VIRGINIA:

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

DEVIN G. NUNES,

Plaintiff,

v.

THE MCCLATCHY COMPANY, ELIZABETH A. "LIZ" MAIR, and MAIR STRATEGIES LLC,

Defendants.

Case No. CL19-629

MEMORANDUM OF LAW
IN SUPPORT OF DEMURRER
BY ELIZABETH A. MAIR AND MAIR STRATEGIES LLC

INTRODUCTION

This lawsuit is a direct assault on the freedom of speech. Devin Nunes (a Member of Congress) has sued Liz Mair (a private citizen) for tweeting articles critical of his conduct while in public office—and for sharing an opinion critical of him with a reporter at McClatchy.

Nunes does not allege in this case that Mair committed defamation. Instead, he seeks to hold Mair liable for allegedly defamatory statements published by McClatchy. To do so, he posits that Mair somehow entered into an illegal conspiracy with McClatchy. But the most essential element of any conspiracy claim is an agreement—a meeting of the minds—to carry out unlawful acts together. And the Complaint comes nowhere close to adequately alleging the existence of such a conspiratorial agreement: it fails to allege the requisite details about when, where, and how this agreement supposedly came into being; it papers over those defects with conclusory assertions; and it resorts to exceedingly unreasonable inferences from a mere handful of factual allegations. Simply put, sharing political opinions with a newspaper—and then tweeting, retweeting, and liking relevant articles by that newspaper—do not suggest the existence of an illegal conspiracy. They are signs that we live in a democracy where people can express political opinions and criticize elected officials on social media platforms. For good reason, no court has *ever* upheld a conspiracy theory—based mainly on tweets and retweets—like the one that Nunes has advanced here.

That is reason enough to dismiss the Complaint. Yet there is more: in order to impose liability on Mair for allegedly conspiring with McClatchy to defame him, Nunes must adequately allege that McClatchy actually defamed him. None of the alleged defamatory statements described in the Complaint, however, are actually defamatory: most of them are not pleaded with their exact words and so must be dismissed; Nunes has failed to allege that *any* of them was published with actual malice; and most of them are categorically non-actionable as a matter of law.

Accordingly, the Complaint should be dismissed for two reasons: (1) it fails to adequately allege a conspiratorial agreement between Mair and McClatchy, and (2) it fails to allege that Mair and McClatchy actually engaged in any defamation as part of this supposed agreement.

BACKGROUND

I. THE PARTIES

Representative Devin Nunes has served in the United States House of Representatives since 2003, and he currently represents California's 22nd Congressional District. (Compl. ¶ 4.)

Defendant the McClatchy Company is a publicly traded media company that owns newspapers and news websites, including the *Fresno Bee*. (*Id.* ¶¶ 8–9.) On February 13, 2020, McClatchy filed for Chapter 11 bankruptcy in the Southern District of New York.

Liz Mair is a right-of-center political commentator and communications strategist. (*Id.* ¶ 16.) She owns Mair Strategies LLC, a communications and public relations firm. (*Id.* ¶ 18.) For convenience, we refer to both Liz Mair and Mair Strategies LLC together as "Mair."

II. THE ALLEGATIONS

Nunes' core allegation is that McClatchy defamed him in an effort to sabotage his inquiry into the 2016 Clinton campaign and to derail his own 2018 congressional reelection campaign. (Compl. ¶¶ 2, 31(a).) Nunes further claims that McClatchy made these defamatory statements in furtherance of an unlawful conspiracy with Mair. (*Id.* ¶¶ 2, 17.)

A. The Yacht Article

Nunes' allegations principally concern an article published by McClatchy on May 23, 2018, entitled "A yacht, cocaine, prostitutes: Winery partly owned by Nunes sued after fundraiser event." (*Id.* ¶ 10; Mackenzie Mays, *A yacht, cocaine, prostitutes: Winery partly owned by Nunes sued after fundraiser event*, THE FRESNO BEE (May 23, 2018) (Ex. A) (hereinafter "Yacht

Article").)[1] This article reported on a California lawsuit brought by Alene Anase, an employee of the Alpha Omega Winery—in which Nunes was (and still is) a limited partner. (Compl. ¶ 11.) As reported in the article, Anase alleged in her suit that the winery auctioned off a yacht cruise to raise money for charity and, on that cruise, guests used cocaine and had sex with prostitutes who appeared to be underage. (*Id.* ¶ 11.) The Yacht Article remarked on Nunes' involvement in the winery: "While Nunes' ties to Alpha Omega made national headlines last year because it was discovered the winery sold wine to Russian clients while the congressman was at the helm of a federal investigation of Russian meddling into the presidential election, there has been little mention of the lawsuit." (*Id.* ¶ 14(c) (hereinafter "Wine Statement").) McClatchy later edited this statement to read as follows: "Nunes' ties to Alpha Omega made national headlines last year because it was discovered the winery sold wine to Russian clients in 2013. The discovery came amid Nunes' ongoing involvement in a federal investigation of Russian meddling into the presidential election." (*Id.*) Nunes alleges that the title of the Yacht Article, and various statements within the article, were false and defamatory and were published as part of a political attack against him. (*Id.* ¶¶ 12, 14.)

B. Other Alleged Defamatory Statements

Nunes claims that McClatchy published five other defamatory statements about him:

(1) The *Bee* Editorial. On May 31, 2018, the *Fresno Bee* Editorial Board published an op-ed that included this statement about Nunes' response to the Yacht allegations:

> [O]n the one hand, you can give your account of what you understood the situation to be, explain how what happened on the boat was repugnant to your values, and explain why you continue to be an investor. Chances are the answers would be straightforward. The affair would likely fade from view. But if you are Devin Nunes, you choose to be silent and offer no answers to The Bee's questions.' McClatchy further stated that 'it would be hard to imagine he [Nunes] did not learn

[1] On review of a demurrer, the court may consider any document "essential to" the Complaint. *Station # 2, LLC v. Lynch*, 75 Va. Cir. 179, 190, 2008 WL 8083417, at *2 (2008).

> of this ill-fated cruise soon after it happened since Robin Baggett, the winery owner, is a good friend of the congressman's who invited him to invest in the first place.

(Compl. ¶ 26(a).) Nunes alleges that this statement defamed him by implication. (*Id.*)

(2) The ADLF Article. On June 8, 2018, McClatchy published a story that quoted from an Office of Congressional Ethics complaint filed against Nunes by the American Democracy Legal Fund (ADLF), seeking an "investigat[ion] as to whether Nunes was on the yacht." (Compl. ¶ 26(b)). Nunes alleges that the "ethics complaint was a sham," McClatchy "had no business republishing the ADLF ethics complaint," and McClatchy defamed him by republishing it. (*Id.*)

(3) The Fake News Video. On June 14, 2018, McClatchy accused Nunes of lying and spreading "fake news" about the *Fresno Bee* in a YouTube video. (Compl. ¶ 26(c).) Nunes alleges that this accusation was itself false and defamatory. (*Id.*)

(4) The Swamp Accountability Article. On July 11, 2018, McClatchy published a story about Congressional ethics complaints filed against Nunes by the Campaign for Accountability and the Swamp Accountability Project, which is operated by Mair. (Compl. ¶ 26(d).) Nunes alleges that "[t]he complaints were total shams" and that McClatchy defamed him by reporting on the ethics complaints without stating that Mair is an opposition research operative. (*See id.*)

(5) The FEC Quote. On July 19, 2018, McClatchy published an article that "accused Nunes of misusing campaign funds." (Compl. ¶ 26(e).) Mair was quoted in it as follows: "[T]he fact is, the FEC is not going to look favorably on a dude who uses his tax-exempt political entity like a personal slush fund, flying himself to Boston to watch [the Celtics] while apparently engaging in no activity relevant to the purpose of the political organization." (*Id.* ¶ 17.)

C. Nunes' Allegations Concerning Mair

On March 19, 2019, Nunes sued Mair, Twitter, and two anonymous Twitter users in the Circuit Court for Henrico County. *See Nunes v. Twitter, Inc., et al.*, No. CL19-1715, Compl.

(Henrico Mar. 19, 2019). There, his principal allegation against Mair is that she defamed him by tweeting about the Yacht Article. *Id.* at ¶ 7. Judge Marshall recently dismissed Nunes' claims against Twitter. *See Nunes v. Twitter, Inc., et al.*, No. CL19-1715, Dismissal Order with Prejudice (Henrico July 24, 2020). Mair has filed her Demurrer and Plea in Bar in the Henrico County case on the same day that she has filed this brief (August 3, 2020).

In this litigation, as discussed above, Nunes does not allege that Mair committed defamation. Instead, the only basis on which he seeks to impose liability is a theory of common law civil conspiracy. Broadly speaking, Nunes alleges that at some point, in some manner, Mair entered into a conspiracy with McClatchy and is therefore liable for McClatchy's alleged acts of defamation. (Compl. ¶¶ 33–37.) More specifically, Nunes' conspiracy allegations against Mair are based on the fact that Mair tweeted and retweeted McClatchy's articles concerning Nunes, sometimes on the same day those articles were published. (*See id.* ¶ 17, 19.) Nunes also alleges that "Mair pitched false narratives" and "egregious soundbites to McClatchy," which "simply republished [them] without any fact-checking." (*Id.* ¶ 17.) The only purported example of such conduct alleged in the Complaint is the above-cited FEC quote published by McClatchy.

Presumably to further his apparent goals of stifling and chilling criticism of his conduct while in office, Nunes requests as compensatory damages the absurd sum of $150 million, punitive damages of $350,000, and an "injunction against McClatchy." (*Id.* ¶ 42.) For reasons that follow, Mair demurs to the Complaint and respectfully requests dismissal of the claim against her.

STANDARD OF REVIEW

"To survive a challenge by demurrer, a pleading must be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." *Squire v. Virginia Hous. Dev. Auth.*, 287 Va. 507, 514 (2014). On a demurrer, the allegations in a well-pleaded complaint

are taken as true, *Parker v. Carilion Clinic*, 296 Va. 319, 330 (2018), but a plaintiff is entitled only to "reasonable" inferences from the facts alleged, *Coward v. Wellmont Health Sys.*, 295 Va. 351, 358–59 (2018). "Distinguishing between reasonable and unreasonable inferences is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *A.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 613 (2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). The court may not accept "conclusions of law camouflaged as factual allegations or inferences," *Sweely Holdings, LLC v. SunTrust Bank*, 296 Va. 367, 371 (2018), or "allegations that are . . . contradicted by other facts pleaded," *Parker*, 296 Va. at 330.

ARGUMENT

The Complaint fails to adequately allege a conspiratorial agreement between Mair and McClatchy. It also fails to allege that any of McClatchy's statements were in fact defamatory. Each of these deficiencies independently requires that the Complaint be dismissed.

I. FAILURE TO ALLEGE A CONSPIRATORIAL AGREEMENT

A. Legal Standard

In Virginia, a common-law civil conspiracy "consists of two or more persons combined to accomplish, by some concerted action, some criminal or unlawful purpose or some lawful purpose by a criminal or unlawful means." *Gelber v. Glock*, 293 Va. 497, 533–34 (2017). To state a conspiracy claim, a plaintiff must allege (1) that an "underlying tort was committed," *id.*; (2) an "agreement . . . to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means"; and (3) "that this agreement caused damage." *Lesner Pointe Condo. Ass'n, Inc. v. Harbour Point Bldg. Corp.*, 61 Va. Cir. 609, 2002 WL 32182354, at *7 (Va. Beach 2002).

The second element—an unlawful agreement—is the essence of a civil-conspiracy claim. A plaintiff must adequately allege "an agreement or understanding willingly entered . . . for the

accomplishment of an unlawful purpose." *Long v. Old Point Bank of Phoebus*, 41 Va. Cir. 409, 1997 WL 33616272, at *17 (Norfolk 1997). In other words, "[n]o conspiracy can exist without an agreement." *Johnson v. Kaugars*, 14 Va. Cir. 172, 1988 WL 619378, at *4 (Richmond 1988).

To avoid freewheeling accusations of hidden conspiracies, Virginia courts have long held that "common law conspiracy claims must be pleaded with particularity and not mere conclusory language." *TradeStaff & Co. v. Nogiec*, 77 Va. Cir. 77, 2008 WL 8201050, at *5 (Chesapeake 2008); *see also Peterson v. Bass*, 48 Va. Cir. 206, 1999 WL 33727578, at *3 (Warren 1999) (noting that the requirement that a plaintiff "[p]lead[] specific facts" to support her claim "is particularly important in fact specific cases like . . . civil conspiracy"). "[I]t is not enough merely to state that a conspiracy took place," but instead the plaintiff must precisely allege "some details of time and place and the alleged effect of the conspiracy." *Johnson*, 1988 WL 619378, at *3. In other words, to survive a demurrer, a plaintiff must plead "specific facts showing actual agreements." *Lesner Pointe Condo. Ass'n*, 2002 WL 32182354, at *19.

Bowman v. State Bank of Keysville, 229 Va. 534, 541 (1985), exemplifies this point. There, the plaintiffs claimed that the directors of a bank conspired with an official of another company to wrongfully terminate their employment. *See id.* These allegations, however, were too "conclusory" to support the existence of a conspiratorial agreement: the fact that the official threatened the plaintiffs, and then attended the meeting where the bank directors decided to fire the plaintiffs, was insufficient to infer the existence of any agreement between him and the bank's directors. *Id.* As the court emphasized, "[t]he conspiracy theory [was] asserted in mere conclusory language and the argument in support of the theory is based on inferences that are not fairly and justly drawn from the facts alleged." *Id.* (affirming grant of demurrer).

A similar rule governed the outcome in *Johnson v. Kaugars*, where a dentist alleged that the defendant conspired with others to injure his practice by sending the state dental board false information. 1988 WL 619378, at *1. Judge Markow concluded that the dentist's allegations of a conspiratorial agreement were too conclusory, since they lacked any "details of time and place and the alleged effect of the conspiracy." *Id.* at *3. He emphasized that "it is not enough merely to state that a conspiracy took place," and that plaintiffs must allege that the "co-conspirators formally or actually met or verbally agreed to engage in [unlawful] conduct." *Id.* at * 4; *see also Long*, 1997 WL 33616272 at *17 ("Simply pleading that [Defendant] 'caused' the trustee to take some action does not provide any evidence that [Defendant] and the Trustee *agreed* to accomplish this act."); *Connor v. Real Title Corp.*, 165 F.2d 291, 294 (4th Cir. 1947) (concluding that allegations of "a vicious conspiracy and collaboration" were insufficient because they were "much too vague and general"). Indeed, in a recent conspiracy case that Nunes filed in the United States District Court for the Eastern District of Virginia, Judge O'Grady dismissed Nunes' claims in a succinct, two-page order, reasoning that they included "many rote statements of law and conclusory allegations which fall short of satisfying the [federal pleading standard]." Order, Dkt. No. 34 at 2, *Nunes v. Fusion GPS*, No. 19 Civ. 1148 (E.D. Va. Feb. 21, 2020). Of course, Virginia courts evaluate conspiracy allegations at the pleading stage with the same rigor as federal courts. *See Church of God in Christ, Inc.*, 297 Va. at 613.

B. Nunes' Allegations Are Deficient as a Matter of Law

Under the cases recited above, Nunes' conspiracy allegations are far too conclusory to survive a demurrer, as he fails to adequately allege any agreement between Mair and McClatchy.

Nunes seeks to hold Mair liable for McClatchy's statements by alleging that she and McClatchy "were engaged in a joint effort . . . to defame him." (Compl. ¶ 19.) But this vague

allegation of a "joint effort" is not enough by itself, since it alleges a legal conclusion—namely, that there was a conspiratorial agreement. *See Bowman*, 229 Va. at 541. The key question is what "specific" factual allegations support this conclusory claim. *Peterson*, 1999 WL 33727578, at *3. The Complaint offers only two such allegations. *First*, it alleges that "Mair pitched false narratives" and "McClatchy printed them." (Compl. ¶ 17, 26(d)–(e).) Here the Complaint refers to two McClatchy articles, one of which merely quotes from a public Congressional ethics complaint filed by Mair, and the other of which quotes Mair's opinion on how the Federal Election Commission (FEC) might react to certain accusations against Nunes. *Second*, Nunes alleges that "the tweets, retweets, replies and likes by Mair and McClatchy reporters demonstrates that McClatchy and Mair were engaged in a joint effort." (Compl. ¶ 19; *see also id.* ¶¶ 17, 26(e) n.22.)

On their face—and as a matter of law—these factual allegations are insufficient to infer the existence of a conspiratorial agreement. Nowhere does Nunes allege the "time and place" when this agreement was supposedly created. *Johnson*, 1988 WL 619378, at * 3. Nor does he allege that Mair and McClatchy ever "formally or actually met or verbally agreed to engage in [unlawful] conduct." *Id.* at *4. Under the cases cited above, these deficiencies are decisive: Nunes fails to clear the minimum requirements for pleading a conspiratorial agreement.

Unable to satisfy Virginia law, Nunes seeks to cobble together a conspiracy theory from two McClatchy articles that quote Mair, plus Mair's pattern of retweeting articles. This effort, too, comes nowhere close to creating a reasonable inference that Mair and McClatchy conspired.

Starting with the quotations, it would defy common sense to infer a conspiracy from the fact that McClatchy reported on (and quoted from) an official, public ethics complaint that Mair submitted against Nunes. The filing of a formal ethics complaint against a Member of Congress is an objectively newsworthy event; the fact that Mair wrote this ethics complaint and McClatchy

reported on it does not reflect a secret conspiratorial agreement.[2] It is equally unreasonable to infer a conspiratorial agreement based on the allegation that McClatchy printed a quote from Mair about how the FEC might respond to certain accusations against Nunes. As Nunes concedes in the Complaint, Mair is a well-known political operative. (Compl. ¶ 16.) She has been quoted on political issues in a wide range of newspapers, magazines, and websites.[3] None of the allegations in the Complaint make it reasonable to infer that this particular quote, to this particular newspaper, was somehow given in furtherance of some kind of illegal agreement to publish illegal statements about Nunes. It simply cannot be the case that a newspaper is inferred to have entered into a conspiratorial agreement with everyone it quotes in its articles and op-eds.[4]

This leaves Nunes' effort to infer a conspiracy from a series of "tweets, retweets, replies and likes by Mair and McClatchy reporters." (Compl. ¶ 19.) Nowhere does the Complaint allege that this Twitter activity included any statements by Mair or McClatchy reporters referring to any sort of mutual agreement. The Complaint instead asks the Court to infer an unlawful agreement from the bare fact that Mair tweeted, retweeted, and liked McClatchy pieces that were critical of Nunes. This is unsupportable as both a matter of law and logic. People use social media with many motives and "engage with one another in a variety of ways." *Knight First Amendment Inst.*

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[2] Unsurprisingly, McClatchy was not the only news organization to publish coverage addressing Mair's ethics complaint against Nunes. *See, e.g.*, Aris Folley, *Activist group trolls Nunes with new sneakers to wear while 'evading questions'*, THE HILL (July 26, 2018 11:25 AM).

[3] *See, e.g.*, Liz Mair, *Who Speaks for the Mountain West?*, N.Y. TIMES (May 8, 2019); Liz Mair, *The Trump Presidency: A Success Story*, U.S. NEWS AND WORLD REPORT (Dec. 21, 2017 10:55 AM); Liz Mair, *The Blue Wave Happened Because Republicans Were Lazy*, DAILY BEAST (Dec. 26, 2019 2:42 AM). To be clear, these articles are cited not for the truth of any assertions they make, but merely for the fact of their publication. While assessing Mair's demurrer, the court may properly take judicial notice of the fact that Mair authored these articles and that the respective sources published them, because such facts are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Va. Sup. Ct. R. 2:201(a).

[4] Nunes alleges that McClatchy did not fact-check Mair's quote. (*See* Compl. ¶ 17.) But Mair's quote is a statement of opinion about what the FEC *might* do in response claims against Nunes, not a statement of fact subject to fact-checking. In any event, not fact-checking this single quote from Mair hardly indicates an illegal agreement.

at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 551 (S.D.N.Y. 2018). For that reason, a person's decision to promote certain newspaper articles on social media generally cannot support a reasonable inference that she has entered into an unlawful conspiracy with the newspaper that published those articles. If that were the case, millions of Americans would be engaging in illegal conspiracies every day. Nor is it nefarious for a political commentator to tweet articles from a newspaper in which she has previously been quoted once or twice; such commonplace conduct does not reasonably imply a secret plot with the newspaper. Accordingly, the allegations in the Complaint offer no basis whatsoever for inferring an actual, specific meeting of the minds between Mair and McClatchy that resulted in an agreement to defame him.

This conclusion is consistent with (and follows from) precedent. We are aware of no case upholding a conspiratorial agreement based on allegations resembling those here. In contrast, courts have repeatedly held that conspiracy allegations arising from supposedly suspicious patterns of social media activity fail to adequately allege a conspiratorial agreement. *See, e.g.*, *Alharbi v. Miller*, 368 F. Supp. 3d 527, 568 (E.D.N.Y. 2019) (dismissing conspiracy claim where plaintiffs alleged, among other things, that one defendant had "retweeted anti-Muslim propaganda" in a manner consistent with the alleged conspiracy); *Sparrow Fund Mgmt. LP v. MiMedx Grp., Inc.*, No. 18 Civ. 4921, 2018 WL 8545604, at *9 (S.D.N.Y. Dec. 14, 2018) (dismissing conspiracy claim based on the "sheer timing of statements" by defendants on social media); *Ascend Health Corp. v. Wells*, No. 412 Civ. 83, 2013 WL 1010589, at *11 (E.D.N.C. Mar. 14, 2013) (dismissing allegations of conspiracy where defendant allegedly "re-posted others' defamatory statements [on her blogs]" and holding that such allegations of online activity do "not support an inference that defendants specifically intended to agree amongst themselves to defame plaintiffs").

At bottom, the Complaint seeks to punish Mair for a perfectly ordinary exercise of her free speech rights. That is dangerous. There are many elected officials in this country. Most of them will, at some point, face strong criticism in local newspapers. And that criticism will be shared and debated on social media—especially by people who make their living in politics. This is how a democracy is supposed to work. By asking the Court to infer that such conduct suggests an illegal conspiracy, Nunes would expose Mair, and other private citizens, to the chilling threat of litigation whenever they retweet articles criticizing him and make statements opposing him. This theory defies reason and common sense. It is inconsistent with principles of our constitutional system. And it is contradicted by cases dismissing similarly flawed conspiracy allegations at the demurrer stage. For these reasons, the conspiracy allegations against Mair should be dismissed.

II. FAILURE TO ALLEGE DEFAMATION

Nunes' claims against Mair should also be dismissed because none of the six alleged statements published by McClatchy are actually defamatory. *See Gelber*, 293 Va. at 534 ("[A] common law claim of civil conspiracy generally requires proof that the underlying tort was committed."). To state a claim for defamation, Nunes must allege "(1) publication of (2) an actionable statement with (3) the requisite intent." *Shaecher v. Bouffault*, 290 Va. 83, 91 (2015). The Complaint fails to meet this standard: a majority of the alleged statements are not pleaded in their exact words or are not actionable as a matter of law; and none of the statements is alleged to have been published with the requisite intent (namely, actual malice).

A. Failure to Satisfy the "Exact Words" Pleading Requirement

It is blackletter law that defamation pleadings "must purport to give the exact words" upon which a claim is based. *Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 132, 134 (2003) (quoting *Federal Land Bank of Baltimore v. Birchfield*, 173 Va. 200, 215 (1939)). General

allegations are insufficient, even if they include "a few small quotations." *Owens v. DRS Auto. Fantomworks, Inc.*, 87 Va. Cir. 30, 2013 WL 9419657, at *2 (Norfolk 2013). The words provided must be exact—and must be provided with sufficient "context with which to interpret their meaning." *Id.* Failure to satisfy this "exact words" requirement requires dismissal. *Id.*

Four statements in the Complaint must be dismissed on that basis. As to the "Fake News Video," the Complaint vaguely describes a YouTube video and quotes only two exact words ("fake news") from that video without providing their specific context. (Compl. ¶ 26(c).) As to the ADLF Article, the Complaint provides only two brief quotes without context—one attributed to the treasurer of the ADLF and the other a sentence fragment reporting that ADLF asked the Office of Congressional Ethics to "investigate whether Nunes was on the yacht." (*Id.* ¶ 26(b).) As to the Swamp Accountability Article, the Complaint includes only a couple of sentence fragments (*e.g.*, "anti-Trump group in D.C.") without context and without specifying that these phrases are in fact allegedly defamatory. (*Id.* ¶ 26(d).) Finally, the FEC quote attributed to Mair starts mid-sentence and is alleged without any surrounding words or specific context. (*Id.* ¶¶ 17, 26(e).) This is *exactly* the form of imprecise pleading forbidden by Virginia's "exact words" requirement; the Complaint's defamation claims based on each of these statements must therefore be dismissed. *See Owens*, 2013 WL 9419657, at *2 (granting demurrer for failure to plead exact words).

B. Failure to Allege Actionable Statements

For a statement to be "actionable," it must be false and defamatory. *Fuste*, 265 at 132–33. A statement is false only if it contains specific, provably false assertions of fact; statements of opinion and political hyperbole cannot be false. *Cashion v. Smith*, 286 Va. 327, 336, 339–40 (2013). A statement is defamatory if it "imputes the commission of a criminal offense involving moral turpitude for which a party may be convicted," "imputes an unfitness to perform the duties

of a job or a lack of integrity in the performance of the duties," or "prejudices the party in her profession or trade." *Yeagle v. Collegiate Times*, 255 Va. 293, 297 n.2 (1998). "[E]nsuring that defamation actions proceed only upon statements which may actually defame a plaintiff is an essential gatekeeping function of the court." *Pendleton v. Newsome*, 290 Va. 162, 172 (2015). While a statement may be defamatory by implication, that rule applies only where the challenged assertion is "reasonably capable" of supporting a defamatory meaning. *Webb v. Virginian-Pilot Media Companies, LLC*, 287 Va. 84, 89 (2014). "[T]he meaning of the alleged defamatory language cannot, by innuendo, be extended beyond its ordinary and common acceptation, nor can innuendo "extend the meaning of the words used, or make that certain which is in fact uncertain." *Id.* at 89–90. Here, the Yacht Article, *Bee* Editorial, Swamp Accountability Article, and ADLF Article are non-actionable as a matter of law because they are not reasonably subject to a defamatory interpretation, they express mere opinions, or they are protected by the fair report privilege.

1. The Yacht Article: On its face, this article does not accuse Nunes of wrongdoing. He thus resorts to alleging that it defamed him by implication—that its "gist" was that he "was involved in the cocaine/sex fueled 'fundraiser.'" (Compl. ¶ 12.) Nunes asks the Court to draw this inference from photos of him in the article and the article's headline: "A Yacht, cocaine, prostitutes: Winery partly owned by Nunes sued after fundraiser event." (*Id.*). But that inference is unsupported by the plain language of the article. The headline states only that Nunes is a partial owner of a winery that has been sued. The article itself then explicitly states that the cruise was a "charity fundraiser" and quotes the winery's communications director as stating "no one aboard the yacht that night had any connection to the winery or its owners." (*Id.* & n.6.); *see also Webb*, 287 Va. at 90 (noting that "article disclaimed [defamatory] implication by quoting the

spokesperson's denial"). In light of these statements, the Yacht Article does not imply that this event was a political fundraiser for Nunes, that Nunes was aboard the yacht, or that Nunes was involved with cocaine or prostitutes. It instead notes that serious allegations have been raised against the winery in a civil lawsuit and raises questions about Nunes' ongoing investment in a business facing such charges. That is valid journalism, not defamation.[5]

2. The Bee Editorial: Because this is an editorial, it is presumptively a statement of opinion and thus non-actionable as a matter of law. *See* Robert D. Sack, *Sack on Defamation* § 4:3.1 (4th ed. 2011) ("If a statement appears in a place usually devoted to, or in a manner usually thought of as representing personal viewpoints, it is also likely to be understood—and deemed by a court—to be nonactionable opinion."). Indeed, Nunes does not even allege that the editorial contains any specific false statements of fact. And the editorial does not reasonably imply that Nunes is "dishonest, unethical and concealing information." (Compl. ¶ 26(a).) It simply notes that he chose "to be silent and offer no answers to The Bee's questions" even though "the winery owner" is "a good friend of the congressman's" and might have informed of him "of this ill-fated cruise soon after it happened." (*Id.*) It is obviously not defamatory for a newspaper to observe that an elected official refused to answer questions about what he knew and when he knew it.

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[5] Although the Complaint also alleges that the article includes falsehoods, these allegations collapse upon scrutiny. *First*, noting that the winery had denied his involvement, Nunes alleges that the article falsely stated that "[i]t's unclear . . . if [Nunes] was . . . affiliated with the fundraiser." (Compl. ¶ 14(a).) But a statement that "uncertain[ty]" surrounds Nunes' relationship to the event—after quoting the winery's own public-relations statement about it and noting that "Nunes' office did not return requests for comment"—is not false and defamatory. *See Fuste*, 265 Va. 132-33. Indeed, the existence of some uncertainty is both attributable to, and proven to be true, by Nunes' own refusal to comment on the issue. *Second*, Nunes alleges that it was "unclear . . . if [Nunes] was aware of the lawsuit." (*Id.* ¶ 14(b).) But Nunes does not allege that he was in fact aware of the suit. Nor does he allege that he or his staff ever told the reporter that he was aware of the suit. In any event, it is a mystery how this statement—that he was unaware of a lawsuit—could be actionable in defamation. *Finally*, Nunes alleges that the article contained an unrelated falsehood about the timing of the winery's sales to Russian clients. (*Id.* ¶ 14(c).) But he then alleges that McClatchy corrected and clarified the statement after the Alpha Omega Winery raised a concern about its accuracy. (*Id.*) Notably, Nunes alleges no falsity in the statement "in its final form." (*Id.*)

3. The Swamp Accountability & ADLF Articles: Like most states, Virginia holds that statements are not actionable if they are shielded by a fair-report privilege. "The publication of public records to which everyone has a right of access is privileged, if the publication is a fair and substantially correct statement of the transcript of the record." *Alexandria Gazette Corp. v. West*, 198 Va. 154, 159 (1956). Notably, "[t]he record's privileged status is not [a]ffected by incorrectness or falsity." *Nystrom v. Servus Robots, L.L.C.*, No. LF-1517-3, 2000 WL 249246, at *7 (Va. Cir. Ct. Mar. 2, 2000). The privilege can be negated only by showing "an abuse of the privilege by malicious republication," but "the court may find from the undisputed facts, as a matter of law, that the privilege was not abused." *Id.*; *see also Dangerfield v. WAVY Broad., LLC*, 228 F. Supp. 3d 696, 706 (E.D. Va. 2017) ("It is for the court to determine, as a matter of law, whether a statement is privileged . . . ."). Generally speaking, the fair-report privilege "is based on public policy to further the right of free speech by protecting certain communications of public or social interests from liability for defamation that otherwise would be actionable." *Vaile v. Willick*, No. 07 Civ. 11, 2008 WL 2754975, at *6 (W.D. Va. July 14, 2008).

Under the fair-report privilege, the Swamp Accountability Project and ADLF Articles are non-actionable. A Congressional ethics complaint lodged against a sitting Member of Congress is "a public record[] to which everyone has a right of access," *Alexandria Gazette Corp.*, 198 Va. at 159, and evokes the policy concerns giving rise to the fair report privilege, *see Vaile*, 2008 WL 2754975, at *6. As a matter of law, Nunes cannot impose liability on McClatchy (or Mair) for publishing verbatim quotes from a Congressional ethics complaint. And nowhere does he allege that either of these articles failed to provide a "fair and substantially correct" account of the ethics

complaint; instead, he attacks the truth of the ethics complaint itself, which is irrelevant for purposes of the fair-report privilege. *See Nystrom*, 2000 WL 249246, at *7.[6]

C. Failure to Allege the Requisite Intent

For the reasons given above, the Complaint fails to allege that any supposed conspiracy between Mair and McClatchy resulted in the "underlying tort" of defamation being committed. *Gelber*, 293 Va. at 534. The Yacht Article and Bee Editorial are not actionable; the Fake News Video and FEC Quote are not alleged in their "exact words"; and the ADLF and Swamp Accountability Articles suffer from both of those defects. That should be the end of the matter.

Yet even if that were all mistaken, the defamation claim would still fail because none of the alleged defamatory statements was published with the "requisite intent." *Shaecher*, 290 Va. at 91. Since Nunes is a public official, the First Amendment requires him to adequately allege that any defamatory statement was published with "actual malice." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). In other words, he must allege that it was published with "knowledge that it was false" or with "reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *Jordan v. Kollman*, 269 Va. 569, 576 (2005). As many courts have affirmed, newspapers are entitled to rely on reputable sources—or even "more questionable" sources, unless a newspaper recklessly disregards clear reason to believe that they were lying. *See Ryan v. Brooks*, 634 F.2d 726, 732 (4th Cir. 1980); *see also Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (requiring a "high degree of awareness of [a statement's] probably falsity"). Moreover, to allege actual malice against a newspaper, a plaintiff must allege more than "highly unreasonable

[6] The ADLF Article is non-actionable as a matter of law for an independent reason: the alleged defamatory statement identified by Nunes is a quote (without any context) from Brad Woodhouse (ADLF's treasurer), and that quote is itself a statement of opinion rather than a statement of fact. *See Fuste*, 265 Va. at 132 ("Statements that are relative in nature and depend largely upon the speaker's viewpoint are expressions of opinion."). Woodhouse's statement about what "Nunes' constituents deserve" is a quintessential non-actionable opinion, as is his statement that "it is possible [Nunes] participated in illegal activity."

conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 664 (1989). Such allegations of "mere negligent error" are insufficient to state a claim. *Gazette, Inc. v. Harris*, 229 Va. 1, 16 (1985). Here, under those legal standards, the Complaint falls far short of adequately alleging that McClatchy acted with actual malice.

1. The Yacht Article: The Complaint offers little more than improper conclusory allegations that this article was published with actual malice. (Compl. ¶ 31(b), (d)). And that is not enough. *See, e.g.*, *Jarrett v. Goldman*, 67 Va. Cir. 361, 2005 WL 1323115, at *10 (Portsmouth May 31, 2005). The Complaint also alleges departures from journalistic standards—but that fails too. *See Harte-Hanks*, 491 U.S. at 666. As to most of the specific alleged defamatory statements in the article, the Complaint alleges nothing more. *See New York Times*, 376 U.S. at 280. And as to the Wine Statement—which concerned the timing of sales to Russians (Compl. ¶14(c))—the Complaint alleges at most a "mere negligent error" that McClatchy corrected after it received a statement from the winery. *See Gazette*, 229 Va. at 42; *see also New York Times*, 376 U.S. at 287-88 (finding only "negligence" where "the Times published the advertisement without checking its accuracy against the news stories in the Times' own files"). The Complaint thus offers no basis whatsoever for inferring that this minor misstatement of fact, which McClatchy promptly corrected, was either a deliberate lie or printed with knowledge of its probable falsity.[7]

2. The Bee Editorial: The Complaint does not contain any specific allegations of actual malice respecting any statement in the Bee Editorial. (Compl. ¶¶ 14(d), 26(a).) To the extent it

[7] More broadly, the Complaint alleges that "McClatchy and its reporters exhibited an "institutional hatred for Nunes, spite, ill-will and the intent to hurt Nunes and impugn his character." (Compl ¶ 31(c)). But "[a]ctual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991). Therefore, "proof of a media defendant's ill will toward a public figure plaintiff is, without more, insufficient to establish knowledge of falsity or reckless disregard for the truth." *Jackson v. Hartig*, 274 Va. 219, 231 (2007).

relies on more general allegations of institutional ill-will toward Nunes, or on allegations that the newspaper varied from journalistic standards, those allegations are deficient as a matter of law.

3. The Swamp Accountability & ADLF Articles: The Complaint improperly contains only stray quotes from these articles. Regardless, it does not allege that either article misquoted the ethics complaints filed against Nunes, or that any statement in either article was false. As to the Swamp Accountability Article, Nunes alleges only that its author should have said more about the Swamp Accountability Project (which filed the ethics complaint) than she did in describing it as an "anti-Trump group in D.C." (Compl. ¶ 26(d).) But Nunes does not allege that this description of the Swamp Accountability Project (which appeared in the article) is false. At the very most, that supposed failure to say more about the group amounts to an allegation of negligence, not an allegation of actual malice; otherwise, every elected official who wished that a journalist had provided more context about a critic could sue for defamation. As to the ADLF Article, Nunes alleges that McClatchy "had no business republishing the ADLF ethics complaint" because "there were obvious reasons" to "doubt [its] veracity." (*Id.* ¶ 26(b)). But Nunes does not actually allege that the article described the allegations in the ethics complaint as true. According to the Complaint, McClatchy merely observed that "the ADLF complaint asked the Office of Congressional Ethics . . . to 'investigate whether Nunes was on the yacht.'" (*Id.*) Nunes does not allege that this description of the ethics complaint—or the quotation from it—were false. That forecloses his defamation claim: it is not illegal, or an indicator of actual malice, for a newspaper to accurately describe and quote from an ethics complaint filed against a Member of Congress, even if the newspaper may have reason to doubt certain allegations included in the complaint.

4. The FEC Quote: The Complaint includes no specific factual allegations indicating that McClatchy or Mair either actually knew, or clearly should have known, that any part of this quote was false. (*See* Compl. ¶ 26(e).) Nunes has therefore failed to allege actual malice.[8]

* * * * *

Under a straightforward application of Virginia law, the Complaint should be dismissed. It fails to adequately allege any conspiratorial agreement between Mair and McClatchy, and it fails to adequately allege that McClatchy published any truly defamatory statements in furtherance of this supposed conspiracy. Compliance with those threshold legal requirements is particularly important in a case like this one, where a Member of Congress seeks to hold a private citizen liable for criticizing him. As precedent makes clear, before elected officials can chill speech by inflicting the burdens of discovery and trial, they must allege more—much more—than Nunes has done here. Citizens are free to give quotes, and tweet articles, critical of politicians. They are free to file lawsuits and submit ethics complaints. Newspapers are free to report on all that. Such conduct is not a sign of illegal conspiracy. It is the lifeblood of our democratic system.

CONCLUSION

For the foregoing reasons, Mair respectfully requests that this Court sustain her demurrer and dismiss the Complaint.

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[8] A review of the article itself confirms the point. *See* Kate Irby, *Nunes used political dollars for $15K in Celtics tickets, winery tours and Vegas trips*, MCCLATCHY D.C. (July 19, 2018). The article discloses that Mair heads the Swamp Accountability Project, "which has been funding ads targeting Nunes." And it bases its specific factual claims about Nunes—which are the subject of Mair's quote—on "reports from the Federal Election Commission and two nonpartisan watchdog groups." This reliance on reputable sources defeats any allegation of actual malice.

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Respectfully submitted,

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