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VIA HAND DELIVERY
September 13, 2019

The Honorable Jon R. Zug, Clerk
Circuit Court of Albemarle County
501 East Jefferson Street
Charlottesville, Virginia 22902

Re: Edward Dickinson Tayloe, II v. C-Ville Holdings, LLC, et al.
Circuit Court of Albemarle County, Case No. CL19-868

Dear Mr. Zug:

Enclosed please find Plaintiff's Response in Opposition to Defendants' Demurrers for filing in the above-referenced case.

Thank you for your prompt attention to this matter. Please call me if you have any questions.

With best regards, I am

Very truly yours,

Thomas E. Albro

TEA/dn
Enclosures

cc: Mr. Edward Dickinson Tayloe, II (w/encl.)
Jay Ward Brown, Esq. (w/encl.)
Eden B. Heilman, Esq. (w/encl.)
Nicole Tortoriello, Esq. (w/encl.)
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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE

EDWARD DICKINSON TAYLOE, II,	
Plaintiff,	
v.	**Case No. CL19-868**
C-VILLE HOLDINGS, LLC	
And	
LISA PROVENCE	
And	
JALANE SCHMIDT,	
Defendants.	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' DEMURRERS

I. INTRODUCTION

The Defendants' arguments take aim at issues in the case that must be resolved by the jury. The generous, pro-plaintiff standard articulated by the Virginia Supreme Court most recently in 2015 in its decision *Pendleton v. Newsome*, 290 Va. 162, requires the court to dismiss the demurrers. The question before the court is whether a reasonable jury could conclude that the Profile, taken as a whole and considered from the perspective of a normal reader, either implied that the Plaintiff: (1) was a racist; (2) participated in the Statue Litigation to antagonize people of color; and/or (3) intentionally roiled the lives of black people.

II. LEGAL STANDARD

"A demurrer admits the truth of all properly pleaded material facts and all facts which are impliedly alleged, as well as facts that may be fairly and justly inferred." *Pendleton*, 290 Va. at 171, *citing Cox Cable Hampton Roads, Inc. v. City of Norolk*, 242 Va. 394, 397 (1991). "'In determining whether the words and statements complained of in the instant case 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.'" *Pendleton*, 290 Va. at 171, *quoting Webb v. Virginian-Pilot Media Companies, LLC*, 287 Va. 84, 88 (2014). "Virginia law recognizes a claim for defamation by inference, implication or insinuation." *Pendleton*, 290 Va. at 172. The trial court's role is to exercise a gate-keeping function to ensure the alleged defamatory inference, implication, or insinuation is not "'extended beyond its ordinary and common acceptation.'" *Id.* at 171, *quoting Webb*, 287 Va. at 88.

The Virginia Supreme Court in *Pendleton* emphatically articulated the generous, pro-plaintiff standard that applies at the pleading stage of a defamation case. The suit in *Pendleton* arose from the heartbreaking death of a seven-year old, who died of an allergic reaction to a peanut given her by another child. The Virginia Supreme Court held that various statements by school officials following the tragedy could be construed by a reasonable jury as implying that the child's mother was partly to blame for the child's death, even though all of the statements made by school officials were *literally true and accurate* recitations of school policy, none of the statements in fact accused the mother of complicity, and none of the statements even named the mother. Even so, the Supreme Court held, the suit should not have been dismissed on demurrer:

> We need not expound upon the fact that a statement falsely implying that a mother was responsible for her child's death would be defamatory. The issue before this Court is whether such an implication is present. Because Virginia law makes room for a defamation action based on a statement expressing a defamatory meaning "not apparent on its face," evidence is admissible to show the circumstances surrounding the making and publication of the statement which would reasonably cause the statement to convey a defamatory meaning to its recipients. Allegations that such circumstances attended the making of the statement, with an explanation of the circumstances and the defamatory meaning allegedly conveyed, will suffice to survive demurrer if the court, in the exercise of its gatekeeping function, deems the alleged meaning to be defamatory. Whether the circumstances were reasonably sufficient to convey the alleged defamatory meaning, and whether the plaintiff was actually defamed thereby, remain issues to be resolved by the fact-finder at trial.

Pendleton, 290 Va. at 172. Just as the C-ville Defendants have attempted here, the defendants in *Pendleton* argued that the defamatory statements were literally true. For the purposes of a demurrer, *Pendleton* instructs that literal truth does not matter, if the Profile as a whole conveys a defamatory impression. *Id.* at 173. ("The defendants argue that their statements were true and the truth is a defense to a defamation claim. The defendants' statements here, however, may be true if taken out of context, but in the context of the alleged publicity attending the case when the statements were published, it cannot be said at the demurrer stage that they were not capable of conveying the defamatory innuendo that the plaintiff bore responsibility for her child's death.") Notably, the defamatory implications at issue in *Pendleton* are relatively oblique in comparison to the implications conveyed by the Profile. In *Pendleton*, school officials stated repeatedly that the parent of a child with an allergy was responsible for providing the school information about the allergy, providing the needed medication to the nurse, and working with the school to develop a health plan for her child. *Id.* at 166-71. The connection a reader must make between the school's statements and their implication, that the plaintiff was a bad mother, is far more attenuated than what the Profile asks of its reader.

Pendleton thus aligned Virginia with the many other courts around the country that have held that even articles or broadcasts containing nothing but literally true facts may as a whole convey a false and defamatory meaning. *See, e.g., Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000) ("Many other courts have likewise recognized that while all the statements in a publication may be true when read in isolation, the publication may nevertheless convey a substantially false and defamatory impression by omitting material facts or suggestively juxtaposing true facts.") *citing Golden Bear Distributing Sys. v. Chase Revel, Inc.*, 708 F.2d 944, 948–49 (5th Cir.1983); *Express Publishing. Co. v. Gonzalez*, 350 S.W.2d 589, 592 (Tex.Civ.App.—Eastland 1961); *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 425 (Tex.2000); *Crane v. Arizona Republic*, 972 F.2d 1511, 1523 (9th Cir.1992); *O'Brien v. Papa Gino's of Am., Inc.*, 780 F.2d 1067, 1073 (1st Cir.1986); *Church of Scientology v. Flynn*, 744 F.2d 694, 696 (9th Cir.1984); *Gannett Co. v. Re*, 496 A.2d 553, 558 (Del.1985); *McCullough v. Cook*, 679 So.2d 627, 632–33 (Miss.1996).

The court in *Pendleton* held that Virginia is *not* among the jurisdictions that impose any especially onerous requirements on plaintiffs in cases of defamation by implication. "Our decisions in defamation cases do not include a requirement that 'a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true.'" Id. at 174. Instead, the plaintiff assumes its normal burden of "proof by a preponderance of the evidence." *Id.*, *citing Food Lion, Inc. v. Melton*, 250 Va. 144, 150 (1995). So too, the court in *Pendleton* held that Virginia is not among the states that require proof that the author *endorsed* the alleged inference. "Nor have we held that the defendant's words must, by themselves, suggest that the author intends or endorses the allegedly defamatory inference." *Pendleton*, 290 Va. at 174.

"Such a holding would immunize one who intentionally defames another by a careful choice of words to ensure that they state no falsehoods if read out of context but convey a defamatory innuendo in the circumstances in which they were uttered." *Id.*

In light of these legal principles, the Defendants' assertions that the Profile could not be construed by a reasonable jury as defaming Plaintiff and should be dismissed on demurrer Plaintiff are untenable. Defamatory statements are those "tend[ing] so as to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Schaecher v. Bouffault*, 290 Va. 83, 91 (2015); *quoting* Restatement (Second) of Torts § 559; *citing Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir.1993) (applying Virginia law). "Characterizing the level of harm to one's reputation required for defamatory 'sting,' we have stated that defamatory language 'tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous.'" *Schaecher*, 290 Va. at 91, *quoting Moss v. Harwood*, 102 Va. 386, 392 (1904). "It is sufficient if the language tends to injure the reputation of the party, to throw contumely, or to reflect shame and disgrace upon him, or to hold him up as an object of scorn, ridicule or contempt.'" *Schaecher*, 290 Va. at 91, *quoting Adams v. Lawson*, 58 Va. (17 Gratt.) 2250, 255-56 (1867).

In construing the meaning of the Profile, the language is not to be parsed and dissected with the grammatical precision of an English professor, but rather read in light of the common-sense understanding of the average lay reader. "Allegedly defamatory statements must be construed from the standpoint of the average reader or average lay reader. The test is what construction would be placed upon such language by the average

reasonable person or the general public." *Lamb v. Weiss*, 62 Va. Cir. 259, 266 (2003). *See also Steinla v. Jackson*, 42 Va. Cir. 281 (1997) ("average reader or average lay reader"); *Wilson v. Miller Auto Sales, Inc.*, 47 Va. Cir. 153 (1998) ("average reader or average lay reader"); *Jackson v. Landmark Communications, Inc.*, No. CL05-657, 2005 WL 1862620, at *2 (Va. Cir. Ct. June 20, 2005) ("the average reader could have understood the whole of Defendant's editorial to say that Jackson is an unfit candidate for office"); *Mills v. Kingsport Times-News*, 475 F. Supp. 1005, 1008-09 (W.D. Va. 1979) (applying Virginia law) ("[I]t is for the jury to decide if the erroneous report cast an imputation of insanity on the plaintiff and, if it did so, did that have an effect on the average reader which the literal truth would not have produced.").

The average reader is not the perfect reader, but a member of the general public approaching the Profile with common ordinary sense. *See Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 177 (2nd Cir. 2000) ("the words are to be construed not with the close precision expected from lawyers and judges but as they would be read and understood by the public to which they are addressed"); *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, at 119 (concluding that a statement's defamatory meaning must be viewed from the standpoint of an "ordinary" listener, not a "careful" listener, and noting that "'courts must refrain from a 'hair splitting analysis' of what is said ... to find an innocent meaning[.]'") *quoting Forsher v. Bugliosi*, 26 Cal.3d 792, 163 Cal.Rptr. 628, 608 P.2d 716, 722 (1980).

Applying these legal principles, a reasonable jury could conclude that an average lay reader of the *C-ville* Profile could easily have understood the Profile as conveying the false impression that the Plaintiff: 1) is racist; 2) joined the Statue Litigation to antagonize people of color; and/or 3) intended to "roil the lives of black people."

Defendants may attempt to convince a jury that the Profile did not convey these meanings, but the court's role on demurrer is simply to determine whether it could.

III. Analysis

A. The Profile and its defamatory statements are "of and concerning" the Plaintiff.

In their demurrer, the C-ville Defendants note that the Plaintiff's burden is, by its pleading, to "show how the allegedly defamatory statement degrades the reputation of, and is 'of and concerning,' [the plaintiff]". *C-ville Dem.*, p. 13, *citing Schaecher*, 290 Va. at 100. The C-ville Defendants have argued that the Profile does not defame Plaintiff Tayloe because it contains no false and defamatory statements that are "of and concerning him", but this argument improperly treats Plaintiff's defamation-by-implication claim as a garden variety defamation claim. Plaintiff did not allege that any factual statement by the C-ville Defendants was false, nor did he allege that any factual statement by the C-ville Defendants was defamatory of him on its face. However, the Plaintiffs failure to do so does not constitute a defect in the pleading, as the C-ville Defendants argue. As the *Pendleton* court made clear, neither of these allegations are required for a defamation by implication Plaintiff to survive demurrer. Defamation by implication does not require that any factual statement in the Complaint be false or defamatory on its face.

Defendant's arguments on "of and concerning" attempt to slip through the door that the *Pendleton* court definitively closed for defamation-by-implication defendants. The *Pendleton* case affirmed bedrock defamation law in holding that defendants may not escape liability by arguing that the statements made about the plaintiff were literally true if they raise a false and defamatory implication. "[T]he issue of falsity relates to the

defamatory facts implied by a statement." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 36 at n.7 (1990). Contrary to Defendants' arguments, the legal test is whether the *implications* raised by the Article are false, not the factual statements that cause the implications to arise.

There can be no argument that the Profile is "about" the Plaintiff. The print version of the Profile promises to tell readers about the Statute Litigation plaintiffs in its cover-page subtitle: "Last Stand: The plaintiffs defending Charlottesville's Confederate monuments." The subtitle appears below a stylized picture of approximately ten advancing Confederate soldiers, rifles and bayonets at the ready, with darkened eyes and menacing expressions. The Profile makes it clear to readers that Tayloe is one plaintiff defending the Confederate Monument by naming him first in its body. The Profile states:

> While much has been written about—and much blame thrown at—those who first raised the idea of removing confederate monuments from the center of town, very little attention has been paid to those still fighting the city's decision. C-VILLE reached out to the plaintiffs to find out why they joined the suit and whether anything had changed for them since 2017.
>
> Here's what we found out:

Edward Dickinson Tayloe, II's name immediately follows the colon in the cited portion of the Profile, in bold type and in significantly larger font that the surrounding text. The Tayloe family is only mentioned because they are related to Edward Dickinson Tayloe, a plaintiff in the Statue Litigation. The Tayloe family members are introduced and referenced by their familial relationship to the Plaintiff. Profile, at 16 ("his ancestor, John Tayloe II"; "Tayloe's great-great-grandfather, Benjamin Ogle Tayloe"; "Plaintiff Tayloe's father"; "the plaintiff's nephew, Tayloe Emery").

The C-ville Defendants' argument that "[i]t is black-letter law that an individual cannot state a claim for defamation based on descriptions of a *relative's* misconduct or

affairs" would be relevant to the court's determination if the Plaintiff had alleged that the description of his ancestors defamed him by association. Instead, he has alleged that the description of his ancestors, read in the context of the entire Profile, created in the mind of the ordinary, average reader several defamatory implications *about him*. *Compl.*, at ¶ 17 ("These defamatory statements convey false and defamatory inferences, implications, and insinuations about Plaintiff Tayloe"). All of the information about Tayloe's ancestors is offered in the context of the Profile's promise to discover and share Tayloe's motivations for joining the suit. Thus, the C-ville Defendants' string cite of cases from Louisiana, Illinois, Alabama, and Indiana is supportive of an irrelevant standard and should not guide the court in resolving this demurrer.

B. The defamatory statements support the three alleged defamatory implications, which possess the requisite "sting."

All Defendants argue that the language used in the Profile cannot support the defamatory implication alleged by the Plaintiff. *C-ville Dem.*, p. 9-13; *Schmidt Dem.*, p. 5-6. The arguments of the defendants are different enough that they should be addressed separately.

1. Response to C-ville Defendants

The C-ville Defendants correctly charge the court with determining whether the Profile is "reasonably susceptible to the interpretation the plaintiff alleges, and if so, whether that interpretation is potentially defamatory." *C-ville Dem.*, p. 10. However, the Defendants fail to articulate why the language used in the Article cannot support the defamatory implications the plaintiff alleged. The Defendant's sole argument on this point is that "there is nothing about the accurate re-telling of Plaintiff's family history, including making editorial decisions about what to omit and what to leave in, that

reasonably conveys the claimed implication that Plaintiff seeks to antagonize and roil black people because he is a racist." *C-ville Dem.*, at p. 12.

Remarkably, the C-ville Defendants fail to address any of the arguments in the Complaint explaining why the factual allegations about Tayloe and his family, submitted as answers to the question of "why [he] joined the suit," created false and defamatory factual implications about him. Plaintiff Tayloe argued that the recitation of his family's slave-owning history was presented in the Profile as an answer to the question of why he joined the lawsuit. *Compl.*, at ¶ 16a. Plaintiff Tayloe argued that the paragraph concerning of his ancestor John Tayloe III, who "bred horses and slaves," was written to raise the implication that Plaintiff Tayloe comes from a line of racists and holds racist views. *Id.* at ¶ 16b. Plaintiff Tayloe argued that the description of his ancestor Benjamin Ogle Tayloe's march of fifty-seven slaves was intended to support the implication that the Tayloe family acted cruelly toward slaves and threatened them with more cruelty as a warning. There is no justification for the inclusion of the information about the Tayloe family but as an answer to the question of why Tayloe joined the suit.

The context in which the family relationships of other plaintiffs are explored is also relevant to the court's determination. Betty Jane Franklin Phillips is introduced as a "collateral descendant of Paul Goodloe McIntire, who donated the controversial statues and the once-segregated parks they inhabit, along with a number of other monuments, parks, and buildings around town." The clear implication is that Betty Jane Franklin Phillips' relation to Paul Goodloe McIntire is part of her justification for joining the suit; however, this is never stated. Similarly, Edward Bergen Fry is quoted as stating that "he was in favor of keeping the statues because, '[t]hey are historical works of art and, more importantly, because Henry Shrady is my great-great-great uncle.'" Henry Shrady "was

the sculptor McIntire hired to create the Lee statue…" An average reader could reasonably interpret the mention of Plaintiff Tayloe's ancestry as a justification for joining the suit in light of the information provided regarding Betty Jane Franklin Phillips and Edward Bergen Fry.

The C-ville Defendants do address the Complaint's allegation that the mention of Edward Thornton Tayloe falsely implied his responsibility for the decision to raze Vinegar Hill. The Defendant argues that this was a misreading of the Profile, which included a suggestion of a democratic process. *C-ville Dem.*, at 12. First, the Profile states that the "decision was made to raze the African American community of Vinegar Hill over the objections of its residents," which could be read to suggest an executive decision overriding a democratic vote. Second, the question naturally arises: Why is Edward Thornton Tayloe introduced as the vice-chair of the Charlottesville Redevelopment and Housing Authority when Vinegar Hill was razed if the author does not intend to convey that he was in part responsible for its razing? The parallel structure the author intentionally deployed in writing about John Tayloe, II, Benjamin Ogle Tayloe, and Edward Thornton Tayloe is clear: each of the men is relevant because of their real or perceived transgressions against African Americans. This thrust of the Profile is made clear by its ending quotation: "For generations this family has been roiling the lives of black people, and this is what [plaintiff Tayloe] chooses to pursue."

Defendants did not offer any alternative explanation for the structure and focus of the Tayloe profile. They failed to explain why the Tayloe family was defined in the Profile by their allegedly antagonistic relationship to the African American community. They failed to explain why the author included no information about the family tree of any of the other twelve Statue Litigation plaintiffs. They failed to explain why only two

paragraphs were devoted to Plaintiff Tayloe and eight to his ancestors' relationship to the African-American community. These questions are relevant to the plausibility of the Plaintiff's alleged defamatory implications arising from the Profile; the Defendants' failure to answer them should cause the court to question whether there is any more plausible reading than what Plaintiff alleged.

The C-ville Defendants also argue that the Plaintiff must allege facts sufficient for a reasonable jury to conclude that they intended or endorsed the defamatory implications. *C-ville Dem.*, at 12. To be clear, it is not the law in Virginia that a defamation plaintiff must make an "especially rigorous showing" that the challenged publication "affirmatively suggests that the author intends or endorses the inference," as Defendants argue. As addressed in the Legal Standard section, *supra*, the court in *Pendleton* clarified the law regarding libel-by-implication in Virginia when it held: "Our decisions in defamation cases do not include a requirement that a 'libel by implication plaintiff must make an especially rigorous showing where the expressed facts are literally true.'" *Pendleton*, at 764. The court in *Pendleton* made no distinction between public figure and private figure plaintiffs in holding that defamation by implication cases do not require proof of falsity of the actual words used. *See id.* at 170. Although the court acknowledged in footnote 5 that the facts in *Chapin* were different from those in *Pendleton*, the main body of the opinion directly contradicts *Chapin* and its "rigorous showing" requirement. The extent to which states allow or do not allow libel by implication claims is a matter of state common law, over which each state, including Virginia, has supremacy. The Virginia Supreme Court's statements in *Pendleton* are a direct statement that the Fourth Circuit interpreted Virginia common law incorrectly. To the extent that *Chapin* is understood as a case interpreting the application of First Amendment principles to

Virginia defamation by implication common-law rules, *Pendleton* represents the Virginia Supreme Court's view as to how the intersection of First Amendment doctrine and common-law libel by implication doctrine should be applied. *Pendleton,* not *Chapin,* is binding on Virginia state courts.

The Plaintiff is not required to show that the Defendant's defamatory words suggested the author intended or endorsed the allegedly defamatory inference. *Pendleton*, at 764. In this case, the Plaintiff's allegations that the author included the Tayloe family history to answer the question of why Tayloe became involved in the suit, that the author intentionally and repeatedly introduced long-dead Tayloes by their real or perceived acts of cruelty towards African Americans, and that the author used Jalane Schmidt's quotation regarding roiling the lives of black people to express the main point of the profile on Tayloe, taken as true, would support a reasonable jury's finding that the Defendants intended or endorsed the defamatory implications alleged. The Plaintiff is also entitled to the fair inferences arising from its pleadings, which would include the inference that the Defendants intended to write what was published, to publish what was written, and to fulfill the stated purpose of the publication, which was to find out why each Statue Litigation plaintiff joined the suit.

The defamatory sting of the alleged implications is apparent. As alleged in the Complaint, since August 2017, there is virtually no more dangerous label for one's reputation in Charlottesville than "racist." *Comp.*, at ¶ 25. The heightened focus on racial dynamics in Charlottesville since August 2017 is a circumstance plead by the Plaintiff which would cause a charge of racism to be defamatory even if the statement, in another context, would not be sufficient to make out a claim for defamation. The Charlottesville readers to which the publication was targeted would necessarily be aware of the social

and political climate, and the court may consider their perspective in determining whether statements are reasonably capable of defamatory meaning. See *Schaecher v. Bouffault*, 290 Va. 83, 93 (2015), *citing Farah v. Esquire Magazine*, 736 F.3d 528, 535 (D.C.Cir.2013) ("[T]he publication must be taken as a whole, and in the sense in which it would be understood *by the readers to whom it was addressed.*") (emphasis added).

The C-ville Defendants argue that a charge of racism is non-actionable opinion, but fail to cite the case in Virginia that would best guide the court in assessing the issue. In *Fleming v. Moore*, a white, tenured professor at the University of Virginia spoke against the construction of a high-density, low-income development proposed to be built by a black real estate developer on land adjacent to his residence, Shack Mountain, which was architecturally significant. 221 Va. 884, 887 (1981). Moore opposed the project on the basis that it would pollute the Rivanna Reservoir and negative affect the value of his adjacent property. *Id.* When county planning officials proposed the use of a screen of evergreen trees between the development and Shack Mountain, Moore supported the idea. *Id.* Subsequently, the real estate developer published a paid advertisement in a local newspaper captioned "RACISM", which included the further statements that the plaintiff "does not want any black people within his sight." *Id.* at 895 n.3. The court's opinion focused on whether the charge of racism was libel per se or libel per quod. *See id.* at 890. The question of whether a charge of racism is defamation per se or per quod only arises if the statement is actionable.

Although a charge of racism, without more, may not be actionable, just as in *Fleming*, the defendant here has been charged with additional defamatory statements that reinforce and expand on the general allegation of racism. The defamatory implication that Plaintiff Tayloe joined the statue litigation to antagonize people of color makes more

credible the charge of racism because it offers a specific example in service of the allegation. Likewise, the implication that Tayloe intends to roil the lives of black people supports and reinforces the charge of racism by linking Tayloe's behavior to an alleged family legacy of systematic cruelty towards people of color. *Fleming* is the best authority in Virginia on the actionability of a charge of racism and should permit the court to deny defendant's arguments on this point.

2. Response to Defendant Schmidt

Defendant Schmidt argues that her statement "For generations, this family has been roiling the lives of black people, and this is what [plaintiff Tayloe] chooses to pursue," cannot support any of the three the defamatory implications alleged. *Schmidt Dem.*, at 6. Defendant Schmidt's own briefing appears to acknowledge that her quotation in the Profile will support the defamatory implications alleged.

The first defamatory implication alleged by plaintiff is that he is racist. Defendant Schmidt admits that "this is what he chooses to pursue" in her statement could mean "this perverse, racist litigation." *Schmidt Dem.*, at p. 8. Plaintiff Tayloe agrees with Defendant Schmidt, and submits further that, if the statement could be read to mean that Tayloe pursued racist litigation, it is a fair inference in his favor that the statement could be read to suggest that Tayloe himself was racist.

With respect the second and third implications, Defendant Schmidt again concedes that the statements made convey something very close to what was alleged. Schmidt argues that by making her statement, she "has drawn a speculative connection between Plaintiff's family history and his involvement in the lawsuit. [The statement] is simply her opinion regarding his motivation in joining the lawsuit." *Schmidt Dem.*, at 7. Setting aside the question of opinion, Defendant Schmidt *admits that her statement was intended*

to convey information about why Plaintiff Tayloe joined the lawsuit. The only question remaining for the court is what information was conveyed. The Plaintiff submits that the answer to this question is found in the remaining portion of the statement: that his family had roiled the lives of black people for generations. Read in this way, the statement supports both the second and third defamatory implications: that Plaintiff joined the Statue Litigation to antagonize people of color and that he intended to roil the lives of black people.

C. The allegations in the Complaint support actual malice whether plaintiff is a public or private figure.

1. The question of whether plaintiff is a public or private figure is not appropriate for resolution by Demurrer.

Whether Plaintiff is a public figure, a private figure, or a limited purpose public figure is a mixed question of law and fact on which the court should take evidence. The Plaintiff alleged that he is a private figure. *Compl.*, at ¶ 28. Defendant Schmidt has argued that Plaintiff is a "limited public figure." *Schmidt Dem.*, at p. 11-14. The C-ville Defendants have not argued as part of their demurrer that Plaintiff is a public or private figure. It would be premature for the court to conclude that the plaintiff is a public or private figure as part of a demurrer hearing, especially without the aid of evidence submitted by the parties related to the five-factor test articulated in *Carr v. Forbes*. 259 F.3d 273, 280 (4th Cir. 2001). Defendant Schmidt submitted factual allegations and newspaper articles in support of her argument for Plaintiff's limited public figure status, but these cannot be considered by the court in addressing her Demurrer since they were not included in the Complaint.

2. The plead allegations relating to Defendant Schmidt exceed the requirements imposed by an actual malice fault standard.

However, assuming *in arguendo* that Plaintiff was found to be a limited purpose public figure, he has still met the notice pleading requirements imposed on public figure plaintiffs in defamation cases. "For defamation actions brought by public figures, the 'requisite intent' established by the Supreme Court is 'actual malice' – knowledge that a statement is false or reckless disregard for whether it is false or not." *Spirito v. Peninsula Airport Commission*, 350 F.Supp 3d 471, 480 (2018), *citing New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). "'[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.*, *citing St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

The following statements in the Complaint allege behavior by Defendant Schmidt that would provide direct or circumstantial evidence of actual malice:

- "The Defendants' decision to include Plaintiff Tayloe's family history was plainly intended to tie his involvement in the litigation to a history of, in their view and in Jalane Schmidt's view, systematic cruelty to and antagonism of people of color." *Compl.*, at ¶ 18.
- "No Defendant or agent of any Defendant questioned Tayloe about 'why he joined the suit.'" *Id.*, at ¶ 21.
- "Defendant Schmidt did not even attempt to contact Plaintiff Tayloe to verify her claim about his efforts to 'roil the lives of black people.'" *Id.*

- "Her claim cites no factual support other than the fact that Plaintiff is a plaintiff in the Statue Litigation." *Id.*
- "Defendants' defamatory statements about Plaintiff Tayloe supported a pre-selected narrative about racism as the driving force behind the Statue Litigation." *Id.*
- "Defendants had no factual basis for their claims that Plaintiff Tayloe's involvement was racially motivated; in fact, they had factual evidence that his involvement was not racially motivated due to the paragraphs quoted from the Statute Litigation complaint explaining the basis for his standing." *Id.*, at ¶ 22.
- "Defendants failed to contact any friends or acquaintances of Plaintiff Tayloe who might have explained their view of his involvement in the litigation." *Id.*, at ¶ 23.
- "Defendants cited no information provided by any person in a position of authority or credibility that supported their defamatory statements, inferences, implications, and insinuations." *Id.*
- "Defendants' statements alleged in this Complaint were designed and intended to imply the defamatory meanings attributed to them in this Complaint, and the Defendants' statements reasonably conveyed those defamatory implications to readers." *Id.*

The factual statements above allege behavior based on which a reasonable jury could conclude that Defendant Schmidt acted with actual malice in making her statements in support of the legally challenged defamatory implications.[1] Defendant

[1] Defendant Schmidt incorrectly argues that the Plaintiff is required to allege that Defendants had actual knowledge of falsity or exhibited reckless disregard for the truth with respect to the factual claims made in the article, including whether the Tayloe family roiled the

Schmidt's failure to contact or question Plaintiff Tayloe is circumstantial evidence of actual malice. Defendant Schmidt's argument that failure to investigate a claim is evidence of a subjective belief in its truthfulness is unsupported by any caselaw. It is true that failure to investigate, *standing alone*, will not support a finding of actual malice. *See Harte-Hanks Communication Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). However, Plaintiff has alleged far more than mere failure to investigate. Plaintiff alleged that Defendant Schmidt had constructive knowledge that Plaintiff was a Vietnam war veteran and a past-president of an organization that had paid to refurbish the statues. *Id.* "Because actual malice is a subjective inquiry, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence." *Eramo v. Rolling Stone, LLC*, 209 F.Supp. 3d 862 (W.D. Va. 2016) (citations omitted). Defendant Schmidt's choice to make statements containing defamatory implications about the Plaintiff, despite access to conflicting information, could be found by a jury to be evidence of actual malice. *See e.g., McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1511 (D.C. Cir. 1996) (holding that actual malice may be inferred from an author's inability to corroborate a story when he or she encounters persuasive evidence that contradicts the defamatory allegation).

Moreover, Plaintiff alleged that Defendant Schmidt's statements "supported a pre-selected narrative about racism as the driving force behind the Statue Litigation." *Compl.*, at ¶ 21. "[E]vidence that a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story is

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lives of black people. Assuming the actual malice standard applied, the correct inquiry is whether the Plaintiff alleged sufficient facts for a reasonable jury to infer actual malice with respect to the *defamatory implications alleged*. This mistake is repeated in Defendant Schmidt's arguments concerning the Plaintiffs' failure to allege sufficient facts from which a jury could find negligence on the part of Schmidt.

evidence of actual malice, and may often prove to be quite powerful evidence." *Eramo*, at 872, *citing Harris v. City of Seattle*, 152 Fed.Appx. 565, 568 (9th Cir. 2005). In determining whether a plaintiff's evidence is sufficient to support a finding of actual malice, the prevailing view is that a court may consider the cumulative effect of the circumstantial evidence. "Actual malice may be established, with the clear and convincing accumulation of facts that, while individually not sufficient to establish actual malice, as a composite are sufficient to satisfy First Amendment standards." 1 Rodney A. Smolla, *Law of Defamation* § 3-117 (2nd ed. 2019); *see also Eramo*, at 872.

Plaintiff argued in his Complaint that "[a]ll the allegations of fault… that meet the actual malice standard of knowledge of falsity or reckless disregard for truth or falsity thus also allege the lesser included fault level of negligence." *Compl.*, at ¶ 20. A private figure plaintiff that proves actual malice may, of course, recover. Thus, a finding by the court that the Complaint should survive demurrer under the actual malice standard would preclude consideration of argument by Defendant Schmidt concerning Plaintiff's allegations of negligence. However, Plaintiff's negligence pleading is even more substantial than its pleading on actual malice, and only Defendant Schmidt's misguided focus on the actual words used in the Complaint, rather than the implications alleged as defamatory, could raise a question of its sufficiency. In addition to its claims concerning actual malice, Plaintiff alleged that Defendant Schmidt failed to contact anyone with information about his intentions in joining the Statue Litigation, failed to attempt to contact or question him about his intentions, cited no factual support for her claim that he intended to "roil the lives of black people," and in fact ignored evidence to the contrary. There can be no question that these claims, taken as true, would support a negligence finding by a reasonable jury.

3. The plead allegations relating to the C-ville Defendants exceed the requirements imposed by an actual malice fault standard.

The allegations of actual malice pertaining to the C-ville Defendants include virtually all of the allegations and arguments relating to Defendant Schmidt. The following statements in the Complaint allege conduct by the C-ville Defendants that would provide direct or circumstantial evidence of actual malice:

- "The Defendants' decision to include Plaintiff Tayloe's family history was plainly intended to tie his involvement in the litigation to a history of, in their view and in Jalane Schmidt's view, systematic cruelty to and antagonism of people of color." *Compl.*, at ¶ 18.
- "No Defendant or agent of any Defendant questioned Tayloe about 'why he joined the suit.'" *Id.*, at ¶ 21.
- "Defendants' defamatory statements about Plaintiff Tayloe supported a pre-selected narrative about racism as the driving force behind the Statue Litigation." *Id.*, at ¶ 22.
- "Defendants Provence and C-ville Weekly tied Plaintiff Tayloe to League of the South slavery apologists by ordering their profiles first and second in the article and by falsely ascribing racist motives to Plaintiff Tayloe's decision to join the statue litigation." *Id.*
- "Defendants had no factual basis for their claims that Plaintiff Tayloe's involvement was racially motivated; in fact, they had factual evidence that his involvement was not racially motivated due to the paragraphs quoted from the Statute Litigation complaint explaining the basis for his standing." *Id.*

- "Defendants failed to contact any friends or acquaintances of Plaintiff Tayloe who might have explained their view of his involvement in the litigation." *Id.*, at ¶ 23.
- According to the Profile, Defendant Provence asked Tayloe Emery, Plaintiff Tayloe's cousin, whether "...all of your family support Confederate monuments?" Defendant Provence's question is evidence that she intended the defamatory implication that Plaintiff Tayloe's participation in the Statue Litigation represents his family's values. Her loaded question also demonstrates her commitment to her pre-selected narrative of the Tayloes as a monolithic, bigoted, white Southern family. *Id.*
- "Defendants cited no information provided by any person in a position of authority or credibility that supported their defamatory statements, inferences, implications, and insinuations." *Id.*
- "Defendants' statements alleged in this Complaint were designed and intended to imply the defamatory meanings attributed to them in this Complaint, and the Defendants' statements reasonably conveyed those defamatory implications to readers." *Id.*

The factual statements above allege behavior based on which a reasonable jury could conclude that the C-ville Defendants acted with actual malice in making her statements in support of the legally challenged defamatory implications. Defendant Provence's lack of investigation of Plaintiff Tayloe's motivations may constitute intentional avoidance of truth, which would support a finding of actual malice. See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 172 (1967). The Defendant's argument that failure

to investigate, standing alone, does not constitute actual malice is not persuasive where the Plaintiff has alleged additional facts which, taken as true, would also be probative of actual malice. The C-ville Defendants' decision to ignore evidence which conflicted with the pre-selected, biased narrative would be circumstantial evidence of actual malice. The C-ville Defendants' decision to order the Tayloe and Anthony Earnest profiles first and second in the story supported their pre-selected narrative of Tayloe's racist motivations for joining the litigation; this decision could be interpreted by a jury as circumstantial evidence of actual malice. The subjective intention and choices made by the author in crafting the piece are relevant to a decision of actual malice and may be proved by circumstantial evidence. *See Pendleton*, at 765 ("Motive, intent, scheme, plan or design are issues of fact that may be proved by circumstantial evidence as well as by direct evidence"). The C-ville Defendants' loaded question posed to Tayloe Emery asking "whether family members share [Plaintiff Tayloe's] enthusiasm for Confederate monuments" is evidence of a pre-selected story line, which would support a finding of actual malice. It may also be interpreted by a jury as evidence of hostile questioning, which some courts have held probative of actual malice. *See, e.g., Jenoff v. Hearst Corp.*, 453 F.Supp. 514 (D. Md 1978), aff'd, 644 F.2d 1004 (4th Cir. 1981); *DiLorenzo v. New York News*, 81 A.D.2d 844, 432 N.Y.S.2d 483 (2d Dept. 1980) (substituted opinion). These allegations, if supportive of actual malice, would also satisfy the negligence fault standard.

D. The three alleged defamatory implications are actionable non-opinion.

Both Defendants argue that they are immune from liability because the complained-of language is protected opinion. These arguments fail for three reasons.

First, the Article itself dispels the notion that the reporting is an editorial or an opinion piece by stating its purpose up-front and in the first column of the story: "C-VILLE reached out to the plaintiffs to *find out why they joined the suit* and whether anything had changed for them since 2017." (emphasis added). The story continued: "Here's what we found out:" The section concerning Plaintiff Tayloe immediately followed. The piece was a series of profiles intended to share factual information about its subjects, one of whom was Plaintiff Tayloe. The section on Tayloe did not begin with the phrase "Here's one UVA professor's perspective," "Here's C-ville take on the plaintiff's motivations:," or even "Here's one theory." The Profile reported on what its writer *found out*. Opinions are not "found out," but facts are.

The profiles of other Statue Litigation plaintiffs also do not support the argument that the piece was intended to convey opinions. The profiles list factual content about each plaintiff: Lloyd Smith was "[t]he founding partner of law firm Tremblay & Smith and a founder of Guaranty Bank and Virginia Broadcasting…"'; Fred Payne "…graduated magna cum laude from Yale , and got his law degree at UVA"; Betty Jane Phillips is a Keswick resident and a Lane High School graduate. None of these three plaintiffs were available for a phone call with C-ville magazine's reporter. A reader would not have any indication that the statements regarding Tayloe's motivation in joining the suit were the opinions of the writer because there are virtually no other opinions in the Profile. The Defendants' reading of the Profile to include editorialization commits the very act of which the Plaintiff has been accused: contorting the language of the defamatory publication beyond its breaking point.

The C-ville Defendants cite *Schaecher v. Bouffault* for the proposition that they are immune from defamation claims because "opinions fully disclosing their factual

bases constitute a subjective view and are not actionable." 290 Va. 83, 105 (2015).[2] However, the recipients of the defamatory communication in *Schaecher* "possessed a high degree of familiarity with the situation" about which the defamatory statement arose. *Id.* at 105-6. In determining that the statement was not defamatory, the court considered what a reasonable person in the position of the person who received the defamatory statement would have understood it to mean. *Id.* at 106. In this case, by contrast, it is impossible to ascribe any particular pre-existing knowledge about the Statue Litigation to the average, reasonable reader.[3] The readers of the Profile do not possess the in-depth contextual knowledge that might have led them to understand that an allegedly defamatory statement was an opinion based on fully disclosed facts. Because the pre-existing knowledge of the reader in this case is unknowable, the Plaintiff submits that the overall tone and character of the Profile—promising to tell readers what *C-VILLE* "found out"—is the key inquiry in determining whether the Profile included an opinion with fully disclosed factual bases.[4]

Second, the implications about Tayloe are capable of being proven true or false, and thus cannot qualify as opinion. A statement made about the subjective intentions of another can be false and defamatory. See, e.g., *Fleming, supra* (declining to address the actionability of a claim that the defendant "does not want black people in his sight");

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[2] The C-ville Defendants appear to assume, without attempting to prove, that the second and third defamatory implications are opinion. Plaintiff contends that these statements are factual and so the liability carve out for opinions fully disclosing their factual bases does not apply.

[3] The Profile appears to adopt this same view of its readership's limited pre-existing knowledge. The piece begins with a factual summary of the City Council vote to remove the statues, the genesis of the litigation, the Unite the Right Rally in August 2017, and an update on the current status of the litigation.

[4] The C-ville Defendants also cite *Schnare v. Ziessow* for the proposition that an opinion fully disclosing its factual bases is non-actionable. C-ville Dem., at 18 (citing 104 F. App'x, 847, 852 (4th Cir. 2004)). The differences in the publication in *Schnare* and this case are almost too numerous to recount. The court called the allegedly defamatory publication in *Schnare* "an opinionated and hyperbolic screed" containing "vigorous and angry expressions of disagreement," quotations from the Ten Commandments, and expressions of outrage. Id. at. 851-852. The publication in *Schnare* was advocacy, and clearly identified itself as such. The case is also inapposite.

Socol v. Albemarle County School Board, No. 3:18V000090 2019 WL 2610117 (W.D.Va. June 25, 2019) (overruling defendant's motion to dismiss the defamation claims where the defendant alleged that plaintiff "deliberately and egregiously misused purchase cards" during his employment). The subjective intentions of another person may be difficult to ascertain and are sometimes only capable of being proven by circumstantial evidence—yet they are not unprovable. Whether or not Plaintiff Tayloe is a racist is a fact on which probative evidence may be gathered. Testimony about his views towards other races, either by him or from others who have observed his behavior, would be relevant to proving or disproving the factual allegation that he is racist. The Virginia Supreme Court noted in *Gazette v. Harris* (on appeal from the remanded trial of *Fleming v. Moore*), that the jury had heard testimony from Bedford Moore about his being "color blind" to race and considerate in his dealings with all other persons. 229 Va. 1, 47 (1985). Plaintiff Tayloe's justification for participating in the lawsuit is also factual, which is made clear by his stated justifications for joining: his commitment to the preservation of war memorials, military service, and past presidency of an organization that contributed to the maintenance of the statues. Defendants submitted a competing factual justification for his involvement by writing the Profile as they did, which caused the defamatory implications to arise.

Third, even if the statements complained of are opinion, they may still bear defamatory "sting" if the opinions give rise to an implication which is a false and defamatory statement of fact. *Milkovich,* at 18-19 (holding that a statement that implies a false assertion of fact may be actionable even if it is couched as an opinion); *Raytheon Technical Services Co. v. Hyland,* 273 Va. 292, 303 (2007) ("expressions of opinion may often imply an assertion of objective fact"). Even if the court were to find

any part of the Defendants' statements were opinion, Plaintiff's claims could proceed past demurrer if the court found that those opinions implied assertions of fact that were plausibly false and defamatory of the Plaintiff.

Defendant Schmidt's argument that the statement, "For generations this family has been roiling the lives of black people, and this is what [plaintiff Tayloe] chooses to pursue," should be read as non-actionable opinion also fails. Defendant Schmidt describes her statement as "drawing a speculative connection between Plaintiff's family history and his involvement in the lawsuit," but there is nothing in the statement to support the claim that she presented it as a hypothesis or mere conjecture. There are no indicia of opinion specifying that the statement is only the speaker's viewpoint.

E. Defendant Schmidt's statement does not constitute rhetorical hyperbole.

Defendant Schmidt addresses only one of the three defamatory implications alleged by Plaintiff in his Complaint: that he "intentionally roils the lives of black people." Both defendants argue that "'roiling the lives of black people' is the type of loose language not capable of being proved true or false." *Schmidt Dem.*, at p. 9; *C-ville Dem.*, at p. 16. First, the term "roiling the lives of black people" would carry a precise meaning to readers. The phrase is far from the type of generalized insult Virginia courts have found non-actionable as defamation. *See, e.g., Scott v. Moon*, 2019 WL 332415 (Jan. 1, 2019) (dismissing the case because the defendant's claims that plaintiff was "the dumbest person, possibly ever," "really fucking stupid," a "moron," and a "slut whore" were loose, hyperbolic, and based in opinion). Defendant Schmidt's statement is unlike these insults because it alleges a specific bad act.

Moreover, Schmidt's statement is eminently believable. "Statements characterized as rhetorical hyperbole are those from which 'no reasonable inference could be drawn

that the individual identified in the statements, as a matter of fact, engaged in the conduct described.'" *Cashion v. Smith*, 286 Va. 327, 339-40 (2013). Any looseness in the meaning of the term "roiling" is defined by reference to the Profile's facts about the Tayloe family and Dickie Tayloe that preceded its utterance. When a reader encounters Defendant Schmidt's statement, he or she has already learned of the specific behavior to which Defendant Schmidt's statement refers: the family's history of slave ownership, the forced marches, the alleged culpability for the razing of Vinegar Hill, and the present litigation.

In *Raytheon v. Hyland,* an employee sued her former employer for five allegedly defamatory statements contained in her performance review. 273 Va. at 296. The plaintiff alleged that she was harmed by the following statement: "[the plaintiff] and her team met their cash goals, but were significantly off plan on all other financial targets including Bookings by 25%, Sales by 11%, and profit by 24%." *Id.* at 304. In determining that the statement was properly permitted by the trial court, the court held that "[t]he word 'significantly' in the first phrase, in this context, is defined by the identified percentages and is not merely the view of the writer." *Id.* A word which might normally convey the subject of an opinion may be made more certain by factual statements which surround it. The court must reject Defendant Schmidt's effort to isolate her statement from its surrounding materials. Just as in *Hyland*, the word "roils" should be considered in relation to the other information to which it refers in the Profile, which causes a factual and defamatory implication to arise.

Defendant Schmidt's reliance on *Yeagle v. Collegiate Times* is also unavailing. In *Yeagle*, the court concluded that statements that conveyed a false representation of fact could be defamatory. 255 Va. 293, 296-97 (1998) ("...to be actionable, the alleged

defamatory statements must still be understood to convey a false representation of fact"). The defamatory implications alleged are profoundly different in both factual content and tone than the epithet in *Yeagle*, where the defendant referred to the plaintiff as the "Director of Butt-Licking." *Id.* at 295. The court ultimately held that the phrase could not be taken as "asserting actual facts about [plaintiff]." Id. at 297. The Defendant makes no similar argument here, nor could they: the defamatory implications alleged are specific, factual, and lack the bombastic tone that characterizes the cases in which Virginia courts found non-actionable rhetorical hyperbole.

Finally, Defendant Schmidt's comment is uttered in the context of a piece of journalism that promised to "find out why [Plaintiff Tayloe] had joined the suit. . ." Far from the political radio show format in *CACI Premier Tech, Inc. v. Rhodes*, 536 F.3d 280 (4th Cir. 2008) or the labor dispute in *Crawford v. United Steel Workers, AFL-CIO*, 230 Va. 217 (1985), the Defendants' claims were presented to the reader as the product of investigative journalism. The Profile is unlike these cases, which arose from statements made in contentious mediums, using bombastic language, emotional rhetoric, and context clues that would have "signal[ed] to the reader to anticipate a departure from what is actually known by the author as fact." *Milkovich*, at 32. The dispassionate presentation of the Profile actually would have made it more credible to readers, appearing as it did in the normal body of the newspaper and not in an editorial or signed column. See Ollman v. Evans, 242 U.S. App. D.C. 301, 317 (1984).

F. The Court should dismiss the Defendants' request for resolution of the case under § 8.01-223.2.

Both Defendants seek their attorneys' fees and dismissal of the case under Va. Code § 8.01-223.2, Virginia's Anti-SLAPP (Strategic Lawsuit Against Public Participation)

statute. As a general matter, § 8.01-223.2, unlike the anti-SLAPP statutes of other states, includes no procedural framework by which defendants may short-circuit litigation at the outset of the case.[5] Moreover, courts applying the current version of the statute have been unwilling to dismiss defamation cases under § 8.01-223.2 early in the case, even under the more stringent pleading standard characterizing federal court. *See, e.g., Steele v. Goodman*, 382 F. Supp.3d 403 (E.D. Va. Jul. 25, 2019) (declining to dismiss the case under Virginia's anti-SLAPP statute where the Amended Complaint was "replete with assertions that [Defendant] made the multitude of statements with actual knowledge of their falsity"); *Gilmore v. Jones*, 370 F.Supp.3d 630 (E.D. Va. March 29, 2019). To grant Defendants the relief they request, the court would have to conclude that no set of facts could exist which could prove actual malice or constructive knowledge on the part of the defendants; this request is simply premature given the factual development in the case. Thus, the Plaintiff respectfully submits that Defendants' motions to dismiss pursuant to § 8.01-223.2 should be made and resolved once discovery is complete.

Defendant Schmidt argues for several pages that her statements are on matters of public concern based on a multitude of factual assertions she attempts to write into the record. The requirement that the court determine whether or not the statements were on matters of public concern is another reason that the resolution of the anti-SLAPP motions should be resolved at a later date and pursuant to an evidentiary hearing. The amount of the Plaintiff's claimed damages is irrelevant to the applicability of the statute to the case. Plaintiff Tayloe's lawsuit was reluctantly filed to seek redress for a violation of his right

[5] *See, e.g.*, Ca. Code § 425.10-55 (making available to California defendants in defamation cases a special motion to strike to be filed within sixty (60) days of the service of the Complaint, or within such other time as the court permits); HB No. 2973 (requiring a Texas defendant attempting to avail himself of the anti-SLAPP provision to file a special motion to dismiss within sixty (60) days of being served with a defamation lawsuit).

to enjoy his positive reputation in the Charlottesville community; the significant value of that well-earned reputation should not be construed against him to suggest coercion.

The C-ville Defendants argue that the Plaintiff "fails to plausibly allege a single true *fact* that could support a finding of actual malice." *C-ville Dem.*, at p. 19-20. This claim is confounding in light of the standard of review requiring the court to take Plaintiff's well-plead facts as true. Plaintiff alleges that the Defendants pre-selected a "narrative about racism as the driving force behind the Statue Litigation." Plaintiff also alleged that the Defendants had no factual support for their defamatory implications, and in fact possessed factual support that conflicted with those defamatory implications. Plaintiff alleged that Melissa Provence asked Tayloe Emery a loaded question which was probative of actual malice. Plaintiff alleged that the C-ville defendants failed to verify their claims by contacting his friends or acquaintances. Plaintiff alleged that the C-ville Defendants intended the defamatory implications arising from the Profile. Any of these facts would independently support a finding of actual malice by a juror; taken together, they should persuade the court to dismiss the demurrer and allow the case to proceed.

WHEREFORE, the Plaintiff, Edward Dickinson Tayloe, II, respectfully requests that this Court overrule the Demurrers of both Defendants.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document was transmitted via electronic mail and sent first-class mail, postage prepaid, on September 13, 2019 to the following:

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