VIRGINIA:

IN THE CIRCUIT COURT OF HENRICO COUNTY

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Henrico Circuit Court

DEVIN G. NUNES, Plaintiff, v. TWITTER, INC., ELIZABETH A. "LIZ" MAIR, MAIR STRATEGIES, LLC, "DEVIN NUNES' MOM" [@DevinNunesMom], "DEVIN NUNES' COW" [@DevinCow], Defendants.	Case No. CL 19-1715 **DEMURRER AND PLEA IN BAR OF DEFENDANTS ELIZABETH A. "LIZ" MAIR AND MAIR STRATEGIES, LLC**

In accordance with Virginia Supreme Court Rule 3:8, Defendants Elizabeth A. "Liz" Mair and Mair Strategies, LLC (collectively, "Mair") respond to the Complaint of Plaintiff Devin G. Nunes ("Rep. Nunes") as follows:

PRELIMINARY STATEMENT

1. In his Complaint, Rep. Nunes alleges: (1) negligence against Defendant Twitter, Inc. ("Twitter"); (2) defamation *per se* against Mair and other Defendants; (3) an insulting words claim under Virginia Code § 8.01-45 against Mair and other Defendants; and (4) a common-law conspiracy claim against Mair and other Defendants. He then asks the Court to issue a rare positive injunction against Twitter to reveal the identity of @DevinNunesMom and @DevinCow; suspend @LizMair, @DevinNunesMom, and @DevinCow; and deactivate hyperlinks to certain tweets, retweets, replies and likes by @LizMair, @DevinNunesMom, and @DevinCow. In

addition to the injunction against Twitter, Rep. Nunes seeks a judgment against the Defendants, jointly and severally, for compensatory damages of $250,000,000 or more, punitive damages of $350,000 or the maximum amount allowed by law, interest, attorney's fees, and costs. The Complaint fails to state any valid claim against Mair and should therefore be dismissed with prejudice.[1]

DEMURRER

Mair demurs to Counts II, III, and IV of the Complaint as follows[2]:

Standard of Review

2. "The purpose of a demurrer," the Supreme Court of Virginia has often said, "is to determine whether a motion for judgment states a cause of action upon which the requested relief may be granted." *Kurpiel v. Hicks*, 284 Va. 347, 353 (2012) (citation omitted). "A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof." *Id.* (citation omitted).

Grounds of Demurrer

Rep. Nunes has failed to adequately plead defamation per se against Mair

3. In Count II, Rep. Nunes alleges that from 2018 to the present, Mair has engaged in a number of allegedly false and defamatory statements about him. (*See* Compl. ¶¶ 39–48.) There are four fundamental deficiencies in this allegation.

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[1] On July 24, 2020, this Court dismissed with prejudice all claims in this case against Twitter. *See Nunes v. Twitter, Inc., et al.*, No. CL19-1715, Dismissal Order with Prejudice (Henrico July 24, 2020).

[2] The Complaint does not appear to state a claim against Mair in Count I. To the extent Rep. Nunes might contend that it does so, Mair demurs for substantially the same reasons set forth below regarding the other counts.

4. *First*, many of the "statements" addressed in the Complaint consist only of hyperlinks or editorialized descriptions, rather than the exact words of the alleged defamatory statement. Count II must be dismissed as to each and every one of these statements: "Good pleading requires that the exact words spoken or written must be set out in the declaration *in haec verba*. Indeed, the pleading must go further—that is, it must purport to give the exact words." *Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 134 (2003) (quoting *Fed. Land Bank of Baltimore v. Birchfield*, 173 Va. 200, 215 (1939)); *see also Owens v. DRS Auto. Fantomworks, Inc.*, 87 Va. Cir. 30, 2013 WL 9419657 (Norfolk 2013) (dismissing defamation allegations on this basis); *Tomlin v. IBM*, 84 Va. Cir. 280, 2012 WL 7850902 (Fairfax Cty. Feb. 13, 2012) (same); *Koegler v. Green*, 78 Va. Cir. 478, 485, 2009 WL 7339901, at *5 (Hanover 2009) (sustaining demurrers where plaintiff alleged that certain documents contained defamatory matter, but did not specifically allege which statements were defamatory); *Shelton v. Consol. Bank & Tr. Co.*, 2005 WL 1774602, at *3 (Richmond Cty. July 21, 2005) (sustaining demurrer based on reviewing only "direct quotes of Defendant or its agents"). Particularly in a case brought by an elected official against private citizens who dared to challenge his qualifications for office, the core requirements of defamation law must be respected.

5. *Second,* the Complaint fails adequately to allege that Mair made any of the alleged defamatory statements with "actual malice." This requires dismissal under the First Amendment of the U.S. Constitution because Rep. Nunes is plainly a public figure. *See Mahan v. Nat'l Conservative Pol. Action Comm.*, 227 Va. 330, 336–

37 (1984) ("[D]iscussion of public issues and debate on the qualifications of candidates for public office are integral to the operation of our system of government and are entitled to the broadest protection the First Amendment can afford.").

6. As the Virginia Supreme Court has recognized, "the burden of proving 'actual malice' is upon the plaintiff[,] who must demonstrate by clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Jordan v. Kollman*, 269 Va. 569, 577 (2005). This demanding standard applies with full force even where criticism "include[s] vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

7. The Complaint fails that standard. Its allegations of "actual malice" are conclusory and thus inadequate. *See* Compl. ¶ 47(b)–(d); *see also Ogunde v. Prison Health Servs.*, 274 Va. 55, 66 (2007); *Jarrett v. Goldman*, 67 Va. Cir. 361, 2005 WL 1323115, at *10 (Portsmouth May 31, 2005). This deficiency is not cured by Rep. Nunes's repeated allegations that Mair harbored "hate[]," "disdain," and "ill will" towards him. Compl. ¶¶ 7, ¶ 47(e); *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510–511 (1991); *Jackson v. Hartig*, 274 Va. 219, 231 (2007); *Fairfax v. CBS Broad. Inc.*, 1:19-cv-01176, _______ (E.D. Va. Feb. 11, 2020) (slip op. at 21).

8. In fact, the Complaint's non-conclusory allegations *defeat* an inference of actual malice. *See Parker v. Carilion Clinic*, 296 Va. 319, 330 n.2 (2018) ("[W]e disregard allegations that are . . . contradicted by other facts pleaded."). Most of Mair's allegedly defamatory statements were based *directly* on news reports and

court filings whose truth Mair had no reason to doubt. *See Jordan,* 569 Va. at 581; *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 295-300 (4th Cir. 2008) (applying Virginia law). There is thus no valid basis to infer that she acted with a "high degree of awareness of probable falsity." *Jordan*, 269 Va. at 580 (citation omitted).

9. *Third*, many of Mair's alleged defamatory statements are completely shielded from defamation liability because they are statements of opinion.

10. Opinion statements "cannot form the basis of an action for defamation." *Chaves v. Johnson*, 230 Va. 112, 119 (1985). Opinions are statements that are subjective and thus not "capable of being proven true or false." *Tharpe v. Saunders*, 285 Va. 476, 893 (2013). The same principle insulates the use of hyperbolic or crude language—including in the course of political commentary—if no factual content can be fairly discerned. *See Yeagle v. Collegiate Times*, 255 Va. 293, 297 (1998).

11. The U.S. Constitution forbids defamation liability based on opinions because "'[h]owever 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.'" *Chaves*, 230 Va. at 119 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)).

12. Here, many of the alleged defamatory statements by Mair rank as opinions. Those include (but are not limited to) declaring that Rep. Nunes is "a clown with big league ethical issues," calling him "Dirty Devin," deeming controversial use of PAC funds to be "a legal problem, not just an ethical or optics-related one," stating that Rep. Nunes should be held accountable for "having voted for warrantless wiretapping and unlimited surveillance of Americans' emails ([including] Carter

Page's)," and stating that Congress should "prioritize review of Rep. Nunes' investment and involvement in the Alpha Omega Winery, and the facts reported by the *Fresno Bee*." None of these statements can be described as objectively "true" or "false." Each is a subjective opinion and thus shielded by the First Amendment.

13. That conclusion is confirmed by context. Mair was commenting in the political arena about the news of the day, and "[p]otentially defamatory statements" that are "made during the course of an ongoing public controversy" are "likely to be understood to be rhetorical opinion" rather than "assertions of fact." Judge Robert D. Sack, 1 *Sack on Defamation: Libel, Slander, and Related Problems* § 4:3.1 (5th ed. 2017); *Birkhead v. Sims*, 3 Va. Cir. 271, 1985 WL 674845, at *2 (Bath Jan. 8, 1985). If Rep. Nunes is allowed to hold citizens liable for expressing political opinions, then Americans throughout the Nation will face legal peril as they engage in democracy.

14. *Finally*, Rep. Nunes seeks to impose liability on Mair for statements that lack any defamatory meaning or implication.

15. Although facially non-defamatory statements may possess a prohibited defamatory implication, *see Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 8 (1954), that "defamatory implication must be present in the plain and natural meaning of the words used," *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993). Plaintiffs cannot manufacture defamation by stretching language "beyond its ordinary and common" meaning, *Carwile*, 196 Va. at 8, or by disregarding "the context in which [the] statements were made," *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 298 (1987). Resolving whether a statement has a defamatory

implication "is an essential threshold, gatekeeping function of the court." *Webb*, 287 Va. at 90–91.

16. Rep. Nunes contends that Mair's "HOLY CRAP" retweet of the *Fresno Bee* article "implied that Nunes colluded with prostitutes and cocaine addicts, that Nunes does cocaine, and that Nunes was involved in a 'Russian money laundering front.'" Compl. ¶ 7. But the article's headline ("A yacht, cocaine, prostitutes: winery partly owned by Nunes sued over fundraiser event") neither states nor implies that Nunes engaged in crimes nor colluded with criminals. Moreover, "the meaning of a headline is to be considered in the context of the entire article." *Mirafuentes v. Estevez*, No. 1:15-cv-610, 2015 WL 8177935, at *3 (E.D. Va. Nov. 30, 2015) (citing *Yeagle*, 255 Va. at 297–98). The article specifies that Nunes was not at the party at issue and makes no suggestion that Nunes was involved in any criminal activity. There is no mention of money laundering or any financial impropriety whatsoever. Analyzing the words actually used in this statement, the only factual implication that emerges is that Mair was taken aback by Nunes's investments (as reported).

17. For the foregoing reasons, Mair asks the Court to sustain her Demurrer to Count II and to dismiss that count as to her.

18. Mair will file a brief in further support of this demurrer.

Rep. Nunes has failed to adequately plead insulting words against Mair

19. In Count III, Rep. Nunes alleges that from 2018 to the present, Mair uttered insulting words that are actionable under Section 8.01-45. *See* Compl. ¶¶ 49–52. "The decision of whether [insulting words] are actionable should be resolved by the Court, not the jury." *Mak Shun Ming Hotung v. Hotung*, 85 Va. Cir. 241, 2012 WL

9334884, at *3 (Fairfax 2012). Here, there are two fundamental deficiencies in Rep. Nunes's allegation.

20. *First*, this claim fails because Rep. Nunes has failed adequately to allege a defamation claim against Mair. *See Walker v. Harrison*, 75 Va. Cir. 319, 2008 WL 8644830, at *1 (2008) ("The Courts of Virginia have consistently imported principles of defamation into causes of action brought under the insulting words statute." (citing *Allen & Rocks, Inc. v. Dowell*, 252 Va. 439 (1996)); *Jarrett v. Goldman*, 67 Va. Cir. 361, 2005 WL 1323115, at *15 (2005) (finding no insulting words in violation of § 8.01-45 where the challenged statements were nondefamatory opinions).

21. *Second*, this claim fails the "additional requirement that the words be provocative for a claim to be meritorious under the Insulting Words Statute." *Walker*, 2008 WL 8644830, at *1; *see also Steele v. Goodman*, 382 F. Supp. 3d 403, 414--15, 423 (E.D. Va. 2019); *Hotung*, 2012 WL 9334884, at *3.Simply put, Mair did not make any of these statements under circumstances calculated to incite violence.

22. For the foregoing reasons, Mair asks the Court to sustain her Demurrer to Count III and to dismiss that count as to her.

23. Mair will file a brief in further support of this demurrer.

Rep. Nunes has failed to adequately plead a common law conspiracy claim against Mair

24. In Count IV, Rep. Nunes alleges that from 2018 to the present, Mair engaged in a common-law conspiracy to injure him, intentionally and unlawfully interfere with his business and employment, and defame him. *See* Compl. ¶¶ 53–57. "A common law conspiracy consists of two or more persons combined to accomplish,

by some concerted action, some criminal or unlawful purpose or some lawful purpose by a criminal or unlawful means." *Gelber v. Glock*, 293 Va. 497, 533 (2017). Here, Rep. Nunes's conspiracy claim against Mair fails for four reasons.

25. *First*, Rep. Nunes has failed adequately to allege any underlying tort, including defamation. His claim cannot succeed for that reason alone. *See, e.g.*, *Commercial Bus. Sys., Inc. v. Halifax Corp.*, 253 Va. 292, 300 (1997) ("[W]ithout proof of the underlying tort, there can be no conspiracy to commit the tort.").

26. *Second,* Rep. Nunes's threadbare allegations cannot substantiate his claim of a common-law conspiracy. *See Bowman v. State Bank of Keysville*, 229 Va. 534, 541 (1985) (sustaining demurrer where "[t]he conspiracy theory is asserted in mere conclusory language and the argument in support of the theory is based on inferences that are not fairly and justly drawn from the facts alleged"). He does not allege when, where, or how Mair planned any activity with any other Defendant. This type of conclusory pleading is insufficient to establish conspiracy. *See Bay Tobacco, LLC v. Bell Quality Tobacco Prods., LLC*, 261 F. Supp. 2d 483, 499 (E.D. Va. 2003) ("[T]o survive a motion to dismiss, Plaintiff must at least plead the requisite concert of action and unity of purpose in more than 'mere conclusory language.'").

27. *Third,* Rep. Nunes has failed adequately to allege an agreement between Mair and any other Defendant. "An essential element of any conspiracy claim is an agreement or understanding willingly entered into by all parties to it for the accomplishment of an unlawful purpose." *Long v. Old Point Bank of Phoebus*, 41 Va. Cir. 409, 1997 WL 33616272, at *17 (Norfolk 1997). Here, however, Rep. Nunes does

not allege "specific facts showing actual agreements" between Mair and any of the other Defendants. *See Lesner Pointe Condo. Ass'n, Inc. v. Harbour Point Bldg. Corp.*, 61 Va. Cir. 609, 2002 WL 32182354, at *8 (Virginia Beach 2002) (dismissing common-law conspiracy claim).

28. In his efforts to establish a conspiratorial agreement, Rep. Nunes relies mainly on allegations that three of the Defendants tweeted about similar subjects and occasionally retweeted or liked each other's tweets. *See* Compl. ¶ 11. But if that were the standard, millions of Americans would be shocked to learn that they are enmeshed in all manner of conspiracies. It would not comport with the First Amendment of the U.S. Constitution—or Article I, Section 12 of the Virginia Constitution—to treat routine political speech on social media as a coordinated plot.

29. Rep. Nunes's allegations do not support an inference that Mair agreed to pursue an unlawful purpose with any other Defendant. Instead, they indicate nothing more than parallel and occasionally overlapping criticism of a public official in a social media forum where that is commonplace. *See Long*, 41 Va. Cir. at 409.

30. *Finally*, Rep. Nunes does not sufficiently allege damage sufficient to sustain an action for civil conspiracy. *See Gelber*, 293 Va. at 533—34 ("The foundation of a civil action of conspiracy is the damage caused by the acts committed in furtherance of the conspiracy."). Civil conspiracy is not the proper mechanism where, as here, there are no factual allegations supporting damages. *See id.* at 535.

31. For the foregoing reasons, Mair asks the Court to sustain her Demurrer to Count IV and to dismiss that count as to her.

32. Mair will file a brief in further support of this demurrer.

PLEA IN BAR

Virginia's anti-SLAPP statute provides immunity for the statements alleged.

33. The Complaint's claims against Mair are also barred by Virginia's anti-SLAPP statute. *See* Va. Code § 8.01-223.2.

34. Anti-SLAPP immunity is available if the alleged defamatory statements were (1) on a matter of public concern; (2) protected by the First Amendment; (3) published to a third party; and (4) not made with actual or constructive knowledge that they are false or with reckless disregard for whether they are false (*i.e.* not made with actual malice). *See id.*

35. All four elements are met here. This suit is an improper attempt to hold Mair liable for protected speech on a matter of public concern. The claims against Mair should be dismissed as barred and Mair should be awarded fees and costs pursuant to the anti-SLAPP statute.

Rep. Nunes' claims should be dismissed because he has sued Mair for the same alleged conduct in Albemarle County.

36. Shortly after filing this action against Mair, Rep. Nunes brought closely related claims against Mair in an action that remains pending in the Circuit Court for Albemarle County. *See Nunes v. The McClatchy Co. et al.*, Case No. CL19-629 ("the Albemarle County case"). Both the Albemarle County case and this one arise out of the same transaction or occurrence: Mair's criticism of Rep. Nunes during his 2018 re-election campaign, with a particular focus on Mair's public commentary based on Fresno Bee articles. *See* Albemarle County case Complaint ¶¶ 1–10.

37. The filing of both this action and the Albemarle County case constitutes improper claim splitting. *See Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 143 (2017) ("The law should afford one full, fair hearing relating to a particular problem—but not two" (internal quotation marks omitted)); *Gary Steel Prods. Corp. v. Kitchin*, 197 Va. 471, 474 (1955) ("The courts generally hold that a single or entire cause of action may not be divided or split so as to make it the subject of several actions, without the express or implied consent of the person against whom the cause of action exists."). Claim-splitting occurs when a plaintiff brings two separate suits against the same defendant based on the same underlying "transaction or occurrence," even if "the second suit includes alternative legal theories or would require evidence not present in the first suit." *Funny Guy*, 293 Va. at 150; *see also* Va. Sup. Ct. R. 1:6 (adopting this test for *res judicata* purposes).

38. Mair objects to this improper claim-splitting, which would require Mair simultaneously to defend two alternative theories of liability in two separate matters arising out of the same alleged conduct.

39. If this action is allowed to proceed and Mair obtains a favorable judgment in Albemarle County case, the claim against Mair in this case will be barred by *res judicata* principles. *See* Rule 1:6; *Funny Guy*, 293 Va. at 160.

40. Mair demands a jury trial on her plea in bar based on the anti-SLAPP statute, but does not demand a jury trial on her plea in bar based on Rep. Nunes' improper claim splitting because that issue involves only questions of law that the Court may decide.

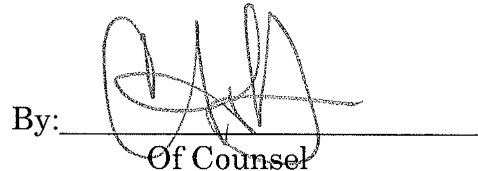
* * *

As stated above, Mair will file a brief in further support of her demurrer and plea and bar.

Based on the foregoing, Mair requests that the Court enter an order (1) sustaining her Demurrer to Counts II, III, and IV as to Mair, or in the alternative, granting the Plea in Bar; (2) dismissing with prejudice the Complaint as to Mair; and (3) granting Mair such other and further relief deemed just and proper.

Respectfully submitted,

ELIZABETH A. MAIR AND
MAIR STRATEGIES, LLC



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CERTIFICATE OF SERVICE

I certify that on this 3rd day of August 2020, a copy of the foregoing Demurrer and Plea in Bar shall be served by first class mail, postage prepaid, and by email, upon:

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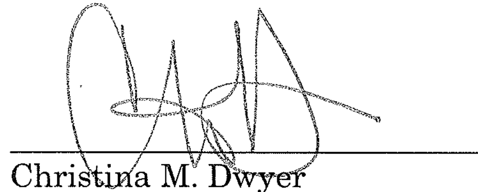

Christina M. Dwyer

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August 3, 2020

VIA HAND DELIVERY

Hon. Heidi S. Barshinger, Clerk
Henrico Circuit Court
4309 East Parham Road
Henrico, VA 23273-0775

Re: Devin G. Nunes v. Twitter, Inc., et al.
Case No. CL19-1715

Dear Ms. Barshinger:

Enclosed are an original and a copy of the Demurrer and Plea in Bar of Defendants Elizabeth A. Mair and Mair Strategies, LLC. Please file the original and file-stamp the copy and return it to me.

By copy of this letter, I am notifying counsel of record of this filing.

Thank you for your assistance in this filing.

Sincerely,

WOODS ROGERS PLC

Christina M. Dwyer

CMD:ed
Encls.

cc: Steven S. Biss (*w/encl. via e-mail and first-class mail*)
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