IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(RICHMOND DIVISION)

VICTOR E. CRETELLA III	)	
	)	
Plaintiff	)	
	)	
v.	)	Case No. 3:08cv109
	)	
DAVID L. KUZMINSKI	)	
	)	
Defendant	)	
	)	

BRIEF SUPPORTING PLAINTIFF'S OPPOSITIONTO DEFENDANT'S MOTION TO DISMISS

Pursuant to Fed. R. Civ. Proc. 12(b)(6), Plaintiff, Victor E. Cretella III ("Plaintiff"), opposes the motion to dismiss filed by Defendant David L. Kuzminski ("Defendant"). For the reasons explained more fully below, the motion should be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

Plaintiff has been admitted to practice law in the State of Maryland since December, 1996. One of Plaintiff's clients is PublishAmerica, LLLP ("PublishAmerica"), which is a book publisher located in Frederick, Maryland. Compl. ¶5. Defendant David L. Kuzminski has been targeting PublishAmerica, LLLP ("PubishAmerica") with false statements for many years now. Mot. to Dismiss, Ex 1 thereto. In fact he despises PublishAmerica and even feels like he has been personally attacked by the company. Mot. to Dismiss at 1, 2.

[1]In the unlikely even this Court converts the Motion to Dismiss into a motion for summary judgment, Plaintiff submits the following facts under oath.

In early 2007, PublishAmerica identified a number of false and defamatory statements concerning it that had been published by Christine Norris ("Norris") on the AbsoluteWrite website. Compl. ¶6. In order to stop this tortious conduct, PublishAmerica hired Plaintiff to send Ms. Norris a cease and desist letter. Id. Plaintiff served Christine Norris with the cease and desist letter on February 7, 2007. Id. When Norris continued publishing defamatory statements about PublishAmerica on the Internet after receiving the cease and desist letter, PublishAmerica served her with a second notice on or about February 15, 2007. Id. After receiving that notice, Ms. Norris posted a message on the AbsoluteWrite website claiming that she would comply with the cease and desist letter at least temporarily. Id.

When determining whether Ms. Norris had complied with her promise to leave PublishAmerica alone, Plaintiff discovered that Defendant had commented negatively about the cease and desist notices on the AbsoluteWrite website. Compl. ¶7. Specifically, he directed defamatory statements at Plaintiff:

> I say it's time to report Vic Cretella to the Maryland Bar Association for attempted extortion. Let them sort it out and decide whether that's what he's involved in or not.
>
> Let's not forget his law firm. They might not know what he's doing. They might not want the blackeye [sic] he's giving them.

Id.

Less than an hour later, Defendant posted a copy of an e-mail, which he had purportedly sent to Plaintiff's employer, on the AbsoluteWrite website. Compl. ¶8. The contents of this letter are as follows:

> Perhaps your office is unaware, but Mr. Cretella seems to be involved in what I would characterize as extortion. I've enclosed a copy of the documentation that leads me to express this extreme displeasure with one of your lawyers because he appears to not only represent a business I consider to be among the sleaziest in the world, but to be actively consorting with them in furthering its unethical if not illegal methods. I fully intend to also report him to the Maryland State Bar Association for disciplinary action.

Id. Defendant also indicated that he copied the e-mail to a number of "related offices in the Maryland State Bar Association and nearly every member of their Ethics Committee." When commenting on what he had done, he said: "Well, let's see Vic deal with this. . . . **Yes, this just went out in e-mail. They want to play rough, then let's level the playing field just a bit."** Id. (Emphasis in original). Defendant did not comply with proper Maryland procedure for reporting this alleged attorney misconduct. Ex. 1.

Kuzminski reiterated his defamatory accusations several minutes later when he posted the following message on the website:

> Okay, folks, if you want to help, send an e-mail to those addresses. . . . If you have documentation about PA or Vic, offer to give it to the Maryland State Bar Association to use in considering whether to administer disciplinary action to dear ole Vic.
>
> Hey Vic, I hope you're reading this so you can include me on the offer you made to Christine.

Compl. ¶9.

On February 13, 2008, Plaintiff filed a complaint for defamation against Defendant based upon the above referenced Internet posts. The Complaint was served on February 15, 2008. Defendant answered the Complaint on February 26, 2008. He has now filed a motion to

dismiss.[2]

II. LEGAL DISCUSSION

A. Defendant's Motion Contravene's the Rules of Civil Procedure

Defendant's motion to dismiss should be denied because it is inconsistent with Rule 12(b)(6). Rule 12(b)(6) of the Federal Rules of Civil Procedure only allows the court to dismiss plaintiff's complaint if it "fails to state a claim upon which relief can be granted." Islam v. Jackson, 782 F. Supp. 1111, 1113 (E.D. Va. 1992). "The function of a motion to dismiss is to test 'the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.'" Gasner v. County of Dinwiddie, 162 F.R.D. 280, 281 (E.D. Va. 1995); Republical Party of North Carolian v. Martin, 980 F.2d 943, 952 (4th Cir. 1992). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Republical Party of North Carolian, 980 F.2d at 952; Islam, 782 F. Supp. at 1113. "The, the standard approach to a motion to dismiss requires the Court to presume that all factual allegations in a plaintiff's complaint are true, to make all reasonable inferences in favor of the non-moving party, and not to dismiss any count unless it appears beyond a doubt that recovery would be impossible under any set of facts which could be proven." Gasner, 162 F.R.D. at 281 (citations omitted); Republical Party of North Carolian, 980 F.2d at 952; Islam,

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[2]In Defendant's certificate of service, he claimed to have served his motion by first class mail. However, that is not the case, he actually served it by priority mail. He also sent it certified. This may have delayed Plaintiff's receipt of the document.

782 F. Supp. at 1113.

"A Rule 12(b)(6) motion to dismiss for failure to state a claim does not permit the Court to look outside the complaint. . . ." Gasner, 162 F.R.D. at 281. "Indeed, the Rules require that if the Court does consider 'matters outside the complaint" it must convert the motion into a motion for summary judgment, affording the parties a 'reasonable opportunity to present all material made pertinent to such a motion." Gasner, 162 F.R.D. at 281-82. However, it is an abuse of discretion to convert a motion to dismiss into a motion for summary judgment before a party has been "afforded a reasonable opportunity for discovery. . . ." Gay v. Wall, 761 F.2d 175, 177 (4th Cir. 1985).

If a motion to dismiss is converted into a summary judgment motion, the burdens and presumptions governing Rule 56 should be applied to it. "Summary judgment is appropriate when the admissible evidence demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." Williams v. Staples, Inc., 372 F.3d 662, 667 (4th Cir. 2004). If the moving party properly supports his motion, "the burden shifts to the nomoving party to set forth specific facts showing genuine issues for trial." Dixon v. State Farm Fire & Cas. Ins. Co., 926 F. Supp. 548, 550 (E.D. Va. 1996). In order to meet their respective burdens, the parties must rely on sworn, authenticated documents which comply with the rules of evidence. Cuddy v. Wal-Mart Super Center, Inc., 993 F. Supp. 962, 967 (W.D. Va. 1998). In reviewing the evidence, the court must draw all reasonable inferences in favor of the nonmoving party and may not make credibility determinations or weigh the evidence. Williams, 372 F.3d at 667.

B. Plaintiff Has Properly Stated A Claim for Defamation

Plaintiff has properly alleged a claim for defamation. In order to state a claim for defamation, a plaintiff must allege (1) the defendant published a defamatory statement to a third person; (2) "the statement was false"; (3) "the defendant was legally at fault in making the statement"; and (4) the plaintiff was harmed by the publication. Gohari v. Darvish, 767 A.2d 321, 327 (Md. 2001); cf., generally, Food Lion, Inc. v. Melton, 250 Va. 144, 458 S.E.2d 580 (1995) (analyzing each of these elements). As explained below, Defendant fails to challenge the sufficiency of Plaintiff's allegations as to any of these elements.

1. Kuzminski's Statement Was Defamatory

Defendant urges that it would contravene the "public interest" to treat his statements as defamatory. Mot. to Dismiss at 2. According to him, "considering such factual reports to be libel would . . . remove valuable regulatory channels for the public when it believes an attorney in whom great trust is granted fails to honor that trust." Id. In other words, Defendant reasons that he should have an unfettered right to accuse attorneys of misconduct with impunity. That of course is not the law.

In American jurisprudence, there is a tension between the First Amendment, which guaranties freedom of speech, and the states' "legitimate . . . interest in compensating individuals for defamatory falsehoods." Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974). On the one hand, the law of defamation preserves a fundamental right at the core of our society: "the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being-a concept at the root of any

system of ordered liberty." Id. at 341. Inherent in the law of defamation is recognition of the principle that "there is no constitutional value in false statements of fact."

> Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open' debate on public issues. They belong to that category of utterances which '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. at 339-40 (citation omitted).

On the other hand, since erroneous statements of fact are "inevitable in free debate", the punishment of such statements could chill the good faith expression of First Amendment rights.

> Punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.

Gertz, 418 U.S. at 340.

In order to set the appropriate balance between First Amendment rights and reputational interests, the Supreme Court increased the burden on defamation plaintiffs through a series of decisions starting with New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Milkovich v. Lorain Journal Co.,, 497 U.S. 1, 14 (1990). The cornerstone of these new requirements was the imposition of a fault requirement for all defamation claims. At common law, courts were free to impose liability for defamation based upon a strict liability standard, which required the plaintiff

to establish only that the statement was false. The Supreme Court abandoned this approach in favor of a standard of care linked to the nature of the plaintiff. For public figures and officers, defamation plaintiffs are obligated to establish that a defamatory statement was published maliciously, i.e. with knowledge of falsity or reckless disregard thereof; private figures must only establish negligence. Milkovich v. Loarain Journal Co., 497 U.S. 1, 14-16 (1990).

Although the Court has certainly increased the burden of proof on defamation plaintiffs over the last forty years, it has never immunized false criminal accusations from all defamation liability to protect the "public interest". To the contrary, courts routinely treat "[w]ords that falsely impute criminal conduct to plaintiff [as] defamatory." Smith v. Danielczyk, 928 A.2d 795, 805 (Md. 2007); Food Lion, Inc. v. Melton, 250 Va. 144, 150, 458 S.E.2d 580, 584 (1995). This continues to hold true for imputations of blackmail and extortion. World Boxing Council v. Cosell, 715 F. Supp. 1259, 1262 (S.D.N.Y. 1989) (holding that imputation of extortion was defamatory but dismissing the case because there was no malice); Fisher v. Larsen, 138 Cal. App. 3d 627, 638 (Cal. Ct. App. 1983)("evidence of the complete lack of investigation to determine the truth of the charges, of the Larsens' motive and intent in making the accusations, and their complete disregard of Fisher's denials may, by accumulation and appropriate inference, show recklessness"); Hornot v. Cardenas, 968 So.2d 789, 800-01 (La. Ct. App. 2007); Atkinson v. Detroit Free Press Co., 9 N.W. 501 (Mich. 1881) (charging lawyer with giving dishonest advice, with making false statements in professional transactions, with incurring loss of confidence by misconduct, with embezzlement, and with making false charges for services and extorting excessive compensation is libelous); Mannix v. Portland Telegram, 297 P. 350, 354 (Ore. 1931)

(newspaper article reporting alleged client as charging attorney with betraying confidence and with extortion held libelous per se); Healy v. Dettra, 8 A. 622 (Pa. 1887) (to call a lawyer a blackmailer in his professional work is slanderous per se).

In other words, the general principles underlying the law of libel are just as applicable today as they have been for well over the past one hundred years:

> Nowhere are the general principles of the law of libel . . . more clearly or accurate stated than in the case of Negley v. Farrow, 60 Md. 158, where the question before the court was whether the publication of a charge intimating that a state senator had sold his vote for private gain was libelous per se. In considering that question the court said:
>
> > It can hardly be necessary to say that such charges as these, against the official conduct of the plaintiff, and the imputation of the base and sordid motives by which such conduct was governed, were calculated to injure his reputation and expose him to the contempt of all honorable men. Independent altogether of the innuendoes, the article on its face shows that these charges were made against the plaintiff, and we have no hesitation, therefore, in saying that the publication is in itself libelous. No one denies the right of the defendants to discuss and criticize boldly and fearlessly the official conduct of the plaintiff. It is a right, which, in every free country belongs to the citizen, and the exercise of it, within lawful and proper limits, affords some protection at least against official abuse and corruption. But there is a broad distinction between fair and legitimate discussion in regard to the conduct of a public man, and the imputation of corrupt motives, by which that conduct may be supposed to be governed. And if one goes out of his way to asperse the personal character of a public man, and to ascribe to him base and corrupt motives, he must do so at his peril; and must either prove the truth of what he says, or answer in damages to the party injured.

Bowie v. Evening News, 129 A. 797, 798 (Md. 1925) (quotation omitted). The only difference between the principles described in Bowie and those applied today is that today, a plaintiff has a

higher burden of proof than intimated in Bowie; not only must a plaintiff now establish falsity, but he must prove fault. Still, defamers do not have wholesale immunity as suggested by Defendant when they speak about matters of public interest. "The need to avoid self-censorship by the news media is . . . not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." Gertz, 418 U.S. at 341. Of course, the Supreme Court has not embraced such a view.

Neither can Defendant establish that his imputation of extortion was rhetorical hyperbole or some other form of unactionable opinion . "[C]ourts have held that certain types of communications, although undoubtedly offensive to the subject, do not rise to the level of defamation." Kryeski v. Schott Glass Technologies, Inc., 626 A.2d 595, 600-01 (Pa. Superior Ct. 1993) (holding that name calling was not actionable). For example, a subjective opinion, which is not "sufficiently factual to be susceptible of being proved true or false" with objective evidence, may not be the subject of a defamation claim. Milkovich, 497 U.S. at 21-22 (holding that averred defamatory language was actioanble because it was "an articulation of an objectively verifiable event").

This exemption for "opinions" covers "statements which are merely annoying, embarrassing or no more than rhetorical hyperbole or vigorous epithets. . . ." Kryeski v. Schott Glass Technologies, Inc., 626 A.2d 595 (Pa. Superior Ct. 1993); see also Old Dominion Branch No. 496 Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264 (1974) (reversing judgment for defamation, which was based upon the characterization of a nonunion worker as a

"scab", because that word was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join"). In order to qualify as rhetorical hyperbole, a statement has to be devoid of any factual content which is capable of being proven true or false. Dube v. Likins, 167 P.2d 93, 107 (Ari. Ct. App. 2007) (holding that characterization of person as "unhappy" was rhetorical hyperbole because it "d[id] not imply the allegation of undisclosed defamatory facts as the basis for the opinion"); see also DeAngelis v. Hill, 847 A.2d 1261, 1269 (N.J. 2004) (holding that "loose, figurative or hyperbolic" speech was subject to the same immunity protecting opinion); Held v. Pokorny, 583 F. Supp. 1038, 1040 (S.D.N.Y. (1984) ("'rhetorical hyperbole', and 'vigorous epithets' are expressions of opinion whose content is so debatable, loose and varying that they are insusceptible to proof of truth or falsity").

In support of his rhetorical hyperbole defense, Defendant alludes to Greenbelt Cooperative Publ'g Assn' v. Bresler, 398 U.S. 6 (1970). See Mot. to Dismiss at 1, 2 & Ex. 4. In that case, a developer named Bresler and the Greenbelt City Council were embroiled in a dispute over the development and use of several properties. As the protracted dispute became more "tumultuous", several people, including a reporter, described the developer's negotiating position as "blackmail". Believing that he had been accused of a crime, the developer successfully prosecuted a defamation action. The Supreme Court, however, reversed the judgment.

> It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the

> newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler' negotiation position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.

Greenbelt Cooperative Publ'g Assn', 398 U.S. at 14.

Greenbelt Cooperative Publ'g Assn' is clearly distinguishable from the instant matter. Here, Kuzminski created the impression that he was using the word extortion in the criminal sense rather than as a "lusty and imaginative expression". This interpretation can be inferred from the fact that Kuzminski repeatedly said Plaintiff should be punished for his extortionate behavior by the authorities. First, he said, "it's time to report Vic Cretella to the Maryland Bar Association for attempted extortion." Compl. ¶7 (emphasis added). He then told Plaintiff's employer: "Perhaps your office is unaware, but Mr. Cretella seems to be involved in what I would characterize as extortion. . . . I fully intend to also report him to the Maryland State Bar Association for disciplinary action." Compl. ¶8 (emphasis added). He then enlisted the aid of others to further his punitive campaign: "Okay, folks, if you want to help, send an e-mail to those addresses. . . . If you have documentation about PA or Vic, offer to give it to the Maryland State Bar Association to use in considering whether to administer disciplinary action to dear ole Vic." Compl. ¶9 (emphasis added). By publicly linking his reference to extortion with his efforts to disbar Plaintiff, a reader could reasonably perceive that Defendant had in fact imputed criminal activity to Plaintiff rather than use the word extortion loosely and figuratively.

In fact, Defendant has hoisted himself on his own petard. In order to avail himself of the rhetorical hyperbole defense, Defendant must establish that his statements were devoid of any factual content capable of being proven true or false. However, Defendant repeats throughout his Motion to Dismiss that his extortion accusations were "factual" in nature. See Mot. to Dismiss at 1 (admitting that "Defendant reported only factual information") (emphasis added); id. at 2 (suggesting that it would be contrary to public interest to consider his "factual reports" to be libelous); id. (noting that he submitted "factual information" to Plaintiff's former employer). These admissions are completely incompatible with a rhetorical hyperbole defense, making a motion to dismiss based upon such a defense inappropriate.

This conclusion is reinforced by the fact that Defendant accused Plaintiff of being unethical. Compl. ¶8. This by itself is defamatory per se. Shapiro v. Massengill, 661 A.2d 202, 219 (Md. 1995) ("implication that [attorney's] lack of ethics, and his "involvement" in a criminal investigation rendered him unfit to be an attorney" was defamatory per se); Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 8, 82 S.E.2d 588, 592 (Va. 1954) (holding that "words and statements which charge an attorney at law with unethical or unprofessional conduct and which tend to injure or disgrace him in his profession are actionable per se"); see also, e.g., Albertini v. Schaefer, 967 Cal. App. 3d 822, 829 (Cal. Ct. App. 1979) ("imputing dishonesty or lack of ethics to an attorney is" defamatory); McCall v. Courier-Journal and Louisville Times Co., 623 S.W.2d 882, 884-85 (Ky. 1981) (holding that it was defamatory to accuse attorney of "a serious violation of the canons of legal ethics"); Armstrong v. Simon & Schuster, Inc., 610 N.Y.S.2d 503, 505-06 (N.Y. App. Div. 1994) (implying that attorney violated attorney ethic rules and suborned perjury

was defamatory).

2. Defendant Cannot Establish Lack of Malice as a Matter of Law

Plaintiff has properly supported his defamation claim with allegations of malice. In order plead malice, Plaintiff must allege that Defendant "published the statement[s] in issue with reckless disregard for its truth or with actual knowledge of its falsity." Shapiro, 661 A.2d at 216; see generally Milkovich v. Lorain Journal Co.,, 497 U.S. 1 (1990).

Here, Plaintiff alleged malice in paragraph 14 of the Complaint. Although he alleged malice generally, he was free to do so. Fed. R. Civ. Proc. 9(b) (stating that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally). Accordingly, Plaintiff's allegations of malice should survive a motion to dismiss.

Defendant argues that he did not act maliciously based upon two facts. First, he claims that he did not act maliciously because he had knowledge of complaints made by authors about Plaintiff's client, PublishAmerica. Mot. to Dismiss at 1, 2. Defendant seems to be suggesting that he was authorized to defame Plaintiff with impunity simply because he believes that Plaintiff's client had committed some unidentified wrongdoing in the past. Defendant's argument is defective for many reasons.

Procedurally, this argument is defective because it grounded on evidence which is not contained within the four corners of the Complaint. Gasner, 162 F.R.D. at 281. Nowhere in the Complaint did Plaintiff allege that Defendant had received any Complaints about PublishAmerica. Accordingly, Defendant's claim that he relied in good faith upon unidentified complaints from authors when accusing Plaintiff of extortion is premature.

It would also be inappropriate to convert Defendant's motion to dismiss into a motion for summary judgment in order to consider Defendant's evidence. Importantly, Defendant provides no foundation for his claim that he has received any complaints about PublishAmerica. He fails to identify the complaining authors, the substance of the complaints or the evidence supporting the complaints. Mot. to Dismiss at 1. He has not even identified this evidence under oath. Accordingly, it would be inappropriate to grant summary judgment based upon Defendant's conclusory evidence. Cuddy, 993 F. Supp. at 967. It would also be premature. Currently, discovery has not even begun. Consequently, Plaintiff has had no opportunity to test whether Defendant has actually received any complaints, or whether these complaints had any type of merit. Gay, 761 F.2d at 177.

Even if Defendant had received legitimate complaints about PublishAmerica from writers, it is unclear how Defendant's knowledge of those complaints would have authorized him to characterize Plaintiff's cease and desist letter to Christine Norris as being extortionate. In fact, Defendant has not even introduced that cease and desist letter into the record. Mot. to Dismiss at 1 (claiming that cease and desist letter demanded "an unspecified sum" from Christine Norris). Accordingly, there is no way for the Court to evaluate whether some unidentified author complaints concerning PublishAmerica (and not Plaintiff), which were allegedly received by Defendant, have any relationship to Plaintiff's cease and desist letter, and if so, how. Without this cease and desist letter being in the record, the Court cannot even determine whether Plaintiff actually demanded any payment from Ms. Norris in the cease and desist letter as claimed by Defendant in his Motion.

Second, Defendant reasons that he acted without malice because he actually reported Plaintiff to the authorities. Mot. to Dismiss at 2. Defendant apparently reasons that he would not have actually reported criminal behavior if he did not believe those charges in good faith. Defendant's argument however is one that he will have to raise for a jury. At this stage of the proceedings, Plaintiff is entitled to have the allegations in the Complaint viewed in a light most favorable to him. Republical Party of North Carolian, 980 F.2d at 952. Accordingly, Plaintiff's allegation that Defendant acted with malice must trump any inferences Defendant may try to raise from the fact that he reported Plaintiff to the authorities.

Furthermore, Defendant is not entitled to an inference that he acted in good faith because there is no evidence that Defendant actually submitted a proper grievance to the appropriate Maryland authority. According to the Attorney Grievance Commission for Maryland, there are two ways to file a complaint against an attorney. Ex. 1. Based upon the allegations in the complaint, it does not appear that Defendant complied with either procedure. Compl. ¶11. Accordingly, if anybody is entitled to an inference supporting his case, it is Plaintiff and not Defendant. Specifically Plaintiff is entitled to the inference that Defendant did not seriously believe Plaintiff had committed extortion because he did not even take the time to determine the correct way to file such a complaint.

This conclusion is bolstered by the evidence of malice identified in Plaintiff's own Motion to Dismiss. Although malice cannot be satisfied solely on ill will, "a plaintiff is entitled to prove the defendant's state of mind, i.e. whether he or she had knowledge of falsity or entertained serious doubts thereof, through circumstantial evidence." Harte-Hanks

Communications, Inc. v. Connaughton, 491 U.S. 657, 692 (1989) (holding it was "likely that the newspaper's inaction[, i.e. the decision not to contact witnesses or listen to tape recordings,] was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges"). Additionally, "the purposeful avoidance of the truth" can support malice as can the publication of a defamatory statement that is "so inherently improbable that only a reckless person would have put it in circulation." Lohrenz v. Donnelly, 350 F.3d 1272, 1284 (D.C. Cir. 2003); see also St. Amant v. Thompson,, 390 U.S. 727 (1968) ("[p]rofessions of good faith will be unlikely to prove persuasive . . . where a story is fabricated by defendant, [or] is the product of his imagination"); Hudnall v. Sellner, 800 F.2d 377, 382 (4th Cir. 1986) (Knowing concoction of accusations out of whole cloth supported finding of malice); Brown & Williamson tobacco Corp. v. Jacobson, 827 F.2d 1119, 1134-35 (7th Cir. 1987) (finding evidence of malice when reporter destroyed his notes after he heard that case was dismissed even though it was "implausible" for reporter to believe that case was over in light of fact he had to have been aware of right to appeal). Rockwood Bank v. Gaia, 170 F.3d 833, 840-41 (8th Cir. 1999) (holding that there was evidence of malice underlying supervisor's defamatory statements about subordinate, based upon supervisor's dislike for subordinate, evidenced by the fact that he objected to hire in the first place, gave employee ambiguous instructions, and then papered employee's personnel record with negative comments when employee did not follow bad instructions); Keenan v. Computer Associates Int'l, 13 F.3d 1266, 1271-72 (8th Cir. 1994) (pretexual basis for terminating employee supported knowledge of falsity).

Here, Defendant admits that he "despises" PublishAmerica. Mot to Dismiss at 2. He

also claims that he was personally attacked twice by PublishAmerica, which creates further evidence of animosity. Mot. to Dismiss at 1 & Exs. 1 & 2 thereto (claiming that he was, inter alia defamed by PublishAmerica). This evidence of malice may be used circumstantially to show that Defendant harbored a grudge against PublishAmerica and was thus inclined to punish any and all persons associated with his hated arch rival, PublishAmerica, with true or false statements. Celle v. Filipino Reporter Enterprises, Inc., 209 F.3d 163, 186-87 (2d Cir. 2000) ("A reasonable juror-considering the ill will . . . could conclude that Pelayo was imposing in-kind retribution on Celle by exaggerating the status of the legal proceedings against him")

Importantly, malice may not even be the appropriate standard here. Generally, Plaintiff must only prove malice if he is a public figure. Food Lion, Inc. v. Melton, 250 Va. 144, 150, 458 S.E.2d 580, 584 (1995). Since attorneys are not necessarily public figures, negligence may be the appropriate standard here. Shapiro v. Massengill, 661 A.2d 202, 216 (Md. 1995) (applying negligence standard); McCall v. Courier-Journal and Louisville Times Co., 623 S.W.2d 882 (Ky. 1981). If negligence is the appropriate standard, Defendant's evidence of good faith is irrelevant. Unless Defendant establishes that Plaintiff is a public figure, which has not even purported to do in his Motion, Defendant's reliance on evidence of good faith is premature.

3. Defendant Cannot Establish Truth at This Stage

Defendant's truth defense is also premature. According to him, his accusations of extortion must have been true because Plaintiff was discharged by his former law firm as a result of the charge. Mot. at 1. He reasons that Plaintiff's law firm, "being lawyers themselves, would clearly know the difference between libel and factual information and thus would act only upon

facts. . . ." Id. ("if he was discharged as a result of the defendant's report, then it stands to reason that there was substance in the report concerning his behavior . . ."). This sophistry is flawed for many reasons.

First, it requires the court to construe the facts in a light most favorable to Defendant. Specifically, it requires the Court presume that all attorneys would automatically be able to distinguish truth from lies. Of course that is not true. If it were, we would have no need for attorneys, juries and appellate courts. Parties to a legal dispute could simply put there evidence before a judge who would make an infallible ruling thereon without any legal briefing whatsoever. With no disrespect to the Court, the Utopia assumed by Defendant does not exist. Judges are not infallible as evidenced by the jury system and appellate courts. Neither can attorneys instantly recognize truth from lies as evidenced by the fact that every trial ends with one or more losing parties. Certainly, attorneys such as Plaintiff's former employer are well trained in spotting truth and lies; yet that does not mean that Defendant is entitled to an irrebuttable presumption that Plaintiff's former employer would have spotted Defendant's lies as a matter of law. Williams, 372 F.3d at 667 (holding that inferences must be resolved against moving party).

Second, it is impossible to determine whether Defendant's extortion accusations are true as a matter of law since vital evidence is missing from the record. Defendant accused Plaintiff of attempting to extort money from Christine Norris through the service of a cease and desist letter. However, that letter is not in the record. Without it, this Court cannot even begin evaluating whether Defendant's characterization of the cease and desist letter was truthful.

4. **Defendant's Statements Were Not Privileged**

Defendant seems to raise some vague privilege in support of his Motion to Dismiss: "[R]eporting an employee's actions, as stated in paragraph 11 [of the Complaint], to his employer and to a lawfully established committee whose purpose is to regulate ethical behavior among its members are also lawful actions." Mot. to Dismiss at 2 (stating also that to encourage others "to report what they knew of Mr. Cretella's behavior is a lawful action"). However, Defendant's allusion to some unidentified privilege is unavailing.

Privilege is an affirmative defense. Carroll v. Paramount Pictures, Inc., 3 F.R.D. 47, 48 (S.D.N.Y. 1943). Accordingly, it is inappropriate to raise such a defense by a motion to dismiss for failure to state a claim. Gasner, 162 F.R.D. at 281 (motion to dismiss "does not resolve . . . the applicability of defenses"). This limitation is particularly appropriate here where the facts underlying Defendant's unidentified privilege are not contained in the Complaint–let alone the record.

> As to the . . . Company, its claim of privilege cannot be availed of by a motion to dismiss; it must be pleaded by answer. . . . There may be an issue for the jury on this subject together with other issues. If the company had a qualified privilege, it may have gone beyond the scope of such defense. Such matters belong to the trial on the merits before the court and a jury, not to a motion to dismiss. . . .

Olan Mills, Inc. v. Enterprise Pub. Co., 210 F.2d 895, 897 (5th Cir. 1954).

For example, Defendant claims that he was privileged to report Plaintiff's unethical behavior to the authorities; but as explained above, it does not appear that Plaintiff ever filed charges with the appropriate authorities. Compare Ex. 1 (explaining procedures for raising

attorney grievance) with Compl. ¶11 (alleging facts which establish that Defendant did not raise attorney grievance with the appropriate authorities). Thus, it does not appear that Plaintiff's e-mails to random attorneys, who may have been affiliated with the Maryland State Bar Association, were privileged at all.

Similarly, it is unclear how Defendant was privileged to contact Plaintiff's former law firm regarding the cease and desist letter sent by Plaintiff to Christine Norris. The cease and desist letter was not sent to Defendant. Nor did the cease and desist letter make any reference to Defendant whatsoever. Accordingly, it is exceedingly unclear how Defendant had any interest in responding to the letter. Since Defendant has cited no authority supporting his claim that he was privileged to characterize a letter that had nothing to do with him, his grounds for dismissal is unsupported.

Furthermore, even if Defendant submitted his grievance to the appropriate authorities and/or had a right to submit a complaint to Plaintiff's former employer, Defendant is not necessarily entitled to judgment as a matter of law. A privilege may be lost if the defendant

> 2. Used language which was intemperate or disproportionate in strength and violence to the occasion and which was unnecessarily defamatory of the plaintiff; or
>
> * * *
>
> 4. Deliberately adopted a method of speaking the alleged words which gave unnecessary publicity to such words;
> 5. Purposely arranged to speak the alleged words in the presence of a person or persons who were wholly uninterested in the matter and who had no right to be present and who in the natural course of things would not have been present; or
> 6. For the purpose of gratifying some sinister or corrupt motive

> such as hatred, revenge, personal spite, ill will, or desire to injure the plaintiff. . . .

Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 154, 334 S.E.2d 846, 854 (1985). Here, there are certainly allegations and evidence supporting a finding that Defendant gave unnecessary publicity to his extortion accusations. Not only did he submit communications to the authorities and Plaintiff's former employer, but he posted them on the Internet such that they are available to anybody with a computer and Internet connection. By his own admissions, there is also evidence that he published his defamatory statements to gratify some corrupt motive such as revenge. Compl. at 1, 2 & Ex. 4 (admitting that he despised Plaintiff and that he had been "attacked" by PublishAmerica, Plaintiff's current employer, on two prior occasions). Accordingly, it would be inappropriate to grant Defendant's privilege defense without allowing a jury to determine whether the privilege had been abused.

5. Plaintiff Has Properly Alleged Damages

Although it is unclear, Defendant apparently seeks dismissal based upon his claim that there are no damages. According to him, Plaintiff and PublishAmerica were despised by hundreds, if not thousands, of writers before Defendant defamed PublishAmerica. Mot. to Dismiss at 2. Based upon this fact, Defendant seems to reason that Plaintiff cannot recover damages. Defendant's argument is wrong. First, it is based upon evidence that is not in the Complaint. Second, Defendant has not even provided an adequate foundation for this claim; he has not identified any of these thousands of people by name; nor he has even proffered this testimony under oath. Third, even if hundreds or thousands of people despised Plaintiff prior to

Defendant's publication of his letter, that does not preclude Plaintiff from recovering damages to his reputation relating to the thousands of people who did not hold a negative view of Plaintiff prior to Defendant's defamation.

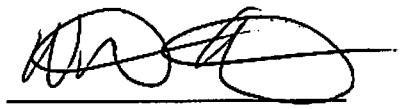
6. Plaintiff's Motives for Filing this Suit Are Irrelevant

Defendant also claims that Plaintiff filed this claim in bad faith. According to him, Plaintiff filed this case to punish Defendant for testifying about PublishAmerica in an arbitration proceeding brought by one of PublishAmerica's authors, Tom Modden, rather than to seek recovery for damages caused by the conduct alleged in the Complaint. However, Defendant has not submitted any admissible in support of his claim. In fact, the exhibit identified by him in support of this claim, i.e. Exhibit 5, does not relate to (1) any arbitration proceeding; (2) Tom Modden; (3) Plaintiff or (4) PublishAmerica. Even if Defendant had some sort of evidence supporting his claim, Plaintiff has no obligation to respond to it because it is procedurally defective. Fed. R. Civ. Proc. 11. Nevertheless, Plaintiff denies that Defendant's charge of bad faith has any merit as evidenced by this very carefully constructed brief concerning the merits of Plaintiff's claim.

III. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be denied.

Respectfully Submitted,



Victor E. Cretella III
113 East Church St.
PO Box 151
Frederick, MD 21705-0151
301-695-6804
301-631-9073 (fax)
vec@publishamerica.com
Plaintiff, pro se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiff's Opposition to Defendant's Motion to Dismiss was sent via first class mail, postage prepaid, to:

David L. Kuzminski
2581 Pine Hurst Drive
Petersburg, Virginia

this 4th day of April, 2008.

Victor E. Cretella III