VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

DEVIN G. NUNES, Plaintiff, v. THE MCCLATCHY COMPANY, ELIZABETH A. "LIZ" MAIR, and MAIR STRATEGIES, LLC, Defendants.	:	Case No. CL19-629

MEMORANDUM IN SUPPORT OF DEFENDANT THE MCCLATCHY COMPANY'S MOTION TO DISMISS BY LIMITED SPECIAL APPEARANCE FOR LACK OF PERSONAL JURISDICTION

This baseless lawsuit is a cynical maneuver to score cheap political points at the expense of a free press. Plaintiff Devin Nunes is a California congressman who claims that a May 2018 article in a California newspaper was defamatory, even though the article accurately described a settled sexual harassment lawsuit that he concedes was "extensively reported" by another publication. Am. Compl. ¶ 8 n.2. In fact, the article with which he now takes issue makes clear that he had received multiple opportunities to set the record straight. But rather than offer any statement, rebuttal, or purported correction, "Nunes' office did not return requests for comment."[1] There is no claim here, despite a powerful politician's demand for $150,000,000 because his local newspaper (whose repeated past endorsements he seemed happy to accept) fairly reported something he does not like.

[1] Mackenzie Mays, *Congressional Ethics Office Gets New Complaints About Nunes' Wine Business, Financial Disclosures*, The Fresno Bee (July 11, 2018), https://www.fresnobee.com/news/business/article214693435.html.

But this motion is not about the lack of merit of Plaintiff's lawsuit. Even before reaching the substance of Plaintiff's claims, his Complaint should be dismissed for lack of personal jurisdiction over The McClatchy Company ("McClatchy"). McClatchy is a Delaware holding company with headquarters in California that has no relevant contacts with Virginia and does not publish any newspapers or have any reporters in Virginia (or anywhere else). Plaintiff seems to take issue with one of McClatchy's wholly independent subsidiaries, McClatchy Newspapers, Inc. ("MNI"), which publishes *The Fresno Bee*. But because MNI is not a "device, stooge, or dummy" of McClatchy, the Court cannot disregard the "separate corporate entities" by imputing MNI's alleged acts to McClatchy. *Eure v. Norfolk Shipbuilding & Drydock Corp.*, 263 Va. 624, 634 (2002) (quotation marks omitted). Even if imputation were proper, there still would be no jurisdiction over McClatchy because the alleged conduct giving rise to this case—posting an article in a California newspaper about a California lawsuit regarding events in California—has nothing to do with Virginia, and Plaintiff does not allege that he incurred any harm in Virginia.

There is no *general* personal jurisdiction over McClatchy because its contacts with Virginia are not so "substantial and of such a nature as to render the corporation at home" here. *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19 (2014). Nor is there *specific* personal jurisdiction because McClatchy has not purposefully directed any activity toward Virginia, and any minimal contacts with Virginia are unrelated to the alleged events giving rise to this case. Forcing a California company to litigate California-based claims made by a California Plaintiff under Virginia procedural law would violate due process, and requiring McClatchy to incur the substantial costs, inconvenience, and burdens of flying its executives, counsel and trial witnesses across the country would offend all "notions of fair play and substantial justice." *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (quotation marks omitted).

Plaintiff, by contrast, would not be inconvenienced in the slightest if the Court dismisses this case so it can be refiled, if at all, against the correct defendant(s) in a California court: Plaintiff resides in California, and the relevant events occurred there. Indeed, the offices of *The Fresno Bee* are only ten blocks from the Fresno County Superior Court, and Plaintiff has a congressional office less than two miles from the Tulare County Superior Court. Plaintiff is quite capable of filing suit in either. Just last month, for example, a Fresno lawyer and Plaintiff's counsel in this case sued four California residents in the Tulare County Superior Court on behalf of the Devin Nunes Campaign Committee. But unlike Virginia's anti-SLAPP statute, California's anti-SLAPP statute gives defendants the *right* to obtain attorneys' fees and costs for defending "strategic lawsuits against political participation," like this one. *See* Cal. Civ. Proc. Code § 425.16(c)(1). So instead of filing suit in his home forum, Plaintiff added to this Court's busy docket by filing suit 3,000 miles away, presumably in an attempt to evade that penalty, to avoid possible scrutiny by a jury of his California constituents, and to unduly burden McClatchy.

The Court should reject Plaintiff's forum shopping and dismiss this California-based dispute for lack of personal jurisdiction over McClatchy.[2]

BACKGROUND

McClatchy is a Delaware corporation that is headquartered in California. Lintecum Decl. ¶¶ 3, 7. It is a holding company that has no offices, employees, or reporters in Virginia; owns no property in Virginia; and has written off its sole investment here since 2017. *Id.* ¶¶ 3, 6, 8. McClatchy is not registered to do business in the Commonwealth. *Id.* ¶ 3. Nor does it have a

[2] McClatchy moves by limited special appearance and challenges only personal jurisdiction. This motion is therefore "unrelated to adjudicating the merits" and "does not waive any objection to personal jurisdiction." Va. Code § 8.01-277.1(B). McClatchy reserves the right to file responsive motions if the Court denies this motion, including but not limited to a demurrer, a motion to dismiss for improper venue, a motion to compel arbitration, and an anti-SLAPP motion to strike.

registered agent in Virginia. *Id.* Plaintiff served McClatchy with the Complaint in this case on August 19, 2019, via a process server in Delaware. *Id.* ¶ 6.

McClatchy does not publish any newspaper anywhere. Lintecum Decl. ¶ 5. Nor does it have any reporters in Virginia, or anywhere else. *Id.* ¶ 6. McClatchy has no revenue in Virginia or elsewhere. *Id.* ¶ 3. McClatchy owns independent subsidiaries that operate in fourteen other States, but not Virginia. *Id.* No newspaper under McClatchy's corporate umbrella operates in Virginia or has offices, employees, or reporters based here. *Id.* ¶¶ 6-7.

One of McClatchy's subsidiaries, MNI, publishes *The Fresno Bee* and other publications solely in California and the State of Washington. Lintecum Decl. ¶ 4. MNI is a Delaware corporation with its headquarters in California. *Id.* It has no offices, employees, or reporters in Virginia; does not advertise in Virginia; has never owned property in Virginia; does not have a registered agent in Virginia; and is not registered to do business in Virginia. *Id.* McClatchy and MNI maintain separate books and observe separate corporate formalities. *Id.* McClatchy does not exercise continual supervision over or intervene in MNI's affairs. *Id.*

The Fresno Bee is a newspaper based in Fresno, California. Ritchey Decl. ¶ 8. It has no offices, employees, or reporters in Virginia; does not advertise in Virginia; has never owned property in Virginia; does not have a registered agent in Virginia; is not registered to do business in Virginia; and does not contract with any distributor in Virginia. *Id.* ¶¶ 4-5. Of its 39,004 subscribers, only 43 Virginia addresses receive *The Fresno Bee*—all via the U.S. mail. *Id.* ¶ 5.

Plaintiff has had an electronic subscription to *The Fresno Bee* since September 4, 2016. Ritchey Decl. ¶ 7. All new subscribers agree to Terms of Service providing that "[c]ourts located in Fresno County, California have jurisdiction in any dispute arising from these Terms of Service." *Id.* ¶ 7 & Exs. A, B. One such term is that "[i]n no event will FresnoBee.com, The McClatchy

Company, or their parents or affiliates be liable for . . . any claim attributable to errors, omissions, or other inaccuracies published on FresnoBee.com or in its mobile apps." *Id.*[3]

Plaintiff Nunes was born and raised in California, is still a California resident, and has represented California as a congressman since 2003. Am. Compl. ¶ 4. He filed this lawsuit in April 2019 asserting three causes of action:

> (1) Defamation against McClatchy based on the theory that its subsidiary, MNI, published a defamatory article in *The Fresno Bee* in May 2018, posted the article on www.fresnobee.com, and shared a link to the article via Twitter. *Id.* ¶ 10. This article described allegations in a California lawsuit involving a fundraiser at a California winery for which Plaintiff is a limited partner. *Id.* ¶¶ 10-12.
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> (2) Conspiracy against McClatchy and two "co-conspirators," Elizabeth Mair and Mair Strategies, LLC (together, "Mair"), based on the theory that McClatchy and Mair "engaged in a joint scheme . . . to destroy [Plaintiff's] personal and professional reputations, advance the goals of the dark money behind [a] paid-for[-]smear campaign, interfere with [Plaintiff's] duties as a United States Congressman, and influence the outcome of a federal election." *Id.* ¶ 34.
>
> (3) Injunction against McClatchy requiring it "to deactivate all hyperlinks to all online articles and all tweets, retweets, replies and likes by McClatchy or any of its agents that contain false and defamatory statements about Nunes." *Id.* ¶ 39.

The Complaint does not allege that Plaintiff lives or works in Virginia, or has ever stepped foot on Virginia soil. Nor does it allege that he suffered harm in Virginia.

Plaintiff has two congressional offices in California. One is less than two miles from the state court where Plaintiff—represented by the same counsel—recently sued several California residents.[4] *See* Complaint, *Devin Nunes Campaign Committee v. Seeley*, No. 27766 (Cal. Sup.

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[3] The Terms of Service also include an arbitration provision and a waiver of any claim not brought within one year. *See* Ritchey Decl. Exs. A, B.

[4] The congressional office is at 113 N. Church Street in Visalia, CA 93291. *See* Devin Nunes, Office Locations, https://tinyurl.com/y34o4kgu (last visited Aug. 29, 2019). The Tulare County Superior Court is approximately 1.7 miles away at 221 South Mooney Boulevard, Visalia, CA 93291. *See* The Superior Court of California, County of Tulare, http://www.tularesuperiorcourt.ca.gov/ (last visited Aug. 29, 2019).

Ct., Tulare Cnty. Aug. 1, 2019), *available at* https://tinyurl.com/y5v7x3nw. The other office is located about twelve miles from *The Fresno Bee*'s headquarters and Fresno County Superior Court.[5]

ARGUMENT

"Plaintiff bears the burden of proving by a preponderance of the evidence that the Court has personal jurisdiction over each defendant." *Frizzell v. Danieli Corp.*, 81 Va. Cir. 427 (2010). "[C]onclusory pleading" is not enough; there must be "facts supporting the exercise of jurisdiction." *E. Direct Mktg. v. The Coolidge Co.*, 26 Va. Cir. 282 (1992).

In determining whether jurisdiction exists over a nonresident defendant, "the Court engages in a two-part analysis." *Frizzell*, 81 Va. Cir. at 427. "First, the Court asks whether Virginia's long-arm statute reaches the non-resident defendant"; if so, the Court asks whether exercising jurisdiction over the defendant "complies with the due process requirements of the Fourteenth Amendment to the United States Constitution." *Id.* (quotation marks omitted); *see also Sutherland v. Robby Thruston Carpentry, Inc.*, 68 Va. Cir. 43 (2005) (articulating same two-part test). Plaintiff has not met—and cannot meet—his burden for either requirement.

I. The Virginia Long-Arm Statute Does Not Reach McClatchy.

In an attempt to establish jurisdiction over McClatchy, Plaintiff cites subsections (A)(1), (A)(3), and (A)(4) of Virginia's long-arm statute, *see* Am. Compl. ¶ 21, which provides:

> A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action *arising from the person's*:
>
> 1. Transacting any business in this Commonwealth;
>
> . . . .
>
> 3. Causing tortious injury by an act or omission in this Commonwealth;

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[5] The congressional office is at 264 Clovis Avenue, Clovis, CA 93612. *See* Devin Nunes, Office Locations, https://tinyurl.com/y34o4kgu (last visited Aug. 29, 2019). *The Fresno Bee* is located approximately 12.5 miles away at 1626 E. Street Fresno, CA 93786. *See* Ritchey Decl. ¶ 8.

> 4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth.

Va. Code § 8.01-328.1 (emphasis added). None of these three subsections applies here.

First, McClatchy does not "[t]ransact[] any business in this Commonwealth." Va. Code § 8.01-328.1(A)(1). Cases finding jurisdiction under this provision generally have involved nonresident companies that register to do business in Virginia, which McClatchy has not done, or "regularly and systematically do[ ] business in Virginia," which McClatchy does not do. *Witt v. Reynolds Metals Co.*, 240 Va. 452, 456 (1990) (finding personal jurisdiction over nonresident company). Although the Complaint vaguely alleges that McClatchy "broadcast[s]" its "national news coverage" to Virginia, Am. Compl. ¶ 8, that is not true; McClatchy does not broadcast news coverage to Virginia, or anywhere else, Lintecum Decl. ¶ 5. And even if McClatchy engaged in a predicate business transaction in Virginia, Plaintiff's claims do not "arise[] from" that transaction, Va. Code § 8.01-328.1, because the claims arise from alleged actions in California—e.g., writing and publishing *The Fresno Bee* article. *See infra* Part I.B.2.

Insofar as Plaintiff suggests that McClatchy transacts business in the Commonwealth based on the alleged acts of its subsidiary, MNI, that too is wrong. MNI does not transact business in Virginia. It has no offices, employees, or reporters here; does not advertise here; has never owned property here; does not have a registered agent here; and is not registered to do business here. Lintecum Decl. ¶ 4. Moreover, all of its alleged acts occurred *in California* and, therefore, do not satisfy the "arising from" requirement of Virginia Code § 8.01-328.1.

MNI's alleged acts also do not support jurisdiction over McClatchy for a more fundamental reason: "The mere showing that one corporation is owned by another . . . is not a sufficient

justification for a court to disregard their separate corporate structure." *Richfood, Inc. v. Jennings*, 255 Va. 588, 592-93 (1998) (quotation marks omitted). Rather, "a parent corporation transacts business in the same district as its subsidiary only when the parent exercises dominion and control over the subsidiary as demonstrated by its continual supervision of and intervention in the subsidiary's affairs." *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 398 (W.D. Va. 1987) (discussing Va. Code § 8.01-328.1). Thus, for a court to exercise personal jurisdiction over a parent based on the acts of its subsidiary, "a plaintiff must show [1] that . . . the parent uses the subsidiary as its alter ego . . . or [2] that the subsidiary is the implied agent of the parent." *Schmitt-Doss v. Am. Regent, Inc.*, 2012 WL 6474038, at *7 (W.D. Va. Dec. 13, 2012) (discussing Va. Code § 8.01-328.1).

None of Plaintiff's allegations touches on these requirements. He does not allege that McClatchy supervises MNI, controls its affairs, treats it as an agent, uses it as an alter ego, or does anything else suggesting that MNI is a "fictitious shield erected by [McClatchy] to protect itself" from being sued in Virginia. *Omega Homes*, 656 F. Supp. at 399. In fact, McClatchy and MNI maintain separate books and observe separate corporate formalities. Lintecum Decl. ¶ 4. McClatchy does not exercise continual supervision over or intervene in MNI's affairs. *Id.* Accordingly, "[t]he separate corporate entities of [the] corporations [must] be observed by the courts." *Eure*, 263 Va. at 634 (quotation marks omitted).

Second, the Complaint does not allege that McClatchy "[c]aus[ed] tortious injury by an act or omission *in th[e] Commonwealth*." Va. Code § 8.01-328.1(A)(3) (emphasis added). This provision does not apply when the defendant acted *outside* the Commonwealth. In *Loria v. Regelson*, for example, the court held that Section 8.01-328.1(A)(3) did not reach a defamation defendant accused of "writing and mailing the allegedly defamatory material . . . *in California* and

not Virginia." 38 Va. Cir. 283 (1995) (emphasis added). Likewise, Plaintiff does not allege that McClatchy (or MNI) took any tortious actions in Virginia. Publishing an article "in print, on the Internet, and . . . [re]tweeting it to the Twitter universe," Am. Compl. ¶ 29, all describe alleged acts by MNI in California.

Third, McClatchy did not cause "tortious injury in this Commonwealth by an act or omission outside this Commonwealth." Va. Code § 8.01-328.1(A)(4). The Complaint nowhere alleges an injury *in Virginia*, and only vaguely alleges that Plaintiff "suffered presumed damages and actual damages" without specifying where that harm occurred. Am. Compl. ¶ 32. Any such harm presumably occurred where Plaintiff was born, raised, and resides (California), or where he works (California or Washington, D.C.). *Id.* ¶ 4; *see Calder v. Jones*, 465 U.S. 783, 788-89 (1984) (reasoning that the "brunt of the harm" in a libel action occurs where the plaintiff resides).

Even if Plaintiff suffered an injury in Virginia, this provision still would not apply because McClatchy is not a company that i) "regularly does or solicits business" in Virginia, ii) "engages in any other persistent course of conduct" in Virginia, or iii) "derives substantial revenue from goods used or consumed or services rendered" in Virginia. Va. Code § 8.01-328.1(A)(4); *see also E. Direct Mktg.*, 26 Va. Cir. at 282 (finding no jurisdiction over defamation defendant that "faxed a libelous memorandum from New York" to Virginia because plaintiff made only "conclusory" allegations about the defendant's business activities in Virginia); *see also infra* Part II.A.

Because no "facts support[ ] the exercise of jurisdiction under the long arm statute," the Court "does not need to reach the due process aspect" of the jurisdictional analysis and should dismiss this case for lack of jurisdiction over McClatchy. *E. Direct Mktg.*, 26 Va. Cir. at 282.

II. Exercising Jurisdiction Over McClatchy Would Violate Due Process.

Even if the long-arm statute reached McClatchy (it does not), jurisdiction would not exist

unless Plaintiff also shows that McClatchy has sufficient "minimum contacts" with Virginia such that maintaining this suit in this Court would not violate federal due process. *Int'l Shoe*, 326 U.S. at 316. Plaintiff can make this showing by establishing "'general' (sometimes called 'all-purpose') jurisdiction [or] 'specific' (sometimes called 'case-linked') jurisdiction." *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017); *see Frizzell*, 81 Va. Cir. at 427. General jurisdiction exists only if McClatchy is "at home" in Virginia; specific jurisdiction exists only if "the suit . . . arise[s] out of or relate[s] to [McClatchy's] contacts with the *forum*." *Bristol-Myers*, 137 S. Ct. at 1780 (quotation marks omitted); *see N.Y. Commercial Bank v. Heritage Green Dev., LLC*, 95 Va. Cir. 278 (2017). Plaintiff cannot make either showing.

A. General Jurisdiction Does Not Exist Because McClatchy Is Not "At Home" In Virginia.

A court may exercise general jurisdiction "over a foreign corporation to hear any and all claims against [it] only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive as to render [it] essentially at home in the forum State." *Daimler*, 571 U.S. at 122 (quotation marks omitted). "The paradigm forums in which a corporate defendant is at home . . . are the corporation's place of incorporation and its principal place of business." *BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549, 1558 (2017) (quotation marks omitted).

McClatchy is not "at home" in Virginia because it is a Delaware corporation, headquartered in California, and this is not the "exceptional case" where a nonresident defendant's affiliations with Virginia are "so substantial . . . as to render [it] at home" in Virginia, *Daimler*, 571 U.S. at 139 n.19. To the contrary, McClatchy is a holding company that is not even registered to do business in Virginia, and has no offices, employees, or reporters here, nor any registered agents or revenues here. Lintecum Decl. ¶¶ 3, 6.

Plaintiff nevertheless argues that "McClatchy is at home in Virginia" because "[i]ts print newspapers are delivered to businesses and consumers throughout Virginia, including Albemarle County, every day by large distributors and independent contractors." Am. Compl. ¶ 8. That is doubly wrong. First, it is factually wrong because McClatchy does not publish or distribute newspapers *anywhere*. Lintecum Decl. ¶ 5. Second, it is legally wrong because, even if McClatchy had distributors in Virginia, a nonresident corporation is not "at home" in every State where it has an "independent contractor, subsidiary, or distributor." *Daimler*, 571 U.S. at 136, 139 n.20 (quotation marks omitted). To the contrary, the general jurisdiction inquiry "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Id.* at 139 n.20. That appraisal shows that, if anything, McClatchy is *less* at home in Virginia than in the fourteen States where it owns media companies. Lintecum Decl. ¶ 3.

Plaintiff also alleges McClatchy owns "investments in Charlottesville," Am. Compl. ¶ 21, but McClatchy has written off all of its interest in the sole "Charlottesville investment" referenced in the Complaint since 2017—before the alleged defamation, Lintecum Decl. ¶ 8. He further alleges that "McClatchy derives substantial revenue" from its business in Virginia, Am. Compl. ¶ 21, but McClatchy has no revenue in Virginia, Lintecum Decl. ¶ 3. And McClatchy does not have reporters "present in Virginia," Am. Compl. ¶ 21, or anywhere else, Lintecum Decl. ¶ 6.

Insofar as Plaintiff is referring to the alleged actions of MNI, those actions are not imputed to McClatchy because, again, there is no evidence that would allow the Court to "disregard the separate legal identities of the corporation[s]." *Beale v. Kappa Alpha Order and Kappa Alpha Alumni Found.*, 192 Va. 382, 399 (1951). Regardless, MNI does not have reporters in Virginia. Lintecum Decl. ¶ 7. Nor does it have other "exceptional" contacts with Virginia such that it may fairly be said to be "at home" here. *Daimler*, 571 U.S. at 139 n.19.

BNSF is instructive. There, the U.S. Supreme Court held that a national railroad company was *not* subject to general jurisdiction in Montana even though it had "over 2,000 miles of railroad track and more than 2,000 employees" in the State. 137 S. Ct. at 1558-59. According to the Court, "the general jurisdiction inquiry does *not* focus solely on the *magnitude* of the defendant's in-state contacts," but instead "calls for an appraisal of a *corporation's activities in their entirety*." *Id.* (emphases added and quotation marks omitted). As one state supreme court recently noted, the U.S. Supreme Court in *BNSF* "firmly rejected any notion that a nonresident defendant's 'doing business' in a forum state is sufficient, in and of itself, to subject the out-of-state defendant to the general personal jurisdiction of the forum state." *Facebook, Inc. v. KGS*, __ So. 3d __, 2019 WL 2710235, at *8 (Ala. June 28, 2019) (no general jurisdiction over Facebook in Alabama because its operations in the State "are not so substantial or of such nature as to render it 'at home' [there]").

Because there is nothing "exceptional" about McClatchy's (or even MNI's) contacts with Virginia, especially when compared to other jurisdictions, the company is not "at home" here and is not subject to general personal jurisdiction in this Court. *Daimler*, 571 U.S. at 139 n.19.

B. Specific Jurisdiction Does Not Exist Because McClatchy's Threadbare Contacts With Virginia Are Unrelated To Plaintiff's Claims.

In determining whether specific jurisdiction exists, the Court asks whether (1) "the defendant has purposefully directed his activities at residents of the forum" and (2) the "litigation results from alleged injuries that arise out of or relate to those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quotation marks omitted). If both requirements are met, the Court then asks whether the "minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of jurisdiction." *Id.* at 477-78 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). None of those three prongs supports the exercise of specific jurisdiction over McClatchy.

1. McClatchy Did Not Purposefully Direct Activities At Virginia.

A defendant must "purposefully direct" its actions towards a forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), in order to purposefully avail itself of "'the benefits and protections' of the forum's laws," *Burger King*, 471 U.S. at 476. This requirement protects defendants from being "haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts" with the jurisdiction. *Id.* at 475.

In *Keeton*, for example, the U.S. Supreme Court held that a New Hampshire court had jurisdiction over libel claims against the publisher of a "national publication" that "continuously and deliberately exploited the New Hampshire market" by regularly selling "thousands of magazines" each month in the State. 465 U.S. at 774, 781. In contrast to the allegations here, "the general course of conduct in circulating magazines throughout the state was purposefully directed at New Hampshire, and inevitably affected persons in the state." *Id.* (quotation marks omitted).

Another example is *Calder*, where the U.S. Supreme Court held that California had personal jurisdiction over a reporter and editor of a magazine who resided in Florida and were accused of defamation in a California court. 465 U.S. at 784-85. Jurisdiction existed in *Calder* because "California [wa]s the focal point *both* of the story *and* of the harm suffered." *Id.* at 789 (emphases added). The magazine sold about 600,000 copies in California, "almost twice the level of the next highest State;" the defendants used "sources in California" for the article, which "concerned the California activities of a California resident;" the article "impugned the professionalism" of that resident, whose "career was centered in California;" and "the brunt of the harm . . . was suffered in California." *Id.* at 785, 788-89.

Here, by contrast, McClatchy did not write or publish any article about events in Virginia. Nor did MNI, because the focal point of *The Fresno Bee* article was California, not Virginia. The

article described events in California, was published in a California newspaper, and allegedly harmed a California resident. Virginia was the "focal point" of *neither* the story *nor* the harm.

The Fresno Bee article did not "target Virginia" simply because it was posted online. For example, in *Lucido v. Maxwell*, the court lacked jurisdiction over a nonresident who published an article online without "a specific intent to reach a Virginia audience." 93 Va. Cir. 415 (2016). Likewise, in *Knight v. Doe*, the "[a]ccessibility of the website in Virginia" did not show that speech posted online was intentionally directed "at a Virginia audience." 2011 WL 2471543, at *3 (E.D. Va. June 21, 2011). And in *Young v. New Haven Advocate*, two Connecticut newspapers did not direct activities into Virginia because they "did not post materials on the Internet with the manifest intent of targeting Virginia residents." 315 F.3d 256, 264 (4th Cir. 2002).

So too here. Although Plaintiff alleges that McClatchy "use[d] the Internet or social media as a weapon to defame" him, Am. Compl. ¶ 25, "a person who simply places information on the Internet" does not purposefully direct activities into "each State into which the electronic signal is transmitted and received." *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002). The Complaint does not allege that McClatchy specifically targeted a Virginia audience—say, by advertising in Virginia. Nor does Plaintiff allege that he lives here, works here, or was harmed here. Although it might have been foreseeable that Virginians would access the article online, "'foreseeability' alone has never been a sufficient benchmark of personal jurisdiction." *Woodson*, 444 U.S. at 295. The decision by third parties to initiate contact with MNI's online platforms (again, McClatchy has none) are the very definition of "random, fortuitous, or attenuated contact[s]" that are insufficient to create jurisdiction. *Burger King*, 471 U.S. at 475 (quotation marks omitted); *see also Young*, 315 F.3d at 263 ("[T]hat the newspapers' websites could be accessed anywhere, including Virginia, does not by itself demonstrate that the

newspapers were intentionally directing their website content to a Virginia audience.").

Indeed, McClatchy's contacts with Virginia are far fewer than in other cases where courts have found a lack of purposeful direction. In *PCR Tech. Holdings, L.C. v. Bell Ventures, L.L.C.*, 79 Va. Cir. 81 (2009), for example, the court held that the nonresident defendants "never purposely availed themselves of any Virginia institution" even though the defendants and the plaintiffs had agreed over the phone to form a joint venture company in Virginia, at least one person on the call was in Virginia, and "communications that led to the Plaintiff's claims occurred by telephone and email between the parties while Plaintiff was present in the Commonwealth." *Id.* If the defendants in *PCR* could not "have reasonably foreseen that they would be haled into Virginia court as a result of their actions," *id.*, then McClatchy could not either.

2. The Claims Do Not "Arise Out Of" Activities Directed At Virginia.

Because McClatchy did not purposefully direct activities at Virginia, Plaintiff's defamation claim necessarily did not "arise out of or relate to those activities." *Burger King*, 471 U.S. at 472 (quotation marks omitted). Indeed, the defamation claim arises out of activities—writing, publishing, and tweeting an article—that all were performed in California, not Virginia, by McClatchy's independent subsidiary, MNI, whose acts are not imputed to McClatchy.

In *Jackson v. Michalski*, the court held that it did not have personal jurisdiction over the author of an allegedly defamatory article posted online even though he had "conduct[ed] sales activities in Virginia" because those activities did "not form the basis for this suit" and were unrelated to the article. 2011 WL 3679143, at *7 (W.D. Va. Aug. 22, 2011). The court also rejected the plaintiff's argument that, because the article "was readily accessible from Virginia," "it was effectively directed to Virginia." *Id.* at *5. The court explained that "[n]either the article . . . nor the website on which the article was published targeted a Virginia audience," and thus the

actions giving rise to the defamation claim were not purposefully directed at Virginia. *Id.* at *7.

Here, McClatchy has conducted no business activities in Virginia, and thus there are no activities that could create jurisdiction because they do "not form the basis for this suit." And the activities that *do* form the basis for this suit were not purposefully directed at Virginia because *The Fresno Bee* article did not target a Virginia—as opposed to a California or national—audience. Thus, like the plaintiff in *Jackson*, Plaintiff here has failed to establish that his claims arise out of any activity McClatchy (or MNI or *The Fresno Bee*) directed at Virginia. *See Bristol-Myers*, 137 S. Ct. at 1781 (finding no jurisdiction over nonresident company that "conducted research" in the forum State because that research was "unrelated to . . . the specific claims at issue").

3. Exercising Jurisdiction Would Be Unreasonable.

Because McClatchy has not purposefully availed itself of the privileges of doing business in Virginia, and because the only alleged Virginia contacts are those of its non-party subsidiary (which are unrelated to the alleged defamation), the constitutional analysis ends and the Court does not need to consider the reasonableness of exercising jurisdiction over McClatchy. But if the Court reaches this issue, it would consider five factors: (1) "the burden on the defendant," (2) "the forum State's interest in adjudicating the dispute," (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (5) "the shared interest of the several States in furthering fundamental substantive social policies." *Woodson*, 444 U.S. at 292; *see Sutherland*, 68 Va. Cir. at 43. All five factors confirm that exercising jurisdiction over McClatchy would be unreasonable.

First, litigating in this Court would significantly burden McClatchy, which has no presence in Virginia. *See generally* Lintecum Decl.; *see Bristol-Myers*, 137 S. Ct. at 1780 (explaining that the "primary concern" in "determining whether personal jurisdiction is present" is "the burden on

the defendant" (quotation marks omitted)). In fact, most—if not all—of the relevant witnesses and documents are in California, where *The Fresno Bee* and its employees are located; where the allegedly defamatory article was published; and where the acts reported in the article occurred. Ritchey Decl. ¶¶ 4, 6; Am. Comp. ¶ 15. It would be expensive and inconvenient to conduct discovery about these California events in California; ship the evidence across the country to Virginia; and force the parties and witnesses to spend nights away from home, family, and jobs to appear at court proceedings and provide testimony at any trial in this Court. That is why the Terms of Service for subscribers to *The Fresno Bee* (including Plaintiff) provide jurisdiction over related disputes to courts located in Fresno County. *Id.* ¶ 7 & Exs. A, B. These substantial costs and burdens "should have significant weight in assessing the reasonableness of" subjecting McClatchy to jurisdiction in Virginia. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987).

Second, Virginia has only a "slight," if any, interest in resolving this dispute, particularly because "minimum contacts have not been established." *Sutherland*, 68 Va. Cir. at 43. McClatchy and Plaintiff are California residents, the allegedly defamatory statement arose from California, and any conceivable defamatory harm occurred primarily in California, where Plaintiff resides and holds public office. Further, the choice-of-law analysis would require applying California law in this case because the law of the State "where the plaintiff is injured"—here, California—governs cases involving allegedly defamatory online speech. *Gilmore v. Jones*, 370 F. Supp. 3d 630, 663-65 (W.D. Va. 2019). If anything, Virginia has a compelling interest in *dismissing* this California-based dispute so it can be refiled, if at all, in Plaintiff's home forum, rather than burdening Virginia's court system with a lawsuit unrelated to the Commonwealth and its residents.

Third, Plaintiff does not have any legitimate interest in litigating here. He is not a resident in Virginia, and the Complaint does not allege that he has even stepped foot in Virginia or incurred

any harm here. If anything, requiring Plaintiff to litigate in California would be *more* convenient for the California congressman with an office less than two miles from a California courthouse.

Fourth, declining to exercise personal jurisdiction over McClatchy would promote the interstate judicial system's interests by preventing forum shopping. Plaintiff appears to have filed suit in this forum in an attempt to avoid scrutiny by his California constituents, impose undue burdens on McClatchy, and evade California's anti-SLAPP statute, which would require prompt dismissal with an award of fees to McClatchy. *See* Cal. Civ. Proc. Code § 425.16. Judicial efficiency is also best served when disputes are resolved in a forum with a nexus to the case or in the plaintiff's home forum. Moreover, this Court's ability to compel documents and testimony from unwilling California witnesses is much more limited than the California courts. *Compare* Cal. Code Civ. Proc. §§ 1987, 1989 (empowering courts to compel California residents to testify), *with Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 289 Va. 426, 433 (2015) ("[O]ur Rules do not recognize the existence of subpoena power over nonresident non-parties.").

Fifth, for the same reasons, declining jurisdiction would advance the interests of other States in "furthering fundamental substantive social policies." *Woodson*, 444 U.S. at 292. California has a fundamental interest in adjudicating disputes involving the First Amendment protections for its newspapers and reporters (e.g., robust Anti-SLAPP statute; reporter shield laws) protecting its citizens from defamation and holding its citizens accountable for making defamatory statements. *See Keeton*, 465 U.S. at 776 ("[It] is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur within the State."). Virginia has little interest in doing the same for nonresident plaintiffs and nonresident defendants. Both jurisdictions, however, have an interest in efficiently seeking the truth and resolving controversies. California courts are much better situated to accomplish that goal with respect to this dispute.

III. Plaintiff's Conspiracy Theory Does Not Establish Jurisdiction Over McClatchy.

In an attempt to support his decision to file this lawsuit in Virginia, Plaintiff halfheartedly advances a theory of co-conspirator jurisdiction, asserting that McClatchy is subject to jurisdiction in Virginia because it conspired with a Virginia resident and her company, and that they "were, at all relevant time, physically present in Virginia." Am. Compl. ¶ 8.

This argument fails out of the gate. "[F]or personal jurisdiction based on a conspiracy theory to exist," a "plaintiff must allege facts that establish a prima facie showing of conspiracy, and more than conclusory allegations that a conspiracy existed." *Knight*, 2011 WL 2471543, at *2 n.2. The sum total of the "conspiracy" factual allegations in the Complaint are that Mair, an alleged Virginia resident, retweeted the allegedly defamatory article that MNI (via *The Fresno Bee*) published in a California newspaper. Am. Compl. ¶ 17. Even if this alleged conduct could be imputed to McClatchy, a third party's retweet of an article, without more, cannot possibly confer jurisdiction over the original publisher; otherwise, third parties could give any court jurisdiction over the author—unbeknownst to the author—with the simple click of a button. *See Walden v. Fiore*, 571 U.S. 277, 284 (2014) ("The unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." (quotation marks omitted)).

To be sure, the Complaint includes legal conclusions and conclusory speculation that McClatchy and Mair "coordinated [a] defamation campaign against" Plaintiff, Am. Compl. ¶ 17, but these cursory allegations do not provide any *facts* that could establish a conspiracy to defame Plaintiff. *See E. Direct*, 26 Va. Cir. at 282 ("[C]onclusory pleading does not satisfy the requirements to exercise personal jurisdiction."). Indeed, Plaintiff has failed to allege "specific facts showing actual agreements" between Mair and McClatchy—a necessary predicate for a conspiracy claim. *See Lesner Pointe Condo. Ass'n, Inc. v. Harbour Point Bldg. Corp.*, 61 Va. Cir.

609 (2002) (dismissing conspiracy claim); *see also Decision Insights, Inc. v. Quillen*, 2005 WL 2757930, at *6 (E.D. Va. Oct. 21, 2005) (rejecting conspiracy jurisdiction over nonresident defendant because complaint "has not alleged any facts" showing a conspiracy that had at least "one essential act . . . in Virginia").

Indeed, the Complaint alleges that Mair learned about the allegedly defamatory article *after The Fresno Bee* published it and posted a link to it on Twitter. Am. Compl. ¶ 17. That "Mair was out to 'stick it' to Nunes" and, therefore, chose to retweet the link is hardly evidence that Mair and *The Fresno Bee* (let alone McClatchy) conspired to conduct a "concerted defamation campaign" against Nunes. *Id.* ¶¶ 17, 19; *see also Knight*, 2011 WL 2471543, at *2 n.3 ("[C]ourts have found that minimal email exchanges or telephone calls into a jurisdiction, in concert with allegedly defamatory postings on a website, are insufficient to confer personal jurisdiction.").

Moreover, jurisdiction arises from an alleged conspiracy only if "Virginia was the focal point of the tortious activity." *Galustian v. Peter*, 750 F. Supp. 2d 670, 675 (E.D. Va. 2010). According to Plaintiff, the alleged conspiracy was aimed at harming him in California (or possibly Washington, D.C.—more than 100 miles away from this Court) by seeking to disrupt "his duties, employment and investigations" as a congressman, Am. Compl. ¶ 19; and to hurt his reelection campaign, *see id.* ¶ 10 n.2; *see also id.* ¶ 2.

Because the alleged conspiracy's "purpose" was purportedly to harm Plaintiff's personal and political reputation in California or D.C., it "has no connection with the Virginia forum" and does not create jurisdiction over McClatchy. *Galustian*, 750 F. Supp. 2d at 675 (finding no jurisdiction over nonresident defendant based on an alleged conspiracy with Virginia resident).

CONCLUSION

The Court should dismiss the Complaint for lack of personal jurisdiction over McClatchy.

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CERTIFICATE OF SERVICE

I certify that on this 9th day of September, 2019, I caused a true and correct copy of the foregoing to be served by email, on the following:

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