context of disputes about the expense of discovery,⁵³ proportionality is not limited

to such financial considerations. Courts and commentators have recognized that privacy interests can be a consideration in evaluating proportionality, particularly in the context of

a request to inspect personal electronic devices. [Tingle v. Hebert](#), No. 15-626-JWD-EWD, 2018 WL 1726667, at *7–8 (M.D. La. Apr. 10, 2018) (finding that "Defendants have also made no showing that the requested forensic examination of Plaintiff's personal cell phone and personal email accounts are proportional to the needs of this case" and holding that "[t]he utility of permitting a forensic examination of personal cell phones must be weighed against inherent privacy concerns") (quoting [John Crane Grp. Corp. v. Energy Devices of Tex., Inc.](#), No. 6:14-CV-178, 2015 WL 11112540, at *2 (E.D. Tex. Oct. 30, 2015)).

[Crabtree v. Angie's List, Inc.](#), No. 1:16-cv-00877-SEB-MJD, 2017 WL 413242, at *3 (S.D. Ind. Jan. 31, 2017) (denying request to forensically examine plaintiff's personal cell phones and holding that the forensic examination "is not proportional to the needs of the case because any benefit the data might provide is outweighed by Plaintiff's significant privacy and confidentiality interests"); [Hespe v. City of Chicago](#), No. 13 C 7998, 2016 WL 7240754, at *3 (N.D. Ill. Dec. 15, 2016) (affirming order denying request to inspect plaintiff's personal computer and cell phone because, among other things, inspection "is not proportional to the needs of this case" because any benefit the inspection might provide is "outweighed by plaintiff's privacy and confidentiality interests"); [Arezaga v. ADW Corp.](#), No. 3:14-cv-2899-B, 2016 WL 9526396, at *3 (N.D. Tex. Aug. 1, 2016) (denying request to inspect plaintiff's personal computer, smart phone, and other electronic devices because the request "is not proportional to the needs of the case at this time, when weighing [defendant]'s explanation and showing as to the information that it believes might be obtainable and might be relevant against the significant privacy and confidentiality concerns implicated by [defendant]'s request"); [In re Anthem, Inc. Data Breach Litig.](#), No. 15-md-02617-LHK (N.C.), 2016 WL 11505231, at *1–2 (N.D. Cal. Apr. 8, 2016) (denying request to inspect or forensically image plaintiffs' computers, tablets, and smartphones as "invasive[ing] plaintiffs' privacy interests" and "disproportional to the need of the case"); [Agnieszka A. McPeak, Social Media, Smartphones, and Proportional Privacy in Civil Discovery](#), 64 U. Kan. L. Rev. 235, 288–91 (2015) (arguing that courts should consider privacy burdens in evaluating proportionality under Rule 26(b)(1)), see [John B.](#), 531 F.3d at 460 (issuing writ of mandamus to set aside orders for forensic imaging of state-owned and privately-owned employee computers because,

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among other things, "[t]he district court's compelled forensic imaging orders here fail to account properly for the significant privacy and confidentiality concerns present in this case"; see also [Johnson v. Nyack Hosp.](#), 169 F.R.D. 550, 562 (S.D.N.Y. 1996) (holding that Rule 26 allows courts to limit discovery on account of burden, including "where the burden is not measured in the time or expense required to respond to requested discovery, but lies instead in the adverse consequences of the disclosure of sensitive, albeit unprivileged, material," and that courts should consider "the burdens imposed on the [responding parties'] privacy and other interests").

*6 As the Supreme Court has recognized, "[m]odem cell phones are not just another technological convenience. With all they contain and all they reveal, they hold for many Americans 'the privacies of life.'" [Riley v. California](#), 134 S. Ct. 2473, 2494–95 (2014) (citation omitted). As the Court observed:

Even the most basic phones that sell for less than \$20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-cut phone book, and so on. ...

....

.... [I]t is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives — from the mundane to the intimate.

.... An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns — perhaps a search for certain symptoms of concern, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building.

Mobile application software on a cell phone, or "apps," offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every

conceivable hobby or pastime; apps for improving your romantic life. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible on the phone indefinitely. There are over a million apps available in each of the two major app stores; the phrase "there's an app for that" is now part of the popular lexicon. The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life.

Id. at 2489–90 (citations omitted); *accord* McPeak, 64 U. Kan. L. Rev. at 244–45 (discussing how a smartphone can contain information about its owner and her emails, text messages, phone calls, calendars, social-media accounts, photographs, videos, what books she reads, what music she listens to, where she goes, when she sleeps, what she buys, and whom she dates — "[q]uite simply, her [smart]phone is a portal to a complete, intimate portrait of her entire life"). While *Riley* was a criminal case, courts have applied its observations about the privacy concerns implicated by modern cell phones in the context of civil discovery as well. *See Bakht v. SafetyMktg., Inc.*, No. 3:13CV1049 (JCH), 2014 WL 2916490, at *3 (D. Conn. June 26, 2014) (citing *Riley* in denying civil-discovery request to inspect personal cell phones).

Turn cites no authorities to support its request that the plaintiffs allow it to directly inspect their mobile devices (or produce complete forensic images of their devices). Turn cites to several cases where courts have ordered a party responding to a discovery request to forensically image its devices — in situations where there was a "sufficient nexus" between the party's devices and the claims or defenses at issue.⁵⁴ But forensic imaging itself is not the issue here. The plaintiffs represent that they have already forensically imaged their devices and are producing information from those images.⁵⁵ What Turn raises is the separate issue of its being allowed to directly access its opponents' devices or forensic images. None of the cases it cites supports that proposition.

*7 Turn's first case, [Calyon v. Mizuho Securities USA, Inc.](#), No. 07CV02241RODF, 2007 WL 1468889 (S.D.N.Y. May 18, 2007), undercuts its request for direct access to the plaintiffs' devices or forensic images. That case, like this one, involved a discovery request for the responding parties (here, the defendants) to produce forensic images of their personal devices. *Id.* at *1. There, as here, the responding parties created forensic images of their devices and offered to search the images (or to have a neutral third-party expert search the

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images) and produce responsive information. *Id.* at *2. There, as here, the requesting party demanded that it be allowed to directly inspect the entirety of the responding parties' forensic images. *Id.* at *1 ("At bottom, [the requesting party] maintains that only its expert — as opposed to the [responding parties'] expert or an independent third-party expert — would possess the requisite incentive to search exhaustively for evidence, and that only [its] expert would be able to confer with [its] counsel on an on-going basis to refine search methods.") (emphasis in original). The court denied the requesting party's request, finding that the requesting party had not made a showing as to why it would be entitled to such "extraordinary" access. *Id.* at *5. Turn's other cases likewise do not support its position. In each of them, the responding party or a neutral third-party expert accessed and produced information from the responding party's forensic images. In none of them did the requesting party directly access its opponent's devices or forensic images. Cf. *Lifetouch Nat'l Sch. Studios, Inc. v. Moss-Williams*, No. C10-05297 RMW (H.R.L.), 2013 WL 11235928, at *2 (N.D. Cal. Oct. 15, 2013) (adopting parties' stipulated protocol that a neutral third-party forensic expert would image computers and produce responsive information therefrom to the parties and that "[n]either [the requesting party]'s personnel nor counsel will ever inspect or otherwise handle [the responding party]'s computers") (citing Stipulated Protective Protocol for Inspection of the Computers, *Lifetouch Nat'l Sch. Studios Inc. v. Moss-Williams*, No. C10-05297 RMW (H.R.L.) (N.D. Cal. filed July 9, 2012), ECF No. 78 at 4–6); *Genworth Fin. Wealth Mgmt., Inc. v. McMullan*, 267 F.R.D. 443, 449 (D. Conn. 2010) (ordering a third-party forensic expert to image the responding party's devices and provide recovered data to the responding party, which would review data for responsiveness and privilege before producing data to the requesting party); see also *Sony BMG*, 2006 WL 8201075, at *1 (denying a party's request to directly inspect the forensic image of its opponent's hard drive in lieu of a neutral third-party expert's doing so).⁵⁵

The parties appear to have in place a protocol for producing information from the plaintiffs' devices or forensic images. Turn has issued nine RFPs (RFPs 27–35) for specific information from the plaintiffs' devices.⁵⁷ The plaintiffs represent (and Turn does not deny) that they have produced information from their devices responsive to all of these requests (other than with respect to RFPs 32 and 33 regarding the browsing-history and cookie disputes the parties raise

in their joint letter brief, which the undersigned addresses below).⁵⁸ Given this, and in light of the fact that the plaintiffs' devices likely contain information not relevant to this case, may contain privileged information, and implicate significant privacy concerns, Turn's request for the plaintiffs to allow it to directly inspect their devices (or produce complete forensic images of their devices) is not relevant or proportional to the needs of this case.

2. Full Web Browsing History and Cookies

The plaintiffs have produced or have offered to produce (1) their web browsing history and cookies associated with Turn partner websites (contingent on Turn's identifying such sites) and (2) the date fields (but not the content) of all other cookies on their mobile devices.⁵⁹ The plaintiffs also represent that they offered to meet and confer with Turn to consider requests for specific cookies.⁶⁰ The undersigned finds the plaintiffs' position and proposals to be reasonable and proportional, with a slight modification — the plaintiffs should produce the dates (but not the content) of the entries in their browsing history (as they are doing for their cookies).

*8 The undersigned denies Turn's request to require the plaintiffs to produce their full web browsing history and cookie data. As discussed above, requiring the plaintiffs to produce their full browsing history presents significant privacy concerns. See *Riley*, 134 S. Ct. at 2490 ("An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns — perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD"). Cookies, which the plaintiffs assert (and Turn does not deny) are closely associated with websites,⁶¹ raise similar privacy concerns. Turn has not shown that its request for the plaintiffs' full browsing history and cookies as they relate to websites other than Turn partner websites is relevant or proportional to the needs of this case.

Turn claims that it needs to examine what Turn cookies are on the plaintiffs' devices,⁶² but the plaintiff's have agreed to produce those cookies, so there is no dispute there. Turn claims it needs web browsing history to determine whether the plaintiffs visited websites that worked with Turn cookies in the first place,⁶³ but the plaintiff's have agreed to produce their browsing history and cookies for those sites, so again there is no dispute there. Turn claims it needs to compare

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its cookies to standard browser cookies,⁶⁴ but it does not need all of the cookies on the plaintiffs' devices to run that comparison. Turn claims that it needs to determine whether the plaintiffs regularly deleted their cookies or browsing histories as they allege,⁶⁵ but it can do so through the date fields of the plaintiffs' cookies and browsing histories and does not need the full content of the cookies and histories to do so. Turn claims that the plaintiffs argued that Turn's cookies transmit a user's web-browsing history back to Turn,⁶⁶ but Turn has not shown why it needs the plaintiffs' full browsing history to determine what information was or was not transmitted back to Turn (information that is presumably within Turn's possession, custody, or control). Given all this, and in light of the significant privacy concerns present here, Turn has not shown that its request for plaintiffs' full browsing history or cookies is relevant or proportional to the needs of this case.

* * *

As another court in this district noted in the context of a data-breach case, "[t]here is an Orwellian irony to the proposition that in order to get relief for a theft of one's personal information, a person has to disclose even more personal information, including an inspection of all his or her devices that connect to the internet. If the Court were to grant [that] request, it would further invade plaintiffs' privacy interests and deter current and future data theft victims from pursuing relief." *In re Anthem Data Breach*, 2016 WL 11505231, at *1. The same holds true here. There is an Orwellian irony to the proposition that in order to get relief for a company's alleged surreptitious monitoring of users' mobile device and web activity, a person has to allow the company unfettered access to inspect his mobile device or his web browsing history. Allowing this discovery would further invade the plaintiffs' privacy interests and may deter current and future plaintiffs from pursuing similar relief. Cf. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) (affirming district court's refusal to allow discovery into certain private information of plaintiffs in a Title VII employment case because, among other things, "[t]he chilling effect such discovery could have on the bringing of civil rights actions unacceptably burdens the public interest").

The undersigned does not mean to imply that there could never be an instance where a request to directly inspect a litigant's electronic devices or forensic images, or a request

for cookies, would be relevant and proportional. There may be situations where such a request would be proper, and this order is without prejudice to Turn's renewing its request should such a situation arise. But that situation has not presented itself here. Turn's request for the plaintiffs to allow it to directly inspect their mobile devices (or produce complete forensic images of their devices) and for the plaintiffs to produce their complete browsing history and cookies, is denied.

CONCLUSION

*9 The court adopts the plaintiffs' proposals, with the slight modification that the plaintiffs should also produce the dates of the entries in their browsing history.

Going forward, if any other discovery disputes arise, the parties must comply with the dispute procedures in the undersigned's standing order (attached). The procedures in it require, among other things, that if a meet and confer by other means does not resolve the parties' dispute, lead counsel for the parties must meet and confer in person (if counsel are local) and then submit a joint letter brief with information about any unresolved disputes. The letter brief must be filed under the Civil Events category of "Motions and Related Filings > Motions – General > Discovery Letter Brief." After reviewing the joint letter brief, the court will evaluate whether further proceedings are necessary, including any further briefing or argument.

IT IS SO ORDERED.

Attachment

STANDING ORDER FOR UNITED STATES MAGISTRATE JUDGE LAUREL BEELER

(Effective October 17, 2018)

Parties must comply with the procedures in the Federal Rules of Civil and Criminal Procedure, the local rules, the general orders, this standing order, and the Northern District's standing order for civil cases titled "Contents of Joint Case Management Statement." These rules and a summary of electronic-filing requirements (including the procedures for emailing proposed orders to chambers) are available at <http://www.cand.uscourts.gov> (click "Rules" or "ECF-PACER"). A

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failure to comply with any of the rules may be a ground for monetary sanctions, dismissal, entry of judgment, or other appropriate sanctions.

I. CALENDAR DATES AND SCHEDULING

Motions are heard each Thursday: civil motions at 9:30 a.m. and criminal motions at 10:30 a.m. Case-management conferences are every Thursday; criminal cases at 10:30 a.m. and civil cases at 11:00 a.m. Parties must notice motions under the local rules and need not reserve a hearing date in advance if the date is available on the court's calendar (click "Calendars" at <http://www.cand.uscourts.gov>). Depending on its schedule, the court may reset or vacate hearings. Please call courtroom deputy Elaine Kabilang at (415) 522-3140 with scheduling questions.

II. CHAMBERS COPIES

Under Civil Local Rule 5-1(b), parties must lodge a paper "Chambers" copy of any filing unless another format makes more sense (such as for spreadsheets, pictures, or exhibits that are better lodged electronically). Paper copies must be printed on both sides and three-hole punched, and they must be the electronically filed copies with the PACER/ECF-generated header (with the case number, docket number, date, and ECF page number). Exhibits must be tabbed. Parties do not need to submit copies of certificates of service, certificates of interested entities or persons, consents or declinations to the court's jurisdiction, stipulations that do not require a court order (see Civil Local Rule 6-1), or notices of appearance or substitution of counsel. Please read Civil Local Rule 79-5 regarding the requirements for filing documents under seal and providing copies. STANDING ORDER

III. CIVIL DISCOVERY

***10 1. Evidence Preservation.** After a party has notice of this order, it must take the steps needed to preserve information relevant to the issues in this action, including suspending any document-destruction programs (including destruction programs for electronically maintained material).

2. Production of Documents in Original Form. When searching for material under **Federal Rule of Civil Procedure 26(a)(1)** or after a **Federal Rule of Civil Procedure 34(a)** request, parties (a) must search all locations — electronic and otherwise — where responsive materials might plausibly exist, and (b) to the extent feasible, produce or make available for copying and/or inspection the materials in their original

form, sequence, and organization (including, for example, file folders).

3. Privilege Logs. If a party withholds material as privileged, see **Fed. R. Civ. P. 26(b)(5) and 45(d)(2)(A)**, it must produce a privilege log that is sufficiently detailed for the opposing party to assess whether the assertion of privilege is justified. The log must be produced as quickly as possible but no later than fourteen days after the party's disclosures or discovery responses are due unless the parties stipulate to, or the court sets, another date. Unless the parties agree to a different logging method, privilege logs must contain the following: (a) the title and description of the document, the number of pages, and the Bates-number range; (b) the subject matter or general nature of the document (without disclosing its contents); (c) the identity and position of its author; (d) the date it was communicated (or prepared, if that is the more relevant date); (e) the identity and position of all addressees and recipients of the communication; (f) the document's present location; (g) the specific basis for the assertion that the document is privileged or protected (including a brief summary of any supporting facts); and (h) the steps taken to ensure the confidentiality of the communication, including an affirmation that no unauthorized persons received the communication.

***11 4. Expedited Procedures for Discovery Disputes.** The parties may not file formal discovery motions. Instead, and as required by the federal rules and local rules, the parties must meet and confer to try to resolve their disagreements. See **Fed. R. Civ. P. 37(a)(1)**; Civil L. R. 37-1. Counsel may confer initially by email, letter, or telephone to try to narrow their disputes. After trying those means, lead trial counsel then must meet and confer in person to try to resolve the dispute. (If counsel are located outside of the Bay Area and cannot confer in person, lead counsel may meet and confer by telephone.) Either party may demand such a meeting with ten days' notice. If the parties cannot agree on the location, the location for meetings will alternate. The plaintiff's counsel will select the first location, defense counsel will select the second location, and so forth. If the parties do not resolve their disagreements through this procedure, lead counsel must file a joint letter brief no later than five days after lead counsels' in-person meet-and-confer. The letter brief must be filed under the Civil Events category of "Motions and Related Filings > Motions — General > Discovery Letter Brief." It may be **no more than five pages** (12-point font or greater, margins of no less than one inch) without leave of the court. Lead counsel for both parties must sign the letter and attest that

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they met and conferred in person. Each issue must be set forth in a separate section that includes (1) a statement of the unresolved issue, (2) a summary of each party's position (with citations to supporting facts and legal authority), and (3) each party's final proposed compromise. (This process allows a side-by-side, stand-alone analysis of each disputed issue.) If the disagreement concerns specific discovery that a party has propounded, such as interrogatories, requests for production of documents, or answers or objections to such discovery, the parties must reproduce the question/response and the response in full either in the letter or, if the page limits in the letter are not sufficient, in a single joint exhibit. The court then will review the letter brief and determine whether formal briefing or future proceedings are necessary. In emergencies during discovery events such as depositions, the parties may contact the court through the court's courtroom deputy pursuant to Civil Local Rule 37-1(b) but first must send a short joint email describing the nature of the dispute to hpo@cand.uscourts.gov.

IV. CONSENT CASES

1. In cases that are assigned to Judge Beeler for all purposes, the parties must file their written consent or declination of consent to the assignment of a United States Magistrate Judge for all purposes as soon as possible. If a party files a dispositive motion (such as a motion to dismiss or a motion for remand), the moving party must file the consent or declination simultaneously with the motion, and the party opposing the motion must file the consent or declination simultaneously with the opposition.

V. SUMMARY-JUDGMENT MOTIONS

The parties may not file separate statements of undisputed facts. See Civil L. R. 56-2. Joint statements of undisputed facts are not required but are helpful. Any joint statement must include — for each undisputed fact — citations to admissible evidence. A joint statement generally must be filed with the opening brief, and the briefs should cite to that statement. A reasonable process for drafting a joint statement is as follows: (1) two weeks before the filing date, the moving party proposes its undisputed facts, and (2) one week later, the responding party replies and the parties meet and confer about any disagreements. For oppositions, a responding party may propose additional undisputed facts to the moving party within seven days after the motion is filed and ask for a response within two business days.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 5281629

Footnotes

- 1** Joint Letter Br. – ECF No. 90 at 2-5; Joint Letter Br. Ex. 1 – ECF No. 90-1. (The parties filed two copies of the letter brief, one at ECF No. 87 without an exhibit, and one at ECF No. 90 with an exhibit containing RFPs 1, 32, and 33, and the plaintiffs' responses thereto. Other than the exhibit, the letters are identical.) Citations refer to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of documents.
- 2** Joint Letter Br. – ECF No. 90 at 8-9.
- 3** *Id.* at 7.
- 4** Referral Order – ECF No. 88.
- 5** Compl. – ECF No. 1 at 3 ¶¶ 2-3.
- 6** *Id.* at 3 ¶ 3, 9 ¶ 27.
- 7** *Id.* at 3 ¶ 3.
- 8** *Id.* at 3 ¶ 3, 9 ¶¶ 25-27.

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- 9 *Id.* at 3–4 (¶ 4), 9 (¶ 28).
10 *Id.* at 9–10 (¶ 29) (citing Jonathan R. Mayer & John C. Mitchell, *Third-Party Web Tracking: Policy and Technology*, 2012 IEEE Symposium on Security & Privacy 413, 415 (2012)).
11 *Id.* at 11 (¶ 33) (citing Forbes, *The Promise of Privacy: Respecting Consumers' Limits While Realizing the Marketing Benefits of Big Data* (2013) (*The Promise of Privacy*), available at http://images.forbes.com/sites/bestsights/StudyPDFs/turn_promise_of_privacy_report.pdf (last visited Oct. 22, 2018)).
12 *Id.* (citing *The Promise of Privacy* at 15).
13 *Id.* at 4 (¶ 5), 10 (¶ 30–31).
14 *Id.* at 11 (¶ 35).
15 *Id.* at 4 (¶ 7–8), 13 (¶ 43).
16 *Id.* at 12 (¶ 40).
17 *Id.* An “HTTP request” is a request from a device to a web server for the website that a user is trying to view. *Id.* (¶ 38). For example, if a user wants to view the New York Times’s website and types www.nytimes.com into her phone’s web browser, the web browser sends an HTTP request to the Times’s web server at <http://www.nytimes.com>. *Id.* The server then sends data back to the user’s web browser, which enables the user to view the Times’s website. *Id.*
18 *Id.* at 13 (¶ 43).
19 *Id.*
20 *Id.* at 13–14 (¶ 43).
21 *Id.* at 5 (¶ 9), 11–12 (¶ 35).
22 *Id.* at 13–15 (¶¶ 42–47) (citing Jonathan Mayer, *The Turn-Verizon Zombie Cookie, Web Policy* (Jan. 14, 2015), <http://webpolicy.org/2015/01/14/turn-verizon-zombie-cookie> (last visited Oct. 22, 2018)).
23 *Id.* at 14 (¶ 45). The ID numbers used here are the ones used in Professor Mayer’s analysis and cited in the plaintiffs’ complaint.
24 *Id.* at 9 (¶ 27).
25 *Id.* at 14 (¶ 45).
26 *Id.* The complaint characterizes 4012847891611109688 as the Verizon X-UIDH in Professor Mayer’s example, *id.* (¶ 46), but Professor Mayer’s article shows that the Verizon X-UIDH in his example is actually OTgxNT..., and 4012847891611109688 is an ID number that is set in the cookie placed in the user’s browser. *Id.* (¶ 43–45).
27 *Joint Letter Br.* – ECF No. 90.
28 *Joint Letter Br.* Ex. 1 – ECF No. 90-1 at 1; *Joint Letter Br.* – ECF No. 90 at 2 (proposing forensic images as an alternative to production of the devices).
29 *Joint Letter Br.* Ex 1 – ECF No. 90-1 at 2.
30 *Id.*
31 *Id.*
32 *Joint Letter Br.* – ECF No. 90 at 2.
33 *Id.* at 3 (citing Compl. – ECF No. 1 at 22 (¶ 81)).
34 *Id.*
35 *Id.*
36 *Id.* at 8.
37 *Id.* at 6. The top of page 6 identifies the two requests to which the plaintiffs objected as RFP 31 (web browsing history) and RFP 32 (cookies), but the rest of the joint letter brief and the exhibit identifies these as RFPs 32 and 33, respectively.
38 *Id.* at 7.
39 *Id.* at 5.
40 *Id.* at 4–5.
41 *Id.* at 8–9.
42 *Id.* at 8 (citing Compl. – ECF No. 8–10 (¶¶ 24–29), 15–16 (¶¶ 50–52)).
43 *Id.*

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- 44 *Id.* at 9.
45 *Id.*
46 *Id.* (emphasis in original).
47 *Id.* at 4.
48 *Id.* at 5.
49 *Id.*
50 *Id.* at 9.
51 *Id.*
52 *Id.* Turn’s request might sweep in privileged documents as well, such as emails the plaintiffs might have sent their attorneys that may be stored in email applications on their mobile devices. Cf. *Sony BMG*, 2006 WL 8201075, at *1.
53 Rule 26(b)(1) expressly provides that “whether the burden or expense of the proposed discovery outweighs its likely benefit is a consideration in evaluating proportionality.”
54 *Joint Letter Br.* – ECF No. 90 at 3 (citing cases).
55 *Id.* at 7 (“Most importantly, Plaintiffs have already forensically imaged the devices and are producing the categories of information requested, subject to the remaining dispute over web browsing history and cookies, outlined below.”).
56 *Id.* Turn also cites *Austin v. Foodliner, Inc.*, No. 16-cv-07185-HSG (D.M.D.), 2018 WL 1168694 (N.D. Cal. Mar. 6, 2018), to argue that the protective order in this case “is more than sufficient to protect Plaintiffs’ privacy concerns.” *Joint Letter Br.* – ECF No. 90 at 5. But the information at issue in *Austin* was just phone-number contact information, and the court there specifically distinguished such contact information from “the disclosure of medical or financial information” or information that “implicates special privacy concerns or threatens ‘undue intrusion into one’s personal life.’” *Austin*, 2018 WL 1168694, at *2 (citation omitted).
57 *Joint Letter Br.* – ECF No. 90 at 6.
58 *Id.*
59 *Id.* at 8–9 (“Plaintiffs are amenable — just as they were with regard to cookies — to produce all browsing history associated with Turn partner websites, contingent on Turn’s identifying its partner websites.... Plaintiffs produced cookie data associated with the turn.com domain, and offered to produce cookie data related to any Turn partner websites. Additionally, Plaintiffs identified the date fields (but not their content) for all other cookies on Plaintiffs’ devices (regardless of their association with Turn) Plaintiffs offered in meet and confer to consider requests for specific cookies[.]”).
60 *Id.* at 9.
61 *Id.* at 9.
62 *Id.* at 4.
63 *Id.* at 5.
64 *Id.* at 4.
65 *Id.* at 4–5.
66 *Id.* at 4.

Attachment

*24

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March 8, 2021

The Honorable John M. Facciola (Ret.) via email to facciola@georgetown.edu

Re: *In re: Marriott International, Inc. Customer Data Security Breach Litigation*, 8:19-md-02879;
Marriott's Response in Opposition to the Consumer Plaintiffs' Motion for Protective Order

Dear Special Master Facciola:

Stripped of histrionics and adjectives, Plaintiffs' motion makes three claims: (1) Marriott seeks full images of Plaintiffs' phones and computers, (2) those devices have no relevant information, and (3) Marriott's true goal is to harass or retaliate against Plaintiffs. Each claim is incorrect.

First, Marriott's proposed protocol does not seek full images. It asks a third-party expert—whom Plaintiffs already selected—to identify relevant forensic information on their phones and computers, and then to produce only that relevant information. Second, Plaintiffs filed this case—a nationwide class action seeking hundreds of millions of dollars in damages—alleging that Marriott harmed personal information they consider “highly-sensitive” and that they “place significant value in data security.” (ECF No. 537 ¶¶ 20-95, 273.) All of their damage theories are rooted in these basic allegations—and Marriott is entitled under Rule 26 to test those allegations during discovery.

Plaintiffs' last argument is belied by the falsity of the first two. This is not retaliation. It is discovery. Indeed, the Court has already rejected Plaintiffs' blanket attempt to shield personal information because “[t]he entire premise of the Consumer Plaintiffs' claims is that their PII was compromised by the Marriott data security breach, and this resulted in substantial damages.” (ECF No. 726 at 4.)

Plaintiffs' motion to prevent discovery they essentially agreed to provide months ago is a continuation of their campaign to obstruct and delay Marriott's discovery of information necessary to its defense. Marriott asks the Court to reject Plaintiffs' tactic.

Marriott is not seeking full images of Plaintiffs' devices.

Plaintiffs suggest repeatedly that Marriott is seeking to review “nearly every file on—and the entire history of—Plaintiffs' personal phone and computer use.” (Pls' Ltr. 1; *see also id.* at 4-5.) Not so. Rather, just like Plaintiffs' proposal, Marriott's protocol asks an expert of Plaintiffs choosing to forensically search for specific information on their devices, and then to only produce that specific information. (*Compare* Pl. Ltr., Ex. C (Plaintiffs' proposal), *with* Pl. Ltr., Ex. D (Marriott's resp.).)

Plaintiffs' motion also ignores that Marriott revised its protocol in response to Plaintiffs' concerns. In fact, Marriott further narrowed its proposed protocol in its email to you on February 25, deleting the request for a forensic review of photographs that Plaintiffs claimed was too intrusive. Marriott attaches the protocol that is actually at issue—including redlines to reflect the additional offered compromise noted below—to this letter as Exhibit A.

Atlanta Chicago Cincinnati Cleveland Columbus Costa Mesa Dallas Denver Houston
Los Angeles New York Orlando Philadelphia San Francisco Seattle Washington, DC Wilmington

Marriott's proposal protects against the production of irrelevant information.

Marriott's proposal asks that a third-party expert look for five categories of information:

1. Evidence of malware and other viruses. (Ex. A § III.5.a.)
2. Web browsing history and bookmarked pages. (*Id.* § III.5.b.)
3. Installed programs and applications. (*Id.* § III.5.c.)
4. Identification of the location of personal information on the devices, e.g., in emails, text messages, or text files. (*Id.* §§ III.5.d-h & l.)
5. Evidence of Plaintiffs' information security habits, such as wireless and Bluetooth connectivity and security. (*Id.* §§ III.5.i-k.)

The search for and production of categories 1, 4, and 5 will not result in the production of extraneous information.

Importantly, and contrary to Plaintiffs' suggestion (*see* Pl. Ltr. 3), Marriott would not receive all of Plaintiffs' text messages and emails—only those that reflect storing or sharing of personal information. And while categories 2 and 3 could in theory result in the production of extraneous information, the protective order prevents any such information from being used for the nefarious purposes Plaintiffs claim to fear. (*See* ECF No. 726 at 6 (“[U]nder the SPO discovery information can only be used to prosecute, defend, or settle the case, and the SPO contains additional protection for Highly Confidential Information and Confidential Information (including PII) by limiting who can access the information.”).) But to further assuage Plaintiffs' concerns, Marriott has revised the protocol further (Exhibit A) to provide for its expert to inspect the data responsive to categories 2 and 3, identifying for production only relevant information.

The information Marriott seeks is relevant.

The information Marriott seeks is focused on identifying evidence of: (1) the risk of or actual theft of Plaintiffs' personal information unrelated to the Starwood cyberattack, (2) instances where Plaintiffs freely provided to others the personal information they claim in this case to carefully protect, and (3) Plaintiffs' security habits on devices containing their personal information. Marriott's expert, Kevin Poindexter of Crypsis, explains in the attached declaration how each category of forensic information identified above will reflect this type of evidence. (*See* Poindexter Dec., Ex. B.)

Plaintiffs concede the first category of information could cause data to be lost. (Pl. Ltr. 2.) But that is only the tip of the iceberg. For example, websites that people visit can result in the theft of personal information with or without malware being installed on the device. (Poindexter Dec. ¶ 6(a)(i).) Similarly, websites often allow or require people to share their personal information voluntarily. (*Id.*) The same is true of applications on computers and phones. (*Id.* ¶ 6(b)(i).) How Plaintiffs connect to wireless Internet or Bluetooth applications, and the related security settings they use, will evidence their security practices for devices that contain personal information. (*Id.* ¶ 6(h)-(i).)

*25 Under Rule 26, relevance is “broadly construed to encompass any possibility that the information sought may be relevant to the claim or defense of any party.” *O'Malley v. Trader Joe's E., Inc.*, 2020 WL 6118841, at *3 (D. Md. Oct. 15, 2020) (quotation omitted). The information Marriott

seeks—that is, the risk of Plaintiffs' information being stolen, Plaintiffs' freely giving their information to other persons or entities, and Plaintiffs' own security practices—meets this standard.

First, the evidence is relevant to plaintiffs' misuse theory of damages and their request for injunctive relief. Plaintiffs concede that if their information was stolen from their own devices prior to fraud for which they blame Marriott, that is relevant to causation of that fraud. (Pl. Ltr. 2-3.) Plaintiffs argue that this means the search should be limited to devices in “use at the time of the fraud event.” (*Id.* at 3.) Marriott agrees that all of Plaintiffs' devices in operation prior to any alleged fraud are relevant and should be searched for evidence of alternative sources of that fraud.

But each plaintiff also alleges that he or she “remains at a substantial and imminent risk of future harm” and that they “continue to suffer injury as a result of the compromise of their Personal Information.” (ECF No. 537 ¶¶ 20-95, 273.) Having put the future at issue, Plaintiffs cannot cut Marriott's discovery off at the date of any particular fraud. Moreover, the less securely and sensitively Plaintiffs treat their personal information—*e.g.*, by not securing it on their electronic devices and by providing to other third parties—the less likely a juror is to believe Plaintiffs claim that Marriott caused fraud or the risk of fraud. Plaintiffs also seek injunctive relief, arguing that an injunction is necessary to prevent them from injury due to further cyber-attacks. (*See, e.g., id.* ¶ 352.) Whether the Court issues an injunction should turn, in part, on the degree to which Plaintiffs protect their own information. If, for example, Plaintiffs do not protect their information, then an injunction would do nothing to prevent the harm they argue an injunction would protect against.

Second, the evidence Marriott seeks is relevant to Plaintiffs' loss-of-value damages theory. Plaintiffs argue that, “as Your Honor already ruled, Plaintiffs will submit expert testimony establishing the *objective* value of their data on an aggregate, classwide basis.” (Pl. Ltr. 3 (emphasis in original).) They similarly attribute a ruling to you that “Plaintiffs' damages claim that Marriott owes them the ‘value’ of their personal information does not turn on any individual plaintiff's *subjective* feelings about his or her data.” (*Id.* at 5 (emphasis in original).) Plaintiffs cite no order from you or Judge Grimm on either alleged point, and Marriott is aware of none. How and if Plaintiffs' prove their alleged “lost value” theory is still in dispute, and the time has not yet come for those determinations.

In any event, Plaintiffs claim that “because their Personal Information is now in the hands of criminals, it is less valuable.” (ECF No. 473 at 14.) How Plaintiffs used or disclosed—and continue to use or disclose—their personal information, both before and after the Starwood incident, is thus relevant to whether Marriott caused their information to lose value, as well as the value of the information itself. In any market for information, information that had never been disclosed and has since never been disclosed would be more valuable than information that has been disclosed 50 times. In short, the issue is not whether a Plaintiff “loved her car”; it is whether the stolen car was missing a bumper and had 150,000 or 15 miles on it. (*Compare Pl. Ltr. 3.*)

*26 Alternatively, the Court ruled that Plaintiffs could attempt to prove they were damaged based on “the economic benefit the consumer derives from being able to purchase goods and services remotely and without the need to pay in cash or a check,” specifically noting that “[c]onsumers choose whether to exchange their personal information for these goods and services every day.” *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 440 F. Supp. 3d 447, 462 (D. Md. 2020). The evidence Marriott seeks will inform whether Plaintiffs have suffered any inability to exchange their information. And, under the Court's order, this evidence is also relevant to determine how each of the Plaintiffs chooses to exchange his or her information for goods and services.

Third, the evidence is designed to test specific allegations that Plaintiffs make in the complaint. Each Plaintiff alleges his or her personal information is “highly sensitive.” (ECF No. 537 ¶¶ 20-95.) Each also claims to “place significant value in data security,” and “would not have stayed at a Marriott Property, purchased products or services at a Marriott Property, and/or would have paid less” if they knew what Plaintiffs allege is “the truth” about Marriott's data security. (*Id.* ¶¶ 273, 275.)

Marriott does not have to take Plaintiffs' word for it. If a Plaintiff, for example, provided personal information to dozens of merchants to receive free shipping or other online discounts, that fact contradicts the allegation that Plaintiffs place significant value in data security. Plaintiffs' browsing history and applications (*e.g.*, applications related to specific merchants that store personal information) may contain this evidence. The evidence Marriott seeks may also show that a Plaintiff frequented a website or has an application or program known to gather or steal personal information.¹ In general, the more third parties to whom a Plaintiff provides personal

information, the less likely a juror is to believe their claim that they consider this information highly sensitive or that they desire to protect the purported value of that information. And if Plaintiffs do nothing to secure the devices that contain their personal information, a reasonable juror could conclude that they do not, in fact, protect or value that information.

The discovery Marriott requests is proportional.

Proportionality is based on “the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to the relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” *O'Malley*, 2020 WL 6118841, at *3. Plaintiffs largely ignore these factors and focus on the so called “unprecedented” nature of Marriott's request, and rely on *In re Anthem, Inc. Data Breach Litig.*, 2016 WL 11505231 (N.D. Cal. Apr. 8, 2016), and *Henson v. Turn, Inc.*, 2018 WL 5281629 (N.D. Cal. Oct. 22, 2018).

These cases support the Court compelling discovery consistent with Marriott's protocol. Both orders deny discovery requests related to turning over *full* images to the defendant. See *Anthem*, 2016 WL 11505231, at *1 (“Defendants seek a discovery order compelling each of the named plaintiffs either to provide access to, or produce forensically sound images of, their computer systems that connect to the internet.”); *Henson*, 2018 WL 5281629, at *1 (request was “to directly access its opponents' devices or forensic images”). And neither court stated that a full forensic image was never appropriate. The *Henson* court stated it did “not mean to imply that there could never be an instance where a request to directly inspect a litigant's electronic devices or forensic images, or a request that a litigant produce his complete web browsing history or cookies, would be relevant and proportional.” 2018 WL 5281629, at *8.

*27 More to the point, Marriott's protocol does not require that a full image—or anything close to a full image—be disclosed. It targets limited areas of the devices likely to contain relevant information, as described in detail above. Thus, *Anthem* and *Henson* support Marriott: in neither case was the defendant denied *all* forensic information, as Plaintiffs request here.

In *Anthem*, the Court ordered a search for malware, as Plaintiffs admit. (Pl. Ltr. 4.) *Anthem* argued malware was relevant, so the court's order does not imply that the only possible relevant information on electronic devices

is malware. See *Anthem*, 2016 WL 11505231, at *1 (“Anthem asserts that it may determine whether the plaintiffs' computer systems contain malware, viruses, or other electronic indicators suggesting that their personally identifiable information or personal health information was compromised”).

As explained above and in Mr. Poindexter's declaration, relevant information beyond malware exists on Plaintiffs' devices. Citing Judge Koh's comments in an unrelated hearing, Plaintiffs suggest the *Anthem* Court “regretted” the decision. In fact, Judge Koh rejected the challenge to the Magistrate Judge's order compelling a forensic inspection for malware. (See Ex. C.)

The *Henson* defendants also received significant information from the plaintiffs' electronic systems. There, plaintiffs “already forensically imaged their devices and [were] producing information from those images” and agreed to produce any browsing history that was possibly relevant to the case. *Henson*, 2018 WL 5281629, at *7-8. This is what Marriott is requesting through its proposed protocol (Exhibit A). Indeed, it may be that Plaintiffs are fighting so hard here because they did not take steps to prevent the loss of relevant information from their devices.

Marriott is not harassing Plaintiffs; Plaintiffs are stonewalling Marriott.

Marriott's request is not unprecedented. “Forensic imaging is not uncommon in the course of civil discovery.” *List Indus., Inc. v. Umina*, 2019 WL 1933970, at *4 (S.D. Ohio May 1, 2019) (quotation omitted)). And forensic information was searched and produced in both *Anthem* and *Henson*. See also *In re Apple Inc. Device Performance Litig.*, 2019 WL 3973752, at *2 (N.D. Cal. Aug. 22, 2019) (ordering forensic review of plaintiffs' cell phones).

As noted in *Apple*, “[p]laintiffs are not passive third parties or defendants sued by the party seeking the invasion.” *Id.* Plaintiffs chose to sue Marriott, to allege value in and the unique loss of their personal information, and to claim Marriott devalued that information and caused fraud and the risk of future fraud. And, on top of their choices, they were selected as bellwether plaintiffs in this MDL—a select group whose claims should be fully tested. “It is well-established that a plaintiff cannot bring suit and then limit the defendant's discovery that is targeted at the subject matter of the plaintiff's claims.” *Id.*; see also *Barfell v. Brucker*, 2018 WL 4568861, at *1 (E.D. Wisc. Sept. 24, 2018) (“Plaintiff's claims of

deliberate indifference to his serious medical needs place his medical health at issue, which entitles Defendants to conduct discovery related to his medical health and to obtain his medical records.”).

But that is what Plaintiffs have done throughout this litigation. They have produced few documents (all but a handful have produced fewer than 100 pages), evasively answered interrogatories, redacted personal information they put at issue, and continued to stymie Marriott's attempts to discover relevant information from third parties.

***28** Sincerely,

/s/ Daniel R. Warren

/s/ Gilbert S. Keteltas

Co-Lead Counsel for Marriott

/s/ Lisa M. Ghannoum

EXHIBIT A TO LETTER

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

SOUTHERN DIVISION

IN RE: MARRIOTT INTERNATIONAL CUSTOMER DATA SECURITY BREACH LITIGATION

THIS DOCUMENT RELATES TO: ALL CONSUMER ACTIONS

MDL NO. 19-md-2879

Judge Paul W. Grimm

REMOTE COLLECTION AND EXAMINATION PROTOCOL

Consumer Plaintiffs shall submit their devices that connect to the Internet to the following protocol for the collection, examination, and production of data concerning Marriott's Request for Results of Examination of Plaintiffs' Devices.

I. Device Identification

1. Prior to scheduling any remote collections or preservations, each Consumer Plaintiff (referred to as “Custodians”) shall provide 4Discovery a detailed schedule of electronic devices they own that connect to the Internet and a secure address to send a remote collection kit containing the necessary hardware. This schedule will, at a minimum, include the following information:

- a. Custodian Name
- b. Device Description
- c. Make/Model/Serial #
- d. Estimated total storage capacity (used and available for use)

II. Collection and Imaging

2. Respective to each Custodian, upon receiving the schedule of devices 4Discovery shall propose dates and times for a remote collection kit to arrive at each Custodian's provided address. A signature will be required at the time of delivery. Within 2 days of delivery, each Custodian will participate in a virtual meeting with a 4Discovery collection specialist at an agreed upon time to facilitate collection and preservation of the specified devices. Collections will be performed using industry standard tools and methodology. This methodology will vary per device. If any encryption or passcodes are being used to protect the device(s), these codes will be provided by the Custodian to 4Discovery at the time of imaging. To the extent any of the devices store information in a cloud-based storage location, the cloud storage will be included in the data being collected by 4Discovery.

3. 4Discovery shall create a full and complete forensic image of each device prior to starting any analysis. These forensic images will be shipped to the 4Discovery lab and shall reside solely in 4Discovery's custody for the length of the matter. The original device(s) will remain in the control of each Custodian and will be preserved consistent with the plaintiffs' obligations to preserve evidence. 4Discovery will ensure that the devices are not altered or harmed in any way during the imaging process.

4. While responsive data will be sent to counsel for the Parties for review, copies of original data and forensic images collected shall not be released to counsel or experts for the

Parties and shall not be released from 4Discovery's custody for any reason absent written permission from the Custodian or Court order.

III. Analysis and Production

5. 4Discovery will conduct a forensic examination of the agreed upon devices and produce a report containing the following items:

***29 a. Malware Scans**

- i. 4Discovery will perform automated scans on the forensic images to look for evidence of viruses or malware and identify and review the log files of any antivirus or anti-malware programs that have been installed on the devices. This review will be performed using various antivirus scans, a review of file lists for suspicious files, analysis of any previously executed command line strings, and a review of system registry hives and event logs.
- ii. 4Discovery will produce a report identifying any evidence any viruses and/or malware found on each device, including both the current antivirus and malware findings, as well as any historical information. The report will also identify the methodology or methodologies used to scan the forensic images.

b. Web Browsing History and Bookmarked Pages

- i. 4Discovery will examine the active web history information for any internet browsers found on the devices and carve or search for any deleted internet history as well. In addition, any bookmarked or otherwise saved websites in any browser or format will be examined.
- ii. The report will include any relevant analytics available on internet history and bookmarked/saved websites, such as frequency of visit, first and most recent visit, etc. The report will also include the full-parsed relevant internet history (both active and deleted-recovered) showing the full list of all available entries and all parsed metadata in an industry standard format. Additionally, the report will include all relevant information about any bookmarked or saved websites including the location where it was found, website it points to and/or was from, and any associated dates.

ii. iii. Relevant information to be included in the report pursuant to Part 5.III.b will be identified through a remote-inspection during which 4Discovery hosts a remotely accessible platform for Marriott's expert to remotely access and analyze all forensically identified web history without the ability to save or download any information. Any information sought for production will be marked during this analysis and reviewed by Plaintiffs' counsel for privilege or other applicable protections prior to production.

c. Installed Programs/Applications

- i. This examination will include the identification of all installed programs or applications, and any artifacts indicative of programs or applications that were previously installed or used that are no longer installed.
- ii. The report will include a list of all relevant installed programs and applications with the context of when and where they were installed and any relevant configuration options. Any artifacts related to previously installed programs and applications should include the location the artifact was found, any contextual details, and the program or application to which the artifact relates.

ii. iii. Relevant information to be included in the report pursuant to Part 5.III.c will be identified through the process described in Part 5.III.b.iii.

d. Notes/Documents/Text Files

- *30 i. 4Discovery will examine and/or search all notes, documents, and text files on the devices and identify any on the devices or a synchronized cloud-based account, that contain personal information or usernames, passwords, passcodes, pins, passphrases, and/or other types of security keys (e.g., answers to security questions) that the Custodian used to secure personal information or access any website, program, application, or account (as used in this protocol "passwords"). As used in this protocol, the term "personal information" is information concerning a single person, including but not limited to a person's name, gender, address, electronic mail address, telephone number, social security number, driver's license information, state identification information, passport information, telephone number,

financial information, information about a person's banking or other type of account, payment card information, date of birth, place of birth, nationality, employer information, membership or loyalty program information, geolocation information, mother's maiden name, and social media account ID or profile information (including username and photo or other data from social media accounts).

- ii. The report will identify all documents found that contained any personal information or passwords, including the location, dates, and metadata from the documents. Any documents found in an application, platform, cloud-based storage, or email system should include the context of where the item was found and any transfer or send/receive artifacts about the item. The report will also include a copy of any notes, documents, or text files found to contain personal information or passwords.

e. Cloud Storage Accounts (Google Drive, OneDrive, DropBox, etc.)

- i. This examination will include identifying any and all cloud storage or file transfer platforms that were connected to the devices, synced with the devices, or that the devices accessed and with which the devices may have transferred data. Each of the cloud storage platforms identified should be collected and their data included in this overall examination. The data stored in any cloud storage platforms should be examined to determine if any of the data contains personal information or passwords.
- ii. The report will include a list of all cloud storage accounts identified in the examination with contextual information and metadata, as well as a copy of any files found on cloud storage platforms found to contain personal information or passwords.

f. Apple/Google/Microsoft Account IDs

- i. On each device, 4Discovery will examine any login information or accounts that are connected to the device and provide a list of any identified accounts. This shall include accounts such as Microsoft accounts being used to login to Windows computers, Apple accounts (iCloud or other) being used with any iPhones, iPads, or Mac computers, and any Google accounts being used on Android based phones, Google Chromebooks, or Windows computers.

- ii. 4Discovery will include in their report a list of any accounts found to be in use as well as any accounts that may have been used historically based on any artifacts or findings on the devices examined, including the context of where and how each was found.

g. Chats & Messages

- i. 4Discovery will examine all **chat** and messaging applications on the Custodians devices to identify any persistent or ephemeral messaging applications. For any applications identified, all extant messages will be parsed into readable form and searched for any personal information or passwords in the message content or as included as attachments.
- ii. The reporting on this area will include a list of all **chat** and messaging applications found, details around where the applications reside as well as their account information and configuration. Any messages that include personal information or passwords in the message or an attachment should be included in the report as well.

h. Email

- i. This examination will include identifying any email continent, both messages and attachments, that may contain or refer to any personal information or passwords. This should include both email data stored on the devices and email in any online email accounts that are connected to any of the devices.
- *31 ii. This report will include any and all available metadata as well as a copy of the email messages and/or any attachments where the message or any attachment contains personal information or passwords.

i. Wireless Device Connectivity

- i. 4Discovery will examine any artifacts relating to Wi-Fi network connections to determine what wireless networks were connected to, when, and using what type of security.
- ii. The report will include a list of all artifacts related to connecting to wireless networks including all available metadata.

j. Bluetooth Data Transfer

- i. 4Discovery will examine any artifacts related to Bluetooth connections that could facilitate data transfer, including Apple AirDrop and Android Nearby Share, or any other Bluetooth transfer applications or technologies.
- ii. The report will include a list of all artifacts related to connecting to and/or transferring data with Bluetooth devices capable of data transfer, including all available metadata.

k. Passwords

- i. On each device, 4Discovery will search for and identify any information they can determine may be passwords or other account credentials stored on the devices, or in any cloud storage or email platform connected to or used by the Plaintiffs on the devices. This analysis should also capture any context to the passwords/credentials such as any notes around them or site, service, or username noted with them.
- ii. 4Discovery will include in their report a list of any identified passwords, account information, or other credentials as well as the context of how and where each was found. The report should be encrypted, and password protected to secure and protect this password related information as well as other sensitive information being reported upon.

l. General Search

- i. In addition to the specific analysis included in the examination to attempt to locate personal information or passwords, a general non-targeted search will be run to identify personal information or passwords stored anywhere else on the devices. This search will leverage tools designed to identify personal information or passwords or search patterns designed to identify personal information or passwords.
- ii. The report will include a list of all files, artifacts, or fragments containing potential personal information or passwords that were identified through this process. Any items already identified in any other analysis focus areas in this protocol may be withheld from reporting in this focus area as long as all the same information is being reported. The report should include all metadata and contextual information about

what was found, where, bearing what dates, and any other metadata or information about each item. The identified items themselves should also be included in the report. The report will also identify the methodology or methodologies used to conduct this search.

m. Other Analysis

- i. ~~Any other analysis, evaluation, or steps 4Discovery deems appropriate to serve the purpose of this examination should also be performed.~~
 - ii. ~~Forensic investigators performing an examination commonly identify other items of interest while carrying out a predetermined protocol even if not explicitly written into the protocol. If this occurs, or if 4Discovery has other ideas it believes should be included, these tasks or items will be added as additional analysis focus areas.~~
- *32 iii. ~~Any additional work being performed will be included in the report describing the work and any findings or observations.~~

6. 4Discovery shall produce a forensic examination report for all analysis focus areas listed above including all Custodians' devices and accounts. To the extent the information described above to be included in the report can fit and makes sense to include inline in the report, it may be included inline. But for larger sets of data that would not fit well inline, those information sets should be included as attachments to the report and/or can be produced in native form.

7. 4Discovery shall provide its report to counsel for Plaintiffs and Defendants simultaneously and as soon as possible but in no event more than ~~14~~ ~~21~~ days following the date ~~of this agreement~~ Plaintiffs are ordered to conduct the forensic examination described in this protocol.

8. Except for the review process identified in Parts III.5.b & c, 4Discovery's report shall be provided to counsel for Plaintiffs and Defendants without any screening review by Plaintiffs' counsel.

9. If requested by either Plaintiffs' counsel or Defendants' counsel, 4Discovery shall make itself available to discuss its report and the methodologies used to complete it with counsel or any expert for Plaintiffs or Defendants following 4Discovery's production of the report.

IV. Data Disposition

10. Upon receiving written authorization provided by counsel for Plaintiffs and Defendants, 4Discovery will securely delete all collected data in its possession.

EXHIBIT B TO LETTER

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

SOUTHERN DIVISION

IN RE: MARRIOTT INTERNATIONAL CUSTOMER DATA SECURITY BREACH LITIGATION

THIS DOCUMENT RELATES TO: ALL CONSUMER ACTIONS

MDL NO. 19-md-2879

Judge Paul W. Grimm

DECLARATION OF KEVIN T. POINDEXTER

I, Kevin T. Poindexter, declare as follows:

1. I am a Senior Consultant at Crypsis, a Palo Alto Networks Company ("Crypsis"), a cybersecurity consulting firm specializing in digital forensic investigations, data breach and computer crime response, and cyber risk management services. I have personal knowledge of the following facts, and if called to testify, I could and would competently testify thereto. Crypsis was retained by Baker & Hostetler LLP ("Counsel"), on behalf of its client Marriott, to provide digital forensic consulting services in this matter.

2. Prior to my employment at Crypsis, I served as a sworn law enforcement officer with over 20 years of service. I have more than 10 years of training and experience in digital and mobile forensics, including conducting and overseeing forensic acquisitions and analyses of laptops, desktops, servers, and mobile devices in criminal investigations, civil litigation, and internal investigations. I have extensive training and experience in using computer and mobile forensic tools and techniques, including tools such as Blacklight, Cellebrite,

Forensic Toolkit, Magnet AXIOM and X Ways Forensic. I also have received training in the investigation and analysis of networked and stand-alone computer systems and mobile devices, including Microsoft Windows, Mac, and Linux operating systems and Android and Apple-branded mobile devices. I have forensically acquired and analyzed hundreds of digital media items, including desktops, laptops, mobile devices, and server computers. I have performed forensic analysis on a wide range of digital forensic matters, including metadata analysis, file transfer, deletion activity, and electronic document movement chronology among different storage media. I hold active certifications as a Commonwealth of Virginia Certified Law Enforcement Officer, National White-Collar Crime Center Certified Cyber Crime Examiner (3CE), Cellebrite Certified Physical Analyst (CCPA), and Certified Blacklight Examiner (CBE). Attached as Exhibit A is a copy of my curriculum vitae, which details additional aspects of my qualifications, experience, and background.

*33 3. I understand that Plaintiffs have alleged certain incidents of identity theft occurred in this matter. A critical component of understanding how identity theft could have occurred, or whether it can be attributed to a particular source, is determining how Plaintiffs stored, used, and shared their personal information. Insecure storage or sharing of personal information could lead to identity theft separate and apart from any security incident that may have occurred at Starwood. Additionally, the secure sharing or storing of personal information to an online platform that then experienced a security incident could also have resulted in the release of sensitive personal information, separate and apart from any security incident that may have occurred at Starwood. Understanding how Plaintiffs stored their personal information, how they shared that information, and with whom the information was shared prior to any alleged incidents of identity theft is critical in identifying how those alleged to have committed these fraudulent acts may have come into possession of Plaintiffs' personal information. This identification process would best be performed on the device Plaintiffs' used prior to the time of any claim of identity theft. To the extent the devices in use prior to the claims of identity theft no longer exist, examining Plaintiff's current devices can provide information about how they use, store, and share personal information.

4. I also understand that there are claims of ongoing risk related to Plaintiffs' personal information in this matter. To the extent ongoing risk is a factor, the alleged risk continues to the present day and beyond. As such, any storage, use, or

sharing of personal information to present day is relevant to determine how the information is stored and shared, and what risks may exist related to the personal information separate and apart from any security incident that may have occurred at Starwood, either before or after the time of the alleged security incident with Starwood.

5. Personal information can be freely offered into a variety of applications and web sites. It can also be stolen by programs or websites designed to capture and transmit personal information. An analysis of what applications were installed and what websites were visited will help demonstrate how personal information may have been shared/stolen. Analysis of what cloud platforms or what online email, chat, or other systems were in use will also help determine what other systems may have been involved in any potential theft of personal information through other online resources. Analysis of wireless and Bluetooth connection will help identify whether or not each examined Plaintiff connected to insecure wireless connections which may have stolen, or contributed to the theft of personal information. Analysis of notes, documents, and general searches for personal information will help identify if and where personal information was stored on Plaintiffs' devices. Any identified information would then be evaluated for how it may have been stored, used, or shared, contributing to the potential for identity theft or ongoing risk. Malware or viruses on the Plaintiffs' computers will be identified both for current infections as well as log files showing historical infections which could potentially steal personal information. Finally, any passwords or other credentials stored on Plaintiffs' computers will be evaluated to determine whether or not Plaintiffs' engaged in sub-optimal security practices such as using the same passwords for multiple services. If so, any system that experienced a security incident but did not include any personal information could be relevant if the same password or credential was also used for some other service that did store personal information.

6. The following analysis areas are typically found on the devices selected for examination and are a sampling of the data that could be analyzed in order to provide conclusions of how each plaintiff stored, used, shared, and secured their personal information on their devices as well as identify potential areas where this data may have been publicly exposed or used for identity theft or fraud. This analysis could be performed leveraging the collection process proposed by Plaintiffs utilizing their own expert for the collection, analysis process, and production of data described in this protocol.

a) Web Browsing History and Bookmarked Pages

*34 i. Websites can be a platform where personal information is stored or shared. Some websites can also be sources of potential compromise for a device as some websites can steal personal information with or without leaving malware on a device, allow an attacker to gain access to a device, passwords, or credentials, or to plant viruses or malware onto a device for later exploitative use. As such, websites visited on the devices could have allowed personal information to be either publicly exposed or used for identity theft or fraud. I understand Plaintiffs object to providing their entire web history. As such, I would recommend a remote-inspection approach where Plaintiffs' experts or other consultants would host a remotely accessible platform where I could remotely access and analyze web browsing activity on Plaintiffs' devices without the ability to save or download any information. Any data sought for production from Plaintiffs to Defendant would be marked in the course of this analysis and reviewed by Plaintiffs' counsel for privilege prior to production.

b) Installed Programs/Applications

i. Programs and applications can store, process, or transmit personal information and may have allowed personal information to be either publicly exposed, or used for identity theft or fraud if those areas of the devices or the applications themselves were compromised. I understand Plaintiffs also object to providing a full listing of applications and programs installed on their devices. As such, I would recommend a similar remote-inspection approach.

c) Notes/Documents/Text Files

i. Documents in many different formats can contain personal information. If the location in which these documents were stored, or any other platform, system, or application that stored or transferred the documents was compromised, that could have allowed personal information to be either publicly exposed or used for identity theft or fraud.

d) Cloud Storage Accounts (Google Drive, OneDrive, DropBox, etc.)

- i. Personal information stored in cloud storage platforms, if compromised, could have allowed personal information to be either publicly exposed, or used for identity theft or fraud, even without any compromise occurring on the devices themselves.

e) Apple/Google/Microsoft Account IDs

- i. Plaintiffs' accounts used to login or sync any devices may have been compromised, which may have allowed personal information to be either publicly exposed or used for identity theft or fraud.

f) Chats & Messages

- i. Individuals often share personal information through **chat** and messaging platforms on their devices and may have allowed this sensitive information to be inadvertently publicly exposed if those areas of the devices or the messaging platforms themselves were compromised.

g) Email

- i. Personal information in email accounts can be sent to other people; email accounts can be compromised, or locally stored email data can be stolen if a device storing the data is compromised. As such, any personal information stored in email on the devices or in accounts associated with the devices could have allowed personal information to be either publicly exposed or used for identity theft or fraud.

h) Wireless Device Connectivity

- i. Wireless devices used while traveling can be subject to interception or access by third parties when connecting to insecure or unofficial wireless networks. Connection to insecure or otherwise questionable wireless networks may have allowed personal information to be either publicly exposed or used for identity theft or fraud.

i) Bluetooth Data Transfer

- i. Sharing or transferring information via Bluetooth can result in inadvertent disclosure of information to unknown third parties if the security of Bluetooth connections are not carefully verified before sending data. Even accidental sharing of information with an unknown third party can cause personal information

to be either publicly exposed or used for identity theft or fraud.

j) Passwords

- i. Any stored passwords may have been accessed by an attacker if the device or account holding the stored password information was compromised. Also, it is common for some users to use the same password for multiple accounts and a compromise of one system or platform that does not contain any personal information could lead to an attacker accessing other platforms that do contain personal information leveraging the same password.

k) Malware Scans

- *35 i. Computer viruses and malware can be used by attackers to steal personal information, to gain remote access to a device, or for a variety of other purposes. If an attacker did compromise any of the devices, the associated accounts, or any of the platforms or information protecting personal information, then the compromise could have allowed personal information to be either publicly exposed or used for identity theft or fraud.

l) General Search

- i. Temporary files, uncommon file types, or other unexpected storage locations may contain copies of personal information that a Custodian does not even know exist but could nonetheless be accessed by an attacker if the device was compromised. If an attacker were able to gain access to any of these files, the compromise could have allowed personal information to be either publicly exposed or used for identity theft or fraud.

7. Because we need to understand how Plaintiffs' stored, used, and shared personal information in order to evaluate the risks posed for potential identity theft, other types of potential fraud, and ongoing risk, the types of analysis described above are necessary, narrowly tailored to identify relevant information, and involve limited burden on Plaintiffs.

8. I declare under the penalty of perjury that the foregoing is true and correct.

Executed on March 8, 2021 at Lynchburg, Virginia.
Kevin T. Poindexter

EXHIBIT A to Declaration

Kevin Poindexter

CRYPSIS, A PALO ALTO NETWORKS COMPANY

Senior Consultant, March 2019 to Present

McLean, VA

Maintain an active case load of digital forensic engagements in internal investigations, civil matters, and cybercrime engagements. Perform digital forensic acquisitions and examinations on laptop and desktop computers, e-mail and file servers, handheld/mobile devices, and network logs. Types of analysis include (but not limited to) document authentication, the theft or misappropriation of intellectual property or other data, computer hardware forensics and data recovery, and investigations into computer/network intrusions or hacking.

LYNCHBURG SHERIFF'S OFFICE

Sworn Auxiliary Deputy Sheriff, March 2019 to Present

Lynchburg, VA

Sworn to maintain full Certified Law Enforcement Officer powers, including arrest authority, in the Commonwealth of Virginia.

LYNCHBURG POLICE DEPARTMENT

Detective, January 1999 to March 2019

Lynchburg, VA

Served as detective and digital forensic examiner in the department's criminal investigations division and forensics unit. Participated in local, state, and federal investigations into a wide array of traditional and cyber-based crimes involving data breaches, wire fraud, and organized crime. Duties included interviewing witnesses, interrogating suspects, completing written reports detailing response, forensic procedures, and evidentiary findings, as well as testifying in court. Provided law enforcement digital forensic imaging, mobile device data extractions, examination, and investigative services for a number of federal agencies including the United States Secret Service, Federal Bureau of Investigation, Bureau of Alcohol Tobacco and Firearms, Department of Health and Human Services,

Social Security Administration and the U.S. Department of Homeland Security Investigations, as well as local police and sheriff's departments across the Commonwealth of Virginia.

EDUCATION

LIBERTY UNIVERSITY

B.S., Criminal Justice, May 2010

Testimony

I have provided investigative testimony in more than 200 court appearances over the past 22 years as a sworn law enforcement officer in both state and federal court. Most of the cases that I have testified in from 2011 to present were related to criminal investigations I conducted and/or subsequent digital forensic examinations that I performed on computers and mobile devices related to various criminal offenses. The cases listed below are cases in which I was qualified as an expert and provided testimony as an expert in the field of digital forensics.

***36 Circuit Court, Bedford County, Virginia**

Commonwealth v. Kevin Soto-Bonilla – CR17000350 - Capital Murder – 2019. Provided expert trial testimony leading to a conviction of my acquisition and examination of multiple mobile devices and **WhatsApp** communications tying defendant's involvement related to a MS-13 gang related homicide.

Commonwealth v. Victor Rodas – CR17000180 - Capital Murder – 2018. Provided expert testimony of my acquisition and examination of multiple mobile devices and **WhatsApp** communications tying defendant's involvement related to a MS-13 gang related homicide.

Circuit Court, City of Lynchburg, Virginia

Commonwealth v. Gary Hicks – CR16000089 – Possession of Child Pornography – 2016. Provided expert trial testimony leading to a conviction concerning child sexual exploitation material located on defendant's computer.

Circuit Court, Amherst County, Virginia

Commonwealth v. Edward Leroy Marshall, JR. – CR15M15271-03 - 2nd Degree Murder- 2016. Provided expert testimony leading to a conviction, related to cellphone data connecting the defendant to the homicide.

Commonwealth v. Cordell Carter – CR14015034-01 – 1st Degree Murder – 2014. Provided expert testimony leading to a conviction, related to cellphone data connecting the defendant to the homicide.

Circuit Court, Campbell County, Virginia

Commonwealth v. Darrell Wayne Delp – CR14000085 – Agg Sexual Battery of multiple children <13 and Possession of Child Pornography – 2014. Provided expert trial testimony leading to a conviction, concerning child sexual exploitation material created by defendant which was found on defendant's computer and additional digital media.

Juvenile & Domestic Relations Court, Nelson County, Virginia

Commonwealth v. Kenneth Alan Spratt – CR14000065 - Object Sex Pen: Victim <13 and Possession of Child Pornography – 2014. Provided expert testimony during a preliminary hearing leading to a guilty plea and conviction, concerning child sexual exploitation material created by defendant which was found on defendant's computer and additional digital media.

CERTIFICATIONS

Certified Cyber Crime Examiner (3CE), National White-Collar Crime Center (NW3C), January 2019 to Present

Cellebrite Certified Physical Analyst (CPOSESSION OF CHILD PORNOGRAPHY), June 2017 to Present

Cellebrite Certified Operator (CCO), September 2015 to Present

BlackBag Technologies Blacklight Certified Examiner (BCE), July 2015 to Present

Virginia Certified Law Enforcement Officer, Virginia Department of Criminal Justice Services, June 1999 to Present

DME Forensics, DVR Examiner User Certification, September 2017 to 2019

AccessData Certified Examiner (ACE), April 2012 to 2015

PROFESSIONAL AND CIVIC AFFILIATIONS

Senior Vice President, Blue Ridge Chapter, Virginia Police Benevolent Association, June 2018 to Present

Associate Member, Association of Certified Fraud Examiners (ACFE), December 2018 to Present

Member, High Tech Crime Investigator's Association (HTCIA), Mid-Atlantic Chapter, March 2017 to Present

Member, Virginia Commonwealth's Attorney's Services Council, Cybercrime Task Force, 2018 to 2019

***37** Affiliate Member, Southern Virginia Internet Crimes Against Children Task Force, 2011 to 2019

Regional Director, Central Shenandoah Region, Virginia Gang Investigator's Association, 2006 to 2019

LPD Member, Lynchburg Sexual Assault Response Team, March 2011 to March 2019

President, Blue Ridge Chapter, Virginia Police Benevolent Association, June 2012 to June 2018

Treasurer/Board Member, Big Brothers & Big Sisters of Central Virginia, June 2011 to December 2017

Founding Member of Youth Education and Support (YES) Program, 2005 to 2006

LPD Member, Lynchburg Sexual Assault Response Team, 2011 to 2019

DIGITAL FORENSIC TRAINING

SANS Institute

September 2019: FOR508: Advanced Incident Response, Threat Hunting, and Digital Forensics

National Computer Forensic Institute

February 2018: Network Intrusion Response Program (NITRO)

June 2016: Paraben Mobile Forensics

September 2015: Mobile Device Examiner Course (MDE)

Teel Technologies

November 2017: In-System Programming (ISP) for Mobile Devices

National White Collar Crime Center (NW3C)

September 2016: Basic Network Intrusion Investigations

August 2016: Intro to Computer Networks

November 2015: Macintosh Forensic Analysis

July 2013: iDevice Forensics

July 2013: Macintosh Triage and Imaging

June 2013: Windows Internet Trace Evidence

May 2013: Windows Artifacts

March 2012: Intermediate Data Recovery & Acquisition

August 2011: Basic Data Recovery & Acquisition (BDRA)

Digital Intelligence

April 2012: AccessData Bootcamp

September 2011: EnCase Versatile Preservation & Examination Responder (VPER)

September 2011: Digital Forensics w/ FRED

AWARDS AND RECOGNITION

Lynchburg Commonwealth's Attorney's Office, Outstanding Police Service Award, Digital Forensics, May 2016

Lynchburg Police Department, Meritorious Service Award, Digital Forensics, May 2016

United States Secret Service, Certificate of Appreciation for Digital Forensic Work, May 2015

Federal Bureau of Investigation, Certificate of Appreciation for Digital Forensic Work, May 2015

U.S. Social Security Administration OIG, Letter of Commendation for Digital Forensic Work, July 2012

Over 100 Lynchburg Police Department Commendations, January 1999 to 2019

TEACHING AND PRESENTATIONS

General Instructor, Virginia Department of Criminal Justice Services, June 2003 to December 2020

Investigations Instructor, Central Virginia Criminal Justice Academy Digital Forensic Investigations, 2012 to 2019

Gang/Organized Crime Investigations Instructor, Central Virginia Criminal Justice Academy Basic/In-Service Police Academy, 2006 to 2015

Criminal Justice Course Instructor, Liberty University, 2012

Gang Identification Instructor, Virginia Attorney General's Office, 2012

Background Investigations Instructor, Southwestern Virginia Criminal Justice Academy Virginia Forensic Nurses Annual Conference, November 2009

Virginia Commonwealth Attorney's Service Council, January 2009

Strategic Therapy Associates Annual Conference, May 2008

Virginia Crime Stoppers Annual Conference, 2007

EXHIBIT C TO LETTER

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Co-Lead Plaintiffs' Counsel

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In Re Anthem, Inc. Data Breach Litigation

Case No: 15-md-02617-LHK (NC)

MOTION FOR RELIEF FROM NONDISPOSITIVE PRETRIAL ORDER OF MAGISTRATE JUDGE

[REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED]

On October 31, 2016, Magistrate Judge Cousins issued a discovery order requiring thirty plaintiffs to produce their PCs, laptops, and tablets for mirror imaging. (Friedman Decl., Ex. 1.) [Redacted] If upheld, this order would mark the first time data breach victims have been subjected to intrusive forensic inspections of their personal devices, and would likely chill future participation in this and other data breach litigation.

Plaintiffs respectfully request that the Court set aside the order, as Judge Cousins applied the wrong legal standard. The law requires a heightened showing of good cause before private individuals may be compelled to provide mirror images of their personal devices—in recognition of the vast compendia of private information that such mirror images inevitably contain. Judge Cousins failed to apply this heightened standard, and as a result allowed Defendants to proceed with what he termed a “fishing expedition.” If Defendants were not requesting that Plaintiffs’ digital devices be cloned, such a fishing expedition might be permissible. There is a possibility, however slight, that one of the rare forms of PC crimeware capable of exfiltrating data was installed on a plaintiff’s computer around the time of the Anthem data breach. If that crimeware were still detectable two years later, its existence could be relevant under one of the three damages theories Plaintiffs are pursuing. But when the form of discovery sought involves mirroring every bit of digital information on Plaintiffs’ devices, a different standard is required—a higher standard of relevancy that should have been applied below.

The discovery order could also be set aside on two other grounds. The first is that the underlying document request Defendants moved to enforce was legally impermissible. It sought to require Plaintiffs to generate new data that would be provided to Defendants, even though Rule 34 only authorizes a party to request things already in existence. The second is that, even if mirror images were not involved, Judge Cousins could not weigh the relevance and intrusiveness of the protocol Defendants are now requesting without first knowing what that analysis would entail.

***39** Plaintiffs appreciate that Judge Cousins was trying to accommodate Defendants, who have scaled back what they are asking for, with the close of discovery in the offing. But Defendants’ proposal still involves the highly-invasive and unsettling procedure of cloning Plaintiffs’ digital devices. Judge Cousins’s earlier observation still applies: “there is an Orwellian irony to the proposition that in order to get

relief for a theft of one's personal information, a person has to disclose even more personal information, including an inspection of all his or her devices that connect to the internet." (4/8/16 Order [Dkt. No. 502] at 2.) Mirror imaging of digital devices by independent experts is reserved for "extreme situations" under the law, such as when a particular computer is the subject of the lawsuit. Data breach cases have never before been found to pose such an "extreme situation," but it will undoubtedly become common for defendants to demand mirror imaging of plaintiffs' devices in future data breach cases if this discovery order is permitted to stand. Plaintiffs accordingly urge the Court to exercise its authority under Rule 72(a) and set aside the present discovery order as contrary to law.

A. Judge Cousins Applied The Wrong Legal Standard.

Under Rule 72(a), the Court is empowered to modify or set aside Judge Cousins' discovery order if it is "clearly erroneous or contrary to law." The Court's review of the underlying factual determinations should be deferential, but its review of the underlying law is *de novo* (as is its review of mixed questions of law and fact), and the Court should reverse if it finds that Judge Cousins applied the wrong legal standard or failed to apply relevant case law. See *Silicon Storage Tech. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 13-CV-05658-LHK, 2015 WL 5168696, at *4 (N.D. Cal. Sept. 3, 2015) ("a magistrate judge's legal conclusions are reviewed *de novo* to determine whether they are contrary to law"); *Ingram v. PG&E*, No. 12-CV-02777-JST, 2013 WL 6174487, at *2 (N.D. Cal. Nov. 25, 2013) ("Mixed questions of fact and law are reviewed *de novo*."); *J & J Sports Prods. v. Bracamontes*, No. 11-CV-03713 YGR, 2013 WL 1149742, at *2 (N.D. Cal. Mar. 19, 2013) ("A legal conclusion is 'contrary to law' if the magistrate judge applies the wrong legal standard"); *U.S. v. Cathcart*, No. C 07-4762 PJH, 2009 WL 1764642, at *2 (N.D. Cal. June 18, 2009) ("A decision may be contrary to law if it fails to apply or misapplies relevant statutes, case law, or rules of procedure").

Here, Plaintiffs contend that Judge Cousins applied the wrong legal standard and failed to apply relevant case law governing requests to mirror image a party's personal computer. Our personal computers, laptops, and tablets contain a running digital diary of our activities: they catalog the webpages we visit, track our internet searches, log our emails with friends and family (and attorneys), and store photographs and videos of loved ones. Accordingly, the law requires a "heightened showing of good cause" before parties may be compelled to produce mirror images of their digital devices. *Cefalu*

v. Holder, No. 12-0303 TEH (JSC), 2013 WL 4102160, at *1 (N.D. Cal. Aug. 12, 2013). "[C]ourts have allowed independent experts to obtain and search a 'mirror image' of a party's computer equipment," only in the "extreme situation where data is likely to be destroyed or where computers have a special connection to the lawsuit." *Memry Corp. v. Kentucky Oil Tech., N.V.*, No. C04-03843 RMW (HRL), 2007 WL 832937, at *3 (N.D. Cal. Mar. 19, 2007).

Judge Cousins's order does not address this heightened standard, much less conclude that Defendants have satisfied it. In fact, Judge Cousins evaluated the parties' respective expert testimony and concluded that Defendants are on "a fishing expedition." (Friedman Decl., Ex. 2 at 30.) Defendants claim that mirror images will be used to assess the existence of malware on Plaintiffs' devices, and those assessments might reveal that someone other than Anthem stole and monetized Plaintiffs' identities. (*Id.* at 14.) They submitted expert testimony showing that hackers could have used keystroke loggers to capture everything typed into a Plaintiff's computer. That may be theoretically true, but the vast majority of malware detected by off-the-shelf software is "adware." (*Id.*, Ex. 5 (Karabelnik Decl.), ¶ 7.) And even when "crimeware" is detected, it is seldom a keystroke logger or other program capable of extracting personal data. (*Id.*, ¶¶ 8, 10.) It simply is not economically rational for hackers to infiltrate personal computers one-by-one and laboriously collect individual PII. (*Id.*, ¶¶ 14-18.) That is why hackers target the large compilations of PII maintained by corporations like Anthem. (*Id.*, ¶ 15.) Finally, even if this exceedingly rare (and economically inefficient) form of crimeware was on Plaintiffs' computers around the time of the Anthem data breach, it would be long gone and undetectable at this point. (*Id.*, ¶¶ 12-13.) There is, in other words, a very low chance that Defendants' requested discovery would lead to relevant information. Defendants truly are engaged in a fishing expedition, and while fishing expeditions may be permitted from time to time under ordinary circumstances, they are not permitted under the heightened standard of good cause applicable here.

***40** Instead of assessing whether Defendants had demonstrated heightened good cause for imaging Plaintiffs' digital devices, as required by case law like *Cefalu* and *Memry*, Judge Cousins permitted Defendants to proceed based on a finding that their current imaging request is less intrusive than their prior imaging request. (*Id.*, Ex. 1 at 2.) He cited three reasons: (1) the devices will be provided to a third-party examiner, not Anthem; (2) handheld devices are

excluded; and (3) production will be limited to 30 plaintiffs.¹ (*Id.*) These caveats do not change the legal standard, however; Defendants are still seeking mirror images and so still must make a heightened showing of good cause. As the *Memry* court found, mirror images should be ordered only in “extreme situation[s]”—even when the proposal is that the image be produced only to “a third party consultant pursuant to a protocol to be determined by the parties or the court.” *Memry*, 2007 WL 832937 at *3. Turning over a forensic record of one's entire digital life is invasive regardless of who receives it. Whether Defendants or one of the consultants suggested by Defendants takes custody, either way Plaintiffs are losing control over their most personal of details (and will be devoting several hours while their devices are imaged). Similarly, the fact that Defendants would not be imaging each and every one of plaintiffs' devices does not diminish the invasiveness of those mirror images that would be created. Judge Cousins was required to assess whether Defendants' had satisfied the heightened legal standard set forth in *Cefalu* and *Memry* before *any* mirror images could be compelled. Because he failed to do so, his order compelling the creation of mirror images of thirty plaintiffs' digital devices is contrary to law and should be set aside.

B. Judge Cousins's Order Is Contrary To Law In Other Respects As Well.

Plaintiffs believe that Judge Cousins's order is contrary to law and should be set aside for two additional reasons as well. The first is that the subject of Defendants' motion to compel, Request for Production No. 33, does not comply with the federal rules. It calls for Plaintiffs to create and produce data that is not yet in existence—namely, the results of an unidentified malware program that is to be run on their digital devices. (Friedman Decl., Ex. 4.) But “Rule 34 cannot be used to require the adverse party to prepare, or cause to be prepared, a writing to be produced for inspection ... it can only be used to require the production of things in existence.” *Lamon v. Adams*, No. 1:09-CV-00205-LJO, 2015 WL 1879606, at *3 (E.D. Cal. Apr. 22, 2015).

The second reason is that Request No. 33 included no information about the forensic scans to be used, it simply asked for “a program to be agreed upon by Plaintiffs and the Anthem Defendants.” (Friedman Decl., Ex. 4.) This is important because the results of the scans will be conveyed to Defendants, and so even if mirror images were not involved, the Court could not accurately evaluate either the relevance or the intrusiveness of this information under Rule 26(b)

(1) without knowing what it would contain. After briefing was complete, Defendants submitted a proposed protocol (adopted in pertinent part by Judge Cousins) that included examples of scanning software that will detect far more than the specific type of malware Defendants say they are looking for. (*Id.*, Ex. 6.) One problem with using overly-broad scans is that they detect files—like website tracking cookies and adware—whose names alone reveal information about Plaintiffs' internet browsing history. (See *id.*, Ex. 5, ¶¶ 4-5, 7.) Another is that finding any “malware”—including these relatively benign tracking cookies or adware—authorizes the forensic examiner to “confer” with Defendants, to potentially run a “root cause analysis” that could probe deep into Plaintiffs' internet, email, and download histories, and to convey the results of that analysis to Defendants in a summary report. (*Id.*, Ex. 1 at 3-4.) [Redacted]

While Plaintiffs are asking the Court to set aside the present discovery order, they do not rule out the possibility that Defendants could propose a protocol that (i) would not require mirror imaging, (ii) would involve remotely scanning devices for malware capable of exfiltrating PII only, and (iii) would exclude private information from the results conveyed to Defendants. Request No. 33 and Defendants' later proposed protocol do none of this, however, and in the many conversations the parties have had in an effort to reach a compromise, Defendants have never moved off their intrusive demand that Plaintiffs' devices be mirror imaged.

Respectfully Submitted,

COHEN MILSTEIN SELLERS & TOLL PLLC

ANDREW N. FRIEDMAN

GEOFFREY GRABER

SALLY M. HANDMAKER

ERIC KAFKA

***41** Dated: November 4, 2016

By: /s/ Andrew N. Friedman

ALTSHULER BERZON LLP

EVE H. CERVANTEZ

JONATHAN WEISSGLASS

/s/ David Berger

DANIELLE E. LEONARD

MEREDITH A. JOHNSON

Attachment

Dated: November 4, 2016

UNITED STATES DISTRICT COURT NORTHERN
DISTRICT OF CALIFORNIA

By: /s/ Eve H. Cervantez

Co-Lead Plaintiffs' Counsel

SAN JOSE DIVISION

GIRARD GIBBS LLP

LORALEE GIOTTA, et al., Plaintiffs,

ERIC GIBBS

v.

DAVID M. BERGER

ANTHEM, INC., et al., Defendants.

505 14th Street, Suite 1110

Case No. 15-MD-02617-LHK

Oakland, California 94612

Telephone: (510) 981-4800

**ORDER RE: MOTION FOR RELIEF FROM
NONDISPOSITIVE PRETRIAL ORDER OF
MAGISTRATE JUDGE**

Facsimile: (415) 981-4846

Re: Dkt. No. 630

On November 4, 2016, Plaintiff filed a motion for Relief from Nondispositive Pretrial Order of Magistrate Judge. The Court finds that a response to the motion is unnecessary, and the Court will not order a briefing schedule. Instead, the Court will allow the 14-day period under Civil Local Rule 72-2 to lapse, after which the motion will be deemed denied.

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

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NICOLE D. SUGNET

275 Battery Street, 29th Floor

San Francisco, CA 94111-3339

Telephone: (415) 956-1000

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Plaintiffs' Steering Committee

IT IS SO ORDERED.

Dated: November 17, 2016

LUCY H. KOH

United States District Judge

SIGNATURE ATTESTATION

All Citations

Pursuant to Civil L.R. 5(i)(3), I hereby attest that concurrence in the filing of this document has been obtained from the signatories shown above.

Not Reported in Fed. Supp., 2021 WL 961066

Footnotes

- 1** I will use this acronym as it is defined in the Second Amended Stipulated Protective Order, E.C.F. No. 531, paragraph 1, (1). The lengthy definition is an appendix to this Report and Recommendation.
- 2** Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, The Doctrine of Chances*, The Social Science Research Network Electronic Paper Collection, <http://ssrn.com/abstract=795725> at 7. The chart on that page is particularly helpful.
- 3** “In general, the more third parties to whom a Plaintiff provides personal information, the less likely a juror is to believe their claim that they consider this information highly sensitive or that they desire to protect the purported value of that information. And if Plaintiffs do nothing to secure the devices that contain their personal information, a reasonable juror could conclude that they do not, in fact, protect or value that information.” Letter of March 8, 2021.
- 4** See *id.* at 3.
- 1** Even the Supreme Court has recognized that the “storage capacity of cell phones has several interrelated consequences for privacy” and that “[a]n Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual’s private interests or concerns[.]” *Riley v. California*, 573 U.S. 373, 394–95 (2014).
- 2** See, e.g., *Tingle v. Hebert*, 2018 WL 1726667, at *7–8 (M.D. La. Apr. 10, 2018) (finding that “Defendants have also made no showing that the requested forensic examination of Plaintiff’s personal cell phone and personal email accounts are proportional to the needs of this case” and holding that “ ‘[t]he utility of permitting a forensic examination of personal cell phones must be weighed against inherent privacy concerns’ ”); *Crabtree v. Angie’s List, Inc.*, 2017 WL 413242, at *3 (S.D. Ind. Jan. 31, 2017) (denying request to forensically examine plaintiff’s personal cell phones and holding that the forensic examination “is not proportional to the needs of the case because any benefit the data might provide is outweighed by Plaintiffs’ significant privacy and confidentiality interests”); *Hespe v. City of Chicago*, No. 13 C 7998, 2016 WL 7240754, at *3 (N.D. Ill. Dec. 15, 2016) (affirming order denying request to inspect plaintiff’s personal computer and cell phone because, among other things, inspection “is not ‘proportional to the needs of this case’ because any benefit the inspection might provide is ‘outweighed by plaintiff’s privacy and confidentiality interests’ ”); *Areizaga v. ADW Corp.*, 2016 WL 9526396, at *3 (N.D. Tex. Aug. 1, 2016) (denying request to inspect plaintiff’s personal computer, smart phone, and other electronic devices because the request “is not proportional to the needs of the case at this time, when weighing [defendant]’s explanation and showing as to the information that it believes might be obtainable and might be relevant against the significant privacy and confidentiality concerns implicated by [defendant]’s request”).
- 1** Plaintiffs quip that “how does Marriott show whether a website is ‘vulnerable?’ ” Expert testimony is one answer, and Plaintiffs know this. What’s more, it is well known and documented that some types of websites are riskier than others. See <https://usa.kaspersky.com/blog/risky-websites-42/15946/>; <https://www.sagagent.com/dangerous-websites-on-internet/>.
- 1** The 30 Plaintiffs covered by the Order are *not* limited, however, to those who have alleged damages as the result of identity theft related to the Anthem data breach.

Faizoma v. Berelli Enterprises, LLC

United States District Court, S.D. Florida. | April 7, 2023 | Not Reported in Fed. Supp. | 2023 WL 4014676

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All Citations: Not Reported in Fed. Supp., 2023 WL 4014676

Outline

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United States District Court, S.D. Florida.

Virginie FAIZOMA, Plaintiff,

v.

BERELLI ENTERPRISES,
LLC, et al., Defendants.

CASE NO. 22-CV-62399-RUIZ/STRAUSS

|

Signed April 7, 2023

Attorneys and Law Firms

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Chris Kleppin, The Kleppin Firm, P.A., Plantation, FL, Allyson Greer Kisiel, Glasser & Kleppin, P.A., Miami, FL, for Defendants.

REPORT AND RECOMMENDATION

Jared M. Strauss, United States Magistrate Judge

*1 THIS MATTER came before the Court upon Defendants' Motion to Dismiss Including Because of Lack of Subject Matter Jurisdiction – Mootness ("Motion") [DE 20]. This case has been referred to me, pursuant to 28 U.S.C. § 636(b)(1) and the Magistrate Judge Rules of the Local Rules of the Southern District of Florida, to take all action as required by law on the Motion [DE 34]. I have reviewed the Motion, the Response [DE 27] and Reply [DE 33] thereto, and all other pertinent portions of the record. For the reasons discussed herein, I respectfully **RECOMMEND** that the Motion [DE 20] be **DENIED**.

BACKGROUND

Plaintiff was employed by Defendant Berelli Enterprises, LLC d/b/a Chevron ("Chevron") as a cashier from May 2019 until February 2021, and again from April 10, 2022 until April 22, 2022. Amended Complaint [DE 14] ¶ 15. Defendant Benedict Ramrattan ("Ramrattan") owns and/or operates Chevron, "acts directly in the interest of [] Chevron

in relation to its employees," and "exercise[s] the authority to hire and fire employees, set[s] the pay rate for the employees, and control[s] the finances and operations of[] Chevron." *Id.* ¶¶ 9-11.

In this case, Plaintiff brings overtime and minimum wage claims against Defendants under the Fair Labor Standards Act ("FLSA"), as well as a claim under the Florida Minimum Wage Act ("FMWA"). Plaintiff brings her FMWA claim in Count I of the Amended Complaint, her FLSA overtime claim in Count II, and her FLSA minimum wage claim in Count III. Counts I and III are predicated on alleged failure to pay wages for non-overtime hours worked in April 2022. Count II is based on alleged failure to pay for overtime hours worked between 2019 and 2021, as well as in April 2022. Ultimately she contends that Defendants owe her overtime wages in the amount of \$27,252 (half of which represents liquidated damages), as well as an additional \$1,920 (half of which represents liquidated damages) because they failed to pay her any compensation at all for the hours she worked in April 2022. *Id.* ¶¶ 24-25. Plaintiff also seeks an award of attorneys' fees and costs.

ANALYSIS

Pursuant to the Motion, Defendants seek dismissal of this action, contending that it is moot (they contend that at least Counts I and III of the Amended Complaint – the non-overtime counts – are moot, but they seek dismissal of Count II as well). Defendants' mootness contention is based on the undisputed fact that they recently tendered a check to Plaintiff's counsel for \$396.18, which Defendants assert represents the full amount Plaintiff was owed for the brief period of time she worked in April 2022. As to Count II (the FLSA overtime count), Defendants contend that it is separately subject to dismissal for other reasons. Finally, Defendants contend that even if Plaintiff could establish liability on the part of Chevron, Plaintiff has failed to plead sufficient factual allegations to establish that Ramrattan is individually liable as an employer under the FLSA. As discussed herein, Defendants' arguments are without merit.

A. Counts I & III and Defendants' Mootness Argument

*2 Defendants have failed to establish that Counts I and III are moot.¹ "Federal courts are courts of limited jurisdiction." *Gardner v. Mutz*, 962 F.3d 1329, 1336 (11th Cir. 2020) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.

[375, 377 \(1994\)](#)). “The most notable—and most fundamental—limits on the federal ‘judicial Power’ are specified in Article III of the Constitution, which grants federal courts jurisdiction only over enumerated categories of ‘Cases’ and ‘Controversies.’” *Id.* (citing U.S. Const. art. III, § 2). “This case-or-controversy requirement comprises three familiar ‘strands’: (1) standing, (2) ripeness, and (3) mootness.” *Id.* (citing *Christian Coal. of Fla., Inc. v. United States*, [662 F.3d 1182, 1189 \(11th Cir. 2011\)](#)). As to the strand at issue here, mootness, “[a] case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief.” *L.E. by & Through Cavorley v. Superintendent of Cobb Cnty. Sch. Dist.*, [55 F.4th 1296, 1300 \(11th Cir. 2022\)](#) (quoting *De La Teja v. United States*, [321 F.3d 1357, 1362 \(11th Cir. 2003\)](#)); *see also Ga. Ass'n of Latino Elected Offs., Inc. v. Gwinnett Cnty. Bd. of Registration & Elections*, [36 F.4th 1100, 1117 \(11th Cir. 2022\)](#) (“Mootness, like standing, is jurisdictional, as Article III’s case and controversy requirement does not expire upon the filing of a pleading. If a case ‘no longer presents a live controversy with respect to which the court can give meaningful relief,’ the case is moot and must be dismissed.” (citation omitted)). “The burden of establishing mootness rests with the party seeking dismissal. This burden is a heavy one.” *Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen*, [586 F.3d 908, 916 \(11th Cir. 2009\)](#) (internal citations omitted).

Defendants have failed to satisfy their heavy burden of establishing that this action is moot. On the contrary, a live controversy clearly remains. According to Defendants, the check for \$396.18 that they tendered to Plaintiff’s counsel represents all that Plaintiff is owed in connection with Counts I and III. They do acknowledge, however, that Plaintiff may also be entitled to reasonable attorneys’ fees and costs. Therefore, in addition to tendering the check for \$396.18, they have offered to pay Plaintiff reasonable attorneys’ fees and costs. They contend that their offer to pay Plaintiff’s reasonable attorneys’ fees and costs combined with the check they have tendered provides full relief to Plaintiff (at least for the claims asserted in Counts I and III). Therefore, Defendants assert that the case (or at least Counts I and III) is rendered moot.

However, Defendants overlook that a live controversy remains regarding the amount that Plaintiff asserts she is owed in connection with Counts I and III. Specifically, as noted above, Plaintiff has alleged that she is owed \$1,920 in connection with those counts. Thus, Defendants’ tender of \$396.18 (plus an offer to pay reasonable attorneys’ fees and

costs) would not afford Plaintiff full relief.² Therefore, Counts I and III are not moot.³

B. Count II (Overtime)

*³ With respect to Count II (the FLSA overtime count), Defendants appear to contend that it is moot because Defendants’ records show that Plaintiff never worked overtime, because Plaintiff was barred from working overtime because she was on governmental assistance, and because it is not plausible that Plaintiff would return to work for Defendants (after leaving a little over a year earlier) if they had in fact failed to pay her overtime that was owed to her. As an initial matter, none of these issues go to mootness. They go to the merits of Plaintiff’s claim. Thus, Defendants’ arguments for dismissal of Count II effectively seek dismissal under Rule 12(b)(6).

To survive a motion to dismiss under Rule 12(b)(6), “factual allegations must be enough to raise a right to relief above the speculative level” and must be sufficient “to state a claim for relief that is plausible on its face.” *Id.* at 555, 570. “A claim has facial plausibility when the plaintiff pleads 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 \(2009\)](#). “The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss.” *Sinaltrainal v. Coca-Cola Co.*, [578 F.3d 1252, 1261 \(11th Cir. 2009\)](#) (citing *Iqbal*, [556 U.S. at 679](#)).

In considering a Rule 12(b)(6) motion to dismiss, the court’s review is generally “limited to the four corners of the complaint.” *Wilchombe v. TeeVee Toons, Inc.*, [555 F.3d 949, 959 \(11th Cir. 2009\)](#) (quoting *St. George v. Pinellas Cnty.*, [285 F.3d 1334, 1337 \(11th Cir. 2002\)](#)). Courts must accept the factual allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Cambridge Christian Sch.*, [942 F.3d at 1229](#); *Tims v. LGE Cnty. Credit Union*, [935 F.3d 1228, 1236 \(11th Cir. 2019\)](#). But “[c]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.” *Jackson v. BellSouth Telecomm.*, [372 F.3d 1250, 1262-63 \(11th Cir. 2004\)](#) (citation omitted); *see also Iqbal*, [556 U.S. at 678](#) (“[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”).

None of the three arguments Defendants raise for dismissal of Count II warrant dismissal. First, the records on which

Defendants rely (employee earnings records) are outside the four corners of the Amended Complaint. Defendants contend that these records may be considered at this stage under an exception to the general rule that consideration of Rule 12(b)(6) motions is confined the four corners of a complaint. But Defendants are mistaken.

Ordinarily, courts may not look beyond a pleading – including exhibits thereto, which are treated as part of the pleading – when ruling on a motion to dismiss under Rule 12(b)(6). *Crowder v. Delta Air Lines, Inc.*, 963 F.3d 1197, 1202 (11th Cir. 2020); *Crawford's Auto Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 945 F.3d 1150, 1162 (11th Cir. 2019). Nonetheless, documents attached to a motion to dismiss may be considered without converting the motion into a motion for summary judgment if the documents are (1) “central to the plaintiff’s claim” and (2) “their **authenticity** is not challenged.” *Crowder*, 963 F.3d at 1202 (citing *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005)); *see also Crawford's Auto Ctr.*, 945 F.3d at 1162 (citing *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 811 (11th Cir. 2015)). Here, Defendants have failed to establish the employee earnings records are central to the Amended Complaint.⁴ Moreover, Plaintiff clearly disputes the **authenticity** of these records. *See* [DE 27] at 8. Therefore, it would be improper to consider the records in connection with the Motion.

*⁴ Second, Defendants’ argument that Plaintiff was barred from working overtime because she was on governmental assistance, even if true, is also outside the four corners of the Amended Complaint and, therefore, cannot be considered at this stage. Defendants’ third argument does not fare any better. Again, they argue that it is not believable that Plaintiff would return to work for them if they had truly failed to pay her overtime that was owed to her. But accepting this argument would require drawing inferences in favor of Defendants when the Court must draw all reasonable inferences in Plaintiff’s favor at this stage. Moreover, Defendants’ argument seems to go to credibility, which is for a factfinder to decide. Thus, none of Defendants’ arguments for dismissal of Count II are appropriate.

C. Ramrattan’s Liability

The Amended Complaint adequately alleges that Ramrattan meets the definition of an “employer” under the FLSA. “The statutory definition of ‘employer’ is [] broad; it encompasses both the employer for whom the employee directly works as well as ‘any person acting directly or indirectly in the interests

of an employer in relation to an employee.’ ” *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1298 (11th Cir. 2011) (quoting 29 U.S.C. § 203(d)). Thus, “the FLSA contemplates that a covered employee may file suit directly against an employer that fails to pay him the statutory wage, or may make a derivative claim against any person who (1) acts on behalf of that employer and (2) asserts control over conditions of the employee’s employment.” *Id.* (citing *Patel v. Wargo*, 803 F.2d 632, 637 (11th Cir. 1986)).

Here, Defendants make a relatively perfunctory argument at the conclusion of the Motion that Plaintiff has not alleged any facts to establish that Ramrattan qualifies as an “employer.” *See* [DE 20] at 10. According to Defendants, Plaintiff has merely alleged, in a conclusory fashion, that Ramrattan ran the company day-to-day. While true that certain allegations regarding Ramrattan are conclusory, the Amended Complaint does also include factual allegations regarding Ramrattan’s role and his control over employees. Specifically, the Amended Complaint alleges that Ramrattan is the owner/operator of Chevron, and even more specifically, alleges that he “exercise[s] the authority to hire and fire employees, set[s] the pay rate for the employees, and control[s] the finances and operations of [] Chevron.” Amended Complaint ¶¶ 9, 11. These allegations are sufficient to allege that Ramrattan qualifies as an employer here. *Cf. Ray v. Adams & Assocs., Inc.*, 599 F. Supp. 3d 1250, 1258 (S.D. Fla. 2022).

CONCLUSION

For the reasons discussed above, I respectfully **RECOMMEND** that the Motion [DE 20] be **DENIED**.

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Rodolfo A. Ruiz, II, United States District Judge. Failure to timely file objections shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989); 11th Cir. R. 3-1.

DONE AND SUBMITTED in Fort Lauderdale, Florida this 7th day of April 2023.

All Citations

Not Reported in Fed. Supp., 2023 WL 4014676

Footnotes

- 1 As discussed in the next section, Defendants' arguments regarding Count II are merits-based arguments, not mootness arguments.
- 2 Cf. *Gomory v. City of Naples*, No. 2:15-cv-657-FtM-99MRM, 2016 WL 455426, at *2 (M.D. Fla. Feb. 5, 2016) ("[T]he Court cannot agree the case is moot, because it is disputed whether Defendant has paid Plaintiff all he is due under the FLSA, including liquidated damages.").
- 3 Defendants' mootness argument also appears to depend, in part, on Defendants' allegation in the Motion that Plaintiff stole \$500 from Defendants and agreed to waive the right to her last paycheck. However, this argument is based upon matters outside the four corners of the Amended Complaint, including text messages that are not central to the Amended Complaint. Moreover, Defendants' contention that the alleged theft gives rise to a waiver or *in pari delicto* defense (see [DE 20] at 8) is improper to consider at this stage because the existence of these affirmative defenses is not apparent from the face of the Amended Complaint. See *Wells v. Brown*, 58 F.4th 1347, 1350 (11th Cir. 2023) ("[A] complaint may be subject to dismissal for failure to state a claim—based on an affirmative defense—only when the affirmative defense appears on the face of the complaint."); *Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1304 (11th Cir. 2020) ("A complaint need not anticipate and negate affirmative defenses and should not ordinarily be dismissed based on an affirmative defense unless the defense is apparent on the face of the complaint."); *Bingham v. Thomas*, 654 F.3d 1171, 1175 (11th Cir. 2011) ("A complaint may be dismissed if an affirmative defense ... appears on the face of the complaint. Otherwise, ... affirmative defenses must be raised in a responsive pleading." (internal citations omitted)); *Pearlman v. Alexis*, No. 09-20865-CIV, 2009 WL 3161830, at *3 (S.D. Fla. Sept. 25, 2009) ("Because *in pari delicto* is an affirmative defense requiring proof of facts asserted by the defendant, it is usually not an appropriate ground for a Rule 12(b)(6) dismissal.... An *in pari delicto* defense may be successfully asserted at the pleading stage only where 'the facts establishing the defense are: (1) definitively ascertainable from the complaint and other allowable sources of information, and (2) suffice [] to establish the affirmative defense with certitude.' " (internal citations omitted)); *Fed. R. Civ. P. 8(c)(1)* (recognizing "waiver" as an affirmative defense).
- 4 Defendants make the following brief, yet convoluted, argument regarding centrality:

[T]he facts that the corporate Defendant's time and pay records demonstrate that the Plaintiff did not work overtime, that Plaintiff was paid her last paycheck, and abandoned it are central to Plaintiff's claims, because there are jurisdictional allegations alleged in the Complaint and the statements directly pertain to those allegations, and it cannot be disputed by the Plaintiff that the documents are authentic and Plaintiff's own WhatsApp chats demonstrate that she stole and abandoned the last paycheck which was thereafter sent to Plaintiff's counsel.

[DE 20] at 4-5.

Layani v. Ouazana

United States District Court, D. Maryland. | March 3, 2021 | Not Reported in Fed. Supp. | 2021 WL 805405

Document Details

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All Citations: Not Reported in Fed. Supp., 2021 WL 805405, RICO Bus.Disp.Guide 13,476

Outline

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MEMORANDUM
OPINION (p.1)
[All Citations](#) (p.34)

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2021 WL 805405
United States District Court, D. Maryland.

Gerard LAYANI, et al. Plaintiffs,
v.
Isaac OUAZANA, et al., Defendants.

Civil Action No. ELH-20-420
|
Signed 03/03/2021

Attorneys and Law Firms

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Christopher Macchiaroli, Silverman Thompson Slutkin White LLC, Washington, DC, William Nelson Sinclair, Silverman Thompson Slutkin and White LLC, Baltimore, MD, for Defendants.

MEMORANDUM OPINION

Ellen L. Hollander, United States District Judge

*1 This putative class action concerns an alleged scheme to defraud investors in rental properties in Baltimore. Plaintiffs Gerard Layani; Britt Investment Baltimore LLC; Yehuda Ragones; and RDNA Investments, LLC filed a “Class Action Complaint for Damages and Injunctive Relief.” ECF 1 (the “Complaint”). They sued multiple defendants: Isaac Ouazana; Benjamin Ouazana; I&B Capital Investments LLC; WAZ-Brothers, LLC; WAZ Investments, LLC; WAZ-Management, LLC; and “John and Jane Doe(s) and John Doe Entities” (collectively, the “Doe Defendants”). *Id.* ¶¶ 10-20. Plaintiffs allege that over a period of years, defendants “implemented a scheme to defraud passive investors in and owners of Baltimore real estate of money, property, and benefits of monetary value through false pretenses and representations.” *Id.* ¶ 38.

According to the Complaint, “Defendants’ scheme to defraud can be broadly divided into two types: (a) Fraud in Marketing/Selling the Baltimore real estate; and (b) Property-Management-related Looting, Concealment, and Related Fraud.” *Id.* ¶ 39. As to the first type, plaintiffs allege that defendants induced investors to purchase interests in Baltimore rental properties and to contract with defendants

to manage the properties. *Id.* ¶ 40. But, defendants allegedly misrepresented key information about the properties, such as the value and quality of the property and the identity of the seller. *Id.* ¶¶ 40-43. With respect to the second category of fraud, plaintiffs assert that defendants’ “deception” took “numerous forms,” and generally involved “hiding or misrepresenting information about the operation and the condition of the properties under their control.” *Id.* ¶ 46. Among other things, defendants allegedly withheld rental income and charged plaintiffs for repairs that were never performed. *Id.* ¶¶ 79, 104, 162, 187, 213, 236, 265.

The Complaint, which is 125 pages in length, contains ten counts and concerns twelve properties. Plaintiffs allege violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962 (Count One), as well as conspiracy to engage in conduct prohibited by RICO, in violation of § 1962(d) (Count Two). In addition, plaintiffs bring eight claims arising under Maryland law, as follows: Negligence (Count Three); Negligent Supervision (Count Four); Common Law Fraud (Count Five); Constructive Fraud (Count Six); Breach of Contract (Count Seven); Conversion (Count Eight); Unjust Enrichment (Count Nine); and Accounting (Count Ten). *Id.* at 83-121. Counts Three and Four are lodged only against the Doe Defendants. *Id.* at 112, 114. All other claims are lodged against all defendants. *Id.* at 83-121.

Plaintiffs assert all counts on behalf of themselves and a putative class. *Id.* ¶ 26. The Complaint defines the putative class “as all persons who,” *id.* ¶ 27:

a. Purchased a full or fractional interest in properties sold directly or indirectly by Defendants, and whom, within four years before the filing of this action, Defendants misled or defrauded, or attempted to mislead or defraud, irrespective of whether they were in fact misled or defrauded; or

*2 b. Entered into a written or implied property management services agreement with Defendants, and whom, within four years before the filing of this action, Defendants misled or defrauded, or attempted to mislead or defraud, irrespective of whether they were in fact misled or defrauded.

According to plaintiffs, the Court has subject matter jurisdiction based on the RICO claims (Counts One and Two), pursuant to 28 U.S.C. §§ 1331, 1337. *Id.* ¶ 21.¹ And, they assert that the Court “is vested with supplemental jurisdiction” as to the claims arising under State law (Counts

Three to Ten), pursuant to 28 U.S.C. § 1367. *Id.* ¶ 22. Alternatively, plaintiffs assert that the Court has jurisdiction over all claims pursuant to 28 U.S.C. § 1332(d). *Id.* ¶ 23. Although the Complaint does not invoke the Class Action Fairness Act (“CAFA”) by name, it cites the pertinent statutory provision, § 1332(d), and states that the elements of the provision are satisfied. *Id.* ¶ 23.

Defendants have moved to dismiss the Complaint (ECF 18), supported by a memorandum of law (ECF 19) (collectively, the “Motion to Dismiss” or the “Motion”). They rely on Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 9(b). And, they seek dismissal of the class action allegations pursuant to Fed. R. Civ. P. 23.

As to Rule 12(b)(1), which concerns subject matter jurisdiction, defendants argue that this Court lacks jurisdiction under § 1331 because plaintiffs’ RICO claims fail under Rule 12(b)(6) and Rule 9(b), for various reasons. See ECF 19. Moreover, defendants mount “a pre-discovery challenge to class certification,” pursuant to Rule 23. *Id.* at 39. In their view, because plaintiffs have failed plausibly to allege a class, CAFA jurisdiction is also lacking. *Id.* at 39-40, 44. And, according to defendants, plaintiffs cannot claim diversity jurisdiction under § 1332(a). *Id.* at 45.

Plaintiffs’ corrected opposition is docketed at ECF 24 and is supported by seven exhibits. ECF 24-1 to ECF 24-7. Defendants have replied. ECF 26.

Plaintiffs have moved for leave to file a surreply (ECF 27, the “Surreply Motion”). It is supported by a proposed surreply (ECF 27-2) and exhibits. Defendants’ opposition is docketed at ECF 28. And, plaintiffs have replied. ECF 29. In addition, plaintiffs have filed a “Motion For Entry of Order Pursuant To The Court’s Inherent Authority To Sanction Defendants’ Witness Tampering And Other Bad Faith Tactics To Gain A Litigation Advantage.” ECF 30 (the “Sanctions Motion”). Defendants oppose the Sanctions Motion. ECF 32. Plaintiffs have replied. ECF 33.

*3 No hearing is necessary to resolve the motions. See Local Rule 105.6. For the reasons that follow, I shall grant defendants’ Motion to Dismiss, without prejudice; deny plaintiffs’ Surreply Motion; and deny plaintiffs’ Sanctions Motion, without prejudice.

I. Factual Background²

The Complaint (ECF 1) was filed on February 19, 2020. It sets forth an extensive summary of the alleged real estate fraud scheme. It also addresses each of the twelve properties implicated in defendants’ alleged scheme.

Plaintiff Gerard Layani is a citizen of Israel. ECF 1, ¶ 10. He is the sole member of Britt Investment Baltimore LLC (“Britt”), a limited liability company with its principal place of business in Baltimore. *Id.* ¶ 11. Britt was “set up by Plaintiff Layani for the purpose of investing in the real estate ventures sold by Defendants.” *Id.* I shall refer to Britt and Layani collectively as the “Layani Plaintiffs.”³

*4 Ragones is also a citizen of Israel and “maintains a U.S. address” in Baltimore. *Id.* ¶ 12. He is the sole member of RDNA Investments, LLC (“RDNA”), a limited liability company with a principal place of business in Baltimore. *Id.* ¶ 13.

Isaac Ouazana and Benjamin Ouazana are brothers and residents of Baltimore. *Id.* ¶¶ 14, 15, 270. I shall refer to them collectively as the “Ouazanas,” “Ouazana Brothers,” or “Brothers,” and individually as I. Ouazana and B. Ouazana. The related corporate defendants are I&B Capital Investments LLC (“I&B”); WAZ-Brothers, LLC (“WAZ-B”); WAZ Investments, LLC (“WAZ-I”);⁴ and WAZ-management, LLC (“WAZ-M”). These entites have their principal places of business in Baltimore. *Id.* ¶¶ 16-19.⁵

Layani was involved with eight of the properties referenced in the Complaint. Ragones was involved with the other four. The suit gives “Notice of Lis Pendens” as to some of the properties. See *id.* ¶¶ 1-6. Throughout the Complaint, plaintiffs reference defendants’ use of “international wires” and “interstate wires,” including “email, telephone, and WhatsApp voice and text chats,” to facilitate the fraud scheme. See, e.g., *id.* ¶¶ 55, 63, 85, 90, 109, 116, 142, 167, 193, 219, 256, 278.

In the section of the Complaint titled “Fraud in the Marketing/Selling the Baltimore Real Estate,” plaintiffs allege, *id.* ¶ 40:

... Defendants, acting directly or indirectly, deliberately used false pretenses and representations to attract passive investors located outside Maryland and, in many instances,

outside the United states, for the purpose of inducing them to purchase full or fractional interests in rental real properties located in Baltimore, with Defendants offering to furnish the efforts required to fulfill the investors' profit expectation from the real property interest acquired in exchange for a management fee pursuant to a written or implicit management contract with Defendants. []

According to plaintiffs, defendants deliberately misrepresented the value, characteristics, and quality of the real properties. *Id.* ¶ 41. Further, plaintiffs assert, *id.* ¶ 42:

In most instances, Defendants offered to sell the properties to the Plaintiffs and the Class Members, in ready to rent condition, fully compliant with the housing code and having passed all necessary inspections, for a "package price" that included: (a) the sale price for the conveyed interest in the real property, including all transfer taxes and charges; (b) an upfront charge by Defendants for any repair and renovation of the properties; (c) an upfront charge for property taxes for the first year of ownership; and (d) an upfront charge for insurance for the first year of ownership.

"[T]ypically," the investors did not attend the "closing[s]" for "the conveyance of the full or fractional interest in the real property," because they "trust[ed] Defendants fully." *Id.* ¶ 44. At the closings, the Ouazanas allegedly "conspired with" the John Doe Defendants, who include "title agents and title companies," by "falsifying documents ... in order to help hide from investors that the transactions closed differed materially from the investment terms agreed with the investors...." *Id.*

*5 According to plaintiffs, there were discrepancies between the agreed-upon sale prices for the properties and the "fictitious" prices reported by defendants to the tax authorities. *Id.* The property records "lower[ed] Plaintiffs' tax basis" and thus "expose[d] Plaintiffs to having to pay higher conveyance taxes than they should when they sell" the properties. *Id.* ¶¶ 69, 92, 117, 177, 226; *see id.* ¶ 203. In other instances, defendants did not own the property they had agreed to sell to the investors, or did not transfer ownership to the buyer, or resold the properties without "the knowledge or permission of the investors." *Id.* ¶ 44.

As indicated, plaintiffs also claim that defendants defrauded plaintiffs and the passive investors with whom they partnered through "property-management-related fraud." *Id.* ¶ 45. Defendants supposedly "use[d] their position of trust as managers of the properties under the written or implicit management agreements" *Id.* This type of fraud took

"numerous forms." *Id.* ¶ 46. For instance, defendants "hid[] or misrepresent[ed] information about the operation and the condition of the properties under their control" *Id.* They also "hid[] rental income" and "claim[ed] false charges" for services that were never rendered, repairs that were never performed, and "property taxes, utilities, and insurance that Defendants then failed to pay" *Id.* ¶ 48.

In sum, plaintiffs allege, *id.* ¶ 51:

[T]he Ouazana Defendants [we]re able to defraud the Plaintiffs and putative Class Members of money, property, and benefits of monetary value, including investment principal and rental income, and to conceal for years that Defendants d[id] not perform management services as agreed, and in many instances that they allow[ed] underlying properties to deteriorate, incur fines for code violations, and often wind up listed for tax sale.

In addition, the Complaint states that a "related lawsuit" was initiated in State court and was dismissed by consent, without prejudice, on October 17, 2019. ECF 1, ¶ 53.⁶ More recently, correspondence submitted by both sides indicates that some of the parties here are presently involved in other litigation in the Circuit Court for Baltimore City. *See ECF 34, ECF 36, ECF 37.* In particular, in 2020 I. Ouazana and WAZ-M brought suit against Ragones and a third party, Kandy, LLC, with respect to two properties that are not at issue in this case. ECF 34; ECF 37. The case is docketed in the Circuit Court as Case No. 24-C-20-003634 CN. *See, e.g., ECF 34.*

I turn to review the allegations as to the various properties referenced in the Complaint.

A. The Layani Properties

1. 314 North Hilton Street ("Property 1")

On June 24, 2014, Simon Jonathan Dahan, a non-party "representative" of the Ouazana Brothers and WAZ-I, emailed Julien Layani, a "representative" of the Layani Plaintiffs, about a business deal. ECF 1, ¶ 54. Dahan "offer[ed] an investment" in 314 North Hilton Street ("Property 1"), along with "a management agreement with Defendants to expend the efforts necessary to fulfill Plaintiffs' profit expectation in exchange," for a fee of "8 percents" [sic]." *Id.* During the ensuing two weeks, the Ouazanas and Layani had multiple conversations about the

business deal. *Id.* ¶ 56. Plaintiffs claim that the Ouazanas “falsely represented that they owned [Property 1] and that it did or could generate a 22% rate of return on investment after expenses based on monthly rent estimates of US\$1,050 to US \$1,150.” *Id.* ¶ 56. Yet, plaintiffs also assert that the Ouazanas indicated that WAZ-I was the property owner and had bought it for \$44,000. *Id.* ¶¶ 60, 61.

*6 On July 7, 2014, the Layani Plaintiffs agreed to pay a \$55,000 “‘package price’” for Property I, “which included all renovation work,” and transferred that sum to Waz Properties Inc.,⁷ as directed by the Ouazanas. *Id.* ¶ 57. Then, WAZ-I, through the Ouazanas, sent an invoice to Britt on July 21, 2014, indicating that WAZ-I was selling the property for \$44,000 and a \$3,000 “commission.” *Id.* ¶ 59. The following day, I. Ouazana emailed Julien Layani “a falsified deed dated July 18, 2014, representing that on that date, Defendant WAZ-I had conveyed title to this property to Plaintiff Britt for the sale price of \$44,000.” *Id.* ¶ 63. However, Maryland property records indicate that WAZ-I acquired Property 1 on July 25, 2014, and paid only \$13,650 for it. *Id.* ¶¶ 60, 61.

Plaintiffs also allege that “Defendants ... did not record a deed until ... March 4, 2015.” *Id.* ¶ 65. And, the recorded deed “differed materially from the one emailed to Plaintiff.” *Id.* It listed a sale price of \$21,000, rather than \$44,000, as represented to plaintiffs in July 2014. *Id.* Plaintiffs allege, *id.* ¶ 69:

Defendants falsely reported ... a fictitious lower price of \$21,000, in order to avoid paying transfer taxes altogether since this lower amount is below the threshold for paying conveyance taxes, and lowering Plaintiffs’ tax basis in this property, which exposes Plaintiffs to having to pay higher conveyance taxes than they should when they sell this property. Also, this enabled Defendants to fraudulently keep the “2014 taxes properties” that they charged Plaintiffs in the July 21, 2014, invoice.

2. 726 North Hilton Street (“Property 2”)

On September 1, 2014, B. Ouazana and WAZ-I, through Dahan, solicited the Layani Plaintiffs to buy a property located at 726 North Hilton Street in Baltimore (“Property 2”). *Id.* ¶ 84. B. Ouazana represented via email: “ ‘I have a good FORECLOSURE deal for you in Baltimore, new in the market for 55000 included work... Rent estimate 1100 to 1200 dollars... Also I put you the website [sic] of the

appraisal of the house that’s Baltimore city estimate this house for 64200 dollars.’ ” *Id.* ¶ 86 (capitalization and ellipses in Complaint). Defendants also proposed to manage the property in exchange for a management fee of “ ‘8 percents.’ [sic].” *Id.* ¶ 84. Discussions transpired over the following four days, during which the Ouazana Brothers represented that WAZ-I owned Property 2. *Id.* ¶ 87.

On September 5, 2014, the Layani Plaintiffs transferred \$55,000 to Waz Properties Inc., as directed by defendants. *Id.* ¶ 88. That sum was the agreed-upon “‘package price’” that included the cost of “a full renovation.” *Id.* On November 3, 2014, I. Ouazana emailed Julien Layani a deed with that date. *Id.* ¶ 90. It showed that the seller was Munitrust REO, not WAZ-I, and the sale price was \$16,000, not the \$55,000 that had been paid. *Id.* Thus, defendants concealed the true terms of the deal for two months before transmitting the deed. *Id.* ¶ 91.

In addition, “Maryland land records show that Defendants ... falsely reported ... a fictitious lower price of \$16,000....” *Id.* ¶ 92. That enabled defendants to avoid payment of transfer taxes and to “fraudulently keep conveyance taxes they collected from Plaintiff as part of the \$55,000 price.” *Id.* And, defendants lowered “Plaintiffs’ tax basis in this property.” *Id.*

3. 4004 Oxford Avenue (“Property 3”)

On December 14, 2014, the Ouazana Brothers and I&B, through Dahan, offered the Layani Plaintiffs a fifty-percent ownership interest in a four-unit multifamily building at 4004 Oxford Avenue in Baltimore (“Property 3”) for the sum of \$112,500. *Id.* ¶ 141. The Brothers were to retain the other fifty-percent interest. *Id.* The defendants also agreed to manage the property, “without fee.” *Id.*

*7 The Brothers and I & B, through Dahan, represented that Property 3 “was a ‘contractor bankruptcy foreclosure’ with a ‘foreclosure listing price’” of \$143,000. *Id.* ¶ 143. They also represented that \$222,000 “was the true price of acquisition of this property,” based on the anticipated costs of “repairs and renovations” as well as “closing fees and recording expenses.” *Id.* And, with the addition of a \$3,000 “finders’ or investment fee,” the full “‘package price’” for Property 3 came to \$225,000. *Id.*

The Ouazanas advised the Layani Plaintiffs on December 22, 2014, that they had “established a new entity, 4004 Oakford Ave. LLC, for the purpose of holding this property.” *Id.* ¶ 144. On January 2, 2015, I. Ouazana proposed over email an “operating agreement” by which Britt would own “50% of the share capital” in 4004 Oakford Ave. LLC and I&B would own “the other 50%.” *Id.* ¶ 145. The agreement called for both investors to make an “initial contribution” of \$112,500. *Id.* The Layani Plaintiffs transferred that sum “to Defendants” on January 7, 2015. *Id.* ¶ 146.

However, “[a]ccording to a deed dated January 12, 2015, and recorded on January 28, 2015 in the Maryland land records, Defendant WAZ-I acquired this property not in a foreclosure but directly from its then owner, nonparty Northstar Realty Management Inc.” *Id.* ¶ 147. Moreover, the deed shows that WAZ-I purchased the property for \$90,000, not \$143,000. *Id.* ¶ 148.

In addition, on August 22, 2018, I. Ouazana “filed amended articles for 4004 Oakford Ave. LLC,” without the knowledge or permission of the Layani Plaintiffs. *Id.* ¶ 152. The amended articles “list[ed] as a new 100% owner, a third party named Laurindo Figueiredo Dacosta, to whom Defendants appear to have sold for an undisclosed price all shares in 4004 Oakford Ave. LLC, including the Layani Plaintiffs’ shares.” *Id.* Plaintiffs assert: “Defendants unjustly and unlawfully converted to their own use—and continue to retain—the proceeds of the sale of all the shares of 4004 Oakford Ave. LLC., including the proceeds of the unauthorized sale of Plaintiffs’ shares.” *Id.* ¶ 164; *see also id.* ¶ 152.

4. 3905 W. Forest Park Ave (“Property 4”)

In January 2015, B. Ouazana and WAZ-I, through Dahan, contacted the Layani Plaintiffs about a four-unit multi family building located at 3905 West Forest Park Avenue in Baltimore (“Property 4”). *Id.* ¶ 108. I. Ouazana represented that the “[f]oreclosure listing price” was \$70,000, and that there would be “renovations costs and other expenses,” warranting a sale price of \$170,000. *Id.* ¶ 111. The Ouazanas also indicated that WAZ-I owned the property and that the property contained four rental units, each with two bedrooms. *Id.* ¶¶ 113, 114.

On April 23, 2015, the Layani Plaintiffs transferred the agreed-upon package price of \$170,000 to Waz Properties Inc., as directed by the Ouazanas. *Id.* ¶ 112. On June 11, 2015,

I. Ouazana emailed Julien Layani a “falsified deed dated June 4, 2015,” which stated that “Defendant WAZ-I had conveyed title to this property to Plaintiff Britt for the sale price of \$145,000.” *Id.* ¶ 116. However, Maryland property records contain a second recorded deed to the property, which shows that WAZ-I purchased the property for \$30,000 on June 17, 2015, after WAZ-I ostensibly conveyed title to the property to Britt. *Id.* ¶¶ 115-17.

In addition, Property 4 did not contain four rental units, as defendants had represented. *Id.* ¶¶ 114, 133. During a “site visit” in March 2018, the Layani Plaintiffs discovered that Property 4 is actually a single-family building. *Id.* ¶ 133. They also discovered at that time that the property was being rented to “a business operating an assisted living facility on the entire premises without Plaintiffs’ knowledge or permission, and without proper insurance or business licenses.” *Id.* ¶ 135.

5. 626 E. 35th Street (“Property 5”)

*8 On February 3, 2015, I. Ouazana, through Dahan, contacted the Layani Plaintiffs about an investment opportunity at 626 E. 35th Street in Baltimore (“Property 5”), described “as a single unit rental property (a rowhouse).” *Id.* ¶ 167. Conversations about the investment opportunity transpired over the following two months. *Id.* ¶ 169. The Ouazanas and I&B claimed that WAZ-I had purchased Property 5 at auction for \$45,000. *Id.* ¶¶ 169, 170. They offered to sell the property for a “package” price of \$73,000, which accounted for “settlement fees and recording expenses,” “needed repairs and permits,” and “Waz Investment Fees.” *Id.* ¶ 171; *see also id.* ¶ 167. Moreover, defendants represented that Property 5 would generate a “cash on cash return” of 14.73% after expenses based on monthly rent of US\$1,250 and gross yearly income of US \$15,000.” *Id.* ¶ 169. In addition, the transaction was “coupled with a management agreement” by which defendants were to manage Property 5 for a fee of 8%. *Id.* ¶ 167.

The parties agreed to a sale price of \$68,000. *Id.* ¶ 172. On March 26, 2015, the Layani Plaintiffs transferred that sum to third party Waz Properties Inc. *Id.*

However, defendants misrepresented their ownership of Property 5; they did not own it in February 2015. *Id.* ¶ 173. A deed to Property 5, recorded on April 15, 2015, showed that I&B, not WAZ-I, purchased the property at auction on April

10, 2015. *Id.* ¶¶ 173-75. And, I&B paid \$25,000, not \$45,000, as represented. *Id.* ¶¶ 174, 175.

6. 805 N. Lakewood Avenue (“Property 6”)

On April 19, 2015, I. Ouazana, through Dahan, contacted the Layani Plaintiffs about investing \$55,000 in a “joint enterprise” as to “a single unit rental property (a rowhouse)” located at 805 N. Lakewood Avenue in Baltimore (“Property 6”). *Id.* ¶ 192. Defendants were to manage Property 6 for their standard fee of “8 percent.” *Id.* Defendants represented that WAZ-I purchased Property 6 at auction for \$24,000, and that the property would generate \$12,600 in annual rental income. *Id.* ¶¶ 194-96. On April 23, 2015, the Layani Plaintiffs transferred \$52,000 to defendants. *Id.* ¶ 197.

However, a deed to the property, recorded on June 17, 2015, indicated that on June 4, 2015, WAZ-I purchased Property 6 for just \$5,000. *Id.* ¶¶ 199, 200. I. Ouazana emailed a deed to Julien Layani on June 11, 2015. *Id.* ¶ 202. It indicated that WAZ-I conveyed title to Property 6 to Britt on June 4, 2015, for a price of \$5,000. *Id.*

7. 2649 Marbourne Ave. (“Property 7”)

On July 23, 2015, I. Ouazana, through Dahan, offered the Layani Plaintiffs an investment in a single unit rental property at 2649 Marbourne Avenue in Baltimore (“Property 7”). *Id.* ¶ 218. Over the following week, the Ouazana Brothers represented that they had purchased the property at auction for \$35,000. *Id.* ¶ 220. But, plaintiffs also claim that defendants represented that WAZ-I owned the property. *Id.* ¶ 222.

Defendants offered a package price of \$60,000 for Property 7, along with a management fee of “8 percent.” *Id.* ¶ 218. On July 30, 2015, the Layani Plaintiffs paid defendants the “negotiated” sum of \$58,000 for Property 7. *Id.* ¶ 221.

However, land records showed that I&B, not WAZ-I or the Brothers, owned Property 7. *Id.* ¶ 222. A deed to the property, recorded on August 11, 2015, indicated that I&B purchased Property 7 on August 11, 2015, *i.e.*, after it was sold to the Layani Plaintiffs, and paid \$30,000, not \$35,000, as represented. *Id.* ¶¶ 222, 223.

8. 1605 Homestead, 2643 Kennedy KD43, 2651 Kennedy KD51 (“Property 8”)

In October 2016, I. Ouazana offered the Layani Plaintiffs an investment opportunity in a twenty-six-unit rental property spanning three buildings, described as “1605 Homestead, 2643 Kennedy – KD43, and 2651 Kennedy – KD51” (collectively, “Property 8”). *Id.* ¶ 241. Essentially, the offer entailed the Layani Plaintiffs becoming a fifty-percent owner of Property 8 and advancing a \$300,000 down payment. *Id.* ¶¶ 240-44. The Brothers were to manage the property “in exchange for a management fee of 5%.” *Id.* ¶ 241.

*9 A contract was executed “by all parties” on January 10, 2017. *Id.* ¶ 242. Under the contract, the purchase price for the property was about \$1.2 million, to be financed with a loan of \$878,000 to WAZ-B. *Id.* ¶ 244. Plaintiffs were to fund the full \$300,000 down payment. *Id.* Of that amount, \$137,500 was a loan to defendants. *Id.* ¶ 246. I. Ouazana claimed a credit against the \$300,000 for half of the \$25,000 he claimed to have advanced for acquisition costs. *Id.* ¶¶ 245, 246. The contract also provided that a new limited liability company, called “Homestead 613 LLC,” would become the owner of Property 8. *Id.* ¶ 243. Homestead 613 LLC would be owned in equal parts by WAZ-B and Britt. *Id.* ¶¶ 243, 256; *see id.* ¶ 244.

Sometime in late January 2015, the Layani Plaintiffs wired \$300,000 to I. Ouazana’s personal bank account, as required by the contract. *Id.* ¶ 251. However, Homestead 613 LLC was never created. *Id.* ¶ 256. And, “as late as June 6, 2019, Defendants engaged in various transactions which they recorded in the Maryland land records, purporting to unlawfully establish Defendants’ 100% ownership of this property through entities under their full control ... without Plaintiff’s knowledge or permission.” *Id.* ¶ 258. Plaintiffs allege: “Defendants unjustly and unlawfully converted to their own use -- and continue to retain -- the Plaintiffs’ ownership shares in this property.” *Id.* ¶ 266.

9. Property Management

According to the Layani Plaintiffs, the defendants “falsely represented that they were diligently managing all of the Plaintiffs’ properties ... which included making payments [in] good faith to third-party contractors and pursuing payment of missing rent amounts from tenants in the landlord-tenant court and through debt collectors.” *Id.* ¶ 77; *see id.* ¶¶ 101,

128, 160, 185, 211, 234, 263. Defendants allegedly “exploited the Layani Plaintiffs’ trust and inability to easily check the Defendants’ false representations in Baltimore, owing to Plaintiffs residing in France and Israel.” *Id.* ¶ 58; *see also id.* ¶¶ 10, 11, 52, 94, 122, 179, 205, 228, 253. Among other things, defendants allegedly “retained and converted to their own use missing rent amounts and amounts after charging Plaintiffs for what appeared to be fictitious repairs that Defendants made up.” *Id.* ¶ 79; *see id.* ¶¶ 104, 162, 187, 213, 236, 265.

In particular, defendants sought reimbursement from plaintiffs for the cost of putative repairs for which they provided no documentation: \$3,173 for Property 1, *id.* ¶¶ 74; \$1,815.80 for Property 2, *id.* ¶ 98; \$11,872 for Property 3, *id.* ¶ 157; \$5,385 for Property 4, *id.* ¶ 126; \$3,491.25 for Property 5, *id.* ¶ 182; \$2,470.25 for Property 6, *id.* ¶ 208; \$1773.9 for Property 7, *id.* ¶ 231; and \$11,872.30 for Property 8, *id.* ¶ 260. Further, defendants allegedly withheld rental income, including the following: \$6,900 for Property 1, *id.* ¶ 76; \$7,252 for Property 2, *id.* ¶ 100; \$7,077 for Property 3, *id.* ¶ 159; \$24,957 for Property 4, *id.* ¶ 137; \$15,938 for Property 5, *id.* ¶ 184; \$675 for Property 7, *id.* ¶ 233; and an unspecified amount for Property 8, *id.* ¶ 262. And, the Ouazanas denied Layani access to property management records. *Id.* ¶¶ 129, 161, 186, 235, 264.

On July 31, 2018, the Layani Plaintiffs, “frustrated with Defendants’ refusal to provide transparency in their management of Plaintiff’s properties, … terminated all their management agreements with Defendants.” *Id.* ¶ 80. But, defendants “continued collecting the Layani Plaintiffs’ rents” from various properties and “refused to account for the amounts unlawfully retained....” *Id.* ¶ 81; *see id.* ¶ 189.

In October 2018, I. Ouazana informed Julien Layani “that Plaintiff Britt had been sued in its capacity as owner of a property Defendants sold Plaintiffs.” *Id.* ¶ 53. The Complaint does not specify which property was implicated in that suit. But, the Complaint alleges that in October 2018, the Layani Plaintiffs learned that defendants had allowed various properties to “fall into severe disrepair,” had “failed to respond to official code violation notices,” had “failed to pay assessed fines,” and caused “property to be listed for tax sale.” *Id.* ¶ 82; *see id.* ¶¶ 106, 139, 190, 216, 239.

B. The Ragones Properties

***10** The Complaint asserts that “the Ouazana Defendants implemented their fraudulent scheme upon Plaintiff Ragones, then based in Las Vegas, by using false pretenses and representations to attract and induce him and Plaintiff RDNA to invest in 6 rental real properties located in Baltimore” *Id.* ¶ 269. However, the Complaint only identifies four such properties. The allegations as to the four properties are set forth, *infra*.

In addition, plaintiffs allege, *id.* ¶ 270:

Defendants actively concealed their acts and omissions from Plaintiff Ragones until August 29, 2017, when Plaintiff Ragones first heard rumors leading him to discover by happenstance that Defendant Isaac Ouazana and the other Ouazana Defendants had sold a property that was jointly owned with Plaintiff Ragones, without his knowledge and permission. Upon learning this information, Plaintiff Ragones started making inquiries about the other investment opportunities that Defendants sold him and visiting each of the many properties that he bought from or through Defendants, discovering only then, the extent of the fraud conducted by [the Ouazanas].

After losing “all trust and confidence in Defendants,” Ragones “canceled the management contract with them for all his properties.” *Id.* ¶ 360.⁸

1. 4415 Pall Mall Avenue (“Property 9”) & 2802 Harford Road (“Property 10”)

In July 2015, I. Ouazana solicited Ragones to invest in rental units in Baltimore that Ragones would own and that defendants would manage. *Id.* ¶¶ 296, 315. Both are single-family units. *Id.* One is located at 4415 Pall Mall Avenue (“Property 9”). *Id.* ¶ 296. The other is located at 2802 Harford Road (“Property 10”). *Id.* ¶ 315.

Although Ragones was “based” in Las Vegas, Nevada at the time, he met with I. Ouazana in Baltimore. *Id.* ¶¶ 269, 297, 316. I. Ouazana represented that he and “the other Defendants[] owned” Property 9 and Property 10 “outright,” and that they “were ready, willing and able to sell [the properties] to Plaintiff Ragones.” *Id.* ¶¶ 297, 316. Further, he stated that the price for each was \$35,000, *id.* ¶¶ 301, 318, with the “full package price” for each property in the sum of \$53,000. *Id.* ¶¶ 296, 311, 315, 306, 320.

I. Ouazana requested a “deposit” of \$175,000. *Id.* ¶¶ 299, 317. It is not entirely clear what that sum represented, but it appears to pertain to several properties. *Id.* ¶¶ 299, 317. In any event, on August 21, 2015, Ragones wired \$175,000 to the Ouazanas. *Id.* ¶¶ 301, 318.

Maryland land records indicate that at the time, a third party, Jackson Santvil, owned Property 9, contrary to defendants’ representations. *Id.* ¶¶ 298, 306. A deed to Property 9, recorded on October 1, 2015, indicates that the property was conveyed to Ragones’s investment entity, RDNA, by Santvil for the “fictitious price” of \$22,000, not \$53,000. *Id.* ¶ 306. A deed to Property 10, recorded on September 16, 2015, indicates that the property was conveyed to RDNA by I&B, an entity controlled by the Ouazanas, for the “fictitious price” of \$21,000, not \$53,000. *Id.* ¶ 320.

In early August 2016, Ragones decided to sell Property 9 and asked I. Ouazana “to help find a purchaser for it.” *Id.* ¶ 307. Shortly thereafter, I. Ouazana sold Property 9 to a third party without informing Ragones. *Id.* ¶ 308. And, when I. Ouazana subsequently told Ragones of the sale, he claimed he sold Property 9 for \$48,000. *Id.* ¶ 308. However, a recorded deed to the property indicates that the sale price was \$5,000. *Id.* ¶ 309.

***11** As to Property 10, from August 2015 to March 2016, I. Ouazana represented to Ragones that defendants were having repairs performed. *Id.* ¶ 324. During that time, Ragones also received one putative “rent payment.” *Id.* ¶ 328. However, Ragones visited the property in March 2016 and “discovered for the first time that the property was still boarded up, not in rentable condition, that no repairs had in fact been completed and that no tenant lived or had lived in this property during the time that Plaintiff Ragones owned it.” *Id.* Indeed, the property was “in a state of severe disrepair.” *Id.* ¶ 325.

Ragones asked I. Ouazana to “find a buyer” for Property 10. *Id.* ¶ 329. Shortly thereafter, I. Ouazana informed Ragones that the property had been sold for \$48,000, without prior consultation with Ragones. *Id.* ¶ 330. But, a deed to the property, dated March 23, 2016, indicates that the sale price was \$62,000. *Id.* ¶ 331. Defendants “appear to have benefited from the help of” John Doe Defendants, who “performed the real estate closing” and “arranged to forward the sale proceeds” to I. Ouazana, “and not to the actual seller, RDNA....” *Id.* ¶ 334.

2. 1109 Lyndhurst Street (“Property 11”)

In July 2015, I. Ouazana offered Ragones an opportunity to purchase a single-unit rental property located in Baltimore at 1109 Lyndhurst Street (“Property 11”). *Id.* ¶ 337. Ragones “transferred to Defendants ... the agreed acquisition price of \$35,000,” plus \$18,000 for renovations. *Id.* ¶¶ 338, 341. The Ouazanas and WAZ-I represented to Ragones that the property had been conveyed to him. *Id.* ¶ 345. However, for almost twenty-two months, defendants concealed that they had not transferred the title, as agreed. *Id.* ¶ 346. Thereafter, Ragones learned “through other means” that I. Ouazana “recorded a deed dated June 19, 2016,” which falsely “reported a sale price” of \$5,000, rather than the \$35,000 actually paid. *Id.* ¶ 348.

At some point in 2017, Ragones “discover[ed]” various misrepresentations “by accident,” including that defendants did not transfer the title, as agreed. *Id.* ¶ 346. Moreover, the building was vacant, lacked a use and occupancy permit, and required “extensive renovations.” *Id.* ¶ 340. Ragones confronted the defendants, who “finally documented the conveyance as demanded, representing to [Ragones] that the documentation ... reflected the agreed terms of the sale of the property.” *Id.* ¶ 347. But, the Ouazanas did not provide Ragones with the documentation, and the representations were allegedly false. *Id.* ¶ 348.

As to the management of Property 11, plaintiffs assert various acts of wrongdoing. However, it is not entirely clear from the Complaint when the alleged acts or events occurred.

According to plaintiffs, the Ouazanas and “the other Defendants” withheld \$2,000 in rental income, ostensibly to pay property taxes, but did not remit the money for taxes. *Id.* ¶ 349. Defendants also made false representations that the property was being rented. *Id.* ¶¶ 349, 355-57. In addition, they “left unpaid fines and penalties of US\$3,415 resulting from their nonpayment of taxes and from additional fines assessed for unabated housing code violations.” *Id.* ¶ 352; *see id.* at ¶¶ 350, 351.

***12** Thereafter, Ragones learned that defendants had rented the property “without a use and occupancy permit in place and had done work on the property without any permits,” which led to “multiple administrative citations and tickets” and an administrative designation of “‘vacant status.’” *Id.* ¶ 361.

Ragones expended \$10,000 “to change its ‘vacant status’ and obtain an occupancy permit.” *Id.* ¶ 362.

3. 3335 Edmondson Ave. (“Property 12”)

In July 2016, I. Ouazana offered Ragones “an introductory deal” to acquire a fifty-percent interest in a single-unit rental property at 3335 Edmondson Avenue in Baltimore (“Property 12”), for the sum of \$2,500. *Id.* ¶ 271. I. Ouazana was to own the other 50%. *Id.* And, Property 12 would be managed by the defendants for a fee. *Id.* Ragones and I. Ouazana met in Baltimore to discuss the transaction. *See id.* ¶¶ 272, 273. Defendants were to obtain all permits and complete renovations so that the property would generate rental income in four months. *Id.* ¶ 273. Shortly thereafter, Ragones paid the Ouazanas \$2,500. *Id.* ¶ 274.

However, despite representations to the contrary, *id.* ¶ 278, defendants never “convey[ed] to Plaintiff Ragones … a 50% ownership interest in the property.” *Id.* ¶ 279. Further, plaintiffs allege, *id.*:

[O]n July 20, 2016, Defendant Isaac Ouazana, with the help of Defendants JOHN DOE or JANE DOE and JOHN DOE ENTITIES, which appear to have included a title company and title agent, caused Defendant WAZ-I to make and record a deed conveying full ownership of this property to third-party Yaakov Krozier, LLC, for the recorded consideration of US\$5,000....

I. Ouazana “personally signed the deed” on July 20, 2016, conveying the property from WAZ-I to Krozier. *Id.* ¶ 282. But, defendants concealed the transfer of Property 12 to a third party. *Id.* ¶ 280.

On August 29, 2017, I. Ouazana executed a written agreement that stated that Ragones and I. Ouazana “‘each ha[d] 50% ownership in this property,’” and that the property cannot be sold without either owner’s consent. *Id.* ¶ 281. The agreement specified: “‘If any of the parties bring an offer on any of the properties listed above, the other party will accept offer [sic] or each partner can pay out the other partner their 50% share according to the offer in 90 business days grace period [sic].’” *Id.* In addition, the agreement stated that Ragones, rather than defendants, was responsible for the renovation of Property 12, and that I. Ouazana was to be reimbursed for his expenditures for materials as well as renovations that had already been performed on the property. *Id.* ¶ 283.

According to plaintiffs, the August 2017 agreement was inconsistent with defendants’ prior conduct as to Property 12. As noted, I. Ouazana conveyed to a third party a deed to Property 12, recorded on July 22, 2016. *Id.* ¶ 282; *see id.* ¶¶ 280, 285. And, between 2016 and 2017, defendants repeatedly “hid[] their failure to make agreed repairs and to document the conveyance” to Ragones of his 50% interest. *Id.* ¶ 277; *see id.* ¶¶ 278, 280, 286, 287.

At some point, “Ragones heard rumors” that I. Ouazana “had sold [Property 12]” for \$75,000, without Ragones’s “knowledge or permission.” *Id.* ¶ 284. Ragones then confronted I. Ouazana about the unauthorized sale. *Id.* ¶ 285. The Complaint does not specify when the confrontation occurred. At first, I. Ouazana told Ragones that “he had sold [Property 12] to a friend … because he thought that Plaintiff Ragones did not want it.” *Id.* But, I. Ouazana then said that Property 12 “was still in [his] possession … and that he would not sell [it] without permission from” Ragones. *Id.* I. Ouazana did not reveal that Property 12 had already been conveyed to Krozier. *Id.*

*13 Sometime “between August 27, 2017 and November 7, 2017,” Ragones visited and inspected Property 12. *Id.* ¶ 289. He “found the property was still boarded up, in shell condition and that no repairs had in fact been done beyond demolition work that he himself had done.” *Id.* Ragones “repeatedly asked Defendants to produce copies of invoices from third parties,” but defendants never did so. *Id.* ¶ 290; *see id.* ¶ 291. And, on November 7, 2017, the “Ouazana Defendants” told Ragones that they had completed “\$36,500 worth of renovations,” for which they sought reimbursement. *Id.* ¶ 289; *see id.* ¶ 288. Nevertheless, in November 2017, Ragones paid defendants \$2,081, supposedly for his share of property taxes, even though he was not the owner. *Id.* ¶ 293.

Ragones “sustained damages” as to Property 12. *Id.* ¶ 294. The damages included, *inter alia*, the “sums that Defendants obtained from him with respect to this investment,” *id.*, and the loss of “ownership, use, possession, and benefit” of Property 12. *Id.* ¶ 295.

Additional facts are included, *infra*.

II. The Surreply Motion

Local Rule 105.2(a) provides that a party is not permitted to file a surreply without permission of the court. Although the filing of a surreply “is within the Court’s discretion, *see Local Rule 105.2(a) ... they are generally disfavored.*” *EEOC v. Freeman*, 961 F.Supp.2d 783, 801 (D. Md. 2013), *aff’d in part*, 778 F.3d 463 (4th Cir. 2015); *see also, e.g., Chubb & Son v. C & C Complete Servs., LLC*, 919 F.Supp.2d 666, 679 (D. Md. 2013). However, a surreply may be permitted when the party seeking to file the surreply “would be unable to contest matters presented to the court for the first time” in the opposing party’s reply. *Clear Channel Outdoor, Inc. v. Mayor & City Council of Baltimore*, 22 F.Supp.3d 519, 529 (D. Md. 2014) (quotations and citations omitted). Conversely, a surreply is generally not permitted where the reply is merely responsive to an issue raised in the opposition. *See Khoury v. Meserve*, 268 F.Supp.2d 600, 605-06 (D. Md. 2003).

Plaintiffs advance three primary arguments in support of their Surreply Motion. First, they assert that in defendants’ reply, defendants characterize the RICO claims and class claims as fabrications. ECF 27 at 2. And, according to plaintiffs, defendants suggest that plaintiffs bring those claims in bad faith. *Id.* In my view, defendants do not argue bad faith or suggest any wrongdoing by plaintiffs (or plaintiffs’ counsel) that might raise colorable claims under Fed. R. Civ. P. 11. Although defendants’ reply might adopt an expressive (and aggressive) tone at points, it does not present new legal arguments that warrant a surreply.

Nor do I discern a basis for granting the Surreply Motion on the ground that defendants made “incorrect legal arguments” in their reply. Although the proposed surreply expresses strong disagreement with various legal arguments made by defendants in their reply, *see* ECF 27-3, those arguments are natural extensions of contentions made in the Motion to Dismiss and in plaintiff’s opposition.

In addition, plaintiffs take issue with defendants’ response to the exhibits submitted by plaintiffs with their opposition. As noted, plaintiffs appended seven exhibits with their opposition. ECF 24-1 to ECF 24-7. In defendants’ reply, they assert that plaintiffs improperly presented “new facts” that were not set forth in the Complaint’s factual allegations. ECF 26 at 10. In plaintiffs’ view, a surreply is necessary to respond to that contention. *See* ECF 27 at 2.

I discuss, *infra*, the circumstances in which a court may consider exhibits appended to a complaint, a motion to dismiss, or a brief submitted in opposition to a motion to

dismiss. As I explain, I may consider some of the exhibits submitted by plaintiffs, but not others. However, plaintiffs do not discuss the rules that are pertinent to that analysis. Rather, they contend that the Court may properly consider all of the exhibits, pursuant to the principle articulated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

*14 In particular, plaintiffs draw on the following statement: “[O]nce a claim has been stated adequately, it may be supported by any set of facts consistent with the allegations in the complaint.” *Id. at 546, 127 S.Ct. 1955*. Plaintiffs misunderstand this statement: it does not permit a court freely to consider any and all exhibits submitted with briefing on a motion to dismiss. The rules that govern whether a court may consider such exhibits are discussed, *infra*.

Accordingly, I shall deny plaintiffs’ Surreply Motion.

III. The Sanctions Motion

Plaintiffs seek a Court order to rectify what they characterize as “Defendants’ ongoing campaign of witness tampering.” ECF 30 at 4. The alleged campaign of misconduct is primarily directed at Phillip Lerner, identified by plaintiffs as a “key witness” in this case. *Id.* According to plaintiffs, the Ouazanas have taken assorted actions to intimidate and/or bring disrepute to Lerner, in an effort to cause him to “stop providing information about Defendants’ fraud.” *Id.* Such actions include aggressively confronting Lerner at work; pressuring a rabbi to expel Learner from his synagogue and to brand him as a “‘mossar’ ”,⁹ harassing Lerner’s wife in a supermarket; and posting “fake reviews online” about Lerner’s bookkeeping business and compelling others to post such reviews, with the aim of harming Lerner’s livelihood. *Id.; see id. at 9.* In plaintiffs’ view, the Court’s intervention is needed because defendants “refuse to stop or even acknowledge their misconduct, and are instead doubling down on their bad faith tactics” *Id. at 5.*

In support, plaintiffs have submitted nine exhibits: Lerner’s affidavit (ECF 30-1); the affidavit of Rabbi Yossef Zvi Weiss, the rabbi of the Jewish congregation to which Lerner belongs (ECF 30-2); screenshots of reviews of Lerner’s business posted on the internet (ECF 30-3, ECF 30-4); the affidavit of Samuel Curtis Hill, a former tenant of “WAZ Management” (ECF 30-5 at 2); and copies of correspondence

between plaintiff's counsel and defense counsel from July 2020 (ECF 30-6 to ECF 30-9).

In his affidavit, Lerner avers that he "became involved in trying to right the many wrongs occasioned by the defendants by providing to the plaintiffs in this case information about what [he] had witnessed that the Defendants did as part of their fraud." ECF 30-1, ¶ 6. He asserts: "Defendants have engaged in a systematic campaign to intimidate me in order to get me to stop." *Id.*

According to Lerner, this campaign began after the State-court action was filed in early 2019, and before this suit was filed. *Id.* ¶ 7. I. Ouazana appeared at Lerner's office, creating a disturbance, and screamed at Lerner that he "had no right to get involved in matters involving the Ouazanas" and demanded that Lerner "stop providing information" about the Ouazanas' "practices." *Id.* In November 2019, the Ouazanas confronted Rabbi Weiss and demanded Lerner's expulsion from the synagogue. *Id.* ¶ 8. Lerner avers that the Brothers continued their intimidation tactics with Rabbi Weiss after this suit was filed. *See id.* ¶ 9. Rabbi Weiss's averments are consistent with those of Lerner. *See ECF 30-2.*

Further, Lerner avers that the Ouazanas' harassment and threats did not end with Rabbi Weiss. B. Ouazana and Ruben Ouazana, another brother, allegedly harassed Lerner's wife at a kosher supermarket, "shouting insults and gesturing towards her, making her uncomfortable and fearful." *Id.* ¶ 11; *see id.* ¶ 13.

***15** The Brothers are also allegedly responsible for the posting of "several fake negative reviews" of Mr. Lerner's bookkeeping business on "Google Reviews, a website read by prospective clients where former clients post reviews about local businesses." *Id.* ¶ 13; *see id.* ¶¶ 2-3. Lerner avers: "The fake review posted under the name of Jack Vaz was likely posted by Isaac OUAZANA, as he commonly uses the a.k.a. Jack instead of Isaac, and often substitutes one or more letters in his last name, having used the spelling Wazana instead of Ouazana, and shortened his name to Waz for many purposes ... and substituted the letter V in Vaz for the W he otherwise uses in Waz." *Id.* ¶ 15.

Another "fake review" was allegedly "posted under the name Latoya Mcleod [sic]." *Id.* ¶ 16. According to Lerner, Latoya McLeod "is a business tenant in one of the buildings operated by the Ouazana defendants, and has no connection" to Lerner's company. *Id.*¹⁰ Lerner contacted McLeod, who

informed him by text message: "'Yes somebody asked to use my phone maybe they day [sic] did this but I don't know you guys.'" *Id.* But, McLeod "refused to identify who asked to use her phone and also refused to remove her review." *Id.* And, Lerner references other reviews for which he believes defendants are responsible. *See id.* ¶¶ 17, 20.

In addition, Lerner avers that the Ouazanas "now claim ... that [he] posted fake reviews about Mr. Isaac OUAZANA's wife." *Id.* ¶ 19. He disputes the contention, stating: "I did no such thing and will willingly testify to this fact under oath." *Id.* However, ECF 30-9 shows that on July 30, 2020, defense counsel emailed plaintiff's counsel copies of what defense counsel represented were negative reviews of the dental practice of I. Ouazana's wife, which were posted by Lerner. *Id.* at 2.

Hill describes an encounter with I. Ouazana on July 13, 2020. *See ECF 30-5.* Hill's "former landlord" was "WAZ Management," of which I. Ouazana is the "owner or manager." *Id.* ¶ 1. According to Hill, I. Ouazana asked whether Hill "was still happy living in [his] apartment." *Id.* ¶ 2. Hill said: "[W]hile I was generally happy, I needed to have some repairs done to my apartment, which repairs I had requested since at least 2017" *Id.* ¶ 4. In response, I. Ouazana told Hill "to post a negative review about the new property manager, Mr. Philippe Lerner and his accounting firm PL Consulting, and that this would cause these repairs to be completed in less than 30 days." *Id.* ¶ 5. However, Hill learned that neither Lerner nor his bookkeeping business were involved with the management of Hill's apartment. *Id.* ¶ 6.

As noted, ECF 30-6 to ECF 30-9 contains copies of emails exchanged between counsel. The details of the correspondence need not be recounted in full. Essentially, it appears that on July 14, 2020, plaintiff's counsel informed defense counsel about some of the factual allegations underlying the Sanctions Motion and asked defendants to cease their alleged misconduct. *See ECF 30-6 at 2.* Ten days later, plaintiffs' counsel repeated the request. *ECF 30-7 at 2.* A flurry of correspondence followed. *See ECF 30-8; ECF 30-9.*

On the basis of these contentions, plaintiffs ask the Court to "invoke its inherent authority to sanction Defendants' ongoing crusade to suppress the truth, which now involves witness tampering" and is allegedly intended "to gain a litigation advantage." *Id.* at 12. They seek an order requiring defendants to: "(a) reimburse Plaintiffs' legal fees and costs; (b) remove fake reviews Defendants posted or caused others

to post about Mr. Lerner; and (c) cease all misconduct, including harassment of witnesses and parties.” *Id.* at 5. The Sanctions Motion is not based upon statute or the Federal Rules of Civil Procedure. Nor do plaintiffs seek to have defendants held in contempt for failure to comply with a court order. *See Life Techs. Corp. v. Govindaraj*, 931 F.3d 259, 267 (4th Cir. 2019).

*16 Defendants “deny the factual allegations that form the basis for Plaintiffs’ motion.” ECF 32 at 3. But, they do not focus on contesting the particulars of any of the assertions or averments raised in plaintiffs’ Sanctions Motion or the accompanying exhibits. In their view, properly addressing plaintiffs’ “ ‘he said, he said’ allegations would, at a minimum, require a lengthy evidentiary hearing.” *Id.* at 2 n.1.

Instead, defendants primarily challenge plaintiffs’ legal arguments, contending that the authority cited by plaintiffs “does not support the imposition of sanctions” for the alleged misconduct. *Id.* at 3. In short, defendants argue that plaintiffs have failed to explain “how Mr. Lerner qualifies as a witness in this case,” *id.* at 8, and that plaintiffs have failed to cite any apposite cases. *Id.* at 3-7. In addition, defendants assert that the timing of the Sanctions Motion is suspect and intended to keep this suit “on life support.” *Id.* at 10. Finally, defendants add that if Lerner, a non-party to this action, desires a remedy for harassment or defamatory online posts, he should directly initiate legal action himself. *Id.*

A court has the inherent power to order sanctions, so as “to preserve the integrity of the judicial process,” *In re Jemsek Clinic, P.A.*, 850 F.3d 150, 157 (4th Cir. 2017), and “to punish bad-faith conduct intended to delay or disrupt the course of litigation or to impede enforcement of a court order.” *Govindaraj*, 931 F.3d at 267; *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *Buffington v. Baltimore Cty.*, 913 F.2d 113, 132 n.15 (4th Cir. 1990). A “court acting under its inherent authority may impose sanctions for any ‘conduct utterly inconsistent with the orderly administration of justice.’ ” *Projects Mgmt. Co. v. DynCorp Int'l LLC*, 734 F.3d 366, 375 (4th Cir. 2013) (quoting *United States v. Nat'l Med. Enters., Inc.*, 792 F.2d 906, 912 (9th Cir. 1986)). When so acting, a court “must consider the whole of the case in choosing the appropriate sanction.” *Projects Mgmt. Co.*, 734 F.3d at 375.

Courts possess the inherent power to assess attorney’s fees, “even though the so-called ‘American Rule’ prohibits fee shifting in most cases.” *Chambers*, 501 U.S. at 45, 111 S.Ct.

2123. Of relevance here, “a court may assess attorney’s fees when a party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’ ” *Id.* at 45-46, 111 S.Ct. 2123 (cleaned up) (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)); *see also Akira Techs., Inc. v. Conceptant, Inc.*, 773 F. App'x 122, 125 (4th Cir. 2019) (per curiam) (same); *Am. Reliable Ins. Co. v. Stillwell*, 336 F.3d 311, 321 (4th Cir. 2003) (citing *Chambers*). Under this principle, the assessment of attorney’s fees may be warranted “if a court finds ‘that fraud has been practiced upon it, or that the very temple of justice has been defiled,’ ” or “when a party ‘shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order.’ ” *Chambers*, 501 U.S. at 46, 111 S.Ct. 2123 (citations omitted).

In *Goodyear Tire & Rubber Co. v. Haeger*, — U.S. —, 137 S. Ct. 1178, 1186, 197 L.Ed.2d 585 (2017), the Supreme Court clarified that a sanction assessing attorney’s fees for bad faith or like conduct “must be compensatory rather than punitive in nature.” The Court explained: “In other words, the fee award may go no further than to redress the wronged party ‘for losses sustained’; it may not impose an additional amount as punishment for the sanctioned party’s misbehavior.” *Id.* (citation omitted). To order a fee award as punishment rather than compensation, “a court would need to provide procedural guarantees applicable in criminal cases, such as a ‘beyond a reasonable doubt’ standard of proof.” *Id.*; *see also Lu v. United States*, 921 F.3d 850, 860-62 (9th Cir. 2019) (discussing and applying *Goodyear*); *Mulugeta v. Ademachew*, 1:17-CV-649, 2019 WL 7945712, at *2-3 (E.D. Va. Nov. 6, 2019) (same). Even when such a standard of proof is satisfied, the moving party may recover “ ‘only the portion of his fees that he would not have paid but for’ the misconduct.” *Goodyear*, — U.S. —, 137 S. Ct. 1178, 1187, 197 L.Ed.2d 585 (quoting *Fox v. Vice*, 563 U.S. 826, 836, 131 S.Ct. 2205, 180 L.Ed.2d 45 (2011)).

*17 Notably, the Supreme Court has cautioned: “Because of their very potency, inherent powers must be exercised with restraint and discretion.” *Chambers*, 501 U.S. at 44, 111 S.Ct. 2123. The Seventh Circuit has elaborated on that instruction. In *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 313 F.3d 385, 390 (7th Cir. 2002), Judge Posner, writing for the Court, stated (brackets added):

The inherent authority of federal courts to punish misconduct before them is not a grant of authority to do good, rectify shortcomings of the common law ... or undermine the American rule on the award of attorneys’

fees to the prevailing party in the absence of statute.... [I]t is a residual authority, to be exercised sparingly, to punish misconduct (1) occurring in the litigation itself, not in the events giving rise to the litigation (for then the punishment would be a product of substantive law—designed, for example, to deter breaches of contract), and (2) not adequately dealt with by other rules, most pertinently here [Rules 11 and 37 of the Federal Rules of Civil Procedure](#), which [the defendant] has not been accused of violating.

In light of the case law discussed above, it is clear that plaintiffs have not shown that they are entitled to recover attorney's fees. They do not assert that defendants have committed fraud on the Court or failed to comply with a Court order. Even if the affidavits submitted by plaintiffs demonstrate that defendants have engaged in bad faith, vexatious, wanton, or oppressive conduct, plaintiffs have not demonstrated a causal connection between defendants' misconduct and specific expenditures of attorney's fees, as required by [Goodyear, — U.S. —, 137 S. Ct. 1178, 1187, 197 L.Ed.2d 585.](#)

As noted, plaintiffs also ask the Court to order defendants to remove fake reviews about Lerner's business, posted by defendants, or which defendants induced others to post, and to discontinue harassing "witnesses and parties." ECF 30 at 5. Plaintiffs do not identify any cases in which a court sanctioned misconduct analogous to the sort alleged here. Nor do they cite any cases in which a court fashioned equitable sanctions similar to those requested by plaintiffs, pursuant to the court's inherent powers. But, that is perhaps unsurprising. After all, inherent powers are to be "exercised sparingly." [Zapata Hermanos Sucesores, 313 F.3d at 390.](#)

Plaintiffs characterize Lerner as a "witness," as mentioned. ECF 30 at 4. And, they describe defendants' conduct as "witness tampering." *Id.* But, plaintiffs seem reluctant to explain the nature of Lerner's connection to this suit; they fail to explain to how Lerner qualifies as a witness or how he is relevant to the allegations in the suit. See ECF 32 at 7-8.

In particular, defendants note that Lerner's name does not appear anywhere in the Complaint. See *id.* at 8. And, defense counsel asked plaintiff's counsel by email to " 'describe Mr. Lerner's 'connection with this case.' " *Id.* (quoting correspondence of July 25, 2020, as shown in ECF 30-8 at 4). But, the question went unanswered. See ECF 32 at 8; ECF 30-8 at 3-4.

In plaintiffs' reply, they remain rather tight-lipped about the nature of Mr. Lerner's connection to this case or of the pertinent knowledge that he possesses. Instead, they insist that defendants would not be targeting Lerner if he did not possess information that might be helpful to defendants' opponents in litigation. See ECF 33 at 8-10.

***18** To be sure, plaintiffs present assertions of conduct by defendants that are of concern to the Court. Lerner has averred that he possesses information about defendants' "fraud," and that he has provided plaintiffs with that information. ECF 30-1, ¶ 6. The affidavits from Lerner, Rabbi Weiss, and Hill indicate a persistent and pernicious effort by the Ouazanas to harass, threaten, or intimidate Lerner for sharing information with plaintiffs about defendants' business practices. Defendants are not entitled to harass, intimidate, or threaten Lerner in an effort to keep him from sharing information with plaintiffs about defendants' business practices.

However, apart from the request for attorney's fees, plaintiffs essentially ask the Court to enjoin defendants from "engag[ing] in any *further* misconduct in this case." ECF 30 at 18 (emphasis added). To qualify for a preliminary injunction under [Fed. R. Civ. P. 65](#), a plaintiff must demonstrate that he is "likely to suffer irreparable harm in the absence of preliminary relief." [Leaders of a Beautiful Struggle v. Baltimore Police Dep't, 979 F.3d 219, 226 \(4th Cir.\), reh'g en banc granted, 831 F. App'x 662 \(4th Cir. 2020\).](#) That requirement does not necessarily apply here because plaintiffs do not seek a preliminary injunction pursuant to [Rule 65](#).

Nevertheless, the underlying principle is relevant. Plaintiffs seek a form of equitable relief. At a minimum, they ought to have thoroughly described and explained the harm for which they seek redress. See [Rule 65\(d\)\(1\)\(C\)](#) (mandating that every injunction and restraining order must "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required"). Instead, plaintiffs insist on characterizing Lerner as a witness while going to lengths to *avoid* clarifying the nature of his connection to the suit. Without more information, I cannot ascertain the import of the alleged misconduct as it relates to this case.

Even if plaintiffs had been more forthcoming, it is not clear that a sanction is warranted. As noted, in [Zapata Hermanos Sucesores, S.A., 313 F.3d at 390](#), the Seventh

Circuit cautioned that a court should not draw on its inherent authority to sanction misconduct “in the events giving rise to the litigation” *Id.* In Lerner’s affidavit, Lerner avers that the Ouazanas began harassing him in “early 2019” and sought his expulsion from the synagogue in late November 2019. This conduct occurred before suit was filed in February 2020. ECF 30-1, ¶¶ 7, 8. Although Lerner avers that the Ouazanas continued their campaign of intimidation and harassment, he does not explicitly address when other specific incidents occurred. *See id.* at 4-6. Thus, plaintiffs’ evidence does not clearly establish that specific acts of misconduct occurred after suit was filed.

Plaintiffs also ask the Court to order defendants to remove the allegedly fake online reviews about Lerner’s business. In this regard, plaintiffs seek remediation for past harms suffered by Lerner, not plaintiffs. If Mr. Lerner desires a remedy for any harms caused by those reviews, he must pursue such a remedy for himself.

Therefore, although the averments are troubling, I shall deny the Sanctions Motion, without prejudice.¹¹

IV. Legal Standards

A. Rule 12(b)(1)

Fed. R. Civ. P. 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction. *See Khoury v. Meserve*, 628 F. Supp. 2d 600, 606 (D. Md. 2003), aff’d, 85 F. App’x 960 (4th Cir. 2004). Under Rule 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of evidence, the existence of subject matter jurisdiction. *See Demetres v. E. W. Constr., Inc.*, 776 F.3d 271, 272 (4th Cir. 2015); *see also Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). “If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3); *see also Trazell v. Arlington Cty.*, 811 F. App’x 857, 857 (4th Cir. 2020) (per curiam); *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 196 (4th Cir. 2008). The court may properly grant a motion to dismiss for lack of subject matter jurisdiction “where a claim fails to allege facts upon which the court may base jurisdiction.” *Davis v. Thompson*, 367 F. Supp. 2d 792, 799 (D. Md. 2005) (citing *Crosten v. Kamauf*, 932 F. Supp. 676, 679 (D. Md. 1996)).

*19 “[B]efore a federal court can decide the merits of a claim, the claim must invoke the jurisdiction of the court.” *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). In *Home Buyers Warranty Corp. v. Hanna*, 750 F.3d 427, 432 (4th Cir. 2014), the Fourth Circuit observed: “Fundamental to our federal system is the principle that ‘[f]ederal courts are courts of limited jurisdiction.’” (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994)) (alteration in *Hanna*); *see United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir.), cert. denied, 558 U.S. 875, 130 S.Ct. 229, 175 L.Ed.2d 129 (2009). Thus, a federal district court may only adjudicate a case if it possesses the “power authorized by Constitution and statute.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2007). Indeed, “if Congress has not empowered the federal judiciary to hear a matter, then the case must be dismissed.” *Hanna*, 750, F.3d at 432.

Notably, a federal court has “an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it.” *Hertz Corp. v. Friend*, 559 U.S. 77, 94, 130 S.Ct. 1181, 175 L.Ed.2d 1029 (2010). If a party seeks to proceed in federal court, it “must allege and, when challenged, must demonstrate the federal court’s jurisdiction over the matter.” *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 296 (4th Cir. 2008). And, pursuant to Fed. R. Civ. P. 12(h)(3), “the court must dismiss the action” if it determines that the court lacks subject matter jurisdiction. *See also Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506-07, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). This is because “jurisdiction goes to the very power of the court to act.” *Ellenburg*, 519 F.3d at 196.

Further, “[a] court is to presume ... that a case lies outside its limited jurisdiction unless and until jurisdiction has been shown to be proper.” *United States v. Poole*, 531 F.3d 263, 274 (4th Cir. 2008) (emphasis in *Poole*) (citing *Kokkonen*, 511 U.S. at 377, 114 S.Ct. 1673). Moreover, “[s]ubject matter jurisdiction cannot be forfeited or waived, and can be raised by a party, or by the court sua sponte, at any time prior to final judgment.” *In re Kirkland*, 600 F.3d 310, 314 (4th Cir. 2010); *see also McCulloch v. Vélez*, 364 F.3d 1, 5 (1st Cir. 2004) (“It is black-letter law that a federal court has an obligation to inquire sua sponte into its own subject matter jurisdiction.”); *Snead v. Board of Educ. of Prince George’s County*, 815 F. Supp. 2d 889, 893-94 (D. Md. 2011).

Congress has conferred jurisdiction on the federal courts in several ways. To provide a federal forum for plaintiffs who seek to vindicate federal rights, Congress has conferred on the district courts original jurisdiction over civil actions that arise under the Constitution, laws, or treaties of the United States. *See 28 U.S.C. § 1331; see also Exxon Mobil Corp.*, 545 U.S. at 552, 125 S.Ct. 2611; *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 394 (4th Cir. 2012); *see also* U.S. Constitution Art. III, § 2 (“The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made ...”). This is sometimes called federal question jurisdiction.

In addition, “Congress … has granted district courts original jurisdiction in civil actions between citizens of different States, between U.S. citizens and foreign citizens, or by foreign states against U.S. citizens,” so long as the amount in controversy exceeds \$75,000. *Exxon Mobil Corp.*, 545 U.S. at 552, 125 S.Ct. 2611; *see 28 U.S.C. § 1332(a)*. Article III, § 2 of the Constitution permits a federal court to decide “Controversies … between Citizens of different States.” *Navy Federal Credit Union v. Ltd. Financial Services LP*, 972 F.3d 344, 352 (4th Cir. 2020). Diversity jurisdiction “requires complete diversity among parties, meaning that the citizenship of *every* plaintiff must be different from the citizenship of *every* defendant.” *Cent. W. Va. Energy Co., Inc. v. Mountain State Carbon, LLC*, 636 F.3d 101, 103 (4th Cir. 2011) (emphasis added); *see Strawbridge v. Curtiss*, 7 U.S. 3 Cranch 267, 2 L.Ed. 435 (1806).

***20** Of relevance here, CAFA grants subject matter jurisdiction to district courts over class actions in which the aggregate number of members of the plaintiff class is 100 or more, any member of the plaintiff class is a citizen of a state different from any defendant, and the aggregate amount in controversy exceeds \$5 million. *See 28 U.S.C. § 1332(d)(2) (A), (5)(B)*.

Under the “well-pleaded complaint” rule, facts showing the existence of subject matter jurisdiction “must be affirmatively alleged in the complaint.” *Pinkley, Inc. v. City of Frederick*, 191 F.3d 394, 399 (4th Cir. 1999) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936)). Moreover, the “burden of establishing subject matter jurisdiction is on … the party asserting jurisdiction.” *Robb Evans & Assocs., LLC v. Holibaugh*, 609 F.3d 359, 362 (4th Cir. 2010); *accord Hertz*, 599 U.S. at 95; *McBurney v. Cuccinelli*, 616 F.3d 393, 408 (4th Cir. 2010).

A challenge to subject matter jurisdiction under Rule 12(b)(1) may proceed “in one of two ways”: either a facial challenge, asserting that the allegations pleaded in the complaint are insufficient to establish subject matter jurisdiction, or a factual challenge, asserting “ ‘that the jurisdictional allegations of the complaint [are] not true.’ ” *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) (citation omitted) (alteration in original); *see also Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017).

In a facial challenge, “the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction.” *Kerns*, 585 F.3d at 192; *accord Clear Channel Outdoor, Inc. v. Mayor & City Council of Baltimore*, 22 F. Supp. 3d 519, 524 (D. Md. 2014). In a factual challenge, on the other hand, “the district court is entitled to decide disputed issues of fact with respect to subject matter jurisdiction.” *Kerns*, 585 F.3d at 192. “Generally … the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.” *Velasco v. Gov’t Of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004); *Evans*, 166 F.3d at 647.

Defendants do not specify whether they bring a facial challenge or a factual challenge. But, they clearly state that, for purposes of their Motion, they take “the facts pled in Plaintiffs’ Complaint as true.” ECF 19 at 18 n.1. Accordingly, I will construe the Motion to Dismiss as a facial challenge to jurisdiction.

B. Rule 12(b)(6)

A defendant may test the legal sufficiency of a complaint by way of a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Fessler v. Int'l Bus. Machs. Corp.*, 959 F.3d 146, 152 (4th Cir. 2020); *Paradise Wire & Cable Defined Benefit Pension Plan v. Weil*, 918 F.3d 312, 317 (4th Cir. 2019); *In re Birmingham*, 846 F.3d 88, 92 (4th Cir. 2017); *Goines v. Valley Cnty. Servs. Bd.*, 822 F.3d 159, 165-66 (4th Cir. 2016); *McBurney v. Cuccinelli*, 616 F.3d 393, 408 (4th Cir. 2010), *aff'd sub nom.*, *McBurney v. Young*, 569 U.S. 221, 133 S.Ct. 1709, 185 L.Ed.2d 758 (2013); *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). A Rule 12(b)(6) motion constitutes an assertion by a defendant that, even if the facts alleged by a plaintiff are true, the complaint fails as a matter of law “to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6).

*21 Whether a complaint states a claim for relief is assessed by reference to the pleading requirements of Fed. R. Civ. P. 8(a)(2). That rule provides that a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” The purpose of the rule is to provide the defendants with “fair notice” of the claims and the “grounds” for entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

To survive a motion under Rule 12(b)(6), a complaint must contain facts sufficient to “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955; see *Ashcroft v. Iqbal*, 556 U.S. 662, 684, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions’” (citation omitted)); see also *Fauconier v. Clarke*, 996 F.3d 265, 276 (4th Cir. 2020); see also *Paradise Wire & Cable*, 918 F.3d at 317; *Willner v. Dimon*, 849 F.3d 93, 112 (4th Cir. 2017). To be sure, a plaintiff need not include “detailed factual allegations” in order to satisfy Rule 8(a)(2). *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. Moreover, federal pleading rules “do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.” *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 10, 135 S.Ct. 346, 190 L.Ed.2d 309 (2014) (per curiam). But, mere “‘naked assertions’ of wrongdoing” are generally insufficient to state a claim for relief. *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (citation omitted).

In other words, the rule demands more than bald accusations or mere speculation. *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955; see *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013). If a complaint provides no more than “labels and conclusions” or “a formulaic recitation of the elements of a cause of action,” it is insufficient. *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. “[A]n unadorned, the-defendant-unlawfully-harmed-me accusation” does not state a plausible claim for relief. *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. Rather, to satisfy the minimal requirements of Rule 8(a)(2), the complaint must set forth “enough factual matter (taken as true) to suggest” a cognizable cause of action, “even if ... [the] actual proof of those facts is improbable and ... recovery is very remote and unlikely.” *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955 (internal quotation marks omitted).

In reviewing a Rule 12(b)(6) motion, “a court ‘must accept as true all of the factual allegations contained in the complaint,’ ”

and must ‘draw all reasonable inferences [from those facts] in favor of the plaintiff.’ ” *Retfalvi v. United States*, 930 F.3d 600, 605 (4th Cir. 2019) (alteration in *Retfalvi*) (quoting *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011)); see *Semenova v. Md. Transit Admin.*, 845 F.3d 564, 567 (4th Cir. 2017); *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015). However, “a court is not required to accept legal conclusions drawn from the facts.” *Retfalvi*, 930 F.3d at 605 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)); see *Glassman v. Arlington Cty.*, 628 F.3d 140, 146 (4th Cir. 2010). “A court decides whether [the pleading] standard is met by separating the legal conclusions from the factual allegations, assuming the truth of only the factual allegations, and then determining whether those allegations allow the court to reasonably infer” that the plaintiff is entitled to the legal remedy sought. *A Society Without a Name v. Virginia*, 655 F.3d 342, 346 (4th Cir. 2011), cert. denied, 566 U.S. 937, 132 S.Ct. 1960, 182 L.Ed.2d 772 (2012).

*22 Courts ordinarily do not “‘resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.’ ” *King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016) (quoting *Edwards*, 178 F.3d at 243); see *Bing v. Brio Sys., LLC*, 959 F.3d 605, 616 (4th Cir. 2020) (citation omitted). But, “in the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6).” *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (en banc); accord *Pressley v. Tupperware Long Term Disability Plan*, 553 F.3d 334, 336 (4th Cir. 2009). Because Rule 12(b)(6) “is intended [only] to test the legal adequacy of the complaint,” *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993), “[t]his principle only applies ... if all facts necessary to the affirmative defense ‘clearly appear[] on the face of the complaint.’ ” *Goodman*, 494 F.3d at 464 (emphasis in *Goodman*) (quoting *Forst*, 4 F.3d at 250).

“Generally, when a defendant moves to dismiss a complaint under Rule 12(b)(6), courts are limited to considering the sufficiency of allegations set forth in the complaint and the ‘documents attached or incorporated into the complaint.’ ” *Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 606 (4th Cir. 2015) (quoting *E.I. du Pont de Nemours & Co.*, 637 F.3d at 448). Ordinarily, the court “may not consider any documents that are outside of the complaint, or not expressly incorporated therein[.]” *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 557 (4th Cir. 2013), abrogated on other grounds

by *Reed v. Town of Gilbert*, — U.S. —, 135 S. Ct. 2218 (2015); see *Bosiger v. U.S. Airways*, 510 F.3d 442, 450 (4th Cir. 2007).

But, under limited circumstances, when resolving a Rule 12(b)(6) motion, a court may consider documents beyond the complaint without converting the motion to dismiss to one for summary judgment. *Goldfarb v. Mayor & City Council of Balt.*, 791 F.3d 500, 508 (4th Cir. 2015). In particular, a court may properly consider documents that are “explicitly incorporated into the complaint by reference and those attached to the complaint as exhibits.” *Goines*, 822 F.3d at 166 (citation omitted); see also *Six v. Generations Fed. Credit Union*, 891 F.3d 508, 512 (4th Cir. 2018); *Anand v. Ocwen Loan Servicing, LLC*, 754 F.3d 195, 198 (4th Cir. 2014); *U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014); *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004), cert. denied, 543 U.S. 979, 125 S.Ct. 479, 160 L.Ed.2d 356 (2004); *Phillips v. LCI Int'l Inc.*, 190 F.3d 609, 618 (4th Cir. 1999).

However, “before treating the contents of an attached or incorporated document as true, the district court should consider the nature of the document and why the plaintiff attached it.” *Goines*, 822 F.3d at 167. “When the plaintiff attaches or incorporates a document upon which his claim is based, or when the complaint otherwise shows that the plaintiff has adopted the contents of the document, crediting the document over conflicting allegations in the complaint is proper.” *Id.* Conversely, “where the plaintiff attaches or incorporates a document for purposes other than the truthfulness of the document, it is inappropriate to treat the contents of that document as true.” *Id.*

Moreover, “a court may properly take judicial notice of ‘matters of public record’ and other information that, under Federal Rule of Evidence 201, constitute ‘adjudicative facts.’” *Goldfarb*, 791 F.3d at 508; see also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007); *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 466 (4th Cir. 2011), cert. denied, 565 U.S. 825, 132 S.Ct. 115, 181 L.Ed.2d 39 (2011); *Philips v. Pitt Cty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). However, under Fed. R. Evid. 201, a court may take judicial notice of adjudicative facts only if they are “not subject to reasonable dispute,” in that they are “(1) generally known within the territorial jurisdiction of the trial court or (2) capable of

accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”

*23 Plaintiffs did not append any exhibits to the Complaint. But, they included seven exhibits with their opposition to the Motion to Dismiss. See ECF 24-1 to ECF 24-7.

The exhibits at ECF 24-1, ECF 24-3, and ECF 24-4 contain records of communications, primarily emails, that plaintiffs’ counsel received from non-parties concerning their ostensible dealings with defendants. According to plaintiffs, ECF 24-5 contains records of communications between plaintiffs’ counsel and previous counsel for defendants from July 2019, before this action was initiated. See ECF 24-5 at 60. In ECF 24-2, plaintiffs submit a copy of a news article published about the filing of the Complaint. See Edward Ericson Jr., *Investors Sue Baltimore Real Estate Company for Racketeering*, Courthouse News Service (Feb. 19, 2020), <https://www.courthousenews.com/investors-sue-baltimore-real-estate-company-for-racketeering/>. And, ECF 24-7 contains correspondence to the Court from Rabbi Yosef Rosenfeld, Administrator of the Baltimore Bait Din. The correspondence, dated June 9, 2020, states that Ragones brought a claim in the Baltimore Bait Din against the Ouazanas. *Id.* In addition, the letter states that ten other “claimants” also brought claims against “Waz Management” and the Ouazana Brothers. *Id.*

Five of the exhibits are not integral to the Complaint or to plaintiffs’ claims. Therefore, in resolving the Motion, I shall not consider ECF 24-1, ECF 24-3, ECF 24-4, ECF 24-5, or ECF 24-7.

ECF 24-6 contains a copy of the “(Consented) Stipulation Of Dismissal Without Prejudice To Refile” from the previous State-court litigation referenced in the Complaint. See ECF 1, ¶ 53; ECF 24 at 65. I may take judicial notice of the stipulation, pursuant to Fed. R. Evid. 201. Likewise, I may take judicial notice of the news article submitted in ECF 24-2. However, taking judicial notice of the article does not entail accepting the truth of its content.

C. Rule 9(b)

Fed. R. Civ. P. 9(b) states: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”

Claims that sound in fraud, whether rooted in common law or arising under a statute, implicate the heightened pleading standard of Rule 9(b). See, e.g., *E-Shops Corp. v. U.S. Bank N.A.*, 678 F.3d 659, 665 (8th Cir. 2012) (“Rule 9(b)’s heightened pleading requirement also applies to statutory fraud claims.”); see also *Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 769, 781 (4th Cir. 2013) (stating that an MCPA claim that “sounds in fraud[] is subject to the heightened pleading standards of Federal Rule of Civil Procedure 9(b)”).

Under the rule, a claim that sounds in fraud “ ‘must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.’ ” *United States ex rel. Nathan v. Takeda Pharms. N.A., Inc.*, 707 F.3d 451, 455 (4th Cir. 2013) (citation omitted); see *Fessler v. Int'l Business Machines Corp.*, 959 F.3d 146 (4th Cir. 2020). In other words, Rule 9(b) requires the plaintiff to plead “the who, what, when, where, and how of the alleged fraud” before the parties can proceed to discovery. *United States ex rel. Wilson v. Kellogg Brown & Root*, 525 F.3d 370, 379 (4th Cir. 2008) (internal quotation marks omitted).

*24 Rule 9(b) serves several salutary purposes:

First, the rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of.... Second, Rule 9(b) exists to protect defendants from frivolous suits. A third reason for the rule is to eliminate fraud actions in which all the facts are learned after discovery. Finally, Rule 9(b) protects defendants from harm to their goodwill and reputation.

Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (citation omitted).

However, by its plain text, Rule 9(b) permits general averment of aspects of fraud that relate to a defendant’s state of mind. And, a “court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts.” Id. Moreover, Rule 9(b) is “less strictly applied with respect to claims of fraud by concealment” or omission of material facts, as opposed to affirmative misrepresentations, because “an omission ‘cannot be described in terms of the time, place, and contents of the misrepresentation or the identity of the person making the misrepresentation.’ ” *Shaw v. Brown & Williamson Tobacco Corp.*, 973 F. Supp. 539, 552 (D. Md.

1997) (quoting *Flynn v. Everything Yogurt*, HAR-92-3421, 1993 WL 454355, at *9 (D. Md. Sept. 14, 1993)).

IV. Federal Question Jurisdiction

A. RICO Claims

Defendants urge dismissal of the RICO claims, contending that plaintiffs have failed to plead allegations in support of the existence of a pattern of racketeering activity or of a RICO enterprise. ECF 19 at 23-31. Defendants also contend that plaintiffs’ claims are barred by RICO’s four-year statute of limitations, and that plaintiffs “[i]mpermissibly [r]ely on [s]ecurities [v]iolations,” contrary to 18 U.S.C. § 1964(c). Id. at 31-37. Plaintiffs oppose the Motion to Dismiss at each step of the RICO analysis. ECF 24 at 35-46.

1. RICO Generally

Congress enacted the Racketeer Influenced and Corrupt Organizations law as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970), 18 U.S.C. §§ 1961-1968. See *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997). Under 18 U.S.C. § 1962, it is unlawful, *inter alia*, for any person employed by or associated with any enterprise to conduct or participate in the “enterprise’s affairs through a pattern of racketeering activity” 18 U.S.C. § 1962(c).

RICO is not limited to criminal cases. In addition to criminal penalties, Congress “granted a private civil right of action to ‘[a]ny person injured in his business or property by reason of a violation of’ the RICO provisions.” *ESAB Grp.*, 126 F.3d at 626 (citing 18 U.S.C. § 1964(c)).

A civil RICO action “ ‘is a unique cause of action that is concerned with eradicating organized, longterm, habitual criminal activity.’ ” *U.S. Airline Pilots Ass’n v. Awappa, LLC*, 615 F.3d 312, 317 (4th Cir. 2010) (citation omitted); see, e.g., *Lewis v. Maryland*, PWG-17-1636, 2018 WL 1425977, at *5 (D. Md. Mar. 22, 2018); *Bailey v. Atlantic Auto. Corp.*, 992 F. Supp. 2d 560, 578 (D. Md. 2014). But, the Fourth Circuit “will not lightly permit ordinary business contract or fraud disputes to be transformed into federal RICO claims.” *Flip Mortg. Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir. 1988).

*25 To plead a civil RICO claim, the plaintiff must allege “ ‘1) conduct [causing injury to business or property] 2) of an enterprise 3) through a pattern 4) of racketeering activity.’ ” *Morley v. Cohen*, 888 F.2d 1006, 1009 (4th Cir. 1989) (quoting *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985)); *see Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, 238 (4th Cir. 2000) (citing 18 U.S.C. §§ 1962, 1964); *see also Bhari Info. Tech. Sys. Private Ltd. v. Sriram*, 984 F. Supp. 2d 498, 503 (D. Md. 2013); *Mitchell Tracey v. First Am. Title Ins. Co.*, 935 F. Supp. 2d 826, 842 (D. Md. 2013); *Grant v. Shapiro & Burson, LLP*, 871 F. Supp. 2d 462, 472 (D. Md. 2012).

A prevailing plaintiff in a civil RICO action is entitled to treble damages, costs, and attorney's fees. *Friedler v. Cole*, CCB-04-1983, 2005 WL 465089, at *7 (D. Md. Feb. 28, 2005). The Supreme Court has characterized RICO's civil penalties as “ ‘drastic.’ ” *Awappa*, 615 F.3d at 317 (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 233, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989)); *see* 18 U.S.C. § 1964(c)).

Congress has directed that the statute “be liberally construed to effectuate its remedial purposes.” Pub. L. 91–452, § 904(a), 84 Stat. 941, 947. But, “Congress contemplated that only a party engaging in widespread fraud would be subject to” the “serious consequences” available under the RICO statute, such as treble damages. *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 683 (4th Cir. 1989). And, courts have recognized the “need to limit [RICO's] severe penalties to offenders engaged in ongoing criminal activity, rather than isolated wrongdoers.” *Friedler*, 2005 WL 465089, at *7.

The Fourth Circuit has noted the “distinction between ordinary or garden-variety fraud claims better prosecuted under state law and cases involving a more serious scope of activity.” *El-Shamari*, 217 F.3d at 238. It has admonished that courts must

exercise caution “to ensure that RICO's extraordinary remedy does not threaten the ordinary run of commercial transactions; that treble damage suits are not brought against isolated offenders for their harassment and settlement value; and that the multiple state and federal laws bearing on transactions ... are not eclipsed or preempted.”

Awappa, 615 F.3d at 317 (quoting *Menasco, Inc.*, 886 F.2d at 683) (ellipsis in *Awappa*).

In other words, RICO “is reserved for conduct whose scope and persistence pose a special threat to social well-being.”

Biggs v. Eaglewood Mortg., LLC, 582 F. Supp. 2d 707, 714 (D. Md. 2008) (quoting *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 551 (4th Cir. 2001)), aff'd, 353 F. App'x 864 (4th Cir. 2009). It applies to “‘ongoing unlawful activities whose scope and persistence pose a special threat to social well-being.’ ” *Menasco, Inc.*, 886 F.2d at 684 (quoting *Int'l Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987)).

In order to analyze the adequacy of a RICO claim, it is important to understand RICO's terms and concepts.

RICO defines an “enterprise” as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4). *See, e.g.*, *Boyle*, 556 U.S. at 944, 129 S.Ct. 2237; *Kimberlin v. Nat'l Bloggers Club*, GJH-13-3059, 2015 WL 1242763, at *3 (D. Md. Mar. 17, 2015). In *Mitchell Tracey*, 935 F. Supp. 2d at 842, the court explained:

*26 An “enterprise” requires proof of three elements: (1) an ongoing organization; (2) associates functioning as a continuing unit; and (3) the enterprise is an entity “separate and apart from the pattern of activity in which it engages.” *Proctor v. Metro. Money Store Corp.*, 645 F. Supp. 2d 464, 477–78 (D. Md. 2009). “[A]n associated-in-fact enterprise is one type of enterprise defined in § 1961(4).” *United States v. Tillett*, 763 F.2d 628, 631 n.2 (4th Cir. 1985).

Because “‘an enterprise includes any union or group of individuals associated in fact,’ ” RICO extends to “‘a group of persons associated together for a common purpose of engaging in a course of conduct.’ ” *Boyle*, 556 U.S. at 944, 129 S.Ct. 2237 (quoting *United States v. Turkette*, 452 U.S. 576, 580, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)). And, a RICO enterprise “need not have a hierarchical structure or a chain of command; decisions may be made on an ad hoc basis and by any number of methods.” *Boyle*, 556 U.S. at 948, 129 S.Ct. 2237; *see United States v. Pinson*, 860 F.3d 152, 162 (4th Cir. 2017) (stating that a RICO enterprise “need not have a rigid structure....”). However, “[v]ague allegations of a RICO enterprise ... lacking any distinct existence and structure’ will not survive dismissal.” *Mitchell Tracey*, 935 F. Supp. 2d at 843 (citation omitted; modifications in *Mitchell Tracey*).

Notably, “an association-in-fact enterprise must have at least three structural features.” *Boyle*, 556 U.S. at 946, 129 S.Ct. 2237. These include “a purpose, relationships among those

associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id.*; accord *Pinson*, 860 F.3d at 161.

"Racketeering activity" is defined in § 1961(1)(B) to include a laundry list of "indictable" acts, such as mail fraud, wire fraud, and financial institution fraud. However, "RICO is not 'aimed at the isolated offender.'" *Zepkin*, 812 F.2d at 155 (quoting *Sedima*, 473 U.S. at 496 n.14, 105 S.Ct. 3275). Therefore, "[t]he pattern requirement was intended to limit RICO to those cases in which racketeering acts are committed in a manner characterizing the defendant as a person who regularly commits such crimes." *Lipin Enters. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986).

A "pattern of racketeering activity" requires "at least two acts of racketeering activity ... the last of which occurred within ten years ... after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). Although "two acts are necessary, they may not be sufficient." *Sedima*, 473 U.S. at 496 n.14, 105 S.Ct. 3275.

To prove a pattern, a plaintiff is required to show that the predicate acts "are [1] related and [2] that they amount to or pose a threat of *continued* criminal activity." *H.J. Inc.*, 492 U.S. at 239, 109 S.Ct. 2893 (first emphasis in original; second emphasis added). Judge Chasanow has reiterated: "To allege a pattern of racketeering activity, a plaintiff must present facts making it plausible, rather than possible, that: (1) at least two predicate acts occurred within ten years of each other; (2) the predicate acts were related; and (3) the acts 'amount to or pose a threat of continued criminal activity.'" *Swaney v. Desert Capital REIT, Inc.*, DKC-11-3615, 2012 WL 4208057, at *12 (D. Md. Sept. 20, 2012) (quoting *H.J. Inc.*, 482 U.S. at 239).

Acts are related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J. Inc.*, 492 U.S. at 240, 109 S.Ct. 2893 (citation omitted). And, the enterprise's actions must affect interstate commerce. *Sterling v. Ourisman Chevrolet of Bowie, Inc.* 943 F. Supp. 2d 577, 587-88 (D. Md. 2013).

*27 Moreover, a pattern of racketeering activity must also involve *continued* criminal activity. *H.J. Inc.*, 492 U.S. at 239, 109 S.Ct. 2893. The Fourth Circuit has adopted a "flexible" approach to the "continuity" requirement. *Brandenburg v. Seidel*, 859 F.2d 1179, 1185 (4th Cir. 1989), overruled on

other grounds by *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996). Courts utilize a "case-by-case analysis, *Capital Lighting and Supply, LLC v. Wirtz*, JKB-17-3765, 2018 WL 3970469, at *6 (D. Md. Aug. 20, 2018), and consider "the 'criminal dimension and degree' of the alleged misconduct." *HMK Corp. v. Walsey*, 828 F.2d 1071, 1073 (4th Cir. 1987) (citation omitted); see *Zepkin*, 812 F.2d at 155 ("[N]o mechanical test can determine the existence of a RICO pattern."); *Brandenburg*, 859 F.2d at 1185 (noting that continuity depends on "all the facts and circumstances of the particular case—with special attention to the context in which the predicate acts occur").

" 'Continuity' is both a closed – and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *H.J. Inc.*, 492 U.S. at 241, 109 S.Ct. 2893. The Fourth Circuit explained in *Menasco*, 886 F.2d at 683-84:

Continuity ... refers to a closed period of *repeated* conduct, or to past conduct that by its nature projects into the future with a threat of *repetition*. To satisfy the continuity element, a plaintiff must show that the predicates themselves amount to, or ... otherwise constitute a threat of, *continuing* racketeering activity. Significantly, [p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Thus, predicate acts must be part of a prolonged criminal endeavor.

(Internal quotation marks, citations, and parentheticals omitted; alteration and emphasis in original).

As to continuity, "[f]acts relevant to this inquiry include the number and variety of predicate acts and the length of time over which they were committed, the number of putative victims, the presence of separate schemes, and the potential for multiple distinct injuries." *Brandenburg*, 859 F.2d at 1185.

Where a fraud claim is asserted as the predicate act for a civil RICO violation, Rule 9(b)'s particularity requirement applies. See, e.g., *Lewis*, 2018 WL 1425977, at *5 (applying heightened pleading standard to claims under RICO); *Healy v. BWW Law Grp., LLC*, PWG-15-3688, 2017 WL 281997, at *6 (D. Md. Jan. 23, 2017) (same); *Kimberlin v. Hunton & Williams LLP*, GJH-15-723, 2016 WL 1270982, at *7 (D. Md. Mr. 29, 2016) (applying Fed. R. Civ. P. 9(b) to RICO claim based on mail or wire fraud), aff'd, 671 F. App'x 127 (4th Cir. 2016); *Bailey*, 992 F. Supp. 2d at 584 ("A plaintiff

must plead circumstances of the fraudulent acts that form the alleged pattern of racketeering activity with sufficient specificity pursuant to Fed. R. Civ. P. 9(b).") (citations and quotation marks omitted); *Sriram*, 984 F. Supp. 2d at 505.

2. Securities Fraud

Section 1964(c) of 18 U.S.C. gives rise to a private cause of action under RICO. However, the statute specifies "that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962." *Id.* According to defendants, plaintiffs allege conduct by defendants that falls under § 1964's exclusion of claims pertaining to "fraud in the purchase or sale of securities." See ECF 19 at 31-33. Defendants point to ¶ 40, n.2 of the Complaint, which states:

*28 Maryland law views as "securities" any investment schemes combining the sale of an interest in real property with a management agreement with the seller to expend the efforts necessary to fulfill the Plaintiffs' profit expectation. It is a matter of record that Defendants have not registered these securities with the Maryland Securities Division within the Office of the Attorney General. See *MD Code, Corporations and Associations*, § 11-501(1). Plaintiffs reserve the right to seek leave to amend this complaint, as warranted, with any proper state or federal securities claims.

In defendants' view, the footnote quoted above constitutes grounds to dismiss Counts One and Two. Without offering analysis of how courts have construed § 1964(c), defendants assume that "conduct that would have been actionable as fraud in the purchase or sale of securities" encompasses securities law as defined under Maryland law. Although defendants cite numerous cases in which courts applied the statutory bar, none of those cases relied on State laws concerning securities fraud.

Multiple federal appellate courts have explained that the pertinent language in § 1964(c) references *federal* securities law. "Actions for fraud in the purchase or sale of securities are controlled by section 10b of the Securities Exchange Act of 1934." *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 871 (9th Cir. 2010); see also *Menzies v. Seyfarth Shaw LLP*, 943 F.3d 328, 334 (7th Cir. 2019), cert. denied, — U.S. —, 140 S. Ct. 2674, 206 L.Ed.2d 825 (2020) ("By its terms, the bar in § 1964(c) ... requires asking

whether the fraud ... alleged ... would be actionable under the securities laws, in particular under section 10(b) [of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b)], and [SEC] Rule 10b-5 [17 C.F.R. § 240.10b-5] (brackets added); *Bixler v. Foster*, 596 F.3d 751, 759-60 (10th Cir. 2010) (providing a similar construction); *Affco Investments 2001, LLC v. Proskauer Rose, LLP*, 625 F.3d 185, 189-90 (5th Cir. 2010) (same).

Defendants do not contend that plaintiffs have alleged misconduct that is actionable under federal securities laws. Therefore, I reject the contention that Count One and Count Two are barred by the exclusionary clause of § 1964(c).

3. Limitations

"The statute of limitations on private civil RICO claims is four years, beginning on the date the plaintiff 'discovered, or should have discovered, the injury.'" *CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 476 (4th Cir. 2015) (quoting *Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc.*, 262 F.3d 260, 266 (4th Cir. 2001)). A cause of action accrues when the plaintiff "has actual or constructive knowledge of his or her claim." *Parkway 1046, LLC v. U.S. Home Corp.*, 961 F.3d 301, 307 (4th Cir. 2020). Under the so-called discovery rule, accrual cannot occur until the plaintiff has, or should have, "possession of the critical facts that he has been hurt and who has inflicted the injury." *United States v. Kubrick*, 444 U.S. 111, 122, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979); see also, e.g., *Nassim v. Md. House of Corr.*, 64 F.3d 951 (4th Cir. 1995) (en banc); *Brown v. Neuberger, Quinn, Gielen, Rubin & Gibber, P.A.*, 731 F. Supp. 2d 443, 449 (D. Md. 2010), aff'd, 495 F. App'x 350 (4th Cir. 2012).

The application of the injury discovery rule is generally fact-sensitive. See, e.g., *Koch v. Christie's Int'l PLC*, 785 F. Supp. 2d 105, 114 (S.D.N.Y. 2011) ("While determining inquiry notice often presents questions of fact more appropriate for a trier of fact, 'nonetheless the test is an objective one and dismissal is appropriate when the facts from which knowledge may be imputed are clear from the pleadings.'") (citation omitted), aff'd, 699 F.3d 141 (2d Cir. 2012); *Wilson v. Parisi*, 549 F. Supp. 2d 637, 656 (M.D. Pa. 2008) ("An analysis of the injury discovery rule is extremely fact-specific."); see also, e.g., *Richardson v. Cella*, 1 F. Supp. 3d 484, 495 (E.D. La. 2014); *Tanaka v. First Hawaiian Bank*, 104 F. Supp. 2d 1243, 1248-49 (D. Haw. 2000).

***29** Defendants are of the view that Counts One and Two are time-barred because plaintiffs' RICO claims accrued in November 2014, more than five years before this suit was filed. The gist of the argument is that the claims accrued in November 2014 because, according to the Complaint, at that time "Plaintiffs" learned of defendants' alleged misconduct as to Property 2. ECF 19 at 36. Therefore, defendants insist that, under the doctrine of inquiry notice, which applies to RICO claims, the claims accrued by November 2014. *Id.*

Defendants begin with ¶¶ 90 and 91 of the Complaint. See ECF 19 at 35. There, plaintiffs allege that on November 3, 2014, I. Ouazana emailed to Julien Layani a copy of the deed to Property 2, "bearing" the date of November 3, 2014. ECF 1, ¶ 90. The deed reflected that the seller was Munitrust REO, not WAZ-I, and that the recorded sale price was \$16,000, not \$55,000, "as represented." *Id.* Further, plaintiffs allege that between September 1, 2014 and November 3, 2014, defendants "concealed" that "the terms of the transaction" were "materially different from those represented to and agreed by Plaintiffs" *Id.* ¶ 91.

Thus, according to defendants, plaintiffs' own allegations establish that as of November 2014, plaintiffs "were on notice that the Defendants ... (i) misrepresented themselves as the true owners of the property when it was sold to Plaintiffs; (ii) misrepresented the actual sale price of the property; and (iii) used the money that was advanced by Plaintiffs to purchase property that the Defendants did not own at the time they entered into a management agreement regarding the property." ECF 19 at 36. Further, defendants assert that under the doctrine of inquiry notice, the discovery in November 2014 qualified as a "'storm warning[]' ... sufficient to put Plaintiffs on inquiry notice as to every transaction commenced with defendants" *Id.* (quoting *Mathews v. Kidder, Peabody & Co. Inc.*, 260 F.3d 239, 252 (2001)).

Moreover, defendants underscore that, according to the Complaint, Ragones learned of defendants' misrepresentations as to Property 10 in March 2016. Plaintiffs allege that in March 2016 Ragones visited Property 10 and found it to be "boarded up, not in rentable condition," and "that no repairs had in fact been completed and that no tenant lived or had lived in this property during the time that Plaintiff Ragones owned it." ECF 1, ¶ 328. According to defendants, this discovery "further confirmed" plaintiffs' knowledge of defendants' misconduct. ECF 19 at 36.

Curiously, defendants do not attempt to explain how, under their theory, the Layani Plaintiffs' knowledge about misconduct in the context of Property 2 put Ragones on notice of any wrongdoing. The Complaint does not identify any link between the Layani Plaintiffs and Ragones, save that they were each involved with the defendants during an overlapping time period. Clearly, the allegations do not support defendants' sweeping contention that Ragones's RICO claims accrued in November 2014, given that his dealings with defendants began in July 2015.

The only pertinent allegations concerning Ragones that defendants identify are those concerning Ragones's site visit to Property 10 in March 2016. See ECF 19. The Complaint does not provide a specific date for that site visit. See ECF 1, ¶ 328. But, even if it occurred on March 1, 2016, and Ragones's RICO cause of action accrued on that date, his RICO claims are nevertheless timely. Plaintiffs filed suit on February 19, 2020. That was close to the four-year mark, but prior to the expiration of the limitations clock. ECF 1. The RICO claims of Ragones and RDNA are timely.

***30** The timeliness of the RICO cause of action for the Layani Plaintiffs is thornier. To be sure, ¶¶ 90 and 91 of the Complaint indicate that in November 2014, the Layani Plaintiffs learned of defendants' misrepresentations concerning key aspects of their purchase of Property 2. In plaintiffs' opposition, they insist that they did not gain knowledge of injury at that time, despite the fact that the deed to Property 2 reflected a different seller and sale price than had been expected based on the defendants' representations. ECF 24 at 63. Plaintiffs assert, *id.*:

The deed correctly listed Layani's holding company Britt Investments Baltimore, LLC as the new property owner, which is what Layani focused on rather than other incorrect information that, in and of itself, seemed peripheral.... [T]he deed did not signify to him that he sustained an injury at all: he expected a deed made out to his holding company and he received a deed made out to his holding company.

The argument of plaintiffs conveniently characterizes the information as "peripheral." ECF 24 at 63. However, plaintiffs have clearly alleged that defendants' scheme involving real estate transactions entailed the deliberate misrepresentation as to the owner, value, characteristics, and quality of the properties. See, e.g., ECF 1, ¶ 41.

In particular, plaintiffs allege that the discrepancies between the agreed-upon purchase price for Property 2 and the

price reflected in property records “lower[ed] Plaintiffs’ tax basis,” and thus “expose[d] Plaintiffs to having to pay higher conveyance taxes than they should when they sell” the property. *Id.* ¶ 92. In other words, plaintiffs clearly allege that defendants’ misconduct as to the purchase of Property 2 caused them injury. And, of significance here, ¶¶ 90 and 91 of the Complaint indicate that by November 2014, the Layani Plaintiffs learned about such misrepresentations as to Property 2. That notice puts the suit beyond limitations, at least as to Property 2.

Defendants also contend that Layani's discovery of issues regarding Property 2 put him on notice of all of defendants' alleged misconduct. They are of the view that when Layani received the deed to Property 2, and realized that it differed from the representations about the property on which he supposedly relied, Layani either was on notice of the entire alleged scheme or incurred a duty to investigate. In other words, defendants characterize the revelation as to Property 2 as inseparable from the entirety of the alleged misconduct, even though the bulk of the alleged fraudulent activity had not yet occurred. They rely primarily on *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 148-53 (2d Cir. 2012), in which the Second Circuit ruled that the plaintiff's RICO claims were time-barred under RICO's injury discovery rule.

There, the plaintiff, William Koch, purchased wine purportedly “linked” to Thomas Jefferson and bottled in 1787. *Id.* at 145. In 2000, Koch had samples of the wine tested to determine its age. *Id.* at 147. In October 2000, Koch received a report that cast doubt on the wine's **authenticity**. *Id.* The But, Koch did not take any additional action to “conduct a reasonably diligent investigation” into the wine until 2005. *Id.* at 153.

The court set forth a “detailed description of when inquiry notice occurs,” under Second Circuit precedent. It said, *id.* at 151 (quoting *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 168 (2d Cir. 2005)):

Inquiry notice—often called “storm warnings” in the securities context—gives rise to a duty of inquiry “when the circumstances would suggest to an investor of ordinary intelligence the probability that she has been defrauded.” In such circumstances, the imputation of knowledge will be timed in one of two ways: (i) “[i]f the investor makes no inquiry once the duty arises, knowledge will be imputed as of the date the duty arose”; and (ii) if some inquiry is made, “we will impute knowledge of what an investor in the exercise of reasonable diligence[] should have discovered

concerning the fraud, and in such cases the limitations period begins to run from the date such inquiry should have revealed the fraud.”

*31 Of relevance here, the court stated that this description of inquiry notice “applies equally in RICO cases.” *Id.* Applying this law, the court determined that “inquiry notice had been triggered” as of 2000, when Koch received the report as to the wine's **authenticity**. *Id.* at 153. In particular, the court reasoned that the report, along with other clues, “would suggest to a reasonably intelligent person that the wine was not authentic.” *Id.* Accordingly, “the duty to inquire” arose upon receipt of the report—more than four years before Koch acted on that duty. *Id.*

Unlike this case, *Koch* involved allegations of fraud and misrepresentation at a single moment in time—when the plaintiff purchased the wine. In contrast, the Layani Plaintiffs engaged in dealings with the defendants as to eight separate properties over a period of four years, from 2014 to 2018. Moreover, plaintiffs have alleged misconduct involving real estate transactions as well as misconduct in the management of the properties, which I have described, *supra*.

Given that the Complaint organizes many of the facts by property, it is intuitive to focus on the wrongdoing as to each property as a separate injury. Several circuits apply the so-called separate accrual rule to RICO claims. The Supreme Court observed in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997) (brackets added):

[S]ome Circuits have adopted a “separate accrual” rule in civil RICO cases, under which the commission of a separable, new predicate act within a 4-year limitations period permits a plaintiff to recover for the additional damages caused by that act. But ... the plaintiff cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period.

To my knowledge, the Fourth Circuit has not adopted the separate accrual rule, even when squarely presented with opportunity to do so. For example, in *Cherrey v. Diaz*, 991 F.2d 787, at *3 (4th Cir. 1993 Apr. 16, 1993) (per curiam) (unpublished table opinion), the Court stated: “The [plaintiffs] urge us to adopt and apply the ‘rule of separate accrual,’ a doctrine which creates a separate civil RICO action for each new and independent injury suffered by a plaintiff.... We find it unnecessary to adopt the rule.” See

also *CSX Transp., Inc. v. Gilkison*, 406 F. App'x 723, 730 n.3 (4th Cir. 2010) (per curiam) (finding it unnecessary to address appellant's "argument regarding the separate accrual rule" in light of the Court's resolution of the limitations question); *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 539 n.18 (4th Cir. 1997) (noting that the Second Circuit has adopted "a rule of separate accrual," without elaborating on the rule or relying on it). Accordingly, it would seem that a property-by-property application of the injury discovery rule is not expressly authorized under existing Fourth Circuit case law.

On the other hand, the cases cited above also reveal that the Fourth Circuit has never expressly rejected the rule of separate accrual. And, those cases did not involve an opportunity to evaluate the potential application of the rule to facts similar to those here.

In this case, plaintiffs allege injuries arising out of several separate and distinct purchases of real property between July 2014 and July 2015. Certainly, the Layani Plaintiffs' discovery in November 2014 of falsehood in defendants' representations as to Property 2 should have alerted them to the possibility of duplicity in the earlier transaction involving Property 1. But, the exchanges that led to the transactions involving Properties 3 through 8 had not commenced as of November 2014. As alleged in the Complaint, each of those transactions entailed its own terms, negotiations, and price, even if they also had some shared characteristics. *Compare Cherrey*, 991 F.2d at *3 (indicating that plaintiffs purchased multiple properties from defendants at a single closing).

*32 Moreover, the Complaint clearly alleges two distinct "types" of fraud within the overall scheme: "(a) Marketing/Selling type of fraud; and (b) Property Management type of Fraud." ECF 1, ¶ 9. Among other things, the alleged property management fraud involved withholding rental income and charging plaintiffs for repairs to the properties that were never actually performed. *Id.* ¶¶ 79, 104, 162, 187, 213, 236, 265. And, in October 2018 the Layani Plaintiffs learned that defendants had allowed the properties to remain in or fall into disrepair and become subject to tax sales, among other things. *See id.* ¶¶ 53, 82, 106, 139, 190, 216, 239. Defendants do not even attempt to explain how the Layani Plaintiffs' discovery of injury in November 2014 as to Property 2 put them on notice of a scheme to defraud with respect to property management.

The doctrine of continuous breach might, by analogy, inform the limitations analysis here. "The Maryland Court of Appeals

has long accepted that certain covenants imposing ongoing negative obligations are covenants *de die in diem* and can be breached continuously, or on a daily basis." *Dave & Buster's, Inc. v. White Flint Mall, LLLP*, 616 F. App'x 552, 556 (4th Cir. 2015) (citing *Kaliopoulos v. Lumm*, 155 Md. 30, 141 A. 440 (1928)). Under that doctrine, "where a contract provides for continuing performance over a period of time, each successive breach of that obligation begins the running of the statute of limitations anew, with the result being that accrual occurs continuously and a plaintiff may assert claims for damages occurring within the statutory period of limitations." *Singer Co., Link Simulation Sys. Div. v. Baltimore Gas & Elec. Co.*, 79 Md. App. 461, 475, 558 A.2d 419, 426 (1989). At this juncture, however, it would be premature to apply the principles of continuous breach to the facts before me.

The Complaint raises questions of fact as to whether discovery of impropriety with Property 2 alerted the Layani Plaintiffs to the possibility of future misconduct. At this stage, the allegations leave "'room for a reasonable difference of opinion'" on the issue. *Carter v. Curators of Univ. of Missouri*, No. 4:18-00426-CV-RK, 2019 WL 1394386, at *2 (W.D. Mo. Mar. 27, 2019) (quoting *Hope v. Klabal*, 457 F.3d 784, 790 (8th Cir. 2006)). Accordingly, I am not prepared to conclude solely on the basis of the Complaint that the RICO claims as to Properties 3 through 8 are time-barred as a matter of law.

Nor do I conclude at this stage that the injury arising from each transaction was necessarily "new and independent." *Bingham v. Zolt*, 66 F.3d 553, 561 (2d Cir. 1995). Of course, pertinent evidence could surface in discovery. And, my ruling would not foreclose a jury from finding that a reasonable person in the shoes of the Layani Plaintiffs would have sought to investigate any representations made by defendants as to transactions that occurred after November 2014. *See Koch*, 785 F. Supp. 2d at 114; *Wilson*, 549 F. Supp. 2d at 656.¹²

As to the RICO claims, however, the claims of Layani and Britt are time-barred to the extent that they pertain to Property 1 and Property 2 and are based on allegations of racketeering activity characterized in the Complaint as the "Marketing/Selling type of fraud." ECF 1, ¶ 9. But, the RICO claims of Layani and Britt are not barred by limitations insofar as they are based on allegations of racketeering activity that is characterized in the Complaint as "Property Management type of Fraud." *Id.* And, because plaintiffs claim that they did not discover other fraud until October 2018, as alleged in the Complaint, *see ECF 1, ¶¶ 53, 82, 106, 139, 190, 216, 239*, the

limitations bar is limited to Property 1 and Property 2. The limitations clock did not begin to run in November 2014 as to events that had not yet occurred.

4. Enterprise

*33 Paragraphs 376 to 380 of the Complaint are under the heading “Enterprise Element of Plaintiffs’ RICO Claims.” Plaintiffs assert that “Defendants were associated with each other for an extended period of time.” ECF 1, ¶ 379. Further, plaintiffs allege, *id.*, ¶¶ 377, 378 (emphasis added):

377. At all relevant times, each and every one of Defendants Isaac Ouazana, his brother, Defendant Benjamin Ouazana, Defendants WAZ-I, WAZ-M, WAZ-B, and I&B and Defendants JOHN (JANE) DOEs and JOHN DOE ENTITIES were Members of an enterprise in that they were “associated together for a common purpose of engaging in a course of conduct,” namely the purpose of furthering Defendants Isaac Ouazana and Benjamin Ouazana’s scheme to defraud out-of-state or foreign passive investors by getting these investors to buy properties in Baltimore as directed by Defendants, and to enable Defendants to engage in post-investment looting by becoming managers of the real estate sold to these investors.

378. ... [A]ll Members of the enterprise were related and carried out specific roles in furtherance of the enterprise. *Defendants Isaac Ouazana and Benjamin Ouazana directed the enterprise.* Defendants WAZ-I, WAZ-M, WAZ-B, and I&B were the corporate vehicles through which Defendants Isaac and Benjamin perpetrated their fraud. *Defendants JOHN (JANE) DOEs and JOHN DOE ENTITIES furthered the scheme* by: (a) marketing, as Defendants’ agents or representatives, the Defendant’s [sic] properties out-of-state and in foreign countries to non-Maryland investors; and (b) enabling Defendants to document conveyances or maintain the appearance of conveyances and to record deeds that these JOHN DOEs and JOHN DOE Entities knew or should have known were fraudulent, as notaries public, title agents and title companies, and by enabling the Ouazana Defendants to obtain control of the Plaintiffs’ funds in real estate closings and subsequently while they looted the properties entrusted to Defendants’ management.

As noted, to plead a civil RICO claim, a plaintiff must allege “an enterprise.” *Morley*, 888 F.2d at 1009 (citation omitted).

To do so, a plaintiff must allege: “(1) an ongoing organization; (2) associates functioning as a continuing unit; and (3) the enterprise is an entity ‘separate and apart from the pattern of activity in which it engages.’” *Mitchell Tracey*, 935 F. Supp. 2d at 842 (citation omitted). A plaintiff may rely on the theory of an associated-in-fact enterprise. *Id.* Such an enterprise must have “a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.” *Boyle*, 556 U.S. at 946, 129 S.Ct. 2237.

Of relevance here, the Supreme Court has explained: “[T]o establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not simply the same ‘person’ referred to by a different name.” *Cedric Kushner Promotions*, 533 U.S. at 161, 121 S.Ct. 2087; see also *Chambers v. King Buick GMC, LLC*, 43 F. Supp. 3d 575, 588 (D. Md. 2014) (“There must be a ‘person,’ alleged to have violated Section 1962(c) and to be liable to the claimant for damages, who is separate and distinct from the ‘enterprise,’ or tool, through which the RICO violation occurred.”) (citing *Busby v Crown Supply, Inc.*, 896 F.2d 833, 840–41 (1990)). Under 18 U.S.C. § 1961(3), a “‘person’ can be an individual or corporate entity.” *Chambers*, 43 F. Supp. 3d at 588. And, as noted, § 1961(4) defines an “enterprise” as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”

*34 Defendants argue that plaintiffs have not plausibly alleged an enterprise under RICO. ECF 19 at 28-31. In particular, they contend that plaintiffs’ allegations of a RICO enterprise are inconsistent with the rule that a RICO defendant “cannot be both the defendant ‘person’ and the ‘enterprise.’” *Id.* at 28 (quoting *Cedric Kushner Promotions v. King*, 533 U.S. 158, 164, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001)). According to defendants, plaintiffs’ allegations of an associated-in-fact enterprise fail to “plead around the person/enterprise distinction.” ECF 19 at 29. In their view, plaintiffs have alleged that defendants engaged in misconduct in the course of carrying out their “normal business operations” as managers of “Plaintiffs’ real estate investments,” which does not fall within the meaning of “enterprise” under RICO. *Id.* at 31, 141 A. 440.

In contending that plaintiffs have not satisfied RICO’s distinctness requirement, defendants draw on *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 343-45 (2d Cir. 1994). ECF 19 at 30. There, the plaintiff

alleged that the defendant, a bank, and two individual officers of the bank, “participated in the affairs of an association-in-fact enterprise.” *Riverwoods Chappaqua Corp.*, 30 F.3d at 341. The court acknowledged that RICO’s “distinctness requirement does not foreclose the possibility of a corporate entity being held liable as a defendant under section 1962(c) where it associates with others to form an enterprise that is sufficiently distinct from itself.” *Id.* at 344. “Nevertheless,” the court explained that, “by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant, the distinctness requirement may not be circumvented.” *Id.* Under that rule, the Second Circuit reasoned that RICO’s enterprise element was not satisfied because the plaintiff’s enterprise theory merely involved bank employees “carrying out the business of that bank.” *Id.*

Riverwoods Chappaqua Corp. does not advance defendants’ position. For one, the Second Circuit relied on an interpretation of § 1962(c) that the Supreme Court later held to be erroneous. *See Cedric Kushner Promotions*, 533 U.S. at 161, 121 S.Ct. 2087; *see also Kelco Constr., Inc. v. Spray in Place Sols., LLC*, No. 18-CV-5925(SJF)(SIL), 2019 WL 4467916, at *7 (E.D.N.Y. Sept. 18, 2019) (noting the effect of *Cedric Kushner Promotions*). The Supreme Court explained that a RICO plaintiff may allege “circumstances in which a corporate employee ... conducts the corporation’s affairs in a RICO-forbidden way” without running afoul of the statute’s “‘distinctness’ principle.” *Cedric Kushner Promotions*, 533 U.S. at 163, 121 S.Ct. 2087.

Here, defendants essentially contend that the Complaint characterizes their “normal business operations” as the basis of a RICO enterprise. ECF 19 at 31. In their view, § 1962(c) is not satisfied by allegations that one or more corporate entities, together with their officers or employees, committed misconduct while engaged in the corporations’ usual affairs. *See id.* at 29-30. However, plaintiffs have alleged that the Ouazanas orchestrated an associated-in-fact enterprise involving entities within their control as well as in collaboration with the Doe Defendants.

In other words, plaintiffs do not allege that a single corporation and employees of that corporation formed an associated-in-fact enterprise. Rather, plaintiffs allege that the Ouazana Brothers engaged in conduct forbidden under RICO through the various WAZ entities and I&B, which served as “corporate vehicles,” ECF 1, ¶ 378, and through

the participation of the John Doe Defendants, who included “notaries public, title agents and title companies.” *Id.*

Cedric Kushner Promotions, 533 U.S. at 163, 121 S.Ct. 2087, clearly stated that allegations that a corporation is being used in a manner forbidden by RICO—*i.e.*, to enable to or conduct a pattern of racketeering activity—may satisfy § 1962(c)’s enterprise requirement. Therefore, I conclude that plaintiffs’ allegations are not inconsistent with the distinctness principle embodied in § 1962(c).

*35 As to the other requirements of a RICO enterprise, plaintiffs have adequately pleaded “an ongoing organization.” *Mitchell Tracey*, 935 F. Supp. 2d at 842. They allege that the enterprise was constituted at least as early as June 2014, when Layani began discussing investment opportunities with the Ouazanas, until July 2018, when Layani “terminated” management agreements with defendants. *See, e.g.*, ECF 1, ¶¶ 54, 80. In addition, plaintiffs allege “associates functioning as a continuing unit,” *Mitchell Tracey*, 935 F. Supp. 2d at 842: they assert that the Brothers “directed the enterprise,” used the WAZ entities and I&B as “vehicles,” and collaborated with the John Doe Defendants. ECF 1, ¶ 378. And, plaintiffs allege that the enterprise is “‘separate and apart from the pattern of activity in which it engages.’” *Mitchell Tracey*, 935 F. Supp. 2d at 842 (citation omitted).

In *Mitchell Tracey*, the court determined that allegations of unlawful conduct in the sale of title insurance satisfied the “‘separate and apart’” prong. *Id.* at 844. The court reasoned: “Such unlawful acts are not conducted in the ordinary course of business.”

Here, plaintiffs allege, *inter alia*, that the Ouazanas, in directing the enterprise, misrepresented information about investment properties, including their value, ownership, and condition; engaged in real estate transactions ostensibly on behalf of plaintiffs, yet the terms diverged from those to which plaintiffs had agreed; misrepresented the condition of rental parties; withheld rental income; and baselessly charged plaintiffs for repairs. By the logic of *Mitchell Tracey*, 935 F. Supp. 2d at 842, such acts satisfy the requirement that the enterprise must be separate and apart from the pattern of activity in which it engages.

Accordingly, I conclude that the allegations are sufficient to plead a RICO enterprise.

5. Pattern of Racketeering Activity

To constitute racketeering activity, the relevant conduct must consist of at least one of the indictable predicate acts listed in [18 U.S.C. § 1961](#). In support of their RICO claim, plaintiffs have alleged multiple predicate acts of racketeering activity, including mail fraud under [18 U.S.C. § 1341](#), and wire fraud under [18 U.S.C. § 1343](#). *See, e.g.*, ECF 1, ¶¶ 389-393.

In order to show mail or wire fraud as a predicate act, a plaintiff must show (1) a scheme to defraud and (2) use of the mails or wires in furtherance of the scheme. [18 U.S.C. §§ 1341, 1343; Chisolm v. TranSouth Fin. Corp.](#), 95 F. 3d 331, 336 (4th Cir. 1996).

The elements of the crimes of mail fraud and wire fraud are as follows: (1) use of the mails or interstate wire communications in furtherance of (2) a scheme to defraud for which the defendant acted intentionally, and (3) the scheme “involved a material misrepresentation or concealment of fact.” *See 18 U.S.C. §§ 1341, 1343; United States v. Harvey*, 532 F.3d 326, 333 (4th Cir. 2008).

Plaintiffs must plead fraud claims with particularity. *See Fed. R. Civ. P. 9(b); Menasco*, 886 F.2d at 684. This means the Complaint must allege the “time, place, and contents of the false representations, as well as the identity of the person making the representation and what he obtained thereby.” *Harrison*, 176 F. 3d at 784 (internal citation omitted). “However, ‘[a] court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which he will have to prepare a defense at trial, and (2) that plaintiff has substantial predisclosure evidence of those facts.’” *Scott v. WFS Fin., Inc.*, No. 2:06cv349, 2007 WL 190237, at *5 (E.D. Va. Jan. 18, 2007) (quoting *Harrison*, 176 F. 3d at 784).

Further, “[w]hile a plaintiff normally must plead specific instances of mail or wire fraud, such a requirement is relaxed where there are ‘numerous mailings of standardized documents containing identical false representations.’” *VNA Plus, Inc. v. Apria Healthcare Group, Inc.*, 29 F. Supp. 2d 1253, 1263 (D. Kan. 1998) (quoting *City of New York v. Joseph L. Balkan, Inc.*, 656 F. Supp. 536, 545 (E.D.N.Y. 1987)); *Chambers*, 43 F. Supp. 3d at 598. In these cases, “Rule 9(b) may be satisfied if the complaint sufficiently identifies ‘[t]he time period involved and the content of the misrepresentations.’” *VNA Plus*, 29 F. Supp. 2d at 1263 (quoting *Hurd v. Monsanto Co.*, 908 F. Supp. 604, 614

(S.D. Ind. 1995)). And, “[t]he mailings or wirings do not have to contain the misrepresentations that defrauded the plaintiff, but merely be in furtherance of the fraudulent, material misrepresentation upon which the plaintiff relied to his detriment and may include mailings and wirings directed at nonparties.” *Proctor*, 64 F. Supp. 2d at 473; *see Day v. DB Capital Group, LLC*, DKC-10-1658, 2011 WL 887554, at *10 (D. Md. Mar. 11, 2011); *Schmuck v. United States*, 489 U.S. 705, 710, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989); *In re Am. Honda Motor Co. Dealerships Litig.*, 941 F. Supp. 528, 546 n.19 (D. Md. 1996).

*36 In addition, to state a RICO claim, a claimant must allege, *inter alia*, a “pattern of racketeering activity.” [18 U.S.C. § 1962](#). The Supreme Court has outlined a two-part test, known as “continuity plus relationship,” to determine whether a “pattern of racketeering” exists: “a plaintiff ... must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.” *H.J. Inc.*, 429 U.S. at 239, 97 S.Ct. 441.

Continuity requires either a “closed period of repeated conduct” or “past conduct that by its nature projects into the future with a threat of repetition.” *H.J. Inc.*, 429 U.S. at 241, 97 S.Ct. 441. Closed-ended continuity may be established “by proving a series of related predicates extending over a substantial period of time.” *Id.* at 242, 97 S.Ct. 441; *see Walk v. Baltimore and Ohio R.R.*, 890 F.2d 688, 690 (4th Cir. 1989) (“What constitutes a ‘substantial’ duration must of course remain a matter for case-by-case determination.”). Whether a pattern reflects continuity that projects into the future “depends on the specific facts of each case.” *H.J. Inc.*, 429 U.S. at 242, 97 S.Ct. 441. A pattern might qualify if “the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future,” or if “the predicate acts or offenses are part of an ongoing entity’s regular way of doing business.” *Id.*

Both types of continuity appear to be at issue in this case. To determine whether a plaintiff has satisfied the continuity requirement, relevant factors to consider include “the number and variety of predicate acts and the length of time over which they were committed, the number of putative victims, the presence of separate schemes, and the potential for multiple distinct injuries.” *Brandenburg*, 859 F.2d at 1185; *see also Friedler*, 2005 WL 465089, at *9 (“[D]etermining whether a pattern exists is a commonsensical, fact-specific inquiry, not a mechanical one determined solely by the number of predicate acts over a given period of time.”).

The Fourth Circuit is “cautious about basing a RICO claim on predicate acts of mail and wire fraud because ‘[i]t will be the unusual fraud that does not enlist the mails and wires in its service at least twice.’” *Al-Abood*, 217 F.3d at 238 (quoting *Anderson v. Found. for Advancement, Educ. and Employment of Am. Indians*, 155 F.3d 500, 506 (4th Cir. 1998)) (internal quotation marks omitted) (alteration in *Anderson*). “This caution is designed to preserve a distinction between ordinary or garden-variety fraud claims better prosecuted under state law and cases involving a more serious scope of activity.” *Al-Abood*, 217 F.3d at 238; *but see Capital Lighting*, 2018 WL 3970469, at *8 (There is no “per se rule against a RICO claim involving only mail and wire fraud.”) (*citing Al-Abood*, 217 F.3d at 238).

Defendants contend that plaintiffs’ RICO claims are impermissibly predicated on “garden variety business fraud,” which courts “have expressly and consistently refused to allow to be brought as RICO claims.” ECF 19 at 26 (citing, *inter alia*, *Al-Abood*, 217 F.3d at 238; *Flip Mortg. Corp.*, 841 F.2d at 538). To support their contention, defendants rely primarily on *Foster v. Wintergreen Real Estate Co.*, 363 F. App’x 269, 270 (4th Cir. 2010) (per curiam). ECF 19 at 27-28.

In *Foster*, real estate investors brought RICO claims against a real estate company and individual defendants, alleging that the defendants “made false statements and/or concealed material facts” about various properties purchased by plaintiffs. 363 F. App’x at 270. The plaintiffs also alleged that “at least some of these alleged fraudulent acts were conducted through interstate communication via the mail and wire, and were perpetrated on ‘hundreds’ of other out-of-state clients.” *Id.* at 271.

*37 The Fourth Circuit summarily rejected the argument that the alleged misconduct constituted predicate acts under RICO. The Court stated, *id.* at 274 (brackets in original):

The case at bar is such an instance of “garden-variety fraud.” Essentially, Plaintiffs allege that Defendants misrepresented their efforts to market for-sale properties, misrepresented or failed to disclose material facts about specific properties, and breached their fiduciary duties. These are quintessential state law claims, not a “scheme[] whose scope and persistence set [it] above the routine.”

HMK Corp. v. Walsey, 828 F.2d 1071, 1074 (4th Cir.1987).

The Court reasoned that its conclusion was “bolstered by the fact that Plaintiffs failed to plead with particularity that any other persons were similarly harmed by defendants’ alleged

fraud, and thus failed to show ‘a distinct threat of long-term racketeering activity.’” *Id.* (quoting *H.J. Inc.*, 492 U.S. at 242, 109 S.Ct. 2893).

Plaintiffs do not confront defendants’ argument head-on. Rather, plaintiffs focus almost entirely on the pattern element, without particular regard for whether the alleged pattern of activity entailed predicate acts that fall within the statute’s sweep. *See* ECF 24 at 36-41.

Foster, 363 F. App’x 269, on which defendants rely, certainly involved facts that were somewhat similar to the facts here. The alleged racketeering activity in *Foster* concerned fraudulent misrepresentations with regard to real estate transactions, as do many of the allegations here. *See* ECF 1, ¶ 40; *see generally* Factual Background, *supra*. In addition, the *Foster* plaintiffs were three real estate investors who dealt with the defendants over “a period of approximately three years.” *Foster*, 363 F. App’x at 270. Here, plaintiffs are also investors in real estate, who separately engaged in dealings and ongoing business relationships with defendants over comparable periods of time: four years in the case of Layani and Britt, and roughly three years in the case of Ragones and RDNA. Although *Foster* is not a published decision, it is nonetheless persuasive, given the analogous facts.

The pertinent facts here are also similar to *Friedler*, 2005 WL 465089, in which Judge Blake found predicate acts of mail and wire fraud insufficient to satisfy the pattern requirement. In that case, two individual real estate investors, along with various entities they directed, were “allegedly defrauded of millions of dollars in a series of real estate investments orchestrated” by the defendant. *Id.* at *10; *see id.* at *1. The fraud scheme, which occurred over three-plus years and entailed “several predicate acts of mail and wire fraud,” was intended to “defraud the plaintiffs of their financial investment in real estate ventures.” *Id.* at 10, 135 S.Ct. 346.

After an informative review of case law, Judge Blake reasoned that the claims were not sufficiently “outside the heartland of fraud cases to warrant RICO treatment,” notwithstanding the allegations of significant financial losses. *Id.* (quoting *Al-Abood*, 217 F.3d at 238); *see id.* at 10-13, 135 S.Ct. 346. In particular, Judge Blake noted that had “plaintiffs alleged a more widespread scheme ... then the fraud they suffered would more closely resemble the kind that ‘rises above the routine’ and ‘poses a threat to social-

well being.’’ *Id.* at 12, 135 S.Ct. 346 (citing *Superior Bank, F.S.B. v. Tandem Nat'l Mortgage, Inc.*, 197 F.Supp.2d 298, 324 (D.Md.2000); *Thomas v. Ross & Hardies*, 9 F.Supp.2d 547, 555 (D.Md.1998)).

*38 To be sure, plaintiffs have alleged misconduct of considerable ‘‘scope and persistence.’’ *Biggs v. Eaglewood Mortg., LLC*, 582 F. Supp. 2d 707, 714 (D. Md. 2008), aff’d, 353 F. App’x 864 (4th Cir. 2009). As to persistence, the Complaint indicates that defendants victimized each plaintiff for at least three years through various misrepresentations as to real estate transactions and management of investment properties. But, plaintiffs do not adequately explain how the alleged conduct ‘‘rises above the routine’ and ‘poses a threat to social-well being.’’ *Friedler*, 2005 WL 465089, at *12.

Plaintiffs and defendants were essentially business partners. Plaintiffs were active participants in multiple real estate transactions, in which they repeatedly demonstrated their willingness to let defendants arrange most, if not all, of the logistics. In addition to relying on defendants to facilitate real estate investments, plaintiffs consistently placed their trust in defendants to manage those investments. In other words, plaintiffs were not passive or helpless victims upon whom defendants preyed. Rather, they were participants in a business relationship. That the business relationship was not what it seemed to be, and ultimately caused plaintiffs injury, does not necessarily give rise to a RICO claim. See *Foster*, 363 F. App’x at 274 (characterizing fraud scheme involving real estate investors as an instance of ‘‘garden-variety fraud’’); *Al-Abood*, 217 F.3d at 239 (determining that scheme that defrauded plaintiffs, who were friendly with defendants, of millions of dollars over several years, and which involved a real estate investment, did not ‘‘involve a scope of unlawful activity that exceeds that found in customary fraud cases’’); *Flip Mortgage Corp.*, 841 F.2d at 538 (concluding that a corporate fraud scheme carried out over seven years and involving one victim did not constitute pattern of racketeering activity); *Smith v. Chapman*, No. 3:14-CV-00238-MOC, 2015 WL 5039533, at *11 (W.D.N.C. Aug. 26, 2015) (suggesting that ‘‘a dispute between friends-turned-business colleagues over business relationships that, by all accounts, severely soured’’ implicated garden variety fraud); see also *Gamboa v. Velez*, 457 F.3d 703, 710 (7th Cir. 2006) (‘‘RICO has not federalized every state common-law cause of action available to remedy business deals gone sour.’’) (citation omitted).

Moreover, although plaintiffs allege generally that the alleged fraud extends beyond Layani and Ragones, they do not so with the requisite particularity. The Complaint states, ECF 1, ¶¶ 384, 385:

384. As of the filing of this complaint, Defendants’ predicate acts are ongoing and, on information and belief, likely to continue indefinitely because Defendants’ efforts to recruit new investors in the United States and abroad have not stopped....

385. Plaintiffs know of tens of putative victims and, based on the length of time that Defendants have been in business and the fact that their business model appears to be wholly fraud based, believe that the putative Class plausibly includes more than one hundred Members.

Thus, the allegations as to other victims rely solely on the invocation of ‘‘information and belief,’’ without any details. Although plaintiffs claim to ‘‘know of tens of putative victims,’’ they provide no clues as to the source of that knowledge or the victims.

As noted, a ‘‘court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial predisclosure evidence of those facts.’’ *Harrison*, 176 F.3d at 784. But, plaintiffs do not allege any predisclosure evidence that supports the allegations regarding the breadth of the alleged scheme.¹³

*39 Nor do plaintiffs sufficiently allege the kind of ‘‘additional layer of impact’’ that might qualify the alleged fraud as racketeering activity. *Starr v. VSL Pharm., Inc.*, — F.3d —, TDC-19-2173, 2020 WL 7694480, at *9 (D. Md. Dec. 28, 2020). In *Starr*, for instance, Judge Chuang determined that such an additional layer of impact obtained where the alleged pattern involved a ‘‘multi-year enterprise involving a substantial number of false and misleading marketing and advertising materials disseminated through a nationwide distribution and sales network that victimized numerous individuals across the United States.’’ *Id.* at *9. Further, the scheme preyed on victims whose health conditions rendered them vulnerable to the fraud at issue there, and thus carried ‘‘the potential to adversely impact the health of a significant number of individuals.’’ *Id.* Here, there are no allegations of comparably pernicious wrongdoing.

Therefore, I conclude that plaintiffs have not alleged a pattern of racketeering activity under RICO. Accordingly, I shall dismiss Counts One and Two, without prejudice, and with leave to amend.

B.

Without RICO claims, plaintiffs cannot avail themselves of federal question jurisdiction, pursuant to 28 U.S.C. § 1331. I turn to address CAFA jurisdiction under § 1332(d).

V. CAFA Jurisdiction (Class Claims)

Defendants seek pre-discovery dismissal of the class allegations, pursuant to Rule 12(b)(6) and Rule 23(d)(1)(D). ECF 19 at 39. According to defendants, plaintiffs have failed to plead a certifiable class. *Id.* at 42, 141 A. 440.

Rule 23(c)(1) provides: “At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.” As a result, “[e]ither plaintiff or defendant may move for a determination of whether the action may be certified under Rule 23(c)(1).” 7AA Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1785 (3d ed. 2018); see *Stanley v. Cent. Garden & Pet Corp.*, 891 F. Supp. 2d 757, 769 (D. Md. 2012) (“A court need not wait until class certification is sought to determine whether a party complies with [Rule] 23.”) (brackets added) (citing, *inter alia*, *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011)). And, of relevance here, Rule 23(d)(1)(D) authorizes the court to require amendment of pleadings “to eliminate allegations about representation of absent persons and that the action proceed accordingly.”

In light of these rules, “several circuits, including the Fourth Circuit in an unpublished table decision, have found that Rule 23 permits defendants to file preemptive motions to deny certification before discovery is completed.” *Williams v. Potomac Family Dining Grp. Operating Co., LLC*, GJH-19-1780, 2019 WL 5309628, at *4 (D. Md. Oct. 21, 2019) (collecting cases). Where, as here, defendants seek pre-discovery dismissal of class allegations, the motion “should be granted when it is clear from the face of the complaint that the plaintiff cannot and could not meet Rule 23’s requirements for certification because the plaintiff has ‘fail[ed] to properly allege facts sufficient to make out a class’ or ‘could establish

no facts to make out a class.’ ” *Id.* (quoting *Bessette v. Avco Fin. Servs., Inc.*, 279 B.R. 442, 449 (D.R.I. 2002)). In other words, in such circumstances a court applies the familiar standard embodied in Rule 12(b)(6) to determine whether the pleadings plausibly allege a class.

Rule 23 requires a “two-step” analysis to determine whether a class action may proceed. *Stanley*, 891 F. Supp. 2d at 770. First, the court must ask whether the putative class satisfies the four elements of Rule 23(a). *Id.* Rule 23(a) requires that the prospective class comply with four prerequisites: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.” *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014). If those elements are satisfied, the court must then determine whether the putative class falls within one of the categories identified in Rule 23(b). *Id.*; see *Stanley*, 891 F. Supp. 2d at 770.

*40 The numerosity requirement does not require plaintiffs to allege “the exact size” of a potential class. *Stanley*, 891 F. Supp. 2d at 770 (citing *Mitchell-Tracey v. United Gen. Title Ins. Co.*, 237 F.R.D. 551, 556 (D. Md. 2006)). According to the Complaint, the putative class includes either “several tens” or more than one hundred members. ECF 1, ¶¶ 385, 387. Those allegations should suffice for purposes of numerosity. See *Stanley*, 891 F. Supp. 2d. at 770. More important, defendants do not contest numerosity.

Rather, defendants stake their argument on the remaining elements. See ECF 19 at 42-44. Commonality, typicality, and adequacy of representation raise similar considerations and may entail overlapping inquiries. See *Stanley*, 891 F. Supp. 2d. at 770.

Commonality requires “‘questions of law or fact common to the class.’ ” *Lloyd v. Gen. Motors Corp.*, 266 F.R.D. 98, 103 (D. Md. 2010) (quoting Rule 23(a)(2)). In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011), the Supreme Court instructed (citation omitted):

“What matters to class certification ... is not the raising of common ‘questions’—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.”
See also *EQT Prod. Co.*, 764 F.3d at 360 (citing *Dukes*).

As for typicality, class members’ claims “must be fairly encompassed by the class representative’s claims.” *Stanley*,

891 F. Supp. 2d at 770 (citing *Mitchell-Tracey*, 237 F.R.D. at 558). Typicality requires that “ ‘a class representative ... possess the same interest and suffer the same injury as the class members.’ ” *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001) (quoting *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

The remaining requirement, adequacy of representation, is embodied in Rule 23(a)(4). The rule demands that “the representative parties will fairly and adequately protect the interests of the class.” *Id.* Under Rule 23(a)(4), the “inquiry focuses on ‘whether the absent class members, who will be bound by the result, are protected by a vigorous and competent prosecution of the case by someone that shares their interests.’ ” *Stanley*, 891 F. Supp. 3d at 770 (quoting *Mitchell-Tracey*, 237 F.R.D. at 558).

As noted, the Complaint defines the putative class “as all persons who,” ECF 1, ¶27:

- a. Purchased a full or fractional interest in properties sold directly or indirectly by Defendants, and whom, within four years before the filing of this action, Defendants misled or defrauded, or attempted to mislead or defraud, irrespective of whether they were in fact misled or defrauded; or
- b. Entered into a written or implied property management services agreement with Defendants, and whom, within four years before the filing of this action, Defendants misled or defrauded, or attempted to mislead or defraud, irrespective of whether they were in fact misled or defrauded.

Defendants do not specify whether the proposed class fails to satisfy Rule 23(a) or Rule 23(b). Accordingly, I construe their argument, which appears directed toward commonality and typicality, to focus only on deficiencies under Rule 23(a). See ECF 19 at 41-43.

The gist of defendants’ argument is that the putative class is fundamentally predicated on allegations of fraud, which are generally ill suited for class actions because they involve highly fact-sensitive analyses. *See id.* In their view, it is not only Count Five (Common Law Fraud) and Count Six (Constructive Fraud) that are unsuitable for class certification. *Id.* at 42. Rather, they appear to argue that none of the State law claims is suitable for certification because all of the claims essentially rely on allegations

of fraudulent misrepresentation, which raise individualized questions regarding both reliance and damages. *See id.*

*41 Defendants lead with a citation to *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998). There, the district court certified a class of franchisees in a suit against a franchisor. *Id.* at 334. The Fourth Circuit reversed the district court’s class certification, ruling that the class failed to satisfy the commonality and typicality prerequisites of Rule 23(a). *Id.*

The Court explained why certification was inappropriate for the class claims sounding in contract, fraud, and negligent misrepresentation. Certification as to the franchisees’ breach of contract claim was improper because the franchisees had “multiple different contracts” with the franchisor. *Id.* at 340. Under Rule 23(a), it was impermissible to “amalgamate multiple contract actions into one.” *Id.*

As to the franchisees’ fraud and tort claims, the Court identified two principal deficiencies for purposes of the commonality and typicality inquiries. First, those claims were “built ... on the shifting evidentiary sands of individualized representations” *Id.* at 340-41. Although the plaintiffs proffered “standardized documents or other documents,” at trial they “relied heavily on audiotapes” of oral exchanges in which representations were made. The Court drew on the Seventh Circuit’s teaching that “ ‘claims based substantially on oral rather than written communications are inappropriate for treatment as class actions unless the communications are shown to be standardized.’ ” *Id.* at 341 (quoting *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 598 n. 17 (7th Cir. 1993)). And, although the franchisees adduced some documents produced by the franchisor, there was “no evidence that all franchisees received, read, and relied on the same literature.” *Broussard*, 155 F.3d at 341.

Second, the fraud and negligent misrepresentation claims “were not readily susceptible to class-wide proof” because they turned on questions of reasonable reliance. *Id.* The Court observed that under North Carolina law, which governed the claims, “ ‘reliance is an essential element of both fraud and negligent misrepresentation.’ ” *Id.* (quoting *Helms v. Holland*, 124 N.C.App. 629, 478 S.E.2d 513, 517 (1996)). And, questions of reasonable reliance give rise to a “fact-intensive inquiry.” *Broussard*, 155 F.3d at 341. The Court reasoned that “ ‘proof of what statements were made to a particular person, how the person interpreted those statements, and whether the person justifiably relied on those statements to

his detriment' are not susceptible to class-wide treatment." *Id.* at 342 (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 398 (6th Cir. 1998)); *see also Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 362 (4th Cir. 2004) (cautioning that "proof of reliance is generally individualized to each plaintiff allegedly defrauded, [meaning that] fraud and negligent misrepresentation claims are not readily susceptible to class action treatment, precluding certification of such actions as a class action").

Broussard is highly pertinent to the Rule 23(a) issues here. Count Seven, which lodges a claim for breach of contract, is clearly inappropriate for class treatment under *Broussard*'s logic. Plaintiffs do not allege that defendants entered into standardized written contracts with all members of the putative class. In fact, the Complaint does not specify whether the various contracts executed between defendants and the class representatives contained any degree of uniformity. Plaintiffs allege virtually nothing about the terms of those agreements. And, the definition of the putative class includes members who entered into "written or implied property management services agreement" with defendants, ECF 1, ¶ 27, which on its face reflects the heterogeneity of agreements and business practices employed by defendants.

*42 Rather than proceed claim by claim on the rest of the counts arising under State law, it suffices to apply *Broussard*'s guidance to the definition of the putative class. The putative class consists of members who, among other things, were "misled or defrauded" by defendants, or persons defendants "attempted to mislead or defraud, irrespective of whether they" were successful in their attempt. ECF 1, ¶ 27.

As pleaded, all class claims would turn on underlying questions of fraud. Thus, proof on a class-wide basis would require inquiry into the "shifting evidentiary sands of individualized representations." *Broussard*, 155 F.3d at 341. Moreover, reliance is an element of fraud in Maryland. *See Kantsevoy v. LumenR LLC*, 301 F. Supp. 3d 577, 601 (D. Md. 2018) (citing *Nails v. S & R, Inc.*, 334 Md. 398, 415, 639 A.2d 660, 668 (1994)). Certifying the proposed class would necessarily give rise to a highly individualized, fact-intensive inquiry on most, if not all, of the claims—so much so as to render class-wide treatment inappropriate under Rule 23(a).

In plaintiffs' opposition, they urge the Court to allow them to proceed to jurisdictional discovery, asserting that such discovery is necessary "to sustain the class allegations, particularly about the repetition of Defendants['] fraud

system on all putative class members." ECF 24 at 71. Plaintiffs also contend that "class treatment is appropriate" where the allegedly fraudulent communications "are shown to be standardized." ECF 24 at 72 (quoting *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1249 (2d Cir. 2002)). Although plaintiffs assert that the Complaint evinces "systematized and standardized fraud acts"—a single "recipe"—they do not cite any particular allegations in support.

In my view, plaintiffs have gone to great lengths to allege various details of their dealings with each of the twelve properties at issue. But, they have not alleged that the contents of defendants' representations to Layani and Ragones, respectively, were standardized. Even if they had, proceeding on a class-wide basis would nevertheless necessitate individualized, fact-intensive inquiries as to reliance. Under the circumstances alleged here, I am not persuaded that a "a class-wide proceeding" would "generate common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350, 131 S.Ct. 2541 (citation omitted).

For the reasons stated above, I conclude that, as pleaded, the proposed class does not satisfy Rule 23(a)'s commonality or typicality prerequisites. Accordingly, I need not address whether the proposed class meets the requirements of CAFA, embodied in 28 U.S.C. § 1332(d)(2). I shall grant defendants' motion to dismiss the class claims, without prejudice.

VI. Supplemental Jurisdiction

Plaintiffs have asserted state law claims in Counts Three through Ten. Plaintiffs do not seek to rely on diversity as a basis for jurisdiction as to those claims. Nor could they; there is no complete diversity among the parties. *See Cent. W. Va. Energy Co., Inc.*, 636 F.3d at 103.

Notwithstanding the absence of federal question jurisdiction, diversity jurisdiction, or jurisdiction pursuant to CAFA, the Court must consider 28 U.S.C. § 1337(a), by which a district court is authorized to resolve state law claims under the grant of supplemental jurisdiction. Notably, pursuant to § 1337(c) (3), a district court "may decline to exercise supplemental jurisdiction over a claim ... if ... the district court has dismissed all claims over which it has original jurisdiction."

***43** The Fourth Circuit has recognized that under § 1367(c) (3), “trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when federal claims have been extinguished.” *Shanaghan v. Cahill*, 58 F.3d 106 (4th Cir. 1995); *see also ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 394 (4th Cir. 2012) (“Section 1367(c) recognizes courts’ authority to decline to exercise supplemental jurisdiction in limited circumstances, including ... where the court dismisses the claims over which it has original jurisdiction.”); *Hinson v. Northwest Fin. S. Carolina, Inc.*, 239 F.3d 611, 616 (4th Cir. 2001) (stating that, “under the authority of 28 U.S.C. § 1367(c), authorizing a federal court to decline to exercise supplemental jurisdiction, a district court has inherent power to dismiss the case ... provided the conditions set forth in § 1367(c) for declining to exercise supplemental jurisdiction have been met”); *Ramsay v. Sawyer Property Management of Maryland, LLC*, 948 F.Supp.2d 525, 537 (D. Md. 2013) (declining to exercise supplemental jurisdiction over plaintiff’s state law claims after dismissing FDCPA claims); *Int'l Ass'n of Machinists & Aerospace Workers v. Werner-Masuda*, 390 F.Supp.2d 479, 500 (D. Md. 2005) (“Because the court will dismiss the claims over which it has original jurisdiction, the court will decline to exercise supplemental jurisdiction over the remaining state law claims.”).

When exercising this discretion, the Supreme Court has instructed federal courts to “consider and weigh ... the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over ... pendent state-law claims.” *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988). The Court has said: “Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.” *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

Pursuant to 28 U.S.C. § 1367(c), and the factors set forth in *Carnegie-Mellon*, 484 U.S. at 350, 108 S.Ct. 614, I decline to exercise supplemental jurisdiction over the eight State law claims in the Complaint, at least at this juncture. Although this case has been pending in this Court since February 2020, it has not progressed beyond the motion to dismiss stage. In the absence of subject matter jurisdiction, there is no reason for Counts Three through Ten to be heard in federal court, rather than in a Maryland State court, which is well equipped to address State law claims. *See, e.g., Medina v. L & M Const.*,

Inc., RWT-14-00329, 2014 WL 1658874, at *2 (D. Md. Apr. 23, 2014) (“Finally, as a matter of comity, this Court will remand Medina’s state law claims back to state court, as ‘[n]eedless decisions of state law [by federal courts] should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.’”) (alteration in *Medina*) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. at 726, 86 S.Ct. 1130); *see also* 13D *Wright & Miller, Federal Practice and Procedure* § 3567.3 n. 72 (3d ed. 2020) (collecting cases).

Assuming that there is no original jurisdiction, plaintiffs may file their State-law claims in a Maryland court within thirty days following the entry of an Order of dismissal. As Judge William D. Quarles, Jr. explained in *Johnson v. Frederick Memorial Hosp., Inc.*, WDQ-12-2312, 2013 WL 2149762, at *7 n.26 (D. Md. May 15, 2013):

28 U.S.C. § 1367(d) provides that, “[t]he period of limitations for any claim asserted under subsection (a) ... shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.” *Accord Md. Rule 2-101(b)* (“[I]f an action is filed in a United States District Court or a court of another state within the period of limitations prescribed by Maryland law and that court enters an order of dismissal ... because the court declines to exercise jurisdiction ... an action filed in a circuit court within 30 days after the entry of the order of dismissal shall be treated as timely filed in this State.”).

VII. Conclusion

***44** For the foregoing reasons, I shall deny plaintiffs’ Surreply Motion (ECF 27); deny plaintiffs’ Sanctions Motion (ECF 30), without prejudice; and grant defendants’ Motion to Dismiss (ECF 18, ECF 19), without prejudice, and with leave to file an amended complaint by April 2, 2021. If plaintiffs fail to do so, I will direct the Clerk to close the case. At that point, dismissal would be without prejudice to plaintiffs’ rights to file suit in State court within thirty days following the entry of an order of dismissal, pursuant to 28 U.S.C. § 1367(d).

An Order follows, consistent with this Memorandum Opinion.

All Citations

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Bus.Disp.Guide 13,476

Footnotes

- 1 Section 1331 pertains to “federal question” jurisdiction. Section 1337 of 28 U.S.C. provides, in relevant part: “The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies” Although plaintiffs invoke § 1337, they offer no explanation of its applicability here. Nor do the defendants address the issue. In any event, even if § 1337 applies, it “provides no additional grant of jurisdiction beyond that provided in 28 U.S.C. § 1331.” *Dutcher v. Matheson*, 733 F.3d 980, 985 n.4 (10th Cir. 2013) (citing, *inter alia*, 13D Wright & Miller et al., Federal Practice & Procedure § 3574 (3d ed., April 2013 update)).
- 2 At this juncture, I must assume the truth of the facts alleged in the suit, as discussed, *infra*. See *Fusaro v. Cogan*, 930 F.3d 241, 248 (4th Cir. 2019). The Court may consider documents attached to the Complaint or the Motion, “so long as they are integral to the complaint and authentic.” *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

I recite the facts in a manner generally consistent with the structure of the Complaint, to the extent feasible. But, the Complaint is not a model of clarity and there is considerable redundancy. A “party should seek to frame his allegations as directly as possible; redundancy and verbosity are to be strictly avoided.” 5 *Wright & Miller, Federal Practice and Procedure* § 1281 (3d. ed. 2020). Moreover, the Complaint contains improper legal arguments, replete with citations to case law. See *Matthew B. v. Pleasant Valley Sch. Dist.*, No. 3:17-CV-2380, 2018 WL 4924013, at *3 (M.D. Pa. Oct. 10, 2018) (directing plaintiff’s counsel to “refrain in the future” from including “legal arguments or conclusions,” including citations to legal authority, in a pleading); *Belanger v. BNY Mellon Asset Mgmt., LLC*, 307 F.R.D. 55, 58 (D. Mass. 2015) (“A pleading is not an appropriate vehicle for aggregating masses of evidence or advancing premature legal arguments.”); *Martinez v. Pittsford Cent. Sch. Dist.*, No. 04-CV-6229T, 2005 WL 643416, at *1 (W.D.N.Y. Mar. 18, 2005) (stating that “legal argument, legal citation, evidentiary pleadings, and conclusory allegations” rendered the complaint “difficult to comprehend, and virtually impossible to answer”).

I note other issues with the Complaint, *infra*.

- 3 The Complaint refers repeatedly to the “Layani Plaintiffs” without defining the term. See, e.g., ECF 1, ¶¶ 52-54, 71, 78, 80-83, 85. From context, it appears that the term refers to Gerard Layani and Britt, the limited liability company whose sole member is Gerard Layani. The term does not appear to include Julien Layani, a non-party who resides in France. *Id.* ¶ 52. Julien Layani is alleged to have acted as “representative” of the Layani Plaintiffs in several of the transactions at issue.

The Complaint does not clearly distinguish between actions taken by Gerard Layani in an individual capacity and those taken by his limited liability company. When reciting allegations that clearly implicate an individual, I shall refer only to Layani. When reciting other allegations, I shall adopt plaintiffs’ convention and refer to the “Layani Plaintiffs.”

- 4 The Complaint contains multiple spellings for this entity: “WAZ-Investments, LLC”; “WAZ Investments, LLC,” and “WAZ Investments LLC.” Compare ECF 1 at 1 (case caption) with *id.* ¶¶ 4, 7, 18.
- 5 Throughout the Complaint, plaintiffs describe actions taken by “Defendants.” But, in most instances, the context suggests that plaintiffs are referring to some or all of the Ouazanas and the corporate defendants associated with them, and not to the Doe Defendants.
- 6 The Complaint does not say anything else about the suit. But, plaintiffs have submitted an exhibit to their opposition, consisting of a copy of a filing from a case identified as *Gerard Layani, et al. v. Isaac Ouazana, et al.*, Circuit Court for Baltimore City, Case No. 24-C-19-000100. ECF 24-6. A review of the docket in that case shows that on January 9, 2019, Layani and Britt filed suit against I. Ouazana, “Waz Brothers LLC,” and “Waz Management LLC.” According to ECF 24-6,

the parties entered a “(Consented) Stipulation of Dismissal Without Prejudice To Refile.” It has a docket stamp of Oct. 17, 2019. *Id.* at 2.

- 7 Waz Properties Inc. is not named as a defendant in the suit.
- 8 Ragones “attempted to resolve [his] claims against Defendants under Rabbinical Supervision in Beit Din, prior to instituting these proceedings.” *Id.* ¶ 34. But, “Defendants refused to appear” *Id.* “Beit Din” or “Bais Din” means “Rabbinical Court.” See ECF 24-7.
- 9 Plaintiffs assert that “mossar” is a “derogatory Hebrew word combining the meanings of ‘snitch’ and traitor, and which refers to Jewish persons who report, outside the Jewish community, the misconduct of other Jewish persons.” ECF 30 at 4.
- 10 The spellings “Mcleod” and “McLeod” both appear in ECF 30-1, ¶ 16.
- 11 I make no ruling at this juncture as to whether, at a trial, plaintiffs would be entitled to adduce evidence of the defendants’ alleged inappropriate conduct.
- 12 The fact that plaintiffs continued to do business with defendants after November 2014, despite their knowledge of prior fraudulent misconduct by defendants, might be relevant to the State-law tort claims. For example, in Maryland contributory negligence is a complete defense to a negligence claim. See *Berkenfeld v. Lenet*, 921 F.3d 148, 153 (4th Cir. 2019) (stating that “contributory negligence operates as a complete bar to recovery”) (citing *Union Mem'l Hosp. v. Dorsey*, 125 Md. App. 275, 281, 724 A.2d 1272, 1275 (1999)); see also *Coleman v. Soccer Ass'n of Columbia*, 432 Md. 679, 690, 69 A.3d 1149, 1155 (2013); *Kassama v. Magat*, 136 Md. App. 637, 657, 767 A.2d 348, 359 (2001), aff'd, 368 Md. 113, 792 A.2d 1102 (2002).
- 13 As noted, the exhibits submitted by plaintiffs with their opposition, containing correspondence from non-parties regarding the Ouazanas, are not integral to the Complaint and cannot be considered in the context of a motion to dismiss.

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T.V. v. Grindr, LLC

United States District Court, M.D. Florida, Jacksonville Division. | August 13, 2024 | Slip Copy |
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Outline

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T.V., as executor de son tort of the estate of A.V., a minor, and on behalf of the estate of A.V. and the survivors of the estate, Plaintiff,
v.
GRINDR, LLC, Defendant.

No. 3:22-cv-864-MMH-PDB

|
Signed August 13, 2024

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Report and Recommendation on Motion to Dismiss (D22)¹

Patricia D. Barksdale, United States Magistrate Judge

I. Background

*1 T.V. sues Grindr, LLC, on behalf of the estate of A.V.² While a minor,³ A.V. allegedly used Grindr's services marketed to gay, bisexual, transgender, and queer people and, through that use, was exposed to, and engaged in, sexual activities and relationships with adult users, resulting in severe emotional distress and bodily injuries culminating in death from a self-inflicted gunshot wound.

T.V. brings eight claims for relief, one based on 18 U.S.C. § 1595—the civil remedy provision of the Trafficking Victims Protection Reauthorization Act of 2003 (“TVPRA”), Pub. L.

No. 108-193—and seven based on Florida common law torts. D9 ¶¶49–161. The Court has jurisdiction.⁴

*2 Grindr moves to dismiss the claims under Rule 12(b) (6), Federal Rules of Civil Procedure.⁵ D22. For most claims, Grindr argues that an affirmative defense clearly appears on the face of the operative pleading; specifically, the defense under 47 U.S.C. § 230(c)(1)—part of the “Good Samaritan” provision of the “Online Family Empowerment” section of the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 501. *Id.* at 13–20. Grindr also argues that T.V. fails to allege facts making the claims plausible or otherwise fails to state a claim on which relief can be granted. *Id.* at 20–34. T.V. opposes dismissal and asks the Court to lift the stay.⁶ D32.

The motion to dismiss was referred to the undersigned to prepare a report and recommendation. D36. At the undersigned's direction, D39, T.V. supplemented the response to the motion to dismiss, D41, and Grindr replied to the supplemented response, D42.⁷ Grindr also twice supplemented its authority. D53, D60.

II. Operative Pleading (D9)⁸

A. Factual Allegations

1. General

When deciding a motion to dismiss a complaint for failure to state a claim on which relief can be granted, a court considers the complaint's factual allegations, accepts them as true, construes them in the light most favorable to the plaintiff, and draws all reasonable inferences from them in the plaintiff's favor. *Karantsalis v. City of Miami Springs*, 17 F.4th 1316, 1319 (11th Cir. 2021).

*3 In the operative pleading, T.V. alleges the following facts. Under the law just stated, to decide the motion to dismiss, the Court must consider them, accept them as true, construe them in the light most favorable to T.V., and draw all reasonable inferences from them in T.V.'s favor.

2. Grindr

Grindr, launched in 2009, is a “geo-social networking application [“app”] for smartphones designed to facilitate the coupling of gay and bisexual men in their geographic area.” D9 ¶¶10, 11. Grindr claims to be “the largest social

networking app[] for gay, bi, trans, and queer people.” *Id.* ¶¶12.

Grindr “runs on the iOS and Android mobile operating systems” and “is available for download at the Apple App Store and Google Play.” *Id.* ¶10. “Grindr Services” include Grindr’s “mobile device, software app[], website, and any other mobile or web service or app[]s owned, controlled, or offered by [Grindr].” *Id.* ¶15.

Grindr “publicizes the location of users of Grindr Services on its platform.” *Id.* ¶48(a). Grindr’s “user interface shows images of men arranged from [geographically] nearest to [geographically] farthest away.” *Id.* ¶13. “Users can see profiles of other users by tapping their image” and “can **chat** with one another on the interface.” *Id.* “Users interact [intending] that the **chat** may ... lead to a date or sexual encounter.” *Id.* On a website page—<https://www.grindr.com/about/>—Grindr represents “that the platform has millions of daily users who use their location-based technology in almost every country in every corner of the planet.” *Id.* ¶12 (emphasis omitted).

3. Grindr’s User Policy and User Agreement

Grindr has a “Privacy and Cookie Policy” on a website page—<https://www.grindr.com/privacy-policy/?lang=en-US>—and separately has a “Terms and Conditions of Service Agreement.” *Id.* ¶¶25, 27(b).

The policy “states that the Grindr App allows users to share sensitive information, including their sexual orientation and precise location, with [Grindr], the service providers who assist in running [Grindr]’s services, and other Grindr users.” *Id.* ¶27(b). The policy “states that user profile and distance information is shared with the Grindr Community.” *Id.* ¶34.

The agreement states that “users shall refrain from adding offensive, harassing, and pornographic material,” *id.* ¶27(e); “users are prohibited from including material on a personal profile page that contains video, audio, photographs, or images of any person under ... eighteen,” *id.* ¶27(f); and Grindr reserves the right to remove user content and material from Grindr’s platform, *id.* ¶¶42(b), 44.

The policy states that Grindr “provides a safe space where users can discover, navigate, and interact with others in the Grindr Community.” *Id.* ¶42(a). But the agreement states that Grindr “does not conduct criminal or other background screenings of its users,” *id.* ¶27(a); “denies any obligation to

monitor any user’s registration for Grindr Services,” *id.* ¶25; and “does not verify the information provided by the users with respect to users’ identity, health, physical condition, or otherwise,” *id.* ¶27(d).

The policy states that Grindr “uses Personal Data from its users to access their camera, photo roll, and microphone to allow a user to share with other users, conduct partner promotions, communicate with the user for promotions, and for Automated Decision Making—such as removing non-compliant images[.]” *Id.* ¶27(c).

4. Grindr’s Revenue Sources

*4 Grindr “has several revenue sources including ... its Grindr Xtra paid for subscription and advertising—especially for businesses making use of the app[]’s geo-location features to target their advertisements to a particular neighborhood or locality.” *Id.* ¶41. Grindr “profits from third party advertisements to users of Grindr Services.” *Id.* ¶41(d).

The policy states that Grindr “shares user information with Ad Partners,” *id.* ¶41(a), and “during the past twelve months, [Grindr] shared the following categories of Personal Data with [Grindr]’s third-party advertising partners who provided payment for ad placement: cookie or device IDs (such as advertising ID), connection information (such as type, carrier, speed), [and] opt-out status and technographics (such as device model, brand, [and] OS version),” *id.* ¶41(b). The policy “states that [Grindr] may promote programs and events with partners to offer discounts, early access, or other information or incentives to [Grindr]’s users.” *Id.* ¶41(c). The agreement states that “Grindr Services may include links to other [websites] or services, whether through advertising or otherwise,” *id.* ¶41(e); “[p]arties other than [Grindr] may provide services or sell products via ... Grindr Services,” *id.* ¶41(f); and Grindr “and its licensees may publicly display advertisement and other information adjacent to user content, but the user is not entitled to any compensation for such advertisements,” *id.* ¶41(g).

5. Grindr’s Introduction of “Daddy” and “Twink” “Tribes”

Grindr “introduced ‘Grindr Tribes,’ allowing users of Grindr Services to identify themselves with a niche group and filter their searches to better find their type.” *Id.* ¶31. “Grindr Tribes include ‘Daddy’^[9] and ‘Twink.’^[10]” *Id.* “The creation of the Twink Tribe made persons under ... eighteen ... feel welcome to access, download, use, purchase, and/or subscribe to Grindr Services.” *Id.* ¶32. “Users of Grindr Services can

more efficiently identify persons under ... eighteen ... by narrowing the search results to the Twink Tribe.” *Id.* ¶33.

6. Grindr’s “Niche” Market

“[T]he presence of persons under ... eighteen ... on Grindr Services created a niche market—separating [Grindr] from its competitors—and increasing [Grindr’s] market share and profitability.” *Id.* ¶36. Grindr “knew that users of Grindr Services—especially persons under ... eighteen ... are exposed to physical danger because of their access, download, use, purchase, and/or subscription to Grindr Services.” *Id.* ¶30. An example of a publication describing the problem is, “Grindr’s new owners are straight. They say that’s OK,” written by Sam Dean and published in the *Los Angeles Times* on July 2, 2020. *Id.* ¶¶30, 30(a).

7. Criticism of Grindr

*5 Grindr “faced criticism for the physical and mental harm suffered by persons under ... eighteen ... from their access, download, use, purchase, and/or subscription to Grindr Services,” including in these publications:

- a. Smith, S.E. “The Real Problem with Children Using Hookup Apps.” *The Daily Dot*, 2 Sept. 2014, <https://www.dailydot.com/>.
- b. McKim, Jenifer B., et al. “Unseen, Part 3: Popular Gay Dating App Grindr Poses Exploitation Risk to Minors.” *News, GBH*, 26 Jan. 2022, <https://www.wgbh.org/news/national-news/2021/07/12/popular-gay-dating-app-grindr-poses-exploitation-risk-to-minors>.
- c. Mendez II, Moises. “The Teens Slipping Through the Cracks on Dating Apps.” *The Atlantic*, Atlantic Media Company, 6 June 2022, <https://www.theatlantic.com/family/archive/2022/06/teens-minors-using-dating-apps-grindr/661187/>.
- d. Suto, Daniel J., et al. “Geosocial Networking Application Use among Sexual Minority Adolescents.” *J. of the Am. Acad. of Child & Adolescent Psychiatry*, vol. 60, no. 4, 2021, pp. 429–431., <https://doi.org/10.1016/j.jaac.2020.11.018>.
- e. “Texas Teacher Who Committed Suicide After Being Snagged in Underage Grindr Sex Sting Was Unfairly Set Up by Cops, Family Says.” *Criminal Legal News*, 20 Aug.

2021, <https://www.criminallegalnews.org/news/2021/aug/20/texas-teacher-who-committed-suicide-after-being-snagged-underage-grindr-sex-sting-was-unfairly-set-cops-family-says/>.

f. “There Are a Lot of Child Sexual Assaults on Grindr. Here’s Why.” *Protect Children from Meeting Strangers Online with SaferKid™*, <https://www.saferkid.com/blog/there-are-a-lot-of-child-sexual-assaults-on-grindr-here-s-why>.

...

h. Taylor, Samuel Hardman, et al. “Social Consequences of Grindr Use.” *Proceedings of the 2017 CHI Conference on Human Factors in Computing Systems*, 2017, <https://doi.org/10.1145/3025453.3025775>.

Id. ¶¶29, 29(a)–(f), 29(h) (citations reformatted).

Grindr also “faced criticism for failing to implement reasonable precautions to prevent persons under ... eighteen ... from accessing, downloading, using, purchasing, and/or subscribing to Grindr Services,” including in the publications just described in (a), (b), (c), and (f) and these publications:

- a. “Child Molesters Moving to Grindr to Find Underage Victims.” *Queerty* ..., 28 Apr. 2010, <https://www.queerty.com/child-molesters-moving-to-grindr-to-find-underage-victims-20100428>.
- b. Jozsa, Kyle, et al. “‘Safe behind My Screen’: Adolescent Sexual Minority Males’ Perceptions of Safety and Trustworthiness on Geosocial and Social Networking Apps.” *Archives of Sexual Behavior*, vol. 50, no. 7, 2021, pp. 2965–2980, <https://doi.org/10.1007/s10508-021-01962-5>.
- c. Macapagal, Kathryn, et al. “Hookup App Use, Sexual Behavior, and Sexual Health among Adolescent Men Who Have Sex with Men in the United States.” *J. of Adolescent Health*, vol. 62, no. 6, 2018, pp. 708–715., <https://doi.org/10.1016/j.jadohealth.2018.01.001>.

Id. ¶¶28, 28(a)–(c) (citations reformatted).

8. Grindr’s Ability to Prevent Minors From Accessing Grindr Services

Grindr could have prevented minors “from accessing, downloading, using, purchasing, and/or subscribing to Grindr Services,” evidenced by detection tools available through the website “sightengine,” <https://sightengine.com/detect-minor>

children. *Id.* ¶20. But Grindr “allowed users under ... eighteen ... to access, download, use, purchase, and/or subscribe to Grindr Services.” *Id.* ¶35. “In turn, [Grindr] served them up on a silver platter to the adult users of Grindr Services intentionally seeking to sexually groom or engage in sexual activity with persons under ... eighteen[.]” *Id.*

9. A.V., T.V., and R.V.

*6 While a minor, A.V. “accessed, downloaded, used, purchased, and/or subscribed to Grindr Services.” *Id.* ¶¶17, 18. As a result, A.V. was “exposed to and engaged in sexual relationships and activities with adult users of Grindr Services.” *Id.* ¶18. “A.V.’s access, download, use, purchase, and/or subscription to Grindr Services resulted in severe emotional distress and bodily injuries culminating in A.V.’s death from a self-inflicted gunshot wound” on August 11, 2020, when he was still a minor. *Id.* ¶¶16, 17, 19.

A.V. was survived by his parents, T.V. and the now late R.V. *Id.* ¶¶64(b), 64(c); *see* footnote 2, *supra* (explaining that R.V. died on August 13, 2023). They “lost the support, love, affection, comfort, and companionship of A.V., and ... experienced mental pain and suffering in the past and [T.V.] will continue to suffer such losses in the future.” *Id.* ¶65.

B. Other Allegations

When deciding a motion to dismiss for failure to state a claim on which relief can be granted, a court does not consider factual an allegation that is a bare recitation of the elements of a claim or is otherwise conclusory. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

T.V. includes conclusory allegations in the operative pleading. Under the law just stated, the Court must not consider these allegations to decide the motion to dismiss.

According to T.V., Grindr “undertook inadequate action ... to remove content and material from [its] platform that posed a threat to the health, safety, and wellbeing of A.V. and other” minors. D9 ¶45. Grindr “undertook inadequate action ... to screen [minors] ... attempting to access, download, use, purchase, and/or subscribe to Grindr Services[,] even though Grindr Services [are products] for adults and adults only.” *Id.* ¶24. “Grindr made no reasonable attempt to verify whether A.V. [had] attained the age of eighteen.” *Id.* ¶23. Grindr “undertook inadequate action ... to prevent A.V. from engaging in sexual relationships and activities with adult users of Grindr Services.” *Id.* ¶26.

Grindr “failed to implement adequate safeguards to prevent minors from accessing Grindr [S]ervices because such action is not in [Grindr’s] financial interest.” *Id.* ¶37. Grindr “knowingly benefited—financially or by receiving something of value—by participating in a venture which, in or affecting interstate commerce, recruited, enticed, harbored, transported, provided, or obtained by other means persons under ... eighteen ... that are caused to engage in commercial sex acts in violation of ... § 1595.” *Id.* ¶40. Grindr “received valuable consideration from A.V. and other [minors who] accessed, downloaded, used, purchased, and/or subscribed to Grindr Services to engage in sexual relationships and activity [with] adult users of Grindr Services.” *Id.* ¶38. “A.V. [also] received valuable consideration in exchange for the sexual relationships and activities with the adult users of Grindr Services.” *Id.* ¶39. “A.V. was a victim” of a “venture” that “recruited, enticed, harbored, transported, provided, or obtained by other means persons under ... eighteen ... caused to engage in commercial sex acts.” *Id.* ¶40. “A.V.’s emotional distress, bodily injuries, and death are a direct result of such activity.” *Id.*

According to T.V., Grindr “knew or should have known” that A.V. was a minor “accessing, downloading, using, purchasing, and/or subscribing to Grindr Services,” *id.* ¶21; that “A.V. was a minor incapable of consenting to” the policy and any agreement, *id.* ¶46; that A.V.’s “access, download, use, purchase, and/or subscription to Grindr Services endangered his health, safety, and wellbeing,” *id.* ¶27; and that “A.V. was engaging in sexual relationships and activity [with] adult users of Grindr Services,” *id.* ¶22.

C. Claims for Relief¹¹

*7 T.V. brings four of the eight claims for relief under the Florida Wrongful Death Act, codified at Fla. Stat. §§ 768.16–768.26. D9 ¶¶49–105.¹² In count one, T.V. sues Grindr for wrongful death based on the TVPRA. *Id.* ¶¶49–67. In count two, T.V. sues Grindr for wrongful death based on strict liability for a product design defect. *Id.* ¶¶68–83. In count three, T.V. sues Grindr for wrongful death based on negligence and “negligence per se” for a product design defect. *Id.* ¶¶84–93. In count four, T.V. sues Grindr for wrongful death based on negligence in failing to ensure that Grindr Services were safe for A.V. and other users. *Id.* ¶¶94–105.

In counts five through eight, T.V. brings “survival” claims “[i]n the alternative to the ... wrongful death claims[.]”¹³ *Id.* ¶¶109, 123, 136, 150. In count five, T.V. sues Grindr for negligence in failing to ensure Grindr Services were safe for A.V. and other users. *Id.* ¶¶106–17. In count six, T.V. sues Grindr for intentional infliction of emotional distress. *Id.* ¶¶118–32. In count seven, T.V. sues Grindr for negligent infliction of emotional distress. *Id.* ¶¶133–45. In count eight, T.V. sues Grindr for negligent misrepresentation. *Id.* ¶¶146–61.

D. Prayer for Relief

*8 For all claims, T.V. demands a jury trial; damages for medical, burial, and funeral expenses; damages for past and future pain, suffering, and anguish; damages for the loss of A.V.’s support and services; pre-judgment interest; and costs. D9 ¶¶19–20, 22–25, 28–29, 32–35, 37, 39–40. For the wrongful death claim based on the TVPRA (count one) and the survival claims based on intentional infliction of emotional distress (count six) and negligent misrepresentation (count eight), T.V. also demands punitive damages. *Id.* ¶¶66, 132, 161. For the wrongful death claim based on the TVPRA, T.V. also demands injunctive relief “to bring [Grindr] into compliance with the” law.¹⁴ *Id.* ¶67.

III. Motion to Dismiss (D22)

A. Factual Allegations

“Generally, when considering a motion to dismiss, the district court must limit its consideration to the [complaint] and any exhibits attached to it.” *Baker v. City of Madison*, 67 F.4th 1268, 1276 (11th Cir. 2023). “If the parties present, and the court considers, evidence outside the pleadings, the motion to dismiss generally must be converted into a motion for summary judgment.” *Id.*

“There are two exceptions to this conversion rule: (1) the incorporation-by-reference doctrine and (2) judicial notice.” *Id.* “Both exceptions permit district courts to consider materials outside a complaint at the motion-to-dismiss stage.” *Id.* Under the incorporation-by-reference doctrine, “a court may properly consider a document not referred to or attached to a complaint ... if the document is (1) central to the plaintiff’s claims; and (2) undisputed, meaning that its **authenticity** is not challenged.” *Johnson v. City of Atlanta*, 107 F.4th 1292, 1300 (11th Cir. 2024). Items satisfying the centrality requirement include product labels in a false-advertising case, *see Hi-Tech Pharm., Inc. v. HBS Int’l Corp.*, 910 F.3d

1186, 1189 (11th Cir. 2018); a purchase agreement in a fraudulent misrepresentation case, *see Maxcess, Inc. v. Lucent Techs., Inc.*, 433 F.3d 1337, 1340 n.3 (11th Cir. 2005); and an allegedly defamatory book in a defamation case, *see Hoffman-Pugh v. Ramsey*, 312 F.3d 1222, 1225 (11th Cir. 2002). Under the judicial notice rule, at any stage of a case and on its own, a court may judicially notice a fact that cannot be reasonably disputed because it either is generally known or can be readily and accurately determined from sources whose accuracy cannot reasonably be questioned. *Fed. R. Evid.* 201(b)–(d).

In its motion to dismiss, Grindr includes alleged facts about what Grindr calls its “Terms and Conditions of Service,” D22 at 11–12, but what the website Grindr cites calls its “Terms of Service,” *id.* at 11 (citing <https://www.grindr.com/terms-of-service/>). According to Grindr, “[t]o create an account, a user must provide their date of birth and accept Grindr’s” terms. *Id.* The terms provide that actions by the user constitute a representation that the user is an adult:

YOU MUST BE A LEGAL ADULT. BY ACCEPTING THIS AGREEMENT, CREATING A USER ACCOUNT (AS DEFINED BELOW), AND ENTERING A DATE OF BIRTH FOR AGE VERIFICATION PURPOSES, YOU AFFIRMATIVELY REPRESENT AND WARRANT THAT ... YOU ARE CURRENTLY EIGHTEEN (18) YEARS OF AGE OR OVER (OR TWENTY-ONE (21) YEARS IN PLACES WHERE EIGHTEEN (18) YEARS IS NOT THE AGE OF MAJORITY).

Id. (citing § 1.2). The terms “prohibit minors from using the platform.” *Id.* (citing § 1.1). The terms describe user responsibilities:

YOU ARE SOLELY RESPONSIBLE FOR YOUR USE OF THE GRINDR SERVICES AND YOUR INTERACTIONS WITH OTHER USERS (WHETHER ON OR OFF THE GRINDR SERVICES). GRINDR MAKES NO REPRESENTATIONS OR WARRANTIES AS TO THE CONDUCT, IDENTITY, INTENTIONS, LEGITIMACY, OR VERACITY OF ANY USERS ... GRINDR DOES NOT CONDUCT CRIMINAL OR OTHER BACKGROUND SCREENINGS OF OUR USERS ... GRINDR DOES NOT INQUIRE INTO THE BACKGROUNDS OF OUR USERS OR ATTEMPT TO VERIFY THE INFORMATION PROVIDED BY OUR USERS IN CONNECTION WITH ACCOUNT CREATION, INCLUDING THE ACCURACY OF THE DATE OF BIRTH REPORTED[.]

Id. at 11–12 (citing § 2).

***9** Grindr states, “Grindr takes the facts from the Complaint[] and sources incorporated by reference or otherwise subject to judicial notice.” D22 at 11 n.1. Grindr cites *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 (11th Cir. 1999), in which the Eleventh Circuit ruled that, when considering a motion to dismiss in a securities fraud case, a court may take judicial notice of what statements are in public documents required to be filed and filed with the Securities and Exchange Commission. *Id.*

T.V. does not respond to Grindr's inclusion of alleged facts in its motion to dismiss. *See* D32. The undersigned directed Grindr to explain why it includes the alleged facts in its motion to dismiss.¹⁵ D39 at 3. Grindr states that the alleged facts “underscore that Grindr is an app designed for and directed at adults that A.V. accessed without permission” and that “[t]his means, for example,” that T.V. “cannot state a product liability claim because the risk that [A.V.] would meet an adult on an adult dating app was known,” and that T.V. cannot state a negligent misrepresentation claim “because [the alleged facts show] that any reliance on the alleged representations that Grindr was safe and enforced its age restriction[] was not justifiable.” D42 at 26. Grindr no longer references judicial notice as a basis for including the alleged facts, instead arguing that the Court can consider the alleged facts because T.V. references other terms in the pleading. *Id.* Grindr relies on *Baker*, 67 F.4th at 1277, in which the Eleventh Circuit held that, under the incorporation-by-reference doctrine, the district court properly considered video footage from an officer's body-worn camera to decide a motion to dismiss because the plaintiff referenced the footage in the complaint, the footage was filed with the motion, the footage depicted events central to the plaintiff's claims, the footage was clear, and the plaintiff did not challenge the footage's **authenticity**. *Id.* The Eleventh Circuit cautioned that any ambiguities in the footage must be construed in the plaintiff's favor. *Baker*, 67 F.4th at 1268.

***10** Employing the incorporation-by-reference doctrine to consider the facts alleged in the motion to dismiss is unwarranted. The alleged facts are unlike the video in *Baker*, which captured the very event on which the litigation was based. Grindr provides nothing to support that the terms Grindr quotes were the same on or before August 11, 2020, the day A.V. died, *see* D9 ¶16.¹⁶ See D22 at 11–12. The terms Grindr quotes do not match the terms T.V. alleges, and whether the parties even intend to reference the same document is unclear. Compare D9 ¶¶25, 27(a),

27(d)–(f), 41(e)–(g), 42(b), 46, 48(b), 151 (T.V.'s pleading referencing terms from Grindr's “Terms and Conditions of Service Agreement”) *with* D22 at 11–12 (Grindr's motion to dismiss referencing other terms from Grindr's “Terms & Conditions of Service” and citing a webpage titled, “Terms of Service,” comprised of 17,645 words). Moreover, contrary to the standard for deciding a motion to dismiss, Grindr appears to ask the Court to infer as a matter of law that A.V., a minor of unspecified age, had read the terms Grindr includes in its motion to dismiss and to place legal significance on that inference at this early stage of the litigation.

The undersigned recommends disregarding the Grindr-introduced terms in deciding to dismiss the motion.

B. Arguments

A complaint must contain “a short and plain statement of the claim showing that the [plaintiff] is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A party can move to dismiss a complaint for failure to state a claim on which relief can be granted. *Id.* at 12(b)(6). “Unless the dismissal order states otherwise,” a dismissal on this ground “operates as an adjudication on the merits.” *Id.* at 41(b).

The pleading standard “does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Id.* (quoting *Twombly*, 550 U.S. at 555). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 557; alteration in *Iqbal*).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant's liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).

“Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. “But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

“An affirmative defense is generally a defense that, if established, requires judgment for the defendant even if the plaintiff can prove his case by a preponderance of the evidence.” *Wright v. Southland Corp.*, 187 F.3d 1287, 1303 (11th Cir. 1999); see also *In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988) (explaining that a defense pointing “out a defect in the plaintiff’s *prima facie* case is not an affirmative defense”). “[G]enerally, the existence of an affirmative defense will not support a ... motion to dismiss for failure to state a claim.” *Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993). But a court may dismiss a complaint on a motion to dismiss for failure to state a claim if the complaint “allegations indicate the existence of an affirmative defense, so long as the defense clearly appears on the face of the complaint.” *Id.* (quoted authority omitted).

*11 Grindr argues that the Court must dismiss the wrongful death and survival claims based on the Florida common law torts (counts two through eight) because the § 230(c)(1) affirmative defense clearly appears on the face of the operative pleading. D22 at 13–20; D42 at 11–17. Grindr excludes from this argument the wrongful death claim based on the TVPRA (count one) because § 230(c)(1) does not “impair or limit” that claim. See 47 U.S.C. § 230(e)(5)(A) (quoted); see section IV.B, *infra* (discussing the scope of § 230(c)(1)). Grindr argues that the Court must dismiss all the claims (counts one through eight) because T.V. fails to allege facts to make the claims plausible or otherwise fails to state a claim on which relief can be granted. D22 at 20–34; D42 at 17–25.

IV. Law and Analysis

The undersigned addresses first whether T.V. alleges facts to make the claims plausible or otherwise states claims on which relief can be granted and second whether T.V. alleges facts clearly showing the existence of the § 230(c)(1) affirmative defense on the face of the operative pleading. Addressing the issues in that order recognizes that understanding the wrongful death and survival claims based on Florida common

law torts (counts two through eight) is important in analyzing whether the § 230(c)(1) defense precludes them.

A. Whether T.V. Alleges Facts to Make the Claims Plausible or Otherwise States Claims on Which Relief Can be Granted

1. TVPRA (Count One)

The TVPRA provides a federal civil claim for relief under 18 U.S.C. § 1595 for a violation of the federal criminal offense in 18 U.S.C. § 1591(a).

Section 1591(a) provides:

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce ... recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion ... or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished[.]

18 U.S.C. § 1591(a).

Section 1595(a) provides:

An individual who is a victim of a violation of [the chapter including § 1591(a)] may bring a civil action against the perpetrator (or whoever knowingly benefits, or attempts or conspires to benefit, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

18 U.S.C. § 1595(a).

To state a “beneficiary” claim under § 1595(a) premised on a violation of § 1591(a), in addition to plausibly alleging that the plaintiff is a sex trafficking victim under § 1591(a), the plaintiff “must plausibly allege that the defendant (1)

knowingly benefited, (2) from taking part in a common undertaking or enterprise involving risk and potential profit, (3) that undertaking or enterprise violated the TVPRA as to the plaintiff, and (4) the defendant had constructive or actual knowledge that the undertaking or enterprise violated the TVPRA as to the plaintiff.” *Doe #1 v. Red Roof Inns, Inc.*, 21 F.4th 714, 726 (11th Cir. 2021); *accord K. H. v. Riti, Inc.*, No. 23-11682, 2024 WL 505063, at *2 (11th Cir. Feb. 9, 2024); *Doe #1 v. Crowley Mar. Corp.*, No. 3:23-cv-383-MMH-JBT, 2024 WL 1346947, at *10 (M.D. Fla. Mar. 29, 2024); *Treminio v. Crowley Mar. Corp.*, No. 322-cv-174-CRK-PDB, 2023 WL 8627761, at *7 (M.D. Fla. Dec. 13, 2023) (to be published).

*12 For her wrongful death claim based on the TVPRA (count one), T.V. contends that A.V. was a victim of sex trafficking and Grindr “knowingly benefited from participating in a venture involving activities that violated the TVPRA.” D9 ¶¶53, 54. T.V. contends that Grindr “knowingly used instrumentalities of interstate commerce”; “knowingly benefited financially from [A.V. and other minors] accessing, downloading, using, purchasing, and/or subscribing to Grindr Services to engage in sexual relationships and activity with adult users of [Grindr’s] services”; and “knowingly benefited financially from adults accessing, downloading, using, purchasing, and/or subscribing to Grindr Services to engage in sexual relationships and activity with underage users of [Grindr’s] services.” *Id.* ¶¶58–60. And T.V. contends that Grindr “knowingly, in or affecting interstate commerce, recruited, enticed, harbored, transported, provided, or obtained by other means [minors, including A.V.] to engage in commercial sex acts” and “knowingly benefited, financially or by receiving something of value, from participating in a venture which, in or affecting interstate commerce, recruited, enticed, harbored, transported, provided, or obtained by other means [minors, including A.V.] to engage in commercial sex acts.” *Id.* ¶¶61–62.¹⁷

Grindr argues that T.V. fails to state a wrongful death claim based on the TVPRA—and the claim thus falls outside of a § 230 exception for TVPRA claims—because she fails to allege facts concerning Grindr’s participation in a venture.¹⁸ D22 at 20–25; D42 at 17–18. T.V. disagrees, emphasizing pleading allegations and arguing, “It is hard to believe that Congress intended [§] 230 immunity to give internet service providers a safe haven to profit from the sexual trafficking, grooming, and exploitation of persons under ... eighteen.” D32 at 8–10 (citing D9 ¶¶28, 31–41, 47, 54, 57–62).

For a civil claim under § 1595(a), a “‘venture’ is an undertaking or enterprise involving risk and potential profit.”¹⁹ *Red Roof Inns*, 21 F.4th at 724. “Participation” is taking part in or sharing “with others in common or in an association.” *Id.* at 725. “Participation in a venture” is taking “part in a common undertaking or enterprise involving risk and potential profit.” *Id.*

*13 If a § 1595(a) civil claim is premised on a § 1591(a) violation, the plaintiff must plausibly allege the venture in which the defendant participated committed a § 1591(a) crime against the plaintiff (i.e., the crime of knowingly recruiting, enticing, harboring, transporting, providing, obtaining, advertising, maintaining, patronizing, or soliciting a person for a commercial sex act while knowing that the person is not yet 18 years old and will be caused to engage in a commercial sex act; or knowingly benefiting financially or by receiving anything of value from knowingly assisting, supporting, or facilitating a violation). *Id.*

The seminal case on § 1595(a) in the Eleventh Circuit is *Red Roof Inns*, 21 F.4th 714. In *Red Roof Inns*, the plaintiffs sued hotel franchisors, alleging the plaintiffs had been trafficked at hotels the franchisors licensed to franchisees, and the franchisors knowingly benefited from the trafficker’s rent. *Red Roof Inns*, 21 F.4th at 719–21. The Eleventh Circuit affirmed dismissal of the complaint, holding that the plaintiffs had failed to plausibly allege that the defendants participated in a venture violating § 1591(a). *Id.* at 726. The Eleventh Circuit emphasized that the plaintiffs framed “the ventures at issue as sex trafficking ventures in their amended complaints” but “provided no plausible allegations that the franchisors took part in the common undertaking of sex trafficking.” *Id.* at 727. The Eleventh Circuit explained that the allegations may have suggested that the franchisors financially benefited from renting rooms to the traffickers but not that the franchisors “participated in a common undertaking involving risk or profit that violated the TVPRA —i.e., the alleged sex trafficking ventures.” *Id.* at 727–28. The Eleventh Circuit found insufficient allegations that “the franchisors investigated the individual hotels, took remedial action when revenue was down, read online reviews mentioning prostitution and crime occurring generally at the hotels, and controlled the training of managers and employees who were allegedly involved in facilitating sex trafficking at the hotels.” *Id.* at 727. According to the Eleventh Circuit, “None of these allegations suggest that the franchisors participated in an alleged common undertaking or enterprise with the Does’ sex traffickers or others at the hotel who

violated the statute.” *Id.* The Eleventh Circuit emphasized, “[O]bserving something is not the same as participating in it.” *Id.*

Accepting the factual allegations as true, construing them in the light most favorable to T.V., drawing all reasonable inferences from them in T.V.’s favor, *see Karantsalis*, 17 F.4th at 1319, and drawing on judicial experience and common sense, *see Ashcroft*, 556 U.S. at 664, T.V., like the plaintiffs in *Red Roof Inns*, fails to allege facts to make Grindr’s participation in a sex trafficking venture plausible. T.V. alleges in a conclusory manner that the venture consisted of recruiting, enticing, harboring, transporting, providing, or obtaining by other means minors to engage in sex acts, *see D9 ¶¶61, 62*, without providing plausible factual allegations that Grindr “took part in the common undertaking of sex trafficking.” *See Red Roof Inns*, 21 F.4th at 727 (quoted). Like the allegations in *Red Roof Inns*, the allegations indicate that Grindr financially benefits from minors using Grindr, but not that Grindr “participate[s] in a common undertaking involving risk or profit that violate[s] the TVPRA—i.e., the alleged sex-trafficking venture.” *See id.* (quoted). Like the allegations in *Red Roof Inns*, the allegations that Grindr knows minors use Grindr, knows adults target minors on Grindr, and knows about the resulting harms are insufficient. *See id.* “None of these allegations suggest that [Grindr] participate[s] in an alleged common undertaking or enterprise with the [adults] who violated the statute.” *See id.* (quoted).

*14 The undersigned recommends dismissing the wrongful death claim based on the TVPRA (count one) for failure to allege facts to make Grindr’s participation in a sex trafficking venture plausible.

2. Causation (Counts Two through Eight)

Florida law requires proximate causation for strict product liability, negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent misrepresentation. *See Fla. Std. Jury Instr. (Civ.) Nos. 403.12 (product liability), 401.12 (negligence), 410.6 (outrageous conduct causing severe emotional distress), 420.5 (negligent infliction of emotional distress), 409.6 (negligent misrepresentation).*²⁰

For her wrongful death and survival claims based on those torts (counts two through eight), T.V. contends that Grindr’s conduct was the “direct and proximate” cause of A.V.’s emotional distress and bodily injuries “culminating and

causing” his death. D9 ¶¶81, 83, 91, 93, 103, 105, 116, 130, 144, 159.

Grindr argues that the Court must dismiss the claims because T.V. fails to allege facts concerning proximate causation. D22 at 25–27; D42 at 19. T.V. disagrees, emphasizing pleading allegations, including those about publications describing the harm minors suffer from using Grindr Services. D32 at 11–12 (citing D9 ¶¶18, 19, 27, 29, 30, 81, 83, 91, 93, 103, 105, 116, 130, 144, 159).

To determine the existence of proximate cause, courts applying Florida law “employ a foreseeability analysis,” requiring “an evaluation of the facts of the actual occurrence.” *Grieco v. Daiho Sangyo, Inc.*, 344 So. 3d 11, 22–23 (Fla. 4th DCA 2022). The analysis “focuses on whether and to what extent the defendant’s conduct foreseeably and substantially caused the specific injury that actually occurred.” *Id.* at 23 (internal quotation marks and quoted authority omitted). “The court in proximate cause cases must determine … (1) causation in fact, i.e., whether the defendant’s conduct was a substantial factor in producing the result, and (2) whether the defendant’s responsibility is superseded by an abnormal intervening force.” *Id.* (quoted authority omitted).

“[H]arm is ‘proximate’ in a legal sense if prudent human foresight would lead one to expect that similar harm is likely to be substantially caused by the specific act or omission in question.” *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992). “[I]t is immaterial that the defendant could not foresee the *precise* manner in which the injury occurred or its *exact* extent.” *Id.* “[T]he law does not require an act to be the exclusive or even the primary cause of an injury … for that act to be considered the proximate cause of the injury[.]” *Ruiz v. Tenet Hialeah Healthsystem, Inc.*, 260 So. 3d 977, 982 (Fla. 2018). Instead, the act “need only be a substantial cause of the injury.” *Id.*

*15 Proximate causation is usually an issue for the factfinder. *Grieco*, 344 So. 3d at 23. But a court may resolve proximate causation “as a matter of law in certain cases such as those involving intervening negligence[.]” *Id.* (internal quotation marks and quoted authority omitted). “Under the doctrine of intervening negligence, the original negligence is not regarded as the ‘proximate cause’ of the injury, even though the injury might not have occurred but for the original negligence, if an independent efficient cause intervenes between the negligence and the injury and the original negligence does not directly contribute to the

force or effectiveness of the intervening cause.” *Id.* “The law does not impose liability for freak injuries that were utterly unpredictable in light of common human experience.” *McCain*, 593 So. 2d at 503.

But “[i]t is only when an intervening cause is completely independent of, and not in any way set in motion by, the tortfeasor’s negligence that the intervening cause relieves a tortfeasor from liability.” *Grieco*, 344 So. 3d at 23 (quoted authority omitted); *see also Sardell v. Malanio*, 202 So. 2d 746, 747 (Fla. 1967) (“To preclude liability of the initial negligent actor, the alleged intervening cause must be efficient in the sense that it is independent of and not set in motion by the initial wrong.”). “The ... question is whether the individual’s conduct is so unusual, extraordinary or bizarre (*i.e.*, so unforeseeable) that the policy of the law will relieve the [defendant] of any liability for negligently creating this dangerous situation.” *Goldberg v. Fla. Power & Light Co.*, 899 So. 2d 1105, 1116 (Fla. 2005) (internal quotation marks and quoted authority omitted; alteration in *Goldberg*).

“It is well-established that if the reasonable possibility of the intervention, criminal or otherwise, of a third party is the avoidable risk of harm which itself causes one to be deemed negligent, the occurrence of that very conduct cannot be a superseding cause of a subsequent misadventure.” *Holley v. Mt. Zion Terrace Apts., Inc.*, 382 So. 2d 98, 101 (Fla. 3d DCA 1980). “If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.” *Id.* (quoting *Restatement (Second) of Torts* § 449 (1965)).

“[W]here reasonable persons could differ as to whether the facts establish proximate causation—*i.e.*, whether the *specific* injury was genuinely foreseeable or merely an improbable freak—then the resolution of the issue must be left to the fact-finder.” *McCain*, 593 So. 2d at 504; *accord Goldberg*, 899 So. 2d at 1116. “The judge is free to take [the determination of proximate cause] from the fact-finder only where the facts are unequivocal, such as where the evidence supports no more than a single reasonable inference.” *McCain*, 593 So. 2d at 504; *see also Chirillo v. Granicz*, 199 So. 3d 246, 251–52 (Fla. 2016) (“We find that the [intermediate appellate court] ... properly classified the foreseeability of the decedent’s suicide as a matter of fact for the jury to decide in determining proximate cause.”).

Accepting the factual allegations as true, construing them in the light most favorable to T.V., drawing all reasonable inferences from them in T.V.’s favor, *see Karantsalis*, 17 F.4th at 1319, and drawing on judicial experience and common sense, *see Ashcroft*, 556 U.S. at 664, T.V. alleges sufficient facts for proximate causation; *i.e.*, facts making plausible that Grindr’s conduct was a “substantial factor” in producing A.V.’s injuries or suicide or both and that no “abnormal intervening force” superseded Grindr’s responsibility, *see Grieco*, 344 So. 3d at 22–23 (quoted). Those allegations include that Grindr “facilitate[d] the coupling of gay and bisexual men,” D9 ¶10; showed users the nearest users without criminal-history screening or age detection, *id.* ¶¶10, 20, 27(a), 27(d); introduced the “Twink” “Tribe” making minors feel welcome and allowing users to identify minors “more efficiently,” *id.* ¶¶32, 33; created a minor-based “niche market,” *id.* ¶36; and served as the meeting place for A.V. and the adults who had sexual relationships with him when he was a minor, resulting in his severe emotional distress, bodily injuries, and ultimate suicide, *id.* ¶¶17–19. At a minimum, reasonable persons could differ on whether Grindr’s conduct was a substantial factor in producing A.V.’s injuries or suicide or both and whether the likelihood adults would engage in sexual relations with A.V. and other minors using Grindr was a hazard caused by Grindr’s conduct.

*16 Grindr characterizes T.V.’s causation allegations as conclusory and argues that T.V. “alleges no facts linking A.V.’s suicide to his use of Grindr or interactions with adult users[.]” *See D22 at 26* (quoted). Grindr’s argument is unpersuasive because it depends on an unreasonably narrow reading of the allegations and disregards that, at this early stage of the litigation, all reasonable inferences from the allegations are drawn in T.V.’s favor. *See Karantsalis*, 17 F.4th at 1319.

Grindr relies on non-binding cases from this Court and the Southern District of Florida. *See D22 at 25–27* (citing *Rinker v. Carnival Corp.*, 753 F. Supp. 2d 1237, 1242 (S.D. Fla. 2010); *Sparks v. Medtronic, Inc.*, No. 8:20-cv-3074-SCB-TGW, 2021 WL 2649235, at *2 (M.D. Fla. June 28, 2021); *Colon v. Twitter, Inc.*, No. 6:18-cv-515-CEM-JK, 2020 WL 11226013, at *6 (M.D. Fla. Mar. 24, 2020); *Dimieri v. Medicis Pharms. Corp.*, No. 2:14-cv-176-SPC-DNF, 2014 WL 3417364, at *5 (M.D. Fla. July 14, 2014); *Kaufman v. Pfizer Pharms., Inc.*, No. 1:02-cv-22692, 2010 WL 9438673, at *8–9 (S.D. Fla. Nov. 23, 2010); *Bailey v. Janssen Pharm., Inc.*, No. 06-80702, 2006 WL 3665417, at *7 (S.D. Fla. Nov. 14, 2006)). These cases stand for the indisputable

proposition that dismissal of a claim is warranted if the plaintiff fails to allege sufficient facts for proximate causation. But T.V.'s factual allegations substantially differ from the factual allegations in those cases. Because “[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense,” *see Ashcroft*, 556 U.S. at 679, the cases on which Grindr relies do not materially help Grindr.

The undersigned recommends rejecting Grindr's argument that T.V. fails to allege sufficient facts for proximate causation.

3. Strict Liability (Count Two)

(a) General

In *West v. Caterpillar Tractor Co.*, the Florida Supreme Court adopted § 402A of the Restatement (Second) of Torts (1965). 336 So. 2d 80, 87 (Fla. 1976); *accord Standard Havens Prods., Inc. v. Benitez*, 648 So. 2d 1192, 1196–97 (Fla. 1994). Through § 402A, Florida law imposes strict liability in tort on the seller of a product under certain circumstances:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

West, 336 So. 2d at 84 (quoting § 402A). “Strict liability means negligence as a matter of law or negligence per se, the effect of which is to remove the burden from the user of proving specific acts of negligence.” *Id.* at 90.

“[A] product may be defective by virtue of a design defect, a manufacturing defect, or an inadequate warning.” *Ferayorni v. Hyundai Motor Co.*, 711 So. 2d 1167, 1170 (Fla. 4th DCA 1998). “As adopted by [the Florida Supreme] Court, an action sounding in strict liability requires the plaintiff to prove that (1) a product (2) produced by a manufacturer (3) was defective or created an unreasonably dangerous condition (4) that proximately caused (5) injury.” *Edward M. Chadbourne, Inc. v. Vaughn*, 491 So. 2d 551, 553 (Fla. 1986). For a design defect—the type of defect T.V. claims, D9 ¶¶68–83—the test focuses on the product's design, not the manufacturer's conduct. *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 506 (Fla. 2015).

*17 For her wrongful death claim based on strict liability (count two), T.V. contends that Grindr “was [the] designer, manufacturer, distributor, importer, seller and/or retailer[] of the Grindr Services it provided to consumers.” D9 ¶72. T.V. contends that “Grindr Services [were] unreasonably dangerous to A.V. and the ordinary consumer.” *Id.* ¶75. T.V. contends that “A.V. accessed, downloaded, used, purchased, and/or subscribed to Grindr Services without substantial change affecting the product.” *Id.* ¶76. T.V. contends that “Grindr Services failed to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by” Grindr. *Id.* ¶77. T.V. contends that Grindr “knew or should have known that [minors] including A.V. ... accessed, downloaded, used, purchased, and/or subscribed to Grindr Services and that condition was unreasonably dangerous to A.V. and the ordinary consumer.” *Id.* ¶78. T.V. contends that “Grindr Services were unreasonably dangerous because the danger in the design outweighed the benefits.” *Id.* ¶79. And T.V. contends that Grindr “knew or should have known that [minors] including A.V. ... accessed, downloaded, used, purchased, and/or subscribed to Grindr Services and engage in sexual relationships and activity with adult users of Grindr Services.” *Id.* ¶80. In supplemental briefing, T.V. clarifies that this claim pertains to the Grindr app. D41 at 2–3; *see* footnote 23, *infra* (explaining the difference between the wrongful death claim based on strict liability (count two) and the wrongful death claim based on “negligence per se product design defect” (count three)).

Grindr argues that the Court must dismiss the claim because, under the facts alleged, the Grindr app is not a product, much less an unreasonably dangerous product. D22 at 27–30; D42 at 22–23. T.V. disagrees, arguing that the Grindr app is “composed of hardware and software” constituting tangible

property and emphasizing pleading allegations relating to dangerousness. D32 at 17–19.

(b) “Product”

When interpreting Florida law, a federal court first determines whether precedent from the Florida Supreme Court exists. *SE Prop. Holdings, LLC v. Welch*, 65 F.4th 1335, 1342 (11th Cir. 2023). If the Florida Supreme Court has not decided the issue, the federal court “must predict” how the Florida Supreme Court would decide the issue. *Id.* (internal quotation marks and quoted authority omitted). In making this prediction, the federal court must “adhere to the decisions of the state’s intermediate appellate courts absent some persuasive indication that the state’s highest court would decide the issue otherwise.” *Id.* (internal quotation marks and quoted authority omitted). The absence “of explicit Florida case law on an issue does not absolve [a federal court] of [its] duty to decide what the state courts would hold if faced with it.” *Freeman v. First Union Nat'l*, 329 F.3d 1231, 1232 (11th Cir. 2003) (internal quotation marks and quoted authority omitted).

Neither the Florida Supreme Court nor any state intermediary appellate court has decided whether strict liability may be imposed based on an alleged design defect in the Grindr app or any similar app. To predict how the Florida Supreme Court would decide the issue, the undersigned details the reasons for strict liability in Florida, how Florida courts have addressed whether strict liability should apply to a new circumstance, what “product” means and does not mean, and analogous cases from Florida and other jurisdictions applying § 402A and similar law.

The Florida Supreme Court explained in *West* why adopting § 402A is “in line with reason and justice”:

Many products in the hands of the consumer are sophisticated and even mysterious articles, frequently a sealed unit with an alluring exterior rather than a visible assembly of component parts. In today's world it is often only the manufacturer who can fairly be said to know and understand when an article is suitably designed and safely made for its intended purpose.

West, 336 So. 2d at 86, 88.

“The manufacturer, by placing on the market a potentially dangerous product for use and consumption and by inducement and promotion encouraging the use of these products, thereby undertakes a certain and special responsibility toward the consuming public who may be

injured by it.” *Id.* at 86. “The obligation of the manufacturer must become what in justice it ought to be—an enterprise liability . . . The cost of injuries or damages, . . . to persons or property, resulting from defective products, should be borne by the makers of the products who put them into the channels of trade, rather than by the injured or damaged persons who are ordinarily powerless to protect themselves.” *Id.* at 92.

*18 A comment to § 402A likewise explains the policy for strict liability:

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Restatement (Second) of Torts § 402A cmt. c (1965).

Within the last decade, the Florida Supreme Court has reaffirmed its adoption of § 402A. See *Aubin*, 177 So. 3d at 510 (“[I]n approaching design defect claims, we adhere to the consumer expectations test, as set forth in the Second Restatement[.]”). “[T]he original purpose of imposing strict liability for defective and unreasonably dangerous products was to relieve injured consumers from the difficulties of proving negligence on the part of the product's manufacturer[.]” *Id.* at 506–07. “The important aspect of strict products liability that led to [the] adoption . . . remains true today: the burden of compensating victims of unreasonably dangerous products is placed on the manufacturers, who are most able to protect against the risk of harm, and not on the consumer injured by the product.” *Id.* at 510.

In reaffirming its adoption of § 402A, the Florida Supreme Court emphasized the focus on “consumer expectations,” requiring consideration of “whether a product is unreasonably dangerous in design because it failed to perform as safely as an ordinary consumer would expect when used as intended or in a reasonably foreseeable manner.” *Id.* at 503.

Focusing on consumer expectations “intrinsically recognizes that a manufacturer plays a central role in establishing the consumers’ expectations for a particular product, which in turn motivates consumers to purchase the product.” *Id.*

The Florida Supreme Court has observed:

[C]ommon law must keep pace with changes in our society and may be altered ... when the change is demanded by public necessity or required to vindicate fundamental rights. ... The common law has shown an amazing vitality and capacity for growth and development. This is so largely because the great fundamental object and principle of the common law was the protection of the individual in the enjoyment of all his inherent and essential rights and to afford him a legal remedy for their invasion.

Jews For Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1104 (Fla. 2008) (internal quotation marks and quoted authority omitted).

To determine whether strict liability should apply in circumstances not previously considered, the Florida Supreme Court has considered the purpose of imposing strict liability. *See, e.g., Samuel Friedland Fam. Enters. v. Amoroso*, 630 So. 2d 1067, 1071 (Fla. 1994) (extending strict liability to commercial lease transactions of products because “the rationale justifying the imposition of strict liability on manufacturers and sellers” also applies to commercial lessors); *Easterday v. Masiello*, 518 So. 2d 260, 261 (Fla. 1988) (declining to extend strict liability to a jail facility, explaining that the court is “unwilling to hold that a jail facility is a product that invokes the principles of products liability cases”); *Vaughn*, 491 So. 2d at 553 (declining to extend strict liability to a public road incorporating allegedly defective paving materials because “the ability to reap profits at the expense of the consuming public is not present in a state bid situation” and “public roads are not available for purchase in the sense that they are offered in the stream of commerce in the way that, for instance, soft drinks or automobiles are”); *see also Ford Motor Co. v. Hill*, 404 So. 2d 1049, 1051–52 (Fla. 1981) (observing that the policy reasons for adopting strict tort liability do not change merely because of the type of defect alleged and holding that the doctrine applies “to all manufactured products without distinction as to whether the defect was caused by the design or the manufacturing”); *Rivera v. Baby Trend, Inc.*, 914 So. 2d 1102, 1105 (Fla. 4th DCA 2005) (extending strict liability to a company that distributed and marketed a product despite that the company had “never possessed the product during its journey through the distribution chain” because the company “clearly was

responsible for placing the product in the stream of commerce and had the ability to control the design of the product”).

*19 Neither § 402A nor any Florida appellate court has defined “product” for the purpose of strict liability. As examples of products, § 402A describes tangible items:

The rule ... extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer. Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide. It applies also to products which, if they are defective, may be expected to and do cause only “physical harm” in the form of damage to the user's land or chattels, as in the case of animal food or a herbicide.

Restatement (Second) of Torts § 402A cmt. d (1965).

Section 19(a) of the Restatement (Third) of Torts defines a “product” as “tangible personal property distributed commercially for use or consumption.” Restatement (Third) of Torts § 19(a) (1998). The definition continues, “Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in th[e] Restatement.” *Id.*

Section 19(b) of the Restatement (Third) of Torts emphasizes that “[s]ervices, even when provided commercially, are not products,” with a reporter’s note observing that “[c]ourts are unanimous in refusing to categorize commercially[] provided services as products.” *Id.* § 19(b), § 19 reporter’s note to cmt. f.²¹

At least two reasons underlie the refusal to categorize services as products. First, unlike mass-produced goods, services are not marketed widely to the general public, and, accordingly, “parties injured by poor services are in a better position to locate the tortfeasor and identify the defect caused by the tortfeasor’s negligence.” *Snyder v. ISC Alloys, Ltd.*, 772 F. Supp. 244, 251 (W.D. Pa. 1991). Second, a product defect, even if latent, can be measured, but “a service is no more than direct human action or human performance”; “Whether that performance is defective is judged by what is reasonable under the circumstances and depends upon the actor’s skill, judgment, training, knowledge and experience.” *Pierson v. Sharp Mem'l Hosp., Inc.*, 216 Cal. App. 3d 340, 345 (Cal. Ct. App. 1989).

***20** Besides services, courts have refused to categorize as products knowledge, ideas, images, information, words, pictures, thoughts, expressions, and concepts and “have been willing to separate the sense in which the tangible containers of those ideas are products from their communicative element for purposes of strict liability.” *James v. Meow Media, Inc.*, 300 F.3d 683, 701 (6th Cir. 2002). As one court explained,

A book containing Shakespeare's sonnets consists of two parts, the material and print therein, and the ideas and expression thereof. The first may be a product, but the second is not. The latter, were Shakespeare alive, would be governed by copyright laws; the laws of libel, to the extent consistent with the First Amendment; and the laws of misrepresentation, negligent misrepresentation, negligence, and mistake. These doctrines applicable to the second part are aimed at the delicate issues that arise with respect to intangibles such as ideas and expression.

Products liability law is geared to the tangible world.

Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1034 (9th Cir. 1991).

“[T]he costs in any comprehensive cost/benefit analysis would be quite different were strict liability concepts applied to words and ideas. We place a high priority on the unfettered exchange of ideas. ... The threat of liability without fault (financial responsibility for our words and ideas in the absence of fault or a special undertaking or responsibility) could seriously inhibit those who wish to share thoughts and theories.” *Id.* at 1035; *see also Morgan v. W.R. Grace & Co. —Conn.*, 779 So. 2d 503, 505 (Fla. 2d DCA 2000) (acknowledging the First Amendment concerns that would be raised by applying strict liability for ultrahazardous activities to the marketing, promotion, and encouraging of such activities); *cf. Cardozo v. True*, 342 So. 2d 1053, 1056–57 (Fla. 2d DCA 1977) (explaining that the transmission of words is not the same as selling items with physical properties; thus, where a bookseller merely passes on a book without inspection, the thoughts and ideas within the book do not constitute a “good” for the purposes of a breach of implied warranty claim under the Uniform Commercial Code).²²

***21** Courts applying state law incorporating § 402A or similar law thus hold that strict liability claims cannot proceed based on content-based defects in written publications, training materials, manuals, and other media. *See, e.g., Winter*, 938 F.2d at 1034–36 (an encyclopedia explaining which mushrooms are edible); *Rodgers v. Christie*, 795 F. App'x 878, 878–80 (3d Cir. 2020) (a multifactor risk

estimation model for a pretrial release program); *Trishan Air, Inc. v. Dassault Falcon Jet Corp.*, No. CV 08–7294, 2011 WL 13186258, at *2 (C.D. Cal. May 17, 2011) (training materials and an aircraft flight simulator); *Isham v. Padi Worldwide Corp.*, No. CV06–00382, 2007 WL 2460776, at *5–9 (D. Haw. Aug. 23, 2007) (a diving program consisting of instructions, lessons, and training); *Gorran v. Atkins Nutr., Inc.*, 464 F. Supp. 2d 315, 323–25 (S.D.N.Y. 2006) (a diet book recommending a high-fat, high-protein diet); *Torres v. City of Madera*, No. CIVFF02-6385, 2005 WL 1683736, at *13–14 (E.D. Cal. July 11, 2005) (training manuals and instructions in slide presentations, a test, and handouts); *Snyder*, 772 F. Supp. at 251 (technical drawings, services, and information); *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1216–18 (D. Md. 1988) (a medical textbook describing a constipation remedy); *Herceg v. Hustler Mag., Inc.*, 565 F. Supp. 802, 803–04 (S.D. Tex. 1983) (a magazine article describing autoerotic asphyxiation); *Birmingham v. Fodor's Travel Publ'n*s, Inc., 833 P.2d 70, 73, 79 (Haw. 1992) (a book identifying a Hawaiian beach to visit); *Garcia v. Kusan, Inc.*, 655 N.E.2d 1290, 1293–94 (Mass. App. Ct. 1995) (the concept of, and instructions for, a floor-hockey game); *Way v. Boy Scouts of Am.*, 856 S.W.2d 230, 232, 238–39 (Tex. App. 1993) (a supplement on shooting sports in a magazine for boys); *Smith v. Linn*, 563 A.2d 123, 124, 126 (Pa. Super. Ct. 1989) (a book recommending a liquid protein diet).

Likewise, courts applying state law incorporating § 402A or similar law hold that strict liability claims cannot proceed based on defects in ideas, images, words, pictures, thoughts, and expressions in games, video games, music, movies, and websites. *See, e.g., James*, 300 F.3d at 700–01 (video games, movies, and websites); *Watters v. TSR, Inc.*, 904 F.2d 378, 381 (6th Cir. 1990) (“Dungeons & Dragons” game); *Est. of B.H. v. Netflix, Inc.*, No. 4:21-cv-06561, 2022 WL 551701, at *3 (N.D. Cal. Jan. 12, 2022) (Netflix show); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 172–74 (D. Conn. 2002) (“Mortal Kombat” videogame); *Sanders v. Acclaim Ent., Inc.*, 188 F. Supp. 2d 1264, 1277–79 (D. Colo. 2002) (videogames and movies); *Davidson v. Time Warner, Inc.*, No. CIV.A. V-94-006, 1997 WL 405907, at *1, *14 (S.D. Tex. Mar. 31, 1997) (Tupac Shakur’s record *2Pacalypse Now*).

Most analogous to T.V.’s claim, some courts applying § 402A or similar law hold that strict liability claims cannot proceed based on defects in virtual platforms or apps. *See Jacobs v. Meta Platforms, Inc.*, No. 22CV005233, 2023 WL 2655586, at *4 (Cal. Super. Mar. 10, 2023) (Facebook); *Ziencik v. Snap, Inc.*, No. CV 21-7292, 2023 WL 2638314, at *4 (C.D. Cal.

Feb. 3, 2023) (Snapchat); *Jackson v. Airbnb, Inc.*, 639 F. Supp. 3d 994, 1010–11 (C.D. Cal. 2022) (Airbnb); *Intellect Art Multimedia, Inc. v. Milewski*, No. 117024/08, 2009 WL 2915273, at *7 (N.Y. Sup. Ct. Sept. 11, 2009) (a website used as “a forum for third-party expression”); *see also Jane Doe No. 1 v. Uber Techs., Inc.*, 79 Cal. App. 5th 410, 419 (Cal. Ct. App. 2022) (observing that the court below held “the Uber app was not a product”).

Some courts hold otherwise. *See In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, No. 4:22-md-03047, 2023 WL 7524912, at *29–34 (N.D. Cal. Nov. 14, 2023) (to be published), *motion to certify appeal denied*, No. 4:22-md-03047, 2024 WL 1205486 (N.D. Cal. Feb. 2, 2024) (functionalities of social media platforms); *Brookes v. Lyft Inc.*, No. 50-2019-CA004782, 2022 WL 19799628, at *2 (Fla. Cir. Ct. Sept. 30, 2022) (Lyft); *see also Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091–94 (9th Cir. 2021) (observing that the plaintiffs’ negligent design claim treats Snapchat as a product but not analyzing the issue of whether Snapchat is a product); *A.M. v. Omegle.com, LLC*, 614 F. Supp. 3d 814, 819–21 (D. Or. 2022) (holding that § 230(c)(1) does not bar a products liability suit against an online chatroom that connected a minor to an adult who sexually abused her online but not analyzing the issue of whether the chatroom is a product).

***22** Of the cases holding that apps and similar platforms can be subject to strict liability based on design defects, *Brookes* is the only one analyzing Florida law. And *In re Social Media Adolescent Addiction*, which relies on *Brookes*, provides the most recent and comprehensive analysis of the issue.

In *Brookes*, the plaintiff sued Lyft after being struck by a vehicle driven by a driver using the Lyft app. 2022 WL 19799628, at *1. She brought a strict liability claim, contending that the Lyft app had distracted the driver. *Id.* Applying the Florida Supreme Court’s decision in *West* and other Florida cases, the court ruled that the Lyft app is a product, rejecting Lyft’s argument that the Lyft app is a service. *Id.* at *2–5.

The court observed that the “question of whether the Lyft app[] is a product or a service for purposes of product liability law[] is purely a legal question,” “[t]here is no Florida precedent that has directly addressed” the issue, and “the case law in other jurisdictions is sparse and is inconclusive[.]” *Id.* at *2.

The court emphasized that “changes [are] rippling through our society as a result of the technology at issue” and explained how a Florida appellate court had recently described Uber as “a multi-faceted product of new technology” and questioned whether Uber “should be fixed into either the old square hole or the old round hole of existing legal categories[] when neither is a perfect fit.” *Id.* at *1 (quoting *McGillis v. Dep’t of Econ. Opportunity*, 210 So. 3d 220, 223 (Fla. 3d DCA 2017)).

The court observed that “[t]he principles ... in *West* have been ‘applied for almost four decades to cases involving a variety of products and contexts.’ ” *Id.* at *3 (quoting *Aubin*, 177 So. 3d at 503). The court continued, “There is no generally accepted definition of ‘product’ that prevails in the reported cases,” and “[t]he definition of ‘product’ should be fluid to accommodate developments in technology and is not susceptible to a ‘crabbed’ definition.” *Id.* Rather, the court stated, “Decisions regarding what constitutes a ‘product’ are reached in light of public policy behind the imposition of strict product liability.” *Id.*

The court explained that its “review of Florida case law leads ... to the conclusion that the Lyft app[] ... is a product for purposes of Florida product liability law.” *Id.* at *2; *see also id.* at *3 (“This [conclusion] is consistent with the Florida Supreme Court precedent in *West* and its progeny.”). The court observed that, under Florida law, “strict liability should be imposed only when a product the manufacturer places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.” *Id.* at *2 (citing *West*, 336 So. 2d at 86–87) (internal quotation marks omitted). The court further observed, “In setting forth the public policy rationale for the imposition of strict liability, the Florida Supreme Court in *West* found that ‘the cost of injuries or damages, either to persons or property, resulting from defective products should be borne by the makers of the products who put them into the channels of trade, rather than by the injured or damaged persons who are ordinarily powerless to protect themselves.’ ” *Id.* (quoting *West*, 336 So. 2d at 92).

***23** The court explained that, under Florida law, the Lyft app is a product for purposes of strict liability because Lyft designed the app for its business, made the design choices for the app, solely distributed the app into the marketplace, placed the app into the stream of commerce, mass-marketed the app, generated revenue and profits from the app, and had “the ability to control any risk or harm the design of the Lyft

app[] might cause once put into the stream of commerce.” *Id.* at *2–3. The court emphasized, “As set forth by the Florida Supreme Court in *West* and its progeny, products liability shifts the burden to ensure a safe, non-defective product on the party who is most able to protect against the harm and bear the cost.” *Id.* at *3 (citing *Aubin*, 177 So. 3d at 502–03).

The court found instructive the explanation of the distinction between a “product” and “service” in the Restatement (Third) of Torts. *Id.* at *5. The court observed that “strict liability does not extend to professionally provided services such as medical or legal assistance” or “to individuals who install or repair things” because these “service providers provide an individualized service for customers, and have not designed, or marketed the product.” *Id.* (citing Restatement (Third) of Torts, § 19, reporter's note to cmt. f). “Unlike these services,” the court continued, “Lyft's app[] is designed, distributed, and mass marketed by Lyft.” *Id.*

The court rejected Lyft's reliance on *Porter v. Rosenberg*, 650 So. 2d 79 (Fla. 4th DCA 1995). *Id.* at *3. In *Porter*, the court held a doctor who had performed breast implant surgery was not strictly liable because he had merely supplied the implant to the patient while performing a medical service and had been in no position to deter the production and distribution of the implants, having neither designed nor distributed them. 650 So. 2d at 82–83. In rejecting Lyft's reliance on *Porter*, the court explained that Lyft had not merely used the app to provide a service; instead, Lyft had designed and distributed the app, making its role different from a doctor exercising professional medical judgment and expertise in selecting the implant and conducting the surgery. *Brookes*, 2022 WL 19799628, at *3. Lyft, the court concluded, “should be responsible for any harm caused by its digital app[] in the same way the designer of any defective physical product is held accountable.” *Id.* The court emphasized that the plaintiff's claims “arise from the alleged defective design choices and the negligent design in conjunction with Lyft's business practices” and “Lyft was in the best position to control the risk of harm associated with its digital app[].” *Id.*

The court also rejected Lyft's reliance on *Quinteros v. InnoGames*, No. C19-1402, 2022 WL 898560, at *1, *7 (W.D. Wash. Mar. 28, 2022), which held the online video game platform “Forge of Empires” was not a product under Washington law. *Id.* at *4; see also *Quinteros v. InnoGames*, No. 22-35333, 2024 WL 132241, at *3 (9th Cir. Jan. 8, 2024) (affirming the district court's dismissal of the strict liability claim but on a ground different from the district court's ruling

that the platform is a service, not a product). The court found the district court opinion in *Quinteros* unconvincing because that court had applied a state statutory definition of “product” and had relied on a case focusing on “whether thoughts, ideas, and messages contained in a movie, video game, or website material constitute a product for purposes of strict product liability law.” *Brookes*, 2022 WL 19799628, at *4. The court observed that “[p]roduct liability law is not geared toward intangible thoughts, expressions, messages or ideas, whereas the tangible properties of websites can be subject to product liability law” and explained that, in those cases, “it was not the design of the video game or website that caused the alleged harm[,] it was the thoughts, expressions, and ideas contained within the video games or website that caused the harm.” *Id.* The court continued:

The distinction between tangible and intangible properties is also covered in the Restatement (Third) of Torts Section 19 ... comment d to Section 19(a). The comments section ... notes that courts have appropriately refused to impose strict product liability in cases where the plaintiff's grievances were ‘with the information, not with the tangible medium.’ However, the tangible medium itself which delivers the information is ‘clearly a product.’ *Id.* at comment d. The Reporter's notes comments also reflect that ‘computer software might be considered a product for purposes of strict liability in tort.’ *Id.* at Reporter's Notes, comment d. *Id.* (emphasis omitted). The court reasoned that the plaintiff's claim is “not based on expressions or ideas transmitted by the Lyft app[]”; instead, the claim is “based on the design of the app[] itself that was designed and distributed by Lyft into the stream of commerce.” *Id.* The claim, the court found, “is based on defects in Lyft's mass produced technically designed app[],” and the plaintiff “presented ... evidence that Lyft made design choices when it decided how, when and with what frequency the Lyft app[] requires ... the driver's attention,” putting Lyft “in the best position to protect against any alleged risk of harm caused by those design choices.” *Id.* The court emphasized that the claim “arises from the defect in Lyft's app[], not from the idea or expressions in the Lyft app[].” *Id.*

***24** The court rejected other non-Florida cases on which Lyft relied because the cases did not address “Florida case law in product liability claims,” did not provide persuasive reasoning, “did not address or mention Lyft's role as a designer and distributor of the Lyft app[],” and “did not address or mention Lyft's generation of revenue as a result of its distribution of the Lyft app[].” *Id.*

The court concluded:

The Florida Supreme Court has made clear that the policy for imposing strict products liability on the designer or manufacturer of a product is to protect the user and innocent bystanders from unreasonably dangerous products or products fraught with unexpected dangers. *West... ,* 336 So. 2d 86–87. If Lyft had designed commercial laundry machines and mass distributed them to laundromats operated by third-parties to provide a laundry service, Lyft could not credibly argue that the laundry machine was a service and not a product under a product liability claim for a design defect with the laundry machine. There is no rational basis to distinguish this Lyft app[] just because it involves enhanced technology from a laundry machine or any tangible object designed and distributed by an entity that causes harm due to a defective design. In both cases, the designer of the hypothetical Lyft laundry machine and the Lyft app[] placed into the stream of commerce to derive a profit, is in the best position to protect the user and innocent bystander against the risk of harm associated with any design defect.

Id. at *5.

The district court in *In re Social Media* relied on *Brookes*. See *In re Soc. Media*, 2023 WL 7524912, at *27. *In re Social Media* is pending multi-district litigation brought on behalf of children and adolescents against Facebook, Instagram, TikTok, Snapchat, and YouTube. *Id.* at *1. The plaintiffs contend that the defendants “target children as a core market,” “designed their platforms to appeal to and addict them,” have “created a youth mental health crisis through the defective design of their platforms,” and have created platforms facilitating and contributing “to the sexual exploitation and sextortion of children, as well as the ongoing production and spread of child sex abuse materials ... online.” *Id.* at *2 (internal footnotes, record citations, and quotation marks omitted).

*25 Addressing whether the platforms are products for strict liability purposes, the court criticized as “overly simplistic” and “misguided” the parties’ “all or nothing” approach. *Id.* at *19–20 (internal quotation marks omitted). The court explained:

While acknowledging that these proceedings implicate novel questions of law, including the applicability of products liability torts to the digital world, the parties repeatedly downplay nuances in the caselaw and the facts. The Court declines to adopt either party’s desired approach. Cases exist on both sides of the questions posed by this

litigation precisely because it is the *functionalities* of the alleged products that must be analyzed. This is borne out in the cases relied upon by all parties. The cases generally concern a specific product defect and the determination of whether a specific technology is a product hinges on the specifics of that defect. The same applies here. The Court determines it is necessary to analyze each defect pled by plaintiffs to determine whether they have adequately alleged the existence of a product (or products).

Id. at *20 (internal footnote omitted).

Based on the definition of “product” in § 19(a) of the Restatement (Third) of Torts, the court described “three circumstances” involving intangibles in the context of strict liability. *Id.* at *22–23. “First, intangible things can be products when analogized to ‘tangible personal property’ based on ‘the context of [its] distribution and use.’” *Id.* at *23. (quoting Restatement (Third) of Torts § 19(a)) (alteration in original). “Second, strict products liability has been imposed in unique circumstances where harm is caused by ... the distribution of objectively false information [in maps and navigational charts] or ... electricity.” *Id.* (internal quotation marks and quoted authority omitted). And “[t]hird ... ideas, content, and free expression have consistently been held *not* to support a products liability claim.” *Id.*

Analyzing the allegedly defective functionalities of the platforms and drawing on conclusions about whether they are analogous to tangible personal property and the design of tangible personal property or to ideas, content, and free expression, the court ruled the following functionalities are products subject to strict liability: (1) the failure “to implement robust age verification processes[,] ... effective parental controls[,] ... and effective parental notifications” (analogous to parental locks on medicine bottles and televisions); (2) the failure to “implement opt-in restrictions on the length and frequency of use” and “implement default protective limits to the length and frequency of use” (analogous to physical timers and alarms); (3) the use of “needlessly complicated” processes to deactivate and delete accounts; (4) the failure “to label images and videos [made with filters] as edited content”; (5) the design of filters permitting users to “‘blur imperfections’ and otherwise enhance their appearance in order to ‘create the perfect selfie’” (tools or analogous to tools); (6) the implementation of a filter enabling “users to overlay the speed they are traveling in real life onto a photo or video” (a tool or analogous to a tool); and (7) the failure “to design [] platforms to include ‘reporting protocols ... allow[ing] users or visitors’

“to report [child sexual abuse materials] and adult predator accounts” without logging in. *Id.* at *29–34.

*26 Like the parties in *In re Social Media*, Grindr and T.V. take an “all or nothing” approach, directing their arguments not to the functionalities about which T.V. complains but to the Grindr app as a whole. See D22 at 27–29; D32 at 17–19; D41 at 3; D42 at 22–23. As in *In re Social Media*, the parties’ approach may be “overly simplistic.” See *In re Soc. Media*, 2023 WL 7524912, at *20 (quoted).

For now, taking the approach the parties offer, T.V. alleges sufficient facts for product liability. Like Lyft in *Brookes*, Grindr designed the Grindr app for its business, see D9 ¶¶10, 11; made design choices for the Grindr app, *id.* ¶¶10, 13; placed the Grindr app into the stream of commerce, *id.* ¶¶10, 11; distributed the Grindr app in the global marketplace, *id.* ¶¶10–12; marketed the Grindr app, *id.* ¶14; and generated revenue and profits from the Grindr app, *id.* ¶41. See *Brookes*, 2022 WL 19799628, at *2–3. “As set forth by the Florida Supreme Court in *West* and its progeny, product liability shifts the burden to ensure a safe, non-defective product on the party who is most able to protect against the harm and bear the cost.” *Id.* at *3 (citing *Aubin*, 177 So. 3d at 502–03).

Grindr argues that its “platform is not a tangible item but an app[] that enables its users to communicate—that is, it provides a *service* to which product liability law is inapplicable.” D22 at 28–29. Grindr’s argument is unpersuasive because T.V. alleges not merely that Grindr offers the Grindr app as a service but also that Grindr designed and distributed the Grindr app, making Grindr’s role different from a mere service provider, putting Grindr in the best position to control the risk of harm associated with the Grindr app, and rendering Grindr responsible for any harm caused by its design choices in the same way designers of physically defective products are responsible. See *Brookes*, 2022 WL 19799628, at *3 (using the same rationale to reject that Lyft merely provides a service). The reasons for distinguishing services from products (i.e., services are not widely marketed to the general public and parties injured by poor services are thus positioned to find the tortfeasors and identify the defects, see *Snyder*, 772 F. Supp. at 251, and the caliber of services depends on providers’ skill, judgment, training, knowledge, and experience, see *Pierson*, 216 Cal. App. at 345) do not apply.

Grindr argues that “by trying to hold Grindr liable for users’ communications, [T.V.] seeks to apply the law of

product liability to ideas and expressions, in contravention of Florida law.” D22 at 29. Grindr’s argument is unpersuasive because T.V. is not trying to hold Grindr liable for “users’ communications,” see D22 at 29 (quoted), about which the pleading says nothing. See D9. T.V. is trying to hold Grindr liable for Grindr’s design choices, like Grindr’s choice to forego age detection tools, *id.* ¶20 (akin to a design choice to forego an effective safety cap on a medicine bottle), and Grindr’s choice to provide an interface displaying the nearest users first, *id.* ¶ 13 (akin to a design choice to make a dangerous feature prominent).

The undersigned recommends rejecting Grindr’s argument that, under the facts alleged, the Grindr app is not a product.

(c) “Unreasonably Dangerous”

Under Florida law, “[a] product is defective because of a design defect if it is in a condition unreasonably dangerous to the user [or] a person in the vicinity of the product and the product is expected to and does reach the user without substantial change affecting that condition.” Fla. Std. Jury Instr. in Civ. Cases, § 403.7(b) (brackets in original omitted); see footnote 20, *supra* (explaining that Florida’s standard jury instructions are not legal adjudications of their correctness but are used in this report and recommendation as a “shortcut” for an explanation of the law). “A product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the manufacturer or [when] the risk of danger in the design outweighs the benefits.” Instr. § 403.7(b) (brackets in original omitted; emphasis added).

*27 The “unreasonably dangerous” standard “balances the likelihood and gravity of potential injury against the utility of the product, the availability of other, safer products to meet the same need, the obviousness of the danger, public knowledge and expectation of the danger, the adequacy of instructions and warnings on safe use, and the ability to eliminate or minimize the danger without seriously impairing the product or making it unduly expensive.” *Radiation Tech., Inc. v. Ware Const. Co.*, 445 So. 2d 329, 331 (Fla. 1983). A comment to § 402A explains:

The rule ... applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only

from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by “unreasonably dangerous[.]” ... The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

Restatement (Second) of Torts § 402A, cmt. i.

Considering the balancing required by Florida law, T.V. alleges sufficient facts for unreasonable dangerousness. Those allegations and all reasonable inferences drawn in T.V.’s favor, *see Karantsalis*, 17 F.4th at 1319, include that Grindr designed its app so anyone using it can determine who is nearby and communicate with them, D9 ¶¶13, 48(a); to allow the narrowing of results to users who are minors, *id.* ¶¶31, 33; and to forego age detection tools, *id.* ¶20, in favor of a minor-based niche market and resultant increased market share and profitability, *id.* ¶36, despite the publicized danger, risk of harm, and actual harm to minors, *id.* ¶¶28, 28(a)–(h), 29, 29(a)–(h), 30, 30(a). At a minimum, those allegations make it plausible that the risk of danger in the design outweighs the benefits.

Grindr argues that “the alleged danger to A.V.—that he would meet adult users—was not merely well-known, but one of the core purposes of Grindr, and indeed a reason why Grindr forbids minors from using the app.” D22 at 29. Grindr contends, “Like alcoholic beverages and tobacco, the alleged dangers of the app cannot constitute a design defect under Florida law.” *Id.* at 29–30. Grindr relies on two cases: *Gibbs v. Republic Tobacco, L.P.*, 119 F. Supp. 2d 1288, 1295 (M.D. Fla. 2000), in which this Court held that loose-leaf tobacco is not unreasonably dangerous considering “widespread public knowledge and acceptance of the dangers associated with tobacco use”; and *Cook v. MillerCoors, LLC*, 829 F. Supp. 2d 1208, 1216–18 (M.D. Fla. 2011), in which this Court held

alcoholic beverages with caffeine and other stimulants are not unreasonably dangerous because, according to Florida courts, “the dangers associated with alcohol are well known.” *Id.* at 29. Grindr fails to offer convincing reasons why this Court should liken the Grindr app to alcohol and tobacco—products used for thousands of years—and rule that, as a matter of Florida law, there is widespread public knowledge and acceptance of the dangers associated with the Grindr app or that the benefits of the Grindr app outweigh the risk to minors.

*28 The undersigned recommends rejecting Grindr’s argument that T.V. fails to allege sufficient facts for unreasonable danger.

4. Duty (*Counts Three through Five*)

Under Florida law, “a claim of negligence requires the establishment of four elements[.]” *Williams v. Davis*, 974 So. 2d 1052, 1056 (Fla. 2007). One element is duty: “the defendant owed a duty, or obligation, recognized by the law, requiring the defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks.” *Id.* (internal quotation marks, quoted authority, and alterations omitted). The elements apply to general negligence claims, *see Williams*, 974 So. 2d at 1056 (a car crash), and to product liability claims based on negligence, *see Grieco*, 344 So. 3d at 22 (compressed-gas dusting spray).

For her wrongful death claim based on negligence and “negligence per se product design defect” (count three), T.V. contends that Grindr “owed a duty of care ... to A.V. ... to prevent foreseeable and known harms including ... the online sexual grooming of children.” D9 ¶88. T.V. contends that Grindr “owed a duty of care (negligence per se) to A.V. not to violate laws, such as the TVRPA, and to exercise reasonable care to prevent foreseeable and known harms including ... the online sexual grooming of children.” *Id.* ¶89. And T.V. contends that Grindr “breached the duties by providing defectively designed services, tools, and products to A.V. that rendered no protection from the known and reasonably foreseeable harms.”²³ *Id.* ¶90.

*29 For her wrongful death claim based on negligence (count four), and her alternative survival claim based on negligence (count five), T.V. contends that Grindr “owed a duty of care (negligence) to A.V. to exercise reasonable care to prevent foreseeable and known harms resulting from Grindr Services including ... the online sexual grooming

of children.” *Id.* ¶¶97, 110. T.V. contends that Grindr undertook duties “to ensure that persons under ... eighteen ... do not access, download, use, purchase, and/or subscribe to Grindr Services,” “to remove harmful content from Grindr Services,” and “to ensure that Grindr Services [were] safe for users of Grindr Services—including persons under eighteen ... accessing, downloading, using, purchasing, and/or subscribing to Grindr Services.” *Id.* ¶¶98–100; *see also id.* ¶¶111–113. T.V. contends that Grindr breached these duties by:

- (a) violating the TVPRA;
- (b) “knowingly, intentionally, and negligently allow[ing] persons under ... eighteen ... to access, download, use, purchase, and/or subscribe to Grindr Services”;
- (c) “knowingly, intentionally, and negligently allow[ing] persons under ... eighteen ... to access Grindr Services and engage in sexual relationships and activity with adult users of Grindr Services”;
- (d) “fail[ing] to undertake adequate precaution—if any—to prevent person under ... eighteen ... from accessing, downloading, using, purchasing, and/or subscribing to Grindr Services”;
- (e) “fail[ing] to undertake adequate precaution—if any—to prevent person under ... eighteen ... from accessing Grindr Services to engage in sexual activity with adult users of Grindr Services”;
- (f) “knowingly, intentionally, and negligently allow[ing] adult users of Grindr Services to engage in or attempt to engage in sexual relationships and activity with persons under ... eighteen ... accessing, downloading, using, purchasing, and/or subscribing to Grindr Services”;
- (g) “fail[ing] to undertake adequate precaution—if any—to prevent adult users of Grindr Services from engaging in or attempting to engage in sexual relationships and activity with persons under ... eighteen ... accessing, downloading, using, purchasing, and/or subscribing to Grindr Services”;
- (h) “knowingly, intentionally, and negligently mispresent[ing] that Grindr Services are safe”; and
- (i) “knowingly, intentionally, and negligently mispresent[ing] that [Grindr] monitors Grindr Services to remove harmful User Content[.]”

Id. ¶¶101(a)–(i), 114(a)–(i). And T.V. contends that the acts and omissions “were caused or allowed to exist by” Grindr, “were known to” Grindr, “or had existed for a sufficient length of time that [Grindr] should have known of the negligent actions, omissions, and conditions.” *Id.* ¶¶102, 115.

Grindr argues that the Court must dismiss the claims “sounding in negligence” because, under the facts alleged, Grindr owed A.V. no duty to prevent the misconduct of Grindr’s adult users or A.V.’s suicide.²⁴ D22 at 30–31 & 31 n.5; D42 at 19–22. T.V. disagrees, emphasizing pleading allegations and arguing they establish that (1) Grindr’s acts and omissions created foreseeable risks and (2) contractual and special relationships between Grindr and users of Grindr Services exist to create a duty. D32 at 12–14 (citing D9 ¶¶17–24, 27, 29, 42, 44, 46).

Duty is a “threshold” issue. *Jenkins v. W.L. Roberts, Inc.*, 851 So. 2d 781, 783 (Fla. 1st DCA 2003). The existence of a duty is usually a question of law. *Goldberg*, 899 So. 2d at 1110; *but see Johnson v. Howard Mark Prods., Inc.*, 608 So. 2d 937, 939 (Fla. 2d DCA 1992) (reversing summary judgment for the operator of a teenage night club and against the estate of a teenager killed while trying to cross a highway to patronize the night club and explaining that in cases involving certain dangerous conditions, “the case-specific standard of care can be a question for the jury to decide.”).

***30** Under Florida law, “the duty of care arises from four potential sources: (1) legislative enactments or administrative regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) a duty arising from the general facts of the case.” *Dorsey v. Reider*, 139 So. 3d 860, 863 (Fla. 2014) (emphasis omitted). “The statute books and case law ... are not required to catalog and expressly proscribe every conceivable risk ... to give rise to a duty of care.” *McCain*, 593 So. 2d at 503.

T.V. asserts Grindr’s duty of care arises from the TVPRA, unspecified laws, and the general facts of the case. *See D9 ¶¶88–90, 97, 110*. The undersigned addresses only a duty of care arising from the general facts of the case because the undersigned recommends dismissing the TVPRA claim, *see section IV.A.1, supra*, and T.V. does not identify other laws establishing a duty of care. *See D32*.

“[T]he determination of the existence of a common law duty ... from the general facts of the case depends upon an evaluation and application of the concept of foreseeability

of harm to the circumstances alleged[.]”²⁵ *U.S. v. Stevens*, 994 So. 2d 1062, 1066–67 (Fla. 2008). “[W]here a person's conduct is such that it creates a ‘foreseeable zone of risk’ posing a general threat of harm to others, a legal duty will ordinarily be recognized to ensure that the underlying threatening conduct is carried out reasonably.” *Id.* at 1067 (quoting *McCain*, 593 So. 2d at 503). “[A]s a general proposition[,] the greater the risk of harm to others that is created by a person's chosen activity, the greater the burden or duty to avoid injury to others becomes.” *Id.* “Thus, as the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken.” *Id.* (quoted authority omitted).

The “foreseeable zone of risk” test “is the test to be applied under Florida law to determine whether a duty exists under [Florida] negligence law.” *Id.*; see also *McCain*, 593 So. 2d at 503 (“[E]ach defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result. This requirement of reasonable, general foresight is the core of the duty element. ... Duty is the standard of conduct given to the jury for gauging the defendant's factual conduct. ... [C]ourts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant.”); *Whitt v. Silverman*, 788 So. 2d 210, 217 (Fla. 2001) (“Foreseeability clearly is crucial in defining the scope of the general duty placed on every person to avoid negligent acts or omissions. Florida ... recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others.”) (quoting *McCain*, 593 So. 2d at 503); *Demelus v. King Motor Co. of Ft. Lauderdale*, 24 So. 3d 759, 763 (Fla. 4th DCA 2009) (“Since *McCain*, the Florida Supreme Court has significantly expanded the concept of duty in Florida negligence law and made foreseeability the sole determinant of whether a duty exists.”); *Johnson v. Wal-Mart Stores E., LP*, No. 5D23-0201, 2024 WL 1595245, at *3 (Fla. 5th DCA Apr. 12, 2024) (to be published) (“Importantly, to establish a duty, the zone of risk created by a defendant's conduct must have been reasonably foreseeable, not just possible.”) (internal quotation marks and quoted authority omitted)).

***31** In applying the “foreseeable zone of risk” test, the Florida Supreme Court has “looked for guidance in sections 302, 302A, and 302B” of the Restatement (Second) of Torts because “[those] sections largely mirror [the] ‘foreseeable zone of risk’ analysis[.]” *Stevens*, 994 So. 2d at 1067. The duties described in those sections “attach to acts of commission, which historically generate a broader umbrella

of tort liability than acts of omission[.]” *Id.* (quoted authority and emphasis omitted).

Section 302 (“Risk of Direct or Indirect Harm”) provides, “A negligent act or omission may be one which involves an unreasonable risk of harm to another through either (a) the continuous operation of a force started or continued by the act or omission, or (b) the foreseeable action of the other, a third person, an animal, or a force of nature.” *Restatement (Second) of Torts* § 302.

Section 302A (“Risk of Negligence or Recklessness of Others”) provides, “An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person.” *Id.* § 302A.

Section 302B (“Risk of Intentional or Criminal Conduct”) provides, “An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.” *Id.* § 302B. A comment to § 302B provides an example involving children: “A leaves dynamite caps in an open box next to a playground in which small children are playing. B, a child too young to understand the risk involved, finds the caps, hammers one of them with a rock, and is injured by the explosion. A may be found to be negligent toward B.” *Id.* § 302B, cmt. c.

“Most negligence claims involve a negligent actor (one who owes a legal duty and breaches that duty) directly causing injury for which a plaintiff seeks to recover damages.” *Barnett v. Dep't of Fin. Servs.*, 303 So. 3d 508, 514 (Fla. 2020). “This is because generally, one has no duty to control the conduct of another to prevent harm, and no duty to warn those who may be endangered by harmful conduct, including the criminal acts of a third person.” *Id.* (internal quotation marks, quoted authority, and alteration omitted). A comment to § 302B explains:

Normally the actor has much less reason to anticipate intentional misconduct than he has to anticipate negligence. In the ordinary case he may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law. Even where there is a recognizable possibility of the intentional interference,

the possibility may be so slight, or there may be so slight a risk of foreseeable harm to another as a result of the interference, that a reasonable man in the position of the actor would disregard it.

[Restatement \(Second\) of Torts § 302B](#), cmt. d.

***32** But comment e to § 302B adds:

There are ... situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account. The following are examples of such situations. The list is not an exclusive one, and there may be other situations in which the actor is required to take precautions.

Id. § 302B, cmt. e. The comment provides these examples:

A. Where, by contract or otherwise, the actor has undertaken a duty to protect the other against such misconduct. Normally such a duty arises out of a contract between the parties, in which such protection is an express or an implied term of the agreement.

...

B. Where the actor stands in such a relation to the other that he is under a duty to protect him against such misconduct. Among such relations are those of carrier and passenger, innkeeper and guest, employer and employee, possessor of land and invitee, and bailee and bailor.^[26]

...

C. Where the actor's affirmative act is intended or likely to defeat a protection which the other has placed around his person or property for the purpose of guarding them from intentional interference. This includes a situation where the actor is privileged to remove such a protection, but fails to take reasonable steps to replace it or to provide a substitute.

...

D. Where the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional

misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct.

...

E. Where the actor entrusts an instrumentality capable of doing serious harm if misused, to one whom he knows, or has strong reason to believe, to intend or to be likely to misuse it to inflict intentional harm.

...

F. Where the actor has taken charge or assumed control of a person whom he knows to be peculiarly likely to inflict intentional harm upon others.

...

G. Where property of which the actor has possession or control affords a peculiar temptation or opportunity for intentional interference likely to cause harm.

...

H. Where the actor acts with knowledge of peculiar conditions which create a high degree of risk of intentional misconduct.

Id.

The Florida Supreme Court explains, “Comment ‘e’ to § 302B ... provides that there are two situations where an actor ‘is required to anticipate and guard against the intentional, or even criminal, misconduct of others’: (1) ‘where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account,’ or (2) where the actor is under a special responsibility to the victim.” *Stevens*, 994 So. 2d at 1067 (quoting [Restatement \(Second\) of Torts § 302B](#), cmt. e).

***33** [Section 449](#), Restatement (Second) of Torts (“Tortious or Criminal Acts the Probability of Which Makes Actor’s Conduct Negligent”) adds, “If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.” [Restatement \(Second\) of Torts § 449](#). A comment to § 449 explains, “This Section should be read together with § 302B, and the Comments to that Section, which deal with the foreseeable likelihood of the intentional

or even criminal misconduct of a third person as a hazard which makes the actor's conduct negligent." *Id.* § 449, cmt. a. Another comment to § 449 explains:

The happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability cannot relieve him from liability. The duty to refrain from the act committed or to do the act omitted is imposed to protect the other from this very danger. To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity.

Id. § 449, cmt. b.

"The Third Restatement has ... expounded upon the impact of Comment e. when taken in conjunction with the "special relationship" exceptions outlined in section 315. *Knight v. Merhige*, 133 So. 3d 1140, 1147 (Fla. 4th DCA 2014). Specifically:

Section 315 ... contributed to frequent judicial pronouncements ... that absent a special relationship an actor owes no duty to control third parties. *Section 315, however, must be understood to address only an affirmative duty to control third parties. It did not address the ordinary duty of reasonable care with regard to conduct that might provide an occasion for a third party to cause harm.* [Section] 302B, Comment e, provides for a duty of care when "the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such [third-party] misconduct." *Section 449* ... also contemplated liability, without regard to any special relationship, for acts that are negligent because of the risk of the third party's conduct.

Id. at 1147–48 (quoting Restatement (Third) of Torts § 37, cmt. d). "Thus, since section 302B is 'concerned only with the negligent character of the actor's conduct, and *not with his duty to avoid the unreasonable risk*,' a defendant who creates an 'unreasonable risk' through his or her own misfeasance is still 'under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.' " *Id.* (quoting Restatement (Second) of Torts § 302, cmt. a). "Florida case law precedent clearly recogniz[es] that negligence liability may be imposed on the basis of affirmative acts which create an unreasonable risk of harm by creating a foreseeable opportunity for third party criminal conduct, even though there is no 'special relationship' between the parties that independently imposes

a duty to warn or guard against that misconduct." *Stevens*, 994 So. 2d at 1068 (quoted authority omitted).

For example, the Florida Supreme Court ruled the following allegations were sufficient "to establish a duty of care under Section 302B" owed by an anthrax laboratory to a person who died from inhaling stolen anthrax mailed to his employer: the laboratory "knew or should have known about the risk of bioterrorism associated with anthrax under the laboratory's ownership and control," especially considering "its history of missing laboratory specimens"; "a reasonable medical research and testing laboratory operator in possession of those facts would understand that the public would be exposed to an unreasonable risk of harm unless it implemented adequate security procedures to guard against the risk of unauthorized interception of toxic materials from its laboratory"; and the death "was a foreseeable consequence of the [laboratory]'s failure to use reasonable care in adopting and implementing security measures reasonably necessary to protect against the possibility of unauthorized interception and release of the biohazards under its control." *Id.* at 1069 (quoting the trial court order).

*34 As another example, a Florida appellate court ruled the following allegations sufficed to establish under § 302B that a rental car company owed a duty of care to a British tourist "asscoeted by unknown criminals" while she was traveling in Miami in a rental car: the car "bore a license plate designation" easily recognized as a rental car; the company should have realized that criminals were targeting tourist car renters in certain areas of Miami; and a reasonable company would have understood that its customers would be exposed to an unreasonable risk of harm if not protected against this risk. *Shurben v. Dollar Rent-A-Car*, 676 So. 2d 467, 468 (Fla. 3d DCA 1996).

In contrast, a Florida appellate court ruled the following facts failed to establish that a car dealership owed a duty of care to a man injured in an accident involving one of three vehicles stolen from the dealership by a juvenile gang: to obtain the keys, the gang smashed hurricane-proof windows on the showroom's exterior and office windows on the showroom's interior, kicked-in doors, ransacked cubicles, and opened locked drawers; to leave, the gang rammed open a chained, locked gate and rammed or moved a vehicle blocking the gate; at night, the showroom was well lit and a guard patrolled the property; and none of the dealership's three dozen break-ins and vehicle thefts during the six previous years involved the gang's methods. *Demelus*, 24 So. 3d at 760–61. The court

explained, “[T]his particular form of theft was unforeseeable to [the dealership], given its prior history of vehicle theft. Questions of foreseeability are fact-dependent. Because [the dealership] had not experienced similar thefts in the past, the vehicle theft ... was unforeseeable as a matter of law. Furthermore, [the dealership]’s conduct did not *create* a risk.” *Id.* at 766.

As another example, a Florida appellate court ruled the following allegations failed to establish that a baseball tournament organizer owed a duty of care to an umpire who was pushed and punched by a batter after the umpire called a third strike: the organizer specialized in player development and the placement of high school athletes into college programs; the organizer selected the umpire; no one came to the umpire’s aid in the two minutes between when the umpire made the call and when the batter hit him; and the organizer had adopted game rules prohibiting players from having physical contact with umpires. *Saunders v. Baseball Factory, Inc.*, 361 So. 3d 365, 367–68 (Fla. 4th DCA 2023). The court explained that the “mere operation of a baseball tournament did not give rise to a duty to protect the umpire from a battery committed by a player, absent some additional risk factor that would have placed the [organizer] on notice of the potential for violence.” *Id.* at 367. The court elaborated: “The question is whether it was objectively reasonable to expect the danger causing [the] injury, not whether it was within the realm of any conceivable possibility. ... While emotions run high at a competitive youth baseball tournament, a player sucker punching the home plate umpire is more of a unicorn event than a perfect game.” *Id.* at 371.

Comment f to § 302B cautions:

It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence ..., it is a matter of balancing the magnitude of the risk against the utility of the actor’s conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the risk is relatively slight in comparison with the utility of the actor’s conduct, he may be under no obligation to protect the other against it.

Restatement (Second) of Torts § 302B, cmt. f.; *see also Saunders*, 361 So. 3d at 370 (quoting the factors in comment f).

*35 “A court’s decision as to whether a legal duty in negligence exists necessarily involves questions of public policy.” *Knight*, 133 So. 3d at 1149. “[T]he duty inquiry in a negligence case involves weighing the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.” *Id.* (internal quotation marks and quoted authority omitted). “Finding that a legal duty exists in a negligence case involves the public policy decision that a defendant should bear a given loss, as opposed to distributing the loss among the general public.” *Id.* (internal quotation marks and quoted authority omitted); *see also id.* at 1149–51 (ruling that even if the parents of a murderer who shot and killed family members at a holiday gathering had a duty of care under § 302B, no duty of care exists for public policy reasons related to familial relationships).

T.V. alleges sufficient facts to establish that Grindr owed A.V. a duty of care “from the general facts of the case.” *See Dorsey*, 139 So. 3d at 863. Applying the “foreseeable zone of risk” test as the Florida Supreme Court instructs, *see Stevens*, 994 So. 2d at 1067, Grindr’s alleged conduct created a foreseeable zone of risk of harm to A.V. and other minors. That alleged conduct, some affirmative in nature, includes launching the Grindr app “designed to facilitate the coupling of gay and bisexual men in their geographic area,” D9 ¶¶10, 11; publicizing users’ geographic locations, *id.* ¶48(a); displaying the image of the geographically nearest users first, *id.* ¶13; representing itself as a “safe space,” *id.* ¶42(a); introducing the “Daddy” “Tribe,” as well as the “Twink” “Tribe,” allowing users to “more efficiently identify” users who are minors, *id.* ¶¶31–33; knowing through publications that minors are exposed to danger from using the Grindr app, *id.* ¶¶28, 28(a)–(h), 29, 29(a)–(h), 30, 30(a); and having the ability to prevent minors from using Grindr Services but failing to take action to prevent minors from using Grindr Services, *id.* ¶20. These allegations describe a situation in which “the actor”—Grindr—“as a reasonable [entity], is required to anticipate and guard against the intentional, or even criminal, misconduct of others.” *See Restatement (Second) of Torts* § 302B, cmt. e. (quoted); *see also id.* § 302B, cmt. f (requiring consideration of the “known character, past conduct, and tendencies of the person whose intentional conduct causes the harm”; “the temptation or opportunity” that the situation may give that person for the misconduct;

“the gravity” of the possible harm; the possibility that another person “will assume the responsibility for preventing the conduct or the harm”; and “the burden of the precautions” the actor would have to take). Unlike in the car dealership case, *see Demelus*, 24 So. 3d at 766, or the baseball game case, *see Saunders*, 361 So. 3d at 367–71, Grindr, according to T.V., was placed on notice and knew of the dangers at hand. *See D9 ¶¶28, 28(a)–(h), 29, 29(a)–(h), 30, 30(a).*

*36 Moreover, considering the vulnerabilities of the potential victims, the ubiquitousness of smartphones and apps, and the potential for extreme mental and physical suffering of minors from the abuse of sexual predators, the Florida Supreme Court likely would rule that public policy “lead[s] the law to say that [A.V. was] entitled to protection,” and that Grindr “should bear [the] given loss, as opposed to distributing the loss among the general public.” *See Knight*, 133 So. 3d at 1149 (quoted); *see also Rupp v. Bryant*, 417 So. 2d 658, 667–68 (Fla. 1982) (explaining a “pragmatic[]” and “socially oriented” approach “assesses the interests of each party and society to determine whether a duty should be imposed”). Were Grindr a physical place people could enter to find others to initiate contact for sexual or other mature relationships, the answer to the question of duty of care would be obvious. That Grindr is a virtual place does not make the answer less so.

Grindr argues, “[T]he Complaint does not allege Grindr had the right or ability to control the conduct of adult users, and A.V.’s mere use of Grindr’s platform does not give rise to a ‘special relationship.’ … The ‘special relationship’ exception is inapplicable.” D22 at 30–31. Grindr relies on *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 598–99 (S.D.N.Y. 2018), in which the Southern District of New York held that the plaintiff—a former Grindr user whose ex-boyfriend impersonated him on Grindr—failed to allege sufficient facts of a special relationship of trust or confidence required for a duty to provide correct information and give rise to a negligent misrepresentation claim under New York law. *Id.* at 31. Grindr also relies on *Dyroff v. Ultimate Software Grp., Inc.*, No. 17-cv-05359-LB, 2017 WL 5665670, at *13–15 (N.D. Cal. Nov. 26, 2017), *aff’d* 934 F.3d 1093, 1101 (9th Cir. 2019), in which the Northern District of California held that the plaintiff—the mother of an adult who died from an overdose of heroin laced with fentanyl bought from a dealer he had met online through social networking posts on the defendant’s website—failed to allege sufficient facts of a special relationship required for a duty to warn under California law. *Id.*

Grindr’s argument does not warrant dismissal. Assuming without deciding that T.V. fails to allege sufficient facts showing a special relationship giving rise to a duty of care to guard against the misconduct of Grindr’s adult users, “Florida case law precedent clearly recogniz[es] that negligence liability may be imposed on the basis of affirmative acts” creating “an unreasonable risk of harm by creating a foreseeable opportunity for third party criminal conduct, even though there is no ‘special relationship’ between the parties that independently imposes a duty to warn or guard against that misconduct.” *Stevens*, 994 So. 2d at 1068 (quoted). Grindr fails to address this alternative basis for a duty of care or its alleged affirmative acts that include introducing the “Tribes.” *See D22 at 30–31; D42 at 19–21.*

In a footnote, Grindr observes, “A duty to protect the plaintiff from third-party conduct may also arise if the defendant controls the instrumentality of the harm, the premises upon which the tort is committed, or the person who committed the tort. … The Complaint does not allege Grindr controlled the adult users with whom A.V. had sexual interactions, nor identify the premises on which those interactions occurred or the instrumentality through which they were accomplished, let alone that Grindr controlled either.” D22 at 31 n.5. Grindr cites *Waves of Hialeah, Inc. v. Machado*, 300 So. 3d 739, 743 (Fla. 3d DCA 2020), in which a Florida appellate court held that a hotel guest who left his friend behind at a hotel after he had locked his key in his room did not owe his friend a duty of protection from third-party misconduct because he did not control the instrumentality, premises, or person associated with the harm. *Id.* Grindr’s observation is for naught; Florida’s “foreseeable zone of risk” test does not require control over the instrumentality, premises, or person. *See Stevens*, 994 So. 2d at 1067–69 (quoted).

*37 Grindr argues, “[T]he only injury that the Complaint identifies with specificity is A.V.’s suicide. While this was tragic, ‘[g]enerally no liability exists for another’s suicide in the absence of a specific duty of care.’ … Plaintiff points to no facts supporting such a duty here.” D22 at 31 (quoting *Surloff v. Regions Bank*, 179 So. 3d 472, 475 (Fla. 4th DCA 2015)) (alteration in motion); *see also* D42 at 20–21 (Grindr’s reply).

Grindr is correct that, under Florida law, a person has no duty of care to prevent the suicide of another person unless the suicide is foreseeable and the person has taken custody and control over the other person such that the person is in a position to control the risk. *Andreasen v. Klein, Glasser, Park & Lowe, P.L.*, 342 So. 3d 732, 734 (Fla. 3d DCA

2022); *see, e.g., id.* (affirming the dismissal of a wrongful death action alleging that attorneys' malpractice caused a lapse in insurance coverage leading to suicide but not that the attorneys had known the client was suicidal or had possessed a duty to exercise supervision over the client's daily activities; unlike in the medical provider context where a duty to prevent suicide may arise, "no state court has extended a similar duty to attorneys"); *Surloff*, 179 So. 3d at 475–76 (affirming the dismissal of a wrongful death action alleging a bank caused the decedent's overdose death by informing him of a loan denial despite knowing he could not process negative information because the bank had no special relationship with the decedent that would enable the bank to supervise his daily activities or protect him against suicide); *see also Paddock v. Chacko*, 522 So. 2d 410, 415–16 (Fla. 5th DCA 1988) (explaining that a psychiatric facility may owe a duty of care "to safeguard and protect a psychiatric patient with suicidal tendencies" when the patients are committed to the facility's custody such that the facility can take measures to prevent suicide).

Still, Grindr's argument fails for two reasons. First, A.V.'s suicide is not the only injury T.V. alleges; T.V. brings alternative survival claims based on injuries to A.V. shy of suicide. *See* D9 ¶¶106–61 (survival claims); *see also* footnote 13, *supra* (explaining Florida's survival law and pleading in the alternative). Second, T.V. does not contend Grindr owed A.V. a duty to prevent A.V.'s suicide. *See* D9 ¶¶88–90, 97–100, 110–113. "Although a duty analysis considers some general facts of the case, it does so only to determine whether a general, foreseeable zone of risk was created, without delving into the specific injury that occurred or whether such injury was foreseeable." *Chirillo*, 199 So. 3d at 249. As the Florida Supreme Court has explained, "the nonexistence of one specific type of duty does not mean that [the defendant] owe[s] the decedent no duty at all." *See id.* at 251 (quoted). Grindr's liability for A.V.'s suicide turns instead on proximate causation, addressed in section IV.A.2, *supra*. *See id.* at 251–52 ("We disapprove [the lower court's decision] on two grounds: (1) the [lower court] evaluated that case under a duty it had already determined did not apply ... — the duty to prevent suicide—and (2) the [lower court] should have assessed the foreseeability of the decedent's specific injury (suicide) as part of a proximate cause analysis, granting summary judgment on that ground only if the evidence was undisputed that the suicide was not foreseeable.").

*38 The undersigned recommends rejecting Grindr's argument that, under the facts alleged, Grindr owed A.V. no duty of care.

5. Intentional Infliction of Emotional Distress (Count Six)

(a) General

For the claim of intentional infliction of emotional distress, the Florida Supreme Court has adopted § 46 of the Restatement (Second) of Torts (1965). *E. Airlines, Inc. v. King*, 557 So. 2d 574, 575–76 (Fla. 1990). The claim has four elements: (1) "[t]he wrongdoer's conduct was intentional or reckless"; (2) "the conduct was outrageous"; (3) "the conduct caused emotional distress"; and (4) "the emotional distress was severe." *Deauville Hotel Mgmt., LLC v. Ward*, 219 So. 3d 949, 954–55 (Fla. 3d DCA 2017).

For her survival claim of intentional infliction of emotional distress (count six), T.V. contends that Grindr's "actions and omissions that allowed A.V. to access, download, use, purchase, and/or subscribe to Grindr Services before reaching the age of eighteen ... were extreme and outrageous, and beyond all possible bounds of decency, and utterly intolerable in a civilized community." D9 ¶124. T.V. contends that Grindr "was intentional and reckless in the actions and omissions that ignored and allowed A.V. and other [minors] to access, download, use, purchase, and/or subscribe to Grindr Services." *Id.* ¶125. T.V. contends that Grindr "intended to cause or disregarded the substantial probability of causing A.V. severe emotional distress." *Id.* ¶126. T.V. contends that "A.V. experienced emotional distress as a result of [Grindr]'s actions and omissions" and Grindr's "actions and omissions directly caused A.V.'s emotional distress." *Id.* ¶127, 128. And T.V. contends that Grindr "was in the exclusive position to stop the harm A.V. experienced but refused to do so." *Id.* ¶129.

Grindr argues that the Court must dismiss the claim for intentional infliction of emotional distress because, under the facts alleged, Grindr's conduct or behavior was neither sufficiently outrageous nor directed at A.V. D22 at 31–32; D42 at 23–24. T.V. disagrees, emphasizing pleading allegations and arguing that, taking the pleading "as a whole," she adequately pleads that Grindr's "behavior was outrageous and directed at A.V." D32 at 15–16 (citing D9 ¶¶23, 35, 37, 40, 124, 132).

(b) Outrageous Conduct

“Outrageous conduct” is conduct that exceeds “all bounds of decency” and is “regarded as odious and utterly intolerable in a civilized community[.]” *Deauville*, 219 So. 3d at 954. Under comment d of § 46, outrageous conduct involves facts that, if recited “to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’ ” *Gallogly v. Rodriguez*, 970 So. 2d 470, 472 (Fla. 2d DCA 2007) (quoting Restatement (Second) of Torts § 46, cmt. d).

“The subjective response of the person affected by the conduct does not control. Rather, the conduct must be evaluated on an objective basis[.]” *Matsumoto v. Am. Burial & Cremation Servs., Inc.*, 949 So. 2d 1054, 1056 (Fla. 2d DCA 2006); *see also Mellette v. Trinity Mem'l Cemetery, Inc.*, 95 So. 3d 1043, 1049 (Fla. 2d DCA 2012) (“[B]ecause the outrageousness test is objective, it is of no moment that [the plaintiff] testified that she did not believe [the defendant] meant to hurt her.”).

*39 “The standard for ‘outrageous conduct’ is particularly high in Florida.” *Clemente v. Horne*, 707 So. 2d 865, 867 (Fla. 3d DCA 1998) (quoted authority omitted); *see also Diamond v. Rosenfeld*, 511 So. 2d 1031, 1035 (Fla. 4th DCA 1987) (“All of the appellate decisions in this State addressing the tort ... have clearly suggested that it be narrowly construed and applied only when the facts would be sufficient to arouse such overwhelming aversion in the average person that he or she would exclaim, ‘Outrageous!’ ”).

Cases involving death and intentional infliction of harm are more apt than others to present sufficiently outrageous conduct. *See Deauville*, 219 So. 3d at 955–56 (distinguishing cases involving outrageous conduct by explaining that the cases “dealt with matters of life-and-death” and “[t]he defendants in those cases caused the death of another, and intentionally inflicted harm”).

Cases involving a disregard for human life and the high probability of causing severe emotional distress are also more apt than others to present sufficiently outrageous conduct. *See Kirkpatrick v. Zitz*, 401 So. 2d 850, 851 (Fla. 1st DCA 1981) (holding that the standard is met by conduct that “is outrageous and extreme in that it intolerably evinces a disregard for human life and the high probability that severe emotional distress would follow”), *dismissed sub nom. Transam. Ins. Co. v. Kirkpatrick*, 411 So. 2d 385 (Fla. 1981).

And cases involving the defendant’s knowledge that the plaintiff is especially sensitive, susceptible, or vulnerable to injury caused by mental distress are more apt than others to present sufficiently outrageous conduct. *Dependable Life Ins. Co. v. Harris*, 510 So. 2d 985, 988 (Fla. 5th DCA 1987) (“[A]nother factor recognized as enhancing the outrageousness of a defendant’s conduct is the defendant’s knowledge that the plaintiff is especially sensitive, susceptible, or vulnerable to injury caused by mental distress.”).²⁷

*40 “Whether the conduct is outrageous enough to rise to the level required by the tort may be decided as a question of law when the facts of a case can under no conceivable interpretation support the tort[.]” *Williams v. City of Minneola*, 575 So. 2d 683, 692 (Fla. 5th DCA 1991); *see also Glegg v. Van Den Hurk*, 379 So. 3d 1171, 1174 (Fla. 4th DCA 2024) (“The question of whether conduct is sufficiently outrageous enough to support a[]claim is a question of law, not a question of fact.”). “[B]ut where significant facts are disputed, or where differing inferences could reasonably be derived from undisputed facts, the question of outrageousness is for the jury to decide.” *Williams*, 575 So. 2d at 692. “The appropriateness of factfinders determining what is ‘outrageous’ is supported by ... the standard of outrageousness set out in comment d to [§] 46 of the Restatement[, which] is almost impossible to apply in any consistent way essentially because outrageousness is a not only highly subjective, but also an extremely mutable trait.” *Id.*; *see also Ponton v. Scarfone*, 468 So. 2d 1009, 1011 (Fla. 2d DCA 1985) (“Determining the boundaries of th[e] conduct which give meaning to the tort ... is not without some difficulty.”).

Florida courts have found the following conduct insufficiently outrageous as a matter of law: a hotel’s switching a wedding reception venue from a ballroom to a cramped, loud, public lobby without informing the bride and groom in advance, *Deauville*, 219 So. 3d at 951–952, 956; parishioners’ accusing a Baptist minister at a church meeting of using church money to buy a Mercedes, *LeGrande v. Emmanuel*, 889 So. 2d 991, 993, 995 (Fla. 3d DCA 2004); landlords’ knowingly maintaining rental property below flood level, causing continuous standing water, and failing to remedy termite infestation, resulting in an order to terminate electricity to the property and constructive eviction, *Clemente*, 707 So. 2d at 866–67; a person’s initiating and continuing for months “a campaign of telephonic harassment in the aftermath of a verbal conflict,” *Kent v. Harrison*, 467 So. 2d 1114, 1114–15 (Fla. 2d DCA 1985); and defendants’ threatening to

shoot their neighbors' dog, repeatedly complaining about noise from their neighbors' apartment, making anti-Semitic remarks about the neighbors, alienating others from the neighbors, repeatedly making threatening and harassing telephone calls to the neighbors, cursing the neighbors and their children, directing prayers for the dead at the neighbors and the neighbors' children and grandchildren, calling one of the neighbors a cripple and a criminal, accusing one of the neighbors of trying to rape one of the defendants, and generally trying to make the neighbors' lives as miserable as possible, *Diamond*, 511 So. 2d at 1033–35.

In contrast, Florida courts have found the following conduct sufficiently outrageous: a hospital's engaging in a "cover-up" after a patient died from negligent medical care and informing the patient's family the patient had died of natural causes despite knowing otherwise, *Thomas v. Hosp. Bd. of Dirs. of Lee Cnty.*, 41 So. 3d 246, 248–49, 256 (Fla. 2d DCA 2010); students' producing and distributing a newsletter in which an author threatened to rape the teacher and her children and kill the teacher, *Nims v. Harrison*, 768 So. 2d 1198, 1199 (Fla. 1st DCA 2000); a creditor's trying to locate a debtor by falsely representing to the debtor's mother that the debtor's children had been involved in a serious automobile accident, *Ford Motor Credit Co. v. Sheehan*, 373 So. 2d 956, 958 (Fla. 1st DCA 1979); and an insurer's directing its insured—a pet store—to keep from a patron bitten by a skunk that the insured had sold the skunk and the skunk was lost before the incubation period necessary to determine whether the skunk had rabies, *Kirkpatrick*, 401 So. 2d at 851.

Under the facts alleged, construed in the light most favorable to T.V., and with all reasonable inferences drawn in her favor, *see Karantsalis*, 17 F.4th at 1319, Grindr's conduct is sufficiently outrageous to survive a motion to dismiss. T.V. alleges Grindr designed a way for users to find nearby users for sexual relationships, D9 ¶¶10, 13, 48(a); Grindr uses "Tribes" making minors feel welcome ("Twink") and suggesting relationships between minors and adults ("Daddy"), which allowed adult users to identify nearby minors more efficiently and allowed Grindr to separate itself from its competitors as a platform with minors and increase its market share and profitability, *id.* ¶¶31–33, 36; Grindr knew minors were being exposed to danger because of their ability to use Grindr Services, *id.* ¶30; and Grindr could have prevented minors' exposure by using age detection tools but did not, *id.* ¶20. In short, says T.V., Grindr "knowingly and intentionally allowed users under ... eighteen ... to [use] Grindr Services. In turn, [Grindr] served them up on a silver

platter to the adult users of Grindr Services intentionally seeking to sexually groom or engage in sexual activity with persons under ... eighteen[.]" *Id.* ¶35. The allegations involve a high probability of causing severe emotional distress, *see Williams*, 575 So. 2d at 692–93, to sensitive, susceptible, and vulnerable persons, *see Dependable Life*, 510 So. 2d at 988, and suffice to "arouse" the "resentment" of "an average member of the community" against Grindr and lead them "to exclaim, 'Outrageous!'" *see Gallogly*, 970 So. 2d at 472 (quoted) (quoted authority omitted). To the extent this issue presents a close call, discovering facts might make the call less so.

*41 Grindr describes the conduct T.V. alleges as the "operation of an app that allows users to interact" and argues that the allegation falls far short of the extremely high standard for outrageousness. D22 at 32. Grindr's argument is unpersuasive because, like other arguments Grindr makes, it depends on an unreasonably narrow reading of the allegations and disregards that, at this early stage of the litigation, all reasonable inferences from the allegations are drawn in T.V.'s favor. *See Karantsalis*, 17 F.4th at 1319.

The undersigned recommends rejecting Grindr's argument that, under the facts alleged, Grindr's conduct is insufficiently outrageous as a matter of law.

(c) Directed At

Section 46 of the Restatement (Second) of Torts provides:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

Commentary explains the "directed at" language in § 46(2):

l. Conduct directed at a third person. Where the extreme and outrageous conduct is directed at a third person, as

where, for example, a husband is murdered in the presence of his wife, the actor may know that it is substantially certain, or at least highly probable, that it will cause severe emotional distress to the plaintiff. In such cases the rule of this Section applies. The cases thus far decided, however, have limited such liability to plaintiffs who were present at the time, as distinguished from those who discover later what has occurred. The limitation may be justified by the practical necessity of drawing the line somewhere, since the number of persons who may suffer emotional distress at the news of an assassination of the President is virtually unlimited, and the distress of a woman who is informed of her husband's murder ten years afterward may lack the guarantee of genuineness which her presence on the spot would afford. The Caveat is intended, however, to leave open the possibility of situations in which presence at the time may not be required.

Furthermore, the decided cases in which recovery has been allowed have been those in which the plaintiffs have been near relatives, or at least close associates, of the person attacked. The language of the cases is not, however, limited to such plaintiffs, and there appears to be no essential reason why a stranger who is asked for a match on the street should not recover when the man who asks for it is shot down before his eyes, at least where his emotional distress results in bodily harm.

Id. § 46, cmt. l; *see also M.M. v. M.P.S.*, 556 So. 2d 1140, 1140–41 (Fla. 3d DCA 1989) (“If courts were to allow relatives of tort victims compensation for the distress they suffer when they receive bad news about family members when there is no attendant intentional or reckless conduct directed toward them, an avalanche of litigation would ensue. Compensation is available for actual harm to the victim; only in carefully prescribed circumstances is compensation permitted for relatives who suffer emotional distress.”).

*⁴² A claim for intentional infliction of emotional distress, therefore, is generally available only to the person at whom the outrageous conduct is directed. *Baker v. Fitzgerald*, 573 So. 2d 873, 873 (Fla. 3d DCA 1990). Thus, for example, Florida courts have held a mother cannot recover for emotional distress arising from the death of her adult son, *id.*; parents cannot recover for emotional distress arising from the defendant's disclosing he had sexually abused their daughter throughout her childhood, *M.M.*, 556 So. 2d at 1140–41; and a wife cannot recover for emotional distress directed at her husband, *Habelow v. Travelers Ins. Co.*, 389 So. 2d 218, 220 (Fla. 5th DCA 1980).

T.V. brings the claim as a survival claim not for her own emotional distress but for A.V.’s emotional distress before he died. *See D9 ¶¶118–32; see also* footnote 13, *supra* (explaining Florida’s survival law). T.V. sufficiently alleges that Grindr directed actions toward A.V. as a minor. Those allegations include that Grindr’s “Twink” “Tribe” made minors feel welcome to use Grindr Services, D9 ¶32, and that the presence of minors on Grindr Services created a “niche market” increasing Grindr’s market share and making it more profitable, *id.* ¶36.

Grindr cites *Dunkel v. Hamilton*, No. 3:15-cv-949-J-34PDB, 2016 WL 4844662, at *9 (M.D. Fla. Aug. 8, 2016), and argues that the operative pleading “contains no nonconclusory allegations that Grindr directed any conduct at A.V.” D22 at 31–32. *Dunkel* merely relies on Florida cases holding a claim for intentional infliction of emotional distress is generally available only to the person at whom the outrageous conduct is directed. *See Dunkel*, 2016 WL 4844662, at *9 (citing *Baker*, 573 So. 2d at 873; *M.M.*, 556 So. 2d at 1140–41; and *Habelow*, 389 So. 2d at 220). *Dunkel* is unhelpful to Grindr because T.V. alleges Grindr’s conduct was directed at A.V.

The undersigned recommends rejecting Grindr’s argument that T.V. fails to allege conduct directed at A.V.

6. *Negligent Infliction of Emotional Distress (Count Seven)*
 Florida recognizes the tort of negligent infliction of emotional distress. *See* Fla. Std. Jury Instr. (Civ.) No. 420.2; *see* footnote 20, *supra* (explaining that Florida’s standard jury instructions are not legal adjudications of their correctness but are used in this report and recommendation as a “shortcut” for an explanation of the law). “[T]he prerequisites for recovery for negligent infliction of emotional distress differ depending on whether the plaintiff has or has not suffered a physical impact from an external force.” *Willis v. Gami Golden Glades, LLC*, 967 So. 2d 846, 850 (Fla. 2007) (quoted authority omitted). “If the plaintiff has suffered an impact, Florida courts permit recovery for emotional distress stemming from the incident during which the impact occurred, and not merely the impact itself.”²⁸ *Id.*

For the claim for negligent infliction of emotional distress (count seven), T.V. incorporates the factual allegation that “A.V. accessed, downloaded, used, purchased, and/or subscribed to Grindr Services ... resulting in A.V. being exposed to and engaged in sexual relationships and activities with adult users of Grindr Services.” D9 ¶135

(incorporating *id.* ¶¶18). T.V. contends that Grindr “owed a duty of care to A.V. to abide by its own terms of use and to prevent A.V. and other [minors] from accessing, downloading, using, purchasing, and/or subscribing Grindr Services” and “breached this duty of care to A.V.” *Id.* ¶¶137, 138. T.V. contends that Grindr “was negligent in the actions and omissions that ignored A.V. and other [minors] accessing, downloading, using, purchasing, and/or subscribing Grindr Services.” *Id.* ¶139. T.V. contends that “A.V. experienced severe emotional distress as a direct result of [Grindr]’s breached duties, actions, and omissions” and Grindr’s “actions and omissions that allowed A.V. to access, download, use, purchase, and/or subscribe to Grindr Services before reaching the age of eighteen ... were extreme and outrageous, and beyond all possible bounds of decency, and utterly intolerable in a civilized community.” *Id.* ¶¶140–41. And T.V. contends that Grindr “was in the exclusive position to stop the harm A.V. experienced but refused to do so.” *Id.* ¶143.

***43** Grindr argues that the claim fails because, under the facts alleged, A.V. suffered no physical impact. D22 at 32; D42 at 24. T.V. disagrees, emphasizing pleading allegations that A.V. had contact with men due to using Grindr Services and contending that “[t]he sheer act of sexual relationships involves physical touch and physical impact.” D41 at 2 (citing D9 ¶¶18, 22).

“[F]or a plaintiff to have endured an [actionable] impact or contact,” the plaintiff need only “meet rather slight requirements.” *Willis*, 967 So. 2d at 890 (internal quotation marks and quoted authority omitted). “The essence of impact ... is that the outside force or substance, no matter how large or small, visible or invisible, and no matter that the effects are not immediately deleterious, touch or enter into the plaintiff’s body.” *Id.* (quoted authority omitted); *see also City of Boynton Beach v. Weiss*, 120 So. 3d 606, 612 (Fla. 4th DCA 2013) (holding that recovery for negligent infliction of emotional distress is permitted when “the jury found that the plaintiff had been battered”). The outside force need not be applied by the defendant; for example, in an action against a hotel owner, the Florida Supreme Court held that a hotel guest who was robbed by an unknown assailant across the street from the hotel satisfied the physical impact requirement. *See Willis*, 967 So. 2d at 848–51.

T.V. alleges sufficient facts that A.V. suffered a physical impact. By alleging that A.V.’s use of Grindr Services resulted in A.V.’s exposure to, and engagement in, sexual relationships

and activities with adults, D9 ¶135 (incorporating *id.* ¶18), T.V. alleges an “outside force” touched A.V.’s body. *See Willis*, 967 So. 2d at 850 (quoted).

Grindr argues that the claim “is based on Grindr having allegedly ‘allowed A.V. to access, download, use, purchase, and/or subscribe to Grindr Services.’” D22 at 32 (quoting D9 ¶141). Grindr continues, “But [T.V.] does not allege A.V.’s use of Grindr had a physical impact on him, much less that his emotional distress resulted from injuries sustained in that impact.” *Id.* at 32–33 (internal footnote omitted). Grindr’s argument fails because the argument disregards Florida law permitting the claim against a defendant when another actor applied the outside force and disregards T.V.’s factual allegations of sexual relationships and activities between A.V. and adult users of Grindr. *See Willis*, 967 So. 2d at 848–51.

The undersigned recommends rejecting Grindr’s argument that T.V. fails to allege that A.V. suffered a physical impact.

7. Negligent Misrepresentation (Count Eight)

(a) General

For the claim of negligent misrepresentation, the Florida Supreme Court has adopted § 552 of the Restatement (Second) of Torts. *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 339 (Fla. 1997). The claim has four elements: (1) “misrepresentation of a material fact”;²⁹ (2) the defendant knew the representation was false, had no knowledge of its truth or falsity, or should have known it was false; (3) in making the statement, the defendant intended to induce the plaintiff’s reliance; (4) injury resulted when the plaintiff “act[ed] in justifiable reliance on the misrepresentation.” *Wallerstein v. Hosp. Corp. of Am.*, 573 So. 2d 9, 10 (Fla. 4th DCA 1990) (quoted authority omitted); *see also Dziegielewski v. Scalero*, 352 So. 3d 931, 934 (Fla. 5th DCA 2022) (listing the same elements). The “heightened pleading standard applies to negligent misrepresentation claims asserted under Florida law because such claims sound in fraud.” *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1127 (11th Cir. 2019) (internal quotation marks and quoted authority omitted); *see Fed. R. Civ. P. 9(b)* (“In alleging fraud ..., a party must state with particularity the circumstances constituting fraud[.]”).

***44** For her negligent misrepresentation claim (count eight), T.V. alleges that Grindr represents in its Privacy and Cookie Policy that Grindr “provides a safe space where users can discover, navigate, and interact with others in the Grindr

Community.” D9 ¶42(a). T.V. alleges that Grindr’s “Terms and Conditions of Service Agreement reserves for [Grindr] the right to remove content.” *Id.* ¶42(b). T.V. contends that Grindr “was aware that the statements … were to be used for a particular purpose—to create a purported agreement with the users and assure the users that [Grindr] applied community standards to make Grindr Services safe.” *Id.* ¶151. T.V. contends that A.V. relied on Grindr’s assurances that Grindr Services were safe and Grindr would enforce its policies. *Id.* ¶152. T.V. contends that Grindr negligently or without diligence “exaggerated or misstated facts relating to the oversight of its products and safety of its users” insofar as Grindr does not enforce safety measures to prevent A.V. and other minors from “accessing, downloading, using, purchasing, and/or subscribing Grindr Services.” *Id.* ¶¶153, 154. T.V. contends that Grindr “was bound to A.V. by a relation or duty of care beyond a purported contract between the parties”; “was in a special position of confidence and trust in relation to A.V.”; and was in the unique and exclusive position to stop the injuries and damages to A.V. but failed to do so.” *Id.* ¶¶155–57. And T.V. contends that “A.V. relied on [Grindr]’s misstatements,” and had he “known that Grindr Services were not safe, and [Grindr] did not enforce its policies, A.V. never would have accessed, downloaded, used, purchased, and/or subscribed to Grindr Services.” *Id.* ¶158.

Grindr argues that T.V. fails to state a claim for negligent misrepresentation because, under the facts alleged, Grindr’s statement or statements are nothing more than non-actionable “puffery.” A.V.’s reliance on the statement or statements was not justifiable, and the amended complaint fails to satisfy the heightened pleading standard by failing to identify the section in the terms where the alleged statement or statements were found or when A.V. saw them. D22 at 33–34 & 34 n.7; D42 at 24–25. T.V. disagrees, emphasizing pleading allegations about Grindr’s representations of safety and arguing, “Reliance on those statements was reasonable considering the circumstances.” D32 at 16–17 (citing D9 ¶¶42, 151, 153).

(b) Puffery

A claim for negligent misrepresentation cannot survive if based on an alleged misrepresentation of fact that is “more in the nature of ‘puffing,’ is patently incredible, or is obviously false[.]” *Upledger v. Vilanor, Inc.*, 369 So. 2d 427, 430 (Fla. 2d DCA 1979); cf. *Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1319 (11th Cir. 2019) (“There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity. Think, for example, Disneyland’s claim to be

‘The Happiest Place on Earth.’ Or Avis’s boast, ‘We Just Try Harder.’ Or Dunkin Donuts’s assertion that ‘America runs on Dunkin.’ Or (for our teenage readers) Sony’s statement that its PlayStation 3 ‘Only Does Everything.’ These boasts and others like them are widely regarded as ‘puff’—big claims with little substance.” (internal quotation marks, citation, and alteration omitted)).

Determining whether an alleged misrepresentation is non-actionable puffery requires consideration of the “peculiar circumstances” involved. *Upledger*, 369 So. 2d at 430; see, e.g., *Hernandez v. Radio Sys. Corp.*, No. EDCV22-1861, 2023 WL 2629020, at *5 (C.D. Cal. Mar. 9, 2023) (holding that the word “safe” was not puffery and explaining that “context is critical when evaluating whether a specific representation is puffery”); *TocMail Inc. v. Microsoft Corp.*, No. 20-60416-CIV, 2020 WL 9210739, at *4 (S.D. Fla. Nov. 6, 2020) (holding that the word “safe” was puffery and explaining that “whether the use of the word ‘safe’ is mere puffery is contingent on the context in which it is used”); *Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, No. CIV 08-1101, 2011 WL 1336473, at *7 (D.N.M. Mar. 31, 2011) (observing that context matters “[i]n analyzing a statement to determine if it is puffery or an assertion of fact,” including the relative expertise of the speaker and listener and the size of the audience (quoted authority omitted)).

“ [S]tate and federal courts are united in the principle that the determination as to whether a statement is … puffery is a question of fact to be resolved by the finder of fact except in the unusual case where the answer is so clear that it may be decided as a matter of law.” *Williams v. Amazon, Inc.*, 573 F. Supp. 3d 971, 975 (E.D. Pa. 2021) (quoting *Commonwealth ex rel. Shapiro v. Golden Gate Nat'l Senior Care LLC*, 648 Pa. 604, 626 (2018)); see also *Bietsch v. Sergeant's Pet Care Prods., Inc.*, No. 15 C 5432, 2016 WL 1011512, at *3 (N.D. Ill. Mar. 15, 2016) (“Whether a statement is puffery or actionable is generally a factual question.”).

***45** For example, in an action against a company selling memberships in a personalized healthcare program, some statements constituted non-actionable puffery as a matter of law (the member “would be seen by the finest national specialists with advanced treatment”; the program is “associated with the best hospitals and doctors nationwide”; the program was “a network fraternity of some of the nation’s finest physicians”; and an “exceptional doctor” is one with “excellent credentials, bedside manner, reputation, and diagnostic skills”), while other statements were actionable (a

particular doctor “would actively coordinate” the plaintiff’s care; the program selected doctors based on their medical expertise and relationships with patients; the program has a relationship with certain facilities; and data showed members had sixty-five percent fewer hospitalizations than patients in traditional practices). *MDVIP, Inc. v. Beber*, 222 So. 3d 555, 561–62 (Fla. 4th DCA 2017) (internal quotation marks and alterations omitted); *see also Williams*, 573 F. Supp. 3d at 973, 975 (declining to rule as a matter of law that statements describing a tattoo kit as “safe,” “safe for its intended use,” and “free from defects” are puffery); *Johnson v. Glock, Inc.*, No. 3:20-cv-08807, 2021 WL 6804234, at *9 (N.D. Cal. Sept. 22, 2021) (declining to rule as a matter of law that statements describing guns as “Safe Action®” and “Safe. Simple. Fast. = Confidence,” and a representation that the gun company “delivers on [its] promise of safety, reliability, and simplicity” are puffery).

Contrary to Grindr’s argument, Grindr’s alleged statement in its Privacy and Cookie Policy (Grindr “provides a safe space where users can discover, navigate, and interact with others in the Grindr Community,” D9 ¶42(a)), especially considered with the Terms and Conditions of Service Agreement (reserving for Grindr “the right to remove content,” *id.* ¶42(b)), is not puffery as a matter of law. The statement, read in context, is not so clearly hyperbolic as to take the issue from the factfinder.

Grindr relies on *Gibson v. NCL (Bahamas) Ltd.*, No. 11-24343-CIV, 2012 WL 1952667, at *6 (S.D. Fla. May 30, 2012), and *Sanlu Zhang v. Royal Caribbean Cruises, Ltd.*, No. 19-20773-Civ, 2019 WL 8895223, at *6 (S.D. Fla. Nov. 15, 2019). D22 at 33. The cases offer little persuasive value in deciding the motion to dismiss because they involve different circumstances (statements by cruise companies about shore excursions), and whether a statement is puffery depends on the “particular circumstances,” *see Upledger*, 369 So. 2d at 430 (quoted), including the relative experience of the speaker and the listener, *Guidance Endodontics*, 2011 WL 1336473, at *7.

The undersigned recommends rejecting Grindr’s argument that the “safe space” statement constitutes non-actionable “puffery” as a matter of law.

(c) Justifiable Reliance

Justifiable reliance required for a negligent misrepresentation claim “is not the same thing as failure to exercise due diligence.” *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010).

An information recipient need not “investigate every piece of information furnished”; instead, the recipient must investigate “information that a reasonable person in the position of the recipient would be expected to investigate” and “cannot hide behind the unintentional negligence of the misrepresenter when the recipient is likewise negligent in failing to discover the error.” *Id.* (internal quotation marks and quoted authority omitted).

Grindr argues that “A.V.’s reliance was not justifiable because Grindr’s Terms [and Conditions of Service Agreement] explicitly state[s] [Grindr] does not screen users or verify the information they provide.”³⁰ D22 at 34 (citing D9 ¶27).

*46 “[P]rinciples of comparative negligence ... apply to negligent misrepresentation claims.” *Butler*, 44 So. 3d at 105. Thus, “the question of a party’s justifiable reliance is an issue of comparative negligence that should be resolved by a jury.” *Newbern v. Mansbach*, 777 So. 2d 1044, 1046 (Fla. 1st DCA 2001); *see also Lorber v. Passick as Tr. of Sylvia Passick Revocable Tr.*, 327 So. 3d 297, 307 (Fla. 4th DCA 2021) (“[T]he failure to exercise diligent attention did not preclude recovery and instead presented a situation in which comparative negligence applied.”). A negligent misrepresentation claim does not fail as a matter of law merely because the recipient of the false information undertook an investigation, *Specialty Marine & Indus. Supplies, Inc. v. Venus*, 66 So. 3d 306, 311 (Fla. 1st DCA 2011), or could have discovered the information, *Newbern*, 777 So. 2d at 1046.

Grindr’s argument fails because the question of A.V.’s justifiable reliance “is an issue of comparative negligence that should be resolved by a jury,” not an issue that should be decided on a motion to dismiss. *See id.* (quoted). Even assuming a reasonable person in A.V.’s position could learn from the absence of screening that Grindr is an unsafe space despite Grindr’s statement that it is a safe space, Grindr’s argument is unpersuasive because a negligent misrepresentation claim does not fail merely because the recipient could have discovered the information. *See id.*

Grindr relies on *Trinidad & Tobago Unit Tr. Corp. v. CB Richard Ellis, Inc.*, 280 F.R.D. 676, 679 (S.D. Fla. 2012). D22 at 34. *Trinidad* does not help Grindr. In *Trinidad*, unlike in this action, the information on which the plaintiff relied (information in a property appraisal) was accompanied by a disclaimer explaining the information was not verified and the defendants “make no guarantee, warranty, or representation about” the information. *Trinidad*, 280 F.R.D. at 677, 679. And

in *Trinidad*, unlike in this action, the ruling on justifiable reliance depended on the sophistication of the plaintiff (a financial institution), a characteristic that cannot be attributed to A.V. or other minors. *Id.* at 679.

The undersigned recommends rejecting Grindr's argument that dismissal of the negligent misrepresentation claim is warranted because of an alleged absence of facts concerning justifiable reliance.

(d) Heightened Pleading Standard

The heightened pleading standard is satisfied if a pleading states "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud." *Young v. Grand Canyon Univ., Inc.*, 57 F.4th 861, 875–76 (11th Cir. 2023) (quoted authority omitted).

The particularity requirement "serves two purposes: alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." *Gose v. Native Am. Servs. Corp.*, No. 23-10600, 2024 WL 3533041, at *14 (11th Cir. July 25, 2024) (to be published) (internal quotation marks and quoted authority omitted). "[A] court considering a motion to dismiss for failure to plead fraud with particularity should always be careful to harmonize the directives of [the heightened pleading standard] with the broader policy of notice pleading." *Id.* (quoted authority omitted). "[A] court should hesitate to dismiss a complaint under [the heightened pleading rule] if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which [the defendant] will have to prepare a defense at trial, and (2) that plaintiff has substantial predisclosure evidence of those facts." *Id.* (internal quotation marks and quoted authority omitted).

*⁴⁷ Grindr relegates to a footnote its argument that the amended complaint fails to satisfy the heightened pleading standard, arguing only that the amended complaint "does not indicate what section of the Terms contained the representations on which A.V. allegedly relied, nor when he saw them." D22 at 34 n.7.

Grindr's limited argument is unpersuasive. The standard requires neither a citation to the section of Grindr's own documents nor an exact date of reliance. See *Wilding*, 941 F.3d at 1128. Through her allegations that Grindr represents in its Privacy and Cookie Policy that Grindr "provides a safe space where users can discover, navigate, and interact with others in the Grindr Community," D9 ¶42(a), and in its Terms and Conditions of Service Agreement that Grindr reserves "the right to remove content," *id.* ¶42(b), and through a reasonable inference that the policy and agreement were in effect when A.V. created his Grindr account (a date presumably within Grindr's knowledge), T.V. provides Grindr sufficient notice of the "what" and "when" of the alleged negligent misrepresentation. That T.V. had substantial predisclosure evidence may be assumed based on the relationship between T.V. and A.V. (parent and child) and the tragedy that occurred (the untimely death of a child).

The undersigned recommends rejecting Grindr's limited argument concerning the heightened pleading standard.

B. Whether the § 230(c)(1) Defense Clearly Appears on the Face of the Operative Pleading

1. General

Under § 230(c)(1), "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

For dismissal of the claims based on Florida common law torts (counts two through eight), Grindr relies on § 230(c)(1), arguing that, to find Grindr liable for those claims, Grindr must be treated as the publisher or speaker of information provided by another information content provider.³¹ D22 at 13–25. T.V. argues that the provision does not benefit Grindr under the facts alleged. D32 at 3–7.

The undersigned asked T.V. to state whether binding precedent exists on the scope of § 230(c)(1). D39 at 2. T.V. responded, "This appears to be an issue of first impression in the Eleventh Circuit[.]" D41 at 3. Grindr does not dispute that response. See D42.

If "statutory language is plain," a court "must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). Unless Congress has defined a term, a court will interpret the term "as taking [its] ordinary ... meaning ... at the time Congress enacted the statute[.]" *Perrin v. U.S.*,

[444 U.S. 37, 42 \(1979\)](#). When the term is a “term of art” with “established meaning” in the law, understanding the “backdrop against which Congress enacted [the statute]” is crucial. [Stewart v. Dutra Constr. Co., 543 U.S. 481, 487 \(2005\)](#). Moreover, a statute must be read as a whole because “the meaning of statutory language, plain or not, depends on context.” [King v. St. Vincent's Hosp., 502 U.S. 215, 221 \(1991\)](#). A court must “consider not only the bare meaning of [each] word” but also the word’s “placement and purpose in the statutory scheme.” [Bailey v. U.S., 516 U.S. 137, 145 \(1995\)](#); see also [Tyler v. Cain, 533 U.S. 656, 662 \(2001\)](#) (observing that the meaning of a statutory term is not construed “in a vacuum”).

***48** With these principles of statutory construction in mind, the undersigned turns to the text of § 230, the statutory scheme in which § 230 is included, the backdrop against which Congress passed § 230, how courts have interpreted § 230(c)(1), and an analysis of Grindr’s argument that § 230(c)(1) precludes all of T.V.’s claims based on Florida common law torts.

2. Text of § 230

Section 230 begins with five congressional findings:

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

[47 U.S.C. § 230\(a\)](#) (underlying defined terms).

Section 230 continues with five statements of congressional policy:

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

Id. § 230(b) (underlining defined terms).

Section 230 continues with the provision on which Grindr relies:

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Id. § 230(c) (underlining defined terms).

***49** Section 230 continues with a provision imposing obligations on interactive computer services:

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

Id. § 230(d) (underlining defined term).

Section 230 continues with statements of the law's effect on other laws:

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under [section 1595 of title 18](#), if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of [section 1591 of title 18](#); or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

Id. § 230(e).³²

***50** Section 230 ends with four definitions:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term “interactive computer services” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such

systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

- (A) filter, screen, allow, or disallow content;
- (B) pick, choose, analyze, or digest content; or
- (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.”

Id. § 230(f) (underlining defined terms).

3. *Statutory Scheme*

The United States Supreme Court has characterized the overarching legislation containing § 230—the Telecommunications Act of 1996—as “an unusually important legislative enactment.” *Reno v. ACLU*, 521 U.S. 844, 857 (1997). The statute’s “major components … have nothing to do with the Internet; they were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting.” *Id.* at 857–58. Indeed, when President Bill Clinton signed the Act in February 1996, today’s online world was nonexistent: people were still paying an hourly fee to use America Online, Mark Zuckerberg was a preteen, and years would pass before the release of the first iPhone and the launch of things like Facebook, Instagram, YouTube, Twitter (X), WhatsApp, TikTok, and the defendant in this action, Grindr.

Six of the seven titles in the Telecommunications Act of 1996 “are the product of extensive committee hearings and the subject of discussion in Reports prepared by Committees of the Senate and the House of Representatives.” *Id.* at 858. “By contrast,” Title V “contains provisions that were either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation.” *Id.*

Title V is titled “Obscenity and Violence,” but Congress said it “may be cited as the ‘Communications Decency Act of 1996.’ ” *Pub. L. No. 104–104, 110 Stat. 56*, § 501. The Communications Decency Act includes sections on “[o]bscene or harassing use of telecommunications facilities under the Communications Act of 1934,” “[o]bscene programming on cable television,” “[s]crambling of sexually explicit adult video service programming,” “[c]larification of current laws regarding communication of obscene materials through the use of computers,” “[c]oercion and enticement of minors,” and “[p]rotection for private blocking and screening of offensive material.” *Id.* at §§ 230, 502, 503, 505, 507, 508, 641.

*51 The Communications Decency Act section at issue in this action—section 509—is titled “Online Family Empowerment.” *Pub. L. No. 104–104, 110 Stat. 56*, § 509. Section 509 added a new section at the end of Title II of the Communications Act of 1934; specifically, at § 230. *Id.*

4. *Backdrop of § 230*

As Congress was drafting the Communications Decency Act, the state court in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), addressed whether Prodigy—the company behind a virtual bulletin board—could be held liable for libel as a publisher based on statements posted by an unidentified user.

In *Stratton Oakmont*, an unidentified user of Prodigy’s “Money Talk” virtual bulletin board posted statements that an investment banking firm and its president had committed criminal and fraudulent acts related to a public stock offering. 1995 WL 323710, at *1. The firm and the president sued Prodigy for libel. *Id.* The court explained the “critical issue” was whether Prodigy was a publisher or akin to a publisher (“one who repeats or otherwise republishes a libel”) subject to liability for libel or whether Prodigy was a distributor (like a library or bookstore) and thus not subject to liability for libel unless Prodigy knew or had reason to know about the libel. *Id.* at *3. The court observed that a newspaper is a publisher because a newspaper exercises editorial control through the selection of content, making it “more than a passive receptacle or conduit for news, comment and advertising.” *Id.* Likening Prodigy to a newspaper, the Court held Prodigy is a publisher, not a distributor, because Prodigy exercised editorial control by holding itself out “as controlling the content” of the virtual bulletin boards and implementing control through an “automatic software screening program,” content guidelines

enforced by board leaders, and tools allowing the deletion of statements considered offensive. *Id.* at *4. The court emphasized that virtual bulletin boards “should generally be regarded in the same context as bookstores, libraries and network affiliates,” but Prodigy’s bulletin boards should not because its “own policies, technology and staffing decisions” to gain editorial control opened it up to liability. *Id.* at *5. The court observed “that the issues ... may ultimately be preempted by federal law if the Communications Decency Act of 1995, several versions of which are pending in Congress, is enacted.” *Id.*

*52 The court in *Stratton Oakmont* distinguished *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991). *Id.* at *4–5. In *Cubby*, the court entered summary judgment for CompuServe on libel and other claims based on user postings, holding that CompuServe was “the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information.” *Id.* at *4. The court in *Stratton Oakmont* emphasized two differences between Prodigy and CompuServe: first, Prodigy “held itself out to the public and its members as controlling the content of its computer bulletin boards”; and second, Prodigy “implemented control through its automatic software screening program” and other means. *Id.* “By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and ‘bad taste,’ ” the court explained, Prodigy “is clearly making decisions as to content ..., and such decisions constitute editorial control.” *Id.*

*53 *Stratton Oakmont* is the “backdrop” against Congress’s adoption of the ultimate version of § 230, see *Stewart*, 543 U.S. at 487 (quoted). As one judge explained:

What is now ... § 230 was added as an amendment to the Telecommunications Act of 1996, a statute designed to deregulate and encourage innovation in the telecommunications industry. Congress devoted much committee attention to traditional telephone and broadcast media; by contrast, the Internet was an afterthought, addressed only through floor amendments or in conference. Of the myriad issues the emerging Internet implicated, Congress tackled only one: the ease with which the Internet delivers indecent or offensive material, especially to minors. And § 230 provided one of two alternative ways of handling this problem.

The action began in the Senate. Senator James J. Exon introduced the [Communications Decency Act] on February 1, 1995. He presented a revised bill on June 9, 1995, “[t]he heart and the soul” of which was “its protection for families and children.” The Exon Amendment sought to reduce the proliferation of pornography and other obscene material online by subjecting to civil and criminal penalties those who use interactive computer services to make, solicit, or transmit offensive material.

The House of Representatives had the same goal—to protect children from inappropriate online material—but a very different sense of how to achieve it. Congressmen Christopher Cox ... and Ron Wyden ... introduced an amendment to the Telecommunications Act, entitled “Online Family Empowerment,” about two months after the revised [Communications Decency Act] appeared in the Senate. Making the argument for their amendment during the House floor debate, Congressman Cox stated:

We want to make sure that everyone in America has an open invitation and feels welcome to participate in the Internet. But as you know, there is some reason for people to be wary because, as a Time Magazine cover story recently highlighted, there is in this vast world of computer information, a literal computer library, some offensive material, some things in the bookstore, if you will, that our children ought not to see.

As the parent of two, I want to make sure that my children have access to this future and that I do not have to worry about what they might be running into on line. I would like to keep that out of my house and off my computer.

Likewise, Congressman Wyden said: “We are all against smut and pornography, and, as the parents of two small computer-literate children, my wife and I have seen our kids find their way into these **chat** rooms that make their middle-aged parents cringe.”

As both sponsors noted, the debate between the House and the Senate was not over the [Communications Decency Act]’s primary purpose but rather over the best means to that shared end. ([S]tatement of Rep. Cox[:] “How should we do this? ... Mr. Chairman, what we want are results. We want to make sure we do something that actually works.”); ([S]tatement of Rep. Wyden[:] “So let us all stipulate right at the outset the importance of protecting our kids and going to the issue of the best way to do

it.”). While the Exxon Amendment would have the FCC regulate online obscene materials, the sponsors of the House proposal “believe[d] that parents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats.” They also feared the effects the Senate’s approach might have on the Internet itself. ([S]tatement of Rep. Cox[:] “[The amendment] will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet”). The Cox-Wyden Amendment therefore sought to empower interactive computer service providers to self-regulate, and to provide tools for parents to regulate, children’s access to inappropriate material.

There was only one problem with this approach, as the House sponsors saw it. A New York State trial court had recently ruled that the online service Prodigy, by deciding to remove certain indecent material from its site, had become a “publisher” and thus was liable for defamation when it failed to remove other objectionable content. The authors of § 230 saw the *Stratton-Oakmont* decision as indicative of a “legal system [that] provides a massive disincentive for the people who might best help us control the Internet to do so.” Cox-Wyden was designed, in large part, to remove that disincentive.

The House having passed the Cox-Wyden Amendment and the Senate the Exxon Amendment, the conference committee had before it two alternative visions for countering the spread of indecent online material to minors. The committee chose not to choose. Congress instead adopted both amendments as part of a final Communications Decency Act. The Supreme Court promptly struck down two major provisions of the Exxon Amendment as unconstitutionally overbroad under the First Amendment, leaving the new § 230 as the dominant force for securing decency on the Internet.^[33]

Section 230 overruled *Stratton-Oakmont* through two interlocking provisions, both of which survived the legislative process unscathed. The first ... states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” The second provision eliminates liability for interactive computer service providers and users for “any action voluntarily taken in good faith to restrict access

to or availability of material that the provider or user considers to be ... objectionable,” or “any action taken to enable or make available to ... others the technical means to restrict access to [objectionable] material.” These two subsections tackle, in overlapping fashion, the two jurisprudential moves of the *Stratton-Oakmont* court: first, that Prodigy’s decision to screen posts for offensiveness rendered it “a publisher rather than a distributor,” 1995 WL 323710, at *4; and second, that by making good-faith efforts to remove offensive material Prodigy became liable for any actionable material it did not remove.

The legislative history illustrates that in passing § 230 Congress was focused squarely on protecting minors from offensive online material, and that it sought to do so by “empowering parents to determine the content of communications their children receive through interactive computer services.” The “policy” section of § 230’s text reflects this goal. It is not surprising, then, that Congress emphasized the narrow civil liability shield that became § 230(c)(2), rather than the broad rule of construction laid out in § 230(c)(1). Indeed, the conference committee summarized § 230 by stating that it “provides ‘Good Samaritan’ protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material”—a description that could just as easily have applied to § 230(c)(2) alone. Congress also titled the entirety of § 230(c) “Protection for ‘Good Samaritan’ blocking and screening of offensive material,” suggesting that the definitional rule outlined in § 230(c)(1) may have been envisioned as supporting or working in tandem with the civil liability shield in § 230(c)(2).

Force v. Facebook, Inc., 934 F.3d 53, 77–81 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part) (internal authority and footnotes omitted; some alterations in original).

5. Interpretation of § 230(c)(1)

*54 The Fourth Circuit in *Zeran v. American Online*, 129 F.3d 327 (4th Cir. 1997), was the first federal appellate court to interpret § 230(c)(1). The plaintiff sued AOL after someone posted messages on an AOL message board offering shirts displaying offensive language about the Oklahoma City bombing and instructing interested buyers to call the plaintiff’s home phone number. 129 F.3d at 329. The plaintiff received multiple calls at day at his home, received death threats, and feared for his safety. *Id.* The plaintiff sued AOL for negligence, contending “AOL unreasonably delayed in

removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter.” *Id.* at 328.

In affirming the district court’s judgment on the pleadings for AOL, the Fourth Circuit held that § 230(c)(1) “plainly immunizes computer service providers like AOL from liability for information that originates with third parties.” *Id.* “By its plain language,” the court ruled, the provision “creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.” *Id.* at 330. The court explained that the provision “precludes courts from entertaining claims that would place a computer service provider in a publisher’s role.” *Id.* “Thus,” the court concluded, “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.” *Id.*

The Fourth Circuit observed that congressional purposes underlying § 230 supported immunity. *Id.* at 330–31. According to the court, “Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.” *Id.* at 330. The court continued, “Interactive computer services have millions of users. ... It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.” *Id.* at 331. Moreover, the court emphasized, Congress enacted § 230 “to encourage service providers to self-regulate the dissemination of offensive material over their services.” *Id.* The court found that, to uphold those purposes, “§ 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.” *Id.*

According to the Fourth Circuit, while the plaintiff attempted to “artfully plead his claims as ones of negligence,” his claims were “indistinguishable from a garden variety defamation action.” *Id.* at 332. The court rejected the plaintiff’s argument that AOL could be subject to distributor liability, concluding that distributor liability is “merely a subset ... of publisher liability, and is therefore also foreclosed by § 230.” *Id.* The court explained that publication is not only “the choice by an author to include certain information” but also “the negligent

communication of a defamatory statement and the failure to remove such a statement when first communicated by another party[.]” *Id.* The court concluded that “AOL falls squarely within [the] traditional definition of a publisher and, therefore, is clearly protected by § 230’s immunity.” *Id.*

After the Fourth Circuit’s decision in *Zeran*, other circuits relied on the decision, seized on the Fourth Circuit’s characterization of the pleading as “artful,” relied on broad language in the decision, or cited the decision (as well as other cases citing the decision) in holding that § 230(c)(1), construed broadly in favor of internet freedom and self-policing, “immunized” interactive computer service providers from liability in a variety of contexts.³⁴

*55 In recent years, however, disagreement with how courts have interpreted § 230(c)(1) has grown. *See, e.g., Doe v. Facebook, Inc.*, 142 S. Ct. 1087 (2022) (statement by Thomas, J.); *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020) (same); *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021) (majority and dissenting opinions); *Force*, 934 F.3d 53 (same); *see also* Adam Candeub, *Reading Section 230 as Written*, 1 J. Free Speech L. 139 (2021); Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 Harv. J.L. & Pub. Pol'y 553 (2018); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401 (2017).

Last term, the United States Supreme Court expressly declined to address § 230(c)(1)’s application because “much (if not all) of [the] plaintiffs’ complaint seems to fail under” the “unchallenged holdings below” or under another case decided the same day, *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (May 18, 2023) (holding that the plaintiffs failed to sufficiently allege the defendants consciously and culpably participated in terrorist attacks required for liability under federal terrorism law). *See Gonzalez v. Google LLC*, 598 U.S. 617, 622 (May 18, 2023).

Years ago, the Eleventh Circuit observed in dictum that “[t]he majority of federal circuits have interpreted the [Communications Decency Act] to establish broad ‘federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service,’ ” but declined to “reach any of [the appellant]’s challenges to the district court’s application of [§ 230.]” *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321, 1324 (11th Cir. 2006) (quoting *Zeran*, 129 F.3d at 330).

More recently, in an unpublished opinion, the Eleventh Circuit relied on § 230(c)(1) in affirming the dismissal of a defamation complaint by pro se plaintiffs against Amazon.com based on a customer review claiming a scarf sold by the plaintiffs was not “authentic Burberry.” *McCall v. Zotos*, No. 22-11725, 2023 WL 3946827, at *1 (11th Cir. June 12, 2023). The court reasoned, “The plaintiffs seek to hold Amazon liable for failing to take down [the customer]’s review, which is exactly the kind of claim that is immunized by [the provision]—one that treats Amazon as the publisher of that information.” *Id.* at *3.

In another unpublished opinion, the Eleventh Circuit relied on § 230(c)(1) in affirming the dismissal of an artist’s defamation claim against Google, explaining, “It is uncontested that Google is an interactive computer service provider, and the article in question indicates that it was authored and posted by an ‘information content provider’: two anonymous bloggers.” *Dowbenko v. Google*, 582 F. App’x 801, 805 (11th Cir. 2014). Relying on a quotation from a non-binding case, the court, without elaboration, added, “Nor does the allegation that Google manipulated its search results to prominently feature the article at issue change this result.” *Id.* (citing *Zeran*, 129 F.3d at 330, for its statement that “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”).

*56 At least two cases raising issues regarding § 230 are pending before the Eleventh Circuit, both from this Court. See *Mother Doe on Behalf of Doe v. Grindr, LLC*, No. 5:23-CV-193-JA-PRL, 2023 WL 7053471 (M.D. Fla. Oct. 26, 2023), Appeal No. 23-13874 (11th Cir.); *M.H. v. Omegle.com, LLC*, No. 8:21-CV-814-VMC-TGW, 2022 WL 93575 (M.D. Fla. Jan. 10, 2022), Appeal No. 22-10338 (11th Cir.).

In *Mother Doe*, the Court dismissed tort claims against Grindr by a mother on behalf of her son. 2023 WL 7053471, at *1, *4. The mother alleged that “Grindr is a website and smartphone … app … that facilitates sex between its users”; “Grindr is an ‘adults only’ app and requires users to enter their birthdate before they are permitted to create an account”; when her son “was a minor, he created an account on the app, apparently by providing a false birthdate”; when her son was 13 years old, he and an adult man “used the Grindr app to arrange a time to meet”; the man “drove to [her son’s] home using Grindr’s geolocation features”; the man and her son “engaged in sexual activity in [the man’s] car”; and a “resident

was alerted to suspicious activity outside of her home and called the police, who arrested” the man. *Id.* at *1. Relying on non-binding cases, the Court held Grindr has “immunity” under § 230(c)(1) and the claims are “barred.” *Id.* at *3.

The mother raises two issues on appeal: (1) “Whether Grindr is immune pursuant to [§ 230(c)(1)] when it negligently operated its app by maintaining a weak age verification system, misrepresenting minors’ ability to create an account on the app, and failing to warn of the known risk of sexual abuse to minors”; and (2) “Whether … [her] claims are excepted under [§] 230 due to Grindr’s material contribution resulting in [her son]’s sexual abuse.” Appeal No. 23-13874, D25 at 12. She filed her reply brief on May 28, 2024. *Id.* D41.

In *M.H.*, the Court dismissed TVPRA, tort, and other claims against Omegle by parents on behalf of their child. 2022 WL 93575, at *2, *7. The parents alleged their eleven-year-old child visited Omegle’s website, where she was placed in a chatroom with an anonymous user who informed her “he knew where she lived,” gave her details to prove his knowledge, “threatened to hack [her] and her family’s … devices if she did not disrobe and comply with his demands,” and recorded her compliance with his demands. *Id.* at *1. The parents alleged Omegle “allows users to communicate with other users randomly and anonymously in real time by text, audio, and video”; “[i]nterested users are placed in a chatroom hosted by Omegle and can begin communicating immediately”; Omegle does not require the provision of identifying information to begin a chatroom session; Omegle “allows users to narrow possible matches based on ‘similarities in conversations and subjects’ ”; “[u]sers are anonymously paired with other users from across the globe and can be paired with a new user in a new chatroom at will”; Omegle’s “website is visited millions of times per day”; articles report that “numerous individuals have been charged with sex crimes against children for their use of Omegle and similar websites”; “Omegle does not have a screening or verification process to ensure that minor children only use the site with parental guidance or consent—anonymity appears to be a primary appeal of the Omegle platform”; Omegle “is susceptible to hacking”; “sexual predators have taken advantage of the anonymity that Omegle offers to prey on other users, including children”; and “[a]mong these predators are ‘cappers,’ who trick children into committing sexual acts over live web feeds while simultaneously recording the encounters.” *Id.* Relying on non-binding cases, the Court held the parents failed to allege sufficient facts to support a TVPRA claim and Omegle has

“immunity” under § 230(c)(1) for the other claims. *Id.* at *2–7.

***57** The parents raise two issues on appeal: (1) “Whether [§] 230 … applies to 18 U.S.C. § 2255”; and (2) “Whether the actual knowledge or the constructive knowledge standard applies to civil liability claims under 18 U.S.C. § 1595.” Appeal No. 22-10338, D23 at 11. Twenty amici have appeared. *Id.* (docket heading). The Eleventh Circuit has stayed the appeal based on Omegle’s bankruptcy. *Id.* D72-2. On April 2, 2024, the parents observed that counsel no longer represents Omegle, emphasized that Omegle has not complied with orders to provide status reports, and asked the court to issue a decision. *Id.* D78. On July 28, 2024, the parents asked the court to judicially notice a decision by the bankruptcy court granting relief from the stay and to issue a decision. *Id.* D81.

6. Analysis

With no binding precedent, the Court must apply the ordinary rules of statutory interpretation to interpret § 230(c)(1): “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider” (i.e., by another “person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service”). 47 U.S.C. § 230(c)(1), (f)(3).

The meaning of § 230(c)(1) is plain. The provision, therefore, must be enforced according to its terms. *See Jimenez*, 555 U.S. at 118. The ordinary meaning of “publisher” and “speaker” are, respectively, “one that makes public” and “one that speaks.” *Webster’s Third New Int’l Dictionary* (1986). “Publication” also has meaning in the defamation context, the backdrop of § 230. *See Force*, 934 F.3d at 77–81. “Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.” *Restatement (Second) of Torts* § 577(1). A person who “repeats or republishes” a defamatory statement to a third party may be liable for defamation “as if he had originally published it.” *Id.* § 578; accord *Stratton Oakmont*, 1995 WL 323710, at *3. And “[o]ne who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.” *Restatement (Second) of Torts* § 577(2).

The plain meaning of § 230(c)(1) is not changed by consideration of the provision “as a whole,” *King*, 502 U.S. at 221, and the “statutory scheme” in which the provision is placed, *Bailey*, 516 U.S. at 145. Congress sought to promote internet development and preserve the absence of government internet regulation, as evidenced by the § 230 findings, 47 U.S.C. § 230(a), and policy statements, *id.* § 230(b)(1)–(2), suggesting a broad reading of the provision to effectuate those purposes, as courts have consistently ruled, originally outside the context of the online sexual abuse of minors. *See, e.g.*, *Zeran*, 129 F.3d at 330–31; footnote 34, *supra* (describing appellate cases interpreting § 230(c)(1) after *Zeran*). But Congress also sought to protect minors and other users from offensive content and internet-based crimes, as evidenced by the title and content of the Act (“The Communications Decency Act”), the title and content of the section (“Online Family Empowerment Act”), the title and content of § 230 (“Protection for private blocking and screening of offensive material”), the title and content of the provision on which Grindr relies (“Protection for ‘Good Samaritan’ Blocking and Screening of Offensive Material,” *id.* § 230(c)(1)), and other § 230 policy statements, *id.* § 230(b)(3)–(5), suggesting a narrow reading of the provision to effectuate those purposes. To avoid the predominance of some congressional purposes over others, the provision should be interpreted neither broadly nor narrowly. The provision should just be interpreted according to its plain meaning.

***58** To obtain dismissal, Grindr must convince the Court that the § 230(c)(1) defense “clearly appears on the face of the complaint.” *See Fortner*, 983 F.2d at 1028 (quoted). In other words, Grindr must convince the Court that all seven claims based on Florida common law torts (counts two through eight) are “inconsistent with” § 230(c)(1), *see* 47 U.S.C. § 230(e)(3) (quoted), because all seven claims treat Grindr as the publisher or the speaker of information provided by another information content provider. *See id.* § 230(c)(1), (f)(3). Under the governing standard for dismissal, Grindr falls short.

The § 230(c)(1) defense does not clearly appear on the face of the operative pleading because, for the seven claims based on Florida common law torts (counts two through eight), T.V. treats Grindr not as the publisher or speaker of information provided by another information content provider but as a publisher or speaker of information Grindr provided. According to T.V. and the reasonable inferences drawn in her favor, *see Karantsalis*, 17 F.4th at 1319, Grindr is responsible, in whole or in part, for the “Daddy” “Tribe,” the “Twink”

“Tribe,” the filtering code, the “safe space” language, and the geolocation interface. *See D9 ¶¶27(a), 31–33, 42(a), 68–105.* To the extent the responsible persons or entities are unclear, discovery, not dismissal, comes next.

Grindr brings to the Court’s attention many cases, *see D22 at 13–17; D42 at 11–17; D53 at 1–2; D60 at 1–2*, including the two cases from this Court pending before the Eleventh Circuit, *see section IV.B.5 supra* (describing *Mother Doe, 2023 WL 7053471, at *3*; and *M.H., 2022 WL 93575, at *2–7*), as well as *Doe v. MySpace, Inc.*, 528 F.3d 413, 416, 418–22 (5th Cir. 2008); *Doe v. Grindr, Inc.*, No. 2:23-cv-2093-ODW-PD, 2023 WL 9066310, at *3–7 (C.D. Cal. Dec. 28, 2023) (to be published), *appeal pending*, No. 24-475 (9th Cir.); *L.H. v. Marriott Int’l, Inc.*, 604 F. Supp. 3d 1346, 1365–66 (S.D. Fla. 2022); *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1244 (S.D. Fla. 2020); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 588–89 (S.D.N.Y. 2018), *aff’d* 765 F. App’x 586 (2d Cir. 2019); *Saponaro v. Grindr, LLC*, 93 F. Supp. 3d 319, 323 (D.N.J. 2015); and *In re Facebook, Inc.*, 625 S.W.3d 80, 93 (Tex. 2021).

***59** In each case, a bad actor’s or actors’ use of the defendant’s online platform in the foreground or background appeared to suffice for § 230(c)(1)’s application. For example, in *MySpace*, an adult sexually assaulted a minor he had met through *MySpace*. 528 F.3d at 416. The minor and her mother sued *MySpace* for negligence and gross negligence, alleging *MySpace* markets itself to minors, *MySpace* is popular because of its underage users, and the minor easily created a *MySpace* profile despite *MySpace*’s supposed safety features. *Id. at 417*. The Fifth Circuit affirmed judgment on the pleadings for *MySpace*, ruling that § 230(c)(1) barred the claims and rejecting the argument that the claims were predicated not on the minor-adult communications but on *MySpace*’s failure to implement basic safety measures to protect minors. *Id. at 418–19*. “Their allegations,” the Fifth Circuit found, “are merely another way of claiming that *MySpace* was liable for publishing the communications and they speak to *MySpace*’s role as a publisher of online third-party-generated content.” *Id. at 420*; *see also Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 285 (5th Cir.), *cert. granted sub nom. Free Speech Coal. v. Paxton*, No. 23-1122, 2024 WL 3259690 (U.S. July 2, 2024) (explaining that in *MySpace* the Fifth Circuit “held that § 230 shielded *MySpace* from negligence liability for publishing communications between a minor and an adult who later sexually assaulted her”).

***60** In his statement accompanying the denial of certiorari in an action raising a § 230(c)(1) issue, Justice Thomas detailed criticisms of many of these cases or the cases on which they are based:

Taken at face value, § 230(c) alters the *Stratton Oakmont* rule in two respects. First, § 230(c)(1) indicates that an Internet provider does not become the publisher of a piece of third-party content—and thus subjected to strict liability—simply by hosting or distributing that content. Second, § 230(c)(2)(A) provides an additional degree of immunity when companies take down or restrict access to objectionable content, so long as the company acts in good faith. In short, the statute suggests that if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A).

This modest understanding is a far cry from what has prevailed in court. Adopting the too-common practice of reading extra immunity into statutes where it does not belong, courts have relied on policy and purpose arguments to grant sweeping protection to Internet platforms. …

Courts have discarded the longstanding distinction between “publisher” liability and “distributor” liability. Although the text of § 230(c)(1) grants immunity only from “publisher” or “speaker” liability, the first appellate court to consider the statute held that it eliminates distributor liability too—that is, § 230 confers immunity even when a company distributes content that it knows is illegal. *Zeran ..., 129 F.3d [at] 331–334* In reaching this conclusion, the court stressed that permitting distributor liability “would defeat the two primary purposes of the statute,” namely, “immuniz[ing] service providers” and encouraging “selfregulation.” *Id., at 331, 334*. And subsequent decisions, citing *Zeran*, have adopted this holding as a categorical rule across all contexts.

To be sure, recognizing some overlap between publishers and distributors is not unheard of. Sources sometimes use language that arguably blurs the distinction between publishers and distributors. One source respectively refers to them as “primary publishers” and “secondary publishers or disseminators,” explaining that distributors can be “charged with publication.”

Yet there are good reasons to question this interpretation.

First, Congress expressly imposed distributor liability in the very same Act that included § 230. Section 502 of the Communications Decency Act makes it a crime to “knowingly … display” obscene material to children, even if a third party created that content. 110 Stat. 133–134 (codified at 47 U.S.C. § 223(d)). This section is enforceable by civil remedy. 47 U.S.C. § 207. It is odd to hold, as courts have, that Congress implicitly eliminated distributor liability in the very Act in which Congress explicitly imposed it.

Second, Congress enacted § 230 just one year after *Stratton Oakmont* used the terms “publisher” and “distributor,” instead of “primary publisher” and “secondary publisher.” If, as courts suggest, *Stratton Oakmont* was the legal backdrop on which Congress legislated, one might expect Congress to use the same terms *Stratton Oakmont* used.

Third, had Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in § 230(c)(1): No provider “shall be held liable” for information provided by a third party. After all, it used that exact categorical language in the very next subsection, which governs removal of content. § 230(c)(2). Where Congress uses a particular phrase in one subsection and a different phrase in another, we ordinarily presume that the difference is meaningful.

...

Courts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content. Section 230(c)(1) protects a company from publisher liability only when content is “provided by *another* information content provider.” (Emphasis added.) Nowhere does this provision protect a company that is itself the information content provider. And an information content provider is not just the primary author or creator; it is anyone “responsible, in whole *or in part*, for the creation or development” of the content. § 230(f)(3) (emphasis added).

But from the beginning, courts have held that § 230(c)(1) protects the “exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.” E.g., *Zeran*, 129 F.3d at 330 (emphasis added); cf. *id.*, at 332 (stating also that § 230(c)(1) protects the decision to “edit”). Only later did courts wrestle with the language in § 230(f)(3) suggesting providers are liable for content they help develop “in part.”

To harmonize that text with the interpretation that § 230(c)(1) protects “traditional editorial functions,” courts relied on policy arguments to narrowly construe § 230(f)(3) to cover only substantial or material edits and additions. E.g., *Batzel v. Smith*, 333 F.3d 1018, 1031, and n. 18 (CA9 2003) (“[A] central purpose of the Act was to protect from liability service providers and users who take some affirmative steps to edit the material posted”).

...

The decisions that broadly interpret § 230(c)(1) to protect traditional publisher functions also eviscerated the narrower liability shield Congress included in the statute. Section 230(c)(2)(A) encourages companies to create content guidelines and protects those companies that “in good faith … restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.” Taken together, both provisions in § 230(c) most naturally read to protect companies when they unknowingly decline to exercise editorial functions to edit or remove third-party content, § 230(c)(1), and when they decide to exercise those editorial functions in good faith, § 230(c)(2)(A).

But by construing § 230(c)(1) to protect any decision to edit or remove content, courts have curtailed the limits Congress placed on decisions to remove content . . . With no limits on an Internet company’s discretion to take down material, § 230 now apparently protects companies who racially discriminate in removing content. *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 Fed. Appx. 526 (CA9 2017), aff’g 144 F. Supp. 3d 1088, 1094 (ND Cal. 2015) (concluding that “ ‘any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune’ ” under § 230(c)(1)).

...

Courts also have extended § 230 to protect companies from a broad array of traditional product-defect claims. In one case, for example, several victims of human trafficking alleged that an Internet company that allowed users to post classified ads for “Escorts” deliberately structured its website to facilitate illegal human trafficking. Among other things, the company “tailored its posting requirements to make sex trafficking easier,” accepted anonymous payments, failed to verify e-mails, and stripped metadata from photographs to make crimes harder to track. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 16–21

(CA1 2016). Bound by precedent creating a “capacious conception of what it means to treat a website operator as the publisher or speaker,” the court held that § 230 protected these website design decisions and thus barred these claims. *Id.*, at 19.

Consider also a recent decision granting full immunity to a company for recommending content by terrorists. *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (CA2 2019), cert. denied, ... 140 S. Ct. 2761 The court first pressed the policy argument that, to pursue “Congress’s objectives, ... the text of Section 230(c)(1) should be construed broadly in favor of immunity.” 934 F.3d at 64. It then granted immunity, reasoning that recommending content “is an essential result of publishing.” *Id.*, at 66. Unconvinced, the dissent noted that, even if all publisher conduct is protected by § 230(c)(1), it “strains the English language to say that in targeting and recommending these writings to users ... Facebook is acting as ‘the publisher of ... information provided by another information content provider.’” *Id.*, at 76–77 (Katzmann, C. J., concurring in part and dissenting in part) (quoting § 230(c)(1)).

Other examples abound. One court granted immunity on a design-defect claim concerning a dating app[] that allegedly lacked basic safety features to prevent harassment and impersonation. *Herrick v. Grindr LLC*, 765 Fed.Appx. 586, 591 (CA2 2019), cert. denied, ... 140 S. Ct. 221, ... (2019). Another granted immunity on a claim that a social media company defectively designed its product by creating a feature that encouraged reckless driving. *Lemmon v. Snap, Inc.*, 440 F. Supp. 3d 1103, 1107, 1113 (CD Cal. 2020).

A common thread through all these cases is that the plaintiffs were not necessarily trying to hold the defendants liable “as the publisher or speaker” of third-party content, § 230(c)(1). Nor did their claims seek to hold defendants liable for removing content in good faith. § 230(c)(2). Their claims rested instead on alleged product design flaws—that is, the defendant’s own misconduct. Cf. *Accusearch*, 570 F.3d at 1204 (Tymkovich, J., concurring) (stating that § 230 should not apply when the plaintiff sues over a defendant’s “conduct rather than for the content of the information”). Yet courts, filtering their decisions through the policy argument that “Section 230(c)(1) should be construed broadly,” *Force*, 934 F.3d at 64, give defendants immunity.

...

Paring back the sweeping immunity courts have read into § 230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail. Moreover, States and the Federal Government are free to update their liability laws to make them more appropriate for an Internet-driven society.

Extending § 230 immunity beyond the natural reading of the text can have serious consequences.

Malwarebytes, Inc., 141 S. Ct. at 14–18 (Thomas, J., statement concurring in decision denying certiorari; some internal citations omitted); see also *Doe*, 142 S. Ct. at 1088 (explaining that § 230(c)(1) can plausibly be read more narrowly by protecting internet companies from strict liability for third-party content, but not from the company’s “own acts and omissions.”) (Thomas, J., statement concurring in decision denying certiorari) (internal quotation marks and citation omitted); *Force*, 934 F.3d at 76–89 (Katzmann, C.J., concurring in part and dissenting in part; explaining that the plain language of § 230(c)(1) does not protect websites for design choices like “targeting and recommending” content because finding liability does not require the court to treat the site as the publisher of the content);³⁵ *Gonzalez*, 2 F.4th at 914–24 (Gould, J., concurring in part and dissenting in part; explaining that “amplify[ing] and direct[ing] content” is “more analogous to the actions of a direct marketer, matchmaker, or recruiter than to those of a publisher” because “publication has never included ... suggesting that one reader might like to exchange messages with other readers”); *A.M.*, 614 F. Supp. 3d at 818–821 (explaining that a product liability action based on a defective design that paired minors and adults in video chatrooms is not barred by § 230(c)(1) because designing the site safely would not require the site “to review, edit, or withdraw any third-party content”).

*61 *MySpace* and the other cases on which Grindr relies are non-binding and rely on non-binding precedent. They also construe § 230(c)(1) broadly to the benefit of some purposes (internet development and self-policing) and the detriment of others (protection of minors from online content ill-suited for them and from online sexual abuse) and arguably fail to apply the plain language of § 230(c)(1). At a minimum, however, they do not help Grindr obtain dismissal because they involve allegations or facts different from the allegations T.V. includes in the operative pleading, such as Grindr’s introduction of the “Tribes,” see D9 ¶¶31–33.

***62** Grindr argues that its design feature displaying the nearest user first “merely publishes data users themselves share with Grindr.” D22 at 19. Grindr relies on *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1269–70 (D.C. Cir. 2019), in which the D.C. Circuit affirmed dismissal based on a concession by the plaintiff and a general understanding of how an internet search engine receives GPS data and transforms the GPS data into a pinpoint on a map. D42 at 16. Grindr’s argument fails under the “clearly appears” standard for deciding a motion to dismiss based on an affirmative defense. *See Fortner*, 983 F.2d at 1028. This Court has no concession, and T.V. alleges nothing about the design feature beyond that Grindr “publicizes the location of users of Grindr Services on its platform,” D9 ¶48(a), Grindr’s “user interface shows images of men arranged from nearest to farthest away,” *id.* ¶13, users “can see profiles of other users by tapping their image,” *id.*, and users “can **chat** with one another on the interface,” *id.* Asking the Court to presume or guess additional information about this interface is asking too much.

Grindr also argues that the “geolocation features cannot defeat [§] 230 immunity because [T.V.] does not allege these features caused A.V.’s alleged injuries.” D22 at 19. Grindr’s argument fails because, as explained in section IV.A.2, *supra*, T.V. alleges sufficient facts to make causation plausible under Florida law.

Grindr argues that it cannot be liable for merely providing “neutral assistance” to good and bad users alike. D22 at 19 & 19 n.2. Neither the plain language of § 230(c)(1) nor any binding precedent includes a “neutral assistance” standard. *See Malwarebytes*, 141 S. Ct. at 14 (“Courts have long emphasized noncontextual arguments when interpreting § 230, leaving questionable precedent in their wake.”) (Thomas, J., opinion on the denial of certiorari). In any event, T.V. alleges that Grindr did more than merely neutrally assist users. *See* section II.A. (describing T.V.’s factual allegations, including allegations about the “Twink” and “Daddy” “Tribes”). Again, like other arguments Grindr makes, this argument depends on an unreasonably narrow reading of the allegations and disregards that, at this early stage of the litigation, all reasonable inferences from the allegations are drawn in T.V.’s favor. *See Karantsalis*, 17 F.4th at 1319.

Footnotes

1 Citations to page numbers are to page numbers generated by CM/ECF.

The undersigned recommends rejecting Grindr’s argument that the § 230(c)(1) defense to the claims based on Florida common law torts (counts two through eight) clearly appears on the face of the operative pleading.

V. Recommendations

The undersigned recommends:

- (1) **granting in part and denying in part** Grindr’s motion to dismiss, D22, as supplemented, D53, D60;
- (2) **dismissing with prejudice** the claim for wrongful death based on the TVPRA (count one);
- (3) **allowing** the other claims (counts two through eight) to proceed; and
- (4) **ordering** the parties to confer about case management and file a case management report within 14 days of the order on the motion to dismiss, D22.

VI. Objections and Responses

***63** “Within 14 days after being served with a copy of [a] recommended disposition, a party may serve and file specific written objections to the proposed … recommendations.” *Fed. R. Civ. P.* 72(b)(2). “A party may respond to another party’s objections within 14 days after being served with a copy.” *Id.* “The district judge must determine de novo any part of the magistrate judge’s disposition that has been properly objected to.” *Id.* 72(b)(3); *see also* 28 U.S.C. § 636(b)(1)(C) (“A [district judge] shall make a de novo determination of those portions of the report … to which objection is made.”). “A party failing to object to … recommendations … waives the right to challenge on appeal the district court’s order based on unobjected-to … legal conclusions[.]” 11th Cir. R. 3-1.

Any objection to this report and recommendation must be made by **August 27, 2024**.

All Citations

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- 2 R.V. was the original executor and plaintiff. D1. R.V. died on August 13, 2023. D43. Without opposition from Grindr, D49, the Court permitted the new executor, T.V., to become the plaintiff. D50. The undersigned replaces most references to "R.V." with "T.V."

Without opposition from Grindr, the Court permitted the identification of A.V., T.V., and R.V. by initials in papers on the public docket. D16 at 4. Grindr knows the full names, D14 at 2, which are disclosed in a sealed paper, SD10 at 1–2. All other information is on the public docket.

- 3 In this report and recommendation, "minor" means a person under 18.
- 4 T.V. contends that the Court has both federal question jurisdiction and diversity jurisdiction. D9 ¶¶6, 8. But she also contends that the only federal law involved—the TVPRA—is brought under the Florida Wrongful Death Act, codified at Fla. Stat. §§ 768.16–768.26. See D41 at 1; see also footnote 17, *infra* (explaining that the survival of a federal cause of action is a question of federal common law). Grindr does not contest jurisdiction. See D22. In the interest of judicial economy, the undersigned analyzes only diversity jurisdiction.

A federal court has diversity jurisdiction over a claim if the amount in controversy exceeds \$75,000 and the action is between citizens of different states. 28 U.S.C. § 1332. "[T]he legal representative of the estate of a decedent [is] a citizen only of the same State as the decedent[.]" *Id.* § 1332(c)(2). "[A] limited liability company is a citizen of any state of which a member of the company is a citizen." *Rolling Greens MHP, L.P. v. Comcast SCH Holdings, LLC*, 374 F.3d 1020, 1022 (11th Cir. 2004).

When he died, A.V. was a Florida citizen. D54 ¶2. T.V. thus is considered a Florida citizen. See 28 U.S.C. § 1332(c)(2). Grindr LLC's sole member is Grindr Holdings, LLC. D9 ¶3. Grindr Holdings LLC's sole member is Grindr Capital LLC. D38 ¶1. Grindr Capital LLC's sole member is Grindr Gap LLC. *Id.* ¶2. Grindr Gap LLC's sole member is Grindr Group LLC. *Id.* ¶3. Grindr Group LLC's sole member is Grindr Inc., a Delaware corporation with its principal place of business in California. *Id.* ¶4. The amount in controversy exceeds \$75,000. D9 ¶6. With Florida on one side and Delaware and California on the other and an amount in controversy exceeding \$75,000, the Court has diversity jurisdiction.

- 5 A motion must be "no longer than twenty-five pages inclusive of all parts." Local Rule 3.01(a). Grindr's motion is 36 pages, presumably because Grindr interprets "parts" to exclude the heading, title, table of contents, table of authorities, signature block, and certificate of service. See D22. "All parts" means "all parts," not "one part" or "some parts." The undersigned did not strike the noncompliant motion in the interest of efficiency.
- 6 When T.V. asked the Court to lift the stay, D32 at 19, no stay had been in place. The parties agreed to refrain from conducting discovery beyond initial disclosures until a ruling on the motion to dismiss. D27 at 5. The Court entered a case management and scheduling order requiring the completion of discovery by February 8, 2024, observing that the agreement binds the parties but not the Court and explaining that the parties must move to extend the deadline if they want that relief. D28 at 2 n.1. After the order directing supplemental briefing on the response to the motion to dismiss and a reply to the supplemented response, D39, the Court vacated the case management and scheduling order and stayed the case pending a decision on the motion to dismiss. D40. The case has remained stayed to allow time to substitute T.V. for R.V. as the plaintiff and, at the parties' request, to allow the parties time to try to settle. D55, D56, D57, D58, D61.
- 7 In the reply to the supplemented response to the motion to dismiss, Grindr raises new arguments concerning duty and reliance. D42 at 21–22, 25. Raising new arguments in a reply is too late because the Court lacks adversarial briefing on them. The undersigned does not address the arguments raised for the first time in the reply. See section IV.A.4, *infra* (analyzing the original arguments concerning duty, D22 at 30–31 & 31 n.5); section IV.A.7, *infra* (analyzing the original arguments concerning negligent misrepresentation, D22 at 33–34 & 34 n.7).
- 8 The operative pleading is the "Second Corrected Complaint." D9. The Court struck the original complaint, D1, because it was an impermissible "shotgun pleading" and failed to comply with Local Rule 1.08's typography requirements. D5. R.V. filed an "Amended Complaint," D6, and, at the Court's direction during a status conference, D8, the second corrected complaint, D9.

- 9 A definition of the slang term “daddy” is “a masculine older man; [specifically] one who is romantically or sexually interested in younger partners.” See OED | Oxford English Dictionary, “daddy,” available at https://www.oed.com/dictionary/daddy_n? (last visited on Aug. 13, 2024).
- 10 Definitions of the slang term “twink” include “a gay man, [especially] one considered to be affected, flamboyant, or feminine”; “a young, attractive gay man with a slim, boyish appearance”; and “[a] gay or effeminate man, or a young man regarded as an object of homosexual desire.” See OED | Oxford English Dictionary, “twink,” available at https://oed.com/dictionary/twink_n3 (last visited on Aug. 13, 2024); Dictionary.com, “twink,” available at <https://www.dictionary.com/browse/twink> (last visited on Aug. 13, 2024); Urban Dictionary, “twink,” available at <https://www.urbandictionary.com/define.php?term=twink> (last visited on Aug. 13, 2024).
- 11 A federal court sitting in diversity applies the substantive law of the forum state to state law claims. *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1020 (11th Cir. 2014). The court also applies the choice-of-law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). If the parties fail to consider the choice of law, the court presumes the substantive law of the forum state controls. *Int'l Ins. Co. v. Johns*, 874 F.2d 1447, 1458 n.19 (11th Cir. 1989).

Both Grindr and T.V. apply Florida law without considering the choice of law. See D22, D32. The undersigned, therefore, presumes Florida's substantive law applies to the state law claims. See *id.*

- 12 The Florida Wrongful Death Act creates a “[r]ight of action”:

When the death of a person is caused by the wrongful act [or] negligence ... of any person ... and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person ... that would have been liable in damages if death had not ensued shall be liable for damages ... notwithstanding the death of the person injured[.]

[Fla. Stat. § 768.19](#); see *Sheffield v. R.J. Reynolds Tob. Co.*, 329 So. 3d 114, 120–21 (Fla. 2021) (explaining that the law creates an “independent cause of action”).

In a wrongful death action, the injury “is to the decedent's statutory beneficiaries, not the decedent.” *Coates v. R.J. Reynolds Tob. Co.*, 375 So. 3d 168, 173 (Fla. 2023). Thus, “although there must be a tort underlying the wrongful death action, it is more appropriate to say that a personal representative brings a wrongful death claim ... based on alleged negligence ... than to say that the personal representative prosecutes the decedent's cause of action.” *Sheffield*, 329 So. 3d at 121 (internal quotation marks and quoted authority omitted).

The law specifies who must bring the action and that no action for personal injury of the decedent survives:

The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages ... caused by the injury resulting in death. When a personal injury to the decedent results in death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate.

[Fla. Stat. § 768.20](#); see *Martin v. United Sec. Servs., Inc.*, 314 So. 2d 765, 770–771 (Fla. 1975) (explaining that the law both creates a cause of action and limits the availability of other causes of action). The law defines “survivors” to include the decedent's parents, [Fla. Stat. § 768.18\(1\)](#), and specifies the damages the survivors and the estate may recover, *id.* § 768.21.

- 13 Florida has a “survival statute” that provides, “No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted, and defended in the name of the person prescribed by law.” [Fla. Stat. § 46.021](#). “[T]he survival statute applies when a person dies while possessing a cause of action against another person, but the harm caused by the other person is not the cause of death.” *Sheffield*, 329 So. 3d at 119. The statute “preserves actions the decedent filed or may have filed prior to ... death.” *Philip Morris USA Inc. v. McCall*, 234 So. 3d 4, 7 n.2 (Fla. 4th DCA 2017).

"Based on th[e] statute, a personal representative may bring and maintain a personal injury action on behalf of the decedent." *Id.* But if "the personal injury was the cause of the decedent's death, the personal injury action 'abates' and becomes a wrongful death cause of action under the Florida Wrongful Death Act." *Id.* (quoting *Fla. Stat. § 768.20*).

A personal representative may "pursue both a claim for survival damages and an alternative wrongful death claim where the cause of the decedent's death may be disputed by the parties." *Capone v. Philip Morris USA, Inc.*, 116 So. 3d 363, 378 (Fla. 2013); see also *Smith v. Lusk*, 356 So. 2d 1309, 1311 (Fla. 2d DCA 1978) ("Alternative pleading is a time honored practice. [The] complaint classically sets up inconsistent and alternative pleadings; Count I for pain and suffering, for injuries not resulting in plaintiff's death; and in Count II, for those elements of damages allowed by the legislature where the injury resulted in one's death.").

T.V. pleads the claims in this manner. See D9 ¶¶49–161.

- 14** A plaintiff must show standing for each "form of relief" demanded. *Davis v. Fed. Elec. Comm'n*, 554 U.S. 724, 734 (2008). A plaintiff demanding injunctive relief must prove "a real and immediate threat of future injury" and "a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future." *Koziara v. City of Casselberry*, 392 F.3d 1302, 1305–06 (11th Cir. 2004).

The parties do not address whether T.V. has standing for the injunctive relief demanded. See D22, D32. Because T.V. does not demand immediate injunctive relief, the Court need not address standing for that relief now.

- 15** The terms on that webpage Grindr cites in its motion to dismiss do not precisely match the terms Grindr quotes in the motion. Compare <https://www.grindr.com/terms-of-service/> (last visited on Aug. 13, 2024) ("GRINDR DOES NOT **CURRENTLY** CONDUCT CRIMINAL OR OTHER BACKGROUND SCREENINGS OF OUR USERS.") (emphasis added), with D22 at 11–12 ("GRINDR DOES NOT CONDUCT CRIMINAL OR OTHER BACKGROUND SCREENINGS OF OUR USERS[.]").

The undersigned directed Grindr to explain the discrepancy. D39 at 3. Grindr responded by providing terms purportedly from December 18, 2022 (five days before Grindr moved to dismiss, D42), D42-1, and terms purportedly from June 29, 2023 (the day after the Court directed supplemental briefing on the response to the motion to dismiss and a reply to the supplemented response), D42-2. Both terms state, "GRINDR DOES NOT **CURRENTLY** CONDUCT CRIMINAL OR OTHER BACKGROUND SCREENINGS OF OUR USERS." D42-1 at 2 (emphasis added); D42-2 at 2 (emphasis added). Despite the Court's direction, Grindr fails to explain why it omitted "CURRENTLY" in its motion to dismiss when purporting to quote the terms. See D42 at 26–27. Because consideration of alleged facts outside the pleading is unwarranted, the Court need not address the unexplained discrepancy.

- 16** The terms on the website Grindr cites at present include the statement, "Effective Date: The earlier of April 30, 2023, or user acceptance," with no indication of when the terms were last revised. See <https://www.grindr.com/terms-of-service/> (last visited on Aug. 13, 2024).

- 17** T.V. describes the "statutory survivors" by referencing the Florida Wrongful Death Act's survivor provision, *Fla. Stat. § 768.21*. See D9 ¶64(a)–(c). In supplemental briefing, she maintains that the claim based on the TVPRA is under the Florida Wrongful Death Act. D41 at 1. Grindr replies, "The TVPRA claim also fails because it cannot be 'based on Florida's Wrongful Death Act,' as [T.V.] states it is." D42 at 18 n.4 (quoting D41 at 1).

"In the absence of an expression of contrary intent, the survival of a federal cause of action is a question of federal common law." *U.S. v. NEC Corp.*, 11 F.3d 136, 137 (11th Cir. 1993), as amended (Jan. 12, 1994). Under federal common law, "survivability ... depends on whether the recovery is deemed 'remedial' or 'penal.'" *Id.* "A remedial action is one that compensates an individual for specific harm suffered, while a penal action imposes damages upon the defendant for a general wrong to the public." *Id.* To decide "whether a statute is penal or remedial," a court examines "three factors: (1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; (2) whether recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered." *Id.* (internal quotation marks and quoted authority omitted).

Deciding whether, under federal common law, a TVPRA claim survives death is unnecessary to decide the motion to dismiss because, as explained in this section, T.V. fails to allege facts sufficient to state a TVPRA violation.

- 18 Grindr also argues that T.V. fails to state a wrongful death claim based on the TVPRA because she fails to allege facts concerning a “commercial sex act,” Grindr’s knowledge about A.V.’s sexual interactions with adults, and Grindr’s knowledge of a benefit. D22 at 21–25; D42 at 17–18. In the interest of judicial economy, the undersigned addresses only one TVPRA argument, which is both persuasive and dispositive.
- 19 Section 1591 defines “venture” as “any group of two or more individuals associated in fact, whether or not a legal entity,” 18 U.S.C. § 1591(e)(6), and “participation in a venture” as “knowingly assisting, supporting, or facilitating a violation” of § 1591(a)(1). *Id.* § 1591(e)(4). Those definitions do not apply to a civil claim under § 1595(a). *Red Roof Inns*, 21 F.4th at 724.
- 20 Florida’s standard jury instructions are not “an adjudicative determination” of their legal correctness. *In re Amends. to Fla. Rules of Jud. Admin., Fla. Rules of Civ. Proc., & Fla. Rules of Crim. Proc.-Std. Jury Instrs.*, No. SC20-145, 2020 WL 1593030, at *3 (Fla. Mar. 5, 2020). The undersigned relies on these instructions only as a “shortcut”; each instruction includes notes citing Florida cases for the indisputable proposition that the torts require proximate causation.
- 21 The Florida Supreme Court has rejected a different aspect of the Restatement (Third) of Torts—specifically, a movement away from consumer expectations. See *Aubin*, 177 So. 3d at 510. In doing so, the court observed the Restatement (Third) of Torts “is not a codification of law or necessarily the consensus on the best policy for courts regarding the proper legal standard for strict liability in products liability cases. In fact, the methodology employed by the American Law Institute in drafting the Third Restatement reflects hurdles in creating a categorical pronouncement in an area of law as complex and fact-driven as strict products liability.” *Id.* at 509 (internal footnote omitted). Still, no Florida case suggests that Florida would not follow the unanimous decisions refusing to categorize services as products.
- 22 Distinguishing between strict liability as a tort and breach of warranty under the Uniform Commercial Code, the Florida Supreme Court has explained that the former is based on public policy, the latter on contract, and has recognized “there are two parallel but independent bodies of products liability law.” *West*, 336 So. 2d at 88. “An action under the strict liability doctrine eliminates the notice requirement, restricts the effectiveness of disclaimers to situations where it can be reasonably said that the consumer has freely assumed the risk, and abolishes the privity requirement.” *Id.*; see also *Sanders v. Acclaim Ent., Inc.*, 188 F. Supp. 2d 1264, 1278 (D. Colo. 2002) (“While computer source codes and programs may be construed as ‘tangible property’ for tax purposes and as ‘goods’ for commercial purposes, these classifications do not establish that intangible thoughts, ideas, and messages contained in computer video games or movies should be treated as products for purposes of strict liability.”). Because of the different rationales for strict liability and breach of warranty, cases analyzing the latter type of claim provide little guidance in this action.
- 23 T.V. explains the “negligence per se product design defect” claim (count three) differs from the strict liability claim (count two) because the strict liability claim “relates only to the defective design of the product, the Grindr app[],” while the negligence per se claim “is a claim for negligence which relates to the duty of care owed to A.V. and not solely limited to the design of the product, the Grindr app[],” and this claim “incorporates defectively designed services and tools, as opposed to just the product/app[] described” in the strict liability claim. D41 at 2–3.
- 24 In the reply, Grindr argues for the first time that a platform owner like itself owes no duty of care to users. Compare D22 at 30–31 (motion providing two reasons to find no duty of care), with D42 at 19–22 (reply providing three reasons to find no duty of care). The undersigned does not address this argument. See footnote 7, *supra* (explaining why the undersigned does not address arguments made for the first time in the reply).
- 25 Both duty and proximate causation rely on foreseeability. See section IV.A.2, *supra* (explaining Florida law on causation and analyzing Grindr’s causation argument). The Florida Supreme Court has explained the difference between duty and proximate causation:

The duty element of negligence focuses on whether the defendant’s conduct foreseeably created a broader “zone of risk” that poses a general threat of harm to others. The proximate causation element, on the other hand, is concerned with whether and to what extent the defendant’s conduct foreseeably and substantially caused the specific injury that actually occurred. In other words, the former is a minimal threshold legal requirement for opening the courthouse doors,

whereas the latter is part of the much more specific factual requirement that must be proved to win the case once the courthouse doors are open. As is obvious, a defendant might be under a legal duty of care to a specific plaintiff, but still not be liable for negligence because proximate causation cannot be proven.

McCain, 593 So. 2d at 502–03 (internal authority, footnote, and emphasis omitted).

- 26 Florida courts recognize that “[a] defendant's liability for the criminal act[] of [a] third party is often linked to a ‘special relationship’ with the plaintiff.” *Knight v. Merhige*, 133 So. 3d 1140, 1145 (Fla. 4th DCA 2014). The existence of a special relationship imposes a duty on those who fail to act. *U.S. v. Stevens*, 994 So. 2d 1062, 1068 (Fla. 2008). “These relationships are protective by nature, requiring the defendant to guard his charge against harm from others.” *Id.* (quoted authority omitted). “For example, a common carrier has a legal duty toward its passengers to exercise reasonable care to prevent physical attacks by third persons,” and a “landlord has a duty to protect a tenant from reasonably foreseeable criminal conduct.” *Id.* (internal quotation marks and quoted authority omitted). “Other examples … include businesses toward their customers, employers toward their employees, jailers toward their prisoners, hospitals toward their patients, and schools toward their pupils.” *Id.* (internal footnotes omitted).
- 27 Other circumstances favoring a finding of outrageousness include conduct against a corpse, see *Winter Haven Hosp., Inc. v. Liles*, 148 So. 3d 507, 516 (Fla. 2d DCA 2014); *Williams v. City of Minneola*, 575 So. 2d 683, 691 (Fla. 5th DCA 1991); *Smith v. Telophase Nat'l Cremation Soc'y, Inc.*, 471 So. 2d 163, 166 (Fla. 2d DCA 1985); conduct by someone with actual or apparent authority over the plaintiff, see *Gallogly*, 970 So. 2d at 472; *Lashley v. Bowman*, 561 So. 2d 406, 409–10 (Fla. 5th DCA 1990); and circumstances involving the unequal position of parties in a relationship, see *Liberty Mut. Ins. Co. v. Steadman*, 968 So. 2d 592, 596 (Fla. 2d DCA 2007); *Dependable Life*, 510 So. 2d at 988; *Dominguez v. Equitable Life Assurance Soc'y of the U.S.*, 438 So. 2d 58, 61–62 (Fla. 3d DCA 1983), approved *sub nom.* *Crawford & Co. v. Dominguez*, 467 So. 2d 281, 281 (Fla. 1985). T.V.’s claim does not involve these circumstances. See D9.
- Circumstances disfavoring a finding of outrageousness include conduct against a person involved in an event of public interest, see *Cape Publ'ns, Inc. v. Bridges*, 423 So. 2d 426, 427–28 (Fla. 5th DCA 1982); and conduct in the workplace for which statutory or administrative remedies are available, see *Williams v. Worldwide Flight SVCS., Inc.*, 877 So. 2d 869, 871 (Fla. 3d DCA 2004); *State Farm Mut. Auto. Ins. Co. v. Novotny*, 657 So. 2d 1210, 1212–13 (Fla. 5th DCA 1995). T.V.’s claim does not involve these circumstances. See D9.
- 28 If a “plaintiff has not suffered an impact, the complained-of mental distress must be manifested by physical injury, the plaintiff must be involved in the incident by seeing, hearing, or arriving on the scene as the traumatizing event occurs, and the plaintiff must suffer the complained-of mental distress and accompanying physical impairment within a short time of the incident.” *Willis*, 967 So. 2d at 850 (internal quotation marks and quoted authority omitted). As Grindr observes, D22 at 33 n.6, T.V. does not attempt to make this type of claim, see D9.
- 29 “A fact is material if, but for the alleged … misrepresentation, the complaining party would not have entered into the transaction.” *Atl. Nat'l Bank of Fla. v. Vest*, 480 So. 2d 1328, 1332 (Fla. 2d DCA 1985). A misrepresentation claim “is not actionable if premised on mere opinion, rather than a material fact.” *MDVIP, Inc. v. Beber*, 222 So. 3d 555, 561 (Fla. 4th DCA 2017) (internal quotation marks and quoted authority omitted). “But this rule has significant qualifications[.]” *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906, 908 (Fla. 2d DCA 1968). The rule “does not apply where there is a fiduciary relationship between the parties, or where there has been some artifice or trick employed by the representor, or where the parties do not in general deal at ‘arm’s length[.]’ … or where the representee does not have equal opportunity to become apprised of the truth or falsity of the fact represented.” *Id.* at 908–09. Grindr does not argue that T.V. fails to allege sufficient facts for materiality. See D22 at 33–34; D42 at 24–25.
- 30 In the reply, Grindr argues for the first time that T.V. fails to allege sufficient facts for reliance, as opposed to *justifiable* reliance. Compare D22 at 34 (arguing that A.V.’s “reliance was not justifiable”), with D42 at 25 (“Plaintiff does not identify any allegations showing A.V. read or relied on Grindr’s supposed representations, nor explain how such reliance could be justified.”). The undersigned does not address the arguably stronger argument about the sufficiency of the allegations for reliance. See footnote 7, *supra* (explaining why the undersigned does not address arguments made for the first time in the reply).

- 31 Grindr refers to the § 230(c)(1) defense as “immunity.” See D22 at 20–34. T.V. does the same. See D32 at 2–8, 10, 11, 18. As the Seventh Circuit persuasively explains, the provision does not create “immunity”; rather, it “limits who may be called the publisher of information that appears online[.]” See *G.G. v. Salesforce.com, Inc.*, 76 F.4th 544, 566 (7th Cir. 2023) (quoted authority omitted).
- 32 In 2000, Congress passed the Trafficking Victims Protection Act of 2000 to recognize child sex trafficking as a crime. *Pub. L. No. 106-386*, 114 Stat. 1464. In 2003, Congress passed the TVPRA to allow victims of sex trafficking to bring civil actions against traffickers and other co-defendants. *Pub. L. No. 108-193*, 117 Stat. 2875; see section IV.A.1, *supra* (analyzing T.V.’s wrongful death claim based on the TVPRA). In 2018, Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 to clarify that § 230 must not be construed to limit those laws. *Pub. L. No. 115-164*, 132 Stat. 1253; see 47 U.S.C. § 230(e)(5)(A).
- 33 Shortly after the enactment of the Telecommunications Act of 1996 and within it the Communications Decency Act, the United States Supreme Court struck down as facially overbroad under the First Amendment two Communications Decency Act prohibitions: prohibiting the knowing transmission of obscene or indecent messages to a minor and prohibiting the knowing sending or displaying of patently offensive messages in a manner that is available to a minor. *Reno*, 521 U.S. at 859–60, 874.
- 34 See, e.g., *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (affirming summary judgment for AOL on claims based on inaccurate stock information on AOL because AOL did not create the information); *Green v. Am. Online (AOL)*, 318 F.3d 465, 470–71 (3d Cir. 2003) (affirming the dismissal of claims against AOL based on wrongdoers’ malware, impersonation, and defamation because holding AOL liable for failing to police wrongdoing would treat AOL as the “publisher” or “speaker” of the wrongdoers’ content); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122–25 (9th Cir. 2003) (affirming summary judgment for a dating website and related parties on claims based on a false profile of the plaintiff because someone else provided the profile’s content); *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 415–16, 418–22 (1st Cir. 2007) (affirming the dismissal of claims against an internet message board operator based on false and defamatory postings because others had made the postings and no amount of “artful pleading” could avoid that fact); *Johnson v. Arden*, 614 F.3d 785, 790–92 (8th Cir. 2010) (affirming the dismissal of a defamation claim against an internet service provider because the provider did not “originate” the allegedly defamatory material, did not design “its website to be a portal for defamatory material,” and did not “do anything to induce defamatory postings”); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1355, 1357–59 (D.C. Cir. 2014) (affirming the dismissal of negligence and assault claims against Mark Zuckerberg and Facebook based on a Facebook page calling for Muslims to rise up and kill Jewish people because the defendants merely provided a neutral means for others to post information of their own independent choosing); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 408–16 (6th Cir. 2014) (ordering the entry of judgment as a matter of law for TheDirty.com and related defendants on defamation claims based on anonymous comments and one defendant’s comments to the comments because the defendants did not materially contribute to the defamatory material); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (affirming the dismissal of a defamation claim against GoDaddy service because others drafted and distributed the allegedly defamatory material).

- 35 The concurring and dissenting judge in *Force*, an action against Facebook, provided this example:

Suppose that you are a published author. One day, an acquaintance calls. “I’ve been reading over everything you’ve ever published,” he informs you. “I’ve also been looking at everything you’ve ever said on the Internet. I’ve done the same for this other author. You two have very similar interests; I think you’d get along.” The acquaintance then gives you the other author’s contact information and photo, along with a link to all her published works. He calls back three more times over the next week with more names of writers you should get to know.

Now, you might say your acquaintance fancies himself a matchmaker. But would you say he’s acting as the publisher of the other authors’ work?

Force, 934 F.3d at 76 (Katzmann, C.J., concurring in part and dissenting in part).

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