IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR FLAGLER COUNTY, FLORIDA

SUNBELT LAND MANAGEMENT, LLC., and
SUNBELT HOLDINGS FLORIDA I, LLC., CASE NO: 2020 CA 000072

Plaintiff,

v.

JOSEPH K. BRYAN A/K/A KEN BRYAN, and
MARY SARA ARNOFF A/K/A SALLEE ARNOFF,

Defendants.
_____/

DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE

COMES NOW, Defendant, MARY SARA ARNOFF A/K/A SALLEE ARNOFF (hereinafter "Sallee Arnoff" or "Ms. Arnoff") by and through the undersigned counsel, hereby files this Motion to Dismiss Plaintiffs', SUNBELT LAND MANAGEMENT, LLC., and SUNBELT HOLDINGS FLORIDA I, LLC, Amended Complaint, and states in support thereof:

INTRODUCTION

Plaintiffs' Amended Complaint, pursuant to Florida Rule of Civil Procedure 1.140(b)(6), fails to state any claim for which relief could be granted under Florida law in its ill attempt to sue Ms. Arnoff as a result of her exercise of her constitutionally protected right to free speech in connection with a public issue. The Amended Complaint contains two counts against Ms. Arnoff, slander *per se* and conspiracy to commit slander. However, as demonstrated in detail below, Plaintiffs' defamation claims fail for three reasons; (1) they are time-barred; (2) are based upon statements of opinion; and (3) the targeted statements are not slander *per se*, pursuant to well established Florida law.

PLAINTIFFS' AMENDED COMPLAINT / BACKGROUND

The Amended Complaint contains two counts against Ms. Arnoff, both of which are based upon the single publication of one sentence, made in the context of a public meeting, to members of her community, regarding issues of public concern about a development proposal that was pending before Ms. Arnoff's local County Commission, and which is thus protected by the qualified First Amendment privilege:

"And Sunbelt, their mode of operation is to go in and clear-cut all of the land."

Plaintiffs' Amend. Comp. ¶32. Plaintiffs contend that this single sentence is *per se* defamatory, imputes illegal conduct, and has somehow damaged them. *See* Plaintiffs' Amend. Comp. ¶¶ 32-40. Further, Plaintiffs contend that this sentence was the result of a conspiracy between Ms. Arnoff and Co-Defendant, Ken Bryan. However, Plaintiffs' Amended Complaint fails to articulate the necessary factual allegations required to support a claim that Ms. Arnoff published a statement amounting to slander *per se*, and must be dismissed for three independent reasons:

(1) The statement is time - barred as basis for a defamation claim as it was allegedly published in 2019, beyond the two-year statute of limitations;

(2) the statement cannot be interpreted by a reasonable person to imply that Plaintiffs have committed an infamous crime or felony; and

(3) the statements constitute pure opinion.

Additionally, without a underlying claim for defamation Plaintiffs' claim for conspiracy to defame, in violation of Florida's single publication / single action rule, must also fail.

MEMORANDUM OF LAW

Florida Pleading Requirements and the Qualified First Amendment Privilege

Unlike Federal notice pleading standards, Florida requires fact pleading, and a plaintiff must set forth ultimate facts in support of each claim alleged in his or her complaint. *See* Fla. R. Civ. P. 1.110(b); *Louie's Oyster, Inc. v. Villaggio Di Las Olas, Inc.*, 915 So. 2d 220, 221-22 (Fla. 4th DCA 2005). Under this guiding principle, a viable complaint "must set forth factual assertions that can be supported by evidence which gives rise to legal liability." *Barrett v. City of Margate*, 743 So. 2d 1160, 1162-63 (Fla. 4th DCA 1999). "It is insufficient to plead opinions, theories, legal conclusions or argument." *Id*. at 1163.

The First Amendment privilege applies to statements made about matters of public policy. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). **"[S]tatement[s] of opinion relating to matters of public concern" are entitled to "full constitutional protection**" unless they allege a "provably false" and "objectively verifiable" fact. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 22 (1990). This is among the most important "constitutional limits" on tort actions. *Id*. at 16; *see also Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 773 (1986). The First Amendment allows a speaker to be held liable for a tort caused by her speech only if that the speech or petition was materially false and was made with actual or express malice. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Accord, *Nodar v. Galbreath*, 462 So.2d 803, 806-07 (Fla. 1984).

Cases involving First Amendment rights are particularly subject to motions to dismiss. **Florida courts have long favored dismissal of legally untenable defamation claims at the earliest possible juncture**. *See*, e.g., *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983) (citing *Wolfson v. Kirk*, 273 So. 2d 774, 778 (Fla. 4th DCA 1973); *Vanmoor v.*

Fox News Network, LLC, 34 Media L. Rep. 2022 (Fla. 17th Jud. Cir. May 26, 2006) (dismissing action for lack of defamatory meaning and protection by fair report privilege); *Hatjioannou v. Tribune Co.*, 8 Med. L. Rptr. 2637, 2638 (Fla. Cir. Ct. 13th Jud. Cir. 1982) aff'd 440 So. 2d 360 (Fla. 2d DCA 1983) (holding that whether a statement may have a defamatory meaning is a question of law).

Thus, Courts should not hesitate to dismiss claims against citizens who speak on matters of public concern to protect them "not only from the consequences of litigation's results but also from the burden of defending themselves" *Helstoki* v. *Meanor*, 442 U.S. 500, 508 (1979) (First Amendment). "One of the most powerful themes in modern First Amendment jurisprudence … is that the causal nexus between speech and [harm] must be extremely tight and compellingly obvious before liability for the speech may be imposed." 2 Smolla, *Law of Defamation* § 11:50 (2d ed. 2018)

Accordingly, if an action is not sufficiently pled, the Court should dismiss it. *See Wolfson*, 273 So. 2d at 778. Pretrial disposition is especially appropriate in defamation cases because of "**the chilling effect**" these cases have on First Amendment rights. *Karp v. Miami Herald Publ'g Co.*, 359 So. 2d 580, 581 (Fla. 3d DCA 1978). *See also Stewart v. Sun-Sentinel Co.*, 695 So. 2d 360, 363 (Fla. 4th DCA 1997). (emphasis added).

The United States Supreme Court has directed courts to ensure that tort suits do not become "an instrument for the suppression" opposing viewpoints on controversial or complex public policy disputes. *Snyder* v. *Phelps*, 562 U.S. 443, 459 (2011). The Court has warned of the constitutional harm inherent in allowing such suits to proceed to be heard by judges and juries who might "impose liability on the basis of [their] tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 55 (1988); *see also*

Bose Corp. v. *Consumers Union of United States, Inc.*, 466 U.S. 486, 505 (1984) (observing the "danger that decisions by triers of fact may inhibit the expression of protected ideas"). *See also, Kassel* v. *Gannett Co.*, 875 F.2d 935, 949 (1st Cir. 1989) (First Amendment "requires that unbounded speculation by juries be discouraged, lest other speakers be chilled").

Here, as admitted on the face the Amended Complaint, the alleged defamatory statement was published during a public meeting and related to an issue of public and community concern. *See generally* Plaintiffs' Amend. Comp. ("On or about November 7, 2019 The Company hosted a meeting [the 'Meeting'] open to the public to discuss its concerns regarding the development of a parcel of land located in Flagler County.…The Meeting was promoted and advertised on social media and the press, among others, to solicit and encourage wide, diverse public attendance… According to media reports, approximately 100 people attended the meeting").

As such, the instant case falls squarely within the concerns articulated above and set forth by Florida and Federal law, that pretrial disposition is especially appropriate in this case because of "**the chilling effect**" it will have on the First Amendment rights of those within the community. *See Karp*, 359 So. 2d 580; *See also Stewart*, 695 So. 2d 360.

The Florida Pleading Requirements for Defamation

Under Florida law, to assert a claim for defamation—libel or slander—a plaintiff must establish that: "(1) the defendant published a false statement; (2) about the plaintiff; (3) to a third party; and (4) that the falsity of the statement caused injury to another." *Alan v. Wells Fargo Bank, N.A.*, 604 Fed. App'x 863, 865 (11th Cir. 2015)(applying Florida law). Libel, which is a written defamation, may be proven in two ways: *per se* or *per quod. Paulson v. Cosmetic Dermatology, Inc.*, Case No. 17-20094-CIV-Scola, 2017 U.S. Dist. LEXIS 88031, 2017 WL 2484197 (S.D. Fla.

June 8, 2017)(citing *Hoch v. Rissman*, 742 So. 2d 451, 457 (Fla. 5th DA 1999)) *see also Budd v. J.Y. Gooch, Co.*, 27 So.2d 72, (Fla. 1946).

"Courts will look to the language of the publication, rather than the innuendoes, in reaching a conclusion as to whether or not the publication is libelous per se or actionable only per quod." *Budd*, 157 Fla. at 719 ("Innuendoes in the pleadings are ineffective for the purpose of fixing the character of an alleged libelous publication per se."). Thus, when determining whether a published statement constitutes defamation per se, the court may consider only the "four corners" of the publication. *Trujillo v. Banco Cent. Del. Ecuador*, 17 F. Supp. 2d 1334, 1339 (S.D. Fla. 1998). Defamation *per quod* requires the statement to be put in context so as "to demonstrate [its] defamatory meaning or that the plaintiff is the subject of the statement." *Id.* (citations omitted). To allege a claim for libel *per se*, however, the plaintiff must allege and prove that the alleged per se defamatory statements are "so obviously defamatory and damaging to [one's] reputation that they give rise to an absolute presumption both of malice and damage." *Id.* (internal quotations omitted)(citing *Wolfson v. Kirk*, 273 So. 2d 774, 776 (Fla. 4th DCA 1973)). In this case, Plaintiffs allege as to Counts I and II, claims of slander *per se* against Ms. Arnoff and Mr. Bryan.

An alleged defamatory statement rises to the level of *per se* "if, when considered alone and **without innuendo**, it (1) charges that a person has committed an infamous crime; (2) tends to subject one to hatred, distrust, ridicule, contempt, or disgrace; or (3) tends to injure one in his trade or profession." *Id.* (quoting *Richard v. Gray*, 62 So. 2d 597, 598 (Fla. 1953)). In a defamation *per se* action, consideration is given only to the "four corners" of the publication. *See Trujillo* 17 F. Supp. 2d at, 1339. The statements alleged to be defamation *per se* should not be interpreted in the extreme, but as the "'common mind' would normally understand it." *Id.* (citation omitted). "In a *per se* action, the injurious nature of the statement is apparent from the words in the statement

itself and the court consequently takes notice of that fact." *Scobie v. Taylor*, No. 13-60457-CIV-Scola, 2013 WL 3776270, (S.D. Fla. July 17, 2013) (*citing Campbell v. Jacksonville Kennel Club Inc.*, 66 So.2d 495, 497 (Fla. 1953)).

ARGUMENT

Count II – Slander Per Se, against Sallee Arnoff

A. Plaintiff's Second Amended Complaint Fails to State a Cause of Action for Slander Per Se

1. Florida's Statute of Limitations Bars Plaintiffs' Claims

The statute of limitations for defamation claims in Florida is two (2) years. *See* § 95.11(4)(g), Fla. Stat. The statute begins to run at the time of **publication, not discovery**. § 770.07, Fla. Stat.; *Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan*, 629 So. 2d 113 (Fla. 1993) (cause of action for defamation accrues on publication, rather than discovery, even where defamation is private); *Holt v. Tampa Bay Television, Inc.*, Case No. 03-11189, 2006 WL 5063132, ¶ 20 (Fla. Cir. Ct. Mar. 17, 2006) (citations omitted), affirmed, 976 So. 2d 1106 (Fla. 2d DCA 2007). Despite this established law, Plaintiffs have brought this claim against Mr. Arnoff.

While the statute of limitations is typically an affirmative defense, Rule 1.110(d) provides that if the defense is apparent from the face of the pleadings, as it is here, the complaint is subject to a motion to dismiss. Fla. R. Civ. P. 1.110(d). *See also Timmins v. Firestone*, 283 So. 2d 63, 65 (Fla. 4th DCA 1973) (where statute of limitations defense appears on face of complaint, dismissal is proper).The only allegedly defamatory statement, allegedly attributable to Ms. Arnoff, identified in the Amended Complaint was admittedly first published on November 7th, 2019 more than two years ago and thus any claims based upon such a statement are beyond the statute of limitations

and cannot support a defamation claim. *See* Plaintiffs' Amend. Comp. ¶¶ 11 and 32; *see also* § 95.11(4)(g), Fla. Stat.

Plaintiffs initially filing a "Jane Doe" complaint over two years ago, before now suddenly naming Ms. Arnoff, does not toll the running of the two-year statute of limitations on defamation claims. *Grantham v. Blount, Inc.*, 683 So. 2d 538 (Fla. 2d DCA 1996). In Florida, the filing of a Jane Doe complaint, without more, does not commence an action against a real party. *Grantham v. Blount, Inc.*, 683 So. 2d 538 (Fla. 2d DCA 1996); *Click v. Pardoll*, 359 So.2d 537 (Fla. 3d DCA 1978) (belated amendment of "Dr. John Doe" complaint alleging medical malpractice, by substituting name of actual doctor, constituted new action filed as to doctor, so that amended complaint did **not "relate back"** to date original complaint was filed, and dismissal of complaint as to actual named doctor was proper). In *Grantham*, the court refused to recognize a plaintiff's power to commence an action against a defendant by filing a John Doe complaint. *Id*. at 541. The court stated that allowing a John Doe complaint to commence a cause of action against a later named defendant would be **inconsistent with the legislative policy set forth in Florida's all-inclusive tolling statute**. *Id*. at 541; §95.051, Fla. Stat.. Florida's tolling statute does not include the filing of a John Doe complaint as an event that tolls the statute of limitations. *Id*. Additionally, this use of a Jane Doe complaint would conflict with the well-established law in Florida concerning relation back of amended complaints to correct misnomers. *Id*. The Court stated:

> "John Doe" is not a misnomer. A plaintiff uses this term intentionally to identify the fact that the defendant's real identity is unknown. It would be difficult to justify a set of rules that extended the limitations period for a plaintiff who intentionally named a fictitious defendant, but barred an action when a plaintiff mistakenly identified the defendant by a substantially incorrect name. In either case, the true defendant is not notified of the action. Accordingly, we choose to treat a John Doe complaint in the same manner we treat a complaint that contains a substantially incorrect identification of the defendant and hold that it does not commence an action against the real party and it does not toll the statute of limitations against that party.

Id. at 541-42. Likewise, the court in *Gilliam v. Smart*, 809 So.2d 905 (Fla. 1st DCA 2002), ruled that an action was not timely commenced against the defendant police officer when the initial complaint filed identified him as "Officer John Doe, with badge No. 305".

Thus, the cause of action against Ms. Arnoff was not timely commenced upon the filing of the initial Jane Doe Complaint, nor does Plaintiffs' Motion to Amend Complaint relate back to the date of the filing of the Jane Doe Complaint. *Grantham v. Blount, Inc.*, 683 So. 2d 538 (Fla. 2d DCA 1996); *Gilliam v. Smart*, 809 So.2d 905 (Fla. 1st DCA 2002); *Click v. Pardoll*, 359 So.2d 537 (Fla. 3d DCA 1978). The statute of limitations for the alleged defamatory statement expired on November 8, 2021. When Plaintiffs filed the motion for leave to amend to sue Ms. Arnoff on July 22nd, 2022, the statute of limitations had already barred the action. Accordingly, Plaintiffs' claims for defamation, and conspiracy to defame resulting in the same allegedly defamatory statement, are time-barred and should be dismissed with prejudice.

Next, Plaintiffs' claim of conspiracy to defame also fails in the absence of an underlying actionable defamatory statement. A "[c]onspiracy to defame claim cannot stand where, as here, the defamation action fails. There being no defamation, the gist of the defamation conspiracy, there can be no conspiracy claim." *See Ovadia v. Bloom*, 756 So. 2d 137, 140 (Fla. 3rd DCA 2000) *(citing Buckner v. Lower Fla. Keys Hosp. Dist.*, 403 So.2d 1025, 1027 (Fla. 3d DCA 1981).

> Since we have determined <u>that a cause of action for defamation, a necessary predicate to a cause of action for conspiracy to defame, has not been alleged or proven, an action for conspiracy to defame predicated on such defamation must also fail</u>.
>
> *Hoon v. Pate Const. Co.*, 607 So. 2d 423 (Fla. 4th DCA 1992)(emphasis added).

2. The Alleged Defamatory Statement is NOT Actionable *Per Se,* as it Does Not Impute Plaintiffs with the Commission of a Felony

The Amended Complaint alleges that the publication by Ms. Arnoff qualifies as defamation *per se* asserting it imputes Plaintiffs with having committed illegal activity. *See Plaintiff's Second Am. Compl.* at ¶¶ 32, 55, 54. However, the statement requires extrinsic facts and context, as alleged by the Amended Complaint and is not "so obviously defamatory and damaging to [one's] reputation that they give rise to an absolute presumption both of malice and damage" as required by Florida law to constitute defamation *per se*. *See Paulson v. Cosmetic Dermatology, Inc.*, Case No. 17-20094-CIV-Scola, 2017 U.S. Dist. LEXIS 88031, 2017 WL 2484197 (S.D. Fla. June 8, 2017)(*citing Hoch v. Rissman*, 742 So. 2d 451, 457 (Fla. 5th DA 1999)) (internal quotations omitted)(*citing Wolfson v. Kirk*, 273 So. 2d 774, 776 (Fla. 4th DCA 1973).

Plaintiffs' claim is also legally insufficient because the alleged statement fails to charge Plaintiffs with committing an infamous crime in order for it to constitute *per se*. *See Aflalo*, No. 17-61923-CIV, 2018 WL 3235529 (*citing Richard*, 62 So. 2d at 598; *see also Scobie* No. 13–60457–CIV, 2013 WL 3776270 ("When context is considered and 'extrinsic facts and innuendo are needed to prove the defamatory nature of the words,' the statements are not defamatory *per se*"). Crimes characterized as having an infamous nature are "murder, perjury, piracy, forgery, larceny, robbery, arson, sodomy or buggery." *See Klayman v. Judicial Watch, Inc.*, 22 F. Supp. 3d 1240, n.3 (S.D. Fla. 2014). Analyzing the publications as the "common mind" would understand it, "[w]here 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." *Wolfson*, 273 So.2d at 778 (citations omitted).

While Plaintiffs allege the statement imputes criminal activity, more is required by Florida Law in order to constitute *per se*, rather the statement must charge or impute a criminal offense

amounting to a felony. *See Klayman* 22 F. Supp. 3d at 1247 (S.D. Fla. 2014), aff'd (Feb. 17, 2015); *Alan*, 604 Fed. App'x at 865 (citing *Valencia v. Citibank Int'l*, 728 So. 2d 330, 330 (Fla. 3d DCA 1999)); *see also Madsen v. Buie*, 454 So. 2d 727, 729-30 (Fla. 1st DCA 1984) ("Under Florida law, a publication is libelous per se when it imputes to another a criminal offense amounting to a felony…"). Plaintiffs' Amended Complaint clearly and unequivocally argues that the portion of the statement which imputes criminal activity is the phrase "clear cut" and that clear cutting is punishable as a criminal misdemeanor under the St. Johns County Land Development Code Sec. 4.01.05 and Sec. 10.05.01. *See* Plaintiffs' Amend. Comp. ¶ 35. Notwithstanding the absence of any language within the alleged defamatory statement or within the Amended Complaint itself that so much as implies unpermitted or impermissible clear-cutting, inconsistent with the aforementioned code, which would trigger any enforcement mechanisms of St. Johns County Land Development Code Sec. 10.05.01, which may include prosecution as a misdemeanor, **the criminal offenses allegedly imputed do not arise to the level of a felony and thus cannot be an infamous crime as required by Florida law to constitute defamation *per se***. *See Klayman* 22 F. Supp. 3d at 1247; *Alan*, 604 Fed. App'x at 865 (citing *Valencia v. Citibank Int'l*, 728 So. 2d 330, 330 (Fla. 3d DCA 1999)); *Madsen v.* 454 So. 2d at 729-30; *See Aflalo*, No. 17-61923-CIV, 2018 WL 3235529 (*citing Richard*, 62 So. 2d at 598; *see also Scobie* No. 13–60457–CIV, 2013 WL 3776270 (statement that defendants "took advantage of a 94 year old sick man committing elder abuse [sic]" does not impute an infamous crime because nothing in the statement supports the conclusion that "elder abuse" amounts to an accusation of a felony.); *McCormick v. Miami Herald Publ'g Co.*, 139 So. 2d 197 (Fla. 2d DCA 1962) (an individual alleged that a publication imputed him with committing tax evasion and willfully failing to pay taxes, a crime under a number of statutes, yet the court held that the publication did not truly accuse said individual of these crimes by simply

referencing that he owed back taxes and that the IRS had taken "levy action"); *Paulson v. Cosmetic Dermatology, Inc.*, 2017 U.S. Dist. LEXIS 88031, at 7 (S.D. Fla. June 8, 2017) (holding that a generic statement, which omitted specific details, avoided providing the type of information that could be construed as defamatory *per se*). Ms. Arnoff's statement, when considered alone, does not charge Plaintiffs with the commission of an infamous crime, cannot be properly asserted as slander *per se*, and must be dismissed with prejudice.

3. The Alleged Defamatory Statement is Pure Opinion as a Matter of Law and Cannot Support a Claim for Defamation

To support a claim for defamation, a statement must have been presented, or **reasonably understood, as a fact.** See *LRX, Inc. v. Horizon Associates Joint Venture*, 842 So. 2d 881 (Fla. 4th DCA 2003.), review denied, 859 So. 2d 514 (Fla. 2003). See also *Lampkin-Asam v. Miami Daily News, Inc*., 408 So. 2d 666 (Fla. 3d DCA 1981), review denied, 417 So. 2d 329 (Fla.), cert. denied, 459 U.S. 806 (1982), reh'g denied, 459 U.S. 1189 (1983). **Statements of pure opinion are not actionable for defamation**. *Pomeroy v. Southern Bell Tel. & Tele. Co.*, 410 So. 2d 647 (Fla. 3rd DCA), *rev. denied*, 418 So. 2d 1280 (Fla.), *cert. denied*, 103 S. Ct. 490 (1982); *From v. Tallahassee Democrat, Inc.,* 400 So. 2d 52, 57-58 (Fla. 1st DCA 1981), *rev. denied*, 412 So. 2d 465 (Fla. 1982). Courts strictly enforce the distinction between verifiable and non-verifiable statements to ensure that tort suits **do not become "an instrument for the suppression of" opposing viewpoints, particularly on controversial policy disputes**. *Snyder* v. *Phelps*, 562 U.S. 443, 459 (2011).

Here, the alleged defamatory statement is pure opinion based on facts which are available to any reader as a member of public, protected by the Constitution, and cannot form the basis for a defamation action. *See Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841, 847 (Fla. 5th DCA 2002). In *Morse,* the Fourth District Court of Appeal discussed the distinction between

pure expressions of opinion, which are constitutionally protected, and mixed expressions of opinion, which are not: "Pure opinion is based upon facts that the communicator sets forth in a publication, or **that are otherwise known or available to the reader or the listener as a member of the public**." *Town of Sewalls Point v. Rhodes*, 852 So.2d 949, 951 (Fla. 4th DCA 2003)(emphasis added)(*quoting Morse v. Ripkin*, 707 So.2d 921 (Fla. 4th DCA 1998)(*quoting Hay v. Independent Newspapers, Inc.*, 450 So.2d 293, 295 (Fla. 2nd DCA 1984)). Statements of pure opinion are not actionable; a defamation action fails to state a claim when the purported statement is protected opinion. *See Keller v. Miami Herald Pub. Co.*, 778 F.2d 711, 717 (11th Circ. 1985); *see also Tunerner v. Wells*, 198 F.Supp.3d 1355, 1365 (S.D. Fla. 2016) (granting a motion to dismiss a defamation action because the challenged statement was protected opinion).

Whether a statement is one of opinion, is not a question of fact for the jury, but is a matter of law for this court to decide. *See Colodny v. Iverson, Yoakum Papiano & Hatch*, 936 F. Supp. 917, 923 (M.D. Fla. 1996). In determining whether an alleged defamatory statement is pure opinion "the court must construe the statement in its totality, examining not merely a particular phrase or sentence, but all the words in the publication. The court must consider the context in which the statement was published … All the circumstances surrounding the publication must be considered**, including the medium by which is was disseminated** and the audience to which it was published." *Hay v. Independent Newspapers, Inc.,* 450 So.2d 293, 295 (Fla. 2nd DCA 1984)(emphasis added). Thus, it is well settled law that where the speaker or writer provides the audience with an adequate and publicly available factual foundation prior to engaging in the discourse, there is no claim for defamation. *Id*.

Here, the alleged defamatory statement is based upon facts available to the listeners as members of the public, specifically, the "Incident and Investigation Form", created by St. Johns

County and accessible as a public record, which documented the "unauthorized clearing" and "violation of the land development code" by Sunbelt Holdings Florida I LLC.[1] The instant case is similar to the Fourth District Court of Appeal's ruling in *Hay* where the Court reversed a judgment of defamation and found the statements made by Hay to be pure opinion and protected by the First Amendment, as the statement was based on criminal charges that were known or publicly available to the audience as a member of the public. *See generally Hay* 450 So.2d 293. What's more, to the extent Plaintiffs claims rely on the notion that it had not "clear cut" all trees on its property, because it left a few un-touched, under the "*substantial truth doctrine*", if the "gist" of the statement is true, there has been no defamation. *Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991). "[F]alsity only exists if the publication is substantially and materially false, **not just if it is technically false**." *Smith v. Cuban Am. Nat'l Found*., 731 So.2d 702, 707 (Fla. 3d DCA 1999).

As such, consistent with the well-established precedent of *Town of Sewalls Point, Morse*, and *Hay* that defamation does not occur where the factual foundation of the statement is publicly available to the reader, the alleged defamatory statement is protected by the First Amendment as pure opinion and Florida law requires dismissal of Plaintiff's Amended Complaint.

Count III – Conspiracy to Commit Slander, against Sallee Arnoff and Ken Bryan

A. Plaintiffs Fail to State a Cause of Action for Civil Conspiracy without an Underlying, Actionable Defamatory Statement

As demonstrated above, a "[c]onspiracy to defame claim cannot stand where, as here, the defamation action fails. There being no defamation, the gist of the defamation conspiracy, there can be no conspiracy claim." *See Ovadia v. Bloom*, 756 So. 2d 137, 140 (Fla. 3rd DCA 2000)

1. *See* St. Johns County Incident and Investigation Form attached hereto as Exhibit A.

(citing Buckner v. Lower Fla. Keys Hosp. Dist., 403 So.2d 1025, 1027 (Fla. 3d DCA 1981). As such, Count III should also be properly dismissed.

B. Plaintiffs' Re-allegations of the Same Facts Set Forth in Count II Violates Florida's Single Publication/Single Action Rule

Count III for Conspiracy to Slander violates Florida's "single publication/single action" rule. Florida's single publication /single action rule precludes the recasting of defamation claims as additional, distinct causes of action in tort if the claims arise from same defamatory publications. *See Fridovich v. Fridovich*, 598 So.2d 65, 69 (Fla. 1992) ("It is clear that a plaintiff is not permitted to make an end-run around a successfully invoked defamation privilege by simply renaming the cause of action and repleading the same facts."); *see also Ovadia v. Bloom*, 756 So.2d 137, 141 (Fla. 3d DCA 2000) (explaining that multiple actions are not permitted under the single publication /single action rule when they arise from the same publication upon which a failed defamation claim is based); *Edelman v. Kolker*, 194 So.2d 683, 684 (Fla. 3d DCA 1967) ("The general rule in Florida is that only one cause of action arises out of a single tort committed on an individual, even though that tort results in damages to both the person and his physical property.")

Here, Plaintiffs have alleged conspiracy within Count III that is entirely based upon the same publication and facts as Count II for slander *per se*, that the defendants alleged agreed to represent that Plaintiffs "illegally clear-cut properties," though it should be noted that the Amended Complaint reveals the absence of any statement or implication by Ms. Arnoff imputing illegal activity, as demonstrated above.

When claims are based on analogous underlying facts and the causes of action are intended to compensate for the same alleged harm, a plaintiff may not proceed on multiple counts for what is essentially the same defamatory publication or event." *Klayman v. Judicial Watch, Inc.*, 22 F. Supp. 3d 1240, 1256 (S.D. Fla. 2014). Under these circumstances, courts have dismissed the

offending counts. *See id*. at 1255–57. Accordingly, because the claim of conspiracy is based on the same underlying facts and is intended to compensate for the same alleged harm, slander per se as alleged in Count II of the amended complaint, the claim for conspiracy must be dismissed. *See Callaway Land & Cattle Co.*, 831 So.2d at 208 (citation omitted)("In Florida, a single publication gives rise to a single cause of action [for libel/slander]: consequently, "[t]he various injuries arising from [such publication] are merely items of damage arising from the same wrong."); *Klayman v. Judicial Watch, Inc.*, 22 F. Supp. 3d 1240, 1257 (S.D. Fla. 2014); *see also Kamau v. Slate*, 2012 U.S. Dist. LEXIS 158213 at * 7 - 8 (N.D. Fla. Oct. 1, 2012)(Court allowed plaintiffs to amend their defamation claim, but dismissed counts for injurious falsehood and interference with business reputation because they relied on the same event as defamation claim). In the instant case, Plaintiffs have utilized the allegations of slander to support its claims for conspiracy to slander, violating Florida's single action rule and warranting dismissal.

CONCLUSION

Plaintiffs in the instant matter have failed to allege the necessary factual allegations to support its claim that Ms. Arnoff published a statement amounting to *slander per se*. The statement is barred as basis for a defamation claim as it was allegedly published in 2019, beyond the two-year statute of limitations, the statement cannot be interpreted by a reasonable person to imply that Plaintiffs have committed an infamous crime or felony and further, and further, the statements constitute pure opinion. Additionally, without a underlying claim for defamation, Plaintiffs' claim for conspiracy must also fail. Finally, Plaintiffs' violation of Florida's single action / single publication rule and warrants dismissal of its claim for conspiracy. As such, even accepting the Plaintiffs' allegations as true along with all reasonable inferences, Plaintiffs have failed to state a claim, and the Amended Complaint should be dismissed in its entirety, with prejudice.

WHEREFORE, Defendant, Sallee Arnoff, respectfully requests that this Honorable Court enter an Order granting this Motion and dismissing the Amended Complaint, in its entirety, with prejudice, along with any other relief this Court deems just and proper considering the foregoing.

Respectfully submitted by,

/s/ Shai Ozery
Shai Ozery, Esq.
Florida Bar No. 118371
ROBERT N. HARTSELL, P.A.
61 NE 1st Street, Suite C,
Pompano Beach, FL 33060
Telephone: 954-778-1052
Counsel for Sallee Arnoff
Shai@Hartsell-Law.com
Robert@Hartsell-Law.com

/s/ Richard Grosso
Richard Grosso, FBN 592978
richardgrosso1979@gmail.com
Grosso.Richard@yahoo.com
RICHARD GROSSO, P.A.
6919 West Broward Boulevard,
Mailbox 142
Plantation, Florida 33317
Telephone: (954) 801-5662

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been e-filed with the Clerk of the Court and electronically served upon the following persons on this 23rd day of September 2022.

ROBERT N. HARTSELL, P.A.
61 NE 1st Street, Suite C,
Pompano Beach, FL 33060
Telephone: 954-778-1052
Counsel for Sallee Arnoff
Shai@Hartsell-Law.com
Robert@Hartsell-Law.com

By: /s/ Shai Ozery
Shai Ozery, Esq.
Florida Bar No. 118371

SERVICE LIST

ST. JOHNS LAW GROUP
Douglas N. Burnett, Esq.
Florida Bar No. 146234
Hillary N. Mesa, Esq.
Florida Bar No. 1010783
104 Sea Grove Main Street
St. Augustine, Florida 32080
(904) 495-0400 (Telephone)
(904) 495-0506 (Facsimile)
sjlgservice@gmail.com
hmesa@sjlawgroup.com
Attorneys for Defendant, Ken Bryan

CHIUMENTO LAW
Michael D. Chiumento III, Esq.
Florida Bar No. 188123
145 City Place, Suite 301
Palm Coast, FL 32174
Michael3@legalteamforlife.com; cmcneil@legalteamforlife.com
litservice@palmcoastlaw.com
Kareen Movsesyan, Esq.
litservice@palmcoastlaw.com
Ethan J. Loeb, Esq.
Sean M. McCleary, Esq.
E. Colin Thompson, Esq.
HeatherW@BLHTlaw.com; EthanL@BLHTlaw.com; SeanM@BLHTlaw.com;
ColinT@BLHTlaw.com

St. Johns County
Incident and Investigation Form

Exhibit A

Incident Number: 1906265 Date Received: 9/23/2019 Status: NEW
Parcel ID: 074760-0000

Citation Number:

Location: 370 GUN CLUB RD
SAINT AUGUSTINE, FL 32095-0000

Directions: Drive East on Gun Club Rd to just past creek turn left

Location Description: Area on North side of Gun Club Rd just past creek there is a driveway, turn left. The house on the property is not lived in per the caller's knowledge.

Geographic Area: N

Concerned Citizen: Anonymous

Owner: SUNBELT HOLDINGS FLORIDA I LLC

, 3129 SPRINGBANK LN STE 200
CHARLOTTE,NC 28226-0000

Complaint Details:
Very Large flatbed truck on property removing several trees and grinding tree stumps all day on Friday. Truck Driver appeared to be clearing the land for the 'Oak Tree' subdivision file PREAPP 2019-19 which has not been properly permitted with subdivision construction plans. This is a heavily wooded area with several very large beautiful specimen oak trees, wildlife including wild hogs and deer, not to mention the possible indigenous peoples utilizing this area due to the proximity to the creek and oyster beds. Please send staff as soon as possible to investigate the destruction of this property.

Activities:

Clearing Without Permit
Clearing Without Permit
Clearing Without Permit
Upland Buffer Impacts

Entry Date	Department	Insp	Next Action/ Inspection Date	Action Taken	Issue Warning Citation
1/15/2020	CODENF	RJC	1/15/2020	Information Provided	False
	closing code enforcement side of complaint. see environmental notes.				
12/11/2019	CODENF	RJC	1/13/2020	Information Provided	False
	continuing to monitor				
12/2/2019	EVRPL	JPB	12/6/2019	Information Provided	False
	Property owner has a submitted Subdivision Construction Plan application SUBCON 19-33. With that plan, staff will address the unauthorized clearing and upland buffer impacts.				
11/8/2019	CODENF	RJC	12/6/2019	Information Provided	False
	continuing to monitor				
9/26/2019	CODENF	RJC	10/24/2019	Information Provided	False
	will monitor notes.				
9/27/2019	DEVSVC	MR	10/11/2019	Inspection	False

	Schedule Inspection. Will continue to monitor other departmental comments.				
10/9/2019	EVRPL	RAM	10/9/2019	Inspection	False
	Revisited site, some additional clearing and fill brought in and smoothed for 2 culverts, one for the roadside ditch along Gun Club Road and one for a small ditch farther north into the property. Existing well marked. Gopher tortoise burrows marked, however need to be posted at 25-feet from mouth the burrow. Some new paths cleared for access around structures. Contacted contractor.				
10/4/2019	DEVSVC	MR	10/4/2019	Inspection	False
	Went by and saw areas that were being mowed and a large piece of equipment setting on the property. A stop work order was posted on site by the Environmental dept. and no work was being done at the time of my visit. Did not see any drainage issues, but will assist as needed.				
10/3/2019	EVRPL	RAM	10/3/2019	Information Provided	False
	Demolition Permit N2019-005251 was applied for to remove existing dilapidated structures located in the southeastern portion of the property. Contacted Tony at 386-479-5803 with Sunbelt Holdings, the demolition contractor. Tony will contact me whenever a date/time is set for the demolition activities. Prior to any activities, staff will meet with the contractor in order to discuss the protection of protected trees surrounding the existing structures and trash to be removed from the site. Stated to the contractor and within the permit application that clearing, damage or removal of any protected trees is prohibited prior to approval of submitted construction plans, which are now under review.				
9/24/2019	CODENF	RJC	10/1/2019	Inspection	False
	Schedule Inspection and consult with Environmental.				
9/23/2019	EVRPL	JPB	9/30/2019	Stop Work Order	False
	Clearing, Significant Natural Communities Habitat impacts, and upland buffer impacts.				

STAFF NOTES:

Stop work order posted onsite 9/23/19 by Environmental Division. Met with contractor performing clearing work same day which was in violation of the land development code.

9/23/2019 Phone call from complainant (Anonymous)input by staff LM Silvestris and alerted Environmental staff.

Inspector Date:

Observations:

Action Taken:

Completed By: Date:

Time: