

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

**GIVEFORWARD, INC.,**

**Plaintiff/Counter-Defendant,**

**v.**

**KENA HODGES, individually and as legal  
guardian for KDH,**

**Defendants/Counter-Plaintiffs**

**Civil Action No.: 1:13-cv-01891-JFM**

**KENA HODGES, individually and as  
legal guardian of her minor son KDH,**

**Third-Party Plaintiffs,**

**v.**

**KIMANI JOHNSON, *et al.***

**Third-Party Defendants.**

**MS. HODGES AND KDH'S MEMORANDUM OF LAW IN OPPOSITION TO  
GIVEFORWARD'S CROSS-MOTION FOR SUMMARY JUDGMENT AND  
REPLY IN FURTHER SUPPORT OF MS. HODGES AND KDH'S  
MOTION FOR SUMMARY JUDGMENT**

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

GIVEFORWARD’S MISSTATEMENTS OF FACT ..... 3

SUPPLEMENTAL PERTINENT FACTS ..... 12

ARGUMENT..... 13

I. GIVEFORWARD MISUNDERSTANDS THE MEANING OF “PUBLICATION” AND WHAT CONSTITUTES SPEECH, CONTENT, AND PUBLICATION ON THE INTERNET..... 13

II. THE TORTIOUS CONTENT OR CONDUCT AT ISSUE IS NOT LIMITED TO THE FALSE CLAIM THAT KDH WAS DYING. .... 20

III. GIVEFORWARD IS AN INFORMATION CONTENT PROVIDER IN GENERAL AND FOR THE KDH FUNDRAISER IN PARTICULAR. .... 25

    A. GiveForward Mischaracterizes and Misapplies CDA Caselaw. .... 26

    B. GiveForward Created and/or Developed Fundraiser Content. .... 31

IV. GIVEFORWARD HAS A LEGAL DUTY AS A PROFESSIONAL FUNDRAISER. .. 33

    A. The State has a Significant Interest in Regulating Fundraising and Such Regulation is Consistent With the CDA. .... 33

    B. The Maryland Solicitations Act Applies to GiveForward..... 34

    C. GiveForward’s Violation of the MD Solicitations Act Gives Rise to a Private Cause of Action and is Proof of GiveForward’s Negligence..... 38

        1. *GiveForward’s arguments are belied by the plain language of the MSA.* ..... 38

        2. *Even if there were not a common law cause of action already in existence, there is an implied private right of action here.*..... 39

        3. *GiveForward’s violations of the MSA are proof of its negligence.* ..... 41

    D. The Cases of *Zeran* and *Okeke* Are Inapposite ..... 44

V. GIVEFORWARD IS NOT ENTITLED TO SUMMARY JUDGMENT ON MS. HODGES AND KDH’S COUNTERCLAIMS. .... 46

    A. GiveForward Misrepresents Ms. Hodges and KDH’s Counterclaims. .... 46

    B. Ms. Hodges and KDH’s Abuse of Process Claim Passes Muster. .... 47

- VI. MS. HODGES AND KDH DO HAVE STANDING TO BRING THEIR COUNTERCLAIMS..... 49
  - A. Ms. Hodges and KDH Have Standing to Pursue their Counterclaim Under the Maryland Solicitations Act..... 49
  - B. Ms. Hodges and KDH Also Have Standing to Pursue Their Counterclaims Based on GiveForward’s Affirmative Representations. .... 50
- CONCLUSION..... 50

## INTRODUCTION

GiveForward's 50-page Memorandum in Support of Its Cross-for CDA immunity in this case can be summed up in one sentence: GiveForward believes that because it did not create the initial lie about KDH's terminal illness and impending death GiveForward cannot be held accountable for *any* aspect of the KDH Fundraiser or *any* aspect of its own tortious conduct with regard to the KDH Fundraisers. Under GiveForward's proposed theory, it is difficult to conceive when – *if ever* – the for-profit professional fundraising company, which proudly proclaims that it has collected over \$150,000,000.00 in donations from United States citizens including citizens of Maryland, could be regulated by *any* state agency or found liable for *any* conduct related to a fundraiser on its online systems (unless GiveForward concocted the original story).

As discussed more fully in Section II, GiveForward asks this Court to rule, in a matter of first impression for the entire federal and state judiciary, that the CDA provides immunity for professional fundraisers who engage in fundraising activities online and that the CDA precludes application of the state laws regulating fundraisers. Such a proposition is well beyond the scope or intended purpose of the CDA. Moreover it directly impedes states' rights to regulate professional fundraisers. As the Fourth Circuit has noted, everyone benefits from state regulation of fundraising speech, even when state laws apply to a professional fundraiser who operates on a national scale, such as GiveForward. *Center for Auto Safety Inc. v. Athey*, 37 F.3d 139, fn 9 (4th Cir. 1994).

Because GiveForward myopically focuses on Johnson's lie or defamatory statement that KDH was dying, GiveForward relies upon certain cases – all of which involve claims of defamation – to support its primary contention—namely, that pursuant to the CDA GiveForward cannot be held accountable for the KDH Fundraiser because it did not create or materially contribute to the lie about KDH's health. GiveForward blithely ignores the fact that *Ms. Hodges*

*and KDH have brought no claim for defamation against GiveForward.*<sup>1</sup> Moreover, Ms. Hodges and KDH do not contend that GiveForward made up the initial lie about KDH dying from a terminal illness. In repeating *ad nauseam* the fact that GiveForward did not make up the initial story about KDH dying from a terminal illness, GiveForward ignores the clear, comprehensive causes of action asserted against it. Ms. Hodges and KDH's Counterclaims against GiveForward are brought as a result of GiveForward's own role in posting a picture of an 8-year-old child without parental permission; plastering that child's name and likeness all over the Internet; tweeting about the child; communicating with donors about the child; failing to take any steps whatsoever to verify the veracity of the story;<sup>2</sup> etc.

GiveForward's Cross-Motion is overrun with misstatements and mischaracterizations of both fact and law.<sup>3</sup> These misstatements and mischaracterizations form the basis of GiveForward's argument in support of summary judgment as to both GiveForward's Complaint for declaratory relief *and* Ms. Hodges and KDH's Counterclaims. Once the misstatements are stripped away, GiveForward's Cross-Motion is unsubstantiated in fact or law.

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<sup>1</sup> See generally Countercl. [ECF 11].

<sup>2</sup> If GiveForward had done even a modicum of due diligence, it would have uncovered, for instance, Johnson's history of criminal domestic violence against Ms. Hodges – KDH's only custodial parent – which is publically available on Maryland Judiciary Case Search. Also publicly available was the fact that a bench warrant had been issued for Johnson's arrest during the time he and GiveForward were operating the fraudulent KDH Fundraiser. This bench warrant was for Johnson's failure to pay child support owing to the mother of one of his other children.

<sup>3</sup> For instance, in support of its Cross-Motion, GiveForward relies heavily on (a) the deposition testimony of Kimani Johnson, (b) the declaration of Catina Harris, and (c) the affidavits of Ethan Austin, Erica Alhorn, and Caiti Stout. However, Johnson and Harris' statements cannot be trusted. Johnson admits to having made up a story about his biological son dying and is a confirmed liar; GiveForward itself has openly acknowledged that Johnson lies. Harris, though she has made herself wholly available to GiveForward, is actively evading service of process and ignored the subpoena power of this Court, refusing to appear for her properly-noticed and subpoenaed deposition. Additionally, as detailed in the two Motions to Strike, which are filed contemporaneous to this Opposition and Reply, Austin, Alhorn and Stout's affidavits should be struck, either entirely or partially, because they are comprised primarily of inadmissible conclusory statements of fact and law, and with respect to Alhorn and Stout, because GiveForward refused to make these fundraising coaches available for their properly noticed videoconference depositions.

In sum, GiveForward's position – that the CDA permits it to engage in professional fundraising speech for profit without regulation because it operates on the Internet – is unsupported by the law. Accordingly, the Court should grant the Ms. Hodges and KDH's Motion for Summary Judgment (the "Hodges Motion") and deny GiveForward's Cross-Motion.

### **GIVEFORWARD'S MISSTATEMENTS OF FACT**

In its Cross-Motion, GiveForward makes various misstatements of fact, primarily in the Statement of Facts and Argument sections of the Memorandum. These misstatements of fact are detailed below and are contrasted with the actual facts in the record before the Court as supported by documentary evidence.

**MISSTATEMENT OF FACT 1:** "The user muse also agree to GiveForward's term of use."

**ACTUAL FACT 1:** GiveForward's account creation process does not require users to take any affirmative action to express agreement to the terms of use, such as clicking on an "accept" or "I agree" button.

**MISSTATEMENT OF FACT 2:** "Because Mr. Johnson did not have Internet access, he asked a friend, Catina Harris, to help him create the fundraiser. On March 19, 2013, at Mr. Johnson's suggestion, Ms. Harris went to the GiveForward website to create an account and set up Mr. Johnson's fundraiser."<sup>4</sup>

**ACTUAL FACT 2:** GiveForward's documents show that Johnson did indeed have Internet access. Johnson viewed the emails GiveForward sent to his [kimanimusic@gmail.com](mailto:kimanimusic@gmail.com) email address.<sup>5</sup> Johnson's GiveForward user id logged into the KDH Fundraiser approximately 42 times.<sup>6</sup> He also used the Internet to make multiple donations to the KDH Fundraiser.<sup>7</sup>

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<sup>4</sup> GF Mem. at 8, ¶ 11.

<sup>5</sup> GF\_Hodges0000432 (Produced in Native)

<sup>6</sup> GF\_Hodges0000448.

<sup>7</sup> Hodges Mot. at 25, ¶ 68.

**MISSTATEMENT OF FACT 3:** “Mr. Johnson provided all of the content for the KDH fundraiser.”<sup>8</sup> “None of the content for the KDH fundraiser came from GiveForward.”<sup>9</sup>

**ACTUAL FACT 3:** GiveForward created content for the KDH Fundraiser wholly independent of Johnson and/or Harris. Specifically, GiveForward, without any involvement or assistance from Johnson or Harris, exclusively created the “widget” that was then placed on third-party websites and directed Internet traffic to the KDH Fundraiser approximately 212 times.<sup>10</sup> GiveForward also independently created the Tweet that advertised the KDH Fundraiser to every single follower of GiveForward’s Twitter feed as well as any member of the public who chose to look at GiveForward’s publicly available Twitter feed.<sup>11</sup> A search for “Kristian” and GiveForward revealed on “TweetBuzz” that the KDH Fundraiser was one of the most popular stories trending on GiveForward’s Twitter feed.<sup>12</sup> As discussed more fully in the Argument, GiveForward’s automated emails are also independently created speech associated with content creation by GiveForward for the KDH Fundraiser and were not content provided by Johnson. GiveForward also independently created and sent thank you emails to donors and supporters of the KDH Fundraiser, promoting the fundraiser, and encouraging users to share it with their social media network.<sup>13</sup>

**MISSTATEMENT OF FACT 4:** “The automated emails sent during the KDH fundraiser are listed on GF\_Hodges 587-610. All of the automated emails were sent *after* publication of the KDH fundraiser.”<sup>14</sup>

**ACTUAL FACT 4:** As explained *infra*, GiveForward completely misconstrues the meaning of “publication” and “speech.” Publication of speech associated with the KDH Fundraiser was an

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<sup>8</sup> GF GF Mem. at 8, ¶ 12.

<sup>9</sup> *Id.* at 9, ¶ 16.

<sup>10</sup> See Dec. 31, 2014 Ltr. from G. Spatz at 6, attached hereto as **Exhibit 1**.

<sup>11</sup> See, e.g., Hodges Mot. at 16, ¶¶ 38-39.

<sup>12</sup> See **TweetBuzz** Exhibit.

<sup>13</sup> Hodges Mot. at 16, ¶ 40.

<sup>14</sup> GF Mem. at 10, ¶ 18.

organic and ongoing process.. Under the law, speech associated with the KDH Fundraiser was continually “published” each time additional content or commentary was added,<sup>15</sup> such as a hug, note from a donor, or loading the KDH Fundraiser widget to a third-party website. So while all of the automated emails may have been sent after *initial* publication of the KDH Fundraiser, the automated emails were still being sent by GiveFoward as the KDH Fundraiser was ongoing and each email was speech independently created by GiveForward that furthered the invasion of KDH’s privacy. Additionally, the KDH Fundraiser webpage was viewed a total of 1,523 times, was shared via Facebook 41 times, and received 54 donations.<sup>16</sup>

**MISSTATEMENT OF FACT 5:** “The first interactions either Mr. Johnson or Ms. Harris had with anyone at GiveForward were on April 5, 2013 and April 8, 2013 when Ms. Harris called GiveForward about the process for receiving payment. Ms. Harris’ April 5, 2013 and April 8, 2013 phone calls were the only times she ever had contact with anyone at GiveForward. [...] All interaction between GiveForward and Mr. Johnson occurred after the fundraisers had closed and payment had been made to Mr. Johnson.”<sup>17</sup>

**ACTUAL FACT 5:** This is directly contradicted by GiveForward’s own electronic evidence, which shows that GiveForward sent 190 emails to Johnson and Harris collectively throughout the pendency of the KDH Fundraiser.<sup>18</sup> Johnson and Harris also interacted with GiveForward via its website throughout the pendency of the KDH Fundraiser.

**MISSTATEMENT OF FACT 6:** “The KDH fundraiser ran from March 19, 2013 to April 10, 2013 and raised \$11,379.89. Prior to the end date, no user had flagged Mr. Johnson’s fundraiser as potentially fraudulent nor had GiveForward received any other indications of potential problems with the fundraiser.”<sup>19</sup>

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<sup>15</sup> Ms. Hodges and KDH discuss this in depth at section I.

<sup>16</sup> See Hodges Mot. at 22, ¶ 57.

<sup>17</sup> GF Mem. at 10, ¶ 20.

<sup>18</sup> See Hodges Mot. at 19, ¶ 53-54.

<sup>19</sup> GF Mem. at 11, ¶ 21.

**ACTUAL FACT 6:** As described by Christopher McKeever during his deposition, at the time of the KDH Fundraiser, GiveForward’s system had a number of donation-based triggers in place that would notify GiveForward’s fundraising coaches of possible suspicious activity in fundraisers.<sup>20</sup> With regard to the KDH Fundraiser, three (3) such notification emails were generated during the fundraiser. Email notifications were triggered twice by multiple donations made by Johnson on the same day.<sup>21</sup> Whether they are called “flags” or “notifications,” the fact is: GiveForward knew of suspicious activity in the KDH Fundraiser as early as March 22, 2013.

**MISSTATEMENT OF FACT 7:** “Three system notifications were generated for the KDH fundraiser. One on March 22, 2013 for a duplicate donation by Mr. Johnson in the amount of \$20.00, one of March 26, 2013 for a duplicate donation by Mr. Johnson in the amount of \$50.00.”<sup>22</sup>

**ACTUAL FACT 7:** The March 22, 2013 email was generated by two separate donations by Mr. Johnson in the same day: one anonymous donation for \$20.00, and a second for \$45.00, posing as a donor named “Paris.”<sup>23</sup> The March 26, 2013 email was also generated by two separate donations by Johnson in the same day: one for \$15.00 and a second for \$50.00 posing as a donor named “Anthony Belthy.”<sup>24</sup> These are not “duplicate donations” but multiple donations made by the same user in the same day, which is suspicious and suggests potentially fraudulent activity – as was the case in the KDH Fundraiser.

**MISSTATEMENT OF FACT 8:** “GiveForward also has system-generated notifications of certain donation activity. These notifications allow GiveForward to address donations that may have been made in error. These notifications also provide some fraud

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<sup>20</sup> McKeever Dep. Tr. 85:21-86:5.

<sup>21</sup> See Hodges Mot. at 24, ¶ 64.

<sup>22</sup> GF Mem. at 11-12, ¶ 23.

<sup>23</sup> Hodges Mot., Ex A at GF\_Hodges0000547, 612.

<sup>24</sup> *Id.*

protection.... However, these system-generated notifications are not “flags” from the user community.”<sup>25</sup>

**ACTUAL FACT 8:** As mentioned above, whatever these “notifications” are called – whether GiveForward’s “donation-based trigger” emails or Ms. Hodges and KDH’s “red flag notification emails”<sup>26</sup> – the notification emails generated in the KDH Fundraiser in response to Johnson’s numerous donations alerted GiveForward as early as March 22, 2013 that there was suspicious activity in the KDH Fundraiser.<sup>27</sup> And as McKeever testified, the purpose served by these notifications is to alert GiveForward to possible fraud.<sup>28</sup>

**MISSTATEMENT OF FACT 9:** “On April 24, 2013, Ms. Hodges called GiveForward and spoke with Caiti Stout. Ms. Hodges informed Ms. Stout that her son was the subject of the fundraiser, that he was not sick, and that she believed the fundraiser was fraudulent. This was the first time GiveForward learned of any problems with the fundraiser.”<sup>29</sup>

**ACTUAL FACT 9:** The red flag notification emails put GiveForward on notice of possible fraud in the KDH Fundraiser approximately one month prior to Ms. Hodges’ conversation with Caiti Stout, on March 22, 2013. McKeever’s testimony also confirms that repeated donations made by the organizer or one specific donor would raise a flag indicating possible suspicious activity.<sup>30</sup> GiveForward likewise was on notice because its systems collected data showing that Johnson was listed as beneficiary rather than the allegedly ill child.

**MISSTATEMENT OF FACT 10:** “In their Motion, the Defendants recite twenty pages of alleged ‘facts.’ Most of the Defendants’ statement of facts is attorney argument and

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<sup>25</sup> GF Mem. at 11, ¶ 23.

<sup>26</sup> See, e.g., Reply on Mot. for Costs [ECF 114].

<sup>27</sup> See Hodges Mot. at 24, ¶ 64.

<sup>28</sup> McKeever Dep. Tr. 85:21-86:5.

<sup>29</sup> GF Mem. at 12, ¶ 25.

<sup>30</sup> McKeever Dep. Tr. 85:21-86:5.

speculation.... Many of the Defendants' 'facts' are not supported by any citations and should be stricken and disregarded on that basis alone."<sup>31</sup>

**ACTUAL FACT 10:** Ms. Hodges and KDH's Statement of Facts is a painstaking, and frankly exhausting, summary of the relevant portions of electronic evidence produced by GiveForward, complete with extensive citation to GiveForward's own documents. Ms. Hodges and KDH detail the precise language of GiveForward's documentary evidence, emails, and the conduct and speech occurring in the fundraiser.<sup>32</sup>

**MISSTATEMENT OF FACT 11:** "...the Defendants raise arguments for the first time in their Summary Judgment Motion that GiveForward allegedly made 'affirmative representations' regarding its fraud prevention measures. Specifically, the Defendants' [*sic*] argue that GiveForward failed to follow its alleged stated policies regarding fraud prevention. Despite the fact that these allegations are found nowhere in the Defendants' Counterclaims...."<sup>33</sup>

**ACTUAL FACT 11:** Paragraphs 10-12 of the Counterclaim specifically detail GiveForward's publicly disseminated affirmative representations regarding its fraud prevention measures.<sup>34</sup> Ms. Hodges and KDH even included an image of GiveForward's fraud statement taken from its publicly available website.<sup>35</sup> These allegations are then explicitly incorporated into each of the counts asserted in the Counterclaim.<sup>36</sup> It is unclear why GiveForward would baldly misstate such a fact.

**MISSTATEMENT OF FACT 12:** "Yet, it is undisputed that GiveForward had no involvement in creating the KDH fundraiser."<sup>37</sup>

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<sup>31</sup> GF Mem. at 12-13.

<sup>32</sup> See Hodges Mot. at 6-26. Apparently, because GiveForward cannot actually refute any of the carefully detailed facts in the Motion, precisely because those facts are a recitation of the content of GiveForward's documentary evidence, GiveForward lodges the factually and legally unsupported claim that Ms. Hodges and KDH's facts "should be stricken."

<sup>33</sup> GF Mem. at 25.

<sup>34</sup> See Countercl. ¶¶ 10-12.

<sup>35</sup> See *id.* at 13.

<sup>36</sup> See *id.* ¶¶ 30, 40, 49, 57, 66, 74, 83, 92, 100, 110, 119, 129, 142.

<sup>37</sup> GF Mem. at 35.

**ACTUAL FACT 12:** GiveForward’s involvement in creating the KDH Fundraiser has been extensively documented by Ms. Hodges and KDH. It does not even make sense for GiveForward to say its role is “undisputed”—GiveForward’s involvement in creating and or developing the KDH Fundraiser is, for all intents and purposes, the entire point of contention between the Parties.

**MISSTATEMENT OF FACT 13:** “In their Motion, the Defendants do not even attempt to explain how [the] Tweet allegedly contributed to the false claim that KDH was sick. Importantly, the Defendants do not contend that the content of this Tweet is in any way actionable.”<sup>38</sup>

**ACTUAL FACT 13:** As detailed in Ms. Hodges and KDH’s Counterclaims and Answers to Interrogatories,<sup>39</sup> the Tweet by GiveForward was *new* content independently created by a GiveForward employee, published exclusively by GiveForward without any involvement from Johnson or Harris, and it further developed the KDH Fundraiser. Additionally, as repeatedly asserted by Ms. Hodges and KDH, in addition to increasing the reach of the KDH Fundraiser, the Tweet itself was an invasion of KDH’s privacy and, therefore, actionable.<sup>40</sup>

**MISSTATEMENT OF FACT 14:** “...it is undisputed that GiveForward had no contact with Mr. Johnson or Ms. Harris during their creation of the KDH fundraiser and, therefore, *GiveForward did not provide any support to them.*”<sup>41</sup>

**ACTUAL FACT 14:** Once again, contact between GiveForward’s electronic systems and Johnson and Harris during the creation of the KDH Fundraiser is heavily documented. GiveForward’s website provides significant and extensive support to all fundraiser organizers. For example,

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<sup>38</sup> GF Mem. at 39.

<sup>39</sup> See Countercl. ¶ 18; Ans. to Interrogs. at 6, attached hereto as **Exhibit 2**..

<sup>40</sup> See generally Hodges Mot.

<sup>41</sup> GF Mem. at 41.

during the fundraiser set-up process at the time in question, in the spring of 2013 (and currently) GiveForward provided sample language and tips for creating a fundraiser.<sup>42</sup>

Select a Photo

Tell the story

TIP: For best results, write at least 80 words here.

Description of Fundraiser

Write about why you are starting the fundraiser, what the money will be used for, be specific and personal.

Please enter a description for your fundraiser.

How do I write a compelling story? ▼

Explain why you're raising money and how it will be spent. Friends and family are more inspired to give if you connect with them emotionally and let them know the potential impact of their gifts.

Example: "Jane Smith is one of the sweetest, most compassionate people I have ever known... On March 15th, 2013, Jane Smith was diagnosed with stage II breast cancer..."

Next Back

Just because no human employee of GiveForward spoke with Johnson and/or Harris during the KDH Fundraiser set-up process does not mean that GiveForward did not, through its publicly facing website, have contact with Johnson and/or Harris. Stating that lack of human contact proves lack of a role in content creation and development reflects GiveForward's recurring misunderstanding of online speech.

<sup>42</sup> <http://www.giveforward.com/fundraise/create#2>; See also McKeever Dep. Tr.

**MISSTATEMENT OF FACT 15:** “In a letter to GiveForward, Ms. Hodges’s lawyer threatened to pursue GiveForward for a bevy of claims—all based on GiveForward’s publication of Mr. Johnson’s claim that his son had a terminal illness. After receiving another letter threatening imminent suit against GiveForward and promising heavy litigation burden, including the promise of ‘extensive discovery,’ ‘uncapped punitive damages,’ and a venue where ‘[s]ome of the largest jury verdicts in the state of Maryland hail from, GiveForward filed suit in a proper federal forum....”<sup>43</sup>

**ACTUAL FACT 15:** As evidenced by the settlement communications that GiveForward once again impermissibly references in violation of Federal Rule of Evidence 408,<sup>44</sup> in May 2013, undersigned counsel sent an initial settlement communication to GiveForward’s Co-Founders notifying them in writing of the facts associated with the fraudulent fundraiser and the problems with GiveForward’s appalling lack of a response thereto. This initial settlement communication contained no specific demand for money and made clear it was a settlement communication. In response thereto, on June 25, 2013, GiveForward’s counsel – Mr. George Spatz – specifically requested that Ms. Hodges prepare and send to him a “written” monetary settlement demand.<sup>45</sup> Thus, at Mr. Spatz’s specific direction, on June 26, 2013, undersigned counsel sent a second

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<sup>43</sup> GF Mem. at 3-4.

<sup>44</sup> Courts recognize the “importance of maintaining the confidentiality of settlement negotiations” because protecting these communications “encourages parties to enter into settlement agreements.” *Porter Hayden Co. v. Bullinger*, 350 Md. 452, 466 (1998); *see also Bittinger v. CSX Transp., Inc.*, 176 Md. App. 262, 276-77 (2007) (“The purpose of Rule 5–408 is to encourage the settlement of lawsuits by ensuring parties need not fear that their desire to settle pending litigation and their offers to do so will be construed as admissions.”); Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 508(D) (3d ed. 1999) (“Offers of compromise are excluded because public policy encourages settlement.”); Clifford S. Fishman & Anne T. McKenna, *Jones on Evidence* § 22:11.70 (7th ed.) (“If parties are permitted [ . . . ] to put before the court through their pleadings the existence of settlement negotiations as a fact in support of the parties’ claim or defense, it circumvents the purpose of the Rule.”). The courts that have addressed the issue of admissibility of settlement communications have routinely struck settlement negotiations attached to or referenced in pleadings. *See, e.g., Cornell Univ. v. Illumina, Inc.*, 2013 WL 3216087, at \*1-3, 22 (D. Del. June 25, 2013) (granting plaintiff’s motion to strike references to settlement negotiations); *Trading Techs. Int’l, Inc. v. BCG Partners, Inc.*, 2011 WL 3946581, \*2 n.3 (N.D. Ill. Sept. 2, 2011) (striking references to settlement negotiations from amended complaint and noting that doing so “at this [pre-discovery] stage is not unusual”); *Ogundule v. Girl Scouts–Ariz. Cactus Pine Council, Inc.*, 2011 WL 1770784, \*8-9 (D. Ariz. May 10, 2011) (striking exhibits to complaint that contained settlement material); *U.S. ex rel. Alsaker v. Centracare Health Sys., Inc.*, 2002 WL 1285089, at \*2 (D. Minn. June 5, 2002 ) (collecting cases).

<sup>45</sup> *See* Compl., Ex. B.

letter containing Ms. Hodges and KDH's settlement demand and outlining the various jurisdictional considerations that likely would be unfamiliar to a Chicago, Illinois-based attorney. Mr. Spatz said he was talking to his client about the offer. In reality, Mr. Spatz and GiveForward engaged in a "rush to the courthouse" to sue then 8-year-old KDH and his mother.<sup>46</sup> In response, GiveForward turned around and sued Ms. Hodges and then-8-year-old KDH.

### **SUPPLEMENTAL PERTINENT FACTS**

1. GiveForward informs the Court that upon learning of the fraud "GiveForward promptly hid the fundraiser from public view and investigated Ms. Hodges' claims."<sup>47</sup> GiveForward clearly had control over the KDH Fundraiser, yet despite being on notice that there was fraud involved (and, therefore, the possibility of litigation), GiveForward failed to preserve the content of the KDH Fundraiser and, as Ms. Hodges and KDH have previously pointed out, there is no way to now know what the KDH Fundraiser content was beyond the black and white screenshot Ms. Hodges was able to preserve.

2. GiveForward's electronic evidence establishes that on March 29, 2013, in direct response to GiveForward's March 26, 2013 email stating "Fundraisers that make 4 updates, on average, raise \$2,890 more than those without updates!," Johnson and Harris made a substantive update to the KDH Fundraiser.<sup>48</sup>

3. GiveForward's late-produced electronic evidence establishes that donations made by Johnson in the name of others triggered two (2) email notifications to GiveForward of suspicious fundraiser activity and that in response thereto GiveForward did nothing.

4. During his deposition, Johnson willingly admitted to lying to Monica Smothers, the previously unknown Good Samaritan who contacted Ms. Hodges on social media and

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<sup>46</sup> Wrigley Dep. Tr.

<sup>47</sup> GF Mem. at 12, ¶ 27.

<sup>48</sup> See Hodges Mot. at 20-21, ¶ 55.

advised her of the fraud, about visiting KDH in the hospital.<sup>49</sup> Additionally, as a direct result of his fraudulent activities in the KDH Fundraiser, Johnson has been indicted in Prince George's County, Maryland on three counts of theft.<sup>50</sup> Nevertheless, GiveForward relies on Johnson's deposition testimony to support its claim that GiveForward did not create or develop any content for the KDH Fundraiser.<sup>51</sup>

5. As evidenced extensively in Ms. Hodges and KDH's motion seeking to serve process on Harris via alternate means, Harris is actively evading service of process in this matter.<sup>52</sup> Harris, however, *is* working with GiveForward in this matter and provided GiveForward with a sworn declaration in support of its Cross-Motion.<sup>53</sup>

### **ARGUMENT**

Contrary to the various arguments made by GiveForward in support of its Cross-Motion and in opposition to Ms. Hodges and KDH's Motion, for the reasons discussed more fully below, GiveForward is neither entitled to summary judgment on its Complaint for declaratory relief nor entitled to summary judgment on Ms. Hodges and KDH's Counterclaims.

#### **I. GIVEFORWARD MISUNDERSTANDS THE MEANING OF "PUBLICATION" AND WHAT CONSTITUTES SPEECH, CONTENT, AND PUBLICATION ON THE INTERNET.**

Throughout its Memorandum, GiveForward reiterates the bullheaded position that the *only* publication of speech that took place in this case was when Johnson and/or Harris initially uploaded the fraudulent story Johnson created about KDH dying of a terminal heart condition. GiveForward contends that its myriad complex activities and actions vis-à-vis the KDH Fundraiser are not speech or content, or even if such activities or actions could be determined to

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<sup>49</sup> See Johnson Dep. Tr. 107:15-20, attached hereto as part of **Exhibit 3**.

<sup>50</sup> See **Exhibit 4** attached hereto.

<sup>51</sup> See GF Mem. \_\_\_\_\_.

<sup>52</sup> See *generally* Mot. for Alternate Service [ECF 127].

<sup>53</sup> See Cross-Mot., Ex. E.

be speech or content, GiveForward cannot be liable because such actions or activities occurred “after” Johnson or Harris clicked publish on the KDH Fundraiser. GiveForward also repeatedly takes the position that its speech, actions, and activities done “after” Johnson or Harris hit the publish button on GiveForward’s website are not relevant because they occurred “after” Johnson’s lie about his son and, thus, cannot be considered speech or content development.<sup>54</sup> Finally, GiveForward alternately appears to admit it engaged in speech and content creation, but it curiously and repeatedly describes its own speech as “content-neutral.” More importantly, GiveForward’s position is unsupported by the extensive electronic record in this case, by its own systems, by its own interactions with and involvement in the KDH fundraiser and the fundraiser organizers and donors, and by its own speech.

GiveForward argues that because it did not create the initial lie about KDH’s terminal illness and impending death, GiveForward cannot be held accountable for *any* aspect of the KDH Fundraiser or *any* aspect of its own tortious conduct with regard to the KDH Fundraiser. GiveForward’s position and legal arguments demonstrate fundamental misunderstandings about: what constitutes speech and content on the Internet; how actions and activities online are determined to be expressive speech and, hence, entitled to constitutional protection; who is a “speaker” for purposes of speech, content, and development; when publication of speech occurs; the essential role of states in regulating professional fundraisers/solicitors; and what the causes of action asserted against GiveForward in this case actually are. For instance, the term “content neutral” – which is peppered throughout GiveForward’s Cross-Motion – has no legal relevance, significance, or bearing on the determination of whether GiveForward engaged in speech that is content development, in whole or part, for purposes of the CDA. The term “content neutral” is an

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<sup>54</sup> GF Mem. at 44-46.

essential factor in a balancing test courts employ to determine whether statutory regulation of speech by the government is constitutional or an unconstitutional prior restraint on speech.<sup>55</sup>

The Supreme Court and Fourth Circuit broadly define what what constitutes speech, content, and publication of speech on the Internet. Speech and speech content can come in many forms. Thus, the Supreme Court has long held that non-verbal conduct may constitute speech,<sup>56</sup> and speech occurs wherever there is “[a]n intent to convey a particularized message” that is accompanied by “surrounding circumstances” indicating a great “likelihood” that the message would be understood by those who viewed it. *Spence v. State of Wash.*, 418 U.S. 405, 411 (1974). The case at hand involves online speech, and in terms of online speech, the Supreme Court has soundly rejected any notion that online speech is somehow not worthy of the same level of protection as other speech. *See, e.g., Reno v. ACLU*, 521 U.S. 840, 870 (1997); *see generally Ashcroft v. ACLU*, 542 U.S. 656 (2004).

The fact that Johnson/Harris and GiveForward’s for-profit professional KDH Fundraiser occurred online and involved myriad expressive actions and activities not limited just to written words requires the Court to consider precisely what constitutes “speech” on the Internet. In other words, the Court must consider how clicks, button-pushes, automated emails, “likes” or “hugs,” and similar such actions and activities that are conducted online electronically and sometimes by automated systems are treated or considered for purposes of analyzing legal issues surrounding speech and speech content. Fortunately, the Fourth Circuit has issued on-point precedent that defines what constitutes speech in the new world of human interaction – social media and the Internet.

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<sup>55</sup> Courts specifically look to the language of the statute or ordinance restricting constitutionally-protected speech to determine if the restriction is drafted in such a way as to be “content neutral” in its application (of the restriction) to speech. *See, e.g., Schneck v. Pro-Choice Network*, 519 U.S. 357 (1997).

<sup>56</sup> *See, e.g., Spence v. State of Wash.*, 418 U.S. 405 (1974) (a peace sign taped to a privately-owned U.S. flag is speech).

In *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013), the Fourth Circuit specifically considered what actions and activities may constitute speech on social media and online platforms where individuals express their interests, likes, preferences, and thoughts with the mere click of a button. In order to make a legal determination as to whether a sheriff's office employee's "likes" of a campaign page on Facebook were constitutionally protected speech, the Fourth Circuit queried whether clicking a button is speech and, if so, whether it is speech or content that is protected by the First Amendment or speech that may potentially subject the speaker to liability under tort law.

*Bland* presented an online speech question of first impression for the Fourth Circuit; namely, do "likes" on Facebook amount to expressive speech entitled to constitutional protection? A lower district court in Virginia had held that "merely 'liking' a Facebook page [was] insufficient speech to merit constitutional protection."<sup>57</sup> In a careful and detailed opinion authored by Chief Judge Traxler, examining the nature of speech and expressive speech online and on social media platforms,<sup>58</sup> the Fourth Circuit reversed the lower court's holding, finding that Facebook "likes" are constitutionally protected speech. *Bland*, 730 F.3d at 385-386.

To answer the question of whether a Facebook "like" could constitute speech, the Fourth Circuit considered "as a factual matter, what it means to 'like' a page on Facebook." *Id.* at 386. The court reviewed what Facebook was,<sup>59</sup> who Facebook Users were and how they used

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<sup>57</sup> *Bland*, 857 F.Supp.2d 599, 603 (E.D. Va. 2012).

<sup>58</sup> In the very first sentence of her concurrence, the Honorable Ellen Lipton Hollander, sitting by designation on the Fourth Circuit panel in *Bland*, described Chief Judge Traxler's opinion as "excellent." 730 F.3d 368, 395 (Hollander, J., concurring in part and dissenting in part on grounds entirely unrelated to the majority's findings and holding with respect to online speech).

<sup>59</sup> "Facebook is 'an online social network where members develop personalized web profiles to interact and share information with other members.' Members can share various types of information, including 'news headlines, photographs, videos, personal stories, and activity updates.' Daily more than 500 million Facebook members use the site and more than three billion 'likes' and comments are posted." 730 F.3d at 385 (internal cites omitted) (quoting *Lane v. Facebook, Inc.*, 696 F.3d 811, 816 (9th Cir.2012)).

Facebook,<sup>60</sup> how Facebook Users had Profiles, how Users' Profiles contained each User's Likes,<sup>61</sup> how Facebook itself defined a "Like," and how Users used "likes."<sup>62</sup> In *Bland*, the Fourth Circuit recognized that when the sheriff's employee visited a political campaign's Facebook page (the "Campaign Page") and clicked the "like" button on the Campaign Page, doing so caused information associated with the Campaign (the campaign page and a photo of the candidate)—which a campaign representative had selected as the Page's icon—to be added to the employee user's profile, which all Facebook users could view. On the employee user's profile, the Campaign Page name served as a link to the Campaign Page. The employee user's clicking on the "like" button also caused an announcement to appear in the news feeds of the employee user's Facebook friends that the employee user liked the Campaign Page. And it caused the employee user's name and profile photo to be added to the Campaign Page's "People [Who] Like This" list. This is akin to how GiveForward's electronic platform works.

In determining that clicking a "like" button on Facebook is expressive speech because of the very nature and way that the Facebook software and platform functions, the Fourth Circuit's holding defines and explains essential aspects of online speech and content on such social media and online platforms like GiveForward's website. This holding has direct precedential bearing on GiveForward's speech in this case. Chief Judge Traxler's opinion is clear:

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<sup>60</sup> "When a user logs on to Facebook, his home page is the first thing that he typically sees. Included on a home page is a news feed, 'which, for most Users, is the primary place where they see and interact with news and stories from and about their Friends and Pages they have connected with on Facebook.'" 730 F.3d at 385.

<sup>61</sup> "Every Facebook user has a profile, which 'typically includes, among other things, the User's name; photos the User has placed on the website (including one photo that serves as the User's profile photo); a brief biographical sketch; a list of individual Facebook Users with whom the User [interacts, known as 'friends']; and...a list of Facebook 'Pages' the User has Liked.' '[B]usinesses, organizations and brands,' can also use "Pages" for similar purposes.'" 730 F.3d at 385. (internal citations omitted).

<sup>62</sup> "'Liking' on Facebook is a way for Facebook users to share information with each other. The 'like' button, which is represented by a thumbs-up icon, and the word "like" appear next to different types of Facebook content. Liking something on Facebook 'is an easy way to let someone know that you enjoy it.' 'When you connect to a Page, it will appear in your timeline and you will appear on the Page as a person who likes that Page. The Page will also be able to post content into your News Feed.'" 730 F.3d at 385 (internal citations omitted).

Once one understands the nature of what Carter [the sheriff's office employee] did by liking the Campaign Page, it becomes apparent that his conduct qualifies as speech. On the most basic level, clicking on the "like" button literally causes to be published the statement that the User "likes" something, which is itself a substantive statement. In the context of a political campaign's Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance.

Aside from the fact that liking the Campaign Page constituted pure speech, it also was symbolic expression. The distribution of the universally understood "thumbs up" symbol in association with Adams's campaign page, like the actual text that liking the page produced, conveyed that Carter supported Adams's candidacy.

In sum, liking a political candidate's campaign page communicates the user's approval of the candidate and supports the campaign by associating the user with it.

730 F.3d at 386 (citations omitted).

As courts adapt and learn to apply speech and content concepts to activity and expression taking place via emerging technologies on more and more sophisticated online platforms for business and interaction, like the GiveForward website, even in the framework of CDA immunity, what is understood to be speech and content creation grows and evolves. For instances, courts have now recognized that impressions created by a website can constitute speech and content development for purposes of the CDA. *See, e.g., Alvi Armani Med., Inc. v. Hennessey*, 629 F.Supp.2d 1302, 1306-07 (S.D. Fla. 2008) (citing *Whitney Info. Network, Inc. v. Xcentric Venture, LLC*, 199 Fed. Appx. 738, 744 (11th Cir. 2006) (where complaint contained allegations illustrating defendants' involvement in creating or developing the alleged defamatory content of consumer complaints posted on their website, district court erred in dismissing complaint)).

Importantly, GiveForward's CEO and Co-Founder, Desiree Vargas Wrigley, testified that she and others at GiveForward considered Facebook as a model for GiveForward's online

platform with “similar” speech or as she described it “type of content” “being posted.”<sup>63</sup> The complex GiveForward fundraising machinery is remarkably similar in ways to a campaign page on Facebook. For instance, GiveForward’s “hugs” “tips” and “emails” are directly analogous to Facebook “likes” in terms of expressive speech. For the KDH Fundraiser, GiveForward provided exemplar fundraiser language,<sup>64</sup> tips to increase fundraising content and results, automated emails, widgets, and human fundraising coaches. In the spring of 2013, when the KDH Fundraiser was launched, GiveForward’s website displayed specific, proposed, exemplar language for how a fundraiser should be worded.<sup>65</sup> The tips publicly available on GiveForward’s website specifically recommend uploading a personal photo of the victim or fundraiser beneficiary, providing detailed information about the issue, and creating “a sense of urgency.” Johnson and Harris did exactly that, which resulted in the improper and privacy invading use of KDH’s name and photograph.

Similar to a Facebook profile, GiveForward’s electronic systems automatically created a KDH Fundraiser profile that displayed KDH’s name and image. GiveForward’s systems automatically created a widget out of software code wholly created by GiveForward. GiveForward’s systems automatically enabled users and visitors to the KDH Fundraiser to “hug” the fundraiser, or to “like” the fundraiser (as on Facebook). And GiveForward’s machinery began to promote the fundraiser. This is documented by the “TweetBuzz” search results that depict the KDH Fundraiser as one of the most popular GiveForward Twitter stories. GiveForward’s fundraising coaches are specifically instructed to “hug” fundraisers, thereby

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<sup>63</sup> Wrigley testified, “We thought that in terms of the type of content that was being posted on -- on GiveForward by users, that it was very similar to the type of content that was being posted by users on Facebook, yeah.” Wrigley Dep. Tr. 24:14-20.

<sup>64</sup> *See supra* at 10.

<sup>65</sup> McKeever Dep. Tr. Conveniently for GiveForward, however, GiveForward says it no longer has the sample language provided on its website at the time the KDH Fundraisers were launched, and thus has refused to produce any the exemplar language it provided at the time despite numerous requests.

promoting fundraiser awareness and providing the public with a sense of legitimacy of the “hugged” fundraisers.<sup>66</sup> In other words, initial input of information on GiveForward’s website is not just a blank box that results in the original input appearing exactly as the organizer inserted it. First, GiveForward engages in activity that heavily shapes the content of the speech

**II. THE TORTIOUS CONTENT OR CONDUCT AT ISSUE IS NOT LIMITED TO THE FALSE CLAIM THAT KDH WAS DYING.**

KDH’s name and picture were posted on GiveForward’s website and multiple social media platforms, along with gut-wrenching lies about KDH’s health, for the purpose of preying on the generosity of unsuspecting donors. This fraudulent fundraising campaign was viewed on GiveForward’s own webpage a total of 1,523 times, was shared via Facebook 41 times, and received 54 individual donations.<sup>67</sup> In other words, KDH’s name and smiling face were associated with this appalling deceit at least 1,523 times on GiveForward’s own webpage and at least 41 times on Facebook. KDH had been used to fraudulently raise funds and his name and photo had been posted on the Internet for all to see. GiveForward mischaracterizes the tortious content at issue as limited *solely* to the false claim that KDH was sick.<sup>68</sup> As Ms. Hodges and KDH have detailed extensively to this Court, the tortious content and conduct in the instant case go far beyond a simple lie that originated with Johnson. In helping to increase the success of the KDH Fundraiser, GiveForward increased the invasion of privacy and emotional distress. Everything that GiveForward did to increase the success of the KDH Fundraiser resulted in more people seeing the fundraiser, and the more people that saw the fundraiser, the greater the invasion of privacy.

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<sup>66</sup> Fundraising coaches who “hug” the most fundraisers receive a prize each month.

<sup>67</sup> Hodges Mot. ¶ 47.

<sup>68</sup> *See, e.g.*, Mem at 16 (“[D]espite the Defendants’ attempt to characterize their claims as premised on something other than Mr. Johnson’s false statement that his son was sick, the claims at issue in this matter are undeniably based on this alleged offensive content.”).

GiveForward’s entire argument is premised on the concept that it did not create or develop the original false claim that KDH was sick. As illustrated by the following chart, GiveForward repeats this position so often in its Cross-Motion that it appears to be beating the Court over the head with it:

<b>GiveForward’s Mischaracterization of Tortious Content and Conduct At Issue</b>	<b>Cite<sup>69</sup></b>
“The Defendants now seeks to hold GiveForward responsible as if GiveForward was the publisher or speaker of Mr. Johnson’s false claim that his son was sick.”	3
Defendants “pursue GiveForward for a bevy of claims – all based on GiveForward’s publication of Mr. Johnson’s claim that his son had a terminal illness.”	3
“Defendants seek to impose liability on GiveForward as the publisher or speaker of content provided by a third party, Kimani Johnson-namely, the false claim that KDH was sick.”	13
“[T]he vast majority of Defendants’ claims center exclusively on Mr. Johnson’s false claim that KDH had a terminal heart condition.”	14
“[E]ach of these claims treats GiveForward as the publisher or speaker of Mr. Johnson’s false claim that his son was sick.”	15
“[D]espite the Defendants’ attempt to characterize their claims as premised on something other than Mr. Johnson’s false statement that his son was sick.”	15-16
“[T]he claims asserted under the [Maryland Solicitation Act] are dependent on treating GiveForward as the publisher or speaker of the claim that KDH had a terminal illness.”	16
“[A]ll of the alleged violations of [the Maryland Solicitation Act] require GiveForward to be treated as the publisher or speaker of Mr. Johnson’s claim that KDH had a terminal illness.”	18
“Defendants do not point to any analogous Maryland law that would create a duty independent from the claims based on GiveForward’s publication of Mr. Johnson’s fraudulent claim that his son was sick.”	19
“[T]he CDA shields GiveForward from liability premised on treating it as the publisher or speaker of Mr. Johnson’s false statements.”	22
“[E]ach of the Defendants’ fraud-based claims is based solely on treating GiveForward as the publisher or speaker of Mr. Johnson’s claim that KDH had a terminal illness.”	29
“GiveForward Is Not An Information Content Provider For The Alleged Tortious Content At Issue – Mr. Johnson’s Claim That KDH Was Sick With A Terminal Illness.”	31 (title)
“Mr. Johnson Provided All Of The Allegedly Tortious Content At Issue – The Fraudulent Claim That KDH Was Sick.”	31 (title)
“Because the Defendants have no basis to argue that GiveForward created Mr. Johnson’s false claim, the Defendants are, instead, left to attempt to argue that	32

<sup>69</sup> These citations are to page locations in GiveForward’s Memorandum.

GiveForward “developed” Mr. Johnson’s claim.”	
“Defendants do not provide evidence of any practice by GiveForward that materially contributed to the false claim that KDH was sick.”	35
“Defendants must produce evidence that demonstrates that GiveForward materially contributed to the false claim that KDH had a terminal illness – the alleged offensive content at issue in this case.”	35
“GiveForward cannot be held liable as an information content provider for ‘development’ of the false claim that KDH was sick.”	35
“Defendants must establish a business practice that materially contributes to illegal content and, in this case, the fraudulent claim that KDH was sick.”	38
“None Of The Alleged Business Practices Identified By The Defendants Materially...Contributed To The Claim That KDH Had A Terminal Illness.”	39 (title)
“Defendants do not even attempt to explain how this Tweet allegedly contributed to the false claim that KDH was sick.”	39
“Defendants...do not explain how allowing users to share a fundraiser... materially... contributed to the claim that KDH had a terminal illness.”	40
“Defendants fail to explain how...[widgets] contributed to the claim that KDH had a terminal illness.”	40
“Neither the Tweet, thank you message nor the widget...materially contributed to Mr. Johnson’s false claim.”	41
“[N]one of these things makes GiveForward an information content provider of the offensive content at issue in this case – the claim that KDH was sick.”	41
“Defendants...fail to identify...anything associated with GiveForward’s lawful fundraising that ... contributed to the claim that KDH was sick.”	41
“Defendants fail to identify anything done by GiveForward that allegedly contributed to the fraudulent claim that KDH was sick.”	41
“Defendants fail to explain how having customer service or “support” for the GiveForward website allegedly... contributed to the false claim that KDH was sick.”	43-44
“Defendants do not explain how allowing users to share a fundraiser... in any way materially contributes to ... the claim that KDH had a terminal illness.”	45
“Defendants do not explain how featuring fundraisers on its website materially contributed to the claim that KDH was sick.”	46
“[N]one of these [tips and suggestions sent directly to Johnson and Harris] could have materially contributed to the false claim that KDH was sick.”	46
“Defendants’ [sic] fail to explain how any of the actions that they speculate Johnson and Harris took (e.g., making an initial donation, sharing the fundraiser with friends, enabling PayPal, etc.) ... materially contributed to the false claim that KDH had a terminal illness.”	46
“All of the claims that form the basis of GiveForward’s complaint are based on the Defendants seeking to hold GiveForward liable as the publisher or speaker of Mr. Johnson’s false claim that his son was sick.”	50

In its Cross-Motion, GiveForward provides small charts that misleadingly describe Ms. Hodges and KDH’s claims, despite the fact that such an unreasonably narrow characterization is

directly contradictory to Ms. Hodges and KDH's Counterclaims and subsequent pleadings and has no basis in fact, law, or logic. GiveForward falsely asserts that "the vast majority of Defendants' claims center *exclusively* on Mr. Johnson's false claim that KDH had a terminal heart condition."<sup>70</sup> (*emphasis* added). As detailed above, Defendants' claims center on a multitude of tortious conduct and content related to the use of KDH's name and likeness to fraudulently solicit donations and GiveForward's misleading business practices. GiveForward's repeated assertions to the contrary intentionally mislead this Court and reflect a profound misunderstanding of the law.

GiveForward's belief that causes of action for invasion of privacy could center exclusively on a simple lie suggests unfamiliarity with the basic elements of Maryland tort law. GiveForward's exclusive fixation on the false statement might be justified in the face of a defamation claim, wherein a false statement is the primary basis for liability. However, invasion of privacy claims are not premised merely on a false statement, but rather the widespread dissemination of private information. Ms. Hodges and KDH do not assert that GiveForward defamed KDH with the false claim that he was sick; rather, Ms. Hodges and KDH assert that the widespread dissemination of this false claim accompanied by KDH's name and likeness is the tortious content and conduct at issue.

GiveForward further distorts Ms. Hodges and KDH's arguments regarding GiveForward's role as an information content provider, falsely representing to the Court that Ms. Hodges and KDH seek to prove that GiveForward created and developed Johnson's false claim that KDH was dying.<sup>71</sup> Again, this false claim is not the only tortious content or conduct at issue, nor even

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<sup>70</sup> GF Mem. at 14. GiveForward's chart purporting to summarize Ms. Hodges and KDH's allegations contains select excerpts from the Counterclaims that reference the false claim about KDH's health, while conveniently failing to include the complete basis for the causes of action. *See* GF Mem. at 14-15.

<sup>71</sup> *See* GF Mem. at 32 ("Because the Defendants have no basis to argue that GiveForward created Mr. Johnson's

is it the primary basis for GiveForward’s liability as asserted by Ms. Hodges and KDH.. GiveForward independently created and developed content that invaded KDH’s privacy and used KDH as a prop for fraudulent fundraising. GiveForward failed to exercise reasonable due care and due diligence. GiveForward failed to heed its own protocol and warnings of potential fraud.

GiveForward misstates the significance of the GiveForward-generated content at issue, again arguing that this content did not contribute to the lie that KDH was sick and therefore is not actionable. The GiveForward-generated content is, in fact, actionable. Consider, for example, the Tweet by Ashley Groves promoting the KDH fundraiser.<sup>72</sup> The Tweet included a photo of KDH and his name, which Ms. Hodges and KDH have already explained is an invasion of KDH’s privacy.<sup>73</sup> GiveForward states that Ms. Hodges and KDH “do not even attempt to explain how this Tweet allegedly contributed to the false claim that KDH was sick.”<sup>74</sup> Ms. Hodges and KDH do not argue that this Tweet contributed to Johnson’s lie, nor do they need to. The Tweet itself is an invasion of KDH’s privacy and it furthered other invasions of KDH’s privacy by increasing the dissemination and success of the fraudulent KDH Fundraiser. The following chart identifies just some of the KDH Fundraiser content that GiveForward created and/or developed and partially explains its tortious character:<sup>75</sup>

<b>Tortious Content and Conduct Created and/or Developed by GiveForward</b>	<b>Tortious Character of this Content and Conduct</b>
Tweet by Ashley Groves promoting KDH fundraiser	Direct invasion of privacy and emotional distress via disclosure of KDH’s name, as well as promotion of the KDH Fundraiser

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false claim, the Defendants are, instead, left to attempt to argue that GiveForward ‘developed’ Mr. Johnson’s claim.”).

<sup>72</sup> GiveForward curiously claims that Ms. Hodges and KDH do not contend this Tweet is actionable. GF Mem. at 39. This is false.

<sup>73</sup> See Defs.’ Ans. to Interrogs. at 6.

<sup>74</sup> GF Mem. at 39.

<sup>75</sup> This chart is not intended to be an exhaustive list of GiveForward created content or an exhaustive analysis of all tortious aspects of GiveForward’s conduct.

Widgets	Direct invasion of privacy and emotional distress via disclosure of KDH's name and likeness, as well as promotion of the KDH Fundraiser.
Thank You Emails from GiveForward to donors and supporters	Invasion of privacy and emotional distress via promotion of the KDH's fundraiser
Fundraising Tip Emails; Fundraising Advice Resources; Fundraiser Coaching	Furthered the dissemination, publicity, and financial success of the KDH Fundraiser, thereby increasing invasion of privacy and emotional distress.
Affirmative Representations regarding safety of GiveForward fundraisers	Created the impression that fundraisers had been vetted, which increased donor confidence and furthered the dissemination, publicity, and financial success of the KDH Fundraiser, thereby increasing invasions of privacy and emotional distress.

GiveForward concludes its argument by repeating its glib mischaracterization of the tortious content and conduct at issue in this case: "All of the claims that form the basis of GiveForward's Complaint are based on the Defendants seeking to hold GiveForward liable as the publisher or speaker of Mr. Johnson's false claim that his son was sick."<sup>76</sup> After suing Ms. Hodges and then-8-year-old KDH, GiveForward now seeks to determine unilaterally what content and conduct Ms. Hodges and KDH take issue with and to rewrite the contents of their pleadings. GiveForward's cavalier assertions about the facts and pleadings of this case demonstrate its stunning disregard of the rules of this Court and the truth.

### **III. GIVEFORWARD IS AN INFORMATION CONTENT PROVIDER IN GENERAL AND FOR THE KDH FUNDRAISER IN PARTICULAR.**

Pursuant to the statutory language of the CDA, an "information content provider" is "any person or entity that is responsible, *in whole or in part*, for the *creation or development* of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3) (*emphasis added*). Despite GiveForward's arguments to the contrary, upon review of the facts, it is clear that in supplementing the content of and creating new content for the KDH

<sup>76</sup> GF Mem. at 50.

Fundraiser (e.g., GiveForward’s Tweet and widget promoting the fraudulent fundraiser, emails to Johnson and Harris, and emails to donors), GiveForward itself created and developed information for the KDH Fundraiser. It is also clear that by providing significant substantive tips and advice designed to maximize donations and GiveForward’s profits therefrom, GiveForward is a co-developer of content. Ultimately, because GiveForward is an information content provider, it loses CDA immunity and, therefore, is not entitled to summary judgment.

**A. GiveForward Mischaracterizes and Misapplies CDA Caselaw.**

GiveForward, in support of its argument that it is not an information content provider “for the alleged tortious content at issue,”<sup>77</sup> primarily relies on three cases: *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008); and *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014). Not only is each of these cases distinguishable, but GiveForward frequently misapplies the law culled from these cases in arguing that it is not an information content provider.<sup>78</sup> For example, GiveForward misconstrues what it means to “develop” content and limits “development” to “material contribution.”<sup>79</sup> However, as explicitly stated by the Fourth Circuit in *Nemet*, the “material contribution” definition is only one definition of “development.” *See* 591 F.3d at 257. Not only are there other definitions of “development,” but a party is an information content provider if it develops *or creates* content. *See* 47 U.S.C. § 230(f)(3). Accordingly, there are multiple bases upon which a website can lose CDA immunity.

<sup>77</sup> *See supra* at section II for a discussion of how GiveForward has myopically and illogically limited the “tortious content at issue” to Johnson’s initial lie that KDH was dying.

<sup>78</sup> Additionally, as discussed *supra*, it is important to keep in mind that GiveForward’s mischaracterization of the tortious conduct at issue here has necessarily impacted and infected GiveForward’s ability to properly address the caselaw.

<sup>79</sup> *See, e.g.*, GF Mem. at 31 (“...it is not sufficient to show that an interactive computer service contributed just any content. Instead, the website must be shown to have materially contributed to the *content that allegedly gives rise to tort liability*.” (emphasis in original)).

*Nemet*—With regard to *Nemet*, GiveForward writes specifically (and in relevant part):

The Fourth Circuit followed the material contribution definition of “development” in *Nemet*.... In *Nemet* the plaintiff argued that the website—which was designed to post consumer complaints—should be liable for developing content because of the “structure and design of its website” and because it “solicit[ed] its customers’ complaints [and] steered them into specific categories.” The court, however, upheld the dismissal of the complaint, because even accepting these allegations as true, there was no evidence that the website “contributed to the allegedly fraudulent nature of the comments at issue.”

In *Nemet*,...the plaintiff claimed that the website contacted “the consumer to ask questions about the complaint and to help her draft or revise her complaint. The Fourth Circuit found that these allegations were insufficient to remove § 230 immunity....”

Mem. at 33 (emphasis omitted). However, GiveForward entirely misconstrues *Nemet*, which addresses whether a Virginia U.S. District Court properly granted the defendant’s motion to dismiss pursuant to Rule 12(b)(6). The *Nemet* court held “that these allegations were insufficient to remove § 230 immunity” precisely because the plaintiff had not alleged sufficient facts regarding the particular questions the website contacted the consumer to ask. Therefore, the complaint was properly dismissed pursuant to Rule 12(b)(6).

Importantly, in *Nemet*, the Fourth Circuit was considering whether the plaintiff had alleged facts sufficient to support the causes of action asserted in the complaint, and ultimately determined that it had not. This issue has already been litigated before the Court in relation to GiveForward’s Combined Motion to Dismiss and For Judgment on the Pleadings [ECF 23]. And this Court has already ruled that Ms. Hodges and KDH pleaded sufficient facts such that the parties in this case were ordered to proceed with discovery. *See* Nov. 22, 2013 Order [ECF 30]. Unlike the plaintiff in *Nemet*, who had failed to plead – as a preliminary matter – sufficient factual allegations, this Court **has already found** that Ms. Hodges and KDH *did* allege sufficient factual allegations to survive GiveForward’s motion to dismiss and move forward with discovery.

Additionally, though the Fourth Circuit in *Nemet* did adopt the material contribution definition of “development” from *Roommates*, the Fourth Circuit did not limit “development” to merely that one definition. The *Nemet* court explicitly states that “*Roommates.com* merely adopted *a* definition of ‘development,’ for purposes of § 230(f)(3), that *includes* ‘materially contributing’ to a given piece of information’s ‘alleged unlawfulness.’” *Nemet*, 591 F.3d at 257 (*emphasis* added). Thus, in the Fourth Circuit, “material contribution” is not the *exclusive* definition of development under the CDA.

*Nemet* is also factually inapposite. The defendant in *Nemet* provided an online consumer complaint bulletin board to which third-party users posted their complaints. The plaintiff filed a claim against the defendant alleging defamation because of complaints posted to the bulletin board by third-party users. By comparison, GiveForward is a for-profit fundraising consulting service that provides tips and advice to third-party users regarding how to maximize donations (and by extension, increase GiveForward’s profits). Importantly, GiveForward also independently creates content (*e.g.*, widgets) designed to extend the reach of fundraisers. This independently created content is speech that directly impacted the extent to which KDH’s privacy was invaded.

***Roommates and Jones***—GiveForward primarily relies on *Roommates* and *Jones* in support of its argument that GiveForward is not an information content provider because it did not materially contribute to the alleged unlawfulness of the tortious conduct or content.<sup>80</sup> In *Roommates*, the Ninth Circuit did hold that *a* definition of “development” of information is to “materially contribut[e] to the alleged unlawfulness” of the conduct. *Roommates*, 521 F.3d at 1167-68. Likewise, in *Jones*, the Sixth Circuit adopted this “material contribution” definition of “development” and rejected the Kentucky District Court’s “encouragement test of immunity”

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<sup>80</sup> See GF Mem. at 32-33, 34-35.

and “adoption or ratification theory.” *See Jones*, 755 F.3d at 413-15. However, as noted by the Fourth Circuit’s controlling decision in *Nemet*, “material contribution” is *merely one* definition of “development” among many. *See Nemet*, 591 F.3d at 257.

In discussing *Jones*, GiveForward curiously ignores the Sixth Circuit’s most important statements and recognition of the law surrounding “development” and publication of speech and content on the Internet:

By contrast, an overly exclusive interpretation of “development” would exclude all the publishing, editorial, and screening functions of a website operator from the set of actions that the term denotes. Some courts have implied this interpretation, however. *See, e.g., Doe v. SexSearch.com*, 502 F.Supp.2d 719, 727 (N.D. Ohio 2007), *aff’d*, 551 F.3d 412 (6th Cir. 2008). But we have refused to adopt it. *See Doe*, 551 F.3d at 415 (“[W]e do not reach the question of whether the [CDA] provides SexSearch with immunity from suit. We do not adopt the district court’s discussion of the Act, which would read § 230 more broadly than any previous Court of Appeals decision has read it, potentially abrogating all state- or common-law causes of action brought against interactive Internet services.”). **We have maintained that, despite the CDA, some state tort claims will lie against website operators acting in their publishing, editorial, or screening capacities.**

755 F.3d at 409-410. (**emphasis** added). In *Jones*, the Sixth Circuit *explicitly rejected* any definition of “development” for purposes of CDA immunity in such a way as to be “potentially abrogating all state- or common-law causes of action brought against interactive Internet services.” 755 F.3d at 410. But that is precisely what GiveForward is asking this court to do. Under GiveForward’s theory, there would be no circumstance where it could be found liable because it never starts any fundraiser without first being approached by third-party, and it is always the third-party organizer who brings the initial story to GiveForward’s systems. By GiveForward’s interpretation no amount of privacy invasion, no amount of negligence, no failure of due diligence, no failure to comply with any state’s professional fundraising laws (and Maryland’s in particular), and no amount of subsequent speech by GiveForward would ever abrogate the CDA’s shield of immunity.

Contrary to GiveForward's assertions, these cases do not foreclose Ms. Hodges and KDH's Counterclaims. As the *Jones* court points out, it is an issue of how inclusively or exclusively a court reads the statutory term "development." See *Jones*, 755 F.3d at 409-10. An overly inclusive interpretation of "development" would posit that a website operator is responsible for the development of content created by a third party merely by displaying or allowing access to it. *Id.* at 409. By contrast, an overly exclusive interpretation of "development" would exclude all the publishing, editorial, and screening functions of a website operator from the set of actions that the term denotes. *Id.* The *Jones* court **rejects both** of these interpretations of "development," stating on the one hand, the "recognition that the CDA affords immunity forecloses this overbroad reading of 'development,'" *id.*, and stating on the other hand, "despite the CDA, *some* state tort claims will lie against website operators acting in their publishing, editorial, or screening capacities. [...] And instances of development *may* include some functions a website operator may conduct with respect to content originating from a third party." 755 F.3d at 410.

Additionally, as the *Roommates* court points out, by enacting section 230 of the CDA, "Congress sought to immunize the *removal* of user-generated content not the *creation* of content," 521 F.3d at 1163 (emphasis in original), and "the substance of section 230(c) can and should be interpreted consistent with its caption," *id.* at 1164. Further, *Roommates* explicitly recognized that there are multiple bases for loss of immunity as an information content provider, specifically stating, "section 230(c) uses both 'create' and 'develop' as separate bases for loss of immunity." *Id.* at 1168. Ultimately, however, GiveForward devotes altogether too much of its Cross-Motion to discussing *Roommates*, a Ninth Circuit case, and *Jones*, a Sixth Circuit case, neither of which is controlling law but only persuasive and/or instructive.

Finally, one thing that *Nemet* and *Jones* have in common is that they are both factually inapposite. *Nemet* and *Jones* involved claims of defamation. Thus, the Fourth and Sixth Circuits in these cases found that in order to lose its CDA immunity, the websites at issue had to materially contribute to the actionable speech (*i.e.*, the defamatory speech). GiveForward seizes on certain language from the *Jones* decision to support the argument that it did not contribute to the actionable speech (*i.e.*, the false claim that KDH was dying).<sup>81</sup> However, as discussed in Section II above and more fully below, Ms. Hodges and KDH have not alleged that GiveForward is liable for Johnson’s initial lie, but rather that GiveForward itself committed other conduct that is either directly actionable itself *or* materially contributed to the actionable invasions of KDH’s privacy, etc. Notably, Ms. Hodges and KDH have not asserted a claim of defamation against GiveForward, so *Nemet* and *Jones* are wholly inapposite.

**B. GiveForward Created and/or Developed Fundraiser Content.**

Without fully rehashing the substance of Ms. Hodges and KDH’s Motion, it is important briefly to revisit the facts that show GiveForward is an “information content provider.” GiveForward independently creates content for fundraising campaigns. Through its Twitter feed and donor thank you emails, GiveForward alone provides information regarding the fundraisers on its website. GiveForward’s Tweets (including the Tweet about the KDH Fundraiser), are initiated, created, and drafted *entirely* by a GiveForward employee. The donor emails are similarly created, drafted, and sent *entirely* by GiveForward. Users of the online fundraising platform have absolutely no involvement in the creation and distribution of GiveForward’s social media and email messages on behalf of a fundraiser. These materials are GiveForward’s independent speech and directly invaded KDH’s privacy for financial gain.

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<sup>81</sup> See GF Mem. at 38 (“The *Jones* court concluded that “[a] website operator cannot be responsible for what makes another party’s statement actionable by commenting on that statement *post hoc*.”)

GiveForward's independently created widgets also make GiveForward an information content provider. As described in Ms. Hodges and KDH's Motion, these widgets allow fundraiser visitors to post a GiveForward-created snapshot of the fundraiser to an external, third-party website. In creating each widget, GiveForward solely develops the software used by the widget, GiveForward rearranges the fundraiser title, description, and photograph, and GiveForward then adds a "progress arc" detailing the progress of the fundraiser towards the fundraising goal. Users are not able to alter GiveForward's widgets in any way. GiveForward's technology transforms the words, photographs, and actions associated with a fundraiser into an entirely different piece of content that then is placed externally to direct traffic to a particular fundraiser. Through its widgets, GiveForward and a fundraiser organizer work together to maximize fundraiser donations and profits to GiveForward. GiveForward's widgets for the KDH Fundraiser sent 212 people to the KDH Fundraiser webpage.

GiveForward is also responsible for the ongoing development of new fundraiser content because it prompts fundraiser organizers to modify and supplement the initial content of their fundraisers through the multitude of fundraising tips, suggestion emails, and personalized suggestions that it provides. In this case, a few days after receiving an email suggesting that they make an update to the KDH Fundraiser, Johnson and Harris did, in fact, make an update to the KDH Fundraiser claiming that KDH's alleged impending surgery had to be pushed up.<sup>82</sup>

GiveForward further develops content during the creation of a fundraiser by providing the organizer with suggested language and detailed instructions on how to write a compelling story.<sup>83</sup> GiveForward also develops content by encouraging users to follow specific content-

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<sup>82</sup> See Hodges Mot. at 21, ¶ 55.

<sup>83</sup> Notably, Mr. McKeever testified that in the spring of 2013 GiveForward's website contained sample fundraiser content designed to guide fundraiser organizers while during the fundraiser creation process. See McKeever Dep. Tr. 81:6-20. This statement directly contradicts Ms. Alhorn's affidavit submitted by GiveForward in

related instructions provided in fundraising tip emails and fundraising guides. For example, GiveForward instructs users as to (i) how many photographs a fundraiser should feature; (ii) what kinds of scenes or activities photographs should depict; (iii) how many updates a user should make to their fundraiser; (iv) what kind of events or personal thoughts fundraiser updates should include; (v) how to create a “sense of urgency”<sup>84</sup> to increase fundraising momentum; and (vi) how to set an example by making the first donation in an amount the user wants others to contribute. GiveForward provides all of this information with the ultimate goal of maximizing donations to each and every fundraiser and, thereby, increasing its own profits. Maximizing donations results in the fundraiser reaching more and more donors, thereby increasing the invasion to KDH’s privacy with each new donation. This goes far beyond the “traditional editorial functions” that Congress intended to immunize with the CDA. *See Zeran*, 129 F.3d at 330.<sup>85</sup>

#### **IV. GIVEFORWARD HAS A LEGAL DUTY AS A PROFESSIONAL FUNDRAISER.**

##### **A. The State has a Significant Interest in Regulating Fundraising and Such Regulation is Consistent With the CDA.**

As Ms. Hodges and KDH addressed extensively in the Hodges Motion,<sup>86</sup> courts have specifically recognized the States’ rights and substantial interest in preventing fraudulent fundraising.<sup>87</sup> GiveForward, however, entirely missed the point of this discussion, arguing that

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support of its Cross-Motion. Importantly, GiveForward is telling this Court to trust Ms. Alhorn’s statements (which are mainly legal conclusions) despite the contradictory nature of Mr. McKeever’s deposition testimony and the fact that neither Ms. Hodges and KDH nor the Court can examine GiveForward’s website circa spring 2013 because **that information is no longer available because GiveForward failed to preserve it.**

<sup>84</sup> Considering that during his deposition Johnson used the precise phrase, “sense of urgency,” multiple times, he obviously received and read GiveForward’s email tips. *See Johnson Dep. Tr.* 76:4, 7, 14, 18.

<sup>85</sup> “[D]eciding whether to publish, withdraw, postpone or alter content” are examples of “a publisher’s traditional editorial functions.”

<sup>86</sup> *See Hodges Mot.* at 43-44.

<sup>87</sup> *See, e.g., Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632, 100 S. Ct. 826, 833-34, 63 L. Ed. 2d 73 (1980) (“Soliciting financial support is undoubtedly subject to reasonable regulation.”); *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 814, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (“The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its

the type of fundraising in this line of cases is not analogous to GiveForward's fundraising.<sup>88</sup> Ms. Hodges and KDH are not analogizing the fraudulent fundraising in these cases to the fraudulent fundraising at issue here. Rather, this line of cases confirms that **courts universally recognize a state's right to regulate professional fundraising to deter fundraising fraud.**

Protecting its citizens from fraud is well within a state's police powers. *See* Melissa G. Liazos, *Can States Impose Registration Requirements on Online Charitable Solicitors?*, 67 U. Chi. L. Rev. 1379, 1400 (2000).<sup>89</sup> This significant state interest in protecting against fraudulent fundraising does not change merely because such fundraising takes place online. *See id.* at 1399.<sup>90</sup> However, GiveForward is asking this Court to hold that the CDA trumps States' ability to protect its citizens from fraudulent fundraising simply because GiveForward conducts its fundraising business online. The CDA does not prevent laws that regulate brick-and-mortar business activity from regulating the same activities if conducted in cyberspace. Something that is unlawful offline – for example, fraud in fundraisers and invasion of privacy – does not “magically become lawful when [moved] online.” *Roommates.com*, 521 F.3d at 1164.

**B. The Maryland Solicitations Act Applies to GiveForward.**

The Maryland Solicitations Act (“MSA”) regulates individuals acting as “fund-raising counsel,” “professional solicitor,” or “charitable representative” and prohibits the use of false or misleading statements or conduct in connection with charitable solicitations. *See generally* Md.

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money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency.”); *Ctr. for Auto Safety, Inc. v. Athey*, 866 F. Supp. 237, 240 (D. Md. 1993) *aff'd*, 37 F.3d 139 (4th Cir. 1994) (“The substantial state interest in this case is protecting the public from fraud by regulating the charities that solicit it for funds.”).

<sup>88</sup> *See* GF Mem. at 19-22 (“The Defendants next try to extrapolate ‘certain duties to the public’ owed by ‘persons engaged in fundraising’ from several cases allegedly involving solicitation of donations.”)

<sup>89</sup> “It is a well established principle that state police powers encompass the protection of citizens from fraud. There is no general federal police power.”

<sup>90</sup> “States’ concerns about fraud being perpetrated against their citizens are no less legitimate in the Internet context than in real space. Such concerns may be even greater online given the low start-up costs and the broad audience that a solicitation may reach.”

Code Ann., Bus. Reg. § 6-101, *et seq.* The MSA draws no distinction between traditional, brick-and-mortar charitable solicitations and those conducted online, *see id.*, and applies with equal force to GiveForward as it does to Goodwill Industries or National Association of Police Organizations.

Under the MSA, GiveForward is a fund-raising counsel,<sup>91</sup> professional solicitor,<sup>92</sup> and charitable representative<sup>93</sup> because it received payment to “hold[], plan[], or manage[]” charitable solicitations in Maryland.<sup>94</sup> A “charitable solicitation” is an “oral or written request for a charitable contribution.” MSA § 6-101(f)(1). Charitable solicitations specifically include “a fund-raising drive, event, campaign, or other activity.” *Id.* § 6-101(f)(2)(i). A “charitable contribution” is one made on the representation that the contribution will be used for a “charitable purpose,” *id.* § 6-101(c)(1), which specifically means “any charitable, benevolent, philanthropic, patriotic, or eleemosynary purpose for religion, health, education, social welfare, arts and humanities, and civic and public interests.” Md. Code Regs. 01.02.04.01.G.

GiveForward earns money (*i.e.*, receives payment) from the percentage of funds raised that it retains (7% for the KDH Fundraiser), and it “holds, plans, or manages” fundraisers by

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<sup>91</sup> “‘Fund-raising counsel’ means a person who, for pay:

(i) advises a charitable organization about a charitable solicitation in Maryland or ***holds, plans, or manages a charitable solicitation in Maryland***; but

(ii) does not directly solicit or receive charitable contributions from the public.

Md. Code Ann., Bus. Reg. § 6-101(h)(1) (***emphasis added***).

<sup>92</sup> “Professional solicitor” means a person who, for pay:

(i) advises a charitable organization about a charitable solicitation;

(ii) ***holds, plans, or manages a charitable solicitation***; or

(iii) solicits or receives charitable contributions for a charitable organization, personally or through an associate solicitor.

Md. Code Ann., Bus. Reg. § 6-101(i)(1) (***emphasis added***).

<sup>93</sup> “‘Charitable representative’ means a professional solicitor, associate solicitor, or fund-raising counsel.” Md. Code Ann., Bus. Reg. § 6-101(e).

<sup>94</sup> GiveForward’s argument that the MSA does not apply to it because it is not a charitable representative misstates the law. *See* GF Mem. at 17-18 n. 3. Nowhere does the MSA state that a fund-raising counsel or professional solicitor must work for a charitable organization; GiveForward’s statement that this is a requirement, *see id.*, is simply false. GiveForward “holds, plans, or manages” fundraisers that qualify as “charitable solicitations” pursuant to § 6-101(f). Thus, GiveForward is a fund-raising counsel and professional solicitor and, therefore, a charitable representative. *See* § 6-101(e), (h), (i).

hosting fundraisers and providing fundraising advice and promotional materials.<sup>95</sup> GiveForward describes itself as “*the #1 platform to start a medical fundraiser and the only site with fundraising coaches who provide fundraising ideas and guidance on how to raise money online.*”<sup>96</sup> The majority of fundraisers on GiveForward’s website qualify as “charitable solicitations” because they are requests for financial help for a benevolent purpose—health interests in the case of the KDH Fundraiser. Indeed, GiveForward’s stated purpose is to assist fundraisers to send “financial support to patients navigating a medical crisis,” Md. Code Regs. 01.02.04.01.G.

The MSA explicitly prohibits charitable representatives, like GiveForward, from engaging in false or misleading fundraising activities. *See* MSA § 6-608(a).<sup>97</sup> The MSA further makes it clear that this prohibition is violated “*whether or not* a person has been misled, deceived, or damaged.” *Id.* § 6-608(b) (*emphasis* added). While acting as a charitable representative, GiveForward engaged in numerous misleading acts and practices regarding the legitimacy of the fundraisers it supports by:

- claiming on its website that using its GiveForward is “quick, easy, and *secure*,”<sup>98</sup>
- telling visitors to their website that there’s “*no need to worry* when creating or giving to a fundraiser,”<sup>99</sup>
- informing CNN Money that “GiveForward assigns a live ‘fundraising coach’ to each campaign, who both *vets and guides the efforts*,”<sup>100</sup> and
- claiming on its online support center that “GiveForward *makes every effort to investigate* suspect fundraisers...[and] *has a due diligence process*.”<sup>101</sup>

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<sup>95</sup> *See* § 6-101(h), (i).

<sup>96</sup> <http://www.giveforward.com>, visited March 23, 2015.

<sup>97</sup> “In connection with a charitable solicitation, a charitable organization or charitable representative may not commit an act or engage in a practice that by affirmative representation or by omission is misleading about anything important to, or likely to affect, another person’s decision to make a charitable contribution.”

<sup>98</sup> <http://www.giveforward.com/p/about-us>, last visited Mar. 26, 2015 (*emphasis* added).

<sup>99</sup> *Id.* (*emphasis* added).

<sup>100</sup> <http://money.cnn.com/2013/04/19/pf/crowdfunding-boston-victims/>, last visited Mar. 26, 2015 (*emphasis* added).

These misleading acts and practices regarding the safety and legitimacy of the fundraisers on GiveForward's website increased donor confidence in the fundraisers it hosted,<sup>102</sup> facilitating in turn the widespread dissemination of the fraudulent KDH Fundraiser and thereby increasing the gross invasions of KDH's privacy. GiveForward itself recognizes the importance of donor confidence.<sup>103</sup>

The MSA also prohibits any "person" from using "false or materially misleading advertising or promotional material in connection with a charitable solicitation." MSA § 6-607. Maryland regulations define these proscribed acts as "any false or misleading oral or written statement or other representation which has the capacity, tendency, or effect of deceiving or misleading the person solicited." Md. Code Regs. 01.02.04.19.G. The MSA's prohibition on misleading advertising, promotion, and statements applies to GiveForward's conduct, regardless of whether it is a fund-raising counsel, professional solicitor, or charitable representative.<sup>104</sup> GiveForward's affirmative misleading statements regarding the safety of its website and the legitimacy of GiveForward fundraisers make donors think that GiveForward has, in fact, exercised due diligence to ensure that fundraisers are legitimate. The false sense of security GiveForward creates via these misleading statements facilitated the widespread dissemination

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<sup>101</sup> Hodges Mot., Ex. A at GF\_Hodges0000002 (*emphasis* added).

<sup>102</sup> The Fourth Circuit has recognized that fundraising efforts benefit from increased donor confidence. *See Ctr. for Auto Safety Inc. v. Athey*, 37 F.3d 139, fn 9 (4th Cir. 1994) ("[T]he level of charitable giving will tend to increase, as citizens are more likely to donate to charities that have been investigated and found to be reputable.").

<sup>103</sup> *See* Hodges Mot. at 23-24, ¶ 63 (quoting Erica Alhorn, GiveForward's Director of User Relations and Fundraising Coach, regarding the importance of donor confidence).

<sup>104</sup> Though the MSA grants immunity to *publishers* of charitable solicitations, *see* MSA § 6-621, such immunity does not apply to GiveForward because it is a fund-raising counsel, professional solicitor, and/or charitable representative under the statute. The Maryland legislature, by including publisher immunity, clearly intended to distinguish an entity that "holds, plans, or manages" a fundraiser from an entity that merely publishes fundraisers. GiveForward "holds, plans, or manages" fundraisers and is precisely the type of business that the MSA is designed to regulate.

and financial success of the KDH Fundraiser, which thereby increased the invasions of KDH's privacy and the emotional distress he has experienced as a result.

**C. GiveForward's Violation of the MD Solicitations Act Gives Rise to a Private Cause of Action and is Proof of GiveForward's Negligence.**

**I. *GiveForward's arguments are belied by the plain language of the MSA.***

GiveForward mistakenly argues that because the MSA authorizes the Secretary of State and Attorney General to investigate violations of the Act, this grant of authority is exclusive and intended to prevent private causes of action.<sup>105</sup> However, the plain language of the statute states that these officials *may* investigate violations. *See* § 6-205(a)(1).<sup>106</sup> The statute expressly uses the word "may" to indicate that it is permissive (not mandatory) and to clarify that it is not the exclusive means of enforcement. Nowhere in the MSA does the legislature express any intention to preclude victims of fraudulent fundraising from seeking remedy from the violators. Maryland courts have long recognized that "if a statute fixing a penalty for an offence, does not either expressly or by necessary implication, cut off the common law prosecution or punishment for the same offence, it shall be taken to intend merely a cumulative remedy." *Pres., Mgrs. & Co. of Washington & Baltimore Tpk. Rd. v. State*, 19 Md. 239, 239 (1862), *aff'd sub nom Washington & Baltimore Tpk. Co. v. State*, 70 U.S. 210 (1865) (citing New York Supreme Court).<sup>107</sup> Furthermore, Ms. Hodges and KDH are not seeking to enforce the provisions of the MSA; rather, they are seeking remedy for injuries they sustained through actions long recognized at common law and pursuant to the policies of law promoted by the MSA.

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<sup>105</sup> *See* GF Mem. at 16.

<sup>106</sup> "The Secretary of State or the Attorney General *may* investigate an alleged violation of this title." (*emphasis added*).

<sup>107</sup> *See also Rosin v. Lidgerwood Mfg. Co.*, 89 A.D. 245, 248, 86 N.Y.S. 49, 52 (App. Div. 1903) (internal citations omitted):

[W]here a remedy existed at the common law for a wrong or injury against which a remedial statute is directed, if such statute provides a more enlarged or summary or more efficient remedy for the party aggrieved, but does not in terms or by necessary implication deprive him of the remedy which existed at common law, the statutory remedy is considered as merely cumulative, and the party injured may resort to either at his election. This doctrine is old as the common law.

**2. *Even if there were not a common law cause of action already in existence, there is an implied private right of action here.***

The MSA does not include an explicit private cause of action for individuals harmed by violations of the Act. However, Maryland regularly recognizes an implied private right of action in statutes that meet the three factors laid out by the U.S. Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975). *See, e.g., Baker v. Montgomery Cnty.*, 201 Md. App. 642, 670, 30 A.3d 267, 284 (2011) *aff'd*, 427 Md. 691, 50 A.3d 1112 (2012); *Erie Ins. Co. v. Chops*, 322 Md. 79, 82–83, 91, 585 A.2d 232 (1991); *Daughton v. Maryland Auto. Ins. Fund*, 198 Md. App. 524, 18 A.3d 152 (2011); *Scull v. Groover, Christie & Merritt, P.C.*, 76 A.3d 1186 (Md. 2013). The three *Cort* factors Maryland courts analyze are:

(1) The presence or absence of an indication of legislative intent to create a private remedy; (2) whether the plaintiff is one of the class for whose special benefit the statute was enacted; and (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.

*Baker*, 201 Md. App. at 670 (citing *Cort v. Ash*, 422 U.S. at 78); *see also Scull*, 435 Md. at 121, (noting that Maryland has adopted the same test applied by the Supreme Court to assess whether statutes contain an implied private cause of action).

As to the first factor, the plain language of the MSA indicates that the Maryland legislature did not intend to preempt or exclude existing common law remedies available to individuals injured by fraudulent fundraising.<sup>108</sup> When a statute declares a right that does *not* exist at common law, a cause of action arising from that right must be specifically authorized by that statute. *See* M.L.E. Actions § 7. However, Maryland common law *does* recognize causes of action based on fraud and misrepresentation; these are not new rights created by the MSA.

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<sup>108</sup> Indeed, “where the legislature enacts a statute establishing a means to enforce existing rights, there is no presumption that the statutory means is intended either as an exclusive remedy or to abolish other actions at common law or equity.” *Jackson v. Callan Pub., Inc.*, 356 Ill. App. 3d 326, 336-37, 826 N.E.2d 413, 425 (2005).

Moreover, “statutes are not presumed to make any alterations in the common law further than is expressly declared...” *Richwind v. Brunson*, 335 Md. 661, 672 (1994). Thus, the MSA need not explicitly create a private cause of action for Ms. Hodges and KDH to be able to enforce these rights.<sup>109</sup>

Regarding the second factor, GiveForward financially profited from the use of KDH’s name and likeness in connection with the fraudulent fundraiser. Individuals who have been used to further such a fraudulent fundraising scheme are directly benefitted by the MSA’s statutory prohibitions on such abuses.<sup>110</sup> Section 6-611 of the MSA specifically prohibits representations that “another person sponsors, endorses, or approves of a charitable solicitation, the sale of goods or services for a charitable purpose, a charitable purpose, or a charitable organization without the consent of the other person.” MSA § 6-611(a). Thus, the legislature clearly intended to protect not only defrauded donors but also individuals who improperly were used to further fraudulent fundraising schemes – like KDH – and KDH is a member of the class this statute is designed to benefits.

As to the third factor, it is consistent with the purposes underlying the legislative scheme to permit the victim used to further fraudulent fundraising to bring suit against those who perpetrated the fraudulent fundraising. As discussed above, the overarching purpose of the MSA is to increase donor confidence. The more confident donors are, the more they are willing to donate. It defies reason that an individual who is unwittingly used to solicit funds fraudulently...

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<sup>109</sup> “Courts discern from legislative intent whether a private cause of action was intended by analyzing the language of the statute to identify its purpose and intended beneficiaries, reviewing the statute’s legislative history, and determining whether the statute provides otherwise an express remedy.” *Baker*, 427 Md. at 710.

<sup>110</sup> GiveForward also directly benefits from the MSA’s statutory prohibitions on fraudulent fundraising. *See Ctr. for Auto Safety, Inc. v. Athey*, 37 F.3d 139, a144 (1994) (“the state’s regulatory efforts...also benefit charities seeking to solicit in Maryland by eliminating illegitimate charities and enhancing public confidence in charities. As a result, the level of charitable giving will tend to increase, as citizens are more likely to donate to charities that have been investigated and found to be reputable. In addition, each charity’s share of available funds may increase because, as illegitimate charities are weeded out, the amount of available funds will be spread among a smaller pool of charities.”).

3. ***GiveForward's violations of the MSA are proof of its negligence.***

GiveForward argues that the only way in which its misleading affirmative representations and practices regarding its fraud prevention policies and the safety of its website, in violation of the MSA, can give rise to liability is if Ms. Hodges and KDH relied on these statements. This assertion misstates the significance of GiveForward's affirmative representations. These statements created a misleading impression that GiveForward vets its fundraisers and that they are safe and legitimate. This misleading impression created donor confidence in the legitimacy of the KDH fundraiser, which facilitated and furthered its widespread dissemination and ultimate success. The Fourth Circuit has recognized the benefit that enhanced donor confidence yields to fundraisers. *See Ctr. for Auto Safety Inc. v. Athey*, 37 F.3d 139 n.9 (4th Cir. 1994) (“[B]y eliminating illegitimate charities and enhancing public confidence in charities...***the level of charitable giving will tend to increase, as citizens are more likely to donate to charities that have been investigated and found to be reputable.***”) (*emphasis added*). Indeed, GiveForward itself recognizes the importance of donor confidence in the safety and legitimacy of fundraisers. Erica Alhorn, GiveForward Director of User Relations & Fundraising Coach, discussed the connection between instilling donor trust and increasing donation amounts in an interview, noting that “the fundraising campaigns GiveForward supports often perform better when a fundraising coach has the opportunity to instill trust in a donor.”<sup>111</sup>

Maryland courts recognize the legal principle that violation of a statute or regulation may be proof of negligence. *See, e.g., Joseph v. Bozzuto Mgmt. Co.*, 173 Md. App. 305, 321-22, (2007); *Wietzke v. Chesapeake Conference Ass'n*, 421 Md. 355, 388 (2011). For this principle to apply, four factors must be met: (1) a violation of a statute or regulation; (2) a resulting injury of

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<sup>111</sup> “That human interaction is especially important when we’re answering ‘trust’ questions from potential donors. They’ll ask questions like, ‘Has this fundraiser been vetted? Why do they say the money is going to a particular expense?’ When we can help donors by providing this information, it builds confidence in GiveForward, but more importantly it builds trust in the campaigns we support.” *See Hodges Mot.* at 23-24, ¶ 63.

a type the statute or regulation was designed to prevent; (3) the plaintiff must be a member of the class the statute or regulation was designed to protect; and (4) the violation must constitute a breach of a duty owed to the plaintiff by the defendant. *Joseph*, 173 Md. App. at 321-22.

GiveForward's conduct in the instant case satisfied all four of these factors. First, GiveForward engaged in misleading practices and statements in violation of MSA § 6-607 and 608. Second, KDH's invasion of privacy and Ms. Hodges' and KDH's emotional distress resulting from the improper use of KDH's name and likeness for financial gain are the types of injuries the MSA is designed to prevent. Third, as previously explained, KDH was used as a means to conduct fraudulent fundraising without his or Ms. Hodges' knowledge or consent, and thus is a member of the class the MSA is designed to protect. *See* MSA § 6-611(a). Finally, as explained in the Counterclaims, as a professional solicitor, GiveForward owes a duty to the individuals whose image and likeness it uses to solicit funds. GiveForward breached this duty by failing to exercise any due diligence to ensure KDH's information was used truthfully and consensually,<sup>112</sup> and, in fact, by using KDH for its own financial gain.

In order to establish that GiveForward was negligence, Ms. Hodges and KDH must show that: (1) GiveForward owed a duty to them; (2) GiveForward breached that duty (3); GiveForward's breach proximately caused the harm suffered by Ms. Hodges and KDH; and (4) Ms. Hodges and KDH suffered actual injury. *See, e.g., Troxel v. Iguana Cantina, LLC*, 201 Md. App. 476, 495 (2011).

GiveForward owes a duty to exercise reasonable care in making affirmative representations. As explained above, the MSA supplies the standard of reasonable care that professional solicitors such as GiveForward must exercise in making such affirmative representations: they must refrain from making false or misleading statements that would

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<sup>112</sup> *See* Countercl. ¶ 94.

influence donor activity. *See* Md. Code Ann., Bus. Reg. §§ 6-607, 608. GiveForward breached that duty by violating the MSA and creating a misleading impression that the fundraisers its supports have been vetted and are safe and legitimate. GiveForward creates that misleading impression, for example, by:

- claiming on its website that using its GiveForward is “quick, easy, and *secure*,”
- telling visitors to their website that there’s “*no need to worry* when creating or giving to a fundraiser,”
- informing CNN Money that “GiveForward assigns a live ‘fundraising coach’ to each campaign, who both *vets and guides the efforts*,” and
- claiming on its online support center that “GiveForward *makes every effort to investigate* suspect fundraisers...[and] *has a due diligence process*.”

As explained above, the Fourth Circuit recognizes that vetting fundraisers increase donations. *See Athey*, 37 F.3d 139 n.9. GiveForward’s breach of its duty not to mislead donors regarding the legitimacy of its fundraisers proximately caused actual injury to Ms. Hodges and KDH. But for GiveForward’s misleading representations that its fundraisers are vetted, legitimate, and safe, the KDH Fundraiser would not have received the significant amount of donations and publicity it ultimately received,<sup>113</sup> in the form of 1,523 separate page views on GiveForward’s website, 41 shares via Facebook, and 54 individual donations.<sup>114</sup> And it is entirely foreseeable that an individual used as a prop to defraud countless donors across the Internet would be harmed by GiveForward’s misleading representations. *See Pittway Corp. v. Collins*, 409 Md. 218, 246 (2009) (“The question of legal causation most often involves a determination of whether the injuries were a foreseeable result of the negligent conduct.”).

GiveForward’s refers to only a single statement in its “Frequently Asked Questions” that allegedly disclaims responsibility for the accuracy of fundraisers. This disclaimer, which is

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<sup>113</sup> Again, the Fourth Circuit recognizes that vetting of fundraisers results in increased donor confidence and donations. *See Athey*, 37 F.3d 139 n.9.

<sup>114</sup> *See Hodges Mot.* ¶ 47.

buried on a subpage within GiveForward's website that users must actively seek out, does not neutralize or negate the misleading impression created by GiveForward's multitude of prominent statements regarding the safety of its website and vetting of fundraisers.

Any disclaimers regarding GiveForward's responsibility for the legitimacy of fundraisers contained in GiveForward's Terms of Use are also ineffective. GiveForward does not require users to affirmatively check a box, click a link, or otherwise acknowledge assent to the Terms of Use, so courts treat them as "browsewrap" agreements. *See, e.g., Hines v. Overstock.com, Inc.*, 668 F.Supp.2d 362, 366 (E.D.N.Y.2009) (distinguishing "browsewrap" agreements from "clickwrap" agreements, "in which website users typically click an 'I agree' box after being presented with a list of terms and conditions of use"). In order for GiveForward's Terms of Use to be binding on its users, they must have actual or constructive knowledge of their terms. *Event, Inc. v. Eventbrite, Inc.*, 739 F.Supp.2d 927, 937 (E.D. Va. 2010) (emphasizing that "[m]ost courts" which have considered the validity of a browsewrap agreement have held that "the website user must have had actual or constructive knowledge of the site's terms and conditions"). In light of GiveForward's emphasis on fundraiser security and the one-on-one interactions that fundraiser coaches have with users, a reasonable donor would not have actual or constructive knowledge of the fact that GiveForward actually does *nothing* to ensure fundraiser safety or legitimacy. Thus, the Terms of Use are inapplicable and ineffective to neutralize or correct GiveForward's misleading representations.

**D. The Cases of Zeran and Okeke Are Inapposite**

GiveForward unwittingly relies on *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) and *Okeke v. Cars.com*, 40 Misc. 3d 582, 966 N.Y.S.2d 843 (N.Y. Civ. Ct. 2013) in support of its contention that, pursuant to the immunity granted by the CDA, GiveForward

cannot be liable for its failure to verify the legitimacy of the KDH Fundraiser.<sup>115</sup> However, like the other cases to which GiveForward clings, *Zeran* and *Okeke* are inapposite to this case.

Like *Nemet* discussed previously, *Zeran* involves a claim of Internet defamation on an online bulletin board by an unknown third-party user. *See* 129 F.3d at 328.<sup>116</sup> Again, Ms. Hodges and KDH have not alleged a claim for defamation against GiveForward. Rather, Ms. Hodges and KDH have alleged that because GiveForward reaps profits from the fundraisers it hosts on its website, it has a duty to ensure those fundraisers are not fraudulent and a duty to acquire parental permission prior to spreading an 8-year-old child's image on the Internet for financial gain. By contrast, the AOL bulletin board involved in *Zeran* was not a for-profit undertaking by AOL. It was a passive site where AOL users could post commentary fully subject to the constitutional right of freedom of speech. In the absence of any independent speech or content put out by AOL, it could not be liable for merely hosting those defamatory statements. However, as discussed extensively above, GiveForward created independent speech and content that is, in and of itself, actionable.

Similarly, the cars.com website in *Okeke* was an online bulletin board site to which third-party users could post used car sales advertisements. Like the KDH Fundraiser, the specific advertisement at issue in *Okeke* turned out to be fraudulent. However, unlike this case, there was no indication in *Okeke* that the website itself created independent content for or promoting the fraudulent advertisement at issue or that the website profited from the used car sales the occurred through the bulletin board it hosted. Nor is there any indication that the website made affirmative representations about the legitimacy of the advertisements. Thus, *Okeke* is unpersuasive.

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<sup>115</sup> *See* GF Mem. at 22-25.

<sup>116</sup> Even a cursory glance at *Zeran* reveals that it does not hold up to the advances in the Internet that have occurred over the last 18 years. GiveForward's website is eminently more sophisticated and advanced than the old-school AOL bulletin boards.

**V. GIVEFORWARD IS NOT ENTITLED TO SUMMARY JUDGMENT ON MS. HODGES AND KDH'S COUNTERCLAIMS.**

Setting aside the CDA Immunity Issue, in order to grant GiveForward's Cross-Motion for summary judgment on Ms. Hodges and KDH's Counterclaims, the Court would first have to find, as a matter of law, that there are no facts in evidence that would satisfy the elements of each Counterclaim asserted by Ms. Hodges and KDH.<sup>117</sup> Moreover, as the party moving for summary judgment on Ms. Hodges and KDH's Counterclaims, GiveForward bears the burden of showing the Court that there is no evidence to support the Counterclaims.<sup>118</sup> GiveForward has not, and cannot, meet this burden, and its Cross-Motion seeking summary judgment on all Counterclaims must be denied.

**A. GiveForward Misrepresents Ms. Hodges and KDH's Counterclaims.**

GiveForward's Cross-Motion routinely and repeatedly misrepresents and mischaracterizes Ms. Hodges and KDH's Counterclaims.<sup>119</sup> GiveForward excerpts certain language from the Counterclaim in an effort to show its entitlement to summary judgment, but in doing so limits the Counterclaims to a mere snapshot and takes them completely out of context.

GiveForward erroneously argues that "the vast majority of Defendants' claims center exclusively on Mr. Johnson's false claim that KDH had a terminal heart condition."<sup>120</sup> Importantly, and as detailed extensively in Section II, GiveForward has unnecessarily narrowed the tortious conduct at issue to suit its mistaken argument that Ms. Hodges and KDH's claims are premised on treating GiveForward as the publisher or speaker. The tortious content or conduct is much broader than the single lie that then-8-year-old KDH was dying of a terminal heart

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<sup>117</sup> See, e.g., Hodges Mot. at 26-28

<sup>118</sup> See *id.*; see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986).

<sup>119</sup> See GF Mem. at 14-15, 22-23, 36.

<sup>120</sup> GF Mem. at 14.

condition. Rather, the tortious content or conduct encompasses GiveForward's independent creation of content that furthered the fraud and the invasion of KDH's privacy.

**B. Ms. Hodges and KDH's Abuse of Process Claim Passes Muster.**

Contrary to GiveForward's assertions,<sup>121</sup> Ms. Hodges and KDH's abuse of process Counterclaim does not fail. Under long standing Maryland law, there are three (3) elements to an abuse of process claim: (1) the defendant willfully used process after it had issued in a manner not contemplated by law; (2) the defendant acted to satisfy an ulterior motive"; and (3) the plaintiff was damaged as a result of the abuse of process. *See Barnes v. Montgomery County*, 798 F. Supp. 2d 688, 693 (D. Md. 2011); *Cottman v. Cottman*, 56 Md. App. 413, 430 (1983). Not only did Ms. Hodges and KDH allege sufficient facts in their Counterclaim to support Count X for abuse of process, but Ms. Hodges and KDH have provided the Court with sufficient evidence to support their abuse of process claim. Specifically, Ms. Hodges and KDH have shown that:

- Under the guise of engaging in settlement negotiations, GiveForward deceptively requested a written settlement demand from Ms. Hodges and KDH in order to improperly file the same with the Court (*See supra* at 10-11, n.31.)
- GiveForward did, in fact, use Ms. Hodges and KDH's written settlement demand to support its issue of process herein, surreptitiously suing Ms. Hodges and KDH while the parties were engaged in settlement negotiations. (*See id.*)
- GiveForward's purpose in doing so was to silence Ms. Hodges and punish and harass her for revealing GiveForward's fraud and various other torts and statutory violations. (*See, e.g.,* Countercl. ¶ 112.)
- As a result of this lawsuit, Ms. Hodges has been forced to take time off work, thereby losing compensation and negatively affecting her professional reputation. (*See Ex. 2.at 11.*)
- Also as a result of the fraud, exacerbated by GiveForward bringing suit against him, the minor KDH has had to undergo therapeutic counseling because of his intense concern and fear that when they learn about the lawsuit, the individuals who donated to the KDH Fundraiser will come after him and Ms. Hodges. (*See id.* at 10-11)

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<sup>121</sup> *See* GF Mem. at 47-48.

- As a result of GiveForward filing suit, Ms. Hodges and KDH have incurred hard expenses to retain an electronic forensic expert to assist with the collection of ESI from GiveForward, discovery that GiveForward steadfastly refuses to produce. (*See id.* at 11.)

The assertion that under Maryland law, the damages stemming from abuse of process must take the form of “an arrest of the person or a seizure of property of the plaintiff,” is not necessarily accurate. In fact, in *State v. Rendelman*, 404 Md. 500 (2008), the highest court in Maryland noted that “abuse of process occurs when a party has ‘wilfully misused criminal or civil process’ against another party for a purpose different than the proceeding’s intended purpose and thereby caused that party damage (*e.g.*, arrest, seizure of property, **economic injury**).” 404 Md. 500, 517 n.9. (**emphasis** added) (citing *Krashes v. White*, 275 Md. 549, 555 (1975) (referring to damages as “other special injury”). Though no technical seizure of person or property has occurred, there is clear economic injury to Ms. Hodges and KDH.

Importantly, GiveForward’s continual reference to confidential settlement communications is a violation of the Rules and undermines the integrity of the legal system. Courts recognize the “importance of maintaining the confidentiality of settlement negotiations” because protecting these communications “encourages parties to enter into settlement agreements.” *Porter Hayden Co. v. Bullinger*, 350 Md. 452, 466 (1998).<sup>122</sup> The courts that have addressed the issue of admissibility of settlement communications have routinely struck settlement negotiations attached to or referenced in pleadings. *See, e.g., Cornell Univ. v. Illumina, Inc.*, 2013 WL 3216087, at \*1-3, 22 (D. Del. June 25, 2013) (granting plaintiff’s motion to strike references to settlement negotiations); *Trading Techs. Int’l, Inc. v. BCG*

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<sup>122</sup> *See also Bittinger v. CSX Transp., Inc.*, 176 Md. App. 262, 276-77 (2007) (“The purpose of Rule 5–408 is to encourage the settlement of lawsuits by ensuring parties need not fear that their desire to settle pending litigation and their offers to do so will be construed as admissions.”); Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 508(D) (3d ed.) (“Offers of compromise are excluded because public policy encourages settlement.”); Clifford S. Fishman & Anne T. McKenna, *Jones on Evidence* § 22:11.70 (7th ed.) (“If parties are permitted [ . . . ] to put before the court through their pleadings the existence of settlement negotiations as a fact in support of the parties’ claim or defense, it circumvents the purpose of the Rule.”).

*Partners, Inc.*, 2011 WL 3946581, \*2 n.3 (N.D. Ill. Sept. 2, 2011) (striking references to settlement negotiations from amended complaint and noting that doing so “at this [pre-discovery] stage is not unusual”); *Ogundule v. Girl Scouts–Ariz. Cactus Pine Council, Inc.*, 2011 WL 1770784, \*8-9 (D. Ariz. May 10, 2011) (striking exhibits to complaint that contained settlement material); *U.S. ex rel. Alsaker v. Centracare Health Sys., Inc.*, 2002 WL 1285089, at \*2 (D. Minn. June 5, 2002 ) (collecting cases).

Though GiveForward initially claimed that it included these settlement communications to show the existence of a controversy, that claim is no longer viable. We are engaged in a costly controversy caused by GiveForward’s own tortious conduct and failures, and exacerbated by GiveForward’s suing an 8-year-old child at great expense to all parties. It is obvious from GiveForward’s cavalier and repeated use of these confidential settlement communications that it has no fear of reprisal for violating the Federal Rules of Evidence.

**VI. MS. HODGES AND KDH DO HAVE STANDING TO BRING THEIR COUNTERCLAIMS.**

**A. Ms. Hodges and KDH Have Standing to Pursue their Counterclaim Under the Maryland Solicitations Act.**

GiveForward specifically argues that Ms. Hodges and KDH do not have standing to assert a claim under the Maryland Solicitations Act.<sup>123</sup> However, as detailed above in section IV.C, that argument is mistaken. There is clearly an implied private right of action and KDH is of the class the MSA was enacted to protect. Moreover, the plain language of the MSA does not limit the remedies thereunder to actions by the Secretary of State and Attorney General. Accordingly, for the reasons discussed *supra*, Ms. Hodges and KDH *do* have standing to pursue their MSA-based Counterclaims and GiveForward’s Cross-Motion as to this point should be denied.

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<sup>123</sup> See GF Mem. at 16-17.

**B. Ms. Hodges and KDH Also Have Standing to Pursue Their Counterclaims Based on GiveForward's Affirmative Representations.**

Since GiveForward did not file a motion pursuant to Rule 12(b)(1), GiveForward's standing arguments regarding the "fraud based claims"<sup>124</sup> are more appropriately categorized as a challenge to Ms. Hodges and KDH's ability to provide evidence satisfying each of the elements of those claims—specifically, in this case, reliance. A person whose name and likeness are used as a fundraising tool has standing to sue the fundraising service that financially profited. As discussed above at section IV.C.3, GiveForward's breach of its duty as a professional fundraiser caused actual damage to Ms. Hodges and KDH. Therefore, they have standing to pursue their Counterclaims based on those Affirmative Representations.

**CONCLUSION**

WHEREFORE, for the foregoing reasons as well as those in Ms. Hodges and KDH's Motion for Summary Judgment, Ms. Hodges and KDH respectfully request that the Court (1) GRANT their Motion for Summary Judgment and (2) DENY GiveForward's Cross-Motion for Summary Judgment.

Dated: March 26, 2015

Respectfully submitted,

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/s/

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<sup>124</sup> See *id.* at 27 n.5.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26<sup>th</sup> day of March, 2015, a true and correct copy of the foregoing Ms. Hodges and KDH's memorandum of law in Opposition to GiveForward's Cross-Motion for Summary Judgment and Reply In Further Support of Ms. Hodges and KDH's Motion for Summary Judgment was served *via* the Court's electronic filing system, Case Management/Electronic Case Files (CM/ECF), upon the following counsel of record:

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