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

BRETT KIMBERLIN,	*	
Plaintiff,	*	
v.	*	Civil Action GJH 13-3059
NATIONAL BLOGGERS CLUB, et al.,	*	
Defendants	*	

* * * * * * * * * *

MOTION OF DEFENDANTS MICHELLE MALKIN AND TWITCHY TO DISMISS SECOND AMENDED COMPLAINT, AND FOR ATTORNEY FEES AND COSTS

Defendants Michelle Malkin and Twitchy, through counsel and pursuant to Fed. R. Civ. P. 12(b)(2), (5), and (6); Fed. R. Civ. P. 8; Fed. R. Civ. P. 9(b); Fed. R. Civ. P. 41(b); Md. Code Ann., Courts & Judicial Proceedings Art. § 5-807(d)(1), and this Court's inherent authority, file this motion asking the Court to dismiss with prejudice the Second Amended Complaint and award them their attorney fees and costs.

Defendant Twitchy further requests a ruling on its request for sanctions against Plaintiff Kimberlin as a result of his forgery of the "summons" and First Amended Complaint he mailed to it, which request has been fully briefed and supported with evidence, and which prompted the Court's show-cause order (R.88 Letter Order, p. 3) but which has not yet been addressed.

In support, Mrs. Malkin and Twitchy rely on and incorporate the accompanying memorandum of law.

WHEREFORE, Defendants Michelle Malkin and Twitchy ask this Court to enter an order dismissing the Second Amended Complaint with prejudice, and awarding them their costs, including attorney fees, and such additional relief as the Court deems just.

Respectfully submitted

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Dated: July 9, 2014

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Motion was electronically filed in this case on July 9, 2014 and thus served on counsel of record via the Court's ECF system. Additionally, I am serving the document via email this date on plaintiff Kimberlin and on defendants Hoge, McCain, and Walker by the express permission of each.

By: /s/ Michael F. Smith

Dated: July 9, 2014

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* * * * * * * * * *

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT, AND FOR ATTORNEY FEES AND COSTS, OF DEFENDANTS MICHELLE MALKIN AND TWITCHY

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FACTS

Defendants Michelle Malkin ("Mrs. Malkin") and Twitchy dispute the veracity of countless assertions in the 82-page Second Amended Complaint ("SAC"), though solely for purposes of Rule 12(b)(6), this motion will assume their truth. However, to the extent dismissal also is warranted for Plaintiff Brett Kimberlin's attempted fraud on the court regarding his forgery of a Summons for defendant Twitchy, and sending that forged summons and a doctored copy of his First Amended Complaint ("FAC") through the U.S. Mail to Twitchy, that issue requires review of documents outside the pleadings. Those documents previously have been provided to this Court, R.41-3 Declaration of Julie Israelson, and pursuant to the Court's 6/24/14 Letter Order, R.133, pg. 2, this motion incorporates them as referenced below.

I. Background facts as pleaded in the Second Amended Complaint

A. "Team Themis" and the roots of the "campaign of personal and professional destruction" against Mr. Kimberlin.

In his 82-page SAC – filed after Mrs. Malkin, Twitchy, and other defendants moved to dismiss his 50-page FAC – Mr. Kimberlin spins an implausible, impenetrable tale of RICO conspiracy that defies easy recapitulation. He claims some of the most prominent names of the conservative blogosphere conspired to defame him in 2012-13 by falsely accusing him of "swatting" three defendants – that is, calling 911 from a number made to appear to be the victim's home phone to report a crime in progress, thereby exposing the victim to significant risk of a violent, armed response by a police SWAT unit. *See United States v. Neff*, 2013 U.S. Dist. LEXIS 629, *8 (N.D. Texas Jan. 3, 2013). Swatting could accurately be deemed "attempted murder by cop," since it aims to use the police to injure or kill another, and Mr. Kimberlin (in his pleading) acknowledges it as "a serious crime." SAC, ¶ 243.

According to the SAC, the conspiracy to defame Mr. Kimberlin by linking him to swatting has its roots in "Team Themis," a "secret group" of three military intelligence contractors and several individuals and entities – none of whom are named as defendants – set up to "destroy progressive organizations and their staff on behalf of corporate clients and federal agencies, including the United States Chamber of Commerce and FBI." *Id.*, ¶ 33. When an employee of HB Gary, one of the three contractors, in 2010 bragged to the *Financial Times* that he had penetrated the hackers' group "Anonymous" was "was going to take down their [*sic*] leaders," Anonymous responded by publishing more than 50,000 HB Gary emails exposing Team Themis's existence. *Id.*, ¶ 34. "Several of the documents and emails showed a multi-million dollar operation to destroy [Mr. Kimberlin], his employer and other organizations and activists" at the instruction of the U.S. Chamber of Commerce...." *Id.* At an unspecified later time, Team Themis's activities supposedly were exposed and became the subject of congressional investigation and media coverage, *Id.*, ¶ 35.

Mr. Kimberlin further alleges that NSA documents leaked by Edward Snowden in early 2014 showed that the tactics of Team Themis were not limited to the "three rogue intelligence contractors," but rather were part of "an NSA program to disrupt and destroy activists worldwide," via a "'dirty tricks' group known as JTRIG -- the Joint Threat Research Intelligence Group [that] would seek to infiltrate different groups online and destroy people's reputations...." SAC, ¶ 36. In 2010, Andrew Breitbart, the now-deceased owner of defendant Breitbart.com, "decided to take up a parallel campaign started by Team Themis [*sic*] to destroy Plaintiff and his livelihood." *Id.*, ¶ 37. Using "code phrases" sent via Twitter, Mr. Breitbart conspired with his "followers," including defendants Frey, Stranahan, and Nagy, "to target [Mr. Kimberlin] for a campaign of personal and professional destruction." *Id.*

The SAC alleges a variety of actions through which various individuals and entities, though not including Mrs. Malkin or Twitchy, supposedly acted in concert from October 2010 through January 2012 to "smear" Mr. Kimberlin and destroy his reputation. SAC, ¶¶ 37-58.

Mr. Kimberlin alleges that in the spring of 2012, defendants Walker, Frey, Nagy, Akbar, and Stranahan, "in concert, planned ways to push their false narrative into the media in order to (1) demonize [him], (2) create a witch hunt, (3) cause maximum harm to [him], (4) portray Defendant Walker as a victim, and (5) raise significant funds from people who believed the false narrative." SAC, ¶ 60. Those defendants "and others" created a 501(c)(3) called the National Bloggers Club ("NBC") "to bring together far right bloggers to collectively coordinate their messaging about specific issues, and target specific individuals." *Id.*, ¶ 61. The SAC describes defendant NBC as a "criminal enterprise engaged in illegal activity for more than two years that has "defrauded citizens out of hundreds of thousands of dollars by creating false narratives, mostly using Plaintiff's name," and by having "scammed hundreds of donors [and] conned major names in the conservative community...." *Id.*, ¶¶ 62-63. Mr. Kimberlin alleges that NBC "engaged in cyber bullying of [him] on a grand scale." *Id.*, ¶ 65.

B. Allegations against Mrs. Malkin and Twitchy

Mr. Kimberlin's FAC contained only a handful of references to Mrs. Malkin or Twitchy; his SAC adds but a few. Mrs. Malkin is a "blogger and FOX News commentator" based in Colorado. SAC, ¶ 21. According to Mr. Kimberlin, Twitchy is "a blogging platform owned or operated by [Mrs.] Malkin through Twitchy LLC to promote stories created by her and other members of Twitchy...." *Id.*, ¶ 25. The SAC alleges that Mrs. Malkin as a member of the NBC board used her reputation "to give the [NBC] credibility," and that she "joined the RICO Enterprise and conspiracy when she agreed to and did publish the false narratives of the National Bloggers Club regarding Plaintiff." *Id.*, ¶ 64.

The SAC alleges that Mrs. Malkin "used her blog and Twitter compiler, Twitchy, to repeatedly state that Plaintiff committed the swattings," but fails to set forth the content of *any* statement by Mrs. Malkin, much less a statement alleged that Kimberlin committed the swattings. SAC, ¶ 108-09. Indeed, while the SAC cites two articles from www.michellemalkin.com – posts from May 2012 ("Breakthrough: Fox News Covers Brett Kimberlin/Patterico Swattings") and April 2013 ("More Celebrities Swatted, Meanwhile Anti-Brett Kimberlin Bloggers Still Under Fire") *Id.*, ¶¶ 108-09 – the only specifics related are from an unidentified commenter to the latter who opined that "Brett Kimberlin needs to wake up with a horse's head in his bed." *Id.*, ¶ 109. Indeed, the only specific statement by Mrs. Malkin set forth in the SAC is an April 8, 2013 blog post – again, on michellemalkin.com, not Twitchy – relating that conservative bloggers and activists have "rallied behind the victims of left-wing convicted domestic terrorist Brett Kimberlin and his cabal" and that, a year later, "the survivors of those SWATting attacks are still fighting for their security and free speech rights." *Id.*, ¶ 132.

Twitchy allegedly "joined the RICO enterprise" on June 25, 2012 by publishing an article about the swatting of Aaron Walker, "which compiled dozens of tweets that together impute that [Kimberlin] committed the swatting." SAC, ¶ 96. The SAC provides a URL link to Twitchy, but does not set forth the allegedly offending content. *Id.* It avers that Twitchy posts are viewable in Maryland. *Id.*

II. Mr. Kimberlin's mailing of forged court documents to Twitchy, and this Court's unresolved show-cause order.

As part of his service of his FAC, Mr. Kimberlin forged two court documents, a summons and the FAC caption, and mailed them to Twitchy in an attempt to defraud it into believing it had been named as a defendant and summoned by this Court. Twitchy provided this Court supporting materials establishing the falsifications, along with legal argument as to the ramifications that should ensue. R.41-1 Memorandum, pp. 2-5, 40-44 & R.41-3, Declaration of Julie Israelson & Tabs 1-5 thereto; R.101

Reply, pp. 1-2, and R.124 Supplemental Memorandum, which defendants here incorporate by reference. Mr. Kimberlin at first tried to completely ignore the allegations, R.67 Response to motion to dismiss, but Judge Grimm noted that the allegations were of "serious misconduct" and ordered plaintiff to show cause why he should not be sanctioned. R.88 Letter Order, pg. 3.

Mr. Kimberlin in response admitted to falsifying both documents, and sending them through the U.S. Mail, though he cited his pro-se status, blamed the Clerk of the Court, and claimed inadvertent mistake. R.102 Verified Response. Twitchy later sought and was given leave to submit materials from a Maryland case in which Mr. Kimberlin similarly was caught in an "inadvertent" falsification of official documents, and offered the same excuses in response. R.124.

Although this Court's 6/24/14 order (R.133) denied without prejudice the motions to dismiss filed by various defendants, including Mrs. Malkin and Twitchy, Judge Grimm's show-cause order regarding the forged Twitchy summons remains to be addressed.

III. Claims against Mrs. Malkin and/or Twitchy that Mr. Kimberlin has dropped or added.

The SAC is 32 pages longer than the FAC, but drops various counts previously asserted against Mrs. Malkin and/or Twitchy. Its claim for violation of 42 U.S.C. § 1985 no longer is brought against "all defendants" but rather 13 specific ones; Twitchy is not one. SAC, pg. 68. Similarly, Mr. Kimberlin excludes both Mrs. Malkin and Twitchy from his defamation claim. SAC, pg. 69. He also appears to have dropped his Fraud/Negligent Misrepresentation claim, Count IV of the FAC, against all defendants.

The SAC adds two counts involving Mrs. Malkin and Twitchy: Interference with Prospective Economic Advantage (count VII - first)[1] and Conspiracy to Commit State Law Torts (count IX).

[1] The SAC contains two "count VIIs"; the second is a claim for battery against Mr. Walker only.

ARGUMENT

I. The Second Amended Complaint violates Rule 8 and should be dismissed.

Rule 8(a)(2) requires a complaint to contain a short and plain statement of the claim showing that the pleader is entitled to relief, while Rule 8(d) requires each allegation to be "simple, concise and direct." The rule's purpose is to avoid complaints that are "so verbose that the Court cannot identify with clarity the claims of the pleader and adjudicate them understandingly on the merits." *Harrell v. Directors of Bureau of Narcotics and Dangerous Drugs*, 70 F.R.D. 444, 446 (E.D. Tenn. 1975) (internal punctuation omitted). While pro-se complaints are to be liberally construed, *Gordan v. Leeke*, 574 F.2d 1147 (4th Cir. 1998), a complaint that fails to comply with Rule 8(a) properly is dismissed, even if filed pro se. *Spencer v. Hedges*, 1998 U.S. App. LEXIS 21159, **2-3 (4th Cir. Feb. 1, 1988); *see also Jones v. National Communications and Surveillance Networks*, 266 Fed. Appx. 31, 32-33 (2d Cir. 2008) (summary order affirming dismissal of 58-page pro-se complaint with 87 pages of attachments that asserted 20 causes of action against more than 40 defendants); *Plymale v. Freeman*, 1991 U.S. App. LEXIS 6996 (6th Cir. April 12, 1991) (affirming dismissal with prejudice of a "rambling" 119-page complaint containing multiple defects that could not be cured by repleading). Whether filed by a lawyer or a layperson, "[u]nnecessary prolixity in a pleading places an unjustified burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage." *Jones*, 266 Fed. Appx. at 32 (citations omitted).

Such shortcomings also are fatal to a RICO complaint, despite the detailed pleading requirements for such a claim. "Courts have repeatedly upheld the dismissal of RICO complaints and/or have denied leave to amend for failure to comply with Fed. R. Civ. P. 8's pleading requirements." *Aaron v. Durani*, 2014 U.S. Dist. LEXIS 32693, **9-11 & n.3 (S.D. Ohio Mar. 13, 2014), *citing, inter alia, Plymale,*

supra; *Confederate Mem'l Ass'n v. Hines*, 995 F.2d 295, 298 (D.C. Cir. 1993) (affirming dismissal with prejudice of RICO and other federal claims in "verbose" pleading of at least 90 paragraphs); *Resource N.E. of Long Island, Inc. v. Town of Babylon*, 28 F. Supp. 2d 786, 795 (E.D.N.Y. 1998) (dismissing an "excessively long-winded," 97-page RICO complaint for violation of Rule 8 and ordering plaintiff to amend; "[f]orcing defendants to answer such a pleading would fly in the face of the very purposes for which Rule 8 exists").

In *Stanard v. Nygren*, 658 F.3d 793, 800 (7th Cir. 2011), plaintiffs filed a 52-page complaint against 24 defendants, asserting 28 counts including claims under RICO, 42 U.S.C. §§ 1983 and 1985, and various state-law causes of action. Their complaint failed to put defendants on notice of the claims asserted, even after plaintiffs were given opportunities to correct it, and the combined effect of those and other missteps made dismissal with prejudice "eminently reasonable":

> The complaint's lack of clarity would have severely disadvantaged the defendants when it came time to responsively plead to, much less defend against, the claims. To form a defense, a defendant must know what he is defending against; that is, he must know the legal wrongs he is alleged to have committed and the factual allegations that form the core of the claims asserted against him. Deciphering even that much from the second amended complaint is next to impossible. [*Stanard*, 658 F.3d at 798-800].

The same is true here. Mr. Kimberlin's rambling SAC is of similar gargantuan scope as those discussed above, and if this Court does not dismiss it, Mrs. Malkin and Twitchy will be obliged to answer it. Given its meandering, fantastical, and in many places impenetrable contents, that task will be "next to impossible," as in *Stanard*. Dismissal is warranted.

II. Mr. Kimberlin fails to state a claim against Mrs. Malkin or Twitchy as to any count, and dismissal is appropriate under Rule 12(b)(6).

A. Standard of review

To survive a motion to dismiss under Rule 12(b)(6), a complaint's allegations must plausibly, not merely conceivably, suggest a viable claim. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570; 127 S. Ct. 1955, 1974; 167 L. Ed. 2d 929 (2007). Although the Court must accept as true a complaint's factual allegations, such deference is not accorded its legal conclusions. *Walters v McMahen*, 684 F.3d 435, 439 (4th Cir. 2012), *citing Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The mere recital of the elements of a cause of action, followed by conclusory statements, is not enough to survive a Rule 12(b)(6) motion. *Id.*

While plaintiff need not show his right to relief is "probable," the complaint must advance his claim "across the line from conceivable to plausible." *Walters*, 684 F.3d at 439, *citing Twombly*, 550 U.S. at 570. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal* 556 U.S. at 678, *citing Twombly*, 550 U.S. at 557 (internal quotation marks omitted).

While Mr. Kimberlin in response can be expected to cite his boilerplate Rule 12(b)(6) review standard, *see* R.29, p. 1; R.30, p. 1; and R.31, p. 1, the cases on which he relies predate *Twombly* and *Iqbal* by many years.

B. The RICO claim (Count I) suffers from several fatal defects.

"RICO is concerned with eradicating organized, long-term, habitual criminal activity, not all instances of wrongdoing." *Bhari Info. Tech. Sys. Private, Ltd. v. Sriram*, 2013 U.S. Dist. LEXIS 169622, **6-7 (D. Md. Dec. 2, 2013) (Grimm, J.) (citations and internal quotation marks omitted). Courts "must exercise caution to ensure that RICO's extraordinary remedy does not threaten the ordinary

run of commercial transactions, while at the same time reading the terms of the statute liberally to effectuate its remedial purposes." *Id.* at**6-7 (internal punctuation omitted), *quoting U.S. Airline Pilots Ass'n v. Awappa, LLC,* 615 F.3d 312, 317 (4th Cir. 2010). The Fourth Circuit "will not lightly permit ordinary business contract or fraud disputes to be transformed into federal RICO claims." *Id*. at *7, *citing Flip Mortg. Corp. v. McElhone,* 841 F.2d 531, 538 (4th Cir. 1988).

As *Flip Mortgage* indicates, the Fourth Circuit is concerned by RICO's application "to a claim that does not rise above the routine, and does not resemble the sort of extended, widespread, or particularly dangerous pattern of racketeering which Congress intended to combat with federal penalties." *Bhari Info. Tech. Sys.*, 2013 U.S. Dist. LEXIS 169622, *7, *citing Flip Mortg. Corp.*, 841 F.2d at 538 and *Int'l Data Bank v. Zepkin*, 812 F.2d 149 (4th Cir. 1987) (internal punctuation omitted). Mr. Kimberlin's fantastic allegations are a mere "formulaic recitation of the elements" of a RICO claim and are not entitled to an assumption of truth. *Iqbal* at 680-681. But even if they were, the "plot" he alleges amounts to, at most, a routine claim that several people decided to besmirch his reputation – it comes nowhere near the sort of "extended, widespread, or particularly dangerous pattern of racketeering" at which Congress aimed in enacting RICO. The SAC's RICO count is serially deficient under Rule 12(b)(6) and should be dismissed.

1. The SAC fails to allege injury to "business or property," and thus Mr. Kimberlin lacks standing to bring a RICO claim.

To establish the requisite standing under 18 U.S.C. § 1964(c), a RICO plaintiff must allege 1) a violation of § 1962, 2) injury to business or property, and 3) causation of the injury by the violation. *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 259, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). The SAC fails to properly plead any of those.

The statutory requirement of injury to "business or property" is a limit Congress placed on RICO's sweep, imported from similar language in the Clayton Act to prevent recovery under RICO for merely any type of injury. *Grogan v. Platt*, 835 F.2d 844, 846-47 (11th Cir. 1988), *citing Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979). Courts have uniformly held that allegations of personal injury fall outside its reach. *Bast v. Cohen, Dunn and Sinclar, P.C.*, 59 F.3d 492, 495 (4th Cir. 1995); *see also Jackson v. Sedgwick Claims Mgt. Servs., Inc.*, 731 F.3d 556 (6th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 2133 (2014); *Evans v. City of Chicago*, 434 F.3d 916, 931 (7th Cir. 2006), *overruled on other grounds*, *Hill v. Tangherlini*, 724 F.3d 965, 967 n.1 (7th Cir. 2013) ("personal injuries and the pecuniary losses stemming therefrom do not establish standing under the RICO statute"). Mr. Kimberlin's RICO claim is based on his general assertion that defendants damaged his reputation by "smearing" him with false charges of swatting, exposing him and his family to threats, depriving him of the ability to raise funds for his nonprofit employer, and making him spend money defending himself against this "false narrative." SAC, ¶¶ 186, 204. Even were those allegations true, they fail to allege harm to "business or property" as required under 1964(c).

Defamation and other damage to reputation constitute "personal injury," and thus are not actionable under RICO. *Tal v. Hogan*, 453 F.3d 1244, 1254 (10th Cir. 2006), *citing Reiter*, 442 U.S. at 339; *see also Geraci v. Women's Alliance, Inc.*, 436 F. Supp. 2d 1022 (D. N.D. 2006); *City of Chicago Heights v. Lobue*, 914 F. Supp. 279, 285 (N.D. Ill. 1996); *Rodriguez v. Quinones*, 813 F. Supp. 924, 928-929 (D. P.R. 1993) (collecting cases). As the Fourth Circuit has made clear, this includes allegations of mental anguish. *Bast*, 59 F.3d at 495 (allegations of "extreme mental anguish" suffered from alleged wiretapping are not injury to "business or property" under RICO.

To the same end, Mr. Kimberlin's allegation of intimidation through "threats of injury and death," SAC, ¶ 183, also is not injury to "business or property." *Bennett v. Centerpoint Bank*, 761 F. Supp. 908, 916 (D.N.H. 1991) (plaintiff's fears for his safety caused by phone threats of physical injury in violation of the Hobbs Act were not injury to "business or property" sufficient to provide RICO standing) (citing cases). To the extent Mr. Kimberlin alleges harm to his employer and/or his ability to raise funds for it, SAC, ¶¶ 204, 123-124, he lacks standing because he is not the real party in interest for such a claim: a RICO suit for injuries to a corporation is a corporate asset and must be vindicated by the corporation itself; not even shareholders may bring suit derivatively. *Bennett*, 761 F. Supp. at 913-914, *citing Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 29 (1st Cir. 1987); *see also*, *Bass v Campagnone*, 838 F.2d 10, 12-13 (1st Cir. 1988) (union local, and not individual plaintiff members, were the party to suffer any of the alleged injuries and thus is the real party in interest).

Finally, to the extent Mr. Kimberlin argues that damage to his employment or livelihood constitute sufficient injury, he is twice mistaken. First, the SAC does not appear to allege that he actually lost employment due to any action of any defendant, thus he suffered no concrete injury. More important, loss of employment and the compensation from it (had any occurred) would be simply an indirect or secondary effect of any tortious conduct by defendants, and thus does not constitute a cognizable claim for "injury to business or property" under § 1964(c). *Evans*, 434 F.3d 916 (citation omitted); *see also Grogan*, 835 F.2d at 848 (plaintiffs may not recover under RICO for pecuniary losses most properly understood as part of a personal injury claim); *Burdick v. American Express Co.*, 865 F.2d 527, 529 (2d Cir. 1989) (loss of employment does not constitute injury to business or property under RICO; purpose of civil RICO liability does not extend to deterring any illegal act such as retaliatory firings for which common-law remedies exist); *but see Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005).

Because Mr. Kimberlin does not allege "damage to business or property," his RICO claim fails and should be dismissed.

2. The SAC fails to plead properly that Mrs. Malkin or Twitchy are connected to the operation or management of a RICO enterprise.

RICO "does not criminalize mere association with an enterprise." *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012) (citation omitted). To establish a violation of § 1962(d), plaintiff must prove that an enterprise affecting interstate commerce existed, "that each defendant knowingly and intentionally agreed with another person to conduct or participate in the affairs of the enterprise; and...that each defendant knowingly and willfully agreed that he or some other member of the conspiracy would commit at least two racketeering acts." *Id*., *citing United States v. Wilson*, 605 F.3d 985, 1018-19 (D.C. Cir. 2010) and *United States v. Posada-Rios*, 158 F.3d 832 (5th Cir. 1998) ("To prove a RICO conspiracy[,] the government must establish (1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense"). The SAC falls far short of that standard, especially as it pertains to Mrs. Malkin and Twitchy. There are simply *no* allegations of sufficient specificity, and plausibility, to meet that standard with regard to any RICO enterprise.

Iqbal is especially instructive, given the similarities between the pleading-allegation deficiencies in that case and this one. As *Iqbal* notes, proper analysis of a Rule 12(b)(6) motion begins "by identifying the allegations in the complaint that are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 680. Mr. Iqbal's allegations that defendants "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest," and that the

Attorney General and FBI Director were, respectively, "the principal architect" of the policy and "instrumental" in adopting and executing it, were deemed unentitled to that assumption:

> These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim....As such, the allegations are conclusory and not entitled to be assumed true. [*Id*. at 680-681 (internal citations omitted)].

The court made clear it was not rejecting them because they were unrealistic or nonsensical. "It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." I*d.* at 681 (internal citation omitted).

Iqbal is fatal to Mr. Kimberlin's RICO claim. Mere detail in appending (farfetched) facts to the elements of an offense is not sufficient to withstand dismissal, where those facts are simply woven into a "formulaic recitation of the elements" alleging that various defendants committed this wrong or that. This fatal shortcoming pervades every single aspect of Mr. Kimberlin's complaint, against all defendants, but it is especially noteworthy as to Mrs. Malkin and Twitchy. Mr. Kimberlin does not allege *any* such agreement on her part to be connected to any RICO enterprise, nor can he, without violating Rule 11. He does not even rely on Mrs. Malkin's supposed membership on NBC's board of directors; instead he claims she joined the RICO enterprise through what she wrote about him. SAC, ¶ 64. He says nothing about Twitchy. Elsewhere he tosses around generalized charges that "Defendants conducted or participated in and agreed to conspire to conduct the affairs of the RICO enterprise...." by engaging in violations of six bullet-pointed statutes. SAC, ¶ 166.[2] Such boilerplate is plainly insufficient under *Iqbal*, and the fact that Mr. Kimberlin's allegations are lengthy and convoluted does not immunize them from dismissal.

[2] His previous complaint alleged eight statutory violations. *Compare,* FAC ¶ 119.

3. Mr. Kimberlin does not allege causation as to any predicate act involving Mrs. Malkin or Twitchy.

For purposes of RICO, the compensable injury resulting from a violation of 18 U.S.C. § 1962(c) necessarily is the harm caused by the predicate acts, "which must be related sufficiently to each other that they constitute a pattern." *Walters*, 684 F.3d at 444, *citing Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 453 (2006). The RICO predicate acts "must not only be a 'but for' cause of a plaintiff's injury, but the proximate cause of that injury, as well." *Id.*, *citing Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010).

The SAC still falls far short in this regard, offering only a single catch-all paragraph attempting to allege causation of injury by all 24 named defendants. SAC, ¶ 204. It fails to tie either but-for or proximate causation to any specific predicate act, but rather simply alleges five types of vague harms. Some of them, even had they occurred, were not suffered by Mr. Kimberlin, i.e. "having his employer defamed." Others, by their plain terms, are tied to some act other than the predicate offenses, i.e. having to spend time and money "defending against the false narratives." *Id*. There is no allegation of "direct relations between the injury asserted and the injurious conduct alleged," instead there is simply a presumed link that is too remote, contingent and indirect to establish a claim. *Hemi Group, LLC*, 559 U.S. at 9, *citing Holmes*, 503 U.S. at 271. The SAC fails to properly plead causation, and should be dismissed.

4. Mr. Kimberlin also fails to properly plead predicate acts.

Leaving aside the irony that Mr. Kimberlin appears to have himself committed mail fraud regarding the Twitchy summons, his attempt to meet RICO's predicate-acts requirement by pleading mail fraud and other violations falls hopelessly short as to Mrs. Malkin and Twitchy.

When mail and wire fraud are asserted as the predicate acts for a civil RICO claim, the heightened pleading standards of Rule 9(b) apply. *Proctor v. Metro. Money Store Corp.*, 645 F. Supp. 2d 464, 473 (D. Md. 2009). While Rule 9(b) allows intent, knowledge and other conditions of a person's mind to be alleged generally, plaintiff "must allege '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." *Bhari Info. Tech. Sys. Private, Ltd.*, 2013 U.S. Dist. LEXIS 169622, **5-6 (citations omitted).

Mr. Kimberlin's allegations regarding the predicate offenses of mail fraud and wire fraud, SAC, ¶¶ 170-179, are deficient when measured against Rule 9(b). The counts make no mention of any activity by Mrs. Malkin or Twitchy, must less conduct that alleges the "time, place and false contents" of anything either wrote or disseminated, or that any such writings were then used to establish mail or wire fraud. SAC, ¶¶ 170-179. As to other defendants, Mr. Kimberlin's allegations amount to at most the routine type of dispute to which the Fourth Circuit has cautioned RICO should not be extended. *Flip Mortg. Corp.*, 841 F.2d at 538. But as to Mrs. Malkin and Twitchy specifically, they certainly fall short of the standard needed to survive dismissal. *See, Walters*, 684 F.3d at 445 (dismissal granted where plaintiff failed to allege a plausible violation of either RICO predicate act).

Mr. Kimberlin's purported use of obstruction of justice as a predicate offense, SAC, ¶¶ 180-185, also fails to state a claim as to Mrs. Malkin or Twitchy. His claim is based on the allegation that defendants falsely accused [him] of swatting, and provided false evidence to the FBI and state and local law-enforcement officials asserting his involvement in swatting. *Id.*, ¶ 180. He echoes that charge regarding information supposedly sent to unspecified members of Congress, the Attorney General, and various Maryland law-enforcement officials and judges. *Id.*, ¶¶ 181-184. But he fails to allege that Mrs. Malkin or Twitchy provided any such information to any of those individuals: rather, he is upset about

two blog posts the former wrote. And each of his other asserted predicate acts (retaliation, extortion, money laundering) also fail to plead that conduct by Mrs. Malkin or Twitchy. SAC, ¶¶ 186-196. Moreover, all are deficient under *Iqbal*. Mr. Kimberlin's failure to plead a predicate act by Mrs. Malkin or Twitchy warrants dismissal of his RICO count against both.

5. The SAC fails to plead a pattern of racketeering activity.

Mr. Kimberlin also fails to allege a "pattern" of racketeering activity, as required to state a RICO claim. RICO prohibits being "associated with any enterprise...[and] conduct[ing] or participat[ing]...in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Merely alleging two or more predicate acts is insufficient to meeting the "pattern of racketeering" requirement; "rather, a plaintiff must allege a continuing pattern and a relationship among the defendant's activities showing they had the same or similar purposes." *Anderson v. Found. for Advancement, Educ. and Emp't of Am. Indians*, 155 F. 3d 500, 505 (4th Cir. 1998), *citing H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989), *abrogated on other grounds, Twombly*, 550 U.S. at 562-563; *see also GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 549 (4th Cir. 2001).

Continuity refers "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." *GE Inv. Private Placement Partners, II*, 247 F.3d at 549, *quoting H.J., Inc.*, 492 U.S. at 241. Closed-ended continuity may be established by a "series of related predicates extending over a substantial period of time." *Id., citing H.J., Inc.*, 492 U.S. at 242. However, "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." *Id.* "Open-ended continuity may be established where, for example, the 'related predicates themselves involve a distinct threat of long-term racketeering

activity,' or where the predicate acts 'are part of an ongoing entity's regular way of doing business...or of conducting or participating in an ongoing and legitimate RICO enterprise.'" *Id., quoting H.J., Inc.,* 492 U.S. at 242-243.

The SAC fails to allege facts establishing either type of continuity.

a. Closed-ended continuity

Though Mr. Kimberlin alleges generically that the predicate acts began in August 2010 and continue to the present, SAC, ¶ 197, a period of nearly four years, the allegations regarding Mrs. Malkin are limited to two website posts over an 11-month period, one in May 2012 and the other in April 2013. SAC ¶¶ 108-109. With regard to the broader alleged RICO enterprise, his allegations span a far shorter period of time. By the complaint's own account, the National Bloggers Club was formed in February 2012 and its supposedly orchestrated "smear" of Mr. Kimberlin took place three months later. SAC, ¶¶ 61-66. The alleged solicitation of funds from donors began only at that point, *Id.*, ¶ 66. (The only actions Mr. Kimberlin alleges in 2010 are various supposed actions by non-defendant Andrew Breitbart and Frey and Nagy; a single blog post by Mr. Nagy; and the lawsuit *Mr. Kimberlin himself* filed in Maryland state court. SAC, ¶¶ 37-39).

A plaintiff's obligation "to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555. In applying that directive for purposes of resolving a motion to dismiss a RICO claim based on a lack of "continuity," a District Court thus should look beyond the pleading's vagaries to its specifics. *See Brown v. Ajax Paving Industries, Inc*., 773 F. Supp. 2d 727, 741 (E.D. Mich., 2011) (applying *Twombly*, court disregarded plaintiff's generalized allegation of racketeering activity over four years and instead focused on specific instances of conduct which spanned only 15

months; complaint failed to plead closed-ended continuity). Here, Mr. Kimberlin has failed to offer any specifics to show Mrs. Malkin undertook a series of predicate acts over a substantial period of time, or that her actions constitute a threat of *any* criminal conduct, much less a threat of future conduct. Dismissal is warranted.

b. Open-ended continuity

Likewise, Mr. Kimberlin fails to allege open-ended continuity sufficient to show a pattern of racketeering activity. He alleges neither related predicates that themselves involve a distinct threat of long-term racketeering activity, nor that any predicate acts are part of the supposed enterprise's "regular way of doing business." *GE Inv. Private Placement Partners, II*, 247 F.3d at 549, *quoting H.J., Inc.*, 492 U.S. at 242-243. Instead, he simply complains of various supposed acts that have been undertaken against him, acts that even by his account do not have a consistent motive: while some are designed to boost the financial fortunes of some defendants, others by his own telling are simply an effort to unleash state and federal law-enforcement officials against him.

RICO liability is reserved for ongoing unlawful activities whose scope and persistence pose a special threat to social well-being. *Menasco v. Wasserman*, 886 F2d 681, 684 (4th Cir. 1989). Blog posts and website commentary regarding Mr. Kimberlin, and the suspicious circumstances under which three conservative commentators have been "swatted," hardly meet that standard.

6. Mr. Kimberlin fails to sufficiently plead the existence of an "enterprise."

A RICO "enterprise" under 18 U.S.C. § 1959(b)(2) is proved "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit....The hallmark concepts that identify RICO enterprises are 'continuity, unity, shared purpose and identifiable structure.'" *United States v. Fiel*, 35 F.3d 997, 1003 (4th Cir. 1993) (citations omitted).

"[A]n association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 945, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009). While a group need not have rigid hierarchical structures, it must function as a continuing unit and remain in existence long enough to pursue a course of conduct. *Id.* *Boyle* also stresses the significance of interrelationship between, or among, the various members of the association:

> [T]he term structure means "[t]he way in which parts are arranged or put together to form a whole" and "[t]he interrelation or arrangement of parts in a complex entity." American Heritage Dictionary 1718 (4th ed. 2000); *see also* Random House Dictionary of the English Language 1410 (1967) (defining structure to mean, among other things, "the pattern of relationships, as of status or friendship, existing among the members of a group or society") [556 U.S. at 945-946].

The FAC fails to plead any facts sufficient to establish an "enterprise." Instead it offers the conclusory allegation that "[a]ll defendants and unnamed persons" constitute "the RICO Enterprise," SAC, ¶ 161, then restates in boilerplate fashion various elements of a RICO offense. *Id.*, ¶¶ 162-168. To the extent it alleges any organizational tendencies, it suggests that defendant National Bloggers Club was formed in February 2012 by various individual defendants for the purpose of targeting Mr. Kimberlin "at all costs." *Id*., ¶¶ 61-71. These defendants in some unspecified way then were able, by calling an "Everyone Blog About Brett Kimberlin Day," to enlist "scores of bloggers" to post stories "smearing" him and disseminating them widely via Twitter. *Id.*, ¶¶ 65-66. In that fashion, the SAC alleges, defendants National Bloggers Club and Akbar were able to generate financial contributions from readers. *Id.* at ¶¶ 66-68.

The allegations amount to an assertion of a "rimless hub and spoke" operation, with the National Bloggers Club and a handful of individual defendants at the center, and other defendants somehow associated to carry out the common purpose, but with no coordination or relationship between the

various other defendants constituting the "spokes." Indeed, the SAC lacks any description of how this "enterprise" functioned and coordinated its efforts to carry out this "smear" campaign, from the "hub" to the various "spokes." Mr. Kimberlin himself has described the alleged "enterprise" in terms that establish it as a classic "hub and spoke" operation:

> Most of the Defendants are members of, paid by or otherwise involved with the National Bloggers Club in some fashion. Defendant Ali Akbar is the boss, Patrick Frey is the consigliore, DB Capitol Strategies is the legal muscle, and various other defendants are the lynch mob, taking orders from Defendants Akbar and Frey to harass Plaintiff through various means such as physical assault, stalking, malicious legal filings, and false allegations online. [R.29 Response to Hoge/Walker motion to dismiss, p. 14].

Post-*Boyle*, such allegations have routinely been deemed insufficient to plead an "enterprise" because they plausibly allege at most, mere parallel conduct. *See, In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 374 (3d Cir. 2010) (allegations of a RICO enterprise with insurance broker at center and numerous insurers as the spokes "do not plausibly imply concerted action – as opposed to merely parallel conduct – by the insurers, and therefore cannot provide a 'rim' enclosing the 'spokes' of these alleged 'hub-and-spoke' enterprises"); *accord Target Corp. v. LCH Pavement Consultants, LLC*, 2013 U.S. Dist. LEXIS 80306 (D. Minn. June 7, 2013) (alleged "enterprise" consisting of retailer's nationwide paving consultant at hub of bid-rigging scheme with numerous paving contractors failed to constitute association-in-fact enterprise because "the complaint alleges no rim...no nonclusory factual allegations to support a reasonable inference of relationships among the Defendant paving contractors"); *Conte v. Newsday, Inc.*, 703 F. Supp. 2d 126, 135 (E.D.N.Y. 2010) (alleged organization consisting of newspaper, newspaper employees and independent contractors set up to engage in circulation and advertising fraud was not an association-in-fact enterprise; "plaintiff fails to allege how each defendant associated with the other defendants in the alleged enterprise, what the defendants' roles were in any

alleged enterprise, the structure and functioning of the alleged enterprise, or even a coherent common purpose of the enterprise").

A "basic requirement" of an association-in-fact enterprise is that "the components function as a unit, that they be 'put together to form a whole.'" *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 374, *citing Boyle*, 556 U.S. at 945. The SAC is completely lacking in any nonconclusory allegations establishing that. For the vast majority of defendants, including Mrs. Malkin, there is no explanation or elaboration whatsoever as to how he, she, or it relate to this supposed "enterprise," how each obtained and agreed to carry out the enterprise's marching orders – its "common purpose" – of smearing Brett Kimberlin. The SAC fails to properly plead a RICO enterprise, and dismissal is warranted.

7. Mr. Kimberlin's RICO claim improperly seeks to federalize areas of historical state-law regulation.

As the Sixth Circuit recently recognized in rejecting a plaintiff's attempt to extend RICO to an alleged conspiracy to fraudulently deny workers-compensation benefits, such efforts run afoul not only of the statutory requirement of injury to "business or property," but also to notions of federalism. Affirming dismissal of a RICO complaint in *Brown*, *supra*, the court noted that allowing the complaint to go forward "would allow the Act to police fraud in the workers' compensation system, planting the national banner on land traditionally patrolled by the States." *Brown v. Ajax Paving Indus.*, __ F.3d __, 2014 U.S. App. LEXIS 9187 (6th Cir. 2014), *citing Jackson*, 731 F.3d at 565-566. "The Act does not speak with enough clarity...to authorize such an intrusion." *Id.*, *citing Jackson*, 731 F.3d at 566-569.

So it is here. Mr. Kimberlin at bottom seeks redress for conduct that by his own description constitutes "defaming, attacking, bullying and harassing" him in order to raise money. *See, e.g.* SAC ¶ 134. This is underscored by the fact that he uses the exact same factual allegations to assert several state-law torts against Mrs. Malkin and Twitchy: false light (count V), interference with prospective economic

advantage (count VII - first), intentional infliction of emotional distress (count VIII) and "conspiracy to commit state law torts (count IX). Indeed, aside from his RICO count and § 1985 claim against Mrs. Malkin, these are the *only* causes of action he asserts against either defendant. Even if his allegations properly stated a claim under RICO, which they do not, they could not be allowed to proceed without federalizing areas of law "traditionally patrolled by the States." *Brown*, *supra*. Dismissal is warranted.

C. Count III fails to state a claim under 42 U.S.C. § 1985 against Mrs. Malkin.[3]

1. Mr. Kimberlin's pleadings are fatally conclusory under *Iqbal.*

As noted, *Iqbal* requires more than that a plaintiff simply attach facts to the elements of a cause of action. Mr. Kimberlin's pleading allegations in Count III do nothing to assert a plausible claim against Mrs. Malkin, or any defendant, under 42 U.S.C. § 1985. Instead, they constitute a one-page boilerplate recitation of the elements of a civil offense under that statute. SAC, ¶¶ 213-220. They fall far short of the line of plausibility, and warrant dismissal. *Francis v. Giacomelli*, 588 F.3d 186, 196-197 (4th Cir. 2009) (citations omitted); *Cook v. Howard*, 484 Fed. Appx. 805, 810 (4th Cir. 2012) (affirming dismissal of § 1983 and § 1985 claims against defendant-county where complaint repeatedly sets forth legal conclusions masquerading as factual allegations).

2. The SAC fails to state a claim under § 1985.

To plead a violation of § 1985, a plaintiff "must demonstrate with specific facts that the defendants were 'motivated by a specific class-based, invidiously discriminatory animus to deprive the plaintiff of the equal enjoyment of rights secured by the law to all." *Francis*, 588 F.3d at 196-197 (internal punctuation omitted), *citing Simmons v. Poe*, 47 F.3d 1370, 1376 (4th Cir. 1995); *see also Id.* at 1377 ("the law is well settled that to prove a section 1985 'conspiracy,' a claimant must show an

[3] The SAC's count II is not brought against Mrs. Malkin or Twitchy.

agreement or a 'meeting of the minds' by defendants to violate the claimant's constitutional rights"); *see also Hughes v. Ranger Coal Corp.*, 467 F.2d 6, 8-9 (4th Cir. 1972). A complaint alleging purposeful discrimination towards an individual, with no allegation of racial or otherwise class-based motivation, is insufficient under § 1985(3). *Hughes*, 467 F.2d at 9 (citation and internal quotation marks omitted).

Not only is Count III completely silent with regard to any such class-based, invidiously discriminatory animus on Mrs. Malkin's part, SAC, ¶¶ 213-220, Mr. Kimberlin pleads himself right out of this count as to *all* defendants, by failing to allege a shred of class-based discrimination. Count III should be dismissed.

Moreover, to the extent Mr. Kimberlin tries to paint himself as the victim of a politically motivated vendetta, that too is not actionable. Although the circuits split on whether discriminatory animus directed at a class based on political affiliation is actionable under § 1985(3), the Fourth Circuit agrees with the weight of authority that it is not. *See, Harrison v. KVAT Food Mgt., Inc.*, 766 F.2d 155, 163 (4th Cir. 1985); *see also*, *Rodgers v. Tolson*, 582 F.2d 315, 317-318 (4th Cir. 1978) (class defined as those in "political and philosophical opposition" to defendants too indefinable to give rise to § 1985(3) claim). And of course, Mr. Kimberlin does not even allege he was targeted as a result of any class to which he belongs; instead he claims defendants sought to chill his various rights as an individual.

To the extent Mr. Kimberlin bases his § 1985(3) claim on his assertion that defendants made false criminal accusations against him regarding swatting, it is settled that "[t]he deliberate giving of false information by an individual to a police officer to cause the arrest of another does not give rise to a cause of action under the Civil Rights Acts." *Kahermanes v. Marchese*, 361 F. Supp. 168, 171 (E.D. Pa. 1973), *citing* 42 U.S.C. §§ 1983 and 1985; *accord Gregg-Wilson v. EFC Trade, Inc.*, 2013 U.S. Dist.

LEXIS 132824, **19-20 (D. Md. July 12, 2013); *Johns v. Home Depot USA, Inc.*, 221 F.R.D. 400, 405 (S.D.N.Y. 2004) (citations omitted) (§ 1983 claim).

Further, Mr. Kimberlin states no claim under § 1985(2) because he does not allege with any specificity that Mrs. Malkin interfered with his attendance at or participation in any state or federal judicial proceeding. *Herrmann v. Moore*, 576 F.2d 453, 457-458 (2d Cir. 1976); *Johns*, 221 F.R.D. at 406 (citations omitted).

Lastly, for the reasons discussed in Section I above regarding the RICO claim, Mr. Kimberlin has not alleged, with the requisite specificity, injury to him caused by any act of Mrs. Malkin or Twitchy and resulting from an alleged conspiracy. His pleading allegations do not advance his claim "across the line from conceivable to plausible," rendering dismissal appropriate. *Walters*, 684 F.3d at 439, *citing Twombly*, 550 U.S. at 570.

D. The false-light invasion of privacy claim (count V) should be dismissed.[4]

Mrs. Malkin's state of residence, Colorado, where any challenged statement presumably was made, does not even recognize the tort of false light invasion of privacy. *Shrader v. Beann*, 503 Fed. Appx. 650, 654 (10th Cir. 2012) (citation omitted). It should be dismissed on that basis alone.

Under Maryland law, a false-light plaintiff must show 1) defendant gave publicity to a matter concerning the plaintiff that placed her before the public in a false light; 2) the false light would be highly offensive to a reasonable person, and 3) defendant acted with knowledge of or reckless disregard for the falsity of the publicized matter and the false light in which plaintiff would be placed. *Byington v.*

[4] Though the FAC included Mrs. Malkin among the defamation defendants, the SAC has dropped that claim against her.

NBRS Fin. Bank, 903 F. Supp. 2d 342, 352-353 (D. Md. 2012) (citations omitted). Mr. Kimberlin's false-light claim against Mrs. Malkin and Twitchy has several fatal flaws.[5]

1. The pleading is insufficient under *Iqbal* and fails to state a claim.

As with many of his other claims, Mr. Kimberlin's Count V simply restates the elements for the tort of false light invasion of privacy, without in any way attempting to tie them to the specific acts of Mrs. Malkin or Twitchy. SAC, ¶¶ 241-257. *Iqbal* requires more, 556 U.S. at 678. The complaint fails to state a claim and should be dismissed.

Further, though Mr. Kimberlin couches in sinister terms the few specific allegations he relates to Mrs. Malkin and Twitchy, closer examination of the material he provides belies that assertion. Thus, he alleges that Mrs. Malkin "used her blog and Twitter compiler, Twitchy, to repeatedly state that Plaintiff committed the swattings," but fails to set forth the content of *any* statement by Mrs. Malkin, much less a statement that accused him of committing the swattings. SAC, ¶ 108-09. Indeed, while the SAC cites two articles from www.michellemalkin.com – posts from May 2012 ("Breakthrough: Fox News Covers Brett Kimberlin/Patterico Swattings") and April 2013 ("More Celebrities Swatted, Meanwhile Anti-Brett Kimberlin Bloggers Still Under Fire") *Id.*, ¶¶ 108-09 – the only specifics related are from an unidentified commenter to the latter who opined that "Brett Kimberlin needs to wake up with a horse's head in his bed." *Id*., ¶ 109. The only specific statement by Mrs. Malkin that the SAC sets forth is an April 8, 2013 blog post – again, on michellemalkin.com, not Twitchy – relating that conservative bloggers and activists have "rallied behind the victims of left-wing convicted domestic terrorist Brett

[5] "False light" claims in Maryland are subject to the same legal standards as defamation claims. *Piscatelli v. Van Smith*, 35 A.3d 1140, 1146-47 (Md. 2012) (citations omitted).

Kimberlin and his cabal" and that, a year later, "the survivors of those SWATting attacks are still fighting for their security and free speech rights." *Id.*, ¶ 132. Where Mr. Kimberlin's own complaint recounts the swattings, and is premised on the charge that various defendants indeed are "Anti-Brett Kimberlin Bloggers," he cannot establish anything about that that relates to the disclosure of private facts to the public at large. *Furman v Sheppard*, 744 A.2d 583, 587 (Md. Ct. Spec. App. 2000).

2. Mr. Kimberlin as a matter of law cannot establish that Mrs. Malkin or Twitchy placed him before the public in a false light.

Mr. Kimberlin blusters about "being falsely accused of crimes and then having those false accusations incite a lynch mob to attack" him. SAC, ¶ 248. But he identifies no statement by Mrs. Malkin or Twitchy that falsely accused him of a crime, and he cannot, because there are none. His claim fails as a matter of law.

In a defamation action (and thus a false-light action), plaintiff bears the burden of proving falsity. *Brown v. Ferguson Entrs., Inc.*, 2012 U.S. Dist. LEXIS 174991, *6 (D. Md. Dec. 11, 2012), *citing Jacron Sales Co., Inc. v. Sindorf*, 350 A.2d 688, 694-698 (Md. 1976). Mr. Kimberlin's failure to even to plead the text of the allegedly actionable comments by Mrs. Malkin and Twitchy renders him incapable of meeting that burden. Dismissal of this count is warranted.

Mr. Kimberlin's allegations against Mrs. Malkin and Twitchy are hopelessly vague and insufficient. He gives two general descriptions mentioning the headlines of the allegedly defamatory articles, and provides URL addresses to each, but fails to give any detail about what they say, how it is defamatory, or what about either is false. SAC, ¶¶ 108-109. He offers nothing as to the actual substance of those pieces, and certainly does not set forth the allegedly offending text. The closest he comes to offering detail is when he cites one unidentified commenter to the latter article who said, "Brett

Kimberlin needs to wake up with a horse's head in his bed." *Id*. Nothing about any of that meets the falsity requirement.

At the core of Mr. Kimberlin's claim is displeasure over his odious past being given publicity. However, that is not grounds for a "false light" claim because a) his past is a matter of public record, and b) it is not false to point it out. Thus, *this Court* has publicly pointed out that Mr. Kimberlin conspired with intent to distribute 10,000 pounds of marijuana loaded onto a Colombian airplane, illegally possessed and/or used the seal of the President of the United States and Department of Defense insignia, impersonated a federal officer, and received explosives as a convicted felon. *Kimberlin v. Dewalt*, 12 F. Supp. 2d 487, 489-490 (D. Md. 1998). It has described his bombing spree, in which an innocent couple leaving a high-school football game were permanently injured and maimed, and then, after one victim eventually committed suicide, his widow was sued by Mr. Kimberlin. *Id* at 490 (citation omitted); *see also Kimberlin v. White*, 7 F.3d 527 (6th Cir. 1993). Another federal court has noted he is a convicted perjurer. *United States v. Kimberlin*, 483 F. Supp. 350 (S.D. Ind. 1979). Mr. Kimberlin's past is fully on display in the law books and elsewhere, and has been for years. Public comment on it by others cannot form the basis of a false-light claim.

3. The SAC fails to sufficiently allege actual malice by Mrs. Malkin or Twitchy.

Libel standards are applicable to cases involving invasion of privacy. *Harnish v. Herald-Mail Co.*, 264 Md. 326, 337, 286 A.2d 146 (1972) (citations omitted). Where a plaintiff is a public figure, as Kimberlin unquestionably is, "he cannot recover unless he shows by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e. with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Masson v. New Yorker Magazine*, 501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991), *citing New York Times Co. v. Sullivan*, 376

U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). "Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author in fact entertained serious doubts as to the truth of [her] publication, or acted with a high degree of awareness of probable falsity." *Id* (citations and internal punctuation omitted).

Mr. Kimberlin's sole attempt to plead actual malice, SAC, ¶ 251, is mere boilerplate that falls far short – claims with even more detail and elaboration have been rejected as insufficient. *Mayfield v. NASCAR*, 674 F.3d 369, 377-378 (4th Cir. 2012) (defamation claim properly dismissed under Rule 12(b)(6); "[plaintiffs'] assertion that [defendants'] statements 'were known by them to be false at the time they were made, were malicious or were made with reckless disregard as to their veracity' is entirely insufficient. This kind of conclusory allegation — a mere recitation of the legal standard — is precisely the sort of allegations that *Twombly* and *Iqbal* rejected") (internal brackets omitted).

4. Any statements are absolutely protected by the fair comment privilege.

Under the "fair comment" privilege as Maryland recognizes it,

> ...any member of the community may, without liability, honestly express a fair and reasonable opinion or comment on matters of legitimate public interest. The reason given is that such discussion is in the furtherance of an interest of social importance, and therefore it is held entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation. [*Piscatelli*, 35 A.3d at 1151-52, *citing A.S. Abell Co. v. Kirby*, 176 A.2d 340, 342 (Md. 1961)].

"Thus, the fair comment privilege is available for opinions or comments regarding matters of legitimate public interest." *Id.* (emphasis added). In *Piscatelli*, the Court of Appeals addressed whether "the occurrence or prosecution of crimes" was a matter of legitimate public interest, and declared that "[t]his

principle seems obvious." *Id*. Even if Mr. Kimberlin had properly pleaded the specific text of any actionable statement by Mrs. Malkin or Twitchy, it would be protected by the fair comment privilege.[6]

5. The false-light claim is untimely

Piscatelli's admonition that defamation standards apply to false-light claims, 35 A.3d at 1146-47, argues in favor of applying the one-year limitation period for defamation actions, Md. Code Ann., Courts & Judicial Proceedings Art. § 5-105, to false-light claims as well. This Court has split as to whether that or the general three-year tort limitations period is applicable; the trend has been toward the latter view. *See, e.g., Long v. Welch & Rushe, Inc.*, 2014 U.S. Dist LEXIS 88913, **20-26 (D. Md. June 30, 2014) (discussing split of authority). While the court need not even reach this issue, since myriad reasons exist for dismissing the false-light claim, Mrs. Malkin and Twitchy submit that the better view is to extend *Piscatelli*'s reasoning. Under that, the claim may also be rejected on limitations grounds.

E. The interference with prospective economic advantage claim (count VII - first) fails to state a claim.

The SAC's scant allegations regarding the interference with prospective economic advantage claim plainly are inadequate under *Iqbal*. They offer absolutely nothing in the way of specifics as to what Mrs. Malkin or Twitchy did that constituted interference. For that reason alone, count VII should be dismissed.

Further, liability for this tort in Maryland "will attach only to interference that is either 'wrongful or unlawful.'" *View Point Med. Sys. LLC v. Althena Health, Inc.*, 2014 U.S. Dist. LEXIS 41670, *72 (D. Md. March 28, 2014) (Hollander, J.) (citations omitted). As discussed elsewhere, any statements by Mrs. Malkin or Twitchy were not false and also were protected by the First Amendment, the fair-comment privilege, and/or the Communications Decency Act. It is well-established that "when a party

[6] The First-Amendment bar against Mr. Kimberlin's claim is discussed separately *infra*.

acts within its rights, that conduct is not wrongful as a matter of law." *Id.* (citations and internal quotation marks omitted). Mr. Kimberlin cannot establish "wrongful or unlawful" conduct by either defendant.

Mr. Kimberlin's count VII (first) also fails because it alleges at most, incidental interference with his supposed commercial activities. There is no way to read the SAC as alleging that Mrs. Malkin or Twitchy acted with the specific purpose to interfere with his foundation employment of his nebulous career as a "musician." At most, even assuming he suffered such damage, it was only incidental to what the SAC claims was defendants' primary motivation – raising money for the NBC. But this tort under Maryland law "is characterized by the defendant's *specific purpose to interfere*...acts which incidentally affect another's business relationships are not a sufficient basis for the tort." *View Point Med. Sys.* at *74, *citing Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs, Inc.*, 336 Md. 635, 656, 650 A.2d (1994). Harm to Mr. Kimberlin's employment, by his own account was incidental.

Lastly, "to establish causation in a wrongful interference action, the plaintiff must prove that the defendant's wrongful or unlawful act caused the destruction of the business relationship which was the target of the interference." *Med. Mut. v. B. Dixon Evander & Assocs.*, 339 Md. 41, 54, 660 A.2d 433 (1995). The SAC pleads, at most, "disruption" Mr. Kimberlin's relationship. ¶ 266. This falls far short of pleading causation, and warrants dismissal.

F. Mr. Kimberlin fails to allege that Mrs. Malkin or Twitchy did anything that meets the level of outrageousness required to state a claim for intentional infliction of emotional distress (count VIII).

Maryland law restricts the tort of intentional infliction of emotional distress to conduct that is truly "outrageous," i.e. "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Batson v. Shiflett*, 602 A.2d

1191, 1216 (Md. 1992), *citing Harris v. Jones*, 380 A.2d 611, 614 (1977) and Restatement (Second) of Torts § 46, comment d (1965). The issue is for the court in the first instance, and "in addressing that question, the court must consider not only the conduct itself but also the 'personality of the individual to whom the misconduct is directed.' *Batson*, 602 A.2d at 1216, c*iting Harris*, 380 A.2d at 615. "This high standard of culpability exists to screen out claims amounting to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" that simply must be endured as part of life." *Id*.

There is no need to gild this lily. Mr. Kimberlin's "personality" is well-established and documented publicly in many places, including various volumes of the Federal Reporter and Federal Supplement.[7] A handful of constitutionally-protected blog posts by Mrs. Malkin or retweets by Twitchy regarding Mr. Kimberlin, and the highly suspicious circumstances in which three political commentators have been exposed to the high risk of having lethal police force unleashed on them at their homes, falls far short of the standard needed to establish "outrageousness." Dismissal is warranted.[8]

G. The civil-conspiracy claim fails.

To call the allegations of count IX "boilerplate" is to insult boilerplate. SAC, ¶¶ 281-283. The sparse three-line allegations of this claim are completely devoid of factual support, and fall under *Iqbal* and *Twombly*.

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[7] *See, e.g., Kimberlin*, 7 F.3d at 528-529 ("The blast tore off [the victim's] lower right leg and two fingers, and embedded bomb fragments in his wife's leg. [The victim] was hospitalized for six weeks, during which he was forced to undergo nine operations to complete the amputation of his leg, reattach two fingers, repair damage to his inner ear, and remove bomb fragments from his stomach, chest, and arm. In February 1983, he committed suicide").

[8] Mr. Kimberlin also does not, and cannot, plead any causal connection between conduct by Mrs. Malkin and the actions he alleges caused him severe emotional distress: the supposed "assault" by defendant Walker, the "many threats of death and injury" to him and his family, and "demands for [his] arrest and imprisonment." SAC, ¶ 277. *See Batson*, 602 A.2d at 1216. His allegations also are merely conclusory, insufficient under *Iqbal*.

Further, in Maryland, civil-conspiracy claims rise or fall based on the underlying tort; if the tort is not proven the claim fails. *Shenker v. Laureate Education, Inc.*, 411 Md. 317, 983 A.2d 408 (2009). They also share the limitation period of the underlying tort(s). *Prince George's County v. Longtin*, 419 Md. 450, 480, 19 A.3d 859 (2011). To the extent any of the SAC's claims are dismissed for the reasons discussed above, and/or are time-barred, so is this one.

III. The SAC runs afoul of the First Amendment and Maryland's anti-SLAPP statute.

A. First Amendment

Paradoxically, given his status as a convicted perjurer, the convicted "Speedway Bomber," the man who injected himself into a Presidential election by claiming to have sold marijuana to one of the running mates,[9] and other widely reported instances of notorious conduct, Mr. Kimberlin argues that he is somehow not a "public figure" for purposes of First Amendment analysis. R.29 Resp. to Hoge/Walker motion to dismiss, p. 7; R.30 Resp. to DB Capitol Strategies motion to dismiss, p. 17). Leaving aside momentarily the untenable nature of that claim, it is simply irrelevant.

The First Amendment's Free Speech Clause can serve as a defense in state tort suits. *Snyder v Phelps*, 131 S. Ct. 1207, 1215 (2011). The proper focus is not so much on the private/public figure distinction on which Mr. Kimberlin dwells, but on whether the blog posts, commentary and other speech at the heart of his claim deal with matters of public or private *concern*. *Snyder*, 131 S. Ct. at 1215 (whether the First Amendment immunizes speech from state tort liability "turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case"). Since the speech here plainly dealt with matters of public concern, Mr. Kimberlin's claims are not actionable.

[9] *Kimberlin*, 12 F. Supp. 2d at 490-491.

"[S]peech on 'matters of public concern'...is 'at the heart of the First Amendment's protection.'" *Id., citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-759, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (opinion of Powell, J.) and *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978)). "The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id., citing New York Times v. Sullivan*, 376 U.S. at 270 (internal punctuation omitted). Because "speech concerning public affairs is more than self-expression; it is the essence of self-government," speech regarding public issues "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.* (citations omitted).

Speech deals with matters of public concern "when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community'...or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Snyder*, 131 S. Ct. at 1216 (citations omitted). Determining whether speech is of public or private concern requires a court to examine the "content, form, and context" of that speech, and the court is obligated to make an independent examination of the whole record to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. *Id.* (citations and quotation marks omitted). No factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.

Speech relating to Mr. Kimberlin and the circumstances in which three conservative bloggers and commentators found themselves the victims of "swatting," certainly is of public concern. The content and context of the challenged speech certainly relates to an issue "of broad interest to society at large," *Snyder*, 131 S. Ct. at 1216-17: whether the political views of three bloggers exposed them to a

"swatting" attack at the hands of a man who has been shown to have no compunction about using deadly violence. Likewise, the form in which the comments were made, on publicly available websites devoted to political and contemporary-issue discussion, shows them to be matters of public concern. And finally their context also supports that view: defendants were exercising their First Amendment rights to shed light upon a situation *arguably being used to suppress First Amendment rights*. It is difficult to imagine speech that could have more to do with issues of public concern, then whether or not a convicted domestic terrorist is behind potentially deadly attacks that seem to have the common thread of targeting outspoken conservative commentators on the American political and social scene – with whose views the man in question strongly disagrees.

The First Amendment bars not only Mr. Kimberlin's state-law claims but his RICO and other federal counts, as well. In *Doe v. State of Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005), a group of anonymous Palestinians sued the Israeli government, its security and military forces, and others, including a New Jersey-based religious organization whose website accepted contributions for Israeli settlement activities in the West Bank (the "Rinat defendants"). Like Mr. Kimberlin, the lead plaintiff, Doe, asserted claims under RICO and a broad variety of state tort claims against the organization and its spiritual leader and former president. The court ultimately dismissed the claims as non-justiciable political questions, but in analyzing § 1961(1)(a)'s definition of "racketeering activity" ("any act or threat involving murder, kidnapping" or other specified offenses) it noted the chilling effect RICO's application could have in that instance. "Although Congress intended RICO to have a broad reach, the Court will not so lightly imply an intent that RICO should constitute an omnipresent blanket of liability that could chill a wide range of economic and First Amendment activity." 400 F. Supp. 2d at 118. Other courts have similarly expressed concerns over RICO inhibiting legitimate First Amendment

activity. *See, e.g., Forty-Eight Insulations, Inc. v. Black*, 63 B.R. 415, 418 (N.D. Ill. 1986) (allowing misstatements in bankruptcy petition to form basis for mail fraud-related RICO claim could chill rights under the Petition Clause).

In *National Organization for Women v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994), the Supreme Court in holding that RICO does not contain an economic-motive requirement, declined to address the question of whether the statute's application to pro-life protesters chilled their First Amendment activities. 510 U.S. at 262 n.6. Writing separately to emphasize why an economic-motive test would be both over- and underprotective of First Amendment interests, Justice Souter (joined by Justice Kennedy) noted that while acts of violence are undeserving of protection, "entities engaging in vigorous but fully protected expression might fail the proposed economic-motive test (for even protest movements need money) and so be left exposed to harassing RICO suits." 510 U.S. at 264 (Souter, J., concurring). As he noted:

> ...it is important to stress that nothing in the Court's opinion precludes a RICO defendant from raising the First Amendment in its defense in a particular case. Conduct alleged to amount to Hobbs Act extortion, for example, or one of the other, somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis.

Id., citing, inter alia, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 917, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) (state common-law prohibition on malicious interference with business could not, under the circumstances, be constitutionally applied to a civil-rights boycott of white merchants); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958) (though RICO violation was established, First Amendment barred court-order relief compelling NAACP to produce membership lists); and *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531 (9th Cir. 1991) (applying heightened pleading standard to complaint based on presumptively protected First

Amendment conduct). Concluding, Justice Souter deemed it "prudent" to note that RICO actions "could deter protected activity and to caution courts applying RICO to bear in mind the First Amendment interests that could be at stake." 510 U.S. at 265 (Souter, J., concurring).

This is precisely such a case. Mr. Kimberlin seeks to use this litigation, especially RICO and its potent treble-damage provisions, to silence Mrs. Malkin, Twitchy and others from discussing whether he is simply continuing his past domestic-terrorist activities by another means, i.e. by "swatting" his personal and ideological foes. By plaintiff's own account he seeks to impose liability on Mrs. Malkin and Twitchy for blog postings, and the reposting of others', regarding activities that bear strong indicia of being politically motivated. SAC, ¶¶ 108-109. Given his past conduct, which include his controversial 11th-hour role in a hotly contested presidential election, and his act of leaving an explosive-laden gym bag in a high-school parking lot where it maimed an innocent bystander, this is no mere academic discussion, but rather a pressing issue of societal significance. The conduct for which Mr. Kimberlin seeks to impose liability is expressive activity that goes to the very heart of the First Amendment, and this action must be dismissed.

Mrs. Malkin is entitled to First Amendment protections, which are not solely the province of the brick-and-mortar "institutional press" but which belong to all Americans. *Snyder v. Phelps*, 580 F.3d 206, 219 n.13 (4th Cir. 2009); *see also Obsidian Finance Group v. Cox*, 740 F.3d 1284, 1290 (9th Cir. 2014) (citations omitted). Twitchy is, as well. *United States v. Bucci*, 582 F.3d 108, 112 n.2 (1st Cir. 2009) (criminal defendant's website posting information about informants assumed to be subject to First Amendment protection). Nothing that either is alleged to have posted or retweeted comes remotely close to meeting the standard of being a "true threat" that would take their commentary outside the zone of First Amendment protection. *See generally*, *United States v. White*, 670 F.3d 498, 508-509 (4th Cir.

2012), *citing Virginia v. Black*, 538 U.S. 343, 359 (2003) (unprotected threat is "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"). Accordingly, that commentary is well within the scope of the First Amendment, and Mr. Kimberlin's attempted use of RICO must yield to their constitutional rights.

B. Anti-SLAPP statute

For similar reasons, the SAC also is subject to dismissal under Maryland's anti-"SLAPP" statute, Md. Code Ann., Courts & Judicial Proceedings Art. § 5-807(a), (b), and Mrs. Malkin and Twitchy are immunized from civil liability as a result. Md. Code Ann., C.J.P. § 5-807(c). As it relates to defendants, Mr. Kimberlin's action falls squarely within the statutory definition of a "strategic lawsuit against public participation." § 5-807(b). It plainly seeks to chill public discussion by Mrs. Malkin, Twitchy and a broad range of conservative online and broadcast commentators, by misusing RICO and other federal and state causes of action to bludgeon them into silence. Dismissal is warranted.

IV. The Communications Decency Act immunizes Twitchy from liability.

Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, immunizes provides of "interactive computer services" against liability arising from content created by third parties. *Zeran v. AOL, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *Jones v. Dirty World Entertainment Recordings, LLC*, __ F.3d __, 2014 U.S. App. LEXIS 11106 (6th Cir. 2014). The CDA states unequivocally that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Zeran*, 129 F.3d at 330, *citing citing* 47 U.S.C. § 230(c)(1). It defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a

computer server, including specifically a service or system that provides access to the internet....", and that definition includes broadband providers, hosting companies, and website operators. *Jones* at **15 & n.2, *citing* 47 U.S.C. § 230(f)(2). The Act defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service," and that term includes unidentified third parties who post allegedly offensive online messages. *Zeran* 129 F.3d at 330. Section 230(e)(3) provides that "[n]o cause of action may be brought and not liability may be imposed under any State or local law that is inconsistent with this section." Indeed, "[t]he majority of federal circuits have interpreted the CDA to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Jones*, *citing*, *inter alia*, *Zeran*, 129 F.3d at 328.

Zeran renders Mr. Kimberlin's claim against Twitchy not only subject to dismissal, but frivolous. Plaintiff in *Zeran* sued AOL, alleging that it "unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter." 129 F.3d at 328. Writing for the court, Judge Wilkinson discussed the many sound reasons why Congress barred such claims:

> The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* Section 230(a)(2). It also found that the Internet and interactive computer services "have flourished, to the benefit of all Americans, *with a minimum of government regulation*." *Id.* Section 230(a)(4). Congress

> further stated that it is "the policy of the United States...to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." *Id.* Section 230(b)(2). [129 F.3d at 330 (court's emphasis)].

The same holds true here. The 82-page fable that is Mr. Kimberlin's SAC alleges exactly one offending statement involving Twitchy: an anonymous commentator's assertion that he "needs to wake up with a horse's head in his bed." *Id.*, ¶ 109. But Congress in enacting the CDA decided that such items simply cannot form the basis of liability against an entity such as Twitchy.

It takes little effort to see what Mr. Kimberlin is trying to do with his SAC. Unhappy with the fact that Twitchy posted others' unfavorable views of him, he seeks to use RICO and various state-law causes of action to bludgeon it into silence. The victimhood theme that drips from virtually every page of the SAC masks the reality that Mr. Kimberlin himself seeks to victimize Twitchy, via use of a "heckler's veto" that would squelch the robust exchange of ideas on the internet that the CDA is intended to promote. His claims against Twitchy violate both the plain language of the CDA and every policy goal Congress sought to advance with its enactment, and should be dismissed.

V. The SAC fails to allege facts bringing Mrs. Malkin or Twitchy within this Court's personal jurisdiction.

A. Standard of review

When a court's personal jurisdiction is properly challenged under Rule 12(b)(2), "the burden [is] on the plaintiff ultimately to prove grounds for jurisdiction by a preponderance of the evidence." *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 59-60 (4th Cir. 1993).

B. Neither Mrs. Malkin nor Twitchy have sufficient minimum contacts with Maryland to support personal jurisdiction.

In cases involving out-of-state persons, the question for personal-jurisdiction purposes is "whether a person electronically transmitting or enabling the transmission of information via the Internet to

Maryland, causing injury there, subjects the person to the jurisdiction of a court in Maryland." *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002). In other words, "when has an out-of-state citizen, through electronic contacts, 'entered' the State via the Internet for jurisdictional purposes"? *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 398-399 (4th Cir. 2003), *citing ALS Scan*, 293 F.3d at 713 (internal quotation marks and ellipses omitted). Under the facts as the SAC pleads them, neither Twitchy nor Mrs. Malkin have sufficient minimum contacts with Maryland to support jurisdiction, the extension of which would be especially egregious as to Mrs. Malkin: her state of residence (Colorado) expressly refuses to recognize one of the torts leveled against her, false-light invasion of privacy. *Shrader*, 503 Fed. Appx. at 654. Dismissal is warranted.

"[A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. *ALS Scan*, 293 F.3d at 714. Under that analysis, for any non-Maryland defendant to this action to fall within this Court's jurisdiction, he or she must have intentionally focused on reaching Maryland readers.

Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002), illustrates this. In *Young*, a Virginia prison warden sued a Connecticut newspaper and four editors and reporters who, in reporting on Connecticut's practice of housing prisoners in Virginia, wrote and posted on the newspaper's website articles that implied the warden was racist and encourage guards to abuse inmates. Reversing the district court's denial of defendants' motion to dismiss, the Fourth Circuit noted that the mere fact the articles were viewable, and thus caused injury, in Virginia, was not sufficient to establish personal jurisdiction. When the internet activity is the posting of articles on a website, the court held, *ALS Scan*'s

first two issues should be analyzed together: that is, have defendants "manifested an intent to direct their website content – which included certain articles discussing conditions in a Virginia prison – to a Virginia audience." *Young* 315 F.3d at 263. The mere fact the website was viewable anywhere could not by itself show that defendants were "intentionally directing their website content to a Virginia audience":

> Something more than posting and accessibility is needed to indicate that the newspapers purposefully (albeit electronically) direct their activity in a substantial way to the forum state, Virginia. The newspapers must, through the Internet posting, *manifest an intent to focus on Virginia readers*. [*Id., citing Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (emphasis added; internal quotation marks and brackets omitted)].

Because the website was aimed primarily at a non-Virginia (i.e. Connecticut) audience, and the articles discussed the warden and Virginia only in the context of issues of concern to that audience, it could not support a conclusion that the newspaper posted the articles "with the manifest intent of targeting Virginia readers." *Young*, 315 F.3d at 264. Accordingly, defendants "could not have reasonably anticipated being haled into court [there] to answer for the truth of the statements made in their articles," and there were insufficient minimum contacts to support personal jurisdiction. *Id., citing Calder v. Jones*, 465 U.S. 783, 790, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). Even critics of *Young* concede that its "audience targeting" test constitutes a "strict limit on jurisdiction over foreign defendants in libel cases" in the Fourth Circuit. Ludington, *Aiming at the Wrong Target: The "Audience Targeting" Test for Personal Jurisdiction in Internet Defamation Cases*, 73 Ohio St. L. J. 541, 551 (2012). *Young* "strongly protects foreign libel defendants who have published on the Internet from being sued outside of their home states." *Id* at 543 & n.4 (citing cases).

Young and *ALS Scan* compel dismissal of the SAC as to Mrs. Malkin and Twitchy for lack of personal jurisdiction. Nothing it asserts supports a conclusion that Mrs. Malkin wrote or posted

anything "with the manifest intent of targeting [Maryland] readers." Just as the newspaper website in *Young* was geared primarily toward readers in New Haven and Connecticut, and thus did not have the "manifest intent of targeting Virginia readers," so too Mrs. Malkin's postings and Twitchy's website are aimed at a nationwide audience, as Mr. Kimberlin's own pleading allegations assert. Moreover, to the extent Mrs. Malkin's writings discussed purported swatting activities – by Mr. Kimberlin, or anyone else – she did so from Colorado, and the swattings of defendants Frey, Erickson, and Walker took place in California, Georgia, and Virginia, respectively. Mr. Kimberlin does not, and cannot, allege that any posting of Mrs. Malkin on that subject was somehow specifically targeting readers in Maryland; indeed he alleges defendants are motivated in part by a desire for driving their blogs to higher rankings. This is insufficient to support Maryland jurisdiction over Mrs. Malkin or Twitchy.

Even focusing on alleged harm to Mr. Kimberlin in Maryland does not salvage his claim. "[A]lthough the place that the plaintiff feels the alleged injury is plainly relevant to the jurisdictional inquiry, it must ultimately be accompanied by the defendant's own sufficient minimum contacts with the state if jurisdiction...is to be upheld." *Young*, 315 F.3d at 262, *quoting ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997) (internal brackets and ellipses omitted); *see also ALS Scan*, 293 F.3d at 714, and *Carefirst of Maryland*, 334 F.3d at 401 (*citing* all three cases). While Mr. Kimberlin plainly is aware of the jurisdictional deficiencies of his complaint – the bulk of the changes he made to his original complaint in the FAC he filed two days later, were to allege that various postings were "read in Maryland" – that is insufficient to establish personal jurisdiction under *Young* and *ALS Scan*.

Policy considerations also counsel strongly against exercising personal jurisdiction. Mrs. Malkin and Twitchy have a nationwide reach, and recognizing sufficient minimum contacts to bring them within Maryland's jurisdiction would doubtless subject online commentators of any political or

philosophical stripe to litigation in all the 50 States. The Fourth Circuit has rejected such a system. "The Internet is omnipresent – when a person places information on the Internet, he can communicate with persons in virtually every jurisdiction...It would be difficult to accept a structural arrangement in which each State has unlimited judicial power over every citizen in each other State who uses the Internet." *ALS Scan*, 293 F.3d at 712-713. "If [a court] were to conclude as a general principle that a person's act of placing information on the Internet subjects that person to personal jurisdiction in each State in which the information is accessed, then the defense of personal jurisdiction, in the sense that a State has geographically limited judicial power, would no longer exist." *Id.* at 712.

Mr. Kimberlin's allegations against Mrs. Malkin and Twitchy cannot be the basis for summoning either into court in Maryland, without vitiating the defense of personal jurisdiction and having a severely chilling effect on internet speech. Dismissal under Rule 12(b))(2) is appropriate.[10]

VI. Mr. Kimberlin's admitted falsification of court documents constitutes a fraud on the court that warrants dismissal of this action with prejudice.

A. Standard of review

A Federal court has discretion to dismiss an action for misconduct that abuses the judicial process or tampers with the administration of justice. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111

[10] Nor can Mr. Kimberlin establish sufficient minimum contacts under a "conspiracy theory" of jurisdiction, which would require him to make "a *plausible claim*" that 1) a conspiracy existed, 2) Mrs. Malkin and Twitchy participated and 3) a coconspirator's activities in furtherance of the conspiracy had sufficient contacts with Maryland to subject that conspirator to jurisdiction there. *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 329 (4th Cir. 2013) (emphasis added), *citing Lolavar v. de Santibanes*, 430 F.3d 221, 229 (4th Cir. 2005) and *McLaughlin v. McPhail*, 707 F.2d 800, 807 (4th Cir. 1983) (per curiam). To meet that test, Kimberlin "would have to rely on more than 'bare allegations,' and would have to "plead with particularity the conspiracy as well as the over acts within the forum taken in furtherance of it." *Id*, *citing Lolavar* and *Jungquist v. Sheik Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1031 (D.C. Cir. 1997). The Second Amended Complaint makes only bare allegations regarding Mrs. Malkin's supposed status as an NBC "director," and it makes *no* such allegations as to Twitchy. The SAC fails fail to establish minimum contacts with Maryland on the part of either defendant.

S. Ct. 2123, 115 L. Ed. 2d 27 (1991). Dismissal with prejudice under Rule 41(b) for violating the court rules or a court order also is within the court's discretion. *Davis v. Williams*, 588 F.2d 69, 70 (4th Cir. 1978), *citing National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976).

B. Mr. Kimberlin's admitted doctoring of his own First Amended Complaint and this Court's summons warrants dismissal.

A Federal District Court possesses inherent powers that are necessary to the exercise of all others. *Johnese v. Jani-King, Inc.*, 2008 U.S. Dist. LEXIS 16435, **4-5 (N.D. Tex. March 3, 2008), *citing Chambers,* 501 U.S. at 43, and *United States v. Hudson*, 11 U.S. 32, 34, 3 L. Ed. 259 (1812). Though a court should exercise those powers with restraint, they extend to dismissing a case with prejudice for a litigant's misconduct if the court considers lesser sanctions, and determines they would not suffice. *Id*. at *5, *citing Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1479 (D.C. Cir. 1995) (collecting cases). Fed. R. Civ. P. 41(b) also provides a basis for dismissing with prejudice, where a plaintiff engages in misconduct constituting a violation of the court rules or a court order. *C.B.H. Resources v. Mars Forging Co.*, 98 F.R.D. 564, 569 (W.D. Pa. 1983).

Fraud on the court has been described as "a scheme to interfere with the judicial machinery performing the task of impartial adjudication, as by preventing the opposing party from fairly presenting his case or defense." *Von Nichols v. Klein Tools, Inc.*, 949 F.2d 1047, 1048 (8th Cir. 1991) (citations omitted). "A finding of fraud on the court is justified only by the most egregious misconduct directed to the court itself, such as...fabrication of evidence by counsel, and must be supported by clear, unequivocal and convincing evidence." *Id.* (citations omitted). Mr. Kimberlin's brazen misconduct in forging both the case caption on the FAC and the summons, which he then mailed to Twitchy, amounts

to fraud on the court, and is so egregious that the only appropriate sanction (in this forum) is dismissal of his action with prejudice.

In *C.B.H. Resources*, *supra*, plaintiff secured a witness's presence for deposition by having its counsel present the witness with a document plaintiff claimed was a valid subpoena, but which was not. Plaintiff's abuse of the court's process under Fed. R. Civ. P. 45 was a sufficiently egregious rule violation to warrant involuntary dismissal under Rule 41(b). 98 F.R.D. at 568-569. So too here, Mr. Kimberlin's actions violate numerous provisions of Fed. R. Civ. P. 4 (Summons), 5 (Serving and Filing Pleadings and Other Papers), 10 (Form of Pleadings), 11 (Signing Pleadings and Representations to the Court), and 15 (Amended and Supplemental Pleadings), to name just a few. And his pro se status is no excuse. Leaving aside that Mr. Kimberlin's ample litigation experience probably makes him more knowledgeable of the rules than many lawyers, *see* R.19-1, p. 1 ("I have filed over 100 lawsuits and another one will be no sweat for me"), every schoolchild knows not to take an official document, alter it, then try to pass it off as something other than what it is.

"Tampering with the administration of justice...involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." *Johnese* at *5, *citing Chambers*, 501 U.S. at 44 and, *inter alia*, *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (dismissing case in which plaintiff attached fabricated document to complaint; "[i]t strikes us as elementary that a federal district court possesses the inherent powers to deny the court's processes to one who defiles the judicial system by committing a fraud on the court"). And *Aoude* noted that:

> Courts cannot lack the power to defend their integrity against unscrupulous marauders; if that were so, it would place at risk the very fundament of the judicial system. As Justice Black wrote in a case involving a not-dissimilar fraud:
>
> > Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the

> institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society....The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.
>
> All in all, we find it surpassingly difficult to conceive of a more appropriate use of a court's inherent power than to protect the sanctity of the judicial process -- to combat those who would dare to practice unmitigated fraud upon the court itself. [*Aoude*, 892 F.2d at 1119, *citing Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 2d 1250 (1944)].

Leaving aside the issue of whether Mr. Kimberlin's actions amount to mail fraud in violation of 18 U.S.C. § 1341 or other criminal conduct, they certainly constitute "defil[ing] the judicial system," *Id.*, and "the most egregious misconduct directed to the court itself," *Von Nichols*, 949 F.2d at 1048, justifying dismissal under the Court's inherent authority and/or Rule 41(b).

Although this Court denied without prejudice the motions to dismiss the FAC, and allowed defendants to refile them as to the SAC, it left open the issue of Judge Grimm's show-cause order. The Second Amended Complaint should be dismissed with prejudice, as to Twitchy and Mrs. Malkin.

C. Mrs. Malkin and Twitchy should be awarded their attorney fees and costs incurred in connection with this frivolous action.

While a pro-se litigant may not be subjected to an award of fees and costs under 28 U.S.C. § 1927, the court may make such an award under its same inherent powers discussed above. *Godwin v. Marsh*, 266 F. Supp. 2d 1355, 1360 (M.D. Ala. 2002), *citing Chambers*, 501 U.S. at 44, 46, 50; *see also Strag v. Bd. of Trustees*, 55 F.3d 943, 955 (4th Cir. 1995) (affirming award of fees as sanction under court's inherent authority). "The key to unlocking a court's inherent power is a finding of bad faith." *Godwin*, 266 F. Supp. 2d at 1360, *citing Barnes v. Dalton*, 158 F.3d 1212, 1214 (11th Cir. 1998) (internal quotation marks omitted). In *Godwin*, the district court found sufficient bad faith where, among other things, plaintiff's claim not only was meritless but was an improper attempt to relitigate a

prior state-court action, and plaintiff responded to motions to dismiss by adding as a defendant the attorney who filed them.

Mr. Kimberlin's conduct in this matter is awash in bad faith, to a far greater extent than the conduct in *Godwin*. Leaving aside the plain lack of substantive merit in his case – his RICO theory contains at least a half-dozen fatal flaws – and also leaving aside his apparent propensity to tell the court he has served papers on various parties, when he has not, his singular and outrageous actions regarding Twitchy warrant that relief. Mr. Kimberlin not only altered the FAC but forged a summons, to convince Twitchy it was a defendant and that this Court was summoning it to Maryland to answer, when in fact the Clerk specifically *refused* to do that. He then used the U.S. Postal Service to deliver it. Indeed, it appears the Legislative branch is the only one of the three that Mr. Kimberlin has yet to misuse or abuse in this litigation. If ever there were a lawsuit involving conduct, and a pro se plaintiff, justifying an award of fees, it is this one.

VII. Twitchy never has been properly served

The procedure for serving a summons is set out in Rule 4, and failure to comply with it justifies dismissal under Rule 12(b)(5). *Tann v. Fisher*, 276 F.R.D. 190, 192-193 (D. Md.), *aff'd*, 458 Fed. App'x 268 (4th Cir. 2011). Twitchy never has been properly served; in fact, upon information and belief, no summons for it ever has issued. Nor does it matter that Twitchy has actual notice of this action – prejudice or lack thereof is not part the analysis. *Wilson v. Kenny*, 20 Fed. R. Serv. 3d 940 (4th Cir. 1991).

While Mrs. Malkin also was not properly served, Mr. Kimberlin's conduct with regard to Twitchy was of an entirely different quantum. Plaintiff appears to believe that falsifying a Federal court

document, and sending it through the U.S. Mail, is no big deal. But it is a big deal. And while there are myriad other reasons warranting dismissal of the SAC as to Twitchy, so too does this.

CONCLUSION/RELIEF REQUESTED

For the foregoing reasons, defendants Michelle Malkin and Twitchy ask this Court to enter an order dismissing the Second Amended Complaint with prejudice, and awarding them costs, including attorney fees, and such additional relief as the Court deems just.

Respectfully submitted,

/s/ Michael F. Smith
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Date: July 9, 2014

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Memorandum was electronically filed in this case on July 9, 2014 and thus served on counsel of record via the Court's ECF system. Additionally, I am serving the document via email this date on plaintiff Kimberlin and on defendants Hoge, McCain, and Walker by the express permission of each.

By: /s/ Michael F. Smith

Dated: July 9, 2014

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

BRETT KIMBERLIN,	*	
Plaintiff,	*	
v.	*	Civil Action GJH 13-3059
NATIONAL BLOGGERS CLUB, et al.,	*	
Defendants	*	

* * * * * * * * * *

PROPOSED ORDER

Upon consideration of the Motion to Dismiss Second Amended Complaint, and for Attorney Fees and Costs, of Defendants Michelle Malkin and Twitchy, and after reviewing the Memorandum submitted in support and plaintiff's Response in opposition and being otherwise fully informed in the grounds, it is on this _____ day of _____, 2014, by the United States District Court for the District of Maryland,

ORDERED THAT:

(1) The Motion to Dismiss be, and hereby is, GRANTED, and this matter is DISMISSED WITH PREJUDICE; and

(2) Defendants Malkin and Twitchy are hereby AWARDED THEIR COSTS AND ATTORNEY FEES incurred in defending this action, under the Court's inherent powers, in an amount to be determined by the Court.

SO ORDERED.

_____
George Jarrod Hazel
United States District Judge

Dated: _____, 2014