IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: 2023-CA-002052

MICHAEL T. FLYNN,

Plaintiff,

v.

EVERETT STERN,
Defendant.

_____/

DEFENDANT, EVERETT STERN'S VERIFIED AMENDED MOTION TO DISMISS, OR, IN THE ALTERNATIVE, MOTION FOR JUDGEMENT ON THE PLEADINGS, AND HIS MOTION FOR ATTORNEY FEES AND COSTS UNDER FLORIDA'S ANTI-SLAPP STATUTE

Defendant, EVERETT STERN ("Mr. Stern"), under Florida Rules of Civil Procedure 1.140 and 1.510 and Section 768.295 of the Florida Statutes, moves to dismiss with prejudice Plaintiff's Complaint filed on December 2, 2023 (Image 43, DIN 5), or motion for final summary judgment on all of Plaintiff's claims, and for, under Florida's Anti-SLAPP statute, award of attorneys' fees and costs incurred in defending himself against this meritless lawsuit. Mr. Stern states in support:

I. PRELIMINARY STATEMENT

This case is a quintessential Strategic Lawsuit Against Public Participation ("SLAPP"): a lawsuit brought to censor, intimidate, and silence Mr. Stern for free speech about matters of public concern. Plaintiff, MICHAEL T. FLYNN ("General Flynn"), is suing Mr. Stern based exclusively over constitutionally protected free speech that also is not actionable on several substantive grounds.

For these reasons and several others, this entire case must be "expeditiously disposed" under section 768.295 of the Florida Statutes, and Mr. Stern is entitled to recover his attorneys' fees and costs under Florida's Anti-SLAPP statute.

Even assuming *arguendo* that General Flynn's material factual allegations are true, his claims are legally unsupported and constitutionally prohibited because they are based entirely upon "free speech in connection with public issues." See § 768.295(2)(a), Fla. Stat.

Specifically, General Flynn is suing Mr. Stern over statements published on his YouTube video clip Stern Truth Podcast, Twitter (now known as X), and other social media accounts (Compl. ¶¶ 30-44). These statements all appear in publications that indisputably addressed matters of widespread public interest and discussion: the Offshore Alert & Acari Project, General Flynn's role in disseminating false information. (Compl. ¶ 42).

Mr. Stern was a witness to some of Flynn's and his agent's misconduct. Additionally, Mr. Stern exercised his constitutional right to join the public debate sparked by General Flynn and publicly defend himself against these scandalous accusations. Although General Flynn's own involvement is one of the reasons Mr. Stern needed to defend himself in the first place, General Flynn apparently believes Mr. Stern should be powerless to do so and can be punished for whistleblowing and exercising his free speech rights. General Flynn is wrong.

As a matter of law, General Flynn cannot abuse the legal process to silence Mr. Stern and penalize him for exercising his constitutional rights.

The prompt disposition of this SLAPP is necessary and appropriate because allowing it to continue any further has a "chilling effect" on Mr. Stern's First Amendment rights. *Karp v. Miami Herald Publ'g Co.*, 359 So. 2d 580, 581 (Fla. 3d DCA 1978) (*per curiam*). Courts have an important obligation to protect free speech by expeditiously dismissing untenable claims such as General Flynn's claims. *See* § 768.295, Fla. Stat.; *see also Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016) ("[T]here is a powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless litigation.").

II. SUMMARY OF THE ARGUMENT

There are several *independent* reasons why General Flynn's claims are meritless and must be expeditiously dismissed.

First, General Flynn's defamation claims fail as a matter of law because the statements he sues upon, when viewed in their required, full context, are all statements that cannot reasonably be construed as conveying a defamatory meaning (*see* Section V below) or nonactionable statements of opinion or rhetorical hyperbole (*see* Section V, below). Mr. Stern's video podcasts on his YouTube channel and his commentaries published on his social media platforms explicitly rebut and refute the false charges lodged by General Flynn and others, and Mr. Stern's statements are legally incapable of supporting viable defamation claims.

Second, General Flynn is indisputably a public figure who voluntarily thrust himself into a public controversy by his involvement in "foreign policy," being investigated by the Federal Bureau of Investigation, by newsworthy conversation with Russian Ambassador Kislyak, etc. (Compl. ¶¶ 8-14). Notably, General Flynn admits that he "**returned to public life**." (Compl. 14). Hence, he is a public figure who is required to, failed to, and cannot allege sufficient facts that could establish by "clear and convincing" evidence that Mr. Stern published actionable defamatory statements with actual knowledge that they were false or with a high degree of awareness of their probable falsity ("actual malice"). *See Michel*, 816 F.3d at 703.

As a matter of law, General Flynn cannot assert traditional claims for "defamation and defamation *per se*" (Count I of his Complaint) or Injurious Falsehood (Count II of his Complaint) because he is a public figure, and his claim for "Injurious Falsehood" fails as a matter of law because its supporting allegations (even if accepted as true for purposes of this motion) are insufficient to establish actual malice. *Id.*; *cf. Frieder v. Prince*, 308 So. 2d 132, 134 (Fla. 3d DCA 1975) (affirming dismissal because complaint "fails to set forth facts which are legally sufficient to establish actual malice").

Third, the "fair report" privilege applies to numerous statements General Flynn challenges and bars General Flynn's claims. Under the fair report privilege, a fair summary of allegations in court documents or proceedings is protected speech shielded from liability for defamation. *See, e.g., Woodard v. Sunbeam*

Television Corp., 616 So. 2d 501, 503 (Fla. 3d DCA 1993) (affirming dismissal based on the fair report privilege because the reporter "had no duty to determine the accuracy of the information contained in the [public record]"). Here, many of the challenged statements are in publicly available on social media.

Fourth, General Flynn fails to allege and cannot demonstrate proximate causation. All the statements upon which General Flynn's claims are based have already been published and widely circulated numerous times before by various news agencies, as well as General Flynn's allegations in his Complaint at paragraphs 12-14. Based upon the undisputed facts, the challenged statements could not have been the required "but for" cause of General Flynn's alleged damages.

Finally, because this lawsuit lacks merit and seeks to hold Mr. Stern liable for free speech on a matter of public concern, it violates Florida's Anti-SLAPP statute. Accordingly, under Section 768.295 of the Florida Statutes, this case must be "expeditiously disposed," and Mr. Stern is entitled to recover his attorneys' fees and costs. *See* § 768.295(4), Fla. Stat.

III. IRRELEVANT BACKGROUND

This action is serving as a springboard for a media campaign, as General Flynn has returned to public life. General Flynn uses these types of action as one of many attempts to weaponize the courts to get even or silence whistleblowers and persons exercising their free speech rights.

As explained in Section V below, "public figures" are held to such a higher standard of proof in defamation actions (the "actual malice" standard of fault) because the law obligates them to use their access to the media (not lawsuits) to defend themselves against and rebut false accusations, unless the publisher acted with an awareness or in reckless disregard of their falsity. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 344 (1974).

Here, Mr. Stern did not act with actual malice. Mr. Stern rightfully reacted by using publicly available means of communication at his disposal to disseminate information, documents, commentary, and opinions to inform the public about his side of the story. In response, General Flynn is using this lawsuit to try to silence and punish Mr. Stern, asserting meritless claims based on isolated statements plucked out of context from the defensive publications in which they appear. Compl. ¶¶ 30-44.

IV. THE PROTECTED SPEECH UPON WHICH GENERAL FLYNN'S CLAIMS ARE BASED

It is indisputable that all of General Flynn's claims are based exclusively upon Mr. Stern's free speech in connection with matters of public concern.

Specifically, General Flynn is suing Mr. Stern over allegedly defamatory statements which General Flynn improperly cherry-picked from Mr. Stern's social media postings. Compl. ¶¶ 30-44. Mr. Stern's voice on these issues is important because he is widely recognized for his activism and advocacy for the protection of United States and truth.

A. The Challenged Statements from Mr. Stern's Social Media Accounts

In his Complaint, General Flynn challenges numerous statements he plucked from various entries on Mr. Stern's social media (Compl. ¶¶ 30-44). Generally, General Flynn characterizes these statements as false claims.

To support his claims (and contrary to controlling law), General Flynn isolates allegedly "defamatory" statements from the full context in which they appear. Controlling law requires the videos in Mr. Stern's social media postings to be viewed collectively as a whole and in full context. "[T]he Court must consider the context in which the statements were published, the author's choice of words and qualifying language, and all of the circumstances surrounding the publication, including the medium of expression and its audience." *Hay v. Independent Newspapers, Inc.*, 450 So. 2d 293, 295 (Fla. 1984). This required context also includes other relevant information the audience is expected to be aware of at the time of publication. *Information Control v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980) (cited in *Hay*).

Here, General Flynn's allegations ignore the required context in which Mr. Stern's statements must be viewed. General Flynn's claims are based on statements he yanked from videos posted on Mr. Stern's YouTube—a type of media that inherently contains opinions and thoughts (particularly posts consisting of readings from and commentary on events that General Flynn himself alleged in his Complaint at paragraphs 11-14.

Mr. Stern's social media postings are filled with figurative, hyperbolic, suggestive, and argumentative language clearly signaling to readers that they were one-side's beliefs and the accusations lodged these postings.

V. THIS CASE MUST BE "EXPEDITIOUSLY DISPOSED"

As expressed in Florida's Anti-SLAPP statute (section 768.295 of the Florida Statutes), Florida's legislature made it a matter of public policy to recognize and dismiss SLAPP suits "expeditiously." *Gundel v. AV Homes, Inc.*, 264 So.3d 304, 310 (Fla. 2d DCA 2019). This statute creates a vested right to not be subjected to meritless suits filed "primarily because [another] person or entity has exercised the constitutional right of free speech in connection with a public issue." *Id.*

In fact, the statute provides that persons (such as General Flynn) "may not file or cause to be filed" claims that are the basis of his lawsuit. § 768.295(3), Fla. Stat. Florida's courts have long recognized that the prompt dismissal of meritless claims based on protected speech serves First Amendment values by safeguarding the robust discussion of public issues. *Stewart v. Sun Sentinel Co.,* 695 So. 2d 360,363 (Fla. 4th DCA 1997) ("Where the facts are not in dispute in defamation cases, ... pretrial dispositions are 'especially appropriate' because of the chilling effect these cases have on freedom of speech.") (*quoting Karp v. Miami Herald Publ Col.*, 359 So. 2d 580, 581 (Fla. 3d DCA 1978)); *see also Southard v. Forbes Inc.*, 588 F. 2d 140, 145 (5th Cir. 1979) (the "very pendency of a [defamation] lawsuit may exert [a] chilling effect" on speech). Indeed, Florida's courts must serve a "prominent function" at the pleadings stage of these types of

cases by making the initial determination as to whether challenged speech is actionable as a matter of law. *Smith v. Cuban Am. Nat'l. Found.*, 731 So. 2d 702, 704 (Fla. 3d DCA 1999). This role and responsibility are critical because SLAPP suits inherently violate the constitutional rights they attack.

These suits are an abuse of the judicial process because they are used to censor, intimidate, or punish people for involving themselves in public affairs. *Id.* (citing 2000-174, § 1, Laws of Fla.). As such, merely allowing a SLAPP to proceed causes irreparable harm. *Id*. The Anti-SLAPP Statute provides that a defendant "may move the Court for an order dismissing the action or granting final judgment" and "may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the claimant's . . . lawsuit has been brought in violation of this section." § 768.295(4), Fla. Stat.

Here, this motion properly seeks relief on both procedural grounds. *Gundel*, 264 So. 3d at 312-313. Under Section 768.295(4) of the Florida Statutes and Florida Rule of Civil Procedure 1.510, General Flynn must timely respond to this motion, and the Court must hold a hearing "at the earliest possible time," thereafter.

With respect to the summary judgment component of this motion, Florida Rule of Civil Procedure 1.510 aligns with the federal summary judgment standard, which change represents a monumental shift in summary judgment practice in Florida state courts. In its 2021 Amendment Court Notes to rule 1.510, Florida's Supreme Court made clear the intention that:

> The rule is amended to adopt almost all the text of Federal Rule of Civil Procedure 56. The "federal summary judgment standard" refers

> to the principles announced in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), and more generally to case law interpreting Federal Rule of Civil Procedure 56.

See In re Amendments to Florida Rule of Civil Procedure 1.510, 2021 WL 1684095, *2 (Fla. Apr. 29, 2021). "More specifically, though, embracing the *Celotex* trilogy means abandoning certain features of Florida jurisprudence that have unduly hindered the use of summary judgment in our state." *Id.* at *2 (citing *in re Amends. to Fla. Rule of Civ. Pro.* 1.510, 309 So. 3d at 192-93.), to implement the changes to Rule 1.150 effectively, our Supreme Court reiterated three key points: First, those applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard. *See Anderson*, 477 U.S. at 251 (noting that "the inquiry under each is the same").

First, both standards focus on "whether the evidence presents a sufficient disagreement to require submission to a jury." *Id.* at 251-52. And under both standards "[t]he substantive evidentiary burden of proof that the respective parties must meet at trial is the only touchstone that accurately measures whether a genuine issue of material fact exists to be tried." *Thomas Logue & Javier Alberto Soto, Florida Should Adopt the Celotex Standard for Summary Judgments*, 76 Fla. Bar J., Feb. 2002, at 26; see also *Anderson*, 477 U.S. at 255.

Second, those applying new rule 1.510 must recognize that a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case. Under *Celotex* and

rule 1.510, such a movant can satisfy its initial burden of production in either of two ways: "[I]f the nonmoving party must prove X to prevail [at trial], the moving party at summary judgment can either produce evidence that X is not so or point out that the nonmoving party lacks the evidence to prove X." *Bedford v. Doe*, 880 F.3d 993, 996-97 (8th Cir. 2018). "A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial." *Wease v. Ocwen Loan Servicing, L.L.C.*, 915 F.3d 987, 997 (5th Cir. 2019).

Third, those applying new rule 1.510 must recognize that the correct test for the existence of a genuine factual dispute is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Under our new rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (emphasis added).

In Florida it will no longer be plausible to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." *Bruce J. Berman & Peter D. Webster*, *Berman's Florida Civil Procedure* § 1.510:5 (2020 ed.) (describing Florida's pre-amendment summary judgment standard).

VI. ARGUMENT

General Flynn's claims against Mr. Stern fail for several reasons as a matter of law. Each of these fatal flaws independently warrant dismissal and summary judgment, and cannot be cured through amendment.

Consequently, this action must be dismissed or a summary judgment should be entered in favor of Mr. Stern on all of General Flynn's claims.

A. General Flynn's Defamation Claims Fail on the Merits as a Matter of Law.

Under Florida law, defamation is "the unprivileged publication of false statements which naturally and proximately result in injury to another." *Wolfson v. Kirk*, 273 So. 2d 774, 776 (Fla. 4th DCA 1973). To succeed on a cause of action for defamation, General Flynn must adequately allege: (1) a false and defamatory statement of fact; (2) published by Mr. Stern; (3) that is of and concerning General Flynn; (4) is privileged; (5) was published with the requisite degree of fault;[1] and (6) caused General Flynn to suffer recoverable damages. *See Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1106 (Fla. 2008); *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 803- 04 (Fla. 1st DCA 1997); *see also* Restatement (Second) of Torts § 558 (1977). As a matter of law, General Flynn fails to allege and cannot establish several of the elements necessary to support a viable defamation claim.

As explained the YouTube videos and website articles are clearly commentary and opinion setting forth a response to the false charges lodged

[1] As explained, the requisite level of fault is "actual malice."

against Mr. Stern by General Flynn. All the challenged statements appear within publications that are replete with cautionary statements and other indicia signaling to readers and viewers that Mr. Stern was either expressing his own mental impressions, opinions or commentary, or simply recounting his past perception of events as they unfolded decades ago; but not making affirmative statements of fact. on a cause of action for defamation, General Flynn must adequately allege: (1) a false and defamatory statement of fact;[2] (2) published by Mr. Stern; and (3) that is of and concerning General Flynn. *See also Gifford v. Bruckner*, 565 So. 2d 887, 888 n.1 (Fla. 2d DCA 1990) ("Compliance with section 770.01, where necessary, is a condition precedent to maintaining an action, and one cannot satisfy the statute by providing notice subsequent to filing the complaint. . . . Presumably, therefore, the circuit court dismissed the action without prejudice to *refile* rather than merely to amend."); *Cummings v. Dawson*, 444 So. 2d 565, 566 (Fla. 1st DCA 1984) (affirming dismissal of libel and slander claim with prejudice where plaintiff did not establish compliance with § 770.01 "before instituting his action"); *Orlando Sports Stadium*, 316 So. 2d at 610 (cannot

[2] General Flynn makes several vague, conclusory allegations (Compl. ¶¶ 45-51) about supposedly "false" and "defamatory" statements." *Hawke v. Broward National Bank of Fort Lauderdale*, 220 So. 2d 678, 680 (Fla. 4th DCA 1969); *Morrison v. Morgan Stanley Properties*, 2007 WL 2316495, *9 (S.D. Fla. Aug. 9, 2007); *Mesa v. Pennsylvania Higher Education Assistance*, 2018 WL 1863743, *5 (S.D. Fla. Mar. 15, 2018); *Fowler v. Taco Villa, Inc.*, 646 F.Supp. 152, 157-58 (S.D. Fla. 1986); *Malhorta v. Aggarwal*, 2019 WL 3425161, *3 (S.D. Fla. Jul. 30, 2019). These pleading requirements is "to enable the court to determine whether the publication was defamatory." *Razner v. Wellington Regional Medical Center, Inc.*, 837 So. 2d 437, 442 (Fla. 4th DCA 2002).

cure defect of non-existence of claim when suit was filed or amend to cover subsequently accruing rights); *Nelson*, 667 F. Supp. at 1484 (granting summary judgment based on Section 770.01).

Section 770.01 applies to "*any civil action* brought for publication or broadcast… of a libel or slander…" (emphasis added).

General Flynn's defamation claims as well as his Injurious Falsehood claim, which is explicitly based on "publishing false and defamatory statements." (*See* Compl. ¶¶ 52-61 (Count I) and 62-67 (Count II)). As a matter of law, these generalized allegations concerning General Flynn (1) is not privileged; (2) was published with the requisite degree of fault; [3] and (3) do not cause General Flynn to suffer recoverable damages. *See Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008); *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 803- 04 (Fla. 1st DCA 1997); *see also* Restatement (Second) of Torts § 558 (1977).

As a matter of law, General Flynn fails to allege and cannot establish several of the elements necessary to support a viable defamation claim.

1. Statements That Are Not Capable of Defamatory Meaning Are Not Actionable.

"Falsity" alone is insufficient to support a defamation claim. Actionable statements must also be "defamatory." *Smith*, 731 So .2d at 704-705. In fact, at the outset of a defamation case, the threshold question for the Court to decide is ***whether as a matter of law*** "the statement at issue is reasonably capable of a

[3] As explained, the requisite level of fault here is "actual malice."

defamatory interpretation." *Keller v. Miami Herald Publ'g Co.*, 778 F.2d 711, 714-15 (11th Cir. 1985). If "the court finds that 'a communication could not possibly have a defamatory or harmful effect, the court is justified in dismissing the complaint for failure to state a cause of action.'" *Rubin*, 271 F.3d at 1306; *see also, e.g., Spilfogel v. Fox Broad. Co.*, 2010 WL 11504189, at *4 (S.D. Fla. May 4, 2010) (granting motion to dismiss because television segment at issue "could not possibly have a defamatory meaning or harmful effect, and therefore, the claim fails as a matter of law"), aff'd, 433 F. App'x 724 (11th Cir. 2011).

The determination of whether a statement is "defamatory" is based on an objective standard and must be made by the trial judge by considering the publication in which the statement appears "in its totality," rather than focus on "a particular phrase or sentence." *Smith*, 731 So. 2d at 704; *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983) (citation omitted); *see also Brown v. Tallahassee Democrat, Inc.*, 440 So. 2d 588, 589 (Fla. 1st DCA 1983) ("It is sound principle that an allegedly defamatory publication must be considered in its entirety rather than with an eye constrained to the objectionable feature alone."). The key question is "how a reasonable and common mind would understand the statements," and the court "should not give the statements a tortured interpretation." *Schiller v. Viacom, Inc.*, 2016 WL 9280239, at *8 (S.D. Fla. Apr. 4, 2016); *see also Byrd*, 433 So. 2d at 595 ("[T]he statement should be considered in its natural sense without a forced or strained construction."). The Court "must evaluate the publication, not by 'extremes, but as the common mind

would understand it.'" *Byrd*, 433 So. 2d at 595 (quoting *McCormick*, 139 So. 2d 197, 200 (Fla. 2d DCA 1962)).

Here, virtually all the statements General Flynn sues over are not actionable because they cannot reasonably be construed to communicate the defamatory meaning that General Flynn apparently attributes to them. *See, e.g., Jews for Jesus*, 997 So. 2d at 1107. General Flynn's subjective, self-serving conclusions about the meaning of the statements are not binding on the Court. *Skupin v. Hemisphere Media Group, Inc.*, 2020 WL 6153447, *1 (Fla. 3d DCA Oct. 21, 2020) (citing *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 494 (Fla. 3d DCA 1994)). When viewed in the required context, the statements at issue in this case either cannot reasonably be interpreted as stating actual facts or are not capable of having defamatory meaning. *Smith*, 731 So. 2d at 704; *Byrd*, 433 So. 2d at 595.

Several rules guide the Court's threshold determination of defamatory meaning. First, courts properly "accord weight . . . to ***cautionary terms*** used by the person publishing the statement" in concluding that challenged statements are not defamatory. *Hay*, 450 So. 2d at 295 (emphasis added).

Second, statement and the publication in which it appears must be viewed in their totality; that is, the court must consider all the words and pictures used and not just isolated words and phrases. *Smith*, 731 So. 2d at 704. As the court explained in *Byrd*, 433 So. 2d at 595:

> When words and pictures are presented together, each is an important element of what, *in toto*, constitutes the publication.

> Articles are to be considered with their illustrations; pictures are to be viewed with their captions; stories are to be viewed with their headlines.

Third, the Court must also consider "[a]ll of the circumstances surrounding the publication . . . including the medium by which it was disseminated and the audience to which it was published." *Hay*, 450 So. 2d at 295. The reasonableness of an asserted defamatory meaning must be assessed against the full context in which the challenged statement was made, including all the information "either known or readily available to the reader as a member of the public." *Id*.; *see also From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52, 57 (Fla. 1st DCA 1981).

Despite these well-established rules, General Flynn improperly cherry-picked statements to support his claims while completely ignoring the full context in which they appear. *See e.g., Smith*, 731 So. 2d 705; *Turner*, 879 F.3d at 1267; *Dockery*, 799 So. 2d at 295; *Zorc v. Jordan*, 765 So. 2d 768, 771 (Fla. 4th DCA 2000). Mr. Stern's statements that General Flynn challenges, when considered in their full context, are indisputable that either an average reader or viewer could not reasonably consider" these statements fail to support a cause of action.

As explained above, the YouTube videos and website postings are clearly commentary and opinion setting forth a response to the false charges General Flynn lodged against Mr. Stern. All the challenged statements appear within social media websites that are replete with indicia signaling to readers and viewers that Mr. Stern was either expressing his own mental impressions, opinions, commentary, or simply recounting his past perception of events as they unfolded—but not

making affirmative statements of fact. His social media postings are also written in a way that signals to readers that they are describing accusations made in the past and in court filings. As one court explained, "[i]t is not libelous to restate prior accusations when winding up a news story." *Brake & Alignment Supply Corp. v. Post-Newsweek Stations of Fla., Inc.*, 472 So.2d 517, 518 (Fla. 3d DCA 1985). Stated differently, '[w]e do not know how authors can ever write about controversies without reporting accusations and counteraccusations." *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1444 (8th Cir. 1989). Moreover, the full context in which the postings were published, including all the information "either known or readily available to the reader as a member of the public," confirms the challenged statements are not defamatory. *Hay*, 450 So.2d at 295; *see also From*, 400 So.2d at 57. Readers of these articles knew or had readily available substantial information about General Flynn, as he alleged in his own complaint, e.g. investigation by the FBI. When viewed as required in this proper context, Mr. Stern's statements at issue simply are not defamatory.

A defamation plaintiff "must allege certain facts such as the identity of the speaker, a description of the statement, and provide the time frame within which the publication occurred." *Hawke v. Broward National Bank of Fort Lauderdale*, 220 So. 2d 678, 680 (Fla. 4th DCA 1969); *Morrison v. Morgan Stanley Properties*, 2007 WL 2316495, *9 (S.D. Fla. Aug. 9, 2007); *Mesa v. Pennsylvania Higher Education Assistance*, 2018 WL 1863743, *5 (S.D. Fla. Mar. 15, 2018); *Fowler v. Taco Villa, Inc.*, 646 F. Supp. 152, 157-58 (S.D. Fla. 1986); *Malhorta v. Aggarwal*, 2019 WL

3425161, *3 (S.D. Fla. Jul. 30, 2019). The simple reason for these pleading requirements is "to enable the court to determine whether the publication was defamatory." *Razner v. Wellington Regional Medical Center, Inc.*, 837 So. 2d 437, 442 (Fla. 4th DCA 2002).

2. Statements of Opinion Are Not Actionable.

Under Florida law and the First Amendment to the United States Constitution, a challenged statement– even if harmful to reputation–must also be provably false (*i.e.,* not an opinion) to be actionable. *Jews for Jesus*, 997 So.2d at 1106; *Milkovich*, 497 U.S. at 20; *Turner*, 879 F.3d at 1269. "The distinction between fact and non-actionable opinion is a question of law to be determined by the court and not an issue for the jury." *Florida Medical Ctr., Inc. v. N.Y. Post Co.*, 568 So.2d 454, 457 (Fla. 4th DCA 1990). The threshold issue for the Court on falsity is whether the truth or falsity of a statement is capable of being proven empirically. *Palm Beach Newspapers, Inc. v. Early*, 334 So. 2d 50, 52 (Fla. 4th DCA 1976). Consequently, statements about such things as an individual's state of mind are not actionable. *Turner*, 198 F. Supp.3d at 1370.

Simply stated, "opinions cannot be defamatory." *Hoon v. Pate Construction Co.*, 607 So.2d 423, 429 (Fla. 4th DCA 1992). Defamation claims based on opinions are prohibited because the marketplace of ideas, not courts, is the appropriate forum for differences of opinion to be resolved: "[h]owever pernicious an opinion may seem, we depend for its correction not on the

conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 U.S. at 339-40.

Critically, commentary and opinion based on facts that are set forth in the subject publication or which are otherwise known or available to the reader or listener are not actionable. *Skupin*, 2020 WL 6153447, at *2; *Turner*, 879 F.3d at 1262. Where the defendant "presents the facts at the same time he or he offers independent commentary, a finding of pure opinion will usually result." *Turner*, 198 F.Supp.3d at 1366 (citing *Zambrano v. Devanesan*, 484 So.2d 603, 606 (Fla. 4th DCA 1986)).

For example, the Second DCA found statements were unactionable opinion where they were based on facts disclosed in the articles themselves or in "the extensive news coverage of the controversy." *Rasmussen*, 484 So.2d at 606; *Hay*, 450 So.2d at 295 (calling plaintiff a "criminal" and "crook" not actionable based on facts discussed in article and readily available facts).

Here, when viewed in full context,[4] Mr. Stern's statements General Flynn challenges are clearly nonactionable opinion or commentary based on facts that are disclosed or otherwise known or available to readers and viewers. *Rasmussen*, 484 So.2d at 606. The full context, tone, and content of the YouTube videos and other social media postings plainly show that they are Mr. Stern's side

[4] The Court must consider the full context of the challenged statements to determine as a matter of law whether challenged statements are demonstrably false or non-actionable opinions. *Razner*, 837 So.2d at 442; *Skupin*, 2020 WL 6153447, at *2; *Hay*, 450 So.2d at 295; *From*, 400 So.2d at 56.

of the story presented about his state of mind, impressions, commentary, and opinions about historical events; all of which are based on disclosed facts. *Turner*, 879 F.3d at 1265.

The opinions expressed in the YouTube videos and social media postings are replete with citations and references to court records and other documents; there is indisputably a vast amount of publicly available information related to the underlying subject matter of Mr. Stern's opinions and commentary, such as court filings, "the extensive news coverage" regarding General Flynn *Compare, Rasmussen*, 484 So.2d at 606; *Hay*, 450 So.2d at 295. The fact that Mr. Stern's challenged statements were published during the media frenzy and public debate over General Flynn confirms that Mr. Stern's statements are non-actionable expressions of opinion. "[W]here potentially defamatory statements are published in a public debate… or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by the use of epithets, fiery rhetoric, or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." *Manufactured Home Communities, Inc. v. County of San Diego*, 544 F.3d 959, 963 (9th Cir. 2008).

The First Amendment also protects rhetorical or hyperbolic statements, which by their very nature cannot reasonably be interpreted as stating actual facts. *Milkovich*, 497 U.S. at 20. Indeed, courts recognize that exaggeration has become an "integral part of social discourse," such that even highly insulting

statements are not actionable. *Horsley v. Rivera*, 292 F.3d 695, 701-702 (11th Cir. 2002) (calling plaintiff an "accomplice to murder" non-actionable); *Demby v. English*, 667 So.2d 350, 254 (Fla. 1st DCA 1995) (accusing animal control director of being "inhumane" and "unreasonable" non-actionable); *Hay*, 450 So.2d at 295-96 (statements referring to plaintiff as "crook" and "criminal" non-actionable).

Here, General Flynn is suing over figurative, exaggerated, hyperbolic and rhetorical statements that are not actionable as a matter of law. Fortunately, the First Amendment protects Mr. Stern's right to defend himself against General Flynn's accusations lodged against Mr. Stern for expressing his opinions, even if he does so use exaggeration and loose, figurative language. This holds true even if General Flynn finds Mr. Stern's opinions and commentary offensive or demeaning. General Flynn is free to disagree with Mr. Stern, but a lawsuit is not the appropriate vehicle for General Flynn to air his grievances. *Gertz*, 418 U.S. at 339- 40. The law expects General Flynn to challenge Mr. Stern's opinions in the marketplace of ideas–which General Flynn did before and after Mr. Stern began publicly defending himself.

3. General Flynn Fails to Allege and Cannot Establish Proximate Cause.

General Flynn's claims also fail as a matter of law because Mr. Stern's alleged actions did not proximately cause General Flynn's alleged damages. It is axiomatic that a plaintiff must establish that the defendant's conduct caused his damages. *Mid-Fla. Television Corp. v. Boyles*, 467 So.2d 282, 283 (Fla. 1985); *see also Peoples Gas Sys. v. Posen Constr., Inc.*, 2011 WL 552346, *2 (M.D. Fla. Nov. 14,

2011). Allegations of "indirect or consequential" harm are insufficient as a matter of law. *Susie's Structures, Inc. v. Ziegler*, 2010 WL 2136513, *7 (M.D. Fla. May 27, 2010).

General Flynn fails to allege and cannot allege proximate causation (*i.e.,* Mr. Stern's conduct must be the "but for" cause of his supposed damages) because it is undisputed that the challenged statements were widely circulated in public before the statements over which General Flynn issuing were published. *See Zimmerman v. Allen*, No. 12-CA-6178, 2014 WL 3731999, *9 (Fla. 18th Jud. Cir. Jun. 30, 2014), *aff'd* 212 So.3d 376 (Fla. 5th DCA 2015). Recoverable damages must be "caused by the language alleged to be libelous." *Hull*, 353 So.2d at 578; *Botham*, 458 So.2d at 1170. However, General Flynn does not and cannot allege injuries that are directly traceable to the alleged defamatory statements at issue here. *Boyles*, 467 So.2d at 283; *Smith*, 731 So.2d at 705; *Borenstein v. Raskin*, 401 So.2d 884, 868 (Fla. 3d DCA 1981).

The same statements over which General Flynn is suing have been made numerous times in other non-actionable publications, as well as by General Flynn himself in his allegations in his Complaint at paragraphs 11-13 and by other news media. As recognized in *Zimmerman*, proximate causation can and should be determined as a matter of law in cases such as this one. 2014 WL 3731999, at *2-3, 9. "The question of whether allegedly tortious conduct was the "but for" cause of a plaintiff's claimed injuries can be resolved by the court as a matter of law 'where the facts are unequivocal, such as where the evidence supports no more

than a single reasonable inference.'" *Id.* (citing *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 504 (Fla. 1992)). Based upon the undisputed facts, the statements General Flynn challenges could not have been the required "but for" cause of his alleged damages.

4. General Flynn's Claims Fail Because he Does Not and Cannot Establish Actual Malice

Any claim that seeks to negate the broad grant of immunity afforded to free speech by the U.S. and Florida Constitutions fails unless General Flynn, a public figure, can establish that Mr. Stern published the challenged statements with actual malice. *Greene v. Times Pub. Co.*, 130 So.2d 724, 729 (Fla. 3d DCA 2014); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966); *Beverly Hills Foodland, Inc. v. UFCW, Local 655,* 39 F. 3d 191, 196 (8th Cir. 1994); *Sandholm v. Kuecker*, 962 N.E.2d 418, 428 (Ill. Jan. 20, 2012). The legal sufficiency of a complaint asserting claims based on free speech filed by a public figure is subject to "more rigorous" testing than other types of claims, particularly as it relates to the actual malice requirement. *Greene*, 130 So.3d at 729.

Here, General Flynn has not made and cannot make the "rigorous" showing that his claims require. As the United States Supreme Court has explained, public figures such as General Flynn are obliged to carry this heavy burden for two compelling reasons.

First, by virtue of their conduct or the position in which they find themselves, and they have assumed the risk of unfavorable public scrutiny. *Gertz*, 418 U.S. at 342 ("Those who, by reason of the notoriety of their achievements or the vigor and

success with which they seek the public's attention, are properly classed as public figures.").

Second, public figures have access to the media and other channels of mass communication, access that affords them the opportunity to rebut allegedly false and defamatory statements, and thereby renders less important or necessary for the law to provide them with a judicial remedy. *Id.* at 344 ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements [than] private individuals normally enjoy.").

The determination of General Flynn's public figure status is "a question of law to be determined by the court" at the earliest possible stage in the litigation. *Mile Marker, Inc.*, 811 So. 2d at 844-46; *see also Lampkin-Asam v. Miami Daily News, Inc.*, 408 So.2d 666, 668 (Fla. 3d DCA 1981).

5. The Determination of Public Figure Status

Generally, courts recognize three categories of public figures: (1) general purpose, (2) limited purpose, and (3) involuntary. *Gertz*, 418 U.S. at 345.

"General purpose" public figures are those who have achieved such pervasive fame or notoriety that they are deemed to be public figures for all aspects of their lives. *Id.*

"Limited purpose" public figures are those who voluntarily inject their views or are otherwise drawn by their conduct into a particular public controversy, and

are, therefore, treated as public figures when they sue someone else over statements bearing on that controversy. *See, e.g.*, *Arnold v. Taco Props., Inc.*, 427 So. 2d 216, 218 (Fla. 1st DCA 1983).

An "involuntary" public figure is one who becomes well-known to the public after finding himself embroiled "through no desire of his own" in a public controversy. *See, e.g.*, *Dameron v. Wash. Magazine, Inc.*, 779 F. 2d 736, 742 (D.C. Cir. 1985).

Public figure status is assessed at the time of the alleged conduct forming the basis of the claim and is determined as a matter of law. *Rosanova v. Playboy Enters., Inc.*, 580 F. 2d 859, 861 (5th Cir. 1978); *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966); *Lampkin-Asam v. Miami Daily News, Inc.*, 408 So. 2d 666, 668 (Fla. 3d DCA 1982).

To determine whether a plaintiff is a "limited purpose" public figure, a court typically considers: (1) whether one or more public controversies existed at the time of the alleged statements, (2) whether the plaintiff played an important role in such a controversy, and (3) whether the publication or broadcast at issue was germane to the plaintiff's role in the controversy. *See Silvester v. ABC*, 839 F. 2d 1491, 1494 (11th Cir. 1988); *Friedgood v. Peters Pub.*, 521 So 2d 236, 239 (Fla. 4th DCA 1988); *Dela-Donna v. Gore Newspapers Co.*, 489 So. 2d 72, 76-77 (Fla. 4th DCA 1986).

For purposes of this analysis, a "public controversy" includes any topic upon which sizable segments of society have different, strongly held views, or a dispute

that a reasonable person would expect to affect people beyond its immediate participants. *Id*. at 76 (*quoting Leran v. Flint Distrib. Co.*, 745 F. 2d 123, 138 (2d Cir. 1984)); *Mile Marker, Inc. v. Peterson Pub'l, LLC*, 811 So. 2d at 841, 846 (Fla. 4th DCA 2002).

A plaintiff is held to have played a sufficiently important role in a controversy when he has either voluntarily injected himself into the debate that surrounds it in an attempt to influence its outcome or has been drawn into the controversy by his own voluntary actions. *Arnold*, 427 So. 2d at 218-19.

Speech is "germane" to the public figure's participation in a controversy so long as it is not "wholly unrelated to the controversy" and "could have been relevant to the public's" assessment of the plaintiff and his role in it. *Waldbaum v. Fairchild Pub.*, 627 F. 2d 1287, 1298 (D.C. Cir. 1980).

Plaintiffs become limited purpose public figures when they act in a fashion that is reasonably likely to draw public attention and comment, regardless of whether they affirmatively seek out such public scrutiny. *See*, *e.g.*, *Friedgood*, 521 So. 2d at 241-42; *Della-Donna*, 489 So. 2d at 77. As one court explained in a case in which the plaintiff petitioned a court to be appointed guardian of his husband, the plaintiff became a public figure because he "undertook purposeful, considered actions intended to affect the outcome of the guardianship case. he could have, and should have, realistically expected that his actions would have an impact on the resolution of the action." *Thomas v. Patton*, 34 Media L. Rep. (BNA) 1188, 1190 (Fla. Duval Cty. Ct. Oct. 21, 2005).

The "involuntary" public figure shares some, but not all, of the hallmarks of both its "general purpose" and "limited purpose" counterparts. Like the "general purpose" public figure, the involuntary public figure has become generally well-known to the public, although he or he did not necessarily achieve that status before the speech at issue. Like the "limited purpose" public figure, the notoriety is a function of his or his involvement in a "public controversy," even though no voluntary conduct or desire is present. One can become an involuntary public figure solely as the result of "sheer bad luck." *Dameron* 779 F. 2d at 742. As the Fourth Circuit explained: "[A]n involuntary public figure has pursued a course of conduct from which it was reasonably foreseeable, at the time of the conduct, that public interest would arise. A public controversy must have actually arisen that is related to, although not necessarily causally linked to the action. The involuntary public figure must be recognized as a central figure during debate over that matter." *Wells v. Lidd*, 186 F. 3d 505, 540 (4th Cir. 1999).

6. General Flynn is a Public Figure.

General Flynn indisputably qualifies as a public figure. he was a focal point of news coverage concerning his background described in his Complaint at paragraphs 8-14.

7. General Flynn Cannot Demonstrate Actual Malice.

Because General Flynn is at the very least a limited-purpose or involuntary public figure, he must plead and prove actual malice to prevail on his claims. *See Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1498 (11th Cir. 1988) (plaintiffs were

limited-purpose public figures who "voluntarily placed themselves in a position and acted in a manner which invited public scrutiny and comment" and therefore "must present clear and convincing evidence that the defendants acted with actual malice"); *Turner*, 879 F.3d at 1273.

"Actual malice" is a constitutional protection designed to afford "breathing space" for free speech on matters of public concern about public figures. *Sullivan*, 376 U.S. at 271-72. The actual malice inquiry looks to the defendant's subjective belief as to the truth or falsity of the challenged statements at the time of publication, and requires plaintiffs to plead and ultimately prove by "clear and convincing evidence" that the statements were published with actual knowledge that they were false or with a "high degree of awareness" of "probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *see also Michel*, 816 F.3d at 703 (stating that test is whether defendant "actually entertained **serious doubts as to the veracity** of the published account, or was highly aware that the account was probably false") (emphasis added) (citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)); *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008).

As the U.S. Supreme Court explained, "actual malice" is generally limited to circumstances where a "story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call." *St. Amant*, 390 U.S. at 732. Notably, actual malice is not simply "[i]ll will, improper motive[,] or personal animosity." *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1198

n.17 (11th Cir. 1999) (applying Florida law); *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510-11 (1991).

Courts routinely dismiss defamation claims by public figures that fail to allege sufficient facts giving rise to actual malice. *See, e.g.*, *Michel*, 816 F.3d at 702, *Turner*, 879 F.3d at 1274 (affirming dismissal of defamation case brought by limited-purpose public figure for failure to adequately plead actual malice). A plaintiff must do more than invoke the "magic words" of actual malice, and failing to adequately plead facts demonstrating the requisite degree of fault will doom a plaintiff's claim. *See, e.g.*, *From*, 400 So. 2d at 55-58 (stating that "even though the complaint contains the magic words and allegations of actual malice," the article was not libelous when measured by the actual malice standard); *Frieder v. Prince*, 308 So. 2d 132, 134 (Fla. 3d DCA 1975) (affirming dismissal because complaint "fails to set forth facts which are legally sufficient to establish actual malice").

General Flynn's allegations clearly fail to meet these high standards. Simply alleging that Mr. Stern "knowingly and recklessly false" (Compl. ¶ 50) or that "General Flynn now seeks to hold Defendant accountable for his malicious and knowing lies" (Compl. ¶ 3) are examples of General Flynn's unsupported legal conclusions that do not satisfy the rigorous pleading requirements. *See, e.g.*, *Turner*, 879 F.3d at 1273 (allegations that defendants "knowingly and recklessly" ignored information insufficient to plead actual malice); *Schatz*, 669 F.3d at 56 (defamation complaint "us[ing] actual-malice buzzwords" that are not "backed

by well-pled facts" cannot survive motion to dismiss.); *Mayfield*, 674 F.3d at 378 (assertion that defendants' allegedly defamatory statements " 'were known by [them] to be false at the time they were made, were malicious or were made with reckless disregard as to their veracity' is entirely insufficient").

General Flynn has not come close to satisfying the intentionally high burden he must meet to demonstrate that Mr. Stern acted with actual malice. *Gertz*, 418 U.S. at 344-45; *Mile Marker,* 811 So. 2d at 845 (Fla. 4th DCA 2002). Actual malice only exists where a speaker makes a false statement of fact with specific knowledge that it was false or with reckless disregard of the statement's probable falsity. *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Mile Marker*, 811 So. 2d at 845. Acting negligently or imprudently is not sufficient. *Dunn v. Air Line Pilots Ass'n*, 193 F. 3d 1185, 1197 (11th Cir. 1999). Instead, actual malice is a subjective standard by which a plaintiff must prove that the speaker actually acted with "a high degree of … probable falsity," or "in fact entertained serious doubts as to the truth of his publication," but published anyway. *St. Amant*, 390 U.S. at 731; *Dockery*, 799 So. 2d at 294.

Whether General Flynn can meet this "daunting" standard must be decided by the Court as a matter of law. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984); *Harte- Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1969). Importantly, actual malice must be shown by clear and convincing evidence. *Mile Marker*, 811 So. 2d at 845. This showing must be "so clear as to leave no substantial doubt … and be sufficiently strong to command

the unhesitating assent of every reasonable mind." *Tobinick*, 108 F. Supp. 3d at 1309. In other words, actual malice must be established by "highly probable" evidence that "leaves no substantial doubt." *Dongguk Univ. v. Tale Univ.*, 734 F. 3d 113, 123 (2d Cir. 2013).

Here, General Flynn has not alleged actual malice generally, let alone with the requisite level of facts required to support a claim against Mr. Stern. First, subjective beliefs change over the course of years, as new facts and information come to light. Second, Mr. Stern's subjective state of mind at the time of the publication of the statements is not known. Not only has General Flynn failed to meet his pleading burden, but also under the circumstances, he cannot ever make the requisite showing that Mr. Stern acted with malice and abused his First Amendment privilege. *Londono v. Turkey Creek, Inc.*, 609 So. 2d 14, 18-19 (Fla. 1992). Mr. Stern's challenged speech amounted to no more than his mental impressions, commentary, and opinions about events General Flynn disputes, but which Mr. Stern had significant documentary and factual material to support. In fact, Mr. Stern refers to hearing a "Flynn Operative" saying "We will accomplish the mission by any means necessary, including the use of domestic terrorism!" (Compl. ¶31); and that Mr. Stern stated in a post "General Flynn, I exposed your plot colluding with President Trump to overturn the 2020 election in favor of Trump." Compl. ¶ 36). Moreover, General Flynn alleges in paragraph 12 of his Complaint that "[i]n the leadup to the 2016 election, the FBI targeted General Flynn because of his affiliation with President Trump. Shortly after the election,

although there was no basis for investigating General Flynn, much less President Trump, the FBI sent two agents to interview General Flynn about a conversation he had with Russian Ambassador Kislyak." (Compl. ¶ 12). "Evidence that an article [or a post] contains information that readers can use to verify its content tends to undermine claims of actual malice." *Klayman v. City Pages*, 650 Fed. Appx. 744, 751 (11th Cir. 2016). Against this factual backdrop, it comes as no surprise that General Flynn fails to allege and cannot demonstrate actual malice. The only reasonable conclusion that could be drawn from the facts of this case are that Mr. Stern had a good faith belief that his challenged statements were accurate, and he justifiably made them to protect his rights and rebut accusations General Flynn and others were making against him.

8. General Flynn's Claims are Barred by the Fair Report Privilege.

General Flynn's claims also fail as a matter of law based on the fair report privilege. The fair report privilege is one of the most significant protections afforded to public speech and permits publishers to "report accurately on information received from government officials," such as court records. *Jamason v. Palm Beach Newspapers,* 450 So. 2d 1130, 1132 (Fla. 4th DCA 1984); *Rasmussen v. Collier Cty. Publ'g Co.*, 946 So. 2d 567, 570 (Fla. 2d DCA 2006); *Alan v. Palm Beach Newspapers, Inc.*, 973 So. 2d 1177, 1179-80 (Fla. 4th DCA 2008); *Stewart v. Sun Sentinel Co.*, 695 So. 2d 360, 362 (Fla. 4th DCA 1997). A defendant is not liable for such speech where the report at issue is "accurate or a fair abridgment." *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 502-03 (Fla. 3d DCA 1993).

The application of this privilege is determined as a matter of law by comparing court records to the statements at issue. *Pierson v. Orlando Reg'l Healthcare Sys., Inc.*, 2010 WL 1408391, at *9-10 (M.D. Fla. Apr. 6, 2010); *Huszar v. Gross,* 468 So. 2d 512, 513 (Fla. 1st DCA 1985); *Stewart*, 695 So. 2d at 362-63.

The question of whether the fair report privilege applies is, in the first instance, "a question of law for the court to decide"; therefore, a proper matter for the Court to consider on a motion to dismiss. *Huszar v. Gross*, 468 So. 2d 512, 515-16 (Fla. 1st DCA 1985). Both a challenged report and public court records can be considered on a motion to dismiss. *See, e.g.*, *Jeter v. McKeithen*, No. 5:14-cv-00189-RS-EMT, 2014 U.S. Dist. LEXIS 142857, at *6 (N.D. Fla. 2014) (dismissing based on the fair report privilege plaintiff's defamation claims related to a broadcast about cyberbullying charges); *see also Vanmoor v. Fox News Network LLC*, 34 Media L. Rep. (BNA) 2022, 2024 (Fla. 17th Jud. Cir. May 26, 2006) (granting motion to dismiss defamation claims based on the fair report privilege where article relied on court documents).

Courts frequently dismiss defamation claims where, as here, an examination of the challenged statements reveals that they are privileged as a matter of law. 2 Robert D. Sack, *Sack on Defamation* § 16.2.1 (5th ed. 2017). In doing so, courts necessarily and appropriately consider the court records themselves. *Huszar*, 468 So.2d at 516.

The privilege applies to publication of "the contents of an official document" and information received from government officials "so long as [the]

account is reasonably accurate and fair." *Woodard*, 616 So. 2d at 502. A publication is "reasonably accurate and fair" if it conveys a "substantially correct" account of what is in the official record, irrespective of whether the official record truthfully reflects the actual events. *Id.*; *see also Ortega v. Post-Newsweek Stations, Fla., Inc.*, 510 So. 2d 972, 975-76 (Fla. 3d DCA 1987) (holding that television station had a privilege to report allegedly defamatory testimony given at an official proceeding). The fair report privilege includes reporting on court proceedings. *See Jamason v. Palm Beach Newspapers, Inc.*, 450 So. 2d 1130, 1133 (Fla. 4th DCA 1984) (holding that the fair report privilege "concerns only the accurate reporting of an occurrence in a judicial proceeding," and report about deposition was substantially accurate and privileged); *Vanmoor*, 34 Media L. Rep. at 2024 ("As a matter of law, a person who provides a fair report of information from public records or court documents is privileged to provide such information without being subjected to a defamation suit.").

Under the fair report privilege, it is only the *summary* of the public information that must be accurate, as opposed to the information in the court document itself. *Hatjioannou v. Tribune Co.*, 8 Media L. Rep. (BNA) 2637, 2639 (Fla. 13th Jud. Cir. Nov. 15, 1982), *aff'd,* 440 So. 2d 360 (Fla. 2d DCA 1983) (affirming trial court without opinion); *see also El Amin v. Miami Herald*, 9 Media L. Rep. (BNA) 1079, 1081 (Fla. 11th Jud. Cir. Jan. 17, 1983) ("The test of accuracy for purposes of the privilege requires that the publications be compared not with the events that

actually transpired, but with the information that was reported from official sources.") (citations omitted).

The fair report privilege allows people license to use colorful language, even if to "sensationalize[s]" a news report, so long as the summary is substantially accurate. *See, e.g., Alan v. Palm Beach Newspapers, Inc.*, 973 So. 2d 1177, 1180 (Fla. 4th DCA 2008) (affirming summary judgment on the basis of the fair report privilege, noting that while "[s]ome of the published information may have been phrased to catch the Post's readership's attention, . . . this alone does not arise to actionable defamation"); *see also Jamason*, 450 So. 2d at 1132 ("Whether the press reports the item on page one with a banner headline or on the last page of the last section is an editorial decision, not a legal one."). The language used need not be sterile but may properly be "phrased to catch… the readership's attention." *Alan*, 973 So.2d at 1180.

Here, many of Mr. Stern's challenged statements commented on allegations leveled in court filings, which in many instances are displayed or hyperlinked in the publications, including General Flynn's own allegation in this Complaint "General Flynn was charged with lying to the FBI. He initially agreed to plead guilty only after the DOJ threatened his son with prosecution." (Compl. ¶ 12). *Gubarev*, 340 F.Supp.3d at 1319-20. In other instances, the challenged publications (e.g., YouTube videos) are video diary entries discussing the allegations in court filings and the legal proceedings themselves. As a matter of law, these types of statements are constitutionally protected. General Flynn

cannot assert an actionable claim based on fair reports about allegations and events that occurred in the Conservatorship Litigation.

VII. GENERAL FLYNN HAS BEEN SANCTIONED VIA SLAPP PREVIOUSLY

General Flynn is attempting to stifle Mr. Stern's first amendment rights as he had attempted to do in *Flynn v. Stewartson*, No. 2023 CA 004264 NC (Fla. 12th Cir. Ct. January 30, 2024), and the court granted final summary judgment in favor of Defendant Rick Wilson, granted in part and denying in part Defendant Stewartson's motion to dismiss.

As in this instant case, in *Stewartson*, General Flynn's alleged claims for defamation and defamation per se in one count against the three defendants; General Flynn also alleged a count for injurious falsehood against the three defendants. General Flynn made these claims by and through one of the same counsel in this action, Jared J. Roberts of Binnall Law Group, PLLC. Therefore, General Flynn knows about his type of defamatory cases being dismissed or adjudged on summary judgment under SLAPP.

The court in *Stewartson* in its January 30, 2024, order recounted General Flynn's claims and pertinent facts; analyzed the issues and facts (citing to all the elements to prove defamatory and injurious falsehood under law), analyzed section 768.295 of the Florida Statutes—as the applicable law relates to facts and issues, and the court granted Defendant Rick Wilson's final motion for summary judgment, and granted in part Defendant's Stewartson's motion to dismiss.

Accordingly, General Flynn knows that this instant lawsuit should not have been brought against Mr. Stern, especially because of SLAPP.

VIII. MR. STERN IS ENTITLED TO RECOVER HIS ATTORNEYS' FEES UNDER FLORIDA'S ANTI-SLAPP STATUTE

Finally, Mr. Stern is entitled to recover his attorneys' fees and costs under Florida's Anti- SLAPP law.

Florida's Anti-SLAPP statute prohibits the filing of lawsuits like this one because their primary purpose is to silence protected speech on matters of public concern. SLAPPs are "based upon nothing more than defendants' exercise of their right under the first amendment to petition the government for a redress of grievances." *Sandholm v. Kuecker*, 962 N.E.2d 418, 427 (Ill. 2012) (citing *Westfield Partners, Ltd. V. Hogan*, 740 F. Supp. 523, 525 (N.D. Ill 1990)). A SLAPP plaintiff is not concerned with the merits of his claim; rather, the goal is to "chill defendants' speech or protest activity and discourage opposition by others through delay, expense and distraction." *Id.* The SLAPP plaintiff's goal is achieved through the ancillary effects of the lawsuit itself on the defendant, not through an adjudication on the merits. *Id.* "SLAPPs masquerade as ordinary lawsuits and may include myriad causes of action, including defamation, interference with contractual rights or prospective economic advantage, and malicious prosecution." *Id.* at 428.

Allowing SLAPPs to proceed violates the very constitutional rights Florida's Anti-SLAPP statute was implemented to protect. *Gundel*, 264 So.3d at 310-311.

Traditional sanctions available for meritless litigation are insufficient to counter SLAPPs because those sanctions often must wait until the conclusion of litigation—thus still allowing the SLAPP plaintiff to accomplish his objectives. *Id.* Accordingly, Florida's Anti-SLAPP statute makes it easier, faster, and less expensive for the victims of SLAPPs to dismiss cases and to be compensated for defending themselves against them.

Florida's Anti-SLAPP law (§ 768.295(3), *Fla. Stat.*) prohibits:

> any lawsuit, cause of action, claim, cross-claim, or counterclaim against any other person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue, or right to peacefully assemble, to instruct representatives of government, or to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.

A "person or entity sued … in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section … [and] … may move the court for an order dismissing the action or granting final judgment in favor of that person … [or] … may file a motion for summary judgment, together with supplemental affidavits, seeking determination that the claimant's … lawsuit has been brought in violation of this section." § 768.295(4), Fla. Stat. The court must hear an Anti-SLAPP motion as early as possible, and award attorneys' fees and costs to the prevailing party, as well as any actual damages suffered by the SLAPP victim. *Id.*

Florida enacted its anti-SLAPP law in order "to protect the right in Florida to exercise the rights of free speech in connection with public issues," § 768.295(1),

Fla. Stat., and to "shield[] individuals and entities from the often-crushing expense of lawsuits" that lack merit. *Lam v. Univision Commc'ns, Inc.*, 2019 WL 6830882, at *2 (Fla. Cir. Ct. Nov. 2, 2019). The statute prohibits any person from filing a lawsuit (a) that is "without merit" and (b) because the defendant "has exercised the constitutional right of free speech in connection with a public issue." § 768.295(3), Fla. Stat. The statute defines "free speech in connection with a public issue" broadly to include "any written or oral statement that is protected under applicable law," and "is made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work." Fla. Stat. § 768.295(2)(a). It provides that "[t]he Court shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of this section." § 768.295(4), Fla. Stat.

This lawsuit is precisely what the anti-SLAPP law prohibits. General Flynn is retaliating against Mr. Stern for publicly rebutting General Flynn's own false accusations, and General Flynn appears to be more interested in disparaging and punishing Mr. Stern than pleading a cause of action.

The first prong of the statute is met because General Flynn cannot deny that he sued Mr. Stern solely because he engaged in protected activities. A plain reading of the Complaint clearly demonstrates that **all** the conduct that forms the basis of General Flynn's claims is Mr. Stern's alleged exercise of his constitutionally protected right of free speech. Postings on Internet social media

are well-recognized forms of protected free speech. *Tobinick*, 108 F. Supp.3d at 1308; *Ingels v. Westwood One Broadcasting Services*, 129 Cal.App.4th 1050, 1067-68 (2005). The salient inquiry concerning the intent of a claim for SLAPP purposes is not the chosen form of General Flynn's cause of action, but the activities that give rise to the asserted liability and whether those activities are protected. *Huntington Life Sciences, Inc. v. Stop Huntington Animal Cruelty USA, Inc.*, 129 Cal. App. 4th 1228, 1244 (2005); *Dible v. Haight Ashbury Free Clinics, Inc.*, 170 Cal. App. 4th 843, 849 (2009).[5]

Here, the answer to that inquiry is simple: the ***only*** conduct upon which General Flynn's claims are based is protected speech. Thus, the only conclusion to be drawn is that General Flynn sued Mr. Stern because he engaged in free speech.

The second prong of the statute is also clearly met because, for the reasons set out above, General Flynn's lawsuit is "without merit." *See, e.g., Boling v. WFTV, LLC*, 2018 WL 2336159, at *2 (Fla. Cir. Ct. Feb. 28, 2018) (defamation suit filed without proper pre-suit notice was "without merit" for purposes of anti-SLAPP law), *aff'd*, 274 So.3d 392 (Table) (Fla. 5th DCA 2019) (per curiam); *Parekh v. CBS Corp.*, No. 6:18-cv-466, Dkt. 104, slip op. at 10 (M.D. Fla. Jan. 9, 2019) (awarding fees

[5] California's Anti-SLAPP law is routinely relied upon by other states for guidance; a practice Florida courts employ to guide their decisions. Bautista v. State, 863 So. 2d 1180, 1183 (Fla. 2003).

under anti-SLAPP law following successful motion to dismiss for lack of defamatory meaning).

PRAYER FOR RELIEF

WHEREFORE, Defendant, Everett Stern, respectfully requests this Court enter an order dismissing Plaintiff's Complaint and this entire action with prejudice, awarding a final summary judgment in favor of Defendant, Everett Stern, on all General Flynn's claims, awarding Defendant, Everett Stern, his attorneys' fees and costs, and granting such other and further relief as the Court deems just and appropriate.

Dated September 25, 2024.

PHILLIPS, HUNT & WALKER

/s/ John M. Phillips

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VERIFICATION

I HAVE READ THE FACTS SET FORTH IN THIS DEFENDANT, EVERETT STERN'S VERIFIED AMENDED MOTION TO DISMISS, OR, IN THE ALTERNATIVE, MOTION FOR JUDGEMENT ON THE PLEADINGS, AND HIS MOTION FOR ATTORNEY FEES AND COSTS UNDER FLORIDA'S ANTI-SLAPP STATUTE, AND I VERIFY UNDER PENALTY OF PERJURY THAT THEY ARE TRUE AND CORRECT.

09/25/2024
DATE

EVERETT STERN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to STEPHEN B. FRENCH; JARED J. ROBERTS; BINNALL LAW GROUP, PLLC; 717 King Street, Suite 200 Alexandria, Virginia 22314; stephen@binnall.com, jared@binnall.com counsel for Plaintiff this 25th day of September 2024.

PHILLIPS, HUNT & WALKER

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