UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 0:22-cv-60123-WPD

CHRISTOPHER T. BERES and
ANDREW DELANEY,

Plaintiffs,

v.

DAILY JOURNAL CORPORATION,

Defendant.
_____/

DEFENDANT DAILY JOURNAL CORPORATION'S AMENDED MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

TOTH FUNES PA

Brian W. Toth
Florida Bar No. 57708
btoth@tothfunes.com
Freddy Funes
Florida Bar No. 87932
ffunes@tothfunes.com
201 South Biscayne Boulevard, 28th Floor
Miami, Florida 33131
Telephone: (305) 717-7850

Counsel for Defendant Daily Journal Corporation

Under Federal Rule of Civil Procedure 12(b)(6), Defendant Daily Journal Corporation moves to dismiss with prejudice the amended complaint of Plaintiffs Christopher T. Beres and Andrew Delaney, ECF No. 5.[1]

I. INTRODUCTION

In this action, Beres, a Florida lawyer, and Delaney, one of Beres's clients, have sued the Daily Journal—a California publication featuring practice pieces written by lawyers for lawyers—for defamation. Plaintiffs' claim is based on a statement in an article authored by two lawyers that describes a "potential scenario" that exists for misappropriation or loss of trade secrets whenever an employee is fired. Plaintiffs' claim is based also on a legal citation immediately following the potential scenario (which includes a legal citation to case name that listed Delaney as the defendant, a case number, and a court) and a parenthetical that describes the complaint's allegations in the case. Nothing in the statement, citation, or parenthetical references is about Beres; Beres's name was not in the article and the Daily Journal did not publish his name. The statement is not about Delaney, either. Based solely on the statement, citation, and

[1] Despite filing a "corrected" amended complaint, ECF No. 6, and a document captioned "Notice of Termination of Parties/Requested Change of Case Caption" stating that "[f]urther to the Corrected Amended Complaint, there is only one plaintiff in this case, Christopher T. Beres, and the other parties should be deleted/terminated," ECF No. 7, Beres—*after* the Daily Journal moved to dismiss the corrected amended complaint—filed a "Correction and Clarification of Caption and Docket No. 7." ECF No. 18. The "Correction and Clarification of Caption and Docket No. 7" states that "Docket No. 7 was intended and is hereby corrected and clarified that there is one plaintiff Andrew Delaney *in addition to* the undersigned Christopher Teny Beres and that there are no John Does." Beres filed as well a "Notice of Withdrawal of Docket No. 6," ECF No. 19, stating that "plaintiffs" are "withdraw[ing] Docket No. 6 (Corrected Amended Complaint) and confirm[ing] that Docket No. 5 (Amended Complaint) is the complaint in this case." Although the Daily Journal has its doubts about the appropriateness and effect of these filings, the Daily Journal—consistent with Beres's representations—files this amended motion to dismiss aimed at the amended complaint, ECF No. 5.

parenthetical, Plaintiffs seek a judgment against the Daily Journal for millions of dollars in damages for harm that Plaintiffs allege to have suffered to their reputation.

Plaintiffs' claim for defamation is wholly without merit and therefore must be dismissed. *First*, the allegedly libelous statement, citation, and parenthetical are not, as the law requires, "of and concerning" or "about" Beres; although the citation and the parenthetical are about Delaney, the statement is not. Beres's entire claim—as well as Delaney's claim based on the statement—must be dismissed for this threshold reason alone. *Second*, because the statement, citation, and parenthetical accurately and fairly depict the complaint's allegations in the civil action, they are not false; even if they contain minor inaccuracies, statements are not considered false for purposes of defamation if the "gist" or "sting" of them are substantially true. *Third*, Plaintiffs' claim is barred by the fair-report privilege.

For these reasons, the Court should dismiss the amended complaint. And because any amendment would be futile, the Court should do so with prejudice.

II. BACKGROUND

On April 28 and April 29, 2020, the Daily Journal, which is a California publication that features articles written by and for lawyers, published a two-part article written by two lawyers from the law firm Sheppard, Mullin, Richter & Hampton LLP entitled *Does Covid-19 Threaten Your Trade Secrets? Yes, It Does. (Part I)*, and *Does Covid-19 Threaten Your Trade Secrets? Yes, It Does. (Part II)*. *See* Am. Compl. ¶¶ 7, 23 & Exhibit A. As the headlines suggest, the article "address[es] how trade secrets are threatened [by the pandemic] and potential steps that may reduce the threat to trade secrets." *Id.* Ex. A. All statements challenged by Plaintiffs in this action are found in the following passage in Part I:

> Any time there is a termination of an employee, there is potential for misappropriation or loss of trade secrets. Consider the following potential scenarios:
>
> …
>
> - A terminated employee cannot find new employment and decides to use the former employer's trade secrets as a source of income. *See, e.g.*, *HC2 Inc. v. Delaney*, Case No. 1:20-cv-03178 (U.S. District Court for the Southern District of New York) (complaint alleges that a former employee of a legal staffing company tried to extort clients for $450,000 by threatening to release confidential information after they suspended a document review project due to the COVID-19 pandemic).

Id. The article then lists "potential steps that employers may wish to consider to reduce the risk to trade secrets in connection with employee terminations." *Id.*[2]

Based solely on the bulleted paragraph in Part I, Plaintiffs have filed this single-count defamation action against the Daily Journal. By way of background, in their amended complaint, Plaintiffs allege that in March 2020 Delaney was "terminated" by Toyota, its law firm, and their job agency HC2, Inc. "from employment as a Thai language translator in illegal retaliation for his public health and safety complaint against them during the height of the coronavirus pandemic" and that in April 2020 Beres sued Toyota "on behalf of Delaney in the courts of Florida." *Id.* ¶ 18. To "preempt his lawsuit," Plaintiffs allege, HC2 sued "Delaney in the United States District Court for the Southern District of New York" seeking a temporary restraining order and preliminary injunction based on claims of breach of contract and the faithless-servant doctrine. *Id.* (citing *HC2, Inc. v. Delaney*, 1:20-cv-03178 (S.D.N.Y. filed Apr. 22, 2020) (Liman, J.)) (the "SDNY action"). Beres alleges that Judge Liman denied the relief requested and, in an

[2] Part II—which does not appear to be relevant to this action—"address[es] how work from home … mandates resulting from the pandemic also increase the risks to the employer's trade secrets and some potential measures that employers can take to reduce those risks." *Id.*

order dated May 27, 2020, ruled that a letter written by Beres and sent to the chairman of Toyota "was 'a routine demand letter'" and "not an extortion." *Id.* ¶¶ 18–19.

Against this background, Plaintiffs allege that the article defamed them. Plaintiffs allege that the "headlines themselves are defamatory" and that "the articles 'conclude' that plaintiffs were guilty six days after the case was filed: 'Yes, it does'." *Id.* ¶ 23. Plaintiffs allege that "[e]very part of the first sentence" of the bulleted paragraph in Part I "is false and defamatory" because "Delaney" was not terminated, because "Delaney" did not "*decide* to use the former employer's trade secrets as a source of income,'" and because "there were no 'trade secrets' in this case." *Id.* ¶ 24. And Plaintiffs allege that the "supposed 'threat to disclose confidential information' and 'extortion' in The Daily Journal is a clear reference to Beres's April 7, 2020 employment demand letter to Toyota Motor Corporation in Japan, thereby imputing these crimes to him." *Id.* ¶ 25 (citing Exhibit B). Plaintiffs allege that the "defamatory content about plaintiffs spread like a disease including on social media," *id.* ¶ 32, and that Plaintiffs suffered "damage to their reputations, embarrassment, pain, humiliation, mental anguish, and have sustained past and future loss of earnings." *Id.* ¶ 37.

III. LEGAL STANDARDS

Courts have long encouraged early dismissals of defamation actions against the media. The "failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend [First Amendment] principles … because of the chilling effect of such litigation." *Times, Inc. v. McLaney*, 406 F.2d 565, 566 (5th Cir. 1969)[3]; *accord Farah v. Esquire Magazine*, 736 F.3d 528, 534 (D.C. Cir. 2013) ("[S]ummary

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before the close of business on September 30, 1981.

proceedings are essential in the First Amendment area because if a suit entails 'long and expensive litigation,' then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails.").

To survive a motion to dismiss, "a complaint must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 694 (11th Cir. 2016) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The article—a "copy" of which is attached as "an exhibit to" the amended complaint—is "part of the pleading for all purposes." FED. R. CIV. P. 10(c). When "there is a conflict between allegations in a pleading and exhibits thereto, it is well settled that the exhibits control." *Friedman v. Mkt. St. Mortg. Corp.*, 520 F.3d 1289, 1295 n.6 (11th Cir. 2008) (internal quotation marks omitted).

The amended complaint references the SDNY action, the claims in the SDNY action, and the complaint in the SDNY action itself. *See* Am. Compl. ¶¶ 18, 24 & n.2, 36. Although not attached by Plaintiffs, the SDNY complaint can and should be considered without converting this motion to dismiss to one for summary judgment under the incorporation-by-reference doctrine, because the SDNY complaint is "(1) central to the plaintiff's claim and (2) undisputed." *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002) (libel action); *accord Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) ("[A] document need not be physically attached to a pleading to be incorporated by reference into it; if the document's contents are alleged in a complaint and no party questions those contents, we may consider such document provided it meets the centrality requirement imposed in *Horsely*."). Similarly, the Court "may take judicial notice of certain facts"—including "[p]ublic records"—"without converting a motion to dismiss into a motion for summary judgment." *Universal Express, Inc. v. S.E.C.*, 177 F. App'x 52, 53 (11th Cir. 2016); *see also id.* at 53–54 ("Because the complaint filed in the Southern District of New York is a public

document, the district court was not obliged to convert the motion to dismiss to one for summary judgment or comply with the notice requirements of Rule 56(c)."); *cf., e.g.*, *Lozman v. City of Rivera Beach*, 713 F.3d 1066, 1075 n.9 (11th Cir. 2013) ("Although this matter is before the court on a motion to dismiss, [courts] may take judicial notice of the court documents from the state eviction action.").

IV. ARGUMENT

The Court should dismiss the amended complaint with prejudice because it fails to plausibly allege facts supporting two elements of a defamation claim and because the fair-report privilege bars Plaintiffs' claim. The Daily Journal will address each reason in turn.

A. The Amended Complaint Fails To State a Claim for Defamation

Under Florida law, "[t]he elements of a cause of action for defamation are: (1) the defendant published a false statement (2) about the plaintiff (3) to a third party and (4) the falsity of the statement caused injury to the plaintiff." *Bass v. Rivera*, 826 So. 2d 534, 535 (Fla. Dist. Ct. App. 2002) (internal quotation marks omitted). Plaintiffs have failed to plausibly allege that the Daily Journal published any statement "about" Beres or that any statement is "false."

1. None of the statement, citation, or the parenthetical is "of and concerning" Beres, and the statement is not about Delaney, either.

To be actionable, a statement must be "of and concerning"—that is, "about"—the defamation plaintiff. *See id.*; *accord Hay v. Indep. Newspapers, Inc.*, 450 So. 2d 293, 294 (Fla. Dist. Ct. App. 1984) ("To state a cause of action for libel, a private person must allege publication (1) of false and defamatory statements *of and concerning* that private person …." (emphasis added)); RESTATEMENT (SECOND) OF TORTS § 558 (1977) ("To create liability for defamation there must be: (a) a false and defamatory statement *concerning another* …." (emphasis added)). In defamation actions against the media, the "of and concerning" element has

constitutional implications as well. *See New York Times v. Sullivan*, 376 U.S. 254, 288 (1964) ("[T]he evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' respondent."); *accord Gilman v. Spitzer*, 902 F. Supp. 2d 389, 394 (S.D.N.Y. 2012) ("Although it is based on common law, the 'of and concerning' requirement has a constitutional dimension, serving a role in protecting freedom of speech and the press."). "Whether a challenged statement reasonably can be understood as of and concerning the plaintiff is a question of law for the Court, which should ordinarily be resolved at the pleading stage." *Gilman*, 902 F. Supp. 2d at 394 (internal quotation marks omitted).

Here, nothing in the statement, legal citation, or parenthetical is even remotely "of and concerning" Beres. And the statement is not about Delaney, either.

Take, first, the statement, which consists of a "potential scenario" that "[a] terminated employee cannot find new employment and decides to use the former employer's trade secrets as a source of income." The statement is followed by a citation—prefaced by the signals "see, e.g.,"—to the SDNY action and the SDNY complaint's allegations. When placed and construed in context, *cf. Turner v. Wells*, 879 F.3d 1254, 1263 (11th Cir. 2018) ("[A] court should construe statements in their totality, with attention given to cautionary terms used by the publisher in qualifying the statement."), it is clear that the statement is a hypothetical "potential scenario" merely *based* on the SDNY action (rather than actually about Delaney (or Beres)). Further, the statement refers only to a hypothetical "terminated employee"; it does not mention Delaney (and

much less Beres) by name. In context, then, the statement cannot "reasonably … be understood" as "of and concerning" either Beres or Delaney. *See Gilman*, 902 F. Supp. 2d at 394.[4]

Nothing in the citation or parenthetical is "of and concerning" Beres. The citation names only Delaney, and the parenthetical, too, is about Delaney, i.e., "a former employee of a legal staffing company." Am. Compl. ¶ 24. The amended complaint alleges that the "supposed 'threat to disclose confidential information' and 'extortion' … is a clear reference to Beres's April 7, 2020 employment demand letter … thereby imputing those crimes to him." *Id.* ¶ 25. But these allegations conflict with what the parenthetical actually states, which is that the SDNY complaint "alleges that a former employee"—i.e., Delaney—"tried to extort clients for $450,000 by threatening to release confidential information." And it is the parenthetical in the article attached to the amended complaint that controls whether it states anything "of and concerning" Beres—not any conflicting allegations. *See Friedman*, 520 F.3d at 1295 n.6 ("Where there is a conflict between allegations in a pleading and exhibits thereto, it is well settled that the exhibits control." (internal quotation marks omitted)).

For this reason, Beres cannot state a claim for defamation, and Delaney cannot state a claim for defamation based on the statement.

[4] Plaintiffs admit that the statement is not "of and concerning" Beres. *See* Am. Compl. ¶ 24 ("*Delaney* was not …." (emphasis added)); *id.* ("*Delaney* did not …." (emphasis added)). These admissions are binding. *See Registe v. Linkamerica Express, Inc.*, 2014 WL 12586053, at *2 (M.D. Fla. Mar. 19, 2014) ("An admission in a pleading is deemed a judicial admission, and it is binding on the party who makes it."); *accord Continental Ins. Co. of New York v. Sherman*, 439 F.2d 1294, 1298 (5th Cir. 1971) ("As a general rule the pleading of a party made in another action, as well as pleadings in the same action which have been superseded by amendment, withdrawn or dismissed, are admissible as admissions of the pleading party to the facts alleged therein ….").

2. The statement, citation, and description are not false.

A "false statement of fact is the *sine qua non* for recovery in a defamation action." *Byrd v. Hustler Mag., Inc.*, 433 So. 2d 593, 595 (Fla. Dist. Ct. App. 1983); *accord Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008) (listing "falsity" as an element of a cause of action for defamation). But "[a] statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Smith v. Cuban Am. Nat'l Found.*, 731 So. 2d 702, 707 (Fla. Dist. Ct. App. 1999) (per curiam) (internal quotation marks omitted). "Under the substantial truth doctrine, a statement does not have to be perfectly accurate if the 'gist' or 'sting' of the statement is true." *Id.* Rather, "falsity exists only if the publication is substantially and materially false, not just if it is technically false." *Id.*

Here, even a cursory review of the allegations in SDNY complaint shows that nothing about the statement, citation, or parenthetical is false. The following are some of the core allegations of the SDNY complaint:

- Plaintiff is "a legal staffing company." Exhibit 1: SDNY Complaint ¶¶ 1, 13, *HC2, Inc. v. Delaney*, No. 20-cv-03178-LJL (S.D.N.Y. Apr. 22, 2020), ECF No. 1.
- Delaney "was selected" as a "contract attorney[]" to "work on a temporary document review project," which included "the review of confidential documents, attorney-client privileged materials, and attorney work-product." *Id.* ¶ 2.
- The project was "suspended" because of the COVID-19 pandemic. *Id.* ¶¶ 3, 20–21.
- Delaney "emailed senior management … alleging retaliatory termination, threatening litigation, and demanding payment." *Id.* ¶ 5; *see also id.* ¶¶ 6, 8, 23–25, 31.
- "Delaney then engaged counsel to demand $450,000 from the Corporate Client. Delaney's counsel ceased representing him a few days after making the entirely unjustified demand. Delaney immediately engaged new counsel to write a letter to the Corporate Client's Chief Executive Officer and its Board of Directors alleging that Delaney had been wrongfully terminated, accusing Corporate Client of all manner of unsubstantiated offenses, and reciting information belonging to the Corporate Client which is confidential and subject to the attorney-client privilege. In the letter, emailed on April 13, Delaney's lawyer threatened to commence legal action and publicly disclose such confidential and privileged information about the Corporate Client that Delaney had

obtained during the Project if Delaney's demand was not met by the next day." *Id.* ¶ 6; *see also id.* ¶¶ 1, 29, 31, 33, 49.

- The SDNY complaint expressly alleges that this was a "scheme to extort a significant payment from the Corporate Client." *Id.* ¶ 31.
- "The NDA defines 'Confidential Information' as 'confidential and proprietary information … belonging to the Clients or their clients … which are secret and not generally known and/or available to third parties ….'" *Id.* ¶ 36.

These allegations and others show that nothing about the statement, citation, or parenthetical is false. The SDNY complaint alleges that Delaney was a "contract attorney[]" who alleged "retaliatory termination," and who then engaged counsel to "threaten[] to commence legal action and publicly disclose such confidential and privileged information … if Delaney's demand was not met by the next day." SDNY Compl. ¶¶ 2, 5–6. In challenging the statement, Plaintiffs allege that Delaney was not terminated, *see* Am. Compl. ¶ 24 & n.2, that Delaney did not "decide" to use trade secrets as a source of income, *see id.*, and that there were no trade secrets in the case, *see id.* But even if the statement—which, again, refers only to a hypothetical "terminated employee"—could plausibly be regarded as "of and concerning" Delaney, Plaintiffs ignore the SDNY complaint's allegations entirely to make their claims. Instead, Plaintiffs either nitpick with the language in the article or focus on Judge Liman's alleged finding made after the article was published "that there were no 'trade secrets' in the case." *Id.* ¶ 27. None of this, however, is sufficient to plead falsity, because "a statement does not have to be perfectly accurate if the 'gist' or 'sting' of the statement is true." *Smith.*, 731 So. 2d at 707. To the contrary, "falsity exists only if the publication is substantially and materially false, not just if it is technically false." *Id.* Plaintiffs have wholly failed to allege that anything about the statement was "substantially and materially false" as opposed to being, at most, just "technically false."

Plaintiffs' challenge to the citation and parenthetical is just as weak. Again, Plaintiffs allege as false the parenthetical description that "the complaint alleges that a former employee of

a legal staffing company tried to extort clients for $450,000 by threatening to release confidential information after they suspended a document review project due to the COVID-19 pandemic." Am. Compl. ¶ 24. But, as shown, the parenthetical describes precisely the allegations of the SDNY complaint. Plaintiffs' mere say-so to the contrary is irrelevant. *See Marder v. TEGNA Inc.*, 2020 WL 3496447, at *5 (S.D. Fla. June 29, 2020) (dismissing with prejudice defamation claim based on a statement that a civil complaint, instead of a criminal complaint, had been filed because "the truth would not have produced a different effect on the reader than the statement about the criminal complaint"); RESTATEMENT (FIRST) TORTS § 582 (1938) ("The truth of a defamatory statement of fact is a complete defense to an action for defamation.").

* * *

In short, Plaintiffs have failed to plausibly allege that the statement, citation, or parenthetical is of and concerning them and have failed to plausibly allege falsity. For these reasons, Plaintiffs' defamation claim fails.[5]

B. The Fair-Report Privilege Bars Plaintiffs' Claim

For a similar—yet legally distinct—reason, Plaintiffs' action should be dismissed because of the fair-report privilege.[6]

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[5] Plaintiffs also allege that the "headlines themselves are defamatory." Am. Compl. ¶ 23. Under Florida law, "stories are to be read with their headlines." *Byrd*, 433 So. 2d at 595. For the same reasons that Plaintiffs' defamation claim based on the statement, citation, and parenthetical fails, any claim based on the headlines—"Does COVID-19 threaten your trade secrets? (Yes, it does)"—fails, too.

[6] Courts routinely consider the fair-report privilege on a motion to dismiss. *See, e.g.*, *Lee v. TMZ Prods. Inc.*, 710 F. App'x 551, 558 (3d Cir. 2017) (affirming 12(b)(6) dismissal of libel complaint based on the fair-report privilege because the articles "present[ed] full, fair, and accurate reports of the [] press conference and press release"); *Marder*, 2020 WL 3496447, at *4 ("All of these statements are substantially accurate accounts of what is contained in the official court documents …. Thus, the Motion to Dismiss is granted ….."); *Olsen v. Providence J., Co.*, 261 F. Supp. 3d 362, 370 (D.R.I. 2017) (granting motion to dismiss under Rule 12(b)(6) based

Under Florida law, the "news media has been given a qualified privilege to accurately report on the information they receive from government officials. This privilege includes the broadcast of the contents of an official document, as long as their account is reasonably accurate and fair, even if the official documents contain erroneous information." *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 502 (Fla. Dist. Ct. App. 1993) (internal quotation marks omitted) (citations omitted). To avail itself of the fair-report privilege, the news media's "reporting need not 'be exact in every immaterial detail or conform to the precision demanded in technical or scientific reporting." *Marder*, 2020 WL 3496447, at *4 (quoting *Woodard*, 616 So. 2d at 502–03). The fair-report privilege has been held to extend to "allegations made in … complaint[s]" and "related court records." *Id.*; *see also Ortega v. Post-Newsweek Stations, Fla., Inc.*, 510 So. 2d 972 (Fla. Dist. Ct. App. 1987) ("[The press] does have a qualified privilege to report on matters brought out in public proceedings.").

For substantially the same reasons that Plaintiffs fail to allege falsity, the fair-report privilege bars their claims. As shown, a careful, objective comparison of the SDNY complaint and statement, citation, and parenthetical shows that each portrays a "reasonably accurate and fair" description of the contents and allegations of the SDNY complaint. All these statements are thus protected by the fair-report privilege. *See Alan v. Palm Beach Newspapers, Inc.*, 973 So. 2d 1177, 1180 (Fla. Dist. Ct. App. 2008) ("It is not improper for a trial court to determine whether allegedly defamatory statements are fair, accurate and impartial. In this case, the trial court determined, and the record supports, the published statements were fair, accurate and impartial. The Post obtained the information for the published statements from court documents and court

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on the fair-report privilege); *Hargrave v. Washington Post*, 2009 WL 1312513, at *1 (D.D.C. May 12, 2009) ("[T]he Court finds that the newspaper article is protected by the fair report privilege and, thus, grants defendant's motion to dismiss.").

proceedings surrounding Alan's arrest and trial." (citation omitted)); *Stewart*, 695 So. 2d at 362 ("Our comparison of the defamatory information with the official documents or press releases issued by the sheriff's office leads us to conclude that there are no material differences. Accordingly, the trial court was correct in disposing of these claims [based on the fair-report privilege].").

V. CONCLUSION

For all these reasons, the Court should dismiss Plaintiffs' amended complaint for failure to state a claim on which relief can be granted. And because any amendment would be futile, the Court should dismiss the amended complaint *with prejudice*.

Dated: February 8, 2022

TOTH FUNES PA

s/Brian W. Toth
Brian W. Toth
Florida Bar No. 57708
btoth@tothfunes.com
Freddy Funes
Florida Bar No. 87932
ffunes@tothfunes.com
201 South Biscayne Boulevard, 28th Floor
Miami, Florida 33131
Telephone: (305) 717-7852

Counsel for Defendant