IN THE COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

MAURICIO ANDRES RUIZ "VARELA",
an individual,

Plaintiff,

v.

WPLG, INC., a Delaware corporation; THE DAILY CALLER, INC., a Delaware corporation; and YAHOO, INC., a Delaware corporation,

Defendants.

CASE NO.: 2024-007863-CA-01

CIRCUIT CIVIL DIVISION

DEFENDANT THE DAILY CALLER, INC.'S
REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

The Daily Caller, Inc. ("*The Daily Caller*") files its Reply in Support of its Motion to Dismiss the Amended Complaint pursuant to Fla. R. Civ. P. 1.140(b).[1]

1.0 INTRODUCTION

The Daily Caller relied on the reporting of a trustworthy local news provider, which happened to use an incorrect mugshot in its initial reporting, while using the correct name of the accused. Despite having amended his Complaint in light of prior motions to dismiss, Plaintiff Mauricio Andres Ruiz Varela ("Plaintiff" or "Ruiz"), has failed to allege any facts, or provide any legal argument, that can overcome the wire service defense or immunity under section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"). The authority Plaintiff cites in his Opposition is either irrelevant or actively damages his arguments, and the Court should dismiss the Amended Complaint in its entirety against *The Daily Caller*, with prejudice.

[1] Plaintiff ignores that his Amended Complaint – filed without leave after an Answer was returned – is a rogue document, thereby conceding his amended pleading is not properly before the Court. Whether the Court addresses the original or amended Complaint, however, the result is the same.

2.0 ARGUMENT

Plaintiff fails to state a claim in his Amended Complaint, and he fails to overcome the authority cited in *The Daily Caller's* Motion explaining why.

2.1 The Defamation Claims Fail Because of the Wire Service Defense

The Daily Caller did no more than republish content from a trusted news publication, which cannot give rise to defamation liability. This is black-letter Florida law, and in fact, the wire service defense was *invented* by Florida's courts. "'[A] republisher may rely on the research of the original publisher, absent a showing that the republisher had, or should have had, substantial reasons to question the accuracy of the articles or the *bona fides* of the reporter.'" *Nix v. ESPN, Inc.*, No. 1:18-cv-22208-UU, 2018 U.S. Dist. LEXIS 149345, *14-15 (S.D. Fla. Aug. 30, 2018) (quoting *Rakofsky v. Washington Post*, 39 Misc. 3d 1226(A) (Sup. Ct. 2013)), *aff'd* 772 Fed. Appx. 807, 813 (11th Cir. 2019) (holding that media republishers prevailed on wire service defense where "Appellants did not assert facts to show, and there is nothing else to suggest, that ESPN or USA Today were negligent, reckless, or careless in relying on AP's content"); *see Layne v. Tribune Co.*, 108 Fla. 177, 238 (1933) (articulating defense in similar fashion); *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1477 (S.D. Fla. 1987) (applying defense to news periodical). The court in *Nix* found that the wire service defense precluded defamation liability because "[t]he Associated Press is a reputable news agency, and its article was a substantially accurate summary of judicial proceedings. Accordingly ... Plaintiffs' claims against the republishers ... are barred by the wire service defense." 2018 U.S. Dist. LEXIS 149345 at *15.

Nothing in Plaintiff's Amended Complaint comes close to suggesting there were any reasons, substantial or otherwise, to doubt WPLG's accuracy in reporting about Mauricio Alexander Ruiz. Nor does he refute or object to the exhibits cited in the Motion showing that WPLG is a reputable news agency. This establishes, conclusively, that *The Daily Caller* properly

relied on WPLG's reporting, and that the wire service defense and facts stated in the Amended Complaint utterly preclude defamation liability under Florida law.

Plaintiff, in his Opposition, claims there is a factual dispute as to whether *The Daily Caller* published its article before WPLG's correction. *Opposition at 3.* Plaintiff does not even allege *The Daily Caller* published after WPLG's correction or had actual knowledge of their correction. Indeed, the only conduct *The Daily Caller* is alleged to have taken following WPLG's correction is a "failure" to remove the article, not *having published* the article. *Amended Complaint at ¶¶ 32-34.* Plaintiff's *own exhibits* show that WPLG's correction was published after *The Daily Caller* published its article. *Amended Complaint at Exhibits C & D*. Plaintiff cannot rely upon extrinsic documents that defeat its claims and then suddenly argue that those documents are not trustworthy. *See Hunt Ridge at Tall Pines, Inc. v. Hall*, 766 So. 2d 399, 401 (Fla. 2d DCA 2000) (finding that "[w]here complaint allegations are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control and may be the basis for a motion to dismiss"); *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 494 (Fla. 3d DCA 1994) (holding that "[w]hen a party attaches exhibits to the complaint those exhibits become part of the pleading and the court will review those exhibits accordingly").

Recognizing he has failed to allege *publication* after WPLG's correction, Plaintiff cites *Doe v. Am. Online, Inc.*, 783 So. 2d 1010 (Fla. 2001), for the proposition that, under the Restatement (Second) of Torts § 577, liability for publishing defamatory content extends to those who "fail[] to take reasonable steps to remove defamatory statements from property under her control." *Doe*, however, does not aid Plaintiff, largely because it revolved around a fault standard that is constitutionally inapplicable here: The *Doe* court mentioned only a "reason to know" standard, by which "entities such as news vendors, ... while not charged with a duty to review the

materials they distribute, are liable if they distribute materials they know or have reason to know contain defamatory statements." *Id*. at 1015.

Plaintiff alleges in conclusory fashion that "The Daily Caller knew, or recklessly failed to check,[2] that its publication that identified Plaintiff's image as being that of Mauricio Alexander Ruiz was false" (*Amended Complaint at ¶ 33*), yet fails to allege any facts at all supporting this conclusion. There is no allegation that *The Daily Caller* had actual notice of WPLG's correction, nor are there any facts creating an inference that *The Daily Caller* would have seen it through reasonable practices. Without a "reason to know" of the correction, there can be no liability under *Doe*.[3]

Plaintiff cites *Taub v. McClatchy Newspapers, Inc.*, 504 F. Supp. 2d 74, 79-80 (D.S.C. 2007), for the proposition that the wire service defense does not immunize a newspaper when it continues to keep a defamatory article on its website if it learns, after publication, of an article's presence on its site and the article's inaccuracy. As explained in *The Daily Caller's* Motion, *McClatchy* does not apply here because it dealt with an atypical situation for the wire service defense: the defendant republished an altered version of its original article after having "some reason to be aware of the article's inaccuracies." *Id*. at 80. Indeed, the court, citing *Layne*, recognized quite rightly that "requiring a newspaper to scour every article received from a reputable wire service or news agency would place too heavy a burden on the newspaper." *Id*. at

[2] This theory of "recklessly failing to check" if a prior publication was in error has no support in the entire American compendium of jurisprudence, anywhere. It simply does not exist. Under First Amendment jurisprudence, publishers have no continuing duty to re-research their prior publications, and Plaintiff will never be able to find a case that says otherwise.

[3] It is also worth noting that *Doe* did not deal with the wire service defense and found that the defendant was immune from liability under Section 230, which provides a separate ground for dismissal here. *Id*. at 1017. No amount of discovery in the world can cure this fatal flaw in Plaintiff's argument.

80 n.7. But even if *McClatchy* were applicable, it still requires that a defendant have had "some reason to be aware of the article's inaccuracies," yet failed to remove the article afterward. There are no facts alleged that *The Daily Caller* knew or had reason to know of the inaccuracy of WPLG's article until it received Plaintiff's alleged pre-suit notice under Fla. Stat. § 770.01, immediately after which *The Daily Caller* issued a correction and removed the mugshot. *Amended Complaint at ¶¶ 42 & 44.*

Grasping at straws, Plaintiff cites no case, but a mere law review article to support his argument. When a plaintiff resorts to citing law review articles as authority, no matter how learned the author might be, that is a resounding admission that no *court* has ever agreed with the propounded theory. However, even if the article itself were magically converted to controlling authority, the article itself fails to help Plaintiff. His allegation that *The Daily Caller* "knew or should have known" about the WPLG article's inaccuracy is supported by nothing but conjecture, meaning Plaintiff, at best, is alleging that *The Daily Caller* failed to constantly monitor the accuracy of its articles after publication. In fact, the esteemed Professor Volokh noted that:

> If Paul's claim is simply that Donna unreasonably failed to proactively monitor further developments in the story, I think he should lose . . . [T]he law shouldn't demand that she or her employer continue keeping up on facts that later emerge as to all the many stories that she's written . . . [I]t's simpler and more predictable to hold that, as a matter of law, the reasonableness standard just doesn't apply. Instead, it should be up to Paul to expressly alert Donna about the supposed error, and to explain why it is indeed an error.

Eugene Volokh, "*The Duty Not to Continue Distributing Your Own Libels*," 97 NOTRE DAME L. REV. 315, 327-28 (2021) (emphasis added). This "Paul expressly alerting Donna" did not happen until Plaintiff's alleged § 770.01 notice. Once that was received, *The Daily Caller* corrected its article. Plaintiff's claims fail even under the "authority" he suggests that this court adopt.

2.2 The Defamation Claims Fails Because of the Single Publication Rule

Plaintiff argues that the single publication rule does not defeat his claims, and that it is merely a procedural tool for ensuring a defamatory publication does not result in numerous lawsuits throughout the country. This is wholly incorrect.

Fla. Stat. § 770.07 codifies the "single publication rule" and provides that "[t]he cause of action for damages founded upon a single publication or exhibition or utterance, as described in § 770.05, shall be deemed to have accrued at the time of the first publication or exhibit or utterance thereof in this state." Fla. Stat. § 770.05 provides examples of a "single publication," including "any one edition of a newspaper ...." Under the single publication rule, Plaintiff's defamation claims accrued at 4:34 p.m. on December 11, 2023. *Amended Complaint at Exhibit D.*

At this time, WPLG had *not* issued its correction, and the Amended Complaint does not allege it had any reason to doubt the accuracy of the article at that time. This is the only point at which *The Daily Caller's mens rea* was potentially relevant. *See Basulto v. Netflix, Inc.*, No. 22-21796-CIV-MORE, 2023 U.S. Dist. LEXIS 76537, *45 n.11 (S.D. Fla. May 2, 2023) (citing *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013) and *Shoen v. Shoen*, 48 F.3d 412, 417 (9th Cir. 1995) for the proposition that facts learned after initial publication are irrelevant to inquiries regarding knowledge of falsity, such as actual malice, under the single publication rule).

Plaintiff claims that the holding in *Doe* overrides the single publication rule in Florida, despite the fact that *Doe* does not deal with the single publication rule at any point. And his argument that the single publication rule is limited to only when the statute of limitations begins is not supported by his cases. Not one of them addresses how the single publication rule interacts

with the negligence or actual malice element of a defamation claim. *Basulto*, cited in the Motion, does address this issue, and Plaintiff ignores it in his Opposition.

Plaintiff also cites the law review article again to support his argument, and again shoots himself in the foot by doing so. The article's author disagrees with the conclusion of other courts that the mental state of the defendant (*i.e.,* whether the *mens rea* of a defamation claim is satisfied) is determined at the time of initial publication. The fact that a law review article disagrees with the overwhelming state of the law provides us insight into the law review author's personal legal philosophy. However, it does not provide legal authority to support Plaintiff's case. Indeed, the cases the article cites are far more persuasive on this question than its editorial opinion. *See Rainbow v. WPIX, Inc.*, 117 N.Y.S.3d 51, 53 (App. Div. 2020); *Pippen*, 734 F.3d at 614-15 (7th Cir. 2013); *Lakireddy v. Soto-Vigil*, No. A138675, 2014 WL 1478693, *8 (Cal. Ct. App. Apr. 16, 2014). This is particularly true when Florida's federal courts have already adopted this position. *Basulto*, 2023 U.S. Dist. LEXIS 76537 at *45 n.11.

Even if the law review article were persuasive authority, however, it would once again defeat Plaintiff. The article's reasoning on this issue stems from the argument that a defamation action only accrues at a single point in time, and thus the cause of action does not accrue until all the elements, including *mens rea*, are met. Accordingly:

> "If in March WPIX reported (based on reasonable belief) that Starlight Rainbow had mistreated a student, and in August WPIX learned that the guilty person was actually Cynthia Rainbow, then any libel cause of action would not have accrued in March, because the negligence element was absent. The action would only have accrued in August, and the single publication rule would have kicked in only then."

Volokh, *supra*, at 331. Accordingly, under the reasoning Plaintiff wants the Court to adopt, his claims did not accrue until he sent his purported § 770.01 notice, immediately after which *The Daily Caller* removed the erroneous headshot. This turns the retraction statute on its head, because

one of the key purposes of that statute is to provide notice of an alleged falsity in the first place. Without a failure to remove the false content upon learning of its falsity, Plaintiff has no claim, and it is uncertain why the plaintiff thought any law review article could change that – but in particular, even if this particular law review article should be followed by this court, it would *defeat* Plaintiff's claims as well.

Plaintiff has failed to state a claim for defamation against *The Daily Caller*, and no amendment, nor any amount of discovery, could cure this defect as a matter of law.

2.3 All Claims Fail Because of Section 230 Immunity

Section 230 states unambiguously that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This creates absolute immunity so long as the defendant is a provider or user of such a service and did not materially contribute to the creation or development of the allegedly tortious content. 47 U.S.C. § 230(f)(3) defines "information content provider" as "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."

Moreover, that immunity has been extended nationwide to news organizations like *The Daily Caller*. "The majority of federal circuits have interpreted the CDA to establish broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'" *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). "The purpose of the act is 'to promote the continued development of the Internet and other interactive computer services and to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services[.]'" *Montano v. Wash. State Dep't of Health*,

No. 1:23-23903-BECERRA/GOODMAN, 2024 U.S. Dist. LEXIS 95402, *34 (S.D. Fla. May 28, 2024) (quoting *Woodhull Freedom Found. v. United States*, 72 F.4th 1286, 1293 (D.C. Cir. 2023)).

Plaintiff argues that Section 230 is an affirmative defense that is not properly resolved on a motion to dismiss, especially given that there are supposedly factual disputes in play. First, most courts characterize Section 230 as providing substantive immunity from suit, not an affirmative defense, and motions to dismiss are routinely granted on Section 230 grounds. *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1248 (S.D. Fla. 2020) (collecting cases). Second, Plaintiff provides no authority for the proposition that affirmative defenses cannot be resolved on a motion to dismiss. They can – and when the First Amendment is intertwined – should be decided at this early point when "the defense appears on the face of a pleading." *Pac. Ins. Co., Ltd. v. Botelho*, 891 So. 2d 587, 590 (Fla. 3d DCA 2004).

Indeed, the very case Plaintiff thinks aids his argument, *Doe v. Am. Online*, 718 So. 2d 385, 388 (Fla. 4th DCA 1998), found that Section 230 can be proper grounds for dismissal at the motion to dismiss stage. Third, Plaintiff does not identify any factual dispute regarding Section 230. Plaintiff alleges that, concerning the only allegedly actionable content in the Daily Caller article (the embedded @ASecondChance tweet with Plaintiff's mugshot), *The Daily Caller* did no more than embed this tweet. Plaintiff claims there is some question as to whether the words in the article were composed solely by *The Daily Caller*, but that doesn't matter; we must only pay attention to the allegations in the complaint, and Plaintiff does not allege third parties authored the article. In any event, not a single word in the article itself is alleged to be false, and so we are only concerned with the tweet, which of course, Plaintiff cannot allege was written by *The Daily Caller*. The Amended Complaint alleges that the article "contains a link to the defamatory Local10.com Article" and "embeds the Second Chance Tweet." *Amended Complaint at ¶ 30.* There is nothing

else *The Daily Caller* is alleged to have done. Those facts alone are sufficient to find that Section 230 immunity applies, and Plaintiff cannot allege or invent any facts changing this conclusion.

Plaintiff, attempting to change the allegations in his Amended Complaint, asserts it is a "half truth" for *The Daily Caller* to correctly note that its article did not mention Plaintiff by name because only the middle name is different between him and Mauricio Alexander Ruiz. So what? That is undisputed. Is Plaintiff's argument that it is defamatory to correctly use an arrestee's name when reporting on his arrest because the arrestee's name might be similar to that of another person? This is a legally incoherent position.

Plaintiff further argues that somehow every word in *The Daily Caller's* article is rendered defamatory by the inclusion of the embedded @ASecondChance tweet. Not so, because the article refers to the correct name of the criminal defendant, Mauricio Alexander Ruiz. It does not leave his identity a secret. The only allegedly defamatory element of the article is that Plaintiff's face is the face of Mauricio Alexander Ruiz. And that contention, whether implicit or explicit, is contained exclusively in the embedded tweet.

The Daily Caller's Motion extensively cites case law throughout the nation that embedding or republishing content created by third parties on the internet, the only allegedly actionable conduct Plaintiff claims *The Daily Caller* did, is protected under Section 230. *Motion at 10-12.* Plaintiff does not engage with this case law, instead only citing general language from disparate cases that Section 230 immunity is not absolute. But without any attempt to discuss these cases or explain why immunity does not apply *here*, these citations do nothing to help Plaintiff.

Plaintiff claims that *The Daily Caller* is not immune under Section 230 because it is "in part responsible for the creation or development of content." *Opposition at 8*, citing *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014). Plaintiff does not appear to

understand the case he cites. The *Jones* court found that the operator of the website in question could only be liable for third-party content on the site *if it "materially contributed" to the alleged unlawfulness of content*, *i.e.,* "being responsible for what makes the displayed content allegedly unlawful." *Id*. at 410 (emphasis added). There is no such "contribution" here, as the @ASecondChance embedded tweet contains Plaintiff's mugshot and accurately states that "#MauricioAlexanderRuiz was arrested last week on a charge of offenses against a student by an authority figure." *Amended Complaint* at *Exhibit D*. Any allegedly defamatory statement or implication is right there in the tweet; no "contribution" is necessary.

Plaintiff then cites an unpublished opinion, *McCall v. Zotos*, No. 22-11725, 2023 U.S. App. LEXIS 14585 (11th Cir. June 12, 2023), to further support his argument. This case dealt with a consumer review website, and the court found that the website was immune under Section 230 for claims based on a consumer review posted by a user of the site because "[t]here are no allegations that suggest Amazon helped develop the allegedly defamatory review." *Id*. at *7-8. At the risk of beating a dead horse, the only allegedly defamatory element of *The Daily Caller's* article is the @ASecondChance tweet, and there is no allegation that *The Daily Caller* developed this content even in part.[4] The Amended Complaint pleads the opposite.

Plaintiff goes on to argue that *The Daily Caller* "actively – not passively – sought out the tweet that was embedded in the article" (Opposition at 11), as though this makes a difference. How does one "passively" embed a tweet, and how is this relevant to Section 230? Plaintiff's citation to authority in the next breath that retweeting can fall outside the scope of Section 230 "when a user couples the retweet with his or her own added speech" is irrelevant because that added speech

[4] Again, we reiterate that no factual allegation in this regard is made, nor could any amount of discovery change that.

must itself be defamatory. Section 230 immunity is not lost simply because a user accompanies a retweet with a reaction like "wow" or "lol" or, as in this case, a completely factual, dry, and accurate article derived from a trusted news source.

Plaintiff cites *US Dominion, Inc. v. Byrne*, 600 F. Supp. 3d 24, 36 (D.D.C. 2022), for the proposition that a defendant may be liable for retweeting when they claim they '"vouch[ed] for' the defamatory evidence contained in the accompanying retweet." *Opposition at 11.* Plaintiff does not identify what these allegedly "additional remarks that are allegedly defamatory" might be, since it does not claim that any of the text in *The Daily Caller's* article is false. Plaintiff's citation to *La Liberte v. Reid*, 966 F.3d 79, 90 (2d Cir. 2020), is also unhelpful. The plaintiff there did not even allege that the defendant republishing a tweet with a "photo showing the plaintiff with open mouth in front of a minority teenager; the caption was that persons (unnamed) had yelled specific racist remarks at the young man in the photo" was actionable. *Id*. at 83. Rather, the defendant subsequently made posts that "attributed the specific racist remarks to La Liberte." *Id*. It was this *additional* commentary, saying that the plaintiff was responsible for racist remarks, that was alleged to be defamatory and defeated a Section 230 defense. *Id*. at 90. Here, in contrast, the @ASecondChance tweet itself – and only the tweet – contained the allegedly defamatory content: the assertion that Plaintiff was Alexander Ruiz and was arrested for abusing authority over a minor. *The Daily Caller* embedding the tweet in its article adds no new allegedly defamatory content or implication.

Plaintiff desperately concludes by citing a few dissenting opinions regarding the universally broad application of Section 230. A dissenting opinion is a dissenting opinion, not legal authority. In fact, by definition, it is the losing side of an argument.

2.4 The Defamation *Per Se* Claim Fails Due to a Lack of Actual Malice

Though Plaintiff takes issue with the wording of *The Daily Caller's* argument as to whether he needs to show actual malice for his defamation *per se* claim, he does not dispute the argument itself. He does not address *The Daily Caller's* citation to bedrock First Amendment law that its article was on an issue of public concern, and thus presumed damages are available to him only if he can adequately allege *The Daily Caller* published with actual malice. The only question for purposes of this Motion, then, is whether Plaintiff has adequately alleged actual malice. He has not and cannot.

The Motion discusses the "actual malice" standard, and there is no need to repeat its nuances here when Plaintiff ignores them. Black-letter Constitutional Law states over and over that a failure to investigate is not actual malice; something more, like a deliberate attempt to avoid learning the truth, must be present. *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968); *Lam v. Univision Communs., Inc.*, 329 So. 3d 190, 198 (Fla. 3d DCA 2021) (finding legally insufficient allegations that defendant broadcaster's primary source was unreliable and provided false information, and that the broadcaster "knew the statements were false, had serious doubts as to their truth, or published them with reckless disregard for, and in purposeful avoidance of, the truth"); *Corsi v. Newsmax Media, Inc.*, 519 F. Supp. 3d 1110, 1123 (S.D. Fla. 2021) (disregarding conclusory allegations that defendants knew the statements were false and analyzing whether plaintiff had "sufficiently pleaded facts giving rise to a reasonable inference that the [defendant] published the statements knowing that they were false").

The Amended Complaint merely alleges that *The Daily Caller* failed to conduct its own investigation, along with the erroneous formulaic allegation that it "must have" published with actual knowledge of or reckless disregard for falsity. The Opposition is even more threadbare, as

Plaintiff argues only that "[t]here is already a good faith reason[5] to believe The Daily Caller acted with actual malice because they had at least constructive notice that WPLG had included the wrong photograph of Plaintiff in its reporting, and therefore the conduct was reckless." *Opposition at 14.* What "constructive notice"? As already explained above, there is not a single factual allegation to support even an inference that *The Daily Caller* had notice, constructive or otherwise, of the inaccuracy of WPLG's original article until Plaintiff's purported §770.01 notice. Plaintiff insinuates that he may wish to amend his Complaint yet again as he learns more facts, but he must make factual allegations that support at least an inference of actual malice *now*, and he does not identify what additional facts he could possibly allege in an amended pleading.

Absent actual malice, Plaintiff is not entitled to presumed damages, and so his defamation *per se* claim fails.[6]

2.5 The Defamation Claims Fail Because Plaintiff is Libel-Proof

The libel-proof plaintiff doctrine "'prohibits a plaintiff from recovering for libelous statements where the plaintiff's reputation in the community was so tarnished before the publication that no further harm could have occurred.'" *Davis v. McKenzie*, No. 16-62499-CIV, 2017 U.S. Dist. LEXIS 183519, *37 (S.D. Fla. Nov. 3, 2017) (quoting *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069, 1073 (3d Cir. 1988)). The plaintiff need not be in a special class of

[5] It is puzzling that Plaintiff claims he made conclusory actual malice allegations in "good faith." That is not the relevant standard. Presumably, Plaintiff is referring to the standard for imposing sanctions under Fla. Stat. § 57.105, but *The Daily Caller* does not seek sanctions against Plaintiff. Yet. But, *The Daily Caller* reserves that right.

[6] Plaintiff, citing *Mid-Florida Television Corp. v. Boyles*, 467 So.2d 282, 283 (Fla. 1985), claims that dismissal of this claim is inappropriate because "libel per se remains a useful shorthand for giving a media defendant notice that the plaintiff is relying upon the words sued upon as facially defamatory, and therefore actionable without resort to innuendo." This has nothing to do with the availability of presumed damages, the distinguishing factor between his defamation and defamation *per se* claims. Plaintiff's position here is also undercut by his own prior argument, where he claims that *The Daily Caller's* article is defamatory by implication. *Opposition at 7-8.*

horrifyingly notorious people to apply this doctrine. He simply needs a reputation that already has enough tarnishment upon it that nothing the Defendant did could have added to the pre-existing negative reputational patina. The doctrine is typically applied where the plaintiff has a criminal history. *Lamb v. Rizzo*, 391 F.3d 1133 (10th Cir. 2004); *Lavergne v. Dateline NBC*, 597 Fed. Appx. 760, 761 (5th Cir. 2015).

Plaintiff takes umbrage at this argument, claiming it is sanctionable, but his response consists of little more than the unsupported assertion that there is something legally more heinous about the criminal allegations against Mauricio Alexander Ruiz than the conduct underlying Plaintiff's own arrests. The Court's ability to consider extrinsic documents may be constrained on a motion to dismiss, but it is a matter of public record that Plaintiff has a more extensive criminal history than the arrest for a violent crime mentioned in his Amended Complaint, including another arrest for battery while this case was pending and a years-long felony battery case.

The Court should not be swayed by Plaintiff's crocodile tears in response to the Motion's reference to his "rapsheet." Plaintiff takes great umbrage at weighing his violent criminal past with the crime the *other* Mauricio Ruiz is accused of. However, both crimes are intolerable – and Plaintiff seems to be asking the Court to adopt the Plaintiff's opinion about the relative merits of two crimes. Meanwhile, there is no consensus that beating up a domestic relation is somehow more honorable than exchanging compromising photos with a minor. And even if there were support for the "question of taste" here, the First Amendment would not support a ruling that split the hair along those lines. As a public policy matter, what Plaintiff seeks is to create a new cottage industry in defamation claims by criminals who might see inaccuracies in how their crimes are characterized. The fact is, Plaintiff certainly *is* someone who has been involved in multiple violent crimes. The *other* Mauricio Ruiz also is accused of something awful. If Plaintiff were in court on

a mere traffic ticket, it would still be an honest mistake for the media to mix up a mugshot when two men with the same name are in the same courtroom. But, our hypothetical traffic scofflaw plaintiff just might have a point if he were mistakenly identified as having committed an actual crime. Here, it is one accused criminal, with a history of arrests for violent crimes, who believes that he is entitled to compensation for the reputational delta between his criminal history and his namesake's criminal history.

Plaintiff also feigns offense at the implication that he beat his *wife*, when he is unmarried. Fair enough. Usually a domestic violence charge involves one's spouse. The Defense concedes, for purposes of this Motion, that the presumption that it was a wife was in error. But, the outrage here simply illustrates Plaintiff's request that the court adopt a hypersensitivity standard. Whomever Plaintiff was arrested for assaulting, it must have been another domestic relation other than a lawful spouse. What difference does it make? Was it a spouse, a lover, a child? Irrelevant. What is relevant is that Plaintiff fails to refute the point that he has come to this Court with a reputation that is already crime-tarnished. That is the baseline from which his reputation must be evaluated, and whatever incremental harm the mugshot error may have caused his reputation, that increment is not significant enough to support a defamation claim under these allegations.

3.0 CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's claims with prejudice, as there is no possible amendment that could cure the problems with Plaintiff's claims and he has already had the benefit of amendment.

Dated: August 22, 2024.

Respectfully submitted,

/s/ Marc J. Randazza

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CERTIFICATE OF SERVICE

I hereby certify that, on August 22, 2024, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Florida E-Filing Portal, or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Florida E-Filing Portal.

/s/ Marc J. Randazza
Marc J. Randazza