

2021 WL 5822137

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United States Court of Appeals, Tenth Circuit.

UNITED STATES of
America, Plaintiff - Appellee,
v.
Nnamdi Franklin OJIMBA,
Defendant - Appellant.

No. 20-6109

|

FILED October 20, 2021

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

Attorneys and Law Firms

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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
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Chiagoziem Kizito OKEKE
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Signed August 21, 2024

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MEMORANDUM OPINION AND ORDER

AMOS L. MAZZANT, UNITED STATES DISTRICT JUDGE

*1 Pending before the Court is Defendant's Motion for Acquittal ([Rule 29 F.R.C.P.](#)) and Motion for New Trial ([Rule 33 F.R.C.P.](#)) (Dkt. #1305). Having considered the motion and the relevant pleadings, the Court finds that the motion should be **DENIED**.

BACKGROUND

Defendant Chiagoziem Kizito Okeke ("Okeke") was charged with two counts in the Second Superseding Indictment (Dkt. #862). Count One charged Okeke with conspiracy to commit wire fraud in violation of [18 U.S.C. § 1349](#) (Dkt. #862 ¶¶ 1–12). Count Two charged Okeke with conspiracy to commit money laundering in violation of [18 U.S.C. § 1945\(h\)](#) (Dkt. #862 ¶¶ 13–14).

The Second Superseding Indictment charged that Okeke participated in "a multitude of fraudulent schemes to unlawfully obtain money from their victims, including online

romance scams, business email compromise and investor fraud, healthcare and prescription fraud, and unemployment insurance fraud" (Dkt. #862 ¶ 2). Further, the Second Superseding Indictment charged that Okeke, along with others, "did knowingly and willfully combine, conspire, confederate, and agree to commit wire fraud against the United States" (Dkt. #862 ¶ 14). Additionally, the Second Superseding Indictment asserted that Okeke, along with others, "not only coordinated how to receive money from victims, but also how to disguise, disburse, and launder that money once victims were defrauded" (Dkt. #862 ¶ 2).

Between February 8, 2024 and February 15, 2024, the United States produced approximately 3.63 gigabytes of discovery to Okeke (Dkt. #1178 at pp. 1–2).¹ Okeke filed a motion for continuance for additional time to review this information (among other grounds) (Dkt. #1178 at pp. 1–2). The Court denied Okeke's motion for continuance (Dkt. #1188).

On February 26, 2024, a jury trial began. Okeke orally moved for a judgment of acquittal under [Federal Rule of Criminal Procedure 29\(a\)](#) after the United States rested. The Court denied Okeke's oral motion. Following a thirteen-day jury trial, the jury returned its verdict. The jury found Okeke guilty on both Count One and Count Two.

On May 13, 2024, Okeke filed the present motion (Dkt. #1305). On June 25, 2024, the United States filed its response (Dkt. #1359). Okeke did not file a reply.

LEGAL STANDARD

I. Motion for Acquittal

A [Rule 29](#) motion for judgment of acquittal "challenges the sufficiency of the evidence to convict." [United States v. Medina](#), 161 F.3d 867, 872 (5th Cir. 1998). The issue is "whether, viewing the evidence in the light most favorable to the verdict, a rational [finder of fact] could have found the essential elements of the offense charged beyond a reasonable doubt." [United States v. Boyd](#), 773 F.3d 637, 644 (5th Cir. 2014) (citing [Jackson v. Virginia](#), 443 U.S. 307, 319 (1979); [United States v. Miller](#), 588 F.3d 897, 907 (5th Cir. 2009)). "The standard does not require that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." [United States v. Loe](#), 262 F.3d 427, 432 (5th Cir. 2001). The

factfinder is “free to choose among reasonable constructions of the evidence,” and “it retains the sole authority to weigh any conflicting evidence and to evaluate the credibility of the witnesses.” *Id.* (quotations and citations omitted).

II. Motion for New Trial

*2 Rule 33 provides that, on request, “the court may vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33(a). The decision to grant or deny a motion for new trial pursuant to Rule 33 is well within the Court’s discretion. *E.g., United States v. Wall*, 389 F.3d 457, 465 (5th Cir. 2004) (citing *United States v. O’Keefe*, 128 F.3d 885, 893 (5th Cir. 1997)).

“Generally, motions for new trial are disfavored and must be reviewed with great caution.” *United States v. Smith*, 804 F.3d 724, 734 (5th Cir. 2015). The Court typically “should not grant a motion for new trial unless there would be a miscarriage of justice” *Wall*, 389 F.3d 466 (citation omitted). As such, a new trial is proper only where the defendant’s “substantial rights” have been harmed—either based on a single error or the cumulative effect of multiple errors. *United States v. Bowen*, 799 F.3d 336, 349 (5th Cir. 2015).

ANALYSIS

Okeke raises three issues in the present motion. First, he claims the evidence was insufficient to support a conviction under Count One of the Second Superseding Indictment. Second, he claims the evidence was insufficient to support a conviction under Count Two of the Second Superseding Indictment. Third, he claims he is entitled to a new trial based on the Government’s lack of timely production of discovery and the Court’s refusal to grant a continuance. The Court addresses each issue in turn.

I. Whether the Evidence Was Insufficient to Support a Conviction Under Count One

Okeke renews his motion for a judgment of acquittal as to Count One, conspiracy to commit wire fraud, on the grounds that the United States was unable to prove a scheme to defraud and a specific intent to defraud (Dkt. #1305 at p. 2). Although the United States introduced several bank accounts belonging to Okeke at trial, he claims that “no evidence [was] presented to the jury that any money from any victim entered his bank accounts” (Dkt. #1305 at p. 3). Further, Okeke

asserts that no text messages or WhatsApp chats “prove[d] beyond a reasonable doubt that he had an agreement with his brother or anyone else to commit wire fraud” (Dkt. #1305 at p. 3). Additionally, Okeke contends that two witnesses (and co-defendants) for the United States, Isaac Asare and Peter Omeiri, testified that Okeke did not commit any illegal activity (Dkt. #1305 at p. 3). Finally, Okeke states that he testified in his own defense, as a credible witness, that he did not agree (with anyone) “to commit the offense of wire fraud” (Dkt. #1305 at pp. 3–4).

The United States first addressed Okeke’s involvement with romance scams. First, the United States presented cellphone extractions demonstrating that Okeke messaged his brother on WhatsApp “[a]sking for 40 percent,” to which his brother responded “[f]or dating?” (Dkt. #1369 at p. 4). Second, the United States submitted a voicemail (that was not sent to Okeke) where a co-defendant discussed the shares that individuals may receive for account owners, owners of the job, and middlemen for wires involving “dating” (Dkt. #1369 at p. 4). Third, the United States presented a conversation intercepted over a wiretap, in which a co-conspirator told a co-defendant “[o]lder women. All this fake love matter ... They will put it there, and they get the women to get the money out. These are different ways, these are new things” (Dkt. #1369 at pp. 4–5).

*3 Next, the United States addressed Okeke’s involvement with email scams. Okeke’s brother sent a message to Okeke on WhatsApp that stated:

We are considering this 82000 US dollars Bank wire to your Washington D. C. Bank Wire Instructions, presently, now[.]

We are gathering up, and processing, this 82000 US dollars the past two days and we are hard at work to complete this 82000 US dollars, soon for all parties involved, now too.

This is best I can communicate to you today, but we will do this promised 82000 US dollars Bank Wire to your Chase Bank in Washington D.C., shall be done for sure.

Thank you again, and I appreciate your prompt and careful attention to this important matter to all parties involved now, too.

Yours Respectively,

(Dkt. #1369 at p. 5). At trial, a 75-year-old man testified that he had been victimized by an email scam involving communications soliciting money from him that were very

similar to the one in the exchange between Okeke and his brother (Dkt. #1369 at p. 5). Further, the United States presented another **WhatsApp** message where Okeke's brother sent Okeke a picture of a \$20,000 wire transfer from the same 75-year-old man (Dkt. #1369 at p. 6).

Additionally, the United States presented evidence regarding the discrepancy between Okeke's total net bank deposits and income reported to the Internal Revenue Service. Okeke's total reported income to the IRS was \$170,398.99 (Dkt. #1369 at p. 8). However, during that same period, his total net bank deposits were \$4,453,167.50 (Dkt. #1369 at p. 8).

The Court finds that the evidence presented was sufficient to support the guilty verdict on Counts One. Okeke's motion argues that the evidence presented does not establish beyond a reasonable doubt a scheme to defraud and a specific intent to defraud. Viewing the evidence in the light most favorable to the verdict, the Court determines that the jury could find Okeke guilty of Count One based on that evidence.

II. Whether the Evidence Was Insufficient to Support a Conviction Under Count Two

Okeke renews his motion for a judgment of acquittal as to Count Two, conspiracy to commit money laundering, on the grounds that “[t]he evidence was insufficient to prove that [Okeke] agreed with anyone or aided and abetted anyone to commit the offense of money laundering” (Dkt. #1305 at p. 4). Okeke claims that “[t]here were not any proceeds that entered his account that were from any wire fraud activity, nor did he have knowledge of any proceeds entering his account being derived from fraud. [Okeke] testified that he engaged in a Naira exchange and only dealt in cash” (Dkt. #1305 at p. 5). Further, Okeke argues that “[t]he [United States] relied on **WhatsApp chats** in their effort to prove an agreement, but the messages did not bear that out” (Dkt. #1305 at p. 5). Therefore, according to Okeke, “[s]ince there was no evidence that [Okeke] agreed to commit wire fraud the evidence is insufficient that he agreed to commit the offense of money laundering” (Dkt. #1305 at p. 5).

The United States responds that Okeke was part of a scheme involving multiple bank accounts to transfer money stolen via wire fraud (Dkt. #1369 at p. 6). The United States presented evidence that Okeke sent (via **WhatsApp**) bank account information related to multiple bank accounts to launder stolen money (Dkt. #1369 at p. 6). Further, the United States presented evidence from another exchange in which Okeke provided his brother with specific account information linked

to a bank in China and stated that \$40,000 was associated with that account (Dkt. #1369 at pp. 6–7). The United States also submitted messages between Okeke and a co-defendant, Peter Omeiri. These messages contain pictures of bank deposits that Omeiri made on Okeke's behalf, instructions from Okeke for Omeiri to open additional bank accounts, and directions on where to and how much money Omeiri should wire (Dkt. #1369 at p. 7).

*4 Further, two co-defendants testified at trial regarding Okeke's activities. Omeiri testified that he opened bank accounts and made many deposits on behalf of Okeke and his brother (Dkt. #1369 at p. 7). Asare testified that he opened several bank accounts, at Okeke's direction, and allowed Okeke and his brother to direct incoming and outgoing wires (Dkt. #1369 at p. 7). Asare further testified that Okeke often provided him with large amounts of cash to deposit in these bank accounts, ranging from \$5,000 to \$50,000 (Dkt. #1369 at pp. 7–8).

Finally, the United States produced evidence regarding Okeke's finances (Dkt. #1369 at p. 8). In addition to the discrepancies between Okeke's reported tax income and his total net bank deposits, Okeke also possessed no fewer than 16 bank accounts with nine different banks during a five-year period (Dkt. #1369 at p. 8). Ten of the 16 bank accounts were open for eight months or less (Dkt. #1369 at p. 8).

The Court finds that the evidence presented was sufficient to support the guilty verdict on Counts Two. Okeke's motion argues that the evidence presented does not establish beyond a reasonable doubt that Okeke agreed with anyone or aided and abetted anyone to commit the offense of money laundering. Viewing the evidence in the light most favorable to the verdict, the Court determines that the jury could find Okeke guilty of Count Two based on that evidence.

III. Whether the Court's Denial of Okeke's Motion for Continuance Entitles Okeke to a new Trial

Okeke argues that the Court should grant him a new trial because the United States' untimely production of discovery and the Court's denial of Okeke's motion for a continuance (Dkt. #1305 at pp. 5–6). Okeke notes that “the [United States] dumped several gigabytes on [him] less than a month before trial” and the Court denied his motion for continuance (Dkt. #1305 at p. 5). According to Okeke, the impact of these events did not “b[ear] itself [out] until closing argument” (Dkt. #1305 at p. 5). During the United States' closing argument, the United States “referenced a **WhatsApp chat** between

Mr. Okeke and his brother where a picture [] had [a] victim[’s] name in it” (Dkt. #1305 at p. 5). Okeke asserts that his “[c]ounsel had never seen this **chat** or picture prior to the government presenting it and was unaware that it even existed” (Dkt. #1305 at p. 5). Okeke further asserts that “[s]ince counsel did not know this picture and **chat** existed, he was unable to question his client during his testimony or rebut it during his case in chief. Counsel was also not able to respond to it during closing argument.” (Dkt. #1305 at pp. 5–6). Therefore, Okeke claims that he “suffered harm as a result and should be granted a new trial” (Dkt. #1305 at p. 6).

The Court interprets Okeke’s argument as specifically claiming that the Court’s denial of his motion for continuance entitles Okeke to a new trial.²

In response, the United States claims that a new trial is not appropriate for several reasons (Dkt. #1369 at pp. 9–11). First, the United States analogizes this case to cases where courts denied continuances where defendants substituted counsel just before trial in complex and document intensive cases (Dkt. #1369 at p. 9) (citing *United States v. Lewis*, 476 F.3d 369, 387 (5th Cir. 2007); *United States v. Stalnaker*, 571 F.3d 428 (5th Cir. 2009)). Second, the United States claims that it consistently and diligently provided discovery pursuant to its obligations (Dkt. #1369 at p. 10). The United States claims that it presented to Okeke’s counsel “the evidence and source of evidence the [United States] would use to prove guilt at trial” and advised Okeke’s counsel that “the investigating agents would assist in locating items, evidence, and extractions of electronic evidence as needed” (Dkt. #1369 at p. 10). The United States claims that in October 2024, it provided a draft exhibit list, which included the **WhatsApp chat** and picture at issue, to Okeke’s counsel (Dkt. #1369 at p. 11). Finally, the United States asserts that the Court admitted the **WhatsApp chat** and picture at issue into evidence during the trial (Dkt. #1369 at p. 11).

***5** The Court’s denial of Okeke’s motion for continuance does not warrant a new trial because Okeke has not shown that he experienced a specific and compelling or serious prejudice. “Trial judges have ‘broad discretion’ in ruling on motions for continuance.” *United States v. Mesquiti*, 854 F.3d 267, 275 (5th Cir. 2017). “To establish that denial of such a motion was an abuse of discretion, [a party] must show that the denial resulted in specific and compelling or serious prejudice.” *Id.* (internal citation omitted). Courts “look to the totality of the circumstances, including”: (1) “the amount of time available,” (2) “the defendant’s role in shortening the time

needed;” (3) “the likelihood of prejudice from denial;” (4) “the availability of discovery from the prosecution;” (5) “the complexity of the case;” (6) “the adequacy of the defense actually provided at trial;” and (7) “the experience of the attorney with the accused.” *United States v. Stalnaker*, 571 F.3d 428, 439 (5th Cir. 2009) (internal citation omitted).

A claim of prejudice to a party from the denial of a motion for continuance requires specific contentions of prejudice. *United States v. Blankenship*, No. 22-40619, 2024 WL 640148, at *2 (5th Cir. Feb. 15, 2024); *see also Mesquiti*, 854 F.3d at 275; *United States v. Capistrano*, 74 F.4th 756, 777 (5th Cir. 2023). In *United States v. Blankenship*, the Fifth Circuit upheld a district court’s denial of a motion for continuance where the appellants had not provided specific instances of prejudice. 2024 WL 640148, at *2. One appellant claimed that he possessed insufficient time to review discovery or prepare a defense. *Id.* However, the Fifth Circuit found that these contentions of prejudice were too general because the appellant did not “identif[y] any evidence he would have presented, witnesses he would have called, or specific defensive strategies he would have employed if given more time.” *Id.*

Although Okeke claims that he experienced “irreparable harm” from his inability to formulate a defense regarding the **WhatsApp chat** and picture, he has not identified any specific defensive measures he would have taken (*See* Dkt. #1305 at pp. 5–6). Okeke claims that his counsel (1) “was unable to question [Okeke] during his testimony;” (2) “was unable … to rebut during his case in chief;” and (3) “was not able to respond to it during closing argument” (Dkt. #1305 at pp. 6–7). However, akin to *Blankenship*, Okeke has not offered specific contentions of prejudice from the Court’s denial of his motion for continuance. *See Blankenship*, 2024 WL 640148, at *2. Therefore, the Court finds that its denial of Okeke’s motion for continuance does not entitle Okeke to a new trial.

CONCLUSION

It is therefore **ORDERED** that Defendant’s Motion for Acquittal (Rule 29 F.R.C.P.) and Motion for New Trial (Rule 33 F.R.C.P.) (Dkt. #1305) is hereby **DENIED**.

IT IS SO ORDERED.

All Citations

Slip Copy, 2024 WL 3891807

Footnotes

- 1** On February 14, 2024, the United States requested a one terabyte drive to provide Okeke's counsel with additional discovery (Dkt. #1178 at p. 2). Okeke's counsel complied and provided the United States with such a drive (Dkt. #1178 at p. 2). It is unclear when and what additional discovery the United States provided to Okeke's counsel.
- 2** The Court admitted the cellphone extraction excerpts (which consists of over 1,000 pages), which contain the **WhatsApp chat** and picture on pages 740–743, during trial on February 27, 2024, without any objection from Okeke's counsel (Dkt. #1221 at p. 3).

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Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

KITCHEN WINNERS NY INC., Plaintiff,

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

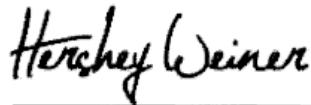
On April 7, 2021, the parties’ negotiations terminated with the execution of the SPA. JSF, Ex. 1 (“SPA”). The SPA’s preamble designates Kitchen Winners as “Seller,” Rock Fintek as “Buyer,” and the two collectively as “Parties,” and does not mention Adorama. *Id.* at 1. The SPA provides that “Seller agrees 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:

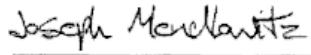
The foregoing Agreement is read and agreed by:

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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United States District Court, S.D. New York.

RED ROCK SOURCING LLC and
Coronado Distributing LLC, Plaintiffs,

v.

JGX LLC, et al., Defendants.

21 Civ. 1054 (JPC)

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Signed March 22, 2024

Attorneys and Law Firms

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Martin Stein, Heller, Horowitz & Feit, P.C., New York, NY, for Defendants Triple Five Worldwide, LLC, Isaac Saba, Eliezer Berkowitz, David Ghermezian, Yonah Ghermezian, Don Ghermezian.

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.

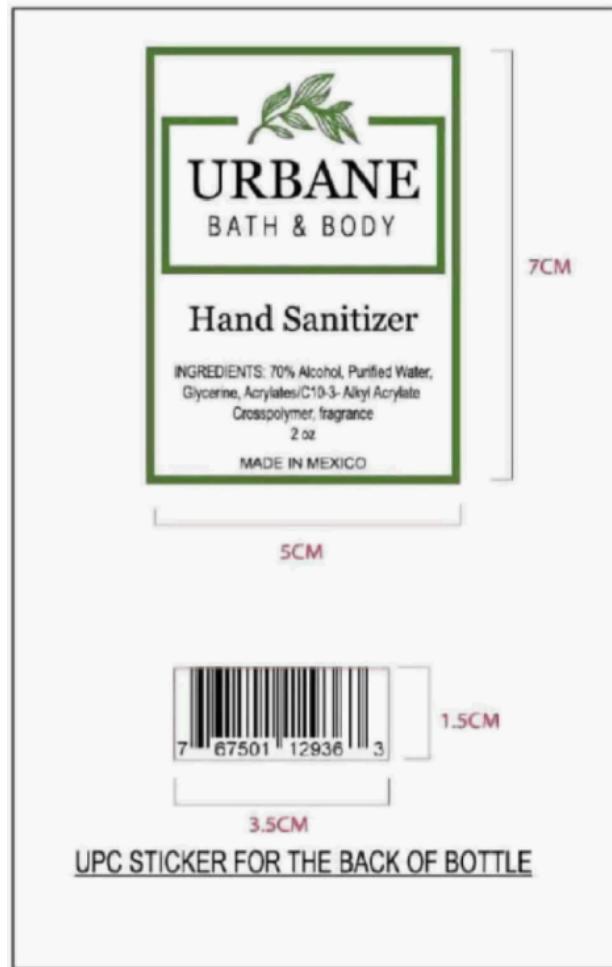
2. JGX and Isaac Import's Involvement in the Counterfeiting Scheme

*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 URBĀNE 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 URBĀNE 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 URBĀNE 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 URBĀNE 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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Only the Westlaw citation is currently available.

United States District Court,
E.D. Texas, Beaumont Division.

BRUCE COHN, Plaintiff,

v.

ANNA POPESCU,
TRUSTHFTWALLET.COM, and
JOHN DOES 1 –20, Defendants.

CIVIL ACTION NO. 1:24-CV-00337

|

Filed 08/16/2024

ORDER GRANTING PLAINTIFF'S MOTION FOR EMERGENCY EX PARTE TEMPORARY RESTRAINING ORDER AND ORDER AUTHORIZING EXPEDITED DISCOVERY

Michael J. Truncale United States District Judge

***1** Plaintiff has filed an Emergency Motion for *Ex Parte* Temporary Restraining Order and Order Authorizing Expedited Discovery (the “Motion”) [Dkt. 2], in which he seeks an order requiring the freezing of the accounts associated with fifteen deposit addresses at several cryptocurrency exchanges and authorization to issue subpoenas to various third parties likely to be in possession of information about the Defendants. The Court has reviewed Plaintiff’s Motion and finds that, for the reasons set out therein, he faces a risk of irreparable harm if the requested relief does not issue and notice to the Defendants should not be required. Accordingly, Plaintiff’s Motion is hereby **GRANTED**.

I. Background

Plaintiff’s relevant allegations are as follows. In June 2024, he met a person claiming to be named Anna Popescu on a dating website. ECF. 1, Verified Complaint (henceforth “Complaint”), ¶ 13. The two began messaging regularly. *Id.* She eventually told him about her success investing and trading cryptocurrencies and introduced him to a platform called TrustHFTwallet. *Id.* at ¶ 14. Popescu said she knew how to make profits using TrustHFTwallet and offered to teach Mr.

Cohn how to do the same. *Id.* She encouraged him to make a TrustHFTwallet account, which he soon did. *Id.*

Over the next several months, Popescu ‘trained’ Mr. Cohn in cryptocurrency trading using the TrustHFTwallet platform. *Id.* at ¶ 15. When Mr. Cohn was ready to make a deposit on TrustHFTwallet, the platform provided him asset-transfer instructions via the platform’s customer-service **chat** or on its “deposit” page. *Id.* Mr. Cohn completed the transactions as instructed. *Id.* Each time he deposited assets, at Popescu’s encouragement, the cryptocurrencies he transferred were reflected in his transaction history and account balance on the TrustHFTwallet platform. *Id.* Over time, he sent assets to TrustHFTwallet with a dollar-denominated value of more than \$2,400,000.00. *Id.*

Mr. Cohn’s balance on the TrustHFTwallet platform appeared to grow rapidly—eventually showing that he had crypto assets worth more than \$4.5 million in his account. *Id.* at ¶ 16. But when he attempted to withdraw his assets, TrustHFTwallet informed him that he could not do so in significant quantities without ‘leveling up’ his account by depositing more money. *Id.* Mr. Cohn began to believe he had been scammed. *Id.*

Mr. Cohn now alleges that TrustHFTwallet’s explanations as to why he could not withdraw his funds were lies. *Id.* at ¶ 18. He says the real reason TrustHFTwallet would not return his assets is that TrustHFTwallet is not a real trading platform at all. *Id.* Instead, he alleges that he has been the victim of what is known as a “pig-butchered scam.” *Id.* at ¶ 4. According to Mr. Cohn, this is a type of investment scam in which the perpetrators deceive victims into depositing their assets on a **fake**-but-realistic-looking “trading” or “investment” platform, where no trading or investment ever occurs. *Id.* Instead, Mr. Cohn alleges, the assets are simply stolen. *Id.*

***2** Evidentiary materials submitted by Mr. Cohn suggest that these kinds of investment scams are now amongst the most prevalent forms of cybercrime worldwide. ECF No. 2, Ex. 1-C, Affidavit of Evan Cole (henceforth “Cole Affidavit”) (providing excerpts from FBI Internet Crime Report). These materials also show that Mr. Cohn’s experience is very similar to those of other pig-butchered victims described in journalistic outlets and law-enforcement reports. *Id.*, Exs. 1-A (article describing typical pig-butchered scam), 1-B (Secret Service Bulletin describing pig-butchered scams), 1-C (excerpts from FBI Internet Crime Report).

After retaining counsel, Mr. Cohn engaged an investigator to perform a “blockchain tracing” report. This “tracing” refers to the process of following digital assets from location to location on the blockchain via publicly available data. Cole Affidavit, ¶ 7. Mr. Cohn's investigator was able to trace his allegedly stolen assets to addresses associated with four distinct cryptocurrency exchanges: (1) Binance, (2) OKX, (3) Zedzion, and (4) Kraken. ECF No. 2-3, Affidavit of Bruce Cohn (henceforth “Cohn Affidavit”), Attachment C (tracing report). In the instant Motion, Mr. Cohn asks the Court to order that these exchanges temporarily freeze the accounts associated with the blockchain addresses he has identified as receiving the assets stolen from him, so that he might preserve some assets for recovery.

In addition, by investigating TrustHFTwallet's website, Mr. Cohn has identified several additional third parties he claims are likely to be in possession of information about the Defendants. These third parties include, for example, the companies this website used for web hosting. His Motion seeks to issue subpoenas to these third parties, in addition to the four cryptocurrency exchanges mentioned above, with the aim of revealing the Defendants' true identities and unearthing contact information that he might subsequently use to serve or otherwise communicate with them.

II. Analysis

Mr. Cohn has met the requirements for issuance of a temporary restraining order and expedited discovery for the following reasons.

A. Temporary Restraining Order

The standard for issuance of an *ex parte* temporary restraining order has both procedural and substantive elements. Procedurally, the Court has the authority to issue an *ex parte* restraining order where (i) “specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition,” and (ii) “the movant's attorney certifies in writing any efforts made to give notice and why it should not be required.” [FED. R. CIV. P. 65\(b\)\(1\)\(A\)-\(B\)](#).

Both requirements are met here. Mr. Cohn's Verified Complaint, the Cole Affidavit, and the blockchain-tracing report show the likelihood of immediate and irreparable

injury or loss. These materials suggest that Mr. Cohn was in fact the victim of a prevalent form of cybercrime—the “pig-butchered scam”—which features well-established and recognizable patterns of deception. *See Complaint*, ¶¶ 13 – 17; Cole Affidavit, ¶¶ 3 – 6 (concluding that Mr. Cohn was the victim of a pig-butchered scam and providing news reports and law-enforcement bulletins for comparison). The Cole Affidavit further details how the assets allegedly stolen from Mr. Cohn could be further transferred to unretrievable locations at any time, with the click of a button. Cole Affidavit, ¶¶ 6 – 7 (explaining that crypto assets can be “dissipated at any moment, with a few mouse clicks and keyboard strokes,” and that Mr. Cohn will be unlikely to recover his assets if they are further dissipated). Several federal courts, including this Court, have found that this exigency justified issuance of *ex parte* restraining orders in similar crypto-fraud cases.¹ The Court finds the same here.

*³ In addition, Mr. Cohn's attorney has certified why notice should not be required. As Mr. Cohn points out in his Motion, the Court has the authority to enter an *ex parte* order not only where notice to the adverse party is impracticable, but where “notice to the defendant would render fruitless [the] prosecution of the action.” *Matter of Vuitton et Fils S.A.*, 606 F.2d 1, 5 (2d Cir. 1979); *see also*, e.g., *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 650 (6th Cir. 1993) (noting that *ex parte* order is justified where “the adverse party has a history of disposing of evidence or violating court orders or [] persons similar to the adverse party have such a history”). Under this logic, courts have found that notice of an asset-freeze motion is not required if the parties to be enjoined “are likely to dissipate assets and destroy business documents,” such that the very act of providing notice would “cause immediate and irreparable injury or damages to the Court's ability to award effective final relief.” *Fed. Trade Comm'n v. Dluca*, No. 18-60379-CIV, 2018 WL 1830800, at *2 (S.D. Fla. Feb. 28, 2018), *report and recommendation adopted*, No. 0:18-CV-60379-KMM, 2018 WL 1811904 (S.D. Fla. Mar. 12, 2018). Several courts have found that this same reasoning justified issuance of *ex parte* freezing orders in crypto-fraud cases analogous to this one.²

Here, the thrust of Mr. Cohn's allegations is that the Defendants are professional cybercriminals who have every motivation to place their ill-gotten gains beyond the reach of this Court or any other authority. While at this stage these are simply allegations, Mr. Cohn has provided sufficient evidence to suggest that the Defendants will in fact further dissipate assets if they were given notice of this motion. This

is sufficient to justify issuance of an *ex parte* order under these unique circumstances.

Having found that the procedural requirements for issuance of an *ex parte* restraining order are met, the Court now turns to the substantive standard. To obtain a temporary restraining order, a movant must show (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable harm if the injunction does not issue, (3) that the threatened injury outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction is in the public interest. *Moore v. Brown*, 868 F.3d 398, 402-03 (5th Cir. 2017).

Mr. Cohn has met each of these requirements. On the merits, Mr. Cohn makes claims against the Defendants for violation of the Racketeering Influenced and Corrupt Organizations Act (“RICO”), fraud, and conversion. Complaint, ¶¶ 20 –31. He has alleged and provided evidence that the Defendants deceived him and misappropriated his assets in what appears to have been an intentional scam. Complaint, ¶¶ 1 –4, 13 – 17; Cole Affidavit, ¶¶ 3 –5. The Court finds, at this stage, that the similarities between Plaintiff’s allegations and the widely known characteristics of this distinctive kind of scam suggest that he will indeed be able to prevail on these claims once a full evidentiary record is developed. In addition, the Court notes that the asset freeze Mr. Cohn seeks in this instance is permissible in light of his request for a constructive trust over specific, traceable stolen assets, as several courts have held in analogous cryptocurrency-fraud cases. See, e.g., *Yogaratnam v. Dubois*, No. CV 24-393, 2024 WL 758387, at *3 (E.D. La. Feb. 23, 2024) (issuing asset-freeze TRO in crypto-fraud case, noting that “numerous district courts ... have issued a TRO in this exact circumstance to freeze a cryptocurrency asset,” and collecting cases); *Jacobo*, 2022 WL 2052637, at *3 (issuing asset-freezing TRO where plaintiff sought constructive trust over allegedly stolen assets); *Gaponyuk*, 2023 WL 4670043, at *2 (same).

*4 Mr. Cohn has also shown that irreparable harm will ensue absent the restraining order he seeks, for the same reasons explained above. In light of the speed with which cryptocurrency transactions are made, as well as the potential that the Defendants may further move the assets they are alleged to have stolen, the Court finds that Mr. Cohn’s request to freeze the exchange accounts to which those assets were transferred is justified, as have other courts in similar cases. See *Jacobo*, 2022 WL 2052637, at *3.

Next, the Court finds that the threatened injury to Mr. Cohn outweighs any harm the Defendants may suffer by virtue of a freeze of their accounts. Maintaining the assets at the destination accounts is perhaps Mr. Cohn’s only realistic chance at a future recovery in this case. In contrast, the Defendants will suffer at worst a temporary inability to move assets if the injunction is later dissolved. See *Jacobo*, 2022 WL 2052637, at *6 (finding “[a] delay in defendant’s ability to transfer the [allegedly stolen] assets only minimally prejudices defendant, whereas withholding injunctive relief would severely prejudice plaintiff by providing defendant time to transfer the allegedly purloined assets into other accounts beyond the reach of this court”).

Finally, the Court finds that issuing the injunction is in the public interest. Mr. Cohn has adduced evidence showing that he is but one of many victims of what appears to be a wave of similar scams. Cole Affidavit, ¶¶ 3 –5 (describing pig-butcherings scams as “epidemic” and providing law-enforcement and academic materials suggesting that Americans have lost billions to such scams). A freezing order will serve the public interest here both by dissuading would-be fraudsters from preying on American citizens, and providing assurance to the public that courts will take action to promote ... recovery of stolen assets when they can be readily located and traced to specific locations.” *Jacobo*, 2022 WL 2052637, at *6; see also, e.g., *Gaponyuk*, 2023 WL 4670043, at *3 (finding that asset freeze would “serve the public’s interest in stopping, investigating, and remedying frauds”).

B. Expedited Discovery

Typically, parties may not seek “discovery from any source before the conference required by Rule 26(f).” FED R. CIV. P. 26(d)(1). But expedited discovery before a Rule 26(f) conference is permitted where “authorized ... by court order.” *Id.* Courts in this circuit apply a “good cause” standard to determine whether such an order should issue. *St. Louis Grp., Inc. v. Metals & Additives Corp.*, 275 F.R.D. 236, 239 (S.D. Tex. 2011) (applying good cause standard). Good cause may be found where “the need for expedited discovery in consideration of the administration of justice, outweighs the prejudice to the responding party.” *Id.* at 239.

Many courts, including this Court, have authorized expedited discovery from cryptocurrency exchanges in cryptocurrency-related fraud cases like this one.³ Indeed, in similar cases,

courts have held that any privacy interests that alleged cybercriminals have concerning the discovery of information about their identities and activities is outweighed by the need to adjudicate victims' claims against them. *Gaponyuk*, 2023 WL 4670043, at *4 (finding alleged cybercriminals' privacy interests were "outweighed by the need to adjudicate the [victim's] claims," and holding that "privacy concerns shall not be a just cause for [a] subpoenaed non-party to withhold [] requested documents and information").

*5 Here, Mr. Cohn's proposed discovery arises from his pre-suit blockchain tracing and investigation of the Defendants' web property. These investigations revealed a series of third parties likely to be in possession of information about the Defendants. Each of those third parties and their connections to this case are set out below.

Subpoena Target WhatsApp, Inc. Alphabet, Inc. Cloudflare, Inc. Amazon.com, Inc. Binance, Ltd. OK Group Zedzion, Limited Payward, Inc. **Connection to Case WhatsApp** is the messaging service that Anna Popescu is alleged to have used to communicate with Mr. Cohn. Alphabet is the parent company of Google. Anna Popescu is alleged to have used a "gmail.com" address to communicate with Mr. Cohn. Cloudflare is alleged to have provided content-delivery-network services to the domain trushtftwallet.com. Amazon is alleged to have provided content-delivery-network services to the domain trushtftwallet.com. Mr. Cohn has submitted evidence showing that a significant portion of the cryptocurrency the Defendants stole from him was ultimately deposited in accounts at the Binance cryptocurrency exchange. Mr. Cohn has submitted evidence showing that a significant portion of the cryptocurrency the Defendants stole from him was ultimately deposited in accounts at the OKX cryptocurrency exchange. Mr. Cohn has submitted evidence showing that a significant portion of the cryptocurrency the Defendants stole from him was ultimately deposited in accounts at the Zedzion cryptocurrency exchange. Payward owns the Kraken cryptocurrency exchange. Mr. Cohn has submitted evidence showing that a significant portion of the cryptocurrency the Defendants stole from him was ultimately deposited in accounts at the Kraken exchange. **Evidence** Exhibit 3-A Exhibit 3-D Exhibit 1-G Exhibit 1-F Exhibit 3-C Exhibit 3-C Exhibit 3-C Exhibit 3-C

Mr. Cohn requests the Court's authorization to issue subpoenas to each of the above-listed entities seeking the following information. For all targets, Mr. Cohn seeks to

discover all biographical and contact information associated with the Defendants' accounts. He also seeks to discover IP-address and location logs showing the devices and locations from which the Defendants accessed these accounts.

Mr. Cohn also seeks to discover any payments information in the subpoena targets' possession, including the Defendants' transaction histories and information about the credit or debit cards the Defendants used to pay for the subpoena targets' services. As to the Defendants' payment methods, Mr. Cohn seeks only information sufficient to identify the Defendants' payments provider and the Defendants' account with that provider.

Finally, as to the firms to which the Mr. Cohn's assets are alleged to have been transferred—*i.e.*, Binance, OKX, Zedzion, and Kraken—Mr. Cohn seeks to discover the current account balances associated with the Defendants' accounts, their transaction histories, and identification of any other accounts on the respective platforms associated with the accountholders by re-use of biographical or contact information.

Courts have authorized similar discovery where the plaintiff adduced evidence that the persons about whom the information was sought were cybercriminals and the plaintiff also sought a temporary restraining order freezing the assets held in those accounts. *Strivelli*, 2022 WL 1082638, at *2 (granting broad expedited discovery in functionally identical crypto-fraud case); *see also Licht*, 2023 WL 4504585, at *4 (same). The Court finds these courts' reasoning persuasive, and therefore authorizes the scope of discovery requested by Mr. Cohn here.

III. Relief Granted

A. Restraining Order

*6 Plaintiff has submitted evidence tracing the assets he alleges were stolen from him to fifteen deposit addresses at the cryptocurrency exchanges Binance, Zedzion, OKX, and Kraken (the "Receiving Addresses"). The Receiving Addresses are:

Exchange	Binance	Binance	Binance	Binance
Binance	Binance	Binance	Zedzion	OKX
OKX	OKX	OKX	OKX	Kraken
Address				
16gWSWQ8nJ6QiiuCj8Ya9ADVZVD4LRRQyy				
1JYByGQYMHzRMSpha7f3bT6V2qv1NVkNVj				

0x8bf9538e6d36a20466b40d1e873b137e68dbf5f3
 0x7d732b8fff5e1fcfb7c384c8ed1577209d7ed48f
 0x6d7c64808be889d12b97d812b6e54d9594c87a1c
 0x16bae474cbdfca7214196decf6e74e856dd09e10
 0x8bd3596bd1d0e4484ff29df420399b6e9197e3f4
 17y7A2SUCZpjdkmdAJq2rD4Js6Z89jehgi
 1n9wzc4Bbb8vYvXugeFBfLsfqC5NC1WcN
 3NdBc2vgwxWt4jjUeoYshqibXPRD5NrL7C
 0xdA22870E0Bd87133250fbC319476E278D7af93c2
 0x5041ed759Dd4aFc3a72b8192C143F72f4724081A
 0x59dca074075b8d622d50bf8bdb78d2d168764fb0
 0x5d8814d1268d70d89c2ee8cdf9e14ff64902fce6
 0x8c14c1215A5b32830537F6255079a9802A020891

For the reasons set out in the Motion, the Court finds that the accounts associated with these deposit addresses should be frozen. Accordingly, the Court hereby **ORDERS** that Defendants and their agents, servants, employees, attorneys, partners, successors, assigns, and all other persons or entities through which they act or who act in active concert or participation with any of them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division or other device, or any of them, are hereby restrained from withdrawing, transferring, or encumbering any assets currently held by, for, or on behalf of the persons controlling the accounts associated with the above-listed Receiving Addresses, or any business entity through which they act or which acts in active concert or participation with them; including but not limited to those assets currently held at or for the Receiving Addresses.

In accordance with [Fed. R. Civ. P. 65\(b\)\(2\)](#), this Order will expire fourteen (14) days from its entry unless it is extended for good cause shown. No bond shall be required to be posted by Plaintiff.

IV. Expedited Discovery

Footnotes

- ¹ See, e.g., *Harris v. Upwintrade*, 1:24-cv-00313-MJT (E.D. Tex.) (Aug. 8, 2024), at p. 9 (granting TRO in functionally identical pig-butcherling case); *Ohlin v. Defendant 1, No. 3:23-C-8856-TKW-HTC, 2023 WL 3676797*, at *3 (N.D. Fla. May 26, 2023) (“Considering the speed with which cryptocurrency transactions are made as well as the anonymous nature of those transactions, it is imperative to freeze the Destination Addresses to maintain the status quo to avoid dissipation of the money illegally taken from Plaintiffs.”); *Jacobo v. Doe, No. 1:22-CV-00672DADBAKBAM, 2022 WL 2052637*, at *3 (E.D. Cal. June 7, 2022) (“Because it would be a simple matter for [defendant] to transfer [the] cryptocurrency to unidentified recipients outside the traditional banking system and effectively place the assets at issue in this matter beyond the reach of the court, the court finds that plaintiff is likely to suffer immediate and irreparable harm in the absence of

The Court finds that Plaintiff's request to issue expedited discovery should be granted for the reasons set out in the Motion. Plaintiff is authorized to serve subpoenas on the following third parties (1) **WhatsApp**, Inc., (2) Alphabet, Inc., (3) Cloudflare, Inc., (4) Amazon.com, Inc., (5) Binance, Ltd., (6) OK Group, (7) Zedzion, Limited, and (8) Payward, Inc.

In light of the time-sensitivity of Plaintiff's subpoenas to the cryptocurrency exchanges to which his assets were ultimately transferred, Plaintiff is further authorized to serve this Order and his subpoenas on these exchanges via email directed to the following addresses.

Recipient	Binance, Ltd.	Zedzion Limited	OK Group
Payward, Inc.	Service Address	legal@binance.com	
	compliance@binance.com	support@zedzion.com	
	legal@zedzion.com	enforcement@okx.com	
	compliance@okx.com	legal@okx.com	legal@kraken.com
	compliance@kraken.com		

All subpoenaed parties shall produce the materials sought in the subpoena to Plaintiff's counsel within seven (7) days of their receipt of Plaintiff's subpoena and this Order.

The Court finds that any privacy interest the Defendants have in the documents requested by Plaintiff is outweighed by the need to investigate and prosecute the theft and conversion alleged in the complaint. Such privacy concerns shall not be good cause for the subpoenaed party to withhold the requested material.

*7 SIGNED this 16th day of August, 2024.

All Citations

Slip Copy, 2024 WL 4525511

injunctive relief.") (cleaned up); *Astrove v. Doe*, No. 1:22-CV-80614-RAR, 2022 WL 2805315, at *3 (S.D. Fla. Apr. 22, 2022) (same).

- 2 See, e.g., *Gaponyuk v. Alferov*, No. 223CV01317KJMJD, 2023 WL 4670043, at *2 (E.D. Cal. July 20, 2023) (issuing *ex parte* asset-freeze TRO in similar crypto-fraud case, and writing that "federal district courts have granted *ex parte* relief in situations like this one, noting the risks that cryptocurrencies may rapidly become lost and untraceable"); *Ohlin*, 2023 WL 3676797, at *2 (notice not required where plaintiff offered declarations showing that the defendants were crypto-criminals, which gave the court "every reason to believe the Defendants would further hide those [stolen] assets if they were given notice"); *Jacobo*, 2022 WL 2052637, at *3 (notice not required because plaintiff made credible allegations that defendants were crypto-criminals, which "pose[d] a heightened risk of asset dissipation").
- 3 See, e.g., *Harris*, No. 1:24-cv-00313-MJT, at p. 9 (authorizing expedited discovery); *Strivelli v. Doe*, No. 22-cv-22060 2022 WL 1082638, at *2 (D.N.J. Apr. 11, 2022) (authorizing expedited discovery from cryptocurrency exchanges in crypto case and noting "the Court's review of cryptocurrency theft cases reveals that courts often grant motions for expedited discovery to ascertain the identity of John Doe defendants"); *Licht*, 2023 WL 4504585, at *4 (issuing broad authorization for expedited discovery in functionally identical crypto-fraud case and requiring that "any party served with a request for production shall produce all requested items within 72 hours of the request").

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Vacated and Remanded by [Missouri v. Biden](#), 5th Cir.(La.), August 26, 2024
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.

2023 WL 349256

Only the Westlaw citation is currently available.
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

Not Reported in Fed. Supp., 2023 WL 349256

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.

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

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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-I-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. (Isiktaç 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

679 F.Supp.3d 303

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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- 173 Statement to the Police of Munzir al-Qanbar, brother of the terrorist, on January 22, 2017.
- 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.
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- 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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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

BAM INTERNATIONAL, LLC, Plaintiff,

v.

The MSBA GROUP INC., Mammoth RX, Inc., Ryan Hilton, Amir Asvadi, and Miles Stephen Bown, Defendants.

C.A. No. 2021-0181-SG

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Date Submitted: September 15, 2021

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Date Decided: December 14, 2021

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MEMORANDUM OPINION

[GLASSCOCK](#), Vice Chancellor

*¹ This matter involves a complex contractual scheme for delivery of a straightforward product—latex gloves. The contract at issue was meant to safeguard payment for the gloves: to simplify, the Plaintiff, BAM International, LLC, (“BAM” or the “Plaintiff”) is the middleman obligated to deliver gloves to a third-party purchaser; it contracted with non-parties Universal SNL Trading SDN BHD and Universal SNT Marketing SDN BHD (together, “Universal”),

Malaysian manufacturers, to supply the gloves; it deposited the purchase price with an escrow agent, Defendant The MSBA Group Inc. (“MSBA” or the “Escrow Agent”), pursuant to an escrow agreement that obligated MSBA to return the money if the delivery failed, and that made Defendant Mammoth RX, Inc. (“Mammoth”), a Delaware corporation, guarantor of that obligation.

As it turned out, per the Plaintiff, delivery failed;¹ the money in escrow was nonetheless dispersed to Universal; and the Plaintiff has not been reimbursed by MSBA or Mammoth, as the contract allegedly requires. This action seeks to impose liability upon Mammoth and MSBA for breach of contract. The Complaint also alleges an equitable claim against MSBA as Escrow Agent. Additionally, and pertinent here, the Plaintiff seeks to impose liability upon two Mammoth officers for the tort of interference with the escrow agreement.

The instant issue before me is jurisdictional: can these individual Defendants, Ryan Hilton and Amir Asvadi (allegedly Mammoth’s CEO and CFO, respectively) be haled into a Delaware court to answer for a contract-related claim, despite having no relationship with Delaware other than their status as officers of a Delaware entity? Mammoth’s principal place of business is California, I note, and the escrow contract at issue was performed in Utah, where MSBA is domiciled. Hilton and Asvadi have moved to dismiss under [Court of Chancery Rule 12\(b\)\(2\)](#); this Memorandum Opinion addresses that motion.

In contesting the motion, the Plaintiff relies in part on Delaware’s implied fiduciary consent statute, [10 Del. Code Section 3114\(b\)](#).² Pursuant to that law, officers (and directors under subsection 3114(a)) of Delaware corporations are deemed to have consented to personal jurisdiction in this state in two situations: for actions alleging breach of their duty to the corporation and its stockholders; or where litigation is brought in Delaware involving the corporation, to which the officer is a necessary or proper party. These two legs could make a misshapen beast, with one small limb—consent to jurisdiction for redress of breaches of duty owed to the company—and one limb vastly greater, encompassing *any* litigation where the company is a party and the officer is at least a proper party defendant. The incongruity of the potential fiddler-crab-like consent scheme created by the statute has not gone unnoticed by our courts.³ Our Supreme Court has found, however, that any resulting unfairness is remedied by the necessity that application of Delaware

jurisdiction must comply not only with the statute, but with the minimum contacts standard of constitutional due process.⁴

*2 Here, the Complaint alleges that Mammoth breached a commercial contract with no relationship to Delaware other than a choice of law and forum, and concedes that the Moving Defendants are not parties to that contract; nonetheless, they are proper parties to this action seeking redress for their alleged tortious interference with the contract.⁵ Accordingly, Section 3114 is satisfied. However, I find that due process is not satisfied, given the nature of the action and the paucity of the Moving Defendants' contacts with this state. I also find that they are not bound by the contractual Delaware forum clause of the Escrow Agreement. As a result, the Motion to Dismiss for failure of personal jurisdiction is granted.

My reasoning follows a fuller statement of the relevant background, below.

I. BACKGROUND

A. The Parties and Certain Non-Parties

BAM is a Delaware corporation⁶ that contracted with certain other parties to this suit in 2020.⁷ Those contracts and alleged breaches thereof give rise to the claims before me.

The defendants include MSBA, a Utah corporation; Mammoth, a Delaware corporation; Ryan Hilton ("Hilton"), the CEO of Mammoth; Amir Asvadi ("Asvadi") and together with Hilton, the "Moving Defendants"), an individual employed by Mammoth;⁸ and Miles Stephen Bown, an individual and the principal of MSBA (collectively, the "Defendants").⁹ Mammoth's principal place of business is in California.¹⁰

Crowley Government Services ("Crowley") is an intervenor-plaintiff in this matter.¹¹

The Universal entities are Malaysian suppliers and non-parties to this action.¹²

B. The California Lawsuit

The instant case is brought by BAM against the Defendants. Certain of the Defendants, namely Mammoth, Hilton, and

Asvadi, have filed a lawsuit (the "California Lawsuit") against BAM in the U.S. District Court for the Central District of California, seeking a declaratory judgment with respect to potential liability stemming from an escrow agreement between the parties (the "Escrow Agreement").¹³ BAM took the position that the filing in California was improper,¹⁴ as the Escrow Agreement included a forum selection clause identifying Delaware state courts as the appropriate forum for any disputes.¹⁵ Mammoth has since dismissed its claims in the California Lawsuit, and the claims of Hilton and Asvadi have been stayed in favor of the determination of this motion.¹⁶ The Moving Defendants represented to the California court that if personal jurisdiction exists here, they will litigate in Delaware and dismiss their claims in California.¹⁷

C. Factual Overview¹⁸

1. The Sale and Purchase Agreement and the Escrow Agreement

*3 BAM contracted with Crowley to sell nitrile gloves to Crowley in 2020.¹⁹ In return, Crowley provided BAM with advance payments "totaling over" \$20 million.²⁰ To fulfill the contract, BAM sought a supplier.²¹ It originally considered working directly with Mammoth, but ultimately was introduced to Universal by Mammoth, who asserted that Universal could supply the desired glove product.²²

BAM and Universal then entered into a Sale and Purchase Agreement (the "SPA") under which BAM would pay \$7.55 million in exchange for 100 million nitrile gloves.²³ Certain conditions were to be satisfied before the money would become due under the SPA, including a right of inspection via a third party (the "Inspection").²⁴ To memorialize and achieve these conditions, BAM entered into the Escrow Agreement with Mammoth, acting as guarantor for the Escrow Agreement, and with MSBA, in its capacity as escrow agent.²⁵ The Escrow Agreement provided that MSBA would release the escrowed funds to Universal upon notice from BAM that the Inspection had been successful.²⁶ In the event that Universal did not permit the Inspection, or if Universal could not deliver the gloves per the requirements of the SPA, the Escrow Agent was to require the "Seller" (Universal) to return the money to BAM's bank account.²⁷

The Escrow Agreement became effective on November 19, 2020.²⁸ Under its express terms, the Plaintiff was to wire the total price of the contract to a Chase Bank branch in Utah within twenty-four hours of execution.²⁹

a. Negotiations

The Plaintiff's answering brief relating to the Motion to Dismiss (the "Answering Brief") provides further color regarding the SPA and Escrow Agreement negotiations, which is helpful to understand the claims against the Moving Defendants.³⁰ The Plaintiff alleges that Hilton and Asvadi were "active participants" in the negotiation, structure and terms of the Escrow Agreement, which took place over email, in WhatsApp chats, and over the phone.³¹ Hilton and Asvadi participated in "hundreds" of communications with respect to the Escrow Agreement and were ostensibly responsible for negotiating the general structure of the deal, including the guarantor provision to which Mammoth ultimately agreed.³² Additionally, the Escrow Agreement names Hilton as the individual who receives notices on behalf of Mammoth, and Hilton signed the Escrow Agreement for Mammoth.³³

b. The Forum Selection Clause and Governing Law

The Escrow Agreement includes the following forum selection clause in Section 11.2, curiously headed "Arbitration": "If any controversy or claim, whether based on contract, tort, statute, or other legal or equitable theory (including any claim of fraud, misrepresentation, or fraudulent inducement), arising [sic] out of this [Escrow] Agreement ... the Parties will resolve the Dispute in State Courts in Delaware."³⁴ "Parties" is defined in the agreement to include BAM, MSBA, and Mammoth.³⁵ The Plaintiff asserts that, although the Moving Defendants are not by the plain text of the Escrow Agreement bound by the forum selection clause, it should be applied to them due to their extensive involvement in negotiating and papering the transaction.³⁶

*4 The Escrow Agreement also identifies the laws of the State of Delaware as the governing law for construction of the agreement.³⁷

2. The Disbursal from Escrow and the Delaware Lawsuit

BAM wired \$7.55 million to the escrow account on November 24, 2020.³⁸ The Complaint alleges that Universal blocked the Inspection from occurring, but that on November 27, 2020, MSBA (through its principal, Bown) transferred the \$7.55 million of escrowed funds to Universal regardless, without BAM's knowledge or consent.³⁹

BAM alleges in the Complaint that prior to releasing the funds, MSBA through Bown "sought Mammoth's input regarding the release of funds."⁴⁰ Per Mammoth's admissions in the California Lawsuit, MSBA represented to Mammoth, prior to its release of the funds, that the Inspection had occurred and been favorable, and that the Inspection report would be released once the funds were sent to Universal by MSBA.⁴¹ Neither MSBA nor Mammoth reached out to BAM to confirm the release of the funds, and BAM alleges that Mammoth did not object to the release "despite knowing" that BAM would not have approved of the release.⁴² The funds were purportedly released on November 27, 2020.⁴³

BAM provided an SPA termination notice to Universal, MSBA and Mammoth on December 16, 2020.⁴⁴ That termination notice included a request that MSBA (as Escrow Agent) and Mammoth (as guarantor) refund the \$7.55 million to BAM within twenty-four hours.⁴⁵ This total refund did not occur.⁴⁶

BAM now believes there were never any gloves, and that Universal will not voluntarily return the funds.⁴⁷ Further, it alleges that most of the purloined funds were moved to a Swiss bank account maintained by the Universal CEO.⁴⁸

BAM filed this action on March 1, 2021 against the Defendants.⁴⁹ The Moving Defendants have filed this Motion to Dismiss on the basis that they do not have sufficient contacts with Delaware to permit a finding of personal jurisdiction.⁵⁰ In support of this position, each of the Moving Defendants has submitted his own affidavit swearing to a lack of personal contact with Delaware and the lack of connection between the transaction documents (including the SPA and the Escrow Agreement) and Delaware.⁵¹ The Moving Defendants' opening brief in this motion (the "Opening

Brief") similarly avers a lack of connection between each of Hilton and Asvadi with the state of Delaware at length, though it admits that Mammoth is in fact a Delaware corporation.⁵²

D. Procedural History

The Complaint in this action was filed by the Plaintiff seeking declaratory judgment in addition to bringing breach of contract, breach of fiduciary duty, tortious interference, and fraud claims against the various Defendants.⁵³ With respect to the Moving Defendants in particular, the Plaintiff (i) pleads tortious interference with the Escrow Agreement and (ii) seeks a declaratory judgment regarding the rights and obligations of the parties under the Escrow Agreement.⁵⁴ The Moving Defendants filed their Motion to Dismiss in April 2021, and Mammoth filed its answer on the same day.⁵⁵ After briefing on the Motion to Dismiss concluded, Crowley filed its Motion to Intervene.⁵⁶ I heard oral argument on both motions on September 15, 2021, and granted the Motion to Intervene.⁵⁷ This Memorandum Opinion deals solely with the pending Motion to Dismiss.

II. ANALYSIS

*5 The Moving Defendants seek dismissal of the action on basis of lack of personal jurisdiction. Their Opening Brief discusses the general theory of personal jurisdiction in Delaware, ultimately asserting that there is no statutory predicate for personal jurisdiction to be established here and therefore their motion should be granted.

In response, the Plaintiff identifies the Non-Resident Director and Officer Consent Statute as the statutory basis for personal jurisdiction against the Moving Defendants. It also puts forth a theory of personal jurisdiction stemming from the forum selection clause of the Escrow Agreement.⁵⁸ The Plaintiff further theorizes that estoppel arising from the filing of the California Lawsuit prevents the Moving Defendants from prevailing on their Motion to Dismiss here.⁵⁹

I consider each of these theories, along with a discussion of the applicable personal jurisdiction law, below.

A. Avenues for Establishing Personal Jurisdiction

The standard of review on a motion to dismiss pursuant to Rule 12(b)(2) is well-established. A plaintiff has the burden to

"make out a *prima facie* case establishing jurisdiction over a non-resident."⁶⁰ Although "the court may consider facts and evidence outside of the complaint such as affidavits and any discovery of record[, w]hatever record the court considers is construed in the light most favorable to the plaintiff."⁶¹

1. Personal Jurisdiction Generally

In general, to assess whether personal jurisdiction exists over non-resident defendants, Delaware courts apply a two-step analysis, asking first whether there is a statutory basis for jurisdiction and then inquiring into whether the exercise of personal jurisdiction over the defendants would be consistent with due process.⁶²

Parties often seek to apply Delaware's long-arm statute, but the Plaintiff has not pled that the long-arm statute applies here. Instead, it looks to apply the Non-Resident Director and Officer Consent Statute (the "Consent Statute").⁶³ Any nonresident who, after January 1, 2004, serves as an officer of a Delaware corporation is subject to personal jurisdiction "in all civil actions or proceedings brought in this State, by or on behalf of, or against such corporation, in which such officer is a necessary or proper party, or in any action or proceeding against such officer for violation of a duty in such capacity."⁶⁴

Regardless of the statutory predicate for jurisdiction, so long as a statute exists that confers jurisdiction, Delaware courts then proceed to an analysis of the minimum contacts test to ensure due process.⁶⁵

2. Personal Jurisdiction by Contract

*6 Where applicable, Delaware courts can also find personal jurisdiction by dint of a contractual arrangement. "If a party properly consents to personal jurisdiction by contract, a minimum contacts analysis is not required. Of course, the party is bound only by the terms of the consent, and such consent applies only to those causes of action that are identified in the consent provision."⁶⁶ The Escrow Agreement did contain a forum selection clause.⁶⁷ To determine whether the Moving Defendants, as non-signatories (in their individual capacities) are bound to the forum selection clause, Delaware courts use a three-part inquiry, assessing (1) whether the forum selection clause is

valid; (2) whether the defendant is a third-party beneficiary or is “closely related to” the contract; and (3) whether the claim arises from the defendant’s standing relating to the agreement.⁶⁸

Where a party is considered bound to a forum selection clause, the court treats that party as having expressly consented to personal jurisdiction.⁶⁹ “An express consent to jurisdiction, in and of itself, satisfies the requirements of Due Process,” meaning that a constitutional minimum contacts analysis is no longer required.⁷⁰

B. The Non-Resident Director and Officer Consent Statute
 In the Complaint, the Plaintiff sought to establish personal jurisdiction over the Moving Defendants by use of the forum selection clause.⁷¹ The Opening Brief discusses the establishment of personal jurisdiction more generally, concluding that no statutory basis for finding personal jurisdiction exists.⁷² The Plaintiff, in answering, identifies the Consent Statute as an alternative basis of jurisdiction, separate from and in addition to the forum selection clause theory.⁷³ Its theory would have me find that Hilton, the CEO, and Asvadi, purportedly the CFO, have consented to personal jurisdiction in Delaware because they are Delaware officers as well as proper parties under the Consent Statute.⁷⁴

The parties agree that Hilton is the CEO of Mammoth, a Delaware corporation, and is therefore an officer to whom the Consent Statute could apply.⁷⁵ Asvadi’s status as the CFO of Mammoth is subject to question, but I assume without deciding for the purposes of this Memorandum Opinion that he is an officer as well.⁷⁶

A summary of the development of our law with respect to the Consent Statute and its application is informative to my analysis.

1. Historical Applications of the Consent Statute

The current Consent Statute was originally enacted with respect to directors in 1977 (extended to officers as of 2004)⁷⁷ and has been characterized by courts as responsive to *Shaffer v. Heitner*, a U.S. Supreme Court case which found unconstitutional a practice previously used to secure

personal jurisdiction over nonresident fiduciaries of Delaware corporations.⁷⁸

*7 Applying the Consent Statute while remaining mindful of constitutional due process has caused Delaware courts some amount of headache.⁷⁹ Under a plain text reading, the Consent Statute provides two avenues to establish jurisdiction over a Delaware director or officer: (1) actions against such parties for violations of fiduciary duties, sometimes called the “internal affairs” prong;⁸⁰ and (2) actions wherein the director or officer is a “necessary or proper party” to an action also proceeding against the corporation.

Construing the Consent Statute in 1980, the Court of Chancery in *Hana Ranch* adopted an approach that essentially read the second “necessary or proper party” prong out of application, finding that “it is the rights, duties, and obligations which have to do with service as a director of a Delaware corporation which make a director subject to personal service in Delaware … and not simply that he or she may be both a proper party as well as a director.”⁸¹ This narrow interpretation limited the reach of the Consent Statute and avoided any concerns about its facial constitutionality.⁸²

The Court of Chancery followed *Hana Ranch* for many years, though certain opinions suggested that the “necessary or proper party” language could be reinstated with a minimum contacts analysis under *International Shoe*⁸³ used as the constitutional limiting factor.⁸⁴

The Delaware Supreme Court did not have the opportunity to directly address the *Hana Ranch* case and its progeny until *Hazout v. Tsang Mun Ting* in 2016.⁸⁵ In doing so, the Delaware Supreme Court noted the disjunctive presentation of the Consent Statute in text, giving rise to the interpretation that “the General Assembly intended there to be two categories of cases to which directors and officers had consented to service.”⁸⁶ The *Hazout* Court considered the “necessary or proper party” provision to “contain[] its own safeguards against overbreadth,” as the requirement to *be* a necessary or proper party itself demanded a “close nexus between the claims involving the corporation … and the conduct of the nonresident fiduciary.”⁸⁷ The Court also stated that the minimum contacts analysis could, as prior Court of Chancery opinions had noted, act as constitutional protection to provide due process to nonresident directors and officers.⁸⁸ The Delaware Supreme Court thus rejected the *Hana Ranch*

line of caselaw and adopted a plain meaning interpretation of the Consent Statute.⁸⁹

2. The Current Consent Statute Analysis, Applied

By virtue of their status as officers of a Delaware corporation, Delaware has, subject to the minimum contacts due process analysis, personal jurisdiction over the Moving Defendants (1) where a civil action or proceeding is brought by or on behalf of, or against Mammoth, and the Moving Defendants are necessary or proper parties; or (2) in any action or proceeding against the Moving Defendants for violation of a duty as officers.⁹⁰

*8 The only substantive claim proceeding against the Moving Defendants in their individual capacities is for tortious interference with the Escrow Agreement.⁹¹ This claim does not arise out of duties the Moving Defendants owed to Mammoth or its stockholders, but instead from torts allegedly committed against BAM.⁹² Therefore, any application of the Consent Statute must be conditioned on the Moving Defendants' status as necessary or proper parties to the suit against Mammoth.

It is helpful to examine the cause of action against the Moving Defendants. Corporate officers are not liable for breach of contracts entered by the corporation to which they have not bound themselves personally.⁹³ Here, the Moving Defendants are alleged to have tortiously interfered with the Escrow Agreement among the Plaintiff, MSBA and Mammoth.⁹⁴ Such an action will not lie against a corporate officer who in such capacity causes the company to act in breach of contract:

[E]mployees acting within the scope of their employment are identified with the [corporate] defendant [its]elf so that they may ordinarily advise the defendant to breach [its] own contract without themselves incurring liability in tort This rationale is particularly compelling when applied to corporate officers as their freedom of action directed toward corporate purposes should not be curtailed by fear of personal liability.⁹⁵

In order, I assume, to plead around this problem, the Complaint avers that the Moving Defendants "were acting in their own interests and *outside the scope of their duties to Mammoth*" at all times pertinent.⁹⁶ This statement is

completely conclusory; no facts are pled to bolster this assertion. In any event, in this independent capacity, per the Complaint, the Moving Defendants caused MSBA to breach the Escrow Agreement by "causing or permitting" it to release the funds in escrow, to disregard BAM's instructions, and to breach its fiduciary duties to the Plaintiff.⁹⁷ These allegations also appear to be entirely conclusory; notably, the issue of whether a cause of action has been pled is not before me. For this jurisdictional issue, however, it is pertinent that the allegations to which the Moving Defendants are being asked to respond were, as explicitly averred in the Complaint, *not* taken in connection with their roles at Mammoth. That is, the Moving Defendants' complained-of actions were not taken in connection with the roles for which they consented to jurisdiction under [Section 3114](#). I turn to that statutory analysis.

*9 In order for [Section 3114](#) to apply here, the Moving Defendants must be necessary or proper parties to the cause of action against Mammoth. A party is a "necessary" party if her rights must be ascertained and settled before the rights of the parties to the lawsuit can be determined.⁹⁸ A party is "proper" if she has a "tangible legal interest in the matter" separate from the corporation's,⁹⁹ and if the claims against her arise out of the same facts and occurrences as the claims against the corporation.¹⁰⁰

The Moving Defendants are proper parties under this construction. The claim against Hilton and Asvadi as individuals for tortious interference establishes tangible legal interests in the lawsuit separate from those of Mammoth, although they arise out of the same set of alleged facts. Thus, the Consent Statute is a proper statutory basis for finding that Delaware courts have jurisdiction over the Moving Defendants.

Before concluding that Delaware has personal jurisdiction over the Moving Defendants, I must conduct the minimum contacts constitutional check on due process. The Delaware Supreme Court in *Hazout* identified the minimum contacts test as the appropriate method for ensuring that the Consent Statute did not confer overbroad personal jurisdiction.¹⁰¹ Ultimately, in *Hazout*, the Delaware Superior Court found (and the Delaware Supreme Court affirmed) that Hazout had accepted duties under Delaware law by accepting a position as a fiduciary of the corporation, which the state of Delaware had an interest in enforcing.¹⁰² The underlying transaction giving rise to claims against Hazout involved a change

in corporate control, bolstering the finding that personal jurisdiction over Hazout was appropriate under the minimum contacts analysis.¹⁰³ However, the Supreme Court's opinion notes that "one can conceive of cases where applying the plain terms of the Necessary or Proper Party Provision might compromise a nonresident fiduciary's due process rights," and describes a potential example scenario in the attendant footnote:

For example, if plaintiffs attempted to drag corporate officers and directors into Delaware by naming them as defendants in a products liability case where the products had been designed and distributed from a state other than Delaware to diverse consumers, most of whom were in states other than Delaware, the minimum contacts test would provide substantial protection. It would be constitutionally questionable, to say the least, for Delaware to exercise personal jurisdiction when Delaware's status as the state of incorporation had no rational connection to the cause of action, where the conduct is governed by the laws of other states, and where there is no reason why a corporate fiduciary should expect to be named as a party at all, much less in a suit where the underlying conduct and claims have no rational connection to Delaware and provide no rational basis for Delaware to apply its own law¹⁰⁴

This footnote is illustrative here, where the contract giving rise to claims is a garden-variety commercial contract, rather than one necessarily implicating Delaware interests. The Delaware Superior Court analyzed the *Hazout* footnote in *Turf Nation v. UBU Sports, Inc.*, which presented a somewhat similar factual scenario to the one at hand.¹⁰⁵ In *Turf Nation*, the plaintiff sought personal jurisdiction over the defendant, a Delaware officer, under both the Consent Statute and Delaware's long-arm statute.¹⁰⁶ The Superior Court determined that the defendant might have been a necessary or proper party to the action, but that the minimum contacts were insufficient to confer jurisdiction, emphasizing that "the Court must examine whether the exercise of personal jurisdiction is consistent with the person's constitutional expectations of due process."¹⁰⁷

*¹⁰ In assessing the *Hazout* footnote, the *Turf Nation* court noted that the plaintiff's claims were brought under the law of various states—none of which were Delaware—and that the actions purportedly giving rise to said claims occurred in multiple non-Delaware states.¹⁰⁸ Further, while the plaintiff and defendant entities were each incorporated in Delaware,

both principal places of business were elsewhere.¹⁰⁹ Finally, the agreement at issue, which was a Manufacture and Supply Agreement, applied Georgia law, rather than Delaware law.¹¹⁰

The Superior Court found that there was thus no "rational connection to Delaware other than the place of incorporation of [the plaintiff and defendant entities]," specifying that "[t]he wrongs alleged here are either tort claims or breach of contract claims unconnected with the internal affairs or corporate governance of a Delaware corporation."¹¹¹ It also rejected an efficiency argument made by the plaintiff, which pointed out that a second lawsuit would need to be filed if personal jurisdiction was not found.¹¹² The court referred to that equitable argument as "weaken[ed]" given that the plaintiff was the one who initiated the civil action in Delaware.¹¹³

The reasoning of the *Turf Nation* court stands in helpful parallel to my thinking here. In the instant case, Hilton and Asvadi were officers of a Delaware corporation (with a principal place of business in California),¹¹⁴ but the action does not involve the entity's status as a corporate citizen of Delaware. As in the *Hazout* hypothetical, the contract at issue is simply commercial, and does not involve the vindication of the General Corporation Law of Delaware.¹¹⁵ Similarly, the negotiation of the Escrow Agreement, though carried out by officers of a Delaware entity, does not implicate Delaware's corporate law in the manner that negotiating a change of control agreement would.¹¹⁶ The Escrow Agreement was also not to be performed in Delaware, but instead in Utah, where the escrow account was located.¹¹⁷ The distribution of the escrow account by the Escrow Agent, a Utah corporation, to the seller Universal, a Malaysian supplier, would not have implicated Delaware interests in any way.¹¹⁸

Delaware has no real interest in this case other than the exercise of personal jurisdiction over officers and directors, which is, in my view, insufficient in light of the constitutional due process rights owed to the Moving Defendants. As in *Turf Nation*, the only harms alleged to have been committed by the Moving Defendants sound in tort¹¹⁹—they are not fiduciary duties, nor do they implicate corporate governance practices. And the actions allegedly giving rise to their liability were not taken as officers of Mammoth.

*¹¹ Admittedly, the Delaware Supreme Court (and the *Turf Nation* court) identified the governing law of the agreement

as a factor for consideration,¹²⁰ and the Escrow Agreement at hand identified Delaware law as the governing law and selected Delaware as the forum for settling associated disputes.¹²¹ I have considered these facts, but they are not dispositive, and they do not persuade me that personal jurisdiction should be extended over the Moving Defendants here. Many commercial contracts adopt Delaware law and include Delaware forum selection clauses, as Delaware has a well-known, settled, and (at times) easy to construe body of law that can be applied by courts anywhere. No additional connection to Delaware has been alleged that signifies this choice of law provision might have had special import to the parties, or that provides a reason for the Moving Defendants to anticipate *personal jurisdiction* over them in Delaware. I conclude that the selection of Delaware as the forum for disputes and the governing body of law is not dispositive here, where the individuals against whom the forum selection and governing law clauses would be construed were not party to the contract (the Plaintiff's contention that the Moving Defendants are nonetheless bound by the contractual forum selection is addressed *infra*).

In its argument in favor of personal jurisdiction, the Plaintiff cites to this Court's decision in *Deutsch v. ZST Digital Networks, Inc.*¹²² In that case, non-party corporate fiduciaries who caused a defendant corporation to violate a court order were subject to answer for contempt of court, and raised lack of personal jurisdiction as a bar.¹²³ The *Deutsch* court applied the Consent Statute.¹²⁴ It found that the fiduciaries were proper parties to the litigation, such that the Consent Statute provided a statutory predicate for personal jurisdiction, and then examined due process.¹²⁵ Citing *Hazout*, the court found that, as in that case, the fiduciaries were being held accountable for taking action (or failure to take action) in their roles as directors and officers of a Delaware corporation.¹²⁶ As such, they were on notice that "they could be haled into the Delaware Courts to answer for alleged breaches of the duties imposed on them by the very laws which empower[] them to act in their corporate capacities."¹²⁷ Accordingly, due process was satisfied.¹²⁸ But *Deutsch* is, for that very reason, not applicable here. The actions allegedly resulting in liability for the Moving Defendants were, explicitly per the Complaint, taken in their individual interests "outside the scope of their duties to Mammoth."¹²⁹ Because the complained-of actions were expressly outside the scope of the Moving Defendants' corporate power as officers, and given the paucity of other contacts with Delaware, it would not comport with due

process to that find minimum contacts exist with respect to the Moving Defendants here.

The Consent Statute provides a statutory jurisdictional predicate under *Hazout*, but I am not satisfied that either of the Moving Defendants' contacts with Delaware is sufficient to subject him to personal jurisdiction in Delaware courts. As such, specific personal jurisdiction cannot lie under the Consent Statute.

C. Personal Jurisdiction Under a Forum Selection Clause

Another avenue for finding personal jurisdiction over the Moving Defendants is establishment of personal jurisdiction under the forum selection clause. Unlike the analysis under [Section 3114](#), above, where parties have consented contractually to jurisdiction, due process is satisfied *a priori*.¹³⁰ Importantly, neither of the Moving Defendants were parties to or signed, in an individual capacity, the Escrow Agreement that contains the clause in this case.¹³¹ To find personal jurisdiction over a non-signatory to a transaction document containing a forum selection clause, I must assess the following three requirements: (1) whether the forum selection clause is valid; (2) whether the defendant is a third-party beneficiary or is "closely related to" the contract; and (3) whether the claim arises from the defendant's standing relating to the agreement.¹³²

*¹² Elements (1) and (3) were not contested in the papers or at oral argument by the Moving Defendants, and for purposes of this motion I assume that they are satisfied.¹³³ Further, the Plaintiff has not pled that the Moving Defendants are third-party beneficiaries of the Escrow Agreement.¹³⁴ Thus, to resolve the question of personal jurisdiction, I must determine whether the Moving Defendants were "closely related" to the Escrow Agreement such that its forum selection clause should be binding upon them and such that this Court has personal jurisdiction over them. I find that the Moving Defendants were not so closely related to the Escrow Agreement as to confer personal jurisdiction. My reasoning follows.

1. The Closely Related Test

Delaware caselaw provides two ways in which a non-signatory to an agreement containing a forum selection clause can be "closely related" such that the clause binds the non-signatory.¹³⁵ First, the non-signatory can receive a "direct

benefit” from the agreement.¹³⁶ Alternatively, I can find that it was “foreseeable” that the Moving Defendants would be haled into Court in Delaware.¹³⁷ I consider each option in turn.

a. Did the Moving Defendants Receive a Direct Benefit?

The Plaintiff's papers do not explicitly argue that the Moving Defendants received a direct benefit from the Escrow Agreement.¹³⁸ The Plaintiff alleged that the small size of Mammoth, as a corporation, and Hilton's role as CEO and founder, led to a reasonable inference that Hilton, at least, had a “substantial” stake in Mammoth and exercised “considerable control” over the corporation, but did not expressly state that a benefit was received by Hilton as a result.¹³⁹ At oral argument, BAM's counsel indicated that there was a “suspicion” that some of the money in escrow “may have made its way into the hands of some of the defendants,” but was not able to cite to allegations in the Complaint.¹⁴⁰ In any event, the receipt of the allegedly purloined funds by the Moving Defendants would not be a benefit from the contract, but from the *breach* of the contract.¹⁴¹

Without more, I cannot find that either of the Moving Defendants received a direct benefit from the Escrow Agreement.¹⁴² Personal jurisdiction arising from the forum selection clause thus cannot be established under the direct benefit prong of the closely related test.

b. Was It Foreseeable that the Moving Defendants Might Be Sued in Delaware?

Delaware caselaw applying solely the foreseeability prong of the “closely related” analysis is limited.¹⁴³ To the extent the foreseeability prong is a legitimate means to bind non-parties to a forum selection provision, the prong operates as a species of equitable estoppel, and “[w]here the facts at bar have not aligned with previous discrete applications of the standalone foreseeability inquiry, [the Court of Chancery] has declined to expand the test.”¹⁴⁴ *Neurvana Medical, LLC v. Balt USA, LLC* provides a recent review of the foreseeability precedent, noting that the foreseeability analysis most often follows the establishment of a direct benefit, but identifying two factual

scenarios where personal jurisdiction was established based on the foreseeability inquiry alone.¹⁴⁵

***13** The first factual scenario allows a non-signatory to *enforce* a forum selection clause against a signatory where the non-signatory is “closely related to one of the signatories such that the non-party's enforcement of the clause is foreseeable by virtue of the relationship between the signatory and the party sought to be bound.”¹⁴⁶ For example, *Ashall Homes Ltd. v. ROK Entertainment Group Inc.* determined that officers and directors could constitute closely related non-signatories with standing to invoke a forum selection clause against a signatory.¹⁴⁷

Here, the party seeking to enforce the forum selection clause was a party to the Escrow Agreement—the Plaintiff, BAM; it is the Moving Defendants who are the non-signatories. Therefore, this line of cases does not support personal jurisdiction.

iModules Software, Inc. v. Essenza Software, Inc. encapsulates the second factual scenario, with the Court finding that a non-signatory entity can be bound to a forum selection clause where its controllers have signed the agreement at issue.¹⁴⁸ The instant case does not resemble this factual scenario, either; the Moving Defendants are alleged to have themselves caused the signatory to act, not the other way around.

Therefore, to find personal jurisdiction by reason of foreseeability, the Plaintiff seeks to have me expand the existing caselaw. In support of its proposition, the Plaintiff cites to a Third Circuit case applying Delaware law, *Carlyle Investment Management LLC v. Moonmouth Company*.¹⁴⁹ *Carlyle* indicates that in conducting the foreseeability inquiry, courts should consider “the non-signatory's ownership of the signatory, its involvement in the negotiations, the relationship between the two parties and whether the non-signatory received a direct benefit from the agreement.”¹⁵⁰

The *Carlyle* Court found personal jurisdiction over the defendant via the forum selection clause, referencing the negotiations process, authority to give and receive instructions on behalf of the pertinent entities, and contact information for the entities.¹⁵¹ *Carlyle* is nevertheless distinguishable from the facts at bar. In that case, the defendant and party at issue were both controlled by a

common controller.¹⁵² Thus, the determination that the forum selection clause conferred personal jurisdiction was not predicated solely on facts regarding the negotiations, contact information and authority in connection with entities.¹⁵³ In other words, to the extent *Carlyle* is persuasive, it is not pertinent.

BAM seeks to establish personal jurisdiction over Asvadi on basis of his participation in the negotiation of the Escrow Agreement, his status as a point of contact for Mammoth following the release of the funds from escrow, and a shared address with Mammoth.¹⁵⁴ The facts are slightly stronger with respect to Hilton—in addition to the above, he signed the Escrow Agreement for Mammoth in his capacity as CEO and is listed as its agent for service of process *in California*.¹⁵⁵ Viewed in the light most favorable to the Plaintiff, this theory mirrors the “active-involvement” theory considered and rejected in *Neurvana*, which declined to find “active involvement in negotiating and executing the transaction” a “standalone basis” for establishing personal jurisdiction.¹⁵⁶

*14 I too decline to extend the foreseeability test in this way. The Plaintiff has not made a *prima facie* showing that the Moving Defendants are “closely related to” the Escrow Agreement such that they should be bound by its forum selection clause. As such, the forum selection clause does not confer personal jurisdiction over the Moving Defendants.

D. Estoppel

Finally, the Plaintiff argues that the Moving Defendants are estopped from denying the application of the forum selection clause.¹⁵⁷ Its basis is that the California Lawsuit filed by the Moving Defendants “embraced” the Escrow Agreement (for purposes of suing BAM and seeking a declaratory judgment), and that the Moving Defendants cannot now disclaim the Escrow Agreement’s applicability.¹⁵⁸ The California Lawsuit seeks a declaratory judgment finding each of Hilton and Asvadi *not liable on the guaranty under the Escrow Agreement*.¹⁵⁹ The Moving Defendants’ theory in that action is that because they did not sign the Escrow Agreement in their individual capacities, they are therefore not personally bound by any of the obligations in the agreement, including the guaranty provision and, although not expressly pled in the California Lawsuit, ostensibly the forum selection clause, as well.¹⁶⁰

The Plaintiff appears to argue that estoppel is its own separate basis for finding personal jurisdiction against the Moving Defendants, but as noted above, the “closely related” test is properly grounded on estoppel. As a consequence, the Plaintiff’s argument here is largely duplicative of the arguments under the closely related test (and are treated as such in the caselaw to which the Plaintiff cites).¹⁶¹ For example, *Capital Group Companies, Inc. v. Armour*, cited in the Answering Brief, states that “a non-signatory is estopped from refusing to comply with a forum selection clause when she receives a ‘direct benefit’ from a contract containing a forum selection clause.”¹⁶² The Complaint does not allege that the Moving Defendants received any direct benefit from the Escrow Agreement, nor did they seek a benefit under the Escrow Agreement in the California action. Quite the contrary, they sought prophylactic judicial recognition that they were strangers to the contract.¹⁶³ Seeking a declaratory judgment in California courts regarding liability under the Escrow Agreement is not equivalent to “embracing” a contract for the purposes of estoppel, because the Moving Defendants do not there seek to obtain a benefit, but rather seek to disclaim liability under the Escrow Agreement. This affirmative defense is therefore unavailing.

* * *

I have considered each of the theories presented by the Moving Defendants and the Plaintiff in connection with the Motion to Dismiss. I find that sufficient minimum contacts do not exist between the Moving Defendants and the State of Delaware to satisfy due process. Further, I do not find that the Moving Defendants were so closely related to the Escrow Agreement as to be contractually bound by its forum selection clause. Finally, I do not find that estoppel prevents the Moving Defendants from prevailing on the Motion to Dismiss. In total, none of the theories advanced by the Plaintiff is sufficient to confer personal jurisdiction over the Moving Defendants.

III. CONCLUSION

*15 The Motion to Dismiss with respect to the Moving Defendants is GRANTED. The parties should submit an appropriate form of order.

All Citations

Not Reported in Atl. Rptr., 2021 WL 5905878

Footnotes

- 1 The Complaint also alleges that BAM's right to a third-party inspection of the product was not consummated.
- 2 *10 Del. C. § 3114(b).*
- 3 Cf. *Armstrong v. Pomerance*, 423 A.2d 174, 176 n.5 (Del. 1980) (explaining that Section 3114 authorizes jurisdiction only in actions which are inextricably bound up in Delaware law and where Delaware has a strong interest); see also *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 287 (Del. 2016) ("[I]t is also understood that blanket judicial invalidation of a statute's words should not ensue if the statute can be applied constitutionally in a wide class of cases, but might operate overbroadly in some more limited class of cases.").
- 4 *Hazout*, 134 A.3d at 291.
- 5 Not before me is the question of whether a tortious interference action will lie against corporate fiduciaries under these facts. See generally *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872 (Del. Ch. 2009).
- 6 I note that although the party name is "BAM International, LLC", the Complaint indicates that BAM is a Delaware corporation. See Verified Compl. for Breach of Contract, Breach Fiduciary Duties, Declaratory J., Tortious Interference, and Fraud, at 1, ¶ 13, Dkt. No. 1 [hereinafter "Compl."]. I have followed the Complaint's lead in this matter.
- 7 See generally Compl. ¶ 15.
- 8 Asvadi's role at Mammoth is subject to some dispute. See Opening Br. Supp. Mot. to Dismiss of Ryan Hilton and Amir Asvadi, Ex. B, Dkt. No. 18 [hereinafter "OB"] (asserting that Asvadi is not currently and never has been an officer of Mammoth as of April 2021); but see Pl.'s Answering Br. Opp'n Defs.' Mot. to Dismiss and its Submission on Equitable Jurisdiction, Ex. A, Dkt. No. 30 [hereinafter "AB"] (Statement of Information filed with California Secretary of State listing Asvadi as the chief financial officer of Mammoth as of March 5, 2021).
- 9 Compl. ¶¶ 14–18.
- 10 See *id.* ¶ 15.
- 11 Although Crowley has filed its own complaint in this matter, I do not consider any additional indicia of jurisdiction presented in the Crowley complaint, as the Motion to Dismiss was fully submitted at the time of the Crowley complaint's filing. See Tr. Of 9-15-21 of Oral Arg. and Partial Ruling of the Ct. on Crowley Government Services, Inc.'s Mot. to Intervene and Defs.' Mot. to Dismiss for Lack of Personal Jurisdiction, 49:1–4, Dkt. No. 59 [hereinafter "Oral Arg."].
- 12 Compl. ¶ 2.
- 13 See *MammothRx, Inc. et al. v. BAM Int'l, LLC.*, Civil Action No. 8:21-cv-00305-DOC-ADS (C.D. Cal. Feb. 17, 2021).
- 14 AB 10.
- 15 Compl., Ex. A, at 3.
- 16 AB 10.
- 17 *Id.*

18 Unless otherwise noted, I draw these facts from the Plaintiff's Complaint or the briefing of the parties in connection with this motion to dismiss. Given the posture of the case at this time, the background section should not be considered formal findings of fact.

19 Mot. to Intervene by Crowley Government Services, Inc. 3, Dkt. No. 36 [hereinafter "Mot. to Intervene"].

20 *Id.*

21 See, e.g., Compl. ¶ 2.

22 See *id.*

23 *Id.* ¶ 3.

24 *Id.* ¶ 4.

25 *Id.* ¶ 5. MSBA was introduced to BAM by Mammoth and Universal. See *id.*

26 *Id.* ¶ 6.

27 *Id.* ¶ 47.

28 *Id.* ¶ 42.

29 See *id.*, Ex. A, at 1.

30 See generally AB.

31 *Id.* at 5.

32 *Id.* at 6.

33 *Id.* at 13.

34 Compl., Ex. A, at 3.

35 *Id.* at 1.

36 See generally AB 11–18.

37 Compl., Ex. A, at 3.

38 *Id.* ¶ 44.

39 *Id.* ¶¶ 7–8.

40 *Id.* ¶ 54.

41 *Id.*

42 *Id.* ¶ 55.

43 *Id.* ¶ 53.

44 *Id.* ¶ 58.

45 *Id.* ¶ 59.

46 *Id.* Mammoth has agreed to provide two partial refund payments totaling \$350,000, and has apparently corresponded with BAM regarding potential **fake** documentation and fraudulent misrepresentations by Universal following the events of November 2020. *Id.* ¶ 60.

47 *Id.* ¶ 56.

48 *Id.* ¶ 57.

49 See generally Compl.

50 See, e.g., OB.

51 See *id.*, Ex. A (affidavit of Hilton), Ex. B (affidavit of Asvadi).

52 See generally OB; see also *id.* at 6.

53 See generally Compl.

54 See *id.*

55 See Mot. to Dismiss of Ryan Hilton and Amir Asvadi, Dkt. No. 17; see also Def. Mammoth Rx, Inc.'s Answer to Pl.'s Verified Compl., Dkt. No. 19.

56 See generally Mot. to Intervene.

57 See generally Oral Arg.

58 The Plaintiff would have me find that the Moving Defendants have waived any defense to this argument, as it was not included in their Opening Brief. See AB 3. However, the Moving Defendants responded to this theory in both their reply brief and at oral argument without further objection. As such, I do not consider the issue waived.

59 *Id.* at 15–16.

60 *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 974 (Del. Ch. 2000).

61 *Microsoft Corp. v. Amplus, Inc.*, 2013 WL 5899003, at *8 (Del. Ch. Oct. 31, 2013); see also *LVI Grp. Invs., LLC v. NCM Grp. Holdings, LLC*, 2018 WL 1559936, at *10 (Del. Ch. Mar. 28, 2018).

62 *Partners & Simons, Inc. v. Sandbox Acquisitions, LLC*, 2021 WL 3161651, at *3 (Del. Ch. July 26, 2021).

63 10 Del. C. § 3114(b).

64 10 Del. C. § 3114(b).

65 See *Hazout*, 134 A.3d at 278.

66 *Ruggiero v. FuturaGene, plc.*, 948 A.2d 1124, 1132 (Del. Ch. 2008) (citations omitted).

67 See *supra* note 34 and accompanying text.

68 *Highway to Health v. Bohn*, 2020 WL 1868013, at *6 (Del. Ch. Apr. 15, 2020).

69 See *Neurvana Med., LLC v. Balt USA, LLC*, 2019 WL 4464268, at *3 (Del. Ch. Sept. 18, 2019).

70 *Id.* (quoting *Sternberg v. O'Neil*, 550 A.2d 1105, 1116 (Del. 1988), abrogated on other grounds by *Genuine Parts Co. v. Cepec*, 137 A.3d 123 (Del. 2016)).

71 Compl. ¶ 21.

- 72 See generally OB.
- 73 See AB 18, 19.
- 74 See *id.*
- 75 See OB, Ex. A, ¶ 5.
- 76 During the oral argument on the motion to dismiss, I noted that I would allow jurisdictional discovery in the event the question of Asvadi's status as an officer (disputed among the parties) was a dispositive fact with respect to his motion. See Oral Arg. at 26:7–17. This determination is not necessary to my ultimate finding here.
- 77 See [10 Del. C. § 3114\(a\)](#). Section 3114(b), pertaining to officers, was approved in June 2003 and became effective January 2004. See Act of June 30, 2003, ch. 83, 2003 Del. Laws, [sec. 3114](#), § 3 (codified as amended at [10 Del. C. § 3114\(b\)](#)).
- 78 See [Hazout](#), 134 A.3d at 286 (Del. 2016) (citing [Shaffer v. Heitner](#), 433 U.S. 186 (1977)).
- 79 See, e.g., [Hana Ranch, Inc. v. Lent](#), 424 A.2d 28 (Del. Ch. 1980); [In re USACafes, L.P. Litig.](#), 600 A.2d 43 (Del. Ch. 1991) (questioning *Hana Ranch*'s approach); [Ryan v. Gifford](#), 935 A.2d 258 (Del. Ch. 2007) (same); [Hazout](#), 134 A.3d 274 (rejecting the reasoning in *Hana Ranch*).
- 80 See [Hazout](#), 134 A.3d at 278.
- 81 [Hana Ranch](#), 424 A.2d at 30.
- 82 See [Hazout](#), 134 A.3d at 286.
- 83 [Int'l Shoe Co. v. Wash., Office of Unemployment Comp. & Placement](#), 326 U.S. 310 (1945).
- 84 See [In re USACafes, L.P. Litig.](#), 600 A.2d at 53 (citing *Int'l Shoe*, 326 U.S. 310); [Ryan v. Gifford](#), 935 A.2d at 268 n.24 (citation omitted).
- 85 See [Hazout](#), 134 A.3d at 289.
- 86 *Id.* at 288.
- 87 See *id.* at 289.
- 88 See *id.* at 291.
- 89 *Id.* at 286; see also [LVI Grp. Invs.](#), 2018 WL 1559936, at *8.
- 90 See [Hazout](#), 134 A.3d at 277 (citing [10 Del. C. § 3114\(b\)](#)).
- 91 See generally Compl. The Complaint also names the Moving Defendants, cryptically, in a count seeking a declaration of the rights of the parties under the Escrow Agreement. See *id.*
- 92 *Id.* ¶ 122 ("Hilton's, Asvadi's ... tortious conduct has caused, and will continue to cause, damages and harm to BAM").
- 93 E.g., [Wallace v. Wood](#), 752 A.2d 1175, 1180 (Del. Ch. 1999).
- 94 See generally Compl.
- 95 *Id.* at 1182–83 (internal quotations omitted); see also [Kuroda](#), 971 A.2d at 884; [Bhole, Inc. v. Shore Invs., Inc.](#), 67 A.3d 444, 453 (Del. 2013) (quoting [Shearin v. E.F. Hutton Grp., Inc.](#), 652 A.2d 578, 590 (Del. Ch. 1994)) (standing for proposition that a party cannot be liable for both breach of contract and for inducing that breach via tortious interference); [Bandera](#)

Master Fund LP v. Boardwalk Pipeline Partners, LP, 2019 WL 4927053, at *28 (Del. Ch. Oct. 7, 2019) (same); *WyPie Invs., LLC v. Homschek*, 2018 WL 1581981, at *14 (Del. Super. Ct. Mar. 28, 2018) (same).

96 Compl. ¶ 120 (emphasis added).

97 *Id.* ¶ 117. Curiously, the Complaint also seeks damages from the Moving Defendants for allegedly causing *Mammoth* to breach its contractual obligation to reimburse the Plaintiff for MSBA's misfeasance; the Complaint does not explain how the Moving Defendants did so outside the scope of their duties as officers of *Mammoth*, however. See *id.* ¶¶ 80–89.

98 See *LVI Grp.*, 2018 WL 1559936, at *8 (citing *Hazout*, 124 A.3d at 289).

99 *Id.* (citing *Hazout*, 124 A.3d at 292).

100 *Hazout*, 124 A.3d at 292.

101 *Id.* at 291.

102 *Id.* at 284.

103 *Id.* at 277, 293.

104 *Id.* at 291, 291 n.60.

105 2017 WL 4535970 (Del. Super. Oct. 11, 2017).

106 See *id.* at *6–*10 (considering both theories).

107 *Id.* at *9.

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 See *id.*

114 See Compl. ¶ 15.

115 Compare *Hazout*, 134 A.3d at 291 n.60 (discussing a products liability contract) with *LVI Grp. Invsts.*, 2018 WL 1559936 (discussing a change of control contract).

116 Defs. Ryan Hilton and Amir Asvadi's Reply to Pl.'s Opp'n Defs.' Mot. to Dismiss 8, Dkt. No. 32 [hereinafter "RB"]; see generally *Hazout*, 134 A.2d 275 (finding personal jurisdiction in the context of a change of control transaction); *LVI Grp. Invsts.*, 2018 WL 1559936 (same).

117 See Compl., Ex. A, at 1 (identifying a Chase bank with address in Utah as the destination for the wire).

118 See *id.* (identifying the Escrow Agent as a Utah corporation and the Sellers as Malaysian entities).

119 *Turf Nation*, 2017 WL 5435970, at *9.

120 *Hazout*, 134 A.3d at 291 n.60.

121 See *supra* notes 34–37 and accompanying text.

122 2018 WL 3005822 (Del. Ch. June 14, 2018).

123 See *id.* at *1, *11.

124 *Id.* at *11.

125 *Id.* at *11–*12.

126 *Id.* at *12 (citing *Hazout*, 134 A.3d at 292).

127 *Id.* (citing *Armstrong*, 423 A.2d at 176).

128 See *id.*

129 Compl. ¶ 120.

130 *Ruggiero*, 948 A.2d at 1132 (citations omitted).

131 See *supra* note 33 and accompanying text.

132 See *supra* note 68 and accompanying text; but see *Fla. Chem. Co., LLC v. Flotek Indus., Inc.*, 2021 WL 3630298, at *2 (Del. Ch. Aug. 17, 2021) (declining to apply the “same-agreement rule”, here referred to as element (3), for purposes of enforcing a forum selection provision against a non-signatory). *Florida Chemical* did not address the question of whether the forum selection provision was sufficient to confer personal jurisdiction over the non-signatory, and in any event, the parties have not disputed element (3) in the instant case.

133 See generally RB; see also Oral Arg.

134 The Plaintiff’s Complaint refers to the Defendants as “parties and beneficiaries” but does not identify them as *third-party* beneficiaries or identify supporting reasoning for this statement. See Compl. ¶ 23.

135 See *Neurvana*, 2019 WL 4464268, at *1.

136 See *id.*

137 See *id.* at *4.

138 See generally AB.

139 Notably, Asvadi is not mentioned in this sentence. See *id.* at 13, 13 n.7.

140 See Oral Arg., 34:13–24, 35:1–2.

141 See *Neurvana*, 2019 WL 4464268, at *4 (citing *Weygandt v. Weco, LLC*, 2009 WL 1351808, at *4 (Del. Ch. May 14, 2009)).

142 Cf. *id.* (“In any event, the mere ‘contemplation’ of a benefit does not directly confer one.”).

143 See *id.* at *5 (identifying two scenarios where the foreseeability inquiry was a singular basis for satisfying the “closely-related” test).

144 See *Partners & Simons*, 2021 WL 3161651, at *7.

145 See generally *Neurvana*, 2019 WL 4464268.

- 146 See *Lexington Servs. Ltd. v. U.S. Patent No. 8019807 Delegate, LLC*, 2018 WL 5310261, at *5–6 (Del. Ch. Oct. 26, 2018) (quoting *Ashall Homes Ltd. v. ROK Entm't Grp., Inc.*, 992 A.2d 1239, 1249 (Del. Ch. 2010)).
- 147 See *Ashall*, 992 A.2d at 1249.
- 148 2017 WL 6596880 (Del. Ch. Dec. 22, 2017) (ORDER).
- 149 779 F.3d 214 (3d Cir. 2015).
- 150 *Id.* at 219 (citing *Weygandt*, 2009 WL 1351808, at *4; then citing *Capital Grp. Cos., Inc. v. Armour*, 2004 WL 2521295, at *6–7 (Del. Ch. Oct. 29, 2004)).
- 151 *Id.*
- 152 See *id.*
- 153 See *id.* at 219; see also *Partners & Simons, Inc.*, 2021 WL 3161651, at *8.
- 154 See AB 13.
- 155 See *id.*
- 156 *Neurvana*, 2019 WL 4464268, at *7 (citing *Compucom Sys., Inc. v. Getronics Fin. Holdings B.V.*, 2012 WL 4963308, at *4 (D. Del. Oct. 16, 2012)); *id.* at *8; see also *Partners & Simons, Inc.*, 2021 WL 3161651 (declining to apply the active-involvement theory).
- 157 AB 15.
- 158 *Id.* at 15–16.
- 159 *Id.*, Ex. I, ¶¶ 35–40.
- 160 *Id.* at 38.
- 161 See *Neurvana*, 2019 WL 4464268, at *3 (“Decisions of [the Court of Chancery] have described the closely-related test as an application of the doctrine of equitable estoppel.”).
- 162 *Capital Grp.*, 2004 WL 2521295, at *6 (citations omitted); see also *Neurvana*, 2019 WL 4464268, at *3 (quoting *Plaze, Inc. v. Callas*, 2019 WL 1028110, at *8 (Del. Ch. Feb. 28, 2017)) (“Equitable estoppel exists ‘to prevent someone from accepting the benefits of a contract without accepting its obligations.’ ”).
- 163 See generally AB, Ex. I.

2024 WL 3567002

Only the Westlaw citation is currently available.
United States Bankruptcy Court, C.D. California,
Los Angeles Division.

IN RE: Clark Warren BAKER, Debtor(s),
James Murtagh, M.D., Plaintiff(s),
v.
Clark Warren Baker, Defendant(s).

Case No.: 2:15-bk-20351-BB

|

Adversary No.: 2:15-ap-01535-BB

|

Date: July 10, 2024, Time: 10:00
AM, Location: Courtroom 1539

|

Signed July 22, 2024

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REPORT AND RECOMMENDATION TO DISTRICT COURT FOR WITHDRAWAL OF REFERENCE AS TO DETERMINATION OF CRIMINAL CONTEMPT

Sheri Bluebond, United States Bankruptcy Judge

*1 Because criminal contempt matters under 18 U.S.C. § 401(3) and Rule 42 of the Federal Rules of Criminal Procedure must be tried by the District Court, rather than the Bankruptcy Court, see *In re Dyer*, 322 F.3d 1178 (9th Cir. 2003), and because this Court believes that the facts of this case warrant consideration of prosecution for criminal contempt, the Court hereby recommends that the District Court *sua sponte* withdraw the reference with respect to all criminal and civil contempt matters in this bankruptcy case pursuant to 28 U.S.C. § 157(d) for the limited purpose of

considering criminal contempt proceedings against defendant Clark Warren Baker (“Baker”) for violation of this Court’s February 17, 2022 “Default Judgment and Permanent Injunction” (the “Injunction”) [Docket No. 867 in the above adversary proceeding (the “Action”)¹].

Throughout the course of this adversary proceeding, Baker has demonstrated a consistent disregard for his duty to cooperate in discovery, his obligation to comply with orders of this Court and the need to testify truthfully when signing declarations under penalty of perjury. These problems (among others) led this Court (i) to make two criminal referrals to the United States Attorney concerning Baker’s conduct in the Action; (ii) to make numerous findings about Baker’s failure to comply with orders of this Court; (iii) to strike Baker’s answer to complaint and authorize plaintiff to proceed by way of default; and (iv) to hold Baker in civil contempt and have him arrested in an effort to obtain compliance with its orders. As none of these efforts had the effect of deterring Baker from engaging in misconduct in the Action, in June of 2019, the Court issued a Report and Recommendation that Baker be held in criminal contempt and incarcerated for a period of 90 days [Docket No. 513, attached as Exhibit 1 hereto]. However, even these measures proved insufficient to cause Baker to turn over a new leaf. Immediately upon entry of a final judgment in the Action that included injunctive relief, Baker began violating the terms of that injunction, resulting in the entry of an order to show cause why he should not be held in contempt yet again and an order holding him in civil contempt, as discussed in more detail below.

Although the Court has given Baker repeated opportunities to purge his contempt of the Injunction, Baker has failed to do so. Instead, Baker has treated this Court’s orders requiring him to provide information concerning his efforts to comply with the Injunction under penalty of perjury as little more than creative writing assignments, offering declaration after declaration with responses that are incomplete, nonresponsive and/or inconsistent with his prior declarations, without any explanation for the inconsistencies. These declarations appear to be little more than efforts by Baker to distract the Court from noticing that he has not actually provided any meaningful information about how and when he took the steps required by the Injunction.

*2 When a party has repeatedly demonstrated that he cannot be cajoled or coerced into complying with court orders, civil contempt is no longer an effective tool. Such a party should be held in criminal contempt and punished for his wrongdoing.

The Bankruptcy Court lacks the authority to take this action and therefore recommends that the District Court withdraw the reference to the extent necessary to permit it to do so.

I

PROCEDURAL HISTORY

To assist the District Court in understanding the nature of the relationship between the parties and the history of problems that this Court has encountered in obtaining compliance with its orders from defendant Baker, the bankruptcy court has included in this Report and Recommendation a lengthy recitation of the background and prior history of the Action. However, the basis of the bankruptcy court's current recommendation that Baker be held in criminal contempt and incarcerated as punishment therefor, the discussion of which begins in Section II below, is limited to Baker's failure to comply with the Injunction [Docket No. 867, attached as Exhibit 2 hereto], and his failure to purge his contempt of the Injunction by taking the steps outlined in this Court's three interim orders re contempt -- Docket No. 975, entered March 22, 2023; Docket No. 1045, entered November 22, 2023; and Docket No. 1087, entered April 25, 2024 -- which orders are attached hereto as Exhibits 3, 4 and 5, respectively.

A. Litigation in State Court

On November 15, 2013, James Murtagh, M.D. ("Murtagh" or "plaintiff") filed a lawsuit against Baker in Los Angeles Superior Court, commencing case no. BC 527716 (the "State Court Action"). In the third amended version of his complaint in the State Court Action, filed February 18, 2015, Murtagh alleged, among other things, that Baker had committed intentional infliction of emotional distress, defamation, intentional interference with contractual relations and intentional interference with prospective economic advantage. On May 12, 2015, the Los Angeles Superior Court, in the State Court Action, ordered Baker to pay \$60,000 in sanctions to reimburse Murtagh for attorneys' fees and costs attributable to a frivolous motion that Baker had filed in the State Court Action. Baker never paid these sanctions and instead filed a chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Central District of California on June 29, 2015, commencing bankruptcy case no. 2:15-bk-20351 (the "Case"). The State Court Action has remained stayed since that date.

B. Litigation in Bankruptcy Court

Murtagh commenced the above adversary proceeding against Baker on October 5, 2015. Murtagh's Second Amended Complaint, filed December 29, 2015 [Docket No. 16] (the "Second Amended Complaint"), seeks to have Murtagh's claims against Baker excepted from any discharge that Baker might receive in the Case under [Bankruptcy Code section 523\(a\)\(6\)²](#). According to the Second Amended Complaint, the original conflict between Murtagh and Baker arose from their opposing views regarding the treatment of patients infected with HIV:

- a. Baker is an "AIDS denier" who: (i) disputes widely accepted medical and scientific evidence that HIV causes AIDS; (ii) through OMSJ³, brokered experts in litigation to discredit test results which resulted in HIV-positive findings; and (iii) encourages HIV-positive individuals to stop taking medically prescribed pharmaceutical treatment based on advocacy that AIDS is just a hoax orchestrated by "Big Pharma" (which advocacy has resulted in many unnecessary or more accelerated deaths).

- *3 b. Dr. Murtagh is an experienced licensed physician with three board certifications (Internal Medicine, Pulmonary Disease and Sleep Medicine), and is a former professor at Emory University's Medical School; Dr. Murtagh disputes Baker's baseless theories about HIV testing and AIDS; (ii) supports medical treatment for HIV and AIDS patients; and (iii) believes that medication for the prevention, postponement and/or treatment of AIDS has been proven to be effective.

[Second Amended Complaint](#), p. 2 at lines 5-18.

Murtagh's Second Amended Complaint offers the following description of Baker's willful and malicious conduct toward him:

7. In an effort to gain prominence in the AIDS-denialist community and obtain personal financial gain (including an admitted payment to OMSJ of at least \$1.2 million from one AIDS denialist), Baker orchestrated a scorched earth campaign against Dr. Murtagh in which Baker sought to: (a) discredit Dr. Murtagh; (b) destroy Dr. Murtagh's professional and personal reputation; and (c) render Dr. Murtagh unemployable and demoralized (as reflected in Baker's emails taunting Dr. Murtagh to commit suicide).

8. Baker's relentless campaign against Dr. Murtagh began in 2008, continued through filing of the Baker Bankruptcy Case on June 29, 2015 and even continues post-bankruptcy. As part of Baker's effort to ruin Dr. Murtagh financially and personally, Baker fabricated and disseminated outright lies and innuendo about Dr. Murtagh such as: (a) by publishing them on websites owned and/or created by Baker about Dr. Murtagh; and (b) by communicating those lies and innuendo directly to Dr. Murtagh's employers and recruiters, both verbally and in writing.

9. In addition to manufacturing false and disparaging material about Dr. Murtagh, Baker improperly obtained Dr. Murtagh's private information, tracked Dr. Murtagh's location and employment and used that private information to contact Dr. Murtagh's current and prospective employers and recruiters; Baker shared the false damaging material with others to advance Baker's plan to get Dr. Murtagh terminated from his then current employment and/or to be disqualified from future employment.

* * * *

11. Sometime in 2012, Baker created, owned and maintained a website named www.jamesmurtaghmd.com, which Baker so named in an effort to deceive readers into believing that Dr. Murtagh had authorized the website. Baker used the website to: (i) post inaccurate and disparaging information about Dr. Murtagh; and (ii) improperly direct traffic to Baker's commercial site (omsj.com), by among other things, advertising a "confidential consultation" with Baker. Dr. Murtagh was forced to bring a formal proceeding before the World Internet Property Organization ("WIPO") -- Murtagh. v. Baker et al., WIPO Case No. 02014-071 -- to protect Dr. Murtagh's professional and personal reputation. Baker defended his claim to the website but Dr. Murtagh prevailed in that, on or about June 26, 2014, WIPO issued a decision finding that Baker acted in bad faith, with a specific intent to confuse and deceive the public, and the WIPO ordered Baker to transfer the disputed domain name to Dr. Murtagh.

*4

* * * *

12. After losing the right to use the domain name www.jamesmurtaghmd.com, Baker simply moved the content from www.jamesmurtaghmd.com to new sites which Baker created and maintained, including www.jamesmurtaghmdtruth.com

and www.jamesmurtaghmdpsycho.com, for the express purpose of publishing the same and additional false and disparaging information about Dr. Murtagh. Baker used the pejorative term "psycho" in the website name to: (i) falsely suggest that Dr. Murtagh has a mental, personality and/or character defect which would render him unfit to work with patients; and (ii) with the intent to inflict reputational and economic harm upon Dr. Murtagh.

13. In addition to using confusingly named websites, Baker published false disparaging information about Dr. Murtagh in other online venues, including www.omsj.org, www.cwbpi.com and www.propagandists.org.

* * * *

18. In addition to disseminating and publishing defamatory content about Dr. Murtagh in writing, and in an effort to cause harm to Dr. Murtagh, Baker regularly communicated, both verbally and in writing, with: (i) numerous recruiters with whom Dr. Murtagh has developed business relationships; and (ii) various hospitals at which Dr. Murtagh was then working and from which Dr. Murtagh was regularly asked to leave promptly after contact with Baker and/or the websites, usually without explanation and despite otherwise positive reviews.

19. On June 28, 2014, Baker sent an anonymous email from drm@nym.hush.com to many medical recruiters, including GMedical, one of Mr. Murtagh's recruitment agencies. The email, which included a link to www.jamesmurtaghmd.com, the website which was then controlled by Baker and contained false information about Dr. Murtagh. By sending the email, Baker intended to convince the recruiting agencies to cancel, not honor and/or not renew Dr. Murtagh's contract with the agency. The email stated:

first name: James [¶] last name: Murtagh [¶] email: drm@nym.hush.com [¶] country: United States [¶] specialty: [¶] question: FYI -- James John Murtagh MD is a Georgia physician who shakes down hospitals and clinics throughout the United States. Shortly after he finds an employer, he causes a problem and sues hoping to get a \$10,000 - \$200K settlement. He records all telephone conversations and uses them to sue recruiting companies and recruiters. He may try to find jobs through your agency. For more information about his behavior and court cases, visit www.jamesmurtaghmd.com.

20. Baker hacked into www.internationalwhistleblower.org, a website owned by Dr. Murtagh. Dr. Murtagh took down the website after he discovered Baker's hack which involved Baker's insertion of an unauthorized and defamatory page on the site. The unauthorized page included a reference to Dr. Murtagh's alleged, involvement in gay porn and a link to www.jamesmurtaghmd.com, the website created and controlled by Baker at the time. Baker's unauthorized post was intended to cause professional and personal harm to Dr. Murtagh.

*5

*** *

22. On November 1.6. 2012, Baker emailed Dr. Murtagh: "Every message I receive from you reminds me that I have a life and you don't. I have more time now that hospital recruiters no longer call me as much as they did Now that your medical career is finally over, will you work at McDonalds or hang yourself in a closet?"

23. On November 19, 2012, Baker emailed Dr. Murtagh: "Dear Mo: I've received a lot of email and phone calls lately - from former lawyers, healthcare recruiters, hospitals... it looks like your behavior is finally catching up with you. With no job, no family, no children, no prospects and no future, I pray that someone won't find you hanging from a belt in a motel closet this Christmas. I want you alive so that I can depose you on videotape. You're the most fascinating sociopath I've ever met. ¶ You can probably find work somewhere that doesn't require you to interact with other people, delivering papers or maybe as a long haul truck driver. ¶ In 2008, I warned you and your associates that the storm would come. That storm has come."

*** *

25. On November 24, 2014, Baker emailed Dr. Murtagh: "Dear Mo ...I see that your medical recruiters, clinics and hospitals regularly visit your website. They spend a few minutes there, click on links that describe your mental problems, and leave. The clock is ticking, your career is circling the drain, and the holiday season will be a very dark and empty place for you and yours - oh wait - you don't have anyone do you. I forgot. http://www.jamesmurtatghmdtruth.com/. Happy Thanksgiving, to the biggest turkey I know. Clark Baker (LAPD ret)"

Second Amended Complaint, pp. 2-8.

1. **The First Criminal Referral**

Plaintiff's efforts to obtain testimony from a witness known as David Bender or Kevin Kuritzky ("Bender") led the Court to make its first criminal referral concerning the conduct of defendant Baker in the Action. In or about October of 2014, Bender, who resides in Baltimore, Maryland, had provided Baker with a declaration that he had used in connection with a motion Baker had filed in the State Court Action (the "2014 Declaration"). According to a declaration filed by Lisa Hiraide,⁴ one of the attorneys who had previously represented Murtagh in the Action, when she contacted Bender by telephone in September of 2015 to ask him about the contents of the 2014 Declaration, Bender advised her that nothing contained in the 2014 Declaration had been true and that he had only provided testimony that was damaging to Murtagh because he had been "totally pressured" and "extorted" by Baker into signing the declaration in exchange for Baker's agreement to remove all embarrassing and damaging materials that Baker had posted about Bender on the internet.

Baker conducted a deposition of Bender in the Action in Los Angeles on or about June 6, 2016, but Bender had insisted on leaving the deposition (at approximately 1:55 p.m. that day) before he could be cross-examined by counsel for Murtagh. [SeeDeclaration of John Wallace, Exhibit 3, to plaintiff's September 20, 2016 motion for a protective order [Docket No. 152].] Through discovery, Murtagh located a copy of an email exchange between Bender and counsel for Baker in which Bender advised Baker's counsel that he would only be willing to come to Los Angeles to be deposed by Baker if he could leave immediately after Baker's questions and not be cross-examined by counsel for Murtagh. *Id.* at par. 4.

*6 Based on this information, Murtagh filed a motion [Docket No. 154] to have Baker's answer to the Second Amended Complaint stricken or, at a minimum, to have Bender's testimony excluded at trial. The Court reached Bender by telephone on the record during the course of the November 15, 2016 hearing on this motion and obtained Mr. Bender's consent to come to Los Angeles for a continued examination on December 12, 2016. Based on this conversation with Bender and his agreement to appear, the Court entered an order requiring Bender to appear in the offices of plaintiff's counsel on December 12, 2016 at 10:00 a.m. and scheduling a continued hearing on plaintiff's motion for January 10, 2017.

On December 7, 2016, Bender sent a fax to Judge Bluebond's chambers [Docket No. 189], advising that he would not be appearing for his December 12, 2016 deposition because he had received inadequate notice of the need to travel across the country. At approximately the same time, however, Bender telephoned Judge Bluebond's law clerk, Jennifer Wolfberg, and advised her that the real reason he would not be appearing for his December 12 deposition was that he was afraid of Baker and what Baker had threatened to do if he gave truthful testimony at the continued deposition. He therefore did not appear at his continued deposition on December 12, 2016.

The Court related the substance of Ms. Wolfberg's December 7, 2016 conversation with Bender to the parties at the continued hearing held January 10, 2017, and ruled that, in light of Bender's refusal to submit to an examination by Murtagh and the conflicting stories he had already provided, neither party would be permitted to introduce any testimony from him at trial. See Docket No. 224 (the "Second Bender Order"), entered March 15, 2017. The Court also stated in the Second Bender Order that it would make a referral to the appropriate law enforcement authorities to investigate whether criminal conduct had occurred with regard to the witness.⁵ (A copy of the referral referenced in the Second Bender Order, docket no. 200, is attached as Exhibit 6 hereto.) But this "witness tampering" incident was merely the first of the problems that the Court encountered as a result of Baker's misconduct in connection with the discovery process.

2. Attempts to Obtain Equal Access to Electronic Data

As Baker had denied being responsible for certain of the defamatory and harassing material directed at Murtagh, both parties retained computer experts to assist them in the Action. Plaintiff employed an expert named Bruce Anderson, and defendant employed an expert named James Pickrell.

On August 23, 2017, plaintiff moved for a protective order [Docket No. 274] (the "August Motion"), asking that his expert be given the same access that Baker's expert had been given in connection with the preparation of his expert reports to two websites, www.Baddocjjm.com and www.jamesmurtaghmdtruth.com, and to Baker's private Hushmail email account(s). Baker's expert had been given the password or password recovery link necessary to give him access to these websites and any password-protected files, including rights available only to administrators of the sites.

However, when Murtagh's expert asked for the same access, Baruch Cohen, then counsel for Baker, refused and offered instead to meet with plaintiff's expert in Cohen's office and to permit Anderson to review materials on Baker's laptop under the supervision and in the presence of Baker's counsel.

*7 The Court granted the August Motion by order entered October 5, 2017 (the "October 2017 Order") [Docket No. 291]. In the October 2017 Order, the Court directed Baker within 3 business days after entry of the order to "provide Bruce Anderson ('Anderson') ... the same level of access to the same websites, passwords, domains, email accounts, etc. that Baker provided to his own expert witness James Pickrell ('Pickrell') in the same manner that Baker provided such access to Pickrell." The October 2017 Order also expressly stated that Anderson could not be required to conduct his investigation in the presence or under the supervision of Baker or his counsel. Baker never complied with this order.

3. Attempts to Obtain Unredacted Copies (or a Privilege Log) and Documents in Native Electronic Format

On September 1, 2017, Murtagh filed another discovery motion (the "September 2017 Motion"), docket no. 281, complaining, among other things, that Baker had repeatedly produced redacted versions of documents without providing a privilege log, had concealed and withheld documents such as emails between himself and witnesses Pardo, Brown and Bender, and had produced altered paper copies of emails by cutting and pasting so as to remove actual contents of the documents, making redactions difficult to detect. As a result, Murtagh requested, among other relief, that (i) Baker be ordered to produce "in native, exact electronic form," and not as .pdfs or other *images* of documents that can be altered, all emails that he previously produced or submitted as exhibits, including any that had been previously redacted; (ii) Baker be ordered to provide a privilege log describing any documents that Baker chose to withhold on privilege grounds; and (iii) Murtagh be awarded monetary sanctions for the attorneys' fees and costs that he had incurred in bringing and prosecuting the September 2017 Motion.⁶

*8 Following a hearing on the September 2017 Motion, the Court granted the relief requested above, among other forms of relief, and imposed monetary sanctions on Baker in the amount of \$5,675, payable to plaintiff within 45 days after entry of the Court's order on that Motion. See Order on September 2017 Motion, Docket No. 313. These additional

sanctions were never paid,⁷ and, according to Murtagh, the required privilege log was never provided.⁸

4. The April and June 2018 Orders

On February 27, 2018, Murtagh filed a motion seeking to have Baker held in contempt and to have certain findings made and certain sanctions imposed based on Baker's violations of this Court's October 2017 Order. According to that motion, Baker violated the terms of the October 2017 Order by failing to give plaintiff's expert, Bruce Anderson, the required level of access to Baker's Hushmail email accounts and to the websites www.Baddocjjm.com and www.jamesmurtaghmdtruth.com. The Court entered an order to show cause on June 26, 2018 in response to that motion (the "June 2018 Order") [Docket No. 361].

The June 2018 Order directed Baker to show cause why the Court should not make a series of findings (collectively, the "First Findings") including the following: (A) that Baker had reduced the amount of the data stored in his Hushmail email account from 155 MB of data to 9 MB of data (the "Data Reduction") after the Court issued the October 2017 Order (the "Data Reduction"); (B) that the Data Reduction was purposeful and intentional and not the result of Baker's having merely deleted a few spam emails; (C) that Baker had deleted "subaccounts" from his Hushmail email account after the Court had issued its October 2017 Order; (D) that, despite having been ordered to do, Baker had failed to restore the data and subaccounts necessary to comply with the Court's April 13, 2018 Order [Docket No. 339]; (E) that, after providing access information to Anderson concerning certain websites referenced in the October 2017 Order, Baker changed the username and/or password for these websites to prevent Anderson from actually obtaining the access that Baker had been ordered to provide; and (F) that, notwithstanding Baker's having repeatedly denied that he had anything to do with the website www.Baddocjj.com, (i) Baker's cooperation and assistance were essential to setting up that website and (ii) Baker maintained an ongoing connection to that website.

The June 2018 Order also directed Baker to show cause why, in light of the proposed findings, the Court should not, among other things, (A) hold Baker in contempt, (B) impose additional monetary sanctions to reimburse plaintiff for attorneys' fees incurred in attempting to obtain compliance with orders of the Court, (C) refer Baker to the United States Attorney for criminal prosecution for the Data Reduction; (D)

issue a report and recommendation to the District Court that Baker be held in criminal contempt and incarcerated for a period of not less than 90 days as punishment for his failure to comply with court orders; (E) enter an order appointing a neutral expert pursuant to [Fed. R. Evid. 706](#) (the "Neutral Expert") to preserve evidence and undertake related activities; and (F) prohibit Baker from raising, contesting or offering evidence or argument to dispute a list of issues in the Action set forth in paragraph 12 of the June 2018 Order (collectively, the "Resolved Issues").

*9 In addition, the June 2018 Order required Baker (A) to preserve and refrain from altering, destroying, overwriting, moving, password-protecting or modifying any of Baker's Data⁹ or any device containing Baker's Data; performing any activity that might accidentally and/or intentionally spoliate any of Baker's Data; or changing any access information (including user names, passwords, etc.) or encryption without a prior written Order or prior written stipulation agreed to and signed by Plaintiff's counsel; (B) to restore and to produce to plaintiff by July 27, 2018 all Baker's Data that had been spoliated since October 5, 2017; (C) to send by August 3, 2018 a prescribed form of notice (the "Preservation Notice") to a list of vendors and witnesses; and (D) to file by August 3, 2018 a compliance declaration containing the information outlined in Attachment B to the June 2018 Order.

The Court conducted a hearing on the June 2018 Order on August 16, 2018. Having found that Baker had failed to file a written response to the June 2018 Order, failed to file the compliance declaration, failed to send the required Preservation Notices and failed to provide any information concerning any steps that he had taken in an effort to restore deleted data, the Court entered its August 16, 2018 order [Docket No. 339]. In that order, the Court (a) made the First Findings; (b) prohibited Baker from challenging the Resolved Issues; (c) set a hearing and a briefing schedule for it to determine the amount of the monetary sanctions to impose upon Baker; (d) stated that it would enter a separate ordering appointing a Neutral Expert; and (e) set a continued hearing for September 27, 2018 to consider whether to refer Baker to the United States Attorney for criminal prosecution for the Data Reduction and/or to issue a report and recommendation to the District Court that Baker be held in criminal contempt and incarcerated for a period of not less than 90 days as punishment for his failure to comply with court orders.

Following the continued hearing, the Court entered its September 28, 2018 order [Docket No. 393]. In that order, the

Court imposed monetary sanctions on Baker in the amount of \$133,319.71 (which have not been paid) and set a continued status conference/holding date of December 11,2018 for a continued hearing on whether it should hold Baker in contempt, refer him to the United States Attorney for criminal prosecution for the Data Reduction and/or issue a report and recommendation to the District Court that Baker be held in criminal contempt. (That hearing was later continued by stipulation between the parties to January 8, 2019.)

5. The Neutral Expert's Reports

On September 6, 2018, the Court entered its Order Appointing Neutral Expert [Docket No. 380] (the “Neutral Expert Order”). The Neutral Expert Order outlines the duties of the Neutral Expert and requires, among other things, that Baker deliver all of Baker's Devices¹⁰ to the Neutral Expert; provide the Neutral Expert with the information necessary to access the data on Baker's Devices; and reimburse plaintiff for all amounts that he pays as fees and expenses of the Neutral Expert within 5 days after proof of payment therefor. Neil Broom of Technical Resource Center, Inc. accepted the appointment as Neutral Expert and filed status reports with the Court on December 4, 2018 [Docket No. 395] (the “First NE Report”), and January 8, 2019 [Docket No. 403] (the “Second NE Report”).

In the First NE Report, Broom explains that he contacted Baker's then counsel, Baruch Cohen, on September 7, 2018 to make arrangements for to obtain the Baker Devices.¹¹ Broom reports that he went to Baker's home at 9:00 p.m. on September 18, 2018 and collected 8 different devices from Baker for forensic processing in his lab.¹² Broom's initial analysis of the data revealed large numbers of deleted files and “data carved” files¹³, but, as of the date of the First NE Report, Broom was not in a position to determine whether any of the deleted or data carved files were relevant to the subject matter of the Action.

*¹⁰ In the Second NE Report, Broom made several important observations:

a. On September 7, 2018, less than 2 hours after Broom contacted Baker's counsel to discuss a turnover of Baker's Devices, Baker ran an encryption application (True Crypt) on one of the devices¹⁴ later turned over to Broom (Device AA321), accessing directories that included ones named

“Pardo” (who has previously been identified as a witness in the Action) and “Murtagh hush.”

b. The following day, on September 8, 2018, Baker again ran the encryption application on Device AA3¹⁵: he connected to an encrypted volume labelled “O” and accessed several files (including one entitled, “Message Source”); and connected to a volume labelled “E:” from which he accessed directories named “Discovery,” “goons,” “batcave,” “Pardo,” and “Brown¹⁶ Pardoetc. email.” Broom was unable to locate the directories “batcave” and “Brown Pardo etc email” on any of the devices that Baker turned over to him. As Broom explains on page 31 of the Second NE Report, “This is concerning because the directory ‘batcave’ contains security and encryption files, while the directory ‘Brown Pardo etc email’ contains ‘Pardo’ and ‘Murtagh hush’ files.”

c. Three days later, on September 11, 2018, Baker connected a backup drive (Device AC) to Device AA3 and copied files (including 335GB of video files) from Device AA3 to Device AC. According to the Neutral Expert, “Any data that had been previously stored on Device AC (and then deleted), would have been permanently destroyed by copying the huge video files onto Device AC, by overwriting the old data with the new video files.”

d. Later that same day, September 11, 2018, Baker reformatted Device AC. According to the Neutral Expert, “Reformatting a hard drive prepares the drive to hold new data by creating a new file system on the drive. This process destroys the previous data that was on the drive. Again, shortly after copying 335 GB of video files onto Device AC (destroying the data previously there), Baker then destroyed the new video files by reformatting the hard drive.”

e. Lastly on September 11, 2018, Baker copied backup files from Device AH onto Device AC. The Neutral Expert reports that, “This activity is consistent with someone attempting to generate worthless data to thwart a forensic examination.”

f. Baker deleted large numbers of files after the entry of orders from this Court prohibiting such activity and requiring the turnover of that data to the Neutral Expert, many of which files appear relevant to the subject matter of the Action. A list of these deleted files and the corresponding deletion dates appears on pages 3 through 9 of the Second NE Report.

g. Baker did not provide Broom with the password and instructions to access the encrypted file “Birthday 2.wmv,” located on three of Baker’s devices, despite Broom’s request for this information.¹⁷ See Second NE Report, p. 30, for a recitation of the discussions between Broom and Baker on this subject.

h. “Baker was running the TrueCrypt application as late as the day he turned his devices over to the Neutral Expert, yet he now states that he cannot remember the password.” Second NE Report, p. 30.

***11** i. Baker has not provided the Neutral Expert with multiple USB devices that have been used on Baker’s Devices.

j. Baker installed another encryption program named “Axcrypt” on Device AA3 ON May 5, 2018. Baker ran Axcrypt on Device AA3 on September 12, September 13, September 14, September 15 and September 17, 2018, for a total of 30 runs. Baker ran Axcrypt on Device AH on September 17, 2018. Baker did not provide a list of the files that he encrypted with this program and did not provide the Neutral Expert with the password necessary to unlock these files.

k. Baker used a portable and secure operating system on a USB drive named “Qubes.” The USB drive was used on Devices AH, AB and AG. Baker did not give Broom any device that had the Qubes operating system on it.

6. The February 19, 2019 OSC

Based on Baker’s failure to comply with earlier orders of the Court and the troubling findings made by the Neutral Expert in the Second NE Report, following the January 8, 2019 hearing, the Court issued its February 19, 2019 “Order to Show Cause re Contempt” [Docket no. 413] (the “February 2019 OSC”). Paragraph 10 of that order, which appears on pages 10 through 11 thereof, details the findings the Court had previously made concerning Baker’s violations of this Court’s orders.¹⁸ Paragraph 1 of the February 2019 OSC directs Baker to appear on April 2, 2019 to show cause why the Court should not do the following based on Baker’s noncompliance with Court orders (collectively, the “Additional Steps”):

a. hold Baker in civil contempt for having failed to comply with prior orders of the Court; issue a warrant for his arrest;

and direct that Baker be incarcerated until he performs the “Affirmative Acts” set forth in paragraph 8 of the February 2019 OSC;¹⁹

b. make a criminal referral to the U.S. Attorney based on, among other things, Baker’s spoliation of evidence;

***12** c. make the “Additional Findings” detailed in paragraph 11 of the February 2019 OSC;²⁰

d. Issue a report and recommendation to the District Court that Baker be held in criminal contempt and incarcerated for a period of not less than 90 days; and

e. Strike Baker’s answer to complaint and enter judgment for Murtagh for damages and injunctive relief.

The February 29 OSC advised Baker that any response was due not later than March 19, 2019 and ordered him to include in his response his own declaration containing certain specified information. Baker’s response to the February 29 OSC consisted of a brief memorandum of points and authorities and a declaration *from Baker’s counsel* authenticating an email she sent to plaintiff’s counsel passing along hearsay statements made by Baker in response to the order to show cause. [See Declaration of J. Ponce, filed March 19, 2019, Docket No. 423-1.] Baker offered no other evidence in a timely manner in response to the February 2019 OSC and made no attempt at any time to refute any of the observations made by the Neutral Expert in the Second NE Report.

At the April 2, 2019 hearing on the February 2019 OSC, the Court struck the email attached to Ms. Ponce’s declaration as hearsay and found that Baker had failed to show cause why the Court should not take the Additional Steps. However, in light of the drastic nature of some of the Additional Steps, the Court agreed to review and consider (i) the declaration that Baker had belatedly filed on the morning of the April 2 hearing, (ii) any additional declaration(s) that Baker might file on or before April 9, 2019 and (iii) any response to these declarations that the plaintiff might file by April 16, 2019, before entering an order in response to the February 2019 OSC. After reviewing the declarations that Baker filed on April 2, 2019 [Docket No. 442] and April 9, 2019 [Docket No. 453] and Murtagh’s response thereto [Docket No. 462], the Court remained of the view that there was cause for it to take the Additional Steps and entered its April 24, 2019 order holding Baker in civil contempt [Docket No. 466] (the “Civil Contempt Order”).

7. Baker's Arrest and Release: The Second Criminal Referral

In the Civil Contempt Order, the Court held Baker in civil contempt for reasons detailed on pages 6 through 7 of that order and directed that Baker be remanded to the custody of the United States Marshal's Service of the Central District of California and detained until he had purged his contempt by completing the "Required Affirmative Acts" defined in paragraph 2 of that order (other than any of the Required Affirmative Acts that he proved "categorically and in detail" he was unable to perform). The Court also made the Additional Findings in the Civil Contempt Order and stated that it would refer Baker to the United States Attorney for criminal prosecution for the spoliation of evidence.²¹ The Court scheduled a status conference on Baker's performance of the Required Affirmative Acts for June 11, 2019.

***13** The United States Marshal's Service arrested Baker on May 1, 2019 and brought him to bankruptcy court for a status conference at 2:00 p.m. that day. It appearing to the Court that it would be difficult to make the arrangements necessary to have Baker released from federal custody in time for him to appear in state criminal court on May 13, 2019 for a preliminary hearing on his child pornography charges,²² the Court agreed to release Baker from custody and gave him until May 9, 2019 to file and serve a declaration attesting to his having performed each of the Required Affirmative Acts by that date.

The Court entered an order on May 10, 2019 [Docket No. 490] (the "May 10 Order"), setting forth its findings after having reviewed Baker's May 9, 2019 declaration [Docket No. 486] and Murtagh's response thereto [Docket No. 489]. As the May 10 Order explains, although the Court did not find Baker's testimony as to his inability to perform certain of the Required Affirmative Acts to be credible: "In the context of civil contempt, incarceration may be used only to coerce a party to take a particular action. It may not be used to punish a party for having failed to take a particular action." May 10 Order, at par. 9. "Although this Court has no doubt that Baker has disregarded repeated orders of this Court and remains in contempt of this Court, this Court has no reason to believe that continued incarceration of Baker will result in an increased level of cooperation from Baker." May 10 Order, at par. 10.

As a result, the Court elected not to issue a new warrant for Baker's arrest for civil contempt and, instead, proceeded with

its June 11, 2019 hearing. At that hearing, Baker had been ordered to show cause why the Court should not (a) strike his answer to complaint and enter judgment for the plaintiff and (b) issue a report and recommendation that the District Court hold Baker in criminal contempt. Baker's response to that order to show cause (the May 10 Order) was due by May 28, 2019.

Baker filed a supplemental declaration regarding the Required Affirmative Acts on May 28, 2019. Only one paragraph of that declaration was responsive to the May 10 Order to show cause -- paragraph 11 -- in which Baker explained that he should not be incarcerated because he is his elderly mother's full time caregiver.²³ Finding that Baker had failed to show cause why the Court should not take the Additional Steps, after the June 11, 2019 hearing on the May 10 Order, the Court entered its June 12, 2019 order [Docket No. 501]. In this order, the Court struck Baker's answer to complaint, authorized Murtagh to proceed by way of default and agreed to issue a report and recommendation to the District Court that Baker be held in criminal contempt. Thereafter, the Court prepared its June 27, 2019 report and recommendation to the District Court, Docket No. 513, a copy of which is attached hereto as Exhibit 1. This report and recommendation resulted in the entry of a July 29, 2019 Minute Order in District Court Case No. CV 19-05734-AG (In re Clark Warren Baker) (the "First District Court Case") [Docket No. 4 in the First District Court Case] holding Baker in criminal contempt and remanding him to the custody of the Bureau of Prisons for a term of 90 days.

8. The Default Judgment and Injunction

***14** After obtaining a series of extensions of the deadline for him to file a motion for default judgment (and extended litigation concerning the ability of third parties to prevent the disclosure to plaintiff or plaintiff's expert of allegedly privileged materials held by Broom), plaintiff filed his motion for default judgment on July 28, 2021 [Docket No. 776]. The Court eventually granted this motion and entered its Default Judgment and Permanent Injunction (the "Injunction") on February 17, 2022 [Docket No. 867] [attached as Exhibit 2 hereto].

In addition to awarding plaintiff nondischargeable compensatory damages of \$10,342,525 and punitive damages of \$20,000,000, the Injunction prohibited Baker from continuing or resuming the wrongful conduct that gave rise to these damages in the first place. More specifically, it

prohibits Baker from, among other things, posting material about the plaintiff on the internet, registering domain names and opening email accounts in the plaintiff's name, cyberstalking or cyber-harassing the plaintiff, maintaining copies of defamatory materials concerning the plaintiff that Baker had previously posted on the internet and recruiting or employing others to engage in any of these activities on his behalf. The Injunction requires Baker within 10 days after issuance of the Injunction (A) to purge and eliminate from the internet the defamatory materials that he posted and (B) transfer to plaintiff certain identified files and websites. [See [Injunction](#), Docket No. 867, at pp. 4-5].

If, for any reason, Baker was not able to complete any of the steps required by the Injunction, the Injunction required him to notify the Court and plaintiff's counsel in writing, identifying the specific directive he was unable to complete and the reason it could not be completed [[Injunction](#), p. 5 at par. 9]. And, to assist plaintiff in ascertaining whether Baker had complied with his obligations under the Injunction, Baker was further required to copy plaintiff's counsel on any written communications by him or any of his agents or representatives with Third-Party Providers²⁴ concerning any aspect of the Injunction and to notify plaintiff's counsel in writing of any oral communications with Third-Party Providers concerning any aspect of the Injunction within 12 hours after any such communication [[Injunction](#), p. 5 at par. 13].

Although it appears that Baker eventually removed his defamatory material concerning plaintiff from public-facing aspects of the internet, he has not turned over files and other defamatory material to plaintiff, has only provided plaintiff with copies of communications with a single Third-Party Service Provider (and did so only belatedly after multiple orders requiring that such materials be turned over) and has provided only inconsistent, incomplete and inaccurate declarations concerning the steps he has taken to comply with the Injunction. After more than a year of attempting to obtain evidence of compliance with the Injunction from Baker, the Court has reached the conclusion that it lacks the power with which to compel Baker through civil contempt orders or otherwise to do anything other than "thumb his nose" at this Court's efforts to ensure compliance with the Injunction.

II

THE CURRENT CONTEMPT PROCEEDINGS

A. The Court's Efforts to Obtain Compliance with the Injunction

*15 On December 21, 2022, plaintiff filed a notice of motion and motion for issuance of an order to show cause why Baker should not be held in contempt for violating the Injunction [Docket No. 936, Exhibit 8 hereto]. In response to that motion, the Court issued its December 22, 2022 "Order to Show Cause re Contempt" (the "OSC") [Docket No. 939, Exhibit 9 hereto].

Thereafter, the Court conducted multiple hearings and entered a series of orders (collectively, the "Interim Orders"), including without limitation the following, finding Baker in contempt of the Injunction and requiring Baker to file declarations providing additional information and to produce various documents for the purpose of purging his contempt of the Injunction:

1. its March 25, 2023 "Interim Order re Contempt Sanctions against Clark Baker" (the "First Interim Order") [Docket No. 975] [Exhibit 3 hereto], which was modified and corrected by this Court's March 28, 2023 "Order Modifying and Correcting Interim Order re Contempt Sanctions Against Clark Baker" [Docket No. 977, Exhibit 10 hereto];
2. its November 22, 2023 "Second Interim Order re Contempt Sanctions Against Clark Baker" (the "Second Interim Order") [Docket No. 1045, Exhibit 4 hereto]; and
3. its April 25, 2024 "Third Interim Order re Contempt Sanctions Against Clark Baker" (the "Third Interim Order") [Docket No. 1087, Exhibit 5 hereto].

In response to the Interim Orders, Baker filed a series of declarations, including without limitation the following, and produced a limited number of documents as attachments to those declarations:

1. "Defendant Clark Baker's Supplemental Declaration in Response to OSC re Contempt" [Docket No. 948] filed January 25, 2023 [Exhibit 11 hereto];
2. "Defendant Clark Baker's Declaration in Response to Court's Interim Order and Order Modifying and Correcting Interim Order" [Docket No. 979] filed April 21, 2023 [Exhibit 12 hereto];

3. “Defendant Clark Baker’s Declaration in Response to Item 2.c.i. of Page 5-6 of Order of March 22, 2023 for C. Baker to Aver Compliance” [Docket No. 990] filed May 5, 2023 [Exhibit 13 hereto];
4. “Defendant Clark Baker’s Supplemental Declaration in Response to Court’s Order of Nov. 22, 2023” [Docket No. 1065] filed December 28, 2023 [Exhibit 14 hereto];
5. “Fourth Baker Compliance Declaration” [Docket No. 1098] filed May 15, 2024 [Exhibit 15 hereto];
6. “Supplement to Fourth Baker Compliance Declaration” [Docket No. 1101] filed June 6, 2024 [Exhibit 16 hereto]; and
7. “Declaration of Clark Baker in Response to Proposed Order (Dkt. #1103) and Supplemental Brief (Dkt. #1102)” [Docket No. 1104] filed July 15, 2024 (the “July 2024 Baker Declaration”) [Exhibit 17 hereto].

In its First Interim Order (as modified and corrected by Docket No. 977), the Court held Baker in contempt for willfully violating the February 17, 2022 Injunction by doing all of the following:

- a. Continuing to own, administer or maintain online properties such as websites, blogs, or domain names that refer to Dr. Murtagh (paragraph 2²⁵);
- b. Maintaining or retaining websites or online storage sites that contain content and/or host documents concerning Dr. Murtagh (paragraph 5);
- c. Failing to purge from the internet content that he controls referring to or mentioning Dr. Murtagh (paragraph 6);
- d. Failing to ensure that Baker’s content about Murtagh was “deindexed” from internet search engines (paragraph 7);
- *16 e. Failing to transfer to Dr. Murtagh within 10 days of the entry of the Injunction domain names and websites referencing Dr. Murtagh (paragraph 8);
- f. Failing to notify the Court and Dr. Murtagh within 10 days after the entry of the Injunction if he was unable to comply with any of the above directives (paragraph 9); and

- g. Failing to copy Dr. Murtagh’s counsel on any third-party communications made in an effort to comply with the directives contained in the Injunction (paragraph 13).

Although Baker eventually complied with certain of the directives outlined in the Interim Orders in the various declarations he submitted in response to these orders, as of the last hearing on the OSC on July 10, 2024, a number of deficiencies remained. The Court permitted Baker to file yet another declaration following that hearing in an effort to purge his contempt. The result was the July 2024 Baker Declaration, which did not address any of the remaining deficiencies identified by the Court at the July 10, 2024 hearing and did not attach any of the exhibits that the declaration itself represented were attached to that document.

Baker was advised in the First Interim Order [p. 7 at par. 3] that, if he failed to purge his contempt in the manner described by that order, or if the Court determined that any of the information contained in his compliance declarations was materially incomplete or false, or both, the Court would prepare a report and recommendation to the District Court in which it recommended to the District Court that it withdraw the reference of the Action to the extent necessary to hold Baker in criminal contempt and order that Baker be incarcerated for a period of not less than one year. Similar warnings/reminders were contained in the Second Interim Order [Docket 1045, p. 3 at lines 17-23] and the Third Interim Order [Docket No. 1087, p. 3 at lines 10-16].

The Court has repeatedly requested information about the steps that Baker took in an effort to comply with the Injunction and has given Baker multiple opportunities to describe the process he used to ensure compliance and to explain how he arrived at the dates on which he previously testified compliance occurred but cannot obtain anything remotely resembling informative answers to its questions. Accordingly, on July 18, 2024, the Court entered its “Order After July 10, 2024 Hearing on Order to Show Cause re Contempt” (the “July 2024 Order”) [Docket No. 1106, Exhibit 18 hereto].

B. Baker’s Failure to Purge His Contempt of the Injunction

In the July 2024 Order, the Court found that Baker has failed to purge his contempt of the Injunction in at least the following respects:

1. Baker has failed to provide a full, complete and truthful explanation of all information, documents and any other grounds upon which he relied when he represented that he had deleted numerous files on October 20, 2016.

a. In his May 5, 2023 declaration [Docket No. 990], Baker testified **292 times** that he had “closed, terminated or last used or accessed” a particular document or internet property on October 20, 2016. When directed in the Second Interim Order and Third Interim Order to explain this testimony by, among other things, advising the Court how he knows that he deleted these files on October 20, 2016 - what specific documents, entries or other records or documents he saw that reflected this date, Baker has failed to supply an answer to this question.

*17 b. Instead, Baker testified in his May 15, 2024 declaration that he never said he deleted files on this date and that this date was first mentioned in the Court's November 6, 2023 Tentative Ruling. (SeeDocket No. 1098, p. 2 at pars. 4(a) and (c) (“The October 20, 2016 date is first mentioned in the Court's November 6, 2023 Tentative Ruling. It is repeated in the subsequent Second Interim Order and Third Interim Order.... To be clear, Baker does not reference October 20, 2016 in either declaration or in any previous declaration.”) Baker's testimony in this declaration is false and demonstrates, at a minimum, that Baker does not take the time necessary to verify the accuracy of his statements before swearing to them under penalty of perjury in a declaration.

c. In the July 2024 Baker Declaration, on page 18, Baker offers the following additional response to the prompt, “How does Baker know that he deleted these files on October 20, 2016?”: “I have no independent recollection of the searches and deletions I performed eight years ago. I vaguely recall that I searched for files and deleted them when I discovered them.” He adds in response to a question that asked what documents, entries or other records or documents he saw that reflected this date, “Because I have deleted my files, I have no independent recollection of having deleted files on 20 October 2016. I do, however, have a general recollection of having deleted files in 2016.”

d. None of this testimony explains how, in May of 2023, when Baker signed docket number 990 under penalty of perjury, Baker knew that he had deleted files on October

20, 2016. Did he invent this date out of whole cloth or did he see this date on some document that he has not identified? Or was there some other reason that he selected or recalled this date when he prepared his May 2023 declaration and signed it under penalty of perjury? Baker never tells us or makes any effort to describe what steps he took to arrive at this date.

2. Baker has failed to provide a full, complete and truthful explanation of all information, documents and any other grounds upon which Baker relied when he testified in his May 2023 declaration [Docket No. 990] that he conducted a diligent search on January 4, 2023 for files and other materials that he was required to delete pursuant to the Injunction, as required by the Third Interim Order.

a. In his May 2023 Declaration, Docket No. 990, Baker testifies **275 times** that, “On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion” of various materials.

b. In response to the Third Interim Order, Baker filed his May 15, 2024 Fourth Compliance Declaration. On page 3 of that document, in paragraph 5, Baker suggests that the Court must have gotten this date wrong and must have been referring to April 20, 2023. (SeeFourth Compliance Declaration, Docket No. 1098 (“In case the court is intending to reference April 20, 2023, to which Baker made numerous references in the 4/21/2023 and 5/5/2023 declarations, Baker responds as follows. Baker conducted diligent searches on his computer and as further described below on and around April 20, 2023 in preparation for the declaration submitted April 21, 2023.”)).

c. In the very next section of the Fourth Compliance Declaration, Baker provides a few paragraphs describing how he went about conducting the search referenced in the preceding section. He includes the date January 4, 2023 as one of the dates in the heading of that section, but it is clear from the text of paragraph 5 of the declaration that he is not testifying that he actually did any of this on January 4, 2023. As a result, Baker has never explained what if anything he did on or about January 4, 2023. As with the October 20 date, the question remains, did Baker invent this date out of whole cloth or was there some reason that he recalled or selected this date at the time he prepared his May 2023 declaration? Baker never

tells us or makes any effort to describe why he arrived at this date when he prepared his May 2023 declaration, again leaving the Court with the distinct impression that he “plays fast and loose” with the facts that he puts in declarations and does not make any effort to verify the accuracy of information given to the Court, even when he swears to the accuracy of that information under penalty of perjury.

*18 d. In the July 2024 Baker Declaration [Docket No. 1104] on page 18 in approximately the middle of the page, he responds to the prompt, “(6) What steps did Baker take on January 4, 2023 as part of this ‘diligent search?’ ” as follows: “I vaguely recall going through the same process on or about January 2023.” He does not describe in this declaration what he means by “the same process.” The preceding paragraph says merely, “I vaguely recall that I searched for files and deleted them when I discovered them.” That is hardly a detailed explanation of the steps he took in performing this “diligent search” and does not contain any information as to what documents or information Baker looked at to determine that he conducted this diligent search on January 4, 2023 or how he remembered in May of 2023 that this “diligent search” had occurred on or about January 4, 2023.

3. Baker has failed to provide a full, complete and truthful explanation of all of the following, as required by the Third Interim Order: (1) how in preparing his December 28, 2023 declaration he missed the fact that one of his email accounts (jtdeshonq@hotmail.com) contained information that should have been deleted in response to the Injunction; (2) how and when he discovered that this information still existed; and (3) what this newly-discovered information was.

a. In his December 28, 2023 declaration [Docket No. 1065], Baker certified under penalty of perjury that the Outlook email account jtdeshonq@hotmail.com had not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of an moniker, such as ‘goon,’ ‘mo,’ ‘shakedowndoc,’ ‘baddoc,’ or ‘baddocjjm,’ etc.” (Docket No. 1065, p. 18 at lines 12-17.) However, shortly after filing that declaration, Baker’s counsel advised opposing counsel (and confirmed on the record at a January 9, 2024 hearing) that Baker had located emails from this account that pertained to Dr. Murtagh.

b. As a result, the Court found in the Third Interim Order that Baker’s certification that this email account did not contain any such information was false ([see Third Interim Order](#), p. 5 at pars. 7-8) and ordered Baker to explain in a fourth compliance declaration how this oversight occurred. Paragraph 9 of the Third Interim Order requires Baker to include the following in the fourth Baker compliance declaration:

- i. The complete factual basis for such testimony [his testimony that this email account does not include any communications concerning Dr. Murtagh];
- ii. A recitation of the steps that Baker took in connection with conducting a diligent search and preparing his responses to the Second Interim Order [his December 28, 2023 declaration], including without limitation with respect to [the email address jtdeshonq@hotmail.com]; and
- iii. Identification of the location and nature of documents and communications that Baker subsequently located at the above online property.

c. Baker’s Fourth Compliance Declaration [Docket No. 1098] fails to provide the requested information and instead provides an explanation that is demonstrably false.

d. In the Fourth Compliance Declaration, on page 4 at paragraphs 9 through 12, Baker provides the following testimony:

9. Declarant was doing a final sweep of his email accounts in preparation for submitting his Declaration in response to the Third Interim Order.

10. On the eve of the deadline Declarant searched the email address server hosting jtdeshonq@hotmail.com and was horrified to see emails regarding Kurtizky and Murtagh pop up (as his recollection at that moment was that on the previous check no such emails were there).

11. When I discovered the emails Declarant immediately notified his attorney via email. Apparently in the final rush just before the filing, she did not catch that final correction. See the accompanying Declaration of Jessica Ponce.

***19** 12. Defendant had, in the meantime, signed and submitted his Declaration in response to the Third Interim Order without adjusting his responses to reflect the change.

e. This testimony cannot be accurate. The Third Interim Order was not even entered until four months after the declaration containing the relevant omission was filed. Therefore, Baker could not have prepared his December 2023 declaration [Docket No. 1065] in compliance with an order [Docket No. 1087] that did not yet exist. Although it could certainly be that Baker was merely confused and that he was preparing this declaration in response to the Second Interim Order rather than the Third, this testimony once again underscores the fact that Baker apparently makes little if any effort to ensure that his declarations are accurate when they are signed and filed with the Court.

f. After this inaccuracy was called to his attention, Baker filed the July 2024 Baker Declaration [Docket No. 1104], which contains more false information (or information that reveals that his earlier declaration was false). In his December 2023 declaration, Baker testified that he found these offending emails “on the eve of the deadline” for filing his declaration and promptly notified his attorney and that she must have missed making this correction before filing the declaration. In the July 2024 Baker Declaration, Baker states that, “later, after submitting his declaration, he realized that the declaration needed correction.” So, apparently, he signed and “submitted” the declaration before conducting this alleged “final sweep”?

g. In any event, even if these inconsistencies can be harmonized, Baker has never explained what steps he took *before* submitting his December 2023 declaration to make sure that the representations and certifications contained in that declaration were accurate, as directed by the Third Interim Order. (He found these documents while doing his “final sweep.” Were there other, earlier sweeps? If so, what did those consist of? And, if not, why didn’t he make any effort to ensure that his certification was correct before signing the declaration?) And he does not provide a description of the location and nature of the offending emails. He says merely that this email address was copied on emails of Murtagh and his associates as they acted against him and claims that these emails

proved that the plaintiff pressured Kuritzky to change his testimony and lie.²⁶

4. Baker has failed to provide plaintiff's counsel with copies of written communications (or to send emails describing oral communications) evidencing that Baker has complied with the Injunction by taking down websites, online storage sites and other online properties that contain disparaging information concerning the plaintiff.

a. Paragraph 13 of the Injunction (entered February 17, 2022) requires Baker to copy plaintiff's counsel with any written communication by Baker (or any agent or representative of Baker, or anyone acting on Baker's behalf), with any Third-Party Provider concerning any part of the Injunction. That same paragraph requires Baker to inform plaintiff's counsel by email of the substance of any verbal communication that Baker (or any agent or representative of Baker, or anyone acting on Baker's behalf) has with any Third-Party Provider concerning any aspect of the Injunction within 12 hours of any such verbal communication.

***20** b. In several instances in his compliance declarations, Baker referred to communications that fell within the scope of paragraph 13 of the Injunction, yet, with the exception of four documents attached to his June 6, 2024 declaration²⁷ [Docket No. 1101], Baker has never supplied copies of any written communications concerning his compliance with the Injunction and has never sent plaintiff's counsel an email describing any oral communications concerning compliance. And Baker has never explained why he failed to produce copies of documents dating back to June and July of 2023 to plaintiff's counsel until June of 2024.

c. In the Third Interim Order, the Court specifically identified the following references from Baker's December 28, 2023 declaration that indicate or evidence the existence of a writing that should have been produced and ordered Baker to produce these writings:

- i. Proton email, 6 April 2022 between Baker and McNair [Docket No. 1065, p. 28, n. 3];
- ii. In an effort to comply with court requests, Baker exchanged emails with McNair in March 2022 [*Id.*, pp. 27:25-28:1];

iii. Shortly after my July/Aug 2023 depositions, I sent an email and made numerous calls to [Carol] Dunn in an effort to identify the company and individuals who removed my case files. [Id., p. 31:16-17]; and

iv. “Lloyd Interaction #1 -112909429” reported to me that “Michael” (No further info) had purchased the [omsj.org] website and posted the pages hours after I closed my account. [Id., p. 33:11-13].

d. The Third Interim Order also directed Baker to include in the Fourth Baker Compliance Declaration a “complete explanation as to why Baker failed to copy Dr. Murtagh's counsel, or provide contemporaneous copies, on all such communications.” (Third Interim Order at par. 17.)

e. Baker's May 15, 2024 declaration fails to comply with these requirements. Instead, in this declaration, Baker offers testimony which, if true, means that his prior testimony concerning the existence of these documents was false. In his May 15, 2024 declaration, Baker represents that he cannot produce any of the requested documents because “no such documents have ever existed.” [Docket No. 1098, at par. 19.] Baker provides no explanation as to why he previously testified that there were April and March 2022 emails with McNair if these emails never existed.

f. With regard to the email that his December 28, 2023 declaration states he sent to Carol Dunn, he offered the following testimony in his May 15, 2024 declaration [Docket No. 1098, p. 6 at par. 20]: “Declarant spoke with Carol Dunn on the telephone about shredding documents approximately one year ago. Declarant asked if there were receipts or documentation of the shredding and she said no.” He neither mentions his prior testimony in which he stated that he sent her an email nor offers any explanation as to how or why his prior testimony was in error, if he now contends that this is the case.

g. In the July 2024 Baker Declaration [Docket No. 1104] on page 7, Baker provides more detail about his conversations with Carol Dunn, but now refers only to an email that Carol Dunn sent to him. Absent from this declaration is any reference to the email that he sent to her (once again without an explanation or discussion of the inconsistency). These inconsistencies further exacerbate the Court's concern that Baker does not take seriously his obligation to provide truthful

testimony to the Court each and every time he submits a declaration under penalty of perjury.

h. In the July 2024 Baker Declaration [Docket No. 1104], Baker makes reference to (A) communications with McNair [p. 4 at line 7], (B) the results of a WhoIs search that Baker conducted on July 11, 2024 [pp. 4, 5, 6 & 9]; and (C) two documents that detail the nature of certain cases in which Baker was involved [p. 11 at line 4] and represents that these documents are attached to the declaration. They are not; there were no exhibits filed with the July 2024 Baker Declaration.

*21 i. The whole purpose of the injunctive relief included in the Court's February 2022 judgment was to prevent Baker from resuming his internet defamation campaign against the plaintiff, which the Court found had resulted in actual compensatory damages to the plaintiff of more than \$10,000,000. Toward this end, paragraph 6 of the Injunction requires Baker to “Take all necessary steps to purge and eliminate from the internet any and all traces of any websites ..., webpages, files, court filings, exhibits or other attachment thereto ... which is about, refers to, references or mentions Dr. James Murtagh, M.D. in any form, variation or misspelling” Baker was ordered by this same paragraph to complete all of these steps within 10 days after issuance of the Injunction. The provisions of paragraph 13 of the Injunction required Baker to copy plaintiff's counsel on communications with Third-Party Providers so that plaintiff's counsel could verify that Baker had in fact complied with the Injunction.

j. With the exception of the four documents identified in footnote 27 above, Baker has never provided plaintiff or this Court with any documents evidencing his efforts to remove defamatory material from the internet.

III

RECOMMENDATION

The gist of Baker's compliance declarations has always been, “I deleted all of the material that I was supposed to a long time ago. Just take my word for it.” The Court respectfully submits that, in light of Baker's track record for submitting declarations that contain false information, the Court cannot possibly accept Baker's unsupported assurances as evidence

that he has in fact complied with the Injunction. The Injunction required Baker to supply corroborating evidence that he has removed the offending material from the internet. The only corroborating evidence Baker has ever produced are the four documents attached to his June 6, 2024 declaration evidencing an attempt to cause BlueHost to take down a single website. This is insufficient.

The Injunction was entered more than two years ago and, only through the diligent efforts of plaintiff's counsel has any compliance with the Injunction been obtained.²⁸ Baker took no steps to comply with the Injunction until plaintiff moved for the entry of an order why he should not be held in contempt for failing to comply with the Injunction. And, at every step in the process, Baker has made at best only half-hearted attempts to supply the information and documentation that the Court has requested, with apparently little if any regard for the accuracy of whatever testimony he provides in his compliance declarations. As a result, Baker has caused the plaintiff and this Court to expend inordinate amounts of time and effort in a largely fruitless effort that, in this Court's view, has been tantamount to "trying to nail Jello to the wall." This process needs to come to an end. As Baker claims to be judgment proof and has failed to pay hundreds of thousands of dollars in compensatory sanctions that the Court has already imposed, and this Court's prior efforts to induce Baker's compliance with its orders through the use of its civil contempt powers have not led to a notable improvement in Baker's behavior, the Court believes that the time has come for it to request that the District Court employ its criminal contempt powers in this Action (again). There needs to be a consequence for failing to comply with court orders and "playing fast and loose" with the truth in submitting declarations under penalty of perjury to a court of law.

***22** Baker has done his best to make it impossible for plaintiff to determine what has become of the defamatory materials that Baker previously posted about him on the internet. As a result, plaintiff has no assurance that, at some point in the future, Baker will not re-post these materials on the internet or recruit a confederate to post these materials for him. Baker needs to be taught that he is not above the law and that he does indeed have an obligation to comply in good faith with orders of this Court. This Court is hopeful that a somewhat lengthier incarceration for Baker will finally accomplish this objective.

In accordance with 28 U.S.C. § 157(a), the District Court has issued a standing order generally referring all cases

under title 11 and all proceedings arising under, arising in or related to cases under title 11 to the bankruptcy judges for the Central District of California. The District Court is authorized by 28 U.S.C. § 157(d) to withdraw, in whole or in part, the reference as to any case or controversy "for cause shown." This Court respectfully submits that the foregoing facts, coupled with this Court's lack of authority to hear and determine criminal contempt matters, constitute sufficient cause within the meaning of this section for the District Court to withdraw the reference to the extent set forth below. Accordingly, this Court recommends that:

1. the District Court *sua sponte* withdraw, in part, the reference pursuant to 28 U.S.C. § 157(d) for the limited purpose of considering criminal contempt proceedings against defendant Clark Warren Baker; and
2. the District Court find Clark Warren Baker guilty of criminal contempt and sentence him to be incarcerated for a period of one year or such other period as the District Court may deem appropriate.

Exhibit 1

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: CLARK WARREN BAKER, Debtor(s).

JAMES MURTAGH, M.D., Plaintiff(s),

v.

CLARK WARREN BAKER, Defendant(s).

CHAPTER 7

Case No.: 2:15-bk-20351-BB

Adv No: 2:15

Date: June 11, 2019, Time: 10:00 AM, Courtroom: 1539

Filed & Entered June 27, 2019

REPORT AND RECOMMENDATION TO DISTRICT COURT FOR WITHDRAWAL OF REFERENCE AS TO DETERMINATION OF CRIMINAL CONTEMPT

Because criminal contempt matters under 18 U.S.C. § 401 (3) and Rule 42 of the Federal Rules of Criminal Procedure must be tried by the District Court, rather than the Bankruptcy Court, see In re Dyer, 322 F.3d 1178 (9th Cir. 2003), and because this Court believes that the facts of this case warrant consideration of prosecution for criminal contempt, the Court hereby recommends that the District Court *sua sponte* withdraw the reference with respect to all criminal and civil contempt matters in this bankruptcy case pursuant to 28 U.S.C. § 157(d) for the limited purpose of considering criminal contempt proceedings against defendant Clark Warren Baker (“Baker”).

I

PROCEDURAL HISTORY

A. Litigation in State Court

On November 15, 2013, James Murtagh, M.D. (“Murtagh”) filed a lawsuit against Baker in Los Angeles Superior Court, commencing case no. BC 527716 (the “State Court Action”). In the third amended version of his complaint in the State Court Action, filed February 18, 2015, Murtagh alleged, among other things, that Baker had committed intentional infliction of emotional distress, defamation, intentional interference with contractual relations and intentional interference with prospective economic advantage. In his prayer for relief, Murtagh requested compensatory damages, estimated at not less than \$ 5 million, exemplary or punitive damages and injunctive and declaratory relief.

On May 12, 2015, the Los Angeles Superior Court, in the State Court Action, ordered Baker to pay \$60,000 in sanctions to reimburse Murtagh for attorneys’ fees and costs attributable to a frivolous motion that Baker had filed in the State Court Action. Baker never paid these sanctions and instead filed a chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Central District of California on June 29, 2015, commencing bankruptcy case no. 2:15-bk-20351 (the “Case”). The State Court Action has remained stayed since that date.

B. Litigation in Bankruptcy Court

*23 On October 5, 2015, Murtagh commenced the above-entitled adversary proceeding against Baker in the Case (the “Action”). Murtagh’s Second Amended Complaint, filed December 29, 2015, seeks to have Murtagh’s claims against Baker excepted from any discharge that Baker might receive in the Case under Bankruptcy Code section 523(a)(6).¹ According to the Second Amended Complaint [Docket No. 16²], attached as Exhibit 1 hereto, the original conflict between Murtagh and Baker arose from their opposing views regarding the treatment of patients infected with HIV.

- a. Baker is an “AIDS denier” who: (i) disputes widely accepted medical and scientific evidence that HIV causes AIDS; (ii) through OMSJ³, brokered experts in litigation to discredit test results which resulted in HIV-positive findings; and (iii) encourages HIV-positive individuals to stop taking medically prescribed pharmaceutical treatment based on advocacy that AIDS is just a hoax orchestrated by “Big Pharma” (which advocacy has resulted in many unnecessary or more accelerated deaths).
- b. Dr. Murtagh is an experienced licensed physician with three board certifications (Internal Medicine, Pulmonary Disease and Sleep Medicine), and is a former professor at Emory University’s Medical School. Dr. Murtagh disputes Baker’s baseless theories about HIV testing and AIDS; (ii) supports medical treatment for HIV and AIDS patients; and (iii) believes that medication for the prevention, postponement and/or treatment of AIDS has been proven to be effective.

Second Amended Complaint, p. 2 at lines 5-18.

Murtagh’s Second Amended Complaint offers the following description of Baker’s willful and malicious conduct toward him:

- 7. In an effort to gain prominence in the AIDS-denialist community and obtain personal financial gain (including an admitted payment to OMSJ of at least \$1.2 million from one AIDS denialist), Baker orchestrated a scorched earth campaign against Dr. Murtagh in which Baker sought to: (a) discredit Dr. Murtagh; (b) destroy Dr. Murtagh’s professional and personal reputation, and (c) render Dr. Murtagh unemployable and demoralized (as reflected in Bakers emails taunting Dr. Murtagh to commit suicide).

8. Baker's relentless campaign against Dr. Murtagh began in 2008, continued through filing of the Baker Bankruptcy Case on June 29, 2015 and even continues post-bankruptcy. As part of Baker's effort to ruin Dr. Murtagh financially and personally, Baker fabricated and disseminated outright lies and innuendo about Dr. Murtagh such as: (a) by publishing them on websites owned and/or created by Baker about Dr. Murtagh; and (b) by communicating those lies and innuendo directly to Dr. Murtagh's employers and recruiters, both verbally and in writing.

*24 9. In addition to manufacturing false and disparaging material about Dr Murtagh, Baker improperly obtained Dr. Murtagh's private information, tracked Dr. Murtagh's location and employment and used that private information to contact Dr. Murtagh's current and prospective employers and recruiters, Baker shared the false damaging material with others to advance Baker's plan to get Dr. Murtagh terminated from his then current employment and/or to be disqualified from future employment.

11. Sometime in 2012, Baker created, owned and maintained a website named www.jamesmurtaghmd.com, which Baker so named in an effort to deceive readers into believing that Dr. Murtagh had authorized the website. Baker used the website to: (i) post inaccurate and disparaging information about Dr. Murtagh; and (ii) improperly direct traffic to Baker's commercial site (omsj.com), by among other things, advertising a "confidential consultation with Baker Dr. Murtagh was forced to bring a formal proceeding before the World Internet Property Organization ("WIPO") -- *Murtagh. v. Baker et al.*, WIPO Case No D2014-071 -- to protect Dr. Murtagh's professional and personal reputation. Baker defended his claim to the website but Dr. Murtagh prevailed in that on or about June 26, 2014, WIPO issued a decision finding that Baker acted in bad faith, with a specific intent to confuse and deceive the public, and the WIPO ordered Baker to transfer the disputed domain name to Dr. Murtagh.

12. After losing the right to use the domain name www.jamesmurtaghmd.com, Baker simply moved the content from www.jamesmurtaghmd.com to new sites which Baker created and maintained, including www.jamesmurtaghmdtruth.com and www.jamesmurtaghmdpsycho.com, for the express

purpose of publishing the same and additional false and disparaging information about Dr. Murtagh. Baker used the pejorative term "psycho" in the website name to: (i) falsely suggest that Dr. Murtagh has a mental, personality and/or character defect which would render him unfit to work with patients; and (ii) with the intent to inflict reputational and economic harm upon Dr. Murtagh.

13. In addition to using confusingly named websites, Baker published false disparaging information about Dr. Murtagh in other online venues, including www.omsj.org, www.cwbpi.com and www.propagandists.org.

18. In addition to disseminating and publishing defamatory content about Dr. Murtagh in writing, and in an effort to cause harm to Dr. Murtagh, Baker regularly communicated, both verbally and in writing, with: (i) numerous recruiters with whom Dr. Murtagh has developed business relationships; and (ii) various hospitals at which Dr. Murtagh was then working and from which Dr. Murtagh was regularly asked to leave promptly after contact with Baker and/or the websites, usually without explanation and despite otherwise positive reviews.

19. On June 28, 2014, Baker sent an anonymous email from drm@nym.hush.com to many medical recruiters, including GMedical, one of Mr. Murtagh's recruitment agencies. The email, which included a link to www.jamesmurtaghmd.com, the website which was then controlled by Baker and contained false information about Dr. Murtagh. By sending the email, Baker intended to convince the recruiting agencies to cancel, not honor and/or not renew Dr. Murtagh's contract with the agency. The email stated:

first name: James [¶] last name: Murtagh [¶] email: drm@nym.hush.com [¶] country: United States [¶] specialty: [¶] question: FYI -- James John Murtagh MD is a Georgia physician who shakes down hospitals and clinics throughout the United States. Shortly after he finds an employer, he causes a problem and sues hoping to get a. \$10,000 - \$200K settlement. He records all telephone conversations and uses them to sue recruiting companies and recruiters. He may try to find jobs through your agency. For more information about his behavior and court cases, visit www.jamesmurtaghmd.com.

*25 20. Baker hacked into www.internationalwhistleblower.org, a website owned by Dr. Murtagh. Dr. Murtagh took down the website after he discovered Baker's hack which involved Baker's insertion of an unauthorized and defamatory page on the site. The unauthorized page included a reference to Dr. Murtagh's alleged involvement in gay porn and a link to www.jamesmurtaghmd.com, the website created and controlled by Baker at the time. Baker's unauthorized post was intended to cause professional and personal harm to Dr. Murtagh.

22. On November 1.6. 2012, Baker emailed Dr. Murtagh: "Every message I receive from you reminds me that I have a life and you don't. I have more time now that hospital recruiters no longer call me as much as they did Now that your medical career is finally over, will you work at McDonalds or hang yourself in a closet?"

23. On November 19, 2012, Baker emailed Dr. Murtagh: "Dear Mo: I've received a lot of email and phone calls lately - from former lawyers, healthcare recruiters, hospitals... it looks like your behavior is finally catching up with you. With no job, no family, no children, no prospects and no future, I pray that someone won't find you hanging from a belt in a motel closet this Christmas. I want you alive so that I can depose you on videotape. You're the most fascinating sociopath I've ever met. ¶ You can probably find work somewhere that doesn't require you to interact with other people, delivering papers or maybe as a long haul truck drive. ¶ In 2008, I warned you and your associates that the storm would come. That storm has come."

25. On November 24, 2014, Baker emailed Dr. Murtagh: "Dear Mo ... I see that your medical recruiters, clinics and hospitals regularly visit your website. They spend a few minutes there, click on links that describe your mental problems, and leave. The clock is ticking, your career is circling the drain, and the holiday season will be a very dark and empty place for you and yours – oh wait – you don't have anyone do you. I forgot. <http://www.jamesmurtaghmdtruth.com/>. Happy Thanksgiving, to the biggest turkey I know. Clark Baker (LAPD ret)"

Second Amended Complaint, pp. 2-8.

After extended litigation about the form of the pleadings and the viability of Baker's cross-complaint (which the Court dismissed), as well as a failed mediation, plaintiff began to encounter problems in conducting discovery. These problems have led this Court (i) to make two criminal referrals to the United States Attorney concerning Baker's conduct in the Action; (ii) to make numerous findings about Baker's failure to comply with orders of this Court; (iii) to strike Baker's answer to complaint and authorize plaintiff to proceed by way of default; and (iv) to hold Baker in civil contempt and have him arrested in an effort to obtain compliance with its orders. To date, none of these efforts has had the effect of deterring Baker from engaging in misconduct in the Action.

When a party cannot be cajoled or coerced into complying with court orders, civil contempt is not an effective tool. Such a party should be held in criminal contempt and punished for his wrongdoing. The Bankruptcy Court lacks the authority to take this action and therefore recommends that the District Court withdraw the reference to the extent necessary to permit it to do so.

1. The First Criminal Referral

Plaintiff's efforts to obtain testimony from a witness known as David Bender or Kevin Kuritzky ("Bender") led the Court to make its first criminal referral concerning the conduct of defendant Baker in the Action. In or about October of 2014, Bender, who resides in Baltimore, Maryland, had provided Baker with a declaration that he had used in connection with a motion Baker had filed in the State Court Action (the "2014 Declaration"). According to a declaration filed by Lisa Hiraide⁴, one of the attorneys for Murtagh in the Action, when she contacted Bender by telephone in September of 2015 to ask him about the contents of the 2014 Declaration, Bender advised her that nothing contained in the 2014 Declaration had been true and that he had only provided testimony that was damaging to Murtagh because he had been "totally pressured and "extorted" by Baker into signing the declaration in exchange for Baker's agreement to remove all embarrassing and damaging materials that Baker had posted about Bender on the internet.

*26 Baker conducted a deposition of Bender in the Action in Los Angeles on or about June 6, 2016, but Bender had insisted on leaving the deposition (at approximately 1:55 p.m. that day) before he could be cross-examined by counsel for Murtagh. [See Declaration of John Wallace, Exhibit 3, to

plaintiff's September 20, 2016 motion for a protective order [Docket No. 152].] Through discovery, Murtagh located a copy of an email exchange between Bender and counsel for Baker in which Bender advised Baker's counsel that he would only be willing to come to Los Angeles to be deposed by Baker if he could leave immediately after Baker's questions and not be cross-examined by counsel for Murtagh. *Id.* at ¶ 4.

Based on this information, Murtagh filed a motion [Docket No. 154] to have Baker's answer to the Second Amended Complaint stricken or, at a minimum, to have Bender's testimony excluded at trial. The Court reached Bender by telephone on the record during the course of the November 15, 2016 hearing on this motion and obtained Mr. Bender's consent to come to Los Angeles for a continued examination on December 12, 2016. Based on this conversation with Bender and his agreement to appear, the Court entered its November 18, 2016 Interim Order [Docket No. 187] attached hereto as Exhibit 2, which orders Bender to appear in the offices of plaintiff's counsel on December 12, 2016 at 10:00 a.m. and schedules a continued hearing on plaintiff's motion for January 10, 2017.

On December 7, 2016, Bender sent a fax to chambers [Docket No. 189, attached as Exhibit 3 hereto], advising that he would not be appearing for his December 12, 2016 deposition because he had received inadequate notice of the need to travel across the country. Attached to this fax were copies of emails he had exchanged with counsel for the parties complaining about not having received adequate notice of the need to appear in Los Angeles for this deposition. At approximately the same time, however, Bender telephoned Judge Bluebond's law clerk, Jennifer Wolfberg, and advised her that the real reason he would not be appearing for his December 12 deposition was that he was afraid of Baker and what Baker had threatened to do if he gave truthful testimony at the continued deposition. He therefore did not appear at his continued deposition on December 12, 2016.

The Court related the substance of Ms. Wolfberg's December 7, 2016 conversation with Bender to the parties at the continued hearing held January 10, 2017, and found that, in light of Bender's refusal to submit to an examination by Murtagh and the conflicting stories he had already provided, neither party would be permitted to introduce any testimony from him at trial. See Docket No. 224, Exhibit 4 hereto (the "Second Bender Order"), entered March 15, 2017. The Court also stated in the Second Bender Order that it would "make a referral to the appropriate law enforcement authorities

to investigate whether criminal conduct has occurred with regard to the witness" and set a briefing schedule and a continued hearing for March 14, 2017 on whether monetary sanctions should be imposed on Baker and his counsel based on this conduct. A copy of the referral referenced in the Second Bender Order, docket No. 200, is attached hereto as Exhibit 5.

At the continued hearing held March 14, 2017, the Court imposed monetary sanctions on Baker in the amount of \$35,000 to compensate Murtagh for his reasonable attorneys' fees and expenses in connection with the preparation and prosecution of the motion that led to the exclusion of Bender's testimony. See Final Bender Order, Docket No. 229, attached as Exhibit 6 hereto. Counsel for Baker filed a notice of compliance on April 26, 2017 [Docket No. 248] in which he reports that these sanctions were paid on April 20, 2017,⁵ but this "witness tampering" incident was merely the first of the problems that the Court encountered as a result of Baker's misconduct in connection with the discovery process.

2. Attempts to Obtain Equal Access to Electronic Data

*²⁷ As Baker had denied being responsible for certain of the defamatory and harassing material directed at Murtagh, both parties retained computer experts to assist them in the Action. Plaintiff employed an expert named Bruce Anderson, and defendant employed an expert named James Pickrell. Mr. Pickrell filed an expert witness report with the Court on May 15, 2017 as docket no. 252 and a supplemental expert report on June 19, 2017 as docket no. 268. (The Court subsequently found that there was no reason for Baker to have filed these reports at that time and made these filings "private events.")

On August 23, 2017, plaintiff moved for a protective order [Docket No. 274], asking that his expert be given the same access that Baker's expert had been given in connection with the preparation of his expert reports to two websites, www.Baddocjjm.com and www.jamesmurtaghmdtruth.com, and to Baker's private Hushmail email account(s). Baker's expert had been given the password or password recovery link necessary to give him access to these websites and any password-protected files, including rights available only to administrators of the sites. However, when Murtagh's expert asked for the same access, Baruch Cohen, then counsel for Baker, refused and offered instead to meet with plaintiff's expert in Cohen's office and to permit Anderson to review materials on Baker's laptop under the supervision and in the

presence of Baker's counsel. A copy of Murtagh's August 23, 2017 motion for protective order (the "August Motion"), docket no. 274, is attached hereto as Exhibit 8.

The Court granted the August Motion by order entered October 5, 2017 (the "October 2017 Order"), docket no. 291, a copy of which is attached hereto as Exhibit 9. In the October 2017 Order, the Court directed Baker within 3 business days after entry of the order to "provide Bruce Anderson ('Anderson') ... the same level of access to the same websites, passwords, domains, email accounts, etc. that Baker provided to his own expert witness James Pickrell ('Pickrell') in the same manner that Baker provided such access to Pickrell."

To protect Baker, the October 2017 Order prohibited Anderson from sharing any information obtained pursuant to the October 2017 Order with Murtagh or anyone acting on Murtagh's behalf and directed him to use this information solely for purposes related to his investigation and analysis in this adversary proceeding and/or for the formation of expert opinions in the Action. The October 2017 Order also expressly stated that Anderson could not be required to conduct his investigation in the presence or under the supervision of Baker or his counsel. As the Court's later findings reflect, Baker never complied with this order.

3. Attempts to Obtain Unredacted Copies (or a Privilege Log) and Documents in Native Electronic Format

On September 1, 2017, Murtagh filed another discovery motion (the "September 2017 Motion"), docket no. 281, Exhibit 10 hereto, complaining, among other things, that Baker had repeatedly produced redacted versions of documents without providing a privilege log, had concealed and withheld documents such as emails between himself and witnesses Pardo, Brown and Bender, and had produced altered paper copies of emails by cutting and pasting so as to remove actual contents of the documents, making redactions difficult to detect. As a result, Murtagh requested, among other relief, that (i) Baker be ordered to produce "in native, exact electronic form," and not as .pdfs or other *images* of documents that can be altered, all emails that he previously produced or submitted as exhibits, including any that had been previously redacted; (ii) Baker be ordered to provide a privilege log describing any documents that he may withhold on privilege grounds; and (iii) Murtagh be awarded monetary

sanctions for the attorneys' fees and costs that he had incurred in bringing and prosecuting the September 2017 Motion.⁶

***28** Following a hearing held October 31, 2017 on the September 2017 Motion, the Court granted the forms of relief requested above, among other forms of relief, and imposed monetary sanctions on Baker in the amount of \$5,675, payable to plaintiff within 45 days after entry of the Court's order on that Motion. SeeOrder on September 2017 Motion, Docket No. 313, attached hereto as Exhibit 11. These additional sanctions were never paid,⁷ and, according to Murtagh, the required privilege log was never provided.⁸

4. The April and June 2018 Orders

On February 27, 2018, Murtagh filed a motion seeking to have Baker held in contempt and to have certain findings made and certain sanctions imposed based on Baker's violations of the terms of this Court's October 2017 Order. According to that motion, Baker violated the terms of the October 2017 Order by failing to give plaintiff's expert, Bruce Anderson, the required level of access to Baker's Hushmail email accounts and to the websites www.Baddocjjm.com and www.jamesmurtaghmdtruth.com (jointly, the "Two Websites").

The order entered in response to that motion (the "April 2018 Order") [Docket No. 339], attached as Exhibit 12 hereto, identifies the respects in which Baker failed to comply with the October 2017 Order and sets a hearing and a briefing schedule on an order to show cause why Baker should not be held in contempt and the sanctions requested by plaintiff should not be imposed. The Court conducted a hearing on the April 2018 Order on May 8, 2019 at 2:00 p.m.

At the May 8 hearing, the Court expressed concern that it might be inappropriate for the Court to hold Baker in contempt and impose some or all of the sanctions requested by Murtagh's February 27, 2018 motion because the April 2018 Order did not itself contain sufficient detail to apprise Baker of the possible sanctions to be imposed.⁹ The Court therefore scheduled a further hearing on Murtagh's requests for relief for August 16, 2018 at 10:00 a.m., set a briefing schedule for that hearing and issued a more detailed order to show cause -- the "June 2018 Order," docket no. 361, a copy of which is attached hereto as Exhibit 13 hereto.

In the June 2018 Order, the Court, among other things:

- a. Directed Baker to show cause why the Court should not make a series of findings (collectively, the “First Findings”) including the following:
 - i. That Baker had reduced the amount of the data stored in his Hushmail email account from 155 MB of data to 9 MB of data (the “Data Reduction”) after the Court issued the October 2017 Order, which required Baker to provide plaintiff’s expert with the same access to data that Baker had given to his own expert;
 - ii. That the Data Reduction was purposeful and intentional and not the result of Baker’s simply removing a few spam emails;
 - iii. That Baker had deleted “subaccounts” from his Hushmail email account after the Court issued the October 2017 Order;
 - iv. That, after having been ordered in the April 2018 Order to provide Anderson with all Hushmail emails that had been in his Hushmail email accounts at any time during the 10 years prior to the entry of the April 2018 Order, Baker failed to restore the data and subaccounts necessary to comply with the April 2018 Order;
 - *29 v. That, after providing access information to Anderson concerning certain websites referenced in the October 2017 Order, Baker changed the username and/or password for these websites to prevent Anderson from actually obtaining the access that Baker had been ordered to provide; and
 - vi. That, notwithstanding Baker’s having repeatedly denied that he had anything to do with the website www.Baddocjj.com, (A) Baker’s cooperation and assistance were essential to setting up that website and (B) Baker maintains an ongoing connection to that website; and
- b. Ordered Baker to show cause why, based on the above proposed findings, the Court should not, among other things:
 - i. Hold Baker in civil contempt and impose additional monetary sanctions to reimburse plaintiff for attorneys’ fees incurred in attempting to obtain compliance with orders of the Court;
 - ii. Refer Baker to the United States Attorney for criminal prosecution for the Data Reduction;
 - iii. Issue a report and recommendation to the District Court that Baker be held in criminal contempt and incarcerated for a period of not less than 90 days as punishment for his failure to comply with court orders;
 - iv. Enter an order appointing a neutral expert pursuant to Fed. R. Evid. 706 (the “Neutral Expert”) to preserve evidence and undertake related activities and directing Baker and his counsel to cooperate with the Neutral Expert by, among other things, sending a specified form of letter to a list of vendors and witnesses directing them to take certain actions;
 - v. Impose additional monetary sanctions; and/or
 - vi. Prohibit Baker from raising, contesting or offering evidence or argument to dispute a list of issues in the Action set forth in paragraph 12 of the June 2018 Order (collectively, the “Resolved Issues”);
- c. Ordered Baker to preserve and refrain from altering, destroying, overwriting, moving, password-protecting or modifying any of Baker’s Data¹⁰ or any device containing Baker’s Data; performing any activity that might accidentally and/or intentionally spoliate any of Baker’s Data; or changing any access information (including user names, passwords, etc.) or encryption without a prior written Order or prior written stipulation agreed to and signed by Plaintiff’s counsel;
- d. Required Baker by July 27, 2018 to restore all Baker’s Data that had been spoliated since October 5, 2017, including emails deleted from his Hushmail email accounts and any contents removed from the Two Websites, and to produce to plaintiff all data removed as part of the Data Reduction;
- e. Required Baker by July 27, 2018 to send a prescribed form of notice (the “Preservation Notice”) to a list of vendors and witnesses identified in attachments to the June 2018 order and each administrator, author, contributor, developer, manager and/or owner known to Baker of the Two Websites and the website shakedowndoc.com; and

- f. Required Baker to file by August 3, 2018 a compliance declaration containing the information outlined in Attachment B to the June 2018 Order (the “Compliance Declaration”).

The Court conducted a hearing on the June 2018 Order on August 16, 2018 at 10:00 a.m. The Court's August 16, 2018 order, docket no. 369, attached hereto as Exhibit 14 (the “August 2018 Order”), memorializes the Court's findings at that hearing, which included the fact that Baker had failed to:

***30** a. file a written response to the June 2018 Order and had therefore waived any opposition to the relief requested;

- b. file the required Compliance Declaration;¹¹
- c. send the required Preservation Notice to third parties;¹² and
- d. provide any information concerning steps that he had taken in an effort to restore deleted data.

In light of the foregoing, in its August 2018 Order, the Court (a) made the First Findings; (b) prohibited Baker from challenging the Resolved Issues; (c) set a hearing for September 27, 2018 at 10:00 a.m. and a briefing schedule for it to determine the amount of the monetary sanctions to impose upon Baker; (d) stated that it would enter a separate ordering appointing a Neutral Expert; and (e) set a continued hearing for September 27, 2018 at 10:00 a.m. to consider the following issues (collectively, the “Continued Matters”)¹³:

- i. Whether the Court should hold Baker in civil contempt and issue additional orders intended to compel compliance with its orders;
- ii. Whether the Court should refer Baker to the United States Attorney for criminal prosecution for the Data Reduction; and/or
- iii. Whether the Court should issue a report and recommendation to the District Court that Baker be held in criminal contempt and incarcerated for a period of not less than 90 days as punishment for his failure to comply with court orders.

Following the September 27, 2018 hearing, the Court entered its September 28, 2018 order [Docket No. 393], a copy of which is attached hereto as Exhibit 15. That order imposed monetary sanctions on Baker in the amount of \$133,319.71

due and payable within 30 days after entry of that order and set a continued status conference/holding date on the Continued Matters for December 11, 2018 at 2:00 p.m. (That hearing was later continued by stipulation between the parties to January 8, 2019 at 2:00 p.m.)

5. The Neutral Expert's Reports

On September 6, 2018, the Court entered its Order Appointing Neutral Expert [Docket No. 380], a copy of which is attached as Exhibit 16 hereto (the “Neutral Expert Order”). The Neutral Expert Order outlines the duties of the Neutral Expert and requires, among other things, that Baker:

- a. deliver all of Baker's Devices¹⁴ to the Neutral Expert;
- b. provide the Neutral Expert with the information necessary to access the data on Baker's Devices¹⁵; and
- ***31** c. reimburse plaintiff for all amounts that he pays as fees and expenses of the Neutral Expert within 5 days after proof of payment is sent to Baker's counsel.¹⁶

Neil Broom of Technical Resource Center, Inc. accepted the appointment as Neutral Expert by filing the required Notice of Acceptance by Neutral Expert with the Court on September 10, 2018 [Docket No. 383] and filed status reports with the Court on December 4, 2018 [Docket No. 395] (the “First NE Report”), attached as Exhibit 17 hereto, and January 8, 2019 [Docket No. 403] (the “Second NE Report”), attached as Exhibit 18 hereto.

In the First NE Report, Broom explains that he contacted Baker's then counsel, Baruch Cohen, on September 7, 2018 to make arrangements for Baker to deliver the Baker Devices to the Neutral Expert.¹⁷ Broom reports that he went to Baker's home at 9:00 p.m. on September 18, 2018 and collected 8 different devices from Baker for forensic processing in his lab.¹⁸ Broom's initial analysis of the data that he imaged revealed large numbers of deleted files and “data carved” files,¹⁹ but that, as of the date of the First NE Report, Broom was not in a position to determine whether any of the deleted or data carved files were relevant to the subject matter of the Action.

In the Second NE Report, Broom makes several observations that are worthy of note:

- a. On September 7, 2018, less than 2 hours after Broom contacted Baker's counsel to discuss a turnover of Baker's Devices, Baker ran an encryption application (True Crypt) on one of the devices²⁰ later turned over to Broom (Device AA3²¹), accessing directories that included ones named Pardo (who has previously been identified as a witness in the Action) and "Murtagh hush."
- *32 b. The following day, on September 8, 2018, Baker again ran the encryption application on Device AA3: he connected to an encrypted volume labelled "O" and accessed several files (including one entitled, "Message Source"); and connected to a volume labelled "E:" from which he accessed directories named "Discovery," "goons," "batcave," "Pardo," and "Brown"²² Pardo etc. email." Broom was unable to locate the directories "batcave" and "Brown Pardo etc email" on any of the devices that Baker turned over to him. As Broom explains on page 31 of the Second NE Report, "This is concerning because the directory 'batcave' contains security and encryption files, while the directory 'Brown Pardo etc email' contains Pardo and 'Murtagh hush' files."
- c. Three days later, on September 11, 2018, Baker connected a backup drive (Device AC) to Device AA3 and copied files (including 335GB of video files) from Device AA3 to Device AC. According to the Neutral Expert, "Any data that had been previously stored on Device AC (and then deleted), would have been permanently destroyed by copying the huge video files onto Device AC, by overwriting the old data with the new video files."
- d. Later that same day, September 11, 2018, Baker reformatted Device AC. According to the Neutral Expert, "Reformatting a hard drive prepares the drive to hold new data by creating a new file system on the drive. This process destroys the previous data that was on the drive. Again, shortly after copying 335 GB of video files onto Device AC (destroying the data previously there), Baker then destroyed the new video files by reformatting the hard drive."
- e. Lastly on September 11, 2018, Baker copied backup files from Device AH onto Device AC. The Neutral Expert reports that, "This activity is consistent with someone attempting to generate worthless data to thwart a forensic examination"
- f. Baker deleted large numbers of files after the entry of orders from this Court prohibiting such activity and requiring the turnover of that data to the Neutral Expert, many of which files appear relevant to the subject matter of the Action. A list of these deleted files and the corresponding deletion dates appears on pages 3 through 9 of the Second NE Report.
- g. Baker has not provided the password and instructions to access the encrypted file "Birthday 2.wmv," located on three of Baker's devices, despite Broom's request for this information.²³ See Second NE Report, p. 30, for a recitation of the discussions between Broom and Baker on this subject.
- h. "Baker was running the TrueCrypt application as late as the day he turned his devices over to the Neutral Expert, yet he now states that he cannot remember the password." Second NE Report, p. 30.
- i. Baker has not provided the Neutral Expert with multiple USB devices that have been used on Baker's Devices.
- j. Baker installed another encryption program named "Axcrypt" on Device AA3 ON May 5, 2018. Baker ran Axcrypt on Device AA3 on September 12, September 13, September 14, September 15 and September 17, 2018, for a total of 30 runs. Baker ran Axcrypt on Device AH on September 17, 2018. Baker did not provide a list of the files that he encrypted with this program and has not provided the Neutral Expert with the password necessary to unlock these files.
- k. Baker used a portable and secure operating system on a USB drive named "Qubes." The USB drive was used on Devices AH, AB and AG. Baker did not give Broom any device that had the Qubes operating system on it.

6. The February 19, 2019 OSC

*33 Based on Baker's failure to comply with earlier orders of the Court and the troubling findings made by the Neutral Expert in the Second NE Report, following the January 8, 2019 hearing, the Court issued its February 19, 2019 "Order to Show Cause re Contempt" [Docket no. 413], attached hereto as Exhibit 19 (the "February 2019 OSC"). Paragraph 10 of that order, which appears on pages 10 through 11 thereof, details the findings the Court had previously made as to

Baker's violations of this Court's orders.²⁴ Paragraph 1 of the February 2019 OSC directs Baker to appear on April 2, 2019 at 10:00 a.m.²⁵ to show cause why the Court should not do the following based on Baker's noncompliance with Court orders (collectively, the "Additional Steps"):

- a. hold Baker in civil contempt for having failed to comply with prior orders of the Court; issue a warrant for his arrest; and direct that Baker be incarcerated until he performs the Affirmative Acts set forth in paragraph 8 of the February 2019 OSC;²⁶
- b. make a criminal referral to the U.S. Attorney based on, among other things, Baker's spoliation of evidence;
- c. make the "Additional Findings" detailed in paragraph 11 of the February 2019 OSC;²⁷
- d. Issue a report and recommendation to the District Court that Baker be held in criminal contempt and incarcerated for a period of not less than 90 days; an
- e. Strike Baker's answer to complaint and enter judgment for Murtagh for damages and injunctive relief.

Paragraph 2 of the February 2019 OSC directs Baker to file and serve any written response to the February 2019 OSC not later than March 19, 2019 and include in his response the declaration described in paragraph 7 of the order (the "Baker Declaration"). The Baker Declaration, as described in paragraph 7, is Baker's own declaration under penalty of perjury setting forth, among other things:

- i. each deletion of data or change in access information or credentials that has taken place with regard to Baker's Data or Baker's Devices from and after certain dates;
- ii. all steps that Baker has taken in an effort to locate backups or copies of any deleted data;
- iii. the names and contact information for custodians of any such backup copies;
- iv. why he had not paid the \$132,633.25 sanction award;
- v. the source of funds used to pay prior sanction awards; and
- vi. all efforts he had made to locate or obtain funds with which to pay the monetary sanctions imposed by the Court.

***34** Instead of filing the declaration required by the terms of the February 2019 OSC, Baker's counsel filed a brief memorandum of points and authorities and her own declaration authenticating an email she sent to Murtagh's counsel passing along hearsay statements from Baker concerning some of the information that should have been included in the Baker Declaration. [SeeDeclaration of J. Ponce, filed March 19, 2019, Docket No. 423-1, attached hereto as Exhibit 20.] Baker offered no other evidence in a timely manner in response to the February 2019 OSC and made no attempt at any time to refute any of the observations made by the Neutral Expert in the Second NE Report.

At the April 2, 2019 hearing on the February 2019 OSC, the Court struck the email attached to Ms. Ponce's declaration as hearsay and found that Baker had failed to show cause why the Court should not take the Additional Steps. However, in light of the drastic nature of some of the Additional Steps, the Court agreed to review and consider (i) the declaration that Baker had belatedly filed on the morning of the April 2 hearing, (ii) any additional declaration(s) that Baker might file on or before April 9, 2019 and (iii) any response to these declarations that Murtagh might file by April 16, 2019, before entering an order in response to the February 2019 OSC.

After reviewing the declarations that Baker filed on April 2, 2019 [Docket No. 442] and April 9, 2019 [Docket No. 453] and Murtagh's response thereto [Docket No. 462], the Court remained of the view that there was cause for it to take the Additional Steps and entered its April 24, 2019 order holding Baker in civil contempt [Docket No. 466], attached hereto as Exhibit 21 (the "Civil Contempt Order").

7. Baker's Arrest and Release: The Second Criminal Referral

In the Civil Contempt Order, the Court held Baker in civil contempt for reasons detailed on pages 6 through 7 of that order and directed that Baker be remanded to the custody of the United States Marshal's Service of the Central District of California and detained until he had purged his contempt by completing the "Required Affirmative Acts" defined in paragraph 2 of that order (other than any of the Required Affirmative Acts that he proved "categorically and in detail" he was unable to perform). The Court also made the Additional Findings in the Civil Contempt Order and stated that it would refer Baker to the United States Attorney for

criminal prosecution for the spoliation of evidence.²⁸ The Court scheduled a status conference on Baker's performance of the Required Affirmative Acts for June 11, 2019 at 10:00 a.m.

The United States Marshal's Service arrested Baker on May 1, 2019 and brought him to bankruptcy court for a status conference at 2:00 p.m. that day. It appearing to the Court that it would be difficult to make the arrangements necessary to have Baker released from federal custody in time for him to appear in state criminal court on May 13, 2019 for a preliminary hearing on his child pornography charges,²⁹ the Court agreed to release Baker from custody and gave him until May 9, 2019 to file and serve a declaration attesting to his having performed each of the Required Affirmative Acts by that date. (The Court advised that it would issue a new warrant for Baker's arrest if he failed to file the foregoing declaration in a timely manner or failed to complete any of the Required Affirmative Acts by May 9, 2019.) See "Order After Status Conference on Civil Contempt" [Docket No. 479] attached hereto as Exhibit 23.

*³⁵ The Court entered an order on May 10, 2019 [docket no. 490] (the "May 10 Order"), a copy of which is attached hereto as Exhibit 24, setting forth its findings after having reviewed Baker's May 9, 2019 declaration [docket no. 486] and Murtagh's response thereto [docket no. 489]. As the May 10 Order explains, although the Court did not find Baker's testimony as to his inability to perform certain of the Required Affirmative Acts to be credible: "In the context of civil contempt, incarceration may be used only to coerce a party to take a particular action. It may not be used to punish a party for having failed to take a particular action." May 10 Order, at ¶ 9. "Although this Court has no doubt that Baker has disregarded repeated orders of this Court and remains in contempt of this Court, this Court has no reason to believe that continued incarceration of Baker will result in an increased level of cooperation from Baker." May 10 Order, at ¶10.

As a result, the Court elected not to issue a new warrant for Baker's arrest at this time and, instead, scheduled a further hearing for June 11, 2019 at 10:00 a.m., at which time Baker was to show cause why the Court should not (a) strike his answer to complaint and enter judgment for the plaintiff and (b) issue a report and recommendation that the District Court hold Baker in criminal contempt. Baker's written response to the May 10 Order was due by May 28, 2019.

Baker filed a supplemental declaration regarding the Required Affirmative Acts on May 28, 2019. Only one paragraph of that declaration was responsive to the May 10 Order to show cause -- paragraph 11 – in which Baker explained that he should not be incarcerated because he is his elderly mother's full time caregiver.³⁰ Finding that Baker had failed to show cause why the Court should not take these additional steps, after the June 11, 2019 hearing on the May 10 Order, the Court entered its June 12, 2019 order [docket no. 501], a copy of which is attached hereto as Exhibit 25. In this order, the Court struck Baker's answer to complaint and authorized Murtagh to proceed by way of default³¹ and agreed to issue the instant report and recommendation.

II

RECOMMENDATION

After Baker was ordered to give plaintiff's expert access to all the same electronic data that he had given to his own expert, Baker deleted large amounts of that data and changed passwords or user names so that plaintiff's expert could not access this information. After Baker was ordered to turnover electronic data and devices to the Neutral Expert and not to alter, destroy, encrypt or overwrite that data, he encrypted, overwrote and destroyed large amounts of data and turned over only a portion of his devices to the Neutral Expert.

When held in civil contempt and incarcerated for this behavior, Baker responded by submitting declaration after declaration swearing under penalty of perjury that he could not remember the passwords or encryption keys necessary to unencrypt the data, had no known backups and could not restore any data that had been deleted. When the Court imposed monetary sanctions, Baker submitted multiple declarations swearing under penalty of perjury that his only income is the pension he receives as a retired LAPD officer – all of which he spends each month for basic living expenses – and that he does not have, and will not be able to obtain, the funds with which to pay any portion of the monetary sanctions that the Court has imposed upon him.

According to Baker's own testimony, it is now impossible for him to undo the harm that he has caused. Baker claims he cannot restore data that has been deleted, cannot unlock files that have been encrypted and cannot compensate the other side for the costs that it has incurred because of his

conduct. Therefore, if Baker's declarations are to be believed, continued reliance on coercive contempt sanctions is futile. Yet Baker cannot be permitted to violate order after order of this Court with impunity and should not be excused from further sanction simply because, by his own actions, he has rendered himself incapable of complying with court orders.

***36** In accordance with [28 U.S.C. § 157\(a\)](#), the District Court has issued a standing order generally referring all cases under title 11 and all proceedings arising under, arising in or related to cases under title 11 to the bankruptcy judges for the Central District of California. The District Court is authorized by [28 U.S.C. § 157\(d\)](#) to withdraw, in whole or in part, the reference as to any case or controversy "for cause shown." See [Fed. R. Bankr. P. 5011\(a\)](#) and [9033](#). This Court respectfully submits that the foregoing facts, coupled with this Court's lack of authority to hear and determine criminal contempt matters, constitute sufficient cause within the meaning of this section for the District Court to withdraw the reference to the extent set forth below. Accordingly, the Court recommends:

1. that the District Court *sua sponte* withdraw, in part, the reference pursuant to [28 U.S.C. § 157\(d\)](#) for the limited purpose of considering criminal contempt proceedings against defendant Clark Warren Baker; and
2. that the District Court find Clark Warren Baker guilty of criminal contempt and sentence him to be incarcerated for a period of 90 days or such other period as the District Court may deem appropriate.

Date: June 27, 2019

/s/ Sheri Bluebond

Sheri Bluebond

United States Bankruptcy Judge

Exhibit 2

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re CLARK WARREN BAKER, Debtor.

JAMES MURTAGH, M.D., Plaintiff,

vs.

CLARK BAKER, Defendant.

BK Case No.: 2:15-bk-20351-BB

Chapter 7

ADV Case No.: 2:15-ap-01535 BB

Hearing Date: February 15, 2022, Time: 2:00 p.m., Place: Courtroom 1539

Derek Newman (SBN 190467), dn@newmanlaw.com, Derek Linke (SBN 302724), linke@newmanlaw.com, Newman Du Wors LLP, 100 Wilshire Blvd., Suite 700, Santa Monica, CA 90401, (310) 359-8200, Attorneys for Plaintiff James Murtagh, M.D.

DEFAULT JUDGMENT AND PERMANENT INJUNCTION

The Court, having reviewed Plaintiff James Murtagh, M.D.'s Motion for Entry of Default Judgment and Permanent Injunction Against Defendant Clark Baker ("Baker") and all related papers, together with any opposition or reply, having separately entered its Findings of Fact and Conclusions of Law concurrently herewith, and for good cause shown,

IT IS HEREBY ORDERED that Plaintiff's Motion for Entry of Default Judgment and Permanent Injunction against Defendant Clark Baker is **GRANTED**. Judgment is entered in favor of Plaintiff Dr. James Murtagh and against Defendant Clark Baker as follows:

1. Judgment is hereby entered against Defendant Baker on all counts alleged in Dr. Murtagh's Second Amended Complaint.
2. Judgment is hereby entered against Defendant Baker and in favor of Dr. Murtagh for a total of \$30,535,844.71, as follows: (a) compensatory damages in the amount of \$10,342,525; (b) punitive damages under [California Civil Code § 3294](#) in the amount of \$20,000,000.00; and (c) unpaid sanctions awarded against Baker in this proceeding (in addition to the \$60,000 awarded but unpaid in the LASC Case) in the total amount of \$193,319.71 of unpaid sanctions.¹

3. This Judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

4. Judgment shall bear interest from and after the entry of this order at the federal judgment rate under 28 U.S.C. § 1961.

IT IS FURTHER ORDERED that, under Rule 65(d)(2) of the Federal Rules of Civil Procedure², Baker and his agents, servants, employees, attorneys, and all persons in active concert or participation with any of them, who receive actual notice of this Order, by personal service or otherwise, are immediately ENJOINED and RESTRAINED, subject to the exceptions in Paragraph 12, below, from:

***37** 1. Engaging in any activity which uses, mentions, or refers to James Murtagh, M.D., or any version, variation, misspelling, of his name, or references Dr. Murtagh in any way, including by the use of any moniker meant to refer to Dr. Murtagh, such as “goon”, “Mo”, “shakedowndoc”, “baddoc”, “baddocjjm”, or “psycho” including:

a. on the internet, on websites (even if password protected), on social-media sites, and blogs, in website names, domain names, hostnames, file names, URL's, emails, email addresses, email sender names, website addresses, sponsored links, hyperlinks, metatags, search engine optimization (SEO), search term or keyword optimization, electronic devices, books, logos, advertisements, articles, promotional materials, medical services, mailings, business cards, notices, letters, memos, telephone listings, and/or publications; and

b. in any written or verbal communications with any health care facility, recruiter of medical personnel, and/or locum tenens healthcare staffing agency, or with any current or former coworker or colleague of Dr. Murtagh.

2. Registering, purchasing, owning, selling, or transferring (other than to Dr. Murtagh), administering, or maintaining any online properties including websites, domain names, blogs, social-media accounts, apps, or email accounts that mention or refer to James Murtagh, M.D., or any version, variation on, or misspelling of Dr. Murtagh's name, or that otherwise reference Dr. Murtagh in any way or form, including by the use of the terms “goon”, “Mo”, “shakedowndoc”, “baddoc”, or “baddocjjm”.

3. Cyberstalking or cyber-harassing Dr. Murtagh including pinging his mobile phone, or any other activity that traces or attempts to trace his location; hacking into or

attempting to hack into any computer, mobile phone, iPad, or other electronic device of Dr. Murtagh; tampering or attempting to tamper with any website or social-media account, messaging or social-media app (including Facebook, Instagram, LinkedIn, Twitter, WeChat, TikTok, Pinterest) of Dr. Murtagh, or any online account owned or registered by Dr. Murtagh or under Dr. Murtagh's name.

4. As a means of undermining or evading any provision of this Order, offering services or obtaining or brokering the services of any other person(s), or instructing, directing or encouraging any other person(s), to create or post on any website, social-media account, messaging or social-media app (Facebook, Instagram, LinkedIn, Twitter, WeChat, TikTok, Pinterest), or using any blog, domain name, email address, electronic device, hyperlink, URL, internet search algorithm, metatag, search term optimization tool, or any other online vehicle about or referencing any witness in (including any party to) any legal proceeding including the use of the witness' (or party's) name or business name.

5. Maintaining or retaining copies in any format (digital or otherwise) of any of Baker's Websites and Other Web Content,³ or any portion thereof, including but not limited to, the files listed in **Attachment A** hereto, in any form and on any medium.

IT IS FURTHER ORDERED that Baker and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, shall, subject to the exceptions in Paragraph 12, below, immediately:

***38** 6. Take all necessary steps to purge and eliminate from the internet any and all traces of any websites (including, but not limited to jamesmurtaghmdtruth.com, baddocjjm.com, shakedowndoc.com, omsj.org), webpages, files, court filings, exhibits or other attachment thereto, native digital files, electronically stored information (including but not limited to, emails, email attachments, metadata, text messages, text message attachments, text files, digital files of any kind, administrative data and/or system data, directories, messages, photos, Skype data, tweets, retweets, social-media or networking site posts, reposts, blog posts, microblog posts, website posts, website data, directories, file directories, facsimiles, files, folders, file links, hidden files, hidden directories, linked documents, documents, Mp3 or other audio files, any video files, metalinks, hyperlinks, hidden codes, internet search algorithms, PDF files, Microsoft Office

documents (Word, Excel, Access, PowerPoint), compressed files (e.g., ZIP, RAR, 7-ZIP, GZIP), native electronic working files, drafts, drafts of websites, digital text files, swap files, temporary files, digital videos or YouTube files, internet browser data, forensic file data, forensic artifacts, and/or any other content, which is about, refers to, references, or mentions Dr. James Murtagh, M.D. in any form, variation, or misspelling, in any way, including by the use of any moniker, such as “goon”, “mo”, “shakedowndoc”, “baddoc” or “baddocjjm”, which Baker, or anyone who assisted, aided, was hired by, retained by, directed, worked with, or consulted by, Baker, created, posted, obtained, received, purchased, authored, set up, transferred, maintained, or organized, in any way (collectively, “Baker's Websites and Other Web Content”). Baker must complete the foregoing within 10 days of the issuance of this Order.

7. Take all necessary steps to ensure that no part of Baker's Websites and Other Web Content appears or comes up in any internet search engine (e.g., Google, Bing, Yahoo!, DuckDuckGo, YouTube, Facebook, Baidu, Ecosia) search of Dr. Murtagh's name or any moniker for Dr. Murtagh (e.g., “goon”, “mo”, “baddoc”, “baddocjjm”, “shakedowndoc”). Baker must complete the foregoing within 10 days of the issuance of this Order.

8. Immediately forfeit and transfer to Plaintiff within 10 days of the issuance of this Order the following:

a. the domain names for Baker's Websites that include Dr. Murtagh's name in any form, variation, or misspelling, in any way, including any moniker, such as “goon”, “mo”, “shakedowndoc”, “baddoc”, or “baddocjjm”;

b. all files about, concerning, or referencing Dr. Murtagh, in anyway, that Baker, any agent or representative of Baker, or anyone acting on Baker's behalf posted on the internet or on any website, whether or not password protected, including, but not limited to all files listed in Attachment A hereto; and

c. every file that Baker, any agent or representative of Baker, or anyone acting on Baker's behalf, ever saved, uploaded, or stored in any “goons” directory or folder.

9. If any directive set forth in Paragraphs 6, 7 or 8 above cannot be completed, Baker must notify the Court and Designated Plaintiff's Counsel in writing by identifying the specific directive and the reason it cannot be completed.

IT IS FURTHER ORDERED that:

10. Third-parties providing services in connection with Baker's website, www.jamesmurtaghmdtruth.com or any other of Baker's Websites and Other Web Content, including without limitation, Internet Service Providers (ISP), domain-name registrars, domain name registries, website or web hosting providers, web designers, search engine or ad-word providers, banks, or online payment platforms or services, peer-to-peer payment platforms (collectively “Third-Party Providers”) having knowledge of this Order by service, actual notice or otherwise, are enjoined from providing services to Baker in conjunction with any of the acts set forth in Paragraphs 1 through 5 above;

11. Third-Party Providers having knowledge of this Order by service, actual notice, or otherwise, shall immediately disable, remove, take down, or cancel any of Baker's Websites and Other Web Content.

12. Notwithstanding anything to the contrary, nothing in this Order shall be construed:

a. to apply to documents filed with a court that would otherwise be protected by a litigation privilege;

b. to apply to confidential attorney-client communications or protected attorney work product;

c. to require anyone to purge internal electronic or paper copies of litigation files;

d. to apply to dockets maintained by any court;

e. to include Neil Broom (“NB”) within the definition of a “Third-Party Provider”; or

f. to prohibit NB from maintaining copies of, or to require him to take any actions with regard to, Baker's Websites and Other Web Content, or any other data or files that he has obtained in his capacity as a court-appointed expert in this adversary proceeding.

***39** 13. Baker's communications. Any written communication by Baker (or any agent or representative of Baker, or anyone acting on Baker's behalf), with any Third-Party Provider concerning any part of this Order, shall be copied (if by email, on the same email) to Designated Plaintiff's Counsel. Baker shall further inform Designated Plaintiff's Counsel by email of the substance of any verbal communication Baker (or any agent or representative of Baker, or anyone acting on Baker's behalf) has with any

Third-Party Provider concerning any aspect of this Order within 12 hours of said verbal communication.

14. Per diem monetary penalty. In addition to and notwithstanding any other remedy available to Plaintiff for violations of this Order, Baker shall be ordered to pay Plaintiff a per diem monetary penalty in the amount of \$5,000 for any violation of this Order upon written notice of said violation by Plaintiff to the Court.

15. Notice of Possible Violation. Baker shall provide written notice (by email) to Designated Plaintiff's Counsel of any known or suspected violation of this Order by any person within 24 hours of learning of the known or suspected violation.

Designated Plaintiff's Counsel:

Derek Linke, Esq. (SBN 302724)
Newman Du Wors LLP
2101 Fourth Avenue, Suite 1500
Seattle, WA 98121
Email: linke@newmanlaw.com; Ph: (206) 274-2800

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction over this matter and over Defendant Baker in order to implement and carry out the terms of all orders and decrees that may be entered and to entertain any suitable application or motion for additional relief within the jurisdiction of this Court, and will order other relief that this Court deems appropriate under the circumstances.

There being no reason for delay, under Rule 54(b) of the Federal Rules of Civil procedure, the Clerk is ordered to enter this Judgment forthwith and without further notice.

IT IS SO ORDERED.

Date: February 17, 2022

/s/ Sheri Bluebond
Sheri Bluebond

United States Bankruptcy Judge

ATTACHMENT A

The websites and weblinks containing Plaintiff James Murtagh, M.D.'s name, as well as metalinks, hyperlinks, hidden codes, and Internet search algorithms improperly infringing upon Plaintiff's name and rights include, but are not limited to, the following:

www.baddocjjm.com
www.shakedowndoc.com
www.jamesmurtaghmdtruth.com
www.jamesmurtaghmdturth.com/omsj-the-questionablecompany-robert-gallo-keeps
www.jamesmurtaghmdtruth.com/sleepcare2014
www.jamesmurtaghmdtruth.com/gapprop
www.jamesmurtaghmdtruth.com/emory-merits
www.jamesmurtaghmdtruth.com/profile-muddled
www.jamesmurtaghmdtruth.com/james john-murtagh
www.jamesmurtaghmdtruth.com/court-cases
www.jamesmurtaghmdtruth.com/tag/lawsuits
www.omsj.org/authors/corruption-dooms-dewhistleblowers
www.jamesmurtaghpsycho.com
www.omsj.org/issues/civil-cases/murtagh-celeb
www.propogandists.org/court-cases-murtagh/ohio-comm-plea-2012
www.propogandists.org/court-cases-murtagh/ndga-fulton-dekalb-1999
www.propogandists.org/court-cases-murtagh/ndga-va-2000
www.propogandists.org/court-cases-murtagh/ndga-fulton-dekalb-2009
www.propogandists.org/court-cases-murtagh/tax-court-2003
www.propogandists.org/court-cases-murtagh/ndga-usa-emory-1999

A. Files stored at [jamesmurtaghmdtruth.com](http://www.jamesmurtaghmdtruth.com) include, but are not limited to, the following:⁴

<http://www.jamesmurtaghmdtruth.com/court-cases/11th-cir-emory-2001/>

<http://www.jamesmurtaghmdtruth.com/court-cases/11th-cir-fulton-dekalb-2000/>

<http://www.jamesmurtaghmdtruth.com/court-cases/murtagh-v-baker/>

<http://www.jamesmurtaghmdtruth.com/court-cases/d-idaho-2012/>

***40** <http://www.jamesmurtaghmdtruth.com/court-cases/d-maine-st-marys-2012/>

<http://www.jamesmurtaghmdtruth.com/court-cases/dc-sup-ct-fulton-dekalb-2007/>

<http://www.jamesmurtaghmdtruth.com/court-cases/ga-ct-app-emory-2012/>

<http://www.jamesmurtaghmdtruth.com/court-cases/ga-sup-ct-emory-2004/>

<http://www.jamesmurtaghmdtruth.com/court-cases/supreme-ct-ga/>

<http://www.jamesmurtaghmdtruth.com/court-cases/ndga-emory-1999/>

<http://www.jamesmurtaghmdtruth.com/court-cases/ndga-emory-2009/>

<http://www.jamesmurtaghmdtruth.com/court-cases/ndga-fulton-dekalb-1999/>

<http://www.jamesmurtaghmdtruth.com/court-cases/ndga-usa-emory-1999/>

<http://www.jamesmurtaghmdtruth.com/court-cases/ndga-va-2000/>

<http://www.jamesmurtaghmdtruth.com/court-cases/ny-sup-ct-farber-2009/>

<http://www.jamesmurtaghmdtruth.com/court-cases/ohio-comm-plea-2012/>

<http://www.jamesmurtaghmdtruth.com/court-cases/tax-court-2003/>

B. Files at <http://shakedowndoc.com/docs> and <http://shakedowndoc.com/wordpress> containing files about Dr. Murtagh, include the following:⁵

1. The Links associated with the /docs directory are:

1.pdf

20090413_Observations.pdf

2bk2010--76346_442013-22200-PM.mp3

68.pdf

75.pdf

April 11 2013 MOTION FOR RECONSIDERATION DENIED TO SUPPLEMENT RECORD DENIED.pdf

April 21 2013 NOTICE OF INTENT TO GA SUPREME COURT.pdf

April 8 2013 MOTION FOR RECONSIDERATION APPELLANT.pdf

April 8 2013 TO SUPPLEMENT RECORD.pdf

Arbitrator Award.pdf

Arbitrator Decision.pdf

Arbitrator award2.pdf

August 17 2012 REPLY BRIEF APPELLANT.pdf

BartonProblem.mp3

CourtofAppeals26Jul2012.pdf

Defamation suit.pdf

Emory 29Mar2013.pdf

Emory1-1.pdf

Emory1-2.pdf	Emory3-9.pdf
Emory1-3.pdf	Emory3.pdf
Emory1-4.pdf	Emory4-1.pdf
Emory1-5.pdf	Emory4.pdf
Emory1-6.pdf	Emory5-1.pdf
Emory1.pdf	Emory5-2.pdf
Emory10.pdf	Emory5-3.pdf
Emory11.pdf	Emory5.pdf
Emory12-1.pdf	Emory6-1.pdf
Emory12.pdf	Emory6-2.pdf
Emory13.pdf	Emory6-3.pdf
Emory14.pdf	Emory6.pdf
Emory2.pdf	Emory7.pdf
Emory3-1.pdf	Emory8.pdf
Emory3-10.pdf	Emory9.pdf
Emory3-11.pdf	Evidence of retaliation.pdf
Emory3-12.pdf	Fake Clark to St Mary.pdf
Emory3-2.pdf	Farber v. Jefferys N.Y. Sup. Ct. 2009.pdf
Emory3-3.pdf	Fierer1997.pdf
Emory3-4.pdf	FiererSellingLies.jpg
Emory3-5.pdf	Final Order.pdf
Emory3-6.pdf	Fulton1-1.pdf
Emory3-7.pdf	Fulton1-2.pdf
Emory3-8.pdf	Fulton1-3.pdf
	Fulton1.pdf

Fulton10-1.pdf	Fulton13.pdf
Fulton10-2.pdf	Fulton14-1.pdf
Fulton10.pdf	Fulton14-2.pdf
Fulton11-1.pdf	Fulton14.pdf
Fulton11-2.pdf	Fulton15.pdf
Fulton11-3.pdf	Fulton16.pdf
Fulton11-4.pdf	Fulton17.pdf
Fulton11-5.pdf	Fulton18.pdf
Fulton11-6.pdf	Fulton19-1.pdf
Fulton11-7.pdf	Fulton19.pdf
Fulton11-8.pdf	Fulton2-1.pdf
Fulton11-9.pdf	Fulton2.pdf
Fulton11.pdf	Fulton20-1.pdf
Fulton12-1.pdf	Fulton20-2.pdf
Fulton12-2.pdf	Fulton20-3.pdf
Fulton12-3.pdf	Fulton20.pdf
Fulton12.pdf	Fulton21.pdf
Fulton13-1.pdf	Fulton22.pdf
Fulton13-2.pdf	Fulton23.pdf
Fulton13-3.pdf	Fulton4-1.pdf
Fulton13-4.pdf	Fulton4-2.pdf
Fulton13-5.pdf	Fulton4.pdf
Fulton13-6.pdf	Fulton7.pdf
Fulton13-7.pdf	Fulton8-1.pdf
	Fulton8-10.pdf

Fulton8-11.pdf	James J Murtagh Lawsuits.docx
Fulton8-12.pdf	Joe Bird Bankruptcy Docket Report.pdf
Fulton8-13.pdf	July 13 2012 RESPONSE TO MOTION FOR SUPERSEDEAS.pdf
Fulton8-14.pdf	July 26 2012 REQUEST TO ARGUE GRANTED.pdf
Fulton8-15.pdf	July 30 2012 BRIEF OF APPELLEE.pdf
Fulton8-16.pdf	July 30 2012 TO SUPPLEMENT RECORD.pdf
Fulton8-17.pdf	July 9 2012 BRIEF OF APPELLANT.pdf
Fulton8-2.pdf	July 9 2012 REQUEST TO ARGUE APPELLANT.pdf
Fulton8-3.pdf	July 9 2012 REQUEST TO ARGUE APPELLEE.pdf
Fulton8-4.pdf	June 29 2012 NOTICE OF APPEARANCE.pdf
Fulton8-5.pdf	Kuritzky REDACTED.pdf
Fulton8-6.pdf	MURTAG v. EMORY, Ga. Ct. App. 2012.pdf
Fulton8-7.pdf	MURTAGH v. FULTON---DEJAKB, DC. Super. Ct. 2007 (1482---2).pdf
*41 Fulton8-8.pdf	MURTAGH v. ST MARY'S REGIONAL HEALTH CENTER, D. Me. 2012 (docs avail).pdf
Fulton8-9.pdf	Mahanylaw.jpg
Gable affidavit.pdf	May 1 2013 NOTICE OF FILING CERT TO GA SUPREME COURT.pdf
Giustra depo.pdf	Murtagh 2008.jpg
Idaho1.pdf	Murtagh 2011.jpg
Idaho2.pdf	Murtagh Resume 2010.pdf
Idaho3.pdf	Murtagh v. COMMISSIONER OF INTERNAL REVENUE, U.S.T.C. 2003.pdf
Idaho5.pdf	Murtagh v. Emory University, N.D. Ga. 1999.pdf
Idaho6.pdf	Murtagh v. Emory, 11th Cir. 2001.pdf

Murtagh v. Emory, N.D. Ga. 2009 (docs avail).pdf	StMarys13.pdf
Murtagh v. Fulton---DeKalb, 11th Cir. 2000.pdf	StMarys14.pdf
Murtagh v. Fulton---DeKalb, N.D. Ga. 2009 (docs avail).pdf	StMarys17.pdf
Murtagh v. Fulton---Dekalb, N.D. Ga. 1999.pdf	StMarys19.pdf
Murtagh v. Southwest Idaho Acute Care, D. Idaho 2012 (docs avail).pdf	StMarys2.pdf
Murtagh v. Veterans Admin, N.D. Ga. 2000.pdf	StMarys20.pdf
Murtagh vs. Sleepcare Diagnostics, Ohio Comm. Pleas. 2012.pdf	StMarys21-1.pdf
Murtagh---Pardoemail27Sep2012.pdf	StMarys21-2.pdf
Murtagh_v._Southwest_Idaho_Acu_1.pdf	StMarys21.pdf
Ohare.mp3	StMarys22-1.pdf
PoisoningAffidavit.pdf	StMarys22-2.pdf
RebJJM.jpg	StMarys23.pdf
RebJJMParis.jpg	StMarys25.pdf
RebJJMwine.jpg	StMarys26.pdf
September 10 2012 TO RESCHEDULE ORAL ARGUMENT.pdf	StMarys27.pdf
September 11 2012 TO RESCHEDULE ORAL ARGUMENT GRANTED.pdf	StMarys28.pdf
September 13 2012 SUPP BRIEF DENIED APPELLEE.pdf	StMarys29.pdf
September 6 2012 TO FILE SUPP BRIEF APPELLEE.pdf	StMarys3.pdf
Settlement Agreement.pdf	StMarys30.pdf
StMarys1.pdf	StMarys31.pdf
StMarys10.pdf	StMarys33.pdf
StMarys11.pdf	StMarys35-1.pdf
StMarys12.pdf	StMarys35-2.pdf

StMarys35-3.pdf	StMarys5.pdf
StMarys35-4.pdf	StMarys50.pdf
StMarys35.pdf	StMarys51.pdf
StMarys36.pdf	StMarys52.pdf
StMarys38-1-1.pdf	StMarys53.pdf
StMarys38-1.pdf	StMarys54.pdf
StMarys38-2.pdf	StMarys55-1.pdf
StMarys38-3.pdf	StMarys55-2.pdf
StMarys38-4.pdf	StMarys55-3.pdf
StMarys38-5.pdf	StMarys55.pdf
StMarys38-6.pdf	StMarys56-1.pdf
StMarys38.pdf	StMarys56-2.pdf
StMarys39.pdf	StMarys56-3.pdf
StMarys4.pdf	StMarys56.pdf
StMarys40-1.pdf	StMarys57-1.pdf
StMarys40.pdf	StMarys57-2.pdf
StMarys42.pdf	StMarys57.pdf
StMarys43.pdf	StMarys58.pdf
StMarys44.pdf	StMarys59.pdf
StMarys45.pdf	StMarys6.pdf
StMarys46.pdf	StMarys60.pdf
StMarys47.pdf	StMarys61.pdf
StMarys49.pdf	StMarys63-1.pdf
StMarys5-1.pdf	StMarys63.pdf
StMarys5-2.pdf	

StMarys64.pdf	
StMarys67.pdf	http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblower-guide-p-27.png
StMarys7.pdf	http://mspbwatcharchive.files.wordpress.com/2013/05/murtagh-poisoning-affidavit.pdf
StMarys70.pdf	http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblower-guide-p-27-n-22.png
StMarys71.pdf	http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblower-guide-p-27-n-22.png
StMarys72.pdf	http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblower-guide-p-27-n-22.png
StMarys75.pdf	http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblower-guide-p-27-n-22.png
StMarys76.pdf	http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblower-guide-p-27-n-22.png
StMarys77.pdf	http://www.jamesmurtaghmdtruth.com/court-cases/ndga-emory-2009/
StMarys78.pdf	http://www.jamesmurtaghmdtruth.com/court-cases/ndga-emory-2009/
StMarys80.pdf	http://www.omsj.org/goons/murtagh/Emory%2029Mar2013.pdf
StMarys81.pdf	http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblower-guide-p-27-n-22.png?
StMarys83.pdf	http://www.jamesmurtaghmdtruth.com/court-cases/ndga-emory-2009/
StMarys9.pdf	http://www.jamesmurtaghmdtruth.com/court-cases/ndga-emory-2009/
USA ex rel Murtagh v. Emory, N.D. Ga. 1999.pdf	
gactapp 22 apr 2014.pdf	http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblower-guide-p-30.png?
*42 johnsmoke.mp3	“http://mspbwatcharchive.wordpress.com/2013/05/12/murtagh-hagiography-gap-propaganda
unsealed.pdf	http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblower-guide-p-30.png
2. The Links Associated with the /wordpress directory are:	
http://www.omsj.org/goons/murtagh/2014/sleepcarejudg.pdf	
http://www.omsj.org/goons/murtagh/2014/sleepcarecomplaint.pdf	http://www.omsj.org/goons/murtagh/Fulton8-4.pdf#page=34
http://shakedowndoc.com/wordpress/gapprop/	http://www.omsj.org/goons/murtagh/Fulton8-3.pdf#page=70
http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblower-guide-p-22.png	http://www.omsj.org/goons/murtagh/Fulton8-3.pdf
	http://www.omsj.org/wp-content/uploads/30919_414238817832_1231093_n.jpg

http://www.omsj.org/wp-content/uploads/30919_414238817832_1231093_n.jpg

<http://www.omsj.org/goons/murtagh/Fulton8-16.pdf>

<http://www.omsj.org/goons/murtagh/Fulton8-12.pdf>

<http://www.omsj.org/corruption/defending-semmelweis>

<http://www.omsj.org/corruption/judge-denies-motion-to-dismiss-farber-libel-suit-case-continues>

<http://www.omsj.org/authors/corruption-dooms-dc-whistleblowers>

<http://www.omsj.org/corruption/the-aidstruth-rats-scatter>

<http://www.omsj.org/corruption/the-semmelweis-report-gallos-egg>

<http://www.omsj.org/corruption/the-semmelweis-report-gallos-egg>

<http://deviningafraud.wordpress.com/2012/11/27/the-devine-lewis-soeken-murtagh-connection>

C. Unauthorized photographs of Dr. Murtagh on Baker's websites, such as shakedowndoc.com and omsj.org include:

<http://www.Shakedown.doc/docs/RebJJM.jpg>

<http://www.Shakedown.doc/docs/RebJJMParis.jpg>

<http://www.Shakedown.doc/docs/RebJJMwine.jpg>

<http://www.omsj.org/goons/murtagh/RebJJM.jpg>

<http://www.omsj.org/goons/murtagh/RebJJMParis.jpg>

<http://www.omsj.org/goons/murtagh/RebJJMwine.jpg>

Exhibit 3

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re CLARK WARREN BAKER, Debtor.

JAMES MURTAGH, M.D., Plaintiff,

vs.

CLARK BAKER, Defendant.

Case No.: 2:15-bk-20351-BB

Chapter 7

Adv. Case No.: 2:15-ap-01535-BB

Date: March 28, 2023, Time: 10:00 a.m., Court: 1539

Filed & Entered March 22, 2023

INTERIM ORDER RE CONTEMPT SANCTIONS AGAINST CLARK BAKER

On January 31, 2023, the Court held a hearing on its December 22, 2022 Order to Show Cause re Contempt (Dkt. 939), at which Defendant Clark Warren Baker (“Baker”) was ordered to appear and show cause why he should not be held in contempt for violations of the following Court orders: (1) February 17, 2022 Default Judgment and Permanent Injunction (“Injunction”) (Dkt. 867); (2) September 6, 2018 Order Appointing Neutral Expert (“Neutral Expert Order”) (Dkt. 380); and (3) November 8, 2021, Order Directing Clark Baker to Produce Financial Documents (“Damages Discovery Order”) (Dkt. 810). At the hearing, the Court overruled Baker’s written objections to the issuance of an order to show cause filed at Docket No. 942.

***43** At the hearing, the Court considered the following: (1) Plaintiff James Murtagh, M.D.’s Motion for an Order to Show Cause why Defendant Clark Baker Should Not Be Held in Contempt of the Permanent Injunction and Other Orders (“Motion”) and accompanying Memorandum of Points and Authorities filed on December 21, 2022 (Dkt. 935); (2) the declaration of James Murtagh, M.D. and exhibits thereto (Dkt. 936); (3) the declaration of Derek Linke and exhibits thereto (Dkt. 937); (5) Defendant Clark Baker’s Response to OSC re Contempt, filed on January 17, 2023 (Dkt. 944); (6) Plaintiff James Murtagh, M.D.’s Response in Support of

Order to Show Cause why Defendant Clark Baker Should Not Be Held in Contempt of Court, filed on January 24, 2023 (Dkt. 947); and (7) Supplemental Declaration of Derek Linke in Support of Plaintiff James Murtagh, M.D.'S Motion for an Order to Show Cause Re Contempt Sanctions for Defendant Clark Warren Baker's Violations of the Permanent Injunction and Other Orders, filed on January 24, 2023 (Dkt. 947-1).

On January 25, 2023, Baker also filed Defendant Clark Baker's Supplemental Declaration in Response to OSC re Contempt (Dkt. 948), which the Court hereby strikes and disregards as untimely under the OSC and LBR 9020-1. The Court, having found that Baker has willfully violated paragraphs 2, 5, 6, 7, 8, 9 and 13 of the Injunction,

IT IS ORDERED as follows:

1. Murtagh is hereby held in contempt of this Court for willfully violating the Injunction by:
 - a. Continuing to own, administer or maintain online properties such as websites, blogs, or domain names that refer to Dr. Murtagh (paragraph 2);
 - b. Maintaining or retaining websites or online storage sites that contain content and/or host documents concerning Dr. Murtagh (paragraph 5);
 - c. Failing to purge from the internet content that he controls referring to or mentioning Dr. Murtagh (paragraph 6);
 - d. Failing to ensure that Baker's content about Murtagh was "deindexed" from internet search engines (paragraph 7);
 - e. Failing to transfer to Dr. Murtagh within 10 days of the entry of the Injunction domain names and websites referencing Dr. Murtagh (paragraph 8);
 - f. Failing to notify the Court and Dr. Murtagh within 10 days after the entry of the Injunction if he was unable to comply with any of the above directives (paragraph 9); and
 - g. Failing to copy Dr. Murtagh's counsel on any third-party communications made in an effort to comply with the directives contained in the Injunction (paragraph 13).
2. In order to purge this contempt, Baker must take all of the following steps within 30 days after entry of this Order:

- a. Baker must file and serve a declaration sworn under penalty of perjury, providing full, complete, and truthful answers and responses to the following enumerated questions and other items (the "Baker Declaration"). In order to satisfy the obligations imposed by this order, the Baker Declaration must be accompanied by a declaration under penalty of perjury from Baker's counsel in which she certifies that she does not know of any responsive information that is not already contained in the Baker Declaration and that she has no reason to believe that any of the information contained in the Baker Declaration is false, inaccurate or incomplete.
- b. The Baker Declaration must address each of the following questions and other items specifically by number. Baker's response to each question or item shall be independent and complete in that it shall not rely on or incorporate other specific responses or other materials by reference.
- c. **Baker's Online Properties and Accounts:**
 - i. The Baker Declaration must include a list of all domains, domain names, URLs, hosts and accounts that Baker has at any time registered, purchased, controlled, owned, sold, transferred, or otherwise held in any way, directly or indirectly, at any time since January 2013 including websites, domain names, blogs, social-media accounts, email accounts, and other online communications accounts (collectively, "Online Properties").
 - ii. For each Online Property, the Baker Declaration must separately certify the following: (1) the most-recent date he closed, terminated, or last used or accessed that Online Property (other than use or access for the purpose of this certification); (2) the account name or names he used in connection with that Online Property, if applicable; (3) the alias or aliases under which he used that Online Property, if applicable; (4) any steps that he took in an effort to comply with provisions of the Injunction with regard to such Online Property; and (5) the identity, contact information, and means of communication that Baker used in connection with the foregoing compliance efforts.
 - iii. For each of the following Online Properties, the Baker Declaration must separately certify each of

the following: (1) whether he has ever owned or controlled it, (2) the most-recent date he closed, terminated, or last used or accessed that Online Property (other than use or access for the purpose of this certification); (3) the account name or names he used in connection with that property, if applicable; (4) the alias or aliases under which he used that property, if applicable; (5) any steps that he took in an effort to comply with provisions of the Injunction with regard to such Online Property; and (6) the identity, contact information, and means of communication that Baker used in connection with the foregoing compliance efforts:

- (<http://elmaltes.blogspot.com/2008/08/gallos-egg-investigation-continues.html>)
- <https://sites.google.com/site/karriestokely/mis/gallo-s-egg>
- <https://www.docin.com/p-388129527.html>
- omsj.org
- <https://rn.facebook.com/SearchingforAnswersBlog/posts/clark-bakerfor-those-who've-wondered-about-the-identity-of-snout-we-tracked-him-d/123924284468167/>
- <http://elmaltes.blogspot.com/2008/07/hiv-aids-gallos-egg.html>
- <https://lokeshvuyyurumd.wordpress.com/2014/03/06/duesberg-semmelweis/>
- <https://lokeshvuyyurumd.wordpress.com/category/cohorts/james-murtagh/>
- jamesmurtaghmdtruth.com
- baddocjjm.com
- shakedowndoc.com

d. Baker's Websites and Other Online Content About Dr. Murtagh

i. The Baker Declaration must list all online hosts, websites, email accounts, and storage providers that Baker (or anyone that Baker has used to assist or aid him, or anyone that he hired, retained, directed or worked with or consulted with) has

used at any time since January 2013 to host, store, maintain, or communicate about any content relating to Dr. Murtagh, in any form, variation, or misspelling, including by the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," including without limitation: jamesmurtaghmdtruth.com, baddocjjm.com, shakedowndoc.com, omsj.org, file directories, files, folders, file links, hidden files, hidden directories, linked documents, documents, Mp3 or other audio files, video files, metalinks, hyperlinks, hidden codes, internet search algorithms, PDF files, Microsoft Office documents (Word, Excel, Access, PowerPoint), compressed files (e.g., ZIP, RAR, 7-ZIP, GZIP), digital text files, swap files, temporary files, digital videos or YouTube files.

ii. For each such online host, or storage provider (collectively, "Third-Party Provider"), the Baker Declaration must separately certify the following: (1) the most-recent date he closed, terminated, or last used or accessed that Third-Party Provider (other than use or access for the purpose of this certification); (2) the account name or names he used in connection with that Third-Party Provider, if applicable; (3) the alias or aliases under which he used that Third-Party Provider, if applicable; (4) any steps that Baker took in an effort to comply with provisions of the Injunction with regard to such Third Party Provider; and (5) the identity, contact information, and means of communication that Baker used in connection with the foregoing compliance efforts.

***45 e. Deposition:** Within 30 days after Baker serves the Baker Declaration on counsel for plaintiff, at a time and place to be agreed upon in good faith between the parties, Baker must appear for a deposition by plaintiff. The scope of said deposition, which may total up to 21 hours on the record and which may be continued from day to day as needed, will be anything reasonably calculated to lead to the discovery of information concerning Baker's compliance with, or violation of, the Injunction.

3. If Baker fails to purge his contempt by complying with all of the directives contained in paragraph 2 (including its sub-parts) within 30 days after entry of this order, or if the Court finds that the Baker Declaration or any testimony given at his deposition is materially incomplete or false, or both, the Court will prepare

a report and recommendation to the District Court in which it recommends to the District Court that it withdraw the reference of this adversary proceeding to the extent necessary to hold Baker in criminal contempt and direct that he be incarcerated for a period of not less than one year.

4. Within 30 days after the completion of Baker's deposition, Plaintiff may lodge a further proposed order re contempt sanctions and file and serve a supplemental brief re contempt sanctions. Defendant's response and objections, if any, must be filed and served within 7 days of Plaintiff's lodging of a further proposed order and filing and service of a supplemental brief re contempt sanctions. Plaintiff's reply, if any, must be filed and served by within 7 days of Defendant's filing.
5. On June 6, 2023, at 2:00 p.m., the Court will conduct a continued hearing on the OSC to review the extent to which Baker has complied with this order and assess what further steps should be taken in order to ensure Baker's compliance with the Injunction.

IT IS SO ORDERED.

Date: March 22, 2023

/s/ Sheri Bluebond
Sheri Bluebond

United States Bankruptcy Judge

Exhibit 4

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA – LOS ANGELES DIVISION

In re CLARK WARREN BAKER, Debtor.

JAMES MURTAGH, M.D., Plaintiff,

vs.

CLARK BAKER, Defendant.

Case No.: 2:15-bk-20351-BB

Chapter 7

Adv. Case No.: 2:15-ap-01535-BB

Hearing: Date: November 7, 2023, Time: 10:00 a.m., Court: 1539

Continued Hearing: Date: January 9, 2024, Time: 10:00 a.m., Court: 1539

Filed & Entered November 22, 2023

Derek Newman (SBN 190467), *dn@newmanlaw.com*, Derek Linke (SBN 302724), *linke@newmanlaw.com*, Newman LLP, 100 Wilshire Blvd., Suite 700, Santa Monica, CA 90401, (310) 359-8200, Attorneys for Plaintiff James Murtagh, M.D.

SECOND INTERIM ORDER RE CONTEMPT SANCTIONS AGAINST CLARK BAKER

On November 7, 2023 at 10:00 a.m., the Court held a hearing on its March 22, 2023 Interim Order re Contempt Sanctions Against Clark Baker (Dkt. 975) and March 28, 2023 Order Modifying and Correcting Interim Order re Contempt Sanctions Against Clark Baker (Dkt. 977) (together, "Interim Order") which arose from the Court's December 12, 2022 Order to Show Cause re Contempt ("December 2022 OSC") (Dkt. 939) relating to Baker's compliance with the Court's February 17, 2022 Default Judgment and Permanent Injunction ("Injunction") (Dkt. 867). Defendant Clark Warren Baker's attorney, Jessica Ponce, appeared remotely by video conference at the hearing. Baker was not in attendance. Other appearances were as noted in the record at the time of hearing.

At the hearing, the Court considered the following: (1) Plaintiff James Murtagh, M.D.'s Supplemental Brief re Interim Order re Contempt Sanctions (Dkt. 1012); (2) the declaration of Derek Linke, Esq., and exhibits thereto (Dkt. 1013); (3) Plaintiff James Murtagh, M.D.'s proposed Order Holding Clark Warren Baker in Contempt (Dkt. 1014); (4) Defendant Clark Baker's Response to Plaintiff's Supplemental Brief re Interim Order re Contempt Sanctions (Dkt. 1025); Defendant Clark Baker's Objections ("Baker's Objections") (Dkt. 1026); and Plaintiff James Murtagh, M.D.'s Supplemental Reply Brief re Interim Order re Contempt Sanctions (Dkt. 1027), along with the prior record on the Court's December 22, 2022 Order to Show Cause re Contempt (Dkt. 939), including as recited in the Interim Order.

***46** At the hearing, the Court overruled Baker's Objections in their entirety. All of the objections relate to Murtagh's Supplemental Brief—a memorandum of points and authorities—not to any declaration that was filed. There is no such thing as an evidentiary objection to a memorandum of points and authorities. It is not evidence.

At the hearing, the Court also considered, among other things noted on the record, the two declarations Baker filed pursuant to the Interim Order: (1) Defendant Clark Baker's Declaration in Response to Court's Interim Order and Order Modifying and Correcting Interim Order ("First Baker Compliance Declaration") (Dkt. 979); and (2) Defendant Clark Baker's Declaration in Response to Item 2.c.i. of Order of March 22, 2023, for C. Baker to Aver Compliance ("Second Baker Compliance Declaration") (Dkt. 990). Based on the foregoing,

IT IS HEREBY ORDERED as follows:

A. Supplemental Baker Declaration

1. On or before **December 11, 2023**, Baker must file and serve a declaration sworn under penalty of perjury, providing full, complete, and truthful answers and responses to the following enumerated questions and other items (the "Supplemental Baker Declaration").

2. The Supplemental Baker Declaration is subject to the Interim Order's standards for Baker's testimony under the Interim Order as follows:

a. In order to satisfy the obligations imposed by this order, the Supplemental Baker Declaration must be accompanied by a declaration under penalty of perjury from Baker's counsel in which she certifies that she does not know of any responsive information that is not already contained in the Supplemental Baker Declaration and that she has no reason to believe that any of the information contained in the Supplemental Baker Declaration is false, inaccurate or incomplete. (*See* Interim Order (Dkt. 975) at p. 3, ¶ 2.a.)

b. If the Court finds that testimony provided in the Supplemental Baker Declaration is materially incomplete or false, or both, the Court will prepare a report and recommendation to the District Court in which it recommends to the District Court that it withdraw the reference of this adversary proceeding to the extent necessary to hold Baker in criminal contempt

and direct that he be incarcerated for a period of not less than one year. (*See* Interim Order (Dkt. 975) at p. 7, ¶ 3.)

c. The Supplemental Baker Declaration must address each of the following questions and other items specifically by number. Baker's response to each question or item shall be independent and complete in that it shall not rely on or incorporate other specific responses or other materials by reference. (*See* Interim Order (Dkt. 975) at p. 4, ¶ 2.b.)

B. Supplemental Baker Declaration Item 1— Baker's Testimony About Online Properties to Which He Claims the Court's Orders Do Not Apply

3. For each instance in either the First Baker Compliance Declaration or the Second Baker Compliance Declaration where Baker testifies that there are no provisions in the Court's Injunction, December 2022 OSC, and/or Interim Order applicable to a particular online property, the Court finds that such testimony is materially incomplete.

4. With respect to each such instance of testimony from either the First Baker Compliance Declaration or the Second Baker Compliance Declaration, the Supplemental Baker Declaration must include a certification under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm." The Injunction, December 2022 OSC, and Interim Order are each broad enough to include any website, URL, or other online property that refers to Dr. Murtagh in any way, even if those properties are not identified by name in the particular order.

C. Supplemental Baker Declaration Item 2— Baker's Testimony About Online Property for Which He Claims John McNair or Another Unidentified Individual Is Responsible

***47** 5. The Second Baker Compliance Declaration (on page 6 at lines 23-28) includes the following testimony relating to the shakedowndoc.com online property:

"A back-up of JamesMurtaghMDTruth.com was transferred from Declarant [Baker] sometime in 2015 or 2016 and was taken down before 2017. The lack of screenshots (one, compared to OMSJ's 300+ and

JamesMurtaghMDTruth.com 29 times). Australian citizen John McNair facilitated that transfer to the unknown server owner.”

6. The Court finds that such testimony is materially incomplete.

7. The Supplemental Baker Declaration must explain the above testimony, including, without limitation, addressing: (1) The complete factual basis for such testimony. (2) Identification of the location and nature of documents or communications, by subject matter and type of document or communication, supporting such testimony. (3) Identification, including all available contact information, of all individuals from whom Baker obtained information forming the basis of such testimony. (4) Who is John McNair? (5) Why was McNair the one facilitating the referenced transfer of the backup of JamesMurtaghMDTruth.com? (6) Does Baker have McNair's contact information? And if so, list all such contact information. (7) What is the basis for Baker's knowledge that McNair facilitated the transfer?

D. Supplemental Baker Declaration Item 3— Baker's Testimony About Online Property for Which He Claims David Pardo Is Responsible

8. The Second Baker Compliance Declaration (on page 152 at lines 22-28) includes the following testimony about an online property:

“d) ‘http://mspbwatcharchive.files.wordpress/gapprop/’ - Declarant [Baker] certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: This website was owned by David Pardo. Declarant [Baker] does not own this website and does not have any control over its content. Declarant [Baker] believes this website has been deleted in approximately 2016.”

9. The Court finds that the above testimony is materially incomplete.

10. The Supplemental Baker Declaration must explain the above-quoted testimony, including, without limitation, addressing: (1) What is the basis for Baker's belief that this property was owned by Pardo? (2) Identification of the location and nature of documents or communications, by subject matter and type of document or communication, supporting such testimony. (3) Identification, including all

available contact information, of all individuals from whom Baker obtained information forming the basis of such testimony. (4) What steps did Baker take to determine when this file was deleted if it was not his?

E. Supplemental Baker Declaration Item 4—Baker's Testimony About Another Online Property for Which He Claims David Pardo Is Responsible

11. The Second Baker Compliance Declaration (on page 6 at lines 23-28) includes the following testimony relating to the shakedowndoc.com online property:

“g) ‘http://deviningafraud.wordpress.com/2012/11/27/the-devine-lewis-soeken-murtaghconnection’ – Declarant [Baker] certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: This website was owned by David Pardo. Declarant [Baker] has never owned this website. Declarant [Baker] believes this was deleted in approximately 2016.

*48 ii) Account name or names used: David Pardo

iii) Alias or aliases used: N/A”

12. The Court finds that the above testimony is materially incomplete.

13. The Supplemental Baker Declaration must explain the above-quoted testimony, including, without limitation, addressing: (1) The complete factual basis for such testimony. (2) Identification of the location and nature of documents or communications, by subject matter and type of document or communication, supporting such testimony. (3) Identification, including all available contact information, of all individuals from whom Baker obtained information forming the basis of such testimony. (4) What is the basis for Baker's belief that this property was owned by Pardo? (5) What steps did Baker take to determine when this file was deleted if it was not his?

F. Supplemental Baker Declaration Item 5—Baker's Testimony About Claimed Destruction of Hard-Copy Materials By Shredding

14. Baker's testimony provided pursuant to the Interim Order included claims that he shredded, or caused to be shredded, 8, 9, or 10 boxes of written information concerning Dr. Murtagh. (See Transcript of August 3, 2023 Deposition of Clark Baker,

filed as Exhibit C to the Linke declaration (Dkt. 1013) at 387:8-389:11, 394:10-395:13.)

15. The Court finds that such testimony is materially incomplete.

16. The Supplemental Baker Declaration must explain the foregoing testimony, including, without limitation, addressing: (1) The complete factual basis for such testimony. (2) Identification of the location and nature of documents or communications, by subject matter and type of document or communication, supporting such testimony. (3) Identification, including all available contact information, of all individuals from whom Baker obtained information forming the basis of such testimony. (4) Where or how did Baker find the shredding company that he used? (5) Did the shredding company come to Carol Dunn's house to pick up the documents and take them elsewhere for shredding or did the shredding occur at the house? (6) Or did Baker bring the boxes to the shredder? (7) Where was the company located? (8) How did he make arrangements with them? By phone, by email? (9) How much did they charge? (10) Does Baker have a receipt or certificate confirming the destruction of the contents of the boxes. (11) Have any of these materials not yet been shredded and remain available?

G. Supplemental Baker Declaration Item 6—Baker's Testimony About Prohibited References to Dr. Murtagh on OMSJ.org

17. Baker testified repeatedly in the First Baker Compliance Declaration and the Second Baker Compliance Declaration that he deleted everything related to Dr. Murtagh from the OMSJ.org website prior to the signing and filing of each declaration under penalty of perjury. The Court finds that such testimony has been proven false, as evidenced by Exhibit E to the Linke declaration (Dkt. 1013), which shows files relating to Dr. Murtagh still present on that website as of August 4, 2023. Additionally, the Court rejects Baker's testimony attempting to blame the continuing existence of these files on the CIA, NSA, CDC, or Dr. Fauci as having been invented out of whole cloth and therefore finds that it is also materially false.

*49 18. The Supplemental Baker Declaration must explain such testimony, including, without limitation, addressing: (1) The complete factual basis for such testimony. (2) Identification of the location and nature of documents or communications, by subject matter and type of document or communication, supporting such testimony.

(3) Identification, including all available contact information, of all individuals from whom Baker obtained information forming the basis of such testimony. (4) Why there continued to be prohibited references to Dr. Murtagh on OMSJ.org as of August 4, 2023; (5) Whether the files or information which resulted in those prohibited references appearing on OMSJ.org have since been deleted; and (6) If so, a complete description of all steps Baker has taken since August 4, 2023 to cause those files or information to be permanently destroyed.

H. Supplemental Baker Declaration Item 7—Baker's Testimony About Claimed Deletion of Electronic Files and Subsequent Search Efforts

19. In his testimony provided pursuant to the Interim Order, Baker testifies at great length about files that claims to have deleted on October 20, 2016 and the diligent search that he conducted on his computer on January 4, 2023. The Court finds that such testimony is materially incomplete.

20. The Supplemental Baker Declaration must explain such testimony, including, without limitation, addressing: (1) The complete factual basis for such testimony. (2) Identification of the location and nature of documents or communications, by subject matter and type of document or communication, supporting such testimony. (3) Identification, including all available contact information, of all individuals from whom Baker obtained information forming the basis of such testimony. (4) How does Baker know that he deleted these files on October 20, 2016? (5) What specific documents, entries, or other records or documents did he see that reflected this date? (6) What steps did Baker take on January 4, 2023 as part of this “diligent search”?

I. Supplemental Baker Declaration Item 8—Baker's Materially Incomplete Testimony About Other Online Properties for Which Baker Claims Someone Else Is Responsible

21. In addition to the above items 1 through 7, for each instance in either the First Baker Compliance Declaration or the Second Baker Compliance Declaration where Baker testified that somebody else other than him was responsible for a particular online property, the Court finds that such testimony is materially incomplete.

22. The Supplemental Baker Declaration must provide an explanation of each such instance of testimony, including without limitation, (1) the basis for such testimony with

respect to each such online property; (2) identification as to the location and nature of documents or communications, by subject and category of document type supporting such testimony with respect to each such online property; (3) identification, including all available contact information, for each person Baker communicated with or otherwise obtained information from about such online property.

J. Supplemental Baker Declaration Item 8—Certification of Protonmail Accounts

23. The Supplemental Baker Declaration must also include a certification by Baker identifying each Protonmail account or subaccount he has owned, held, or controlled.

24. For each such account or subaccount, the Supplemental Baker Declaration must separately certify the following: (1) the date that account or subaccount was created; (2) the most-recent date he closed, terminated, or last used or accessed (other than for purposes of responding to this Order or the Interim Order) that account or subaccount; (3) the alias or aliases under which he used or accessed that account or subaccount; (4) all forms of communication Baker has used in connection with the creation, operation, or termination of each such account or subaccount; and (5) the identity, including all available contact information, for each person other than Baker who has had access to each such account or subaccount.

***50** 25. Should Baker claim that any of the identified Protonmail accounts or subaccounts have been terminated, the Supplemental Baker Declaration must separately certify the following: (1) the date on which such account or subaccount was terminated; and (2) the reason or reasons that Baker terminated such account or subaccount.

K. Records of Baker's Protonmail Activity

26. At the November 7, 2023 hearing, Dr. Murtagh's counsel proposed a mechanism by which certain information about Baker's usage of his Protonmail accounts might be obtained consistent with the parameters the Court identified on the record. The Court set forth a procedure intended to implement that proposal.

27. Dr. Murtagh's counsel has now advised the Court that, following a diligent investigation into the technical feasibility of that particular proposal, it does not appear to be possible under these circumstances. Therefore, Dr. Murtagh is evaluating alternate approaches that he will promptly submit

to the Court for consideration if and when he identifies an alternate approach that would be technically feasible.

28. Pending further order of the Court, Baker is ordered to not delete, transfer, or otherwise lose access to all contents of each identified Protonmail account and subaccount and all associated activity or other logs or any other electronically stored information or documents associated with any of the Protonmail accounts or subaccounts.

29. The Court reserves determination as to whether and to what extent the previously found privilege waiver applies to any putatively privileged communications associated with any of Baker's Protonmail accounts or subaccounts.

L. Baker's Alleged Recent Harassing and Cyberstalking of Dr. Murtagh in Violation of the Injunction

30. In Dr. Murtagh's briefing and at the November 7, 2023 hearing, his counsel advised the Court of Dr. Murtagh's contention that there is ongoing online harassment and cyberstalking by Baker that Dr. Murtagh claims violates the Injunction.

31. Such issues are not immediately before the Court in connection with the resolution of the pending contempt motion.

32. The Court indicated at the hearing that it would authorize Dr. Murtagh—and hereby makes such authorization—to conduct third-party discovery to the extent reasonably calculated to lead to the discovery of admissible evidence in connection with such alleged online harassment and cyberstalking.

M. Continued Contempt Hearing and Related Deadlines

33. The Court hereby continues its consideration of all matters at issue in the Injunction, December 2022 OSC, and/or Interim Order to January 9, 2024 at 10:00 a.m.

34. Baker shall appear at the continued hearing.¹

35. At the January 9, 2024 hearing, the Court will also conduct a continued status conference in the above adversary proceeding. The parties need not file a status report in advance of that conference.

36. This Order is not intended to modify the Injunction, December 2022 OSC, and/or Interim Order.

IT IS SO ORDERED.

Date: November 22, 2023

/s/ Sheri Bluebond
Sheri Bluebond

United States Bankruptcy Judge

Exhibit 5

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re CLARK WARREN BAKER, Debtor.

JAMES MURTAGH, M.D., Plaintiff,

vs.

CLARK BAKER, Defendant.

Case No.: 2:15-bk-20351-BB

Chapter 7

Adv No.: 2:15-ap-01535 BB

Filed & Entered April 25, 2024

Prior Hearings Date: January 9 and April 16, 2024, Time: 10:00 a.m., Court: 1539

Continued Hearings Date: June 20, 2024, Time: 11:00 a.m., Court: 1539

***51** Derek Newman (SBN 190467), *dn@newmanlaw.com*, Derek Linke (SBN 302724), *linke@newmanlaw.com*, NEWMAN LLP, 100 Wilshire Blvd., Suite 700, Santa Monica, CA 90401, (310) 359-8200, Attorneys for Plaintiff James Murtagh, M.D.

THIRD INTERIM ORDER RE CONTEMPT SANCTIONS AGAINST CLARK BAKER

On January 9, 2024, the Court held a hearing on its March 25, 2023 Interim Order re Contempt Sanctions against Clark Baker (“Interim Order”) (Dkt. 975) as modified by the April 27, 2023 Order Extending Deadline with Respect to Item 2.c.i of Page 5-6 of the Order of March 22, 2023, for C. Baker to Aver Compliance and Related Deadlines and Continuing Hearing Dates (Dkt. 988), and the November 22, 2023 Second Interim Order re Contempt Sanctions Against Clark Baker (“Second Interim Order”) (Dkt. 1045) (collectively, “Interim Contempt Orders”) which arose from the Court’s December 12, 2022 Order to Show Cause re Contempt (“December 2022 OSC”) (Dkt. 939) relating to Baker’s compliance with the Court’s February 17, 2022 Default Judgment and Permanent Injunction (“Injunction”) (Dkt. 867). Defendant Clark Warren Baker’s attorney, Jessica Ponce, appeared remotely by video conference at the hearing. Baker was in attendance by Zoom for a portion of the hearing. Other appearances were as noted in the record at the time of hearing.

At the hearing, which was a continuation of all matters at issue in the Injunction, December 2022 OSC, and Interim Contempt Orders, the Court considered Defendant Clark Baker’s Supplemental Declaration in Response to Court Order of Nov. 22, 2023 (“Third Baker Compliance Declaration”¹) (Dkt. 1065), along with the prior record on the Court’s December 2022 OSC, including as recited in the Interim Contempt Orders. Based on the foregoing,

IT IS HEREBY ORDERED as follows:

A. Fourth Baker Compliance Declaration

1. On or before **May 1, 2024**, Baker must file and serve a declaration sworn under penalty of perjury, providing full, complete, and truthful answers and responses to the following enumerated questions and other items (the “Fourth Baker Compliance Declaration”).

2. The Fourth Baker Compliance Declaration is subject to the Interim Order’s standards for Baker’s testimony under the Interim Order as follows:

***52** a. In order to satisfy the obligations imposed by this Order, the Fourth Baker Compliance Declaration must be accompanied by a declaration under penalty of

- perjury from Baker's counsel in which she certifies that she does not know of any responsive information that is not already contained in the Fourth Baker Compliance Declaration and that she has no reason to believe that any of the information contained in the Fourth Baker Compliance Declaration is false, inaccurate or incomplete. (*See* Interim Order (Dkt. 975) at p. 3, ¶ 2.a.)
- b. If the Court finds that testimony provided in the Fourth Baker Compliance Declaration is materially incomplete or false, or both, the Court will prepare a report and recommendation to the District Court in which it recommends to the District Court that it withdraw the reference of this adversary proceeding to the extent necessary to hold Baker in criminal contempt and direct that he be incarcerated for a period of not less than one year. (*See* Interim Order (Dkt. 975) at p. 7, ¶ 3.)
- c. The Fourth Baker Compliance Declaration must address each of the following questions and other items specifically by number. Baker's response to each question or item shall be independent and complete in that it shall not rely on or incorporate other specific responses or other materials by reference. (*See* Interim Order (Dkt. 975) at p. 4, ¶ 2.b.)

B. Fourth Baker Compliance Declaration Item 1

3. In Paragraph 19 of its Second Interim Order, the Court found that, "In his testimony provided pursuant to the Interim Order, Baker testifies at great length about files that claims to have deleted on October 20, 2016 and the diligent search that he conducted on his computer on January 4, 2023. The Court finds that such testimony is materially incomplete." (Second Interim Order ¶ 19.) Accordingly, the Court ordered Baker to explain such testimony in the Third Baker Compliance Declaration, "including, without limitation, addressing: (1) The complete factual basis for such testimony. (2) Identification of as to the location and nature of documents or communications, by subject and category of document type supporting such testimony. (3) Identification, including all available contact information, of all individuals from whom Baker obtained information forming the basis of such testimony. (4) How does Baker know that he deleted these files on October 20, 2016? (5) What specific documents, entries, or other records or documents did he see that reflected this date? (6) What steps did Baker take on January 4, 2023 as part of this "diligent search"? (*Id.* ¶ 20.)

4. The Court finds that the Third Baker Compliance Declaration fails to include any such testimony in response to Paragraph 20 of the Second Interim Contempt Order and is thus materially incomplete.

5. The Fourth Baker Compliance Declaration must include (1) full, complete, and truthful answers and responses to each of the questions and directions presented in Paragraph 20 of the Second Interim Contempt Order; (2) a complete explanation as to why Baker failed to provide them in the Third Baker Compliance Declaration as directed in the Second Interim Contempt Order; (3) a full, complete, and truthful explanation and identification of all other information, documents, and any other grounds upon which Baker relied in determining what files he claims to have deleted on October 20, 2016; and (4) a full, complete, and truthful explanation and identification of all other information, documents, and any other grounds upon which Baker relied on or implemented in conducting his claimed "diligent search" on January 4, 2023.

C. Fourth Baker Compliance Declaration Item 2

*53 6. The Third Baker Compliance Declaration (on page 18 at lines 12–17) includes the following testimony relating to the Outlook email account jtdeshonq@hotmail.com online property:

"kk. Outlook 'jtdeshonq@hotmail.com' – Declarant certifies the following information:...

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of an moniker, such as 'goon,' 'mo,' 'shakedowntdoc,' 'baddoc,' or baddocjjm,' etc.

(x) Yes

() No"

7. At the Hearing, Baker's counsel confirmed that, notwithstanding the above testimony, Baker subsequently conceded that there was material pertaining to Dr. Murtagh located at this online property.

8. Therefore, the Court finds that the above testimony at page 18 at lines 12–17 of the Third Baker Compliance Declaration was false.

9. The Fourth Baker Declaration must explain the above testimony, including without limitation, addressing: (1) The complete factual basis for such testimony. (2) What steps did Baker take in connection with conducting a diligent search and preparing his responses to the Second Interim Order, including without limitation with respect to the above online property. (3) Identification of the location and nature of documents and communications that Baker subsequently located at the above online property.

D. Fourth Baker Compliance Declaration Item 3

10. In Paragraph 3 of its Second Interim Order, the Court found that, “3. For each instance in either the First Baker Compliance Declaration or the Second Baker Compliance Declaration where Baker testifies that there are no provisions in the Court’s Injunction, December 2022 OSC, and/or Interim Order applicable to a particular online property, the Court finds that such testimony is materially incomplete.” (Second Interim Order ¶ 3.) Accordingly, the Court ordered Baker to explain such testimony in the Third Baker Compliance Declaration, “With respect to each such instance of testimony from either the First Baker Compliance Declaration or the Second Baker Compliance Declaration, the Supplemental Baker Declaration must include a certification under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as “goon,” “mo,” “shakedowndoc,” “baddoc,” or “baddocjjm” The Injunction, December 2022 OSC, and Interim Order are each broad enough to include any website, URL, or other online property that refers to Dr. Murtagh in any way, even if those properties are not identified by name in the particular order.” (*Id.* ¶ 4.)

11. The Court finds that the Third Baker Compliance Declaration did not address two such sites, clarkbaker.org and osmj.org, and for that reason, that such testimony was materially incomplete.

12. The Fourth Baker Compliance Declaration must explain the above testimony, including without limitation, addressing: (1) full, complete, and truthful answers and responses to each of the questions and directions presented in Paragraph 4 of the Second Interim Contempt Order; (2) a complete explanation

as to why Baker failed to provide them in the Third Baker Compliance Declaration as directed in the Second Interim Contempt Order; (3) the complete factual basis for such testimony; and (4) what steps did Baker take in connection with conducting a diligent search and preparing his responses to the Second Interim Order, including without limitation with respect to the above online properties.

E. Fourth Baker Compliance Declaration Item 4

*54 13. The Injunction required Baker to copy Dr. Murtagh's counsel on certain third-party communications made in an effort to comply with the Injunction (Dkt. 867 ¶ 13, p. 6:18–24):

¶ 13. Baker's communications. Any written communication by Baker (or any agent or representative of Baker, or anyone acting on Baker's behalf), with any Third-Party Provider concerning any part of this Order, shall be copied (if by email, on the same email) to Designated Plaintiff's Counsel. ...

14. In the December 2022 OSC, the Court found that, Dr. Murtagh had made a “*a prima facie* showing that Baker did not copy Dr. Murtagh's counsel on any written communication and did not inform Dr. Murtagh's counsel by email of the substance of any such verbal communications in violation of the specific and definite requirements of Paragraph 13 of the Injunction.” (Dkt. 939 at 7:11–15)

15. The Court finds that Baker has failed to copy Dr. Murtagh's counsel on any such written communication, including without limitation, the following communications referenced in the Third Baker Compliance Declaration: (1) “Proton email, 6 April 2022 between Baker and McNair” (Dkt. 1065, p. 28, n. 3); (2) “In an effort to comply with court requests, Baker exchanged emails with McNair in March 2022...” (*Id.*, pp. 27:25–28:1); (3) “Shortly after my July/Aug 2023 depositions, I sent an email and made numerous calls to [Carol] Dunn in an effort to identify the company and individuals who removed my case files.” (*Id.*, p. 31:16–17); and (4) “‘Lloyd Interaction #1-112909429’ reported to me that ‘Michael’ (No further info) had purchased the [osmj.org] website and posted the pages hours after I closed my account.” (*Id.*, p. 33:11–13.)

16. Baker is hereby ORDERED to produce copies of all such communications, including without limitation those identified in the preceding paragraph, to Dr. Murtagh, via his counsel, **within five days of the entry date of this Order**.

17. The Fourth Baker Compliance Declaration must include a complete explanation as to why Baker failed to copy Dr. Murtagh's counsel, or provide contemporaneous copies, on all such communications.

F. Baker's Consents re Omsj.org Service Providers

18. On or before **May 1, 2024**, Dr. Murtagh may provide to Baker, via email to his counsel, proposed consent forms under which Baker provides full, complete, and unrestricted consent to Dr. Murtagh's obtaining directly from Network Solutions, LLC and from BlueHost, Inc. (and/or any affiliated company) all records, communications, invoices, logs, and other materials associated with the domain name omsj.org and any website or other materials hosted at the domain name omsj.org at any time, including without limitation relating to the registration, hosting, sale, transfer, billing, ownership, of such domain name, website, or hosted materials.

19. Such consent may apply to any account controlled or owned by Baker, Office of Medical & Scientific Justice, Inc., or any pseudonym, user name, email address, or handle identified by Baker in any testimony provided in response to the Interim Contempt Orders, including without limitation in the First Baker Compliance Declaration, Second Baker Compliance Declaration, Third Baker Compliance Declaration, or any deposition testimony.

***55** 20. Such consent may include Baker's relinquishing all privacy or other rights, under state, federal, or other law that might otherwise restrict the release of such information and materials and will apply to any and all means of requesting such information and materials, including without limitation, informal requests by Dr. Murtagh's counsel, subpoena, or other means reasonably calculated to obtain the materials reliably and efficiently.

21. Baker shall return duly executed copies of such consent forms to Dr. Murtagh's counsel via email within three business days after receiving them.

22. Subsequently, Baker shall provide all reasonable cooperation requested in writing by Dr. Murtagh's counsel in connection with obtained such information and materials.

G. Takedown of OMSJ.org

23. Baker and his agents, servants, employees, attorneys and successors, and all persons in active concert or participation

with any of them, who receive actual notice of this Order, by personal service or otherwise, are immediately ORDERED to take down the omsj.org website and all content hosted therein.

H. Continued Contempt Hearing

24. The Court hereby continues its consideration of all matters at issue in the Injunction, December 2022 OSC, and/or Interim Order to June 20, 2024 at 11:00 a.m.

25. Within 30 days after the filing and service of the Fourth Baker Compliance Declaration, Plaintiff may lodge a further proposed order re contempt sanctions and file and serve a supplemental brief re contempt sanctions. Defendant's response and objections, if any, must be filed and served within 7 days of Plaintiff's lodging of a further proposed order and filing and service of a supplemental brief re contempt sanctions. Plaintiff's reply, if any, must be filed and served within 7 days of Defendant's filing.

26. Baker shall appear at the continued hearing.²

27. On June 20, 2024 at 11:00 a.m., the Court will also conduct a continued status conference in the above adversary proceeding. The parties need not file a status report in advance of that conference.

28. This Order is not intended to modify the Injunction, December 2022 OSC, and/or Interim Contempt Orders.

IT IS SO ORDERED.

Date: April 25, 2024

/s/ Sheri Bluebond

Sheri Bluebond

United States Bankruptcy Judge

Exhibit 6

United States Bankruptcy Court

Central District of California

Royal Federal Building & Courthouse

255 East Temple Street, Suite 1534
Los Angeles, California 90012

Sheri Bluebond Chief Bankruptcy Judge

Filed January 18, 2017

VIA FAXSIMILE; ORIGINAL BY FIRST CLASS MAIL

Eileen M. Decker, Esq.

United States Attorney

United States Attorney's Office

Central District of California

312 North Spring Street, Suite 1200

Los Angeles, California 90012

Re: Referral of Clark Warren Baker for Investigation for Witness Tampering

Dear Ms. Decker,

I recently encountered a situation in one of the adversary proceedings pending before me that I want to bring to your attention for further investigation and possible criminal prosecution. The action, entitled James Murtagh v. Clark Warren Baker, adversary proceeding number 2:15-01535-BB (the "Action"), currently pending in the United States Bankruptcy Court for the Central District of California, Los Angeles division, was commenced on October 5, 2015. The plaintiff, James Murtagh, is currently represented by John B. Wallace, Esq., of Rosen & Associates, P.C. in Los Angeles. The defendant, Clark Warren Baker, is currently represented by Baruch Cohen, Esq., of the Law Office of Baruch C. Cohen, also in Los Angeles. (Addresses and contact information for these attorneys appears below.)

***56** Plaintiff Murtagh alleges in the complaint that commenced the Action that Baker engaged in a variety of improper conduct (e.g., stalking, defamation, hacking, etc.) and that the damage that Murtagh suffered as a proximate result of this conduct should be excepted from Baker's discharge in bankruptcy. (Baker filed a voluntary chapter 7

bankruptcy petition on June 29, 2015.) Baker disputes these allegations and has been vigorously defending the Action.

One of witnesses in the Action is a gentleman who currently resides in Baltimore, Maryland, named David Bender. (His contact information appears below as well.) Mr. Bender had signed a declaration in connection with an earlier state court action between Murtagh and Baker in Los Angeles Superior Court (Case No. BC527716) (the "Bender Declaration"). According to a declaration filed in this Action by Lisa Hiraide of Rosen & Associates (a copy of which is attached hereto), when she interviewed Mr. Bender in this Action, he reported that he had been "totally pressured" and "extorted" by Baker into signing the Bender Declaration, that Baker makes a habit of contacting him approximately monthly to ensure that he does not intend to recant his earlier testimony and that he (Bender) is afraid to retract his earlier, false testimony for fear that Baker will reactivate the damaging and embarrassing content about Bender that Baker had previously posted on the internet.

During the course of a hearing held November 15, 2016 in the Action, in the presence of counsel for both parties, I telephoned Mr. Bender at a phone number provided by counsel for Baker and inquired as to Mr. Bender's willingness to appear for a continued examination by Murtagh's counsel in Los Angeles on December 12, 2016. (Bender had previously been examined at a deposition by counsel for Baker but had left before Murtagh had been able to cross-examine him.) Although Mr. Bender agreed during that conversation to appear at the continued deposition, he subsequently failed to appear. Instead, he sent a fax to my chambers, on or about December 7, 2015, forwarding copies of correspondence complaining that he had not received a formal deposition notice in a timely manner and therefore would not be appearing for his deposition on December 12, 2016. At approximately the same time, however, he telephoned my chambers and spoke to one of my law clerks, Jennifer Wolfberg, advising her that the real reason that Bender would not be appearing for his deposition was that he was afraid of Baker and what Baker had threatened to do to him if he gave truthful testimony at the continued deposition.

I docketed Mr. Bender's fax to me and related the substance of my law clerk's conversation with him to the parties on the record at a hearing held January 10, 2017 in the Action. Thereafter, I entered an order barring either party from relying on testimony from Mr. Bender in the Action, but I believe that further investigation is warranted into the manner in which

Baker has behaved with regard to Mr. Bender. I have not made any factual findings on this issue, but it seems likely to me that, if what Mr. Bender has told Ms. Hiraide and Ms. Wolfberg is true, Mr. Baker may well have engaged in conduct that amounts to witness tampering within the meaning of [18 U.S.C. § 1512\(b\)](#). Accordingly, I would appreciate your taking whatever steps you deem appropriate in this matter.

Thank you very much for your consideration in this matter.

***57** Very truly yours,

/s/ Sheri Bluebond
SHERI BLUEBOND

Enclosures

cc: Baruch C. Cohen, Esq.

John B. Wallace, Esq.

CONTACT INFORMATION

Counsel for plaintiff James Murtagh, M.D.: John B. Wallace, Esq., Rosen & Associates, 444 S. Flower Street, Suite 3010, Los Angeles, CA 90071, Telephone: (213)362-1000, Telecopier: (213)362-1001, Email: mail@rosen-law.com

Counsel for defendant Clark Warren Baker: Baruch C. Cohen, Esq., Law Office of Baruch C. Cohen, A Professional Law Corporation, 4929 Wilshire Boulevard, Suite 940, Los Angeles, CA 90010, Telephone: (323)937-4501, Telecopier: (323)937-4503, Email: BCC4929@gmail.com

Debtor/Defendant: Clark Warren Baker, 2645 Greenvalley Road, Los Angeles, CA 90046

Witness: David Bender, 1631 Whetstone Way #426, Baltimore, MD 21230, Telephone: (617)710-3303, Email: bender.d@icloud.com

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re CLARK WARREN BAKER,

JAMES MURTAGH, M.D., Plaintiff,

vs.

CLARK WARREN BAKER, Defendant.

Bk. Case No.: 2:15-bk-20351-BB (Ch. 7)

Adv. Case No. 2:15-AP-01535-BB

ROSEN & ASSOCIATES, P.C., Robert C. Rosen (SBN 79684), John B. Wallace (SBN 93047), Lisa Hiraide (SBN 206142), David Bleistein (SBN 191810), 444 S. Flower Street, Suite 3010, Los Angeles, CA 90071, Tel.: (213) 362-1000; Fax: (213) 362-1001, email: mail@rosen-law.com, Attorneys for Plaintiff JAMES MURTAGH, M.D.

DECLARATION OF LISA HIRADE

I, Lisa Hiraide, declare as follows:

1. I am an attorney duly licensed to practice law before all courts of the State of California. I am an associate attorney with Rosen & Associates, P.C., counsel for Plaintiff James Murtagh, M.D. in the above-captioned matter. I have personal knowledge of the matters stated herein and if called upon to testify as a witness, I could and would competently do so.
2. One of my responsibilities in this case is to interview certain witnesses. One of the witnesses I interviewed was David Bender, f/k/a Kevin Kuritzky ("Mr. Bender"). On September 21, 2015, I spoke to Mr. Bender by telephone.
3. The primary purpose of my telephone call to Mr. Bender was to question him about certain damaging statements about Dr. Murtagh contained in a declaration that Mr. Bender signed on or about October 8, 2014 ("Bender Declaration"). The Bender Declaration had been submitted in support of Baker's anti-SLAPP motion filed by Baker in Dr. Murtagh's state court action against Baker.¹

4. During our telephone conversation, I asked Mr. Bender if any of the statements about Dr. Murtagh contained in his Declaration was true. Mr. Bender, in a candid and up-front manner, admitted to me that:

- a. Nothing contained in his Declaration about Dr. Murtagh was true;
 - b. The only reason that Mr. Bender signed the Declaration was because he was “totally pressured” and “extorted” by Baker into signing the Declaration in exchange for Baker’s agreeing to remove all the embarrassing and damaging materials that Baker posted about him on the internet. (See Ex. 21 (p. 3 of 3); Ex. 164 (p. 2 of 3); and Ex. 494 (p. 6 of 7) - “Fugitive on the run captured” webpage).
- *58 c. he did not even read the entire Declaration - maybe only the first two pages - before he signed it;
- d. Dr. Murtagh did not spoof any emails in Baker’s name as Mr. Bender had testified in his Declaration, nor did Dr. Murtagh direct Mr. Bender to do any of the things of which he accused Dr. Murtagh in his Declaration - it was all made up by Baker.
 - e. he did not forward to Baker any of the emails attached to his Declaration as exhibits;
 - f. he did not read any of the emails attached as exhibits to his Declaration before he signed it.
 - g. his sole motivation in signing the Declaration was to get Baker to remove Baker’s posts about him on the internet.
5. I asked Mr. Bender if he would sign a declaration for Dr. Murtagh repeating what he told me during our telephone conversation.
6. Mr. Bender expressed that he was very, very reluctant to sign a declaration which recanted his earlier Declaration because Baker had threatened him that with a flick of a switch he could and would reactivate the damaging and embarrassing internet content about him.
7. Mr. Bender explained to me that now that he had gotten his life together working at a \$125,000 per year great job at the University of Maryland with great health insurance benefits, he simply could not afford to risk doing anything, i.e., disavowing the Declaration Baker extorted him into signing, which would set off Baker and trigger his retaliation by re-posting the damaging material about him on the internet.
- 8. Mr. Bender said the fact that the internet postings were taken down concurrently with his signing his Declaration should be proof enough that he was extorted into signing it.
 - 9. I asked Mr. Bender if he was still in contact with Baker. Mr. Bender stated that he contacts Baker every month or so to make sure that Baker believes that Mr. Bender is still on his side.
 - 10. Mr. Bender stated to me that he has not turned against Dr. Murtagh and reiterated yet again that he was extorted by Baker into signing the Declaration and did so in order to get Baker off his back.
 - 11. Mr. Bender said he thinks Baker is crazy and that what he is doing to Dr. Murtagh is reprehensible.

Work on Joint Stipulation Re Plaintiff’s Motion For: (A) Protective Order and Order

12. **Experience and Customary Billing Rate.** I have over 15 years of litigation practice in state and federal court, which includes complex business litigation, securities litigation and FINRA arbitrations. My normal and customary billing rate is \$425 per hour. My understanding is that my hourly rate is consistent with the prevailing rates in downtown Los Angeles for lawyers with my level of experience. The Los Angeles Superior Court in the litigation with Baker has previously determined that my rate is reasonable.

13. **My Work.** I maintain time records on a daily basis contemporaneously documenting my professional time. I have reviewed my time sheet entries since August and September 2016, and list the time related to the Bender deposition as follows.

6/15/16 - 9/2/16: Analyzed portions of D. Bender’s deposition transcript in preparation for working on Joint Stipulation; prepared, revised and edited Declaration of L. Hiraide; revised and edited Declarations of J. Wallace, J. Murtagh in support of Joint Stipulation Re D. Bender’s deposition Testimony; prepared, revised and edited Joint Stipulation; communications with J. Murtagh and J. Wallace Re declarations and Joint Statement; prepared exhibits; prepared tables.

*59 Total hour spent: 8.3 hours

I also anticipate spending another 2.0 hours working on the Supplemental/Reply brief in support of the instant Motion. Thus, my total attorney's fees in connection with is Motion is \$4,377.50.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration is executed this September 2, 2016, at Los Angeles, California.

/s/ Lisa Hiraide
LISA HIRAI

Exhibit 7

United States Bankruptcy Court

Central District of California

Royal Federal Building & Courthouse

255 East Temple Street, Suite 1534

Los Angeles, California 90012

Sheri Bluebond, U.S. Bankruptcy Judge

Ph: 213-894-8980

Fax: 213-894-1336

May 6, 2019

VIA EMAIL

Jolene Tanner, Esq.

Coordinator, Bankruptcy Fraud Task Force

U.S. Attorney's Office

300 N. Los Angeles Street, Suite 7211

Los Angeles, CA 90012

Re: Criminal Referral of Chapter 7 Debtor Clark Warren Baker

Bk. Case No. 2:15-bk-20351-BB; Adv. No. 2:15-ap-015-BB

Dear Ms. Tanner:

Section 3057 of Title 18 of the United States Code requires a judge who has grounds for believing that a violation of the laws of the United States has occurred, or that an investigation should be had as to whether such a violation has occurred, to report the relevant facts and circumstances to the United States Attorney. In fulfillment of that duty, I am writing to convey my opinion that the individual identified above, Clark Warren Baker ("Baker"), has violated **18 U.S.C. § 1519** by knowingly destroying, altering or concealing relevant evidence in an adversary proceeding currently pending before me for the purpose of impeding, obstructing or influencing the outcome of the litigation. If you are not the correct person to whom such facts and circumstances should be reported, I would appreciate your forwarding this letter and its enclosures to the appropriate party or parties.

Baker filed a voluntary chapter 7 petition on June 29, 2015, commencing the above-referenced bankruptcy case. On October 5, 2015, Dr. James Murtagh ("Murtagh") filed the above-referenced adversary proceeding against Baker in that bankruptcy case (the "Action"), asserting, among other things, that Baker had posted defamatory material about Dr. Murtagh on the internet and seeking a nondischargeable monetary judgment and injunctive relief. Baker was initially represented in the Action by Baruch Cohen, until Mr. Cohen was replaced in or about September of 2018 by Jessica Ponce. Dr. Murtagh has been and continues to be represented in the Action by John B. Wallace and Lisa Hiraide of Rosen & Associates, P.C., in Los Angeles.

After the parties commenced discovery in the Action, Dr. Murtagh became frustrated with, among other things, Baker's failure or refusal to give plaintiff's expert, Bruce Anderson of Cyber Investigation Services, LLC, the same access to electronic information that he had given to his own expert, as required by this Court's October 5, 2017 order [Exhibit 1 hereto]. Dr. Murtagh sought and obtained a series of orders from this Court directing Baker to cooperate with Dr. Murtagh's efforts to obtain electronic discovery, including this Court's June 26, 2018 order [Exhibit 4 hereto], which ordered Baker not to "alter, change, damage, delete, destroy, remove, move, empty, hide, limit, move, overwrite, password-protect,

secrete modify, spoliate and/or otherwise adversely affect (collectively ‘Spoliate’) any of Baker’s Data, or any device containing Baker’s Data,” as defined in that order.

***60** Based on written testimony provided by Mr. Anderson, in its August 16, 2018 order [Exhibit 5 hereto at p. 4], this Court found, among other things, that Baker had deleted electronic information after having been ordered to give Mr. Anderson access to that information (the “Data Reduction”) and that the “Data Reduction was purposeful and intentional and was not the result of Baker’s simply removing a few spam emails.” And although this Court has repeatedly ordered Baker to restore this deleted information, Baker has never done so.

In light of Baker’s repeated failures to comply with this Court’s orders concerning the preservation and production of electronic data, on September 6, 2018, this Court entered an order [Exhibit 6 hereto] that, among other things, appointed Neil Broom of Technical Resource Center, Inc., as its Neutral Expert and directed Baker to turnover all of his electronic devices to Mr. Broom. Included in that order were additional provisions prohibiting Baker from destroying, deleting, altering or removing data and directing Mr. Broom to ascertain whether Baker had deleted any data that might be relevant to the matters at issue in the Action since the inception of the Action and, if so, when such deletion occurred.

Mr. Broom submitted two reports to the Court, detailing his findings. Copies of these reports are attached hereto as Exhibits 8 and 9. Based on Mr. Broom’s findings in these reports (jointly, the “Expert Reports”), the Court advised Baker in its February 19, 2019 order to show cause re contempt [Exhibit 10 hereto] that, absent evidence from Baker demonstrating that the assertions of fact contained in the Expert Reports were inaccurate, the Court would make the additional findings of fact outlined on pages 11 through 16 of this Court’s February 19, 2019 order (the “Additional Findings”). Notwithstanding having been given at least two opportunities to supply evidence to contradict Mr. Broom’s findings, Baker has failed to do so. As a result, in its April 24, 2019 order holding Baker in civil contempt [Exhibit 11 hereto], the Court made the Additional Findings.

The Additional Findings include the following:

- Baker deleted multiple files on the Baker Devices after the Court issued its September 28, 2018 Order [docket no. 393] (the “September Order”). Specifically, on Device

AA3, files were placed in the Recycle Bin, Emails were deleted, and files accessed after the September Order was entered were deleted.

- Baker destroyed electronic evidence by overwriting data and then reformatting Device AC.
- On Device AA3, TrueCrypt [an inscription program] was installed on July 1, 2018 and run on the following dates: September 7 [the day after the Court entered an order directing that Baker’s devices be turned over to the Neutral Expert], September 8, September 11, and September 18, 2018, for a total of 7 runs.
- The Neutral Expert contacted Baker on December 14, 2018 and again on December 21, 2018, via iPhone **Chat** (iMessage) and requested his TrueCrypt password; however, Baker provided the wrong password to Mr. Broom on both occasions and claimed that he could not remember the correct password.
- Baker was running the TrueCrypt application as late as the day he turned his devices over to the Neutral Expert.
- Baker installed another encryption program named “Axcrypt” on May 5, 2018 on Device AA3. Baker did not provide a list of files that he accessed with the Axcrypt encryption application or the password to unlock these files.
- Baker is skilled in the use of encryption applications, knew he had used encryption on the Baker Devices and knew the Neutral Expert would need the passwords to access the encrypted files.
- *61** • On Device AA3, Axcrypt was run on the following dates: September 12, September 13, September 14, September 15, and September 17, 2018, for a total of 30 runs.
- On Device AH, Axcrypt was run on September 17, 2018.
- On Device AA3, the Neutral Expert detected TrueCrypt Activity and directory names that appear relevant to this adversary proceeding. However, these directories do not appear to be on any of Baker’s Devices.
- On September 7, 2018 at 2:53 P.M., the Neutral Expert emailed Baker’s then Attorney Baruch Cohen to ascertain when Baker would meet for the Court Ordered evidence collection.

- On September 7, 2018 at 4:46 P.M. (less than 2 hours later), Baker ran the TrueCrypt application on Device AA3. Baker mounted (connected to the encrypted volume) labeled “N:” and accessed multiple files (including “Pardo” and “Murtagh hush”) on that volume.
- On September 8, 2018, Baker again ran the TrueCrypt application on Device AA3. He mounted (connected to the encrypted volume) labeled “O:” and accessed multiple files (including “Message Source”) on that volume. On this same date, Baker connected to a volume labeled “E:” and accessed directories named “Discovery,” “goons,” “batcave,” Pardo,” and “Brown Pardo etc email.” These directories do not appear on any of Baker's Devices delivered to Mr. Broom.
- The directory “batcave” contains security and encryption files.
- The directory “Brown Pardo etc email” contains “Pardo” and “Murtagh hush” files.
- Electronic evidence on Baker's Devices reveals that, on September 11, 2018 at 6:50 AM, Baker connected Device AC (the Seagate Backup Plus Portable Drive) to Device AA3 (the Operating System hard drive in the Custom Desktop Black Case Computer). Baker then copied files (including 335GB of video files) to Device C from 8:35 AM until 9:52 AM.
- Device AC shows that on, September 11, 2018 at 10:35 AM, the Master File Table was created, which shows the

device was reformatted. By so doing, Baker destroyed the previous data that was on the drive.

As you will note from page 10 of my April 24, 2019 order [Exhibit 11 hereto], after making the foregoing findings, it appeared to me that a referral to the United States Attorney for spoliation of evidence was warranted. Hence, this letter. Please let me know if there is any additional information that you require to assist your office with its investigation of this matter. (For your convenience, I have also attached a chart containing contact information for the potential witnesses identified above.)

Very truly yours,

/s/ Sheri Bluebond
SHERI BLUEBOND

cc: Peter C. Anderson (via email)

Jessica Ponce, Esq. (via email)

John B. Wallace, Esq. (via email)

Neil Broom (via email)

Contact Information for Potential Witnesses

NAME	ADDRESS	TELEPHONE	EMAIL
Baruch C. Cohen	Law Offices of Baruch C. Cohen 4929 Wilshire Blvd. Suite 940 Los Angeles, CA 90010	(323)937-4501	barchcohen@baruchcohenesq.com
Jessica Ponce	Law Offices of Jessica Ponce 3255 Wilshire Blvd. Suite 1801 Los Angeles, CA 90010	(213)362-2911	office@jponcelaw.com
John B. Wallace	Rosen & Associates, P.C. 515 S. Figueroa St. Suite 1060 Los Angeles, CA 90071	(213)362-1000	JohnWallace@rosen-law.com
Lisa Hiraide	Rosen & Associates, P.C. 515 S. Figueroa St. Suite 1060 Los Angeles, CA 90071	(213)362-1000	LHiraide@rosen-law.com

Bruce Anderson	Cyber Investigation Services 3433 Lithia Pinecrest Road Suite 190 Valrico, Florida 33596		bruce@cyberinvestigationservices.co
Neil Broom	Technical Resources Center, Inc. 20422 Beach Blvd., Suite 205 Huntington Beach, CA 92648	(678)428-6304	nbroom@trcglobal.com

Exhibit 8

UNITED STATES BANKRUPTCY COURT**CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION**

In re CLARK WARREN BAKER, Debtor.

JAMES MURTAGH, M.D., Plaintiff.

v.

CLARK BAKER, Defendant.

BK Case No. 2:15-bk-20351-BB

Chapter 7

ADV. Case No. 2:15-ap-01535 BB

Date: TBD

Time: TBD

Dept: 1539

***62** Derek Newman (SBN 190467), *dn@newmanlaw.com*, Derek Linke (SBN 302724), *linke@newmanlaw.com*, Newman Du Wors LLP, 100 Wilshire Blvd., Suite 700, Santa Monica, CA 90401, (310) 359-8200, Attorneys for Plaintiff James Murtagh, M.D.

DECLARATION OF JAMES MURTAGH, M.D. IN SUPPORT OF PLAINTIFF JAMES MURTAGH, M.D.'S MOTION FOR ISSUANCE OF AN ORDER TO SHOW CAUSE WHY DEFENDANT CLARK BAKER SHOULD NOT BE HELD IN CONTEMPT OF COURT

I, James Murtagh, M.D., swear under penalty of perjury under the laws of the United States to the following:

1. I am the Plaintiff in the above adversary proceeding, over the age of 18, competent to testify in this action, and make this declaration from personal knowledge.
2. Under the Court's February 17, 2022 Default Judgement and Permanent Injunction ("Injunction"), I understand that Defendant Clark Baker was prohibited from registering, purchasing, owning, selling, transferring (other than to me), administering, or maintaining any online properties including websites, domain names, blogs, social-media accounts, apps, or email accounts that mention or relate to me.
3. As of the date of this declaration, Baker still has the following active websites targeting me by name:
4. A blog post by Baker about me titled "Gallo's Egg - The Investigation Continues" is located at: <http://elmaltes.blogspot.com/2008/08/gallos-egg-investigation-continues.html>. I visited this site and a true and correct copy of this site as of December 15, 2022 is attached as Exhibit A.
5. A blog post by Baker about me titled "HIV, AIDS & Gallo's Egg" is located at <https://sites.google.com/site/karristokely/misc/gallo-s-egg>. I visited this site and a true and correct copy of this site as of December 15, 2022 is attached as Exhibit B.

6. Baker maintains an online repository of some of my personal correspondence located at <https://www.docin.com/p-388129527.html>. I visited this site and a true and correct copy of this site as of December 15, 2022 is attached as Exhibit C.

7. Baker continues to own the domain name OMSJ.org at which he posted and likely continues to host his repository of thousands of pages of documents about me, among other victims of Baker's targeted harassment and intimidation campaigns. I visited this site and a true and correct copy of the OMSJ.org homepage as of December 15, 2022 is attached as Exhibit D.

8. Baker maintains a Facebook post republishing an OMSJ.org article about me located at <https://m.facebook.com/SearchingforAnswersBlog/posts/clark-bakerfor-those-who've-wondered-about-the-identity-of-snout-we-tracked-him-d/123924284468167/>. I visited this site and a true and correct copy of this Facebook post as of December 15, 2022 is attached as Exhibit E.

9. A blog post by Baker about me titled, "HIV, AIDS & Gallo's Egg" is located at <http://elmaltes.blogspot.com/2008/07/hiv-aids-gallos-egg.html>. I visited this site and a true and correct copy of this site as of December 15, 2022 is attached as Exhibit F.

***63** 10. Additionally, Baker continues to own the domain name jamesmurtaghmdtruth.com

11. Baker also continues to maintain online a copy of the 2014 declaration he coerced from David Bender which contains extremely harmful and defamatory content about me that Baker has been known to use to attempt to harm me. This is hosted at the OMSJ.org domain name and as of December 15, 2022, is available at <http://www.omsj.org/temp/Kuritzky%20FINAL%20OctB%20EXHIBITS.pdf>

12. Baker created an online repository of files about me and other targets of Baker's online harassment he called the "Goons" file. He stored these materials in that online location to make it easy to retrieve defamatory and harmful materials about me and other victims.

13. Baker's "goons" file also includes files on other persons he has harassed online or extorted, including David Bender aka Kevin Kuritzky and Dr. Lokesh Vuyyuru.

14. The Goons file contained documents relating to me including my private photographs, documents marked "Confidential" that I produced in discovery to Baker in the California Superior Court action which preceded this adversary proceeding titled *Murtagh v. Baker*, No. BC527716 ("LASC Case").

15. In 2015, during the LASC Case, Baker was ordered to destroy various materials because they were found to include my attorney-client privileged communications which Baker had obtained improperly.

16. Earlier this year, when my counsel in this proceeding first threatened to seek contempt sanctions, Baker produced a collection of tens of thousands of documents which he still possesses. Multiple copies of the privileged and confidential files Baker had been ordered to destroy by the court in the LASC Case were included in the documents, including for example, copies of the following documents:

Murtagh-Pardoemail27Sep2012.pdf

Murtagh 2008.jpg

Murtagh 2011.jpg

Fake Clark to St Mary.pdf

Clark TMB Complaint.pdf

Greenfire timelineXXXyyY.pdf

Kendrick Dec20June14 FINAL.pdf

TMB Complaint17Oct13.pdf

Kendrick Dec20June14 FINAL.pdf

Kendrick Declaration.pdf

Kendrick FINAL.pdf

Tracy Dec 21June14 DRAFT.docx

mcdermott6mar2014.wav

xxClark Declaration FINAL 12 March-ATT.pdf

xxPardo Declaration 10Mar2014.pdf

Fake Clark to St Mary.pdf

Greenf.pdf

17. Additionally, Baker's 2022 production revealed that he retains copies of the following privileged documents that he had been ordered to destroy:

Bird Brown 9 Apr 2013.pdf

Bird emails.pdf

Goodhart Fax 2010.pdf

Hack 1 Dec 2012.pdf

Hack 10 Dec 2012.pdf

Hack 18 Nov 2012.pdf

Hack 18 Oct 2010.pdf

Hack 19 Nov 2012.pdf

Hack 19 Nov 2012a.pdf

Hack 21 Nov 2012.pdf

Hack 29 Apr 13 Bird to Brown.pdf

Hack 3 Dec 2012.pdf

Kendrick Dec20June14 FINAL.pdf

Fulton8-4 p21-43.pdf

Goodhart Fax.2010.pdf

Hack 1 Dec 2012.pdf

Hack 10 Dec 2012.pdf

Hack 18 Nov 2012.pdf

Hack 18 Oct 2010.pdf

Hack 19 Nov 2012.pdf

Hack 19 Nov 2012a.pdf

Hack 21 Nov 2012.pdf

Hack 29 Apr 13 Bird to Brown.pdf

Hack 3 Dec 2012.pdf

Kendrick Dec20June14 FINAL.pdf

Fake ymail to Pardo.pdf

SmokingGunKS1(1).pdf

SmokingGunKS3.pdf

I declare under the penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: December 16, 2022.

***64** /s/ James Murtagh, M.D.
James Murtagh, M.D.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 2101 Fourth Avenue, Suite 1500, Seattle, WA 98121

A true and correct copy of the foregoing documents entitled (specify): **DECLARATION OF JAMES MURTAGH, M.D. IN SUPPORT OF PLAINTIFF JAMES MURTAGH, M.D.'S MOTION FOR ISSUANCE OF AN ORDER TO SHOW CAUSE WHY DEFENDANT CLARK BAKER SHOULD NOT BE HELD IN CONTEMPT OF COURT** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF) - Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (date) December 21, 2022, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

- Peter A Arhangelsky parhangelsky@emord.com, jfernandes@emord.com
- David P Bleistein dbleistein@rosen-law.com, robertrosen@rosen-law.com, johnwallace@rosen-law.com, lhiraide@rosen-law.com, mail@rosen-law.com, jim@rosen-law.com, sharan@rosen-law.com, Marcia@rosen-law.com
- Baruch C Cohen bcc@BaruchCohenEsq.com, paralegal@baruchcohenesq.com

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- Sam S Leslie (TR) sleslie@trusteeleslie.com, sleslie@ecf.axosfs.com, trustee@trusteeleslie.com
- Derek Linke ecf@newmanlaw.com
- Alan I Nahmias anahmias@mbnlawyers.com, jdale@mbnlawyers.com
- Douglas M Neistat dneistat@gblawllp.com, mramos@gblawllp.com
- Jessica Ponce office@jponcelaw.com
- United States Trustee (LA) ustpregion16.la.ecf@usdoj.gov

255 East Temple Street

Suite 1534/Ctrm. 1539

Los Angeles, CA 90012

Personal Delivery

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

December 21, 2022

Date

Derek Linke

Printed Name

/s/ Derek Linke

Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

Exhibit 9

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re CLARK WARREN BAKER, Debtor.

JAMES MURTAGH, M.D., Plaintiff,

vs.

CLARK BAKER, Defendant.

BK Case No.: 2:15-bk-20351-BB

Chapter 7

ADV Case No.: 2:15-ap-01535 BB

Filed & Entered December 22, 2022

Honorable Sheri Bluebond

***65** United States Bankruptcy Court

Los Angeles Division

Date: January 31, 2023, Time: 10:00 a.m., Crtm: 1539

Derek Newman (SBN 190467), dn@newmanlaw.com, Derek Linke (SBN 302724), linke@newmanlaw.com, Newman Du Wors LLP, 100 Wilshire Blvd., Suite 700, Santa Monica, CA 90401, (310) 359-8200, Attorneys for Plaintiff James Murtagh, M.D.

ORDER TO SHOW CAUSE RE CONTEMPT

On December 21, 2022, Plaintiff James Murtagh, M.D. filed a Motion for an Order to Show Cause why Defendant Clark Baker Should Not Be Held in Contempt of the Permanent Injunction and Other Orders (“Motion”) (Dkt. 935).

Having considered the Motion and accompanying Memorandum of Points and Authorities, the declarations of James Murtagh, M.D., and exhibits thereto (Dkt. 936), and Derek Linke, and exhibits thereto (Dkt. 937); having provided Baker 21 days to object to the issuance of an order to show cause under LBR 9020-1(b)¹; and having reviewed any such objection:

IT IS HEREBY ORDERED THAT BAKER IS ORDERED TO SHOW CAUSE why he should not be held in contempt for violations of the following Court orders: (1) February 17, 2022 Default Judgment and Permanent Injunction (“Injunction”) (Dkt. 867); (2) September 6, 2018 Order Appointing Neutral Expert (“Neutral Expert Order”) (Dkt. 380); and (3) November 8, 2021, Order Directing Clark Baker to Produce Financial Documents (“Damages Discovery Order”) (Dkt. 810), as follows:

A. Baker's alleged violations of the Injunction

1. The Injunction prohibits Baker from owning websites or domain names targeting Dr. Murtagh

Paragraph 2 of the Injunction prevents, inter alia, Baker from owning, administering, or maintaining online properties such as websites, blogs, or domain names that refer to Dr. Murtagh (Injunction ¶ 2, p. 3:8-13):

¶ 2. Registering, purchasing, owning, selling, or transferring (other than to Dr. Murtagh), administering, or maintaining any online properties including websites, domain names, blogs, social-media accounts, apps, or email accounts that mention or refer to James Murtagh, M.D., or any version, variation on, or misspelling of Dr.

Murtagh's name, or that otherwise reference Dr. Murtagh in any way or form, including by the use of the terms “goon”, “Mo”, “shakedowndoc”, “baddoc”, or “baddocjjm”.

*66 The Motion and supporting documents make a prima facie showing that Baker continues to register, own, administer, or maintain online properties, including websites, domain names, blogs, or social-media accounts which violate the specific and definite requirements of Paragraph 2 of the Injunction, including at the following online properties:

- <http://elmaltes.blogspot.com/2008/08/gallos-egg-investigation-continues.html>
- <https://sites.google.com/site/karristokely/misc/gallo-s-egg>
- <https://www.docin.com/p-388129527.html>
- omsj.org
- <https://m.facebook.com/SearchingforAnswersBlog/posts/clark-bakerfor-those-who've-wondered-about-the-identity-of-snout-we-tracked-him-d/123924284468167/>
- <http://elmaltes.blogspot.com/2008/07/hiv-aids-gallos-egg.html>
- jamesmurtaghmdtruth.com

2. The Injunction prohibits Baker from maintaining or retaining copies of specified websites and content.

Paragraph 5 of the Injunction prevents, inter alia, Baker from maintaining or retaining copies of “Baker's Websites and Other Web Content” (*id.* ¶ 5, p. 4:1-3) which is defined as:

Websites (including, but not limited to jamesmurtaghmdtruth.com, baddocjjm.com, shakedowndoc.com, omsj.org), webpages, files, court filings, exhibits or other attachment thereto, native digital files, electronically stored information (including but not limited to, emails, email attachments, metadata, text messages, text message attachments, text files, digital files of any kind, administrative data and/or system data, directories, messages, photos, Skype data, tweets, retweets, social-media or networking site posts, reposts, blog posts, microblog posts, website posts, website data, directories, file directories, facsimiles, files, folders, file links, hidden files, hidden directories, linked documents, documents, Mp3 or other audio files, any video files, metalinks, hyperlinks, hidden codes, internet search algorithms, PDF files, Microsoft Office documents

(Word, Excel, Access, PowerPoint), compressed files (e.g., ZIP, RAR, 7-ZIP, GZIP), native electronic working files, drafts, drafts of websites, digital text files, swap files, temporary files, digital videos or YouTube files, internet browser data, forensic file data, forensic artifacts, and/or any other content, which is about, refers to, references, or mentions Dr. James Murtagh, M.D. in any form, variation, or misspelling, in any way, including by the use of any moniker, such as “goon”, “mo”, “shakedowndoc”, “baddoc” or “baddocjjm”, which Baker, or anyone who assisted, aided, was hired by, retained by, directed, worked with, or consulted by, Baker, created, posted, obtained, received, purchased, authored, set up, transferred, maintained, or organized, in any way.

This also includes, without limitation, the files listed in Attachment A to the Injunction.

The Motion and supporting documents make a *prima facie* showing that Baker maintains or retains websites and other web content in violation of the specific and definite requirements of Paragraph 5 of the Injunction, including that:

- Baker still owns the domain names jamesmurtaghmdtruth.com and omsj.org, as well as the other online content listed in Section A.1, above, which constitute information and materials Baker has retained and is maintaining about Dr. Murtagh;
- Baker is maintaining and hosting the declaration he obtained from David Bender which contains disparaging and defamatory content about Dr. Murtagh. This declaration has been used by Baker in the past to harm Dr. Murtagh and remains available at a URL located at the OMSJ.org domain name: http://www.omsj.org/temp/Kuritzky*20FINAL*20OctB*20EXHIBITS.pdf.

*67 • Baker continues to maintain a folder or directory named “goons” in his online Dropbox account at which he hosts thousands of files about, referring to, referencing, or mentioning Dr. Murtagh, including without limitation, all of the files listed in Attachment A to the Injunction.

3. Baker was ordered to purge from the internet all of Baker's content about Dr. Murtagh

Within 10 days of issuance of the Injunction, Baker was required to “take all necessary steps to purge and eliminate from the internet” about, referring to, or mentioning Dr. Murtagh, including without limitation content located at

jamesmurtaghmdtruth.com and omsj.org which Baker was involved in creating or publishing (*id.* ¶ 6, p. 4:8-27):

¶ 6. Take all necessary steps to purge and eliminate from the internet any and all traces of any websites (including, but not limited to jamesmurtaghmdtruth.com, baddocjjm.com, shakedowndoc.com, omsj.org), webpages, files, court filings, exhibits or other attachment thereto, native digital files, electronically stored information (including but not limited to, emails, email attachments, metadata, text messages, text message attachments, text files, digital files of any kind, administrative data and/or system data, directories, messages, photos, Skype data, tweets, retweets, social-media or networking site posts, reposts, blog posts, microblog posts, website posts, website data, directories, file directories, facsimiles, files, folders, file links, hidden files, hidden directories, linked documents, documents, Mp3 or other audio files, any video files, metalinks, hyperlinks, hidden codes, internet search algorithms, PDF files, Microsoft Office documents (Word, Excel, Access, PowerPoint), compressed files (e.g., ZIP, RAR, 7-ZIP, GZIP), native electronic working files, drafts, drafts of websites, digital text files, swap files, temporary files, digital videos or YouTube files, internet browser data, forensic file data, forensic artifacts, and/or any other content, which is about, refers to, references, or mentions Dr. James Murtagh, M.D. in any form, variation, or misspelling, in any way, including by the use of any moniker, such as “goon”, “mo”, “shakedowndoc”, “baddoc” or “baddocjjm”, which Baker, or anyone who assisted, aided, was hired by, retained by, directed, worked with, or consulted by, Baker, created, posted, obtained, received, purchased, authored, set up, transferred, maintained, or organized, in any way (collectively, “Baker's Websites and Other Web Content”). Baker must complete the foregoing within 10 days of the issuance of this Order.

The Motion and supporting documents make a *prima facie* showing that Baker did not take any such steps, much less “all necessary steps,” in violation of the specific and definite requirements in Paragraph 6 of the Injunction.

4. Baker was required to ensure that Baker's content about Dr. Murtagh was deindexed from internet search engines

Within 10 days of issuance of the Injunction, Baker was required to “take all necessary steps to ensure” that no part of Baker's Websites and Other Web Content come up in an internet search for Dr. Murtagh (*id.* ¶ 7, p. 5:1-5):

¶ 7. Take all necessary steps to ensure that no part of Baker's Websites and Other Web Content appears or comes up in any internet search engine (e.g., Google, Bing, Yahoo!, DuckDuckGo, YouTube, Facebook, Baidu, Ecosia) search of Dr. Murtagh's name or any moniker for Dr. Murtagh (e.g., "goon", "mo", "baddoc", "baddocjjm", "shakedowndoc"). Baker must complete the foregoing within 10 days of the issuance of this Order.

*68 The Motion and supporting documents make a prima facie showing that Baker has not taken any steps, much less "all necessary steps," in violation of the specific and definite requirements of Paragraph 7 of the Injunction.

5. Baker was required to transfer to Dr. Murtagh all domain names and files for Baker's websites referencing Dr. Murtagh

Within 10 days of issuance of the Injunction—*i.e.* no later than February 27, 2022, Baker was required to (*id.* ¶ 8, p. 5:6-16):

¶ 8. Immediately forfeit and transfer to Plaintiff within 10 days of the issuance of this Order the following:

a. the domain names for Baker's Websites that include Dr. Murtagh's name in any form, variation, or misspelling, in any way, including any moniker, such as "goon", "mo", "shakedowndoc", "baddoc", or "baddocjjm";

b. all files about, concerning, or referencing Dr. Murtagh, in anyway, that Baker, any agent or representative of Baker, or anyone acting on Baker's behalf posted on the internet or on any website, whether or not password protected, including, but not limited to all files listed in Attachment A hereto; and

c. every file that Baker, any agent or representative of Baker, or anyone acting on Baker's behalf, ever saved, uploaded, or stored in any "goons" directory or folder.

The Motion and supporting documents make prima facie showings that Baker (1) did not transfer any such domain names or files to Dr. Murtagh within 10 days of issuance, and (2) has never forfeited such files, in violation of the specific and definite requirements of Paragraph 8 of the Injunction

6. Baker was required to notify the Court and Dr. Murtagh's counsel if Baker was unable to complete the directives under Paragraphs 6, 7, or 8 of the Injunction.

Within 10 days of issuance of the Injunction, Baker was required to notify the Court and Dr. Murtagh's counsel if he was unable to complete any of the directives identified in Paragraphs 6, 7, or 8 of the Injunction, which are addressed immediately above in order (*id.* ¶ 9, p. 5:17-19):

¶ 9. If any directive set forth in Paragraphs 6, 7 or 8 above cannot be completed, Baker must notify the Court and Designated Plaintiff's Counsel in writing by identifying the specific directive and the reason it cannot be completed.

The Motion and supporting documents make a prima facie showing that Baker has never notified the Court in writing that he was unable to complete the directives in Paragraphs 6, 7, or 8 of the Injunction, in violation of the specific and definite requirements of Paragraph 9 of the Injunction.

7. Baker was required to copy Dr. Murtagh's counsel on any communications with a third-party provider.

Baker was required to copy Dr. Murtagh's counsel on certain third-party communications made in an effort to comply with the Injunction (*id.* ¶ 13, p. 6:18-24):

¶ 13. Baker's communications. Any written communication by Baker (or any agent or representative of Baker, or anyone acting on Baker's behalf), with any Third-Party Provider concerning any part of this Order, shall be copied (if by email, on the same email) to Designated Plaintiff's Counsel. Baker shall further inform Designated Plaintiff's Counsel by email of the substance of any verbal communication Baker (or any agent or representative of Baker, or anyone acting on Baker's behalf) has with any Third-Party Provider concerning any aspect of this Order within 12 hours of said verbal communication.

*69 The Motion and supporting documents make a prima facie showing that Baker did not copy Dr. Murtagh's counsel on any written communication and did not inform Dr. Murtagh's counsel by email of the substance of any such verbal communications in violation of the specific and definite requirements of Paragraph 13 of the Injunction.

Under LBR 9020-1(c)(1), Baker must file a written explanation, if there is such an explanation, why he should not be held in contempt for the foregoing alleged violations of Paragraphs 2, 3, 5, 6, 7, 8, 12, and 13 of Injunction.

B. Baker's alleged violations of the Court's Damages Discovery Order.

On November 8, 2021, the Court issued its Damages Discovery Order. (Dkt. 810) The Damages Discovery Order included questions about Baker's finances and related document requests, along with specific instructions for Baker's responses, including that his response must include "all responsive Documents available to You, including any Documents in Your possession, custody, or control." (*Id.*, Schedule 1 § B, ¶ 4.)

The Motion and supporting documents make a prima facie showing that Baker reviewed and understood the instructions in the Damages Discovery Order and was aware that they applied to his responses, including that he understood that he was required to "produce all responsive documents that were available to me including any of the documents that were in my possession, custody, and control at the time."

The Motion and supporting documents make a prima facie showing that Baker intentionally limited his search under the Damages Discovery Order to search only information about financial institutions in existing bookmarks in his web browser and that he took no other steps to determine whether his response was complete.

The Motion and supporting documents make a prima facie showing that Baker's written response to the Damages Discovery Order identified multiple bank accounts, yet he failed to produce a majority of the statements for those accounts across the time period specified in the Damages Discovery Order and took no steps whatsoever to obtain missing statements for production. The majority of his banking records were not produced, including statements from Bank of America accounts ending in 1650, 2514, 6467, 9291 and USAA accounts ending in 2924 and 4538.

Under LBR 9020-1(c)(1), Baker must file a written explanation, if there is such an explanation, why he should not be held in contempt for the foregoing alleged violations of the Damages Discovery Order.

C. Baker's alleged violations of the Neutral Expert Order.

The Court appointed a Neutral Expert to collect Baker's data. Baker was ordered to "cooperate with all activities of the Neutral Expert" and "provide access to all locations, devices, Data and information promptly upon request therefor from the Neutral Expert." (Dkt. 380 ¶ 12.) The term "Data" was

defined to include, inter alia, "any and all documents, native digital files, electronically stored information (including but not limited to, emails (including Cc's, Bcc's, forwards), email attachments, [and] metadata...." (*id.* at p. 11.) More specifically, Baker was required to "supply the Neutral Expert with any and all information necessary for the Neutral Expert to obtain access to Baker's electronic information, email accounts, websites, data storage locations, and any other repository of any of the Data." (*Id.* ¶ 12.)

***70** Baker's court-ordered cooperation included providing the Neutral Expert with: (1) "functioning and effective physical and electronic access to Baker's Devices and Baker's Data at all Data Locations"; (*Id.* ¶ 12(a)) and (2) "usernames, passwords and/or other access codes and/or answers to security questions as may be necessary to access data" (*Id.* ¶ 12(d))

The Motion and supporting documents make a prima facie showing that Baker intentionally concealed and withheld, with his counsel's assistance, the existence of and access to, Baker's Protonmail account which he created for the express purpose of avoiding discovery in this proceeding.

Under LBR 9020-1(c)(1), Baker must file a written explanation, if there is such an explanation, why he should not be held in contempt for the foregoing alleged violations of the Neutral Expert Order.

D. Order to Show Cause re Contempt Sanctions

Baker must show cause why, based on the foregoing alleged violations of its orders, the Court should not:

1. hold Baker in civil contempt and impose monetary sanctions to reimburse Plaintiff for his attorneys' fees and costs; and
2. hold Baker in civil contempt and issue further orders for the purpose of compelling compliance with the Court's orders, including incarceration.

E. Hearing Date and Deadline for Baker's Written Response

1. Baker shall appear before this Court at a hearing at 10:00 a.m. on January 31, 2023, in the above-captioned courtroom (the "Hearing") to show cause, if any, why the Court should not enter an order adjudging Baker to be in contempt for his

violations of the Injunction, Damages Discovery Order, and/or Neutral Expert Order.²

2. On or before January 17, 2023, Baker shall file and serve a written explanation, if there is an explanation, why he should not be held in contempt of court for the alleged violations as follows:

3. Injunction Paragraph 2 Required Explanation. Baker's written explanation, if there is an explanation, why he should not be held in contempt of court for the alleged violations of Paragraph 2 of the Injunction must include, at a minimum, the following:

(a) A detailed explanation, if there is an explanation, of all of the efforts Baker undertook in an attempt to comply with the prohibition against Baker registering, purchasing, owning, selling, or transferring (other than to Dr. Murtagh), administering, or maintaining any online properties including websites, domain names, blogs, social-media accounts, apps, or email accounts that mention or refer to James Murtagh, M.D. under Paragraph 2 of the Injunction;

(b) A detailed explanation, if there is an explanation, as to why Baker should not be held in contempt for violating Paragraph 2 of the Injunction as a result of registering, purchasing, owning, selling, or transferring (other than to Dr. Murtagh), administering, or maintaining each of the following online properties:

- <http://elmaltes.blogspot.com/2008/08/gallos-egg-investigation-continues.html>
 - <https://sites.google.com/site/karリストkely/misc/gallo-s-egg>
 - <https://www.docin.com/p-388129527.html>
 - omsj.org
 - <https://m.facebook.com/SearchingforAnswersBlog/posts/clark-bakerfor-those-who've-wondered-about-the-identity-of-snout-we-tracked-him-d/123924284468167/>
- *71 • <http://elmaltes.blogspot.com/2008/07/hiv-aids-gallos-egg.html>
- jamesmurtaghmdtruth.com

- http://www.omsj.org/temp/Kuritzky*20FINAL*20OctB*20EXHIBITS.pdf

(c) A detailed explanation, if there is an explanation, as to any justification as to why Baker failed to comply with the prohibition against registering, purchasing, owning, selling, or transferring (other than to Dr. Murtagh), administering, or maintaining any online properties including websites, domain names, blogs, social-media accounts, apps, or email accounts that mention or refer to James Murtagh, M.D., under Paragraph 2 of the Injunction.

4. Injunction Paragraph 5 Required Explanation. Baker's written explanation, if there is an explanation, why he should not be held in contempt of court for the alleged violations of Paragraph 5 of the Injunction must include, at a minimum, the following:

(a) A detailed explanation, if there is an explanation, of all of the efforts Baker undertook in an attempt to comply with the prohibition against Baker maintaining or retaining copies of Baker's Websites and Other Web Content, or any portion thereof, including the files listed in Attachment A to the Injunction, under Paragraph 5 of the Injunction;

(b) A detailed explanation, if there is an explanation, as to why Baker should not be held in contempt for violating Paragraph 5 of the Injunction as a result of maintaining or retaining each of the following:

- <http://elmaltes.blogspot.com/2008/08/gallos-egg-investigation-continues.html>
 - <https://sites.google.com/site/karリストkely/misc/gallo-s-egg>
 - <https://www.docin.com/p-388129527.html>
 - omsj.org
 - <https://m.facebook.com/SearchingforAnswersBlog/posts/clark-bakerfor-those-who've-wondered-about-the-identity-of-snout-we-tracked-him-d/123924284468167/>
- <http://elmaltes.blogspot.com/2008/07/hiv-aids-gallos-egg.html>
- jamesmurtaghmdtruth.com

- [http://www.omsj.org/temp/
Kuritzky*20FINAL*20OctB*20EXHIBITS.pdf](http://www.omsj.org/temp/Kuritzky*20FINAL*20OctB*20EXHIBITS.pdf)
 - The folder or directory named “goons” stored in Baker's Dropbox account containing over 20,000 files.
- (c) A detailed explanation, if there is an explanation, as to any justification as to why Baker failed to comply with the prohibition against maintaining or retaining copies of Baker's Websites and Other Web Content, or any portion thereof, including the files listed in Attachment A to the Injunction, under Paragraph 5 of the Injunction.
- 5. Injunction Paragraph 6 Required Explanation.** Baker's written explanation, if there is an explanation, why he should not be held in contempt of court for the alleged violations of Paragraph 6 of the Injunction must include, at a minimum, the following:
- (a) A detailed explanation, if there is an explanation, of all of the efforts Baker undertook in an attempt to comply with the requirement that he take all necessary steps to purge and eliminate from the internet any and all traces of Baker's Websites and Other Web Content, as required under Paragraph 6 of the Injunction;
 - (b) A detailed explanation, if there is an explanation, as to why Baker should not be held in contempt for violating Paragraph 6 of the Injunction as a result of failing to take all necessary steps to purge and eliminate each of the following:
 - *72 • <http://elmaltes.blogspot.com/2008/08/gallos-egg-investigation-continues.html>
 - <https://sites.google.com/site/karristokely/misc/gallo-s-egg>
 - <https://www.docin.com/p-388129527.html>
 - omsj.org
 - <https://m.facebook.com/SearchingforAnswersBlog/posts/clark-bakerfor-those-who've-wondered-about-the-identity-of-snout-we-tracked-him-id/123924284468167/>
 - <http://elmaltes.blogspot.com/2008/07/hiv-aids-gallos-egg.html>
 - jamesmurtaghmdtruth.com
- [http://www.omsj.org/temp/
Kuritzky*20FINAL*20OctB*20EXHIBITS.pdf](http://www.omsj.org/temp/Kuritzky*20FINAL*20OctB*20EXHIBITS.pdf)
 - The folder or directory named “goons” stored in Baker's Dropbox account containing over 20,000 files
- (c) A detailed explanation, if there is an explanation, as to any justification as to why Baker failed to take all necessary steps to purge and eliminate from the internet any and all traces of Baker's Websites and Other Web Content, as required under Paragraph 6 of the Injunction.
- 6. Injunction Paragraph 7 Required Explanation.** Baker's written explanation, if there is an explanation, why he should not be held in contempt of court for the alleged violations of Paragraph 7 of the Injunction must include, at a minimum, the following:
- (a) A detailed explanation, if there is an explanation, of all of the efforts Baker undertook in an attempt to comply with the requirement that he take all necessary steps to ensure that no part of Baker's Websites and Other Web Content appears or comes up in any internet search engine, as required under Paragraph 7 of the Injunction;
 - (b) For each internet search engine with respect to which Baker claims to have made efforts in relating to Paragraph 7, identification of the internet search engine, a description of such efforts with respect to such internet search engine, the identification of all persons or entities, including all available contact information and title, if applicable, with whom Baker communicated in connection with such efforts, and the dates of all such efforts and communications; and
 - (c) A detailed explanation, if there is an explanation, as to any justification as to why Baker failed to take all necessary steps to ensure that no part of Baker's Websites and Other Web Content appears or comes up in any internet search engine, as required under Paragraph 7 of the Injunction.
- 7. Injunction Paragraph 8 Required Explanation.** Baker's written explanation, if there is an explanation, why he should not be held in contempt of court for the alleged violations of Paragraph 8 of the Injunction must include, at a minimum, the following:
- (a) Identification of each domain name for Baker's Websites that include Dr. Murtagh's name in any form,

variation, or misspelling, in any way, that Baker failed to forfeit and transfer to Dr. Murtagh as required by Paragraph 8(a) of the Injunction, including, without limitation, jamesmurtaghmdtruth.com and omsj.org;

(b) For each such domain name Baker failed to forfeit and transfer to Dr. Murtagh as required by Paragraph 8(a) of the Injunction, a detailed explanation of Baker's efforts to forfeit and transfer such domain name to Dr. Murtagh;

(c) A detailed explanation, if there is an explanation, as to any justification as to why Baker failed to forfeit and transfer to Dr. Murtagh any such domain name as required by Paragraph 8(a) of the Injunction;

*73 (d) Identification, including by file name and specific online location, including, as applicable, the internet address or hosting provider, of all files about, about, concerning, or referencing Dr. Murtagh, in anyway, that Baker, any agent or representative of Baker, or anyone acting on Baker's behalf posted on the internet or on any website, whether or not password protected, including, but not limited to all files listed in Attachment A to the injunction, that Baker failed to forfeit and transfer to Dr. Murtagh as required by Paragraph 8(b) of the Injunction;

(e) For each such online file that Baker failed to forfeit and transfer to Dr. Murtagh as required by Paragraph 8(b) of the Injunction, a detailed explanation of Baker's efforts to forfeit and transfer such file to Dr. Murtagh;

(f) A detailed explanation, if there is an explanation, as to any justification as to why Baker failed to forfeit and transfer to Dr. Murtagh any such online files as required by Paragraph 8(b) of the Injunction;

(g) Identification, including by file name and specific online location, including, as applicable, the internet address or hosting provider, of every file that Baker, any agent or representative of Baker, or anyone acting on Baker's behalf, ever saved, uploaded, or stored in any "goons" directory or folder, that Baker failed to forfeit and transfer to Dr. Murtagh as required by Paragraph 8(c) of the Injunction; and

(h) For each such file in a "goons" directory or folder that Baker failed to forfeit and transfer to Dr. Murtagh as required by Paragraph 8(c) of the Injunction, a detailed explanation of Baker's efforts to forfeit and transfer such file to Dr. Murtagh; and

(i) A detailed explanation, if there is an explanation, as to any justification as to why Baker failed to forfeit and transfer to Dr. Murtagh any such file in a "goons" directory or folder as required by Paragraph 8(c) of the Injunction.

10. Injunction Paragraph 12 Explanation. Baker's written explanation, if there is an explanation, why he should not be held in contempt of court for the alleged violations of Paragraph 12 of the Injunction must include, at a minimum, the following:

(a) Identification of each directive under Paragraph 6, 7, or 8 of the Injunction which Baker failed to complete;

(b) For each such uncompleted directive, a detailed explanation of Baker's efforts to comply with such directive and the reason if could not be completed; and

(c) For each such uncompleted directive, a detailed explanation, if there is an explanation, as to any justification as to why Baker failed to notify the Court and Dr. Murtagh's counsel in writing by identifying the specific directive and the reason it could not be completed as required under Paragraph 9 of the Injunction.

11. Injunction Paragraph 13 Explanation. Baker's written explanation, if there is an explanation, why he should not be held in contempt of court for the alleged violations of Paragraph 13 of the Injunction must include, at a minimum, the following:

(a) Identification of all persons or entities, including all available contact information and title, if applicable, associated with a Third Party Provider, with whom Baker (or any agent or representative of Baker or anyone acting on Baker's behalf) communicated with in writing or verbally concerning the Injunction;

(b) For each such person or entity, a detailed description of the dates of such communication, the means of such communication (i.e. whether written or verbal), and the substance of such communication; and

(c) A detailed explanation, if there is an explanation, as to any justification as to why Baker failed to copy Dr. Murtagh's counsel on such communications (if written) or to inform Dr. Murtagh's counsel of the substance of the

communication within 12 hours (if verbal) as required under Paragraph 13 of the Injunction.

***74 12. Discovery Order Required Explanation.** Baker's written explanation, if there is an explanation, why he should not be held in contempt of court for the alleged violations of the Damages Discovery Order must include, at a minimum, the following:

- (a) A detailed explanation of all of the efforts Baker undertook in an attempt to comply with the requirement that he produce all statements for each of the bank or other financial accounts listed in his written response to the Damages Discovery Order, including, without limitation, statements from Bank of America accounts ending in 1650, 2514, 6467, 9291 and USAA accounts ending in 2924 and 4538;
- (b) Identification of all persons or entities, including all available contact information and title, if applicable, with whom Baker exchanged communications in an effort to obtain records, including without limitation bank or other financial statements, he was required to produce under the Damages Discovery Order; and
- (c) Identification of all bank or other financial accounts that Baker failed to identify in his written response to the Damages Discovery Order.

13. Neutral Expert Order Required Explanation. Baker's written explanation, if there is an explanation, why he should not be held in contempt of court for the alleged violations of the Neutral Expert Order must include, at a minimum, the following:

- (a) An identification of each Protonmail account held or controlled by Baker, including the email address, any aliases used with that address, the date the account or address was created, and if applicable, any pseudonym Baker used in connection with creation or use of each such account or address;
- (b) An explanation as to why Baker did not supply the Neutral Expert with information necessary to access Baker's Protonmail account or accounts;
- (c) An explanation as to why Baker did not disclose the Protonmail account or accounts to the Court in any of the compliance declarations or other filings made in response to previous Court Orders; and

(d) An identification of each other email account, website, data storage location, or any other repository of Baker's Data that Baker failed to provide to the Neutral Expert, including, as may be applicable, the email or website address, any aliases used with that address, the date the account, address, or website was created, and if applicable, any pseudonym Baker used in connection with creation or use of each such account, address, or website.

14. If Baker files such written explanation, Dr. Murtagh may file any responsive written submission no later than **January 24, 2023**.

15. At the Hearing, the Court may treat as true any uncontested facts established by declaration and limit testimony to controverted facts only.

IT IS SO ORDERED.

Date: December 22, 2022

/s/ Sheri Bluebond

Sheri Bluebond

United States Bankruptcy Judge

Exhibit 10

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: CLARK WARREN BAKER, Debtor(s),

JAMES MURTAGH, M.D., Plaintiff(s),

vs.

CLARK WARREN BAKER, Defendant(s).

Case No.: 2:15-bk-20351-BB

Chapter: 7

Adversary No.: 2:15-ap-01535-BB

Filed & Entered March 28, 2023

Date: March 28, 2023, Time: 10:00 AM, Location:
Courtroom 1539 and via Zoom for Government

**ORDER MODIFYING AND CORRECTING INTERIM
ORDER RE CONTEMPT SANCTIONS AGAINST
CLARK BAKER**

***75** The Court conducted a continued hearing on its December 22, 2022 Order to Show Cause re Contempt [Docket No. 939] at 10:00 a.m. on March 28, 2023 in Courtroom 1539 of the above-entitled Court. Appearances were as noted on the record at the time of hearing.

The Court having entered its “Interim Order re Contempt Sanctions Against Clark Baker” [Docket No. 975] on March 22, 2023 (the “Interim Order”); counsel for plaintiff, James Murtagh, M.D. (“Murtagh”), having brought to the Court’s attention a significant error in the Interim Order; and counsel for defendant Clark Baker (“Baker”) having advised the Court that it would be difficult for her to attend a hearing on the date the Court unilaterally selected in the Interim Order for a further hearing, and other good cause appearing therefor,

IT IS ORDERED that the Interim Order is hereby modified and corrected in the following respects:

1. Lines 26 and 27 of paragraph 1, commencing on page 2 of the Interim Order, are hereby corrected to read as follows: “**1. Baker** is hereby held in contempt of this Court for willfully violating the Injunction by:”; and
2. Paragraph 5 on page 7 of the Interim Order is hereby deleted and replaced with the following: “**On June 13, 2023**, at 2:00 p.m., the Court will conduct a continued hearing on the OSC to review the extent to which Baker has complied with this order and assess what further steps should be taken in order to ensure Baker’s compliance with the Injunction.”

IT IS FURTHER ORDERED that, except as expressly set forth to the contrary herein, all terms and provisions of the the Interim Order remain in full force and effect.

Date: March 28, 2023

/s/ Sheri Bluebond

Sheri Bluebond

United States Bankruptcy Judge

Exhibit 11

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re CLARK WARREN BAKER Debtor.

JAMES MURTAGH, M.D., Plaintiff,

CLARK WARREN BAKER, Defendant.

Bk. Case No.: 2:15-bk-20351-BB

Chapter 7

Adv. Case No. 2:15-AP-01535-BB

Date: January 31, 2023, Time: 10:00 a.m., Ct.Rm: 1539

JESSICA PONCE (SBN 284043), LAW OFFICES OF JESSICA PONCE, 3255 Wilshire Blvd., Suite 1801, Los Angeles, CA 90010, Tel. (213) 263-2911, Fax (213) 403-5737, Attorney for Debtor, CLARK BAKER

DEFENDANT CLARK BAKER'S SUPPLEMENTAL DECLARATION IN RESPONSE TO OSC RE CONTEMPT

SUPPLEMENTAL DECLARATION OF CLARK BAKER

I, Clark Warren Baker, declare:

1. If called as a witness I could competently testify to the following matters, which are of my own personal knowledge.
2. This Declaration is made in further response to the OSC re Contempt set for hearing on January 31, 2023. This declaration provides additional information and addresses matters which were not previously directly addressed.

Elmaltes ... gallos-egg

3. Declarant does not own, administer or maintain “elmaltes.blogspot.com/2008/08/gallos-egg-investigation-continues.html”. Declarant did not register, purchase, sell or transfer this website.

a. This website is a cross-post by a third party from my original post in 2008. I have long-deleted the original post and URL but the author of this blog had re-posted my original post back in 2008. I do not have any control over the third-party website content.

b. After receipt of this OSC, Declarant did a search on the website on Google which reported that the operator of this blog is someone named Manu located in Europe. Declarant does not know Manu and does not have any affiliation with him or the website/blog.

*76 c. Declarant left a comment on the page asking Manu to contact him on January 7, 2023 in an effort to have the page removed. Declarant has not received a response as of the writing of this Declaration.

Karristokely ... gallo-s-egg

4. Declarant does not own, administer or maintain “<https://sites.google.com/site/karristokely/misc/gallo-s-egg>.” Declarant did not register, purchase, sell or transfer this website.

a. This site is a posting by Karri Stokely (who died between 2010-2012) on WordPress in 2008. This was a reposting of Declarant's original content without Declarant's cooperation or participation. Declarant does not have any access to the website or any ability to delete the posting.

Docin.com

5. Murtagh makes the bald and unsupported allegation that Declarant “maintains an online repository of some of my personal correspondence located at <https://docin.com/p-388129527.html>”.

a. To be clear, Declarant did not establish, does not maintain an “online repository,” and has no affiliation with this website. Declarant does not own, administer or maintain this website.

b. Declarant did not register, purchase, transfer or sell this website. From Declarant's search, it is registered to Gang Mai in Beijing.

OMSJ.org

6. OMSJ.org does not make a single mention of Murtagh or anything related to Murtagh in any section of the website.

Facebook

7. Declarant does not have a Facebook account and does not maintain any Facebook pages or posts.

Blogpost

8. Murtagh complains about a blogpost which he claims was posted by Baker at Elmaltes.blogspot.com/2008/07/hiv-aids-gallos-egg.html. As noted above, Declarant does not own, administer or maintain this website. Declarant did not register, purchase, sell or transfer this website.

a. This website is a cross-post by a third party from Baker's original post in 2008. Baker has long-deleted the original post and URL but the author of this blog had re-posted Baker's original post. Baker does not have any control over the third-party website content.

b. After receipt of this OSC, Declarant did a search on the website on Google which reported that the operator of this blog is someone named Manu located in Europe. Declarant does not know Manu and does not have any affiliation with him or the website/blog.

c. Declarant left a comment on the page asking Manu to contact him on January 7, 2023 in an effort to have the page removed. Declarant has not received a response as of the writing of this Declaration.

Jamesmurtaghmdtruth.org

9. Declarant's continued ownership of the domain name jamesmurtaghmdtruth.org is due to Murtagh and Murtagh's counsel's lack of cooperation in coordinating the transfer.

a. In May 2022, Declarant submitted his Declaration of Compliance to Murtagh and counsel, explaining “Declarant has tried to transfer the single remaining URL owned by Declarant that contains Dr. Murtagh's name in any form, variation, or misspelling, in any way... (as further described in Par. 8.a.), namely,

“jamesmurtaghmdtruth.com” (Declarant has done a search for this name and it does not appear on the internet). When Declarant attempted to transfer the URL, Declarant was instructed that he would need to unlock the URL and, after approximately 48 hours, Declarant can send it to the specified destination. This URL will not let Declarant transfer without specifying a destination account.

*77 “Declarant has requested a transferee name, telephone number and email address with whom Declarant can coordinate and complete the transfer from Dr. Murtagh in May 2022. Declarant will initiate the transfer upon receipt of transferee's said information.” (Baker May 2022 Declaration of Compliance.) A true and correct copy of Baker's Declaration of Compliance is attached hereto as Exhibit 1.

- b. Declarant cannot comply with this order without cooperation by Murtagh or Murtagh's counsel.

David Bender

10. The allegation regarding David Bender declaration provided a link that went to an “Error 404” site.

- a. Nonetheless, Declarant does not maintain an online copy of the 2014 declaration from Bender hosted at the OMSJ.org domain name.

Retaining Specified Websites

11. Declarant has not maintained/retained copies of the specified websites and content nor have I maintained or retained copies.

- a. Neither of the websites cited by Murtagh contain any information or copies related to Murtagh in the backend or on the pages themselves.
- b. The link provided by Murtagh regarding the David Bender Declaration goes to “Error 404 - Not Found”.
- c. Declarant is not maintaining the David Bender Declaration in any other location.

Purging Content from Internet

12. Declarant has purged and eliminated all of his original content from the internet in accordance with the Judgment.

a. Declarant has spent hours online trying to comply combing through the internet and Google searching through many, many, pages.

b. As explained above, Declarant's original content has been re-posted by third parties, without my knowledge or consent.

13. De-indexing from search engines

- a. Declarant has de-indexed all of his previously-posted content related to Murtagh from Google.
- b. Declarant is not able to de-index anything that has been indexed by third parties that he has no affiliation with or control over.

14. Discovery Order

- a. Declarant closed his Bank of America accounts ending in 1650, 2514, 6467, 9291 between 2016-2019. Declarant accessed the statements he was able to locate and turned them over to Murtagh.
- b. Declarant provided his statements for his two USAA accounts 2924 and 4538.

15. Proton mail Account

- a. Mr. Linke on behalf of Dr. Murtagh makes the following conclusory and highly misleading accusation that with respect to the creation of a Protonmail email account, “... he recently admitted was intended to prevent it from being discovered in this proceeding.”
- b. The transcript of his deposition actually said that he set the account up to send his attorney-client communications.

I declare under the foregoing is true and correct under the penalty of perjury under the laws of the state of California. Executed this January 24, 2023 in Vero Beach, Florida.

Dated: January 24, 2023

/s/ Clark Baker

CLARK BAKER

EXHIBIT 1

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re CLARK WARREN BAKER, Debtor.

JAMES MURTAGH, M.D., Plaintiff,

vs.

CLARK WARREN BAKER, Defendant.

Bk. Case No.: 2:15-bk-20351-BB

Chapter 7

Adv. Case No. 2:15-AP-01535-BB

JESSICA PONCE (SBN 284043), LAW OFFICES OF JESSICA PONCE, 3255 Wilshire Blvd., Suite 1801, Los Angeles, CA 90010, Tel. (213) 362-2911, Fax (213) 403-5737, Attorney for Debtor, CLARK BAKER

DEFENDANT CLARK BAKER'S DECLARATION OF COMPLIANCE

DECLARATION OF CLARK BAKER

I, Clark Warren Baker, declare:

1. If called as a witness I could competently testify to the following matters, which are of my own personal knowledge.

***78** 2. This Declaration is made to confirm Declarant's compliance with the Default Judgment and Permanent Injunction (U.S. Bankruptcy Court, Central District of California, Case No. 2:15-ap-01535-BB, Document Number 867). The Paragraph numbers and Page numbers herein are provided for ease of reference and coordinate with said Default Judgment and Permanent Injunction.

3. With respect to Paragraph 1, Page 2, Declarant has not engaged in any activity which uses, mentions, or refers to James Murtagh, M.D., or any variation of that name,

moniker, etc. (as further detailed in Paragraph 1 on Page 2 of the Default Judgment and Permanent Injunction), in any manner described in Paragraph 1.a. (internet, websites, etc.) or Paragraph 1.b. (any written or verbal communications with any health care facility, recruiter of medical personnel, etc.).

4. With respect to Paragraph 2, Page 3, Declarant has tried to transfer the single remaining URL owned by Declarant that contains Dr. Murtagh's name in any form, variation, or misspelling, in any way... (as further described in Par. 8.a.), namely, "jamesmurtaghmdtruth.com" (Declarant has done a search for this name and it does not appear on the internet). When Declarant attempted to transfer the URL, Declarant was instructed that he would need to unlock the URL and, after approximately 48 hours, Declarant can send it to the specified destination. This URL will not let Declarant transfer without specifying a destination account. Declarant respectfully requests a transferee name, telephone number and email address with whom Declarant can coordinate and complete the transfer. Declarant will initiate the transfer upon receipt of transferee's said information.
5. With respect to Paragraph 3, Page 3, Declarant is complying with the court's order not to cyberstalk or cyberharass Dr. Murtagh (including pinging his mobile phone, or any other activity that traces or attempts to trace his location; hacking into or attempting to hack into any computer, mobile phone, iPad, or other electronic device, etc., as fully described in Paragraph 3 on Page 3 of the Default Judgment and Permanent Injunction) and will continue to not do so.
6. With respect to Paragraph 4, Page 3, Declarant has not, "as a means of undermining or evading any provision of this Order"... offered services or obtained or brokered the services of any other person(s), or instructing, directing or encouraging any other person(s), to create or post on any website, social media account, etc. (as fully described in Paragraph 4 of Page 3 of the Default Judgment and Permanent Injunction) ... of Dr. Murtagh, or any online account owned or registered by Dr. Murtagh or under Dr. Murtagh's name.
7. With respect to Paragraph 5, Page 4, with the exception of the documents now placed into the Dropbox described below, Declarant affirms that he does not retain or maintain matter

referred to in this item number, of the contents placed into a DropBox: <https://www.dropbox.com/sh/lzmwnirsxvtlj2v/AACn90Ggi9XZboWy0v0K0iE1a?dl=0>

8. With respect to Paragraph 6, Page 4, Declarant has taken all steps to purge and eliminate from the internet any and all traces of any websites, etc. (as further described in Paragraph 6 of Page 4 of the Default Judgment and Permanent Injunction). Attached hereto as Group Exhibit A is a true and correct copy of screenshots that I took of my search efforts to confirm.

*79 9. With respect to Paragraph 7, Page 5, Declarant has taken all steps to ensure that no part of my websites and other web content is deleted and does not appear in search engine results. Attached hereto as Group Exhibit A is a true and correct copy of screenshots from Google search confirming that none of my websites appear in said search.

10. With respect to Paragraph 8.a., Page 5, Declarant has tried to transfer the single remaining URL owned by Declarant that contains Dr. Murtagh's name in any form, variation, or misspelling, in any way... (as further described in Par. 8.a.). The only such item is a single URL owned by Declarant is "jamesmurtaghmdtruth.com" (Declarant has done a search for this name and it does not appear on the internet). When Declarant attempted to transfer the URL, Declarant was instructed that he would need to unlock the URL and, after approximately 48 hours, Declarant can send it to the specified destination. This URL will not let Declarant transfer without specifying a destination account. Declarant respectfully requests a transferee name, telephone number and email address with whom Declarant can coordinate and complete the transfer. Declarant will initiate the transfer upon receipt of transferee's said information.

11. With respect to Paragraph 8.b., Page 5, with the exception of the documents now placed into the Dropbox described below. Declarant affirms that he does not retain or maintain matter referred to in this item number, of the contents placed into a DropBox: <https://www.dropbox.com/sh/lzmwnirsxvtlj2y/AACn90Ggj9XZboWy0v0K0iE1a?dl=0>

12. With respect to Paragraph 8.c., Page 5, with the exception of the documents now placed into

the Dropbox described below, Declarant affirms that he does not retain or maintain matter referred to in this item number, of the contents placed into a DropBox: <https://www.dropbox.com/sh/lzmwnirsxvtlj2y/AACn90Ggj9XZboWy0v0K0iE1a?dl=0>

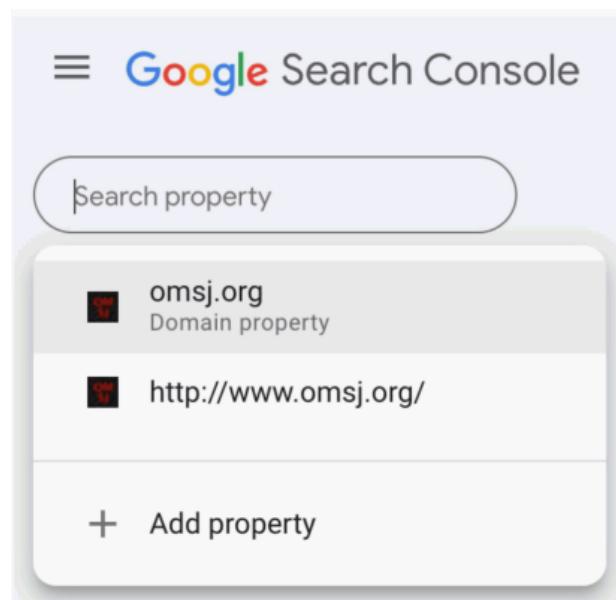
13. Note: Declarant does not host any of the items listed in Attachment A.

I declare that the foregoing is true and correct under the penalty of perjury, under the laws of the United States of America. Executed this May 19, 2022 in Silverton, Colorado.

/s/ Clark Warren Baker
CLARK WARREN BAKER,

Declarant

Group Exhibit A



No matching property

+ Add property

Submitted sitemaps

Sitemap	Type	Submitted	Last read	Status	Discovered URLs
http://www.omsj.org/sitemap.xml	Sitemap index	Jul 25, 2013	Oct 24, 2017	Couldn't fetch	0

Rows per page: 10 | 1-1 of 1 | < >

Add New Tag

Name: murtagh

The name is how it appears on your site.

Slug: murtagh

The "slug" is the URL-friendly version of the name. It is usually all lowercase and contains only letters, numbers, and hyphens.

Description:

Tags deleted.

Bulk actions: Apply

Name	Description	Slug	Count	ID	Hits

Search Tags: murtagh

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

3255 Wilshire Blvd., Ste. 1801, Los Angeles, CA 90010

A true and correct copy of the foregoing document entitled (*specify*): **Defendant Clark Baker's Supplement Declaration in Response to OSC Re Contempt**

will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*)

***80** 1/25/2023 I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that

the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

#Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (*date*) 01/25/2023, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Honorable Judge Sherri Bluebond
255 East Temple Street, Room 1539
Los Angeles, CA 90012

Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL(state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

01/25/2023

Date

Pam Pantell

Printed Name

/s/ Pam Pantell

Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

Bk. Case No.: 2:15-bk-20351-BB

Chapter 7

Adv. Case No. 2:15-AP-01535-BB

Date: June 13, 2023, Time: 10:00 a.m., Ct.Rm: 1539

SERVICE LIST

In re Clark Warren Baker, Debtor - Defendant

David P. Bleistein
Rosen & Associates PC
Email: dbleistein@rosen-law.com

Michael J. Conway
Greenberg & Bass LLP
Email: MConway@gblawllp.com

Lisa Hiraide
Rosen & Associates PC
Email: lhiraide@rosen-law.com

Derek Linke
Newman Du Wors LLP
Email: linke@newmanlaw.com

Douglas M. Neistat
G&B LAW, LLP
Email: dneistat@gblawllp.com

Derek A. Newman
Newman Du Wors LLP
newman@newmanlaw.com

Exhibit 12

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re CLARK WARREN BAKER, Debtor.

JAMES MURTAGH, M.D., Plaintiff,

vs.

CLARK WARREN BAKER, Defendant.

JESSICA PONCE (SBN 284043), **LAW OFFICES OF JESSICA PONCE**, 3255 Wilshire Blvd., Suite 1801, Los Angeles, CA 90010, Tel. (213)263-2911, Fax (213) 403-5737, office@iponcelaw.com, Attorney for Debtor, CLARK BAKER

DEFENDANT CLARK BAKER'S DECLARATION IN RESPONSE TO COURT'S INTERIM ORDER and ORDER MODIFYING AND CORRECTING INTERIM ORDER

DECLARATION OF CLARK BAKER

I, Clark Warren Baker, declare:

1. If called as a witness I could competently testify to the following matters, which are of my own personal knowledge.
2. This Declaration is made in response to the Court's Interim Order dated March 22, 2023 and the Court's March 28th Order Modifying and Correcting Interim Order in order to purge the contempt.

***81 3. Baker's Online Properties and Accounts:** List of all domain names, URLs, hosts and accounts that Baker has at any time registered, purchased, controlled, owned, sold, transferred, or otherwise held in any way, directly or indirectly, at any time since January 2013 including websites, domain names, blogs, social media accounts, email accounts, and other online communications accounts (collectively, "Online Properties").

URL/DOMAINS

a. **"Baddocjjm.com"** - Declarant certifies the following information:

- i. Most-recent date closed, terminated, or last used or accessed: Declarant deleted the account and website in approximately 2018 and has not had access since deletion.

- ii. Account name or names used: Clark Baker
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- b “**CB18.org**” - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: Declarant opened this account in approximately 2017/2018 and closed it just months afterwards. Declarant has not had any access since closure.
 - ii. Account name or names used: Clark Baker; User ID: exliberal
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- c. “**CFDUNN.COM**” - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: Declarant turned over the keys to Mario Mi chela in approximately 2016/2017. Declarant's last access was prior to the turnover of the keys in approximately 2016/2017.
 - ii. Account name or names used: Clark Baker
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; keys turned over prior to the injunction).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- d. “**CLARKBAKER.ORG**” - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: Last accessed on April 20, 2023.
 - ii. Account name or names used: Clark Baker
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (the court order did not have provisions for this particular website).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- e. “**CWBPI.COM**” - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: Closed in 2016. Declarant has not had access since closure.
 - ii. Account name or names used: Clark Baker
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- f. “**DAVIDBENDER.COM**” - Declarant certifies the following information:
- *82 i. Most recent date used, accessed, terminated or closed: Closed in approximately 2014-2015. Declarant has not had access since closure.
- ii. Account name or names used: Clark Baker
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

g. **“ELECTRICFAMILY-FACTS.COM”** - Declarant certifies the following information:

i. Most recent date used, accessed, terminated or closed: Closed in approximately 2014-2105. Declarant has not access since closure.

ii. Account name or names used: Clark Baker

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

h. **“EXLIBHOLLYWOOD.BLOGSPOT.COM”** -

Declarant certifies the following information:

i. Most recent date used, accessed, terminated or closed: This account is active. Declarant last accessed this account on April 20, 2023.

ii. Account name or names used: WB Clark; gallosegg@gmail.com

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the court order applicable to this website.)

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

i. **“JAMESMURTAGHMDPSYCHO.BIZ”** - Declarant certifies the following information:

i. Most recent date used, accessed, terminated or closed: Expired in 2015. Declarant has not had any access since expiration.

ii. Account name or names used: Clark Baker

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

j. **“JAMESMURTAGHMDPSYCHO.INFO”** - Declarant certifies the following information:

i. Most recent date used, accessed, terminated or closed: Expired in 2015. Declarant has not had any access since expiration.

ii. Account name or names used: Clark Baker

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

k. **“JAMESMURTAGHMDPSYCHO.NET”** - Declarant certifies the following information:

i. Most recent date used, accessed, terminated or closed: Expired in 2015. Declarant has not had any access since expiration.

ii. Account name or names used: Clark Baker

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).

***83** v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

l. **“JAMESMURTAGHMDPSYCHO.ORG”** - Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed: Expired in 2015. Declarant has not had any access since expiration.
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

m. **JAMESMURTAGHMDTRUTH.COM** - Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed: This domain is hosted by NetworkSolutions. Declarant accessed his NetworkSolutions account on April 20, 2023. Declarant also accessed this account in an attempt to transfer ownership to Dr. Murtagh in May 2022.
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: Declarant's May 19, 2022 Declaration and January 24, 2023 Supplemental Declaration explained In May 2022, Declarant submitted his Declaration of Compliance to Murtagh and counsel, explaining "Declarant has tried to transfer the single remaining URL owned by Declarant that contains Dr. Murtagh's name in any form, variation, or misspelling, in any way..., namely, "jamesmurtaghmdtruth.com" (Declarant has done a search for this name and it does not appear on the internet). When Declarant attempted to transfer the URL, Declarant was instructed that he would need to unlock the URL and, after approximately 48 hours, Declarant can send it to the specified destination. This URL will not let Declarant transfer without specifying a destination account. "Declarant has requested a transferee name, telephone number and email address with whom Declarant can coordinate and complete the transfer from Dr. Murtagh in May 2022. Declarant will initiate the transfer upon receipt of transferee's said information." (Baker May 2022 Declaration of

Compliance.) Declarant previously could not comply with this order without cooperation by Murtagh or Murtagh's counsel. Declarant made a third attempt, through counsel, to obtain the necessary information from Mr. Linke on the morning of April 20, 2023. Mr. Linke gave us the information necessary to comply on the evening on April 20, 2023. This morning, April 21, 2023, Declarant initiated the transfer and received confirmation that said transfer was initiated and that the information was being validated before completion. The confirmation was emailed to Mr. Linke on April 21, 2023. The company will generate an authorization code within three days and send it to Mr. Linke at linke@newmanlaw.com.

- v. Identity, contact information, means of communication used: NetworkSolutions contact information is www.networksolutions.com and the means of communication is by entering the website; Derek Linke, Attorney for Plaintiff, Dr. Murtagh, via email.

*84 n. **OMSJ.ORG** - Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed: This domain is hosted on Declarant's Network Solutions account. The website omsj.org has been non-functional since February 2023.
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: Declarant removed any and all references to Murtagh, any variation of that name, moniker, etc. in any manner and/or Murtagh-related information prior to the injunction.
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A. Declarant, having access to the website, personally deleted in accordance with the injunction.
- o. **OSMJ.ORG** - Declarant certifies the following information:
 - i. Most recent date used, accessed, terminated or closed: This domain is hosted on Declarant's NetworkSolutions account. There is no website to access. Declarant

accessed NetworkSolutions on April 20, 2023 to confirm that the domain name still exists. Declarant accessed the NetworkSolutions account on April 20, 2023. There is not a website associated with this domain name. Declarant obtained the domain as a backup to the OMSJ.org domain.

- ii. Account name or names used: Clark Baker
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the court order applicable to this domain.)
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- p. **“PROPAGANDISTS.ORG”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: This website expired in 2016/2017. Declarant has not used or had access since the expiration.
 - ii. Account name or names used: Clark Baker
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with respect to this Online Property. It expired prior to injunction.)
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- q. **“SEMMELWEIS.ORG”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: Declarant last used or accessed this website on or about December 2022. The website was hacked/corrupted by an unknown person and Declarant has not had access since then.
 - ii. Account name or names used: Clark Baker
 - iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with respect to this Online Property).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- r. **“SHAKEDOWNDOC.COM”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: This Online Property has been closed. Declarant has not used or accessed this website since 2016-2018.
 - *85 ii. Account name or names used: Clark Baker
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (closed prior to injunction).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

SOCIAL MEDIA

- s. **Twitter “@OMSJ”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: This account was closed in 2019. Declarant has not accessed this account since its closure.
 - ii. Account name or names used: @OMSJ
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- t. **Twitter “@RINSETS”** - Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed:
This account is active. Declarant last accessed this account on April 20, 2023.
 - ii. Account name or names used: @RINSERTS
 - iii. Alias or aliases used: Kochspostulates
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- u. **Twitter “@RKOCH28399683”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed:
This account is active. Declarant last accessed this account on or about April 10-April 15, 2023.
 - ii. Account name or names used: Robert Koch, @rkoch28399683
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- v. **Truth Social “@USMC_LAPD_ret”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed:
This account is active. Declarant accessed and used this account on or about April 1 - April 10, 2023.
 - ii. Account name or names used: @USMC_LAPD_ret
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- w. **GETTR “@USMC_LAPDret”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed:
This account is active. Declarant accessed this account on or about April 17-April 19, 2023.
 - ii. Account name or names used: @USMC_LAPDret
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
- ***86** v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- x. **MINDS “@USMC LAPDret”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed:
This account is active. Declarant accessed and used this account on or about April 17, 2023-April 19, 2023.
 - ii. Account name or names used: @USMC_LAPDret
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- y. **Instagram “@CWARRENB323”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed:
This account is active. Declarant last accessed and used this account on or about April 18, 2023-April 19, 2023.
 - ii. Account name or names used: @CWARRENB323
 - iii. Alias or aliases used: N/A

- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- z. **Ancestry.com “@CWB2_1”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed and used this account on or about April 17-18, 2023.
- ii. Account name or names used: @CWB2_1
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- aa. **Skype “@CWBPI01”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed and used this account on approximately April 17-19, 2023.
- ii. Account name or names used: @CWBPI01
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A Skype is a means of communications and does not store information about Murtagh.
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- bb. **WHATSAPP “@3236321050”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: This account is active. Declarant last used this account the week of April 10-April 15, 2023
- ii. Account name or names used: Clark Baker; 3236321050
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- cc. **Google Voice “@3237906107”** - Declarant certifies the following information:
- *87 i. Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed this account on April 20, 2023.
- ii. Account name or names used: WB Clark; 3237906107
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- dd. **Facebook “CB@OMSJ.ORG”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: Account closed in 2019. Declarant has not accessed account since closure.
- ii. Account name or names used: Clark Baker; CB@omsj.org
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

EMAIL

ee. **Hushmail “OMSJ@hushmail.com”** - Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed:
The account and all aliases under the account were closed in 2019. Declarant has not had any access since closure.
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: murtaghinfo@nym.hush.com, drm@nym.hush.com, cbaker@nym.hush.com, electricfamily@nym.hush.com, 07delete@nym.hush.com, commercialjunk@nym.hush.com, creditreport212@nym.hush.com, credor@nym.hush.com, delete09@nym.hush.com, delete21@nym.hush.com, delete23@nym.hush.com, delete57@nym.hush.com, mjcrawford@nym.hush.com, jcase@nym.hush.com, jenny@nym.hush.com, agent@nym.hush.com, clark782@nym.hush.com
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ff. **Corrlinks “clark.baker@pm.me”** - Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed:
This account is active and declarant accessed it on April 20, 2023.
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

gg. **Corrlinks “clark.baker@protonmail.com”** - Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed:
This account is active. Declarant accessed this account on April 20, 2023.
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

*88 hh. **Protonmail.com “clark.baker@pm.me”** - Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed:
This account is active. Declarant accessed this account on April 20, 2023.
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: junk06@pm.me, dores.baker@protonmail.com, junk07@protonmail.com, cfrancisd@protonmail.com, cfrancisd@proton.me
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ii. **Protonmail.com “sheri.bluebond@protonmail.com”** - Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed:
This account was closed in 2018/early 2019.
- ii. Account name or names used: Clark Baker; sheri.bluebond@protonmail.com
- iii. Alias or aliases used: N/A

- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (this account and email address were closed prior to the injunction).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- jj. Google “gallosegg@gmail.com”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed this account on April 20, 2023
 - ii. Account name or names used: WB Clark; gallosegg@gmail.com
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- kk. Outlook “jtdehonq@hotmail.com”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed this account on April 20, 2023.
 - ii. Account name or names used: JT DeShonq; jtdehonq@hotmail.com
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- ll. Outlook “CWB@OMSJ.ORG”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed this account on April 20, 2023.
 - ii. Account name or names used: Clark Baker; CWB@OMSJ.ORG
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- mm. Outlook “CWBPI”** - Declarant certifies the following information:
- ***89** i. Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed this account on April 20, 2023.
 - ii. Account name or names used: Clark Baker; CWBPI
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- STORAGE, SERVERS, HOSTS, ETC.**
- nn. iCloud “clark.baker@protonmail.com”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed this account on April 20, 2023
 - ii. Account name or names used: Clark Baker
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).

- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- oo. **Dropbox “clark.baker@pm.me”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: This account was closed in late 2022 and Declarant has not accessed it since closure.
 - ii. Account name or names used: Clark Baker
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: Declarant turned over all contents and access to this account to Plaintiff on or about May 19, 2022. Declarant re-affirms that he does not retain or maintain any of the files therein.
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- pp. **Youtube “@UhOhhhhhh”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: This account is active. Declarant last accessed this account on April 20, 2023.
 - ii. Account name or names used: WB Clark; gallosegg@gmail.com; @UhOhhhhhh
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A Declarant has not used YouTube to host, store, maintain, or communicate about any content relating to Dr. Murtagh, in any form, variation, or misspelling, including by the use of any moniker, such as “goon,” “mo,” “shakedowndoc,” “baddoc,” or “baddocjm,” since issuance of the injunction.
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- qq. **Rumble “Teleoperatorski”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: This account is active. Declarant last accessed the account on April 20, 2023.
 - ii. Account name or names used: Teleoperatorski
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- *90 rr. **Carbonite “Clark.baker@protonmail.com”** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: This account was closed in approximately 2018. Declarant has not accessed this account since closure.
 - ii. Account name or names used: Clark Baker
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property; closed prior to injunction).
 - v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- ss. **Netsource** - Declarant certifies the following information:
- i. Most recent date used, accessed, terminated or closed: This account was closed in approximately 2015. Declarant has not had access to this account since closure.
 - ii. Account name or names used: Clark Baker
 - iii. Alias or aliases used: N/A
 - iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (this account was closed prior to the injunction).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

tt. **Orangewebsite.com** - Declarant certifies the following:

i. Most recent date used, accessed, terminated or closed: Account closed in 2016.

ii. Account name or names used: Clark Baker

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunctions: N/A (there are no provisions to comply with; closed prior to injunction).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

uu. **Orangewebsite.com** - Declarant certifies the following:

i. Most recent date used, accessed, terminated or closed: Declarant last accessed this account in 2020.

ii. Account name or names used: Clark Baker; junk06@pm.me

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunctions: N/A (there are no provisions in the order applicable to this Online Property).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

iii) Account name or names used in connection - N/A

iv) Alias or aliases used - N/A

v) Any steps taken in an effort to comply with provisions of the injunction: Shortly after receipt of the OSC in December 2022/January 2023, Declarant did a search on Google for the website and saw that it is a cross-post by a third party from Declarant's original post in 2008. Declarant has long-deleted the original post and URL but the author of this blog had re-posted Declarant's original post. Declarant does not have any control over the third-party website content. The Google search also reported that the operator of this blog is someone named Manu located in Europe. Declarant does not know Manu and does not have any affiliation with him or the website/blog. Declarant left a comment on the page asking Manu to contact him on January 7, 2023 in an effort to have the page removed. Declarant has not received a response as of the writing of this Declaration.

*91 vi) Identity, contact information, means of communication used: Declarant left a comment on the webpage asking Manu to contact him on January 7, 2023 in an effort to have the page removed. Declarant has not received a response as of the writing of this Declaration.

b) "<https://sites.google.com/site/karristokely/mis/gallo-s-egg>" - Declarant certifies the following information:

i) Ever owned or controlled - Declarant has never owned or controlled this Online Property.

ii) Most recent date used, accessed, closed or terminated - Declarant has never used, closed or terminated this Online Property. Declarant visited this website after receipt of the OSC in December/January in order to be able to respond to the OSC.

iii) Account name or names used in connection - N/A

iv) Alias or aliases used - N/A

v) Any steps taken in an effort to comply with provisions of the injunction: Declarant looked at the website and it is a reposting of Declarant's original content without Declarant's cooperation or participation. Declarant does not have any access to the website or any ability to delete the posting. The site was posted by Karri Stokely, who died between 2010-2012.

4. Online Properties Specified in Court Order

a) "<http://elmaltes.blogspot.com/2008/08/gallos-egg-investigationcontinues.htm>" - Declarant certifies the following information:

i) Ever owned or controlled - Declarant has never owned or controlled this Online Property.

ii) Most recent date used, accessed, closed or terminated - Defendant has never used, accessed, closed or terminated this Online Property.

- vi) Identity, contact information, means of communication used: N/A
- c) "<https://www.docin.com/p-388129527.html>" - Declarant certifies the following information:
- i) Ever owned or controlled - Declarant never owned or controlled this Online Property.
 - ii) Most recent date used, accessed, closed or terminated
 - Declarant has never used, closed or terminated this Online Property. Declarant visited this website after receipt of the OSC in December/January in order to be able to respond to the OSC. Declarant's search showed that it is registered to Gang Mai in Beijing, China.
 - iii) Account name or names used in connection - N/A
 - iv) Alias or aliases used - N/A
 - v) Any steps taken in an effort to comply with provisions of the injunction: Declarant did a search online and learned that it is registered to a person named Gang Mai in Beijing, China.
 - vi) Identity, contact information, means of communication used: Declarant does not have any means of contacting Gang Mai.
- d) "omsj.org" - Declarant certifies the following information:
- i) Ever owned or controlled: Yes, Declarant owns this Online Property.
 - ii) Most recent date used, accessed, closed or terminated: This domain is hosted on Declarant's Network Solutions account. Declarant accessed NetworkSolutions on April 20, 2023. The website omsj.org has been non-functional since February 2023.
 - iii) Account name or names used: Clark Baker
 - iv) Alias or aliases used: N/A
 - v) Any steps taken in an effort to comply with provisions of the injunction: N/A (Declarant removed any and all references to Murtagh, any variation of that name, moniker, etc. in any manner and/or Murtagh-related information prior to the injunction).
- vi) Identity, contact information, means of communication used: N/A
- e) "<https://m.facebook.com/SearchingforAnswersBlog/posts/clarkbakerfor-those-whovewondered-about-the-identity-of-snout-wetracked-him-d/123924284468167/>" - Declarant certifies the following information:
- i) Ever owned or controlled - Declarant has never owned or controlled this Online Property.
 - ii) Most recent date used, accessed, closed or terminated - N/A
 - iii) Account name or names used in connection - N/A
 - *92 iv) Alias or aliases used - N/A
 - v) Any steps taken in an effort to comply with provisions of the injunction: N/A (Declarant clicked on the link to confirm it was not his).
 - vi) Identity, contact information, means of communication used: N/A
- f) "<http://elmaltes.blogspot.com/2008/07/hiv-aids-gallos-egg.html>" - Declarant certifies the following information:
- i) Ever owned or controlled - Declarant has never owned or controlled this Online Property.
 - ii) Most recent date used, accessed, closed or terminated - Declarant visited this website after receipt of the OSC in December 2022/January 2023 in order to respond to the OSC. This website is a cross-post by a third party from Declarant's original post in 2008. Declarant has long-deleted the original post and URL but the author of this blog had re-posted his original post back in 2008. Declarant does not have any control over the third-party website content.
 - iii) Account name or names used in connection - N/A
 - iv) Alias or aliases used - N/A
 - v) Any steps taken in an effort to comply with provisions of the injunction: After receipt of this OSC, Declarant did a search on the website on Google which reported that the operator of this blog is someone named Manu located in Europe. Declarant does not know Manu and does not have any affiliation with him or the website/blog. Declarant left a comment on the webpage asking

Manu to contact him on January 7, 2023 in an effort to have the page removed. Declarant has not received a response as of the writing of this Declaration.

vi) Identity, contact information, means of communication used: Declarant left a comment on the webpage asking Manu to contact him on January 7, 2023 in an effort to have the page removed. Declarant has not received a response as of the writing of this Declaration.

g) "<https://lokeshvuyyurumd.wordpress.com/2014/03/06/duesbergsemmelweis/>" - Declarant certifies the following information:

i) Ever owned or controlled: Yes, Declarant owns this website. It is one website with two links (<https://lokeshvuyyurumd.wordpress.com/category.cohorts/jamesmurtagh/> is the second link).

ii) Most recent date used, accessed, closed or terminated: Declarant logged in for the first time in years on April 19, 2023 and terminated it. Prior to access on April 19, 2023, Declarant had not accessed the account since before approximately 2018-2019.

iii) Account name or names used in connection: Clark Baker

iv) Alias or aliases used: N/A

v) Any steps taken in an effort to comply with provisions of the injunction: Declarant logged into the account for the first time in years on April 19, 2023 and terminated the account.

vi) Identity, contact information, means of communication used: N/A

h) "<https://lokeshvuyyurumd.wordpress.com/category/cohorts/jamesmurtagh/>" - Declarant certifies the following information:

i) Ever owned or controlled: Yes. Declarant owns this website. It is one website with two links (<https://lokeshvuyyurumd.wordpress.com/category.cohorts/jamesmurtagh/> is the second link).

ii) Most recent date used, accessed, closed or terminated: Declarant logged in for the first time in years on April 19, 2023 and terminated it. Prior to access on April 19, 2023, Declarant had not accessed the account since before approximately 2018-2019.

*93 iii) Account name or names used in connection: Clark Baker

iv) Alias or aliases used: N/A

v) Any steps taken in an effort to comply with provisions of the injunction: Declarant logged into the account for the first time in years on April 19, 2023 and terminated the account.

vi) Identity, contact information, means of communication used: N/A

i) "jamesmurtaghmdtruth.com" - Declarant certifies the following information:

i) Ever owned or controlled: Yes declarant owns this Online Property. Declarant's continued ownership of the domain name jamesmurtaghmdtruth.com is due to Murtagh and Murtagh's counsel's lack of cooperation in coordinating the transfer.

ii) Most recent date used, accessed, closed or terminated: This domain is hosted by NetworkSolutions. Declarant accessed his NetworkSolutions account on April 20, 2023. Declarant also accessed this account in an attempt to transfer ownership to Dr. Murtagh in May 2022.

iii) Account name or names used in connection: Clark Baker

iv) Alias or aliases used: N/A

v) Any steps taken in an effort to comply with provisions of the injunction: Declarant's May 19, 2022 Declaration and January 24, 2023 Supplemental Declaration explained In May 2022, Declarant submitted his Declaration of Compliance to Murtagh and counsel, explaining "Declarant has tried to transfer the single remaining URL owned by Declarant that contains Dr. Murtagh's name in any form, variation, or misspelling, in any way... namely, "jamesmurtaghmdtruth.com" (Declarant has done a search for this name and it does not appear on the internet). When Declarant attempted to transfer the URL, Declarant was instructed that he would need to unlock the URL and, after approximately 48 hours, Declarant can send it to the specified destination. This URL will not let Declarant transfer without specifying a destination account. "Declarant has requested a transferee name, telephone number and email address

with whom Declarant can coordinate and complete the transfer from Dr. Murtagh in May 2022. Declarant will initiate the transfer upon receipt of transferee's said information." (Baker May 2022 Declaration of Compliance.) Declarant could not comply with this order without cooperation by Murtagh or Murtagh's counsel. Declarant made a third attempt, through counsel, to obtain the necessary information from Mr. Linke on the morning of April 20, 2023. Mr. Linke gave us the information necessary to comply on the evening on April 20, 2023. This morning, April 21, 2023, Declarant initiated the transfer and received confirmation that said transfer was initiated and that the information was being validated before completion. The confirmation was emailed to Mr. Linke on April 21, 2023. The company will generate an authorization code within three days and send it to Mr. Linke at linke@newmanlaw.com.

- i) Identity, contact information, means of communication used: NetworkSolutions contact information is www.networksolutions.com and the means of communication is by entering the website; Derek Linke, Attorney for Plaintiff, Dr. Murtagh, via email.

***94 j) "Baddocjjm.com"** - Declarant certifies the following information:

- i) Ever owned or controlled: Yes.
- ii) Most recent date used, accessed, closed or terminated: Declarant deleted the account and website in approximately 2018 and has not had access since deletion.
- iii) Account name or names used in connection: Clark Baker
- iv) Alias or aliases used: N/A
- v) Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).
- vi) Identity, contact information, means of communication used: N/A

k) "SHAKEDOWNDOC.COM" - Declarant certifies the following information:

- i) Ever owned or controlled: Yes.

- ii) Most recent date used, accessed, terminated or closed: Declarant has not used or accessed this website since 2016-2018.
- iii) Account name or names used: Clark Baker
- iv) Alias or aliases used: N/A
- v) Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).
- vi) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

5. Baker's Websites and Other Online Content About Dr. Murtagh - all online hosts, websites, email accounts, and storage providers that Baker (or anyone that Baker has used to assist or aid him, or anyone that he hired, retained, directed or worked with or consulted with) has used at any time since January 2013 to host, store, maintain, or communicate about any content relating to Dr. Murtagh, in any form, variation, or misspelling, including by the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," including without limitation: jamesmurtaghmdtruth.com, baddociim.com, shakedowndoc.com, omsi.org, file directories, files, folders, file links, hidden files, hidden directories, linked documents, documents, Mp3 or other audio files, video files, metalinks, hyperlinks, hidden codes, internet search algorithms, PDF files, Microsoft Office documents (Word, Excel, Access, PowerPoint), compressed files (e.g., ZIP, RAR, 7-ZIP, GZIP), digital text files, swap files, temporary files, digital videos or YouTube files,

a) **Hushmail** - Declarant certifies the following information:

- i) Most recent date used, accessed, terminated or closed: The account and all aliases under the account were closed in 2019. Declarant has not had any access since closure.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: omsj@hushmail.com, murtaghinfo@nym.hush.com, drm@nym.hush.com, cbaker@nym.hush.com, electricfamily@nym.hush.com, 07delete@nym.hush.com, commercialjunk@nym.hush.com,

creditreport212@nym.hush.com,
credor@nym.hush.com, delete09@nym.hush.com,
delete21@nym.hush.com, delete23@nym.hush.com,
delete57@nym.hush.com,
mjcrawford@nym.hush.com, jcase@nym.hush.com,
jenny@nym.hush.com, agent@nym.hush.com,
clark782@nym.hush.com

iv) Any steps taken in an effort to comply with provisions of the injunction: Turned over to neutral expert Neil Broom pursuant to court order. There are no provisions to comply with; closed prior to injunction.

*95 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: Neil Broom; nbroom@trcglobal.com, (678)428-6304; conferred via telephone and email.

b) **Protonmail.com-** Declarant certifies the following information:

i) Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed this account on April 20, 2023.¹

ii) Account name or names used: Clark Baker; clark.baker@pm.me, clark.baker@protonmail.com

iii) Alias or aliases used: clark.baker@protonmail.com, junk06@pm.me, dores.baker@protonmail.com, junk07@protonmail.com, cfrancisd@protonmail.com, cfrancisd@proton.me.

iv) Any steps taken in an effort to comply with provisions of the injunction: N/A because these are attorney-client communications.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

c) **Outlook “jtdehonq@hotmail.com”** - Declarant certifies the following information:

i) Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed this account on April 20, 2023.

ii) Account name or names used: JT DeShonq; jtdehonq@hotmail.com

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

d) **“Baddocjjm.com”** - Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Declarant deleted the account and website in approximately 2018 and has not had access since deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

e) **“CB18.org”** - Declarant certifies the following information:

i) Most recent date used, accessed, terminated or closed: Declarant opened this account in approximately 2017/2018 and closed it just months afterwards. Declarant has not had any access since closure.

ii) Account name or names used: Clark Baker; User ID: exliberal

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

- f) “**CWBPI.COM**” - Declarant certifies the following information:
- i) Most recent date used, accessed, terminated or closed: Closed in 2016. Declarant has not had access since closure.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).
- *96 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- g) “**DAVIDBENDER.COM**” - Declarant certifies the following information:
- i) Most recent date used, accessed, terminated or closed: Closed in approximately 2014-2015. Declarant has not had access since closure.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- h) “**EXLIBHOLLYWOOD.BLOGSPOT.COM**” - Declarant certifies the following information:
- i) Most recent date used, accessed, terminated or closed: This account is active. Declarant last accessed this account on April 20, 2023.
 - ii) Account name or names used: WB Clark, gallosegg@gmail.com
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the court order applicable to this website.)
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- i) “**JAMESMURTAGHMDTRUTH.COM**” - Declarant certifies the following information:
- i) Most recent date used, accessed, terminated or closed: This domain is hosted by NetworkSolutions. Declarant accessed his NetworkSolutions account on April 20, 2023. Declarant also accessed this account in an attempt to transfer ownership to Dr. Murtagh in May 2022.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: Declarant's May 19, 2022 Declaration and January 24, 2023 Supplemental Declaration explained In May 2022, Declarant submitted his Declaration of Compliance to Murtagh and counsel, explaining “Declarant has tried to transfer the single remaining URL owned by Declarant that contains Dr. Murtagh's name in any form, variation, or misspelling, in any way... namely, “jamesmurtaghmdtruth.com” (Declarant has done a search for this name and it does not appear on the internet). When Declarant attempted to transfer the URL, Declarant was instructed that he would need to unlock the URL and, after approximately 48 hours, Declarant can send it to the specified destination. This URL will not let Declarant transfer without specifying a destination account. “Declarant has requested a transferee name, telephone number and email address with whom Declarant can coordinate and complete the transfer from Dr. Murtagh in May 2022. Declarant will initiate the transfer upon receipt of transferee's said information.” (Baker May 2022 Declaration of Compliance.) Declarant could not comply with this order without cooperation by Murtagh or Murtagh's counsel. Declarant made a third attempt, through counsel, to obtain the necessary information from Mr. Linke on the morning of April 20, 2023. Mr. Linke gave us the information necessary to comply on the evening on April 20, 2023. This morning, April 21, 2023, Declarant initiated the transfer and received confirmation that said transfer was initiated and that the information was being validated before completion. The confirmation was emailed to Mr. Linke on April 21, 2023. The company

will generate an authorization code within three days and send it to Mr. Linke at linke@newmanlaw.com.

*97 v) Identity, contact information, means of communication used: NetworkSolutions contact information is www.networksolutions.com and the means of communication is by entering the website; Derek Linke, Attorney for Plaintiff, Dr. Murtagh, via email.

j) "OMSJ.ORG" - Declarant certifies the following information:

- i) Most recent date used, accessed, terminated or closed: This domain is hosted on Declarant's Network Solutions account. The website omsj.org has been non-functional since February 2023.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: Declarant removed any and all references to Murtagh, any variation of that name, moniker, etc. in any manner and/or Murtagh-related information prior to the injunction.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A. Declarant, having access to the website, personally deleted.

k) "PROPAGANDISTS.ORG" - Declarant certifies the following information:

- i) Most recent date used, accessed, terminated or closed: This website expired in 2016/2017. Declarant has not used or had access since the expiration.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with respect to this Online Property. It expired prior to injunction.)
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

l) "SEMMELWEIS.ORG" - Declarant certifies the following information:

- i) Most recent date used, accessed, terminated or closed: Declarant last used or accessed this website on or about December 2022. The website was hacked/corrupted by an unknown person and Declarant has not had access since then.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with respect to this Online Property).
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

m) "SHAKEDOWNDOC.COM" - Declarant certifies the following information:

- i) Most recent date used, accessed, terminated or closed: This Online Property has been closed. Declarant has not used or accessed this website since 2016-2018.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (closed prior to injunction).
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

n) "<https://lokeshvuyyurumd.wordpress.com>" - Declarant certifies the following information:

- i) Most recent date used, accessed, terminated or closed: Declarant logged in for the first time in years on April 19, 2023 and terminated it. Prior to access on April 19, 2023, Declarant had not accessed the account since before approximately 2018-2019.
- ii) Account name or names used in connection: Clark Baker
- iii) Alias or aliases used: <https://lokeshvuyyurumd.wordpress.com/categorycohorts/>

jamesmurtagh/https://
lokeshvuyyurumd.wordpress.com/2014/03/06/
duesbergsemmelweis/

*98 iv) Any steps taken in an effort to comply with provisions of the injunction: Declarant terminated the account on April 19, 2023. Prior to logging in on April 19, 2023, Declarant had not accessed the account since before approximately 2018-2019.

v) Identity, contact information, means of communication used: N/A

o) **Netsource** - www.netsource.com - Declarant certifies the following information:

i) Most recent date used, accessed, terminated or closed: This account was closed in approximately 2015. Declarant has not had access to this account since closure.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (the account was closed prior to the injunction).

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

p) **Skype** - Declarant certifies the following information:

i) Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed and used this account on approximately April 17-19, 2023.

ii) Account name or names used: Clark Baker; @CWBPI01

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: N/A Skype is a means of communications and does not store information about Murtagh.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

q) **Youtube “@UhOhhhhhh”** - Declarant certifies the following information:

i) Most recent date used, accessed, terminated or closed: This account is active. Declarant last accessed this account on April 20, 2023.

ii) Account name or names used: WB Clark, gallosegg@gmail.com

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: Declarant has not used YouTube to host, store, maintain, or communicate about any content relating to Dr. Murtagh, in any form, variation, or misspelling, including by the use of any moniker, such as “goon,” “mo,” “shakedowntdoc,” “baddoc,” or “baddocjim,” since issuance of the injunction.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

r) **Carbonite**- Declarant certifies the following information:

i) Most recent date used, accessed, terminated or closed: This account was closed in approximately 2018. Declarant has not accessed this account since closure.

ii) Account name or names used: Clark Baker; Clark.baker@protonmail.com

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

s) **Orangewebsite.com** - Declarant certifies the following:

i) Most recent date used, accessed, terminated or closed: Account closed in 2016.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunctions: N/A (there are no provisions to comply with; closed prior to injunction).

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

***99 t) Orangewebsite.com** - Declarant certifies the following:

- i) Most recent date used, accessed, terminated or closed: Declarant last accessed this account in 2020.

- ii) Account name or names used: Clark Baker; junk06@pm.me

- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunctions: N/A (there are no provisions in the order applicable to this Online Property).

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

u) **Dropbox**- Declarant certifies the following information:

- i) Most recent date used, accessed, terminated or closed: This account was closed in late 2022 and Declarant has not accessed it since closure.

- ii) Account name or names used: Clark Baker; clark.baker@pm.me

- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: Declarant turned over all contents and access to this account to Plaintiff on or about May 19, 2022. Declarant re-affirms that he does not retain or maintain any of the files therein.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

**ADDRESSING PAGE NO. 5-6 OF COURT ORDER,
Paragraph 2.c.i. ("File directories, files, folders...")**

- a) Regarding "...file directories, files, folders, file links, hidden files, hidden directories, linked documents, documents, Mp3 or other audio files, video files, metalinks, hyperlinks, hidden codes, internet search algorithms, PDF files, Microsoft Office documents (Word, Excel, Access,

PowerPoint), compressed files (e.g., ZIP, RAR, 7-ZIP, GZIP), digital text files, swap files, temporary files, digital videos or YouTube files..." This item is the subject of a request for more time filed concurrently with this Declaration.

I declare under the foregoing is true and correct under the penalty of perjury under the laws of the state of California. Executed this April 21, 2023 in Vero Beach, Florida.

Dated: April 21, 2023

/s/ CLARK BAKER

CLARK BAKER

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 3255 Wilshire Blvd., Suite 1801, Los Angeles, CA 90010

A true and correct copy of the foregoing documents entitled: DECLARATION OF C. BAKER IN RESPONSE TO INTERIM JUDGMENT OF 3/22/23; DECLARATION OF CERTIFICATION OF COUNSEL will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (date) 04/21/2023, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

SEE ATTACHED SERVICE LIST

Service information continued on attached page

***100 2. SERVED BY UNITED STATES MAIL:**

On (date) 04/21/2023 I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the

judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Honorable Judge Sherri Bluebond
255 East Temple Street, Room 1539
Los Angeles, CA 90012

Service information continued on attached page

3.SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL(state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (date) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

4/21/2023

Date

Pam Pantell

Printed Name

/s/ Pam Pantell

Signature

SERVICE LIST

In re Clark Warren Baker, Debtor - Defendant

David P Bleistein

Rosen & Associates PC

Email: dbleistein@rosen-law.com

Michael J Conway

Greenberg & Bass LLP

Email: MConwavPeblawllp.com

Lisa Hiraide

Rosen & Associates PC

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Derek Linke

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Email: linke@newmanlaw.com

Douglas M Neistat

G&B LAW, LLP

Email: dneistat@eblawllp.com

Derek A Newman

Newman Du Wors LLP

dn@newmanlaw.com

Exhibit 13

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re CLARK WARREN BAKER Debtor.

JAMES MURTAGH, M.D, Plaintiff,

vs.

CLARK WARREN BAKER, Defendant.

Bk. Case No.: 2:15-bk-20351-BB

Chapter 7

Adv. Case No. 2:15-AP-01535-BB

Date: July 25, 2023, Time: 10:00 a.m., Ct.Rm: 1539

JESSICA PONCE (SBN 284043), **LAW OFFICES OF JESSICA PONCE**, 3255 Wilshire Blvd., Suite 1801, Los Angeles, CA 90010, Tel. (213) 263-2911, Fax (213) 403-5737, office@iponcelaw.com, Attorney for Debtor/Defendant, CLARK BAKER

DEFENDANT CLARK BAKER'S DECLARATION IN RESPONSE TO ITEM 2.c.i. OF PAGE 5-6 OF ORDER

OF MARCH 22, 2023, FOR C. BAKER TO AVER COMPLIANCE

(With Attorney Certification Per Court Order)

DECLARATION OF CLARK BAKER

I, Clark Warren Baker, declare: 1. If called as a witness I could competently testify to the following matters, which are of my own personal knowledge.

2. This Declaration is made in response to the Item 2.c.i. of Page 5-6 of Order of March 22, 2023 and to aver compliance.

3. Said Item 2.c.i. provides the following: “The Baker Declaration must list all online hosts, websites, email accounts, and storage providers that Baker (or anyone that he hired, retained, directed or worked with or consulted with) has used at any time since January 2013 to host, store, maintain, or communicate about any content relating to Dr. Murtagh, in any form, variation, or misspelling, including by the use of any moniker, such as “goon,” “mo,” “shakedowndoc,” “baddoc,” or “baddocjjm,” including without limitation: jamesmurtaghmdtruth.com, baddocjjm.com, shakedowndoc.com, omsj.org, file directories, files, folders, file links, hidden files, hidden directories, linked documents, documents, Mp3 or other audio files, video files, metalinks, hyperlinks, hidden codes, internet search algorithms, PDF files, Microsoft Office documents (Word, Excel, Access, PowerPoint), compressed files (e.g., ZIP, RAR, 7-ZIP, GZIP), digital text files, swap files, temporary files, digital videos or YouTube files.”

URLS/DOMAINS

*101 a. **“JAMESMURTAGHMDTRUTH.COM” –** Declarant certifies the following information:

i. Most recent date used, accessed, terminated or closed: This domain is hosted by NetworkSolutions. Declarant accessed his NetworkSolutions account on April 20, 2023. Declarant also accessed this account in an attempt to transfer ownership to Dr. Murtagh in May 2022.

ii. Account name or names used: Clark Baker

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: Declarant's May 19,

2022 Declaration and January 24, 2023 Supplemental Declaration explained In May 2022, Declarant submitted his Declaration of Compliance to Murtagh and counsel, explaining “Declarant has tried to transfer the single remaining URL owned by Declarant that contains Dr. Murtagh's name in any form, variation, or misspelling, in any way...., namely, “jamesmurtaghmdtruth.com” (Declarant has done a search for this name and it does not appear on the internet). When Declarant attempted to transfer the URL, Declarant was instructed that he would need to unlock the URL and, after approximately 48 hours, Declarant can send it to the specified destination. This URL will not let Declarant transfer without specifying a destination account. “Declarant has requested a transferee name, telephone number and email address with whom Declarant can coordinate and complete the transfer from Dr. Murtagh in May 2022. Declarant will initiate the transfer upon receipt of transferee's said information.” (Baker May 2022 Declaration of Compliance.) Declarant previously could not comply with this order without cooperation by Murtagh or Murtagh's counsel. Declarant made a third attempt, through counsel, to obtain the necessary information from Mr. Linke on the morning of April 20, 2023. Mr. Linke gave us the information necessary to comply on the evening on April 20, 2023. On the morning of April 21, 2023, Declarant initiated the transfer and received confirmation that said transfer was initiated and that the information was being validated before completion. The confirmation was emailed to Mr. Linke on Friday, April 21, 2023. On Monday, April 24, 2023, Declarant received the authorization code and forwarded it to Mr. Linke (linke@newmanlaw.com) through counsel, Jessica Ponce. As a result, the transfer has been completed on Declarant's end. v. Identity, contact information, means of communication used: NetworkSolutions contact information is www.networksolutions.com and the means of communication is by entering the website; Derek Linke, Attorney for Plaintiff, Dr. Murtagh, via email.

vi. This information applies to the sub-links and/or files within this URL/domain:

“www.jamesmurtaghmdtruth.com/omsj-the-questionablecompany-robert-gallokeeps”,
“www.jamesmurtaghmdtruth.com/sleepcare2014”,
“www.jamesmurtaghmdtruth.com/gapprop”,

“www.jamesmurtaghmdtruth.com/emory-merits”,
“www.jamesmurtaghmdtruth.com/profile-muddled”,
“www.jamesmurtaghmdtruth.com/james-john-
murtagh”, “www.jamesmurtaghmdtruth.com/court-
cases”, “www.jamesmurtaghmdtruth.com/tag/lawsuits”.

*102 b. **“Baddocjjm.com”** – Declarant certifies the following information:

- i. Most-recent date closed, terminated, or last used or accessed: Declarant deleted the account and website in approximately 2018 and has not had access since deletion.
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

c. **“OMSJ.ORG”** – Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed: This domain is hosted on Declarant's Network Solutions account. The website omsj.org has been non-functional since February 2023.
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: Declarant removed any and all references to Murtagh, any variation of that name, moniker, etc. in any manner and/or Murtagh-related information prior to the injunction.
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A. Declarant, having access to the website, personally deleted in accordance with the injunction.
- vi. This information also applies to sub-links and/or files of this URL/domain:

“www.omsj.org/issues/civil-cases/murtagh-celeb”,
“www.omsj.org/authors/corruption-ddoms-
dcwhistleblowers”, “http://www.omsj.org/goons/
murtagh/2014/sleepcarecomplaint.pdf”, “http://
www.omsj.org/goons/murtagh/2014/
sleepcarejudg.pdf”, “http://www.omsj.org/goons/
murtagh/Fulton8-4.pdf#page=34”, “http://
www.omsj.org/goons/murtagh/
Fulton8-3.pdf#page=70”,
“http://www.omsj.org/goons/murtagh/Fulton8-3.pdf”,
“http://www.omsj.org/wp-content/
uploads/30919_414238817832_1231093_n.jpg”,
“http://www.omsj.org/wp-content/
uploads/30919_414238817832_1231093_n.jpg”,
“http://www.omsj.org/goons/murtagh/Fulton8-16.pdf”,
“http://www.omsj.org/goons/murtagh/Fulton8-12.pdf”,
“http://www.omsj.org/corruption/defending-
semmelweis”, “http://www.omsj.org/corruption/judge-
denies-motion-to-dismiss-farber-libel-suit-
casecontinues”, “http://www.omsj.org/corruption-
dooms-dc-whistleblowers”, “http://www.omsj.org/
authors/corruption-dooms-dc-whistleblowers”, “http://
www.omsj.org/corruption/the-aidstruth-rats-scatter”,
“http://www.omsj.org/corruption.the-semmelweis-
report-gallos-egg”, “http://www.omsj.org/
corruption.the-semmelweis-report-gallos-egg”

d. **“SHAKEDOWNDOC.COM”** – Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed: This Online Property has been closed. Declarant has not used or accessed this website since 2016-2018.
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A, because it was closed prior to the injunction.

Note: After receipt of this OSC, Declarant conducted a Google Wayback Machine search which reported as follows: according to Google Wayback, only one screen capture of this website was taken on 14 Oct 2016. On that date, the website was already being taken down and was likely closed before 2017. This webpage was hosted on a private server located in Australia, but

Declarant doesn't know the name or owner of the server. Declarant has never accessed this website or server. A back-up of JAMESMURTAGHMDTRUTH.COM was transferred from Declarant sometime in 2015 or 2016 and was taken down before 2017. The lack of screenshots (one, compared to OMSJ's 300+ and JAMESMURTAGHMDTRUTH.COM 29 times). Australian citizen John McNair facilitated that transfer to the unknown server owner.

*103 v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A. Note: Regarding John McNair, because the website no longer exists, we cannot ask John McNair to remove information from a nonexistent website. Google Wayback does not give contact information for John McNair. The contact information is the following: In Google search engine, enter keywords "Google Wayback Machine."

e. "**PROPAGANDISTS.ORG**" – Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed:
This website expired in 2016/2017. Declarant has not used or had access since the expiration.
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with respect to this Online Property. It expired prior to injunction.)
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A "www.propogandists.org/court-cases-murtagh/ohio-comm-plea-2012"
- vi. This information also applies to the following sub-links and/or files:

"www.propogandists.org/court-cases-murtagh/ndga-fulton-dekalb-1999", "www.propogandists.org/court-cases-murtagh/ndga-va-2000",
"www.propogandists.org/court-cases-murtagh/ndga-fulton-dekalb-2009", "www.propogandists.org/court-cases-murtagh/tax-court-2003",

"www.propogandists.org/court-cases-murtagh/ndga-usa-emory-1999".

f. "**DAVIDBENDER.COM**" – Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed:
Closed in approximately 2014-2015. Declarant has not had access since closure.
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

g. "**CWBPI.COM**" – Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed:
Closed in or about July 2017, but had access to files through the BlueHost CPanel until I deleted the files. Files were deleted in December 2019. Declarant has not had access to those files since Dec 2019.
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

FILES

a) **Files stored at jamesmurtaghmdtruth.com** – Declarant certifies the following information:

- i) Most recent date used, accessed, terminated or closed:
This domain is hosted by NetworkSolutions. Declarant accessed his NetworkSolutions account on April 20, 2023. Declarant also accessed this account in an attempt to transfer ownership to Dr. Murtagh in May 2022.

- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: Declarant's May 19, 2022 Declaration and January 24, 2023 Supplemental Declaration explained in May 2022, Declarant submitted his Declaration of Compliance to Murtagh and counsel, explaining "Declarant has tried to transfer the single remaining URL owned by Declarant that contains Dr. Murtagh's name in any form, variation, or misspelling, in any way..., namely, "jamesmurtaghmdtruth.com" (Declarant has done a search for this name and it does not appear on the internet). When Declarant attempted to transfer the URL, Declarant was instructed that he would need to unlock the URL and, after approximately 48 hours, Declarant can send it to the specified destination. This URL will not let Declarant transfer without specifying a destination account. "Declarant has requested a transferee name, telephone number and email address with whom Declarant can coordinate and complete the transfer from Dr. Murtagh in May 2022. Declarant will initiate the transfer upon receipt of transferee's said information." (Baker May 2022 Declaration of Compliance.) Declarant previously could not comply with this order without cooperation by Murtagh or Murtagh's counsel. Declarant made a third attempt, through counsel, to obtain the necessary information from Mr. Linke on the morning of April 20, 2023. Mr. Linke gave us the information necessary to comply on the evening on April 20, 2023. On the morning of April 21, 2023, Declarant initiated the transfer and received confirmation that said transfer was initiated and that the information was being validated before completion. The confirmation was emailed to Mr. Linke on April 21, 2023. Declarant received the authorization code on Monday, April 24, 2023 and forwarded it to Mr. Linke (linke@newmanlaw.com) on April 24, 2023 through counsel, Jessica Ponce.

*104 v) Identity, contact information, means of communication used: NetworkSolutions contact information is www.networksolutions.com and the means of communication is by entering the website; Derek Linke, Attorney for Plaintiff, Dr. Murtagh, via email at linke@newmanlaw.com.

- vi) This information also applies to the following sub-links and/or files:

"www.jamesmurtaghmdtruth.com/omsj-the-questionablecompany-robert-gallo-keeps", "www.jamesmurtaghmdtruth.com/sleepcare2014", "www.jamesmurtaghmdtruth.com/gapprop", "www.jamesmurtaghmdtruth.com/emory-merits", "www.jamesmurtaghmdtruth.com/profile-muddled", "www.jamesmurtaghmdtruth.com/james-john-murtagh", "www.jamesmurtaghmdtruth.com/court-cases", "www.jamesmurtaghmdtruth.com/tag/lawsuits", "<http://jamesmurtaghmdtruth.com/court-cases/llth-cir-emory-2001/>", "<http://jamesmurtaghmdtruth.com/court-cases/llth-cir-fulton-dekalb-2000/>", "<http://jamesmurtaghmdtruth.com/court-cases/murtagh-v-baker/>", "<http://jamesmurtaghmdtruth.com/court-cases/d-idaho-2012/>", "<http://jamesmurtaghmdtruth.com/court-cases/d-main-st-marys-2012/>", "<http://jamesmurtaghmdtruth.com/court-cases/dc-sup-ct-fulton-dekalb-2007/>", "<http://jamesmurtaghmdtruth.com/court-cases/ga-ct-app-emory-2012>", "<http://jamesmurtaghmdtruth.com/court-cases/ga-sup-ct-emory-2004/>", "<http://jamesmurtaghmdtruth.com/court-cases/supreme-ct-ga/>", "<http://jamesmurtaghmdtruth.com/court-cases/ndga-emory-1999/>", "<http://jamesmurtaghmdtruth.com/court-cases/ndga-emory-2009/>", "<http://jamesmurtaghmdtruth.com/court-cases/ndga-fulton-dekalb-1999/>", "<http://jamesmurtaghmdtruth.com/court-cases/ndga-usa-emory-1999/>", "<http://jamesmurtaghmdtruth.com/court-cases/ndga-va-2000/>", "<http://jamesmurtaghmdtruth.com/court-cases/ny-sup-ct-farber-2009/>", "<http://jamesmurtaghmdtruth.com/court-cases/ohio-comm-plea-2012/>", "<http://jamesmurtaghmdtruth.com/court-cases/tax-court-2003/>".

- b) **Dropbox delivered to Linke May 2022** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: May 2022
Declarant accessed <https://www.dropbox.com/sh/lzmwnirsxvtlj2y/AACn90Ggj9XZboWy0v0K0iE1a?dl=0> to turn over any remaining files to plaintiff and plaintiff's attorney, Derek Linke.

- ii) Account name or names used: Clark Baker

- iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: Declarant turned over all access to the DropBox account in May 2022 and deleted all contents after turning it over and confirming receipt by plaintiff.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: Communication with Mr. Linke, attorney for plaintiff, via Email, letter exchange, and submission of Declaration of Compliance of Clark Baker (signed May 19, 2022).
- c) **Files stored at “<http://www.shakedowndoc.com/docs>” and “<http://www.shakedowndoc.com/wordpress>”** - Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Declarant deleted shakedowndoc.com, and all websites contained within that URL, on or about 10/20/2016. When Declarant deleted shakedowndoc.com, <http://shakedowndoc.com/docs> and <http://shakedowndoc.com/wordpress> and any files contained therein were deleted when shakedowndoc.com was deleted on or about 10/20/2016.
- *105 ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: Declarant confirmed the deletion. In response to this OSC, Declarant conducted a Google Wayback Machine search, which reported that shakedowndoc.com was live between 9/2015 and 11/2017. This website hasn't had any content or active links since 2017.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: Google Wayback Machine is a website that Declarant accessed to confirm when shakedowndoc.com was last “live” on the internet in order to respond to this OSC. The contact information is the following: In Google search engine, enter keywords “Google Wayback Machine.”
- d) **“1.pdf”** - Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- e) **“20090413_Observations.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- f) **“2bk2010—76346_442013-22200-PM.mp3”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- g) **“68.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- *106 ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- h) **“75.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- i) **“April 11 2013 MOTION FOR RECONSIDERATION DENIED TO SUPPLEMENT RECORD DENIED.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- j) **“April 21 2013 NOTICE OF INTENT TO GA SUPREME COURT.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- k) **“April 8 2013 MOTION FOR RECONSIDERATION APPELLANT.pdf”** - Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- *107 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- l) **“April 8 2013 TO SUPPLEMENT RECORD.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- m) **“Arbitrator Award.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- n) **“Arbitrator Decision.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- o) **“Arbitrator award2.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- p) **“August 17 2012 REPLY BRIEF APPELLANT.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- q) **“BartonProblem.mp3”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- r) **“CourtofAppeals26Jul2012.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- s) **“Defamation suit.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- t) **“Emory 29Mar2013.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- *109 u) **“Emory1-1.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- v) "Emory1-2.pdf" – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- w) "Emory1-3.pdf" – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- x) "Emory1-4.pdf" – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- y) "Emory1-5.pdf" – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- *110 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- z) "Emory1-6.pdf" – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- aa) **“Emory1.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- bb) **“Emory10.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- cc) **“Emory11.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- dd) **“Emory12-1.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - *111 iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- ee) **“Emory12.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- ff) **“Emory13.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- gg) **“Emory14.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- hh) **“Emory2.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- ii) **“Emory3-1.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- *112 ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- jj) **“Emory3-10.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- kk) **“Emory3-11.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- ll) **“Emory3-12.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- mm) **“Emory3-2.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- *113 nn) **“Emory3-3.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- oo) **“Emory3-4.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- pp) **“Emory3-5.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- qq) **“Emory3-6.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- rr) **“Emory3-7.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- *114 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- ss) **“Emory3-8.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- tt) **“Emory3-9.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- uu) **“Emory3.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- vv) **“Emory4-1.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- ww) **“Emory4.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- *115 iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- xx) **“Emory5-1.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- yy) **“Emory5-2.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- zz) **“Emory5-3.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- aaa) **“Emory5.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- bbb) **“Emory6-1.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ***116** ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- ccc) **“Emory6-2.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- ddd) **“Emory6-3.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

eee) **“Emory6”** – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion. ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

fff) **“Emory7”** – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

*117 ggg) **“Emory8”** – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

hh) **“Emory9”** – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

iii) **“Evidence of retaliation.pdf”** – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- jjj) “**Faker Clark to St. Mary.pdf**” – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- kkk) “**Farber v. Jefferys N.Y. Sup. Ct. 2009.pdf**” – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- *118 iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- lll) “**Fierer1997.pdf**” – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- mmm) “**FiererSellingLies.jpg**” – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- nnn) “**Final Order.pdf**” – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ooo) **“Fulton1-1.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ppp) **“Fulton1-2.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- *119 ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

qqq) **“Fulton1-3.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

rrr) **“Fulton1.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

sss) **“Fulton10-1.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ttt) **“Fulton10-2.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

*120 uuu) **“Fulton10.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

vvv) **“Fulton11-1.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

www) **“Fulton11-2.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

xxx) **“Fulton11-3.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

yyy) **“Fulton11-4.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- *121 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

zzz) **“Fulton11-5.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

aaaa) **“Fulton11-6.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

bbbb) **“Fulton11-7.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

cccc) **“Fulton11-8.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

dddd) **“Fulton11-9.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

*122 iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

eeee) **“Fulton11.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ffff) **“Fulton12-1.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

gggg) **“Fulton12-2.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

hhhh) **“Fulton12-3.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

*123 iii) **“Fulton12.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

jjj) **“Fulton13-1.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

kkkk) **“Fulton13-2.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

llll) **“Fulton13-3.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

mmmm) **“Fulton13-4.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

*124 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

nnnn) **"Fulton13-5.pdf"** – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

oooo) **"Fulton13-6.pdf"** – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

pppp) **"Fulton13-7.pdf"** – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

qqqq) **"Fulton13.pdf"** – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

rrrr) **"Fulton14-1.pdf"** – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

*125 iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ssss) **“Fulton14-2.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

tttt) **“Fulton14.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

uuuu) **“Fulton15.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

vvvv) **“Fulton16.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

*126 www) **“Fulton17.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

xxxx) **“Fulton18.pdf”** - Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

yyyy) **“Fulton19-1.pdf”** - Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

zzzz) **“Fulton19.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

aaaaa) **“Fulton2-1.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- *127 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

bbbb) **“Fulton2.pdf”** - Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

cccc) **"Fulton20-1.pdf"** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

dddd) **"Fulton20-2.pdf"** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

eeee) **"Fulton20-3.pdf"** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

fffff) **"Fulton20.pdf"** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- *128 iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

gggg) **"Fulton21.pdf"** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

hhhh) **“Fulton22.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

iiii) **“Fulton23.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

jjjj) **“Fulton4-1.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

*129 kkkk) **“Fulton4-2.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

llll) **“Fulton4.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

mmmmm) “**Fulton7.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

nnnnn) “**Fulton8-1.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ooooo) “**Fulton8-10.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- *130 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ppppp) “**Fulton8-11.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

qqqq) “**Fulton8-12.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

rrrr) “**Fulton8-13.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ssss) “**Fulton8-14.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

tttt) “**Fulton8-15.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- *131 iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

uuuu) “**Fulton8-16.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

vvvv) “**Fulton8-17.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

wwwww) “**Fulton8-2.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

xxxxx) “**Fulton8-3.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

*132 yyyy) “**Fulton8-4.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

zzzzz) “**Fulton8-5.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

aaaaaa) “**Fulton8-6.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

bbbbbb) **“Fulton8-7.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

cccccc) **“Fulton8-8.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- *133 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

dddddd) **“Fulton8-9.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

eeeeee) **“Fulton8.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ffffff) **“Gable affidavit.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

gggggg) **“Giustra depo.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

hhhhh) **“Idaho1.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- *134 iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

iiiiii) **“Idaho2.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

jjjjjj) **“Idaho3.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

kkkkkk) **“Idaho5.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

lllll) **“Idaho6.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

mmmmmm) **“Idaho7.pdf”** – Declarant certifies the following information:

- *135 i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

nnnnnn) **“James J Murtagh Lawsuits.docx”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

oooooooo) **“Joe Bird Bankruptcy Docket Report.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

pppppp) **“July 13 2012 RESPONSE TO MOTION FOR SUPERSEDEAS.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker

- iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- qqqqqq) **“July 26 2012 REQUEST TO ARGUE GRANTED.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- *136 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- rrrrr) **“July 30 2012 BRIEF OF APPELLEE.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- ssssss) **“July 30 2012 TO SUPPLEMENT RECORD.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- ttttt) **“July 9 2012 BRIEF OF APPELLANT.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- uuuuu) **“July 9 2012 REQUEST TO ARGUE APPELLANT.pdf”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

vvvvv) “**July 9 2012. REQUEST TO ARGUE APPELLEE.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

*137 ii) Account name or names used: Clark Baker

- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

wwwww) “**June 29 2012 NOTICE OF APPEARANCE.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant

conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

xxxxxx) “**Kuritzky REDACTED.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

yyyyyy) “**MURTAG v. EMORY, Ga. Ct. App. 2012.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

zzzzzz) “**MURTAGH V. FULTON—DEJAKB, D.C. Super. Ct. 2007 (1482—2).pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

*138 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

aaaaaaaa) “MURTAGH v. ST. MARY'S REGIONAL HEALTH CENTER, D. Me. 2012 (docs avail).pdf” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

bbbbbbb) “Mahanylaw.jpg” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ccccccc) “May 1 2013 NOTICE OF FILING CERT TO GA SUPREME COURT.pdf” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ddddddd) “Murtagh 2008.jpg” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

eeeeeee) **“Murtagh 2011.jpg”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

*139 ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion. v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

fffffff) **“Murtagh Resume 2010.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ggggggg) **“Murtagh v. COMMISSIONER OF INTERNAL REVENUE, U.S.T.C. 2003.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

hhhhh) **“Murtagh v. Emory University, N.D. Ga. 1999.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

iiiiii) **“Murtagh v. Emory, 11th Cir. 2001.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

*140 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

jjjjjj) "Murtagh v. Emory, N.D. Ga 2009 (docs avail).pdf"

- Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

kkkkkk) "Murtagh v. Fulton—Dekalb, 11th Cir. 2000.pdf" – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

llllll) "Murtagh v. Fulton—Dekalb, N.D. Ga 2009 (docs avail).pdf" – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

mmmmmm) "Murtagh v. Fulton—Dekalb, N.D. Ga 1999.pdf" – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

nnnnnn) "Murtagh v. Southwest Idaho Acute Care, D. Idaho 2012 (docs avail).pdf" – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- *141 ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

oooooooo) “**Murtagh v. Veterans Admin, N.D. Ga. 2000.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

pppppp) “**Murtagh v. Sleepcare Diagnostics, Ohio Comm. Pleas. 2012.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

qqqqqqq) “**Murtagh—Pardoemail27Sep2012.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

rrrrrr) “**Murtagh_v._Southwest_Idaho_Acu_1.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- *142 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ssssss) “**Ohare.mp3**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

tttttt) **“PoisoningAffidavit.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

uuuuuu) **“RebJJM.jpg”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

vvvvvv) **“RebJJMParis.jpg”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

xxxxxxxx) **“September 10 2012 TO RESCHEDULE ORAL ARGUMENT.pdf”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- *143 iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

xxxxxxxx) **“September 10 2012 TO RESCHEDULE ORAL ARGUMENT.pdf”** – Declarant

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

yyyyyyy) “September 11 2012 TO RESCHEDULE ORAL ARGUMENT GRANTED.pdf” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

zzzzzzz) “September 13 2012 SUPP BRIEF DENIED APPELLEE.pdf” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

aaaaaaaa) “September 6 2012 TO FILE SUPP BRIEF APPELLE.pdf” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- *144 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

bbbbbbb) “Settlement Agreement.pdf” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ccccccc) “StMarys1.pdf” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.
- ii) Account name or names used: Clark Baker
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ddddddd) “**StMarys10.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

eeeeeee) “**StMarys11.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

fffffff) “**StMarys12.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

*145 iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ggggggg) “**StMarys13.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

hhhhhhh) “**StMarys14.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

iiiiii) "StMarys17.pdf" – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

jjjjjjjj) "StMarys19.pdf" – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

*146 kkkkkkkk) "StMarys2.pdf" – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

lllllll) "StMarys20.pdf" – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

mmmmmmmm) "StMarys21-1.pdf" – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

nnnnnnnn) “**StMarys21-2.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

oooooooooo) “**StMarys21.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

*147 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

pppppppp) “**StMarys22-1.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

qqqqqqqq) “**StMarys22-2.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

rrrrrrrr) “**StMarys22.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ssssssss) “**StMarys23.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ttttttt) “**StMarys25.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

*148 iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

uuuuuuuu) “**StMarys26.pdf**”

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

vvvvvvv) “**StMarys27.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

wwwwwww) “**StMarys28.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

xxxxxxxx) “**StMarys29.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

yyyyyyyy) “**StMarys3.pdf**” – Declarant certifies the following information:

*149 i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

zzzzzzz) “**StMarys30.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

aaaaaaaaaa) “**StMarys31.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

bbbbbbbbbb) “**StMarys33.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

cccccccc) “**StMarys35-1.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

*150 dddddddd) “**StMarys35-2.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

eeeeeee) “**StMarys35-3.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

fffffff) “**StMarys35-4.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

gggggggg) “**StMarys35.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

hhhhhhhh) “**StMarys36.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

*151 iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

iiiiii) “**StMarys38-1-1.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

jjjjjjjj) “**StMarys38-1.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

kkkkkkkk) “**StMarys38-2.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

llllllll) “**StMarys38-3.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

mmmmmmmmmm) “**StMarys38-4.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

*152 ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

nnnnnnnnn) “**StMarys38-5.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

oooooooooo) “**StMarys38-6.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ppppppppp) “**StMarys38.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

qqqqqqqqq) “**StMarys39.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

*153 rrrrrrrr) “**StMarys4.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ssssssss) “**StMarys40-1.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

tttttttt) “**StMarys40.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

uuuuuuuu) “**StMarys42.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

vvvvvvvv) “**StMarys43.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

*154 v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

wwwwwwwww "StMarys44.pdf" – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

xxxxxxxxx) "StMarys45.pdf" – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

yyyyyyyyy) "StMarys46.pdf" – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

zzzzzzzz) "StMarys47.pdf" – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

aaaaaaaaaa) "StMarys49.pdf" – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

*155 iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

bbbbbbbbbb) “StMarys5-1.pdf” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

cccccccccc) “StMarys5-2.pdf” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ddddddddd) “StMarys5.pdf” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

eeeeeeeeee) “StMarys50.pdf” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

*156 ffffffff) “StMarys51.pdf” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ggggggggg) “**StMarys52.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

hhhhhhhhh) “**StMarys53.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

iiiiiiii) “**StMarys54.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

jjjjjjjjjj) “**StMarys55-1.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

*157 iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

kkkkkkkkk) “**StMarys55-2.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

lllllllll) “**StMarys55-3.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

mmmmmmmmmm) “**StMarys55.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

nnnnnnnnnn) “**StMarys56-1.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

oooooooooooo) “**StMarys56-2.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

*158 ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

pppppppppp) “**StMarys56-3.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

qqqqqqqqqq) “**StMarys56.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

rrrrrrrrr) “**StMarys57.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

sssssssss) “**StMarys58.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

*159 tttttttt) “**StMarys59.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

uuuuuuuuu) “**StMarys6.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

vvvvvvvvv) “**StMarys60.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

wwwwwwwww) “**StMarys61.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

xxxxxxxxxx) “**StMarys63-1.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

*160 iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

yyyyyyyyy) “**StMarys63.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

zzzzzzzzz) “**StMarys64.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

aaaaaaaaaaaa) “**StMarys67.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

bbbbbbbbbb) “**StMarys7.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

cccccccccc) “**StMarys70.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

*161 ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ddddddddd) “**StMarys71.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

eeeeeeeeee) “**StMarys72.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ffffffffffff) “**StMarys75.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

gggggggggggg) “**StMarys76.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

*162 hhhhhhhhhh) “**StMarys77.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

iiiiiiiiii) “**StMarys78.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

jjjjjjjjjj) “**StMarys8.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

kkkkkkkkkkk) “**StMarys80.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

lllllllll) “**StMarys81.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

*163 iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

mmmmmmmmmm) “**StMarys83.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

nnnnnnnnnnn) “**StMarys9.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

ooooooooooooo) “**USA ex rel Murtagh v. Emory, N.D. Ga. 1999.pdf**” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

pppppppppppp) “**gactapp 22 apr 2014.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

qqqqqqqqqqqq) “**johnsmoke.mp3**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

*164 ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

rrrrrrrrrr) “**unsealed.pdf**” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016. Declarant conducted a

diligent search of his computer and online files after receipt of this OSC and confirmed deletion.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Links Associated with Wordpress Directory

a) “<http://www.omsj.org/goons/murtagh/2014/sleepcarejudg.pdf>” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2020.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: N/A, because there are no further steps to take to comply with provisions of the injunction.

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

b) “<http://www.omsj.org/goons/murtagh/2014/sleepcarecomplaint.pdf>” – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted approximately 10/20/2020.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: N/A, because there are no further steps to take to comply with provisions of the injunction.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

c) **"http://shakedowntdoc.com/wordpress/gapprop/"**

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: N/A, because there are no further steps to take to comply with provisions of the injunction.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

d) **"http://mspbwatcharchive.files.wordpress/gapprop/"** – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: This website was owned by David Pardo. Declarant does not own this website and does not have any control over its content. Declarant believes this website has been deleted in approximately 2016.

*165 ii) Account name or names used: N/A

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: N/A, because there are no further steps to take to comply with provisions of the injunction.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

vi) This information also applies to the following sub-links and/or files associated with this website: "http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblowerguide-p-22.PNG", "http://mspbwatcharchive.files.wordpress.com/2013/05/corporatewhistleblower-guide-p-27.PNG", "http://mspbwatcharchive.files.wordpress.com/2013/05/murtagh-poisoning-affidavit.pdf", "http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblower-guide-p-27-n-22.png", "http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblowerguide-p-27-22.PNG", "http://mspbwatcharchive.files.wordpress.com/2013/05/corporatewhistleblower-guide-p-27-n-22.png", "http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblower-guidep-27-n-22.png", "http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblowerguide-p-30.PNG", "http://mspbwatcharchive.files.wordpress.com/2013/05/12/murtaghhagiography-gappropaganda", "http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblower-guide-p-30.png".

mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblowerguide-p-27-22.PNG", "http://mspbwatcharchive.files.wordpress.com/2013/05/corporatewhistleblower-guide-p-27-n-22.png", "http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblower-guidep-27-n-22.png", "http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblowerguide-p-30.PNG", "http://mspbwatcharchive.files.wordpress.com/2013/05/12/murtaghhagiography-gappropaganda", "http://mspbwatcharchive.files.wordpress.com/2013/05/corporate-whistleblower-guide-p-30.png".

e) **"http://www.jamesmurtaghmdtruth.com/court-cases/ndga-emory-2009/"** – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted. Declarant blocked public access to this website, pursuant to court order, in approximately 2015-2016 and deleted the site and all files on or about May 2022 to July 2022.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: Declarant deleted the site and all files on or about May 2022 to July 2022.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A.

vi) This information also applies to the following sub-links and/or files: "http://www.jamesmurtaghmdtruth.com/court-cases/ndga-emory-2009/",

f) **"http://www.omsj.org/goons/murtagh/Emory%2029Mar2013.pdf"** – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Last access prior to the injunction was approximately September 2016. Declarant deleted this file on or about May 2022.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: Declarant deleted this file on or about May 2022.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A.

vi) This information also applies to the following sub-links and/or files:

“<http://www.omsj.org/goons/murtagh/Fulton8-4.pdf#page=34>”,

“<http://www.omsj.org/goons/murtagh/Fulton8-3.pdf#page=70>”,

*166 “<http://www.omsj.org/goons/murtagh/Fulton8-3.pdf>”, “http://www.omsj.org/wp-content/uploads/30919_414238817832_1231093_n.jpg”, “http://www.omsj.org/wp-content/uploads/30919_414238817832_1231093_n.jpg”, “<http://www.omsj.org/goons/murtagh/Fulton8-16.pdf>”, “<http://www.omsj.org/goons/murtagh/Fulton8-12.pdf>”, “<http://www.omsj.org/corruption/defending-semmelweis>”, “<http://www.omsj.org/corruption/judge-denies-motion-to-dismiss-farber-libel-suit-casecontinues>”, “<http://www.omsj.org/corruption/dooms-dc-whistleblowers>”, “<http://www.omsj.org/authors/corruption/dooms-dc-whistleblowers>”, “<http://www.omsj.org/corruption/the-aidstruth-rats-scatter>”, “<http://www.omsj.org/corruption.the-semmelweis-report-gallos-egg>”, “<http://www.omsj.org/corruption.the-semmelweis-report-gallos-egg>”.

g) “<http://deviningafraud.wordpress.com/2012/11/27/the-devine-lewis-soekenmurtaghconnection>” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: This website was owned by David Pardo. Declarant has never owned this website. Declarant believes this was deleted in approximately 2016.

ii) Account name or names used: David Pardo

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: This website has been deleted.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A.

Unauthorized photographs of Dr. Murtagh on Baker's websites, such as shakedown.com and omsj.org include:

h) “<http://www.shakedown.doc/docs/RebJJM.jpg>” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016.

ii) Account name or names used: Clark Baker

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: Deleted 10/20/2016. Declarant conducted a Google Wayback Report after receipt of this OSC and confirmed that this link was live between 9/2015 and 11/2017 and has no content or active links since 2017.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: Declarant used Google Wayback Machine to conduct a report of when the link was last live. The contact information is the following: In Google search engine, enter keywords “Google Wayback Machine.”

i) “<http://www.shakedown.doc/docs/RebJJMParis.jpg>” – Declarant certifies the following information:

i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016.

ii) Account name or names used: Unknown

iii) Alias or aliases used: N/A

iv) Any steps taken in an effort to comply with provisions of the injunction: Deleted 10/20/2016. Declarant conducted a Google Wayback Report after receipt of this OSC and confirmed that this link was live between 9/2015 and 11/2017 and has no content or active links since 2017.

v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: Declarant used Google Wayback Machine to conduct a report of when the link was last live. The contact information is the following:

In Google search engine, enter keywords “Google Wayback Machine.”

*167 j) **“<http://www.shakedown.doc/docs/RebJJMwine.jpg>”** – Declarant certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: Deleted 10/20/2016.
 - ii) Account name or names used: Unknown
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: Deleted 10/20/2016. Declarant conducted a Google Wayback Report after receipt of this OSC and confirmed that this link was live between 9/2015 and 11/2017 and has no content or active links since 2017.
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: Declarant used Google Wayback Machine to conduct a report of when the link was last live. The contact information is the following: In Google search engine, enter keywords “Google Wayback Machine.”
- k) **“<http://www.omsj.org/goons/murtagh/RebJJM.jpg>”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 12/1/2020
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (no provisions to comply with, deleted prior to injunction).
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- l) **“<http://www.omsj.org/goons/murtagh/RebJJMParis.jpg>”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 12/1/2020
- ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (no provisions to comply with, deleted prior to injunction).
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (no provisions to comply with, deleted prior to injunction).
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A
- m) **“<http://www.omsj.org/goons/murtagh/RebJJMwine.jpg>”** – Declarant certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: Deleted 12/1/2020
 - ii) Account name or names used: Clark Baker
 - iii) Alias or aliases used: N/A
 - iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (no provisions to comply with, deleted prior to injunction).
 - v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

I declare under the foregoing is true and correct under the penalty of perjury under the laws of the state of California. Executed this May 5, 2023 in Vero Beach, Florida.

Dated: May 5, 2023

/s/ CLARK BAKER
CLARK BAKER

Exhibit 14

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA – LOS ANGELES DIVISION

In re CLARK WARREN BAKER Debtor.

JAMES MURTAGH, M.D., Plaintiff,
vs.

CLARK WARREN BAKER, Defendant.

Bk. Case No.: 2:15-bk-20351-BB

Chapter 7

Adv. Case No. 2:15-AP-01535-BB

Date: July 25, 2023, Time: 10:00 a.m., Ct.Rm: 1539

JESSICA PONCE (SBN 284043), LAW OFFICES OF JESSICA PONCE, 3255 Wilshire Blvd., Suite 1801, Los Angeles, CA 90010, Tel. (213) 263-2911, Fax (213) 403-5737, office@jponcelaw.com, Attorney for Debtor/Defendant, CLARK BAKER

DECLARATION OF JESSICA PONCE

DECLARATION OF JESSICA PONCE

*168 I, Jessica Ponce, declare:

1. If called as a witness I could competently testify to the following matters, which are of my own personal knowledge, except where stated on information and belief.

2. Concurrently with this Declaration and the, Declarant is submitting a request for extension of time to respond to item 2.c.i on Page 5-6 of the March 22, 2023 Interim Order. With the exception of said information, The undersigned hereby certifies that she does not know of any responsive information that is not already contained in Baker's Declaration in Response to Item 2.c.i. of Page 5-6 of Order of March 22, 2023, for C. Baker to Aver Compliance Baker Declaration and that she has no reason to believe that any of the information contained in Baker's Declaration in Response to Item 2.c.i. of Page 5-6 of Order of March 22, 2023, for C. Baker to Aver Compliance Baker Declaration is false, inaccurate, or incomplete.

I declare under the foregoing is true and correct under the penalty of perjury under the laws of the state of California. Executed this May 5, 2023 in Encinitas, California.

Dated: May 5, 2023

/s/ Jessica Ponce
JESSICA PONCE

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 3255 Wilshire Blvd., Suite 1801, Los Angeles, CA 90010

A true and correct copy of the foregoing documents entitled: DECLARATION OF C. BAKER IN RESPONSE TO ITEM 2.c.i. OF PAGE 5-6 OF ORDER OF MARCH 22, 2023 FOR C. BAKER TO AVER COMPLIANCE (W/ Atty. Cert. Per Court Order will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (date) 05/05/2023, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

SEE ATTACHED SERVICE LIST

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (date) 5/5/2023, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Honorable Judge Sherri Bluebond
255 East Temple Street, Room 1539
Los Angeles, CA 90012

Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL(state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (date) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page
*169 I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

5-5-2023

Date

Pam Pantell

Printed Name

/s/ Pam Pantell

Signature

SERVICE LIST

In re Clark Warren Baker, Debtor - Defendant

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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA – LOS ANGELES DIVISION

In re CLARK WARREN BAKER, Debtor.

JAMES MURTAGH, M.D., Plaintiff,

vs.

CLARK WARREN BAKER, Defendant.

Bk. Case No.: 2:15-bk-20351-BB

Adv. Case No. 2:15-AP-01535-BB

Chapter 7

Date: January 9, 2024, Time: 10:00 a.m., Ct.Rm: 1539

JESSICA PONCE (SBN 284043), LAW OFFICES OF JESSICA PONCE, 3255 Wilshire Blvd., Suite 1801, Los Angeles, CA 90010, Tel. (213) 362-2911, Fax (213) 403-5737, Attorney for Debtor, CLARK BAKER

DEFENDANT CLARK BAKER'S SUPPLEMENTAL DECLARATION IN RESPONSE TO COURT'S ORDER OF NOV. 22, 2023

(With Attorney Certification)

SUPPLEMENTAL DECLARATION OF CLARK BAKER

I, Clark Warren Baker, declare:

1. If called as a witness I could competently testify to the following matters, which are of my own personal knowledge, except where stated on information and belief.

2. This Declaration is made in response to the Court's Order dated November 22, 2023 and in order to purge the contempt in this matter.

3. ITEM I

a. "Baddocjjm.com"

Original Response:

Declarant certifies the following information:

- i. Most-recent date closed, terminated, or last used or accessed: Declarant deleted the account and website in approximately 2018 and has not had access since deletion.
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling? including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

(X) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions to comply with as this account was closed prior to the injunction.

v. N/A because there were no provisions to comply with as this account was closed prior to the injunction; therefore, there was never anybody contacted

b. "CB18.org"

Original Response

– Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed: Declarant opened this account in approximately 2017/2018 and closed it just months afterwards. Declarant has not had any access since closure.
- *170 ii. Account name or names used: Clark Baker; User ID: exliberal
- iii. Alias or aliases used: N/A
- iv. Alias or aliases used: N/A
- v. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).
- vi. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling? including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

(X) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions to comply with as this account was closed prior to the injunction.

v. N/A because there were no provisions to comply with as this account was closed prior to the injunction; therefore, there was never anybody contacted

h. "EXLIBHOLLYWOOD.BLOGSPOT.COM" –

Original Response:

Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed:
This account is active.

Declarant last accessed this account on April 20, 2023.

- ii. Account name or names used: WB Clark;
gallosegg@gmail.com
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the court order applicable to this website.)
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

(X) Yes

Original Response

– Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed: This account is active.

Declarant last accessed this account on December 19, 2023.

- ii. Account name or names used: @RINSETS

- iii. Alias or aliases used: Kochspostulates

- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).

- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

*171 Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

(X) Yes

() No

- iv. N/A because there are no provisions in the court order applicable to this online property.

- v. N/A because there are no provisions in the court order applicable to this online property; therefore, there was never anybody contacted.

U. Twitter "@RKOCHE28399683"

Original Response

– Declarant certifies the following information:

i. Twitter "@RINSETS"

h. Most recent date used, accessed, terminated or closed:
This account is active. Declarant last accessed this account on or about April 10-April 15, 2023.

ii. Account name or names used: Robert Koch,
@rkoch28399683

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjim," etc.

(X) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property.; therefore, there was never anybody contacted.

v. Truth Social "@USMC_LAPD_ret"

Original Response:

– Declarant certifies the following information:

i. Most recent date used, accessed, terminated or closed:
This account is active. Declarant accessed and used this account on or about April 1 – April 10, 2023.

ii. Account name or names used: @USMC_LAPD_ret

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjim," etc.

(X) Yes

() No

*172 iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property.; therefore, there was never anybody contacted

w. GETTR "@USMC_LAPDret"

Original Response:

– Declarant certifies the following information:

i. Most recent date used, accessed, terminated or closed:
This account is active.

Declarant accessed this account on or about April 17-April 19, 2023.

ii. Account name or names used: @USMC_LAPDret

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

(X) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property.; therefore, there was never anybody contacted

x. **MINDS “@USMC_LAPDret”** – Declarant certifies the following information:

i. Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed and used this account on or about April 17, 2023-April 19, 2023.

ii. Account name or names used: @USMC LAPDret

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

(X) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property.; therefore, there was never anybody contacted

y. **Instagram “@CWARRENB323”** – Declarant certifies the following information:

*173 i. Most recent date used, accessed, terminated or closed: This account is active. Declarant last accessed and used this account on or about April 18, 2023-April 19, 2023.

ii. Account name or names used: @CWARRENB323

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property),

- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

(X) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property.; therefore, there was never anybody contacted

j. "**JAMESMURTAGHMDPSYCHO.INFO**" – Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed: Expired in 2015. Declarant has not had any access since expiration.
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions to comply with; closed prior to injunction).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

(X) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions to comply with because this was closed prior to the injunction.

v. N/A because there are no provisions to comply with because this was closed prior to the injunction; therefore, there was never anybody contacted.

bb. **WHATSAPP “@3236321050”**

Original Response:

– Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed: This account is active.

Declarant last used this account the week of April 10-April 15, 2023

ii. Account name or names used: Clark Baker; 3236321050

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

*174 Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

(X) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property.; therefore, there was never anybody contacted

cc. **Google Voice “@3237906107”** – Declarant certifies the following information:

i. Most recent date used, accessed, terminated or closed:
This account is active. Declarant accessed this account on April 20, 2023.

ii. Account name or names used: WB Clark; 3237906107

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

(x) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property.; therefore, there was never anybody contacted

dd. **Facebook “CB@OMSJ.ORG”** – Declarant certifies the following information:

i. Most recent date used, accessed, terminated or closed:
Account closed in 2019. Declarant has not accessed account since closure.

ii. Account name or names used: Clark Baker;
CB@omsj.org

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

(x) Yes

() No

*175 iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property; therefore, there was never anybody contacted

ff. **Corrlinks “clark.baker@pm.me”** – Declarant certifies the following information:

i. Most recent date used, accessed, terminated or closed: This account is active and declarant accessed it on April 20, 2023.

ii. Account name or names used: Clark Baker

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as “goon,” “mo,” “shakedowndoc,” “baddoc,” or “baddocjjm,” etc.

(x) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property; therefore, there was never anybody contacted

gg. **Corrlinks “clark.baker@protonmail.com”** – Declarant certifies the following information

i. Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed this account on April 20, 2023.

ii. Account name or names used: Clark Baker

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as “goon,” “mo,” “shakedowndoc,” “baddoc,” or “baddocjjm,” etc.

(x) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property; therefore, there was never anybody contacted

hh. **Protonmail.com “clark.baker@pm.me”** – Declarant certifies the following information:

i. Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed this account on April 20, 2023.

- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: junk06@pm.me, dores.baker@protonmail.com, junk07@protonmail.com, cfrancisd@protonmail.com, cfrancisd@proton.me
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

Yes

No

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property; therefore, there was never anybody contacted

jj. **Google “gallosegg@gmail.com”** – Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed this account on April 20, 2023
- ii. Account name or names used: WB Clark; gallosegg@gmail.com
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).

- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

Yes

No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property; therefore, there was never anybody contacted

kk. **Outlook “jtdeshonq@hotmail.com”** – Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed: This account is active. Declarant accessed this account on April 20, 2023.
- ii. Account name or names used: JT DeShonq, jtdeshonq@hotmail.com
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

(x) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property; therefore, there was never anybody contacted

ll. **Outlook "CWB@OMSJ.ORG"** – Declarant certifies the following information:

i. Most recent date used, accessed, terminated or closed:
This account is active. Declarant accessed this account on April 20, 2023.

ii. Account name or names used: Clark Baker;
CWB@OMSJ.ORG

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr.

Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

(X) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property; therefore, there was never anybody contacted

mm. **Outlook "CWBPI"** – Declarant certifies the following information:

i. Most recent date used, accessed, terminated or closed:
This account is active. Declarant accessed this account on April 20, 2023.

ii. Account name or names used: Clark Baker; CWBPI

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjjm," etc.

(X) Yes

() No

- ***178** iii. Alias or aliases used: N/A because no aliases were ever used.
- iv. N/A because there are no provisions in the court order applicable to this online property.
- v. N/A because there are no provisions in the court order applicable to this online property; therefore, there was never anybody contacted

nn. **iCloud “clark.baker@protonmail.com”** – Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed:
This account is active. Declarant accessed this account on April 20, 2023
- ii. Account name or names used: Clark Baker
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as “goon,” “mo,” “shakedowndoc,” “baddoc,” or “baddocjjm,” etc.

(X) Yes

() No

ii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property; therefore, there was never anybody contacted

qq. **Rumble “Teleperatorski”** – Declarant certifies the following information:

- i. Most recent date used, accessed, terminated or closed:
This account is active.
Declarant last accessed the account on April 20, 2023.
- ii. Account name or names used: Teleperatorski
- iii. Alias or aliases used: N/A
- iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property).
- v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as “goon,” “mo,” “shakedowndoc,” “baddoc,” or “baddocjjm,” etc.

(X) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property; therefore, there was never anybody contacted

rr. **Carbonite “Clark.baker@protonmail.com”** – Declarant certifies the following information:

*179 i. Most recent date used, accessed, terminated or closed: This account was closed in approximately 2018. Declarant has not accessed this account since closure.

ii. Account name or names used: Clark Baker

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the order applicable to this Online Property; closed prior to injunction).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as “goon,” “mo,” “shakedowndoc,” “baddoc,” or “baddocjjm,” etc.

(X) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property because it was closed prior to the injunction.

v. N/A because there are no provisions in the court order applicable to this online property because it was closed prior to the injunction; therefore, there was never anybody contacted

uu. **Orangewebsite.com** – Declarant certifies the following:

i. Most recent date used, accessed, terminated or closed: Declarant last accessed this account in 2020.

ii. Account name or names used: Clark Baker; junk06@pm.me

iii. Alias or aliases used: N/A

iv. Any steps taken in an effort to comply with provisions of the injunctions: N/A (there are no provisions in the order applicable to this Online Property).

v. Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as “goon,” “mo,” “shakedowndoc,” “baddoc,” or “baddocjjm,” etc.

(X) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property; therefore, there was never anybody contacted

h) **“EXLIBHOLLYWOOD.BLOGSPOT.COM”** –

Declarant certifies the following information:

i) Most recent date used, accessed, terminated or closed: This account is active. Declarant last accessed this account on April 20, 2023.

ii) Account name or names used: WB Clark, gallosegg@gmail.com

- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunction: N/A (there are no provisions in the court order applicable to this website.)
- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

*180 Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjim," etc.

(X) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this website.

v. N/A because there are no provisions in the court order applicable to this website; therefore, there was never anybody contacted

t) **Orangewebsite.com** – Declarant certifies the following:

- i) Most recent date used, accessed, terminated or closed: Declarant last accessed this account in 2020*
- ii) Account name or names used: Clark Baker; junk06@pm.me
- iii) Alias or aliases used: N/A
- iv) Any steps taken in an effort to comply with provisions of the injunctions: N/A (there are no provisions in the order applicable to this Online Property).

- v) Identity, contact information, and means of communication used in connection with the foregoing compliance efforts: N/A

Supplemental Response:

Can you, C. Baker, certify the following regarding the above Online Property?

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of any moniker, such as "goon," "mo," "shakedowndoc," "baddoc," or "baddocjim," etc.

(X) Yes

() No

iii. Alias or aliases used: N/A because no aliases were ever used.

iv. N/A because there are no provisions in the court order applicable to this online property.

v. N/A because there are no provisions in the court order applicable to this online property; therefore, there was never anybody contacted

4. **ITEM 2 (John McNair or Other Responsible, Unidentified Individual) Original Response:**

5. The Second Baker Compliance Declaration (on page 6 at lines 23-28) includes the following testimony relating to the shakedowndoc.com online property:

"A back-up of JamesMurtaghMDTruth.com was transferred from Declarant [Baker] sometime in 2015 or 2016 and was taken down before 2017. The lack of screenshots (one, compared to OMSJ's 300+ and JamesMurtaghMDTruth.com 29 times). Australian citizen John McNair facilitated that transfer to the unknown server owner."

Supplemental Response: Unfortunately, I was ordered to delete hundreds of emails and documents related to Dr. Murtagh and no longer have possession of those documents. I relate the forgoing mostly by memory from documents that Dr. Murtagh possesses in the form of the court appointed

forensic computer expert. My recollection of the past fifteen years of events cannot compete with the documents and emails that are in Dr. Murtagh's possession. I fear that these questions are designed to serve as perjury traps. I no longer have many of the documents that contained emails and references to my responses.

***181** To my best recollection, Australia resident John McNair¹ interviewed me on his podcast on the subject of my investigations into HIV/AIDS sometime in 2009~2011. Because of Dr. Murtagh's ongoing libelous attacks and libels against me, my clients and associates since 2008, I investigated and discovered Dr. Murtagh's lengthy public litigation history against Emory University² and dozens of doctors and hospitals in numerous states. To expose his voluminous litigation history, I created www.JamesMurtaghMDTruth.com in an effort to protect and defend hospitals and employees where Dr. Murtagh had peijured himself to gain employment where he could provoke his termination before suing for wrongful termination. Sometime after Dr. Murtagh sued me in Los Angeles in 2014, I asked McNair (sometime in 2015-2016) to create another website (ShakedownDoc.com) to repost the contents of www.JamesMurtaghMDTruth.com. To my best recollection, McNair hired another unknown party to host the website on his server. Shortly after posting "ShakedownDoc", the website became buggy and eventually failed. McNair also assisted me in another unrelated case to post the website ELECTRICFAMILYSCAM.COM. In an effort to comply with court requests, Baker exchanged emails with McNair in March 2022 and finally spoke by Jitsi videoconference on 6 April 2022. McNair stated that he could not recall details from 2015~2016 and had no records.³ The approximate existence and timeline of these websites is corroborated by Google's Wayback Machine. With the passage of time, I no longer recall whether McNair pulled a backup from my website, or if I pushed the backup to McNair.

Explain the above testimony, including, without limitation, addressing:

- (1) The complete factual basis for such testimony.
- (2) Identification of the location and nature of documents or communications, by subject matter and type of document or communication, supporting such testimony.
- (3) Identification, including all available contact information, of all individuals from whom Baker

obtained information forming the basis of such testimony.

- (4) Who is John McNair?
- (5) Why was McNair the one facilitating the referenced transfer of the backup of JamesMurtaghMDTruth.com?
- (6) Does Baker have McNair's contact information? And if so, list all such contact information.
- (7) What is the basis for Baker's knowledge that McNair facilitated the transfer?

5. ITEM 3 (David Pardo Online Property) Original Response:

8. The Second Baker Compliance Declaration (on page 152 at lines 22–28) includes the following testimony about an online property:

- "d) '<http://mspbwatcharchive.files.wordpress/gapprop/>' - Declarant [Baker] certifies the following information:
- i) Most-recent date closed, terminated, or last used or accessed: This website was owned by David Pardo. Declarant [Baker] does not own this website and does not have any control over its content. Declarant [Baker] believes this website has been deleted in approximately 2016."
 - ii) Account name or names used: David Pardo
 - iii) Alias or aliases used: N/A"

Supplemental Response:

Sometime in 2008/2009, Attorney David Pardo of MSPBWatch forwarded an email from Murtagh who had used the email address CWBPI@ymail.com to spoof my name in a defamatory way. When Pardo mentioned harassment from Murtagh, I recognized the content as characteristic of Murtagh's countless malevolent emails to me and my associates. After sharing notes about Murtagh, Pardo helped me to compile Dr. Murtagh's voluminous litigation history that became the basis of JAMESMURTAGHMDTRUTH.COM. I was ordered to delete this correspondence that could corroborate the events that Murtagh has in his possession. Pardo told me that he was the webmaster of Pardo's website and Murtagh's lawsuit against Pardo contains all of the information that I've deleted

that Murtagh now claims to be seeking. Therefore, I can only corroborate my 15+years of these events that Murtagh and the courts ordered me to delete. As for files deleted, the fact that the links are dead indicates that the website no longer exists. I don't know what Pardo has or has not deleted, nor am I aware of the facts related to Murtagh v. Pardo. I haven't spoken to Pardo since 2013 and recall little of our conversations.

Explain the above-quoted testimony, including, without limitation, addressing:

- (1) The complete factual basis for such testimony.
 - (2) Identification of the location and nature of documents or communications, by subject matter and type of document or communication, supporting such testimony.
- *182 (3) Identification, including all available contact information, of all individuals from whom Baker obtained information forming the basis of such testimony.
- (4) What is the basis for Baker's belief that this property was owned by Pardo?
 - (5) What steps did Baker take to determine when this file was deleted if it was not his?

6. ITEM 4 (David Pardo – Another Online Property)
Original Response:

11. The Second Baker Compliance Declaration (on page 6 at lines 23–28) includes the following testimony relating to the shakedowndoc.com online property :

“g) ‘<http://deviningafraud.wordpress.com/2012/11/27/the-devine-lewis-soeken-murtaghconnection>’ – Declarant [Baker] certifies the following information:

- i) Most-recent date closed, terminated, or last used or accessed: This website was owned by David Pardo. Declarant [Baker] has never owned this website. Declarant [Baker] believes this was deleted in approximately 2016.
- ii) Account name or names used: David Pardo
- iii) Alias or aliases used: N/A”

Supplemental Response:

Sometime in 2008/2009, Attorney David Pardo of MSPBWatch forwarded an email from Murtagh who had

used the email address CWBPI@ymail.com to spoof my name in a defamatory way. When Pardo mentioned harassment from Murtagh, I recognized the content as characteristic of Murtagh's countless malevolent emails to me and my associates. After sharing notes about Murtagh, Pardo helped me to compile Dr. Murtagh's voluminous litigation history that became the basis of JAMESMURTAGHMDTRUTH.COM. I was ordered to delete this correspondence that could corroborate the events that Murtagh has in his possession. Pardo told me that he was the webmaster of Pardo's website and Murtagh's lawsuit against Pardo contains all of the information that I've deleted that Murtagh now claims to be seeking. Therefore, I can only corroborate my 15+years of these events that Murtagh and the courts ordered me to delete. As for files deleted, the fact that the links are dead indicates that the website no longer exists. I don't know what Pardo has or has not deleted, nor am I aware of the facts related to Murtagh v. Pardo. I haven't spoken to Pardo since 2013 and recall little of our conversations.

Explain the above-quoted testimony, including, without limitation, addressing:

- (1) The complete factual basis for such testimony.
- (2) Identification of the location and nature of documents or communications, by subject matter and type of document or communication, supporting such testimony.
- (3) Identification, including all available contact information, of all individuals from whom Baker obtained information forming the basis of such testimony.
- (4) What is the basis for Baker's belief that this property was owned by Pardo?
- (5) What steps did Baker take to determine when this file was deleted if it was not his?

7. ITEM 5 (Shredding of Hard Copy Materials)
Original Response:

14. Baker's testimony provided pursuant to the Interim Order included claims that he shredded, or caused to be shredded, 8, 9, or 10 boxes of written information concerning Dr. Murtagh. (See Transcript of August 3, 2023 Deposition of Clark Baker, filed as Exhibit C to the Linke declaration (Dkt. 1013) at 387:8-389:11, 394:10-395:13.)

***183 Supplemental Response:**

I separated from Carol Dunn's home in January 2021 and left boxes of my litigation at her home. I moved to Florida in June 2021. Dunn sold her home sometime around November 2021. Dunn reported to me that she had called someone who picked up the documents and destroyed them. Shortly after my July/Aug 2023 depositions, I sent an email and made numerous calls to Dunn in an effort to identify the company and individuals who removed my case files. She refused to provide that information to me abnd I have no further info. I left numerous messages on her phone and she has not answered my calls. I don't know if the company shredded the documents at her home or were transported to a facility. All of the documents contained in those boxes are PUBLIC LEGAL documents that remain at the numerous court clerks of those jurisdictions. Dunn told me that the documents remained at her home until transported, she doesn't know the identity or company name of the service she used, she has no receipts, I was in Florida when they were removed from Dunn's cellar, Dunn called or emailed them. I have no idea what they charged her and I have no receipt of the services rendered. Dunn told me that she hired a shredding company but I have no further information. And she doesn't answer my calls.

8. ITEM 6 (Prohibited References to Dr. Murtagh on OMSJ.org) Original Response:

17. Baker testified repeatedly in the First Baker Compliance Declaration and the Second Baker Compliance Declaration that he deleted everything related to Dr. Murtagh from the OMSJ.org website prior to the signing and filing of each declaration under penalty of perjury. The Court finds that such testimony has been proven false, as evidenced by Exhibit E to the Linke declaration (Dkt. 1013), which shows files relating to Dr. Murtagh still present on that website as of August 4, 2023. Additionally the Court rejects Baker's testimony attempting to blame the continuing existence of these files on the CIA, NSA, CDC, or Dr. Fauci as having been invented out of whole cloth and therefore finds that it is also materially false.

Supplemental Response:

Explain such testimony, including, without limitation, addressing:

In 2000, President Clinton issued an order that made HIV/AIDS a national security issue. As I explained in my deposition, Bender/Kuritzky admitted in his declaration that Murtagh was part of a group that attacked individuals who

questions HIV/AIDS "pseudoscience". Having won dozens of criminal cases in state and federal courts, I was attacked much the same way that skeptics of the Covid program and lockdowns attacked scientists like Jay Bhattacharya MD and others academic giants. Revelations from the Twitter files, along with the false claims of "RussiaGate", the FBI and CIA's ongoing misconduct illustrates the lengths that the bureaucracies will go to obstruct justice. Days before Kuritzky was scheduled to testify at his deposition, Murtagh mistakenly copied Baker in an email that he sent on 13 Jul 2016, stating that Murtagh played a recording of Kuritzky, that he was "shocked" that Murtagh has him "dead to rights" and that Kuritzky would "cooperate (sic) the extortion, perjury, everything... that (Kuritzky's dad) laid down the law. His family bailed him out last time, they aren't going to bail him out again. Kevin's parole officer will assist too."⁴ All of these facts occurred days before Kuritzky lied about my alleged witness tampering – a fact that the Georgia Courts established was a characteristic of Murtagh's litigation history. Kuritzky was a federal fugitive living in Israel when the State Department issued him a new passport in the new name of David Bender, complete with a new SSN and Florida driver license before I found him at Harvard University resuming his medical school classes. Kuritzky's cooperation led to his position at U. Maryland Baltimore where Fauci and the NIH Fauci AIDS cabal are based. I'm my experience, federal fugitives are not issued new identification and passports without clandestine federal assistance. There is far more evidence from the daily revelations from the Covid scandal.

*¹⁸⁴ I don't know why the documents were found on OMSJ.ORG on 4 August 2023 but, the day after I closed my website and URL, OMSJ.ORG was back online. I called Network Solutions and "Lloyd Interaction #1-112909429" reported to me that "Michael" (No further info) had purchased the website and posted the pages hours after I closed my account. These facts suggest and concerted and coordinated effort to discredit me further.⁵ I have no idea who Michael is or why he purchased the URL to keep the website active except to discredit me further. Despite the fact that the OMSJ.ORG url and pages are still live despite having closed my account can be corroborated by a subpoena to the new owner of OMSJ.ORG "Michael" (as per Network Solutions). Because most or all of these documents are public legal documents, they likely still exist in a dozen or more county clerks across the US.

9. ITEM 7 (Deletion of Electronic Files and Subsequent Search Efforts) Original Response:

19. In his testimony provided pursuant to the Interim Order, Baker testifies at great length about files that claims to have deleted on October 20, 2016 and the diligent search that he conducted on his computer on January 4, 2023. The Court finds that such testimony is materially incomplete.

Supplemental Response:

Explain such testimony, including, without limitation, addressing:

- (1) The complete factual basis for such testimony.
- (2) Identification of the location and nature of documents or communications, by subject matter and type of document or communication, supporting such testimony.
- (3) Identification, including all available contact information, of all individuals from whom Baker obtained information forming the basis of such testimony.
- (4) How does Baker know that he deleted these files on October 20, 2016?
- (5) What specific documents, entries, or other records or documents did he see that reflected this date?
- (6) What steps did Baker take on January 4, 2023 as part of this “diligent search”?

10. ITEM 8 (Other Online Properties for Which Someone Else Is Responsible) Original Response:

- a) “<http://elmaltes.blogspot.com/2008/08/gallo-egg-investigationcontinues.html>” - Declarant certifies the following information:
 - i) Ever owned or controlled – Declarant has never owned or controlled this Online Property.
 - ii) Most recent date used, accessed, closed or terminated - Defendant has never used, accessed, closed or terminated this Online Property.
 - iii) Account name or names used in connection – N/A
 - iv) Alias or aliases used – N/A

v) Any steps taken in an effort to comply with provisions of the injunction: Shortly after receipt of the QSC in December 2022 January 2023. Declarant did a search on Google for the website and saw that it is a cross-post by a third party from Declarant's original post in 2GGS. Declarant has long-deleted the original post and URL but the author of this blog had reposted Declarant's original post. Declarant does not have any control over the third-party website content. The Google search also reported that the operator of this blog is someone named Manu located in Europe. Declarant does not know Manu and does not have any affiliation with him or the website/blog. Declarant left a comment on the page asking Manu to contact him on January 7, 2023 in an effort to have the page removed. Declarant has not received a response as of the writing of this Declaration.

vi) Identity, contact information means of communication used: Declarant left a comment on the webpage asking Manu to contact him on January 7, 2023 in an effort to have the page removed. Declarant has not received a response as of the writing of this Declaration.

Supplemental Response:

Provide an explanation of such testimony, including without limitation,

(1) the basis for such testimony with respect to each such online property; Declarant conducted a Google search and found the name of the operator “Manu” and left a comment as more completely described in his Original Response. Declarant's only basis for naming Manu as the operator is the Google search conducted after receipt of this OSC.

*185 (2) identification as to the location and nature of documents or communications, by subject and category of document type supporting such testimony with respect to each such online property; There are no such documents.

(3) identification, including all available contact information, for each person Baker communicated with or otherwise obtained information from about such online property. There is no contact information available that Declarant is aware of. Declarant only left a comment on the subject website comment section.

b) "<https://sites.google.com/site/karristokely/mis/gallo-s-egg>" - Declarant certifies the following information:

- i) Ever owned or controlled – Declarant has never owned or controlled this Online Property.
- ii) Most recent date used, accessed, closed or terminated – Declarant has never used, closed or terminated this Online Property. Declarant visited this website after receipt of the OSC in December/January in order to be able to respond to the OSC.
- iii) Account name or names used in connection – N/A
- iv) Alias or aliases used – N/A
- v) Any steps taken in an effort to comply with provisions of the injunction: Declarant looked at the website and it is a reposting of Declarant's original content without Declarant's cooperation or participation. Declarant does not have any access to the website or any ability to delete the posting. The site was posted by Karri Stokely, who died between 2010-2012.
- vi) Identity, contact information, means of communication used: N/A

Supplemental Response:

Provide an explanation of such testimony, including without limitation,

(1) the basis for such testimony with respect to each such online property; Declarant met Karri Stokely in person and knew of her website. Declarant looked at the website after receipt of this OSC. Declarant knew of Karri's Stokely's death which occurred between 2010-2012.

(2) identification as to the location and nature of documents or communications, by subject and category of document type supporting such testimony with respect to each such online property; There are none.

(3) identification, including all available contact information, for each person Baker communicated with or otherwise obtained information from about such online property. Declarant didn't communicate with anyone to obtain information.

c) "<https://www.docin.com/p-388129527.html>" - Declarant certifies the following information:

- i) Ever owned or controlled – Declarant never owned or controlled this Online Property.
- ii) Most recent date used, accessed, closed or terminated – Declarant has never used, closed or terminated this Online Property. Declarant visited this website after receipt of the OSC in December. January in order to be able to respond to the OSC. Declarant's search showed that it is registered to Gang Mai in Beijing, China.
- iii) Account name or names used in connection – N/A
- iv) Alias or aliases used – N/A
- v) Any steps taken in an effort to comply with provisions of the injunction: Declarant did a search online and learned that it is registered to a person named Gang Mai in Beijing, China.
- vi) Identity, contact information, means of communication used: Declarant does not have any means of contacting Gang Mai.

Supplemental Response:

*186 Provide an explanation of such testimony, including without limitation,

(1) the basis for such testimony with respect to each such online property; Declarant did an online search after receipt of this OSC.

(2) identification as to the location and nature of documents or communications, by subject and category of document type supporting such testimony with respect to each such online property; There are none.

(3) identification, including all available contact information, for each person Baker communicated with or otherwise obtained information from about such online property. Declarant does not have any contact information.

e) "<https://m.facebook.com/SearchingforAnswersBlog/posts/clarkbakerfor-those-who've-wondered-about-the-identity-of-snout-wetracked-him-d/123924284468167/>" - Declarant certifies the following information:

- i) Ever owned or controlled – Declarant has never owned or controlled this Online Property.

- ii) Most recent date used, accessed, closed or terminated – N/A
- iii) Account name or names used in connection – N/A
- iv) Alias or aliases used – N/A
- v) Any steps taken in an effort to comply with provisions of the injunction: N/A (Declarant clicked on the link to confirm it was not his).
- vi) Identity, contact information, means of communication used: N/A

Supplemental Response:

Provide an explanation of such testimony, including without limitation,

(1) the basis for such testimony with respect to each such online property; Declarant did an online search and clicked on the link to confirm it was not his.

(2) identification as to the location and nature of documents or communications, by subject and category of document type supporting such testimony with respect to each such online property; There are none.

(3) identification, including all available contact information, for each person Baker communicated with or otherwise obtained information from about such online property. There is no one.

f) **"http://elmaltes.blogspot.com/2008/07/hiv-aids-gallos-egg.html"** - Declarant certifies the following information:

- i) Ever owned or controlled – Declarant has never owned or controlled this Online Property,
- ii) Most recent date used accessed closed or terminated – Declarant visited this website after receipt of the OSC in December 2022/January 2023 in order to respond to the OSC. This website is a cross-post by a third party from Declarant's original post in 2008. Declarant has long-deleted the original post and URL but the author of this blog had re-posted his original post back in 2008. Declarant does not have any control over the third-party website content,
- iii) Account name or names used in connection – N/A

- iv) Alias or aliases used – N/A
- v) Any steps taken in an effort to comply with provisions of the injunction: After receipt of this OSC, Declarant did a search on the website on Google which reported that the operator of this blog is someone named Manu located in Europe. Declarant does not know Manu and does not have any affiliation with him or the website blog. Declarant left a comment on the webpage asking Manu to contact him on January 7, 2023 in an effort to have the page removed. Declarant has not received a response as of the writing of this Declaration.

***187** vi) Identity, contact information, means of communication used: Declarant left a comment on the webpage asking Manu to contact him on January 7, 2023 in an effort to have the page removed. Declarant has not received a response as of the writing of this Declaration.

Supplemental Response:

The same supplemental Response re (a) eltmates applies to this section.

11. **ITEM 8 (Certification of Protonmail Accounts)**

23. The Supplemental Baker Declaration must also include a certification by Baker identifying each Protonmail account or subaccount he has owned, held, or controlled.

For each such account or subaccount, the Supplemental Baker Declaration must separately certify the following:

- (1) the date that account or subaccount was created;
- (2) the most-recent date he closed, terminated, or last used or accessed (other than for purposes of responding to this Order or the Interim Order) that account or subaccount;
- (3) the alias or aliases under which he used or accessed that account or subaccount;
- (4) all forms of communication Baker has used in connection with the creation, operation, or termination of each such account or subaccount; and
- (5) the identity, including all available contact information, for each person other than Baker who has had access to each such account or subaccount.

Additional:

Should Baker claim that any of the identified Protonmail accounts or subaccounts have been terminated, the Supplemental Baker Declaration must separately certify the following: (1) the date on which such account or subaccount was terminated; and (2) the reason or reasons that Baker terminated such account or subaccount.

Baker created account CLARK.BAKER@PM.ME on or about 18 December 2018 and last accessed this account on 20 December 2023. Baker used no alias. Baker accessed his email account using his iPhone and computer. Baker is the sole owner and operator of this account.

accessed his email account using his iPhone and computer. Baker is the sole owner and operator of this account.

Baker created account JUNK06@PM.ME on or about 2 November 2019 and last accessed this account on 20 December 2023. Baker used alias JUNK06. Baker accessed his email account using his iPhone and computer. Baker is the sole owner and operator of this account.

Baker created account JUNK06@PROTONMAIL.COM on or about 2 November 2019 and last accessed this account on 20 December 2023. Baker used alias JUNK06. Baker accessed his email account using his iPhone and computer. Baker is the sole owner and operator of this account.

Baker created account DORES.BAKER@PROTONMAIL.COM on or about 26 January 2019 and last accessed this account on 20 December 2023. Baker used alias DORES.BAKER. Baker accessed his email account using his iPhone and computer. Baker is the sole owner and operator of this account.

Baker created account JUNK07@PROTONMAIL.COM on or about 16 May 2022 and last accessed this account on 20 December 2023. Baker used alias JUNK07. Baker accessed his email account using his iPhone and computer. Baker is the sole owner and operator of this account.

Baker created account CFRANCISD@PROTONMAIL.COM on or about 13 July 2022 and last accessed this account on 20 December 2023. Baker used alias CFRANCISD. Baker accessed his email account using his iPhone and computer. Baker is the sole owner and operator of this account.

***188** Baker created account CFRANCIS@PROTON.ME on or about 13 July 2022 and last accessed this account on 20 December 2023. Baker used alias CFRANCISD. Baker accessed his email account using his iPhone and computer. Baker is the sole owner and operator of this account.

Supplemental Response to “Additional” Regarding Terminated Accounts:

Baker affirmatively states none of the immediately foregoing eight (8) identified Protonmail accounts nor subaccounts have been terminated.

I declare under the foregoing is true and correct under the penalty of perjury under the laws of the state of California. Executed this December 28, 2023 in Vero Beach, Florida.

/s/ Clark Baker
CLARK BAKER

DECLARATION OF JESSICA PONCE

I, Jessica Ponce, declare:

1. If called as a witness I could competently testify to the following matters, which are of my own personal knowledge, except where stated on information and belief.
2. The undersigned hereby certifies that she does not know of any responsive information that is not already contained in Baker's foregoing Supplemental Declaration and that she has no reason to believe that any of the information contained therein is false, inaccurate, or incomplete.

I declare under the foregoing is true and correct under the penalty of perjury under the laws of the State of California.

Executed December 28, 2023 in Encinitas, California.

/s/ Jessica Ponce
Jessica Ponce, Esq.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

3255 Wilshire Blvd., Ste. 1801, Los Angeles, CA 90010

A true and correct copy of the foregoing document entitled (*specify*): **CLARK BAKER'S SUPPLEMENTAL DECLARATION PURSUANT TO ORDER OF COURT NOV. 22, 2023** be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) December 28, 2023, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

SEE ATTACHED SERVICE LIST

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL: Service information continued on attached page On (*date*) December 28, 2023, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Honorable Judge Sheri Bluebond
255 East Temple Street, Room 1539
Los Angeles, CA 90012

Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL(state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge

here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

***189**

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

December 28, 2023

Date

Pam Pantell

Printed Name

/s/ Pam Pantell

Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

SERVICE LIST

In re Clark Warren Baker, Debtor - Defendant

David P Bleistein

Rosen & Associates PC

Email: dbleistein@rosen-law.com

Michael J Conway

Greenberg & Bass LLP

Email: MConway@gblawllp.com

Lisa Hiraide

Rosen & Associates PC

Email: lhiraide@rosen-law.com

Derek Linke

Newman Du Wors LLP

Email: linke@newmanlaw.com

Douglas M Neistat

G&B LAW, LLP

Email: dneistat@gblawllp.com

Derek A Newman
Newman Du Wors LLP
newman@newmanlaw.com

Exhibit 15

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA – LOS ANGELES DIVISION

In re CLARK WARREN BAKER Debtor.

JAMES MURTAGH, M.D., Plaintiff,

vs.

CLARK WARREN BAKER, Defendant.

Bk. Case No.: 2:15-bk-20351-BB

Chapter 7

Adv. Case No. 2:15-AP-01535-BB

Date: June 20, 2024, Time: 11:00 a.m., Ct.Rm: 1539

JESSICA PONCE (SBN 284043), **LAW OFFICES OF JESSICA PONCE**, 3255 Wilshire Blvd., Suite 1801, Los Angeles, CA 90010, Tel. (213) 263-2911, Fax (213) 403-5737, office@jponcelaw.com, Attorney for Debtor/Defendant, CLARK BAKER

FOURTH BAKER COMPLIANCE DECLARATION

(With Attorney Certification Per Court Order)

DECLARATION OF CLARK BAKER

I, Clark Warren Baker, declare:

1. If called as a witness I could competently testify to the following matters, which are of my own personal knowledge.
2. This Declaration is made in response to the Third Interim Order lodged by Plaintiffs on and to aver compliance.

3. The following “Items 1-4” are enumerated as per the Third Interim Order.

Item 1: October 20, 2016 and Diligent Searches

4. **Erroneous Date of Oct. 20, 2016:** The Court makes the reference to the fact that Baker did not make any reference to October 20, 2016 in the compliance declaration (Declarant leaves a big blank after the court's reference to 2016 in Baker's Declaration Filed 12/28/23, Dkt. #1065). It was intended that Baker would explain why there is no response. That explanation is provided now.

- a. The October 20, 2016 date is first mentioned in the Court's November 6, 2023 Tentative Ruling. It is repeated in the subsequent Second Interim Order and Third Interim Order.
- b. Baker filed two Declarations before the November 2023 hearing:
 - i. 4/21/2023 Dkt.# 979 - Def. Clark Baker's Decl. in re Court's Interim Order and Order Modifying and Correcting Interim Order; and
 - ii. 5/5/2023 Dkt.# 990 - Def. Clark Baker's Decl. in re Item 2.c.i. of Page 5-6 of Order of March 22, 2023 for Baker to Aver Compliance.
- c. To be clear, Baker does not reference October 20, 2016 in either declaration or in any other previous declaration.
- d. In Baker's Declaration filed 12/28/2023, Baker mistakenly failed to bring the immediately foregoing facts to the court's attention. The language was mistakenly left in the declaration without providing the response. (Defendant Clark Baker's Supplemental Declaration in Response to Court's Order of November 22, 2023, Dkt. # 1065, Pg. 34.) No disrespect was intended the court.

***190 e.** Although Declarant did not technically make a reference to “October 20, 2016,” it is acknowledged the court has a concern and Declarant stands ready to respond further with clarification in that regard.

5. **Diligent Search April 20, 2023:** In case the court is intending to reference April 20, 2023, to which Baker made numerous references in the 4/21/2023 and 5/5/2023 declarations, Baker responds as follows. Baker conducted diligent searches on his computer as further described

below on and around April 20, 2023 in preparation for the declaration submitted April 21, 2023.

Diligent Searches conducted January 4, 2023 and April 2023

6. Declarant owns a Mac laptop and a PC computer. The Mac contains a single hard drive, “Drive C.” The PC contains three hard drives, “Drives C:, D: and Z.” Declarant conducted the same diligent search concerning each of the four hard drives.

7. Declarant conducted the subject diligent searches as follows:

- a. I referred to Exhibit A for the names of the prohibited files. I conducted “Boolean searches” for the restricted files on each of my above-referenced hard drives.
- b. Multiple prohibited files list the name “Emory” in its name, i.e., Emory 29Mar2013.pdf, Emory1-1.pdf, Emory1-2.pdf, Emory1-3.pdf, etc.
- c. By searching for “Emory” on each drive, I was able to establish that all of the prohibited “Emory” files had been deleted. I followed the same steps to search for each of the other files on all of my drives, i.e., “Fulton”, “Murtag”, “Idaho”, etc.

8. Sometime after conducting these searches, I noticed that Drive D: was performing with increasing instability. I took my PC to “Computer Connection” (941 Seventeenth St, Vero Beach FL 32960), where Drive D: was mirrored and replaced. I then conducted a new search as described above on that new drive. I’m confident that I no longer possess any of the prohibited files on any of my drives.

Item 2 (jtdehonq@hotmail.com)

9. Declarant was doing a final sweep of his email accounts in preparation for submitting his Declaration in response to the Third Interim Order.

10. On the eve of the deadline Declarant searched the email address server hosting jtdehonq@hotmail.com and was horrified to see emails regarding Kurtizky and Murtagh pop up (as his recollection at that moment was that on the previous check no such emails were there).

11. When I discovered the emails Declarant immediately notified his attorney via email. Apparently in the final rush

just before the filing, she did not catch that final correction. See the accompanying Declaration of Jessica Ponce.

12. Declarant had, in the meantime, signed and submitted his Declaration in response to the Third Interim Order without adjusting his responses to reflect the change.

13. **Good Faith:** As evidence of good faith, I am bringing to the court’s attention the following fact. Hours later, early the next morning, my attorney spoke with Mr. Linke on the telephone and alerted him to the fact that Baker filed his declaration bearing the discrepancy and was preparing the files and emails for submission to Linke and Dr. Murtagh. See below the accompanying declaration of my attorney.

Item 3 (clarkbaker.org, osmj.org)

14. Declarant bought the domains for clarkbaker.org and osmj.org but never created any websites or did anything with the domain names. Both are maintained by Network Solutions.

*191 15. OSMJ.org is registered to Declarant. It was initially acquired in July 2009. The registration expires July 2024. Baker has never used this domain.

16. Clarkbaker.org is registered to Declarant. It was initially acquired in February 2006. The registration expires on February 2, 2027. Baker has never used this domain.

17. Any omissions regarding these two items were simple error. Declarant has submitted hundreds of pages of documents by way of Declarations and did not intend to omit these items.

18. **Good Faith:** As evidence of good faith, I am bringing to the court’s attention the following fact. On May 7, 2024 Declarant submitted authorizations for Network Solutions pursuant to Plaintiff’s request.

Item 4 (Copies of Communications)

19. Baker does not have communications to submit in response to this item because no such documents have ever existed.

20. Declarant spoke with Carol Dunn on the telephone about shredding documents approximately one year ago. Declarant asked if there were receipts or documentation of the shredding and she said no.

21. After receipt of the subject OSC, Declarant did a search on Google (for the websites referenced in the OSC) which reported that the operator was someone named Manu located in Europe. Declarant does not know Manu and does not have any affiliation with him. On January 7, 2023 Declarant left a comment on Manu's page asking him to remove the page. Declarant did not receive a response. There was no option to "copy" counsel or Murtagh on a comment left on a webpage.

22. No violation of a court order was intended.

I declare under the foregoing is true and correct under the penalty of perjury under the laws of the state of California. Executed this May 15, 2024 in Vero Beach, Florida.

Dated: May 15, 2024

/s/ Clark Baker
CLARK BAKER

DECLARATION OF JESSICA PONCE

I, Jessica Ponce, declare:

1. If called as a witness I could competently testify to the following matters, which are of my own personal knowledge, except where stated on information and belief.

2. **Good Faith:** As evidence of good faith, I am bringing to the court's attention the following facts. In preparing the December 28, 2023 Declaration for filing, apparently I did not see Baker's last email correction regarding jtdehonq come in. Hours after submitting the Baker Declaration on December 28, 2023, it came to my attention that Baker had located files in the subject email account. Early the next morning, I called Mr. Linke on the telephone and spoke with him and alerted him to the fact that Baker filed his declaration bearing the discrepancy. I explained that I would be preparing the files from the emails for submission to Linke and Dr. Murtagh and would email them the following week. On January 7, 2024 I emailed the files to Mr. Linke referencing our 12/29 telephone conversation and asking if "he needs further supplemental declaration on this point." A true and correct copy of the email is attached hereto as Exhibit A. We never received a response. (For this reason, I was surprised when Mr. Linke later claimed to the Court that Baker had falsely sworn when he was notified within hours of the oversight; he made

a serious accusation without notifying the Court of these material circumstances.)

*192 3. The undersigned hereby certifies that she does not know of any responsive information that is not already contained in the Baker Declaration and that she has no reason to believe that any of the information contained in the Baker Declaration is false, inaccurate, or incomplete.

I declare under the foregoing is true and correct under the penalty of perjury under the laws of the state of California. Executed this May 15, 2024 in Encinitas, California.

Dated: May 15, 2024

/s/ Jessica Ponce
JESSICA PONCE

EXHIBIT A

Gmail Jessica Ponce <office@jponcelaw.com>

Murtagh v. Baker - Item 1 of Court Order 11/22/23

1 message

Sun, Jan 7, 2024 at 6:29 PM

Jessica Ponce Merino <office@jponcelaw.com>

To: Derek Linke <linke@newmanlaw.com>

Cc: Assistant One <assistant1@jponcelaw.com>

Mr. Linke,

In accordance with our telephone conversation last Friday (12/29), attached please find the following:

- With respect to the Hotmail/Outlook, which is the subject of item 1 of the above order, Baker discloses the following:
 - Mr. Baker found the attached Murtagh files in his old DeShong Outlook email folder. Although previously provided to Murtagh and his counsel and generated by Murtagh through his previous counsel's email server.
 - Attached are the emails from Mr. Baker's Hotmail/Outlook Deshong folder.

- Mr. Baker initially placed these items in a deleted folder and is now awaiting your approval before deleting them.

Please let us know if you need a further supplemental declaration on this point.

Thank you,

Jessica Ponce Merino

Law Offices of Jessica Ponce
3255 Wilshire Blvd., Suite 1801
Los Angeles, CA 90010
(213) 263-291
F: (213) 403-5737
office@jponcelaw.com
jponcelaw.com

NOTICE: This message is intended for the use of the individual or entity to which it is addressed and may contain attorney/client information that is privileged, confidential and exempt from disclosure under applicable law. If you are not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by reply email or by telephone and immediately delete this message and all its attachments.

Unless our firm has been formally retained, nothing contained in this email shall be construed as legal advice.

Baker_Deshonq.pdf

1065K

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

3255 Wilshire Blvd., Suite 1801, Los Angeles, CA 90010

A true and correct copy of the foregoing documents entitled:
**BAKER'S FOURTH COMPLIANCE DECLARATION,
DECL. OF J. PONCE (WITH ATTORNEY
CERTIFICATION PER COURT ORDER)**

(a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (date) 5/15/2024, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

SEE ATTACHED SERVICE LIST

Service information continued on attached page

***193 2. SERVED BY UNITED STATES MAIL:**

On (date) 5/15/2024, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Honorable Judge Sherri Bluebond
255 East Temple Street, Room 1539
Los Angeles, CA 90012

Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL(state method for each person or entity served): Pursuant to **F.R.Civ.P. 5** and/or controlling LBR, on (date) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

5/15/2024

Date

Pam Pantell

Printed Name

vs.

CLARK WARREN BAKER, Defendant.

/s/ Pam Pantell

Signature

Bk. Case No.: 2:15-bk-20351-BB

Chapter 7

Adv. Case No. 2:15-AP-01535-BB

Date: June 20, 2024, Time: 11:00 a.m., Ct.Rm: 1539

SERVICE LIST

In re Clark Warren Baker, Debtor - Defendant

David P Bleistein

Rosen & Associates PC

Email: dbleistein@rosen-law.com

JESSICA PONCE (SBN 284043), **LAW OFFICES OF JESSICA PONCE**, 3255 Wilshire Blvd., Suite 1801, Los Angeles, CA 90010, Tel. (213) 263-2911, Fax (213) 403-5737, office@jponcelaw.com, Attorney for Debtor/Defendant, CLARK BAKER

Michael J Conway

Greenberg & Bass LLP

Email: MConway@gblawllp.com

SUPPLEMENT TO FOURTH BAKER COMPLIANCE DECLARATION; ATTORNEY CERTIFICATION PER COURT ORDER

Lisa Hiraide

Rosen & Associates PC

Email: lhiraide@rosen-law.com

(Clarifying Item 4 Re Certain Third-Party Communications)

Derek Linke

Newman Du Wors LLP

Email: linke@newmanlaw.com

DECLARATION OF CLARK BAKER

I, Clark Warren Baker, declare:

1. If called as a witness I could competently testify to the following matters, which are of my own personal knowledge.

2. This Declaration supplements my Fourth Compliance Declaration filed May 15, 2024 made in response to the Third Interim Order.

3. The Court's Third Interim Order in Item 4 referenced the Injunction requirement that "Baker [] copy Dr. Murtagh's counsel on certain third-party communications made in an effort to comply with the Injunction." The Third Interim Order then provides "Para. 13, Baker's Communications. Any written communication by Baker [] with any Third-Party Provider concerning any part of this Order, shall be copied ... to Designated Plaintiff's Counsel ..."'

*194 4. It is stressed to the Court, that I received a bill from BlueHost, an online provider, and that the below described events were only response to that bill. In other words, they did not occur as a "third-party communications made in an

Exhibit 16

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA – LOS ANGELES DIVISION

In re CLARK WARREN BAKER Debtor.

JAMES MURTAGH, M.D., Plaintiff,

effort to comply,” nor did they occur “concerning any part of this order.”

5. Declarant submits this declaration as a further good faith effort to comply with the Injunction and Interim Orders and provide notice to Plaintiff of communications with third parties, even though they are in response to a bill and not made for purposes of compliance with Court order, as such.

6. Attached hereto as Group Exhibit 1 are true and correct copies of documents referenced in parenthetical comments below.

7. On 14 June 2023, I received a bill for my BlueHost account. I ignored it, hoping that it would lapse. (BlueHost 14 June 2023.)

8. On July 28th 2023, BlueHost **auto-renewed** my account. (Exh. 1, BlueHost 28 July 2023.)

9. On or about 4 August 2023 I noticed that the website and URL, OMSJ.ORG was back online. I called Network Solutions and “Lloyd Interaction #1-112909429” reported to me that “Michael” (No further info) had purchased the OMSJ URL. The pages reappeared hours after I closed my account.

10. On August 27 2023, I contacted BlueHost **Chat** and wrote to employee **Eliyas Mohammad** (EM) that “**I wanted (my URLs and OMSJ links) gone months ago and they still show. I wanted my website closed - that page - construction - ANYTHING but close those links... Those links are dead - I want them off my old page... I was told last time that it would be done within a couple business days.... How do I kill that page -1 want a 404 error or something... All of those links must be removed. I requested this weeks ago... can you fix this for me?**” EM replied “I am checking the website files... okay - they're all dead links.” I replied that “**This should have been done weeks ago when I contacted you last... We discussed this page... I asked for my account to be closed.**” EM replied, “Can you please check the website now I have removed the links from the website.” I confirmed that the links and website were down. **I replied, “Thank you - that works - please make that permanent.”** Because BlueHost had failed to shut down my website earlier, EM emailed the **chat** conversation to clark.baker@pm.me. (Exh. 1, BlueHost 27 Aug 2023)

11. **On Tuesday, June 4th 2024, I received a new email notice from BlueHost reporting that my “hosting plan was scheduled for an upgrade”.** (Exh. 1 BlueHost 4 June 2024.)

12. I immediately called BlueHost **Chat** and was connected to employee Nevidita Math (NM). I told NM about my previous contact with EM and that I wanted the OMSJ.ORG website closed and my BlueHost account closed as I had requested 4 August 2023. I wrote again that “I wanted all of my websites and URLs closed.” NM reported that it had automatically renewed on 4 August 2023 and was paid for one year. I replied “**CLOSE MY ACCOUNT ASAP**”. NM asked me why and I replied, “**I DON'T want it - the Federal Government wants me to close it and I want it closed.**” After reconfirming my account information, NM wrote, “**Order: 1729945533 submitted to delete... Your account is successfully closed...**” I thanked her and ended the conversation. (Exh. 1, BlueHost **CHAT** 4 June 2024.)

*195 13. As of the signing of this declaration, the website is still up.

14. I will keep continuous demands on Blue host until it is truly removed. I declare under the foregoing is true and correct under the penalty of perjury under the laws of the United States of America. Executed this June 6, 2024 in Vero Beach, Florida.

Dated: June 6, 2024

/s/ Clark Baker

CLARK BAKER

DECLARATION OF JESSICA PONCE

I, Jessica Ponce, declare:

1. If called as a witness I could competently testify to the following matters, which are of my own personal knowledge, except where stated on information and belief.

2. The undersigned hereby certifies that she does not know of any responsive information that is not already contained in the Baker Declaration and that she has no reason to believe that any of the information contained in the Baker Declaration is false, inaccurate, or incomplete.

I declare under the foregoing is true and correct under the penalty of perjury under the laws of the state of California. Executed this June 6, 2024 in Encinitas, California.

Dated: June 6, 2024

/s/ Jessica Ponce
JESSICA PONCE

GROUP EXHIBIT 1

Bluehost auto-renew notification for account omsj.org

From: noreply@bluehost.com <noreply@bluehost.com>
To: clark.baker@protonmail.com
Date: Wednesday, June 14th, 2023 at 5:16 PM

[Account Login](#)

Clark,

Just letting you know that the following products will auto-renew as outlined below.

If the billing information on your account is up-to-date then you're all set! These products will renew automatically roughly 15 days before the expiration date(s) listed below and use the payment method on file.

Billed to:
Clark Baker
2645 Greenvalley Road Los Angeles, CA 90046-1412

Paying With:
card

Product Description	Exp.	Qty	Price
omsj.org			
Plus from 2023-08-04 to 2024-08-04	04 Aug 2023	\$14.99/12.00	\$179.88
Site Backup Pro from 2023-08-04 to 2024-08-04	04 Aug 2023	\$2.99/12.00	\$35.68
		mo	
		subtotal:	\$216.76
		tax:	\$0.00
		total:	\$216.76

You can adjust your renewal setting(s), update your billing information, or cancel at any time by [logging in to your account](#) or by calling customer support at 888-401-4678.

Check out our [Resource Center](#) to get answers to your most pressing website questions, or [contact support](#) any time you need.

Your continued use of Bluehost products and services is subject to the [Terms of Service](#), [Privacy Notice](#) and [Cancellation Policy](#).

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[Privacy Notice](#) | [Terms of Service](#) | [Cancellation Policy](#)

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BLUEHOST ORDER COMPLETE

From: noreply@bluehost.com <noreply@bluehost.com>
To: Clark-jurik05@pm.me
Date: Friday, July 28th, 2023 at 2:03 PM

Your Bluehost order has been confirmed.

[Account Login](#)

Payment Confirmation

Thank you again for choosing Bluehost. Our best-in-class solutions are designed to meet all of your online needs.

Your payment has been confirmed and you're all set to go. Log in to your account [here](#).

Receipt Details

Invoice Number: 76397524

Date: 28 July 2023

Billing Information

Clark Baker

6055 Sequoia Circle

Vero Beach, FL 32967

Payment Details

Payment Method: VISA 1560

Status: Authorized

Transaction Type: VISA ending in 1560

Description	Domain	Term	Expiration	Price
Plus	omsj.org	12 months	04 August 2024	\$179.88
Codeguard Basic	omsj.org	11.97 months	04 August 2024	\$47.76

Subtotal: \$227.64

Total: \$227.64

All plans and products automatically renew approximately 15 days before the expiration unless you cancel. The renewal will be for the same term length and at the [regular rates](#) reflected in your Control Panel under My Account. The payment method you chose today, or we have on file, will be used for renewals, unless you change it or cancel. You may cancel at any time by calling customer support at 888-401-4678 or by [logging into your account](#). Please note, if you purchased a Microsoft product, additional [Microsoft terms](#) apply.

Bluehost is always dedicated to customer success. We now offer even faster hosting for quicker website load times, improved visitor experience, and better SEO rankings for you.

Check out our [Resource Center](#) to get answers to your most pressing website questions, or [contact support](#) any time you need.

Your purchase and use of Bluehost products and services are subject to the [Terms of Service](#), [Privacy Notice](#) and [Cancellation Policy](#).

Connect With Us

[Privacy Notice](#) | [Terms of Service](#) | [Cancellation Policy](#)

Copyright © 2023. All rights reserved. We never send email unsolicited. Bluehost, 5335 Gate Pkwy 2nd Floor Jacksonville, FL 32256.

Aug 27, 2023 7:02 AM

Eliyas Mohammad

I closed my account for OMSJ.org but the site still hosts links that I wanted gone months ago.

Aug 27, 2023 7:02 AM

How may I help you today?

Aug 27, 2023 7:02 AM

Eliyas Mohammad

Please go to OMSJ.org.

Aug 27, 2023 7:02 AM

You'll see links - I wanted them gone months ago and they still show. I wanted my website closed - that page - construction - ANYTHING but close those links

Aug 27, 2023 7:03 AM

Those links are dead - I want them off my old page

Aug 27, 2023 7:04 AM

Can you do that for me? I was told last time that it would be done within a couple business days.

Aug 27, 2023 7:04 AM

How do I kill that page - I want a 404 error or something

Aug 27, 2023 7:04 AM

You there?

Aug 27, 2023 7:05 AM

You mean to say that you dont want show the links on the website is that right?

Aug 27, 2023 7:05 AM

Eliyas Mohammad

I need those links dead - I cloed my account

Aug 27, 2023 7:06 AM

closed my account

Aug 27, 2023 7:06 AM

Can you do that for me?

Aug 27, 2023 7:06 AM

HELLO?????

Aug 27, 2023 7:07 AM

I will check and help you with it.

Aug 27, 2023 7:09 AM

Eliyas Mohammad

To maintain high security standards, please authenticate with the token number Here's the link to get the token number:
<https://my.bluehost.com/hosting/token>

Aug 27, 2023 7:09 AM

Eliyas Mohammad

592234

Aug 27, 2023 7:09 AM

All of those links must be removed. I requested this weeks ago.

Aug 27, 2023 7:10 AM

How long does this take?

Aug 27, 2023 7:12 AM

can you fix this for me?

Aug 27, 2023 7:12 AM

Thank you for authenticating.

Aug 27, 2023 7:14 AM

Eliyas Mohammad

I am checking the website files.

Aug 27, 2023 7:14 AM

Eliyas Mohammad

okay - they're all dead links.

Aug 27, 2023 7:15 AM

This should have been done weeks ago when I contacted you last.

Aug 27, 2023 7:15 AM

We discussed this page.

Aug 27, 2023 7:15 AM

I asked for my account to be closed.

Aug 27, 2023 7:16 AM

Can you please check the website now I have removed the links from the website.

Aug 27, 2023 7:17 AM

Eliyas Mohammad

Thank you - that works - please make that permanent.

Aug 27, 2023 7:18 AM

Please send a copy of our conversation to clark.baker@pm.me

Aug 27, 2023 7:20 AM

It is a permanent change.

PrivateBin -

1.2.1

PrivateBin is a minimalist, open source online pastebin where the server has zero knowledge of pasted data. Data is encrypted/decrypted *in the browser* using 256 bits AES. More information on the project page.

Important Reminder: Hosting Plan Storage Limits

From Bluehost <no-reply@e.bluehost.com>
To clark.baker@protonmail.com
Date Tuesday, June 4th, 2024 at 2:00 PM

Your Hosting Plan is scheduled for upgrade | View in Browser

Hi Clark,

At Bluehost, we're dedicated to ensuring top-notch performance for every website we host. We wanted to take a moment to remind you that your Shared Plus plan does have limits on CPU and storage resources.

Per the notice you received about this transition, we are now implementing these limits across all users to uphold the level of uptime and reliability that you expect from us. This adjustment is necessary for maintaining the quality of service we provide.

What does this mean for you?

Our records show that you've currently exceeded the storage limits allowed in your Shared Plus hosting plan. As a result, on your next renewal date, your account will be transitioned to a plan that better aligns with your storage needs.* Typically, this involves moving to a higher tier plan.

Updating your plan not only ensures compliance but also offers additional benefits. With a higher tier plan, you'll benefit from increased CPU allocation, translating to faster response times and improved website stability. We encourage you to take a moment to compare the benefits of each hosting plan option, including website and storage limits, as well as pricing, by visiting our Hosting Plan Comparison page.

If you have any questions or concerns about this change, our support team is here to help.

We appreciate your understanding and cooperation as we work together to ensure the best possible experience for you and all of our valued customers.

Sincerely,
The Bluehost Support Team

Connect With Us

Your customer ID is 75597784

*With this upgrade, your plan will be adjusted to the hosting plan that fits your storage needs to ensure your website continues to operate as intended.

All products and services will automatically renew approximately 15 day(s) prior to Expiration Date. You may cancel at any time prior to renewal by contacting Bluehost support by logging into your account online.

Copyright © 2024. All rights reserved. Bluehost, 5335 Gate Pkwy, Jacksonville, FL 32256
[Terms of Service](#) | [Privacy Notice](#) | [Cancellation Policy](#).

Bluehost Customer Support [OEML-1707341]

From noreply@bluehost.com <noreply@bluehost.com>
To CLARKBAKER@PROTONMAIL.COM, Clark Baker<clark.baker@pm.me>
Date Tuesday, June 4th, 2024 at 5:45 PM



Dear Clark,

Thank you for contacting "Bluehost". By continuing you agree to our privacy policy
<https://newfold.com/privacy-center>

Jun 5, 2024 2:49 AM
Workflow



Do you require support with existing products or are you looking to renew/purchase services?

Jun 5, 2024 2:49 AM
Workflow



I asked months ago to close my account.

Jun 5, 2024 2:49 AM



Sorry. To best assist you, please select one of the options below.

Jun 5, 2024 2:49 AM

Workflow



[Close my account](#)

Jun 5, 2024 2:50 AM



Sorry. To best assist you, please select one of the options below.

Jun 5, 2024 2:50 AM

Workflow



QuickReply Selection
Support for Existing Products

Jun 5, 2024 2:50 AM



What is the product you need help with?

Jun 5, 2024 2:50 AM

Workflow



QuickReply Selection
Web Hosting

Jun 5, 2024 2:50 AM



What service do you need help with?

Jun 5, 2024 2:50 AM

Workflow



QuickReply Selection
Billing

Jun 5, 2024 2:50 AM



Please select the option below that best describes what you need help with.

Jun 5, 2024 2:50 AM

Workflow



QuickReply Selection
Cancel Product/Services

Jun 5, 2024 2:50 AM



What is the domain name associated to the account you are contacting us about today? If you do not have a domain name type "pass".

Jun 5, 2024 2:50 AM

Workflow



All of them - I asked to close my Bluehost account months ago.

Jun 5, 2024 2:51 AM



Thanks! For our team to quickly begin researching your request, please describe your issue in detail.

Jun 5, 2024 2:51 AM

Workflow



I changed my debit card last year and haven't paid you for months. Bluehost employee Elias Mohammad told me that he closed my BlueHost account on Aug 27, 2023. He confirmed on Aug 27, 2023 7:20 AM that my account was permanently closed. Months later he said that "Michael" took over the website. I don't know who Michael is.

Jun 5, 2024 2:57 AM



Let me get you to someone who can help. Please note, once our agent has completed assisting you, we'd also like to invite you to complete a brief survey on your experience today.

Jun 5, 2024 2:57 AM

Workflow



Hi! I'm Nivedita and I'm looking forward to assisting you today.

Jun 5, 2024 2:57 AM

Nivedita Math



To ensure a seamless and uninterrupted chat experience, please consider enabling sound on your device. By doing so, you'll receive notification sounds throughout our interaction, preventing any accidental disconnections and keeping our conversation engaging and active. Thank you for your cooperation.

Jun 5, 2024 2:57 AM

Nivedita Math



226344

Jun 5, 2024 2:58 AM

Nivedita Math



Please authenticate your account with the security PIN or access the link
<https://www.bluehost.com/my-account/account-center> to get the Security PIN. Meanwhile, I will pull up the account details.

Jun 5, 2024 2:57 AM

Thank you for authenticating.

Jun 5, 2024 2:58 AM

Nivedita Math



May I know the exact concern?

Jun 5, 2024 2:58 AM

Nivedita Math



I want all of my URLs and websites closed and my Bluehost account closed.

Jun 5, 2024 2:59 AM



I asked for this in August 2023.

Jun 5, 2024 2:59 AM



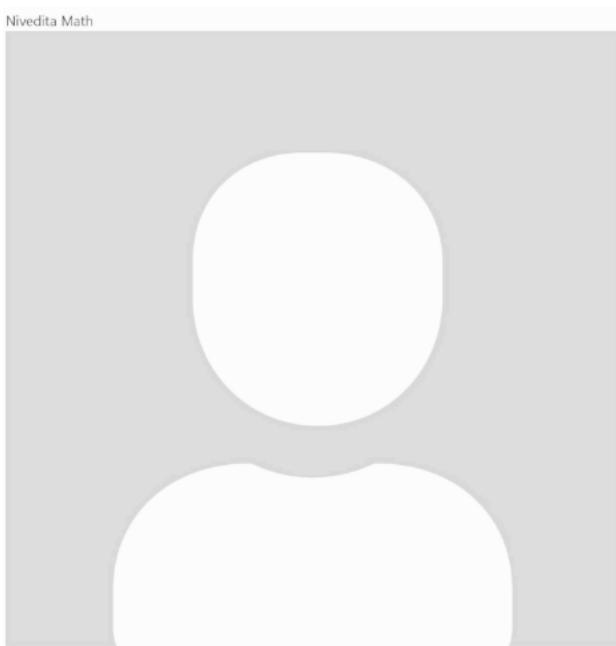
I changed my debit card last year and haven't paid you for months. Bluehost employee Elias Mohammad told me that he closed my BlueHost account on Aug 27, 2023. He confirmed on Aug 27, 2023 7:20 AM that my account was permanently closed. Months later he said that "Michael" took over the website. I don't know who Michael is.

Jun 5, 2024 3:00 AM



Thank you for the information. I see your account is active

Jun 5, 2024 3:00 AM



I want all of my websites and URLs CLOSED.

Jun 5, 2024 3:00 AM



Who has been paying you since August 2023?

Jun 5, 2024 3:01 AM



Its renewed on 08-04-2023 and it is paid for an year

Jun 5, 2024 3:01 AM

Nivedita Math



CLOSE MY ACCOUNT ASAP.

Jun 5, 2024 3:01 AM



TODAY

Jun 5, 2024 3:02 AM



May I know the reason to close this account ?

Jun 5, 2024 3:02 AM



I DON'T want it - the Federal Government wants me to close it and I want it closed.

Jun 5, 2024 3:02 AM



Thank you for clarifying. 1 – Could you please provide me your full name on file for the account? 2 – Have you already taken backups for the website files and databases? Once the account is deleted, you will no longer have access to them. 3-Do you have access to the email address on file for the account?

Jun 5, 2024 3:02 AM

Nivedita Math



I changed my debit card last year and haven't paid you for months. Bluehost employee Elias Mohammad told me that he closed my BlueHost account on Aug 27, 2023. He confirmed on Aug 27, 2023 7:20 AM that my account was permanently closed. Months later he said that "Michael" took over the website. I don't know who Michael is.

Jun 5, 2024 3:02 AM



There are no refund available on the account

Jun 5, 2024 3:02 AM

Nivedita Math



Clark Warren Baker - no backups needed. Close the account.

Jun 5, 2024 3:03 AM



I don't access Bluehost email.

Jun 5, 2024 3:03 AM



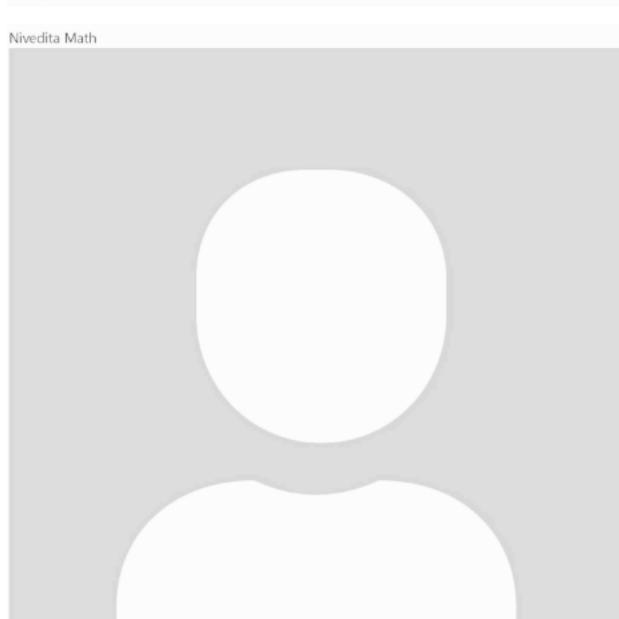
May I know if you have any future plans to build the webostes?

Jun 5, 2024 3:05 AM



Thank you for clarifying.

Jun 5, 2024 3:05 AM



Your account si active till 2028 Aug. You can just keep them to expire as well

Jun 5, 2024 3:05 AM

Nivedita Math



Clarify me to proceed further

Jun 5, 2024 3:05 AM

Nivedita Math



No future plans - I want nothing to do with Bluehost, as I told Bluehost employee Elias Mohammad last August.

Jun 5, 2024 3:06 AM



Thank you for the clarification.

Jun 5, 2024 3:06 AM

Nivedita Math



CLOSE IT

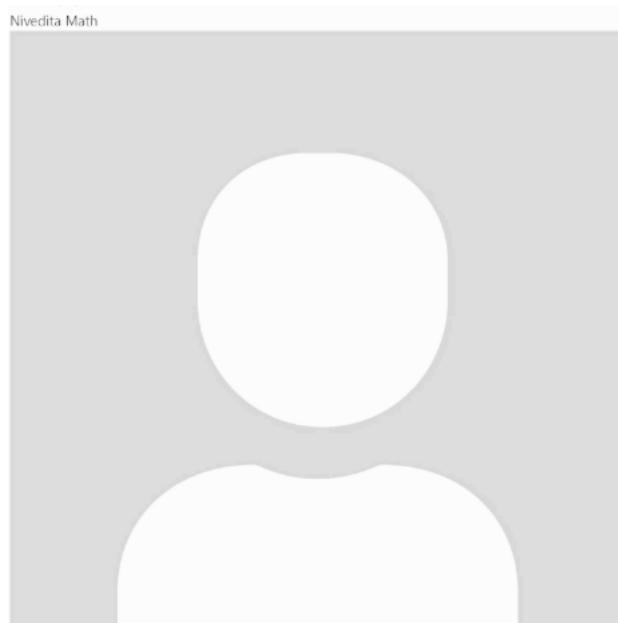
Jun 5, 2024 3:06 AM



Let me cancel the complete account for you

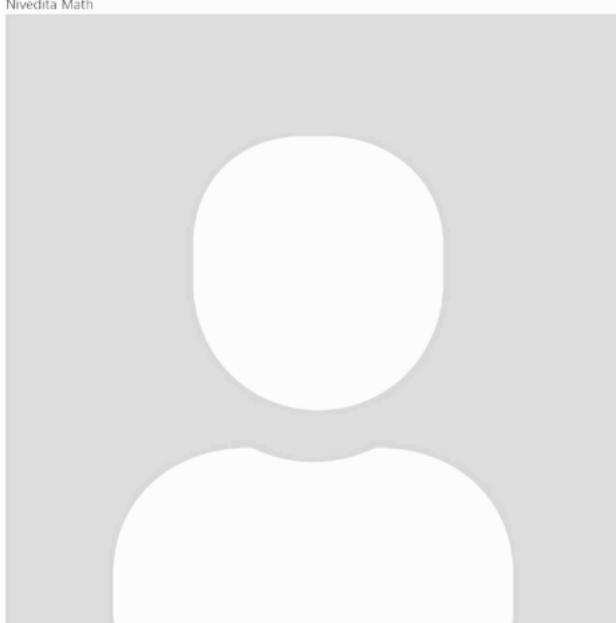
Jun 5, 2024 3:06 AM

Nivedita Math



THANK YOU

Jun 5, 2024 3:06 AM



Please be on hold

Jun 5, 2024 3:06 AM



Order: 1729945533 submitted to delete

Jun 5, 2024 3:06 AM

Nivedita Math



Your account is successfully closed

Jun 5, 2024 3:07 AM

Nivedita Math



You will be receiving an email regards this

Jun 5, 2024 3:07 AM

Nivedita Math



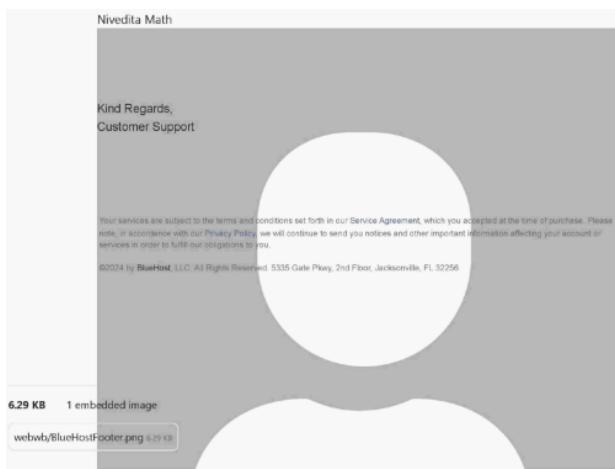
Send a copy of this transcript

Jun 5, 2024 3:07 AM



I-15038708 chat reference ID

Jun 5, 2024 3:07 AM



PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 3255 Wilshire Blvd., Suite 1801, Los Angeles, CA 90010
A true and correct copy of the foregoing documents entitled:

**SUPPLEMENT TO
BAKER'S FOURTH COMPLIANCE DECLARATION
(Clarifying Item 4 Re Certain Third-Party Communications)**

(a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (date) 6/6/2024, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

SEE ATTACHED SERVICE LIST

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (date) 6/6/2024, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

***201** Honorable Judge Sherri Bluebond
255 East Temple Street, Room 1539

Los Angeles, CA 90012

Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (date) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

6/6/2024

Date

Pam Pantell
Printed Name

/s/ Pam Pantell
Signature

SERVICE LIST

In re Clark Warren Baker, Debtor - Defendant

David P Bleistein
Rosen & Associates PC
Email:dbleistein@rosen-law.com

Michael J Conway
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Douglas M Neistat

G&B LAW, LLP

Email: dneistat@eblawllp.com

Derek A Newman

Newman Du Wors LLP

dn@newmanlaw.com

Exhibit 17

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA – LOS ANGELES DIVISION

In re CLARK WARREN BAKER Debtor.

JAMES MURTAGH, M.D., Plaintiff,

vs.

CLARK WARREN BAKER, Defendant.

Bk. Case No.: 2:15-bk-20351-BB

Chapter 7

Adv. Case No. 2:15-AP-01535-BB

Date: July 10, 2024, Time: 10:00 a.m., Dept: 1539

JESSICA PONCE (SBN 284043), LAW OFFICES OF JESSICA PONCE, 3255 Wilshire Blvd., Suite 1801, Los Angeles, CA 90010, Tel. (213) 263-2911, Fax (213) 403-5737, office@jponcelaw.com, Attorney for Debtor/Defendant, CLARK BAKER

DECLARATION OF CLARK BAKER IN RESPONSE TO PROPOSED ORDER (DKT. # 1103) AND SUPPLEMENTAL BRIEF (DKT. #1102)

DECLARATION OF CLARK BAKER

I, Clark Warren Baker, declare:

1. If called as a witness I could competently testify to the following matters, which are of my own personal knowledge.
2. This Declaration is made in response to Plaintiff's Supplemental Brief Re Contempt Sanctions and [Proposed] Order Holding Defendant Clark Warren Baker in Contempt.
3. Before I begin, I apologize to the Court for any and all problems that I have caused to the Court. I also apologize to Dr. Murtagh for any and all problems that I created in his personal life. My intentions were only to protect and defend the innocent from malevolent actors. If tracked like real diseases, preventable errors and complications would rank as the third leading cause of death in the US. My intentions were no more than to protect and defend the innocent. I've since retired, moved to a safe and healthy environment, I've married and have been welcomed by a loving family. I have no interest or desire to pursue Dr. Murtagh or to conduct any investigations into Murtagh or his governmental and non-governmental associates again. I simply seek peace for my friends, family, and pray that Dr. Murtagh finds peace and is blessed with a long and healthy life.

Proposed Finding of Alleged Materially Incomplete and/or False Testimony	Order	Response
For each instance in either the First Baker Compliance Declaration or the Second Baker Compliance Declaration where Baker testifies that there are no provisions in the Court's Injunction,	Second Interim Order, 4:3-7	This item is the subject of an objection by my attorney based on it being compound and non-specific, and that the Court cannot render such an order without an evidentiary hearing. Also,

<p>December 2022 OSC, and/or Interim Order applicable to a particular online property, the Court finds that such testimony is materially incomplete.</p>	<p>any imagined shortcomings are non-material.</p> <p>But as far as I know every time I said statement, it was correct. The following should be kept mind:</p> <ul style="list-style-type: none"> (i) The Judgment/Injunction contained sixteen (16) pages and was extremely complex, with references to other and almost impossible to read. (It should be noted, I only received the judgment six or so months after date stamped on it from my attorney, but was never served by anyone before then). (ii) I REQUEST A TRIAL IF THE COURT IS GOING adopt the conclusion leapt to by Mr. Linke and Plaintiff. The Court should know I did not act wilfully in violation any court order. In a trial with live testimony, the Court can determine my veracity.
<p>The Second Baker Compliance Declaration (on page 6 at lines 23–28) includes the following testimony relating to the shakedowndoc.com online property:</p> <p>“A back-up of JamesMurtaghMDTruth.com was transferred from Declarant [Baker] sometime in 2015 or 2016 and was taken down before 2017. The lack of screenshots (one, compared to OMSJ's 300+ and JamesMurtaghMDTruth.com29 times). Australian citizen John McNair facilitated that transfer to the unknown server owner.”</p> <p>The Court finds that such testimony is materially incomplete.”</p>	<p>Second Interim Order, 4:23-5:1</p> <p>This item is the subject of an objection by my attorney based on the following grounds.</p> <ul style="list-style-type: none"> - Murtagh has presented no evidence said statement is materially incomplete. It is a bald conclusion. - Due process requires an evidentiary hearing with live testimony to determine if any shortcoming was material. - Such evidentiary hearing is necessary to determine whether Baker acted intentionally or willfully, - Such evidentiary hearing is necessary to determine veracity. <p>Defendant responds as follows:</p>

		<p>- The information required by the order was unclear to me, so I gave it my best answer. I do not possess a "back-up of JamesMurtaghMDTruth.com." I don't recall whether I pushed a backup to McNair or he pulled it from my server.</p> <p>- I REQUEST A TRIAL IF THE COURT IS GOING adopt the conclusion leapt to by Mr. Linke and Plaintiff. The Court should know I did not act wilfully in violation of any court order. In a trial with live testimony, the Court can determine my veracity.</p>
		<p>Attached hereto as Exhibit A are true and correct copies of all communications with McNair and the Whols search results for Shakedown conducted by Baker on 7-11-2024. Declarant has no further information or recollection of the website, which no longer exists or appears.</p>
<p>"The Second Baker Compliance Declaration (on page 152 at lines 22–28) includes the following testimony about an online property:</p> <p>"d) 'http://mspbwatcharchive.files.wordpress/gapprop/' – Declarant [Baker] certifies the following information:</p> <p>i) Most-recent date closed, terminated, or last used or accessed: This website was owned by David Pardo. Declarant [Baker] does not own this website and does not have any control over its content. Declarant [Baker] believes this website has been deleted in approximately 2016."</p>	<p>Second Interim Order, 5:16-24</p>	<p>This item is the subject of an objection by my attorney based on the following grounds.</p> <ul style="list-style-type: none"> - Murtagh has presented no evidence said statement is materially incomplete. It is a bald conclusion. - Due process requires an evidentiary hearing with live testimony to determine if any shortcoming was material. - Such evidentiary hearing is necessary to determine whether Baker acted intentionally or willfully, - Such evidentiary hearing is necessary to determine veracity.

<p>The Court finds that the above testimony is materially incomplete.</p>	<p>I, Declarant [Baker], certify that I never owned or operated, and I do not recall accessing 'http://mspbwatcharchive.files.wordpress/gapprop/'. Declarant does not know when it was opened or closed.</p> <p>Declarant conducted a Whols.com search on July 11, 2024 in preparation of this response. Whols info shows no registration. Attached hereto as Exhibit Bis a true and correct copy of the Whols search conducted by Baker on 7/11/2024.</p> <p>This website was owned by David Pardo, who was also sued by Murtagh. Declarant [Baker] has never own or controlled this website and does not have any control over its content. Declarant [Baker] believes this website has been deleted in approximately 2016.</p> <p>- I REQUEST A TRIAL IF THE COURT IS GOING adopt the conclusion leapt to by Mr. Linke and Plaintiff. The Court should know I did not act wilfully in violation of any court order. In a trial with live testimony, the Court can determine my veracity.</p>	
<p>The Second Baker Compliance Declaration (on page 6 at lines 23–28) includes the following testimony relating to the shakedowndoc.com online property:</p> <p>"g) 'http://deviningafraud.wordpress.com/2012/11/27/the-devine-lewis-soeken-murtaghconnection' – Declarant [Baker] certifies the following information:</p>	<p>Second Interim Order, 6:8-18</p> <p>This item is the subject of an objection by my attorney based on the following grounds.</p> <ul style="list-style-type: none"> - Murtagh has presented no evidence said statement is materially incomplete. It is a bald conclusion. - Due process requires an evidentiary hearing with live testimony to determine if any shortcoming was material. - Such evidentiary hearing is necessary to determine 	

<p>i) Most-recent date closed, terminated, or last used or accessed: This website was owned by David Pardo. Declarant [Baker] has never owned this website. Declarant [Baker] believes this was deleted in approximately 2016.</p> <p>ii) Account name or names used: David Pardo</p> <p>iii) Alias or aliases used: N/A</p> <p>The Court finds that the above testimony is materially incomplete.</p>	<p>whether Baker acted intentionally or willfully.</p> <ul style="list-style-type: none"> - Such evidentiary hearing is necessary to determine veracity. 	<p>Declarant [Baker] certifies that Baker never owned or operated, and does not recall accessing http://deviningafraud.wordpress.com/2012/11/the-devine-lewis-soeken-murtaghconnection'.</p> <p>Baker does not know when it was opened or closed.</p> <p>Declarant conducted a Whols.com search on July 11, 2024 in preparation of this response. Whols info shows no registration. Attached hereto as Exhibit C is a true and correct copy of theWhols.com search.</p> <p>This website was owned by David Pardo. Declarant [Baker] has never owned or controlled this website and does not have any control over its content. Declarant [Baker] believes this website has been deleted in approximately 2016.</p> <p>- I REQUEST A TRIAL IF THE COURT IS GOING adopt the conclusion leapt to by Mr. Linke and Plaintiff. The Court should know I did not act wilfully in violation of any court order. In a trial with live testimony, the Court can determine my veracity.</p>
<p>Baker's testimony provided pursuant to the Interim Order included claims that he shredded, or caused to be shredded, 8, 9, or 10 boxes of written information concerning Dr. Murtagh. (See Transcript of August 3, 2023 Deposition of Clark</p>	<p>Second Interim Order, 7:3-8</p>	<p>This item is the subject of an objection by my attorney based on the following grounds.</p> <ul style="list-style-type: none"> - Murtagh has presented no evidence said statement is materially incomplete. It is a bald conclusion

<p>Baker, filed as Exhibit C to the Linke declaration (Dkt. 1013) at 387:8–389:11,394:10–395:13.)</p> <p>The Court finds that such testimony is materially incomplete.</p>	<ul style="list-style-type: none"> - Due process requires an evidentiary hearing with live testimony to determine if any short coming was material. - Such evidentiary hearing is necessary to determine whether Baker acted intentionally or willfully, - Such evidentiary hearing is necessary to determine veracity. 	<p>Baker responds as follows:</p> <p>On 4 Feb 2022, Carol Dunn sent an email to Baker requesting that the 14 case boxes be removed from her basement, located at Baker's former resident at 2645 Greenvalley Road, Los Angeles, 90046. Baker left them in her basement. On August 8 2022, Baker traveled to Los Angeles. Upon his arrival, Carol Dunn informed Baker that she was selling her house and had hired an unknown document disposal/shredding service to remove the boxes and destroy them. When I asked, Dunn said that she did not recall the name of the company or the date they had performed their services. Baker only knows that Carol Dunn told him they were removed and destroyed.</p> <p>- I REQUEST A TRIAL IF THE COURT IS GOING adopt the conclusion leapt to by Mr. Linke and Plaintiff. The Court should know I did not act wilfully in violation of any court order. In a trial with live testimony, the Court can determine my veracity.</p>
<p>Baker testified repeatedly in the First Baker Compliance Declaration and the Second Baker Compliance Declaration that he deleted</p>	<p>Second Interim Order, 7:26-8.4</p>	<p>This item is the subject of an objection by my attorney based on the following grounds.</p>

everything related to Dr. Murtagh from the OMSJ.org website prior to the signing and filing of each declaration under penalty of perjury.

The Court finds that such testimony has been proven false, as evidenced by Exhibit E to the Linke declaration (Dkt. 1013), which shows files relating to Dr. Murtagh still present on that website as of August 4, 2023.

- The language “such testimony has been materially proven false” is objectionable insofar as it implies that there was an intentional falsehood, which has not been shown (i.e. that there was false swearing).

- There is no evidence that Baker AT THE TIME OF THE SWEARING knew certain information was incorrect.

- The proposed language disregards Baker's statement that he found out about certain incorrect statements, only after the declaration was signed.

- The proposed language disregards Baker's counsel notifying Linke of later-discovered incorrect statements promptly and within days of the filing of the declaration.

- If the Court is going to weigh the evidence showing that Baker only later discovered the certain incorrect factual statements, then Due Process requires an evidentiary hearing with live testimony.

- To the extent there were incorrect statements later discovered, whether such discrepancies are material requires a due process evidentiary hearing.

- Such evidentiary hearing is necessary to determine whether Baker acted intentionally or willfully,

- Such evidentiary hearing is necessary to determine veracity.

Baker responds: Before 4 August 2023, Declarant was

		<p>not aware that that single document still remained on the website. To my best recollection, that document must have been found on a temporary folder that I somehow missed during my search. Upon returning home, I immediately removed that document and re-searched the website for Murtagh-related files.</p> <p>Although Declarant has deleted all files and closed my OMSJ accounts with BlueHost and Network Solutions, the website continues to appear at the URL <u>OMSJ.ORG</u>.</p> <p>Declarant conducted a Whols.com search on July 11, 2024. Attached hereto is a true and correct copy of the search results which reveal that the new owner of OMSJ is registered in Poland (Country Code PL, Whols).</p> <p>A further search of the website reveals no evidence of Murtagh's name or any of the prohibited files. Declarant conducted said search on July 11, 2024 in preparation of submitting this declaration.</p> <p>- I REQUEST A TRIAL IF THE COURT IS GOING adopt the conclusion leapt to by Mr. Linke and Plaintiff. The Court should know I did not act wilfully in violation of any court order. In a trial with live testimony, the Court can determine my veracity.</p>
Additionally, the Court rejects Baker's testimony attempting to blame the continuing existence of these files on the CIA, NSA, CDC, or Dr. Fauci as having been invented out of whole cloth and therefore finds	Second Interim Order, 8:4-7	My attorney is objecting to this item based on said proposed order language omits Baker's material and main statement which preceded Baker's language, that Baker is not to blame for the continued existence of

that it is also materially false.

the files, and that, in other words, without evidence Mr. Linke and Plaintiff have leapt to the conclusion that Baker is to blame. Also,

- Due process requires an evidentiary hearing with live testimony to determine if any shortcoming was material.

- Such evidentiary hearing is necessary to determine whether Baker acted intentionally or willfully,

- Such evidentiary hearing is necessary to determine veracity.

Baker responds: Between 2009 and 2015, Baker successfully conducted 50+ criminal defense investigations/cases. In each case, Baker's team demonstrated the unreliability and ineffectiveness of biological tests that included Polymerase Chain Reaction (PCR) tests and proved with electron microscopy that the tests could not detect pathogens in human blood, thereby misdiagnosing millions of US and foreign citizens who relied on those tests. The biological PCR technology is a multi-billion dollar industry that appears to use the tests to convince healthy and uninfected patients that they are sick with a disease that will eventually kill them unless they immediately subject themselves to unnecessary medical interventions with "Black Box" drugs that compromise kidney and liver function. Baker's final win was US v. David Gutierrez, which reversed the conviction of an HIV+ USAF veteran and effectively ended all criminal HIV arrests and

prosecutions throughout the US. (UNITED STATES, Appellee v. David J. A. GUTIERREZ, Technical Sergeant U.S. Air Force, Appellant No. 13-0522 Crim. App. No. 37913 United States Court of Appeals for the Armed Forces Argued December 9, 2014 - Decided February 23, 2015

<https://www.armfor.uscourts.gov/newcaaf/opinions/2014SepTerm/130522.pdf>

The attached are two documents that detail the nature of the cases that I was involved in. One will scoff at the idea of Fauci/CIA involvement until you read these documents and understand the government's stakes in my efforts to expose the fraud and corruption of the US Government's biotech industry, pre-covid. (see attached 8-4-7 BECK.pdf and 8-4-7 US v AB.pdf)

The PCR technology used to test for HIV is the same technology used to misdiagnose and grossly inflate millions of positive Covid tests between 2020 through today. Like HIV, those tests were used to misdiagnose patients to generate "cases" to begin unnecessary treatment with drugs like Remdesivir that led to ventilation and death - deaths that were then used to inflate Covid "case" numbers. Further revelations of Dr. Fauci's gross misconduct and fraud is now widely understood, as was his connection to Covid and the CIA's involvement in the development of deadly protocols and mRNA shots that have already crippled and killed millions

of people throughout the world. (The Real Anthony Fauci, RFK 2021), <https://www.michaelsenger.com/p/michael-callahan-darpas-ventilator>

Aside from the revelations about the NSA (Snowden files), Fauci, NIAID, CDC, and DoD's involvement in the Covid operations, more recent revelations by Project Veritas of CIA Agents Amjad Anton Fseisi (May 2024 <https://rumble.com/v4stsko-project-veritas-video-inside-cia.html>) and Gavin O'Bleennis (<https://rumble.com/v4of6un-ciafbis-sets-updestroys-americans-if-they-dont-like-what-you-say.html>) shows CIA officers admitting on camera that the CIA/FBI sets up and destroys Americans when they don't like what we say. I did far more than say impolite things, I posted public court documents about Dr. Murtagh's parasitical and predatory behavior and his 16 years of harassment against Emory University, St. Mary's Hospital, VA Altoona, and many others. This case is just ONE of Dr. Murtagh's 10+ lawsuits:

"(T)he trial court was authorized to conclude, as it did in its orders of 2005, 2007, and 2012, that Murtagh's 2004 suit was part of a larger pattern of "repeated, bad faith and surreptitious violations of the settlement agreement ... Emory's counterclaims also arose from Murtagh's bad faith conduct in the performance of the settlement agreement, and thus "arose separately" from Murtagh's 2004 suit itself..." (<https://cases.justia.com/georgia/>

[court-of-appeals/2013-a12a2127.pdf?ts=1541003824](#)

What else explains the intelligence community's involvement in providing federal fugitive Kevin Kuritzky a new identity (David Bender), a new passport, new Florida driver license, admission into Harvard and his eventual employment at U. Maryland Baltimore where Fauci and his associates operate? What kind of plaintiff spends 16+ years and \$6 million to sue a judgment-proof pensioner with no assets? The ONLY explanation is that my involvement and leadership in exposing widespread fraud and corruption that is now widely recognized in NIAID and the Covid/mRNA bioweapons debacle is that I threatened the technologies that would be used in 2020 to perpetrate the Covid project that has injured and killed 17 million (still climbing), generated billion of dollars in profits, and transferred \$4 trillion in wealth from the middle class to America's ruling class. Without the PCR or other unreliable tests, 2020-2024 would have been no more than a series of cold and flu seasons. Even PCR inventor and Nobel Laureate Kary Mullis cautioned that PCR could not be used for diagnostic purposes.

Unfortunately, US courts have no jurisdiction over the Intelligence Community, so all of the methods and technologies they use against US citizens are conducted with impunity. The Court may not believe me, but these are some of the many reasons that this

case has been prosecuted. You may not believe me now, but the evidence, history and growing actuarial data bears much of this out.

A defendant who raises the necessity defense admits to committing what would normally be a criminal act but claims the circumstances justified it.

I had a legal necessity to investigate and report what I found in biotech:
* a specific threat of significant, imminent danger existed

* the situation required an immediate necessity to act

* no effective legal alternatives were available

* the defendant didn't cause or contribute to the threat

* the defendant acted out of necessity at all times, and

* the harm caused wasn't greater than the harm prevented.

A defendant has the best chance at succeeding with this defense when the criminal act is minor and the potential harm is significant (life-threatening or catastrophic). The misdiagnosis and unnecessary treatment for HIV and Covid has killed millions of people. The criminal charges brought against misdiagnosed people who are accused of exposing others to HIV are catastrophic.

These facts are why I created my websites. This court is why I have removed them and destroyed the

		<p>evidence (Murtagh's documents).</p> <p>- I REQUEST A TRIAL IF THE COURT IS GOING adopt the conclusion leapt to by Mr. Linke and Plaintiff. The Court should know I did not act wilfully in violation of any court order. In a trial with live testimony, the Court can determine my veracity.</p>
In his testimony provided pursuant to the Interim Order, Baker testifies at great length about files that claims to have deleted on October 20, 2016 and the diligent search that he conducted on his computer on January 4, 2023. The Court finds that such testimony is materially incomplete.	Second Interim Order, 8:22-25	<p>This item is the subject of an objection by my attorney based on the following grounds.</p> <ul style="list-style-type: none"> - Due process requires an evidentiary hearing with live testimony to determine if any shortcoming was material. - Such evidentiary hearing is necessary to determine whether Baker acted intentionally or willfully, - Such evidentiary hearing is necessary to determine veracity. <p>Declarant cannot explain how the restricted file appeared on OMSJ's website in August 2023 - all I can say is that the protected documents no longer exist on the website since I closed my accounts. Even after closing my account, the website remains up. I've authorized Murtagh's access to my BlueHost and NetWork Solutions accounts and hope that they will be satisfied that no documents remain and that my access to that website no longer exists.</p> <p>- I REQUEST A TRIAL IF THE COURT IS GOING adopt the conclusion leapt to by Mr. Linke and Plaintiff. The Court should know I did not act wilfully in violation of any court order. In a trial</p>

		with live testimony, the Court can determine my veracity.
In addition to the above items 1 through 7, for each instance in either the First Baker Compliance Declaration or the Second Baker Compliance Declaration where Baker testified that somebody else other than him was responsible for a particular online property, the Court finds that such testimony is materially incomplete.	Second Interim Order, 9:11-15	<p>This item is the subject of an objection by my attorney based on the following grounds.</p> <ul style="list-style-type: none"> - The proposed language is compound. - The proposed language is a blanket statement too general and non-specific. - Murtagh has presented no evidence said statement is materially incomplete. It is a bald conclusion - Due process requires an evidentiary hearing with live testimony to determine if any shortcoming was material. - Such evidentiary hearing is necessary to determine whether Baker acted intentionally or willfully, - Such evidentiary hearing is necessary to determine veracity. <p>Baker responds: Declarant cannot prove how the material appeared on the OMSJ website on August 2023, but I have explained how and why it could've been placed there, but former CIA/NSA whistleblower Edward Snowden leaked the existence of global surveillance programs that target Americans and use technologies and techniques that enter computer systems and plant evidence. Members of Congress and Media have been unlawfully targeted in ways that are nearly impossible to protect and defend oneself from. XKeyscore, PRISM, ECHELON,</p>

		Sentient, Carnivore, Dishfire, Stone Ghost, Tempora, Frenchelon, Fairview, MYSTIC, DCSN, Boundless Informant Bullrun Pinwale Stingray SORMRAMPART-A, Mastering the Internet, Jindalee Operational Radar Network are just a few of those programs. https://en.wikipedia.org/wiki/Edward_Snowden
In Paragraph 19 of its Second Interim Order, the Court found that, "In his testimony provided pursuant to the Interim Order, Baker testifies at great length about files that claims to have deleted on October 20, 2016 and the diligent search that he conducted on his computer on January 4, 2023. The Court finds that such testimony is materially incomplete." (Second Interim Order ¶19.) Accordingly, the Court ordered Baker to explain such testimony in the Third Baker Compliance Declaration, "including, without limitation, addressing: (1) The complete factual basis for such testimony. (2) Identification of as to the location and nature of documents or communications, by subject and category of document type supporting such testimony. (3) Identification, including all available contact information, of all individuals from whom Baker obtained information forming the basis of such testimony. (4) How does Baker know that he deleted these files on October 20, 2016? (5) What specific documents, entries, or other records or documents did he see that reflected this date? (6) What steps did Baker take on January 4, 2023 as part	3rd Interim Order, 3:23-4:12	<p>This item is the subject of an objection by my attorney based on the following grounds.</p> <ul style="list-style-type: none"> - The proposed language is compound. - The proposed language is a blanket statement too general and non-specific. - Murtagh has presented no evidence said statement is materially incomplete. It is a bald conclusion - Due process requires an evidentiary hearing with live testimony to determine if any short coming was material. - Such evidentiary hearing is necessary to determine whether Baker acted intentionally or willfully, - Such evidentiary hearing is necessary to determine veracity. <p>Baker responds: In Paragraph 19 of its Second Interim Order, the Court found that, "In his testimony provided pursuant to the Interim Order, Baker testifies at great length about files that claims to have deleted on October 20, 2016 and the diligent search that he conducted on his computer on January 4, 2023. The Court finds that such testimony is materially</p>

of this “diligent search”? (Id. ¶ 20.)

The Court finds that the Third Baker Compliance Declaration fails to include any such testimony in response to Paragraph 20 of the Second Interim Contempt Order and is thus materially incomplete.

incomplete.” (Second Interim Order ¶ 19.)

Declarant doesn't know how I missed deleting certain files from OMSJ's servers in 2016 and January 2023 - I searched for them and deleted everything that I found. Once notified that one file was still located at omsj.org in august 2023, Declarant made repeated attempts to delete the entire website and all files (related or not) from the server. months after Declarant requested that omsj.org and its contents be removed and closed, the url and website are still visible.

Despite the \$6 million Murtagh has spent to compel me to remove publicly available court documents that prove that his medical career had ended before we met in 2008, he gives me no guidance as to what I am to do. The websites are gone - the files are gone - short of email and social media, I have closed all of my accounts at network solutions, bluehost, orange. I am at a loss as to how to comply with Murtagh's ongoing lawfare. Even if the court finds me in contempt again and punishes me with incarceration, I fear that all of their current claims and accusations will be refiled and I will be unable to satisfy a court that will return me to prison for failing to prove that I deleted files I no longer have. would it not be easier for Murtaghto notify me when a file is found so that i can pursue and delete it? After 2015, whenever Murtagh reported an offending file, I immediately deleted it. I will gladly respond this way in

the future if he comes across something that violates the court orders. Even if I stopped using and junked my computers, Murtagh would still blame me for posting files. more than 95% of the files are public court documents, so what prevents me from being accused if and when others dig into dr. murtagh's public court documents?

I have no independent recollection of what I did eight years ago or how I deviated from this process in 2016.

How do I prove the non-existence (the negative) that something is not there? When I deleted everything related to Murtagh, I deleted records that might've helped me remember.

I have deleted all the files. This information is from my own knowledge.

I deleted my files from my computers and servers. I sought no help from third parties.

(4) How does Baker know that he deleted these files on October 20, 2016?

I have no independent recollection of the searches and deletions I performed eight years ago. I vaguely recall that i searched for files and deleted them when I discovered them.

(5) What specific documents, entries, or other records or documents did he see that reflected this date?

Because I have deleted my files, I have no independent recollection of having deleted files on 20 October

2016. I do, however, have a general recollection of having deleted files in 2016.

Because of the physical and psychological trauma caused by this lawfare, I regularly attend private counseling and have deliberately forgotten much of the past 16 years to preserve my health and sanity.

(6) What steps did Baker take on January 4, 2023 as part of this "diligent search"? (Id. ¶ 20.)

I vaguely recall going through the same process on or about January 2023. I don't know how or why the Kuritzky file still appeared on omsj.org in August 2023, but once identified I immediately removed it and initiated the process to close omsj.org and my hosting accounts when it became clear to me that I no longer controlled the presentation and contents of the website.

As previously mentioned, I am aware of the widespread corruption and unlawful misconduct of our US intelligence agencies, the weaponization of those agencies against US citizens that our intelligence agencies deem dangerous; the 4000+ illegal searches that former FBI Director Mueller has admitted to, and the motives that government agencies would have in their ongoing efforts to silence individuals who expose the tools used to wage their war against US and foreign citizens in operations like covid, gain of function, mRNA, and PCR testing. Like millions of Americans, I've learned the lengths the US government will go to wage

		<p>war against its own citizens. Lawfare is widely used against Americans every day, but the worst form comes when a court enables a predator like Murtagh in proxy wars like this. What kind of man spends 16 years and \$6million to sue a man with no assets? I accept that Murtagh will continue to attack me until dead, but how many years is this court willing to stretch this punishment out? What purpose exactly will further incarceration serve except to make good citizens fear reprisal for protecting and defending the innocent from pathologized government agencies and the parasitical predators they contract. I've already endured prison and continue to do everything I can to avoid the court's wrath.</p> <p>- I REQUEST A TRIAL IF THE COURT IS GOING adopt the conclusion leapt to by Mr. Linke and Plaintiff. The Court should know I did not act wilfully in violation of any court order. In a trial with live testimony, the Court can determine my veracity.</p>
<p>The Third Baker Compliance Declaration (on page 18 at lines 12–17) includes the following testimony relating to the Outlook email account jtdeshonq@hotmail.com online property:</p> <p>"kk. Outlook jtdeshonq@hotmail.com' – Declarant certifies the following information:....</p> <p>Supplemental Response:</p> <p>Can you, C. Baker, certify the following regarding the above Online Property</p>	<p>3rd Interim Order, 4:25-5:15</p>	<p>This item is the subject of an objection by my attorney based on the following grounds.</p> <p>- The language "the Third Compliance Declaration was false" is objectionable insofar as it implies that there was an intentional falsehood, which has not been shown (i.e. that there was false swearing).</p> <p>- The language, "Baker subsequently conceded that there was material pertaining to Dr. Murtagh located at this online property" is a characterization of an unstated fact, and</p>

I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of an moniker, such as 'goon,' 'mo,' 'shakedowndoc,' 'baddoc,' or 'baddocjim,' etc.

(x)Yes ()No"

At the Hearing, Baker's counsel confirmed that, notwithstanding the above testimony, Baker subsequently conceded that there was material pertaining to Dr. Murtagh located at this online property.

Therefore, the Court finds that the above testimony at page 18 at lines 12–17 of the Third Baker Compliance Declaration was false.

is a blatantly incorrect mischaracterization. Instead, Baker stated that he later, after submitting his declaration, realized that the declaration needed correction.

- There is no evidence that Baker AT THE TIME OF THE SWEARING knew the information was incorrect.

- If the Court is going to weigh the evidence showing that Baker only later discovered the certain incorrect factual statements, then Due Process requires an evidentiary hearing with live testimony.

- To the extent there were incorrect statements later discovered, whether such discrepancies are material requires a due process evidentiary hearing.

- Such evidentiary hearing is necessary to determine whether Baker acted intentionally or willfully,

- Such evidentiary hearing is necessary to determine Baker's credibility.

Baker responds: I created and briefly used the email address jtdeshonq@hotmail.com after reporting that the NIH website aidstruth.org was down. Subsequently, that email was copied on emails of Murtagh and his associates as they acted against me and pressured Kuritzky to change his testimony and falsely claim that I had pressured Kuritzky to lie about Murtagh. Those emails proved that it was Murtagh who pressured Kuritzky to lie to the court and falsely

		claim that I had committed witness tampering. After being sanctioned and threatened with criminal charges, I stopped using the outlook account and eventually forgot about it. Nothing in those emails that prove that Murtagh and his lawyers knew of Murtagh's witness tampering was ever revealed and I reported and deleted that account when I rediscovered it. I forwarded copies of those emails, deleted them from the account, and notified the court. To avoid further confusion on this issue, I have closed jtdehonq@hotmail.com.
The Third Baker Compliance Declaration (on page 18 at lines 12–17) includes the following testimony relating to the Outlook email account jtdehonq@hotmail.com online property “kk. Outlook ‘jtdehonq@hotmail.com’ – Declarant certifies the following information:... Supplemental Response: Can you, C. Baker, certify the following regarding the above Online Property? I, Clark Baker, certify under penalty of perjury that that particular online property has not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of an moniker, such as ‘goon,’ ‘mo,’ ‘shakedowndoc,’ ‘baddoc,’ or ‘baddocjhm,’ etc. (x)Yes ()No”	3rd Interim Order, 5:25-6:17	This item is the subject of an objection by my attorney based on the following grounds. - The language “the Third Compliance Declaration was false” is objectionable insofar as it implies that there was an intentional falsehood, which has not been shown (i.e. that there was false swearing). - There is no evidence that Baker <u>AT THE TIME OF THE SWEARING</u> knew certain information was incorrect. - The proposed language disregards Baker's statement in Supplemental Declaration that he found out about continued existence of websites despite his formal orders to take down the websites, which he only discovered after the declaration was signed and submitted. - The proposed language disregards Baker's counsel promptly filing said Supplemental Declaration, which promptness allows

At the Hearing, Baker's counsel confirmed that, notwithstanding the above testimony, Baker subsequently conceded that there was material pertaining to Dr. Murtagh located at this online property.

Therefore, the Court finds that the above testimony at page 18 at lines 12–17 of the Third Baker Compliance Declaration was false.

the natural inference of that original statement was made in good faith and later discovered to be incorrect. Declaration being filed promptly.

- If the Court is going to weigh the evidence showing that Baker only later discovered the certain incorrect factual statements, then Due Process requires an evidentiary hearing with live testimony.
- To the extent there were incorrect statements later discovered, whether such discrepancies are material requires a due process evidentiary hearing.
- Such evidentiary hearing is necessary to determine whether Baker acted intentionally or willfully,

Baker responds: Such evidentiary hearing is necessary to determine veracity. Both clarkbaker.org and osmj.org were never live websites and never contained prohibited documents and never referred to Murtagh. They were only URLs that Declarant purchased and maintained. The existence of those urls do not violate any orders and neither of those urls ever contained anything related to Murtagh as defined by the injunction. They were urls, nothing more. Declarant reported those urls in previous filings. Declarant has closed his account with network solutions.

- I REQUEST A TRIAL IF THE COURT IS GOING adopt the conclusion leapt to by Mr. Linke and Plaintiff. The Court should know I did not act wilfully in violation

of any court order. In a trial with live testimony, the Court can determine my veracity.

I declare under the foregoing is true and correct under the penalty of perjury under the laws of the state of California. Executed this July 15, 2024 in Vero Beach, Florida.

Dated: July 15, 2024

/s/ Clark Baker

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

3255 Wilshire Blvd., Suite 1801, Los Angeles, CA 90010

A true and correct copy of the foregoing documents entitled:
DECLARATION OF CLARK BAKER

(a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (date) 6/6/2024, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

SEE ATTACHED SERVICE LIST

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (date) 7-15-24, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Honorable Judge Sherri Bluebond

255 East Temple Street, Room 1539
Los Angeles, CA 90012

Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL(state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (date) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

*204

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

7-15-24

Date

Pam Pantell

Printed Name

/s/Pam Pantell

Signature

SERVICE LIST

In re Clark Warren Baker, Debtor - Defendant

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Exhibit 18

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re: CLARK WARREN BAKER, Debtor(s),

JAMES MURTAGH, M.D., Plaintiff(s),

Vs.

CLARK WARREN BAKER, Defendant(s).

Case No.: 2:15-bk-20351-BB

Chapter: 7

Adversary No.: 2:15-ap-01535-BB

Date: July 10, 2024, Time: 10: 00 AM, Location: Courtroom
1539

File and Entered July 8, 2024

**ORDER AFTER JULY 10, 2024 HEARING ON ORDER
TO SHOW CAUSE RE CONTEMPT**

On July 10, 2024, the Court held a continued hearing on its December 22, 2022 “Order to Show Cause re Contempt” (the “OSC”) [Docket No. 939], relating to Baker’s compliance with the Court’s February 17, 2022 Default Judgment and

Permanent Injunction (the “Injunction”) [Docket No. 867]. Defendant Clark Warren Baker and his attorney, Jessica Ponce, appeared remotely by video conference at the hearing. Other appearances were as noted in the record at the time of hearing.

Having previously found that Baker had failed to comply in various respects with the requirements of the Injunction, the Court issued the OSC in December of 2022. Thereafter, the Court conducted numerous hearings and entered a series of orders (collectively, the “Interim Orders”), including without limitation the following, requiring defendant Clark Warren Baker (“Baker”) to file declarations providing additional information and to produce various documents for the purpose of purging his contempt of the Injunction:

1. its March 25, 2023 “Interim Order re Contempt Sanctions against Clark Baker” (the “First Interim Order”) [Docket No. 975] (which was modified and corrected by this Court’s March 28, 2023 “Order Modifying and Correcting Interim Order re Contempt Sanctions Against Clark Baker” [Docket No. 977]);
2. its November 22, 2023 “Second Interim Order re Contempt Sanctions Against Clark Baker” (the “Second Interim Order”) [Docket No. 1045]; and
3. its April 25, 2024 “Third Interim Order re Contempt Sanctions Against Clark Baker” (the “Third Interim Order”) [Docket No. 1087].

In response to the Interim Orders, Baker filed a series of declarations, including without limitation the following, and produced a limited number of documents as attachments to those declarations:

1. “Defendant Clark Baker’s Supplemental Declaration in Response to OSC re Contempt” [Docket No. 948] filed January 25, 2023;
2. “Defendant Clark Baker’s Declaration in Response to Court’s Interim Order and Order Modifying and Correcting Interim Order” [Docket No. 979] filed April 21, 2023;
- *205 3. “Defendant Clark Baker’s Declaration in Response to Item 2.c.i. of Page 5-6 of Order of March 22, 2023 for C. Baker to Aver Compliance” [Docket No. 990] filed May 5, 2023;

4. “Defendant Clark Baker's Supplemental Declaration in Response to Court's Order of Nov. 22, 2023” [Docket No. 1065] filed December 28, 2023;
5. “Fourth Baker Compliance Declaration” [Docket No. 1098] filed May 15, 2024;
6. “Supplement to Fourth Baker Compliance Declaration” [Docket No. 1101] filed June 6, 2024; and
7. “Declaration of Clark Baker in Response to Proposed Order (Dkt. #1103) and Supplemental Brief (Dkt. #1102)” [Docket No. 1104] filed July 15, 2024 (the “July 2024 Baker Declaration”).

The Court, having reviewed and considered (a) the requirements that the Interim Orders established for Baker to purge his contempt of the Injunction; (b) the extent to which Baker has fulfilled these requirements; (c) all of the memoranda, declarations and other documents filed by the parties in the above adversary proceeding (the “Action”) with regard to Baker's attempts to purge his contempt; (d) the oral argument of counsel at the time of the numerous hearings on this matter; (e) the proposed form of order lodged by plaintiff in the Action in advance of the July 10, 2024 hearing on the OSC; (f) Baker's objections to the form of that proposed order; and (g) the Court's records and files in the Action; hereby makes the following findings:

1. In its First Interim Order (as modified and corrected by [Docket No. 977]), the Court held Baker in contempt for willfully violating the February 17, 2022 Injunction by doing all of the following:
 - a. Continuing to own, administer or maintain online properties such as websites, blogs, or domain names that refer to Dr. Murtagh (paragraph 2¹);
 - b. Maintaining or retaining websites or online storage sites that contain content and/or host documents concerning Dr. Murtagh (paragraph 5);
 - c. Failing to purge from the internet content that he controls referring to or mentioning Dr. Murtagh (paragraph 6);
 - d. Failing to ensure that Baker's content about Murtagh was “deindexed” from internet search engines (paragraph 7);

- e. Failing to transfer to Dr. Murtagh within 10 days of the entry of the Injunction domain names and websites referencing Dr. Murtagh (paragraph 8);
 - f. Failing to notify the Court and Dr. Murtagh within 10 days after the entry of the Injunction if he was unable to comply with any of the above directives (paragraph 9); and
 - g. Failing to copy Dr. Murtagh's counsel on any third-party communications made in an effort to comply with the directives contained in the Injunction (paragraph 13);
2. Although Baker complied with certain of the directives outlined in the Interim Orders in the various declarations he submitted in response to these orders, as of the July 10, 2024 hearing, a number of deficiencies remained (as outlined in detail below).
 3. The July 2024 Baker Declaration does not address any of the remaining deficiencies identified by the Court at the July 10, 2024 hearing on the OSC and does not attach any of the exhibits that the declaration represents are attached to that document;
 4. In the July 2024 Baker Declaration, in response to the prompt, “How does Baker know that he deleted these files on October 20, 2016,” Baker states that he has “no independent recollection of the searches and deletions I performed eight years ago;” however, Baker first submitted a declaration swearing under penalty of perjury that he had deleted the files in question on October 20, 2016 **in a declaration that he filed on May 5, 2023** [Docket No. 990] - a little over a year ago. How did Baker know that that deletion had occurred on October 20, 2016 in May of 2023? The Court has repeatedly requested more information about the steps that Baker took in an effort to ensure that he had complied with the Injunction (or the documents or electronic records that he looked at to determine that the deletion occurred on this date) and has given Baker multiple opportunities to describe the process he used to ensure compliance or to determine that deletion occurred on this date, but cannot obtain anything remotely resembling an answer to this question.

^{*206} 5. Baker was advised in the First Interim Order [p. 7 at par. 3] that, if he failed to purge his contempt in the manner described by that order, or if the Court

determined that any of the information contained in his compliance declarations was materially incomplete or false, or both, the Court would prepare a report and recommendation to the District Court in which it recommended to the District Court that it withdraw the reference of the Action to the extent necessary to hold Baker in criminal contempt and direct that he be incarcerated for a period of not less than one year. Similar warnings/reminders were contained in the Second Interim Order [[Docket 1045](#), p. 3 at lines 17-23] and the Third Interim Order [[Docket No. 1087](#), p. 3 at lines 10-16].

6. Baker has had more than ample time and opportunity to provide the information and documentation necessary to purge his contempt of the Injunction and has failed to do as described in more detail below.

In light of the foregoing, **IT IS HEREBY ORDERED** as follows:

1. Baker has failed to purge his contempt of the Injunction in at least the following respects:
 - a. He has failed to provide a full, complete and truthful explanation of all information, documents and any other grounds upon which he relied when he represented that he had deleted numerous files on October 20, 2016.
 - i. In his May 5, 2023 declaration [[Docket No. 990](#)], Baker testified 292 times that he had “closed, terminated or last used or accessed” a particular document or internet property on October 20, 2016. When directed in the Second Interim Order and Third Interim Order to explain this testimony by, among other things, advising the Court how he knows that he deleted these files on October 20, 2016 – what specific documents, entries or other records or documents he saw that reflected this date, Baker has failed to supply an answer to this question.
 - ii. Instead, Baker testified in his May 15, 2024 declaration that he never said he deleted files on this date and that this date was first mentioned in the Court’s November 6, 2023 Tentative Ruling. ([See Docket No. 1098](#), p. 2 at pars. 4(a) and (c) (“The October 20, 2016 date is first mentioned in the Court’s November 6, 2023 Tentative Ruling. It is repeated in the subsequent Second Interim Order and Third Interim Order. ... To be clear, Baker does not
- reference October 20, 2016 in either declaration or in any previous declaration.”) Baker’s testimony in this declaration is false and demonstrates, at a minimum, that Baker does not take the time necessary to verify the accuracy of his statements before swearing to them under penalty of perjury in a declaration.
- iii. In the July 2024 Baker Declaration, on page 18, Baker offers the following additional response to the prompt, “How does Baker know that he deleted these files on October 20, 2016?”: “I have no independent recollection of the searches and deletions I performed eight years ago. I vaguely recall that I searched for files and deleted them when I discovered them.” He adds in response to a question that asked what documents, entries or other records or documents he saw that reflected this date, “Because I have deleted my files, I have no independent recollection of having deleted files on 20 October 2016. I do, however, have a general recollection of having deleted files in 2016.”
 - iv. None of this testimony explains how, in May of 2023, when Baker signed docket number 990 under penalty of perjury, Baker knew that he had deleted files on October 20, 2016. Did he invent this date out of whole cloth or did he see this date on some document that he has not identified? Or was there some other reason that he selected or recalled this date when he prepared his May 2023 declaration and signed it under penalty of perjury? Baker never tells us or makes any effort to describe what steps he took to arrive at this date.
- *207** b. Baker has failed to provide a full, complete and truthful explanation of all information, documents and any other grounds upon which Baker relied when he testified in his May 2023 declaration [[Docket No. 990](#)] that he conducted a diligent search on January 4, 2023 for files and other materials that he was required to delete pursuant to the Injunction, as required by the Third Interim Order.
- i. In his May 2023 Declaration, Docket No. 990, Baker testifies 275 times that, “On or about January 4, 2023 Declarant conducted a diligent search online and of his own computer and confirmed deletion” of various materials.
 - ii. In response to the Third Interim Order, Baker filed his May 15, 2024 Fourth Compliance Declaration. On page 3 of that document, in paragraph 5, Baker

suggests that the Court must have gotten this date wrong and must have been referring to April 20, 2023. (See Fourth Compliance Declaration, Docket No. 1098 (“In case the court is intending to reference April 20, 2023, to which Baker made numerous references in the 4/21/2023 and 5/5/2023 declarations, Baker responds as follows. Baker conducted diligent searches on his computer and as further described below on and around April 20, 2023 in preparation for the declaration submitted April 21, 2023.”)).

iii. In the very next section of the Fourth Compliance Declaration, Baker provides a few paragraphs describing how he went about conducting the search referenced in the preceding section. He includes the date January 4, 2023 as one of the dates in the heading of that section, but it is clear from the text of paragraph 5 of the declaration that he is not testifying that he actually did any of this on January 4, 2023. As a result, Baker has never explained what if anything he did on or about January 4, 2023. As with the October 20 date, the question remains, did Baker invent this date out of whole cloth or was there some reason that he recalled or selected this date at the time he prepared his May 2023 declaration? Baker never tells us or makes any effort to describe why he arrived at this date when he prepared his May 2023 declaration, again leaving the Court with the distinct impression that he “plays fast and loose” with the facts that he puts in declarations and does not make any effort to verify the accuracy of information given to the Court, even when he swears to the accuracy of that information under penalty of perjury.

iv. In the July 2024 Baker Declaration [Docket No. 1104] on page 18 in approximately the middle of the page, he responds to the prompt, “(6) What steps did Baker take on January 4, 2023 as part of this ‘diligent search?’ ” as follows: “I vaguely recall going through the same process on or about January 2023.” He does not describe in this declaration what he means by “the same process.” The preceding paragraph says merely, “I vaguely recall that I searched for files and deleted them when I discovered them.” That is hardly a detailed explanation of the steps he took in performing this “diligent search” and does not contain any information as to what documents or information Baker looked at to determine that he conducted this diligent search on January 4, 2023 or

how he remembered in May of 2023 that this “diligent search” had occurred on or about January 4, 2023.

c. Baker has failed to provide a full, complete and truthful explanation of all of the following, as required by the Third Interim Order: (1) how in preparing his December 28, 2023 declaration he missed the fact that one of his email accounts (jtdeshonq@hotmail.com) contained information that should have been deleted in response to the Injunction; (2) how and when he discovered that this information still existed; and (3) what this newly-discovered information was.

***208** i. In his December 28, 2023 declaration [Docket No. 1065], Baker certified under penalty of perjury that the Outlook email account jtdeshonq@hotmail.com had not been used to host, store, maintain, or communicate about any content relating to Dr. Murtagh in any form, variation, or misspelling, including, without limitation, the use of an moniker, such as ‘goon,’ ‘mo,’ ‘shakedowntdoc,’ ‘baddoc,’ or ‘baddocjjm,’ etc.” (Docket No. 1065, p. 18 at lines 12–17.) However, shortly after filing that declaration, Baker’s counsel advised opposing counsel (and confirmed on the record at a January 9, 2024 hearing) that Baker had located emails from this account that pertained to Dr. Murtagh.

ii. As a result, the Court found in the Third Interim Order that Baker’s certification that this email account did not contain any such information was false (see Third Interim Order, p. 5 at pars. 7–8) and ordered Baker to explain in a fourth compliance declaration how this oversight occurred. Paragraph 9 of the Third Interim Order requires Baker to include the following in the fourth Baker compliance declaration:

1. The complete factual basis for such testimony [his testimony that this email account does not include any communications concerning Dr. Murtagh];
2. What steps did Baker take in connection with conducting a diligent search and preparing his responses to the Second Interim Order [his December 28, 2023 declaration], including without limitation with respect to [the email address jtdeshonq@hotmail.com]; and
3. Identification of the location and nature of documents and communications that Baker subsequently located at the above online property.

iii. Baker's Fourth Compliance Declaration [Docket No. 1098] fails to provide the requested information and instead provides an explanation that is demonstrably false.

iv. In the Fourth Compliance Declaration, on page 4 at paragraphs 9 through 12, Baker provides the following testimony:

9. Declarant was doing a final sweep of his email accounts in preparation for submitting his Declaration in response to the Third Interim Order.

10. On the eve of the deadline Declarant searched the email address server hosting jtdeshong@hotmail.com and was horrified to see emails regarding Kurtizky and Murtagh pop up (as his recollection at that moment was that on the previous check no such emails were there).

11. When I discovered the emails Declarant immediately notified his attorney via email. Apparently in the final rush just before the filing, she did not catch that final correction. See the accompanying Declaration of Jessica Ponce.

12. Defendant had, in the meantime, signed and submitted his Declaration in response to the Third Interim Order without adjusting his responses to reflect the change.

v. This testimony cannot be accurate. The Third Interim Order was not even entered until four months after the declaration containing the relevant omission was filed. Therefore, Baker could not have prepared his December 2023 declaration [Docket No. 1065] in compliance with an order [Docket No. 1087] that did not yet exist. Although it could certainly be that Baker was merely confused and that he was preparing this declaration in response to the Second Interim Order rather than the Third, this testimony once again underscores the fact that Baker apparently makes little if any effort to ensure that his declarations are accurate when they are signed and filed with the Court.

vi. After this inaccuracy was called to his attention, Baker filed the July 2024 Baker Declaration [Docket No. 1104], which contains more false information (or information that reveals that his earlier declaration was false). In his December 2023 declaration, Baker

testified that he found these offending emails "on the eve of the deadline" for filing his declaration and promptly notified his attorney and that she must have missed making this correction before filing the declaration. In the July 2024 Baker Declaration, Baker states that, "later, after submitting his declaration, he realized that the declaration needed correction." So, apparently, he signed and "submitted" the declaration before conducting this alleged "final sweep"?

*209 vii. In any event, even if these inconsistencies can be harmonized, Baker has never explained what steps he took *before* submitting his December 2023 declaration to make sure that the representations and certifications contained in that declaration were accurate, as directed by the Third Interim Order. (He found these documents while doing his "final sweep." Were there other, earlier sweeps? If so, what did those consist of? And, if not, why didn't he make any effort to ensure that his certification was correct *before* signing the declaration?) And he does not provide a description of the location and nature of the offending emails. He says merely that this email address was copied on emails of Murtagh and his associates as they acted against him and claims that these emails proved that the plaintiff pressured Kuritzky to change his testimony and lie.²

d. Baker has failed to provide plaintiff's counsel with copies of written communications (or to send emails describing oral communications) evidencing that Baker has complied with the Injunction by taking down websites, online storage sites and other online properties that contain disparaging information concerning the plaintiff.

i. Paragraph 13 of the Injunction (entered February 17, 2022) requires Baker to copy plaintiff's counsel with any written communication by Baker (or any agent or representative of Baker, or anyone acting on Baker's behalf), with any Third-Party Provider³ concerning any part of the Injunction. That same paragraph requires Baker to inform plaintiff's counsel by email of the substance of any verbal communication that Baker (or any agent or representative of Baker, or anyone acting on Baker's behalf) has with any Third-Party Provider concerning any aspect of the Injunction within 12 hours of any such verbal communication.

ii. In several instances in his compliance declarations, Baker referred to communications that fell within the scope of paragraph 13 of the Injunction, yet, with the exception of four documents attached to his June 6, 2024 declaration⁴ [Docket No. 1101], Baker has never supplied copies of any written communications concerning his compliance with the Injunction and has never sent plaintiff's counsel an email describing any oral communications concerning compliance. And Baker has never explained why he failed to produce copies of documents dating back to June and July of 2023 to plaintiff's counsel until June 6, 2024.

iii. In the Third Interim Order, the Court specifically identified the following references from Baker's December 28, 2023 declaration that indicate or evidence the existence of a writing that should have been produced and ordered him to produce these writings:

1. Proton email, 6 April 2022 between Baker and McNair [Docket No. 1065, p. 28, n. 3];
2. In an effort to comply with court requests, Baker exchanged emails with McNair in March 2022 [Id., pp. 27:25–28:1];
3. Shortly after my July/Aug 2023 depositions, I sent an email and made numerous calls to [Carol] Dunn in an effort to identify the company and individuals who removed my case files. [Id., p. 31:16–17]; and
4. “Lloyd Interaction #1-112909429” reported to me that “Michael” (No further info) had purchased the [omsj.org] website and posted the pages hours after I closed my account. [Id., p. 33:11–13].

iv. The Third Interim Order also directed Baker to include in the Fourth Baker Compliance Declaration a “complete explanation as to why Baker failed to copy Dr. Murtagh's counsel, or provide contemporaneous copies, on all such communications.” (Third Interim Order at par. 17.)

v. Baker's May 15, 2024 declaration fails to comply with these requirements. Instead, in this declaration, Baker offers testimony which, if true, means that his prior testimony concerning the existence of these documents was false. In his May 15, 2024 declaration, Baker represents that he cannot produce

any of the requested documents because “no such documents have ever existed.” [Docket No. 1098, at par. 19.] Baker provides no explanation as to why he previously testified that there were April and March 2022 emails with McNair.

*210 vi. With regard to the email that his December 28, 2023 declaration states he sent to Carol Dunn, he offered the following testimony in his May 15, 2024 declaration [Docket No. 1098, p. 6 at par. 20]: “Declarant spoke with Carol Dunn on the telephone about shredding documents approximately one year ago. Declarant asked if there were receipts or documentation of the shredding and she said no.” He neither mentions his prior testimony in which he stated that he sent her an email nor offers any explanation as to how or why his prior testimony was in error, if he now contends that this is the case.

vii. In the July 2024 Baker Declaration [Docket No. 1104] on page 7, Baker provides more detail about his conversations with Carol Dunn, but now refers only to an email that Carol Dunn sent *to him*. Absent from this declaration is any reference to the email that he sent to her (once again without an explanation or discussion of the inconsistency). These inconsistencies further exacerbate the Court's concern that Baker does not take seriously his obligation to provide truthful testimony to the Court each and every time he submits a declaration under penalty of perjury.

viii. In the July 2024 Baker Declaration [Docket No. 1104], Baker makes reference to (A) communications with McNair [p. 4 at line 7], (B) the results of a WhoIs search that Baker conducted on July 11, 2024 [pp. 4, 5, 6 & 9]; and (C) two documents that detail the nature of certain cases in which Baker was involved [p. 11 at line 4] and represents that these documents are attached to the declaration. They are not; there were no exhibits to the July 2024 Baker Declaration.

ix. The whole purpose of the injunctive relief included in the Court's February 2022 judgment was to prevent Baker from resuming his internet defamation campaign against the plaintiff, which the Court found had resulted in actual compensatory damages to the plaintiff of more than \$10,000,000. Toward this end, paragraph 6 of the Injunction requires Baker to “Take all necessary steps to purge and eliminate from the internet any and all traces of any

websites ..., webpages, files, court filings, exhibits or other attachment thereto ... which is about, refers to, references or mentions Dr. James Murtagh, M.D. in any form, variation or misspelling " Baker was ordered by this same paragraph to complete all of these steps within 10 days after issuance of the Injunction. The provisions of paragraph 13 of the Injunction required Baker to copy plaintiff's counsel on communications with Third-Party Providers so that plaintiff's counsel could verify that Baker had in fact complied with the Injunction.

2. The Injunction was entered more than two years ago and, only through the diligent efforts of plaintiff's counsel has any compliance with the Injunction been obtained.⁵ Baker took no steps to comply with the Injunction until plaintiff moved for the entry of an order why he should not be held in contempt for failing to comply with the Injunction. And, at every step in the process, Baker has made at best only half-hearted attempts to supply the information and documentation that the Court has requested, with apparently little if any regard for the accuracy of whatever testimony he provides in his compliance declarations. As a result, Baker has caused the plaintiff and this Court to expend inordinate amounts of time and effort in a largely fruitless effort that, in this Court's view, might best be described as "trying to nail Jello to the wall." This process needs to come to an end. As Baker claims to be judgment proof and has failed to

pay hundreds of thousands of dollars in compensatory sanctions that the Court has already imposed, and this Court's prior efforts to induce compliance with its orders through the use of its civil contempt powers have not led to a notable improvement in Baker's behavior, the Court believes that the time has come for it to request that the District Court employ its criminal contempt powers in this Action. There needs to be a consequence for failing to comply with court orders and "playing fast and loose" with the truth in submitting declarations under penalty of perjury to a court of law.

***211** 3. In light of the foregoing, the Court will prepare a Report and Recommendation to the District Court recommending that it withdraw the reference of this adversary proceeding to the extent necessary to hold Baker in criminal contempt and direct that he be incarcerated for a period of not less than one year.

Date: July 18, 2024

/s/ Sheri Bluebond

Sheri Bluebond

United States Bankruptcy Judge

All Citations

Slip Copy, 2024 WL 3567002

Footnotes

- 1 Unless otherwise noted, all docket numbers used in this Report and Recommendation refer to docket numbers in the Action.
- 2 [Bankruptcy Code section 523\(a\)\(6\)](#) excepts from discharge an individual debtor's debts for "for willful and malicious injury by the debtor to another entity or to the property of another entity."
- 3 According to the Second Amended Complaint at paragraph 5, OMSJ (the "Office of Medical & Scientific Justice, Inc.") is a private investigation company that claims to be a nonprofit corporation whose stated mission is to "defend victims of scientific and medical abuse." OMSJ filed bankruptcy on June 29, 2015 – the same day that Baker filed bankruptcy – using the same attorney that represented Baker in filing bankruptcy. OMSJ used Baker's home address as its business address on its petition, and Baker signed OMSJ's petition as its president.
- 4 See [Declaration of Lisa Hiraide](#). Exhibit 4 to a September 20, 2016 motion by plaintiff for a protective order [Docket No. 152].
- 5 Unfortunately, this story did not end well for Bender. On December 11, 2017, Bender again wrote to the Court, this time complaining that Baker had once again posted personal and harassing information about him on the internet. According to Bender, "This has obviously occurred after the submission of your 'Referral of Clark Warren Baker for Investigation for

'Witness Tampering', docket #200 in the aforementioned case." A copy of Bender's December 11, 2017 letter appears on the docket in the Action as item no. 310.

6 Murtagh filed yet another discovery motion on September 13, 2017 (the "Second September 2017 Motion") -- docket no. 284. In the Second September 2017 Motion, Murtagh complains, among other things, that (A) Baker supplemented his Rule 26 disclosures with not less than 435 documents after the discovery cutoff, depriving Murtagh of the ability to depose Baker or conduct other discovery concerning these documents; (B) many of the documents are emails sent or received by Baker himself dated as early as 2008, meaning that many of the documents have been in Baker's possession for years and should have been produced earlier; (C) many of the documents concern a subject matter as to which Baker previously stated under penalty of perjury that he had no documents; (D) the contents of these documents refer to other documents that Baker has withheld, although they fall within the scope of prior discovery requests; (E) many of the documents were previously excluded by the Second Bender Order or are documents that Baker was prohibited from retaining by an earlier order of the Los Angeles Superior Court in the State Court Action. Murtagh requested that these documents be excluded and that monetary sanctions be imposed. In response to the Second September 2017 Motion, the Court entered its December 14, 2017 "Order on Plaintiffs Motion for Protective Order re 435 Late Produced Documents, Etc.," docket number 312, which provides, among other things, that (A) Baker and his counsel must provide plaintiff with a declaration not later than December 11, 2017 in which they explain, as to the 435 late produced documents, why the document was not previously produced; (B) Baker must produce certain documents discussed on the record at the hearing on the Second September 2017 Motion in native electronic format without redactions, without the removal of metadata and without removing or altering information that is embedded in the document that reflects if and when the document was altered and by whom; and (C) plaintiff shall have a period of 90 days after Baker has produced the foregoing documents in native electronic format and the required declarations to propound additional discovery concerning any issues raised by the newly produced documents.

7 SeeDeclaration of Robert Rosen, Esq. in Support of Plaintiff's Status Report, Docket No. 400, at p. 13, par. 23(b).

8 Seeld., p. 11 at par. 19(b).

9 The terms "Baker's Data" and "Baker's Devices," among other terms, are defined in Attachment "A" to the June 2018 Order.

10 Capitalized terms used in the Neutral Expert Order have the meanings set forth in Attachment B to that order.

11 Baruch Cohen filed a Substitution of Attorney with the Court on September 13, 2018 [Docket No. 384], replacing himself as counsel for Baker with Baker, acting in propria persona. On September 23, 2018, Jessica Ponce substituted in as counsel for Baker. SeeSubstitution of Attorney, Docket No. 388. She has served as counsel for Baker in the Action ever since.

12 After forensically imaging the data on these devices, Broom returned all but one of the devices to Baker. The one device not returned, a Dell XPS 1340 Laptop, Model PPI 7S, was instead turned over the Los Angeles Police Department Internet Crimes Against Children Taskforce, as Broom discovered materials on that device that he considered to be contraband. A criminal prosecution of Baker by the Los Angeles Police Department for child pornography ensued. According to a report from NBC News in Los Angeles dated July 25, 2019, the result of this prosecution was that Baker was sentenced to five years of formal probation and was ordered to register as a sex offender and attend 52 weeks of sex offender counseling.

13 Broom explains in the First NE Report that "Data Carving" is the process used to recover files that have been previously deleted.

14 According to page 30 of the Second NE Report, "On Device AA3, TrueCrypt was installed on July 1, 2018 and run on the following dates: September 7, September 8, September 11, and September 18, 2018 for a total of 7 runs."

15 Broom assigned a designation to each device given to him by Baker. A list of the devices and the designations given each device appears on page 2 of the First NE Report.

16 Brown had been identified as a witness in the Action.

- 17 In multiple declarations filed later with the Court, Baker claimed to be unable to recall the password or encryption key necessary to access this file. Broom notes further, on page 29 of the Second NE Report, that, although this file bears the extension "wmv," which is the standard file extension for a Windows Media Video file, and Baker has placed this file in the directory, "Users/Baker/Videos," this file is NOT a Windows Media Video file. Broom concludes that, by naming the file with this extension and placing it in a directory of video files, "Baker was attempting to hide the file from detection." Second NE Report, p. 29. Page 29 of the Second NE Report also explains the basis for Broom's conclusion that the file Birthday2.wmv is a TrueCrypt Encrypted Volume.
- 18 The "Declaration of Robert Rosen, Esq. in Support of Plaintiffs Status Report" [Docket No. 400], filed January 4, 2019, also contains a listing of respects in which Baker has failed to comply with orders of this Court.
- 19 Paragraph 9 of the February 2019 OSC sets forth the information that Baker should include in the Baker Declaration if he claims to be unable to perform any of the Affirmative Acts.
- 20 The proposed findings set forth in paragraph 11 of the February 2019 OSC track closely the findings of the Neutral Expert in the Second NE Report and include the observations outlined above in Section 5 on pages 14 through 17.
- 21 Attached hereto as Exhibit 7 is a copy (without exhibits) of this Court's second referral to the U.S. Attorneys' office concerning Baker's conduct [Docket No. 503].
- 22 Seesupra note 12.
- 23 This testimony was contradicted by earlier testimony offered by Baker to the effect that his mother had another caregiver who comes in for a few hours a day and that Baker's girlfriend also lived in the household with his mother. (Baker claimed that his girlfriend was elderly as well and could not provide the required care for his mother.)
- 24 The Injunction defines the term, "Third-Party Providers," as referring collectively to third-parties providing services in connection with Baker's website, www.jamesmurtaghmdtruth.com, or any other of Baker's websites and other web content, including without limitation, Internet Service Providers (ISP), domain-name registrars, domain name registries, website or web hosting providers, web designers, search engine or ad-word providers, banks, or online payment platforms or services, and peer-to-peer payment platforms.
- 25 The paragraph numbers in these sub-indented paragraphs refer to paragraph numbers in the Injunction.
- 26 As discussed above, the Court previously found that Baker (and not the plaintiff) had pressured Kuritzky (also known as David Bender) to sign a perjurious declaration and referred Baker to the U.S. Attorney's office for further investigation and possible criminal prosecution for witness tampering. A copy of this referral appears as docket no. 200 in the Action and is attached hereto as Exhibit 6.
- 27 The four documents produced on June 6, 2024 were (1) an email from BlueHost dated June 14, 2023; (2) an email from BlueHost dated July 28, 2023; (3) a printout of a chat with Elias Mohammad (a representative of BlueHost) dated August 27, 2023; and (4) a printout of an online chat between Baker and BlueHost dated June 4-5, 2024.
- 28 When plaintiff's counsel first contacted Baker's counsel in May 2022 to note several violations of the Injunction, she responded (although she had attended the hearings at which provisions of the Injunction were discussed, negotiated and revised and had been served with an entered copy of the Injunction) that she was "shocked that there are provisions which require affirmative action by my client." (See Exhibit "G" to the Declaration of Derek Linke filed in support of "Plaintiff James Murtagh M.D.'s Notice of Motion and Motion for Issuance of an Order to Show Cause Why Defendant Clark Baker Should Not be Held in Contempt of Court" [Docket No. 935].)
- 1 Bankruptcy Code section 523(a)(6) excepts from the discharge that an individual debtor may receive any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity."
- 2 Unless otherwise noted, all docket numbers used in this Report and Recommendation refer to docket numbers in the Action.

- 3 Acting to the Second Amended Complaint at ¶ 5, OMSJ (the “Office of Medical & Scientific Justice Inc.”) is a private investigation company that claims to be a nonprofit corporation whose stated mission is to defend victims of scientific and medical abuse.” OMSJ filed bankruptcy on June 29, 2015 – the same day that Baker filed bankruptcy - using the same attorney that represented Baker in filing bankruptcy. OMSJ used Baker’s home address as its business address on its petition, and Baker signed OMSJ’s petition as its president.
- 4 See Declaration of Lisa Hiraide, Exhibit 4 to a September 20, 2016 motion by plaintiff for a protective order [Docket No. 152].
- 5 Unfortunately, this story did not end well for Bender. On December 11, 2017, Bender again wrote to the Court, this time complaining that Baker had once again posted personal and harassing information about him on the internet According to Bender, “This has obviously occurred after the submission of your ‘Referral of Clark Warren Baker for Investigation for Witness Tampering’, docket #200 in the aforementioned case.” A copy of Bender’s December 11, 2017 letter, docket no. 310, is attached hereto as Exhibit 7.
- 6 Murtagh filed yet another discovery motion on September 13, 2017 (the “Second September 2017 Motion”) -- docket no. 284. (The Court has not attached a copy of this motion as it runs, with exhibits and attachments, approximately 126 pages.) In the Second September 2017 Motion, Murtagh complains, among other things, that (A) Baker supplemented his Rule 26 disclosures with not less than 435 documents after the discovery cutoff, depriving Murtagh of the ability to depose Baker or conduct other discovery concerning these documents; (B) many of the documents are emails sent or received by Baker himself dated as early as 2008, meaning that many of the documents have been in Baker’s possession for years and should have been produced earlier; (C) many of the documents concern a subject matter as to which Baker previously stated under penalty of perjury that he had no documents; (D) the contents of these documents refer to other documents that Baker has withheld, although they fall within the scope of prior discovery requests; (E) many of the documents were previously excluded by the Second Bender Order or are documents that Baker was prohibited from retaining by an earlier order of the Los Angeles Superior Court in the State Court Action. Murtagh requests that these documents be excluded and that monetary sanctions be imposed. In response to the Second September 2017 Motion, the Court entered its December 14, 2017 “Order on Plaintiff’s Motion for Protective Order re 435 Late Produced Documents, Etc.,” Docket No. 312, which provides, among other things, that (A) Baker and his counsel must provide plaintiff with a declaration not later than December 11, 2017 in which they explain, as to the 435 late produced documents, why the document was not previously produced; (B) Baker must produce certain documents discussed on the record at the hearing on the Second September 2017 Motion in native electronic format without redactions, without the removal of metadata and without removing or altering information that is embedded in the document that reflects if and when the document was altered and by whom; and (C) plaintiff shall have a period of 90 days after Baker has produced the foregoing documents in native electronic format and the required declarations to propound additional discovery concerning any issues raised by the newly produced documents.
- 7 See Declaration of Robert Rosen, Esq. in Support of Plaintiff’s Status Report, Docket No. 400, at p. 13, par. 23(b).
- 8 See id. at p. 11, par. 19(b).
- 9 See Local Bankruptcy Rule 9020-1, requiring that a proposed order to show cause why someone should not be held in contempt should, among other things, identify clearly the allegedly contemptuous conduct (and not just by reference to the content of the motion) and the possible sanctions that the Court may impose at the hearing.
- 10 The terms “Baker’s Data” and “Baker’s Devices,” among other terms, are defined in Attachment “A” to the June 2018 Order.
- 11 Baker filed declarations on April 13, 2018 (docket no. 228) and June 13, 2018 (docket no. 356), but these declarations did not satisfy the requirements of the June 2018 Order for the reasons set forth in paragraph 3 of the August 2018 Order.
- 12 Baker claims to have mailed letters on June 1, June 6 and June 28, 2018, but these letters did not satisfy the requirements of the June 2018 Order for the reasons set forth in paragraph 4 of the August 2018 Order.

- 13 The penultimate paragraph of the August 2018 Order clarifies that the September 27, 2018 hearing would be only a “holding date” with regard to the Continued Matters and that the Court would set a further briefing schedule and hearing date on the Continued Matters once it received and reviewed the report of the Neutral Expert.
- 14 Capitalized terms used in the Neutral Expert Order have the meanings set forth in Attachment B to that order.
- 15 Seesupra note 14.
- 16 According to “Plaintiff’s Notice of Defendant Baker’s Non-Compliance with the Court’s September 6, 2018 Order” [docket no. 409], Murtagh sent Baker proof that he had paid Broom \$22,870 on January 22, 2019, but Baker has failed to reimburse Murtagh for this payment.
- 17 Baruch Cohen filed a Substitution of Attorney with the Court on September 13, 2018 [docket no. 384], replacing himself as counsel for Baker with Baker, acting in propria persona. On September 23, 2018, Jessica Ponce substituted in as counsel for Baker. SeeSubstitution of Attorney, docket no. 388.
- 18 After forensically imaging the data on these devices, Broom returned all but one of the devices to Baker. The one device not returned, a Dell XPS 1340 Laptop, Model PP17S, was instead turned over the Los Angeles Police Department Internet Crimes Against Children Taskforce, as Broom discovered materials on that device that he considered to be contraband. A criminal prosecution of Baker by the Los Angeles Police Department for child pornography ensued and remains pending as of the date of this report and recommendation. Counsel for Baker has advised that a plea agreement was reached in connection with this prosecution and that Baker is due to be sentenced shortly in connection with this matter.
- 19 Broom explains in the First NE Report that “Data Carving” is the process used to recover files that have been previously deleted.
- 20 According to page 30 of the Second NE Report, “On Device AA3, TrueCrypt was installed on July 1, 2018 and run on the following dates: September 7, September 8, September 11, and September 18, 2018 for a total of 7 runs.”
- 21 Broom assigned a designation to each device given to him by Baker. A list of the devices and the designations given each device appears on page 2 of the First NE Report. The same list appears on page 12 of this Court’s February 19, 2019 Order to Show Cause re Contempt, docket no. 413, Exhibit 19 hereto.
- 22 Brown has also been identified as a witness in the Action.
- 23 In multiple declarations filed later with the Court, Baker claims to be unable to recall the password or encryption key necessary to access this file. Broom notes further, on page 29 of the Second NE Report, that, although this file bears the extension “wmv,” which is the standard file extension for a Windows Media Video file and Baker has placed this file in the directory, “Users/Baker/Videos,” this file is NOT a Windows Media Video file Broom concludes that, by naming the file with this extension and placing it in a directory of video files, “Baker was attempting to hide the file from detection.” Second NE Report, p. 29. Page 29 of the Second NE Report also explains the basis for Broom’s conclusion that the file Birthday2.wmv is a TrueCrypt Encrypted Volume.
- 24 The “Declaration of Robert Rosen, Esq. in Support of Plaintiff’s Status Report” [docket no. 400], filed January 4, 2019 also contains a listing of respects in which Baker has failed to comply with orders of this Court.
- 25 Plaintiff also noticed a hearing for April 2, 2019 on his motion for an order directing the Neutral Expert to turnover to plaintiff’s cyber expert, Anderson, all data that he has received from Baker. The Court granted that motion by order entered April 23, 2019 [docket no. 464]. The Court’s April 23 order contained provisions designed to protect former clients of Baker from having privileged materials delivered to Anderson. The Court provided additional protections for third parties claiming a privilege with regard to the information obtained from Baker in its June 12, 2019 order supplementing the April 23 order [docket no. 500]. As a result of these third-party privilege issues, data that the Neutral Expert obtained from Baker has not yet been turned over to Anderson.

- 26 Paragraph 9 of the February 2019 OSC sets forth the information that Baker should include in the Baker Declaration if he claims to be unable to perform any of the Affirmative Acts.
- 27 The proposed findings set forth in paragraph 11 of the February 2019 OSC track closely the findings of the Neutral Expert in the Second NE Report and include the observations outlined above in Section 5 on pages 19 through 21.
- 28 Attached hereto as Exhibit 22 is a copy (without exhibits) of this Court's second referral to the U.S. Attorney's office concerning Baker's conduct [Docket No. 503].
- 29 Seesupra, note 16.
- 30 This testimony is contradicted by earlier testimony offered by Baker to the effect that his mother has another caregiver who comes in for a few hours a day and that Baker's girlfriend also lives in the household with his mother. (Baker claims that his girlfriend is elderly as well and cannot provide the required care for his mother.)
- 31 The Court set a deadline of September 10, 2019 for Murtagh to file and serve a motion for default judgment.
- 1 See *Stolfo v. Kindercare Learning Ctrs.*, 727 Fed. Appx. 861, 863 (7th Cir. 2018) (unpaid sanctions were a nondischargeable debt under 11 U.S.C. § 523(a)(6) because they were intended to remedy a "willful and malicious injury").
- 2 Fed. R. Civ. P. 65 is made applicable in this proceeding by FBPR 7065.
- 3 See ¶ 12 below for definition of Baker's Websites and Other Web Content.
- 4 See Ex. 662, Anderson Decl. ¶12.
- 5 See Ex. 464 (Anderson Decl. Re shakedowndoc.com)
- 1 Parties and their counsel may appear either in person or by Zoom for Government. Connection information will be posted along with the Court's tentative ruling. For more information, see Judge Bluebond's Phone/Video Appearance procedures on the Court's webpage.
- 1 As referenced previously in the record on the Court's December 2022 OSC: (1) "First Baker Compliance Declaration" refers to Defendant Clark Baker's Declaration in Response to Court's Interim Order and Order Modifying and Correcting Interim Order (Dkt. 979) and (2) "Second Baker Compliance Declaration" refers to Defendant Clark Baker's Declaration in Response to Item 2.c.i. of Order of March 22, 2023, for C. Baker to Aver Compliance (Dkt. 990). See Dkt. 1045.
- 2 Parties and their counsel may appear either in person or by Zoom for Government. Connection information will be posted along with the Court's tentative ruling. For more information, see Judge Bluebond's Phone/Video Appearance procedures on the Court's webpage.
- 1 On 11/15/2013 Dr. Murtagh filed a state court action against Clark Baker and Baker's company, the Office of Medical and Scientific Justice, Inc., Los Angeles Superior Court Case No. BC527716.
- 1 The Motion requested that the objection period be extended from the seven days provided under LBR 9020-1(b) for objection to 21 days to avoid undue burden on the Court, Baker, and Baker's counsel during the holiday season.
- 2 Parties and their counsel may appear either in person or by Zoom for Government. Connection information will be posted along with the Court's tentative ruling. For more information, see Judge Bluebond's Phone/Video Appearance procedures on the Court's webpage.
- 1 This account is the designated email account for attorney-client communications regarding this case.
- 1 admin4one@protonmail.com. no further contact information.
- 2 <https://law.justia.com/cases/georgia/court-of-appeals/2013/a12a2127.html>

3 Proton email, 6 April 2022 between Baker & McNair.

4 Exhibit 1

5 Network Solutions and "Lloyd Interaction #1-112909429"

1 The paragraph numbers in these sub-indented paragraphs refer to paragraph numbers in the Injunction.

2 The Court previously found that Baker (and not the plaintiff) had pressured Kuritzky (also known as David Bender) to sign a perjurious declaration and referred Baker to the U.S. Attorney's office for further investigation and possible criminal prosecution for witness tampering. A copy of this referral appears as docket no. 200 in the Action.

3 The Injunction defines the term, "Third-Party Providers," as referring collectively to third-parties providing services in connection with Baker's website, www.jamesmurtaghmdtruth.com or any other of Baker's websites and other web content, including without limitation, Internet Service Providers (ISP), domain-name registrars, domain name registries, website or web hosting providers, web designers, search engine or ad-word providers, banks, or online payment platforms or services, and peer-to-peer payment platforms.

4 The four documents produced on June 6, 2024 were (1) an email from BlueHost dated June 14, 2023; (2) an email from BlueHost dated July 28, 2023; (3) a printout of a **chat** with Eliyas Mohammad (a representative of BlueHost) dated August 27, 2023; and (4) a printout of an online **chat** between Baker and BlueHost dated June 4-5, 2024.

5 When plaintiff's counsel first contacted Baker's counsel in May 2022 to note several violations of the Injunction, she responded (although she had attended the hearings at which provisions of the Injunction were discussed, negotiated and revised and had been served with an entered copy of the Injunction) that she was "shocked that there are provisions which require affirmative action by my client." (See Exhibit "G" to the Declaration of Derek Linke filed in support of "Plaintiff James Murtagh M.D.'s Notice of Motion and Motion for Issuance of an Order to Show Cause Why Defendant Clark Baker Should Not be Held in Contempt of Court" [Docket No. 935].)

2019 WL 3017132

Only the Westlaw citation is currently available.
United States District Court, S.D. Texas, Houston Division.

Kimberly KJESSLER, Klare Rueckert,
Laura Braley, Timothy Hayden, and
Summer Lang, Individually and on behalf
of all others similarly situated, Plaintiffs,
v.

ZAAPPAAZ, INC., Azim Makanojiya,
Netbrands Media Corp., Mashnoon Ahmed,
Gennex Media, LLC, Brandeco, L.L.C.,
Akil Kurji, [Custom Wristbands Inc.](#),
and Christopher Angeles, Defendants.

Civil Action No. 4:18-0430

|

Signed on 04/24/2019

Attorneys and Law Firms

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Stuart A. Berman, Pro Hac Vice, Lerch Early Brewer, Bethesda, MD, [Jeffrey M. Edelson](#), Markowitz Herbold PC, Portland, OR, for Defendants.

MEMORANDUM AND ORDER

NANCY F. ATLAS, SENIOR UNITED STATES DISTRICT JUDGE

*1 Pending before the Court in this nationwide direct-purchaser antitrust lawsuit are three motions to dismiss:

1. Defendants Netbrands Media Corporation's ("Netbrands") and Mashnoon Ahmed's Partial Motion to Dismiss Plaintiffs' Consolidated Amended Class Action Complaint Under Rule 12(b)(6) and Brief in Support [Doc. # 147] ("Netbrands Defendants' Motion");

2. Motion to Dismiss Consolidated Amended Complaint by Zaappaaz, Inc. ("Zaappaaz"), Azim Makanojiya, Custom Wristbands, Inc. ("Custom Wristbands") and Christopher Angeles [Doc. # 148] ("Zaappaaz and Custom Wristbands Defendants' Motion");

3. Defendants Gennex Media, LLC ("Gennex"), Brandeco, LLC ("Brandeco") & Akil Kurji's Motion to Dismiss Consolidated Amended Class Action Complaint [Doc. # 149] ("Gennex Defendants' Motion").

Plaintiffs filed a consolidated response.¹ Defendants replied,² and Plaintiffs filed a sur-reply.³ The Motions are now ripe for decision. Based on the parties' briefing, relevant matters of record, and pertinent legal authority, the Court grants the Netbrands Defendants' Motion and grants in part and denies in part the Zaappaaz, Custom Wristbands, and Gennex Defendants' Motions.

I. BACKGROUND

The facts in this background section are drawn from the allegations in Plaintiffs' Consolidated Amended Class Action Complaint ("Complaint") [Doc. # 134]. At this stage, these allegations must be taken as true. See [Harrington v. State Farm Fire & Cas. Co.](#), 563 F.3d 141, 147 (5th Cir. 2009).

This is a nationwide direct-purchaser antitrust lawsuit involving an alleged conspiracy to fix prices of certain customized promotional products ("CPPs") in violation of Section 1 of the Sherman Act. See 15 U.S.C. § 1. CPPs are small, inexpensive items imprinted with text or imagery to promote a brand or piece of information. Complaint ¶ 2. CPPs are generally used by businesses or other organizations for promotional or advertising purposes. *Id.* Individuals also purchase CPPs for various reasons, including to commemorate life events or to raise money for charitable causes. *Id.* ¶ 3. Common CPPs include pens, calendars, T-shirts, coffee mugs, key chains, badge holders, wristbands, lanyards, and pin buttons. *Id.* ¶ 29.

*2 This case concerns three CPPs in particular: customized silicone wristbands, customized lanyards, and customized pin buttons. Plaintiffs allege that, from at least June 2014 to June 2016, Defendants formed a Houston-centric "cartel" to fix the prices of these three CPPs. *Id.* ¶ 4.

Plaintiffs are five natural persons who allege they bought Defendants' wristbands, pin buttons, or both.⁴ *Id.* ¶¶

11-15. Defendants are four corporate entities and each entity's top officer: Zaappaaz and its president Azim Makanojiya (the "Zaappaaz Defendants"); Netbrands and its president Mashnoon Ahmed (the "Netbrands Defendants"); Gennex (a/k/a Brandeco) and its CEO Akil Kurji (the "Gennex Defendants"); and Custom Wristbands and its CEO Christopher Angeles (the "Custom Wristbands Defendants"). *Id.* ¶¶ 16-25. All Defendants have been criminally charged for conspiring to fix CPP prices and, thus far, all Defendants except Netbrands, Gennex, Brandeco, and Akil Kurji have pleaded guilty and agreed to pay criminal fines.⁵

*³ From at least June 2014 to June 2016, Defendants sold CPPs throughout the United States, using highly similar online ordering systems. *Id.* ¶¶ 16-25, 38, 40, 45-47. Customers ordered wristbands and lanyards by choosing a type of printing (e.g., printed, debossed, or embossed); a width; a color; a customized message, logo, or picture; a method of bagging; and the type or speed of shipping and production. *Id.* ¶ 46. Similarly, customers ordered pin buttons by picking amongst a pre-set selection of sizes and shapes, upon which a custom image or message is printed. *Id.* ¶ 47. These customizable features for CPPs are standardized across the industry. *Id.* ¶ 60, 107. Once a customer input an order, the order screen quoted him or her a price. *Id.* ¶ 49.

The Zaappaaz, Netbrands, and Gennex Defendants operated out of Houston, selling wristbands, lanyards, and pin buttons. *Id.* ¶¶ 16-23, 38, 40, 45. The Custom Wristbands Defendants operated out of California, selling wristbands and lanyards. *Id.* ¶¶ 24-25, 38, 40. Plaintiffs do not allege the Custom Wristbands Defendants sold pin buttons at any point. Cf. *id.* ¶ 45, 106. From June 2014 to June 2016, the CPP industry was dominated by relatively few companies, the corporate Defendants allegedly, collectively, constituted 90% of the market for customized silicone wristbands, and each corporate Defendant separately boasted that it was the largest CPP supplier in the country. *Id.* ¶ 53.

Plaintiffs allege that, starting in at least June 2014, Defendants met in secret, exchanged text messages, and communicated on online messaging platforms to coordinate their price fixing conspiracy. *Id.* ¶ 4. Defendants, however, were not always on friendly terms. In 2010, Netbrands sued Zaappaaz for copyright infringement, unfair competition, fraud, conversion, and cyberpiracy. *Id.* ¶ 75. Netbrands alleged that Zaappaaz submitted **fake** orders on Netbrands' website to determine how Netbrands' ordering process worked. *Id.* ¶ 76. Netbrands asserted that the purpose of

this trickery was to allow Zaappaaz to duplicate Netbrands' ordering process on its website and then offer products and services similar to Netbrands' at a lower price. *Id.* ¶ 77. In 2011, the case settled out of court, and the parties agreed to dismiss the lawsuit with prejudice. *Id.* ¶ 79. Both Defendants' websites continued operating, but their pricing patterns change dramatically. *Id.* Plaintiffs allege that from 2011 onward, Netbrands' and Zaappaaz's silicone wristband prices were often nearly identical. *Id.*

Plaintiffs allege that by at least 2014, the Houston-based Defendants started reaching out over text, email, and social media to each other and other competitors to turn them into co-conspirators. *Id.* ¶¶ 80, 84. When a new CPP company entered the market, the corporate Defendants would initially decrease their prices to match their new competitor. *Id.* ¶ 88. An individual Defendant, frequently Mashnoon Ahmed of Netbrands or Akil Kurji of Gennex, would then reach out to the competitor. *Id.* The Defendant would explain that the Houston-based Defendants had all agreed on a price and suggest the competitor increase its price for the common good of all CPP sellers. *Id.* If the competitor agreed to join the alleged "cartel,"⁶ Defendants and the new recruit would all increase their prices. *Id.*

The Complaint includes two screenshots of conversations between Defendants and various competitors. *Id.* ¶¶ 83, 89. In these conversations, Akil Kurji of Gennex and Mashnoon Ahmed of Netbrands admitted the so-called cartel exists, attempted to recruit the competitor to the group, and implicated the other Defendants. *See id.*

*⁴ In January 2016, Kurji of Gennex exchanged text messages with a competitor, inviting him to the group. *Id.* ¶ 83. In the exchange, Kurji admits that "prices have been agreed between" Gennex, Netbands, and Zaappaaz; that he, Ahmed of Netbrands, and Azim Makanojiya of Zaappaaz had "all met up"; and the three of them had "already agreed to not undercut each other." *Id.* Kurji explained the rationale:

I burnt a lot of money the first two years didn't make jack shit. I know I can help you be very profitable and that's all that matters man. Margin margin margin or we can all fight and let google rape us all.

And if me and mash [Mashnoon Ahmed] want to lower our prices we will win but we both realized why not make money it's a big market for all of us. Let me know if you want to meet up bro.

* * * *

I'm not trying to hurt you trust me. I just want all of us to make more money.

Id.

On another occasion, Ahmed of Netbrands sent a Facebook message to Fiyyaz Pirani, a competitor, inviting him into the cartel. *Id.* ¶ 89. Ahmed stated, “I’m talking to the rest of the wristband companies about matching your prices. Did you want to come up to our prices or do you want us to come down? We stopped under cutting each other last year as it only benefits google.” *Id.* Ahmed also indicated that Custom Wristbands was fixing prices as part of the conspiracy. *Id.*

In March 2016, a Houston-based silicone wristband seller, Victor Rey, received texts and Facebook messages from Ahmed and Kurji asking him to join the cartel. *Id.* ¶ 85. Rey was told that Gennex, Custom Wristbands, Netbrands, and Zaappaaz had all agreed to fix prices rather than compete. *Id.* ¶ 86. Rey told the Government about this invitation and agreed to wear a wire. *Id.* In a recorded conversation between Ahmed, Kurji, and Makanojiya, the three Defendants discussed CPP pricing, their private WhatsApp group they used to discuss CPP prices, and the restaurants where they would meet to agree on prices. *Id.* ¶ 87.

At least three of Defendants’ competitors, including Rey and Pirani, reported Defendants’ conduct to the FBI or Department of Justice. *Id.* ¶ 92. In June 2016, the FBI conducted simultaneous raids of Zaappaaz, Netbrands, and Gennex. *Id.*

As noted, Plaintiffs allege they bought Defendants’ wristbands, pin buttons, or both. *Id.* ¶¶ 11-15. No Plaintiff alleges he or she bought a lanyard from any Defendant. Plaintiffs assert antitrust class claims on behalf of all persons or entities in the United States who purchased wristbands, lanyards, or pin buttons directly from one or more Defendants from June 1, 2014, to present. *Id.* ¶ 93.

II. DISCUSSION

The Netbrands Defendants move to dismiss Plaintiffs’ lanyard price fixing claims based on lack of Article III and antitrust standing. The Netbrand Defendants’ Motion is joined by the Zaappaaz, Gennex, and Custom Wristband Defendants, who also move to dismiss Plaintiffs’ Complaint for failure to state a claim. These Defendants contend

Plaintiffs do not allege a plausible price fixing conspiracy claim among all Defendants and covering all three relevant CPPs.

For reasons explained hereafter, the Court concludes Plaintiffs lack Article III standing to assert class claims for lanyard price fixing.⁷ Accordingly, the Netbrands Defendants’ Motion is granted, the Zaappaaz, Gennex, and Custom Wristband Defendants’ Motions are granted in part, and the lanyard component of Plaintiffs’ antitrust claim is dismissed for lack of subject matter jurisdiction. On the other hand, Plaintiffs adequately plead a claim under Section 1 of the Sherman Act against all Defendants. The Zaappaaz, Custom Wristband, and Gennex Defendants’ Motions are therefore denied in part.

A. Plaintiffs Lack Article III Standing to Assert Lanyard Price Fixing Claims

*5 Defendants move to dismiss Plaintiffs’ lanyard price fixing claims for lack of Article III standing. Plaintiffs acknowledge that none of them bought a lanyard from any Defendant but contend they have standing to pursue class claims on behalf of lanyard purchasers because they have sufficiently pleaded a single conspiracy covering all three relevant CPPs. The Court is unpersuaded by Plaintiffs’ position and, consequently, dismisses Plaintiffs’ lanyard price fixing claims for lack of Article III standing.

1. Legal Standard for Article III Standing

When a motion to dismiss for lack of standing is filed in conjunction with other Rule 12 motions, the district court should consider the “jurisdictional attack before addressing any attack on the merits.” *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam). Under Federal Rule of Civil Procedure 12(b)(1),⁸ dismissal due to lack of Article III standing is proper based on: “(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” See *Moore v. Bryant*, 853 F.3d 245, 248 (5th Cir. 2017) (quoting *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996)). In this case, Defendants base their jurisdictional attack on the Complaint alone.

The requirements of Article III standing are that the plaintiff “(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.” *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). These three requirements form the “irreducible constitutional minimum” of standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). As parties invoking a federal court’s jurisdiction, Plaintiffs have the burden to demonstrate Article III standing. *See Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016).

To establish injury in fact, “the ‘[f]irst and foremost’ of standing’s three elements,” a plaintiff “must show he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo*, 136 S. Ct. at 1547–48 (first quoting *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 103 (1998); then quoting *Lujan*, 504 U.S. at 560). A “particularized” injury is one that affects “the plaintiff in a personal and individual way.” *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560 & n.1). “[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.” *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982).

“[S]tanding is not dispensed in gross.” *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Instead, “a plaintiff must demonstrate standing for each claim he seeks to press,” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006), and for “each form of relief sought,” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

*6 That this suit is a class action “adds nothing to the question of standing.” *Spokeo*, 136 S. Ct. at 1547 n.6 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976)). The class representatives still must “allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.” *Simon*, 426 U.S. at 40 n.20 (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975)). Moreover, “class representatives must ‘possess the same interest and suffer the same injury’ as the class members, and a plaintiff lacks standing to litigate injurious conduct to which he was not subjected.” *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 550 (5th Cir. 1988) (internal citation omitted) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). *See id.* at 550–51 (affirming dismissal on standing grounds of Title VII class claims asserted on behalf of employees who accepted backpay and signed releases

when named plaintiff had not signed a releases); *Vuyanich v. Republic Nat. Bank of Dall.*, 723 F.2d 1195, 1200 (5th Cir. 1984) (dismissing on standing grounds Title VII class claims based on defendant’s discriminatory compensation, promotion, placement, and maternity practices when the named plaintiffs could only allege injuries as a result of the defendant’s hiring and termination practices). “[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.” *Johnson v. City of Dallas*, 61 F.3d 442, 445 (5th Cir. 1995) (quoting *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974)). *See 1 Newberg on Class Actions* § 2:5 (5th ed. 2015) (“In a class action suit with multiple claims, at least one named class representative must have standing with respect to each claim. A finding that no class representative has standing with respect to a given claim requires dismissal of that claim.” (footnotes omitted)).

2. Plaintiffs Lack Article III Standing to Assert Lanyard Price Fixing Claims

Plaintiffs bear the burden of demonstrating they have adequately alleged Article III standing for “each claim” they “seek[] to press.” *See Wittman*, 136 S. Ct. at 1737; *DaimlerChrysler*, 547 U.S. at 352. It is undisputed that Plaintiffs have standing to assert claims based on their own alleged injuries—*i.e.*, the economic harm from purchasing over-priced wristbands or pin buttons. These injuries are “similar” to Defendants’ lanyard customers’ economic injury. *See Blum*, 457 U.S. at 999. But class representatives must suffer the “same” injury as class members—not just a similar injury—to have standing to maintain a class claim. *See Bernard*, 841 F.2d at 550 (quoting *Schlesinger*, 418 U.S. at 216). Because no named plaintiff alleges he or she was personally injured by Defendants’ alleged lanyard price fixing, “none may seek relief on behalf of himself or any other member of the class” for Defendants’ lanyard price fixing. *See Johnson*, 61 F.3d at 445 (quoting *O’Shea*, 414 U.S. at 494). Cf. *Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-cv-42 (JG)(VP), 2011 WL 7053807, at ***9–13 (E.D.N.Y. Jan. 4, 2011) (Pohorelsky, M.J.) (dismissing antitrust claims based on defendants’ alleged conspiracy to impose fixed surcharges on various air cargo routes when plaintiffs did not allege they paid any collusively fixed surcharges), *report and recommendation adopted*, 2012 WL 3307486 (E.D.N.Y. Aug. 13, 2012) (Gleeson, J.); *Arista Records LLC v. Lime Group LLC*, 532 F.

Supp. 2d 556, 567-69 (S.D.N.Y. 2007) (Lynch, J.) (dismissing antitrust claims based on claimants' failure to allege they acquired or attempted to acquire the allegedly price fixed licenses).

To counter, Plaintiffs argue they have standing to assert claims on behalf of lanyard purchasers because price fixing of all three relevant CPPs implicates the "same set of concerns." For support, Plaintiffs cite out-of-circuit authority, namely from the Second Circuit. The Second Circuit recognized in a residential mortgage-back securities ("RMBS") class action that "a plaintiff has class standing if he plausibly alleges (1) that he 'personally has suffered some actual ... injury as a result of the putatively illegal conduct of the defendant,' and (2) that such conduct implicates 'the same set of concerns' as the conduct alleged to have caused injury to other members of the putative class by the same defendants." *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 162 (2d Cir. 2012) (alteration in original) (first quoting *Blum*, 457 U.S. at 999; then quoting *Gratz v. Bollinger*, 539 U.S. 244, 267 (2003)).⁹

*7 In *NECA*, the plaintiff alleged Securities Acts violations on behalf of a putative class of investors. *Id.* at 149. The putative class consisted of all persons who acquired mortgage-backed certificates issued and underwritten by various Goldman Sachs entities in a series of separate offerings under the same shelf registration statement. *Id.* The plaintiff alleged it only bought certificates in a subset of the offerings. *Id.* Nevertheless, the Second Circuit held the plaintiff had standing to assert claims targeting all the offerings because all the offerings contained nearly identical misrepresentations and were covered by a single shelf registration statement. *Id.* at 162-63.

At least one district court in the Second Circuit has extended *NECA*'s "same set of concerns" standard to the antitrust context. See *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 157-59 (S.D.N.Y. 2018) (Kaplan, J.). In *Dennis*, various financial institutions were alleged to have manipulated the Bank Bill Swap Reference Rate ("BBSW"), an interest rate used as a benchmark for the pricing of various financial derivatives. *Id.* at 141. The named plaintiffs, who had only purchased particular BBSW-based derivatives, asserted class claims on behalf of all persons or entities that engaged in transactions that were "priced, benchmarked, and/or settled based on BBSW." *Id.* at 147-48. The district court held that the named plaintiffs had standing to assert claims for BBSW-based derivatives they had not bought because

the "BBSW was a component of the prices of" the relevant derivatives. *Id.* at 159.

Plaintiffs cite no other Circuit authority that has adopted the Second Circuit's "same set of concerns" approach, and *NECA* has been widely criticized.¹⁰ See *Okla. Law Enf't Ret. Sys. v. Adeptus Health Inc.*, No. 4:17-CV-00449, 2018 WL 4352836, at *6 (E.D. Tex. Sept. 12, 2018) (Mazzant, J.) ("[NECA's] doctrine has not been adopted by the Fifth Circuit and a district court within the Fifth Circuit has rejected the doctrine in its entirety."); *In re Plains All Am. Pipeline, L.P. Sec. Litig.*, 245 F. Supp. 3d 870, 929-30 (S.D. Tex. 2017) (Rosenthal, C.J.) (disagreeing "with the reasoning and result in *NECA*" and recognizing that *NECA* "has been heavily criticized in cases from outside [the Second Circuit]"); *Beaver Cty. Emps.' Ret. Fund v. Tile Shop Holdings, Inc.*, 94 F. Supp. 3d 1035, 1058 (D. Minn. 2015) (Montgomery, J.) ("The [NECA] decision, however, has been criticized as being inconsistent with established Supreme Court precedent and prior holdings at the Circuit level."); *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 934 F. Supp. 2d 1219, 1229 (C.D. Cal. 2013) (Pfaelzer, J.) ("NECAIBEW is inconsistent with Ninth Circuit precedent ... [and] with the prior rulings of every federal court to consider similar questions in the RMBS context, including the First Circuit Court of Appeal and numerous district courts, both in and outside the Second Circuit." (footnote omitted)); *FDIC v. Countrywide Fin. Corp.*, No. 2:12-CV-4354 MRP (MANx), 2012 WL 5900973, at *12 (C.D. Cal. Nov. 21, 2012) (Pfaelzer, J.) ("This Court, consistent with the majority of federal courts outside the Second Circuit, therefore does not find the court's decision in *NECAIBEW* persuasive."). Indeed, Fifth Circuit precedent is hostile to *NECA*'s "same set of concerns" formulation, repeatedly holding that class representatives must "possess the same *interest* and suffer the same *injury*" as the class members. See *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518, 522 (5th Cir. 1995) (emphasis added); *Bernard*, 841 F.2d at 550; *Vuyanich*, 724 F.2d at 1199. The Court adheres to this binding Fifth Circuit authority.

*8 Plaintiffs next argue they have the proper incentive to vigorously represent absent class members harmed by Defendants' alleged lanyard price fixing. They observe the Sherman Act imposes joint and several liable on defendants for all damages class members sustain. See *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1257 (7th Cir. 1980). From this, Plaintiffs argue they have an incentive to prove Defendants' conspiracy covered lanyards and establish large

antitrust damages flowing from lanyard price fixing. See *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 262 (D.D.C. 2002).

Plaintiffs' reliance on *Vitamins* is misplaced. There, the district court focused on the named plaintiffs' adequacy under Rule 23 to represent the putative class and did not meaningfully address Article III standing.¹¹ Standing, however, is a "constitutional threshold" issue that must be addressed "before" the class certification questions raised by Rule 23. See *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 294 (5th Cir. 2001) (quoting *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. Unit A July 1981), superseded on other grounds by statute, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988)). "The standing determination is quite separate from certification of the class." *Casey*, 518 U.S. at 358 n.6. See 1 Newberg, *supra*, § 2:6 ("The concepts of standing and Rule 23(a) therefore appear related as they both aim to measure whether the proper party is before the court to tender the issues for litigation. But they are in fact independent criteria. They spring from different sources and serve different functions." (footnote omitted)).

It is conceivable that Plaintiffs may adequately represent, for purposes of Rule 23, the interests of Defendants' lanyard customers. But that does not satisfy Plaintiffs' burden to show they were personally injured by Defendants' alleged lanyard price fixing, an "irreducible constitutional minimum" of Article III standing. See *Lujan*, 504 U.S. at 560. Moreover, the Sherman Act's provision of joint and several liability does not relieve Plaintiffs of their burden to allege personal injury flowing from Defendants' lanyard price fixing. Congress may of course "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan*, 578 U.S. at 555. But such congressional "broadening" does not relieve a party's obligation to show he or she *personally* suffered the congressionally identified injury. See *id.*; *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) ("[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."); *In re Carter*, 553 F.3d 979, 989 (6th Cir. 2009) ("Congress may empower individuals to sue based only on 'personal and individual[ized]' injuries.").

Because no Plaintiff alleges he or she suffered a personal injury from Defendants' alleged lanyard price fixing, the Court **dismisses** Plaintiffs' lanyard price fixing claims for lack of Article III standing.

B. Plaintiffs State a Claim Under Sherman Act Section

1 Against All Defendants

*9 The Zaappaaz, Gennex, and Custom Wristband Defendants also move to dismiss Plaintiffs' Complaint for failure to state a claim. These Defendants' basic argument is that the Complaint fails to allege facts suggesting every aspect of the alleged price fixing conspiracy is plausible. Viewed holistically, however, Plaintiffs' Complaint states a plausible overarching price fixing conspiracy involving all Defendants and the relevant CPPs. The Court therefore **denies in part** the Zaappaaz, Gennex, and Custom Wristband Defendants' Motions.

1. Rule 12(b)(6) Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is viewed with disfavor and is rarely granted. *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (citing *Harrington*, 563 F.3d at 147). The complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true. *Harrington*, 563 F.3d at 147. The complaint must, however, contain sufficient factual allegations, as opposed to legal conclusions, to state a claim for relief that is "plausible on its face." See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Patrick v. Wal-Mart, Inc.*, 681 F.3d 614, 617 (5th Cir. 2012).

When there are well-pleaded factual allegations, a court should presume they are true, even if doubtful, and then determine whether they plausibly give rise to an entitlement to relief. *Iqbal*, 556 U.S. at 679. Rule 8 "generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." *Skinner v. Switzer*, 562 U.S. 521, 530 (2011). Additionally, regardless of how well-pleaded the factual allegations may be, they must demonstrate that the plaintiff is entitled to relief under a valid legal theory. See *Neitzke v. Williams*, 490 U.S. 319, 327 (1989); *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997).

2. Legal Standard for Claims Under § 1 of the Sherman Act

Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy,

in restraint of trade” is unlawful 15 U.S.C. § 1. “The term ‘every’ is not to be taken literally; instead the standard of reasonableness has been adopted to judge the lawfulness of the restraint.” *In re Plywood Antitrust Litig.*, 655 F.2d 627, 632 (5th Cir. Unit A Sept. 1981). Nevertheless, certain practices “have such a ‘pernicious effect on competition,’ that they are considered to be per se violations.” See *id.* at 632-33 (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)). Among these per se unlawful practices is horizontal price fixing—*i.e.*, price fixing among competitors. See *id.* at 633.

By its terms, “§ 1 of the Sherman Act ‘does not prohibit [all] unreasonable restraints of trade ... but only restraints effected by a contract, combination, or conspiracy.’ ” See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (alterations in original) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 775 (1984)). Consequently, “[t]he crucial question” is whether the challenged anticompetitive conduct ‘stem[s] from independent decision or from an agreement, tacit or express.’ ” *Id.* (alterations in original) (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954)). To state a § 1 claim “requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.” *Id.*

Importantly, “lawful parallel conduct fails to bespeak unlawful agreement.” *Id.* at 557. “[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice.” *Id.* What pushes a § 1 claim from “possible” to “plausible” is “some further factual enhancement”—that is, some “context,” “setting,” or “further circumstance pointing towards a meeting of the minds.” *Id.*

*10 Courts have identified numerous “factual enhancements” potentially supporting the inference of a conspiracy. These include the existence of an ongoing government investigation, see *In re Propranolol Antitrust Litig.*, 249 F. Supp. 3d 712, 723 (S.D.N.Y. 2017); a common motive to enter into a price fixing conspiracy, beyond merely making more money, see *Burtsch v. Milberg Factors, Inc.*, 662 F.3d 212, 227 (3d Cir. 2011); conduct that would be irrational in a competitive market, see *In re Blood Reagents Antitrust Litig.*, 266 F. Supp. 3d 750, 772 (E.D. Pa. 2017); “whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy,” see *Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310, 318 (6th Cir. 2014); and “evidence that the industry is conducive to collusion,” see *In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 158 F. Supp. 3d 544, 569 (E.D. La. 2016).

Caution, however, is required when examining these “plus factors,” as many also give rise to a competing inference of non-collusive behavior. Cf. *Tunica Web Advert. v. Tunica Casino Operators Ass’n, Inc.*, 496 F.3d 403, 409 (5th Cir. 2007) (noting, in the summary judgment context, that circumstantial evidence of conspiracy is subject to the competing inference of independent action).

“It bears noting that ... plus factors need be pled only when a plaintiff’s claims of conspiracy rests on parallel conduct.” *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 (3d Cir. 2010). “If a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question whether an agreement has been adequately pled.” *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010). Direct evidence of an agreement includes “a document or conversation explicitly manifesting the existence of the agreement in question—‘evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.’ ” *Ins. Brokerage*, 618 F.3d at 324 n.23 (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999)).

3. Plaintiffs Adequately Allege a Single Price Fixing Conspiracy Covering Wristbands and Pin Buttons Among All Defendants

The Zaappaaz, Gennex, and Custom Wristband Defendants’ basic position is the Complaint, indictments, and plea deals reveal “discrete conspiracies,” not one vast industry-wide conspiracy among Defendants to fix prices on three different CPPs. Defendants observe that the Complaint focuses on wristbands, there is no direct evidence expressly indicating Defendants agreed to fix pin button prices, and the plea agreements do not specifically mention pin buttons.¹² Moreover, the Complaint does not allege the Custom Wristband Defendants sold pin buttons. In light of these omissions, moving Defendants contend that there is no plausible basis to infer that they collectively participated in an overarching CPP price fixing conspiracy.

The Court is unpersuaded with regard to wristbands and pin buttons (the only CPPs presently before in issue). Defendants contest “not whether any conspiracy existed, only how far it reached”—a question “of fact” that “cannot be resolved in the present procedural posture, where the court tests only the sufficiency of the pleadings.” See *In re Lithium Ion Batteries*

Antitrust Litig., No. 13-MD-2420 YGR, 2014 WL 309192, at *2 (N.D. Cal. Jan. 21, 2014) (Rogers, J.). “Defendants’ atomizing approach is inconsistent with the principle that ‘the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.’” *Id.* at *11 (internal quotation marks omitted) (quoting *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 738 F. Supp. 2d 1011, 1019 (N.D. Cal. 2010) (Conti, J.)). The Supreme Court has warned against “tightly compartmentalizing the various factual components” of a plaintiff’s case “and wiping the slate clean after scrutiny of each.” See *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). Analyzing Plaintiffs’ allegations “holistically,” see *Lithium Ion Batteries*, 2014 WL 309192, at *10 (quoting *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-MD-2143 RS, 2012 WL 1366718, at *3 (N.D. Cal. Apr. 19, 2012) (Seeborg, J.)), the Complaint states a plausible price fixing conspiracy claim covering wristbands and pin buttons against all Defendants.

*11 The Complaint contains text and social media platform conversations where Mashnoon Ahmed of Netbrands and Akil Kurji of Gennex admit to the cartel’s existence and implicate each other, Azim Makanojiya of Zaappaaz, and Custom Wristbands.¹³ See Complaint ¶¶ 83, 89. The Complaint alleges specific, recorded meetings between Ahmed, Kurji, and Makanojiya discussing CPP pricing and coordinating future meetings to discuss pricing. See *id.* ¶ 87. It is true, within this direct evidence, that it is unclear which CPPs are the subject of the price fixing and that only customized wristbands are specifically mentioned. But at this stage, the Complaint must be liberally construed in Plaintiffs’ favor, *Harrington*, 563 F.3d at 147, and it is improper “to prejudge the scope of the conspiracy,” *In re Vitamins Antitrust Litig.*, No. MISC 99-197(TFH), 2000 WL 1475705, at *17 (D.D.C. May 9, 2000) (Hogan, J.). Additionally, allegations sufficient to demonstrate a price fixing conspiracy related to certain products or practices within an industry permit an inference of a larger conspiracy covering other products or practices. See *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1211-14 (N.D. Cal. 2015) (Koh, J.) (holding that plaintiffs’ specific allegations of a collusive non-solicitation agreement combined with systematic and constant opportunities to conspire sufficed to state a claim for an overarching conspiracy to suppress wages).

Similarly, Defendants’ criminal guilty plea agreements, where Defendants individually admit to general CPP price fixing with multiple competitors, are evidence of these

Defendants’ own acknowledgement of the existence of a conspiracy covering both wristbands and pin buttons. See *In re Generic Pharm. Pricing Antitrust Litig.*, 338 F. Supp. 3d 404, 452 (E.D. Pa. 2018) (Rufe, J.) (considering government investigation and guilty plea allegations “without regard to whether they specifically address the relevant pharmaceutical products because the allegations [were] probative of broadly anticompetitive conduct in the generic pharmaceutical industry”); *In re Propranolol Antitrust Litig.*, 249 F. Supp. 3d 712, 723 (S.D.N.Y. 2017) (Rakoff, J.) (considering individual defendants’ guilty pleas to price fixing as “circumstantial evidence of motive, actions against interest and interfirm communications,” even though the pleas did not concern the allegedly price fixed product); *In re Auto. Parts Antitrust Litig.*, 29 F. Supp. 3d 982, 995-96 (E.D. Mich. 2014) (Battani, J.) (holding that “[t]he investigations and guilty pleas” relating to a single product “create an inference of an expansive industry-wide component parts conspiracy”); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008) (Wilken, J.) (“Although the allegations regarding the DRAM guilty pleas are not sufficient to support Plaintiffs’ claims standing on their own, they do support an inference of a conspiracy in the SRAM industry.”). This inference is especially potent here because of Ahmed, Kurji, Makanojiya, and Angeles’s status as the top officers of their respective companies and their companies’ allegedly large market share. See *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1149 (N.D. Cal. 2009) (Armstrong, J.) (holding it was reasonable to infer a price fixing conspiracy from guilty pleas by defendants’ employees as to another product when the employees were involved in pricing both products and their employers wielded significant market power over both products).

The Complaint also alleges several “factual enhancement[s]” suggesting the existence of a broad and overarching price fixing conspiracy between Defendants. See *Twombly*, 550 U.S. at 557. First, Zaappaaz and Netbrands’ history of intense price competition which ceased following a civil settlement qualifies as “a further circumstance pointing towards a meeting of the minds.” See *id.* Second, Kurji’s January 2016 statement recognizing the declining profits in the CPP industry suggests Defendants shared a common motive to conspire. See *Burtch*, 662 F.3d at 227; *Generic Pharm. Pricing*, 338 F. Supp. 3d at 450 (“Declining prices or profits in a market make ‘price competition more than usually risky and collusion more than usually attractive.’” (quoting *Processed Egg Prods.*, 821 F. Supp. 2d at 732)).

Third, the existence of **chat** groups, in-person meetings, and the ability of Defendants' to monitor each other's prices through each other's websites, all suggest that Defendants "had the opportunity to exchange information relative to the alleged conspiracy." See *Hyland*, 771 F.3d at 318. Fourth, the concentration of the CPP market, Defendants' alleged domination of the market, and CPPs' commodity-like nature suggest the "industry is conducive to collusion." See *Pool Prods. Distrib.*, 158 F. Supp. 3d at 569.

***12** Plaintiffs have satisfied their pleading burden, plausibly alleging a single conspiracy among all Defendants covering wristbands and pin buttons. While a narrower conspiracy is plausible, at this pre-discovery stage Plaintiffs are not required to define the precise boundaries of the alleged agreement among Defendants. "Questions as to each Defendant's participation in the conspiracy and the conspiracy's scope may be raised later in litigation, but do not merit dismissal at this phase." See *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13 CIV. 7789 (LGS), 2016 WL 5108131, at *4 (S.D.N.Y. Sept. 20, 2016) (Schofield, J.).¹⁴

III. CONCLUSION AND ORDER

Because no Plaintiff alleges he or she purchased a lanyard from any Defendant, Plaintiffs lack Article III standing to assert class claims for lanyard price fixing. Plaintiffs, however, state a viable claim under Section 1 of the Sherman Act against all Defendants for price fixing customized wristbands and pin buttons. It is therefore

ORDERED the Netbrands Defendants' Motion [Doc. # 147] is **GRANTED**, the Zaappaaz, Custom Wristband, and Gennex Defendants' Motions [Docs. # 148, # 149] are **GRANTED in part**, and the Plaintiffs' customized lanyard price fixing claims are **DISMISSED** for lack of Article III standing. It is further

ORDERED that the Zaappaaz, Custom Wristband, and Gennex Defendants' Motions are **DENIED in part** and Plaintiffs' price fixing claims are not dismissed for failure to state a claim. It is further

***13** **ORDERED** that counsel shall appear at a status conference on **May 9, 2019**, at **10:00 a.m.**, to discuss scheduling and other outstanding issues.

All Citations

Not Reported in Fed. Supp., 2019 WL 3017132

Footnotes

- 1** Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Response") [Doc. # 151].
- 2** Netbrands Media Corporation's and Mashnoon Ahmed's Reply in Support of Their Partial Motion to Dismiss Plaintiffs' Consolidated Amended Class Action Complaint Under Rule 12(b)(6) ("Netbrands Defendants' Reply") [Doc. # 153]; Reply Memorandum of Law in Support of Motion to Dismiss Consolidated Amended Complaint by Zaappaaz, Inc., Azim Makanojiya, Custom Wristbands, Inc. and Christopher Angeles ("Zaappaaz and Custom Wristbands Defendants' Reply") [Doc. # 155]. The Gennex Defendants have not filed a reply and their time to do so has expired. See Hon. Nancy F. Atlas, Court Procedures and Forms, R.7(A)(4).
- 3** Plaintiffs' Motion for Leave to File [Proposed] Sur-Reply in Opposition to the Zaappaaz and Custom Wristbands Defendants' Motion to Dismiss ("Sur-Reply") [Doc. # 156] is **granted**.
- 4** Plaintiffs are Kimberly Kjessler, Klaire Rueckert, Laura Braley, Timothy Hayden, Summer Lang. Complaint ¶¶ 11-15.
- 5** Complaint ¶¶ 5, 7; *United States v. Ahmed*, No. 4:18-cr-694 (S.D. Tex. Jan 8, 2019) Plea Agreement [Doc. # 29]; *United States v. Netbrands Media Corp.*, No 4:19-cr-065 (S.D. Tex. Jan. 24, 2019) Information [Doc. # 1]; *United States v. Gennex Media LLC*, No. 4:18-cr-654 (S.D. Tex. Nov. 1, 2018), Information [Doc. # 1]; *United States v. Kurji*, No. 4:18-cr-655 (S.D. Tex. Nov. 1, 2018) Information [Doc. # 1].

The Court also takes judicial notice of the cited criminal indictments and plea agreements. Normally, at the motion to dismiss stage, "courts must limit their inquiry to the facts stated in the complaint and the documents either attached to or incorporated in the complaint." See *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996). The Court, however, is permitted to take judicial notice here of the indictments and plea agreements because they

are incorporated by reference into the complaint and are central to Plaintiffs' claims. See *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000). Moreover, judicial notice is proper because the indictments and plea agreements are "matters of public record." See *Norris v. Hearst Tr.*, 500 F.3d 454, 461 n.9 (5th Cir. 2007). See also Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").

While Ahmed's guilty plea and Netbrands and the Gennex Defendants' indictments occurred after Plaintiffs' filed their Complaint, the Court may take judicial notice of these new indictments and guilty pleas. See *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775(JG)(VP), 2009 WL 3443405, at *1 (E.D.N.Y. Aug. 21, 2009), aff'd, 697 F.3d 154 (2d Cir. 2012) (considering guilty pleas filed after motion to dismiss briefing was completed); *Hinds County v. Wachovia Bank N.A.*, 700 F. Supp. 2d 378, 394 (S.D.N.Y. 2010) ("In its plausibility analysis, the Court will also consider the [complaint] in light of recent developments in state and federal investigations into the municipal derivatives industry.").

- 6 The Court uses this term because Plaintiffs employ it throughout the Complaint.
- 7 Defendants also move to dismiss Plaintiffs' lanyard claim for lack of antitrust standing. Because the Court dismisses the claim for lack of Article III standing, it does not reach the question of Plaintiffs' antitrust standing.
- 8 Defendants raise their Article III standing attack through a Rule 12(b)(6) motion. An attack on Article III standing, a jurisdictional issue, is properly raised on a Rule 12(b)(1) motion. See *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 795 n.2 (5th Cir. 2011) ("Unlike a dismissal for lack of constitutional standing, which should be granted under Rule 12(b)(1), a dismissal for lack of prudential or statutory standing is properly granted under Rule 12(b)(6)."'). The Court construes Defendants' Article III standing challenge to be asserted under Rule 12(b)(1).
- 9 Plaintiffs also cite in a footnote *In re Asacol Antitrust Litigation*, 907 F.3d 42, 48-51 (1st Cir. 2018). There, the First Circuit held that the named plaintiffs could bring state law antitrust claims on behalf of class members whose claims arose under the laws of states within which no named plaintiff either resided or purchased the defendant's products. *Id.* at 48. Importantly, the First Circuit recognized "the claims of the named plaintiffs parallel[ed] those of the putative class members." *Id.* at 49. The various states' laws were "materially the same" and "success on the claim under one state's law will more or less dictate success under another state's law." *Id.* *Asacol* is non-binding authority and is distinguishable. There, the named plaintiffs and class members bought the same allegedly overpriced products and sued under materially similar state laws. Here, by contrast, certain putative class members purchased products entirely different from those purchased by the named plaintiffs.
- 10 Nor has the Court's research discovered any non-Second Circuit cases adopting the NECA rationale.
- 11 In a footnote, *Vitamins* "briefly address[ed]" defendants' Article III standing argument that the named plaintiffs could not assert class claims for vitamin products they had not purchased. See 209 F.R.D. at 258 n.10. Noting that the defendants "offered virtually no support for this argument," the district court held, "[o]n the record before" it, that plaintiffs had standing to sue for products they had not purchased. See *id.*
- 12 The Zaappaaz, Gennex, and Custom Wristband Defendants also move for dismissal of the lanyard price fixing claim on similar grounds. Because the Court dismisses this claim for lack of subject matter jurisdiction, Defendants' request is **denied as moot** and without prejudice.
- 13 With respect to Custom Wristbands, the Complaint alleges a conversation where Ahmed tells a competitor, Fiyaz Pirani, "that Custom Wristbands was fixing prices as part of the conspiracy." Complaint ¶ 89. The Complaint reproduces a Facebook message where Ahmed tells Pirani that "wristbandcreation.com," a website operated by Custom Wristbands, had agreed to the cartel's price. *Id.* ¶¶ 24, 89.
- 14 Defendants rely upon distinguishable and non-controlling cases to advance their distinct conspiracies argument. For instance, in *Iowa Ready-Mix Concrete Antitrust Litigation*, the district court dismissed an antitrust claim alleging an overarching conspiracy amongst several corporate and individual defendants to fix prices of ready-mix concrete in Iowa. See 768 F. Supp. 2d 961, 965-66 (N.D. Iowa 2011). There, the plaintiffs' relied solely upon conclusory allegations of

conspiratorial agreements and guilty pleas by a few individual defendants admitting to bilateral agreements to engage in bid-rigging for discrete projects. See *id.* at 974-75. There, unlike here, the complaint did not contain direct evidence of conspiratorial agreements. Nor did the plaintiffs allege simultaneous meetings by multiple defendants or any “plus factors” suggesting the existence of a conspiracy. See *id.* at 975-76.

In *Dahl v. Bain Capital Partners, LLC*, the district court held that “[w]here a single, overarching conspiracy derived from discrete incidents is alleged,” the court must look to the existence of “(1) a common goal, (2) interdependence among the participants, and (3) overlap among the participants.” See 937 F. Supp. 2d 119, 135 (D. Mass. 2013) (quoting *United States v. Portela*, 167 F.3d 687, 695 (1st Cir. 1999)). *Dahl* is distinguishable. There, the district court faced a summary judgment motion where the plaintiffs attempted to establish an “overarching conspiracy” from “discrete incidents.” See *id.* Here, by contrast, the Court faces a motion to dismiss and Plaintiffs’ allegations involve a continual string of conspiratorial interaction between most Defendants.

In *Precision Associates, Inc. v. Panalpina World Transportation (Holding) Ltd.*, the district court dismissed a claim for a global conspiracy among 65 defendants when plaintiffs relied on guilty pleas by a fraction of the defendants. See No. 08-CV-42 (JG)(VVP), 2011 WL 7053807, at **27-30 (E.D.N.Y. Jan. 4, 2011). Here, by contrast, all Defendants have been indicted or pleaded guilty and all Defendants are tied together through direct evidence.

2018 WL 6977619

Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

UNITED STATES of America,

v.

Terra Jean MILLER, Defendant.

Case No. 18-80241-Cr-Marra/Matthewman

|
Signed 12/13/2018

Attorneys and Law Firms

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ORDER DENYING GOVERNMENT'S MOTION FOR PRETRIAL DETENTION

BRUCE E. REINHART, UNITED STATES MAGISTRATE JUDGE

*1 “In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987).

This matter is before the Court upon the Government’s motion to detain Defendant Terra Jean Miller (“Defendant”) without bond pending trial in accordance with 18 U.S.C. § 3142, commonly known as the Bail Reform Act of 1984. The Defendant is charged in a criminal complaint with conspiracy to possess with intent to distribute five kilograms or more of a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Sections 846, 841(a)(1), and 841(b)(1)(A). DE 1. The Government moved for pre-trial detention of Defendant on the basis of risk of nonappearance, danger to the community, and serious risk of obstruction of justice. The Court held a detention hearing on December 10, 2018, and, after stating its reasons on the record, ordered the Defendant released on conditions. This Order summarizes and further explains the undersigned’s determination that there were a combination of conditions that would reasonably assure the Defendant’s appearance

as required and the safety of any other person and the community. At the Government’s request, the undersigned stayed the release order to allow an appeal to the District Judge under Local Magistrate Judge Rule 4. DE 8, 11. The Government filed a Notice of Appeal from the release order on December 11, 2108. DE 9.

BACKGROUND

1. The Bond Order

The Court ordered the Defendant released on a \$50,000 personal surety bond with conditions. DE 7. The bond is to be co-signed by her brother and sister-in-law. The bond is to be collateralized by her residence and the residence of her brother and sister-in-law. The Defendant is to be on electronic monitoring and house arrest, except as approved by Pretrial Services to care for her children, to seek employment, and to meet with her lawyer. In addition to standard conditions of release, such as no firearms, no contact with victims or witnesses, and no possession of a passport, the Court imposed special conditions pursuant to 18 U.S.C. § 3142(c)(1)(B). Pretrial Services is also authorized to randomly monitor the Defendant’s communications devices, including computers, phones, and tablets. The Defendant is subject to evaluation and treatment for mental health issues or substance abuse.

2. The Bail Reform Act

An arrested individual must be brought before a judicial officer “without unnecessary delay.” Fed. R. Crim. P. 5(a) (1)(A). The person is entitled to a judicial determination whether she will (1) be released on personal recognizance or an unsecured appearance bond, (2) be released on a condition or combination of conditions, (3) detained temporarily to permit revocation of conditional release, deportation, or exclusion, or (4) detained pending trial. 18 U.S.C. § 3142(a). Under limited circumstances, the Government can request a pretrial detention hearing, at which the Court must determine “whether any condition or combination of conditions ... will reasonably assure the appearance of such person as required and the safety of any other person and the community.” 18 U.S.C. § 3142(f).

*2 Among the situations where the Government may request a detention hearing are (1) an offense for which the maximum sentence is life imprisonment or death, 18 U.S.C. § 3142 (f)(1)(B), (2) an offense for which a maximum term of imprisonment of ten years or more is prescribed by the

Controlled Substances Act, 18 U.S.C. § 3142(f)(1)(C), and (3) a case that involves a serious risk that the Defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror. 18 U.S.C. § 3142(f)(2)(B). At the detention hearing, the Court must consider the following factors:

- (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
- (2) the weight of the evidence against the person;
- (3) the history and characteristics of the person, including —
 - (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
 - (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
- (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

18 U.S.C.A. § 3142(g).

The Defendant can be detained only if the Court determines that “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.” 18 U.S.C. § 3142(e)(1). The Government must establish by a preponderance of the evidence that no condition or combination of conditions will reasonably assure the Defendant's appearance as required. *United States v. Medina*, 775 F.2d 1398, 1402 (11th Cir. 1985). Clear and convincing evidence is required to support a finding that no condition or combination of conditions will reasonably assure the safety of others or the community. 18 U.S.C. § 3142(f)(2); *see id.* The relevant inquiry is whether “an arrestee presents an identified and articulable threat to an individual or the community.”

Salerno, 481 U.S. at 751. A party meets the “clear and convincing” standard only when it “place[s] in the ultimate factfinder an abiding conviction that the truth of its factual contentions are ‘highly probable.’” *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Int'l Seaway Trading Corp. v. Walgreens Corp.*, 599 F. Supp. 2d 1307, 1313 (S.D. Fla.) (J. Ryskamp), *aff'd in part, vacated in part*, 589 F.3d 1233 (Fed. Cir. 2009) (citations omitted).

Certain offenses create a rebuttable presumption that no condition or combination of conditions will reasonably assure the Defendant's appearance or the safety of the community. As relevant here, the presumption arises upon a finding that there is probable cause to believe that the Defendant committed an offense for which a maximum term of imprisonment of ten years or more is prescribed by the Controlled Substances Act. 18 U.S.C. § 3142(e)(3)(A). The presumption does not affect the ultimate burden of proof, which remains on the Government.

If the Court determines that release on conditions is appropriate, it must impose “the least restrictive further condition, or combination of conditions,” that will reasonably assure the Defendant's appearance and the safety of the community. 18 U.S.C. § 3142(c)(1)(B); *United States v. Price*, 773 F.2d 1526, 1527 (11th Cir. 1985) (per curiam) (policy underlying the Bail Reform Act “is to permit release under the least restrictive condition compatible with assuring the future appearance of the defendant.”). Those conditions may not include “a financial condition that results in the pretrial detention of the Defendant.” 18 U.S.C. § 3142(c)(2).

FINDINGS

*3 Based on the offense charged, the Government moved for pretrial detention, in the alternative, under 18 U.S.C. §§ 3142(f)(1)(B) and (f)(1)(C). Additionally, and also in the alternative, the Government moved for pretrial detention under 18 U.S.C. § 3142(f)(2)(B) on the basis that there was a serious risk that the Defendant would obstruct justice by threatening or intimidating a prospective witness.¹ The Government also invoked a rebuttable presumption of detention under 18 U.S.C. § 3142(e)(3)(A). The Court finds that the facts alleged in the Criminal Complaint establish probable cause that 21 U.S.C. § 846 was violated; therefore, the rebuttable presumption applies to the Defendant.

The Court makes the following findings regarding the § 3142(g) factors. These findings are based upon the evidence introduced at the pretrial detention hearing, as well as the Court's review of the recording of the Defendant's initial appearance before Judge Matthewman on December 4, 2018. The evidence at the hearing consisted of the Pretrial Services Report, the Criminal Complaint, the Government's proffer, Defendant's proffer, the testimony of DEA Task Force Agent Christian Padilla, the record in this case, and the parties' arguments.

1. Nature and Circumstances of the Offense

The Defendant is charged in a criminal complaint with conspiracy to possess with intent to distribute five kilograms or more of a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Sections 846, 841(a)(1), and 841(b)(1)(A). The offense alleged in the complaint is a violation of the Controlled Substances Act punishable by up to life imprisonment, with a 10 year mandatory minimum sentence, a fine of up to \$10,000,000, supervised release of between 5 years and life, and a \$100 special assessment.

2. Weight of the Evidence

In or about October 2018, a cooperating defendant named Veronica Cantarero told the Government that the Defendant was known as "La Gringa" and was dealing in cocaine along with Fernando Salgado.² Cantarero was cooperating in hopes of mitigating her exposure after being arrested on federal drug charges. Cantarero provided the Government with WhatsApp text messages she had with Rogelio Pineda-Flores (who is now Cantarero's co-defendant) prior to Cantarero's arrest. Govt. Ex. 11. They had the following chat on May 20, 2018, at approximately 9:00 a.m.:

Pineda-Flores: Listen, and your friend, the gringa, have you seen her.

Cantarero: I did speak with her but she told me that she'd let me know – but has told me nothing yet.

Pineda-Flores: OK 'cause according to them (they) are arriving tonight to take the "dough" but I'm not finished."

Cantarero: Right now I'm buying food when I get (there) I'm gonna check or maybe right now I'll call the gringa and see what she tells me.

Pineda-Flores: Call her please tell her that I have some cheap ones – if she takes [some] I'll give you something

Cantarero: Yeah I'll call her soon.

Pineda-Flores: OK thanks.

The next day, May 21, 2018, they had the following chat:

*4 Pineda-Flores: Listen – and your [female] friend – you didn't find her?

Cantarero: Yeah I didn't call you over the weekend because that stinking (woman) was there. Yeah but (she) says that shithead has (some) now but she told me that he hadn't told her nothing.

Pineda-Flores: Well let's see what I can do with these pricks.

A little while later, at approximately 11:50 a.m., Pineda-Flores sent Cantarero the message, "Hey, tell the gringa to tell her dude that I'm gonna give them (to him/her) cheap. These guys just keep fucking harassing me." At approximately 3:04 p.m., the following conversation occurred:

Pineda-Flores: Nothing – listen I just want to tell you that those assholes are pissed off.

Cantarero: Nah Don't get desperate everything is gonna come out alright you'll see

Pineda-Flores: Listen I wanted you to tell the gringa that I have 3 and I can give them to her at 28 – please

Cantarero: I'm gonna tell her again now 'cause I told her a little while ago and she told me that the "cenire" (sic) had plenty right now

Pineda-Flores: 'Cause no one can get 'em at 28 – Listen I'm letting 'em go for that so this shitheads will go away.

The Government proffered that Cantarero would identify the Defendant as "La Gringa" and that these communications related to three kilograms of cocaine that Pineda-Flores was trying to sell to the Defendant and Fernando Salgado. The Government seized the three kilograms before they could be delivered. Cantarero also told the Government that she was present for a meeting with Pineda-Flores, Salgado, and the Defendant related to the sale of cocaine. A second confidential source also has identified the Defendant and Salgado as cocaine dealers.

On November 13, 2018, agents conducted a trash pull at 1627 Cynmar Drive. They recovered wrappers from kilograms of cocaine, along with correspondence directed to the Defendant and Salgado. On November 16, 2018, a second trash pull was conducted. Agents recovered more drug packaging and a Walgreens receipt for a purchase made by the Defendant.

On December 4, 2018, a search warrant was executed at 1627 Cynmar Drive, West Palm Beach, Florida, which is a mobile home owned by the Defendant. The Defendant resided in the trailer with her paramour, Fernando Salgado, and two children, ages 4 and 15. Agents found 580 grams of cocaine hydrochloride in two bedrooms in the residence, as well as wrappers from three other kilograms of cocaine. *See* Govt. Ex. 1. Some of the drugs and drug paraphernalia were recovered from the children's bedroom. Seven bundles of U.S. currency were also found, some concealed within food containers. *See* Govt. Ex. 2, 5, 8, 9, 10. In total, approximately \$149,000 in U.S. currency was seized. A box containing .40 caliber Remington ammunition was found in the kitchen pantry, but no firearms in the residence. Govt. Ex. 7. Also found in a drawer in the kitchen was a press for packaging ounce and quarter kilo quantities of cocaine. Govt. Ex. 3, 4. In a post-*Miranda* statement, the Defendant stated that several months ago, while looking for a television cord in the hutch in her home, she came across a shoebox with what appeared to be drugs inside. A photograph of a shoebox matching that description and containing envelopes of money was introduced as Government Exhibit 6. The Defendant also freely and voluntarily consented to allow the agents to search her phone.

*5 In his own post-*Miranda* statement on December 4, 2018, Salgado admitted to selling approximately one kilogram of cocaine per month. He stated that the Defendant was not involved in his drug activities.

According to the sworn testimony of Task Force Agent Padilla, the Government has no intercepted calls with the Defendant related to cocaine trafficking, no video evidence of the Defendant dealing drugs, and has not identified the Defendant's fingerprints on any of the drug evidence.

The Court finds that there is substantial evidence that the Defendant was aware that Salgado was acquiring and selling cocaine. There is also substantial evidence that she and Cantarero knew each other, and that she was involved in communications with Cantarero about acquiring cocaine. There is no evidence that she, as opposed to Salgado, was

directly distributing cocaine, or that she had the capability to do so without Salgado's assistance.

The weight of the evidence to establish that Defendant conspired to illegally possess cocaine with intent to distribute is substantial. She faces significant penalties if convicted. This factor creates an inference of a motive to not appear as required.

3. History and Characteristics of the Defendant

The Court takes judicial notice of the Pretrial Services Report. The Defendant was born in Belle Glade, Florida. She completed 9th grade at Glades Central High School. She has lived in Palm Beach County continuously since approximately 2001, and has lived in South Florida her entire life. She has not traveled outside the United States for at least the last 10 years. She does not have a passport. She has never been married but has two children. She has a 15 year-old daughter whose father lives in Mexico. She has a four year-old son with her co-defendant Fernando Salgado. Both children live at 1627 Cynmar Drive with the Defendant and Salgado. The Defendant has been unemployed for the past five months. Prior to that, she was self-employed as a house cleaner for over a decade. The Government proffered, without contradiction, that the Defendant is a fluent Spanish speaker.

The Defendant owns the mobile home at 1627 Cynmar Drive, which has an estimated value of \$15,000. She has approximately \$12,000 in a bank account. She also owns two unencumbered vehicles (a 2007 Lexus, a 2007 Toyota Camry). She told Pretrial Services that she owns a 2017 General Motors vehicle, but the record before the Court does not clarify whether that vehicle is encumbered.

The Defendant admitted trying marijuana once at age 16, but denied any other illegal drug use. Defendant has some health problems, including [asthma](#), circulation problems, and swelling in her legs.

The Defendant's brother Robert Miller and his wife Anaiz Miller reside in West Palm Beach. Mr. Miller works at Publix. Mrs. Miller is a registered nurse. They own a home worth approximately \$250,000, which they recently purchased for \$237,000. They are currently caring for the Defendant's children. According to the Pretrial Services Report, the Defendant's father is incarcerated. Her mother's location is unknown. There was no evidence of any other family members.

Mr. Miller testified that he had no recent health problems and no health issues that would prevent him from continuing to work and pay for his home. In response, the Government had Agent Padilla testify that during a recorded call from the Palm Beach County Jail Mr. Miller asked the Defendant if she remembered when he used to have nose bleeds. Mr. Miller said he was having them again and asked if he was going to be okay. The Defendant said, "Yeah." Agent Padilla testified that based on his training and experience this conversation related to drug trafficking, and the Government argued that there was now reason to suspect Mr. Miller of involvement in illegal drug activities with his sister. Despite this speculation, Agent Padilla testified the Government had no independent evidence that Mr. Miller was engaged in illegal activity. The Court had the opportunity to question Mr. Miller and to observe his demeanor. The Court finds him to be a credible witness on the relevant issues relating to the bond collateral.

***6** Although not entirely clear from the testimony, it appears that Elias Salazar is the father of Defendant's daughter. The Government proffered that the daughter's father is a convicted drug dealer who was deported from the United States to Mexico. No further evidence was introduced about the details of his conviction or the date of his deportation. Agent Padilla testified that the only known contact between the Defendant and Salazar in the last five years was three letters that Salazar sent her from prison. There was no testimony as to the dates or contents of those letters.

Defendant is a long-time resident of this district and a property owner, with two minor children. She has strong ties to this district. She is a U.S. citizen and does not engage in international travel. She has no history of drug or alcohol abuse. Her criminal history is remote and for non-violent, non-serious offenses. Her history and characteristics favor release on bond or other conditions.

4. Defendant's Criminal History

The Defendant has a number of arrests and convictions for driving offenses between ages 15 and 20 (from 2001 through 2005). She had one failure to appear in 2003 related to a charge of having no drivers license. She also pled guilty in 2005, at age 20, to the misdemeanors of possession of alcohol by a person under 21 and providing a false identification to a law enforcement officer. She has no other criminal history. It appears that, if convicted, she could qualify for the "safety valve" provision that would allow the Court to

impose a sentence below the otherwise-applicable mandatory minimum sentence. See 18 U.S.C. § 3553(f).

Law enforcement records reflect the Defendant being associated with the names "Tera Miller", "Terra Jeanette Miller" and "Jeanette Rodriguez." No evidence was offered about when, to whom, and for what purposes these names were used. Two of these names appear to be simple misspellings. As noted above, the Defendant pled guilty to using a **false** identification at age 20; it is not clear if one of these names was on that identification.

The Government also proffered that in February 2008 (more than 10 years ago), an individual named Darrell Phillips was stopped at the U.S.-Mexico border with 18.95 kilograms of cocaine inside his car. As proffered by the Government, unspecified "follow up investigation determined" Phillips was recruited by the Defendant and Elias Salazar to bring the cocaine into the United States. The Defendant was not charged. No additional evidence relating to this incident was presented to the undersigned. The undersigned gives this evidence no weight. It is uncorroborated, multi-layered hearsay about a temporally remote event for which the Defendant was never charged.

5. The Nature and Seriousness of the Danger to Any Person or the Community that would be posed by the Defendant's Release

The Government argued that the Defendant presents a serious risk of danger to Cantarero and her family. In support of that argument, the Government offered the following facts.

After being arrested on December 4, 2018, the Defendant was housed at the Palm Beach County Jail in the same cell as Cantarero. In the middle of the day on December 5, 2018, Cantarero's lawyer reported to the Government that the Defendant had confronted Cantarero at the jail. Cantarero was then interviewed by Agent Padilla. Cantarero was highly emotional, barely able to speak, extremely upset and scared for herself and her children. Her demeanor was inconsistent with her prior interactions with Agent Padilla. Agent Padilla described the interaction between the Defendant and Cantarero as a "long, drawn out conversation" regarding Cantarero's cooperation, involvement, and "what she's been doing with the Government." The Defendant allegedly told Cantarero that if they were separated at the jail it would be an indication that Cantarero was cooperating with the Government. Agent Padilla paraphrased Cantarero's summary of the conversation as "if anything happens to

Miller, it's going to happen to Cantarero, too." Cantarero reported no physical violence, nor any express threat of violence. Nevertheless, Cantarero perceived an implied threat. Other than Cantarero's uncorroborated statement, the Government has no other evidence of what the Defendant said to Cantarero. In recorded conversations from the jail, the Defendant stated that Cantarero is the reason the Defendant is in jail.

DISCUSSION

A. Risk of Non-Appearance

*7 Even accounting for the statutory presumption, the Government has not met its burden of showing by a preponderance of the evidence that no condition or combination of conditions will reasonably assure the Defendant's appearance as required. To the contrary, the Court finds that the stringent combination of pretrial release conditions imposed by the Court will reasonably assure Defendant's presence if Defendant is released. Specifically, Defendant will be confined to her home, with some exceptions, and monitored electronically. Defendant is a long-time resident of Palm Beach County. She has two minor children and family here. She has no passport and has not traveled outside the United States in at least 10 years. Her brother and sister-in-law are cosignatories on her bond and have pledged their personal residence to secure her bond. They will be highly motivated to monitor her activities and assure her appearance. She has also pledged her personal residence; although that property may ultimately be subject to forfeiture, at this time it is the Defendant's primary asset. Her sole failure to appear occurred 15 years ago when she was a minor; it appears to be an isolated event.

The Government argues that the Defendant has the motivation and ability to flee to Mexico. The Government repeatedly argued that the Defendant has "extensive ties" and "significant ties" to Mexico. It further argued that she is connected to a Mexican drug trafficking organization. The Government proffered that the Defendant had "extensive ties to Mexico through her former husband, who, incidentally, is also related to her current paramour as well as Enrique Salgado by virtue of his last name." At another point the Government proffered that the Defendant has "extensive ties outside the United States" and that if she fled her children could be "repatriated" to Mexico.

The assertions about the Defendant's close ties to Mexico are simply not supported by the evidence introduced at the detention hearing. First, although the testimony at the hearing established that the father of the Defendant's daughter³ is a Mexican national who was deported after a drug trafficking conviction, Agent Padilla testified that the only known contact between the Defendant and Salazar in the last five years was three letters that Salazar sent her from prison. There was no testimony as to the dates or contents of those letters. The Government did not introduce or proffer any other evidence indicating that the Defendant has ongoing communications, or any relationship, with Salazar. Second, the Defendant's children are U.S. citizens; they cannot be "repatriated" to Mexico. Third, Agent Padilla testified that the Government had no evidence the Defendant had ever been to Mexico. Fourth, the uncontested evidence was that the Defendant has not traveled outside of the United States in at least 10 years. Fifth, the Government has not introduced evidence that the Defendant has the financial and logistical ability to flee. The Court finds any inference of non-appearance arising from the Defendant's connections to Mexico to be weak.

The Government also proffered, without evidentiary support, that the Defendant had "significant ties to" a Mexican drug trafficking organization. The evidence on this issue was that the Defendant obtained cocaine from Cantarero and Pineda-Flores. There was no testimony that either of them is from Mexico or that their source(s) of supply are from Mexico. Here, again, the evidence does not support the Government's proffer. Therefore, the Court declines to draw an inference of risk of flight from these facts.

Whatever motivations may exist for the Defendant to not appear as required, the electronic monitor and other conditions ordered by the undersigned are sufficient to mitigate any risk of this nature. The issue before the Court is not whether the Defendant committed the crimes with which she is charged, nor is it whether the Defendant presents *any* risk of flight, nor whether the bond conditions will conclusively *ensure* her appearance. The Bail Reform Act presents a different question: Will any combination of conditions *reasonably assure* the Defendant's appearance? The Court finds by a preponderance of the evidence that the proposed bond conditions will reasonably assure the Defendant's presence as required.

B. Nature and Seriousness of the Danger to Any Person or the Community that would be posed by the Defendant's Release, Including the Risk of Witness Tampering

*8 Even starting with the statutory presumption, the Government has not shown by clear and convincing evidence that there are no condition or combination of conditions that would reasonably assure the safety of others, including prospective witnesses. In this case, the indicia of future danger are (1) the distribution of significant quantities of cocaine that, if continued, creates a generalized danger to the society, (2) the presence of drugs and drug paraphernalia in the mobile home where her children reside, which creates a danger for the children, including the risk of a home invasion by other drug dealers, and (3) alleged threats to Cantarero. The Government did not otherwise present facts or argument that the Defendant presents a physical danger, nor does the evidence support that inference. The Defendant has no personal history (criminal or otherwise) involving violence. Although ammunition was found in the mobile home, there was no evidence that the Defendant has personally possessed or used firearms.

The evidence showed the Defendant's involvement in acquiring and processing cocaine for distribution, but there was no evidence that she was directly involved in distributing. There was also no evidence that she had the ability to obtain and distribute drugs independently from Salgado. Also, in the undersigned's experience, if a drug dealer is released on bond after being arrested and having their home searched by federal law enforcement, other criminals become suspicious that the person is cooperating with the Government, which significantly decreases the person's ability to obtain and distribute drugs while on release. Therefore, the risk to society from continued drug dealing if the Defendant is released is not high, particularly in light of the proposed bond conditions. The electronic monitoring and home detention ameliorate the risk that the Defendant will personally obtain or distribute drugs. The monitoring of her communications devices reduces her ability to facilitate drug dealing by others. The Probation Office has the right to conduct random searches of her home to see if she is in possession of illegal drugs. In combination, these conditions are sufficient to reasonably assure that she will not continue to engage in drug dealing or have drugs in her home while on bond.

The evidence that the Defendant made an identified and articulable threat to physically harm Cantarero or her family

is not substantial. In fact, Agent Padilla testified that no overt threat was made.

Even assuming there is some reason for concern arising from the Defendant's interactions with Cantarero, they are adequately addressed by the bond conditions. Cantarero is in custody at the Palm Beach County Jail. The Defendant is on house arrest, with electronic monitoring, so she is not in a position to personally locate and harm Cantarero's family. There is no evidence that the Defendant has access to third parties who can harm Cantarero in the jail, or her family outside the jail.

The Government argues (without evidentiary support, as noted above) that the Defendant is affiliated with a Mexican drug organization, which stereotypically are known to be violent. Whatever the truth of that assertion, it has limited, if any, relevance here. There is simply no evidence before the Court that the Defendant is associating with persons who would harm witnesses or their families. The evidence before the Court is that the Defendant dealt with Salgado and Cantarero, that Cantarero dealt with Pineda-Flores, and that Salgado had other sources of supply. There was no additional evidence introduced that the Defendant has the ability to control these individuals (both known and unknown) or that they present any kind of particularized danger to Cantarero or her family.

The Government also asserted that the Defendant attempted to obstruct justice by not being truthful with Judge Matthewman during her indigency colloquy on December 4, 2018, by attempting to hide assets, and by attempting to secrete her children from the Government. Although a serious risk that a defendant will obstruct justice is a basis for holding a pretrial detention hearing under § 3142(f), risk of obstruction is not an independent basis for pretrial detention. That decision must be based solely on risk of non-appearance and risk of ongoing danger to a person or the community. 18 U.S.C. § 3142(e). Nevertheless, a risk of witness tampering or obstruction may be relevant to non-appearance or ongoing danger.

*9 The undersigned reviewed the tape recording of the indigency hearing. DE 3. The Defendant truthfully disclosed that she had approximately \$12,000 in the bank and that she owned a 2007 Lexus GS 350. She did not volunteer that she also owned two other vehicles and the mobile home. When this omission was pointed out to Judge Matthewman, he reserved jurisdiction to order the Defendant to contribute toward the cost of her court-appointed counsel. He deferred

any further questioning on this issue until after the Defendant consulted with counsel.

Agent Padilla also testified that recorded outgoing calls from the Palm Beach County Jail captured the Defendant telling her brother to go to her mobile home to retrieve approximately \$2,000 worth of scratch-off tickets and any currency that was left behind after the search. She also told him to take money out of her bank account; she wanted it to go to her family or her lawyer rather than the Government. The Defendant also told her brother that she did not want law enforcement interacting with her children.

The Defendant has a 9th grade education, has worked primarily as a house cleaner, and has no prior exposure to the federal criminal justice system. The undersigned's observations of her during Court proceedings are that she is unsophisticated and overwhelmed by her current situation. The Defendant's uncounseled initial appearance before Judge Matthewman occurred immediately after her house was raided, she was arrested, and her children were removed from their home. It would be consistent with the undersigned's observations for her to have been confused and not thinking clearly during those proceedings. As such, the Court declines to draw an inference that her omission of certain assets was a calculated effort to deceive Judge Matthewman, particularly in light of the fact that she disclosed the cash in her bank account.

Similarly, the Court does not infer that her desire to have money available to care for her children or to provide for her legal defense is evidence of a future risk of non-appearance or danger. The Government appears to be suggesting that the Defendant wanted to prevent her children from being witnesses against her. Even assuming the Government would take the highly unusual, and distasteful step of using a 15 year-old child as a witness against her parent, an equal (if not stronger) inference from this evidence is that the Defendant did not want her minor children further traumatized by interacting with law enforcement; this concern is an entirely

appropriate one for a parent under these circumstances. On the record before it, the Court declines to find that these actions raise an inference that the Defendant is likely to obstruct justice.

In sum, the Government's evidence that the Defendant presents a danger to the community that cannot be reasonably addressed through bond conditions does not give the undersigned an abiding conviction that it is highly probable that the proposed conditions are insufficient. Therefore, the Government has failed to show by clear and convincing evidence that there is no condition or combination of conditions that would reasonably assure the safety of others and the safety of the community.

CONCLUSION

When the Government seeks to detain a presumptively-innocent citizen before trial, it must support that request with competent and credible evidence sufficient to meet its burden of proof. The Government has not met its burden of showing by a preponderance of the evidence that no condition or combination of conditions is sufficient to reasonably assure the Defendant's appearance as required. Nor has the Government met its burden of showing by clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of others and the safety of the community.

***10** For the foregoing reasons, it is hereby **ORDERED** that the Government's oral motion for Pretrial Detention is **DENIED**.

DONE and ORDERED in chambers at West Palm Beach, Florida, this 13th day of December 2018.

All Citations

Not Reported in Fed. Supp., 2018 WL 6977619

Footnotes

- **1** The undersigned has significant doubts whether the Government properly invoked Section 3142(f)(2)(B). Nevertheless, because there was an independent basis for a detention hearing, the Court need not resolve whether the Government offered enough facts to establish a "serious" risk of obstruction of justice or witness tampering sufficient to warrant a pretrial detention hearing. Once a hearing is properly invoked, the Court may consider the alleged obstruction in making a detention decision. See *United States v. Holmes*, 438 F. Supp. 2d 1340 (S.D. Fla. 2005) (J. Hopkins).

- 2 The Court takes judicial notice that Ms. Cantarero is a defendant in case number 18-80115-CR-RLR, along with co-defendant Rogelio Pineda-Flores.
- 3 The undisputed evidence was that the Defendant has never been married, so she has no former husband. The Court considers the Government's statement to be an innocent error.

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Only the Westlaw citation is currently available.

United States District Court, W.D.
Arkansas, Fayetteville Division.

NETCHOICE, LLC, Plaintiff

v.

Tim GRIFFIN, in his Official Capacity as
Attorney General of Arkansas, Defendant

CASE NO. 5:23-CV-05105

Signed August 31, 2023

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

TIMOTHY L. BROOKS, UNITED STATES DISTRICT JUDGE

TABLE OF CONTENTS

***I. INTRODUCTION...**

II. BACKGROUND...

A. The Social Media Safety Act: Objectives and Requirements...

B. Social Media Use Among Minors...

C. Types of Speech Available on NetChoice Members' Platforms...

D. Existing Parental Controls...

III. LEGAL STANDARD...

IV. DISCUSSION...

A. Standing...

1. Constitutional Standing...

2. Prudential Standing...

B. Likelihood of Success on the Merits...

1. Void for Vagueness: NetChoice Members' Claim...

2. Burdens on First Amendment Rights: Platform Users' Rights...

a. Level of Scrutiny...

b. Burdens on Adults' Access to Speech...

c. Burdens on Minors' Access to Speech...

d. Narrow Tailoring...

C. Irreparable Harm...

D. Balance of the Equities and the Public Interest...

V. CONCLUSION...

I. INTRODUCTION

This case presents a constitutional challenge to Arkansas Act 689 of 2023, the “Social Media Safety Act” (“Act 689”), a new law that aims to protect minors from harms associated with the use of social media platforms. Act 689—which becomes effective tomorrow, September 1, 2023—requires social media companies to verify the age of all account holders who reside in Arkansas. Self-reporting one's age (a common industry practice) is not sufficient; Arkansans must submit age-verifying documentation before accessing a social media platform.

Under Act 689, a “social media company,” as defined in the Act, must outsource the age-verification process to a third-party vendor. A prospective user of social media must first prove their age by uploading a specified form of

identification, such as a driver's license, to the third-party vendor's website. A verified adult may obtain a social media account. Minors, however, will be denied an account and prohibited from accessing social media platforms, *unless* a parent provides express consent—which will require more proof to confirm the parent's age, identity, and relationship to the minor.

The Plaintiff, NetChoice, LLC, is an Internet trade association whose members include Facebook, Instagram, Twitter, TikTok, Snapchat, Pinterest, and Nextdoor. NetChoice asks the Court to preliminarily enjoin Act 689 from taking effect. NetChoice does not dispute that social media usage poses risks to minors' physical and mental well-being. Rather, NetChoice claims the Social Media Safety Act does not provide a constitutional way to address the dangers that minors face online. According to NetChoice, Act 689 is unconstitutionally vague because it is impossible to determine which social media companies and platforms fall within its purview. In addition, NetChoice contends Act 689 violates Arkansans' First Amendment rights. NetChoice argues that Act 689's age-verification requirements are not narrowly tailored to address the harms that minors may face on social media, while at the same time placing an undue burden on both adults' and minors' access to constitutionally protected speech.

The Defendant (the "State") is Arkansas Attorney General Tim Griffin, who is sued in his official capacity, because his office is tasked to enforce Act 689 on behalf of the State of Arkansas. The State maintains that Act 689 is a constitutional way to curtail minors' access to social media platforms. The State contends that Act 689 is narrowly tailored to address the harms posed by social media, while the alleged burdens are neither too costly for NetChoice members nor too intrusive for Arkansans who wish to open social media accounts. The State concedes that social media platforms host a wide range of protected free speech, but it contends that the slight burden to protected speech is justified by the important goal of protecting minors.

*² NetChoice's Motion for Preliminary Injunction was fully briefed by the parties, *see* Docs. 17, 18, 34, 38, and the ACLU submitted an amicus brief in support of NetChoice's position, *see* Doc. 31. In its response, the State lead with an argument that NetChoice lacks standing to assert the First Amendment rights of Arkansas social media users. The Court ordered additional briefing on this issue. *See* Docs. 39–41.

On August 15, the Court held an evidentiary hearing. The parties introduced documentary evidence, witness declarations, and stipulations of fact. The State also presented the live testimony of its expert witness, Tony Allen. Afterwards, the Court engaged counsel in a lengthy period of oral argument.

Having taken these matters under advisement, the Court now concludes that NetChoice has standing to assert a constitutional challenge to Act 689 on behalf of its members and its members' users. Therefore, for the reasons explained below, the Court finds that NetChoice's arguments are likely to succeed on the merits and its request for a Preliminary Injunction is **GRANTED**.

II. BACKGROUND

A. The Social Media Safety Act: Objectives and Requirements

According to Act 689, "social media compan[ies]" will be required to "verify the age[s] of ... account holder[s]" using the age-verification methods sanctioned by the State. *See Ark. Code Ann. § 4-88-1102(b)(1).*¹ Further, the regulated companies "shall not permit an Arkansas user who is a minor to be an account holder ... unless the minor has the express consent of a parent or legal guardian." *Id.* at § 1102(a).

Not every online company or platform will be subject to the State's new age-verification requirements. Under Act 689, a "social media company" is defined in terms of what *account holders* may do on the company's platform. A "social media company" is one that permits its account holders to: (1) create a public profile "for the *primary purpose* of interacting socially with other profiles and accounts"; (2) upload or post content; (3) view content of other account holders; and (4) interact with other account holders "through request and acceptance." *Id.* at § 1101(7)(A) (emphasis added). The State offers no guidance on how it will assess the "primary purpose" of account holders. Furthermore, Act 689 specifically exempts any company that "[d]erives less than twenty-five percent (25%) of [its] revenue from operating a social media platform" and "[o]ffers cloud storage services." *Id.* at § 1101(7)(B)(iv)(a)–(b). This exemption shields Google (a subsidiary of Alphabet, Inc.) from compliance. Neither Google Hangouts nor Google's

video-sharing platform, YouTube, will be required to verify the ages of their account holders.

Act 689 defines “social media platform” as a “public or semipublic internet-based service or application” of which the “***substantial function*** … is to allow users to interact socially with each other within the service or application.” *Id.* at § 1101(8)(A)(ii)(a) (emphasis added). Once again, the State does not identify the criteria it will rely on to determine the “substantial function” of an online platform. Act 689 exempts platforms controlled by businesses that generate less than \$100 million annually. *Id.* at § 1101(8)(C). As a result, platforms like Parler, Gab, and Truth Social will fall outside the scope of Act 689, even though they may host the same potentially harmful content with which the State is concerned.

*3 Act 689 is littered with other exemptions. For example, companies that exclusively offer interactive online gaming, cloud storage services, cybersecurity services, professional networking, career development, or educational tools need not comply. *See id.* at § 1101(7)(B)(iii)–(v). Platforms that predominantly or exclusively provide users with email or direct-messaging services are entirely exempt. *See id.* at § 1101(8)(B)(i)–(ii). Act 689 also gives a free pass to streaming services (for licensed movies or music); platforms that pre-select news, sports, entertainment, or other content for account holders to view; and online shopping or e-commerce sites—provided that the type of user interaction on these sites is limited to posting and commenting on product reviews or displaying lists of goods. *See id.* at § 1101(8)(B)(iii)–(v).

During the hearing for preliminary injunction, the State called Tony Allen to testify in support of Act 689. Mr. Allen is an expert in age-verification trade standards for the United Kingdom. He serves as the technical editor of the international standard for age assurance systems used in the UK and has global oversight over the operation of the UK's age-assurance standardization program. *See* State's Hearing Exhibit 1-A. Mr. Allen testified that he was familiar with the sort of robust age-verification requirements Act 689 would likely require, in part, due to his work on the UK's Online Safety Bill (“OSB”), which is expected to pass the Houses of Parliament sometime next month. He noted that the OSB is similar to Act 689 in that both laws are likely to require social media companies to tighten their age-verification procedures. However, unlike Act 689, the OSB's age-verification requirements will be triggered by particular content, called “primary priority content,” which the UK has determined is damaging or harmful to minors. Arkansas, in

contrast, will require age verification for particular companies at the time of account creation. Examples of the UK's “primary priority content” include adult pornography and information about suicide, self-harm, and dieting.

Mr. Allen analogized a social media platform, like Facebook, to a shopping mall consisting of various “stores” full of content. For example, a Facebook account holder may use the platform to read the news, interact with a favorite actor or author, share family photographs, watch videos of people dancing or singing, review books, order products, or comment on important political events. None of these topics appear to be obscene, illegal, immoral, or otherwise concerning for minors to view. According to Mr. Allen, the OSB will only require rigorous age-verification methods “when the primary priority content risk is triggered”—in other words, when a user approaches the door of a harmful “store” within the “mall.” Act 689, in contrast, requires age verification at the “front door” of the “mall” of online platforms, *regardless of the content within*.

Mr. Allen also testified about the technology used to perform age verification and the commercial entities that provide age-assurance services in the UK and the European Union.

Act 689 generally permits a company to utilize “[a]ny commercially reasonable age verification method.” Act 689 at § 1102(c)(2)(C). Mr. Allen explained the current state-of-the-art capabilities in online age verification. He testified that a typical scenario would involve a user being asked to verify his or her age online. Then, the user then would be shunted to a third-party servicer that collects official documents, such as digital identification cards or digital driver's licenses. The user would upload documents to prove his or her age.² Mr. Allen also explained that artificial intelligence programs could be used to verify age as an alternative (or in addition to) the user providing an identification card. For example, a user could be asked to upload a selfie of his or her face to prove that the user was the same person pictured in the official identity document. In addition, selfies or voice recordings could be required for the servicer to estimate the user's age using artificial intelligence. Mr. Allen opined that uploading and scanning a digital driver's license would take less than a minute, while age estimation using biometric scanning would likely take even less time.

*4 Mr. Allen further explained that once an age-verification servicer gathered enough proof to know that a user was either an adult or a minor, the servicer would generate an

encrypted “token” that answered “yes” or “no” to the question of whether the user was an adult. After the “token” was sent electronically to the social media company or platform requesting it, the third-party servicer would then delete the user’s documents, images, and other data used to verify age and retain a record of the transaction for billing purposes only.

Mr. Allen identified at least one critical gap in Act 689’s regulatory structure: How will a regulated company prove that it obtained parental consent for a minor to open a social media account? He testified that in the UK, online parental consent is only required when a minor seeks to perform some action online that the law forbids, such as enter into a contract for the sale or purchase of goods. By contrast, Act 689 will require social media companies to obtain “express consent of a parent or legal guardian” much more frequently—whenever an Arkansas minor seeks to open a social media account—and to use procedures reliable enough to ensure that these companies avoid incurring civil and criminal penalties. *See* Act 689 at § 1102(a). Implementing these parental-consent procedures will not be an easy task, according to Mr. Allen:

I think the biggest challenge you have with parental consent is actually establishing the relationship, the parental relationship. It’s easy to say that this person who is giving the consent is, let’s say, in their 40s, versus the person that’s asking for the consent being under 18. But actually establishing that that is a parent or a legal guardian, that’s the challenge with those processes.

B. Social Media Use Among Minors

“There is broad agreement among the scientific community that social media has the potential to both benefit and harm children and adolescents.” U.S. Surgeon General, Social Media and Youth Mental Health 5 (2023), <https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf> (last accessed Aug. 19, 2023) (State’s Hearing Exhibit 5). Moreover, “different children and adolescents are affected by social media in different ways, based on their individual strengths and vulnerabilities, and based on cultural, historical, and socio-economic factors.” *Id.* Still, experts agree that social media use carries significant risk to minors’ physical and mental well-being.

The State’s medical expert, Dr. Karen Farst, notes in her Affidavit that in her practice, she has encountered numerous

examples of children “active on social media” who “thought they were communicating with a same-aged peer, and instead it was someone posing in that role in order to gain trust of the child.” (State’s Hearing Exhibit 2, p. 3, ¶ 10).³ Adult predators frequent the internet, and children “from homes where there has been abuse, neglect, or family discord look to social media for attachments and relationships they do not have within their family.” *Id.* at ¶ 12. This “makes them more susceptible to being lured into a situation they think is supportive.” *Id.* Dr. Karst also cautions that youth experience “cyberbullying” while “on social media” and “can become so consumed in their online image that it can lead into unlawful and criminal behavior.” *Id.* at p. 4, ¶ 14.

The State observes in its Brief that “[a]dult predators often create **fake** accounts, posing as minors, and then take advantage of real minors’ comfort in online environments, coercing them into sending explicit images of themselves.” (Doc. 34, p. 17) (quotation marks and citation omitted). Moreover, an FBI report the State relies on found:

*5 Financial sextortion schemes occur in online environments where young people feel most comfortable —using common social media sites, gaming sites, or video **chat** applications that feel familiar and safe. On these platforms, online predators often use **fake** female accounts and target minor males between 14 to 17 years old, but the FBI has interviewed victims as young as 10 years old.

FBI Nat'l Press Off., *FBI and Partners Issue National Public Safety Alert on Financial Sextortion Schemes* (Dec. 19, 2022), <https://www.fbi.gov/news/press-releases/fbi-and-partners-issue-national-public-safety-alert-on-financial-sextortion-schemes> (last accessed Aug. 19, 2023) (State’s Hearing Exhibit 6).

In addition, several recent studies have highlighted a possible link between social media use by young people and negative effects on youth mental health. According to an article published by the American Academy of Child & Adolescent Psychiatry, “On average, teens are online almost nine hours a day, not including time for homework.” *See* Am. Academy of Child & Adolescent Psychiatry, *Social Media and Teens* (updated Mar. 2018), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Social-Media-and-Teens-100.aspx (last accessed Aug. 19, 2023) (State’s Hearing Exhibit 7). And according to an advisory report issued this year by the U.S. Surgeon General, a longitudinal cohort study of U.S. adolescents aged 12–15 found “that

adolescents who spent more than 3 hours per day on social media faced double the risk of experiencing poor mental health outcomes including symptoms of depression and anxiety.” U.S. Surgeon General, *Social Media and Youth Mental Health* 4 (2023) <https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf> (last accessed Aug. 19, 2023) (State’s Hearing Exhibit 5). Yet another study conducted among 14-year-olds “found that greater social media use predicted poor sleep, online harassment, poor body image, low self-esteem, and higher depressive symptom scores with a larger association for girls than boys.” *Id.* at 7.

The amount of time minors spend online appears indicative of negative mental-health outcomes, and studies indicate that the content minors find online may be to blame. The Surgeon General’s report observed:

Extreme, inappropriate, and harmful content continues to be easily and widely accessible by children and adolescents. This can be spread through direct pushes, unwanted content exchanges, and algorithmic designs. In certain tragic cases, childhood deaths have been linked to suicide-and self-harm-related content and risk-taking challenges on social media platforms. This content may be especially risky for children and adolescents who are already experiencing mental health difficulties. Despite social media providing a sense of community for some, a systematic review of more than two dozen studies found that some social media platforms show live depictions of self-harm acts like partial *asphyxiation*, leading to seizures, and cutting, leading to significant bleeding. Further, these studies found that discussing or showing this content can normalize such behaviors, including through the formation of suicide pacts and posting of self-harm models for others to follow.

Id. at 8.

C. Types of Speech Available on NetChoice Members’ Platforms

The parties jointly stipulate that adults and minors use NetChoice members⁴ online services to engage in an array of expressive activity that is protected by the First Amendment. See Court’s Exhibit 1. Social media companies and platforms “allow[] users to gain access to information and communicate with one another about it on any subject that might come to mind.” *Packingham v. North Carolina*, 582 U.S. 98, 107

(2017). “[U]sers employ these websites to engage in a wide array of protected First Amendment activity on topics ‘as diverse as human thought.’ ” *Id.* at 105 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)). “On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos.” *Id.* at 104. On “Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner.” *Id.* at 104–05.

*6 According to the Declaration of Carl Szabo, Vice President and General Counsel of NetChoice, minors routinely use the services of NetChoice members “to read the news, connect with friends, explore new interests, and follow their favorite sports teams and their dream colleges,” as well as “showcase their creative talents to others,” “raise awareness about social causes,” and “participate in public discussion on the hottest topics of the day.” (Plaintiff’s Hearing Exhibit 1, ¶ 6). Adults use Facebook for various reasons, including taking part in religious services. *Id.* at ¶ 9. Users of Pinterest share ideas for recipes, style, and home décor. *Id.*

According to the Declaration of Antigone Davis, Vice President and Global Head of Safety at Meta Platforms, Inc., Facebook and Instagram provide online platforms for users to engage in speech for the purpose of making social connections, showcasing creative talents, gathering information and news about the world, receiving education, and participating in the democratic process. (Plaintiff’s Hearing Exhibit 2, ¶¶ 11–20). Her Declaration cites to a number of surveys that indicate social media may promote connectedness, reduce social isolation, establish online-only friendships, assist individuals in finding support and inspiration during times of depression, stress, and anxiety, and allow users of all ages to engage with differing viewpoints on civic issues. *Id.* at ¶¶ 22–25.

With all that said, it cannot be assumed that NetChoice members host *only* constitutionally protected speech. Despite these entities’ efforts to self-regulate, it is undoubtedly true that social media users of any age may still encounter some speech online that is not entitled to constitutional protection, including real threats, child pornography, obscenity, defamation, fighting words, or speech integral to criminal conduct. See *United States v. Alvarez*, 567 U.S. 709, 717 (2012). In addition, minors may encounter speech online that is constitutionally protected as to adults, but not as to minors.

D. Existing Parental Controls

Of course, parents may rightly decide to regulate their children's use of social media—including restricting the amount of time they spend on it, the content they may access, or even those they **chat** with. And many tools exist to help parents with this.

Cell carriers and broadband providers provide parents with tools to block certain applications and websites from their children's devices, ensure that their children are texting and chatting with trusted contacts only, and restrict their children's access to screen time during certain hours of the day. *See, e.g.*, Verizon, *Verizon Smart Family*, <https://tinyurl.com/ycyxy6x6> (Plaintiff's Hearing Exhibit 17); AT&T, *Parental Controls*, <https://tinyurl.com/3ypvj7bv> (Plaintiff's Hearing Exhibit 6); T-Mobile, *Family Controls and Privacy*, <https://tinyurl.com/57run7ac> (Plaintiff's Hearing Exhibit 16); Comcast Xfinity, *Set Up Parental Controls for the Internet*, <https://tinyurl.com/5acdsnat> (Plaintiff's Hearing Exhibit 7).

Wireless routers, which provide internet connectivity, also offer parental control settings. *See* Molly Price & Ry Crist, *How to Set Up and Use Your Wi-Fi Router's Parental Controls*, CNET (Feb. 11, 2021), <https://archive.ph/wip/uGaN2> (Plaintiff's Hearing Exhibit 15). Parents can use these settings to block certain websites or online services that they deem inappropriate, set individualized content filters for their children, and monitor the websites their children visit and the services they use. *See* Netgear, *Circle Smart Parental Controls*, <https://archive.ph/wip/0GbB5> (Plaintiff's Hearing Exhibit 14). Parents can also use router settings to turn off their home internet at particular times of day, pause internet access for a particular device or user, or limit the amount of time that a child can spend on a particular website or online service. *Id.*

*7 Additional parental controls are available at the device level. For example, iPhones and iPads empower parents to limit the amount of time their children can spend on the device, choose which applications (e.g., YouTube, Facebook, Snapchat, or Instagram) their children can use, set age-related content restrictions for those applications, filter online content, and control privacy settings. *See* Apple, *Use Parental Controls on Your Child's iPhone, iPad, and iPod Touch*, <https://archive.ph/T68VI> (Plaintiff's Hearing Exhibit 5). Google and Microsoft similarly offer parental controls

for their devices. *See* Google Family Link, *Help Keep Your Family Safer Online*, <https://tinyurl.com/mr4bnwpy> (Plaintiff's Hearing Exhibit 8); Microsoft, *Getting Started with Microsoft Family Safety*, <https://tinyurl.com/yc6kyruh> (Plaintiff's Hearing Exhibit 10). In addition, numerous third-party applications allow parents to control and monitor their children's use of Internet-connected devices and online services. *See* Ben Moore & Kim Key, *The Best Parental Control Apps for Your Phone*, PCMag (Mar. 29, 2022), <https://archive.ph/HzzfH> (Plaintiff's Hearing Exhibit 12).

Parental controls on internet browsers offer another layer of protection. Apple Safari, Google Chrome, Microsoft Edge, and Mozilla Firefox offer parents tools to control which websites their children can access. *See, e.g.*, Mozilla, *Block and Unblock Websites with Parental Controls on Firefox*, <https://tinyurl.com/6u6trm5y> (Plaintiff's Hearing Exhibit 13). Microsoft offers "Kids Mode," which allows children to access only a pre-approved list of websites. *See* Microsoft, *Learn More About Kids Mode in Microsoft Edge*, <https://tinyurl.com/59wsev2k> (Plaintiff's Hearing Exhibit 11). Google has a similar feature. It also provides parents with "activity reports," allowing them to see what apps and websites their children access most frequently. *See* Google, *Safety Center*, <https://tinyurl.com/kwkeej9z> (Plaintiff's Hearing Exhibit 9).

To be sure, parents may or may not use these tools. Mr. Allen's Declaration explains that even though these filtering controls can be "applied in the home, on the router or on laptops, tablets, and smartphones through family cellular plans," research indicates "that many parents are unaware of this technology" or "do not know how to use it, or discover their children also know how to use it or have circumvented it some other way." (State's Hearing Exhibit 1, p. 5). Furthermore, he attests, "Children can be very persuasive, and parents might release the controls to allow them to play a game designed for 18+ within a social media platform, unaware the game or platform may be a portal to pornographic or other unsuitable content and dangerous functionality." *Id.*

NetChoice members have developed their own policies and practices designed to protect minors who use social media. Facebook, Instagram, Twitter, Pinterest, Snapchat, and Nextdoor require users in the United States to be at least 13 years old before they can create an account—though account holders are asked only to self-report their ages. *See* Declaration of Justyn Harriman, Plaintiff's Hearing Exhibit 4, ¶ 13. TikTok offers a limited app experience for users

under 13 called “TikTok for Younger Users” where children are provided a viewing experience that does not permit them to share personal information and puts extensive limitations on content and user interaction. (Doc. 2, ¶ 17). TikTok also partners with Common Sense Networks to try and ensure that content is both age-appropriate and safe for an audience under 13. *Id.* Facebook, Instagram, TikTok, and Pinterest default to private settings for teenage users when they sign up for accounts, and these platforms claim they encourage their teenage users to choose more private settings through prompts and suggestions. *See* Doc. 2, ¶ 17; Declaration of Antigone Davis, Plaintiff’s Hearing Exhibit 2, ¶ 31.

NetChoice members also attempt to curate the content that users post on their platforms. *See, e.g.*, Declaration of Justyn Harriman, Plaintiff’s Hearing Exhibit 4, ¶ 9. Members attempt to restrict the uploading of violent and sexual content, bullying, and harassment. *See* Declaration of Carl Szabo, Plaintiff’s Hearing Exhibit 1, ¶ 7. Several NetChoice members use age-verification technology to try to keep minors from seeing certain content visible to adults, or to keep younger teens from seeing content visible to older teens. *Id.* NetChoice members implement these policies through algorithms, automated editing tools, and human review. *See* Declaration of Antigone Davis, Plaintiff’s Hearing Exhibit 2, ¶¶ 27, 36. If a platform decides that certain content violates its policies, it may remove the content, restrict it, or add a warning label or a disclaimer to accompany it. *See* Declaration of Justyn Harriman, Plaintiff’s Hearing Exhibit 4, ¶ 10.

***8** Evidence received by the Court demonstrates that NetChoice members also provide users with tools to curate the content they wish to see. Facebook users can control the content that Facebook recommends to them by hiding a post or opting to see fewer posts from a specific person or group. *See* Declaration of Antigone Davis, Plaintiff’s Hearing Exhibit 2, ¶ 41. Instagram users can use the “not interested” button or keyword filters (for example, “fitness” or “recipes” or “fashion”) to filter out content they do not wish to see. *Id.* Parents can use Instagram’s “supervision tools” to see how much time their teens spend on Instagram, set time limits and scheduled breaks, receive updates on which accounts their teens follow and the accounts that follow their teens, and receive notifications if a change is made to their child’s settings. *Id.* at ¶ 28. Instagram also uses online prompts and safety notices to encourage teens to be cautious in their conversations with adults, even those they may already know. *Id.* at ¶ 30. Further, Instagram informs young people when an

adult who has been exhibiting potentially suspicious behavior tries to interact with them. *Id.* Instagram claims that if an adult is sending a large number of friend or message requests to people under age 18, or if the adult has recently been blocked by people under age 18, the platform alerts the recipients and gives them an option to end the conversation and block, report, or restrict the adult. *Id.* TikTok also has a “family pairing” feature that allows parents to, among other things, set a screen-time limit, restrict exposure to certain content, decide whether their teen’s account is private or public, turn off direct messaging, and decide who can comment on their teen’s videos. *See* Declaration of Carl Szabo, Plaintiff’s Hearing Exhibit 1, ¶ 7.

Mr. Allen offered helpful testimony about his impressions of NetChoice members’ internal parental-control features. He agreed that “the vast majority [of member platforms] have ... family control centers” and similar features that allow parents to “set [their] preferences and controls [they] want to have in place for [their children].” These controls are available “on the individual platform” or “can be programmed as part of the device that [is being used] to access them”—i.e., through the user’s phone or laptop computer. Mr. Allen believes the key to keeping children safe online is to age-gate harmful content through rigorous methods and to dramatically increase parents’ use of filtering and other control methods to curate and monitor minors’ activities online.

III. LEGAL STANDARD

In determining whether to grant a motion for preliminary injunction to a plaintiff with standing, the Court must weigh the following four considerations: (1) the threat of irreparable harm to the moving party; (2) the movant’s likelihood of success on the merits; (3) the balance between the harm to the movant if the injunction is denied and the harm to other party if the injunction is granted; and (4) the public interest. *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). “While no single factor is determinative, the probability of success factor is the most significant.” *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1133 (8th Cir. 2019) (citation and quotation omitted). In particular, “[w]hen a Plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied.” *Phelps-Roper v. Troutman*, 662 F.3d 485, 488 (8th

Cir. 2011) (per curiam), vacated on reh'g on other grounds, 705 F.3d 845 (8th Cir. 2012).

IV. DISCUSSION

A. Standing

To bring a cause of action in federal court, the plaintiff must establish standing to sue. *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007). “In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The “inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.” *Id.* Constitutional standing addresses *who* has the right to invoke the power of a court (e.g., by filing a lawsuit), while prudential standing addresses *what arguments* a party may raise as a claim or defense. See Curtis A. Bradley, Ernest A. Young, *Unpacking Third-Party Standing*, 131 Yale L.J. 1, 26 (2021).

For a plaintiff to prove it has constitutional standing to sue under Article III, it must demonstrate it has suffered, or will suffer, and injury-in-fact that is concrete and particularized, actual or imminent, fairly traceable to the defendant's actions, and likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Requiring a plaintiff to establish constitutional standing to sue “ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved.” *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018).

*9 NetChoice contends that its constitutional standing enables it to bring two separate claims. First is a due process claim made on behalf of NetChoice's members. NetChoice argues that certain pivotal terms in Act 689 are too vague to be understood by the regulated parties and uniformly enforced by the State, which makes Act 689 unconstitutional. The State does not dispute that NetChoice has constitutional standing to assert this claim, as it clearly arises from economic injuries that are fairly traceable to Act 689's regulatory requirements.

Second, NetChoice asserts a constitutional claim on behalf of Arkansans. It argues that Act 689's regulatory requirements unconstitutionally burden Arkansans' First Amendment

rights. The State maintains that NetChoice lacks prudential standing to assert this claim.

1. Constitutional Standing

As the Court previously noted, NetChoice is an internet trade association with members who are subject to Act 689's requirements. Though an entity like NetChoice is not directly injured by a law, it may nevertheless assert associational standing on behalf of its injured members. See *Higgins Elec., Inc. v. O'Fallon Fire Prot. Dist.*, 813 F.3d 1124, 1128 (8th Cir. 2016). To establish associational standing, the entity must show: (1) its members would have standing to sue in their own right; (2) the suit seeks to protect interests germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires the individual members of the association to participate in the lawsuit. See *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

NetChoice establishes associational standing on behalf of its members due to the non-speculative economic injury members must incur to comply with Act 689. Economic injury associated with state regulatory requirements forms a sufficient basis for first-party standing. See *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (finding that a booksellers' association had constitutional standing to challenge a state law “aimed directly” at it, since the association would “have to take significant and costly compliance measures or risk criminal prosecution”).

If Act 689 goes into effect, the member entities will have three choices: incur expenses to implement an age-verification system in compliance with the Act; bar Arkansans from opening accounts on all regulated platforms; or face criminal penalties and civil enforcement actions brought by the Arkansas Attorney General. See Doc. 18, p. 45 (arguing that those entities “covered by the Act will face a perilous choice between exposing themselves to massive liability for disseminating speech to minors or taking costly and burdensome steps that will drastically curtail access to their online services, all before a court decides the merits of their claims.”); Doc. 17-2, p. 21, Declaration of Antigone Davis, Vice President, Global Head of Safety, Meta (explaining that Act 689 requires “substantial and burdensome changes to the design and operation of the Facebook and Instagram services”); Doc. 17-4, p. 11, Declaration of Justyn Harriman, Senior Engineering Manager, Trust & Safety and Verification, Nextdoor (explaining that it would take Nextdoor “at least

six months” to implement Act 689’s requirements and would increase costs “by up to 3000%”).

While the State quibbles with precisely how burdensome Act 689 will prove in practice, it does not deny that compliance will impose some costs. The injuries here are sufficient to establish that NetChoice members would have standing to sue in their own right, and thereby satisfy the first prong of the associational-standing test. See *Dakota Energy Coop., Inc. v. E. River Elec. Power Coop., Inc.*, 2023 WL 4834598, at *2 (8th Cir. July 28, 2023) (finding a “risk of direct financial harm establishes injury in fact for standing purposes” (brackets and quotations omitted)).⁵

*10 As for the second prong of associational standing, the relief sought by NetChoice is central to its organizational purpose of “mak[ing] the Internet safe for free enterprise and free expression.” (Declaration of Carl Szabo, Plaintiff’s Hearing Exhibit 1). And as to the third prong, the resolution of NetChoice’s claims does not require the “individual participation of each injured party.” *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 552 (1996) (brackets omitted) (quoting *Warth*, 422 U.S. at 511). NetChoice’s “claims can be proven by evidence from representative injured members, without fact-intensive-individual inquiry,” and, under these circumstances, “the participation of [certain] individual members does not thwart associational standing.” *Ass’n of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd.*, 627 F.3d 547, 552 (5th Cir. 2010).⁶ In sum, NetChoice possesses constitutional standing to challenge Act 689.

2. Prudential Standing

Prudential standing asks, “who, according to the governing substantive law, is entitled to enforce the right.” *Abraugh v. Altimus*, 26 F.4th 298, 304 (5th Cir. 2022). “Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon ‘that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.’” *United States v. Windsor*, 570 U.S. 744, 760 (2013) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Accordingly, the “prudential standing rule … normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves.” *Warth*, 422 U.S. at 509. However, there are exceptions to the rule—which, the Court concludes,

enable NetChoice to properly assert both a due process challenge based on direct injury to its members and a First Amendment challenge based on indirect injury to Arkansans.

“There is no prudential standing bar when member-based organizations advocate for the rights of their members.” *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 557 (6th Cir. 2021). By establishing associational standing, NetChoice also establishes itself as the appropriate party to raise a due process challenge to Act 689 based on direct injury to the due process rights of its members.

The Supreme Court has also held that a litigant may assert the rights of a third party “when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties’ rights.” *Warth*, 422 U.S. at 510. Here, the State contends no such exception applies because NetChoice members cannot adequately advocate in favor of their users’ First Amendment rights. According to the State:

Social-media companies are businesses that seek a profit, and they do not have the same concerns as parents and children. This is a “substantial conflict” of interests that would make NetChoice an ineffective proponent of the rights of the users and thus defeats any potentially close relationship.

(Doc. 41, p. 3) (cleaned up).

The Court disagrees. The relationship between NetChoice members and their users is analogous to the relationship between vendors of goods and their customers—and the Supreme Court has held that vendors have prudential standing to advocate in favor of their customers’ constitutional rights when those rights are burdened by the state’s regulation of the vendor. For example, in *Craig v. Boren*, a licensed vendor of beer and her underage male customer challenged the constitutionality of gender-based distinctions in Oklahoma’s liquor laws. 429 U.S. 190, 193 (1976). During the pendency of the lawsuit, the customer, Craig, turned 21, so his claim became moot. Nevertheless, the Court held that the vendor, Whitener, had standing to assert constitutional equal protection claims on behalf of Craig and other underage male customers. The Court explained:

*11 As a vendor with standing to challenge the lawfulness of [Oklahoma’s liquor laws], appellant Whitener is entitled to assert those concomitant rights of third parties that would be ‘diluted or adversely affected’ should her constitutional challenge fail and the statutes remain in force. Otherwise, the threatened imposition of governmental sanctions might

deter appellant Whitener and other similarly situated vendors from selling 3.2% beer to young males, thereby ensuring that “enforcement of the challenged restriction against the (vendor) would result indirectly in the violation of third parties’ rights.” *Warth v. Seldin*, 422 U.S. 490, 510 (1975). Accordingly, vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function.

Id. at 195.

Just a year after the decision in *Craig*, the Court took up a similar prudential standing question in *Carey v. Population Services International*, 431 U.S. 678, 682–84 (1977). There, the Court decided that a vendor of contraceptive devices had standing to challenge the constitutionality of a New York law that restricted the sale of such devices. The vendor “ha[d] standing to challenge [state law], not only in its own right but also on behalf of its potential customers,” as was “settled in *Craig v. Boren*.” *Id.* at 683.

Since *Carey*, many circuit courts have found prudential standing to exist in the context of vendor-customer relationships. See, e.g., *Postscript Enters., Inc. v. Whaley*, 658 F.2d 1249, 1252 (8th Cir. 1981) (finding that a vendor had standing, not only in its individual capacity, but also with respect to its ability to assert the rights of its present and potential customers in challenging a municipal ordinance that banned the sale of contraceptives and related products except by certain entities); *Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199 (4th Cir. 2020) (holding that firearms dealer had third-party standing to pursue claim that Maryland’s handgun qualification license violated its potential customers’ Second Amendment rights); *Kaahumanu v. Hawaii*, 682 F.3d 789, 797 (9th Cir. 2012) (agreeing that a wedding planner had standing to challenge permitting regulations on behalf of those seeking to marry); *Ezell v. City of Chi.*, 651 F.3d 684, 696 (7th Cir. 2011) (allowing a vendor to challenge city ordinance banning firing-range facilities for third parties who sought access to those facilities); *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 155 (3d Cir. 2005) (holding that a vendor of obscene materials had standing to challenge a federal obscenity statute on behalf of its customers).

Another Supreme Court case, *Virginia v. American Booksellers Association, Inc.*, is particularly compelling. 484 U.S. 383, 393 (1988). In *Virginia*, a booksellers’ association challenged the constitutionality of a state law on the ground that it infringed on the First Amendment rights of book

buyers. The trial court dismissed the book buyer plaintiffs after finding their claims were too speculative. *Id.* at 392. When the case finally made its way to the Supreme Court, the state argued that the booksellers’ association lacked standing to bring a First Amendment challenge on behalf of its book buying customers. The Court rejected that argument, reasoning:

Even if an injury in fact is demonstrated, the usual rule is that a party may assert only a violation of its own rights. However, in the First Amendment context, “[l]itigants ... are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.” *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 956–957, 104 S. Ct. 2839, 2846–2847, 81 L.Ed.2d 786 (1984), quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). This exception applies here, as plaintiffs have alleged an infringement of the First Amendment rights of bookbuyers.

*12 *Id.* at 392–93.

Turning now to the instant case, the State argues that the vendor line of cases cited above is inapposite because those cases involved *existing* customers, while Act 689 seeks to regulate hypothetical *future* users of social media platforms. During the hearing, the State pointed the Court to *Kowalski v. Tesmer*, a case in which the Supreme Court found that criminal defense attorneys lacked third-party standing to challenge the constitutionality of a Michigan statute on behalf of hypothetical future clients. 543 U.S. 125, 130–31 (2004). The Court finds *Kowalski* to be clearly distinguishable from the case at bar because the contested issue there was Article III standing—not prudential standing.

The Supreme Court dismissed *Kowalski* upon finding that the attorneys who filed suit had no injury-in-fact and, thus, no constitutional standing in their own right. Here, NetChoice asserts a cognizable economic injury-in-fact that directly arises from compliance with Act 689. In addition, NetChoice has asserted the constitutional rights of its users and the injuries that users are likely to suffer as a direct result of the State’s regulation of NetChoice’s members. These concerns are not speculative. Moreover, the Court finds that NetChoice members are well positioned to raise these concerns. They have a thorough understanding of the content hosted on their platforms and the ways in which their customers exercise their First Amendment rights on those platforms. The Court

therefore concludes that NetChoice—like the booksellers’ association in the *Virginia* case—is in a unique position to advocate for the rights of Arkansas users and may appropriately do so here.

B. Likelihood of Success on the Merits

1. Void for Vagueness: NetChoice Members’ Claim

NetChoice argues that Act 689 violates the due process rights of its members because pivotal terms are unconstitutionally vague. As the Supreme Court explained in *Grayned v. City of Rockford*:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

[408 U.S. 104, 108 \(1972\)](#) (footnotes omitted).

A regulation “violates the first essential of due process of law” by failing to provide adequate notice of prohibited conduct. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (citations omitted). A court should find a regulation unconstitutional if it “forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application” *Id.*

*¹³ Although the “void for vagueness” doctrine often applies to criminal laws enacted under a state’s penal code, see *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982), the doctrine is applicable here because Act 689 not only imposes possible criminal and civil penalties on companies that fail to comply with its requirements,⁷ but also interferes with their customers’ access to constitutionally protected speech. The void-for-vagueness doctrine provides that “regulated parties should know what is required of them so they may act accordingly ... [and that] precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.”

F.C.C. v. Fox TV Stations, Inc., 567 U.S. 239, 253 (2012) (citing *Grayned*, 408 U.S. at 108–109). The stakes are even higher, however, “[w]hen speech is involved.” *Id.* at 253–54. It is critical “to ensure that ambiguity does not chill protected speech.” *Id.*

“It is essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application.” *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968) (striking down city ordinance imposing misdemeanor penalty on movie theaters for showing films “unsuitable for minors” as impermissibly vague); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 497 (1952) (invalidating state law banning motion picture distributors from distributing “sacrilegious” movies due to vague standards); *Winters v. New York*, 333 U.S. 507, 518–19 (1948) (finding unconstitutionally vague a state law regulating the distribution of certain commercial publications).

Here, Act 689 is unconstitutionally vague because it fails to adequately define which entities are subject to its requirements. A “social media company” is defined as “an online forum that a company makes available for an account holder” to “[c]reate a public profile, establish an account, or register as a user for the *primary purpose* of interacting socially with other profiles and accounts,” “[u]pload or create posts or content,” “[v]iew posts or content of other account holders,” and “[i]nteract with other account holders or users, including without limitation establishing mutual connections through request and acceptance.” Act 689 at § 1101(7)(A) (emphasis added). But the statute neither defines “primary purpose”—a term critical to determining which entities fall within Act 689’s scope—nor provides any guidelines about how to determine a forum’s “primary purpose,” leaving companies to choose between risking unpredictable and arbitrary enforcement (backed by civil penalties, attorneys’ fees, and potential criminal sanctions) and trying to implement the Act’s costly age-verification requirements. Such ambiguity renders a law unconstitutional.

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or

discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

*14 See *Fox*, 567 U.S. at 253–54. “[A] regulation is not vague because it may at times be difficult to prove an incriminating fact *but rather because it is unclear as to what fact must be proved.*” *Id.* (emphasis added) (citing *United States v. Williams*, 553 U.S. 285, 306 (2008)). Here, NetChoice argues that the actions and intentions of platform users drive whether a platform is subject to regulation, and because the motivations of platform users are varied, it is impossible for companies to know whether they are subject to regulation.

The State argues that Act 689's definitions are clear and that “any person of ordinary intelligence can tell that [Act 689] regulates Meta, Twitter[,] and TikTok.” (Doc. 34, p. 20). But what about other platforms, like Snapchat? David Boyle, Snapchat's Senior Director of Products, stated in his Declaration that he was not sure whether his company would be regulated by Act 689. He initially suspected that Snapchat would be exempt until he read a news report quoting one of Act 689's co-sponsors who claimed Snapchat was specifically targeted for regulation. See Plaintiff's Hearing Exhibit 3, ¶ 8 (citing Brian Fung, *Arkansas Governor Signs Sweeping Bill Imposing a Minimum Age Limit for Social Media Usage*, CNN.com (Apr. 12, 2023), <https://www.cnn.com/2023/04/12/tech/arkansas-social-media-age-limit/index.html>).

During the evidentiary hearing, the Court asked the State's expert, Mr. Allen, whether he believed Snapchat met Act 689's definition of a regulated “social media company.” He responded in the affirmative, explaining that Snapchat's “primary purpose” matched Act 689's definition of a “social media company” (provided it was true that Snapchat also met the Act's profitability requirements). When the Court asked the same question to the State's attorney later on in the hearing, he gave a contrary answer—which illustrates the ambiguous nature of key terms in Act 689. The State's attorney disagreed with Mr. Allen—his own witness—and said the State's official position was that Snapchat was *not* subject to regulation because of its “primary purpose.”

Other provisions of Act 689 are similarly vague. The Act defines the phrase “social media platform” as an “internet-based service or application ... [o]n which a *substantial function* of the service or application is to connect users in order to allow users to interact socially with each other within the service or application”; but the Act excludes

services in which “the *predominant or exclusive function* is” “[d]irect messaging consisting of messages, photos, or videos” that are “[o]nly visible to the sender and the recipient or recipients” and “[a]re not posted publicly.” Act 689 at § 1101(8)(A)–(B) (emphasis added). Again, the statute does not define “substantial function” or “predominant ... function,” leaving companies to guess whether their online services are covered. Many services allow users to send direct, private messages consisting of texts, photos, or videos, but also offer other features that allow users to create content that anyone can view. Act 689 does not explain how platforms are to determine which function is “predominant,” leaving those services to guess whether they are regulated.

Act 689 also fails to define what type of proof will be sufficient to demonstrate that a platform has obtained the “express consent of a parent or legal guardian.” *Id.* at § 1102(a). If a parent wants to give her child permission to create an account, but the parent and the child have different last names, it is not clear what, if anything, the social media company or third-party servicer must do to prove a parental relationship exists. And if a child is the product of divorced parents who disagree about parental permission, proof of express consent will be that much trickier to establish—especially without guidance from the State.

*15 These ambiguities were highlighted by the State's own expert, who testified that “the biggest challenge ... with parental consent is actually establishing the relationship, the parental relationship.” Since the State offers no guidance about the sort of proof that will be required to show parental consent, it is likely that once Act 689 goes into effect, the companies will err on the side of caution and require detailed proof of the parental relationship. As a result, parents and guardians who otherwise would have freely given consent to open an account will be dissuaded by the red tape and refuse consent—which will unnecessarily burden minors' access to constitutionally protected speech.

For all these reasons, the Court finds that NetChoice is likely to succeed on the merits of its vagueness claim, and the law is likely to be unconstitutional on that basis alone.

2. Burdens on First Amendment Rights: Platform Users' Rights

a. Level of Scrutiny

NetChoice contends that Act 689's age-verification requirements target speech on social media websites and platforms based on content, speaker, and viewpoint, so the Act is subject to strict scrutiny. The State disagrees and argues that Act 689's age-verification requirements are merely a content-neutral regulation on *access* to speech at particular "locations," so intermediate scrutiny should apply. According to the Supreme Court's seminal opinion in *Ward v. Rock Against Racism*:

The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

[491 U.S. 781, 791–92 \(1989\)](#).

Deciding whether Act 689 is content-based or content-neutral turns on the reasons the State gives for adopting the Act. First, the State argues that the more time a minor spends on social media, the more likely it is that the minor will suffer negative mental-health outcomes, including depression and anxiety. Second, the State points out that adult sexual predators on social media seek out minors and victimize them in various ways. Therefore, to the State, a law limiting access to social media platforms based on the user's age would be content-neutral and require only intermediate scrutiny.

On the other hand, the State points to certain speech-related content on social media that it maintains is harmful for children to view. Some of this content is not constitutionally protected speech, while other content, though potentially damaging or distressing, especially to younger minors, is likely protected nonetheless. Examples of this type of speech include depictions and discussions of violence or self-harming, information about dieting, so-called "bullying" speech, or speech targeting a speaker's physical appearance, race or ethnicity, sexual orientation, or gender. If the State's purpose is to restrict access to constitutionally protected speech based on the State's belief that such speech is harmful to minors, then arguably Act 689 would be subject to strict scrutiny.

*¹⁶ During the hearing, the State advocated for intermediate scrutiny and framed Act 689 as "a restriction on where minors can be," emphasizing it was "not a speech restriction" but

"a location restriction." The State's briefing analogized Act 689 to a restriction on minors entering a bar or a casino. But this analogy is weak. After all, minors have no constitutional right to consume alcohol, and the primary purpose of a bar is to serve alcohol. By contrast, the primary purpose of a social media platform is to engage in speech, and the State stipulated that social media platforms contain vast amounts of constitutionally protected speech for both adults and minors. Furthermore, Act 689 imposes much broader "location restrictions" than a bar does. The Court inquired of the State why minors should be barred from accessing entire social media platforms, even though only some of the content was potentially harmful to them, and the following colloquy ensued:

THE COURT: Well, to pick up on Mr. Allen's analogy of the mall, I haven't been to the Northwest Arkansas mall in a while, but it used to be that there was a restaurant inside the mall that had a bar. And so certainly minors could not go sit at the bar and order up a drink, but they could go to the Barnes & Noble bookstore or the clothing store or the athletic store. Again, borrowing Mr. Allen's analogy, the gatekeeping that Act 689 imposes is at the front door of the mall, not the bar inside the mall; yes?

THE STATE: The state's position is that the whole mall is a bar, if you want to continue to use the analogy.

THE COURT: The whole mall is a bar?

THE STATE: Correct.

Clearly, the State's analogy is not persuasive.

NetChoice argues that Act 689 is not a content-neutral restriction on minors' ability to access particular spaces online, and the fact that there are so many exemptions to the definitions of "social media company" and "social media platform" proves that the State is targeting certain companies based either on a platform's content or its viewpoint. Indeed, Act 689's definitions and exemptions do seem to indicate that the State has selected a few platforms for regulation while ignoring all the rest. The fact that the State fails to acknowledge this causes the Court to suspect that the regulation may not be content-neutral. "If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content-based." [City of Austin v. Reagan Nat'l Advertising of Austin, LLC](#), 142 S. Ct. 1464, 1475 (2022).

Having considered both sides' positions on the level of constitutional scrutiny to be applied, the Court tends to agree with NetChoice that the restrictions in Act 689 are subject to strict scrutiny. However, the Court will not reach that conclusion definitively at this early stage in the proceedings and instead will apply intermediate scrutiny, as the State suggests. Under intermediate scrutiny, a law must be "narrowly tailored to serve a significant governmental interest." *Ward*, 491 U.S. at 796, which means it must advance that interest without "sweep[ing] too broadly" or chilling more constitutionally protected speech than is necessary, and it must not "raise serious doubts about whether the statute actually serves the state's purported interest" by "leav[ing] [out]" and failing to regulate "significant influences bearing on the interest," *Republican Party of Minn. v. White*, 416 F.3d 738, 752 (8th Cir. 2005) (citations omitted and cleaned up).

Since Act 689 clearly serves an important governmental interest, the Court will address whether the Act burdens adults' and/or minors' access to protected speech and whether the Act is narrowly tailored to burden as little speech as possible while effectively serving the State's interest in protecting minors online.

b. Burdens on Adults' Access to Speech

"The right of freedom of speech ... includes not only the right to utter or to print, but the right to distribute, the right to receive, *the right to read* and freedom of thought" *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (emphasis added and citation omitted). An individual has the "right to read or observe what he pleases," and that right is "fundamental to our scheme of liberty" and cannot be restricted. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969). "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold*, 381 U.S. at 482.

*17 Social media sites are, "for many ... the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." See *Packingham*, 582 U.S. at 107. Requiring adult users to produce state-approved documentation to prove their age and/or submit to biometric age-verification testing imposes significant burdens on adult access to constitutionally protected speech and "discourage[s] users from accessing [the regulated] sites." *Reno v. American Civil*

Liberties Union, 521 U.S. 844, 856 (1997). Age-verification schemes like those contemplated by Act 689 "are not only an additional hassle," but "they also require that website visitors forgo the anonymity otherwise available on the internet." *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003); see also *ACLU v. Mukasey*, 534 F.3d 181, 197 (3d Cir. 2008) (finding age-verification requirements force users to "relinquish their anonymity to access protected speech").

Other courts examining similar regulations have found that "[r]equiring Internet users to provide ... personally identifiable information to access a Web site would significantly deter many users from entering the site, because Internet users are concerned about security on the Internet and because Internet users are afraid of fraud and identity theft on the Internet." *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 806 (E.D. Pa. 2007); see also *PSINET, Inc. v. Chapman*, 167 F. Supp. 2d 878, 889 (W.D. Va. 2001), aff'd, 362 F.3d 227 (4th Cir. 2004) ("Fear that cyber-criminals may access their [identifying information] ... may chill the willingness of some adults to participate in the 'marketplace of ideas' which adult Web site operators provide."). The Court agrees. It is likely that many adults who otherwise would be interested in becoming account holders on regulated social media platforms will be deterred—and their speech chilled—as a result of the age-verification requirements, which, as Mr. Allen testified, will likely require them to upload official government documents and submit to biometric scans.

c. Burdens on Minors' Access to Speech

Act 689 bars minors from opening accounts on a variety of social media platforms, despite the fact that those same platforms contain vast quantities of constitutionally protected speech, even as to minors. It follows that Act 689 obviously burdens minors' First Amendment Rights. The Supreme Court instructs:

[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely

to protect the young from ideas or images that a legislative body thinks unsuitable for them.

Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 794–95 (2011) (internal quotation marks and citations omitted).

Neither the State's experts nor its secondary sources claim that the majority of content available on the social media platforms regulated by Act 689 is damaging, harmful, or obscene as to minors. And even though the State's goal of internet safety for minors is admirable, “the governmental interest in protecting children does not justify an unnecessarily broad suppression of speech addressed to adults.” *Reno*, 521 U.S. at 875; see also *Brown*, 564 U.S. at 804–05 (“Even where the protection of children is the object, the constitutional limits on governmental action apply.”).

d. Act 689 is Not Narrowly Tailored

*18 *Using the State's analogy, if a social media platform is like a bar, Act 689 contemplates parents dropping their children off at the bar without ever having to pick them up again.*

As described above, Act 689 burdens both adults' and minors' access to constitutionally protected speech. The State asserts an important governmental objective for doing so. To withstand challenge under intermediate scrutiny, then, Act 689 must be narrowly tailored to avoid unduly burdening Arkansans' First Amendment rights.

The Court first considers the Supreme Court's narrow-tailoring analysis in *Brown v. Entertainment Merchants Association*, which involved a California law prohibiting the sale or rental of violent video games to minors. 564 U.S. at 802. The state “claim[ed] that the Act [was] justified in aid of parental authority: By requiring that the purchase of violent video games [could] be made only by adults, the Act ensure[d] that parents [could] decide what games [were] appropriate.” *Id.* The *Brown* Court recognized that the state legislature's goal of “addressing a serious social problem,” namely, minors' exposure to violent images, was “legitimate,” but where First Amendment rights were involved, the Court cautioned that the state's objectives “must be pursued by means that are neither seriously underinclusive nor seriously overinclusive.” *Id.* at 805. “As a means of protecting children from portrayals of violence, the legislation [was] seriously underinclusive, not only because it exclude[d] portrayals other than video games, but also because it permit[ted] a parental ... veto.” *Id.* If the material was indeed “dangerous

[and] mindaltering,” the Court explained, it did not make sense to “leave [it] in the hands of children so long as one parent ... says it's OK.” *Id.* at 802. Equally, “as a means of assisting concerned parents,” the Court held that the regulation was “seriously overinclusive because it abridge[d] the First Amendment rights of young people whose parents ... think violent video games are a harmless pastime.” *Id.* at 805. Put simply, the legislation was not narrowly tailored.

In the end, the *Brown* Court rejected the argument “that the state has the power to prevent children from hearing or saying anything without their parents' prior consent,” for “[s]uch laws do not enforce parental authority over children's speech and religion; they impose governmental authority, subject only to a parental veto.” 564 U.S. at 795, n.3. “This is not the narrow tailoring to ‘assisting parents’ that restriction of First Amendment rights requires.” *Id.* at 804. The Court also expressed “doubts that punishing third parties for conveying protected speech to children just in case their parents disapprove of that speech is a proper governmental means of aiding parental authority.” *Id.* at 802. “Accepting that position would largely vitiate the rule that ‘only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors].’” *Id.* (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–213 (1975)).

*19 The State regulation here, like the one in *Brown*, is not narrowly tailored to address the harms that the State contends are encountered by minors on social media. The State maintains that Act 689's exemptions are meant to precisely target the platforms that pose the greatest danger to minors online, but the data do not support that claim.

To begin with, the connection between these harms and “social media” is ill defined by the data. It bears mentioning that the State's secondary sources refer to “social media” in a broad sense, though Act 689 regulates only some social media platforms and exempts many others. For example, YouTube is not regulated by Act 689, yet one of the State's exhibits discussing the dangers minors face on “social media” specifically cites YouTube as being “the most popular online activity among children aged 3–17” and notes that “[a]mong all types of online platforms, YouTube was the most widely used by children” See OfCom, *Children and parents: media use and attitudes report 2022*, Mar. 30, 2022, https://www.ofcom.org.uk/__data/assets/pdf_file/0024/234609/ childrens-media-use-

and-attitudes-report-2022.pdf (cited in Declaration of Tony Allen, States' Hearing Exhibit 1, p. 23 n.10).

Likewise, another State exhibit published by the FBI noted that “gaming sites or video **chat** applications that feel familiar and safe [to minors]” are common places where adult predators engage in financial “sextortion” of minors. *See* State's Hearing Exhibit 6. However, Act 689 exempts these platforms from compliance. Mr. Allen, the State's expert, criticized the Act for being “very limited in terms of the numbers of organizations that are likely to be caught by it, possibly to the point where you can count them on your fingers....” He then stated that he did not “want to be unkind to the people who drafted [Act 689],” but at least some exempt platforms are ones that adult sexual predators commonly use to communicate with children, including Kik and Kik Messenger, Google Hangouts, and interactive gaming websites and platforms.

The Court asked the State's attorney why Act 689 targets only certain social media companies and not others, and he responded that the General Assembly crafted the Act's definitions and exemptions using the data reported in an article published by the National Center for Missing and Exploited Children (“NCMEC”). *See 2022 CyberTipline Reports by Electronic Service Providers (ESP)* 1, National Center for Missing & Exploited Children (2023), <https://www.missingkids.org/content/dam/missingkids/pdfs/2022-reports-by-esp.pdf> (State's Hearing Exhibit 9). This article lists the names of dozens of popular platforms and notes the number of suspected incidents of child sexual exploitation that each self-reported over the past year. The State selected what it considered the most dangerous platforms for children—based on the NCMEC data—and listed those platforms in a table in its brief. *See* Doc. 34, p. 16.

During the hearing, the Court observed that the data in the NCMEC article lacked context; the article listed raw numbers but did not account for the amount of online traffic and number of users present on each platform. The State's attorney readily agreed, noting that “Facebook probably has the most people on it, so it's going to have the most reports.” But he still opined that the NCMEC data was a sound way to target the most dangerous social media platforms, so “the highest volume [of reports] is probably where the law would be concentrated.”

***20** Frankly, if the State claims Act 689's inclusions and exemptions come from the data in the NCMEC article, it

appears the drafters of the Act did not read the article carefully. Act 689 regulates Facebook and Instagram, the platforms with the two highest numbers of reports. But, the Act *exempts* Google, **WhatsApp**, Omegle, and Snapchat—the sites with the third-, fourth-, fifth-, and sixth-highest numbers of reports. Nextdoor is at the very bottom of NCMEC's list, with only one report of suspected child sexual exploitation all year, yet the State's attorney noted during the hearing that Nextdoor would be subject to regulation under Act 689.

None of the experts and sources cited by the State indicate that risks to minors are greater on platforms that generate more than \$100 million annually. Instead, the research suggests that it is *the amount of time that a minor spends unsupervised online* and the content that he or she encounters there that matters. However, Act 689 does not address time spent on social media; it only deals with account creation. In other words, once a minor receives parental consent to have an account, Act 689 has no bearing on how much time the minor spends online. Using the State's analogy, if a social media platform is like a bar, Act 689 contemplates parents dropping their children off at the bar without ever having to pick them up again. The Act only requires parents to give express permission to create an account on a regulated social media platform *once*. After that, it does not require parents to utilize content filters or other controls or monitor their children's online experiences—something Mr. Allen believes the real key to keeping minors safe and mentally well on social media.

The State's brief argues that “requiring a minor to have parental authorization to make a profile on a social media site means that many minors will be protected from the well-documented mental health harms present on social media because their parents will have to be involved in their profile creation” and are therefore “more likely to be involved in their minor's online experience.” (Doc. 34, p. 19). But this is just an assumption on the State's part, and there is no evidence of record to show that a parent's involvement in account creation signals an intent to be involved in the child's online experiences thereafter. Mr. Allen testified to that effect in the following colloquy with the Court:

THE COURT: Okay. Let's say that the parental consent is legitimate. The 17-year-old goes to mom or dad and says, “All my friends are on Facebook, I want to be able to communicate with them on Facebook, will you sign this consent, will you provide your driver's license, will you sit down for 10 minutes,” or however long it takes,

and mom or dad says, “yes.” Does that automatically mean, just because the parent has given their consent, that the 17-year-old won’t surf to content that is harmful to them?

MR. ALLEN: No. It will answer the question that they were asked: “Can I have ... consent to have an account.” But ... it’s then down to the company’s policies of how it treats users that it knows are under 18 and what material it makes available to them.

THE COURT: So, you are saying that the parents will still have to stay involved in overseeing the content that their minor child views?

MR. ALLEN: They may do Those controls can either be web-based or device-based and they can be tailored and they can be—some of them are quite advanced in terms of what they will and won’t allow you to access. And they can be updated as well by the parents.

THE COURT: Parental controls?

THE WITNESS: Yes.

Finally, the Court concludes that Act 689 is not narrowly tailored to target content harmful to minors. It simply impedes access to content writ large. Consider the differences between Act 689 and the UK’s Online Safety Bill. Mr. Allen, who worked on the UK legislation, testified that the UK’s main concern was preventing minors from accessing particular content, whereas Arkansas will require age verification at the time of account creation, regardless of the content. It appears the UK’s approach is more consistent with Supreme Court precedent than Arkansas’s approach. In *Packingham*, the Court observed that it was possible for a state to “enact specific, narrowly tailored laws” targeted to “conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor”; but it would be unconstitutional for a state to unduly burden adult access to social media. [582 U.S. at 106–07](#).

***21** Age-verification requirements are more restrictive than policies enabling or encouraging users (or their parents) to control their own access to information, whether through user-installed devices and filters or affirmative requests to third-party companies. “Filters impose selective restrictions on speech at the receiving end, not universal restrictions at the source.” *Ashcroft v. ACLU*, 542 U.S. 656, 657 (2004). And “[u]nder a filtering regime, adults ... may gain access to speech they have a right to see without having to identify

themselves[.]” *Id.* Similarly, the State could always “act to encourage the use of filters ... by parents” to protect minors. *Id.; see also United States v. Playboy Entertainment Group*, 529 U.S. 803, 809–10, 815 (2000) (finding that voluntary, “targeted blocking” of certain content by viewers “is less restrictive than banning” the same content).

In sum, NetChoice is likely to succeed on the merits of the First Amendment claim it raises on behalf of Arkansas users of member platforms. The State’s solution to the very real problems associated with minors’ time spent online and access to harmful content on social media is not narrowly tailored. Act 689 is likely to unduly burden adult and minor access to constitutionally protected speech. If the legislature’s goal in passing Act 689 was to protect minors from materials or interactions that could harm them online, there is no compelling evidence that the Act will be effective in achieving those goals.

C. Irreparable Harm

Because Act 689 contains terms too vague to be reasonably understood, NetChoice members are likely to suffer irreparable harm if the Act goes into effect. It is unclear which NetChoice members will be subject to regulation, and several terms that are pivotal to NetChoice members’ compliance with Act 689 are undefined or subject to multiple interpretations. Separately, Act 689 is likely to abridge the First Amendment rights of users of NetChoice’s members’ platforms, which will cause those users to suffer irreparable harm. No legal remedy exists to compensate Arkansans for the loss of their First Amendment rights. *Nat'l People's Action v. Vill. of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990). “Loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury.” *Ingebretsen v. Jackson Public Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

D. Balance of the Equities and the Public Interest

When the government opposes the issuance of a preliminary injunction, the final two factors—the balance of the equities and the public interest—merge. See *Nken v. Holder*, 556 U.S. 418, 435 (2009). The balance of the equities and public interest decidedly favor NetChoice, given the likelihood that Act 689 will infringe the public’s First Amendment rights. Act 689 is not targeted to address the harms it has identified,

and further research is necessary before the State may begin to construct a regulation that is narrowly tailored to address the harms that minors face due to prolonged use of certain social media. Age-gating social media platforms for adults and minors does not appear to be an effective approach when, in reality, it is the content on particular platforms that is driving the State's true concerns. The many exemptions in Act 689 all but nullify the State's purposes in passing the Act and ignore the State's expert's view that parental oversight is what is really needed to insulate children from potential harms that lurk on the internet.

V. CONCLUSION

For the reasons explained herein, Plaintiff's Motion for Preliminary Injunction (Doc. 17) is **GRANTED**. Act 689 of 2023, the "Social Media Safety Act," is **PRELIMINARILY ENJOINED** under [Federal Rule of Civil Procedure 65\(a\)](#), pending final disposition of the issues on the merits.

***22 IT IS SO ORDERED** on this 31st day of August, 2023.

All Citations

Not Reported in Fed. Supp., 2023 WL 5660155

Footnotes

- 1 All citations to Act 689 in this Opinion refer to particular subsections of Chapter 88, Subchapter 11 of the Arkansas Code. For brevity's sake, the Court will cite only to the subsection, e.g., "Act 689 at § 1102(b)(1)."
- 2 The Act authorizes the use of digitized identification cards or driver's licenses, as well as other digitized forms of government-issued identification. Act 689 at § 1102(c)(2). A "digitized identification card" is defined as "a data file available on a mobile device that has connectivity to the internet through a state-approved application that allows the mobile device to download the data file from the Office of Driver Services that contains all of the data elements visible on the face and back of a driver's license or identification card and displays the current status of the driver's license or identification card, including valid, expired, cancelled, suspended, revoked, active, or inactive." *Id.* at § 1101(4). Mr. Allen testified during the hearing that Arkansas was still in the process of developing its "state-approved" online app for downloading data files from the Office of Driver Services—which means that this technology is unlikely to be available when Act 689 takes effect on September 1.
- 3 Dr. Farst practices in Arkansas and is a licensed pediatrician and member of the American Academy of Pediatrics' counsel on child abuse and neglect.
- 4 As previously stated, NetChoice, LLC, is an internet trade association consisting of members such as Facebook, Instagram, Twitter, TikTok, Snapchat, Pinterest, and Nextdoor.
- 5 As NetChoice has standing under an economic theory of injury, it is not necessary for the Court to evaluate its non-economic theory of injury at this time.
- 6 Many courts have found the third prong of the associational standing test to be prudential. See *Housatonic River Initiative v. United States Envt Prot. Agency, New England Region*, 75 F.4th 248, 265 (1st Cir. 2023) ("The first two prongs of this test have constitutional dimensions; the third prong is prudential.") (citing *United Food*, 517 U.S. at 554–58 (1996)). However, the prudential nature of NetChoice's associational standing is not at issue.
- 7 Act 689 states that a regulated "social media company" is to be held strictly liable for "fail[ing] to perform a reasonable age verification." Act 689 at § 1103(a)(1). The Act contemplates the imposition of a Class A misdemeanor penalty for non-compliance, see § 1103(b)(1) (cross-referencing [Ark. Code Ann. § 4-88-103](#)), a possible civil enforcement action by the Attorney General, see § 1103(b)(2) (cross-referencing [Ark. Code Ann. § 4-88-104](#)), and civil lawsuits brought by aggrieved citizens, see § 1103(c)(1).

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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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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.

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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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