20-1368(L); 20-1437

United States Court of Appeals

for the

Fourth Circuit

SVETLANA LOKHOVA,

Plaintiff-Appellant,

– v. –

STEFAN A. HALPER; DOW JONES & COMPANY, INCORPORATED, d/b/a The Wall Street Journal; THE NEW YORK TIMES COMPANY; WP COMPANY LLC, d/b/a The Washington Post; NBCUNIVERSAL MEDIA, LLC, d/b/a MSNBC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

OPENING BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1368 Caption: Lokhova v. Halper

Pursuant to FRAP 26.1 and Local Rule 26.1,

Svetlana Lokhova
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Steven S. Biss Date: 04/14/2020

Counsel for: Appellant, Svetlana Lokhova

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

Page No.

Page No.

Page No.

Page No.

Page No.

Page No.

JURISDICTIONAL STATEMENT[1]

The basis of the District Court's subject matter jurisdiction is 28 U.S.C. § 1332 (diversity jurisdiction). The parties are citizens of different States and the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs. [*JA, p. 27*].

The basis for the Court of Appeals' jurisdiction is 28 U.S.C. § 1291 (final decision of the District Court). On February 27, 2020, the District Court entered an Order, which is a final decision in this matter. [*JA, p. 349*].

On March 27, 2020, Plaintiff, Svetlana Lokhova ("Lokhova"), timely filed notice of appeal to the United States Court of Appeals for the Fourth Circuit pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure ("FRAP"). Lokhova appeals the District Court's Order granting motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure filed by defendants, Stefan A. Halper, Dow Jones & Company, Inc., The New York Times Company, WP Company, LLC d/b/a The Washington Post, and NBCUniversal Media, LLC d/b/a MSNBC, entered in this action on February 27, 2020. [*JA, pp. 351-355*].

This Appeal is from a final order or judgment that disposes of all parties' claims.

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[1] Appellant's Brief will refer to the Joint Appendix as "*JA*" and will cite to the specific page numbers of the Joint Appendix. *E.g., "JA, p. 1"*.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Lokhova presents the following issues for review:

1. Did the District Court follow the proper standard in evaluating Lokhova's amended complaint or did the District Court view the amended complaint in a light most favorable to the Defendants? Was it appropriate to reach the Defendants' statute of limitations defenses on a motion to dismiss under Rule 12(b)(6) or is the question of republication a factual issue for the jury?

2. Does the "single publication rule" apply to tweets, retweets, replies and likes of original defamatory content by users of Twitter?

3. Each time a defamatory tweet is republished to a new target audience via Twitter does the statute of limitations begin to run anew?

4. Does the republication doctrine apply only to republication by the defendant himself? Or, does it apply whenever any person, including a third party, republishes (tweets, retweets, replies or likes) a defamatory statement to their followers via Twitter?

5. Does the intentional publication of a hyperlink to a previously published article constitute republication?

6. Is the answer different if the hyperlink is published to a different target audience, where, for example, a hyperlink to an online article is republished via Twitter in an effort to garner a wider audience?

7. Is *Weaver v. Beneficial Finance Co.*, a Virginia Supreme Court decision "issued over 60 years ago, well before the advent of the internet and Twitter" [*JA, p. 315*], controlling? Did the District Court err in applying it to the facts of this case?

8. In the new age of social media, does holding a media defendant liable for subsequent dissemination of its defamatory content by third parties via Twitter, Facebook, YouTube or other forms of electronic distribution undermine First Amendment protections of the press and render the statute of limitations meaningless? Or, are there rules already in place, such as the fair report privilege, to ameliorate the "chilling effect" of the republication doctrine?

9. Did Lokhova's amended complaint adequately identify Halper as the "source" of the defamatory statements given to various non-defendant media outlets, such that Halper is liable for republication of those defamatory statements by the non-defendant media outlets and other third parties?

10. Is Halper liable for subsequent republications of his intentionally defamatory statements under *Moore v. Allied Chemical Corp.*, 480 F.Supp. 364 (E.D. Va. 1979)?

11. Is *Moore* of limited value simply because it was decided "more than 30 years ago"? [*JA, p. 319*].

12. Do the Post Article, the statements by MSNBC's producer, and the July 2018 tweets by Malcolm Nance contain actionable statements?

13. Did Lokhova plead sufficient facts to support MSNBC's liability for Nance's statements and the statement republished by MSNBC's producer under the doctrine of *respondeat superior*?

14. Did the District Court err in dismissing Lokhova's civil conspiracy claim, where Lokhova alleged that Halper and his Cambridge associates combined to tortiously interfere with Lokhova's contracts and business expectations?

15. Did the District Court err in dismissing Lokhova's claim against Halper for tortious interference with contract and business expectations?

STATEMENT OF THE CASE AND RELEVANT FACTS

Lokhova commenced this action on May 23, 2019. She filed an amended complaint on August 29, 2019, alleging claims of defamation, common law conspiracy and tortious interference with contract and business expectations against defendants, Stefan A. Halper ("Halper"), Dow Jones & Company, Inc. d/b/a the Wall Street Journal ("Dow Jones"), The New York Times Company ("Times"), WP Company, LLC d/b/a The Washington Post ("Post"), and NBCUniversal Media, LLC d/b/a MSNBC. [*JA, pp. 16-89*].[2]

[2] Lokhova also named Malcolm Nance ("Nance") as a defendant in her amended complaint, but did not serve Nance.

On September 12, 2019, the defendants each filed motions to dismiss Lokhova's amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. [*JA, pp. 90-243*]. Halper also filed a motion to dismiss pursuant to Rule 12(b)(1), claiming that Lokhova lacked standing to bring her claim of tortious interference with contract. [*JA, p. 167*].

On October 25, 2019, the parties appeared for argument on the defendants' motions. No evidence was introduced. By Order entered February 27, 2020, the District Court granted defendants' motions to dismiss. [*JA, pp. 244-288, 349*].

Lokhova timely appealed to the Court of Appeals. [*JA, pp. 351-355*].

Facts Relevant To The Issues Submitted For Review

Stefan Halper is a veteran political operative, who has been directly involved in clandestine dirty tricks campaigns for almost four (4) decades. [*JA, pp. 17-18*]. This is a case about lies manufactured by Halper and his confederates to promote a false and discredited narrative: that members of the Trump campaign – specifically General Michael Flynn – colluded with Russians. Lokhova was the "Russian" and the latest victim of Halper's dirty tricks. At issue is Lokhova's untarnished name and impeccable reputation in academia and historic scholarship and her book deals, all of which was damaged by Halper and the media defendants' misconduct.

On November 8, 2016, Donald J. Trump was duly elected President of the United States of America. Beginning in December 2016, Halper orchestrated the publication of a series of false and defamatory statements about Lokhova and General Flynn in furtherance of a conspiracy to topple the Trump Presidency. Many of the statements published by Halper were expressly libelous and many were defamatory by implication.[3]

Lokhova's amended complaint identifies the following false and defamatory statements:

Halper

- "Halper misrepresented, directly or by implication, that Plaintiff was a 'Russian spy' and a traitor to her country (the United Kingdom), that Plaintiff had an affair with General Flynn, and that Plaintiff had compromised General Flynn. Halper … assert[ed] that Plaintiff was not a real academic and that her research was provided by Russian intelligence on the orders of Vladimir Putin."
  [*JA, p. 19 (Amended Complaint, ¶ 4)*]

- Halper stated that he resigned from the Cambridge Intelligence Seminar ("CIS") "because of concerns over what [he feared] could be a Kremlin-backed operation to compromise the group" and due to "unacceptable Russian influence on the group".
  [*JA, p. 43 (Amended Complaint, ¶¶ 84-85)*]

[3] Statements, even if literally true, that are intended by the defendant to express a defamatory implication and that, in light of the circumstances prevailing at the time they were made, convey that defamatory innuendo are actionable. *Pendleton v. Newsome*, 290 Va. 162, 174, 772 S.E.2d 759 (2015).

- Halper told Sean O'Neill, a chief reporter with *The Sunday Times* of London that Lokhova was a "Russian spy".
[*JA, pp. 43-44 (Amended Complaint, ¶¶ 88-89)*]

- Halper told Dow Jones that "Lokhova and Flynn had an affair".[4]
[*JA, pp. 48-49 (Amended Complaint, ¶¶ 102-107)*]

- Halper was the source of the false statements, implications and insinuations in the WSJ Article, the Guardian Article, the Mail and Telegraph Articles, the NYT Article, and the Post Article.
[*JA, pp. 50, 54, 58, 70-71, 74 (Amended Complaint, ¶¶ 110, 120, 126-127, 157, 162, 166)*]

- Halper was the source of John Brennan's "concerns" that General Flynn had been compromised by "Russian" intelligence agencies.
[*JA, pp. 65-66 (Amended Complaint, ¶¶ 146-147)*]

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[4] Lokhova's allegations about Halper and the scheme to manufacture evidence of "Russian collusion" have been corroborated by two recently released documents. First, on April 29, 2020, the Department of Justice released an FBI "Closing Communication" which confirmed that Halper told the FBI in 2016/2017 that after the February 28, 2014 dinner Lokhova "surprised everyone and got into CR's [Flynn's] cab and joined CR on the train ride to [redacted]." *United States v. Flynn*, Case 1:17-cr-00232-EGS (Document 189-1). Second, on May 7, 2020, the House Permanent Select Committee on Intelligence released the transcript of the December 2017 testimony of David J. Kramer ("Kramer"). Kramer testified that Christopher Steele told him that "Mr. Flynn had an extramarital affair with a Russian woman in the U.K [who] … may have been a dual citizen." [https://dailycaller.com/2020/05/08/christopher-steele-michael-flynn-lokhova/]. Lokhova plausibly alleged claims against Halper and, obviously, should have been permitted to obtain discovery to support her claims.

The Andrew Article

- Halper enlisted his Cambridge University ("Cambridge") associates, Richard Dearlove and Christopher Andrew, in the scheme to defame Lokhova and General Flynn.[5]

- The Andrew Article, published on February 19, 2017 in furtherance of the conspiracy, falsely states that General Flynn asked Lokhova to travel with him as a translator to Moscow on his next official visit and that General Flynn signed emails to Lokhova as "General Misha". [*JA, p. 4 (Amended Complaint"), ¶¶ 93-95)*]

The WSJ Article[6]

- On March 17, 2017, Dow Jones published an article, entitled "**Mike Flynn Didn't Report 2014 Interaction With Russian-British National**". [*JA, p. 48 (Amended Complaint, ¶ 102)*].

- The gist and defamatory implication of the WSJ Article was that Lokhova engaged in unlawful or suspicious interactions with General Flynn on behalf of the Russia government that should have been reported to the Defense Intelligence Agency ("DIA").

- The WSJ Article is intentionally laden with false facts in order to support Halper's preconceived false narrative:

  - ► The WSJ Article falsely refers to the February 2014 dinner as a "U.K. security conference".

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[5] It is well-established that each co-conspirator is liable for the tortious acts of the other committed in furtherance of the unlawful project. *Pinkerton v. United States*, 328 U.S. 640, 646-647 (1946); *id. McFarland v. McFarland*, 684 F.Supp.2d 1073, 1085 (N.D. Iowa 2010); *In re Orthopedic Bone Screw Products Liability Litigation*, 1997 WL 186325, at * 17 (E.D. Pa. 1997).

[6] The fact that Halper was the original source of the false statements about Lokhova is born out by statements made to Lokhova by fellow academics at Cambridge. [*See, e.g., JA, pp. 48-49 (Amended Complaint, ¶ 105)*].

- The WSJ Article falsely states that General Flynn's contact with Lokhova at the Cambridge dinner "came to the notice of US intelligence".

- The WSJ Article falsely states that Lokhova was a "foreign stranger".

- The WSJ Article omits the fact that Lokhova was invited to the dinner by Dearlove and the fact that her research was pre-reported to the DIA.

- The WSJ Article falsely insinuates and implies that General Flynn and Lokhova had engaged in "anomalous behavior" and that there were inappropriate interactions between the two.

- The WSJ Article falsely states that Lokhova worked for "Russia's state-controlled Sberbank".

- The WSJ Article falsely insinuates that the "contact" between General Flynn and Lokhova at the February 2014 dinner might be the subject of the FBI's "wide-ranging counterintelligence probe into any contacts that Trump campaign personnel may have had with Russian officials". The dinner was not the subject of the FBI's so-called "Operation Hurricane". The FBI dropped its investigation of General Flynn on January 4, 2017 and a search of law enforcement databases returned no "derogatory information" concerned Lokhova.

- The WSJ Article falsely states that Lokhova "approached Mr. Flynn at the start" (untrue) and "sat next" to him (false).

- The WSJ Article portrays Lokhova and her behavior as so suspicious that it leaves the reader in no doubt that Lokhova was an agent of an "adversarial power".
[*JA, pp. 50-51 (Amended Complaint, ¶ 111)*][7]

[7] Even though Cambridge University Professor Neil Kent emailed Dow Jones to correct the grave errors in the WSJ Article, Dow Jones refused to correct or retract the publication. [*JA, pp. 52-53 (Amended Complaint, ¶¶ 115-116)*].

The Guardian Article

- On March 31, 2017, the Guardian published an online story written by Luke Harding ("Harding"),[8] entitled "**Michael Flynn: new evidence spy chiefs had concerns about Russian ties**".
[*JA, p. 54 (Amended Complaint, ¶ 119)*].

- The Guardian Article is laden with false statements supplied by Halper:

  - ► The click-bait headline reads "**US and UK officials**[9] **were troubled by Moscow contacts and encounter with woman linked to Russian spy agency records**".

  - ► The Guardian Article falsely implies that Lokhova had special access to documents in the possession of the "GRU – Russia's military spy agency."

  - ► The Guardian Article falsely states that "US intelligence officials had serious concerns about Michael Flynn's appointment as the White House national security adviser because of his … encounter with a woman [Lokhova] who had trusted access to Russian spy agency records".

  - ► The Guardian Article repeats Andrew's misrepresentations about Lokhova in the Andrew Article.

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[8] It was obvious why Halper enlisted Harding in his scheme to publicize the false narrative about Lokhova and Flynn, Harding is a leading proponent of the failed "Russian collusion" narrative. He is a friend of Christopher Steele, putative author of the "Steele Dossier". In 2017, Harding published a book called "Collusion". An entire chapter of Harding's book is devoted to "General Misha". [https://www.penguinrandomhouse.com/books/566132/collusion-by-luke-harding/9780525562511/]. [*JA, p. 54 (Amended Complaint, ¶ 119 fn. 13)*].

[9] Throughout the various Articles, there are references to "US and UK officials" and the like. These so-called "officials" are Halper and Dearlove. The same sources recycle throughout each of the Articles.

► The Guardian Article was universally understood to imply that Lokhova was an agent of Russian intelligence and that she and General Flynn had engaged behavior that caused "US intelligence officials" "serious concerns".[10]
[*JA, pp. 54-55 (Amended Complaint, ¶¶ 121-122)*]

The Daily Mail and Telegraph Articles

- On March 31, 2017, the Daily Mail published a story about Lokhova and General Flynn, entitled "**Disgraced Trump aide, and questions over his meeting with Cambridge historian at Intelligence Seminar raised concerns among British and US security chiefs**".
[*JA, p. 57 (Amended Complaint, ¶ 125)*].

- On April 2, 2017, the Daily Telegraph published a story about Lokhova and General Flynn, entitled "**Cambridge University dragged into row over Donald Trump's ex-spy chief's links to Russia**".
[*JA, p. 57 (Amended Complaint, ¶ 125)*].

- The Telegraph Article falsely states that "Mr Flynn, a former lieutenant general in the US army, struck up a friendship at a Cambridge dinner with a Russian banker turned academic whom he then sought to enlist as a translator on an official trip to Moscow".

- The Telegraph further falsely states that "Mr. Flynn's encounter with Miss Lokhova was exposed in February" 2017 by Andrew.

- As with each and every one of the other defamatory Articles, the Telegraph Article was understood to have a defamatory meaning.
[https://twitter.com/LizMair/status/999070995037196289 ("**This is interesting. Always expect the Russians to infiltrate Cambridge :)**.
[*JA, p. 58 (Amended Complaint, ¶¶ 127-128)*]

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[10] Nance tweeted a link to the Guardian Article with the following message: "There it is. Flynn poss caught in FSB honeypot w/female Russian Intel asset". [https://twitter.com/MalcolmNance/status/848108731896352768; *JA, p. 56 (Amended Complaint, ¶ 122)*].

The NYT Article

- On May 18, 2018, the Times published an article, entitled **"F.B.I. Used Informant to Investigate Russia Ties to Campaign, Not to Spy, as Trump Claim**".
  [*JA, p. 69 (Amended Complaint, ¶ 155)*].

- The NYT Article contains many false and defamatory statements of and concerning Lokhova, including:

  ► "According to people[11] familiar with Mr. Flynn's visit to the intelligence seminar, the source [Halper] was alarmed by the general's apparent closeness with a Russian woman who was also in attendance."

  ► "The concern was strong enough that it prompted another person[12] to pass on a warning to the American authorities that Mr. Flynn could be compromised by Russian intelligence, according to two people familiar with the matter."
  [*JA, p. 70 (Amended Complaint, ¶ 158)*].

- Halper was not "alarmed by the general's apparent closeness" with Lokhova. No "closeness" was "apparent" to anyone at the dinner because Lokhova was never "close" to General Flynn. There was no basis for any belief that Lokhova had "compromised" General Flynn, let alone on behalf of Russian intelligence, and no "warning" was passed to "American authorities" in 2014. This is all a concerted lie concocted by Halper and Times reporter Adam Goldman.
  [*JA, p. 71 (Amended Complaint, ¶ 161)*].

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[11] One of the authors of the NYT Article, Mathew Rosenberg, told Lokhova that the "people" referred to in the NYT Article were Halper and Dearlove. [*JA, p. 70 (Amended Complaint, ¶ 158 fn. 17)*].

[12] The Times blindly published Halper's lies. If Halper was so concerned ("alarmed") in 2014 at a dinner he never attended, why did it take him over two (2) years to resign from the Seminar because of the "Kremlin-backed attempt to take over the group"? Further, if Halper had concerns about the "closeness" of General Flynn and Lokhova, why did Halper not report the matter himself? Why did "another person" pass on "a warning"?

- The Times coordinated its attack upon Lokhova and General Flynn with MSNBC. On May 18, 2018, Goldman appeared on MSNBC's *Rachel Maddow* Show, where Maddow repeated the false and defamatory statements published in the NYT Article. [*JA, p. 71 (Amended Complaint, ¶ 162)*].

- Goldman confirmed to Rachel Maddow that Halper was an FBI informant, and that Halper was the "source" of the NYT Article. [*JA, p. 71 (Amended Complaint, ¶ 162)*].[13]

The Post Article

- On June 5, 2018, the Post published a story, entitled "**Cambridge University perch gave FBI source access to top intelligence figures—and a cover as he reached out to Trump associates**". [*JA, p. 74 (Amended Complaint, ¶ 165)*].

- The Post Article contains the following false and defamatory statements:

  - "During a dinner Flynn attended, Halper and Dearlove were disconcerted by the attention the then-DIA chief showed to a Russian-born graduate student who regularly attended the seminars, according to people familiar with the episode". [*JA, pp. 74-75 (Amended Complaint, ¶¶ 170-171)*].

[13] The transcript of the broadcast clearly reveals that Goldman identified the "source" as an "American" who made contact with Papadopoulos on September 2 and "bumped in[to] Carter Page at a conference in Cambridge, England". These details, together with the description of the "informant" as an "American academic who teaches in Britain", positively identify the "source" as Halper.

MSNBC

- Lokhova's amended complaint alleges that MSNBC acted by and through its authorized agents, including Nance. Nance is "the chief terrorism" analyst for MSNBC. He maintains and operates an official Twitter account on which he conducts the business of "NBC/MSNBC". Nance made and tweeted the false and defamatory statements about Lokhova at issue in this action "during normal business hours and while performing the business of MSNBC". [*JA, pp. 26, 75-76 (Amended Complaint, ¶¶, 19, 173)*].

- On April 1, 2017, Nance called Lokhova a "honeypot" and a "Russian intel asset".[14] [*JA, p. 77 (Amended Complaint, ¶ 174)*].

- On May 6, 2017, MSNBC aired a program, entitled "**Nance: Was Flynn recruited by foreign powers?**", in which Nance specifically referred to Lokhova as a "Russian intelligence officer". Nance also called General Flynn "dirty" in an intelligence sense, implying that he had be compromised by Lokhova. [*JA, p. 77 (Amended Complaint, ¶ 175)*].

- After May 2018, MSNBC producer, Anna Schecter ("Schecter"), stated that "a colleague at NBCUniversal with '25 years intelligence experience' was laughing and saying that 'everyone at the CIA knows Flynn had an affair with Lokhova'". [*JA, pp. 78-79 (Amended Complaint, ¶ 177)*].

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[14] A "honeypot" is a spy (typically attractive and female) who uses sex to trap and blackmail a target. [https://en.wiktionary.org/wiki/honeypot; *see* https://twitter.com/MalcolmNance/status/1070299994039742464 ("Fun Fact: The Intelligence community informally describes cheap honey pot temptresses who collect thru sex employed by GRU/KGB (FSB) as 'Svetlanas'. 'Natasha's' were trained smart agents who used brains.")]. [*JA, p. 77 (Amended Complaint, ¶ 174 fn. 19)*]. Nance's "honeypot" tweet has been republished thousands of times within the year preceding the filing of this action. [*See, e.g.*, https://twitter.com/ThunderB/status/1130789999300009984; https://twitter.com/bayareahausfrau/status/1118308190175674368].

- On July 19, 2019, Nance tweeted that Lokhova was "very likely" a "Honeypot" for General Flynn.
  [*JA, pp. 79-80 (Amended Complaint, ¶ 179)*].

The defamatory statements at issue in this case were published and republished hundreds of times within the year preceding the filing of this action, including in articles written by the Times and other media outlets,[15] in tweets by agents of the defendants, such as Robert Costa,[16] and by millions of third-parties via Twitter. [*JA, pp. 19-20, 45-47, 51, 55-56, 58-59, 72-73, 75, 82-83 (Amended Complaint, ¶¶ 5, 98, 112, 122, 128, 163, 172, 187)*].

Lokhova alleges that Halper's defamation and tortious interference and the actions and defamation of his agents and co-conspirators caused actual damages, including insult, humiliation and mental suffering, impairment of her untarnished reputation as an author and a historian, and loss of valuable book contracts with Basic and Penguin Books, Norton and Harper Collins (second book). Lokhova was forced to flee her country after the birth of her child and to live abroad without

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[15] [*E.g.*, https://twitter.com/ChuckRossDC/status/999674664304574464; https://twitter.com/WilkowMajority/status/1002580434637787136].

[16] Robert Costa ("Costa") was a student of Halper's at Cambridge. [https://www.npr.org/2018/05/22/613449461/washington-post-reporter-discusses-fbi-informant-who-met-with-trump-campaign]. Costa is a reporter for the Post and a political analyst for MSNBC. [https://www.washingtonpost.com/people/robert-costa/]. [*JA, p. 20_(Amended Complaint, ¶ 5 fn. 3)*]. Costa continued to promote and republish the Post Article well into 2019 [*see, e.g.*, https://twitter.com/costareports/status/1110580905154891776], including in May 2019. [https://twitter.com/costareports/status/1124011600648732678].

a permanent address in order to avoid public scrutiny, invasion of her privacy, and constant public ridicule. Her health has deteriorated. She lives in constant fear and with a deep sense of betrayal and dismay. She experiences a recurring nightmare about being separated from her baby as a result of arrest on a false charge manufactured by Halper and his handlers. Lokhova even contemplated suicide at one time to end the suffering caused by the enormous weight and stress of being collateral damage in Halper's international conspiracy and scandal. [*JA, pp. 20, 22, 37, 40, 60, 85, 87 (Amended Complaint, ¶¶ 6, 11, 60, 72, 132, 190, 200)*].

SUMMARY OF THE ARGUMENT

The District erred when it granted the Defendants' motions to dismiss. For the following reasons, the District Court's decision should be reversed and this action remanded for a trial on the merits:

1. Halper and the media defendants intentionally used Twitter to amplify the breadth and sting of their message. They deliberately released false and defamatory statements into the electronic stream of commerce, inviting republication by teasing followers in tweets and by including hyperlinks to the offending statements. The hyperlinks delivered one message to Twitter users and served one purpose: "Click Me" and "Read Me". The hyperlinks ensured that defendants' followers could both read the Articles and then copy and republish

them to newer and different target audiences – the media defendants' followers followers. The media defendants effectively baited millions of Twitter followers, knowing that it was reasonably foreseeable (indeed certain), given the highly charged subject of "Russian collusion", that the Articles about Lokhova and General Flynn would be republished indefinitely. Lokhova plausibly alleged republication in her amended complaint. The District Court erred when it refused to accept as true Lokhova's allegations of republication.

2. The "single publication rule" does not apply under these circumstances. Each Twitter follower is a different target audience. Each time a defamatory tweet is republished to a new target audience via Twitter the statute of limitations begins to run anew. The republication doctrine does not apply only to republication by a defendant itself. Rather, it applies whenever any person, including a third party, republishes (tweets, retweets, replies or likes) a defamatory statement. Halper and the media defendants initiated, introduced and interjected the defamatory content onto the Twitter platform deliberately. Dow Jones, the Times, MSNBC and the Post each controlled the course of the defamation. They could have deactivated the hyperlinks to any Article. They could have deleted any offending tweet. They could have prevented further injury to Lokhova's reputation. In the new age of social media, holding the original defamer liable for subsequent dissemination of defamatory content by third parties via Twitter does

not undermine First Amendment protections of the press or render the statute of limitations meaningless. Rather, it encourages the media to be responsible and accountable for their actions. *Compare Delavan v. North American Company for Life and Health Insurance*, 2007 WL 9808081, at * 9 (E.D. Va. 2007) ("The case before the Court does not deal with the re-reading of defamatory material, but rather deals with the controlled dissemination of an allegedly defamatory statement … Additionally, in the present case, the alleged original defamer, North American, was in a position to permanently stop the repeated publication of the allegedly defamatory information").

3. In Virginia, *Weaver v. Beneficial Finance Co.* and *Moore v. Allied Chemical* control. The Defendants are liable for subsequent republications of their defamatory content by third parties on Twitter.

4. Lokhova's amended complaint adequately identifies Halper as the "source" of the defamatory statements given to various non-defendant media outlets, including the Guardian, such that Halper is also liable for republication of those defamatory statements by those non-defendant media outlets and other third parties. Lokhova forecasts facts which, if proven, show a direct connection between Halper, Andrew and Harding in 2017 and publication of the fake story about "General Misha".

5. The Post Article, the statement by MSNBC's producer, Schecter, and the tweets by Nance contain actionable statements.

6. MSNBC is liable for Nance's statements and those of its producer, Schecter, under the under the doctrine of *respondeat superior*.

7. The District Court erred in dismissing Lokhova's civil conspiracy claim. Lokhova plausibly alleged that Halper and his Cambridge associates combined to tortiously interfere with Lokhova's contracts and business expectations and that Lokhova suffered damage as a result.

8. The District Court erred in dismissing Lokhova's claim against Halper for tortious interference with contract and business expectations. Halper knew about Lokhova's contracts and business expectancies. He acted intentionally to interfere with those property rights, causing Lokhova to lose the contracts, including advances, foreign rights, movie rights and royalties.

STANDARD OF REVIEW

The Court of Appeals reviews de novo a district court's order granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Fessler v. IBM*, 2020 WL 2479683, at * 4 (4th Cir. 2020) (citing *E. Shore Markets, Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000)). The Court's inquiry is to determine whether the facts alleged in the plaintiff's complaint are legally sufficient to state a claim upon which relief can be granted. *Id.* (internal citations

omitted). "Because only the legal sufficiency of the complaint, and not the facts in support of it, are tested under a Rule 12(b)(6) motion, we assume the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the complaint's allegations." *Id.* (internal citations omitted). To survive a motion to dismiss, the Court requires "only enough facts to state a claim to relief that is plausible on its face." *Id.* (citing and quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

Freedom of speech is not absolute. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *id. Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-246 (2002) ("freedom of speech has its limits; it does not embrace certain categories of speech, including defamation"). False and defamatory statements are not entitled to ***any*** constitutional protection. *See, e.g., Chaplinsky*, 315 U.S. at 572 ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These included the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is

clearly outweighed by the social interest in order and morality."); *id. Herbert v. Lando*, 441 U.S. 153, 171 (1979) ("[s]preading false information in and of itself carries no First Amendment credentials."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-350 (1974) (there is "no constitutional value in false statements of fact.").

This is a case of defamation, common law conspiracy and tortious interference with contract. The District Court short-circuited the litigation. For the reasons stated below, the Court of Appeals should reverse.

A. ***LOKHOVA'S DEFAMATION CLAIMS ARE TIMELY***

The law of defamation protects a basic constitutional interest: the individual's right to personal security and the uninterrupted enjoyment of her reputation. *Gazette, Inc. v. Harris,* 229 Va. 1, 7, 325 S.E.2d 713 (1985) (citing *Fuller v. Edwards*, 180 Va. 191, 198, 22 S.E.2d 26 (1942) ("[o]ne's right to an unimpaired limb and to an unimpaired reputation are, in each instance, absolute and has been since common law governed England. Indeed, an impaired reputation is at times more disastrous than a broken leg.")). In *Rosenblatt v. Baer*, Mr. Justice Stewart emphasized that:

> "'Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.' The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty … Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society."

383 U.S. 75, 92-93 (1966).

In Virginia, the elements of defamation are "(1) publication of (2) an actionable statement with (3) the requisite intent." *Tharpe v. Saunders*, 285 Va. 476, 737 S.E.2d 890, 892 (2013); *Jordan v. Kollman*, 269 Va. 569, 575, 612 S.E.2d 203 (2005). At common law, words that are actionable as defamation *per se* include (1) those which impute to a person an unfitness to perform the duties of her trade or a lack of integrity in the performance of the duties, and (2) those which prejudice a person in her profession or trade. *Goulmamine v. CVS Pharmacy, Inc.*, 2015 WL 5920009, at * 3 (E.D. Va. 2015) (citing *Hatfill v. New York Times Co.*, 416 F.3d 329, 330 (4th Cir. 2005)). Where the defamatory statements are understood to mean that the plaintiff is unfit to perform the duties of her employment or the effect of the words are prejudicial to plaintiff in her work, "injury to plaintiff's personal and business reputation, humiliation, and embarrassment is presumed." *Virginia Model Jury Instruction No. 37.105 (citations omitted)*; *Askew v. Collins*, 283 Va. 482, 486, 722 S.E.2d 249 (2012). In *Carwile v. Richmond Newspapers*, the Virginia Supreme Court held that "[i]n order to render words defamatory and actionable, it is not necessary that the defamatory charge be in direct terms but it may be made indirectly, and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory." 196 Va. 1, 7, 82 S.E.2d 588 (1954); *see id. James v. Powell*, 154

Va. 96, 106, 152 S.E. 539 (1930) (quoting *Adams v. Lawson*, 17 Gratt. (58 Va.) 250) ("It is not necessary to make a writing libelous that the imputations should be made in the form of positive assertion. It is equally so if they are expressed in the form of insinuation, provided the meaning is plain.").

In her amended complaint, Lokhova pled statements that are both untrue and defamatory *per se*. The amended complaint quotes the exact words spoken and written by Halper and the media defendants of and concerning Lokhova. The qualities disparaged by Halper and the media defendants – Lokhova's loyalty to her country, fidelity to the Cambridge Intelligence Seminar ("an academic forum for former spies and researchers") and to her colleagues, honesty, integrity, ethics, judgment and performance as a graduate student, academic and author – are peculiarly valuable to Lokhova and are absolutely necessary in the practice and profession of any historian. The statements and Articles at issue accuse and ascribe to Lokhova qualities, conduct, and characteristics – including infiltration of the Seminar, surreptitious abuse of her position as a graduate student to compromise a U.S. intelligence official, ulterior and corrupt motives, dishonesty and deception – that adversely affect Lokhova's fitness to be a member of an intelligence seminar and to conduct the business of an author and intelligence historian. Viewed in the light most favorable to Lokhova, the defamatory implication of Halper and the media defendants' statements is that Lokhova, a

Russian spy or "Russian intelligence", somehow got so "close" to General Flynn that a warning was sent to "American authorities" that Flynn "could be compromised". The statements are odious and offensive. Lokhova lost publishing rights, lost standing and became unemployable in academia, and was ostracized by colleagues because of the false statements. [*JA, p. 20 (Amended Complaint, ¶ 6)*]. Each statement is provably false. The statements can be disproved by evidence, if adduced, that Lokhova is not a spy,[17] that she has never had any ties to Russian intelligence, that she never had an affair[18] with General Flynn, was never close to General Flynn at any time, including during the February 2014 dinner, that there were and are no "General Misha" emails, no one who was at the dinner was alarmed about anything that Lokhova did or said, and nothing was reported to

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[17] *See Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979) (libel action brought against the author and publishers of a book which named plaintiff as a Russian spy); *id. Fitzgerald Penthouse Intern., Ltd.*, 776 F.2d 1236 (4th Cir. 1985) (defamation action brought against publisher of article which libelously charged plaintiff with espionage).

[18] Halper's statement that Lokhova had an affair with General Flynn is most certainly defamatory. *See, e.g., Payne v. Tancil*, 98 Va. 262, 35 S.E. 725, 726 (1900) (statement that plaintiff was "keeping Mrs. Bowler", when taken in connection with the other words spoken, or considered by themselves, could only be understood to accuse the plaintiff of criminal intercourse and the crime of adultery – statement was actionable *per* se, demurrer "properly overruled"); *id., Kelly v. Grigsby*, 2005 WL 533544, at * 3 (Loudoun Cir. 2005) (defendant's statement that plaintiff was "shacking up with a blonde from Hillsboro" was actionable as defamation *per se* – "a reasonable person could interpret Mr. Grigsby's statement that Mr. Kelly "shacked up with some blonde in Hillsboro" as meaning he was having an adulterous relationship").

"American authorities" until 2017 – and only then as part of the false "Russian collusion" narrative manufactured by Halper and his associates to undermine the Trump Presidency.

1. *The Republication Doctrine*

It has long been stated that "[t]alebearers are as bad as talemakers". *Harris v. Minvielle*, 19 So. 935, 928 (La. Ct. App. 1896); *see id. Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1298-1299 (D.C. Cir. 1988) ("The common law of libel has long held that one who republishes a defamatory statement 'adopts' it as his own, and is liable in equal measure to the original defamer") (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* 799 (5th ed. 1984) ("Every repetition of the defamation is a publication in itself, even though the repeater states the source ... or makes clear that he himself does not believe the imputation.") (footnotes omitted), *cert. denied*, 488 U.S. 825 (1988).[19]

Virginia follows the "republication rule". Under the republication rule, "each successive publication of an old or preexisting defamatory statement gives rise to a new cause of action under Virginia law." *Dragulescu v. Va. Union Univ.*, 223 F.Supp.3d 499, 509 (E.D. Va. 2016); *see id. WJLA-TV v. Levin*, 264 Va. 140,

[19] To ameliorate the "chilling effect" that the republication rule would have on the reporting of controversial matters of public interest, Courts have recognized that newspapers enjoy the privilege to fairly and accurately report on judicial and governmental proceedings. *Liberty Lobby*, 838 F.2d at 1299.

153, 564 S.E.2d 383 (2002) ("each publication of a defamatory statement is a separate tort and, indeed, generally subsequent republications of such a statement are separate torts"). Republication occurs when the original defamatory statement is "affirmatively reiterated" **or** redistributed with the goal of reaching a new audience. *Eramo v. Rolling Stone, LLC*, 209 F.Supp.3d 862, 879 (W.D. Va. 2016) (citing *Clark v. Viacom Int'l, Inc.*, 617 Fed.Appx. 495, 505 (6th Cir. 2015) and *In re Davis*, 347 B.R. 607, 611 (W.D. Ky. 2006)); *id. Gilmore v. Jones*, 370 F.Supp.3d 630, 658 fn. 30 (W.D. Va. 2019) (article and video published on the website www.infowars.com was republished by Alex Jones on his YouTube channel); *Doe v. Roe*, 295 F.Supp.3d 664, 670-671 (E.D. Va. 2018) ("where the same defamer communicates a defamatory statement on several different occasions to the same or different audience, each of those statements constitutes a separate publication") (citing Restatement (Second) of Torts § 577A (1977)).

The leading case in Virginia on republication is *Weaver v. Beneficial Finance Co.*, 199 Va. 196, 98 S.E.2d 687 (1957). In *Weaver*, the defendants wrote a libelous letter about the plaintiff, and published the letter to plaintiff's employer. The letter was later republished to the company's promotion board. 199 Va. at 198, 98 S.E.2d at 690. The trial court sustained a plea of the statute of limitations and dismissed plaintiff's complaint. The Supreme Court reversed. The Supreme Court held that:

> "It is well settled that the author or originator of a defamation is liable for a republication or repetition thereof by third persons,[20] provided it is the natural and probable consequence of his act, or he has presumptively or actually authorized or directed its republication. This is based upon the principle that such republication constitutes a new cause of action against the original author. However, the original author is not responsible if the republication or repetition is not the natural and probable consequence of his act, but is the independent and unauthorized act of a third party.
> …
>
> 'Under the weight of authority the author of a libel or slander is not liable for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, either as on a direct cause of action or by way of aggravation of damages, and such repetition cannot be considered in law a necessary, natural and probable consequence of the original slander or libel. But the rule has one important qualification. It is a general principle that everyone is responsible for the necessary consequences of his act, and it may be that the repetition of a slander or libel may be the natural consequence of the original publication, in which case the author of the original defamatory matter would be liable. **And where the words declared on are slanderous per se their repetition by others is the natural and probable result of the original slander**.'"

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[20] The District Court indicated that the republication rule "typically applies to republication by the defendant itself." [*JA, p. 309*]. This was error. In Virginia, the rule applies broadly to any republication or repetition, including republication by a third party. *See, e.g., Dragulescu*, 223 F.Supp.3d at 512 ("Under Virginia law, a defendant may be liable in defamation for a third-party republication 'if the republication was the natural and probable consequence of the original publication or if defendants actually or presumptively authorized its republication.'") (quoting *Watt v. McKelvie*, 219 Va. 645, 649, 248 S.E.2d 826 (1978) (citing *Weaver*, 199 Va. at 199, 98 S.E.2d at 690)); *see id. Pelullo v. Patterson*, 788 F.Supp. 234, 239 (D. N.J. 1992) ("States that have addressed this issue have concluded that republications by third parties give rise to new causes of action. Because republications by third parties are seen as new causes of action, the statute of limitations commences to run on the date of that republication."). *Hartmann v. Time*, cited in *Weaver*, does not create a special rule applicable to newspapers. For purposes of the republication doctrine in Virginia, newspapers and non-media defamers are equally liable for republications by third parties.

199 Va. at 199-200, 98 S.E.2d at 690 (emphasis added); *see also Wuchenich v. Shenandoah Memorial Hospital*, 215 F.3d 1324 (Table), at * 16 (4th Cir. 2000) ("In sum, we hold the district court properly dismissed all portions of Dr. Wuchenich's claim alleging defamation except for the portion seeking redress against SMH for the ongoing publication (knowingly allowed and expected by SMH) in the National Practitioner's Data Bank that SMH had suspended Dr. Wuchenich's medical staff privileges for professional incompetency, and for SMH's publication of the false statement that Dr. Wuchenich is professionally incompetent during the post June 1, 1997 portion of the Board of Medicine's investigation of the allegations that lead to the suspension of Dr. Wuchenich's medical staff privileges at SMH."); *Moore v. Allied Chemical Corp.*, 480 F.Supp. 364, 376 (E.D. Va. 1979) ("Count V is not time-barred insofar as plaintiff seeks to hold Allied liable for republications of the allegedly defamatory statement occurring on or after July 1, 1976. If he can show that the statement was defamatory, he may be able to show that the republications of the statement were the natural and probable result of the original publication.").

The statute of limitations for defamation claims in Virginia is one year. *§ 8.01-247.1*. A cause of action for defamation accrues on the date of publication. *Askew*, 283 Va. at 487, 722 S.E.2d at 252. A defamatory statement is deemed published whenever it is communicated to and understood by a person other than

the Plaintiff. Publication may be proven by direct or circumstantial evidence. The plaintiff need not identify the person to whom the defamatory words were published, and need not place in evidence testimony from a third party regarding what the person heard and understood. *Food Lion, Inc. v. Melton*, 250 Va. 144, 151, 458 S.E.2d 580 (1995); *Thalhimer Bros v. Shaw,* 156 Va. 863, 871, 159 S.E. 87 (1931) ("Publication sufficient to sustain common-law defamation is uttering the slanderous words to some third person so as to be heard and understood by such person. Here, if the plaintiff's account of the interview is true, the words were published in such a manner that at least three of her co-employees knew of the charge made against her. They were not only repeated by Hall to May, but May reiterated substantially the same defamation.").

Lokhova's amended complaint clearly alleges that Halper's false statements to Andrew, to the non-defendant media outlets, and to the media defendants, and the defamatory Articles and Nance's tweets were republished by the media defendants and by third parties[21] within the year preceding the filing of this action.

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[21] In its memorandum opinion, p. 25 [*JA, p. 316*], the District Court observed in passing that the *Weaver* Court "quoted a secondary source stating that ''the publisher of a newspaper or magazine has been held not responsible for the acts of third persons who, after the original publication, sell copies of the newspaper or magazine to others.' Weaver, 199 Va. at 200 (quoting 53 C.J.S., Libel and Slander, § 85, p. 137)." This is mere dicta. The *Weaver* Court was clear in its holding: "where the words declared on are slanderous per se their repetition by others **is** the natural and probable result of the original slander". *Weaver*, 199 Va. at 200, 98 S.E.2d at 690 (emphasis added).

At this stage of the proceeding, the District Court should have accepted these allegations as true, resolved all inferences in Lokhova's favor, and denied the motions to dismiss Lokhova's defamation claims.[22] *See Eramo*, 209 F.Supp.3d at 879-880 (the question whether a plaintiff has proved republication is a factual one for the jury) (citations omitted). Instead, the District Court relied on the "single publication rule" to hold, without evidence, that there was no republication. This was error.

2. *The Single Publication Rule*

Virginia follows the "single publication rule". The "single publication rule" is an exception to the republication rule. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 fn. 3 (1984). The "single publication rule" "permits only one cause of action to be maintained for any ***single*** publication, even if heard or read by two or more third persons." *Katz v. Odin Feldman & Pittleman, P.C.*, 332 F.Supp.2d 909, 918 (E.D. Va. 2004) (emphasis added) (citing *Morrissey v. William Morrow Co.*, 739 F.2d 962 (4th Cir. 1984) and *Restatement (Second) of Torts* § 557A(4) (1997)). In *Katz*, the Court explained that although subsequent distribution of a defamatory statement "may continue to increase plaintiff's compensable damages,

[22] There is no question that Plaintiff's claim for tortious interference is timely. *Dunlap v. Cottman Transmission Systems, LLC*, 287 Va. 207, 219-222, 754 S.E.2d 313 (2014) ("we hold that the five-year statute of limitations in Code § 8.01-243(B) applies to both tortious interference with contract and tortious interference with business expectancy.") (citations omitted).

it does not create independent actions or start the statute of limitations running anew." 332 F.Supp.2d at 918. In reaching the conclusion that there had been no republication, the *Katz* Court relied on *Semida v. Rice*. In *Semida*, the Court of Appeals found that a defamatory letter stuck in a "file" and unintentionally transmitted within the same organization was not a republication. It was important to the *Semida* Court that the USAID employee who transmitted the file "had no reason to know of the defamatory contents of the file and did nothing to draw particular attention to the [defamatory] letter":

> "More importantly, the copy of Rice's letter sent by Dean is analogous to multiple copies of the same edition of a book or magazine article. Rice's letter was republished at the time it was first distributed to USAID, and we think that multiple copies within the organization should be considered part of an aggregate communication for purposes of applying the single publication doctrine. Under this doctrine, an aggregate communication is treated as a single publication for which only one action for damages can be maintained. Treatment as an aggregate communication is reasonable at least where the incidents of distribution are substantially contemporaneous with the original communication to the organization and where the distribution is confined to those persons in the organization having a direct interest in the matter."

863 F.2d 1156, 1161 (4th Cir. 1988).

The Court's ruling in *Semida* underscores that the question of republication is very fact-specific, and depends, in large part, on consideration of several factors, including (1) the knowledge and intent of the republisher, (2) the timing of the republication, *i.e.*, whether the republication is "substantially contemporaneous with the original communication", and (3) scope and target audience, *i.e.*, whether

the distribution is confined to "persons in the organization having a direct interest in the matter".[23] *See Eramo*, 209 F.Supp.3d at 880 (denying plaintiff's motion for summary judgment, where "a reasonable jury could find that the defendants did not act with intent to recruit a new audience"); *see also Hoesten v. Best*, 34 A.D.3d 143, 821 N.Y.S.2d 40, 46 (N.Y. A.D. 2006) (to determine whether an item has been republished, relevant considerations include: (1) whether the subsequent publication is intended to and actually reaches a new audience; (2) whether the second publication is made on an occasion distinct from the initial one; (3) whether the republished statement has been modified in form or in content; and (4) whether the defendant has control over the decision to republish.) (citations and quotations omitted).

Twitter has been described by the United States Supreme Court as a "modern public square". *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017). In this case, the media defendants intentionally used Twitter as a means to recruit new audiences and unleash endless republication of the Articles at issue.

[23] In *Morrissey*, the Court recognized that publication to a new audience constitutes classic republication. The District Court gave the plaintiff "the benefit of treating the paperback edition as perhaps reaching a different audience so that for publication purposes, the paperback publication would be the date of accrual of the cause of action." 739 F.2d at 964. The Court of Appeals acknowledged that the paperback edition of the defamatory book was published to a different audience, and observed that "Bantam Books entered into a separate agreement with William Morrow to publish the book in paperback version and thereby Bantam Books restated the malicious falsehoods about the plaintiff. This is not a claim of republication by William Morrow." *Id.* at 967.

That was the media defendants' intent and they found an endless supply of disciples, who republished their Articles with a vengeance. Unlike *Semida*, the target audience in this case was Dow Jones' 16,600,000 followers on Twitter, the Times' 43,400,000 Twitter followers, the Post's 13,700,000 Twitter followers, and MSNBC's 3,300,000 followers on Twitter. Lokhova alleges that it was reasonably foreseeable, given that Twitter is a "public" square, that the media defendants' combined **77,000,000** Twitter followers would republish the defamation. [*JA, pp. 26-27, 82-83 (Amended Complaint, ¶¶ 20, 187)*]. The District Court erred when it found that the media defendants' followers on Twitter did not republish the false and defamatory statements about Lokhova.

3. *Hyperlinks And Republication*

After May 18, 2018, the Times intentionally republished the NYT Article in multiple editions of its newspapers by embedding hyperlinks to the NYT Article in articles about the same or similar subject matter. On May 24, 2018, for instance, the Times published an article, entitled "**Trump's Lawyer and Chief of Staff Appear at Briefings on F.B.I.'s Russia Informant**". Goldman, the principal author of the NYT Article, contributed to the May 24 piece. The May 24 piece, which is about Halper, contains *several* bolded hyperlinks to the NYT Article. [https://www.nytimes.com/2018/05/24/us/politics/fbi-informant-russia-congress-briefings.html?auth=login-email&login=email]. This is not a mistake. Rather, it

reflects the Times' intent to republish. The Times next embedded a hyperlink to the NYT Article in a piece published on August 18, 2018, entitled "**Kremlin Sources Go Quiet, Leaving C.I.A. in the Dark About Putin's Plans for Midterms**". [https://www.nytimes.com/2018/08/24/us/politics/cia-russia-midterm-elections.html]. Rosenberg, an author of the NYT Article, wrote the August 18 piece, to which Goldman also contributed. Like the May 24 piece, the August 18, 2018 piece contained *multiple* hyperlinks to the NYT Article, again evidencing an intent to republish. On April 9, 2019, Goldman and the Times again embedded a bolded hyperlink to the NYT Article in yet another piece about Halper, entitled "**Justice Dept. Watchdog's Review of Russia Inquiry Is Nearly Done, Barr Says**".[24] The hyperlink appears in the following paragraph of the April 9, 2019 article:

> "Mr. Halper's contacts have prompted Republicans and the president to incorrectly accuse the F.B.I. of spying on the campaign. Mr. Page has also said he met with Mr. Halper in mid-July 2016, about two weeks before the Russia investigation was opened."

[*JA, p. 19 (Amended Complaint, ¶ 5)*]. For his part, Post reporter and MSNBC analyst, Costa, also went out of his way to affirmatively reiterate the statements in

[24] The May 24, August 18 and April 9 Times publications were separate editions of the online newspaper. The Times also tweeted the stories to its followers. [*E.g.*, https://twitter.com/NYTNational/status/999737319757316096; https://twitter.com/julianbarnes/status/1033027472978264064; https://twitter.com/adamgoldmanNYT/status/1115722909287370752]. By tweeting out the May 24, August 18 and April 9 articles, the Times further directed the NYT Article to new audiences.

the Post Article to his 550,000-plus Twitter followers in June 2018 and again in March and May 2019 – almost a year after the original publication:

> https://twitter.com/costareports/status/1003968153448271872 ("Cambridge University perch gave FBI source access to top intelligence figures — and a cover as he reached out to Trump associates. My latest on the backstory of the Russia investigation");
>
> https://twitter.com/costareports/status/1004023179277422592 ("'Beware of Russians bearing gifts,' Halper wrote");
>
> https://twitter.com/costareports/status/1110580905154891776 ("There many exchanges here about Stefan Halper, the Cambridge professor. The Post reported on him last June");
>
> https://twitter.com/costareports/status/1124011600648732678 ("From the Post, last June: 'Cambridge University perch gave FBI source access to top intelligence figures — and a cover as he reached out to Trump associates'").

[*JA, pp. 19-20 (Amended Complaint, ¶ 5)*]. And, Dow Jones reporter, Rob Barry, one of the authors of the WSJ Article, republished the WSJ Article on his website. This is a republication. *Rare 1 Corp. v. Moshe Zwiebel Diamond Corp.*, 822 N.Y.S.2d 375, 377 (2006) ("if the defamatory material is relocated to a second website, the relocation to the new website constitutes a republication of the defamatory comment, thereby acting to restart the statute of limitations."). The date of Barry's republication to his website is unknown without discovery. [https://robbarry.org/pages/work/].

The District Court concluded that the Times' publication of an article with active hyperlinks to the NYT Article was not a republication of the NYT Article.

This was error. Because the Times redistributed the NYT Article in later editions of its online newspapers and with the intended goal of expanding and reaching a new audience, there was a republication. The common practice of the media defendants to use hyperlinks to republish defamation, especially on Twitter, is a matter of first impression in the Fourth Circuit. The media defendants' common practice of republication on Twitter poses a serious threat to any person's liberty interest in an unimpaired reputation.

A "hyperlink" is a colored and underlined electronic connection providing direct access from one distinctively marked place in a document to another in the same or a different document. *See Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 27 fn. 1 (2nd Cir. 1997) ("[a] hyperlink is 'highlighted text or images that, when selected by the user, permit him to view another, related Web document'" (citation omitted); https://www.merriam-webster.com/dictionary/hyperlink. A "text" hyperlink uses a word or phrase to take a user to another page or document. An "image" hyperlink uses an image to take the reader directly to another publication. An "absolute" hyperlink is a hyperlink that contains the full address of the destination file or of the web site. [https://support.microsoft.com/en-us/help/903163/how-to-create-absolute-hyperlinks-and-relative-hyperlinks-in-word-docu]. A hyperlink can be embedded in any kind of computer document, including a webpage or a tweet. The hyperlinked text or image "is really a sign

that says: Click Here". *Adelson v. Harris*, 973 F.Supp.2d 467, 483 (S.D.N.Y. 2013) (quoting *Fteja v. Facebook*, 841 F.Supp.2d 829, 839 (S.D.N.Y. 2012)). Immediately upon clicking an absolute hyperlink, the reader is automatically transferred to the other end of the hyperlink, which, in this case, is the Andrew Article, WSJ Article, the NYT Article and/or the Post Article. In sum, creating and embedding an absolute hyperlink in an online article or a tweet is akin to including the contents of the linked material in the "same delivery envelope" as the article. *Adelson*, 973 F.Supp.2d at 484 (citation omitted). Hyperlinks serve innumerable substantive purposes, including to create enforceable contracts and to republish and incorporate the contents of other publications. *Bartholomew v. YouTube, LLC*, 17 Cal.App.5th 1217, 225 Cal.Rptr. 917, 925-926 fn. 7 (Cal. App. 6th DCA 2017) (hyperlinks "can be used … to refer the viewer to more *specific* information about the subject being discussed on the originating page" and "to create an enforceable contract") (emphasis in original).

Whether a particular event constitutes a republication giving rise to a new cause of action for defamation with a refreshed limitations period must be analyzed on a case-by-case basis. The issue requires a "close textual and contextual analysis". *Enigma Software Group USA, LLC v. Bleeping Computer, LLC*, 194 F.Supp.3d 263, 277 (S.D.N.Y. 2016) (citing *Martin v. Daily News, L.P.*, 2012 WL 1313994, at * 2 (N.Y. Sup. 2012) ("Relevant to this inquiry is whether the

subsequent publication is intended to and actually reaches a new audience"); *Wiswell v. VerticalScope, Inc.*, 2012 WL 13136295, at * 4 (W.D. Tex. 2012) ("republication is a fact issue, depending upon the specific context of the hyperlink"); *see Trombetta v. Novocin*, 2020 WL 1304120, at * 6 (S.D.N.Y. 2020) (statute of limitation on defamation claim began to run when the defendant "republished the link" in 2017 to an original internet post that appeared in 2012); *see Rare 1*, 822 N.Y.S.2d at 377 (2006) ("if the defamatory writing is republished in a new format, *i.e.,* … a newspaper article republished in a later newspaper edition, then, the statute of limitations will run anew from the date of the republication"); *compare id. Cook v. Connors*, 215 N.Y. 175, 109 N.E. 78, 79 (1915) (noting that publishing the same statement in two different newspapers constituted two "distinct publication[s]" because "[p]ersons would read or acquire knowledge of [the statement] from or through either paper who would not do so through the other").

A hyperlink is an intentional republication of original defamatory content. It is not a mere uniform resource locator, or "URL" – an address for a webpage – or a mere footnote. It is not a mere reference. It is a direct bridge to the content at issue. It is an incorporation by reference. *See, e.g., Stephen G. Perlman, Rearden, LLC v. Vox Media, Inc.*, 2015 WL 5724838, at * 16 (Del. Ch. 2015) ("the alleged defamation of Artemis all stems from the 2014 Article and its link to the 2012

Articles … [T]he defamatory content of the 2012 Articles [was] incorporated by reference through the hyperlink"). As noted above, modern contracts are created by simply embedding a hyperlink to terms of service in the body of an electronic form. There is no reason to include a hyperlink in an online article or in a tweet other than to incorporate the content and induce the reader to view the linked content. Hyperlinked source material is clearly part of the total mix of information available to determine whether a publication is false and defamatory. *See, e.g.*, *Abbas v. Foreign Policy Grp., LLC*, 975 F.Supp.2d 1, 16 (D.D.C. 2013), *aff'd*, 783 F.3d 1328 (D.C. Cir. 2015); *Amaretto Ranch Breedables, LLC v. Ozimals, Inc.*, 2013 WL 3460707, at * 4-5 (N.D. Cal. 2013); *Pisani v. Staten Island Univ. Hosp.*, 440 F.Supp.2d 168, 173-174 (E.D.N.Y. 2006). In *Pisani*, the allegedly defamatory statement (contained in a press release) referred to "former executives of the hospital", but did not identify the plaintiff. However, the press release "contained a link" to a complaint that identified three former executives, "one of whom was plaintiff, and they were named in paragraphs in connection with the alleged wrongdoing." Relying on the hyperlinked content, the District Court held that "a reasonable jury could conclude that the Hospital statement refers to plaintiff". 440 F.Supp.2d at 174 ; *id. Wallace v. Geckosystems Int'l Corp.*, 2013 WL 4054147, at * 7 (Del. Super 2013) ("Any reader who follows the link to the article will realize that AI_ Guru is offering his own opinion about what happened").

In *Vox Media*, the defendant's 2014 article contained hyperlinks to articles written in 2012 that contained defamatory statements. The Court denied the defendant's motion to dismiss, ruling as follows:

> "I also find sufficiently persuasive to survive a motion to dismiss Plaintiffs' argument that the 2014 Article directed the defamation published in the 2012 Articles to a new audience because the Complaint alleges facts sufficient to support a reasonable inference that the 2014 Article was intended to and actually did reach a new audience. Plaintiffs allege that the analysts, investors, academic researchers, and operators interested in commercial wireless technology—*i.e.,* Artemis's pCell technology featured in the 2014 Article—are unlikely to be familiar with, much less interested in, the details of the consumer video game industry as described in the 2012 Articles. Plaintiffs also allege, and I consider it reasonable to infer, that Defendant knew an article about pCell would generate high traffic on its website because pCell had received news coverage by the New York Times, Bloomberg Television, and Wired Magazine, and intentionally directed readers to the sensationalistic August 28 Article by including a hyperlink in the 2014 Article's very first sentence, which Plaintiffs allege is itself false and defamatory."

2015 WL 5724838 at * 19. In *Wiswell v. VerticalScope, Inc.*, the District Court denied the defendant's motion for judgment on the pleadings. The Court declined to adopt a bright-line rule that hyperlinks can *never* constitute republications. Rather, the Court held that "the inquiry should turn on the context in which the link is made or posted." The Court looked at the "core rationale behind the republication exception. In its traditional fact setting, the exception is animated to a considerable extent by whether a new audience is reached." In denying the defendant's motion for judgment on the pleadings, the Court found as follows:

> "Here, because the link was made in what appears to be an entirely new thread, some six years later, it may plausibly have reached a different audience than the original thread. Also, a much stronger analogy can be drawn between new print publications, and posting a new message thread on a forum, as compared to merely making technical adjustments to a website. Although the Court cannot make a final determination at this point, based on the limited record before it, judgment under Rule 12(c) regarding the 2004 thread is improper at this time for the reasons given above."

2011 WL 13324271, at * 2-3 (W.D. Tex. 2011). In further denying the defendant's motion for summary judgment, the Court found that the issue whether a new audience was reached by the hyperlink was a "fact issue" for the Jury:

> "The Court finds this is a fact issue, given that (1) the websites, though linked, are at different web addresses, apparently with separate login and membership databases, (2) each site has its own forum structure, including separate headings and categories for threads, (3) threads posted on one website apparently do not appear on the other, and (4) the two forums discuss different types of motorcycle."

2012 WL 13136295 at * 4.

In this case, like *Vox Media* and *Wiswell*, the republications by the Times were intended to and actually did reach new audiences – the Times's online and print subscribers and its 59,000,000+ social media followers between May 24, 2018 and August 2019. [*JA, pp. 19-20, 72-73 (Amended Complaint, ¶¶ 5, 163)*]. The Times intentionally directed readers to the scandalous statements about Lokhova and General Flynn by repeatedly including multiple hyperlinks to the NYT Article within the May 24, August 18 and April 9 pieces. Including hyperlinks in the May 24, August 18 and April 9 pieces provided a means for the

Times to disseminate the NYT Article to new target audiences. The Times exclusively controlled the decision whether to embed the hyperlinks in subsequent online editions of its newspaper. The Times is and should be responsible for retriggering the statute of limitations. Because a hyperlink constitutes a republication, Lokhova's defamation claim based on the Times's republication of the NYT Article is timely.

B. *THIRD-PARTY REPUBLICATION OF HALPER'S STATEMENTS*

Rather than accept Lokhova's allegations that Halper was the source of the statements published by Andrew, the Guardian and other non-defendant media outlets and third parties [*see, e.g., JA, pp. 44-45, 48-49, 50, 52, 54, 58, 64-66, 68-69, 70-71, 72-73, 74-75 (Amended Complaint, pp. 93, 96-98, 102-107, 110, 115, 120, 126, 127, 144, 146-147, 153-154, 157-158, 163, 166, 170)*], the District Court dismissed Lokhova's allegations as conclusory and insufficient to satisfy Rule 8. This was error. Viewed in the light most favorable to Lokhova, the amended complaint identifies what Halper said, to whom, when, and why. This is enough to survive Rule 12(b)(6) and to entitle Lokhova to discovery from Halper, Andrew, the non-defendant media outlets, Harding, Brennan, and others.

C. *THE POST'S AND NANCE'S DEFAMATORY STATEMENTS*

To be actionable, a statement must be "both false and defamatory." *Goulmamine*, 138 F.Supp.2d at 659 (quoting *Jordan v. Kollman*, 269 Va. 569, 575,

612 S.E.2d 203 (2005)). At the 12(b)(6) stage in a defamation case, "a court must accept as false any statements which the Complaint alleges to be false." *Goulmamine*, 138 F.Supp.2d at 659 (citing *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993)). "Because the Court presumes falsity at this stage, the key actionability question in deciding a motion to dismiss is whether the statements referenced in the Complaint are defamatory." *Id.*

Whether a statement is capable of having defamatory meaning is a question of law for the Court to decide.

> "In determining whether or not the language does impute a criminal offense, the words must be construed in the plain and popular sense"; an express allegation of criminal activity is not necessary.
> …
>
> With regard to impugning fitness for one's trade, an 'implication ... that the plaintiff is guilty of unethical and unprofessional conduct ... for which conduct the defendant suggests ... that the plaintiff could and should be subjected to disbarment proceedings' is defamatory *per se,* because it "impute[s] conduct tending to injure him in his profession.'"

Goulmamine, 138 F.Supp.2d at 659 (citing and quoting *Hatfill*, 416 F.3d at 331; *Carwile v. Richmond Newspapers*, 196 Va. 1, 8, 82 S.E.2d 588 (1954)); *see id. Virginia Citizens Defense League v. Couric*, 910 F.3d 780, 784 (4th Cir. 2018) ("Virginia law requires that when 'determining whether the words and statements complained of ... are reasonably capable of the meaning ascribed to them by innuendo, every fair inference that may be drawn from the pleadings must be resolved in the plaintiff's favor.'") (quotation and citation omitted).

The Post Article [*JA, p. 74 (Amended Complaint, ¶ 165)*] conveys a defamatory implication: that Lokhova, identified as a "Russian-born graduate student", engaged in such serious conduct that it caused Halper and Dearlove – her superiors at Cambridge – to become "disconcerted" with the attention that General Flynn showed to Lokhova. That the words published by the Post import wrongful conduct by Lohkova and impute that she is unfit in her profession cannot be questioned. Viewed in the light most favorable to Lokhova, the Post Article clearly imputes to Lokhova behavior that was contrary to the customs and practices of the Cambridge Intelligence Seminar and the expectations of Halper and Dearlove. In the overall context of the Post Article, which is about Halper's assistance in the "secret" FBI "operation" into "Russian efforts to intervene in U.S. politics", the Post insinuates that Lokhova – a Russian – was attempting to compromise General Flynn, a person "already of interest to investigators", and that this was disconcerting to her Cambridge superiors.

Lokhova also alleges that certain statements by MSNBC are capable of a defamatory meaning. The statement by MSNBC's producer, Shechter – that a colleague at MSNBC told her that "everyone at the CIA knows Flynn had an affair with Lokhova" – is expressly libelous and is a direct republication of an earlier false and defamatory statement published to Shechter by her MSBNC colleague. *See, e.g., Williams v. Burns*, 463 F.Supp. 1278, 1281 (D. Colo. 1979) (citing and

quoting Restatement (Second) of Torts § 577(i) ("Communication by one agent to another agent of the same principal. The communication within the scope of his employment by one agent to another agent of the same principal is a publication not only by the first agent but also by the principal and this is true whether the principal is an individual, a partnership or a corporation"). Nance's July 2018 tweet, identifying Lokhova as a "Honeypot", is expressly libelous. [*See* https://www.politico.com/magazine/story/2018/07/27/silicon-valley-spies-china-russia-219071 ("Intel officials have suspected that Russian spies were enlisting local high-end Russian and Eastern European prostitutes, in a classic Russian 'honeypot' maneuver, to gather information from (and on) Bay Area tech and venture-capital executives"); https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/12/everything-you-need-to-know-about-the-russian-art-of-kompromat/ ("The possibility of Trump falling for a Russian 'honey pot' paid to be receptive to his sexual overtures seems plausible enough.")].

The District Court erred is dismissing Lokhova's defamation claims against the Post and MSNBC.

D. *MSNBC IS VICARIOUSLY LIABLE FOR NANCE'S TWEETS*

In support her claim that MSNBC is liable for Nance's July 2018 tweets, Lokhova alleges that Nance held himself out as an agent of MSNBC, that he was the "chief terrorism analyst" for MSNBC and a regular contributor to MSNBC,

that Nance maintains and operates a Twitter account on which he conducts the business of "NBC/MSNBC", and that Nance published the tweets at issue during normal business hours and while he was performing the business of MSNBC. [*JA, pp. 26, 75-76 (Amended Complaint, ¶¶ 19, 173)*]. The District Court failed to accept Lokhova's allegations as true and failed to draw all reasonable inferences in Lokhova's favor. Instead, the Court concluded that Lokhova "failed to plead sufficient facts" to support her claim that MSNBC was liable under the doctrine of *respondeat superior*. [*JA, pp. 325-327*].

This was error. Lokhova has alleged sufficient facts from which a jury could conclude that Nance was acting as an agent of MSNBC within the scope of his actual or apparent authority. *See Brubaker v. City of Richmond*, 943 F.2d 1363, 1378 (4th Cir. 1991) ("Under general agency law, principals are liable for the acts of their agents when those agents act within the scope of their actual or apparent authority.") (citing *American Soc. Of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 565-570 (1982)); *Davis v. American Society of Civil Engineers*, 330 F.Supp.2d 647, 654 (E.D. Va. 2004) ("There is no question that under the general application of the doctrine of respondeat superior, a principal can be liable for the tortious actions of its agent or servant. *See* Restatement (Second) of Agency §§ 215-216, 219 (1958); W. Prosser, Law of Torts §§ 60-70 (4th ed. 1971)); *see also Jefferson Standard Life Ins. Co. v. Hedrick*, 181 Va. 824, 834, 27 S.E.2d 198

(1943) ("It is a general doctrine of law, that, he (the principal) is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them") (quotation and citation omitted); Restatement (Second) of Agency § 254 (1958) ("A principal is subject to liability for a defamatory statement by a servant or other agent if the agent was authorized, or if, as to the person to whom he made the statement, he was apparently authorized to make it."); *id.*, § 247 ("A master is subject to liability for [even unauthorized] defamatory statements made by a servant acting within the scope of his employment, or, as to those hearing or reading the statement, within his apparent authority.").[25]

[25] Whether MSNBC is liable for Nance's statements requires the consideration and evaluation of the many elements of his relationship with, and the nature of his activities for, MSNBC. The Court will note that Nance's twitter profile expressly identifies "MSNBC" and does ***not*** state that the tweets are Nance's own. [*JA, pp. 76-77 (Amended Complaint, ¶ 173)*]. Additionally, as to Nance's 606,000 Twitter followers – the persons to whom Nance published the statements – there is the further question of whether there was apparent authorization by MSNBC. Under the circumstances of this case, these complex matters are jury questions and are not amenable to resolution on a motion to dismiss. *See Mills v. Crawford County*, 1989 WL 142845, at * 5 (Wis.App. 1989) (denying motion for summary judgment on question of vicarious liability for defamatory statements).

E. ***LOKHOVA PLAUSIBLY ALLEGES A COMMON LAW CONSPIRACY***

The elements of a claim of common law conspiracy are 1) an agreement between two or more persons; 2) to participate in an unlawful act; 3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; and 4) that the overt act was done pursuant to and in furtherance of the common scheme. *Anderson v. Reeds Jewelers, Inc.*, 2017 WL 1987249, at * 5 (E.D. Va. 2017) ("to survive a motion to dismiss for common law conspiracy, a Plaintiff must simply allege that Defendant was engaged in a conspiracy that included either an unlawful act or an unlawful purpose"); *Harrell v. Colonial Holdings, Inc.*, 923 F.Supp.2d 813, 825 (E.D. Va. 2013) ("The 'unlawful act' element requires that at least one member of the conspiracy commit an 'underlying tort.' … This can include the inducement of a breach of contract or defamation, as alleged in this case.") (citations omitted); *Dunlap v. Cottman Transmission Systems, LLC*, 287 Va. 207, 218, 754 S.E.2d 313 (2014) (tortious interference with contract and tortious interference with business expectancy each constitute the requisite "unlawful act" to plead a claim of civil conspiracy).

Lokhova's amended complaint identifies (a) the purpose of the conspiracy, (b) when it was hatched, (c) who participated in the overt acts, (d) the fact that Halper utilized colleagues at Cambridge, media "sympathizers" and known proponents of the Russia "collusion" narrative, (e) the coordinated nature of the

attacks, including the common theme and timing of each hit piece, and (f) the role of each participant in accomplishing the common goal of the defamation campaign. [*See, e.g., JA, pp. 18-19, 26-27, 28, 40, 42, 44, 47-48, 54, 68-69, 71, 73, 85-86 (Amended Complaint, ¶¶ 3, 20, 21, 27, 28, 74, 80-82, 93, 101-102, 119, 153-154, 162, 164, 192)*; *compare T.G. Slater & Son, Inc. v. Donald P. and Patricia A. Brennan, LLC*, 385 F.2d 836, 845-846 (4th Cir. 2004) (complaint alleged that defendants "combined to terminate and interfere with the contractual relationship", and alleged that the parties to the conspiracy acted "together to complete the sale of the farm without paying Slater & Son a commission for the work it performed" and that this conduct was "intentional, purposeful and without lawful justification" resulting in "substantial monetary damages"); *Steele v. Goodman*, 382 F.Supp.3d 403, 424 (E.D. Va. 2019) ("Plaintiffs adequately plead (1) the existence of an agreement between Negron and Goodman (2) to defame Plaintiffs, resulting in the production and publication of allegedly defamatory videos that (3) caused Plaintiffs damages. Negron's participation in the production and publication of the videos constitutes an overt act to satisfy the fourth and final prong of the common law conspiracy claim"); *Harrell*, 923 F.Supp.2d at 826 ("Even if the heightened standards of Rule 9(b) applied [to a claim of civil conspiracy], the Court would find the allegations here to be sufficient. Construed in Defendants' favor, the Counterclaim alleges that Plaintiffs purchased the Strawberry Hill Races Mark on

May 24, 2012, and within one week formed an agreement to tortiously injure Defendants"); *Ramar Coal Co., Inc. v. International Union, United Mine Workers of America*, 814 F.Supp. 502, 507 (W.D. Va. 1993) ("Although there is no direct evidence of union complicity in the violence, there is sufficient circumstantial evidence for the jury's conclusion.").

The District Court erred in dismissing Lokhova's conspiracy claim.

F. ***LOKHOVA SUFFICIENTLY ALLEGES TORTIOUS INTERFERENCE***

To prevail on a claim for tortious interference with a contractual relation in Virginia, a plaintiff must prove four elements: "(1) the existence of a valid contractual relationship[...]; (2) knowledge of the relationship[...] on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship[...]; and (4) resultant damage to the party whose relationship ... has been disrupted." *Steele*, 382 F.Supp.3d at 424 (quoting *Commerce Funding Corp. v. Worldwide Sec. Servs. Corp.*, 249 F.3d 204, 210 (4th Cir. 2001)).

Here, Lokhova alleges the specific contracts and business expectancies that Halper interfered with [*JA, pp. 20, 86 (Amended Complaint, ¶¶ 6, 197)*], how and why Halper knew of Lokhova's book deals, employment and academic posts [*JA, pp. 36-37, 41, 86 (Amended Complaint, ¶¶ 58, 76, 198)*], and that the improper methods employed by Halper caused Lokhova to lose her book deals and business expectancies. [*JA, pp. 19-20, 86-87 (Amended Complaint, ¶¶ 4, 6, 199*]. Halper

was a convenor of the Cambridge Intelligence Seminar until July 2016, and was aware of Lokhova's participation in the Seminar. Halper was also very aware of Lokhova's participation in the Cambridge Security Initiative (CSI). In September 2015, Halper was involved in approving Lokhova's appointment to the prestigious, honorary position of CSI Fellow. As a result of his position at Cambridge and interactions with Dearlove and Andrew, Halper was aware of Lokhova's book deals and business expectancies. [*JA, pp. 33, 35, 41, 86 (Amended Complaint, ¶¶ 43, 56, 76, 198)*]. *Compare Brown v. Transurban USA, Inc.*, 144 F.Supp.2d 809, 848 (E.D. Va. 2015) ("Plaintiffs further allege that Transurban was 'aware of the existence of the User Agreement between ... Plaintiffs ... and the E–ZPass.' This knowledge satisfies the second of the four requirements outlined in *Stradtman*"). The District Court erred in dismissing Lokhova's tortious interference claim against Halper.

CONCLUSION AND REQUEST FOR RELIEF

For the reasons stated above, the Court of Appeals should reverse the District Court's Order and Judgment, and remand the case for a trial on the merits of Lokhova's claims of defamation, common law conspiracy and tortious interference with contract and business expectancies.

REQUEST FOR ORAL ARGUMENT

Lokhova requests, and the Court should permit, oral argument because of this case involves questions of first impression in this Circuit and because of the factual and procedural history of this case. Oral argument will allow the parties to address questions the Court may have regarding the unique issues raised on appeal or the factual and procedural history of this case, which may aid the Court in the decision-making process.

DATED: June 24, 2020

Respectfully Submitted,

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CERTIFICATE OF FILING AND COMPLIANCE

I hereby certify that on June 24, 2020, I caused Appellant's Brief and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to counsel for the Appellees.

I further certify that on June 24, 2020, I caused the required copies of Appellant's Brief and Joint Appendix to be served on counsel for the Appellees.

In accordance with FRAP 32(a)(7)(B), I further certify that Appellant's Brief complies with the type-volume limitation and that the total number of words, as measured by the word count of the word-processing system used to prepare the brief, is 11,430.

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