App. 1

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14125

D.C. Docket No. 2:17-cv-00566-MHT-SMD

CORAL RIDGE MINISTRIES MEDIA, INC., d.b.a. D. James Kennedy Ministries,

Plaintiff - Appellant,

versus

AMAZON.COM, INC., SOUTHERN POVERTY LAW CENTER, INC., AMAZONSMILE FOUNDATION,

Defendants - Appellees,

AMAZONSMILE FOUNDATION, INC., et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Alabama

(July 28, 2021)

Before WILSON, GRANT, and TJOFLAT, Circuit Judges.

WILSON, Circuit Judge:

Coral Ridge Ministries Media (Coral Ridge), a Christian ministry and media corporation, appeals the district court's dismissal of its defamation claim against the Southern Poverty Law Center (SPLC) and religious discrimination claim against Amazon.com and the AmazonSmile Foundation (collectively, Amazon). Because we find that the district court did not err in dismissing this suit, we affirm.

I.

Amazon.com is the largest internet-based retailer in the world. AmazonSmile Foundation (Amazon Smile) is a tax-exempt corporation affiliated with Amazon.com. The AmazonSmile website allows customers to buy products as if they were using Amazon.com, but with every purchase Amazon will donate 0.5% of the price to an eligible charity selected by the customer. To be an eligible charity for the AmazonSmile program, an organization must be registered and in good standing with the Internal Revenue Service as a nonprofit organization under 26 U.S.C. § 501(c)(3); must agree to a Participation Agreement; and cannot "engage in, support, encourage, or promote intolerance, hate, terrorism, violence, money laundering, or other illegal activities." In relation to the last requirement, organizations that SPLC designates as hate groups are not eligible to participate in the AmazonSmile program. SPLC is an Alabama-based nonprofit organization

that, among other things, publishes a "Hate Map"—a list of entities the organization has characterized as hate groups—on its website.[1] Coral Ridge applied to be an eligible charity for the AmazonSmile program, but Amazon denied its application because Coral Ridge is listed on the Hate Map as being anti-LGBTQ.[2]

Coral Ridge filed suit in the Middle District of Alabama, claiming, inter alia, that (1) SPLC defamed Coral Ridge by listing it on the Hate Map, and (2) Amazon violated Title II of the Civil Rights Act (Title II), 42 U.S.C. § 2000a et seq., by discriminating against it based on religion.[3] In its complaint, Coral Ridge acknowledged that it opposes homosexual conduct, but denied that it is a hate group. It rejected SPLC's definition of hate group and instead said that the commonly understood definition of the term was "groups that engage in violence and crime."[4] Coral Ridge

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[1] According to Coral Ridge's complaint, SPLC defines "hate groups" as organizations that have "beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics."

[2] LGBTQ is an acronym referring to lesbian, gay, bisexual, transgender, and queer people.

[3] Coral Ridge also brought claims against SPLC under the Lanham Act, 15 U.S.C. § 1125. The district court dismissed these claims and Coral Ridge does not appeal that dismissal. Additionally, Coral Ridge brought a negligence claim against Amazon. It concedes that this claim hinges on its Title II claim. Because we affirm the district court's dismissal of Coral Ridge's Title II claim, we do not address this negligence claim on appeal.

[4] On appeal, Coral Ridge puts forward a different definition that combines the definitions for "hate" and "group." Therefore,

asserted it did not fall within either this definition or SPLC's definition of the term. Additionally, Coral Ridge alleged that SPLC listed it on the Hate Map because of its religious beliefs about LGBTQ conduct. Therefore, according to Coral Ridge, a court could infer that Amazon discriminated against it by relying on the Hate Map. Both SPLC and Amazon moved to dismiss the suit under Federal Rule of Civil Procedure 12(b)(6).

In a thorough 141-page order, the district court dismissed the defamation claim on First Amendment grounds and dismissed the Title II claim primarily because it found that the AmazonSmile program was not covered by Title II in this instance. Alternatively, it held that Coral Ridge's interpretation of Title II created First Amendment problems. Finally, the district court found that Coral Ridge did not plausibly allege either intentional or disparate impact discrimination. It therefore dismissed Coral Ridge's suit in full.

II.

We review de novo a Rule 12(b)(6) dismissal for failure to state a claim upon which relief may be granted. *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 694 (11th Cir. 2016). We accept the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Id.* To survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id.*

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according to Coral Ridge a hate group is commonly understood as "a 'group' that 'hates.' "

(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). We need not, however, accept as true a complaint's conclusory allegations or legal conclusions. *Id.*

III.

Under Alabama law, a plaintiff establishes a prima facie defamation claim when he or she demonstrates: "(1) that the defendant was at least negligent (2) in publishing (3) a false and defamatory statement to another (4) concerning the plaintiff, (5) which is either actionable without having to prove special harm . . . or actionable upon allegations and proof of special harm." *Ex parte Bole*, 103 So. 3d 40, 51 (Ala. 2012) (alterations accepted and emphasis omitted).

When applying state defamation law to public figures, the First Amendment imposes additional limitations.[5] First, the alleged defamatory statement must be "sufficiently factual to be susceptible of being proved true or false." *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 21 (1990). Second, the statement must be actually false. *Id.* at 16. And third, a public-figure plaintiff must prove that the defendant made the alleged defamatory statement with "actual malice"—"with knowledge that it

[5] Coral Ridge concedes that it is a public figure for the purposes of this case.

was false or with reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). This actual malice test is subjective; the public-figure plaintiff must show that the defendant "*in fact* entertained serious doubts as to the truth" of the statement. *Berisha v. Lawson*, 973 F.3d 1304, 1312 (11th Cir. 2020).

The district court dismissed Coral Ridge's defamation claim on the grounds that the term hate group has a "highly debatable and ambiguous meaning" and thus is not provable as false. Alternatively, the court found that Coral Ridge did not sufficiently plead that SPLC acted with actual malice.[6] Because we agree that Coral Ridge failed to adequately plead actual malice, we affirm the dismissal of Coral Ridge's defamation claim.[7]

Coral Ridge did not sufficiently plead facts that give rise to a reasonable inference that SPLC "actually entertained serious doubts as to the veracity" of its hate group definition and that definition's application to Coral Ridge, or that SPLC was "highly aware" that

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[6] Because the district court found that the term hate group was not provable as false, it also held that Coral Ridge did not plausibly allege that the defamatory statement was false.

[7] There is a fair debate about whether the term hate group is definable in such a way that it is provable as false. That debate is complicated in this case by the fact that SPLC put its own definition of the term on its website. In any event, our finding that Coral Ridge failed to adequately plead actual malice is sufficient to affirm the dismissal of the defamation claim. Therefore, we need not reach the district court's alternative holding that the term hate group is not sufficiently factual as to be proven true or false.

the definition and its application was "probably false." *Michel*, 816 F.3d at 702–03. For starters, we can disregard the portions of the complaint where Coral Ridge alleged in a purely conclusory manner that the defendants acted "with actual malice" in publishing the Hate Map. Allegations such as these amount to threadbare recitals of the elements of a cause of action, which are insufficient to state a claim. *Id.*; *see also Iqbal*, 556 U.S. at 678.

Setting those allegations aside, Coral Ridge makes two basic contentions regarding actual malice. First, it claims that SPLC's definition of hate group is so far removed from the commonly understood meaning of the term that its designation of Coral Ridge as a hate group is "intentionally false and deceptive." This statement comes very close to being a conclusory assertion of the elements of the cause of action. *Michel*, 816 F.3d at 703. In any event, Coral Ridge does not plead any facts that would allow us to infer that SPLC doubted the veracity of its own definition of the term. Moreover, the complaint states that SPLC publicly disseminates its own definition of a hate group on its website; given that, it is hard to see how SPLC's use of the term would be misleading. Regardless of the commonly understood meaning of hate group, and regardless of whether SPLC's definition is the same, the complaint did not present any factual allegations that would allow us to infer that SPLC's subjective state of mind was sufficiently culpable. *Berisha*, 973 F.3d at 1312.

Second, Coral Ridge contends that SPLC acted "with reckless disregard for the truth" in designating

Coral Ridge a hate group, even under SPLC's definition of the term. But Coral Ridge pleaded no facts that would allow us to infer that SPLC seriously doubted the accuracy of designating Coral Ridge a hate group. The complaint states that Coral Ridge "has never attacked or maligned anyone on the basis of engaging in homosexual conduct" and that "SPLC's conduct, in and of itself, would have created a high degree of awareness of the probable falsity of SPLC's declaration."[8] Although we must accept Coral Ridge's allegations as true at this stage, bare-bone allegations like these are insufficient to show that SPLC doubted the truth of its designation. *Michel*, 816 F.3d at 703. Accordingly, the district court was correct to dismiss Coral Ridge's defamation claim on the ground that Coral Ridge did not sufficiently plead actual malice, and we affirm as to this issue.[9]

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[8] Coral Ridge also pleaded that SPLC intended to harm its reputation by making the designation and that its aim is to "completely destroy" hate groups. But the actual malice standard is not about whether the speaker had evil intent or a motive arising from ill will; it is about whether the speaker subjectively doubts the truth of the publication. *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510–11 (1991). These allegations do not give rise to a reasonable inference that SPLC seriously doubted the accuracy of its designation. *See Berisha*, 973 F.3d at 1304.

[9] Coral Ridge also asks us, for the first time on appeal, to get rid of the actual malice requirement. But even if this argument were not waived, we could not grant the relief Coral Ridge seeks. *See Bryant v. Jones*, 575 F.3d 1281, 1308 (11th Cir. 2009). A circuit court is not at liberty to decline to follow the decisions of the Supreme Court. *United States v. Gibson*, 434 F.3d 1234, 1246 (11th Cir. 2006).

IV.

Next, we review whether the district court was correct in dismissing Coral Ridge's religious discrimination claim. In relevant part, Title II states: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a).

The district court assumed without deciding that websites, like Amazon and AmazonSmile, qualify as places of public accommodation under Title II. It dismissed Coral Ridge's Title II claim primarily because it found that the AmazonSmile program did not qualify as a "service," "privilege," or "advantage" under the statute. It held in the alternative that Coral Ridge's claim failed on First Amendment grounds. And last, it found that the claim had to be dismissed because it did not adequately allege discrimination.

Coral Ridge challenges all of the district court's findings. It alleges that Amazon is liable under Title II because (1) Amazon is a "place of public accommodation," (2) the AmazonSmile program is a "privilege," "service," or "advantage" of Amazon, and (3) Amazon excluded Coral Ridge from benefiting from the AmazonSmile program because of Coral Ridge's religious views. Coral Ridge also contests the district court's finding that its interpretation of Title II "raise[s] serious First Amendment problems." It says that the First

Amendment should not apply because it is ultimately the customers—not Amazon—who donate and decide what charity to donate to. Therefore, it claims, if any First Amendment rights are at issue here it would be the customers'—not Amazon's.

We hold that the district court was correct in finding that Coral Ridge's interpretation of Title II would violate the First Amendment by essentially forcing Amazon to donate to organizations it does not support.

As an initial matter, we disagree with Coral Ridge's position that it is the customers rather than Amazon who donate under the program. It is Amazon that is forgoing a portion of its proceeds and donating to the charities. Coral Ridge acknowledges as much in their complaint when it quotes the AmazonSmile website, which states that the "AmazonSmile Foundation will donate 0.5% of the price of eligible purchases to the charitable organizations selected by customers." Coral Ridge argues that still it is the customers who get to choose where to donate. This is true in a sense, but ignores the fact that Amazon is the party actually paying the charities. Thus the donation is Amazon's—not the customers'. With that in mind, we turn to Amazon's right to free speech under the First Amendment.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. "Constitutional protection for freedom of speech does not end at the spoken or written word"; the First Amendment also protects expressive conduct. *Fort Lauderdale Food Not Bombs v. City*

of Fort Lauderdale, 901 F.3d 1235, 1240 (11th Cir. 2018) (quotation mark omitted). "[I]n determining whether conduct is expressive, we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Id.* If we find that the conduct in question is expressive, any law regulating that conduct is subject to the First Amendment. *See id.*

The parties do not dispute that donating money qualifies as expressive conduct. Indeed, it is "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014). The question is how the facts of this case map onto that principle.

In setting out the criteria for the AmazonSmile program, Amazon expressly states that it relies on SPLC to determine which charitable organizations are eligible to participate. A reasonable person would interpret this as Amazon conveying "*some* sort of message" about the organizations it wishes to support. *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1240; *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) ("Since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." (citations and internal quotation marks omitted)). Thus, we have no problem finding that Amazon engages in expressive

conduct when it decides which charities to support through the AmazonSmile program.

Next, we must consider whether Coral Ridge's proposed application of Title II to the AmazonSmile program is permissible under the First Amendment. The Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* is instructive here. 515 U.S. 557. In *Hurley*, the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) sued the South Boston Allied War Veterans Council (the Council), an association that organized a St. Patrick's Day parade in Boston, when the Council denied GLIB's application to have a unit in the parade. *Id.* at 561. GLIB sued in state court under a Massachusetts law that prohibited discrimination on the basis of sexual orientation "in the admission of any person to, or treatment in any place of public accommodation." *Id.* at 572 (internal quotation mark omitted). The Massachusetts Supreme Court agreed with GLIB, finding that the Council violated the state law in denying its parade-unit application. *Id.* at 563–64. In a unanimous decision, the United States Supreme Court reversed. *Id.* at 581.

The Supreme Court stated that GLIB's interpretation of the state public accommodation law was "peculiar" in that individual members of GLIB were not "claim[ing] to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement [went] to the admission of GLIB as its own parade unit carrying its own banner." *Id.* at 572. The Court explained that while the

state statute was generally constitutional and acceptable, "the state courts' application of the statute had the effect of declaring the [Council's] speech itself to be the public accommodation." *Id.* at 573. That is, the Council's decision as to which organizations could have a unit in the parade was expressive conduct protected by the First Amendment. *Id.* The Court further reasoned that the lower court's application of the law did not advance the law's purpose of preventing discrimination in access to public accommodations. *Id.* at 578 ("When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids."). Because there was no other legitimate reason to apply the state statute in this way, the Court reversed the Massachusetts Supreme Court's decision on First Amendment grounds. *Id.* at 579 ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.").

Hurley is analogous to this case in that Coral Ridge's proposed interpretation of Title II would violate the First Amendment. In the same way that the Council's choice of parade units was expressive conduct, so too is Amazon's choice of what charities are eligible to receive donations through AmazonSmile.

Applying Title II in the way Coral Ridge proposes would not further the statute's purpose of "secur[ing] for all citizens the full enjoyment of facilities described in the Act which are open to the general public." *United States v. DeRosier*, 473 F.2d 749, 751 (5th Cir. 1973).[10] It would instead "modify the content of [Amazon's] expression"—and thus modify Amazon's "speech itself"—by forcing it to donate to an organization it does not wish to promote. *See Hurley*, 515 U.S. at 578, 573.[11]

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[10] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

[11] The district court offered a helpful, concrete example demonstrating the negative implications of accepting Coral Ridge's interpretation of Title II:

> By way of comparison, assume that a closely held fast-food restaurant chain, whose owners are Christian and object to homosexuality based on their religious beliefs, initiates a "charity match" program. Under the program, consumers who purchase a certain number of sandwiches may donate up to $5.00 to the charity of their choice, subject to certain restrictions, and the corporation will match the donation. According to Coral Ridge's interpretation of Title II, the fast-food chain could be compelled—over their objection—to match donations to, for example, a church whose central mission is promoting the Christian acceptance of homosexuality; the Church of Satan; or any number of religious organizations whose purpose and activities run directly contrary to the business's deeply held convictions. Even though the consumer initiated the transaction that would ultimately lead to the business donating money, it is still the business's money being donated, and the business retains its say as to where it goes.

Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 406 F. Supp. 3d 1258, 1303 (M.D. Ala. 2019).

This we cannot do. The law "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579.

Therefore, because Coral Ridge's proposed interpretation of Title II would infringe on Amazon's First Amendment right to engage in expressive conduct and would not further Title II's purpose, we affirm the district court's dismissal of this claim.[12]

V.

In sum, we find that Coral Ridge has not adequately alleged a state law defamation claim and that its proposed interpretation of Title II would violate the First Amendment. Accordingly, we affirm the district court's dismissal of Coral Ridge's complaint.

AFFIRMED.

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[12] We have not determined if non-physical spaces, like websites, qualify as places of public accommodation under Title II. However, in *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1277 (11th Cir. 2021), we held that websites are not places of public accommodation under Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §12182. While we recognize that the relevant statutory language in the ADA is similar to that of Title II, we do not decide whether *Gil* is applicable here because we find Coral Ridge's claim fails regardless on First Amendment grounds.

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE MIDDLE DISTRICT
OF ALABAMA, NORTHERN DIVISION

CORAL RIDGE MINISTRIES MEDIA, INC., d/b/a D. James Kennedy Ministries,	)	
Plaintiff,	)	CIVIL ACTION NO. 2:17cv566-MHT (WO)
v.	)	
AMAZON.COM, INC., et al.,	)	
Defendants.	)	

OPINION

(Filed Sep. 19, 2019)

Plaintiff Coral Ridge Ministries Media, Inc. ("Coral Ridge") filed this lawsuit against three defendants: the Southern Poverty Law Center, Inc. ("SPLC"), Amazon.com, Inc. ("Amazon"), and the AmazonSmile Foundation ("AmazonSmile"). The lawsuit is based largely on Coral Ridge's allegations that, because of its religious opposition to homosexual conduct, SPLC has designated it as a "hate group" and that, because of this designation, Amazon and AmazonSmile have excluded it from receiving donations through the AmazonSmile charitable-giving program.

Coral Ridge has three claims against SPLC: a state claim that its "hate group" designation is defamatory and federal claims for false association and false advertising under the Lanham Act, 15 U.S.C. § 1125. Coral Ridge has a single claim against the Amazon

defendants: a federal claim that they excluded it from the AmazonSmile charitable-giving program based on religion, in violation of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.*[1]

This lawsuit is before the court on the United States Magistrate Judge's recommendation to grant SPLC's and the Amazon defendants' motions to dismiss filed pursuant to Rule 12(b)(6) of the Federal Rules on Civil Procedure. After an independent and de novo review of the record, and for reasons that follow, the court overrules Coral Ridge's objections to the recommendation and adopts the recommendation that this case should be dismissed in its entirety, albeit for reasons, in some instances, different from the magistrate judge's.

I. JURISDICTION

The court has jurisdiction over Coral Ridge's federal claims pursuant to 28 U.S.C. § 1331 (federal question), 42 U.S.C. § 2000a-6(a) (Title II), and 15 U.S.C. § 1121(a) (Lanham Act); and over its state claim pursuant to 28 U.S.C. § 1367 (supplemental) and 28 U.S.C. § 1332 (diversity).

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[1] Coral Ridge also asserts a state claim of negligence against the Amazon defendants. However, as Coral Ridge concedes, *see* Objection to R&R (doc. no. 58) at 6, the negligence claim hinges on the Title II claim, given that the alleged duty breached is Title II's anti-discrimination obligation, *see* Am. Compl. (doc. no. 40) at ¶ 179. Because the court finds no violation of Title II, the negligence claim fails by extension and is not discussed separately.

II. MOTION-TO-DISMISS STANDARD

"To survive a Rule 12(b)(6) motion to dismiss, a complaint must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 694 (11th Cir. 2016) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The allegations in the complaint must be accepted as true and construed in the light most favorable to the plaintiff." *Michel*, 816 F.3d at 694.

Crucially, however, the court need not accept as true "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d. 1182, 1188 (11th Cir. 2002); *see also Roberts v. Ala. Dept. of Youth Servs.*, 2013 WL 4046383, at *2 (M.D. Ala. Aug. 9, 2013) (Thompson, J.) ("[G]eneralizations, conclusory allegations, blanket statements, and implications will not" allow the complaint to survive a motion to dismiss). Conclusory allegations are those that express "a factual inference without stating the underlying facts on which the inference is based." *Conclusory*, Black's Law Dictionary (11th ed. 2019).

As recognized by the Eleventh Circuit Court of Appeals, the "application of the plausibility pleading standard makes particular sense when examining public figure defamation suits" such as this one, given

that "there is a powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless litigation." *Michel*, 816 F.3d at 702.

III. BACKGROUND FACTS

The allegations of the complaint, taken in the light most favorable to Coral Ridge, establish the following facts. Coral Ridge is a Christian ministry whose main activities include broadcasting via television, and otherwise spreading, the "Gospel of Jesus Christ," as well as fundraising. Am. Compl. (doc. no. 40) at ¶¶ 32-39. In addition to being a Christian ministry, it is, by its own account, a media corporation, *see id.*, as is also evident from its name, Coral Ridge Ministries Media, Inc. Its vision statement, included in its bylaws, is "to communicate the Gospel . . . and a biblically informed view of the world, using all available media." *Id.* at ¶ 33. Its "mission" includes "proclaim[ing] the Gospel upon which this Nation was founded." *Id.* at ¶ 38.

Coral Ridge was founded in 1974 by David James Kennedy, an American pastor, evangelist, and broadcaster, and it produced a weekly television program, "The Coral Ridge Hour" (now called "Truths that Transform"), which "was carried on television networks and syndicated on numerous other stations with a peak audience of three million viewers in 200 countries." Id. at ¶ 31-32. Kennedy also had a daily radio show that ran from 1984 to 2012. *Id.* at ¶ 32.

Coral Ridge continues to broadcast Kennedy's "Truths that Transform" on television. *Id.* at ¶¶ 35, 39. It espouses "biblical morals and principles" on homosexuality and marriage. *Id.* at ¶ 58. It also opposes same-sex marriage and the "homosexual agenda" based on its religious beliefs. *Id.* at ¶ 82.

Coral Ridge alleges that it "opposes homosexual conduct," but "has nothing but love for people who engage in homosexual conduct." *Id.* at ¶ 61. It says that its "position on LGBT issues is inextricably intertwined and connected to the [its] religious theology." *Id.* at ¶ 155. It views homosexual conduct as "lawless," "an abomination," "vile," and "shameful." *Id.* at ¶¶ 155, 175 (citing and quoting Bible verses). Coral Ridge not only admits that "the Ministry has been vocal about its position on homosexuality because it believes the Bible speaks clearly about God's intent for marriage and sexuality," it also argues that "speaking out on these issues is necessary to fulfill the Ministry's stated purpose of 'lovingly engag[ing] the culture with the heart and mind of Christ.' " Pl.'s Resp. to SPLC's Mot. to Dismiss (doc. no. 51) at 10 (quoting Am. Compl. (doc. no. 40) at ¶ 34(d)).

SPLC is a nonprofit organization that, among a range of activities, disseminates a "Hate Map" that lists groups that it designates as "hate groups," including Coral Ridge. *Id.* at ¶¶ 20-21. SPLC's Hate Map is located on its website, and defines "hate groups" as groups that "have beliefs or practices that malign or attack an entire class of people, typically for their immutable characteristics." *Id.* at ¶ 59. SPLC has

disseminated the Hate Map in fundraising efforts and in its reports, training programs, and other informational services. *Id.* at ¶¶ 120, 121, 132.

SPLC designated Coral Ridge as a hate group because of its espousal of biblical views concerning human sexuality and marriage – that is, because of its religious beliefs on those topics. *Id.* at ¶¶ 57-61; *see also id.* at ¶¶ 154-55.

Amazon is the largest internet-based retailer in the world by total sales and market capitalization. *See id.* at ¶ 5. AmazonSmile is a tax-exempt corporation affiliated with Amazon. *See id.* at ¶¶ 14, 41. Amazon and AmazonSmile operate the AmazonSmile program, whereby they donate 0.5% of the price of a purchase made on smile.amazon.com to an eligible charitable organization selected by the customer. *See id.* at ¶¶ 42-43. The vast majority of the items available for purchase through Amazon are also available for purchase through the AmazonSmile program at smile.amazon.com. *See id.* at ¶ 15.

To be selected by a customer to receive donations through the AmazonSmile program, an entity must satisfy the program's eligibility requirements. *See id.* at ¶ 44. These requirements include, among others, that the entity is "a [26 U.S.C.] § 501(c)(3) . . . public charitable organization" located in the United States. *Id.* Furthermore, the organization cannot "engage in, support, encourage, or promote intolerance, hate, terrorism, violence, money laundering, or other illegal activities." *Id.* Notably, "[e]ntities that are designated by

[the] SPLC as hate groups are automatically ineligible" to receive donations through the AmazonSmile program. *Id.* at ¶ 23.

Coral Ridge alleges that it attempted to register to receive donations through the AmazonSmile program, *see id.* at ¶ 51, but that it was prohibited from doing so because SPLC had designated it as a "hate group," *id.* at ¶ 24, 53.

IV. DISCUSSION

A. Defamation Claim Against SPLC

Coral Ridge alleges that SPLC defamed it by designating it as a "hate group."[2]

Because "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on *matters of public interest and concern*," *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-504 (1984), a

[2] Coral Ridge alleges defamation "pursuant to Alabama common law." Am. Compl. (doc. no. 40) at 1. Alabama's *lex loci delicti* choice-of-law approach might actually dictate the application of Florida defamation law to this multi-state defamation action, given that Coral Ridge is a Florida corporation with its principal place of business there. *See, e.g.*, *Hatfill v. Foster*, 415 F. Supp. 2d 353, 364-65 (S.D.N.Y. 2006) (McMahon, J.). Nevertheless, SPLC does not challenge the application of Alabama law. Therefore, "[b]ecause no party has challenged the choice of" Alabama "libel law, all are deemed to have consented to its application." *Michel*, 816 F.3d at 695 (internal quotation marks omitted). In any event, even if Florida law applied, the outcome here would be the same, for, as explained below, the defamation claim fails on federal constitutional grounds.

'public figure' asserting a defamation claim must plausibly allege that the purported defamatory statement – here, the "Anti-LGBT hate group" designation[3] – was (1) provable as false and (2) actually false, and (3) that SPLC made the statement with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not."[4] *New York*

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[3] In its response to the motion to dismiss, Coral Ridge argues that the defamatory nature of the "Anti-LGBT" designation is not before the court: only SPLC's "hate group" designation is the focus on the defamation claim. *See* Pl.'s Resp. to SPLC's Mot. to Dismiss (doc. no. 51) at 4-5. While Coral Ridge has chosen not to contest the "Anti-LGBT" part of the "hate group" designation, this does mean that court should ignore it in assessing whether SPLC's statements were defamatory. The allegations of the amended complaint make clear that the "Anti-LGBT" designation is an inseparable part of SPLC's application of the "hate group" label to Coral Ridge. *See* Am. Compl. at ¶ 119 ("SPLC published [Coral Ridge's] trademarked name 'D. James Kennedy Ministries' on its Hate Map, listing it as an Anti LGBT hate group."); *id.* at ¶ 56 ("SPLC . . . has labelled [Coral Ridge] as one of AmazonSmiles' prohibited types of organizations with the following entry on SPLC's 'Hate Map': D. James Kennedy Ministries (formerly Truth in Action) Fort Lauderdale, Florida ANTI LGBT."); *id.* at ¶ 57 (alleging that Coral Ridge's entry on the Hate Map can be located by sorting for "Anti LGBT" organizations, then clicking on a symbol over Miami, Florida). SPLC has made clear that it views Coral Ridge as a "hate group" with respect to gay people – not, for example, black people or Muslims. Thus, the court rejects Coral Ridge's argument that it should ignore the "Anti-LGBT" part of the "hate group" designation in assessing the legal claims.

[4] The Supreme Court has explicitly held that the plaintiff bears the burden of proving falsity. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69, 775 (1986). By implication, the burden as to the provable-as-false requirement must also be on the plaintiff, given that being provable as false is a necessary condition for meeting the burden of proving falsity.

Times v. Sullivan, 376 U.S. 254, 280 (1964). Whether this heightened legal standard applies here depends on whether Coral Ridge is a public figure – and not just any one.

A public figure is defined by the "notoriety of . . . [its] achievements or the vigor and success with which . . . [it] seek[s] the public's attention." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). "[P]ublic figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 323. Public figures thrust themselves and their views into the public controversy in an effort to influence others. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135-36 (1979) (finding scientist was not a public figure in part because he "did not thrust himself or his views into public controversy to influence others").

Coral Ridge concedes it is a public figure, and this concession makes sense, given its focus on broadcasting its viewpoints through the media and the global reach of its television program. *See* Am. Compl. (doc. no. 40) at 32-33, 35, 39. Consequently, to succeed on this defamation claim against SPLC, it must satisfy the First Amendment heightened standard.[5]

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[5] Thus, of course, this standard likely would not apply if SPLC had called an ordinary church or ministry a "hate group." Because, unlike the average church, Coral Ridge is, as stated, a public, figure, a media corporation that has successfully sought public influence and broadcast its views to millions through its weekly television program. *Compare Hustler Magazine v. Falwell*,

To decide whether Coral Ridge plausibly pleads these three constitutional requirements for its defamation claim, the court must first determine the meaning (or meanings) of the term "hate group." For, without determining the meaning of "hate group," it is impossible to assess whether SPLC's labeling of Coral Ridge as "Anti-LGBT hate group" was provable as false, actually false, and made with actual malice. Thus, the court will turn to Coral Ridge's amended complaint to determine – under the motion-to-dismiss standard – the meaning of the term "hate group" for an average reader. *See St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1317 (3d Cir. 1994) ("In defamation actions, words should be construed as they would be understood by the average reader.").

1. Meaning of "Hate Group"

As stated above, the tenet that a court must accept as true the allegations in a complaint does not apply to conclusory statements. *See Iqbal*, 556 U.S. at 678. Therefore, in pleading the meaning of "hate group," Coral Ridge cannot rely on allegations that express "a factual inference without stating the underlying facts on which the inference is based." *Conclusory*, Black's Law Dictionary (11th ed. 2019). As detailed below, Coral Ridge did just that.

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485 U.S. 46, 47 (1988) (applying *New York Times* standard to Jerry Falwell, "a nationally known minister who has been active as a commentator on politics and public affairs," and thus a public figure).

i. Coral Ridge's Alleged Meaning of "Hate Group"

The amended complaint asserts that, "A hate group is legally and commonly understood as one that engages [in] or advocates crime or violence against others based on their characteristics." Am. Compl. (doc. no. 40) at ¶ 91; *see also id.* at ¶ 66. The alleged definitional requirement that hate groups "engage[ ] [in] or advocate[ ] crime or violence" is central to Coral Ridge's claim, since Coral Ridge contends that its "hate group" designation is false because it "does not engage in or advocate violence or crime against any group." *Id.* at ¶ 123; *see also id.* at ¶¶ 66-69. In other words, Coral Ridge's main falsity argument – and thus defamation claim – hinges on its allegation that a required trait of "hate groups" is engaging in or advocating crime or violence.[6]

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[6] That the characteristic of engaging in or advocating crime or violence is a *requirement* of Coral Ridge's alleged "hate group" definition reflects a plain reading of its pleaded definition. The amended complaint says that a hate group is commonly understood as "one that engages [in] or advocates crime or violence," Am. Compl. (doc. no. 40) at ¶ 91; this categorical formulation expresses that a group must have that characteristic to qualify. Moreover, interpreting the characteristic as a requirement reads the allegations in the light most favorable to Coral Ridge. If the court were to read the alleged definition as being inclusive of – but *not restricted* to groups with that characteristic – then Coral Ridge's contention that its designation as a "hate group" is false because it does not engage in or advocate crime or violence would automatically fail. Put differently, Coral Ridge's alleged lack of that characteristic can be the basis of falsity only if the "hate group" definition *requires* that characteristic.

The court need not accept Coral Ridge's alleged definition of "hate group" because it is a conclusory allegation. Critically, Coral Ridge fails to plead any facts to support its "generaliz[ed]," "blanket statement[]" about the commonly understood meaning of "hate group." *Roberts*, 2013 WL 4046383, at *2. It does not, for example, plead that "hate group" is anywhere defined – whether in a dictionary, or by any other source or entity – to require engaging in or advocating violence or crime. Coral Ridge thus asserts "a factual inference" – the commonly understood meaning of "hate group" – "without stating the underlying facts on which the inference is based." *Conclusory*, Black's Law Dictionary (11th ed. 2019). The court will not accept Coral Ridge's "naked assertion[s] devoid of further factual enhancement." *Simpson v. Sanderson Farms, Inc.*, 744 F.3d 702, 708 (11th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678).

If courts considering motions to dismiss were obligated to accept as true plaintiffs' factually unsupported definitions of words, concepts, and terms, it would make a mockery of Federal Rule of Civil Procedure 12(b)(6)'s pleading standard.[7] Requiring courts to accept as true plaintiffs' pleaded definitions of words would be particularly inappropriate in public-figure defamation suits such as this one, where "there is a

[7] For example, if a plaintiff buyer alleging that a defendant seller fraudulently misrepresented the number of apples in a delivery could successfully plead any definition he wanted of "apples" – such as requiring that they have seeds made of 24-karat gold – then even the most frivolous claim could survive a motion to dismiss.

powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless litigation." *Michel*, 816 F.3d at 702.

Not only is Coral Ridge's conclusorily asserted definition of "hate group" unsupported by any other factual allegations; worse yet, it is *contradicted* by more specific alleged facts that Coral Ridge pleads, cites in its briefing, and asserts to be subject to judicial notice.[8] This court's "duty to accept the facts in the complaint as true does not require [it] to ignore specific factual details of the pleading in favor of general or conclusory allegations." *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205-06, 1210 (11th Cir. 2007) (reversing denial of motions to dismiss where "the facts in [plaintiff's] own complaint plainly contradict the conclusory allegation" in the complaint); *see also Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002) (stating that the court need not "accept as true allegations that contradict matters properly subject to judicial notice"). Here, Coral Ridge's conclusorily alleged and factually unsupported definition does not trump the concretely sourced, specific definitions of "hate group" that it cites.

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[8] "[I]n ruling on a motion to dismiss courts may supplement the allegations in a complaint with facts contained in judicially noticed materials," without converting the motion into a summary-judgement motion. *K.T. v. Royal Caribbean Cruises, Ltd.*, 931 F.3d 1041, 1048 (11th Cir. 2019) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)); *cf. Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999).

In its amended complaint and briefing, Coral Ridge cites three sources – other than itself and SPLC – of definitions of a "hate group": (1) judicial opinions, (2) the Federal Bureau of Investigation (FBI), and (3) the Anti-Defamation League (ADL). The definitions – or, in the case of the judicial opinions, lack of a definition – of the term "hate group" provided by all of these sources directly contradict Coral Ridge's allegation that a "hate group is legally and commonly understood as one that engages [in] or advocates crime or violence against others." Am. Compl. (doc. no. 40) at ¶ 91.

To start, the amended complaint cites four judicial opinions to support its assertion that "the law defines a hate group as one whose activities include violence and crime." *Id.* at ¶ 65. None of the cited opinions defines the term "hate group," and two do not even mention the term: *Virginia v. Black*, 538 U.S. 343 (2003) (nowhere mentioning term); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (nowhere mentioning term); *Powers v. Clarke*, 2014 WL 6982475, at *3 n.10 (E.D. Va. Dec. 9, 2014) (Hudson, J.) (not defining term); *Doe v. Pittsylvania Cnty.*, 844 F. Supp. 2d 724, 740 (W.D. Va. 2012) (Urbanski, J.) (not defining term). The amended complaint's blanket assertion that "hate group" is legally defined in a particular way is therefore contradicted by the more specific fact that none of the cases cited by Coral Ridge defines the term.

Furthermore, unlike Coral Ridge's definition, the FBI's and ADL's definitions of a "hate group" do *not* include a requirement that the group engage in or

advocate crime or violence. According to Coral Ridge, the FBI defines "hate group" as, "An organization whose primary purpose is to promote animosity, hostility, and malice against persons of or with a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity which differs from that of the members or the organization, e.g., the Ku Klux Klan, American Nazi Party." Pl.'s Resp. to SPLC's Mot. to Dismiss (doc. no. 51) at 5 (quoting FBI, *Hate Crime Data Collection Guidelines And Training Manual*, at 9 (2015), https://ucr.fbi.gov/hate-crime-data-collection-guidelines-and-training-manual.pdf).[9] The ADL defines a "hate group" as "an organization whose goals and activities are primarily or substantially based on a shared antipathy towards people of one or more different races, religions, ethnicities/nationalities/national origins, genders, and/or sexual identities. . . . [T]he group itself must have some hate-based orientation/purpose." *Id.* at 5-6 (quoting *Hate Group*, ADL, https://www.adl.org/resources/glossary-terms/hate-group).[10] Again, neither of these

[9] Coral Ridge contends – and SPLC and this court agree – that the definition contained in the FBI manual is subject to judicial notice. This court takes notice of – and considers for purposes of this motion to dismiss – only the fact that an FBI manual with this definition exists, but of course takes no notice as to the veracity of the definition. *See U.S. ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 811-12, 811 n.4 (11th Cir. 2015).

[10] The court takes judicial notice of the existence of this ADL definition, which Coral Ridge cites in its brief.

definitions contains the crime or violence requirement.[11]

In addition to conflicting with the FBI and ADL definitions, Coral Ridge's alleged definition of "hate group" is inconsistent with this court's "common sense" understanding of the words "hate" and "group." *Iqbal*, 556 U.S. at 679 (explaining that courts must draw on their "common sense" in determining whether plaintiffs meet the plausibility pleading standard). While the word "hate" is sometimes associated with violence and crime, it does not *necessarily* connote the two. Plainly, the word "group" carries no such connotation.

In sum, the court need not accept Coral Ridge's blanket contention that a "hate group" is "legally and commonly understood as one that engages [in] or advocates crime or violence against others," Am. Compl. (doc. no. 40) at ¶ 91, given that it is not only factually

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[11] For its part, SPLC defines "hate groups" as those groups that "have beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics." Am. Compl. (doc. no. 40) at ¶ 59. SPLC's definition especially undermines Coral Ridge's conclusory allegation concerning how "hate group" is "commonly understood," given that Coral Ridge also pleads that, "[a]s a result of SPLC's position as the alleged 'premier U.S. nonprofit organization monitoring the activities of domestic hate groups and other extremists,' . . . SPLC's Hate Map [and other 'hate group' materials, goods, and services] reach a large number of people in every state in the United States and beyond." Am. Compl. (doc. no. 40) at ¶ 75. The term "hate group" is less likely to be "commonly understood" to necessarily involve violence or crime if the widely viewed Hate Map produced by a "premier" organization monitoring "hate groups" does not define such groups as necessarily engaging in or advocating violence or crime.

unsupported, but also contradicted by the FBI and ADL definitions that Coral Ridge cites, as well as by the court's common-sense understanding of the words "hate" and "group."

Beyond belying the alleged crime or violence element of the "hate group" definition, the FBI and ADL definitions also show that the term does not have a single, "commonly understood" meaning. This is because the definitions contain important differences from one another. For example, unlike the FBI definition, the ADL definition does not require that the group "promote" animosity, hostility, malice, antipathy, or the like; under the ADL's definition, a white supremacist organization is still a "hate group" even if it keeps to itself. *See* Pl.'s Resp. to SPLC's Mot. to Dismiss (doc. no. 51) at 5-6. Further, the FBI definition requires that a group's "primary purpose" be the promotion of its bigoted ideas, while the ADL definition is broader, including those whose "goals and activities" are "substantially based" on a shared antipathy towards people of a certain group.

The conclusion that the term "hate group" has no single, commonly understood meaning is reinforced by the lack of a definition for the term in dictionaries, of which the court takes judicial notice. *See Veney*, 293 F.3d at 730 ("Nor must we accept as true allegations that contradict matters properly subject to judicial notice or by exhibit.)". Neither Black's Law Dictionary (11th ed. 2019), Merriam-Webster Unabridged (online

ed.), nor the Oxford English Dictionary (online ed.), defines the term "hate group."[12]

ii. Court's Conclusion as to Meaning of "Hate Group"

Accepting as true the well-pleaded facts – but not the conclusory allegations – and construing them in the light most favorable to Coral Ridge, the court concludes that there is no single, commonly understood meaning of the term "hate group." Rather, as shown by the conflicting definitions cited by Coral Ridge – and dictionaries' lack of a definition – the term does not have one precise definition, and instead may be

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[12] Black's Law Dictionary defines the distinct term of "hate speech" as follows: "Speech whose sole purpose is to demean people on the basis of race, ethnicity, gender, religion, age, disability, or some other similar ground, esp. when the communication is likely to provoke violence." *Hate Speech*, Black's Law Dictionary (11th ed. 2019). Strikingly, this definition undercuts Coral Ridge's definition of "hate group" as requiring that the group engage in or advocate crime or violence. To explain: the key verb in the definition – "to demean" – does not necessarily entail engaging in or advocating crime or violence. Furthermore, the word "especially" in the clause "especially when the communication is likely to provoke violence," shows that hate speech may *sometimes* be likely to provoke violence, but it is not *always* likely to provoke violence. Thus, according to the definition, "hate speech" does not necessarily provoke, promote, or advocate crime or violence. Therefore, if the court were to accept Coral Ridge's asserted definition of "hate group" as requiring engaging in or advocating crime or violence, it would mean that there could be a group exclusively and zealously dedicated to engaging in "hate speech" – as defined by Black's Law Dictionary – that would not qualify under Coral Ridge's definition of a "hate group," because it did not engage in or advocate crime or violence. This would be absurd.

ascribed multiple different meanings by "the average reader." *St. Surin*, 21 F.3d at 1317.[13]

With this determination as to the meaning of "hate group" in mind, the court will now assess whether Coral Ridge has plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.[14]

2. Constitutional Requirements for Defamation

As previously mentioned, the First Amendment imposes three requirements on Coral Ridge: It must plausibly allege that the "hate group" designation is provable as false and actually false, and that SPLC

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[13] Interestingly, there appears to be no uniform definition of "hate group" in Canada either. The Canadian Anti-Hate Network defines a hate group as "a group which, as demonstrated by statements by its leaders or its activities, is overtly hateful towards, or creates an environment of overt hatred towards, an identifiable group. . . ." https://www.antihate.ca/what_is_a_hate_group (last accessed on September 6, 2019). Meanwhile, Queens University's Human Rights Office defines "hate groups" as "organizations which: spread lies intended to incite hatred toward certain groups of people; advocate violence against certain groups on the basis of sexual orientation, race, colour, religion etc.; claim that their identity (racial, religious etc.) is 'superior' to that of other people; do not value the human rights of other people." *See* http://www.queensu.ca/humanrights/initiatives/end-hate-project/what-hate/what-hate-group (last accessed on September 6, 2019).

[14] As the "actual malice" subsection below explains, an alternative holding in this case is that, even if the court were to accept as true Coral Ridge's allegation that "hate group" is commonly understood to require engaging in or advocating crime or violence, Coral Ridge still would not plausibly plead actual malice, and therefore its amended complaint would still be dismissed.

made the designation with "actual malice." While Coral Ridge must meet all three requirements, it cannot, for the reasons outlined below, satisfy any of them.

i. Provable as False

Under the First Amendment, the "hate group" designation is not actionable unless it is "provable as false." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990).[15] Statements are provable as false when their

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[15] *Milkovich* stated that the "provable as false" requirement for allegedly defamatory statements on matters of public concern applied "at least in situations, like the present, where a media defendant is involved," thus reserving the question whether it applied with a nonmedia defendant. *Id.* at 19-20, n.6. However, this court agrees with other courts that subsequently concluded that the requirement applies regardless of whether the defendant is characterized as belonging to the media. *See Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014) (agreeing with "every other circuit to consider the issue," which have "held that the First Amendment defamation rules in [*New York Times v.*] *Sullivan* and its progeny apply equally to the institutional press and individual speakers"); *Snyder v. Phelps*, 580 F.3d 206, 219 n.13 (4th Cir. 2009) ("[W]e believe that the First Amendment protects nonmedia speech on matters of public concern that does not contain provably false factual assertions."); *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000) ("[A] distinction drawn according to whether the defendant is a member of the media or not is untenable."); *Piccone v. Bartels*, 40 F. Supp. 3d 198, 207 (D. Mass. 2014) (Wolf, J.) (agreeing with collected cases in holding that "the constitutional limitations on speech that can support liability for defamation apply in cases involving non-media defendants"); *see also In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986); *Garcia v. Bd. of Educ. of Socorro Consol. Sch. Dist.*, 777 F.2d 1403, 1411 (10th Cir. 1985).

Concluding that the media-nonmedia distinction is irrelevant comports with Eleventh Circuit decisions that have applied

truth or falsity can be determined based on "a core of objective evidence." *Id.* at 21. Put differently, the requirement is satisfied if the statement is "subject to empirical verification." *Michel*, 816 F.3d at 697.

An alleged defamatory statement is generally not provable as false when it labels the plaintiff with a term that has an imprecise and debatable meaning. *See, e.g.*, *Buckley v. Littell*, 539 F.2d 882, 893-94 (2d Cir. 1976). In *Buckley*, the author and commentator William F. Buckley, Jr. sued author and Holocaust scholar

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the "actual malice" standard to nonmedia defamation defendants. *See Echols v. Lawton*, 913 F.3d 1313, 1321 (11th Cir. 2019); *Morgan v. Tice*, 862 F.2d 1495, 1500 (11th Cir. 1989). Indeed, providing less constitutional protection to nonmedia defendants would conflict with *Turner v. Wells*, where the Eleventh Circuit rejected the defamation plaintiff's argument that "a different set of rules" applied to the allegedly defamatory report because it was not published by a media organization. 879 F.3d 1254, 1270-71 (11th Cir. 2018). The court reasoned: "The First Amendment protects both media ('freedom . . . of the press') and non-media ('freedom of speech') defendants." *Id.* at 1271.

Finally, giving less protection to nonmedia defendants would be at odds with the Supreme Court's statement in *Citizens United v. Fed. Election Comm'n*: "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." 558 U.S. 310, 352 (2010); *cf.* at 326 ("Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored.").

To summarize, because the constitutional limits on defamation actions apply equally to media and nonmedia defendants, this court need not decide on which side of the "blurred" media-nonmedia line SPLC falls. *Id.* at 352 ("With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.").

Franklin H. Littell for libel because Littell's book characterized Buckley as a "fellow traveler" of "fascism" or the "radical right." *Id.* at 890, 893. The Second Circuit Court of Appeals held that those terms were "concepts whose content is so debatable, loose and varying, that they are insusceptible to proof of truth or falsity." *Id.* at 894. As the court emphasized, the ambiguous labels contrasted sharply with accusations of being a member or legislative representative of a concrete political party, which are allegations that are "susceptible to proof or disproof of falsity." *Id.* That the plaintiff and defendant defined "fascism" differently was but one example of the "imprecision of the meaning and usage of the[ ] term[ ] in the realm of political debate." *Id.* at 890, 893.

Subsequently, in *Ollman v. Evans*, the D.C. Circuit Court of Appeals elaborated on and applied the principles set forth in *Buckley. See* 750 F.2d 970, 979-87 (D.C. Cir. 1984) (en banc).[16] The court held to be "obviously

[16] Both *Buckley* and *Ollman* analyzed whether the defamatory statements had a precise meaning and were provable as false to determine whether the statements were of fact or "opinion." The fact-versus-opinion distinction was relevant because those courts – and others – considered opinions to be protected by the First Amendment. In fact, *Ollman* set forth an influential four-factor test for distinguishing fact from constitutionally protected opinion. *See* 750 F.2d at 979. The first factor was "whether the statement has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous." *Id.* The second factor was "the statement's verifiability – is the statement capable of being objectively characterized as true or false?" *Id.*; *see also id.* at 981 ("[I]s the statement objectively capable of proof or disproof?"). These two factors were essentially the driving considerations in *Buckley* and

unverifiable" the alleged defamatory statement that the plaintiff academic was an "outspoken proponent of political Marxism." *Id.* at 987. It highlighted that the characterization was "much akin to" the "fascist" label in *Buckley*, in that it was a "loosely definable, variously interpretable statement" made in the context of "political, social or philosophical debate." *Id.* The D.C. Circuit contrasted, on the one hand, the political Marxist and fascist designations with, on the other, an accusation of a crime, which is a "classic example of a

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Ollman, which both reasoned that certain alleged defamatory statements were constitutionally protected opinion because their meaning was highly ambiguous and not provable as false.

Later, in *Milkovich*, the Supreme Court clarified that there is no independent constitutional protection for "opinion" that is separate from the requirement that the defamatory statement be provable as false. 497 U.S. at 19-21. However, *Milkovich*'s rejection of the fact-versus – "opinion" dichotomy was largely semantic, as the Court recognized the "provable as false" requirement that drove the "opinion" – versus-fact analyses in *Buckley* and *Ollman.* Therefore, *Buckley*'s and *Ollman*'s analyses of whether the statements were provable as false are still most instructive and directly pertinent to assessing the still-valid constitutional requirement that a defamatory statement be provable as false, even though the provable-as-false analyses in those cases were technically to determine whether the statements qualified as "opinion" – a term that *Milkovich* deemed constitutionally irrelevant. Or, as one commentator put it: "The Court in *Milkovich* was primarily rejecting only the *terminology* of 'fact v. opinion.' The Court actually *endorsed* rather than rejected the essential substance of the previously existing constitutional protection for opinion. . . . [S]tatements not subject to objective proof . . . are still immune from liability under the First Amendment. . . . [T]he rich body of jurisprudence developed by lower courts . . . under the rubric of the 'opinion' doctrine remains alive and well." 1 Rodney A. Smolla, *Law of Defamation* § 6:21 (2d ed. May 2019 update).

statement with a well-defined meaning." *Id.* at 980. Even though accusations of crimes are "not records of sense perceptions," they depend for their meaning on social norms that "are so commonly understood that the statements are seen by the reasonable reader or hearer as implying highly damaging facts." *Id.*

The *Ollman* court explained why demanding that defamatory statements be "objectively capable of proof or disproof" safeguards important free speech interests: "[I]nsofar as a statement is unverifiable, the First Amendment is endangered when attempts are made to prove the statement true or false." *Id.* at 981. This is because without "a clear method of verification with which to evaluate a statement – such as labelling a well-known American author a 'fascist' – the trier of fact may improperly tend to render a decision based upon approval or disapproval of the contents of the statement, its author, or its subject." *Id.* (internal citations omitted). "An obvious potential for quashing or muting First Amendment activity looms large when juries attempt to assess the truth of a statement that admits of no method of verification." *Id.* at 981-82.

So, with these cases in mind, is the statement that Coral Ridge is a "hate group" provable as false? No, it is not. Like in *Ollman* and *Buckley*, the meaning of the term "hate group" is so "debatable, loose and varying," that labeling Coral Ridge as one is "insusceptible to proof of truth or falsity." *Buckley*, 539 F.2d at 894. Similar to the terms "fascism," "radical right," and "political Marxist," the term "hate group" also suffers from a "tremendous imprecision of the meaning and usage . . .

in the realm of political debate." *Id.* at 893. This imprecision is reflected in the conflicting definitions of the term espoused by Coral Ridge and SPLC, as well as by the ADL, and FBI. Unlike the accusation of a crime, the accusation of being a hate group does not derive its meaning from "commonly understood" social norms. *Ollman*, 750 F.2d at 980. A "hate group" designation is also a far cry from the objectively verifiable allegation of having a "well-defined political affiliation," such as being "a legislative representative of the Communist Party." *Buckley*, 539 F.2d at 894.

In sum, because "hate group" has a highly debatable and ambiguous meaning, Coral Ridge's designation as such is not "provable as false." *Milkovich*, 497 U.S. at 19.[17] Therefore, the First Amendment protects the statement.

ii. False

In addition to requiring that a defamatory statement be provable as false, the First Amendment also requires that "a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in

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[17] The court does not go so far as to hold that a "hate group" label can *never* be provable as false. The court need not address whether it would be possible for a factual situation to arise in which the designation would be provable as false because no plausible construction of the ambiguous term would fit the plaintiff, such as might be the case if the term were applied to a middle-school chess team with no views on anything other than chess strategy. That is not the case here, given that Coral Ridge is a public figure that espouses its opposition to homosexual conduct.

a suit for defamation." *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988). Coral Ridge cannot prove the falsity of the "hate group" designation, given that, as the court has found, the designation is not provable as false. Logically speaking, a plaintiff cannot prove what is not provable. *Cf. Milkovich*, 497 U.S. at 16, 19 (inferring the provable-as-false requirement from *Hepps*'s requirement to prove falsity).

This court's holdings that Coral Ridge does not plausibly plead that the "hate group" designation was (1) provable as false or (2) false are each independently sufficient to dismiss the defamation claim. Nevertheless, the court will now discuss Coral Ridge's failure to plead, plausibly, actual malice, which is an alternative ground for dismissing the claim.

iii. Actual Malice

The third and final First Amendment hurdle for Coral Ridge is that it must plausibly allege that SPLC made the "hate group" designation with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280. "Actual malice" requires falsity. *See Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 247 (2014) ("One could in principle construe the language of the actual malice standard to cover true statements made recklessly. But we have long held, to the contrary, that actual malice entails falsity."). Therefore, Coral Ridge's failure to plead

plausibly that the "hate group" designation is provable as false or false necessarily means that it cannot plausibly allege "actual malice."

Nonetheless, for the following reasons, even if the court were to conclude that the "hate group" label was both provable as false and actually false, Coral Ridge still would not plausibly allege actual malice.

The test for actual malice "is not an objective one and the beliefs or actions of a reasonable person are irrelevant." *Michel*, 816 F.3d at 702-03 (citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). Rather, the plaintiff must plead enough facts to allow the court to draw the reasonable inference that the defendant, "instead of acting in good faith, actually entertained serious doubts as to the veracity of the published account, or was highly aware that the account was probably false." *Id.* Coral Ridge does not satisfy this test.

Coral Ridge's basic contention regarding actual malice is that the "hate group" definition that SPLC used in designating it as such is so far removed from the commonly understood meaning of the term that SPLC must have known – or at least recklessly disregarded – the falsity of the designation. *See, e.g.*, Am. Compl. (doc. no. 40) at ¶ 67 ("SPLC's definition of 'hate group' is so far outside of how hate groups are legally and culturally understood that . . . SPLC knew of the falsity of its definition at the time it designated the Ministry a hate group. . . ."); *id.* at ¶ 67, 69. In other words, according to Coral Ridge, SPLC's actual malice should be inferred from the gaping disparity between,

on the one hand, the common understanding that all hate groups engage in or advocate crime or violence, and, on the other, SPLC's broader definition of "hate group" and its application of that definition to Coral Ridge for "oppos[ing] homosexual conduct." *Id.* at ¶ 61.

Fatal to Coral Ridge's contention is the reality that "hate group" has no single, commonly understood meaning. Without a commonly understood meaning, there can be no chasm between the commonly understood meaning and SPLC's definition.

Furthermore, Coral Ridge still would not plausibly allege actual malice even if this court were to accept as true its allegation that the single, commonly understood meaning of "hate group" requires that the group engage in or advocate crime or violence. Granted, if that were the case, there would be a significant discrepancy between the commonly understood meaning of a hate group and SPLC's definition, given that the latter lacks a violence or crime requirement. And, admittedly, a substantial disparity between the commonly understood meaning of a term and the definition relied on by an alleged defamatory speaker might, *in certain circumstances*, lead to a reasonable inference of knowledge or recklessness as to falsity. *Cf. Michel*, 816 F.3d at 703 (noting that the Supreme Court has stated that actual malice "can be inferred in certain circumstances," such as when allegations are "so inherently improbable that only a reckless man would have put them in circulation"). Nevertheless, those circumstances are not present under the facts pleaded here.

Specifically, Coral Ridge pleads that SPLC, holding itself out to the public as a "premier" U.S. monitor of "hate groups," publicly disseminates its own definition of "hate groups" to a "vast" audience of people and media across the country. Am. Compl. (doc. no. 40) at ¶¶ 71, 143.[18] Coral Ridge does not plead any facts indicating that SPLC subjectively doubts or disbelieves the validity or accuracy of the definition that it so widely promotes under the banner of being a premier "hate group" monitor. Consequently, even if the court accepted Coral Ridge's asserted commonly understood meaning of "hate group," the pleaded facts, read in the light most favorable to Coral Ridge, would support the reasonable inference that SPLC promotes its own sincerely held view of the meaning of "hate group," despite the difference between its view and the commonly understood meaning that a "hate group" engages in or advocates crime or violence.[19] Setting aside the above-discredited allegations claiming a common definition

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[18] SPLC puts its definition of a "hate group" on its website at https://www.splcenter.org/hate-map. *See* Am. Compl. (doc. no. 40) at ¶ 59. On its website, SPLC claims to be the "premier U.S. nonprofit organization monitoring the activities of domestic hate groups and other extremists." *Id.* at ¶ 71. SPLC "disseminates, distributes and promotes the Hate Map and resulting hate group designations on its website." *Id.* ¶ 21. The dissemination of the Hate Map and hate group designations "is nothing short of vast," as the "SPLC's website receives an extremely large number of views and significant general media exposure." *Id.* at ¶ 143. The Hate Map reaches "a large number of people in every state in the United States and beyond." *Id.* at ¶ 75.

[19] The same would be true if the court were to accept the FBI's or ADL's definitions of a hate group as providing the single, commonly understood meaning of the term.

of "hate group," the pleaded facts do *not* lead to a reasonable inference that "instead of acting in good faith," SPLC "actually entertained serious doubts as to the veracity" of its "hate group" definition and application to Coral Ridge, or was "highly aware" that the definition and designation was "probably false." *Michel*, 816 F.3d at 702-03.[20] The bottom line is that, regardless of the commonly understood meaning of "hate group," Coral Ridge does not plausibly allege that SPLC's subjective state of mind was sufficiently culpable.

To find actual malice just because SPLC publicized a meaning of "hate group" that conflicted with the common understanding of the term would severely undermine debate and free speech about a matter of public concern. This is because, even if the term had achieved a commonly understood meaning, that meaning would not be fixed forever, but rather could evolve through public debate. To sanction a speaker for promoting a genuinely held dissenting view of the meaning of "hate group" would be akin to punishing a

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[20] Still operating under the counterfactual situation in which the court credited Coral Ridge's definition of "hate group" as the single, commonly understood meaning of the term, the court might have reached a different conclusion as to actual malice if SPLC did not publish and widely disseminate its own definition; or if its definition were ridiculously outlandish. It also might have been a different case if the allegedly defamatory term SPLC defined on its website was not so germane to its mission, such as if SPLC started to publish a list of purported "substance abusers" – a topic far removed from its mission to monitor hate groups – and then provided a highly unconventional definition of the term. Circumstances such as these might indicate that SPLC was acting in bad faith. Of course, they do not exist here.

speaker for advocating new conceptions of terms like "terrorist," "extremist," "sexist," "racist," "radical left wing," "radical right wing," "liberal," or "conservative." Punishing speakers to preserve status quo ideas would be anathema to the First Amendment.

* * *

If Coral Ridge disagrees with the "hate group" designation, its hope for a remedy lies in the "marketplace of ideas," not a defamation action. *Milkovich*, 497 U.S. at 18 (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas – . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market."). As a public figure, with a national, if not international audience, and a figure that has already "been vocal about its position on homosexuality" and maintains that "speaking out on these issues is necessary," Pl.'s Resp. to SPLC's Mot. to Dismiss (doc. no. 51) at 10, Coral Ridge is free publicly to engage SPLC; to criticize SPLC's definition of a "hate group"; and, in particular, to challenge Coral Ridge's designation as such. This engagement should be in the court of public opinion, not a federal court. The defamation claim will be dismissed with prejudice.

B. Lanham Act Claims Against SPLC

Coral Ridge seeks to hold SPLC liable for its designation of Coral Ridge as a "hate group" under Section 43(a) of the Lanham Act, which is codified at 15 U.S.C.

§ 1125(a). This provision establishes "two distinct bases of liability: false association, § 1125(a)(1)(A), and false advertising, § 1125(a)(1)(B)." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 122 (2014). Coral Ridge brings both types of claims.

Coral Ridge claims that SPLC engaged in false advertising by falsely designating it a "hate group" on its Hate Map, disseminating the Map and "hate group" designation in connection with reports and trainings, and engaging in fundraising focused on the Hate Map and "hate group" designations. *See* 15 U.S.C. § 1125(a)(1)(B) (establishing claim for use "in connection with goods and services" of "a false or misleading description of fact . . . in commercial advertising or promotion").

Coral Ridge's false-association claim rests on many of the same allegations, but focuses on SPLC's use of Coral Ridge's trademarked name. Coral Ridge contends that the use of its trademarked name on the Hate Map is likely to cause confusion as to Coral Ridge's "association" with other hate groups on the Map, such as the Ku Klux Klan and the American Nazi Party. *See* 15 U.S.C. § 1125(a)(1)(A) (establishing claim for use of a trademark "in connection with goods and services" that "is likely to cause confusion . . . as to . . . association").

Because Coral Ridge's claims cannot, as an initial matter, withstand the rigorous protections of the First Amendment, and because it has not pleaded viable claims under the statute, the claims fail.

1. First Amendment

As the Supreme Court has made clear, even when they do not bring a defamation claim, 'public figures' who seek to sue others who criticize them may still be subject to *New York Times v. Sullivan*'s heightened requirements for liability. 376 U.S. 254 (1964).

In *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), Jerry Falwell, a nationally known minister and commentator on politics, had successfully sued Hustler Magazine, a nationally circulated magazine, to recover damages for 'intentional infliction of emotional distress' arising from the publication of an advertisement "parody" which, among other things, portrayed Falwell as having engaged in a drunken incestuous rendezvous with his mother in an outhouse. In overturning the lower-court jury verdict, the Supreme Court, while recognizing that the publication was "gross and repugnant in the eyes of most," 485 U.S. at 50, found that, because Falwell was concededly a public figure, he was subject to the *New York Times*'s twin obligations of showing that the publication contains "a false statement of fact" and that the statement "was made with 'actual malice.'" *Id.* at 56.

In explaining why the Supreme Court found as it did, this court must, as did the Supreme Court in *Falwell*, revisit certain well-founded principles, albeit only briefly. These principles, as summarized in *Falwell*, are as follows: "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on *matters of public interest*

and concern. '[T]he freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole.' *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-504 (1984). We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a 'false' idea. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). As Justice Holmes wrote, 'when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .' *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion)." *Falwell*, 485 U.S. at 50-51 (emphasis added).

The *Falwell* Court went on to state that: "The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.' *Associated Press v. Walker*, decided with *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result). Justice Frankfurter put it succinctly in *Baumgartner v. United States*, 322 U.S.

665, 673-674 (1944), when he said that '[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures.' Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks,' *New York Times*, *supra*, 376 U.S. at 270." *Falwell*, 485 U.S. at 51.

Falwell argued that, despite these First Amendment principles, a different standard should apply in this case because the government sought to prevent "not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication." *Falwell*, 485 U.S. at 52. .

The Court rejected this argument, reasoning that: "[I]n the world of *debate about public affairs*, many things done with motives that are less than admirable are protected by the First Amendment. . . . [E]ven when a speaker or writer is motivated by hatred or ill-will his expression was protected by the First Amendment: '*Debate on public issues* will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.' [*Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)]." *Falwell*, 485 U.S. at 53 (emphasis added).

Critical to Court was not the "label" placed on the cause of action, *New York Times*, 376 U.S. at 269 ("In deciding the question now, we are compelled by neither

precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law."), but rather whether the concern raised by *New York Times* and reiterated in later cases was at issue: that "debate on public issues should be uninhibited, robust, and wide-open. . . ." *Id.*, 376 U.S. at 270. As the *Falwell* Court emphasized: "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on *matters of public interest and concern.*" 485 U.S. at 50 (emphasis added).

The *Falwell* Court then concluded: "This is not merely a 'blind application' of the *New York Times* standard . . . , it reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.* at 56.

Here, as discussed above, Coral Ridge has conceded that it is a 'public figure.' Public figures, as stated, are defined by "the notoriety of their achievements or the vigor and success with which they seek the public's attention," *Gertz*, 418 U.S. at 342; they "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy," *id.* at 323; and they "thrust themselves and their views into the public controversy in an effort to influence others, *see Hutchinson v. Proxmire*, 443 U.S. 111, 135-36 (1979).

Coral Ridge admits that it is a public figure, with quite significant "access to the channels of communication" through its television and other media efforts. *Id.* at 323. It freely chose to take a public stance on an issue of broad, pressing national debate and public concern: homosexuality, and more specifically the morality of "homosexual conduct" and the legal right to same-sex marriage. *See* Pl.'s Resp. to SPLC's Mot. to Dismiss (doc. no. 51) at 10 (Coral Ridge not only admits that "the Ministry has been vocal about its position on homosexuality," it also argues that "speaking out on these issues is necessary).

It has further conceded that the dispute between it and SPLC arises out of SPLC's labelling of it as an "Anti-LGBT hate group" for its stance on this debate. *See* Am. Compl. (doc. no. 40) at ¶ 154. At issue here, therefore, is nothing less than a public figure's engagement in an out-and-out "public debate" on one of the matters of "highest public interest and concern" in this country. *New York Times*, 376 U.S. at 266. That being so, "adequate 'breathing space,'" *Falwell*, 485 U.S. at 56, in the form of the protections provided in *New York Times v. Sullivan* must be given.

Coral Ridge argues that it is not a hate group; that, while it "opposes homosexual conduct," it "has nothing but love for people who engage in homosexual conduct," Am. Compl. (doc. no. 40) at ¶ 61; and that its views on "same-sex marriage" and the "homosexual agenda" are "decent and honorable," id. at ¶ 82 (*quoting Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015)). It further argues that, because SPLC's labeling, in

response to its stand, is "in connection" with "goods and services," it should be able to recover damages under the Lanham Act. *Id.* at ¶¶ 125, 145. But, when Coral Ridge, as a public figure, entered the public debate about gay rights, it took on the risk that it and its goods and services would be adversely affected. A public figure cannot enter the fray of debate halfway. As the Supreme Court cautioned in the *Falwell* case: The public figure that "vaunts [its] spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971).

Moreover, there is nothing in *New York Times v. Sullivan* and its progeny that suggests that, simply because a public figure that has entered the fray of public debate sells goods or services, it should when verbally attacked escape the heightened requirements for establishing liability under the First Amendment and should enjoy an uneven playing field, that is, an advantage over those public figures that do not sell goods and services. Coral Ridge joined many other public figures around the country in the national discussion about the rights of gay people. When it did this it opened itself up to criticisms about its views. For all the 'public figure' participants, name-calling – "purveyor of sin and indecency" or "purveyor of hate" – comes with the turf. Coral Ridge has joined in that public debate and must now abide by the same rules all other public figures do.

Having found that, in asserting Lanham Act claims, Coral Ridge is subject to the heightened standard of the First Amendment, the court further concludes that, to recover from SPLC, Coral Ridge must show that what SPLC said about it was provable as false and false, and was said with actual malice. For the reasons given above, in the discussion of Coral Ridge's defamation claim, Coral Ridge's complaint fails to assert adequate allegations to this effect.

Nevertheless, Coral Ridge argues that public debate on gay rights is not the sole concern presented here. It contends that SPLC also uses the Hate Map and "hate group" designations to promote Hate-Map-related "goods and services" – its reports, trainings, and other informational services – and, indeed, argues that it makes money from the sale of those "goods and services" as a result of its "hate group" designations. However, SPLC, like a magazine or a newspaper, is in the business of communicating information and viewpoints on issues of public concern and debate. "[M]agazines and newspapers often have commercial purposes, but those purposes do not convert the individual articles within these editorial sources into commercial speech subject to Lanham Act liability. *See Farah v. Esquire Magazine*, 736 F.3d 528, 541 (D.C. Cir. 2013) (holding that a satirical article about a book in a magazine's online blog was not commercial speech subject to Lanham Act liability even though 'writers write and publishers publish . . . for commercial purposes'); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001) ('A printed article meant to draw

attention to the for-profit magazine in which it appears, however, does not fall outside of the protection of the First Amendment because it may help to sell copies.')." *Edward Lewis Tobinick, MD v. Novella*, 848 F.3d 935, 952 (11th Cir. 2017). See also *Burstyn v. Wilson*, 343 U.S. 495, 501 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."). The fact that SPLC may, as alleged, earn money in connection with these communicative activities on an issue of public concern does not reduce the protection it receives under the First Amendment, and does not convert its speech into the basis for a viable Lanham Act claim. Likewise, the fact that the Hate Map may be used to attract attention to and increase sales of SPLC's Hate-Map-related trainings and informational services does not convert the Map and "hate group" designations into purely commercial speech subject to a lower level of constitutional protection. *See Hoffman*, 255 F.3d at 1186.

Similarly, the allegation that SPLC may use the Hate Map and "hate group" designations in fundraising does not mean that it should receive a lesser level of First Amendment protection. As the Supreme Court explained in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, where it struck down a restriction on the advertising of prescription drug prices: "Speech . . . is protected . . . even though it may involve a solicitation to purchase or otherwise pay or contribute money." 425 U.S. 748, 761 (1976).

Furthermore, in cases involving fundraising by charitable organizations, the court has treated that speech as deserving of the highest level of protection, based on "the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech . . . , and . . . that without solicitation the flow of such information and advocacy would likely cease." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988); *see also Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980). Thus, the allegations about the use of Hate Map in fundraising do not reduce the constitutional protections for SPLC's speech.

Finally, the legislative history of the Lanham Act is consistent with the court's conclusion. When the Act was revised in 1989, requirements were added that false advertising occur in the context of "commercial advertising and promotion," and that a false or misleading description or representation be one "of fact." 5 McCarthy on Trademarks and Unfair Competition § 27:96 (5th ed.). With regard to these changes, Representative Kastenmeier, who carried the bill in the House of Representatives, explained that both additions were drafted in order to avoid conflicts with the First Amendment. *See* Remarks of Rep. Kastenmeier on S. 1883, 134 Cong. Rec. 31851 (Oct. 19, 1988) ("To avoid legitimate constitutional challenge, it was necessary to carefully limit the reach of the subsection. Because section 43(a) will now [*sic.*] provide a kind of commercial defamation action, the reach of the

section specifically extends only to false and misleading speech that is encompassed within the "commercial speech" doctrine developed by the United States Supreme Court. *See, e.g.*, *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In addition, subsection (a) will extend only to false and misleading statements of *fact. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)." (emphasis in original)).

Although the above legislative history is admittedly sparse, a leading commentator has observed that the added "fact" requirement appears to have been "a conscious and intentional limitation imposed by Congress to exclude from the prohibitions of § 43(a) allegedly false or misleading representations of *opinion*" in light of the *Gertz* decision, which indicated that the First Amendment prohibited defamation liability for statements of opinion.[21] 5 McCarthy on Trademarks and Unfair Competition § 27:96 (emphasis in original); *see Gertz*, 418 U.S. at 339-40.

As for the added requirement of "commercial advertising or promotion," Representative Kastenmeier offered more explanation, quoting at length a noted trademark commentator, who explained that the "advertising or promotion" requirement would exclude

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[21] As stated earlier, *see* supra n. 16, the Supreme Court later clarified its view that the proper test for First Amendment purposes is not whether an allegedly false statement is of "fact" or "opinion," but whether it is provably false. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

statements raising free speech concerns from coverage of the Act. Remarks of Rep. Kastenmeier on S. 1883, 134 Cong. Rec. 31852 (Oct. 19, 1988). He explained that the categories of speech excluded from the coverage of the Act "are the type which raise free speech concerns, such as a Consumer Report which reviews and may disparage the quality of stereo speakers or other products, misrepresentations made by interested groups which may arguably disparage a company and its products because of the company's failure to divest its South African holdings, and disparaging statements made by commentators concerning corporate product liability and injuries to the public (*e.g.*, A.H. Robins and the Dalkon shield cases, or the Manville Corporation asbestos cases). All of these would be judged by first amendment law (including *New York Times v. Sullivan*) and not section 43(a) law. . . ." *Id. See also id.* ("As Mr. Gilson correctly notes, the proposed change in section 43(a) should not be read in any way to limit political speech, consumer or editorial comment, parodies, satires, or other constitutionally protected material. . . . The section is narrowly drafted to encompass only clearly false and misleading commercial speech.").

While not conclusive, this legislative history is consistent with this court's analysis: it suggests Congress anticipated that a conflict would arise between the First Amendment and the Lanham Act if it were applied to speech on matters of public concern, and that, were a claim brought under the Lanham Act for such speech, the claim would be subject to the standard

set forth in *New York Times v. Sullivan*, not those of the Lanham Act.

2. Application of the Lanham Act

Constitutional concerns aside, Coral Ridge has failed to plausibly plead its false-association and false-advertising claims. The court will first address the false-advertising claim, and will then turn to the false-association claim.

a. False-Advertising Claim

Section 1125(a)(1)(B) establishes a cause of action for false advertising against any person or entity "who, on or in connection with any goods or services, . . . uses in commerce . . . any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." 15 U.S.C. § 1125(a)(1)(B); *see also Suntree Techs., Inc. v. Ecosense Int'l, Inc.*, 693 F.3d 1338, 1348 (11th Cir. 2012). Even if for purposes of this discussion Coral Ridge has sufficiently alleged that SPLC made its "hate group" designation in connection with goods and services, Coral Ridge's false-advertising claim must nevertheless be dismissed because it has not plausibly pled that the "hate group" designation was a description or representation of fact, and or that that it made the

challenged statement in "commercial advertising and promotion."

As discussed above, prior to the 1989 revision, Section 43(a) of the Lanham Act applied to false or misleading "representations" or "descriptions." The 1989 revision added the clarification that such representations or descriptions must be "of fact." As discussed above, Congress apparently added this phrase to ensure that liability would not be imposed under the Lanham Act for statements of opinion, which the Supreme Court in *Gertz* suggested were protected from liability under the First Amendment. *See Gertz*, 418 U.S. at 339-40 ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."). The Supreme Court later clarified its view that the proper test under the First Amendment is not whether an allegedly false statement is of "fact" or "opinion," but whether it is "provably false." *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).[22]

In support of its false-advertising claim, Coral Ridge alleges in the complaint that SPLC misrepresented the nature, characteristics, and quality of Coral Ridge's goods and services by labelling the organization a 'hate group.' For the reasons discussed in the

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[22] As discussed earlier, *see supra* n. 16, this distinction appears largely semantic, because opinions are not provable as false.

defamation section, the designation of Coral Ridge as a "hate group" is not provable as false; there is no commonly accepted definition of the term "hate group." Thus, the representation or description that Coral Ridge challenges is not one "of fact," and the false-advertising claim must be dismissed.

Coral Ridge's claim also must be dismissed because it has not plausibly pleaded that SPLC used the hate group designation in "commercial advertising or promotion." 15 U.S.C. § 1125(a)(1)(B). The test for "commercial advertising or promotion" is: "(1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services; and (4) the representations . . . must be disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry."[23] *Edward Lewis Tobinick, MD*, 848 F.3d at 950 (*quoting Suntree Techs., Inc. v. Ecosense Int'l, Inc.*, 693 F.3d 1338, 1349 (11th Cir. 2012) (*quoting Gordon & Breach Sci.*

[23] It is unclear whether the second part of the test for "commercial advertising or promotion" – that the speech must have been "by a defendant who is in commercial competition with [the] plaintiff", *Edward Lewis Tobinick, MD*, 848 F.3d at 950 – is still good law after the Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). There, in determining the requirements for statutory standing under 15 U.S.C. § 1125(a)(2), the Court explained "when a party claims reputational injury from disparagement, competition is not required for proximate cause." *Id.* at 138. Because the allegations of the complaint do not establish the other factors in the four-part test, the court need not resolve the continuing validity of the second part of the test, and does not apply it here.

Publishers S.A. v. Am. Inst. of Physics, 859 F. Supp. 1521, 1535-36 (S.D.N.Y. 1994) (Sand., J.))).

i. Commercial Speech

With the facts alleged in the complaint considered in the light most favorable to the plaintiff, SPLC's use of the Hate Map does not constitute 'commercial speech.'

To assess whether Coral Ridge has sufficiently alleged that SPLC engaged in commercial speech, the court looks to the First Amendment commercial speech doctrine. *See Edward Lewis Tobinick, MD*, 848 F.3d at 950 (applying First Amendment commercial speech jurisprudence to determine whether plaintiff met the 'commercial speech' element of commercial advertising or promotion under § 1125(a)(1)(B)).[24]

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[24] This is so for two reasons. First, as discussed earlier, seeking to avoid conflict with the First Amendment, Congress reportedly drafted § 1125(a) "to extend only to false and misleading speech that is encompassed within the 'commercial speech' doctrine developed by the United States Supreme Court." *Gordon & Breach Sci. Publishers S.A.*, 859 F. Supp. at 1536. Second, under the doctrine of constitutional avoidance, the Lanham Act should be read in a way that avoids conflict with the First Amendment. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) ("In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail."). If the Lanham Act were read to impose civil liability for noncommercial speech receiving the highest level of constitutional protection under the First Amendment, it would likely be unconstitutional.

Under the commercial speech doctrine, commercial speech receives a lower level of constitutional protection than do other forms of speech more central to the concerns of the First Amendment, such as expressive, scientific, and political speech, and speech on matters of public concern. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980). The "core notion" of commercial speech is speech proposing a commercial transaction, such as a run-of-the-mill advertisement for a product or service. *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (*quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. at 762, *quoting Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)). *See also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) (*citing Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989)) (referring to speech that "propose[s] a commercial transaction" as "*the test* for identifying commercial speech") (italics added and citations omitted)). The Supreme Court has also defined commercial speech as "'expression related solely to the economic interests of the speaker and its audience.'" *Edward Lewis Tobinick, MD*, 848 F.3d at 950 (*quoting Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561).

SPLC's Hate Map and "hate group" designations do not meet the definition of commercial speech under either of these tests. Based on the allegations in the complaint, neither the Hate Map nor the "hate group" designations propose a commercial transaction. Nor does the complaint plausibly allege that SPLC's Hate

Map and its "hate group" designations are "expression related *solely* to the economic interest of the speaker and its audience." While describing SPLC's Hate Map as a "fundraising tool," the complaint does not allege that SPLC's interest in the Hate Map is solely economic. On the contrary, the complaint alleges that SPLC wants to shut "hate groups" down. Nor does the Hate Map constitute expression related solely to the economic interests of SPLC's audience. As alleged in the complaint, the audience for the Hate Map includes government agencies that seek information about "hate groups;" presumably these agencies' interest in the Hate Map is not solely or even primarily economic, but instead is an interest in law enforcement. Furthermore, the complaint alleges that SPLC has placed the Hate Map on its public website, where the audience presumably includes individuals who are concerned about or interested in "hate groups" for non-economic reasons. Thus, the Hate Map does not constitute core commercial speech.

Coral Ridge argues that the Hate Map and "hate group" designations are commercial speech because (1) they are used to promote SPLC's 'goods and services'; and (2) because SPLC uses the Hate Map and related designations as a tool in fundraising appeals, and has raised millions of dollars as a result. Based on these allegations, the court will assume that SPLC's Hate Map has an economic element. But that does not resolve the issue.

In looking at speech advancing a mix of economic and other important societal interests, the Supreme

Court's approach has varied based on "the essential nature of the speech in question." *Gordon & Breach Sci. Publishers S.A.*, 859 F. Supp. at 1540. In *Bolger v. Youngs Drug Prod. Corp.*, the defendant contraceptive company mailed informational pamphlets about contraceptives and venereal disease directly to consumers; these pamphlets mentioned the defendant's products while discussing the broader issues. 463 U.S. 60 (1983). The defendant company conceded that the pamphlets were advertisements for its products, but argued that the pamphlets were nonetheless entitled to the highest level of protection under the First Amendment because they addressed the public debate about contraception. However, the Court held that the pamphlets were commercial speech, because "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." *Id.* at 68.

In contrast, in a series of cases, the Court has applied the highest level of First Amendment protection to charitable fundraising, because such solicitations are ordinarily intertwined with speech on matters of public concern. In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the Court invalidated a local ordinance prohibiting door-to-door solicitation of contributions by charitable organizations that do not use a certain percentage of their receipts for charitable, as opposed to administrative, purposes. The municipality argued that the law did not violate the First Amendment because such charitable

solicitation constitutes merely commercial speech. The Court rejected this argument, finding that solicitations "involve a variety of speech interests . . . that are within the protection of the First Amendment," and therefore have not been dealt with as "purely commercial speech." *Id.* at 632. Because the ordinance would potentially ban solicitation by "organizations that are primarily engaged in research, advocacy, or public education and that use their own paid staff to carry out these functions as well as to solicit financial support," *id.* at 636-637, the Court applied exacting scrutiny and struck down the ordinance as overbroad. *See id.* at 637 (noting that the statute must be "narrowly drawn" to serve village's interests and cannot "unnecessarily interfer[e] with First Amendment freedoms"). *See also Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (applying exacting First Amendment scrutiny in striking down a statute regulating fundraising by charitable organizations because it was not narrowly tailored to advance the municipality's interests); *id.* at 967, and n. 16 (referring to "the law as 'a direct restriction on the amount of money a charity can spend on fundraising activity," and "a direct restriction on protected First Amendment activity").

The Court again struck down a law regulating solicitation by charitable organizations in *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988). The law at issue defined reasonable fees for professional fundraisers, prohibited them from soliciting without a license, and required them to disclose the amount they turned over to charities in the previous

year. There, the Court again rejected the idea that charitable solicitations – even when conducted by a professional fundraiser – should be subjected to a reduced level of scrutiny as commercial speech. The Court reasoned that "solicitation is characteristically intertwined with informative and perhaps persuasive speech . . . , and . . . that without solicitation the flow of such information and advocacy would likely cease." *Id.* at 796 (quoting *Munson*, 467 U.S. at 959-960 (quoting *Schaumburg*, 444 U.S. at 632). The Court held that arguably commercial speech does not "retain[ ] its commercial character when it is inextricably intertwined with otherwise fully protected speech. . . . Where . . . the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression." *Id.*

The speech alleged in this case is clearly more akin to the speech deemed fully protected expression in the charitable fundraising cases than to the disguised commercial advertising by a pharmaceutical company at issue in *Bolger*. Although the alleged fundraising and fee generating aspects of SPLC's use of the "hate group" designations reflect economic interests, based on the allegations of the complaint, this economically motivated speech is "inextricably intertwined" with informative and persuasive speech on matters of public concern, and therefore is entitled to the highest level of protection under the First Amendment, not

the lower level of protection assigned to commercial speech.

In addition to its alleged use in fundraising, Coral Ridge alleges that SPLC uses the Hate Map to promote its trainings, for which Coral Ridge alleges government agencies pay a fee, and that SPLC has sold the Hate Map and associated "hate group" designations to AmazonSmile and Guidestar USA. This does not change the court's conclusion that SPLC's use of the Hate Map and "hate group" designation is not commercial speech. Assuming the truth of the allegations that SPLC generates fees from trainings and has sold the contents of the Hate Map to other organizations, SPLC's receipt of fees does not convert the Hate Map into commercial speech under the Lanham Act. "The fact that expressive materials are sold does not diminish the degree of protection to which they are entitled under the First Amendment." *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924-25 (6th Cir. 2003) (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n. 5 (1988)). In this sense, the SPLC Hate Map is no different than an article in a magazine or newspaper, or a product review in Consumer Reports. As noted earlier, "magazines and newspapers often have commercial purposes, but those purposes do not convert the individual articles within these editorial sources into commercial speech subject to Lanham Act liability." *Edward Lewis Tobinick, MD*, 848 F.3d at 952 (*citing Farah v. Esquire Magazine*, 736 F.3d 528, 541 (D.C. Cir. 2013); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001)). Furthermore, the fact that

SPLC has used the Hate Map to promote its Hate-Map-based trainings and informational services does not convert it into commercial speech. *See Hoffman*, 255 F.3d at 1186. The allegation that SPLC generates fees from trainings of government agencies based on the contents of the Hate Map and the fact that organizations may have paid for the content does not convert the Map into commercial speech.

ii. Speech for the purpose of influencing consumers to buy defendant's goods or services

The third requirement of "commercial advertising or promotion" is showing the defendant engaged in the challenged speech with "the purpose of influencing consumers to buy defendant's goods or services." *Edward Lewis Tobinick, MD*, 848 F.3d at 950. Coral Ridge has failed to plausibly plead this element of the test.

The allegations of the amended complaint do not support Coral Ridge's argument that SPLC designated it as a "hate group" with the purpose of influencing consumers to buy SPLC's produce. The amended complaint clearly alleges that SPLC's "very purpose for placing the Ministry on the Hate Map was to harm the reputation of the Ministry as to lower it in the estimation of the community and to deter third persons from associating or dealing with the Ministry. Specifically, SPLC was attempting to dissuade people and organizations from donating to the Ministry and to ultimately destroy the Ministry." Am. Compl. (doc. no. 40) at ¶ 95; see also *id.* at ¶¶ 79, 106 (alleging that "SPLC"

has publicly stated that its aim is to destroy those organizations it labels at "hate groups").

In the Lanham Act section of the complaint, Coral Ridge changes this allegation somewhat by stating that "SPLC's purpose in placing the Ministry's trademark . . . on its Hate Map and in SPLC's hate group-based goods and services is to influence the relevant consumers to buy SPLC's goods and services, *in advancement of SPLC's publicly stated goal of destroying the Ministry and the other organizations that SPLC has placed on its Hate Map.*" *Id.* at ¶ 139 (emphasis added). The allegation that SPLC placed Coral Ridge's trademark on the Hate Map "to influence the relevant consumers to buy SPLC's goods and services" does nothing more than state a legal conclusion and an element of the Lanham Act claim; the court will not credit this conclusory allegation without supporting facts. In addition, the allegation makes clear that SPLC's ultimate goal is destroying those it considers "hate groups," not commercial gain. In the next sentence of the amended complaint, Coral Ridge goes on to explain the basis for that statement:

> "SPLC uses the Hate Map and hate group based designations to promote its goods and services, include [sic] 'investigative reports,' training programs (used by U.S. law enforcement . . . and private organizations), 'key intelligence,' and 'expert' analysis. Through promotion of the Hate Map and hate group designations, the groups listed on the Map becomes an object of scorn and disdain for SPLC's audience, which includes individuals

> and organizations interested in charitable giving. Through the use of the Hate Map and hate group designations, SPLC focuses attention on these groups to convince its audience that these groups must be destroyed. SPLC then markets its Hate Map-infused produces to this audience for the purpose of further marginalizing and isolating the listed 'hate groups,' potentially leading to the destruction of the listed organizations, . . . which is SPLC's ultimate goal."

Id. at ¶ 140. With the initial allegation taken together with the explanatory paragraph that follows, the clear import is that SPLC's goal in designating Coral Ridge as a "hate group" is shutting it down – not selling goods and services to relevant consumers.

iii. Dissemination to the Relevant Purchasing Public

The final part of the test is that "the representations . . . must be disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry." *Edward Lewis Tobinick, MD*, 848 F.3d at 950. The allegations of the complaint are insufficient to establish this element of commercial advertising and promotion.

Applying this factor, "breadth of dissemination, although important, is not dispositive. Rather, the primary focus is the degree to which the representations in question explicitly target relevant consumers." *Gordon and Breach Sci. Publishers. S.A. v.* Am. Inst. of

Physics, 905 F. Supp. 169, 182 (S.D.N.Y. 1995).To apply this test to the allegations of the complaint, the court must first define the relevant purchasing public and industry. Coral Ridge attempts to define the "relevant purchasing public" as "those people and those organizations that engage in charitable giving to tax-exempt organizations." Am. Compl. (doc. no. 40) at ¶ 142; Pl.'s Resp. to SPLC's Mot. to Dismiss (doc. no. 51) at 44. As for the relevant industry, Coral Ridge takes issue with SPLC's argument that the relevant industry is Christian television ministries, arguing that it also engages in "publishing and other activities related to its mission," Pl.'s Resp. to SPLC's Mot. to Dismiss (doc. no. 51) at 44, but it does not specify its industry. Instead, it implies that the relevant industry is comprised of tax exempt organizations. *See id.* at 43-44.

If the relevant purchasing public and industry could be defined at such a high level of generality, the test would be meaningless. The world of non-profit organizations is almost, if not just, as varied as the world of for-profit organizations: it ranges from publishers of scientific journals, to health-care providers, to vocational-training providers, religious organizations, atheist organizations, and organizations that promote the arts. It would make no sense to consider the relevant purchasing public for all these organizations to be the same simply because they are all non-profits, just as it would make no sense to consider the relevant purchasing public the same for a subway-car manufacturer and a health-food store simply because they are both for-profit organizations. While there may be some

minor overlap in the purchasing public for each, that makes little difference to the determination of "the degree to which the representations in question explicitly target relevant consumers." *Gordon and Breach Sci. Publishers*, 905 F. Supp. at 182.

Based on the allegations of the complaint, the court considers Coral Ridge's industry to be Christian television and media. While Coral Ridge has alleged that SPLC has broadly disseminated the Hate Map through its website, fundraising efforts, and promotion of its training for government agencies, Coral Ridge has failed to allege any specific facts showing that SPLC has disseminated its Hate Map, and more specifically, its designation of D. James Kennedy Ministries as a "hate group," within the relevant purchasing public for Christian television and media.[25] Nor is there any allegation that the dissemination of the "hate group" designation "explicitly target[s] relevant consumers." *Gordon and Breach Sci. Publishers S.A.*, 905 F. Supp. at 182. Based on the allegations, it appears that some of Coral Ridge's target consumers may incidentally come across the Hate Map and "hate

[25] It bears noting that Coral Ridge has not alleged a decline in sales or donations that could suggest dissemination to the relevant purchasing public. *See Lexmark Int'l, Inc.*, 572 U.S. at 133 ("[A] plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that that occurs when deception of consumers *causes them to withhold trade* from the plaintiff.") (emphasis added). However, as § 1125(a) authorizes relief for solely anticipated injury, the lack of such an allegation is not fatal to its claim.

group" designation, but there is no indication that SPLC's methods of dissemination are targeted towards consumers of Christian television and media. As a result, Coral Ridge has failed to plead that SPLC used the Hate Map and "hate group" designation in commercial advertising and promotion.

Because it failed to allege that SPLC made a representation or description of "fact" and that it made such a statement in "commercial advertising and promotion," Coral Ridge has not plausibly pled that SPLC a viable claim for false advertising under the Lanham Act.

b. False-Association Claim

Coral Ridge also brings a claim for false association pursuant to 15 U.S.C. § 1125(a)(1)(A). In connection with this claim, Coral Ridge alleges that SPLC published its trademarked name, "D. James Kennedy Ministries," on the Hate Map, designating it as an Anti-LGBT hate group," and that SPLC published this "hate group" designation on its website, in fundraising materials, and in its reports, trainings, informational materials, intelligence, and analysis. Am. Compl. at ¶¶ 117, 121. Coral Ridge argues that SPLC's use of its trademark on the Hate Map falsely associates its trademark "with the Neo-Nazi's, skin heads, and the other actual terrorist organizations that are listed on the map." Pl.'s Resp. to SPLC's Mot. to Dismiss (doc. no. 51) at 50-51. For the reasons discussed below, this claim must be dismissed.

To prevail on a false-association claim under § 1125(a)(1)(A), a plaintiff must establish that the defendant, "in connection with goods and services . . . used in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person." 15 U.S.C. § 1125(a)(1)(A). The court assumes for the purposes of discussion that Coral Ridge has adequately pleaded that SPLC used Coral Ridge's trademark in commerce in connection with goods and services.

To survive the motion to dismiss, Coral Ridge must plausibly plead that the use of its trademark created a "likelihood of confusion" in consumers.[26] As noted above, Coral Ridge contends that, by designating its trademarked name as a "hate group" on the Hate Map, SPLC created a likelihood of confusion in the public as to Coral Ridge's "association" with the other

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[26] In the ordinary false-association case, in which in the plaintiff contends that the defendant used plaintiff's trademark to sell its own products, courts apply a multi-factor test to determine the likelihood of confusion, which weighs factors such as the similarity of the plaintiff's mark and the mark used by the defendant. *See Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1514 (11th Cir. 1984). Because there is no allegation here that SPLC used Coral Ridge's trademark in an effort to pass its goods and services off as those of Coral Ridge, this test is of little assistance.

groups listed on the Map. Thus, the court begins its analysis by determining the meaning of the phrase "likelihood of confusion as to the . . . association" in the statute.

As discussed at length above, SPLC used Coral Ridge's trademark to criticize its stance on homosexuality; by doing so, it engaged in speech on a matter of public concern – a core focus of the First Amendment's protections. The Lanham Act must be construed narrowly to avoid impinging on speech protected by the First Amendment. *Univ. of Alabama Bd. of Trustees v. New Life Art, Inc.*, 683 F.3d 1266, 1277 (11th Cir. 2012). As a result, courts applying the Lanham Act must carefully "weigh the public interest in free expression against the public interest in avoiding consumer confusion." *Id.* (*quoting Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Grp., Inc.*, 886 F.2d 490, 494 (2d Cir. 1989) (internal quotations omitted). Ordinary applications of trademark law – such as where a seller uses another's trademark to trick consumers into buying his own goods – do not risk the suppression of highly protected speech. However, when trademark law is used "to obstruct the conveyance of ideas, criticism, comparison, and social commentary," the risk of such suppression is great. *Radiance Found., Inc. v. N.A.A.C.P.*, 786 F.3d 316, 321-22 (4th Cir. 2015). Conflict with the First Amendment is avoided "so long as [interpretation of] the Act hews faithfully to the purposes for which it was enacted." *Id.* at 322 (citing *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002)).

The trademark protections in § 1125(a) "exist to protect consumers from confusion in the marketplace." *Radiance Found.*, 786 F.3d 316 at 321. "Trademark infringement laws limit the ability of others to use trademarks or their colorable imitations in commerce, so that consumers may rely on the marks to make purchasing decisions." *Id.* Congress "did not intend for trademark laws to impinge the First Amendment rights of critics and commentators." *Id.* at 321 (*quoting Lamparello v. Falwell*, 420 F.3d 309, 313 (4th Cir. 2005)). Furthermore, § 1125(a)(1)(A) "is not designed to protect mark holders from consumer confusion about their positions on political or social issues." *Radiance Found.*, 786 F.3d at 327. "Actual confusion as to a non-profit's mission, tenets, and beliefs is commonplace, but that does not transform the Lanham Act into an instrument for chilling or silencing the speech of those who disagree with or misunderstand a mark holder's positions or views." *Id.* at 327-28 (*citing Rogers v. Grimaldi*, 875 F.2d 994, 1001 (2d Cir. 1989)).

Mindful of these principles and purposes, the court finds that § 1525(a)(1)(A)'s requirement of likelihood of confusion as to the "association of a person with another" means confusion as to whether the seller or the trademark holder is associated with another person or organization by virtue of a legal or other relationship – not whether the trademark holder belongs in the same category as, or might be associated in some other vague sense with, another person or organization. This reading is consistent with the intent of Congress: It would cover the use of a trademark that falsely

insinuates that a seller has a relationship with the trademark holder in order to sell products. Furthermore, if "association" were defined to mean any type of mental association between the trademark holder and another person or organization, its potential applications could be limitless and far afield of the purpose of the Act. For example, if "association" were so broadly defined, a health food producer could sue for false association because a supermarket advertised the health food company's products next to those of a company that produces junk food on the theory that consumers might falsely "associate" the junk food with the health food company's trademark. Furthermore, such a broad interpretation of "association" could be applied to a wide range of protected speech, and would allow companies to shield themselves from valid criticism, while doing nothing to advance the purposes of the Lanham Act. *See CPC Int'l, Inc. v. Skippy Inc.*, 214 F.3d 456, 462 (4th Cir. 2000) (quoting *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 307 (9th Cir. 1992)) ("'Much useful social and commercial discourse would be all but impossible if speakers were under threat of an infringement lawsuit every time they made reference to a person, company or product by using its trademark.'").

Applying the proper definition of "association," the court holds that Coral Ridge has not alleged a likelihood of confusion as to its "association" with the Ku Klux Klan and other criminal and violent hate groups. Nothing in the complaint suggests that the public is likely to be confused into believing, based on SPLC's

use of Coral Ridge's trademark on the Hate Map and in its "hate group" designation, that Coral Ridge has an actual relationship any other group on the Map, let alone the criminal and violent ones.[27]

In sum, Coral Ridge has failed to allege the "likelihood of confusion" requirement for its false-association claim. The claim must be dismissed.

C. Title II Discrimination Claim Against the Amazon Defendants

Coral Ridge claims that, by denying it access to the AmazonSmile charitable-giving program, Amazon and AmazonSmile violated the ban on religious discrimination in places of public accommodation that is codified in Title II of the Civil Rights Act of 1964. Title II provides: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a).

Applying the alleged facts to Title II, Coral Ridge asserts that its theory of liability is as follows: the Amazon defendants are places of public accommodation subject to Title II. *See* Am. Compl. (doc. no. 40) at ¶ 150. One of the "service[s]," "privilege[s]," and

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[27] For example, there are no allegations that SPLC represents that the groups on the Map work with each other.

"advantage[s]" that the Amazon defendants provide as places of public accommodation is the ability to receive charitable donations through the AmazonSmile program. *Id.* at ¶¶ 14, 160. The Amazon defendants excluded Coral Ridge from accessing that service, privilege, and advantage – that is, from receiving donations through the AmazonSmile program – because SPLC classified Coral Ridge as a "hate group." *Id.* at ¶¶ 23-24. The "hate group" designation by SPLC is based on Coral Ridge "oppos[ing] homosexual conduct." *Id.* at ¶¶ 61, 154. Coral Ridge's opposition to homosexual conduct, in turn, is based on its religious beliefs. *Id.* at ¶ 155.

In sum, Coral Ridge's theory is that, by excluding it from receiving charitable donations due to its "hate group" designation – which SPLC based on Coral Ridge's religious opposition to homosexual conduct – the Amazon defendants discriminated against Coral Ridge based on its religion, in violation of Title II.

To prevail, Coral Ridge must overcome three successive hurdles. First, it must plausibly allege that the Amazon defendants operate as a "place of public accommodation" within the meaning of Title II. 42 U.S.C. § 2000a(a). Second, it must plausibly allege that its exclusion from receiving donations through the AmazonSmile program constituted the denial of "services," "privileges," or "advantages," etc., of the Amazon defendants as places of public accommodation. *Id.* Third, it must plausibly allege that the denial of such services, privileges, advantages, etc. amounted to "discrimination . . . on the ground of . . . religion." *Id.*

As explained below, Coral Ridge's claim fails. Even if it were assumed that the Amazon defendants are places of public accommodation subject to Title II, seeking to receive donations through the AmazonSmile program does not qualify as a service, privilege, or advantage, etc. protected by the statute's anti-discrimination prohibition. This is because the Amazon defendants limit the ability to receive such donations exclusively to 26 U.S.C. § 501(c)(3) organizations and therefore do not make that ability open to the public. Moreover, an alternative ground for dismissing the claim is that Coral Ridge has not plausibly alleged that the Amazon defendants discriminated against it *based on religion*.

1. Public Accommodation

The parties dispute whether the Amazon defendants are "place[s] of public accommodation" under Title II and are thus subject to the statute's requirements. 42 U.S.C. § 2000a(a)-(b). Although Title II does not define a "place of public accommodation," it lists certain establishments that qualify as such. Specifically, § 2000a(b) provides that "[e]ach of the following establishments which serves the public is a place of public accommodation . . . if its operations affect commerce . . . ":

> "(1) [A]ny inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is

> actually occupied by the proprietor of such establishment as his residence;
>
> "(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> "(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
>
> "(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment."

The scope of what constitutes a place of public accommodation "is to be liberally construed and broadly read" with "open minds attuned to the clear and strong purpose of" Title II. *Miller v. Amusement Enters., Inc.*, 394 F.2d 342, 349 (5th Cir. 1968).[28] The "overriding purpose" of Title II is to eliminate "the daily affront and humiliation involved in discriminatory denials of

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[28] In *Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit Court of Appeals handed down prior to the close of business on September 30, 1981.

access to facilities ostensibly open to the general public." *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969).

The Amazon defendants contend that their websites are not places of public accommodation within the meaning of Title II because the statute applies to only physical facilities. By contrast, Coral Ridge alleges that the Amazon defendants are places of public accommodation because they fall under the category of places of "exhibition or entertainment." 42 U.S.C. § 2000a(b)(3). Coral Ridge further points out that the Amazon defendants are "encroaching on entire industries in which brick and mortar businesses have thrived, including businesses traditionally covered by the provisions of Title II." Am. Compl. (doc. no. 40) at ¶ 18. Because Amazon has replaced traditional brick and mortar establishments covered by Title II with a primarily virtual, rather than physical, marketplace, and because Amazon's services are not entirely virtual, but include physical stores and operations, Coral Ridge argues that the Amazon defendants should also be covered by Title II.[29]

Whether internet-based businesses – or the Amazon defendants in particular – are precluded from being places of public accommodation under Title II is an issue of first impression. It is a difficult one, at that. On

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[29] Coral Ridge alternatively argues that, even if AmazonSmile is not considered a place of public accommodation, the AmazonSmile program is still covered as a "service," "privilege," and "advantage" of Amazon, which is a place of public accommodation. *See* Pl.'s Resp. to Amazon Defs.' Mot. to Dismiss (doc. no. 52) at 5-6.

the one hand, the statute's use of the term "place" and references to "facilit[ies]," physical structures, and "physically located" establishments suggest that "places of public accommodation" might be limited to "actual, physical places and structures." *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 540-43 (E.D. Va. 2003) (Ellis, J.) (concluding that "AOL's chat rooms and other online services do not constitute a 'place of public accommodation' under Title II" because they do not "consist of, or have a clear connection to, actual physical facilities or structures"). On the other hand, the need to construe Title II broadly, in light of its purpose, *see Daniel*, 395 U.S. at 307, suggests that denying access to even an entirely virtual marketplace based on a protected characteristic might result in the "the daily affront and humiliation" that the drafters of Title II sought to prevent, *id.* at 307-308.

Ultimately, the court need not resolve whether the Amazon defendants are places of public accommodation within the meaning of Title II. Even if it were assumed that, as Coral Ridge alleges, they are covered by the statute as places of "exhibition or entertainment," the Title II claim would still fail for two independently sufficient reasons discussed below.

2. Denial of Services, Privileges, or Advantages

Assuming, without deciding, that the Amazon defendants are places of public accommodation, the court turns next to the question whether Coral Ridge plausibly alleges that it has been denied "the full and equal

enjoyment of the goods, services, facilities, privileges, advantages, [or] accommodations" of the Amazon defendants as places of public accommodation. § 2000a(a). Coral Ridge argues that the Amazon defendants have denied it the "service," "privilege," or "advantage" of receiving money donations through the AmazonSmile program.[30] So, the issue to resolve here is whether Title II's protection of the "enjoyment of . . . services," "privileges," and "advantages" of a place of public accommodation encompasses the ability to receive such donations. In other words, is Coral Ridge within the class of plaintiffs that Title II is designed to protect?

The court begins its analysis with two premises. First, Title II is "not limited to proscribing discrimination only as to the enjoyment" of the goods, services, privileges, etc. that "make the establishment a place of public accommodation." *United States v. DeRosier*, 473 F.2d 749, 752 (5th Cir. 1973). In *DeRosier*, the court held that Title II not only protected access to the juke box, shuffle board, and pool table that converted the bar into a "place of entertainment"; rather, it protected the enjoyment of all the bar's goods, services, etc. *See id.* at 751-52. Applying this principle here, the court concludes that Title II's ban on discrimination extends beyond the enjoyment of the video, audio, and book selling, downloading, and streaming activities that Coral Ridge asserts – and this court assumes, *arguendo* – makes the Amazon defendants public

[30] Coral Ridge does not allege that it was prevented from *making* donations to organizations that are eligible to participate in the AmazonSmile program.

accommodations as "place[s] of exhibition or entertainment." § 2000a(b)(3).

The second premise is that "it is the traditional understanding of public-accommodation laws that they provide rights for *customers*," rather than, say, the providers of goods or services. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 692 (2001) (Scalia, J., dissenting) (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 571 (1995) and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)). As the Supreme Court pointed out in *Hurley*, the history of public-accommodation laws can be traced to the "common law, [under which] innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a *customer*." 515 U.S. at 571. (emphasis added). Moreover, in *Heart of Atlanta*, a 1964 decision upholding the constitutionality of Title II, the Supreme Court found that the "[b]asis of Congressional [a]ction" to pass Title II was the evidence before Congress of discrimination against potential black *customers* of hotels. *See* 379 U.S. at 252. This Congressional testimony included that "Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances [to] secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight; and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself dramatic testimony to the difficulties Negroes encounter

in travel." *Id.* at 252-53 (internal citations and quotation marks omitted). Since Title II's enactment and upholding by the Supreme Court in 1964, the heartland, run-of-the-mill Title II cases involve establishments that refuse to provide their goods, services, etc., to potential *customers. See, e.g.*, *Stout v. YMCA of Bessemer, Ala.*, 404 F.2d 687, 688-89 (5th Cir. 1968) (holding that the YMCA violated Title II by refusing to rent rooms to two black plaintiffs).

Combining these two premises, the court concludes that it is clear that, while a viable Title II plaintiff need not be denied the good, service, or privilege, etc. that makes the defendant establishment a place of public accommodation, *see DeRosier*, 473 F.2d at 752, in the typical Title II case, consistent with the traditional understanding of public-accommodations laws, he is denied enjoyment of some good, service, or privilege, etc. in his capacity as a *customer.* Consequently, Coral Ridge's claim does not fail just because the activity at issue – receiving donations – is different from the activities that Coral Ridge alleges makes the Amazon defendants places of public accommodation (book, music, and video sales, streaming, etc.). Nevertheless, what remains unclear is whether Title II's protections extend to a plaintiff, such as Coral Ridge, who is seeking to receive donations from a place of public accommodation, and thus not acting as a potential "customer" in any ordinary sense of the word.

i. Caselaw

It is an open question whether Title II covers the "enjoyment of" goods, services, privileges, etc. by a plaintiff other than a potential customer of a public accommodation. Some lower courts have held that federal public-accommodation laws protect exhibitors at a safari convention, *see Impala African Safaris, LLC v. Dall. Safari Club, Inc.*, 2014 WL 4555659, at *6 (N.D. Tex. Sept. 9, 2014) (Fish, J.) (Title II), or physicians seeking medical-staff privileges at a hospital, *see Hetz v. Aurora Med. Ctr. of Manitowoc Cnty.*, 2007 WL 1753428, at *11-12 (E.D. Wis. June 18, 2007) (Callahan, Jr., M.J.) (Title III of the Americans with Disabilities Act of 1990); *see also Menkowitz v. Pottstown Memorial Med. Ctr.*, 154 F.3d 113, 122 (3d Cir. 1998) (Title III). Conversely, other courts have held that a public-accommodation law protects only customers or patrons of a public accommodation, not camp counselors, *see Bauer v. Muscular Dystrophy Ass'n, Inc.*, 268 F. Supp. 2d 1281, 1291-92 (D. Kan. 2003) (Brown, J.) (Title III), and that Title II does not protect taxicab services seeking to "'provide' services at, not merely enjoy the benefits of access to," a mall transit station, *Gold Star Taxi and Transp. Serv. v. Mall of Am. Co.*, 987 F. Supp. 741, 752-53 (D. Minn. 1997) (Magnuson, J.). None of these decisions is directly on point, or for that matter, binding.

Of all the existing caselaw on the issue, the Supreme Court decision, *PGA Tour, Inc. v. Martin*, is the most instructive as to whether Title II extends beyond customers. 532 U.S. at 679-81. Critically, as elaborated

below, *Martin* teaches that, regardless of whether Coral Ridge constitutes a customer in any ordinary sense of the word, it is not protected by Title II, because the ability to receive donations through the AmazonSmile program is not a service, privilege, etc. that is *open to the public.*

In *Martin*, the Court confronted – without deciding – the question whether the Americans with Disabilities Act's analogous prohibition on discrimination in public accommodations (Title III of the act) applies to only "clients or customers" of public accommodations. *Id.* at 679. Although Title III of the Americans with Disabilities Act and Title II of the Civil Rights Act of 1964 have their differences, the texts of the two statutes are quite similar. Mirroring the language of Title II, Title III provides: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. . . ." 42 U.S.C. § 12182(a). Title III enumerates a similar, yet more extensive, list of entities that qualify as "public accommodations," § 12181(7), and that, like Title II, should be "construed liberally," *Martin*, 532 U.S. at 676. As described below, the *Martin* Court's holding interpreting Title III explicitly relied on its own precedent interpreting Title II, which further shows why courts' – especially the highest court's – interpretations of each statute are mutually relevant and instructive.

The plaintiff in *Martin* was Casey Martin, a professional golfer with a disability that limited his ability

to walk. He alleged that the PGA Tour violated Title III of the Americans with Disabilities Act by prohibiting him from using a golf cart while participating in its golf tournaments. The PGA Tour conceded that its golf tournaments were conducted at places of public accommodation. *See id.* at 677. Nonetheless, it argued that Title III did not protect Martin because he was a competing golfer, rather than a spectator consuming the entertainment. *See id.* at 678. More specifically, the PGA Tour contended that Title III "is concerned with discrimination against clients and customers seeking to obtain goods and services at places of public accommodation," not a professional golfer such as Martin, who "is a provider rather than a consumer of the entertainment that [the PGA Tour] sells to the public." *Id.* (internal quotation marks omitted).

The *Martin* Court did not decide whether Title III was limited to "clients and customers" of public accommodations, because it determined that Martin qualified as a client or customer of the PGA Tour. *Id.* at 679-80. The Court explained that the golf tournaments offered "at least two 'privileges' to the public – that of watching the golf competition and that of competing in it." *Id.* at 680. In other words, during its tournaments, the PGA Tour "may not discriminate against either spectators or competitors on the basis of disability." *Id.* at 681.

The Court offered four interrelated reasons why Martin was a client or customer and thus protected by Title III. First, it highlighted that Martin paid a $ 3,000 entry fee for a chance to compete in the

tournament. *See id.* at 679. Second and most importantly, the Court stressed that competing in the PGA Tour tournaments was a privilege "available to members of the general public." *Id.* at 680. As the Court explained, Martin had sought to gain entry into the PGA Tour tournament by successfully competing in a three-stage tournament known as the "Q-School." *Id.* at 669. "Any member of the public may enter the Q-School by paying a $ 3,000 entry fee and submitting two letters of reference. . . ." *Id.* at 665. Through three stages of the Q-School, the thousands of contestants are whittled down to the PGA-Tour participants. Third, the Court emphasized that its "conclusion is consistent with case law in the analogous context of Title II of the Civil Rights Act of 1964." *Id.* at 681. For example, in *Daniel v. Paul*, the Court had held that the "definition of a 'place of exhibition or entertainment,' as a public accommodation, covered participants 'in some sport or activity' as well as 'spectators or listeners.'" *Id.* (quoting 395 U.S. at 306). Fourth and finally, the court cited Title III's "expansive purpose." *Id.* at 680.[31]

Martin's reasoning shows that Title II does not cover Coral Ridge's attempt to receive donations through the AmazonSmile program. Crucially, unlike in *Martin*, the ability to receive donations through the AmazonSmile program is not "a privilege that [the

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[31] The *Martin* Court limited its holding by clarifying that a "customer" does not encompass "everyone who seeks a job at a public accommodation, through an open tryout or otherwise." 532 U.S. at 680 n.33 (internal quotation marks omitted).

Amazon defendants] make[ ] available to members of the general public." *Id.* To register to receive donations through the AmazonSmile program, the entity must, among other eligibility requirements, be a § 501(c)(3) organization that is located in the United States and in good standing in the IRS. *See* Am. Compl. (doc. no. 40) at ¶ 44. Sure, *Martin* embraced a broad conception of being open to members of the general public by recognizing the PGA Tour as such. *See Martin*, 532 U.S. at 696 (Scalia, J., dissenting) (criticizing that competing in the Q-School qualifying tournament is "no more a 'privilege' offered for the general public's 'enjoyment' than is the California Bar Exam" or an "open casting for a movie or stage production"). Still, the fact that the AmazonSmile program is limited to certain § 501(c)(3) organizations – and *thus completely excludes all natural persons* – removes the program from even *Martin*'s broad conception of being "available to members of the general public." *Id.* at 680; *see also Gold Star Taxi*, 987 F. Supp. at 752-53 (holding that Title II did not cover taxicab services' access to mall transit station because municipal regulations restricted the right to provide such services in the city, and only a limited number of qualifying persons and companies were legally able to provide services to the mall). The bottom line is that any good, service, or privilege, etc. that is available to only a specific type of legal entity – and not directly to human beings – is not open to the public for Title II purposes.

Additionally, this case is distinguishable from the *Daniel* decision on which *Martin* relied. Receiving

money donations through the AmazonSmile program is nothing like participating in a sport or other activity while visiting an *open-to-the-public* "232-acre amusement park with swimming, boating, sun bathing, picnicking, miniature golf, dancing facilities, and a snack bar." *Daniel*, 395 U.S. at 301.[32] And because, as noted above, the program is limited to § 501(c)(3) organizations and thus not open to the public, protecting Coral Ridge here would not further the "overriding purpose of Title II" recognized in *Daniel*: to remove "the daily affront and humiliation involved in discriminatory denials of access to facilities *ostensibly open to the general public.*" *Id.* at 307-08 (emphasis added).

To summarize, the *Martin* Court refused to foreclose the possibility of a federal public-accommodations law protecting noncustomers, and embraced a capacious conception of a protected "customer" that extends beyond the everyday meaning of the word, such that it encompasses competitors in a professional golf tournament. *See Martin*, 532 U.S. at 695 (Scalia, J., dissenting) ("[N]o one in his right mind would think that [professional baseball players] are *customers* of the American League or of Yankee Stadium."). The *Martin* Court also embraced a liberal understanding of what qualifies as available to the general public. *See id.* at 697. Nevertheless, as expansive as the Court's reading

[32] This case also differs from *Martin* because there is no allegation that Coral Ridge would need to pay any fee to participate in the AmazonSmile program. However, this distinction is not dispositive to the court's ruling here, because making a payment is not a requirement for being protected by public accommodation laws.

of Title III of the Americans with Disabilities Act was, *Martin* still supports concluding that Coral Ridge is not covered here by the similarly worded Title II of the Civil Rights Act of 1964, because the ability to receive donations through the AmazonSmile program is simply not "available to members of the general public." *Id.* at 680.

ii. Text and Structure of Title II

The text and structure of Title II reinforce the above-stated conclusion: The statute does not protect the ability to receive donations through the AmazonSmile program, given that this ability is not open to the public. Specifically, the statute provides that an establishment qualifies as a place of public accommodation governed by Title II only if it "serves the public." 42 U.S.C. § 2000a(b); *see also Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1269 (7th Cir. 1993). Subsection (e) further provides that Title II's ban on discrimination does not apply "to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment *are made available to the customers or patrons of an establishment*" that qualifies as a place of public accommodation under subsection (b). § 2000a(e) (emphasis added). Combining these two subsections, the court concludes that Title II applies to an entity only if it "serves the public" or is made available to the "customers or patrons" of a public accommodation (which, by definition, "serves the public"). True, these two provisions relate to the types of entities covered by the statute, not what

qualifies as a good, service, or privilege, etc. Nevertheless, because the provisions limit the statute's coverage to entities that serve the public or are available to entities that serve the public, and because, by definition, entities that serve the public provide goods, services, etc. that are open to the public, the provisions suggest that Congress designed Title II to address the evil of discrimination with respect to goods, services, etc. that are open to the public. Moreover, the fact that opening an entity up to "customers or patrons" triggers the application of Title II to an otherwise exempt establishment strongly suggests that at least a primary concern of Congress was discrimination against "customers and patrons." Given that Coral Ridge seeks to receive donations through a program that is not open to the public, and that Coral Ridge is not acting as a customer or patron in seeking the donations, it is not the type of plaintiff envisioned by Title II.

iii. Avoiding First Amendment Problems

Finally, even if one could conceivably read Title II to protect Coral Ridge here – which this court strongly doubts – the canon of constitutional avoidance would preclude such a reading. This longstanding principle of statutory interpretation holds: "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, [courts] are obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (internal citations and quotation marks

omitted); *see also Clark v. Martinez*, 543 U.S. 371, 381 (2005) (explaining that the canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts").

Here, interpreting Title II to require the Amazon defendants to include Coral Ridge in the AmazonSmile program would raise serious First Amendment problems. Such an interpretation would essentially compel the Amazon defendants to donate money to Coral Ridge, and thus subsidize its "mission . . . to proclaim the Gospel upon which this Nation was founded." Am. Compl. (doc. no. 40) at ¶ 38. This outcome would seriously risk violating the "bedrock" First Amendment "principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014); *see also NAACP v. Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) ("[T]he government may not compel persons to support candidates, parties, ideologies or causes that they are against.") (internal quotation marks omitted). As the AmazonSmile eligibility requirements make clear, the Amazon defendants do not want to donate money to organizations that SPLC classifies as "hate groups." *See* Am. Compl. (doc. no. 40) at ¶¶ 23, 44. SPLC classified Coral Ridge as a "hate group." Therefore, Coral Ridge is a "third party that" the Amazon defendants do "not wish to support."

Harris, 573 U.S. at 656. Yet, if this Court adopted Coral Ridge's reading of Title II, the Amazon defendants would be forced to donate money to Coral Ridge, despite their wish not to, and thus be compelled to subsidize Coral Ridge's mission to broadcast its religious views, including its opposition to homosexual conduct that resulted in SPLC's labeling it a "hate group."

Coral Ridge argues that applying Title II here would not violate the Amazon defendants' First Amendment rights, because it is the customers, rather than the defendants, who make the donations through the AmazonSmile program. This argument is belied by Coral Ridge's amended complaint, which quotes the program's website as stating that "*AmazonSmile Foundation will donate* 0.5% of the price of eligible purchases to the charitable organizations selected by customers." Am Compl. (doc. no. 40) at ¶ 43. Sure, the Amazon customers initiate the purchase and choose the organization to which they donate. But, importantly, the customers can donate to only the restricted universe of entities that meet the AmazonSmile program's eligibility requirements. In other words, the Amazon defendants choose which groups can receive donations, and the Amazon defendants donate 0.5% of their revenue from each purchase. It is therefore the Amazon defendants who would be compelled to donate to a group that they did not want to – namely, Coral Ridge.

By way of comparison, assume that a closely held fast-food restaurant chain, whose owners are Christian and object to homosexuality based on their

religious beliefs, initiates a "charity match" program. Under the program, consumers who purchase a certain number of sandwiches may donate up to $ 5.00 to the charity of their choice, subject to certain restrictions, and the corporation will match the donation. According to Coral Ridge's interpretation of Title II, the fast-food chain could be compelled – over their objection – to match donations to, for example, a church whose central mission is promoting the Christian acceptance of homosexuality; the Church of Satan; or any number of religious organizations whose purpose and activities run directly contrary to the business's deeply held convictions. Even though the consumer initiated the transaction that would ultimately lead to the business donating money, it is still the business's money being donated, and the business retains its say as to where it goes.[33]

So, even if Coral Ridge's reading of the statute to cover its claim were plausible, such an interpretation

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[33] In addition to likely forcing establishments to subsidize speech with which they disagree, extending Title II to charitable monetary giving more broadly runs the danger of restricting speech by diluting donations to organizations to whom establishments *want* to give. For instance, assume a business decided to donate a portion of its proceeds to a particular religious or nationality-based organization – perhaps a Korean restaurant donating to a church that the owners attend, or to a Korean neighborhood association. Applying Title II as Coral Ridge suggests might allow other groups to come and demand a share of the donations, which would in turn reduce the owners' contributions to the group of their choice – potentially ad infinitum. This possibility further supports the conclusion that Coral Ridge's construction of Title II would likely be unconstitutional.

would raise serious constitutional problems under the First Amendment. Because "an alternative interpretation of the statute is fairly possible" – indeed, in the court's view, is the correct interpretation of Title II – this court is "obligated to construe the statute to avoid such problems." *St. Cyr*, 533 U.S. at 300.

In conclusion, the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation" does not encompass the ability to receive donations through the AmazonSmile program. This conclusion stems from the reasoning of *Martin* and text and structure of Title II – given that receiving donations through the program is not open to the public – as well as the traditional understanding of public-accommodations laws, and the canon of constitutional avoidance.[34] Accordingly, the Title II claim is due to be dismissed with prejudice.

3. Discrimination Based on Religion

Even if Title II's ban on discrimination applied to Coral Ridge's ability to receive donations through the AmazonSmile program, it has not plausibly alleged that the Amazon defendants discriminated against it based on religion.

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[34] The court expresses no opinion as to whether Title II would cover the ability to receive donations if the AmazonSmile program had no – or significantly less restrictive – eligibility requirements for donation recipients.

i. Disparate Impact

Coral Ridge asserts a disparate-impact theory of discrimination. *See* Pl.'s Resp. to Amazon Defs.' Mot. to Dismiss (doc. no. 52) at 8-9. "In contrast to a disparate-treatment case, where a plaintiff must establish that the defendant had a discriminatory intent or motive, a plaintiff bringing a disparate-impact claim challenges practices that have a disproportionately adverse effect on [a protected group] and are otherwise unjustified by a legitimate rationale." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015) (internal quotation marks omitted). The Amazon defendants, on the other hand, argue that Title II requires intentional discrimination and does not embrace disparate-impact claims.

Neither the Supreme Court nor Eleventh Circuit has determined whether Title II recognizes disparate-impact claims. Several lower courts have concluded that it does. *See, e.g.*, *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1340-41 (2d Cir. 1974); *Robinson v. Power Pizza, Inc.*, 993 F. Supp. 1462, 1464-66 (M.D. Fla. 1998) (Schlesinger, J.). Others have held that it does not. *See, e.g.*, *Akiyama v. U.S. Judo Inc.*, 181 F. Supp. 2d 1179, 1187 (W.D. Wash. 2002) (Lasnik, J.); *LaRoche v. Denny's, Inc.*, 62 F. Supp. 2d 1366, 1370 n.2 (S.D. Fla. 1999) (Seitz, J.).

This court need not resolve the open question, for Coral Ridge has not plausibly plead a prima-facie case of disparate-impact discrimination.

To make out a prima-facie case under a disparate-impact theory, a plaintiff must show that the defendant's challenged policy or practice has a "significantly disparate impact" on members of a protected group. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657-58 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(k); *Stephen v. PGA Sheraton Resort, Ltd.*, 873 F.2d 276, 279 (11th Cir. 1989) (requiring showing a "significant discriminatory effect"). As the Supreme Court has clarified, the prima-facie case of disparate-impact liability is "essentially[ ] a threshold showing of a significant statistical disparity." *Ricci v. DeStefano*, 557 U.S. 557, 587 (2009); *see also Powers v. Ala. Dep't of Educ.*, 854 F.2d 1285, 1293 (11th Cir. 1988) (explaining that a prima-facie case requires plaintiffs to show a "statistically significant disparity" between promotions of black people and similarly situated white people). The Supreme Court has instructed courts to "examine with care whether a plaintiff has made out a prima facie case of disparate impact" and cautioned that "prompt resolution of these cases is important." *Inclusive Cmtys.*, 135 S. Ct. at 2523.

Still, at this motion-to-dismiss stage, Coral Ridge must plausibly allege – not prove – only a prima-facie case of disparate impact. A plaintiff "should be afforded the opportunity of discovery before he is required to present detailed statistics to the court." *Forsyth v. Univ. of Ala. Bd. of Trs.*, 2018 WL 4517592, at *6 (N.D. Ala. Sept. 20, 2018) (Proctor, J.). Accordingly, all Coral Ridge must do is allege "*some* statistical disparity,

however elementary." *Brady v. Livingood*, 360 F. Supp. 2d 94, 100 (D.D.C. 2004) (Leon, J.).

Coral Ridge does not meet its burden because it does not allege even an elementary statistical disparity; indeed, its amended complaint makes no factual allegations whatsoever of any "disproportionately adverse effect" on religious or Christian groups. *Inclusive Cmtys.*, 135 S. Ct. at 2513.[35] The Amazon defendants' challenged policy or practice is their eligibility requirement for the AmazonSmile program that excludes any organization that SPLC classifies as a "hate group." *See* Am. Compl. (doc. no. 40) at ¶¶ 23-24, 44. Coral Ridge, a "Christian ministry," *id.* at ¶ 63, has not alleged any facts indicating that this eligibility requirement results in the disproportionate exclusion of Christian or religious organizations, as compared to non-Christian or non-religious organizations seeking to participate in the program.[36] That is, Coral Ridge

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[35] Of course, the court does not credit Coral Ridge's conclusory allegations of disparate impact that are unsupported by any well-pleaded underlying factual allegations.

[36] Disparate-impact claims require evaluating the impact of a policy or practice on members of a protected class as compared to persons outside the protected class. The court reads the relevant protected class alleged here to be a Christian or religious organization, *not* a Christian organization whose religious views oppose homosexual conduct. If a plaintiff could narrowly define its class based on its particular religious belief, rather than the broader religious faith or group to which it belongs, then disparate-impact claims would have a nearly limitless reach. This is because any policy impacting a plaintiff's specific religious belief would generally impact 100% of the members of a class defined by that belief, which would virtually always amount to a disproportionate impact as compared to those falling outside the class. *Cf.*

Akiyama, 181 F. Supp. 2d. at 1186. For example, a Jewish man impacted by a policy affecting a belief rooted in his idiosyncratic, personalized interpretation of Judaism could claim disparate impact even though no other Jewish people hold that belief.

Such a broad interpretation of religion-based disparate-impact claims would conflict with the Supreme Court's admonition that policies "are not contrary to the disparate-impact requirement unless they are artificial, arbitrary, and unnecessary barriers." *Inclusive Cmtys.*, 135 S. Ct. at 2512 (internal quotation marks omitted). Furthermore, such an interpretation would be contrary to the text of Title II, which prohibits discrimination "on the ground of race, color, religion, or national origin." § 2000a(a). First, the statute refers to "religion," not religious beliefs. *Id.*; *compare with* 42 U.S.C. §§ 2000bb-1(a)-(b) & 2000cc-5(7) (establishing the Religious Freedom Restoration Act of 1993's much broader protection for religious freedom, which mandates, in much more expansive language, that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government makes certain showings; and defining "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief"). Second, all the other protected grounds – race, color, and national origin – refer to broad categories of people. Reading "religion" in light of those surrounding categories, it makes little sense to allow a plaintiff to narrowly define his protected class for disparate-impact purposes based on one specific belief related to their religious faith. *See United States v. Williams*, 553 U.S. 285, 294 (2008) (explaining the "commonsense canon of *noscitur a sociis* – which counsels that a word is given more precise content by the neighboring words with which it is associated").

Granted, a plaintiff might be able to define his class as members of a particular branch, strand, denomination, sect, etc. of a religion, such as Sufi Muslims, Orthodox Jews, or Lutheran Christians. However, even if the court construed Coral Ridge's complaint to identify its protected class as *evangelical* Christian organizations, it still does not make the factual allegations that evangelical Christian organizations are disproportionately deemed – or likely to be deemed – "hate groups" and thus excluded from

does not allege any facts that would lead to a reasonable inference that Christian or religious organizations are more likely than other § 501(c)(3) organizations falling outside those categories to be designated by SPLC as "hate groups" and thus excluded. For example, its amended complaint makes no factual allegations reasonably suggesting that Christian organizations are more likely than other organizations to – or have in fact been more frequently deemed to – qualify under SPLC's definition of a "hate group." Nor does Coral Ridge allege any facts indicating that Christian or religious organizations are more likely than other similarly situated groups to "oppose homosexual conduct." *Cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("Many who deem same-sex marriage to be wrong" do so based on "religious *or philosophical* premises") (emphasis added).

Despite these pleading defects, Coral Ridge maintains that there is a disparate impact because it was excluded from the AmazonSmile program based on its religious beliefs, whereas § 501(c)(3) organizations "that fall outside of SPLC's 'hate group' category" are eligible to participate. Pl.'s Resp. to Amazon Defs.' Mot. to Dismiss (doc. no. 52) at 8-9. This argument misses the mark. Alleging disparate impact by comparing its eligibility to that of organizations "that fall outside of

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the AmazonSmile program. *See* Am. Compl. (doc. no. 40) at ¶ 31 (describing Coral Ridge's founder as an "evangelist"). The bottom line is that, even is assumed that Title II recognizes disparate-impact claims, the protected class in such a claim should be defined along the lines of a religion or religious *group*, not a particular belief within that group.

SPLC's 'hate group' category" would make sense only if Coral Ridge were alleging discrimination based on its trait of being deemed a 'hate group' by SPLC. *Id.* Of course, being deemed a 'hate group' by SPLC is not one of the traits protected by Title II.

In sum, Coral Ridge's allegation that its religious beliefs caused it to be deemed a hate group and thus excluded from AmazonSmile, without any allegations indicating that Christian or religious organizations are disproportionately deemed – or likely to be deemed – hate groups and thus excluded, is not enough to allege plausibly a prima-face case of disparate impact.

ii. Intentional Discrimination

Coral Ridge further argues that, even if Title II requires *intentional* discrimination, it plausibly alleges such intent. Specifically, it contends that the following factual allegations support a reasonable inference of intentional discrimination based on religion. First, "Amazon specifically chose SPLC's on-its-face religiously discriminatory hate group criteria as its eligibility standard." Pl.'s Resp. to Amazon Defs.' Mot. to Dismiss (doc. no. 52) at 10 (citing Am. Compl. (doc. no. 40) at ¶¶ 44, 53-54). The court rejects this allegation, given that it is contradicted by Coral Ridge's more specific allegation that SPLC defines a "hate group" as one that has "beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics." Am. Compl. (doc. no. 40) at ¶ 64. This

definition, which does not reference religion, is not "on-its-face religiously discriminatory."

Second, Coral Ridge argues that an inference of intentional discrimination is supported by its allegation that the "SPLC placed [Coral Ridge] on the Hate Map because of [Coral Ridge's] religious beliefs regarding LGBT issues." Pl.'s Resp. to Amazon Defs.' Mot. to Dismiss (doc. no. 52) at 10 (citing Am. Compl. (doc. no. 40) at ¶¶ 56-58). The court accepts as true that SPLC designated Coral Ridge as a "hate group" because of its beliefs about LGBT issues, and that these are religious beliefs for Coral Ridge. Yet, the fact that Coral Ridge's opposition to homosexual conduct happens to be rooted in its religious beliefs does not mean that SPLC targeted Coral Ridge because of its *religious* beliefs, as opposed to its belief, full stop, regardless of whether that belief is religiously rooted. Moreover, Coral Ridge's allegation that the designation was *because of its religious* beliefs need not be accepted, because it is tantamount to the legal conclusion of intentional religion-based discrimination. *See Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d. 1182, 1188 (11th Cir. 2002) (explaining that, at the motion to dismiss stage, the court need not accept as true "legal conclusions masquerading as facts").

Third, Coral Ridge alleges that "Amazon (not SPLC) makes the ultimate decision as to who may or may not participate in the AmazonSmile program." Pl.'s Resp. to Amazon Defs.' Mot. to Dismiss (doc. no. 52) at 10 (citing Am. Compl. (doc. no. 40) at ¶¶ 43, 53). This allegation, alone or in combination with the other

allegations, does not lead to a reasonable inference of intentional discrimination.

Finally, Coral Ridge contends that: "Even if Amazon were to argue that there *was* no intent to discriminate prior to this lawsuit being filed, at this point in the litigation, Amazon has been on notice of the issues in this case for months now and could easily have made this case go away by simply permitting [Coral Ridge] to be part of the AmazonSmile program. Amazon's continued refusal to do so, especially in light of the expense of defending this litigation, certainly indicates Amazon's intent to continue discriminating." *Id.* Coral Ridge is basically arguing that the Amazon defendants' refusal to acquiesce to its litigation demands somehow converts its exclusion from the AmazonSmile program into intentional discrimination. This argument lacks merit.

Accordingly, Coral Ridge does not plausibly allege intentional discrimination based on religion.

* * *

While Title II "is to be liberally construed and broadly read," *Miller*, 394 F.2d at 349, Coral Ridge wants to stretch the statute beyond its breaking point. Perhaps Title II extends beyond physical "place[s]," § 2000a(b), to the internet. Perhaps it protects more than just potential *customers* seeking goods, services, etc. Perhaps it even recognizes disparate-impact claims. But it does not protect the ability to receive money donations, where such an ability is limited exclusively to § 501(c)(3) organizations and thus not open

to the public. And Title II certainly does not entitle to relief a plaintiff who does not plausibly alleged any discrimination whatsoever, whether intentional or by disparate impact.

Coral Ridge cannot force the Amazon defendants to donate money to it. Its Title II claim is due to be dismissed with prejudice.[37]

V. CONCLUSION

The court should not be understood as even suggesting that Coral Ridge is or is not a "hate group." It has merely held that SPLC's labeling of the group as such is protected by the First Amendment and that the Amazon defendants' exclusion of the group from receiving donations through the AmazonSmile charitable-giving program does not violate Title II of the Civil Rights Act of 1964. The court will, therefore, enter a judgment adopting the recommendation of the magistrate judge (albeit for different reasons in some respects); granting SPLC's and the Amazon defendants' motions to dismiss; and dismissing this case in its entirety.

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[37] The court reaches the same conclusion, for the same reasons, regardless of whether Coral Ridge characterizes its claim as seeking to be able to receive money through the AmazonSmile program based on purchases by other customers, or based on purchases that Coral Ridge itself makes.

DONE, this the 19th day of September, 2019.

/s/ Myron H. Thompson
UNITED STATES
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE MIDDLE DISTRICT
OF ALABAMA, NORTHERN DIVISION

CORAL RIDGE MINISTRIES MEDIA, INC., d/b/a D. James Kennedy Ministries,	)	
Plaintiff,	)	CIVIL ACTION NO. 2:17cv566-MHT (WO)
v.	)	
AMAZON.COM, INC., et al.,	)	
Defendants.	)	

JUDGMENT

(Filed Sep. 19, 2019)

In accordance with the opinion entered this day, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) Plaintiff Coral Ridge Ministries Media, Inc.'s objections (doc. no. 58) are overruled.

(2) The magistrate judge's recommendation (doc. no. 57) is adopted, albeit at times for reasons different from those given by the magistrate judge.

(3) Defendant Southern Poverty Law Center, Inc.'s motion to dismiss (doc. no. 42) is granted.

(4) Defendants Amazon.com, Inc. and Amazon-Smile Foundation, Inc.'s motion to dismiss (doc. no. 43) is granted.

(5) This lawsuit is dismissed in its entirety with prejudice.

It is further ORDERED that costs are taxed against plaintiff Coral Ridge Ministries Media, Inc., for which execution may issue.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

This case is closed.

DONE, this the 19th day of September, 2019.

/s/ Myron H. Thompson
UNITED STATES
DISTRICT JUDGE

2018 WL 4697073
Only the Westlaw citation is currently available.
United States District Court, M.D.
Alabama, Northern Division.

CORAL RIDGE MINISTRIES MEDIA, INC., d/b/a D. James Kennedy Ministries, Plaintiff,
v.
AMAZON.COM, INC., et al., Defendants.

2:17-cv-566-MHT-DAB
|
Signed 02/21/2018

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REPORT AND RECOMMENDATION

David A. Baker, United States Magistrate Judge

Plaintiff Coral Ridge Ministries Media, Inc., d/b/a D. James Kennedy Ministries ("CR Media") filed its Complaint against Amazon.com, Inc. ("Amazon"), the AmazonSmile Foundation ("AmazonSmile") (sometimes collectively "Amazon Defendants"), and the Southern Poverty Law Center ("SPLC") (sometimes collectively with Amazon Defendants, "Defendants") alleging civil rights claims of religious discrimination, violations of the Lanham Act, and defamation. (Doc. I; Amended Complaint at Doc. 40). SPLC filed a motion to dismiss the Amended Complaint in its entirety. (Doc. 42). The Amazon Defendants also filed a motion to dismiss the Amended Complaint. (Doc. 43). The motions are fully briefed and taken under submission.

I. JURISDICTION

Subject matter jurisdiction is conferred by 28 U.S.C. § 1331 as to Plaintiff's federal causes of action, and the court may exercise supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367. In addition, the Amended Complaint asserts the existence of diversity jurisdiction under 28 U.S.C. § 1332, no basis for challenging this is apparent. The parties do not contest personal jurisdiction or venue, and there are adequate allegations to support both. *See* 28 U.S.C. § 1391. On August 4, 2017, this matter was referred to the undersigned by U.S. District Judge Myron H. Thompson for disposition or recommendation

on all pretrial matters. (Doc. 4). *See also* 28 U.S.C. § 636(b); Rule 72, Fed. R. Civ. P.; *United States v. Raddatz*, 447 U.S. 667 (1980); *Jeffrey S. v. State Board of Education of State of Georgia*, 896 F.2d 507 (11th Cir. 1990).

II. BACKGROUND AND STATEMENT OF FACTS[1]

Parties: CR Media describes itself as a Christian ministry whose fundamental activities include spreading its interpretation of Biblical gospel and fundraising. (Amd. Compl. Doc. 40 at ¶¶ 38-39). The Amazon Defendants, as pertinent to this case, operate a program that allows Amazon customers (who choose to do so) to have 0.5% of their payments go to a fund for the benefit of various nonprofit entities. SPLC is a nonprofit civil rights organization that, among other things, monitors various groups and publishes on its website a "Hate Map" and a list of groups it has designated as hate groups. At issue in this case is Amazon's use of SPLC's designation of CR Media as a hate group as a basis for excluding it from eligibility to participate in the AmazonSmile charitable program.

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[1] These are the facts for purposes of recommending a ruling on the pending motions to dismiss; they may not be the actual facts and are not based upon evidence in the court's record. They are gleaned exclusively from the allegations in the Amended Complaint.

III. STANDARD OF REVIEW

A Rule 12(b)(6) motion to dismiss tests the sufficiency of the Complaint against the legal standard set forth in Rule 8: "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

When evaluating a motion to dismiss pursuant to Rule 12(b)(6), the court must take "the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 663 (alteration in original) (citation omitted). "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the

reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The standard also "calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" of the claim. *Twombly*, 550 U.S. at 556. While the complaint need not set out "detailed factual allegations," it must provide sufficient factual amplification "to raise a right to relief above the speculative level." *Id.* at 555.

"So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Twombly*, 550 U.S. 558 (quoting 5 Wight & Miller § 1216, at 233-34) (quoting in turn *Daves v. Hawaiian Dredging Co.*, 114 F.Supp. 643, 645 (D. Haw. 1953)) (alteration original). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679 (citing *Twombly*, 550 U.S. at 556).

> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 556 U.S. at 679.

IV. CR MEDIA'S CLAIMS

As to the Amazon Defendants, CR Media asserts that they discriminated against CR Media on the basis of religion by excluding it from the AmazonSmile giving program, claiming in Count III a violation of Title II of the Civil Rights Act. (Doc. 40 at ¶¶ at 146-66). CR Media further asserts pursuant to 42 U.S.C. § 2000e and under Alabama common law a negligent violation of the Act in Count IV. (Doc. 40 at ¶¶ 167-82). CR Media seeks relief against SPLC claiming its designation of CR Media as a "hate group" is libel per se (Count I, Doc. 40 at ¶¶ 88-114) and violates the federal Lanham Act, 15 U.S.C. § 1125(a) (Count II, Doc. 40 at ¶¶ 115-45).

CR Media's theory of the case is that the AmazonSmile program is a "place of public accommodation" subject to the anti-discrimination provisions of Title II. (Doc. 40 at ¶¶ 14-19). Further, using its own definition of "hate group," CR Media claims labelling it as such is libel per se, even though SPLC uses its own, different, definition. CR Media also argues the designation is false "commercial speech" subject to the restrictions of the Lanham Act.

The Court will address each count, though not in the order presented in the Amended Complaint.

Amazon Defendants: Count III-Title II

Amazon "is an American electronic commerce and cloud computing company, and is the largest Internet-

based retailer in the world . . . " (Doc. 40 at ¶ 5). CR Media alleges that "AmazonSmile is a website operated by Amazon that lets customers enjoy the same wide selection of products, low prices, and convenient shopping features as on Amazon.com." *Id.* ¶ 43 (quoting the "About AmazonSmile" tab located at https://org.amazon.com/). Unlike Amazon, "when customers shop on AmazonSmile (smile.amazon.com), the AmazonSmile Foundation will donate 0.5% of the price of eligible purchases to the charitable organizations selected by customers." *Id.* AmazonSmile does not make donations to any member of the public, or any charity. Rather, it donates to charitable organizations that satisfy certain requirements. First, organizations "must be registered and in good standing with the IRS as a 501(c)(3)" and meet other regulatory criteria. *Id.* at ¶ 44 (quoting the "About AmazonSmile" tab located at https://org.amazon.com/). Second, they "must . . . adhere to the AmazonSmile Participation Agreement." *Id.* Finally, "[o]rganizations that engage in, support, encourage, or promote intolerance, hate, terrorism, violence, money laundering, or other illegal activities are not eligible to participate." *Id.* AmazonSmile "relies on the US Office of Foreign Assets Control and the Southern Poverty Law Center to determine which registered charities fall into these groups." *Id.*

Recognizing that applicability of Title II in this case depends on establishing that the AmazonSmile program is a "place of public accommodation" (Doc. 52 at 15), CR Media makes essentially two arguments: first, Amazon's other commercial ventures,

which include some physical stores and operations, make this program subject to Title II and, second, Title II should now be interpreted to include essentially any internet activity open to the public. Title II guarantees "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation," without discrimination, including on the basis of religion. 42 U.S.C. § 2000a(a).

Under the statute:

> Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce . . .
>
> > (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
> >
> > (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
> >
> > (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

> (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

42 U.S.C. § 2000a(b).

CR Media argues at great length that Amazon's other business activities should subject this particular web-based program to Title II requirements. Those arguments, however, do not include any controlling or persuasive authority for such a sweeping proposition. Likewise, other than wishing it were so, CR Media fails to cite any authority for the courts to expand the reach of Title II from physical locales to all internet activity. Accordingly, this claim fails as a matter of law and should be dismissed with prejudice.[2]

Amazon Defendants: Count IV-Negligence Per Se

CR Media concedes that this claim fails if there is no underlying applicability of Title II. (Doc. 52 at 30). Thus, it, too, should be dismissed with prejudice. Again, based on this disposition, the Court need not

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[2] Because of this recommended disposition, the Court need not reach Amazon's additional arguments that CR Media's exclusion is not religious discrimination and that its own First Amendment rights would be infringed by subjecting this program to CR Media's claims. Nor does the Court reach or decide any issues as to intentionality or strict liability in cases where Title II does apply.

and does address the other issues and arguments advanced by the parties.

Defendant SPLC: Count I-Libel Per Se

CR Media's first claim against SPLC is for libel per se. For purposes of the claim, CR Media concedes that it is a "public figure" subject to the heightened standard of proof for such entities that claim to have been defamed. (Doc. 51 at 13). Under First Amendment precedent, if a court determines that a plaintiff in a defamation action is "a public official, public figure, or limited-purpose public figure," then the plaintiff must establish by clear and convincing evidence "that the defamatory statement was made with 'actual malice'-that is, with knowledge that it was false or with reckless disregard to whether it was false or not." *Cottrell v. Nat'l Collegiate Athletic Ass'n*, 975 So. 2d 306, 333 (Ala. 2007) (citing *New York Times, Co. v. Sullivan*, 376 U.S. 254, 280 (1964)); *Gertz v. Robert Welch, Inc.*, 4I8 U.S. 323 (1974) (some internal quotation marks omitted). A defendant acts with "reckless disregard" if, at the time of publication it "'entertained *serious doubts* as to the truth of [its] publication' or acted 'with a *high degree of awareness* of . . . [its] probable falsity.'" *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1508 (D.C. Cir. 1996) (*quoting St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

The test is not an objective one and the beliefs or actions of a reasonable person are irrelevant. *St. Amant*, 390 U.S. at 731. Rather, courts ask whether the

defendant, instead of acting in good faith, *actually* entertained serious doubts as to the veracity of the published account, or was highly aware that the account was probably false. *Id.*; *Silvester v. Am. Broad. Cos. Inc.*, 839 F.2d 1491, 1493 (11th Cir. 1988). Under this standard, even "[t]he most repulsive speech enjoys immunity provided it falls short of" meeting the actual malice standard. *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) (internal quotation marks/citations omitted).

The essence of the claim is that SPLC's designation of CR Media as a "hate group" is defamatory and false. The *sine qua non* of CR Media's effort to allege "actual malice" by SPLC is imposition and use of a definition of "hate group" different from that actually used by SPLC itself as part of the designation.[3] Unless the meaning of the language used by a libel defendant is beyond dispute, a libel *plaintiff* may not rely on its chosen meaning to establish actual malice by the *defendant*, particularly where the defendant has set forth the meaning of the language and the basis for that meaning. In argument, CR Media posits various definitions of "hate group" used by various groups and organizations for their particular purposes. The existence of these various definitions (with their differences, large and small) and the absence of any usage established by statute or other controlling authority, certainly gives entities such as SPLC the right to specify the

[3] CR Media makes no substantial argument that SPLC's designation, based on its own definition of "hate group," would be actionable.

meaning *they* give to the words as *they* use them. SPLC is not required to use "hate group" definitions used by others, and its state of mind, for purposes of determining "actual malice," cannot be judged based on those other definitions.

CR Media advances other alleged circumstances, *e.g.*, the biblical source for its own credo, CR Media's self-description, and the history of discrimination against LGBT individuals and activities, as somehow showing SPLC acted with actual malice. The Court is at a loss to discern any legal or logical connection between these alleged circumstances and SPLC's state of mind regarding actual malice. CR Media also argues that SPLC's so-called "agenda" of opposing hate groups and the extent of its messaging somehow speak to its ill will. To the contrary, these observations, to the extent they are pleaded, tend to demonstrate SPLC's sincerity and good faith.

CR Media has failed to allege facts or circumstances that could suggest that SPLC's designation of CR Media as a hate group (as SPLC defined the term) was made with actual knowledge of the falsity or in reckless disregard of its truth or falsity. Accordingly, Count I of the Amended Complaint should be dismissed with prejudice.[4]

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[4] SPLC forcefully advances additional arguments based on its First Amendment right to publish opinions. As with Amazon's additional arguments, the Court need not and does not address those issues.

Count II-Lanham Act

The Lanham Act at 15 U.S.C. § 1125 (a)(1)(B) prohibits false advertising in connection with "commercial advertising or promotion." 15 U.S.C. § 1125(a)(1)(B). The Eleventh Circuit defines "commercial advertising or promotion" for Lanham Act purposes as encompassing four elements: (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services; and (4) the representations . . . must be disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry. *Edward Lewis Tobinick, MD v. Novella*, 848 F.3d 935, 950 (11th Cir. 20I7) (internal quotation marks and brackets omitted). The first element, "commercial speech," is a threshold requirement for liability under the Lanham Act false advertising claim. *See Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999). Unless CR Media can plausibly prevail on this fundamental issue, there can be no claim under the Lanham Act against SPLC.

The concept of commercial speech under the Lanham Act mirrors the commercial speech doctrine under the First Amendment. *See Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1274 (10th Cir. 2000); *see also Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1323 (11th Cir. 20I0). The "core notion" of commercial speech encompasses "speech that proposes a commercial transaction." *Edward Lewis Tobinick, MD v. Novella*, 848 F.3d 935, 950 (11th Cir. 2017). In fact, commercial speech is "expression related solely to the economic

interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

The present action is not the only case in which SPLC's "hate group" designation has been alleged to be commercial speech to support a Lanham Act claim. In *Liberty Counsel, Inc. v. GuideStar USA, Inc.*, No. 4:17-cv-71 (E.D. Va. Jan. 23, 20I8), the Court succinctly held that use of SPLC's hate speech notation was not commercial speech and dismissed the Lanham Act claim in that case with prejudice. Judge Jackson reasoned that characterization of one organization by another should be analyzed under First Amendment principles, not those of the Lanham Act. Slip Opinion at 8. "The notation simply states the SPLC's review of Plaintiff's organization, and that review labels Plaintiff's organization as a 'hate group.' Defendant's notation does not request or propose a sale of its products or services." *Id.* Thus, the notation is an informative statement rather than commercial speech.

> It is not sufficient that Plaintiff alleges that Defendant advertised its subscription on the website because the notation itself did not propose a commercial transaction or imply from the SPLC notation that the donors should buy its subscription. Pursuant to *Radiance Found.*, [786 F.3d 316 (4th Cir. 2015)] the Court finds that SPLC's notation was not an advertisement, did not offer the reader anything for sale, and did not mention Plaintiffs services or Defendant's services. See *id.* at

> 331-32. A reasonable person on Defendant's website, reading SPLC's notation, is unlikely to read the notation as advertising a service or proposing a transaction of any kind. *Id.*
>
> Therefore, the Court finds that Defendant's statement is not commercial speech.

Id., at 9.

The reasoning and result in *Liberty Counsel* are persuasive and well-supported. SPLC's designation of CR Media as a hate group is simply not the kind of speech encompassed by the language or intent of the Lanham Act. CR Media's arguments to the contrary, while creative, are far-fetched. The disagreements between these parties are deeply held and societally important. But they are not part of a commercial or advertising dispute and are not subject to resolution under the Lanham Act. Count II should also be dismissed with prejudice. Again, there are additional issues raised by the parties that the Court does decide due to the complete inapplicability of the basis for CR Media's claim.

V. RECOMMENDATION AND CONCLUSION

Accordingly, for the reasons stated, it is **RESPECTFULLY RECOMMENDED** that the SPLC's motion to dismiss (Doc. 42) and the Amazon Defendants' motion to dismiss (Doc. 43) be **GRANTED** and that the case be dismissed with prejudice.

It is **ORDERED** that the parties shall file any objections to this Recommendation on or before **March 8, 2018**. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation to which the party objects. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a *de novo* determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982).

DONE and **ORDERED** this 21st day of February 2018.
