IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

Marc Edwards *Plaintiff* *v.* Paul Schwartz, *et. al.* *Defendant*s	Case Number: 7:18-cv-00378-MFU Date: August 10, 2018

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(B)(2) AND RULE 12(B)(6).

Defendants Melissa Mays, Yanna Lambrinidou and Paul Schwartz, by and through William Moran, Esq., Arthur Hawgood, Esq., and Alexander Hawgood, Esq. and pursuant to Local Civil Rule 11(c), hereby submit this memorandum of law in support of their jointly filed Motion to Dismiss for Want of Personal Jurisdiction and Motion to Dismiss for Failure to State a Claim. Fed. R. Civ. P. 12(b)(2), 12(b)(6).

Specifically, this Court should dismiss the Complaint for (1) failure to state a claim upon which relief could be granted because: (a) the allegedly actionable statements made by defendants are protected opinion in the context of a heated public policy and science debate; (b) plaintiff fails to plead actual malice beyond mere conclusory assertions; (c) the allegedly actionable statements made by defendants are substantially true; (d) the elements of tortious interference are not plausibly plead in failing to reference the breach of any existing business relationship or expectancy; (e) the claims for civil conspiracy (both statutory and common law) are not plausibly plead in failing to allege any non-speculative harm and for absurdly labeling as illegal the sacrosanct right to petition for redress of grievance. The Court should also dismiss the Complaint for (2) lack of personal jurisdiction because: (a) the non-resident defendants

have insufficient minimum contacts with the Commonwealth; (b) the inconvenience to defendants, particularly Defendant Mays; (c) the compelling interest the State of Michigan has over the health, safety and welfare of her denizens; and (d) the fact pattern does not conform to *Calder*. For the reasons set forth in this motion, defendants respectfully request that the Court dismiss the Complaint with prejudice and award reasonable attorney's fees to defendants under Va. Code § 8.01-223.2.

INTRODUCTION

Plaintiff seeks to embroil this Court in a public policy debate over the future of the City of Flint with the battle lines set between those seeking community empowerment by allowing residents to speak for themselves versus those with a preference for scientific paternalism, under the guise of an action for defamation, statutory and common law conspiracy, and tortious interference.

The lawsuit represents a cynical attempt by Plaintiff to strip the residents of Flint of their right to self-determination by replacing their voices with the judgment of Virginians who, for better or worse, would be tasked with deciding whether a Flint mom and two community activists are to suffer unconscionable financial harm and what the future shall hold for a community ravaged by a water crisis.

Plaintiff fails to allege any act by these non-resident defendants occurring in the Commonwealth, makes merely conclusory allegations of actual malice, laces the lawsuit with invective about defendants, fails to make a specific or plausible showing of harm and alleges libel at various junctures in his Complaint without citing the words or even providing appropriate context clues. It is necessary for this Court to dismiss this case early on in furtherance of the public interest otherwise an unmistakable message will be sent to vulnerable communities across America who raise public policy concerns in the

context of a heated debate… you could be next. Attorney's fees should also be awarded as plaintiff's claims are barred under the immunities of Va. Code § 8.01-223.2.

FACTUAL BACKGROUND

A. SEVERAL DOZEN FLINT RESIDENTS SIGN COMPLAINT LETTER

Plaintiff is an award-winning scientist widely credited with certain successes in the response to the Flint Water Crisis, but is also a man who takes pride in hurling *ad hominem* attacks that some have found disconcerting after his transition from an activist to the role of a quasi-public official. Compl. ¶¶2, 27; Compl. Ex. 1, at 1-3; Defs. Ex. 1.[1]

Plaintiff's lawsuit comes in response to a letter signed by several dozen Flint residents criticizing his outrageous behavior and what they perceived as his tendency to speak on behalf of others without their consent. Compl. Ex. 1. The letter begins by referencing Jemez Principles for Democratic Organizing #3: "Let People Speak for Themselves." *Id.* at 1. Plaintiff's response, in the form of this lawsuit, is nothing more than a thinly veiled attempt to silence these dissenting perspectives.

Plaintiff singles out the three defendants while ignoring the fact that several dozen Flint residents also put their name on the letter to say that they have had enough of his "Entertainment Tonight" outbursts to self-promote his (admittedly critical) role in the response and remediation of the Flint water crisis as well as his antagonistic behavior towards perceived rivals. *Id.* at 2, 4.

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[1] Hohn, Donovan, "*Flint's Water Crisis and the 'Troublemaker Scientist,*" New York Times Magazine, accessed on Aug. 10, 2018 at: https://www.nytimes.com/2016/08/21/magazine/flints-water-crisis-and-the-troublemaker-scientist.html; Courts considering a motion to dismiss may rely upon those documents incorporated by reference such as this article. *See Simons v. Montgomery Cnty. Police Officers*, 762 F.2d 30, 31 (4th Cir. 1985); *see also Davis v. George Mason Univ.*, 395 F. Supp. 2d 331, 335 (E.D. Va. 2005) ("[W]hen a plaintiff fails to introduce a pertinent document as part of his complaint, the defendant may attach the document to a motion to dismiss the complaint and the Court may consider the same without converting the motion to one for summary judgment.").

This letter, allegedly issued to over a dozen academics and organizations nationwide as well as officials at Virginia Tech University before finding publication at FlintComplaints.com, asked a simple but harrowing question: To whom exactly do the vulnerable make a complaint about a public figure funded in part by the Environmental Protection Agency, emboldened by the full backing of the Michigan Governor's office, and enabled by a powerful public research university? Compl. ¶¶ 40-42; Compl. Ex. 1, at 1. Where can a distressed people complain about an unelected quasi-public official with whom they are dissatisfied?

Professor Edwards' answer is simple: nowhere. How dare several dozen residents sign a letter criticizing him? Plaintiff now claims that the letter is defamatory and part of a "concerted smear campaign" for which he picked out three signatories – one resident and two community advocates – to sue for $3 million. Compl. ¶¶ 31,42; Compl. Ex. 1, at 4.

Next the letter asks why Edwards represented himself as speaking for "The People of the State of Michigan" in a blog post denigrating Wayne State Professor Shawn McElmurry of the Flint Area Community Health and Environment Partnership. Compl. Ex. 1, at 1-3. Edwards is neither a Michigan resident nor a domiciliary of Flint – he resides in Virginia. Compl. ¶ 2; Compl. Ex. 1, at 1. If he wanted to enter the public debate over the Flint crisis he could have spoken as himself rather than claiming to speak for the residents.

The letter proceeds to state that the community was shocked and appalled by his portrayal that an outbreak of shigella was the result of Flint residents changing their bathing habits – the letter argues that at least some Flint residents believed the connotation of such a claim to be that they were an unwashed ignorant mass of Luddites who had forsworn science. Compl. Ex. 1, at 2-3. An expression that people feel

insulted over a perceived portrayal seems a profoundly improper tree to bear the fruit of a defamation claim by the party who either spoke the offending utterance or was misunderstood to that effect.

The correspondence then opens with an equivocation of "as far as we know" Professor Edwards' scientific dictates are not being reviewed by third parties, but that what he is saying – or how it is being understood by at least some – seems to conflict with the advice of some other experts. *Id.* at 3.

Finally, the letter alleges that at least some residents view Professor Edwards as having a savior complex pointing to his dismissive neocolonialist sounding reference to Flint residents as "tribal" in reaching the conclusion that they would rather not have his help. *Id.* Nonetheless, plaintiff is a quasi-public official who cannot be voted out and who is accountable (as far as they know) to nobody. *Id.*

B. NYT: FLINT'S WATER CRISIS AND THE "TROUBLEMAKER" SCIENTIST

To fully understand why this lawsuit is a strategic lawsuit against public participation (SLAPP) that must be dismissed, one need only refer to the words of Marc Edwards who told an identical story to the letter signed by several dozen Flint residents with one non-factual distinction: He believes his behavior is justified.

The People's Troublemaker: Cowboy Heads West to Flint

Plaintiff referred to himself as "a troublemaker" who sought to publish incriminating emails, labeled certain individuals "pathological lying scumbags" and openly acknowledged using "ridicule" as a "weapon," but who ultimately thought this approach was necessary to expose corruption and promote public health. Defs. Ex. 1.

Edwards explained that this cowboy approach to the scientific endeavor was mapped off of his role model, Clair Cameron Patterson, who exposed the hyper-prevalence of lead in everything from gasoline to canned tuna as early as the 1960s and

spent 20 years campaigning on this – work that saved many lives. *Id.* Patterson also was dismissed as a "rabble rousing" "zealot" for his approach. *Id.*

Flint's Mayor Karen Weaver explained her community's early favorable sentiment towards the rabble-rousing Virginia Tech scientist detailing that the city's residents had been nearly a year and a half into their struggle, but were largely ignored until their own John Wayne (plaintiff) strolled into town – "[Y]ou gave our voice some validation" and that when "we got those Virginia Tech results… we knew: People couldn't say we were crazy." *Id.*

The Fearless Gunslinger Turned De Facto Bureaucrat

In 2016, Edwards role switched from that of an advocate, an outside gunslinger to take on the town's enemies, to a de facto agent of the state appointed to Michigan Governor Rick Snyder's "task force overseeing the state's response to the emergency in Flint." Id. Plaintiff also received a grant from the U.S. EPA to retest the city's water. *Id.*

Plaintiff by his own political predilection as a fiscal libertarian expressed frequently in the earlier years of the crisis a certain distrust with government institutions, a position shared by many Flint residents, stating that one "thing that governments don't do very well is fix the problems they create." *Id.*

In a book foreword, Edwards expanded upon his personal distrust of governmental actions saying, "In my opinion the abuses and dangers of institutional scientific misconduct far exceed those arising from misconduct in industrial science." *Id.* Nonetheless, in a bout of apparent cognitive dissonance, plaintiff brushed aside the significance of his transition from that of an activist to the position of an institutional agent saying only that he remained an advocate for "sound science." *Id.*

A Fraud Rolls into Town and the De Facto Bureaucrat Thinks He's Still a Gunslinger

The renegade turned bureaucrat knowing only the feeling of the pistol in his hand, having become his own favorite target, turned his fire at the next cowboy to stroll into town: a cartoonish sponge salesman by the name of Scott Smith who would toss what "looked like Koosh balls made from shredded swimming-pool noodles" into the Flint River claiming it to be a revolutionary new way to assess water safety. *Id.*

Going after "Smith the way he went after government officials" a year earlier, Edwards penned an expose labeling Smith an "F-List Scientist" and accusing him of bringing "fear and misinformation to Flint," but this time Edwards was not the valiant stranger but an institutional actor linked to Governor Snyder – some were upset. *Id.*

To his credit, plaintiff understood the reason for this reaction saying, "[t]his is exactly the danger of having untrustworthy government science. A Hollywood fraud rolls into town, and they cannot even call him out." *Id.*

In May 2016, he said, "I understand that the trust will never be there for some people. If the residents in Flint, given their journey, decide they never want to drink tap water again, never want to take a bath or shower again, I'm not going to try to talk them out of it, because they went through hell for 18 months." *Id.*

Fully cognizant of the chaos that would ensue if he played the role of "troublemaker" while cloaked in the role of task force agent for Governor Rick Snyder – who some residents blamed for the Flint Water Crisis – plaintiff did it anyways viewing the risk a necessary sacrifice for the advancement of public health. *Id.*

The Cowboy Turns his Fire on Flint Residents

Like his role model Clair Cameron Patterson, Edwards would be confronted with the same self-admitted accusations of rabble rousing that he now complains to this

Court about, but in response to criticism he turned his (rhetorical) guns on the town folk. *Id.;* Compl. Ex. 1, at 1-3.

When cases of shigella began to break out in Flint, Edwards, who said in May 2016 that he would not try to talk residents out of it if they "never want to take a bath or shower again," pointed squarely at the altered hygiene habits of the residents in the wake of the crisis – a perceived offense to some – whether that was actually Edwards' intent or not. *Id.;* Compl. Ex. 1, at 2-3.

"You're saying that we're dumb and dirty, that's what's wrong with us," said Defendant Mays to the New York Times. *Id.* "Now it feels like, intentionally or unintentionally, he's filling the role of the State of Michigan and how they felt about our experiences back in the summer of 2015." Defs. Ex. 1.

That Edwards now held this position towards the residents, independent of the scientific validity or scope of his findings, is perfectly encapsulated in his interactions with the mother (Lulu Brezzell) of Mari Copeny, a young community organizer known affectionately as Little Miss Flint. When Ms. Brezzell showed him "angry red splotches on [her] hands and arms and legs" that forced her and her family to take "speed showers" of no longer than two minutes. *Id.*

Professor Edwards inspected the abnormally blue water coming from her tap that smelled "like a swimming pool," but while the plaintiff confirmed "that is blue water" he assured her that it's only "light blue" and not a significant concern. *Id.* Ms. Brezzell still suffering rashes retorted, "It's still darker, though." *Id.*

At the time, Edwards said he understood Ms. Brezzell's reaction because she was suffering, "and when you're in pain, you want an answer, even if it's wrong." *Id.*

Speaking three months later Edwards' script changed declaring that for people in Flint "science is no longer a source of enlightenment," but rather out of their distrust for institutions they had become "anti-science" Luddites living in the "dark age." *Id.*

"We lost our authority and the public trust with good reason," explained Edwards before saying, "I took off my activist suit and put on my lab coat. Some people assumed my motives changed just as easily." *Id.* Edwards now sues over a letter that dozens of residents put their name to expressing the same distrust and frustration that he said two years ago that one could hold "with good reason." *Id.;* Compl. Ex. 1.

Defendant Lambrinidou said it best in a statement that Marc Edwards now claims is defamatory, "We are all capable of outstanding courage (even if at times we have been 'cowards') and of outstanding wrongdoing (even if at times we have been 'heroes'). This is what it means to be human, no?" Defs. Ex. 1.

The courageous role as an outside gunslinger advocating against government corruption – the hero story that is known of Marc Edwards – should not become license for the cowardly and outstanding wrongdoing that he seeks to perpetrate as an unelected quasi-public official who is now turning his guns on Flint residents and his former colleagues because what seems to be an unwillingness to accept that he is neither good nor bad, but simply human.

Speaking about the Flint River, the EPA's Miguel Del Toral called it "corrosive as hell." *Id.* By the "troublemaker's" own admission, the same can be said about plaintiff's behavior – that was the point of the complaint letter that several dozen Flint residents put their name to. *Id.;* Compl. Ex. 1.

C. DEFENDANTS: A FLINT MOM, A CO-RESEARCHER AND AN ACTIVIST

Melissa Mays, a mother and community activist, was one of the early Flint Water Crisis activists. Compl. ¶¶ 5, 26; Defs. Ex. 1. When plaintiff strolled into town on his

white horse, Mays assisted his Virginia Tech team with fieldwork and appeared next to Edwards at his September 2015 news conference. Defs. Ex. 1.

Yanna Lambrinidou is an anthropological researcher and community advocate who counseled Edwards on "listening" to communities and the importance of local "vernacular" knowledge to avoid painful misunderstandings between communities and scientists – Edwards credited Lambrinidou with much of the early success of his Flint intervention. *Id.*

Speaking with the New York Times, Edwards explained that Dr. Lambrinidou's research on the preceding D.C. lead in water crisis helped to bring the matter to the attention of Congress and resulted in Edwards' vindication after he picked a fight with the Centers for Disease Control (CDC). Id.; Compl. ¶¶ 8-9.

Paul Schwartz, who would later found the group Campaign for Lead Free Water with Dr. Lambrinidou, worked alongside her and Professor Edwards in exposing the D.C. crisis. *Id.*; Compl. ¶27.

Following their efforts in the District of Columbia, Yanna Lambrinidou and plaintiff went on to co-teach a course at Virginia Tech titled "Engineering Ethics and the Public" while leading the non-profit organization "Parents for Nontoxic Alternatives." Compl. ¶¶ 8-9.

D. PLAINTIFF'S NARRATIVE: "SEVERE AND PERSISTENT ANIMOSITY"

Plaintiff alleges in his complaint that Dr. Lambrinidou possessed a personal, financial and professional incentive to "harbor[] severe and persistent animosity towards Edwards." *Id.* at ¶¶ 10-23. Edwards further alleges that Ms. Mays had certain financial incentive to harbor ill will towards plaintiff. *Id.* at ¶¶ 24, 26, 34. Finally, the

Complaint alleges that Dr. Lambrinidou "caused [Paul] Schwartz to act with actual and common law malice towards Edwards." *Id.* at ¶ 24.[2]

Plaintiff's lawsuit boasts a litany of other allegedly defamatory statements, apart from the letter signed by several dozen Flint residents, over a two year period and even appears to allege in paragraph 30 that every word defendants uttered or penned since mid-2017 was defamatory – the latter reeks of a cynical attempt to inflate defendants' legal expense and is deserving of no more than an eye-roll under the "plausibility" standard in Federal Rule of Civil Procedure 8(a)(2) as articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). For that matter, plaintiff's paragraph 30 fails to even meet the less stringent standard of *Iqbal* and *Twombly*'s overruled progenitor which stated that a complaint must "give the defendant fair notice of what the [plaintiff's] claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

ARGUMENT

Courts favor early disposition of defamation claims – especially where the plaintiff is a public figure – because the cost of litigation can have an irreparably chilling effect on speech. This consideration looms large in this case where the targets for litigation are activists who are on the opposite side of the proverbial picket line from the Time Magazine Person of the Year shortlister who is suing them. Compl. ¶¶2, 27. This consideration is fortified by the pleading standards articulated by the Supreme Court. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678

[2] Based on paragraph 24, before getting to this motion's argument section, the claims against Paul Schwartz must be dismissed as plaintiff alleges that a third party is the proximate "cause" of any alleged tortious activity, not Mr. Schwartz.

(2009); *see also Mayfield v. NASCAR*, 674 F. 3d 369, 377-378 (4th Cir. 2012) (applying the plausibility standard of *Iqbal* and *Twombly* to actual malice).

Plaintiff's cynical attempt to drag a Flint mom (and two other defendants) to a faraway jurisdiction "to defend [against an] inappropriate suit[] through expensive discovery proceedings" threatens to "chill free speech nearly as effectively as the absence of the actual malice standard altogether." *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016). It would serve a vital public imperative to dismiss this case early, less dissent by vulnerable frontline communities be unduly trammeled upon.

A. THE COURT SHOULD DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND AWARD ATTORNEY'S FEES UNDER VIRGINIA CODE § 8.01-223.2.

1. The Statements Alleged in the Complaint are Protected Opinion in the Context of a Heated Public Policy Debate. Plaintiff's Claims are also Barred Pursuant to Va. Code § 8.01-223.2. Attorney's Fees Should be Awarded.

Stripped of the tabloid gossip, the Complaint claims that defendants raised concerns in the context of a heated public debate that plaintiff was engaged in combative and destructive behavior (he boasts about being a "troublemaker"), was not listening to Flint residents, was supplanting Flint residents' voices with his own ("People of the State of Michigan"), was talking down to Flint residents ("anti-science" and "tribal") and that they had some distrust (which plaintiff said is held for "good reason") after he flipped from activist to quasi-public official (Snyder's task force and taking EPA money). Compl. Ex. 1, at 1, 3; Defs. Ex. 1. Plaintiff now requests that this Court intercede on his behalf to shut down a vital public debate about the future of the City of Flint and declare him the winner.

The judiciary is cautious not to intervene in emotional public and scientific debates instead choosing to, in light of the adversarial context, observe such statements in a debate to be "protected expression(s) of opinion." *Arthur v. Offit*, 2010 WL 883745,

at *6 (E.D. Va. Mar. 10, 2010) (Finding that a remark by a 'participant in a heated public-health debate [regarding vaccines and autism] stating that his adversary "lies" is not an actionable defamation'); *Faltas v. State Newspaper*, 928 F. Supp. 637, 649 (D.S.C. 1996) (dismissing libel action where "the op-ed piece and responding letter were on a highly controversial topic as to which emotions and verbal exchanges often ran hot"). The 11th Circuit explained the obvious rule in regards to hyperbolic statements made in a public debate explaining that reasonable viewers take it with a grain of salt: "The fact that the parties were engaged in an emotional debate on a highly sensitive topic weighs in favor of the conclusion that a reasonable viewer would infer that [defendant's] statement was **more an expression of outrage than an accusation of fact**." *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002) (bolded for emphasis).

For example, plaintiff claims as defamation a May 2017 Facebook post by Defendant Schwartz which claims Edwards has "no knowledge of the social sciences" and refers to "Rush Limbaugh," "Ayn Rand," 'libertarian bible, "Atlas Shrugged," and "Breitbart like tactics." All of these are rhetorical signals to the reader of a highly emotional political diatribe that represents the subjective views of the writer and is not to be taken as absolute empirical truth – it's his feelings. Compl. ¶32.

The case of *Arthur v. Offit* is instructive on this point where a professor who had regularly been badgered by an anti-vaccination advocate, who expressed a profound belief that immunizations cause autism, in both public statements and the woman's blog. Overwhelmed by the constant assault, the defendant eventually accused the woman of lying to people. *Arthur v. Offit*, 2010 WL 883745 (E.D. Va. Mar. 10, 2010). In this comparator, Professor Edwards is the anti-vaccination lady who pestered, used "ridicule" as a "weapon" replete with a blog and behaved like a "troublemaker" until getting the obvious inverse response when everybody not personally immersed in this

emotional debate knows to take each warring faction's words about the other with not even a grain of salt, but a bucket of salt. Compl. Ex. 1, at 1-2; Defs. Ex. 1.

Another case comparator comes out of the 7th Circuit where defendants were sued for libel after alleging that prominent psychologists Ralph Underwager and Hollida Wakefield were trafficking in junk science. *Underwager v. Salter*, 22 F.3d 730 (7th Cir. 1994). Highlighting the distinction between "actual malice" and "ill will," Judge Easterbrook explained that both defendants "came to believe that Underwager is a hired gun who makes a living by deceiving judges about the state of medical knowledge and thus assisting child molesters to evade punishment. Persons who hold such opinions cannot be expected to look kindly on their subjects...." *Id.* In Easterbrook's analysis, the heated nature of the personal debate, in fact the ill will held by each side to the other, actually militates against a finding of actual malice.

An example of this is seen in defendant Paul Schwartz's letter on May 31, 2017 in which he asks, "What do you think you are doing consulting with the agencies that have betrayed our children again and again without first consulting with us?" Compl. ¶33.[3] This question clearly demonstrates that Defendant Schwartz possesses a firmly held opinion that plaintiff is not on the same side as his community, if he ever was, which means Schwartz cannot be expected to "look kindly" upon plaintiff. Professor Edwards is not legally entitled to the benefit of the doubt especially when he conceded that doubt is held for "good reason." Easterbrook continued in *Salter*, "[plaintiff] cannot, simply by filing suit and crying "character assassination!", silence those who

[3] It is worth noting, as numerous questions by or attributed to defendants, including asking where a formal complaint can be made, are incapable of being deemed defamatory. *See Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1338 (D.C. Cir. 2015) (dismissing libel case on grounds that "questions are not factual representations.").

hold divergent views, no matter how adverse those views may be to plaintiffs' interests." *Salter*, 22 F.3d at 736.

The Court must dismiss plaintiff's claims which are nothing more than the same tired pretext used by all of the *Underwagers* and *Wakefields* plaintiffs who came before him to clog up the legal system with attempts to silence valid criticism. Here, plaintiff seeks to enlist this Court to intercede on his behalf to silence the concerns raised about his "troublemaker" behavior, quash the doubts held for "good reason" arising out of his transition from an activist to a quasi-public official, and break the backs of these three defendants for speaking their minds. Defs. Ex. 1.

2. Plaintiff Fails to Plausibly Plead Actual Malice Making Only Conclusory Assertions. Plaintiff's Claims Must be Dismissed Under Case Law and are also Barred Under Va. Code § 8.01-223.2. Attorney's Fees Should be Awarded.

Plaintiff is a Public Figure Triggering the Actual Malice Standard

The actual malice standard applies to any statement made about an all-purpose public figure (pervasively famous) and applies to others, deemed limited-purpose public figures, for matters of societal concern that they have "thrust themselves to the forefront of." *Gertz v. Robert Welch*, 418 U.S. 323, 345, 351 (U.S. 1974); *see also Foretich v. Capital Cities/ABC*, 37 F.3d 1541, 1551-52 (4th Cir. 1994). Similarly, a public official is prohibited "from recovering damages for a defamatory falsehood relating to [their] official conduct unless [they] prove[] that the statement was made with 'actual malice.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

Plaintiff is a member of Michigan Governor Rick Snyder's Flint Water Crisis remediation task force, an employee of a public funded research institute and an Environmental Protection Agency funded scientist. Defs. Ex. 1. In 2016, plaintiff was included in Time Magazine's 100 Most Influential People in the World, the World's 50 Greatest Leaders by Fortune Magazine, Politico Magazine's Top 50 Visionaries who

have transformed American politics, Foreign Policy Magazine's 100 World's Greatest Thinkers, and was shortlisted for Time Magazine's Person of the Year **for his work on the Flint Water Crisis.** Compl. ¶2 (bolded for emphasis). Plaintiff also received the 2017 MIT Disobedience Award and received the 2018 AAAS Scientific Freedom and Responsibility Award. *Id.*

The actual malice standard applies to plaintiff as a quasi-public official acting on behalf of government and as a limited-purpose public figure (at minimum) who thrust himself to the forefront of the debate over Flint's future. Plaintiff, an individual shortlisted for Time Magazine's Person of the Year, in no way lacked access to the media to correct the record or to present a competing narrative such that his only recourse for the unpleasantries incumbent to public life was to plead for this Court to financially bullwhip defendants into submission forever. This litigation serves only to chill any future critical debate by Flint residents and other vulnerable frontline communities and as such is improper.

Judge Easterbrook defined the more appropriate solution in *Salter*, "Scientific controversies must be settled by the methods of science rather than by the methods of litigation. . . More papers, more discussion, better data, and more satisfactory models — not larger awards of damages — mark the path toward superior understanding of the world around us." *Salter*, 22 F.3d at 736. The solution for undesirable speech has always been more speech and this is particularly true for public figures who have superior access to the press, the institutions of government, and the halls of academia compared to the layman. Plaintiff should exercise his free speech rights rather than seeking to abridge those same rights of others through frivolous, expensive litigation.

Finally, Virginia's free speech immunity statute bars any claim for statutory civil conspiracy, tortious interference with an existing contract or a business or contractual

expectancy, and claims for defamation that arise out of a speech act – written or verbal – to a third party on a matter of public concern absent a showing of actual malice. Va. Code § 8.01-223.2(A). Further, if these causes of action are dismissed pursuant to the statute, the Court has discretion to award reasonable attorney's fees to defendants. Va. Code § 8.01-223.2(B).

The Applicable Pleading Standards

As the 11th Circuit recently explained, in order '[t]o determine whether a plaintiff adequately pleads actual malice, the court must "disregard the portions of the complaint where [the plaintiff] alleges in a purely conclusory manner that the defendants had a particular state of mind in publishing the statements" *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 703-04 (11th Cir. 2016).

The 4th Circuit is in concurrence applying the *Iqbal* plausibility standard in accordance with Rule 8(a)(2) to the element of actual malice and finding that conclusory allegations that the [defendants'] statements "were known by [them] to be false at the time they were made" are precisely the type of "mere recitation of the legal standard" that was rejected by *Twombly* and *Iqbal*. *Mayfield v. NASCAR*, 674 F. 3d 369, 377-378 (4th Cir. 2012). Thus, in "defamation cases, Rule 12(b)(6) not only protects against the costs of meritless litigation, but provides assurance to those exercising their First Amendment rights that doing so will not needlessly become prohibitively expensive." *Palin v. New York Times Co.*, 264 F. Supp. 3d 527 (S.D.N.Y. 2017) (quoting *Biro v. Conde Nast*, 963 F. Supp. 2d 255, 279 (S.D.N.Y. 2013); *see also Michel v. NYP Holdings, Inc.*, 816 F.3d at 702 ("[A]pplication of the plausibility pleading standard makes particular sense when examining public figure defamation suits. In these cases, there is a powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless litigation.").

Plaintiff's Complaint fails to plausibly allege, apart from just writing the words "actual malice" and boldly conflating the term with common law malice, how or why defendants would know any of the alleged defamatory statements are false when by his own words they are substantially true. Compl. ¶¶ 52, 60, 65.

Plaintiff's "Threadbare" Assertions of Actual Malice are Insufficient

Plaintiff alleges that defendants made certain statements, written and verbal, over the course of a two year period relating to his conduct in Michigan, regarding his role as a public figure (short-listed for Time Magazine's Person of the Year) and quasi-public official (Snyder's task force, EPA grant work and as a professor of a public research university) and that the content of that speech related in some way to the Flint Water Crisis and related remediation efforts as well as the treatment of vulnerable populations – the speech acts that give rise to this lawsuit are undeniably matters of public concern. Compl. ¶¶ 2, 29-31, 38-42; Compl. Ex. 1, at 1-3. Plaintiff further alleges that defendants Mays and Lambrinidou have personal, financial and/or professional reasons to harbor ill will towards him (common law malice) and that Dr. Lambrinidou proximately caused defendant Schwartz's ill will towards plaintiff. Id. at ¶26. These allegations are insufficient for the Complaint to survive a motion to dismiss.

Actual malice (actual or constructive knowledge of falsity) is the standard for these claims, not common law malice (harboring ill will). The Supreme Court explained in no uncertain terms, "[T]he **actual malice standard is not satisfied merely through a showing of ill will or malice** in the ordinary sense of the term… nor that the defendant published the defamatory material in order to increase its profits." *Harte-Hanks Commc'ns Inc v. Counnaughton*, 491 U.S. 657, 665-67 (1989) (bolded for emphasis); *see also Underwager v. Salter*, 22 F.3d 730, 733 (7th Cir. 1994) ('"actual malice" [is] a term that reads to the untutored eye as a proxy for "ill will" but actually means knowledge that

the statement was false, or doubts about its truth coupled with reckless disregard of whether it was false.').

In this case, plaintiff takes a page out of the timber industry's playbook recreating in all legally salient ways a failed 2017 SLAPP lawsuit brought by the Resolute Forest logging company against environmental activists at Greenpeace and Stand in a case that alleged civil racketeering, defamation, conspiracy and tortious interference. *Resolute Forest Prods. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1010 (N.D. Cal. 2017). In *Resolute Forest*, the court even found that "the facts pleaded in Resolute's complaint could, if true, show ill will or bad faith." *Id.* at 1019. Nonetheless, the court in that case not only dismissed the Complaint under 12(b)(6), but also awarded attorney's fees holding that plaintiff failed to plausibly plead that defendants knew what they were saying was false or that they "entertained serious doubts as to the truth." *Id.* at 1018-19 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974)). [4]

Further, the Supreme Court has explained that the determination of whether a defendant had actual or constructive knowledge of falsity is "not measured by whether a reasonably prudent man would have published or would have investigated before publishing," but by whether "the defendant in fact entertained serious doubts as to the truth of [its] publication." *St. Amant v. Thompson*, 390 U. S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968).

Roll back that time machine to August 2016 when plaintiff labeled defendants and Flint residents "anti-science" Luddites living in the "dark age."[5] Defs. Ex. 1. If we take plaintiff at his word then the standard for knowledge of falsity is not what would a

4 The Court's decision was without prejudice granting plaintiff's leave to amend citing F.R.C.P. 15(a).
5 Before that, in May 2016, he said that distrust was held for "good reason" and acknowledged that he knew "some people assumed [his] motives changed" when he joined Snyder's task force and started taking EPA money.

"reasonably prudent man" would think, but instead what would "anti-science" tribal Luddites living in the "dark age" believe to be true – this Complaint does not even come close to meeting such a standard.

Finally, the elephant in the room, which is plaintiff's cynical ploy to artificially inflate defendants' legal fees and manufacture claims out of thin air by making a mockery of the Rule 8(a)(2) pleading standard as articulated in *Iqbal* and *Twombly*. Plaintiff relies on the 4th Circuit's ruling that "exact words" need not be plead for defamation cases in federal court because this Virginia standard conflicts with Rule 8(a)(2). *Wuchenich v. Shenandoah Mem'l Hosp.*, 2000 WL 665633, at *14 (4th Cir. 2000).[6] The Complaint uses the phrase "not limited to" in three separate paragraphs in an attempt to launder in ghost claims of defamation, Compl. ¶¶28, 48, 51, while in another paragraph plaintiff appears to allege every word uttered or penned by defendants since mid-2017 by Facebook, Twitter, television, radio, emails, correspondence and other public for a is defamatory. *Id.* at ¶30. Notably, the Complaint does not even reference any specific radio program or even radio channel – this is what they call a "fishing expedition." Fortunately, plaintiff was too cute by half because those ghost claims cannot survive the plausibility standard articulated in *Iqbal* and *Twombly* – "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S.Ct. at 1949. While plaintiff need not plead *haec verbae*, he cannot possibly satisfy the plausibility standard for actual malice – actual or constructive knowledge of falsity – regarding unknown statements with insufficient context clues for the Court to even apprehend their substance. The standard

[6] Plaintiff knew defendants were not going play this litigation against a stacked deck in his backyard of Christiansburg where he is a local celebrity, but will likely defend this bad faith maneuver by saying, "but they were the ones who removed the case." If it were one or two paragraphs maybe it's a coincidence, but this is done systematically throughout the Complaint.

requires plaintiff to demonstrate some plausible reason why defendants knew or had constructive knowledge that a statement was false and while that does not require pleading "exact words," it cannot be done without at least providing the "gist" of the statement. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) ("[m]inor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, or the libelous charge be justified.").

Plaintiff's "mere threadbare recitations" of the words "actual malice" are insufficient for any defamation case while his habit of labeling and disparaging others only compounds the lack of plausibility in his pleading. *Ashcroft*, 556 U.S. at 678. Further, attempts to launder frivolous claims past a motion to dismiss using vague pleading are but Band-Aids on bullet wounds utterly failing to cure the defects of the Complaint. This Court must dismiss plaintiff's claims and should award attorney's fees.

3. The Alleged Statements in the Complaint are Substantially True or Fail to Sufficiently Identify Plaintiff. Plaintiff's Claims Must be Dismissed Under Case Law and are also Barred Under Va. Code § 8.01-223.2. Attorney's Fees Should be Awarded.

The standard for establishing falsity for purposes of actual malice is not that the statement is merely inaccurate, but that any inaccuracy must be "material." *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 247 (2014). The Supreme Court in *Masson* explains that a "statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Masson*, 501 U.S. at 517 (1991) (quoting R. Sack, Libel, Slander and Related Problems 138 (1980)).

Plaintiff refers to himself as a "troublemaker" who refers to other people as "pathological lying scumbags," brags about using "ridicule" as a "weapon," is known for doing takedown exposes on potential rivals like Smith and McElmurry (one of which he wrote as "The People of the State of Michigan"), refers to certain Flint

residents and activists as "anti-science" Luddites of the "tribal" variety who live in the "dark age," and has identified himself as part of a group that has "lost our authority and the public trust **with good reason**." Compl. Ex. 1, at 1-3, Defs. Ex. 1.

Further, despite this behavior, plaintiff is a "Distinguished Professor" who has been named one of Time Magazine's 100 Most Influential People in the World, was shortlisted for Person of the Year, received the 2017 MIT Disobedience Award and received the 2018 AAAS Scientific Freedom and Responsibility Award, among other awards and distinctions. Compl. ¶2.

By comparison, the Flint Complaint letter expresses frustration about plaintiff talking down to residents, speaking in place of residents, failing to listen, picking fights with people, and there being a lack of accountability or checks on him "as far as they know." These positions, the "gist" of that letter, are substantially true. Compl. Ex. 1.

In the New York Times article, Dr. Lambrinidou said essentially that all men are destined for great accomplishment and great failure, Paul Schwartz said he felt Edwards was helpful at times and other times not, and Mays said he picked a fight with Scott Smith and talks down to people. Compl. ¶28; Defs. Ex. 1. None of these statements are even remotely disparaging let alone defamatory and they are also substantially true.

The letter by Paul Schwartz in May 2017 lays out the argument that Marc Edwards is powerful and privileged, but is a troublemaker who uses ridicule as a weapon and talks down to people, which caused Schwartz concern because plaintiff is dealing with vulnerable communities. Those positions, the "gist" of that letter, are substantially true. Compl. ¶33.

Similarly, the statement by Defendant Mays on Twitter that "[t]he person [Edwards] being talked about betrayed my family. He promised he would fight for us and when he was co-opted by the State, he abandoned us" is similarly substantially true

in its factual predicates – that Edwards joined Governor Snyder's task force and took EPA money. Assertions of betrayal and abandonment are subjective opinions that Edwards himself acknowledged over a year prior he knew that some people would harbor. Edwards explained, "[s]ome people assumed my motives changed just as easily" as his transition from activist to quasi-public official. Compl. ¶35; Defs. Ex. 1.

Schwartz's May 2017 Facebook post, stripped of hyperbole amounts to: (1) plaintiff seems to have a less than enthusiastic view towards the poor and minorities which, whether true or not, is supported by Edwards calling people in the majority-minority city of Flint things like anti-science tribal Luddites living in the dark age who suffered a shigella outbreak because of bathing habits; (2) Using phrases in regards to the poisoned people like turning "lead into gold" is remarkably tone-deaf; (3) Edwards has become the face (or one of them) of the Flint Water Crisis as evidenced by his listing of awards including the Top 50 and Top 100 lists of Time, Politico and Fortune despite the fact that the city of Flint was trying to fight back a year and a half before he arrived; and (4) To his credit things started changing after he arrived because "the media, governments, the medical establishment and academics would only really listen to our problems when someone with letters behind their name put them out there." Compl. ¶¶2, 32; Compl. Ex. 1, at 2-3; Defs. Ex. 1. Those views are substantially true or, at least, each "charge [can] be justified." *Masson*, 501 U.S. 496, 517 (1991).

Similarly, the late-2017 keynote statements attributed to Dr. Lambrinidou based on other people's "live tweet[s]" allegedly referred to an engineer who worked in both D.C. and Flint who engaged in "structural bullying." Compl. ¶36. Plaintiff talks about using "ridicule" as a "weapon" and refers to himself as a "troublemaker." Defs. Ex. 1. Dr. Lambrinidou's personal opinion about where that type of conduct falls on the hierarchy of good and evil (whether bullying is comparable to MeToo behavior) is

irrelevant. The factual assertion is that plaintiff engages in a routine practice of bullying, which is not only true, but also something that Edwards takes pride in. Defs. Ex. 1.

The June 27-28, 2018 social media statements attributed to defendants to the W.K. Kellogg Foundation, the Engagement Scholarship Consortium, and the Association of Public and Land Grant Universities allegedly consisted of the aforementioned letter signed by dozens of Flint residents that is substantially true by plaintiff's own word. Compl. ¶48. Plaintiff further alleges that defendants discouraged these organizations from providing Edwards' team with awards, which represents protected opinion about a public figure and quasi-public official on matters of public concern. *See Salter*, 22 F.3d at 736 ("A person who concludes that a public figure is a knave may shout that conclusion from the mountain tops.").

Melissa Mays' statement on February 27, 2018 does not reference plaintiff's name and her reference to "other PhDs" is an insufficiently limited descriptor as this could be a reference to any grouping of thousands of doctorate degree recipients. Compl. ¶37; *New York Times Co. v. Sullivan*, 376 U.S. 254, 289 (1964) (dismissing libel claim where the statement "did not on their face make even an oblique reference to respondent.").

The reference by Melissa Mays on June 30, 2018 to "legal genocide" referred to a photo illustration of a "water hydrant spewing discolored water." Plaintiff is not a "water hydrant spewing discolored water" and he is far from the only person or official involved in the Flint Water Crisis remediation effort such that this fails to represent "even an oblique reference" to plaintiff. *New York Times Co.*, 376 U.S. at 289.[7] Further, the statement about "genocide" is a giveaway for non-factual hyperbole unless plaintiff believes Ms. Mays was alleging that a junta had been unleashed with machetes on the

[7] Read this paragraph a few times because the wording is deceptive or at least unduly contorted.

population of Flint. Compl. ¶49; *See Horsley v. Rivera*, 292 F.3d 695, 701-02 (statement in an ethics complaint comparing a prosecutor's investigation to "the equivalent of Jeffrey Dahmer complaining his victims got blood on the carpet" not defamatory because it cannot be construed as a literal comparison to the convicted mass murderer.).

In the same paragraph, the plaintiff claims as defamation Melissa Mays saying that plaintiff and his team called her a liar, but in the sentence prior the Complaint itself confirms that they wrote a piece stating Mays posted false information – Mays' claim that Edwards and his team were calling her a liar is true. Compl. ¶49.

The final reference in that same paragraph to "experts" who claimed that Flint water was now "normal" is not even an "oblique reference" to plaintiff unless Edwards thinks that the word "expert" could only possibly refer to him. *Id.; New York Times Co.*, 376 U.S. at 289.

The statements about plaintiff listed in the Complaint are substantially true: Edwards is a "troublemaker" who uses "ridicule" as a "weapon." Plaintiff's apparent self-denial that these personality traits, which he boasts about and takes pride in, could be seen by others as character deficits manifests itself in this bizarre lawsuit with three defendants facing the horror and havoc of having a man at the peak of institutional power sue them for millions. Attorney's fees should be awarded pursuant to Va. Code § 8.01-223.2 as plaintiff's claims are simply barred under the statute's immunity.

4. This Court Should Dismiss the Cause of Action for Tortious Interference Pursuant to 12(b)(6) Because it is Identical to Plaintiff's Failed Defamation Claims and for Failure to Plausibly Plead Several Elements.

Plaintiff's claim of defamation based on common nuclei of operative fact (defendants' alleged speech acts) and alleging an identical injury (reputational harm) renders the cause of action for tortious interference redundant. As such, this cause of action must be dismissed upon the failure of his claims for libel and slander as well as

pursuant to Va. Code § 8.01-223.2. Plaintiff's claim of tortious interference should also be dismissed for failure to plausibly plead several elements.

The elements of tortious interference in Virginia are: (1) "the **existence of** a valid contractual relationship or business expectancy"; (2) "knowledge of the relationship or expectancy" by defendants; (3) "intentional interference **inducing or causing** a breach or termination of the relationship or expectancy"; and (4) "**resultant damage** to the party whose relationship or expectancy **has been disrupted**." *Chaves v. Johnson*, 230 Va. 112, 120 (1985) (bolded for emphasis).

Plaintiff in this case fails to plausibly allege the first, third and fourth elements of tortious interference: he does not allege the existence of any valid contractual relationship or business expectancy that was breached and his claim of future harm to his ability to procure grants is so speculative as to be non-existent and is (at minimum) not recoverable at law. *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 53 (1902) ("Damages such as are recoverable at law must not only be the proximate result of the act complained of, but must also be capable of definite ascertainment, or, to use the language of law writers and the decided cases, must be certain, definite, and not speculative in their character.").

Plaintiff nowhere alleges that he lost any employment or privileges at Virginia Tech nor does he allege the revocation of any grant funding or contractual interest. To the contrary, the Complaint lists an enviable array of awards and distinctions that plaintiff received from 2016 to 2018. Compl. ¶2. Plaintiff's claim of tortious interference is not plausible on its face and presumed damages do not apply to this cause of action – plead it or it didn't happen. *Gigante v. Target, Inc.*, 52 Va. Cir. 141 (2000) (Markow, J.) (sustaining demurrer on tortious interference claim for failure to plead an actual contract or expectancy that was breached, but finding defamation claim properly

supported on a *per se* theory). This frivolous claim deserves no further words to defend against.

5. This Court Should Dismiss Plaintiff's Common Law Civil Conspiracy Claim for Seeking to Declare the Right to Petition to be "Criminal or Unlawful" and for Failure to Plausibly Plead Both the Existence of a Civil Conspiracy or any Special Damages.

Plaintiff's claim of defamation based on common nuclei of operative fact (defendants' alleged speech acts) and alleging an identical injury (reputational harm) renders the cause of action for civil conspiracy redundant. This cause of action must be dismissed upon the failure of plaintiff's claims for libel and slander. Plaintiff's claim of civil conspiracy must also be dismissed for failure to plausibly plead several elements and for absurdly demanding that the right to petition be declared a criminal or unlawful act or that the seeking of redress of grievances be deemed a criminal or unlawful purpose.

Plaintiff Seeks to Abolish the Right to Petition, a Bad Idea for 800 Years

Plaintiff fails to plausibly allege the elements of common law civil conspiracy: (1) The combination of two or more persons, (2) to accomplish, by some **concerted action**, (3) some **criminal or unlawful purpose** or some lawful purpose by a **criminal or unlawful means**, and (4) **resultant damage** was caused by the acts committed in furtherance of the conspiracy. *Commercial Bus. Sys., Inc. v. BellSouth Servs., Inc.*, 453 S.E.2d 261, 267 (Va. 1995) (bolded for emphasis).

The Complaint alleges that defendants were the masterminds of a letter to which several dozen Flint residents put their name and that also over the course of a two-year period made certain statements criticizing plaintiff's behavior in the State of Michigan, related to his role as a de facto agent of the government of the State of Michigan and the federal government, to seek particular social policy outcomes (whether or not, as

plaintiff alleges they had private motivations of their own) and that in the process they reached out to the public as well as the scientific and engineering communities of which Virginia Tech (a public taxpayer funded research institute) is a part. Compl. ¶¶ 29-31, 38-42; Compl. Ex. 1. Plaintiff is asking this Court to repeal more than just the First Amendment and 242 years of US history.

This implicates not only defendants' free speech rights, and that of other vulnerable communities in the future, but also the sacrosanct "**right to Petition the Government for redress of grievances**." Professor Edwards is an employee of a taxpayer funded public research university, he is on Governor Synder's task force, and he receives grants from the EPA. Nonetheless, the Complaint outrageously asserts that an email to a taxpayer funded public research university (among dozens of other recipients) bearing the names of several dozen Flint residents seeking the redress of grievances shall now be considered either a **criminal or unlawful** means (asking about how to petition the government) or serving a **criminal or unlawful** purpose (asking about how to properly seek redress of grievances from a government institution).

One could wax poetically about the Founders or crib a quote or two from the Federalist Papers, but it goes without saying on an entirely intuitive level that this is a perilous path for this nation's civil liberties that plaintiff now asks this Court to take.

In fact, it is so perilous that it not only brings us to gaze upon the tyranny averted by our Founders, but the despotism faced by their English progenitors until a band of rebel barons forced the hand of King John on June 15, 1215 at Runnymede in an agreement known as the Magna Carta. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J. concurring). "The Magna Carta itself was King John's answer to a petition from the barons" and the great charter "confirmed the rights of barons to petition the King." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 426 (2011) (citing W.

McKechnie, Magna Carta: A Commentary on the Great Charter of King John 467 (rev. 2d ed. 1958). Plaintiff's case has been repugnant to our fabric of justice for 800 years.

Do not forget that the letter which plaintiff attributes to defendants asks a most solemn question: "Where [can] we file a formal complaint against the behavior, since January 2016, of Professor Marc Edwards of Virginia Tech"? Compl. Ex. 1, at 1. To whom should they petition for redress of their grievances when "as far as they know" he is not accountable to anybody? *Id.* at 3. Plaintiff seeks either (1) for this Court to declare even asking about the right to petition for redress of grievances with regards to the acts of a quasi-public official to be a criminal or unlawful act or (2) for this Court to endow plaintiff with a title of nobility superior to that of a king.

Plaintiff Fails to Plausibly Plead the Existence of a Conspiracy

The most absurd defect in the Complaint is the alleged conspiracy's start date: (1) "upon information and belief" defendants allegedly entered a conspiracy to defame Edwards in 2017; (2) defendants allegedly have jointly smeared him in every word they have ever uttered or written since mid-2017; and (3) defendants allegedly "engaged in a concerted smear campaign direct at Edwards, since at least August of 2016." Compl. ¶¶ 29-31. Whether or not "upon information and belief" clears the plausibility standard under Rule 8(a)(2) articulated in *Iqbal* and *Twombly*, plaintiff makes clear that his "information and belief" in paragraph 29 is neither credible nor plausible by placing two competing dates for the inception of the alleged "conspiracy" in the next two paragraphs. Yes, plaintiff provided three options, one of them on "information and belief," of when the alleged conspiracy began: 2017, mid-2017 and/or August 2016. Which one is it? Perhaps the conspiracy is a metaphor. Maybe it came to him in a dream. Regardless, that's not a plausibly plead claim.

Plaintiff Fails to Plausibly Plead Any Special Damages

Plaintiff makes a conclusory reference to "special damages" in a single paragraph of the Complaint and references potential harm to his ability to procure grant funding, but he does not allege any grant funding that he has lost nor any sanction that he has suffered. Compl. ¶53. Not only does plaintiff fail to plausibly claim any "resultant damage" from the alleged "conspiracy," but also, he recites all of the wonderful things that happened to him since it allegedly began. Compl. ¶2.

The Virginia Supreme Court in *Werth v. Fire Cos' Adjustment Bureau, Inc.*, 160 Va. 845 (1933) explained that the absence of special damages is a fatal flaw for a claim of common law civil conspiracy: "The essential elements, whether of a criminal or actionable conspiracy, are the same, though to sustain an action special damages must be proved." *See also Connelly v. Western Union Tel. Co.*, 100 Va. 51, 53 (1902) (speculative damages are not recoverable at law). Plaintiff simply does not plausibly allege special damages – plead it or it did not happen.

B. THIS COURT SHOULD DISMISS FOR LACK OF JURISDICTION PURSUANT TO RULE 12(B)(2) AND VIRGINIA'S LONG-ARM STATUTE VA. CODE § 8.01-328.1(A)(3).

The Applicable Pleading Standards

Plaintiff bears the burden of proving jurisdiction by a preponderance of the evidence when challenged under Rule 12(b)(2), *Mylan Lab., Inc. v. Akzo, N.V.*, 2 F.3d 56, 59-60 (4th Cir. 1993). Prior to any prospective evidentiary hearing, plaintiff must make a prima facie showing of personal jurisdiction. *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989). Plaintiff does not meet his burden.

Plaintiff alleges personal jurisdiction based on Va. Code § 8.01-328.1(A)(3) for "[c]ausing tortious injury by an act or omission in this Commonwealth." Virginia's

long-arm statute, including this subsection, has been determined "to extend personal jurisdiction to the extent permissible under the due process clause, [such that] the statutory inquiry merges with the constitutional inquiry." *Consulting Eng'rs Corp. v. Geometric, Ltd.*, 561 F.3d 273, 277 (4th Cir. 2009).

Constitutional Analysis of Personal Jurisdiction

Personal jurisdiction breaks into two categories: general and specific. *CFA Inst. v. Inst. of Chartered Fin. Analysts of India*, 551 F.3d 285, 292 n.15 (4th Cir. 2009). "General personal jurisdiction . . . requires 'continuous and systematic' contact with the forum state, such that a defendant may be sued in that state for any reason, regardless of where the relevant conduct occurred" whereas specific jurisdiction "requires only that the relevant conduct have such a connection with the forum state that it is fair for the defendant to defend itself in that state." *Id.*

Given that plaintiff has alleged personal jurisdiction on the basis of conduct allegedly occurring within the forum state, and fails to allege any systematic contacts within the Commonwealth by the non-resident defendants, the analysis for specific personal jurisdiction is applicable to the present case. Compl. ¶¶3-5.

In order to satisfy the due process requirement, the defendants must have "sufficient 'minimum contacts' with the forum state such that 'the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945). In order to show sufficient minimum contacts with the Commonwealth, plaintiff must first prove not only that defendants "purposefully directed [their] activities at residents of the forum" and that the causes of action "arise out of those activities," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, (1985), but also that defendants' acts or contacts with the forum are such that they would "reasonably

anticipate being haled into court" in the Commonwealth. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Even upon a finding of sufficient minimum contacts, courts look to whether a finding of personal jurisdiction can be deemed fair and reasonable upon reviewing factors including: (1) "The burden on the defendant[s]"; (2) "The forum State's interest in adjudicating the dispute;" (3) "The plaintiff's interest in obtaining convenient and effective relief"; (4) "The interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) The shared interest of other States (notably Michigan's) in "furthering fundamental substantial social policies." *Burger King*, 471 U.S. at 476-77 (quoting *World-Wide Volkswagen Corp.*, 444 U.S., at 292).

Consistent with the above analysis, the Fourth Circuit developed a three-part test for determining whether sufficient minimum contacts exist allowing district courts to consider: "(1) the extent to which the defendant[s] purposefully availed itself of the privilege of conducting activities in the State; (2) whether the plaintiff's claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable.'" *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002).

The touchstone of this analysis is the quality, as opposed to quantity, of the contacts with the forum state such that "even a single contact may be sufficient," whereas multiple contacts may prove insufficient, depending on whether or not the principles of "fair play and substantial justice" are offended. *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 397 (4th Cir. 2003) (quoting *Burger King*, 471 U.S. at 477-78).

In the event that the Court finds insufficient minimum contacts under an analysis of *International Shoe* and *Burger King*, plaintiffs in defamation cases often look to *Calder*

v. Jones, 465 U.S. 783 (1984) where the Supreme Court found personal jurisdiction in the State of California was proper for an article written, edited and published in Florida where the story focused on a California resident with a career in California and relied on California sources.

In the present case, even under the less stringent *Calder* "effects test" – (a) an intentional act (b) expressly aimed at the forum state with (c) knowledge that the brunt of the injury would be felt in the forum state – plaintiff still fails to satisfy his burden on personal jurisdiction for the simple reason that the alleged actions of defendants were not predicated upon plaintiff's work, acts or relationship with the Commonwealth nor did they seek to effectuate an outcome in Virginia. *Id.*

Rather the alleged actions of defendants focused on plaintiff's acts or omissions in the state of Michigan, in his capacity as a de facto agent of the state of Michigan and the federal government, and sought to effectuate an outcome in the State of Michigan for which the letter's drafters and publishers allegedly reached out to the public and to the "Scientific and Engineering Communities" writ large, of which Virginia Tech is only one institution out of many. Compl. Ex. 1, at 1-3. In this context, the present case is quite literally the opposite of a *Calder* fact pattern.

Plaintiff's case similarly fails on a 12(b)(2) under an *International Shoe/Burger King* analysis because the "quality" of defendants' alleged contacts rival the water coming through Flint residents' tap at the height of crisis. It strains credulity for plaintiff to argue that it comports with principles of fair play and substantial justice to force a mom from Flint, along with two community advocates based in D.C., out to Roanoke because they allegedly sought to effectuate change in Michigan. Compl. Ex. 1, at 3. In fact, the only alleged jurisdictionally salient acts are the transmission of one or two tweets or emails from outside the Commonwealth that went to dozens of individuals and

organizations within the scientific and engineering communities of which Virginia Tech is one part of. Compl. ¶¶ 33, 39-41.

A finding of personal jurisdiction in this matter would offend all notions of fair play and substantial justice by imposing an unconscionable burden on defendants when there no chance that defendants could have "reasonably anticipate[d] being haled into court" in the Commonwealth and further, it would disregard the overwhelming state interests of Michigan over the potential health, safety and welfare of her residents by having the case farmed out to Virginia.

CONCLUSION

For the foregoing reasons, defendants respectfully request this court DISMISS plaintiff's complaint and GRANT defendants' reasonable attorney's fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2018, I electronically filed the foregoing Memorandum of Law in Support of Motion to Dismiss by Defendants – Paul Schwartz, Yanna Lambrinidou and Melissa Mays – with the Clerk of the Court using the CM/ECF system, which will then transmit a notification of filing (NEF) to all registered users, and I further certify that, to the extent that any of the following persons are not registered users of said system, copies of the aforementioned document have been mailed to such persons, first-class, postage prepaid on this date.

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