IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE S. BOLEY,
c/o George S. Boley, Jr.
54 Bruen Ave., Unit 4
Irvington, NJ 07111,

Plaintiff,

v.

ATLANTIC MONTHLY GROUP and JEFFREY GOLDBERG
600 New Hampshire Ave., NW
Washington, DC 20037,

Defendants.

Civil Action No. 1:13-cv-00089 (RBW)

ORAL HEARING REQUESTED

DEFENDANTS THE ATLANTIC MONTHLY GROUP, INC. AND JEFFREY GOLDBERG'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AND SPECIAL MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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In support of their motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and special motion to dismiss pursuant to the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5502, Defendants The Atlantic Monthly Group, Inc. and Jeffrey Goldberg (collectively, "Atlantic") respectfully submit this Memorandum of Points and Authorities.

PRELIMINARY STATEMENT

Plaintiff George Boley ("Boley"), a former high-level Liberian government official and notorious head of a warring faction during the Liberian civil war in the 1990s, and no stranger to litigation, brings this defamation claim against the 150-year-old, award-winning publication, *The Atlantic*, and its award-winning correspondent, Jeffrey Goldberg. The focus of Boley's dispute: two articles published on *The Atlantic*'s website almost three years before the filing of this Complaint that accurately describe official investigations into Boley's war crimes, including administrative charges against him for extrajudicial killings, his arrest and detention, and one of his prior unsuccessful lawsuits. Those articles report widely available facts, including facts directly reflected in findings of the Liberian Truth and Reconciliation Commission, the U.S. Department of State, and the U.S. Department of Justice Executive Office of Immigration Review that, in the 1990s, Boley led a warring Liberian faction, and committed human rights violations and war crimes that included killing, gang rape, forced recruitment and use of child soldiers, sexual slavery, and extrajudicial executions.

Boley's defamation claim is barred not only by the applicable one-year statute of limitations, but also by the fair report privilege, which protects the fair and accurate reporting of official reports and proceedings. Moreover, Boley – a public figure and former public official – has failed to plead the necessary elements of falsity or fault to succeed on a defamation claim (nor could he plausibly do so). Accordingly, the Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

In addition, the District of Columbia's Anti-SLAPP Act counsels in favor of prompt dismissal of Boley's claim, as his claim is not only meritless, but also aimed at silencing debate and criticism on issues of public concern and retaliating against a journalist for his compelled testimony in a prior lawsuit. Because the published articles at issue address an issue of paramount public interest – war crimes and human rights abuses during the Liberian civil war – Boley's claim could only survive dismissal at this stage under the Anti-SLAPP Act if he could carry the heavy burden of demonstrating he is "likely to succeed on the merits." For the same reasons this case warrants dismissal under Rule 12(b)(6), he cannot.

For the reasons discussed below, we respectfully request that this Complaint be dismissed in its entirety with prejudice and Atlantic be awarded, under the Anti-SLAPP Act, attorney's fees and costs for defending this meritless action designed to stifle speech on a matter of grave public concern.

STATEMENT OF FACTS[1]

I. GOVERNMENT REPORTS REGARDING BOLEY'S HUMAN RIGHTS VIOLATIONS AND WAR CRIMES DURING THE LIBERIAN CIVIL WAR

During the mid-1990s, a civil war raged in Liberia. Plaintiff George Boley led the warring faction called the Liberian Peace Council ("LPC"). A U.S. Department of State report on Liberian Human Rights Practices found that "[t]here were credible reports that George Boley,

[1] The materials attached to the Ratner Declaration are proper evidence for the purpose of the anti-SLAPP analysis, and are also appropriate for judicial notice pursuant to Federal Rule of Evidence f. *See, e.g., Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (judicial notice of newspaper articles); *Washington Ass'n for Television and Children v. FCC*, 712 F.2d 677, 683 n.12 (D.C. Cir. 1983) (judicial notice of a speech); *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 35 (D.D.C. 2012), *appeal docketed*, No. 12-7055 (D.C. Cir. June 15, 2012) (judicial notice of internet postings on a 12(b)(6) and anti-SLAPP motion, explaining "a court may take judicial notice of historical, political, or statistical facts, or any other facts that are verifiable with certainty."); *Jovanovic v. US-Algeria Business Council*, 561 F. Supp. 2d 103, 106 n.1 (D.D.C. 2008) (citing *Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1088 (D.C. Cir. 2007)) (judicial notice of records of plaintiff's other cases).

leader of the LPC faction . . . authorized the summary execution of seven of his fighters . . . for harassment of civilians. Boley did not deny these allegations." *Liberian Human Rights Practices, 1995*, U.S. Department of State, at 3 (March 1996) (the "State Department Report"), attached as Ex. 1 to the Declaration of Micah Ratner ("Ratner Decl.").

The State Department Report also found that Boley's LPC fighters committed rape, explaining:

> Displaced persons reported that the LPC frequently burned women between their breasts, on their thighs or their backs; burned men on their genitals and legs; and buried people alive. The rape of both old and young women was common. Displaced persons arriving at Monrovia shelters reported that LPC fighters in Greenville in March killed 55 persons who had surrendered to them.

Id. at 7. The State Department Report stated that Boley's LPC soldiers murdered civilians:

> At the end of March, LPC fighters murdered a number of civilians in Sakpoh, Clark's Town, and Cheasbeh, Sinoe County. By the end of April, fighting between the NPFL and LPC reportedly resulted in the death of over 1,000 civilians in a 1-month period in these counties, with few injuries to the fighters.

Id. It additionally noted "credible reports that . . . LPC fighters committed acts of cannibalism." *Id.*at 8.

In May 2009, the Liberian Truth and Reconciliation Commission ("LTR Commission") determined that the Liberian Peace Council was one of the "armed groups or warring factions [that was] responsible for the commission of gross human rights violations and . . . War Crimes" during the Liberian civil war. *See* Republic of Liberia, Truth and Reconciliation Commission, Final Report, Vol. II: Consolidated Final Report, at 336 (June 30, 2009) (relevant excerpts of which are attached as Ratner Decl. Exhibit 2 "LTR Commission Report") (noting that the Liberian Peace Council was responsible for 16,708 human rights violations). It "determine[d] that *all* individuals affiliated with warring factions or armed groups in positions of command

authority and decision making including *heads of warring factions*, *commanders* . . . and *political leaders* are responsible" for these "gross human rights violations" and "war crimes[.]" *Id.* at 335 (emphasis added).

The LTR Commission made clear that "George Boley" was the "leader[] of [the] warring faction[]" called LPC and, importantly, it "recommended [Boley] for prosecution" for "gross human rights violations" and "war crimes." *Id.* at 349. These "gross human rights violations" included "violations of international humanitarian law, international human rights law, war crimes and economic crimes including but limited to, killing, gang rape, multiple rape, forced recruitment, sexual slavery, forced labor, exposure to deprivation[.]" *Id.* The Commission made these findings under a preponderance of the evidence standard, under which it determined that Boley "more likely than not is criminally responsible for committing the violation or crime." *Id.* at 53.

II. GOLDBERG'S REPORTING ON THE LIBERIAN CIVIL WAR

In the mid-1990s, Goldberg worked as a writer for *New York* magazine. During that time he became interested in the Liberian civil war, and in particular, the warring factions' use of child soldiers. Goldberg visited and investigated Boley in Liberia, and wrote an article entitled "A War Without Purpose in a Country Without Identity," which was published in the *New York Times Magazine* on January 22, 1995. (Ratner Decl. Ex. 3 "1995 Article".) Goldberg wrote an op-ed entitled "Lifting Liberia Out of Chaos," published in the *New York Times* on April 15, 1996. (Ratner Decl. Ex. 4 "1996 Article".)

III. BOLEY'S PRIOR LITIGATION

Boley has a history of employing litigation – and defamation claims in particular – as a tactic to silence those who publicize his atrocities in the Liberian civil war. In 2008, Boley filed a defamation action against the Minnesota Advocates for Human Rights – an organization that

assisted in the LTR Commission's investigation. His claim arose from that organization's statement on the radio two years earlier that Boley was "in custody in the United States for human rights violation[s]" and was a "perpetrator of crimes in Liberia." *Boley v. Minnesota Advocates for Human Rights*, No. 0:08-cv-5908-PJS-FLN, ECF No. 1 (D. Minn. filed Nov. 5, 2008) (complaint). In discovery, the defendant subpoenaed Goldberg, who provided a sworn affidavit describing his personal observations of Boley commanding a military faction during the civil war and recounting his interviews with Boley and the child soldiers Boley commanded. *Id.* ECF No. 20. (Ratner Decl. Ex. 5 "Goldberg Aff.") The U.S. district court dismissed the case based on Boley's admission that the claim was barred by the statute of limitations. *See Boley v. Minnesota Advocates for Human Rights*, 2010 WL 346769, at *1 (D. Minn. Jan. 22, 2010).

In 2009, Boley also filed a civil rights complaint against U.S. Immigration and Customs Enforcement ("ICE") and the U.S. Department of Homeland Security ("DHS") for defamation and other claims for investigating him for deportation, a claim Boley pursued for more than two years until he voluntarily dismissed it in October 2011. *Boley v. United States*, No. 6:09-cv-06348-CJS (W.D.N.Y. filed July 9, 2009).

IV. ICE AND DHS IMMIGRATION INVESTIGATIONS INTO BOLEY

Based on the State Department Report and LTR Commission findings, ICE and DHS investigated Boley for potential deportation for alleged war crimes and human rights abuses. *See* Press Release, *Liberian Human Rights Violator Removed from US: First-Ever Removal Under the Child Soldiers Accountability Act*, Immigration & Customs Enforcement, Mar. 30, 2012 (Ratner Decl. Ex. 6 "ICE Press Release".) On January 15, 2010, ICE officials detained Boley at the U.S. border and charged him administratively for extrajudicial killings in Liberia and for making false statements to obtain a visa. *See Boley v. Philips*, No. 6:12-cv-06016-CJS, ECF No. 4, at 21 (W.D.N.Y. filed Mar. 14, 2012) (government's Answer and Return to Boley's habeas

corpus complaint attaching charging documents). On February 6, 2012, an immigration judge with the Executive Office for Immigration Review – a part of the U.S. Department of Justice – found Boley inadmissible in the United States based upon the U.S. government's charges of recruitment and use of child soldiers, extrajudicial killings in Liberia in the 1990s, and making false statements to obtain a visa. (Ratner Decl. Ex. 6 "ICE Press Release".) Boley was deported from the U.S. on March 29, 2012.[2]

V. THE COMPLAINED-OF PUBLICATIONS

Atlantic is the highly-acclaimed publisher of *The Atlantic*, which Boley admits in his Complaint "covers news and analysis in politics, business, culture, technology, national international and life[.]" (Compl. ¶ 5.) As Boley has acknowledged, Goldberg is "a national correspondent for *The Atlantic* and a recipient of the National Magazine Award for Reporting." (*Id.* ¶ 6.) On January 27, 2010, Goldberg's article, entitled "George Boley, Liberian Warlord, Is Finally Under Arrest," appeared on *The Atlantic*'s website (the "Article"). (Ratner Decl. Ex. 7 "Article".) The Article states:

- That Boley, whom Goldberg met when reporting on Liberia in the 1990s, had been arrested and detained by US authorities ("George Boley, a warlord I first met when covering the Liberian civil war in the mid-90s . . . was arrested January 15th by U.S. Immigration and Customs and is now sitting in a jail cell in upstate Batavia.") (Ratner Decl. Ex. 7 "Article");

- Charges against Boley ("[H]e's being charged administratively, with lying in order to gain entry into the U.S., and with committing extrajudicial killings while in another country.") (*Id.*);

- Additional U.S. government investigations into Boley ("Other branches of Homeland Security, I've been told, are looking at charging him with actual war crimes, which is a good thing, because he belongs in the Hague with his fellow warlord, Charles Taylor.") (*Id.*);

[2] Boley currently lives in Liberia and files this suit using what appears from the face of the Complaint to be his son's address in New Jersey. (Compl. at 1, 7.)

- That Goldberg was subpoenaed to testify in Boley's prior unsuccessful defamation suit ("I've been involved with Boley's case for a little while. I was subpoenaed by a human rights group in Minnesota, the Advocates for Human Rights, to testify against Boley in a defamation lawsuit that he himself filed against the group (the definition of chutzpah, by the way).") (*Id.*);

- The contents of Goldberg's subpoenaed affidavit in that lawsuit ("I eventually provided a sworn affidavit in the case, in which I detailed what I knew of Boley's activities in the civil war, which is a lot -- I knew, from firsthand observation, that his organization, the grossly-misnamed Liberian Peace Council, recruited and armed child soldiers; fed them drugs; and ordered them to rape and kill.") (*Id.*);

- The disposition of the suit ("(The lawsuit, unsurprisingly, was dismissed earlier this month.)") (*Id.*);

- Boley's side of the story – that his organization, the LPC, was peaceful, which Goldberg debunks ("I've been speaking to [Boley] on and off now for a year, and his excuse-making had become increasingly ridiculous. The last time we spoke, he told me that there had been two organizations in Liberia during the civil war named the Liberian Peace Council: His, which was peaceful, and someone else's, which was a fighting faction. This was an absurd line of argument, especially to someone, me, who had seen him actually in command of child soldiers in the war zone.") (*Id.*).

On February 11, 2010, Goldberg posted a short follow-up, linking to the Article, entitled "Pat Robertson, Friend of Warlords" (the "Post"). (Ratner Decl. Ex. 8 "Post".) The 108-word Post refers to an article authored by Charles Johnson, which was published by another publication, that reported on the relationship between Reverend Pat Robertson and another Liberian war criminal, Charles Taylor. In the Post, Goldberg republished a portion of Johnson's article, and commented: "You should pardon the expression, but, Christ. Charles Taylor is an evil man, more evil than my own personal Liberian warlord, George Boley. I suppose I shouldn't be surprised by Pat Robertson, but this is fairly unbelievable." (Ratner Decl. Ex. 8 "Post".)

VI. THE CURRENT ACTION

Boley filed this action on January 27, 2012, alleging that Defendants' publication of the Article and the Post defamed him by (1) reporting on charges against him for extrajudicial killings, his arrest and detention, and the U.S. government investigation into alleged war crimes; (2) stating "I knew from firsthand observation, that his organization, the grossly-misnamed Liberian Peace Council, recruited and armed child soldiers; fed them drugs; and ordered them to rape and kill"; and (3) stating "You should pardon the expression, but Christ. Charles Taylor is an evil man, more evil than my own personal Liberian warlord, George Boley." (Compl. ¶¶ 20-21.) Boley claims Defendants' publications "falsely allege[] that Plaintiff committed acts which would constitute war crimes." (*Id.* ¶ 23.) Despite these claims, however, Boley has failed to allege any facts to support his bare allegation that "Defendants published the statements knowing them to be false with reckless disregard to the truth." (*Id*. ¶ 27.)

ARGUMENT

VII. DISMISSAL IS WARRANTED BY RULE 12(b)(6)

By this suit, Boley demands that Defendants be held civilly liable for reporting on a matter of public concern. This demand cuts at what the Supreme Court has recognized as the "heart of the First Amendment": "the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S. Ct. 876, 879 (1988). "[T]he courts in the District of Columbia have been vigilant in upholding those principles." *Carpenter v. King*, 792 F. Supp. 2d 29 (D.D.C. 2011), *aff'd*, 473 F. App'x 4 (D.C. Cir. 2012); *see also Lane v. Random House, Inc.*, 985 F. Supp. 141 (D.D.C. 1995) (recognizing "judicial disposition in favor or open and unobstructed" speech). Indeed, the D.C. Circuit has long instructed that "[i]n the First Amendment area, summary

procedures are even more essential. For the stake here, if harassment succeeds, is free debate." *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966).[3]

Here, dismissal at this stage is warranted pursuant to Rule 12(b)(6) on the grounds that (1) Boley's claim is time-barred, (2) the fair report privilege protects the reporting at issue, and (3) Boley has not plausibly and could not plausibly plead defamation. *See Molina-Aviles v. District of Columbia*, No. CIV.A. 10-1088, 2011 WL 2783853, at *2 (D.D.C. June 23, 2011) ("A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the adequacy of a complaint on its face, testing whether a plaintiff has properly stated a claim.").

A. The Instant Claim is Time-Barred

Boley's libel claim – filed almost three years after the complained-of articles were published – is time-barred by the one-year statute of limitations applicable under D.C. law.[4] *See* D.C. Code Ann. § 12-301(4) (setting one-year limitations period for libel and slander); *see, e.g.*, *Jin*, 254 F. Supp. 2d at 68 ("District of Columbia courts adhere strictly to the one-year limitation" in defamation claims). "The one-year time period begins to run when the right to maintain the action accrues." *LaPointe v. Van Note*, No. 1069-70, 2004 WL 3609346 (D.D.C.

[3] Although *Keogh* involved summary judgment, its reasoning is equally applicable to motions to dismiss. *See also Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26 (D.D.C. 1995) ("Given the threat to the first amendment posed by nonmeritorious defamation actions, it is particularly appropriate for courts to scrutinize such actions at an early stage of the proceedings to determine whether dismissal is warranted."), *aff'd*, 88 F.3d 1278 (D.C. Cir. 1996); *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 50 (D.C. 1983) ("In this area, perhaps more than any other, the early sifting of groundless allegations from meritorious claims made possible by a Rule 12(b)(6) motion is an altogether appropriate and necessary judicial function.").

[4] The District of Columbia, as the forum jurisdiction, will apply its own statute of limitations. *Jovanovic*, 561 F. Supp. 2d at 111; *Jin v. Ministry of State Sec.*, 254 F. Supp. 2d 61, 68 (D.D.C. 2001) ("Because the District of Columbia choice-of-law rules treat statutes of limitations as procedural, the rules require application of the District of Columbia statute of limitations.").

Nov. 9, 2004) (Walton, J.) (citing D.C. Code Ann. § 12-301(4)). The single publication rule applies, and one cause of action for libel began to accrue when the articles were originally published.[5] *Jin*, 254 F. Supp. 2d at 68-69; *Jankovic*, 494 F.3d at 1087 (if first publication occurs online, that publication starts the statute of limitations); *Foretich v. Glamour*, 753 F. Supp. 955, 960 (D.D.C. 1990) ("[T]he modern 'single publication rule' provides that in the case of a single, integrated publication of a periodical or edition of a book or similar aggregate communication, the statute of limitations runs from the date on which a publication was first made available to the general public."); *Ogden v. Ass'n of U.S. Army*, 177 F. Supp. 498, 502 (D.D.C. 1959) ("[T]he modern American law of libel has adopted the so-called 'single publication' rule; and, therefore, this principle must be deemed a part of the common law of the District of Columbia.").

Here, as is plain from the face of the Complaint,[6] the Article and the Post were respectively published on January 27, 2010 and February 11, 2010 (Compl. ¶¶ 20-21), but Boley did not file suit until January 22, 2013 – almost two years after the one-year statute of limitations

[5] Notably, it is also well-settled in this district that "the discovery rule is inapplicable to tort claims arising from the dissemination of information by the mass media." *Henderson v. MTV*, No. 05-1937 (EGS), 2006 WL 1193872, at *1 (D.D.C. May 3, 2006); *see also Mullin v. Washington Free Weekly, Inc.*, 785 A.2d 296, 299 & n.5 (D.C. 2001) (rejecting the "discovery rule," because any injury is readily apparent from a defamatory statement disseminated by the mass media). Atlantic constitutes a "mass media" defendant.

[6] "A defendant may raise the affirmative defense of a statute of limitations via a Rule 12(b)(6) motion when the facts giving rise to the defense are apparent on the face of the complaint." *Jovanovic*, 561 F. Supp. 2d at 111 (quoting *National R.R. Passenger Corp. v. Lexington Ins. Co.*, 357 F. Supp. 2d 287, 292 (D.D.C. 2005), *aff'd*, 249 F. App'x 832 (D.C. Cir. 2007)); *Jin*, 254 F. Supp. 2d at 67 (citing *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998)).

had expired. Accordingly, Boley's claim is time-barred and should be dismissed pursuant to Rule 12(b)(6).[7]

B. The Fair Report Privilege Protects the Articles at Issue

Boley's claim should be dismissed pursuant to Rule 12(b)(6) because the reporting in the complained-of articles is privileged under the fair report privilege, which protects against defamation suits where – as here – a news article accurately summarizes official actions, reports, documents, or proceedings. *See Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88 (D.C. 1980); *Bell v. Associated Press*, 584 F. Supp. 128, 130 (D.D.C. 1984); *Coles*, 881 F. Supp. at 31 n.3; *White v. Fraternal Order of Police*, 909 F.2d 512, 527 (D.C. Cir. 1990); *Reuber v. Food Chem. News*, 925 F.2d 703, 712 (4th Cir. 1991). Whether the fair report privilege protects an article is a question of law that courts routinely decide on an initial pre-discovery motion. *See*,

[7] It bears noting that tolling of Boley's claim is not warranted pursuant to D.C. Code § 12-302(a)(3), because Boley was not "imprisoned" for a crime when the cause of action accrued. Although Boley was in civil immigration detention for a period prior to filing suit, no D.C. Court has extended § 12-302(a)(3) to a civil immigration detention. This Court should not strain to do so here. Indeed, "the term 'imprisonment' should be given its ordinary meaning," which is "'the act of putting or confining a man in prison.'" *Fernandors v. District of Columbia*, 382 F. Supp. 2d 63, 69 (D.D.C. 2005) (citing *Rose v. Washington Times Co.*, 23 F.2d 993, 994 (D.C. Cir. 1928)); *Cannon v. District of Columbia*, 569 A.2d 595, 596 (D.C. 1990) (per curiam) ("It has long been established in this jurisdiction that in order for the complaining party to toll the running of the statute of limitations on the ground of disability by reason of imprisonment, such party must be in prison."). The ordinary meaning of a "prison," is "[a] state or federal facility of confinement for *convicted criminals*, esp. felons." Black's Law Dictionary, at 1232 (8th ed.) (emphasis added). Immigration detention proceedings are "civil, not criminal." *Zadvydas v. INS*, 533 U.S. 678, 690, 121 S. Ct. 2491, 2499 (2001); *Maldonado-Perez v. INS*, 865 F.2d 328, 332 (D.C. Cir. 1989); *Prieto-Romero v. Clark*, 534 F.3d 1053, 1065 (9th Cir. 2008) (citing *Demore v. Kim*, 538 U.S. 510, 528, 128 S. Ct. 1708, 1720 (2003)). Moreover, Boley could not demonstrate "real disabilities" that prevented him from litigating while he was detained, particularly given that he litigated at least two cases during that time. *See Cannon*, 569 A.2d at 596 ("[W]e are not persuaded that appellant . . . had 'real disabilities' from litigating while on parole . . . to toll the statute of limitations, given . . . that during the service of his first sentence in prison he was vigorously litigating in this jurisdiction . . . and after he was re-imprisoned under his second sentence he then filed this action."). Even after he was released from civil detention, Boley waited nine months to bring this suit.

e.g., *Hargrave v. Washington Post*, No. 09-0357(HHK), 2009 WL 1312513 (D.D.C. May 12, 2009), *aff'd*, 365 F. App'x 224 (D.C. Cir. 2010) (dismissing complaint under Rule 12(b)(6) claiming recitation of plaintiff's criminal testimony gave rise to libel because the report was protected by the fair report privilege); *Q Int'l Courier, Inc. v. Seagraves*, No. 95-1554, 1999 WL 1027034, at *4-5 (D.D.C. Feb. 26, 1999) (stating "[t]he question of whether a published account is fair and accurate is a question of law" and dismissing on a pre-discovery motion for summary judgment because articles accurately reported on and relied on the government's civil complaint); *Foretich v. Chung*, No. 91-0123, 1995 WL 224558, at *1-2 (D.D.C. Jan. 25, 1995) (dismissing on pre-discovery summary judgment motion a defamation claim against a news anchor, in part, for discussing the allegations in judicial proceedings).

Here, the Article serves the very function that the fair report privilege is designed to protect: it provides "both a fair and accurate accounting of public proceedings as well as informed commentary," *Coles*, 881 F. Supp. at 34, and thereby advances "[t]he purpose of the privilege" by "promot[ing] public scrutiny of governmental affairs," *Harper v. Walters*, 822 F. Supp. 817, 823 (D.D.C. 1993), *aff'd*, 40 F.3d 474 (D.C. Cir. 1994).

Indeed, the Article summarizes Boley's January 15, 2010 arrest, charges, and detention by ICE, and the DHS and ICE investigations; discusses the U.S. government's effort to deport Boley for alleged war crimes and human rights abuses in the Liberian civil war; comments on Boley's attempts to fight the charges in court; and summarizes the affidavit – itself absolutely privileged[8] – that Goldberg provided. Each of these official documents, proceedings, or actions clearly fall within the fair report privilege. *See White*, 909 F.2d at 515 (explaining that the

[8] "'[S]tatements preliminary to or in the course of a judicial proceeding' . . . enjoy 'absolute privilege' 'so long as the defamatory matter has some relation – a standard broader than legal relevance – to the proceeding." *Browning v. Clinton*, 292 F.3d 235, 246 (D.C. Cir. 2002) (citation omitted).

privilege "extends broadly to the report 'of any official proceeding, or any action taken by any officer or agency of the government,'" including not only government proceedings themselves, but also allegations or findings that prompt such proceedings) (citation omitted). For example, courts routinely hold that reporting on these topics is protected:

- Statements made concerning past or pending judicial proceedings, including those in which the speaker is a party or witness, *see, e.g.*, *Rosenberg v. Helinski*, 616 A.2d 866, 876 (Md. 1992) (statement of expert witness to reporters recounting his prior testimony covered by fair report privilege and testimony itself was protected by the absolute judicial privilege); *Southridge Capital Mgmt., LLC v. Lowry*, No. 01-4880, 2003 WL 68041, at *2 (S.D.N.Y. Jan. 7, 2003) (press release issued by plaintiff was a fair report of its pending judicial proceeding); *Proctor & Gamble Co. v. Quality King Distribs., Inc.*, 974 F. Supp. 190, 195-97 (E.D.N.Y. 1997) (company's statements in letter and press release describing its position in a lawsuit); *Karp v. Hill & Knowlton, Inc.*, 631 F. Supp. 360, 364 (S.D.N.Y. 1986) (statement by public relations firm characterizing the results of its client's appeal);

- Charges, arrests, and incarceration, *see, e.g.*, *Bell*, 584 F. Supp. at 130 (arrest report protected); *Porter v. Guam Publ'ns, Inc.*, 643 F.2d 615, 616-17 (9th Cir. 1981) (news item that reported contents of "daily police bulletin" of complaint and arrest reports based on false charges filed against plaintiff was protected by fair report privilege); *Cobin v. Hearst-Argyle Television, Inc.*, 561 F. Supp. 2d 546, 555-56 (D.S.C. 2008) (fair report privilege applied to police arrest report); *Medico v. Time, Inc.*, 643 F.2d 134, 139 (3d Cir. 1981) (fair report privilege extends to magazine's report based on FBI documents that "express only tentative and preliminary conclusions that the FBI has never adopted as accurate"); *Reeves v. American Broad. Cos.*, 719 F.2d 602, 603-04 (2d Cir. 1983) (privilege extends to news reports of "charges made to a grand jury," even though "[n]o formal charges were ever filed against" the plaintiff or anyone else and even though grand jury proceedings are not public); *McCormick v. Wright*, No. 2:10-cv-00033-RBH, 2010 WL 565303, at *3 (D.S.C. Feb. 17, 2010) (newspaper not liable for printing pending charges, as a fair report applies to "case reports, published cases, investigative reports, or arrest records . . . .");

- Law enforcement investigations, *see, e.g.*, *White*, 909 F.2d at 515 (privilege applies to report of administrative committee established by the D.C. mayor); *Dowd v. Calabrese*, 589 F. Supp. 1206, 1217 (D.D.C. 1984) (report of DOJ investigation protected as a fair report); *Nanji v. National Geographic Soc'y*, 403 F. Supp. 2d 425, 433-34 (D. Md. 2005) (fair report privilege applied to DOJ reports);

- Statements by government officials, *see, e.g.*, *Yohe v. Nugent*, 321 F.3d 35, 44 (1st Cir. 2003) (articles giving a "rough-and-ready summary" of official statement

by police protected by fair report privilege); *Law Firm of Daniel P. Foster, P.C. v. Turner Broad. Sys., Inc.*, 844 F.2d 955 (2d Cir. 1988) (statement by FBI official regarding execution of search warrant protected).

Moreover, the Article expressly reports on the investigation and proceedings. *See Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.D. Cir. 1985) (fair report privilege applies where "apparent either from specific attribution or from the overall context that the article is quoting, paraphrasing or otherwise drawing upon official documents or proceedings"); *Ditton v. Legal Times*, 947 F. Supp. 227, 230 (E.D. Va. 1996) ("A publisher properly attributes a report if the average reader is likely to understand that the report summarizes or paraphrases from the judicial proceedings."), *aff'd*, 129 F.3d 116 (4th Cir. 1997).

Notably, Boley has not – and cannot – plausibly allege that the Article is anything but a fair and "substantially accurate," *White*, 909 F.2d at 527, account of the findings and allegations in the investigations, arrest, detention, charges, and court proceedings. *See Yohe*, 321 F.3d at 44 ("'Accuracy' for fair report purposes refers only to the factual correctness of the events reported and not to the truth about the events that actually transpired."); *Zerman v. Sullivan & Cromwell*, 677 F. Supp. 1316, 1322 (S.D.N.Y. 1988).[9] The Article fairly and accurately reports the status of

[9] To be sure, the Article and Post in places use subjective, figurative language or hyperbole when they refer to Boley's lawsuit against human rights advocates as "the definition of chutzpah" which was "unsurprisingly" dismissed, or to "the grossly-misnamed Liberian Peace Council," Boley's "increasingly ridiculous" "excuse making," "absurd line of argument," (Ratner Decl. Ex. 7 "Article") or to Charles Taylor as "more evil than my own personal Liberian warlord, George Boley," (Ratner Decl. Ex. 8 "Post"), but such hyperbole is non-actionable opinion. *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 624 (D.C. Cir. 2001) (hyperbolic statement that referred to an individual as having "paranoia" lacks defamatory meaning of psychiatric diagnosis); *Kreuzer v. George Washington Univ.*, 896 A.2d 238, 248 (D.C. 2006) (statement "I think he's inhaling" held nonactionable as hyperbole); *Guilford Transp. Indus. v. Wilner*, 760 A.2d 580, 598 (D.C. 1999) ("'[T]o say of one: you are reactionary, you are undemocratic, you are a nationalist, you are an isolationist, you are a New Dealer, you are a Union Leaguer, you are opposed to labor, you are a coddler of labor, is similarly to express an opinion.'") (citation omitted). The fair report privilege does not require a verbatim, dry recitation of the underlying documents or proceedings, and a plaintiff cannot defeat the privilege

DHS and ICE proceedings and the government's investigation into Boley. *See Boley v. Philips*, No. 6:12-cv-06016-CJS, ECF No. 4, at 21 (W.D.N.Y. filed Mar. 14, 2012) (ICE charges). To the extent Boley complains of the Article's report of Goldberg's sworn affidavit, the Article substantially accurately summarizes the original affidavit Goldberg swore to under oath based on personal knowledge (which is itself absolutely privileged). (Ratner Decl. Ex. 5 "Goldberg Aff." ¶¶ 8, 9, 14, 15-29.)

Thus, Boley's claim should be dismissed pursuant to Rule 12(b)(6), as it is barred by the fair report privilege.

C. Plaintiff Has Not and Cannot Plausibly Plead a Claim for Defamation

A complaint will be dismissed pursuant to Rule 12(b)(6) for failure to state a claim if it fails "'to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1959 (2007) (citation omitted). A plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.*, 127 S. Ct. at 1959. Rather, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is "plausible on its face." *Id.* at 570, 127 S. Ct. at 1974. In determining that issue, "a court need not accept as true legal conclusions set forth in a complaint;" "'[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Ashcroft v. Iqbal*, 556 U.S. 662,678, 129 S. Ct. 1937, 1949 (2009). Here, Boley has failed to – and cannot plausibly – plead facts to support two

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by citing minor inaccuracies. *Johnson v. Johnson Publ'g Co.*, 271 A.2d 696, 698 (D.C. 1970) ("[T]he question is whether or not the publication, taken as a whole, was a fair and *substantially correct* repetition of these allegations and thus privileged.") (emphasis added); *White*, 909 F.2d at 525 ("Newspaper reporters should not be required to report the results of investigative journalism with a precision establishing an exhaustive, literal picture of what transpired.").

significant elements of a defamation claim: (1) that the statements at issue are false, and (2) that the Defendants acted with knowledge of falsity or reckless disregard for the truth, as required in light of Boley's status as a public figure. *Jankovic*, 494 F.3d at 1088 (stating elements of defamation); *Clyburn v. News World Commc'ns, Inc.*, 903 F.2d 29, 31 (D.C. Cir. 1990) (a public figure "can prevail in a defamation suit only by proving the defendant's 'actual malice'").

1. Failure to Plausibly Plead Falsity

First, Boley does not allege – and cannot plausibly allege – facts to support the claim that the reporting at issue, including reporting characterizing him as a "warlord," is materially false. *See Weyrich*, 235 F.3d at 628 (noting that the law of defamation is concerned only with "*material*[ ]" falsity) (emphasis added); *Masson v. New Yorker Magazine, Inc.*¸ 501 U.S. 496, 516, 111 S. Ct. 2419, 2433 (1991) ("[S]o long as 'the substance, the gist, the sting, of the libelous charge [is] justified,'" the publication must be deemed substantially true, even if the defendant "cannot 'justify every word of the alleged defamatory matter.'") (citation omitted). *Id.*, 111 S. Ct. at 2433. "[A] plaintiff seeking to prove falsity . . . [must] prove that the conduct alleged is substantially different from the conduct in which the plaintiff in fact engaged." Hon. Robert D. Sack, Sack on Defamation § 3:9 (4th ed. 2010); *see also Masson*, 501 U.S. at 517, 111 S. Ct. at 2433 (holding that an alleged defamation is "not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'"). Boley has failed to meet his burden of plausibly alleging facts (nor can he) to support the charge that the defamatory sting of the publication is untrue, and his claim should therefore be dismissed. *Copeland-Jackson v. Oslin*, 555 F. Supp. 2d 213, 217 (D.D.C. 2008) (Huvelle, J.) (dismissing defamation claim); *cf. Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1294 (D.C. Cir. 1988) (same).

Moreover, where, as here, the allegations of the complaint, documents relied on or referenced in the complaint, or records subject to judicial notice corroborate the gist of the alleged defamation, dismissal of the claim is warranted. *See Oslin*, 555 F. Supp. 2d at 217; *Robertson v. Cartinhour*, 867 F. Supp. 2d 37, 59 (D.D.C. 2012) (Huvelle, J.) (granting motion to dismiss libel claim based on statements that plaintiff was the subject of a criminal investigation and was found liable for breach of fiduciary duties and legal malpractice, because the statements were substantially true based on public records). In *Oslin*, for example, the *pro se* plaintiff alleged he had been defamed by a journalist who said the plaintiff was a "convicted pedophile." 555 F. Supp. 2d at 217. In fact, the evidence presented showed plaintiff had previously been convicted (and pleaded guilty) to two counts of "gross sexual imposition" on two boys. *Id.* On that record, the court dismissed the complaint under Rule 12(b)(6), finding the plaintiff could not demonstrate the material falsity of the journalist's statement because the plaintiff's criminal records showed the statement was substantially accurate.

The definition of a "warlord" is (1) a "supreme military leader" or (2) "a military commander exercising civil power by force usually in a limited area." *See Merriam-Webster Dictionary*, *available at* http://www.merriam-webster.com/dictionary/warlord. In this case, there is ample evidence – of which this Court may take judicial notice – that Boley was, in fact, found to be a "warlord" during the Liberian civil war who committed war crimes and human rights abuses. Specifically, the public record reveals that:

- The LTR Commission identified "George Boley" as the "leader of [the] warring faction[]," "LPC" (Ratner Decl. Ex. 2 "LTR Commission Report," at 349);
- The LTR Commission identified "George Boley, LPC" as "responsible" under a preponderance of the evidence standard and "recommended [Boley] for prosecution" for "the commission of human rights violations including violations of international humanitarian law, international human rights law, war crimes, and economic crimes including but not limited to, killing, gang rape, multiple rape,

forced recruitment, sexual slavery, forced labor, exposure to deprivation[.]" (*Id.* at 53, 335-36, 349);

- The State Department Report on Human Rights Practices in Liberia documented credible reports that Boley authorized the extrajudicial executions of seven of his soldiers in 1995 and that his fighters committed murder and rape (Ratner Decl. Ex. 1 "State Department Report," at 3, 6); and

- On February 6, 2012, an immigration judge with the Executive Office for Immigration Review – a component of the U.S. Department of Justice – found Boley inadmissible to the United States based upon the U.S. government's charge of recruitment and use of child soldiers and commission of extrajudicial killings in Liberia in the 1990s (Ratner Ex. 6 "ICE Press Release," at 1).

As noted above, *see supra*, note 1, the Court may take judicial notice of each of these public records. Accordingly, the record in this case, as in *Oslin*, "precludes any reasonable inference that the central allegation of the challenged [publication] was false." *Tavoulareas v. Piro*, 817 F.2d 762, 783-84 (D.C. Cir. 1987) (en banc).

Thus, Boley has not (and cannot) plausibly plead material falsity of the statements at issue, and therefore his defamation claim should be dismissed.

2. Failure to Plausibly Plead Actual Malice

Even if falsity were adequately plead, Boley has failed to and cannot plausibly allege facts that suggest Defendants acted with actual malice, as required for a public figure or public official to plead a defamation claim.[10] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335-37, 94

[10] That Boley – a high-level government official in Liberia, the leader of the Liberian Peace Council, and a former candidate for President of Liberia (Compl. ¶¶ 4, 10, 12, 15, 16, 18) – constitutes a public public official is clear beyond cavil. *See, e.g., Sharon v. Time, Inc.*, 599 F. Supp. 538, 563 (S.D.N.Y. 1984) ("parties properly assume" Ariel Sharon, former Israeli defense minister, was "'public official,' or, in any event, a 'public figure'"). Boley also constitutes a "limited purpose public figure," having "inject[ed]" himself into and been "drawn into a particular public controversy" centered on his alleged war crimes and human rights abuses during the Liberian civil war. *Tavoulareas*, 817 F.2d at 772; *see also LaPointe*, 2004 WL 3609346, at *9 (finding secretary general of the U.N.'s conference on endangered species who publicly opposed a complete ban on African ivory trade was a limited purpose public figure); *OAO Alfa Bank v. Center for Public Integrity*, 387 F. Supp. 2d 20, 43 (D.D.C. 2005) (two

S. Ct. 2997, 3005 (1974) (fault required in libel case); *Harrison v. Washington Post Co.*, 391 A.2d 781, 783 (D.C. 1978); *Clyburn*, 903 F.2d at 33. Actual malice is an exacting standard that requires a plaintiff to plead that the speaker made defamatory statements with a "high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S. Ct. 209, 216 (1964); *see also Gertz*, 418 U.S. at 334 n.6, 94 S. Ct. at 3004 n.4 ; *Foretich v. CBS, Inc.*, 619 A.2d 48, 59 (D.C. 1993). For example, a plaintiff could support a defamation claim with allegations of facts evidencing that a defendant was subjectively aware when it published that the story was "(1) fabricated; (2) so inherently improbable that only a reckless person would have put [it] in circulation; or (3) based wholly on an unverified anonymous telephone call or some other source that [plaintiff] has obvious reasons to doubt." *Lohrenz v. Donnelly*, 350 F.3d 1272, 1283 (D.C. Cir. 2003).

Here, however, the Complaint nowhere plausibly alleges facts (nor can it) "suggesting that" Atlantic "fabricated the" Article and Post, that the Article and Post "were so improbable that only a reckless person would have circulated the story," or that Atlantic "acted *wholly* on an unverified anonymous telephone call." *Parisi v. Sinclair*, 845 F. Supp. 2d 215, 218-19 (D.D.C.

Russian oligarchs who were "leading participants in the transformation of the Russian economy" were limited purpose public figures); *Egiazaryan v. Zalmayev*, 11 Civ. 2670 (PKC), 2011 WL 6097136, at *4-5 (S.D.N.Y. Dec. 7, 2011) (finding a member of the Russian Duma, or parliament, a public figure); *Desai v. Hersh*, 719 F. Supp. 670, 673 (N.D. Ill. 1989) (confirming parties' stipulation that former high-ranked official in the Indian government was public figure).

Even assuming *arguendo* that Boley is neither a public figure nor a public official, the Complaint must still be dismissed because he has failed to plead negligence, the lower standard applicable to private figure plaintiffs. *Phillips*, 424 A.2d at 87 ("[T]he basic standard of care in the District of Columbia for media defamation of private individuals . . . [is] that of negligence."); *see also Gertz*, 418 U.S. at 347, 94 S. Ct. at 3010 (holding that as a matter of constitutional law, states may not impose "liability without fault" in defamation cases brought by private plaintiffs). Nowhere does Boley allege that Atlantic acted negligently – nor could he, for as the Article and Post reflect, Goldberg interviewed Boley, investigated the charges that Boley is a warlord through personal observation and corroboration, and included Boley's side of the story in the Article – all factors that show lack of negligence, much less actual malice.

2012) (citing *Lohrenz*, 350 F.3d at 1283). In fact, the Complaint's sole allegation of fault – a conclusory allegation of actual malice in the libel *per se* claim (Compl. ¶ 27) – is wholly insufficient to plead fault. Since the U.S. Supreme Court's decisions in *Twombly* and *Iqbal*, federal courts have repeatedly dismissed defamation cases for failure to state a claim where, as here, the plaintiff merely pleads conclusory allegations of actual malice. *See, e.g., Parisi*, 845 F. Supp. 2d 215; *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50 (1st Cir. 2012); *Mayfield v. NASCAR*, 674 F.3d 369, 378 (4th Cir. 2012); *Egiazaryan*, 2011 WL 6097136, at *8; *Hanks v. Wavy Broad., LLC*, No. 2:11-cv-439, 2012 WL 405065, at *12 (E.D. Va. Feb. 7, 2012); *Pan Am Sys., Inc. v. Hardenbergh*, 871 F. Supp. 2d 6, 17 (D. Me. 2012); *Hakky v. Washington Post Co.*, No. 8:09-cv-2406-T-30MAP, 2010 U.S. Dist. LEXIS 63065, at *17-18 (M.D. Fla. June 24, 2010); *Diario El Pais, S.L. v. Nielsen Co., (US)*, No. 07-CV-11295, 2008 WL 4833012, at *6-7 (S.D.N.Y. Nov. 6, 2008). *See also Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974.

It bears noting that the facts here conclusively demonstrate an absence of actual malice by Defendants. The Article reflects that Goldberg interviewed Boley during the Liberian civil war in the 1990s and in 2009, personally observed Boley commanding child soldiers during the Liberian civil war, and corroborated his observations through interviews with the child soldiers themselves (*see* Ratner Decl. Ex. 7 "Article") – conclusive evidence of the absence of actual malice. *See Loeb v. New Times Commc'ns Corp.*, 497 F. Supp. 85, 93 (S.D.N.Y. 1980) ("It cannot be said that the defendants' conduct constitutes an 'extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.' Loeb himself was interviewed . . . ."); *LaPointe*, 2006 WL 3734166, at *10 (finding author who "relied on his personal knowledge," including "attendance" at a meeting, "as well as other published reports,"

did not act with actual malice); *cf. Newton v. National Broad. Co.*, 930 F.2d 662, 686 (9th Cir. 1990) (repeated attempts to interview plaintiff dispel accusation of actual malice and purposeful avoidance of the truth).

The Article also includes Boley's side of the story and his denials, which further prevents a finding of actual malice. *See Lohrenz*, 350 F.2d at 1286 ("Reporting perspectives at odds with the publisher's own 'tends to rebut a claim of malice'") (quoting *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1304 (D.C. Cir. 1996)); *McFarlane*, 74 F.3d at 1304 ("[F]ull (or pretty full) publication of the grounds for doubting a source tends to rebut a claim of malice, not to establish one").

Finally, reliance on official reports or sources, as Defendants did here, cannot, as a matter of law, constitute actual malice. *Bell*, 584 F. Supp. at 129, 132 (no actual malice as a matter of law where reporter relied on arrest report); *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 292 (4th Cir. 2008) (no actual malice as a matter of law where radio commentator relied on official reports about rape, torture, and murder at Abu Ghraib prison); *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 562-63 (5th Cir. 1997) (no actual malice as a matter of law where arson allegations were based on a police report); *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 175 (2d Cir. 2001) (no actual malice as a matter of law where author relied on sources including a police report).

Thus, as Boley fails to plausibly allege facts to support actual malice – and indeed, because he could not plausibly do so as a matter of law – his Complaint should be dismissed.[11]

[11] Amending the Complaint would be futile, since Plaintiff does not – and cannot – state a claim. This Court should dismiss with prejudice. *See James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996) ("Courts may deny a motion to amend a complaint as futile . . . if the proposed claim would not survive a motion to dismiss.").

VIII. DISMISSAL AND AN AWARD OF ATTORNEYS FEES ARE MERITED BY THE D.C. ANTI-SLAPP ACT

The District of Columbia Anti-SLAPP Act of 2010 was enacted to encourage the swift and efficient dismissal of precisely the type of claim Boley brings here.[12] D.C. Code § 16-5502. In urging the adoption of the Act, the D.C. Council's Committee on Public Safety and the Judiciary recognized with some dismay the growing use of lawsuits aimed to punish or prevent the expression of opposing points of view, commonly referred to as strategic lawsuits against public participation, or SLAPPs:

> Such lawsuits . . . have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights.

Committee Report on Bill 18-893 (Nov. 18, 2010) at 1 (Ratner Decl. Ex. 9 "Committee Report").

The Act allows defendants to "file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim." D.C. Code § 16-5502(a). Once "a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest," the statute provides that "the

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[12] The D.C. Anti-SLAPP Act provides substantive protections that can be invoked in federal diversity cases. *See Farah*, 863 F. Supp. 2d at 36 n.10 (D.D.C. 2012), *appeal docketed*, No. 12-7055 (D.C. Cir. June 15, 2012) (applying the Act to a diversity case in federal court and dismissing libel and related claims under both the Act and Fed. R. Civ. P. 12(b)(6)). To date, the district court in *3M Co. v. Boulter* is the only district court to conclude that the D.C. Anti-SLAPP Act does not apply in federal diversity cases. *See* 842 F. Supp. 2d 85, 96 (D.D.C. 2012) (Wilkins, J.), *appeal dismissed*, No. 12-7012 (D.C. Cir. Oct. 19, 2012). But that decision is contrary to the court in *Farah* and courts across the country that apply anti-SLAPP statutes in federal diversity actions. *See, e.g.*, *Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010) ("[F]ederal appellate courts that have addressed whether they must enforce these state anti-SLAPP statutes in federal proceedings have concluded that they must.").

motion *shall* be granted unless the responding party demonstrates that the claim is *likely* to succeed on the merits." D.C. Code § 16-5502(b) (emphasis added).

The Act applies to claims based on statements made "[i]n connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law," and also to "[a]ny other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest." *Id.* § 16-5501(1)(A), (B). An "issue of public interest" is defined broadly as one "related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." *Id.* § 16-5501(3).

The Act also provides for a stay of discovery, an expedited hearing on the special motion to dismiss, and for the issuance of a ruling as soon as practicable after the hearing. *Id.* § 16-5502 (c), (d). If the motion to dismiss is granted, the complaint shall be dismissed with prejudice. *Id.* § 16-5502(d). Successful defendants are entitled to costs and attorney's fees upon an appropriate showing.[13]

For the reasons discussed below, dismissal and an award of attorneys fees are merited by the D.C. Anti-SLAPP Act.

A. Plaintiff's Claim Falls Within the Scope of D.C.'s Anti-SLAPP Act

This lawsuit is a classic SLAPP case, intended to chill speech and punish Plaintiff's (perceived) political enemies, rather than redress any legitimate grievance. The complained-of articles clearly fall within the scope of D.C. Code § 16-5501(1)(A)(i), as they focus on the

[13] D.C. Code § 16-5504(a). If this Court grants Defendant's Special Motion to Dismiss, Defendants will file a separate motion setting forth the fees and costs incurred and requesting an award of fees.

controversy stoked by DHS and ICE investigations into Boley, his arrest and charges arising from his alleged war crimes and human rights abuses during the Liberian civil war, and therefore constitute statements made "[i]n connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law."

The articles also involve an issue under consideration by the executive branch and an "official proceeding authorized by law," as the articles report on separate lawsuits filed by Boley himself. *See Boley v. Minnesota Advocates for Human Rights*, No. 0:08-cv-5908-PJS-FLN, ECF No. 1 (D. Minn. filed Nov. 5, 2008); *Boley v. United States*, 6:09-cv-06348-CJS, ECF No. 1 (W.D.N.Y. filed July 9, 2009).

Finally, the complained-of articles – which report on alleged war crimes and human rights abuses of a former high-ranking Liberian official – are protected under D.C. Code § 16-5501(1)(B), which extends the statute's protection to any statement made "in connection with . . . an issue of public interest" involving a "public figure." *See also McCree v. McCree*, 464 A.2d 922, 928 (D.C. 1983) (adopting the "general rule of statutory construction" that a "remedial statute should be construed liberally in order to effectuate the purposes for which it was enacted").

Accordingly, Plaintiff's claims clearly fall within the scope of D.C.'s Anti-SLAPP Act and the burden must shift to Plaintiff to demonstrate that he is likely to succeed on the merits of his claim. For the reasons discussed in Part I and based on the official findings contained in the exhibits, however, Plaintiff cannot make this showing, as his defamation claim is without merit.

CONCLUSION

For all of the reasons set forth above, Defendants respectfully request that the Court dismiss Plaintiff's Complaint in its entirety with prejudice and award, pursuant to the D.C. Anti-

SLAPP Act, The Atlantic Monthly Group, Inc. and Jeffrey Goldberg their attorney's fees and costs.

Dated: February 15, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2013, I caused the foregoing Defendant The Atlantic Monthly Group, Inc. and Jeffrey Goldberg's Motion to Dismiss and Special Motion to Dismiss Plaintiff's Complaint, Memorandum of Points and Authorities, Declaration of Micah J. Ratner in support thereof, and proposed order to be served via the court's CM/ECF system upon the Clerk of the Court and via First Class mail, postage prepaid, upon the following persons:

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/s/ Micah J. Ratner
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