IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

BTIG, LLC,	)	
	)	
Plaintiff,	)	C.A. No.: N19C-08-314 EMD CCLD
	)	
v.	)	
	)	
PALANTIR TECHNOLOGIES, INC., and DISRUPTIVE TECHNOLOGY ADVISERS LLC,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION DENYING DEFENDANT'S MOTION TO DISMISS

For the reasons set forth below, the Court **DENIES** Defendant Palantir Technologies Inc.'s Motion to Dismiss (the "Motion") filed by Defendant Palantir Technologies Inc. ("Palantir") on September 26, 2019. The Court, in arriving at this decision, considered the Motion; Plaintiff's Answering Brief in Opposition to Defendant Palantir Technologies, Inc.'s Motion to Dismiss (the "Response") filed by BTIG, LLC ("BTIG") on October 30, 2019; the Joinder of Defendant Disruptive Technology Advisers LLC in Palantir's Motion to Dismiss and Opening Brief in Support of Its Motion to Dismiss for Failure to State a Claim filed by Disruptive Technology Advisers LLC ("DTA") on October 31, 2019; Palantir's Reply Brief in Support of Its Motion to Dismiss For Failure to State a Claim (the "Reply") filed by Palantir on November 15, 2019; the arguments presented on the Motion to Dismiss, the Response, and the Reply at the hearing on December 10, 2019 (the "December 10, 2019 Hearing"); the Complaint filed by BTIG; and the entire record of this civil action.

I. BACKGROUND[1]

This is a civil action filed and assigned to the Complex Commercial Litigation Division. The action purports to arise out of BTIG's attempt to broker a sale of Palantir's stock.[2] BTIG seeks to recover from Palantir and DTA for their alleged tortious interference with prospective economic advantage and civil conspiracy.[3]

According to the Complaint, one of BTIG's clients expressed to BTIG an interest in selling its shares of Palantir stock.[4] BTIG then learned that a foreign private equity fund, CDH Investments ("CDH"), was interested in purchasing $300 million of Palantir stock.[5] Because that was more than its one client had to sell, BTIG identified other Palantir shareholders interested in selling, until it had identified a group of sellers ("Selling Group") interested in collectively selling the $300 million of Palantir stock that CDH wanted to purchase.[6]

By December 2015, BTIG, the Selling Group, and CDH were preparing to close the transaction (the "CDH Transaction").[7] BTIG requested information from the Selling Group so that CDH could conduct minimal, pre-closing due diligence.[8] As required by the Preferred Stock Purchase Agreements, the Selling Group began the process of informing Palantir of the CDH Transaction.[9]

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[1] Unless otherwise indicated, the following are the facts as alleged in the Complaint. For purposes of the Motion, the Court must view all well-pleaded facts alleged in the Complaint as true and in a light most favorable to BTIG. *See, e.g., Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Acad., LLC*, 2010 WL 5825343, at *3 (Del. Super. Oct. 27, 2010).
[2] Compl. ¶ 12.
[3] *Id.* ¶ 2.
[4] *Id.* ¶ 1
[5] *Id.*
[6] *Id.*
[7] *Id.* ¶ 14.
[8] *Id.*
[9] *Id.*

On December 7, 2015, a member of the Selling Group disclosed to a Palantir executive, Colin Anderson, that BTIG had been working with the Selling Group to coordinate a sale of shares to a buyer and that the buyer would like to move forward with due diligence and set up a meeting with Palantir.[10] Mr. Anderson responded that he "would be delighted to help" and proposed a call or meeting to get the process started.[11]

On December 11, 2015, BTIG scheduled a December 15, 2015 meeting with Palantir regarding the CDH Transaction.[12] In or about mid-December 2015, a member of the Selling Group, Rosco Hill, informed a Palantir executive, Kevin Kawasaki, of: (i) the CDH Transaction, and (ii) CDH's identity.[13] In his interactions with BTIG, Mr. Kawasaki indicated to BTIG that he would cooperate and facilitate the BTIG-brokered CDH Transaction.[14]

On December 14, 2015, Palantir informed BTIG that it had to postpone the previously scheduled December 15, 2015 meeting.[15] No one—Palantir, DTA and/or CDH—disclosed to BTIG the reason for postponing the meeting, and BTIG alleges that it continued to attempt to reschedule it after the holidays at the beginning of 2016.[16] The meeting was never rescheduled and the CDH Transaction was never consummated.[17]

BTIG filed the Complaint on August 30, 2019. The Complaint contends the CDH Transaction did not close because Palantir and DTA had tortiously interfered with the deal.[18] BTIG claims that it first learned why the CDH Transaction failed to close on August 21, 2019

[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* ¶ 16.
[16] *Id.*
[17] *Id.* ¶ 1.
[18] *Id.*

when documents (the "KT4 documents") based on two recent filings in the *KT4 Partners LLC v. Palantir Technologies. Inc.*, C.A. No. N17C-12-212 EMD CCLD, became publicly available.[19]

Specifically, BTIG alleges it first learned on August 21, 2019 that: (i) by late December 2015, Palantir made a deliberate decision to block any transaction brokered by BTIG and that DTA had indicated that Palantir wanted to "crush" Palantir;[20] (ii) on December 14, 2015, Palantir decided to "shut down" interaction with BTIG;[21] (iii) by December 18, 2015, Palantir informed DTA that it had refused to meet with BTIG and CDH's representatives;[22] (iv) on December 18, 2015, Alexander Fishman indicated that DTA was the only broker allowed to carry out secondary transactions for the sale of Palantir stock and that Palantir would not approve any deals involving BTIG;[23] (v) on or about December 18, 2015, Alexander Davis sent a LinkedIn message to CDH regarding a primary sale;[24] (vi) in February 2016, DTA made further representations to CDH that DTA controlled Palantir's primary and secondary liquidity and that CDH must work with DTA exclusively;[25] and (vii) through May 2016, DTA purportedly continued negotiating with CDH for a potential sale of Palantir stock.[26] BTIG asserts it was "blamelessly ignorant" of all of these facts.[27]

BTIG further claims it reasonably believed that Palantir would cooperate in BTIG's secondary transaction with CDH.[28] BTIG had a pre-existing relationship with Palantir executives, including Mr. Kawasaki, and had previously carried out a transaction involving

[19] *Id.* at 2 n.1.
[20] *Id.* ¶ 19.
[21] *Id.* ¶¶ 16, 23.
[22] *Id.* ¶ 17.
[23] *Id.*
[24] *Id.*
[25] *Id.* ¶ 22.
[26] *Id.*
[27] Id. ¶ 23.
[28] *Id.* ¶ 20.

Palantir. BTIG contends that it received indication from Palantir that Palantir would cooperate with the CDH Transaction.[29] In 2016, BTIG sought Palantir's assistance in carrying out the CDH Transaction, and continued to attempt to meet with CDH and Palantir regarding this deal.[30] BTIG alleges that Palantir misled BTIG by openly giving BTIG the impression that it would facilitate the BTIG-brokered CDH Transaction.[31]

As a result of CDH's withdrawal from the deal with BTIG and the Selling Group, BTIG alleges it was unable to obtain broker fees.[32] Each member of the Selling Group had agreed, in their respective agreements, to pay BTIG a broker fee equal to 3% of their gross proceeds received from the transaction.[33] BTIG alleges that it suffered an estimated total sum of not less than $9 million dollars as a result of the tortious interference by Palantir and DTA.[34]

Palantir filed the Motion on September 26, 2019. On October 30, 2019, BTIG filed the Response. On November 15, 2019, Palantir filed the Reply. At the December 10, 2019 Hearing, the Court heard arguments on the Motion, the Response and the Reply. After the hearing, the Court took the matter under advisement.

II. PARTIES CONTENTIONS

A. PALANTIR'S CONTENTIONS

Palantir contends that the BTIG's claims are barred by the three-year statute of limitations for tortious interference and civil conspiracy claims. Moreover, Palantir asserts that the statute of limitations is not tolled under any rule, exception or doctrine. Palantir argues that tolling under the "time of discovery" rule should not apply because (1) the injury is not

[29] *Id.*
[30] *Id.*
[31] *Id.* ¶ 24.
[32] *Id.*
[33] *Id.*
[34] *Id.*

inherently unknowable and (2) BTIG has failed to plead facts with particularity. Palantir further contends that BTIG failed to plead with particularity that fraudulent concealment should apply. Finally, Palantir argues that BTIG was on inquiry notice more than three years before bringing the suit. DTA joins with Palantir in seeking dismissal of the Complaint.

B. BTIG'S CONTENTIONS

BTIG claims that it has adequately alleged facts to support tolling of the statute of limitations by the "time of discovery" rule and the fraudulent concealment rule. In addition, BTIG argues that it was not on inquiry notice more than three years before bringing the suit.

III. STANDARD OF REVIEW

Upon a motion to dismiss, the Court (i) accepts all well-pleaded factual allegations as true, (ii) accepts even vague allegations as well-pleaded if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) only dismisses a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[35] However, the court must "ignore conclusory allegations that lack specific supporting factual allegations."[36]

IV. DISCUSSION

Under Delaware law, claims for tortious interference and civil conspiracy are subject to a three-year statute of limitations.[37] Delaware courts apply a three-step analysis to determine whether a claim is time-barred.[38] First, the Court determines when the cause of action accrues.[39] For tort claims, "the wrongful act is a tortious act causing injury, and the cause of action accrues

[35] *See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Academy*, No. 09C-09-136, 2010 WL 5825343, at *3 (Del. Super. Oct. 27, 2010).
[36] *Ramunno v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998).
[37] 10 *Del. C.* § 8106.
[38] *Wal–Mart Stores Inc. v. AIG Life Ins. Co.*, 860 A.2d 312 (Del. 2004).
[39] *Id.*

at the time of injury."[40] Second, the Court determines whether the statute of limitations may be tolled so that the cause of action accrues after the time of breach or injury.[41] The plaintiff must plead with specificity why the statute of limitations should be tolled.[42] Third, if a tolling exception applies, the Court determines when the plaintiff received inquiry notice.[43] The statute of limitations begins to run from the date when the plaintiff received inquiry notice.[44]

Where the moment of the wrongful act and the plaintiff's discovery of the injury do not occur within close proximity of each other, Delaware courts have tolled the statute of limitations using the "time of discovery" rule, otherwise known as the doctrine of inherently unknowable injury.[45] The "time of discovery" rule applies where the injury is (a) "inherently unknowable"; and (b) sustained by a "blamelessly ignorant" plaintiff.[46]

In applying the "time of discovery" rule, an important preliminary issue is determining what the "injury" is that was sustained by the plaintiff. In *Brown v. E.I. DuPont de Nemours & Co.*, a number of children were born with severe eye defects.[47] In *Brown*, no one in the medical community had characterized the birth defects as possible tortious injuries at the time of exposure or when the defects were initially observed.[48] Years later, an expert linked the children's eye defects to their mothers' prenatal exposure to a component of a fungicide produced by E.I. DuPont de Nemours and Company ("DuPont").[49] Within two years of this expert

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[40] *Certainteed Corp. v. Celotex Corp*., 2005 WL 217032, at *7 (Del. Ch. Jan. 24, 2005) (citing *Ambase Corp. v. City Investing Co*., 2001 WL 167698, at *14 n. 4 (Del. Ch. Feb. 7, 2001) and *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 834 (Del. 1992).
[41] *Wal–Mart Stores*, 860 A.2d 312 (Del. 2004).
[42] *Young & McPherson Funeral Home, Inc. v. Butler's Home Improvement, LLC*, 2015 WL 4656486, at *1 (Del. Super. Aug. 6, 2015); *Eni Holdings, LLC v. KBR Grp. Holdings, LLC*, 2013 WL 6186326, at *11 (Del. Ch. Nov. 27, 2013).
[43] *Wal–Mart Stores*, 860 A.2d 312.
[44] *Id*.
[45] *Brown*, 820 A.2d 362, 366 (Del. 2003).
[46] *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 832 (Del. 1992).
[47] 820 A.2d 362, 364–65 (Del. 2003).
[48] *Id*. at 364–65.
[49] *Id*.

revealing the linkage, the plaintiffs brought suit against DuPont, who in turn moved for summary judgment on the grounds that the actions were time-barred under the applicable statute of limitations. The Delaware Supreme Court found that the "time of discovery" exception applied and differentiated "legal injuries" from the "injuries" that were physically "sustained" by the children in utero.[50] The Delaware Supreme Court ruled that this exception "starts the limitations period running only 'when a legal injury is sustained'" rather than when a physical injury is sustained.[51] The Delaware Supreme Court further found that the "legal injury" was sustained when the parents were on notice that the children's defects may have been tortiously caused by the mothers' exposure to fungicide, as opposed to when the birth defects were first observed.

The Delaware Supreme Court also found that the parents were blamelessly ignorant of the potential claim even after the latent injury revealed itself through physical ailments where "the symptoms are reasonably attributable to another cause and the plaintiff is not on notice of the tortious cause."[52] The plaintiffs suffered a physical condition that could not be attributed to a tortious injury until "someone from the scientific community found and revealed publicly a link between the physical condition and the exposure to the toxic substance."[53]

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[50] *Brown*, 820 A.2d 362, 366 (Del. 2003).
[51] *Id*. at 368 (citing *Stagg v. Bendix Corp.,* 472 A.2d 40, 43 (Del.Super.1984) *aff'd* 486 A.2d 1150 (Del.1984) and *Layton,* 246 A.2d at 797 (noting that in the typical tort case the physical impact starts the limitations period because the impact "serves to notify the plaintiff of the violation of his rights before the expiration of the period of limitations")). The Delaware Supreme Court in *Brown* also noted that several other authorities make a similar distinction between physical injury and legal injury. *See id*. (citing BLACK'S LAW DICTIONARY 789 (7th ed.1999) (noting that the primary definition of "injury" is "The violation of another's legal right, for which the law provides a remedy"); RESTATEMENT (SECOND) OF TORTS § 7 (1965) (defining "injury" as "the invasion of any legally protected interest of another"); and *Condon v. A.H. Robins Co.*, 217 Neb. 60, 349 N.W.2d 622, 625 (1984) (noting that "injury" for purposes of a statute of limitations must be defined "in the legal sense," and legal injury does not " 'occur' until it has sufficiently manifested itself so that a reasonable person knows, or ... should have discovered, the injury or damage")).
[52] *Id*.
[53] *Id*.

The Court finds that the reasoning in *Brown* is applicable here.[54] From the factual allegations in the Complaint, the Court can discern that BTIG is making a "time of discovery" tolling argument.[55] In summary, BTIG alleges that the legal injury is tortious interference and civil conspiracy and that they only had notice of these injuries when "the previously secret documents" showed that Palantir and DTA—

> secretly decided that they wanted to 'crush' BTIG and capture the economic benefits of a potential transaction with the buyer for themselves, instructed the buyer that the buyer could purchase Palantir shares exclusively through DTA, and stated that Palantir would refuse to approve any transaction the buyer attempted to pursue through another broker.[56]

The Court also finds *Wal–Mart Stores Inc. v. AIG Life Ins. Co.* to be helpful.[57] In *Wal-Mart Stores*, the Delaware Supreme Court held that Wal-Mart could not be expected to discover that the Internal Revenue Service might rule that Wal-Mart's utilization of a tax-avoidance strategy advocated by insurance brokers was improper as the injury was inherently unknowable.[58] The Delaware Chancery Court has commented that the *Wal-Mart Stores* ruling "sets a low threshold for the use of the doctrine of inherently unknowable injury, but one that is hard for a trial court to ignore."[59]

Furthermore, unlike the buyer in *Krahmer v. Christie's Inc.*—who failed to adequately allege facts demonstrating that the "time of discovery" rule should apply to her claims, BTIG has

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[54] Although the *Brown* court was specifically interpreting the language of Del. Code Ann. tit. 10, § 8119 in deciding when an injury is sustained, the same reasoning applies in interpreting when an injury is sustained under the "time of discovery" rule. Moreover, Delaware courts have expanded the reasoning in § 8119 claims to claims concerning 8106. *See Isaacson, Stolper & Co. v. Artisans' Sav. Bank*, 330 A.2d 130, 132–33 (Del.1974) (applying the "time of discovery" rule to accounting malpractice claims subject to Section 8106, where the taxpayer did not know he suffered an injury until the Internal Revenue Service asserted a claim); *Mulrooney v. Corp. Serv. Co.*, No. CIV.A. 12-163-SLR, 2013 WL 1246769, at *11 (D. Del. Mar. 27, 2013) (applying the *Brown* court's reasoning to determine that the "time of discovery" rule should toll the statute of limitations to where the legal injury was sustained).
[55] Compl. ¶¶ 1,14,17, 19-20, 23.
[56] *Id*. ¶ 1.
[57] 860 A.2d 312 (Del. 2004).
[58] *Id*.
[59] *Certainteed Corp.*, No. CIV. A. 471, 2005 WL 217032, at *9 (Del. Ch. Jan. 24, 2005).

alleged that Palantir had control over the documents that gave rise to its tortious interference claim.[60] The *Krahmer* Court called the issue of "whether the inherently unknowable injury rule applies to where an auction house sells an allegedly fake work of art to one who has no specific reason to question is authenticity until long after the three year statute of limitations has expired" to be one of first impression in Delaware.[61] The *Krahmer* Court rejected the argument that the Krahmers, as amateur art collectors, "reasonably relied on the representations of a reputable auction house that held itself out as an expert in American art" where the auction house's only duty was to the owner of the artwork and not to the Krahmers.[62]

Unlike *Krahmer*, the Court finds that—at this very early stage of the litigation—BTIG has *adequately alleged* that it reasonably relied on Palantir's representations in 2015 and 2016. Although not yet addressed in this, or other related litigation, the Preferred Stock Purchase Agreements present a situation that seemingly involves good faith and fair dealing as these agreements purportedly require disclosure of a transaction to Palantir before any sale of stock. The Court finds strange any idea that parties could use this information, with impunity, and negotiate side deals that cut out the disclosing parties. Given the surreptitious nature of the scheme pled by BTIG in the Complaint, the facts support finding that the injury is inherently unknowable.

BTIG also has alleged facts supporting that it is "blamelessly ignorant." The Court in *Brown* found that a plaintiff "may remain blamelessly ignorant of the potential claim even after a

[60] 903 A.2d 773, 780 (Del. Ch. 2006)
[61] *Id.*
[62] *Id.*

latent injury reveals itself through physical ailments."[63] Here, even Palantir acknowledges that "many transactions are contemplated but never consummated."[64]

Like the physical injury suffered by the plaintiffs in *Brown*, BTIG suffered an injury where the link to a tortious cause became known only where the KT4 documents were revealed publicly. To hold that BTIG would have been alerted to the potential cause of its simply by the fact that transaction was never consummated seems unreasonable. It is possible that BTIG might have been able to discover that there was tortious interference before the KT4 documents were released;[65] however, the Court does not find that the record has been developed enough for that conclusion.

The Court can also discern in the Complaint that BTIG is claiming tolling through fraudulent concealment doctrine.[66] Fraudulent concealment requires a defendant to commit "some 'actual artifice' which prevents a plaintiff from gaining knowledge of the facts, or some misrepresentation which is intended to put the plaintiff off the trail of inquiry."[67] Here, the Court finds the Complaint puts the parties on notice that BTIG is pleading fraudulent concealment. In summary, BTIG has asserted that "[i]n his interactions with BTIG, [Palantir executive Kevin] Kawasaki indicated to BTIG that he would be cooperative in facilitating the BTIG-brokered deal";[68] (2) "Plaintiff received indication from Palantir that Palantir would cooperate with Plaintiff's secondary transaction;"[69] and (3) "[b]y openly giving the impression to BTIG that

[63] *Brown*, 820 A.2d 362, 368 (Del. 2003).
[64] Palantir Br. 3–4.
[65] Defendants state that the KT4 action was filed in March 2017, two-and-a-half years prior to BTIG's complaint. Palantir Br. 5. Even assuming that this filing would have provided BTIG with appropriate notice, the court need not consider this issue because it would have been within the three-year statute of limitations period.
[66] Compl. ¶¶ 14, 24.
[67] *Halpern v. Barran*, 313 A.2d 139, 143 (Del. Ch. 1973).
[68] Compl. ¶ 14.
[69] *Id*. ¶ 20.

Palantir would facilitate the BTIG-brokered deal, but secretly working together to 'crush' and 'shut down' any such deal, Palantir and DTA misled BTIG."[70]

The Complaint, therefore, alleges facts that support a "time of discovery" tolling argument and a fraudulent concealment tolling argument. Palantir claims that BTIG should have known that the CDH Transaction was lost due to tortious interference and civil conspiracy. The Complaint alleges a different scenario—a scenario where BTIG relied upon Palantir's assertions that it would assist in carrying out BTIG's transaction. At this stage in the proceedings, the Court must accept the facts as alleged in the Complaint. If the factual discovery demonstrates otherwise, then a dispositive motion may resolve the matter prior to trial.

Inquiry notice does not require actual discovery of the reason for injury. Rather, inquiry notice exists when the plaintiff becomes aware of "facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery [of injury]."[71] A plaintiff is expected to act with alacrity once the plaintiff has reason to suspect that the plaintiff's rights have been violated, and that the statute of limitations runs from the point at which the plaintiff, by exercising reasonable diligence, should have discovered the injury.[72]

In deciding whether a plaintiff was on inquiry notice of the claims on a motion to dismiss, Delaware courts have examined whether a diligent investigation, if pursued, would uncover facts sufficient to enable a plaintiff to discover the basis of a claim.[73] In *Weiss v. Swanson*, the Delaware Chancery Court found it would be inappropriate to infer that the plaintiff was on inquiry notice of his claims simply because he could have pieced together the alleged

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[70] *Id*. ¶ 24.
[71] *Becker v. Hamada, Inc.*, 455 A.2d 353, 356 (Del.1982).
[72] *Id.*
[73] *See Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d 838, 843 (Del. 2004); *see also Incyte Corp. v. Flexus Biosciences, Inc.*, 2017 WL 7803923, at *6 (Del. Super. Ct. Nov. 1, 2017) (finding no reason to believe that a diligent inquiry would have uncovered facts sufficient to assert a trade libel claim where a competitor's presentation was confidential).

practice of timing option grants from publicly available information.[74] "In order to discover the alleged pattern of timing, Weiss would have had to cull through the company's Form 4s each time they were filed, compare the grant dates of the options with the timing of the quarterly earnings releases, and then conduct a statistical analysis in order to uncover the alleged malfeasance. Such an investigation is beyond 'reasonable' diligence.'"[75]

The Court finds it similarly inappropriate to infer that BTIG was on inquiry notice simply because BTIG may have been able to piece together the tortious interference by Palantir and DTA by culling through Palantir's documents. This is especially where it is alleged that Palantir took efforts to keep the documents from becoming public.[76] Furthermore, the very nature of a conspiracy implies that the uncovering of facts is unlikely.[77] The Court, therefore, finds that it is premature to dismiss the complaint on statute of limitations grounds.

V. CONCLUSION

For the set forth above, the Court **DENIES** the Motion.

Dated: January 3, 2020
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

cc: FileAndServeExpress

[74] 948 A.2d 433, 452 (Del. Ch. 2008).
[75] *Id*.
[76] *Id*. ¶ 1; ¶ 1 n.1.
[77] "Conspirators do not voluntarily proclaim their purposes; their methods are clandestine." *Hoffman v. Stamper*, 867 A.2d 276, 291 (Md. 2005) (quoting *Western Maryland Dairy v. Chenworth*, 23 A.2d 660 (Md. 1942)).