APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

Opinion, United States Court of Appeals for the Eleventh Circuit (October 21, 2022) 1a

Order Granting Summary Judgment, United States District Court for the Middle District of Florida Orlando Division (May 20, 2022) 9a

Order Granting Motion to Dismiss Without Prejudice, United States District Court for the Middle District of Florida Orlando Division (April 7, 2021) 29a

Order Granting Motion to Dismiss Without Prejudice, United States District Court for the Middle District of Florida Orlando Division (January 26, 2021) 46a

REHEARING ORDER

Order Denying Petition for Rehearing, United States Court of Appeals for the Eleventh Circuit (December 14, 2022) 69a

OPINION, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (OCTOBER 21, 2022)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALAN GRAYSON,

Plaintiff-Appellant,

v.

NO LABELS, INC., PROGRESS TOMORROW, INC., UNITED TOGETHER, INC., NANCY JACOBSON, MARK PENN, ET AL.,

Defendants-Appellees.

No. 22-11740

Non-Argument Calendar

Appeal from the United States District Court for the Middle District of Florida D.C. Docket No. 6:20-cv-01824-PGB-LHP

Before: WILLIAM PRYOR, Chief Judge, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

Alan Grayson appeals the summary judgment against his second amended complaint of defamation, defamation by implication, and civil conspiracy by No Labels, Inc., its founder, Nancy Jacobson, her husband, Mark Penn, and two defunct political action committees, Progress Tomorrow, Inc., and United Together, Inc. Grayson alleged that his reputation was tarnished and he lost his seat in the United States House of Representatives because the defendants falsely denounced him for profiteering and for spousal abuse. The district court ruled that the defendants' reference to reliable publications in their mailings and online postings evidenced they acted without actual malice and were not liable for defamation and that Grayson's claim of civil conspiracy failed as a matter of law. We affirm.

Grayson filed a complaint in a Florida court against the defendants, who removed the action to federal court, *see* 28 U.S.C. § 1332, and then moved to dismiss. The district court dismissed Grayson's complaint without prejudice for failure to state a claim of defamation, invasion of privacy, cyberstalking, civil conspiracy, or fraudulent transfer. *See* Fed. R. Civ. P. 12(b)(6). Grayson's amended complaint of defamation, invasion of privacy, and civil conspiracy suffered a similar fate. *See id.*

With leave from the district court, Grayson filed a second amended complaint against the defendants for defamation, defamation by implication, and civil conspiracy. Grayson alleged that the defendants, "acting through Progress Tomorrow," disparaged him using the mail, internet postings, and the website "FloridaDeservesBetter.org." Those materials touted

that a "Congressional Ethics Investigation Found Alan Grayson Abused His Office for Financial Gain" and "to enrich himself," that he "[h]id income on his public disclosures," and that he "[u]sed taxpayer resources to conduct his high-risk investor scheme." One mailing depicted Grayson sitting in a chaise lounge on the beach in Grand Cayman with a drink close at hand. A two-sided mailing had, on one side, a man carrying an attache case striding to a jet bound for Grand Cayman and, on the other side, an opened attache case containing a passport bearing Grayson's photo with dollar signs for eyes and 15 stacks of $100 bills. A third mailing accused Grayson of abusing his former wife. On Facebook, the defendants touted that Grayson "used international government travel to drum up business for his hedge fund," "used Congressional staff to work for the fund," and had a hostile incident with a reporter.

Progress Tomorrow moved for summary judgment and argued there was no evidence that its publications were false or distributed with actual malice, and the other defendants moved for similar relief on the ground they were uninvolved in the publications. Progress Tomorrow submitted copies of its mailings and online postings, which cited to various news websites and directed readers to visit "FloridaDeservesBetter.org," which contained hyperlinks to a congressional report and news articles about Grayson and his divorce proceedings. The defendants also submitted copies of articles about Grayson's business and personal affairs in the *New York Times, Politico, Washington Post, Orlando Weekly,* and *Vanity Fair,* police reports; and his former wife's deposition.

Some of the defendants' mailings urged readers to examine a "nearly 1,000 page report" produced after a "congressional ethics investigation" of Grayson. Investigators found that Grayson, "an attorney who often worked on litigation involving the federal government," created a hedge fund during his first term in office from which "on at least one occasion . . . [he] appear[ed] to have received compensation"; he "managed a Virginia-based corporation that used the Grayson name and provided legal services involving a fiduciary relationship"; and he "agreed to receive contingent fees in cases in which the federal government had a direct and substantial interest . . . during his time in Congress." The report described omissions from "Grayson's annual financial disclosure forms concerning assets, income, agreements and positions" "significantly related to . . . the Grayson Hedge Fund and . . . [his] interest in law firms and pending litigation" and Grayson's role as a "limited partner in three energy-sector limited partnerships, all of which had agreements with the federal government" while he was a member of Congress. The report also described "multiple instances in which a congressional staffer[,] . . . who was also employed by the Grayson Hedge Fund, used official time and resources to work for the hedge fund" and for Grayson and how Grayson misused campaign resources.

The district court granted the defendants' motions for summary judgment. The district court ruled that the defendants' "reasonable reliance on previously published reports from . . . independent, reputable sources rebut[ted] the presence of actual malice" and rendered Grayson's "defamation claims not viable." The district court declined to consider Grayson's

"various theories and conjectures regarding [the] Defendants' liability" that lacked evidentiary support, Grayson's "cease and desist letter characterizing Defendants' publications as defamatory," or his allegations of additional defamatory statements in his opposition to summary judgment. The district court also ruled that, without any actionable defamation, Grayson's "civil conspiracy claim also fail[ed]."

We review *de novo* the summary judgment against Grayson's second amended complaint and view the evidence in the light most favorable to him as the non-movant. *See Edward Lewis Tobinick, MD v. Novella,* 848 F.3d 935, 943 (11th Cir. 2017). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Florida provides causes of action for defamation and defamation by implication. Defamation requires publication of a defamatory statement that is false and that causes its subject actual damages. *Jews For Jesus, Inc. v. Rapp,* 997 So.2d 1098, 1106 (Fla. 2008). Defamation by implication occurs when "literally true statements are conveyed in such a way as to create a false impression. . . . " *Id* at 1108.

For a public figure like Grayson to prevail on his claims of defamation, he must prove that the defendants acted with actual malice. *See Berisha v. Lawson,* 973 F.3d 1304, 1312, 1314 n.6 (11th Cir. 2020); *Rapp,* 997 So.2d at 1106, 1108. In *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), the Supreme Court held that the First Amendment requires a public figure to prove that a defamatory statement was made with actual malice to recover damages. *Id* at 279-80. That standard applies equally to the media and non-media

because both decide what "facts to include in their publication." *Turner v. Wells,* 879 F.3d 1254, 1271 (11th Cir. 2018); *see Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 352 (2010). A public figure must prove "—well beyond a preponderance of the evidence—that the defendants published a defamatory statement either with actual knowledge of its falsity or with a high degree of awareness of its probable falsity." *Berisha,* 973 F.3d at 1312 (internal quotation marks omitted).

The district court did not err by granting summary judgment against Grayson's claims of defamation and defamation by implication. Grayson submitted no evidence from which a jury might plausibly infer that the defendants distributed statements "with knowledge that [the statements] were false or with reckless disregard of whether [they were] false or not," *Sullivan,* 376 U.S. at 279-80. The defendants' mailings and online postings cite source materials, including an official congressional report, articles in well-known newspapers and magazines, and police reports. The defendants' "reliance on these many independent sources, alone, . . . de-feat[s] any claim of actual malice." *Berisha,* 973 F.3d at 1313. And it does not matter that, as Grayson argues, republication of defamatory statements is defamation because "a reasonable juror would not conclude (clearly and convincingly) that [the defendants would] h[ave] serious doubts about the truth of the information they were repeating. *See id.* at 1312.

Grayson argues that the district court—'cherry-picked' the defamatory statements as to which it considered actual malice," but we disagree. The district court correctly refused to consider defamatory statements Grayson alleged in his opposition to summary

judgment that he had omitted from—and never sought to add by amendment to—his second amended complaint. *See Dukes v. Deaton,* 852 F.3d 1035, 1046 (11th Cir. 2017). Grayson identifies no allegedly defamatory statement in his second amended complaint that the district court overlooked.

The district court also correctly entered summary judgment against Grayson's claim of civil conspiracy. "Under Florida law, the gist of a civil conspiracy is not the conspiracy itself but the civil wrong which is done through the conspiracy which results in injury to the Plaintiff." *Am. United Life Ins. Co. v. Martinez,* 480 F.3d 1043, 1067 (11th Cir. 2007) (internal quotation marks omitted). Because "a claim that is found not to be actionable cannot serve as the basis for a conspiracy claim," *id,* and Grayson cannot prove actual malice to support his claims of defamation, his claim of a civil conspiracy fails as a matter of law.

Grayson's challenges to the dismissal of his claims of invasion of privacy, cyberstalking, and fraudulent transfer are not properly before us. "[A]n amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against his adversary." *Pintando v. Miami-Dade Hous. Agency,* 501 F.3d 1241, 1243 (11th Cir. 2007) (quoting *Dresdner Bank AG, Dresdner Bank AG in Hamburg v. M/V OLYMPIA VOYAGER,* 463 F.3d 1210, 1215 (11th Cir. 2006)). Grayson abandoned his claims of cyberstalking and fraudulent transfer by failing to replead them in his amended complaint. And Grayson abandoned his claim of invasion of privacy by omitting it from his second amended complaint.

We AFFIRM the summary judgment in favor of No Labels, Jacobson, Penn, Progress Tomorrow, and United Together.

ORDER GRANTING SUMMARY JUDGMENT, UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION (MAY 20, 2022)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ALAN GRAYSON,

Plaintiff,

v.

NO LABELS, INC., PROGRESS TOMORROW, INC., UNITED TOGETHER, INC., NANCY JACOBSON, MARK PENN and JOHN DOES,

Defendants.

Case No. 6:20-cv-1824-PGB-LHP

Before: Paul G. BYRON, United States District Judge.

ORDER

This case arises from the August 28, 2018, Democratic Party Primary Election for a seat in the United States House of Representatives for Florida's Ninth Congressional District, in which Darren Soto defeated former Congressman Plaintiff Alan Grayson.

(Docs. 136, 137). In his Second Amended Complaint,[1] Plaintiff sues Defendants Progress Tomorrow, Inc. (a now-defunct political action committee), United Together, Inc. (another now-defunct political action committee), No Labels, Inc. (a nonprofit organization), Nancy Jacobson (the president and founder of No Labels, Inc.), and Mark Penn (Nancy Jacobson's husband) for defamation (Count I),[2] defamation by implication (Count II),[3] and civil conspiracy to commit the allegedly defamatory acts (Count III).[4] (Docs. 35,

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[1] Plaintiff originally initiated this action in state court, which Defendants removed to this Court on October 2, 2020. (Doc. 1). Plaintiff filed his Second Amended Complaint on April 21, 2021. (Doc. 35).

[2] "Federal courts sitting in diversity apply the substantive law of the forum state." *Grange Mut. Cas. Co. v. Woodard*, 826 F.3d 1289, 1295 (11th Cir. 2016). "Defamation under Florida law has these five elements: (1) publication; (2) falsity; (3) the statement was made with knowledge or reckless disregard as to the falsity on a matter concerning a public official . . . ; (4) actual damages; and (5) the statement must be defamatory." *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018) (citing *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1106 (Fla. 2008)).

[3] "[D]efamation by implication is a well-recognized species of defamation that is subsumed within the tort of defamation," and it "turns on whether the 'gist' of the publication is false." *Jews for Jesus*, 997 So. 2d at 1108; *Turner*, 879 F.3d at 1269 (collecting Florida case law).

[4] Under Florida law, a civil conspiracy claim has four elements: (1) an agreement between two or more parties; (2) to do an unlawful act or to do a lawful act by unlawful means; (3) the doing of some overt act in pursuance of the conspiracy; and (4) damage to the plaintiff as a result of the acts done under the conspiracy. *See United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1271 (11th Cir. 2009) (quoting *Charles v. Fla. Foreclosure Placement Ctr., LLC*, 988 So.2d 1157, 1159–60 (Fla. 3d DCA 2008)).

136, 137). Specifically, Plaintiff claims that Defendants, "acting through" Progress Tomorrow, Inc., published defamatory statements on various platforms that ruined his reputation and caused him to lose the 2018 congressional campaign. (Doc. 35, ¶ 1).

Now before the Court are Defendants' respective Motions for Summary Judgment (Docs. 94, 95),[5] Plaintiff's responses in opposition (Docs. 110, 111), and Defendants' replies thereto (Docs. 113, 114). Upon consideration, the Motions for Summary Judgment are due to be granted.

I. Standard of Review

To prevail on a motion for summary judgment under Federal Rule of Civil Procedure 56, the movant must show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "An issue of fact is 'material' if, under the applicable substantive law, it might affect the outcome of the case. An issue of fact is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Harrison v. Culliver*, 746

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[5] United Together, Inc., No Labels, Inc., Nancy Jacobson, and Mark Penn argue that only Progress Tomorrow, Inc., published the allegedly defamatory statements. (Doc. 95). Therefore, Progress Tomorrow, Inc., moves for summary judgment separately (Doc. 94), and the other Defendants' brief focuses solely on the publication element of the defamation claims (Doc. 95). However, the other Defendants' brief incorporates by reference the arguments advanced by Progress Tomorrow, Inc., as to the other elements of the defamation claims. (Doc. 95, p. 20). Accordingly, even though the Court refers exclusively to Progress Tomorrow, Inc.'s Motion for Summary Judgment for the purposes of this Order, the Court refers to Defendants collectively.

F.3d 1288, 1298 (11th Cir. 2014) (internal quotations omitted).

The Court must "view the evidence and all factual inferences therefrom in the light most favorable to the [nonmoving] party, and resolve all reasonable doubts about the facts in favor of the non-movant." *Davila v. Gladden*, 777 F.3d 1198, 1203 (11th Cir. 2015) (quoting *Carter v. City of Melbourne*, 731 F.3d 1161, 1166 (11th Cir. 2013) (per curiam)). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Brooks v. Cnty. Comm'n of Jefferson Cnty.*, 446 F.3d 1160, 1162 (11th Cir. 2006) (quoting *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990)).

Importantly, there is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (emphasis in original). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file." *Id.* (internal quotations omitted). "Such a motion, whether or not accompanied by affidavits, will be made and supported as provided in this rule, and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* (internal quotations omitted).

II. Governing Law: Defamation & the First Amendment[6]

The seminal case on the intersection between the tort of defamation and the protections of the First Amendment, *New York Times Co. v. Sullivan*, emphasizes the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. 254, 270 (1964). Given the importance of the First Amendment's "guarantees," a public figure cannot prevail in a defamation lawsuit unless he demonstrates, by clear and convincing proof, that the defendants published the allegedly defamatory statements with "actual malice," meaning "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279–80; *Harte-Hanks Commc'ns., Inc. v. Connaughton*, 491 U.S. 657, 659 (1989).

"That is, he must be able to show—well beyond a preponderance of the evidence—that the defendants published a defamatory statement either with actual knowledge of its falsity or with a 'high degree of awareness' of its 'probable falsity.'" *Berisha*, 973 F.3d at 1312 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). The actual malice standard "is a subjective test, which asks whether the [defendants] '*in fact*

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[6] Florida law governs the merits of the instant defamation causes of action, but the "standards for public figures and 'actual malice' derive from the First Amendment and thus . . . are matters of federal law." *Berisha v. Lawson*, 973 F.3d 1304, 1314 n.6 (11th Cir. 2020).

entertained serious doubts as to the truth of [their] publication[s].'" *Id.* (emphasis in original) (quoting *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1498 (11th Cir. 1988)).

Certain circumstantial evidence, such as the defendants' motivations or lack of diligence, bears on the existence of actual malice:

> Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant[s], is the product of [their] imagination[s], or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the [] allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Michel v. NYP Holdings, Inc., 816 F.3d 686, 703 (11th Cir. 2016) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). However, "courts must be careful not to place too much reliance on such [circumstantial evidence]" as "the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." *Harte-Hanks*, 491 U.S. at 667–68.

Furthermore, "[e]ven an 'extreme departure from professional publishing standards' does not necessarily rise to the level of actual malice." *Berisha*, 973 F.3d at 1312 (quoting *Harte-Hanks*, 491 U.S. at 665); *see St. Amant*, 390 U.S. at 731 ("[R]eckless conduct is not measured by whether a reasonably prudent man

would have published, or would have investigated before publishing."). "Thus, a failure to investigate, standing on its own, does not indicate the presence of actual malice. Rather, there must be some showing that the defendant[s] purposefully avoided further investigation with the intent to avoid the truth." *Michel*, 816 F.3d at 703 (internal citations omitted).

The inverse is also true: the defendants' reasonable reliance on previously published reports from independent, reputable sources "defeat[s] any claim of actual malice." *Berisha*, 973 F.3d at 1313. Likewise, "[w]here [the defendants] give[] readers sufficient information to weigh for themselves the likelihood of an article's veracity, it reduces the risk that readers will reach unfair (or simply incorrect) conclusions, even if the [defendants themselves have]," and rebuts the presence of actual malice. *Michel*, 816 F.3d at 703; *see also Klayman v. City Pages*, 650 F. App'x 744, 751 (11th Cir. 2016) ("Evidence that an article contains information that readers can use to verify its content tends to undermine claims of actual malice. . . . [I]f the defendants actually had been highly aware of the publications' falsity, it is unlikely they would have included source information that refuted any defamatory claims or implications.").

III. Analysis

There are two categories of allegedly defamatory statements at issue. The Court examines these categories in turn and ultimately concludes that summary judgment in favor of Defendants is proper because there is no clear and convincing proof of actual malice.

A. The First Category: Plaintiff's Conduct as a Former Congressman

First, the Second Amended Complaint contests two print advertisements, or "mailers," containing the following statements: "Congressional Ethics Investigation Found Alan Grayson Abused His Office for Financial Gain"; "A Congressional Ethics Investigation found evidence that Alan Grayson Abused His Position in Congress to enrich himself"; "as a congressman, he . . . [h]id income on his public disclosures" and "[u]sed taxpayer resources to conduct his high-risk investor scheme"; "Alan Grayson Used His [Congressional] Office For His Own Financial Gain." (Doc. 35, ¶¶ 19–22). The Second Amended Complaint describes the first mailer as a picture of Plaintiff lounging on the beach in the Cayman Islands with a cocktail. (*Id.* ¶ 21). It describes the front of the second mailer as a picture of a figure striding towards a jet bound for the Cayman Islands, an attaché case in hand. (*Id.* ¶ 22). On the back, the open attaché case reveals stacks of cash and Plaintiff's passport photograph, with dollar signs replacing his eyes. (*Id.*).[7] The Second Amended Complaint also alleges that the same content appeared online, alongside other statements that Plaintiff: "used international government travel to drum up business for his hedge fund"; "used Congressional staff to work for the fund" (omitting the fact that the staffer

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[7] In a footnote, the Second Amended Complaint describes a third mailer as a picture of a Cayman Islands beach with the caption, "Where Alan Grayson Made Congress Work For Him." (*Id.* ¶ 21 n.2). It is not clear whether this mailer forms part of the basis of Plaintiff's lawsuit, particularly as the parties do not discuss it in their briefs; regardless, the logic herein applies to the footnoted mailer with equal force.

worked for the fund when Plaintiff was not a member of Congress); and called for a reporter's arrest after the reporter asked Plaintiff some questions (omitting the fact that Plaintiff called for the reporter's arrest because the reporter repeatedly chest-bumped him in an ambush interview). (*Id.* ¶¶ 30–31, 33 n.13, 35–36, 57).[8]

Interestingly, the Second Amended Complaint does not attach the contested mailers or the allegedly defamatory online content. However, Defendants attach the described mailers to their brief,[9] and, notably, the Second Amended Complaint leaves out a few details. Both mailers cite to a December 18, 2015, report by the Office of Congressional Ethics ("OCE") and encourage readers to review it themselves and "check the facts" in three different places. (Docs. 94-21, 94-23). As is relevant here, the nearly 1,000-page OCE report, also attached to Defendants' brief, finds "substantial reason to believe" that: Plaintiff "im-

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[8] In another footnote, the Second Amended Complaint mentions that Defendants made another defamatory statement, "Grayson pushed reporter." (*Id.* ¶ 23 n.6). Again, it is not clear whether this statement forms part of the basis of Plaintiff's lawsuit, particularly as the parties do not discuss it in their briefs; regardless, the logic herein applies to the footnoted statement with equal force.

[9] In their brief, Defendants state that Plaintiff's Amended Answers to Interrogatories alleged that all publications produced by Defendants during discovery are also defamatory. (Doc. 94, p. 11 n.1). Thus, "in an abundance of caution," Defendants attach all publications produced during discovery. (*Id.*). However, the Court limits its review to those allegedly defamatory publications specified in the Second Amended Complaint; Plaintiff cannot further amend his pleading through his Amended Answers to Interrogatories. *See* Fed. R. Civ. P. 15(a).

properly allowed the use of his name by four entities connected to [his] hedge fund," including entities in the Cayman Islands, "and received compensation through management fees"; Plaintiff "improperly omitted information related to his assets, unearned and earned income, reportable agreements and positions from his [annual financial] disclosure statements"; and "[Plaintiff's] congressional staffer improperly used official resources for unofficial purposes, including the use of staff time and resources to perform work for [his] hedge fund." (Doc. 94-8, pp. 2, 11–25, 39–59, 73).

In addition to the OCE report, one of the mailers cites to a June 30, 2015, *Politico* article, "Grayson hedge funds skirt ethics rule," and Defendants attach the article—which they assert has not been retracted and remains available online—to their brief. (Docs. 94-11, 94-21). In it, *Politico* reports that Plaintiff managed "hedge funds that use his name in their title[s]," "two of which are based in the Cayman Islands," "a practice prohibited by congressional ethics rules designed to prevent members from using their elected post for financial gain." (Doc. 94-11, p. 1). Defendants also attach a February 11, 2016, *New York Times* article, "Alan Grayson's Double Life: Congressman and Hedge Fund Manager," to their brief, again asserting that it has not been retracted and remains available online:

> This highly unusual dual role—a sitting House lawmaker running a hedge fund, which until recently had operations in the Cayman Islands—has led to an investigation of Mr. Grayson by the House Committee on Ethics. The inquiry has become public, but

> emails and marketing documents obtained by [*The New York Times*] show the extent to which Mr. Grayson's roles as a hedge fund manager and a member of Congress were intertwined, and how he promoted his international travels, some with congressional delegations, to solicit business.

(Doc. 94-10, p. 1). As to their statements regarding the incident between Plaintiff and the reporter, Defendants attach July 2016 articles by *Politico*,[10] *The Washington Post*,[11] *Orlando Weekly*,[12] and *Vanity Fair*,[13] to their

[10] "Rep. Alan Grayson threatened to have a POLITCO reporter arrested . . . , alleging that the reporter assaulted him as he attempted to question the congressman about allegations of domestic abuse." (Doc. 94-15, p. 1).

[11] "There is no perfectly right way to handle allegations of domestic violence, but Rep. Alan Grayson (D-Fla.) just demonstrated the totally wrong way. At an event hosted by Politico in Philadelphia, site of the Democratic National Convention, Grayson . . . got in the face of—and made contact with—Edward-Isaac Dovere, a reporter for Politico, which earlier in the day published claims of abuse by the congressman's ex-wife." (Doc. 94-16, p. 2).

[12] "U.S. Rep. Alan Grayson was caught on video threatening to call police on a Politico reporter who was asking him questions about a report where his ex-wife Lolita [Carson-Grayson] says she repeatedly went to law enforcement officials accusing the congressman of alleged domestic abuse over a two-decade period. . . . Grayson appears to push past Dovere . . . After they both accused each other of pushing, Dovere says there's evidence of who started it on video. Grayson tells him, 'Well that's right and it's a good thing. I'll be handing it over to the Capitol police, my friend.' After some more arguing, Grayson tells Dovere, 'You know, I hope somebody comes here and arrests you.'" (Doc. 94-17, pp. 1–2).

[13] "Mere hours after Politico revealed 20 years' worth of claims of domestic abuse filed against the congressman by his ex-wife,

brief, once more asserting that these reports have not been retracted and remain available online. (Docs. 95-15, 94-16, 94-17, 94-18).

Thus, Defendants correctly contend that their reasonable reliance on previously published reports from these independent, reputable sources for all their advertisements, as well as their citation to some of these sources in the mailers, rebuts the presence of actual malice. *See Berisha*, 973 F.3d at 1313; *Michel*, 816 F.3d at 703.

Perplexingly, Plaintiff's response brief[14] raises a vague hearsay objection to all of Defendants' attached exhibits. (Doc. 110, pp. 3–5). Because Plaintiff does not define the basis for his hearsay objection, and therefore "decline[s] to put forth any argument on the issue or provide legal authority in support of [his] position," the objection is overruled. *Nephron Pharms. Corp. v. Hulsey*, No. 6:18-cv-1573, 2020 WL 7137992, at *3 (M.D. Fla. Dec. 7, 2020) (citing *U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 n.13 (11th Cir. 2007)).

Lolita [Carson-Grayson], the politician lashed out at a reporter from the outlet, Edward-Isaac Dovere, whom he threatened to have arrested. The altercation, which occurred at a Politico event in Philadelphia, was caught on tape. In the footage, Grayson can be heard saying, 'You're assaulting a member of Congress,' and, 'You know, I'm hoping someone comes here and arrests you,' after Dovere asks for a comment on the alleged domestic abuse." (Doc. 94-18, p. 2).

[14] Most of Plaintiff's response brief is in single-spaced, bullet-pointed, 12-point font. (Doc. 110). Normally, the Court would strike this filing as a blatant violation of Local Rules 1.08 and 3.01, but it suffers through this headache-inducing format in the interests of judicial efficiency.

Even setting aside this glaring defect, Plaintiff's hearsay objection is clearly baseless. The attached mailers are not hearsay; they are not offered for the truth of the matter but rather to show the legally operative facts at issue (*i.e.*, the allegedly defamatory words in the full context in which they were published). Fed. R. Evid. 801(c).[15] Likewise, the attached reports are not hearsay; they are not offered for the truth of the matter but rather to show the effect of those reports on Defendants, and the OCE report is also admissible as a public record. Fed. R. Evid. 803(8).[16] The Court does not need to consider the evidence subject to *Daubert* challenges for the purposes of this Order; Plaintiff's broad authenticity objection to any documents downloaded from a website is foundationless, Fed. R. Evid. 902(5)–(6); and Plaintiff's objection that some of the attached publications were not produced during discovery is unsupported.[17]

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[15] This applies to the mailers identified in the Second Amended Complaint as well as all the other allegedly defamatory publications attached to Defendants' brief, *supra* note 9. (*See* Docs. 94-21, 94-22, 94-23, 94-24, 94-25, 94-26, 94-27, 94-28, 94-29, 94-30, 94-31, 94-32, 94-33, 9434, 94-35, 94-36, 94-37).

[16] (*See* Docs. 94-8, 94-10, 94-11, 94-12, 94-15, 94-16, 94-17, 94-18). This also applies to the attached police reports and medical records of spousal abuse by Lolita Carson-Grayson against Plaintiff, discussed in more detail below (Doc. 94-13), and to the attached 2016 and 2018 election results by the Federal Election Commission (Docs. 94-2, 94-3).

[17] Plaintiff's attached deposition is admissible as an opposing party's statement, Fed. R. Evid. 801(d)(2), and the various declarations in support of Defendants' brief can be reduced to an admissible form at trial by calling the declarants to testify, Fed. R. Evid. 601, or, if they are unavailable, by offering their previously sworn testimonies at trial, Fed. R. Evid. 804(b)(1).

Plaintiff then disingenuously contends that "this record *reeks* of actual malice." (Doc. 110, p. 13). Plaintiff conveniently ignores his Spoliation Motion, filed on January 3, 2022, which concedes "there is an incomplete record as to the extent that the Defendants knew or should have known that their anti-Grayson screeds were false (*i.e.*, malice)." (Doc. 96, p. 9).

Moreover, the purported "proof" of actual malice consists of:

- No Labels, Inc.'s boast to donors that it could destroy Plaintiff's political career.
- An overview of the donations received by and the transfers among Defendants during the 2018 election, accompanied by Plaintiff's speculations that Defendants used this money to publish the allegedly defamatory statements against him.
- Plaintiff's observation that he and one of Defendants' major donors, Fox News, "had attacked each other for years."
- Emails from Defendants' counsel and opposition researcher evaluating various advertisements for potential defamation liability, most of which advise the qualification of certain state-

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See Rowell v. BellSouth Corp., 433 F.3d 794, 800 (11th Cir. 2005) ("On motions for summary judgment, we may consider only that evidence which can be reduced to an admissible form); (Docs. 94-1, 94-4, 94-5, 94-6, 94-7, 94-9, 94-14, 94-19, 94-20, 94-38, 94-39, 94-42, 94-43, 94-45). Additionally, the attached pleading by Plaintiff against Thomas Ubl (Doc. 94-39) is subject to judicial notice "for the limited purpose of recognizing . . . the subject matter of the litigation." *U.S. v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994); Fed. R. Evid. 201.

ments and the accurate quotation of source materials, and Plaintiff's commentary that Defendants failed to heed this advice in numerous allegedly defamatory publications.

- Plaintiff's statement that although Defendants were aware that the OCE report does not contain final conclusions regarding his guilt or innocence of the ethical violations alleged against him, their allegedly defamatory publications "indicate the opposite."
- Plaintiff's counsel's cease and desist letter to Defendants, "informing them that their attacks were false and defamatory," and Plaintiff's remark that "[t]here is no indication that the Defendants did anything to check . . . their facts after this."

(Doc. 110, pp. 3, 7, 11–13). As a preliminary matter, Plaintiff's various theories and conjectures regarding Defendants' liability are insufficient at the summary judgment stage of this proceeding to carry his case, and Plaintiff's counsel's cease and desist letter characterizing Defendants' publications as defamatory does not make them so. And, as to the actual pieces of evidence referenced, Plaintiff's disorderly citation to the record makes it impossible for the Court to locate them. The Court is under no obligation to sift through the record and, in fact, doing so would be improper, as the Court cannot remediate haphazard advocacy.[18]

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[18] Another example of carelessness, Plaintiff's brief sporadically mentions allegedly defamatory statements that are not challenged in the Second Amended Complaint. (*See, e.g.*, Doc. 110, p. 13 n.19). Plaintiff never moved to further amend his pleading, and therefore

But, even accepting Plaintiff's professions at face value, this is far from a demonstration of actual malice. At most, this "evidence" merely shows ill will in the ordinary sense of the term and, perhaps, a deviation from professional publishing standards. *See Harte-Hanks*, 491 U.S. at 667–68.[19] Thus, there is no clear and convincing proof that Defendants published the first category of allegedly defamatory statements with actual malice, and summary judgment in favor of Defendants as to these publications is proper.

B. The Second Category: Allegations of Abuse Against Plaintiff by Lolita Carson-Grayson, His Ex-Wife

Next, the Second Amended Complaint generally alleges that Defendants knew Lolita Carson-Grayson's charges of abuse against Plaintiff were false and, nonetheless, published her statements, omitting her recantation of those allegations. (Doc. 35, ¶¶ 23, 32, 36, 57). However, the Second Amended Complaint does

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the Court cannot and will not consider such information. *See Gimour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1314–15 (11th Cir. 2004) ("[T]he Supreme Court has mandated a liberal pleading standard for civil complaints under Federal Rule of Civil Procedure 8(a). This standard however does not afford plaintiffs with an opportunity to raise new claims at the summary judgment stage. . . . At the summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with [Rule] 15(a). A plaintiff may not amend her complaint through argument in a brief opposing summary judgment.").

[19] Actually, the fact that Defendants vetted their advertisements through counsel and their opposition researcher could further undermine the presence of actual malice.

not state what allegations of abuse were recanted by Lolita Carson-Grayson, attach the challenged publications, or otherwise describe the allegedly defamatory statements at issue with any specificity.

In their brief, Defendants list the allegedly defamatory statements (apparently) at issue and attach the (supposedly) challenged publications: "Her husband came up behind her and hit her on the back of the head with a large book"; "Mr. Grayson . . . hit her in the back of her head . . . and told her 'I'm gonna kill you'"; "Alan Grayson's ex-wife repeatedly reported Grayson to police for verbally and physically abusing her over two decades"; "Alan Grayson, serial abuser"; "Two decades of reported abuse. Alan Grayson: enough is enough." (Doc. 94, p. 10; Docs. 94-22, 94-24, 94-25, 94-26, 94-28, 94-31, 94-32, 94-33, 94-34). Again, many of the challenged publications cite to articles by independent, reputable sources and encourage readers to review these sources themselves and "check the facts." (Doc. 94, p. 11; Docs. 94-22, 94-24, 94-26, 94-28, 94-33). And, again, Defendants assert that they reasonably relied on these previously published reports of Lolita Carson-Grayson's allegations against Plaintiff, particularly a July 26, 2016, *Politico* article titled "Grayson's ex-wife claimed domestic abuse over two decades." (Doc. 94, pp. 5–6; Doc. 94-12). As part of the article, *Politico* published police reports and medical records provided by Lolita Carson-Grayson that seem to corroborate her allegations. (Doc. 94, pp. 5–6; Doc. 94-13).

In response, Plaintiff again raises the same vague hearsay objections, which, again, are baseless for the reasons stated above. (Doc. 110, pp. 3–5). Plaintiff then provides a completely irrelevant narrative

of the tumultuous annulment proceedings between him and his ex-wife, announcing that "[w]ithout question Lolita Carson-Grayson is a vicious, violent, world-class liar." (*Id.* at pp. 2–3, 8–10). Plaintiff's opinion of his ex-wife's veracity is immaterial to the question of Defendants' state of mind when publishing this undefined category of allegedly defamatory statements.

As evidence that Defendants knew Lolita Carson-Grayson is a "liar," Plaintiff cites to an opposition research report and an email exchange between Christine Dolan, a consultant for No Labels, Inc., and Nancy Jacobson. (*Id.* at pp. 8–10, 12–13). Once again, Plaintiff's citations to the record are incorrect and incoherent. Even so, the highlighted excerpts from this "evidence" in Plaintiff's brief only discusses an altercation in 2014 between Plaintiff and Lolita Carson-Grayson in which a video proved that she was the aggressor. Thus, at most, Plaintiff's "evidence" shows that Defendants were aware that Lolita Carson-Grayson instigated the domestic violence incident in 2014 and lied about her role in the event; it does not show that Defendants were aware she was the aggressor in *every* domestic violence incident between herself and Plaintiff or that she lied about *all* allegations of abuse.

Defendants' reply highlights this point. They argue that Plaintiff's response brief relies on an outdated September 2015 opposition research report. (Doc. 114, pp. 5–6). They also state that they based the challenged publications on the 2016 *Politico* article, which included police reports and medical records spanning over 20 years, some of which seem to corroborate Lolita Carson-Grayson's allegations of abuse. (Doc. 114, pp. 5–6; *see* Docs. 94-12, 94-13). This position adds some clarity

to Plaintiff's comment that, "[h]ad Defendants *updated* their research on the annulment proceedings, they would have learned" of Lolita Carson-Grayson's allegedly incessant deception. (Doc. 110, p. 10) (emphasis added). However, there is no indication that Defendants "purposefully avoided further investigation with the intent to avoid the truth," and "a failure to investigate, standing on its own, does not indicate the presence of actual malice." *Michel*, 816 F.3d at 703 (internal citations omitted). Thus, there is no clear and convincing proof that Defendants published this amorphous second category of allegedly defamatory statements with actual malice, and summary judgment as to these publications is proper.

IV. Conclusion

For these reasons, even viewing the record in the light most favorable to Plaintiff, there is not even a scintilla of evidence showing—much less clear and convincing proof of—actual malice.[20] Thus, summary judgment in favor of Defendants on Counts I and II is proper. Furthermore, because the defamation claims are not viable, the civil conspiracy claim also fails, and summary judgment in favor of Defendants is proper on Count III. *Alhassid v. Bank of Am., N.A.*, 60 F. Supp. 3d 1302, 1316 (S.D. Fla. 2014) (first citing

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[20] Consequently, the Court does not need to address the other arguments advanced in Defendants' briefs. (Docs. 94, 95). And, logically, because defamation by implication is merely a subset of defamation, the same actual malice standard applies. *See Jews for Jesus*, 997 So.2d at 1108. That is, a defamation by implication claim cannot stand independently of a defamation claim here; defamation by implication simply recognizes a different type of false statement. Thus, because the defamation claim fails, the defamation by implication claim must also fail.

Raimi v. Furlong, 702 So.2d 1273, 1284 (Fla. 3d DCA 1997), and then citing *Kee v. Nat'l Rsrv. Life Ins. Co.*, 918 F.2d 1538, 1541–42 (11th Cir. 1990)) (holding that a civil conspiracy must be based on "an underlying illegal act or tort"); *Liappas v. Augoustis*, 47 So.2d 582, 582–83 (Fla. 1950) (same).

Accordingly, it is ORDERED and ADJUDGED that Defendants' Motions for Summary Judgment (Docs. 94, 95) are GRANTED. The Clerk of Court is DIRECTED to enter judgment in favor of Defendants and against Plaintiff and to thereafter close the file.

DONE AND ORDERED in Orlando, Florida on May 20, 2022.

/s/ Paul G. Byron
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties

ORDER GRANTING MOTION TO DISMISS WITHOUT PREJUDICE, UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION (APRIL 7, 2021)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ALAN GRAYSON,

Plaintiff,

v.

NO LABELS, INC., PROGRESS TOMORROW, INC., UNITED TOGETHER, INC., NANCY JACOBSON, MARK PENN and JOHN DOES,

Defendants.

Case No. 6:20-cv-1824-PGB-LHP

Before: Paul G. BYRON, United States District Judge.

ORDER

This cause is before the Court on Defendants' Motion to Dismiss (Doc. 30 (the "Motion")) and Plaintiff's response in opposition (Doc. 33). Upon consideration, Defendants' Motion is due to be granted.

I. Background

Plaintiff Alan Grayson, a former congressional candidate, filed suit in state court against Defendants No Labels, Inc. ("No Labels"), Progress Tomorrow, Inc. ("Progress Tomorrow"), United Together, Inc. ("United Together"), Nancy Jacobson, Mark Penn, and John Does for "the vitriolic, hateful, false, and maliciously defamatory statements published about him" during his 2018 campaign. (Doc. 29, ¶ 1). On October 2, 2020, Defendants removed the action to this Court. (Doc. 1). On January 26, 2021, this Court dismissed the Complaint without prejudice. (Doc. 28).

On February 9, 2021, Plaintiff filed his Amended Complaint, asserting three causes of action: (1) defamation; (2) invasion of privacy; and (3) civil conspiracy. (Doc. 29). Defendants now move to dismiss the Amended Complaint, and the matter is ripe for review.

II. Standard of Review

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(1). Thus, to survive a motion to dismiss made pursuant to Rule 12(b)(6), the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* To assess the sufficiency of factual content and the plausibility of a claim, courts draw on their "judicial

experience and common sense" in considering: (1) the exhibits attached to the complaint; (2) matters that are subject to judicial notice; and (3) documents that are undisputed and central to a plaintiff's claim. *See Iqbal*, 556 U.S. at 678; *Parham v. Seattle Serv. Bureau, Inc.*, 224 F. Supp. 3d 1268, 1271 (M.D. Fla. 2016).

Though a complaint need not contain detailed factual allegations, mere legal conclusions, or recitation of the elements of a claim are not enough. *Twombly*, 550 U.S. at 555. Moreover, courts are "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. Courts must also view the complaint in the light most favorable to the plaintiff and must resolve any doubts as to the sufficiency of the complaint in the plaintiff's favor. *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1483 (11th Cir. 1994) (per curiam).

In sum, courts must (1) ignore conclusory allegations, bald legal assertions, and formulaic recitations of the elements of a claim; (2) accept well-pled factual allegations as true; and (3) view well-pled allegations in the light most favorable to the plaintiff. *Iqbal*, 556 U.S. at 679.

III. Discussion

First, Defendants argue that the Amended Complaint constitutes a shotgun pleading. Next, Defendants

challenge each count of the Amended Complaint. The Court addresses Defendants' arguments in turn.[1]

A. Shotgun Pleading

Shotgun pleadings are deficient because "they fail . . . to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Weiland v. Palm Beach Cnty. Sheriff's Office*, 792 F.3d 1313, 1323 (11th Cir. 2015); *see also Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996). The Eleventh Circuit has outlined four types of shotgun pleadings:

> The most common type—by a long shot—is a complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint. The next most common type . . . is a complaint . . . replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action. The third type of shotgun pleading is one that commits the sin of not separating into a different count each cause of action or claim for relief. Fourth, and finally, there is the relatively rare sin of asserting multiple claims against multiple

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[1] All three counts of the Amended Complaint assert violations of Florida law. As a federal court sitting in diversity jurisdiction, the Court applies the substantive law of the forum state—in this case, Florida law—alongside federal procedural law. *See Horowitch v. Diamond Aircraft Indus., Inc.*, 645 F.3d 1254, 1257 (11th Cir. 2011) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

> defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against.

Weiland, 792 F.3d at 1321–23.[2]

First, Defendants argue that the Amended Complaint "groups" them together for each cause of action. (Doc. 30, p. 9). It is true that the Amended Complaint asserts each claim against each Defendant. (*See* Doc. 29). But Defendants ignore the Amended Complaint's allegations, which describes each Defendant's culpability as follows:

- Defendants Jacobsen and Penn primarily used Defendant No Labels to raise money for personal profit and "character assassination" of their political opponents. (*Id.* ¶ 64). Defendant No Labels used Defendants United Together and Progress Tomorrow—along with various other judgment-proof shell companies—to conduct its campaign activity, thereby obscuring its funding sources. (*Id.* ¶¶ 14, 64). Defendant Penn owned, controlled, or otherwise profited from these shell companies, and Defendants Jacobsen and Penn "called the shots" regarding

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[2] "When presented with a shotgun complaint, the district court should order repleading *sua sponte*." *Ferrell v. Durbin*, 311 F. App'x 253, 259 n.8 (11th Cir. 2009) (per curiam) (citing *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1280 (11th Cir. 2006)); *see also Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 n.7 (11th Cir. 2007) ("Unpublished opinions are not controlling authority and are persuasive only insofar as their legal analysis warrants.").

Defendant No Labels' campaign activity. (*Id.* ¶¶ 12–13).

- When Plaintiff announced his 2018 congressional campaign, Defendants No Labels and Jacobsen obtained a $500,000 contribution, made to Defendant United Together, to target Plaintiff. (*Id.* ¶¶ 14–16). Defendant United Together then transferred the $500,000 donation to Defendant Progress Tomorrow. (*Id.* ¶ 16). Defendant Progress Tomorrow used this money to disparage Plaintiffs to voters via mail, Internet advertisements, and a website. (*Id.* ¶¶ 5–15, 18–35). Defendants Jacobsen and Penn knew of and approved Defendant Progress Tomorrow's defamatory statements about Plaintiff. (*Id.* ¶ 64).

The Amended Complaint thus gives Defendants "adequate notice of the claims against them and the grounds upon which each claim rests." *Id.* at 1323. The reference to all Defendants in each cause of action simply reflects the nature of a civil conspiracy claim. Such a claim makes it possible for *all* Defendants to participate in *every* act complained of because an agreement to commit a tortious act itself confers liability. *See, e.g.*, *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1271 (11th Cir. 2009) (delineating the elements of a civil conspiracy claim under Florida law).

Second, Defendants cite to *Magluta v. Samples* for the proposition that the Amended Complaint is a quintessential shotgun pleading:

> It is fifty-eight pages long. . . . Each count incorporates by reference the allegations

> made in a section entitled "General Factual Allegations"—which comprises 146 numbered paragraphs—while also incorporating the allegations of any count or counts that precede it. The result is that each count is replete with factual allegations that could not possibly be material to that specific count, and that any allegations that are material are buried beneath innumerable pages of rambling irrelevancies. This type of pleading completely disregards Rule 10(b)'s requirement that discrete claims should be plead in separate counts, and is the type of complaint that we have criticized time and again.

256 F.3d 1282, 1284 (11th Cir. 2001) (internal citations omitted).

But *Magluta* is not directly on par with this case. Plaintiff's Amended Complaint is only 22 pages long, which comports with Rule 8(a)(2)'s "short and plain statement" requirement. The Court further notes that Plaintiff's Amended Complaint does not include 146 numbered paragraphs in its General Allegations section but rather contains only 32. (*Id.* ¶¶ 11–42). The Amended Complaint realleges the paragraphs contained in the General Allegations section in each count, but it does not reallege *each preceding count*, which is the defining characteristic of a shotgun pleading. (*Id.* ¶¶ 44, 56, 62). There are no "rambling irrelevancies" or "buried" materials here.

Despite the Amended Complaint's adherence to most general pleading principles, the Court recognizes that Count II impermissibly combines two distinct claims: defamation by implication and invasion of

privacy based on public disclosure of private facts. *See Weiland*, 792 F.3d at 1321–23 (stating that the pleading must separate each cause of action into a distinct count). Therefore, the Court dismisses the Amended Complaint and orders Plaintiff to file a Second Amended Complaint that rectifies this defect.

B. Count I: Defamation

Although the Court dismisses the Amended Complaint without prejudice based on the pleading defect identified above, it nonetheless addresses the adequacy of the underlying claims for the parties' benefit. Defendants assert two grounds for dismissal of Count I: (1) the Amended Complaint fails to sufficiently plead a defamation claim; and (2) the Amended Complaint fails to properly allege malice. (Doc. 30, p. 10).

1. Insufficient Pleading

Under Florida law, the elements of a defamation claim are: (1) publication; (2) falsity; (3) the statement was made with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) the statement must be defamatory. *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018) (citing *Jews For Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1106 (Fla. 2008)). "In a defamation case, a plaintiff must allege certain facts such as the identity of the speaker, a description of the statement, and provide a time frame within which the publication occurred." *Five for Ent. S.A. v. Rodriguez*, 877 F. Supp. 2d 1321, 1328 (S.D. Fla. 2012) (internal quotations and citations omitted).

Defendants appear to take issue with the specificity of the facts alleged in the Amended Complaint. Defendants argue that the Amended Complaint "provides no context for the allegedly defamatory statements and cherry-picks language from the publications, characterizing the statements as he sees fit instead of including the entire statements verbatim." (*Id.* at p. 11). They further argue that the Amended Complaint "omits, disregards, and/or only vaguely alludes to relevant citations provided in the purported publications, which would provide context to the statements." (*Id.*).

Defendants offer no authority for these arguments, and they completely ignore the Amended Complaint's allegations, which identify Defendant Progress Tomorrow as the speaker, describe the statements in detail, and provide a time frame of August 1, 2018 to August 23, 2018. (Doc. 29, ¶¶ 18–42); *see Five for Ent. S.A.*, 877 F. Supp. 2d at 1328; *cf. Jackson v. N. Broward Cnty. Hosp. Dist.*, 766 So.2d 256, 257 (Fla. 4th DCA 2000) (finding that the defamation count failed to state a cause of action because it failed to specifically identify the persons to whom the allegedly defamatory comments were made and to link a particular remark to a particular defendant). Accordingly, the Court finds that these allegations are sufficiently pled.

2. Malice Allegations

It is undisputed that Plaintiff is a public figure, and therefore he must allege that Defendants acted with "actual malice." *Turner*, 879 F.3d at 1273. That is, the Amended Complaint must allege sufficient facts to give rise to a reasonable inference that Defendants

made the false statements with knowledge that they were false or with reckless disregard for whether they were false or not. *Id.*

Ignoring the Court's prior Order, which found adequate pleading of actual malice, Defendants assert that Plaintiff cannot *prove* actual malice because Defendants based their statements on "reputable sources" such as news reports and a 2015 Office of Congressional Ethics Report. (Doc. 28, pp. 3–4; Doc. 30, p. 12–14). They rely on *Berisha v. Lawson*, wherein the Southern District of Florida granted *summary judgment* in favor of the defendant because the plaintiff failed to establish actual malice, noting the defendant's reliance on "the multitude of previous reports implicating [the plaintiff] in arms-related scandals." 378 F. Supp. 3d 1145, 1161–62 (S.D. Fla. 2018) (internal quotations omitted).

But the procedural posture of this case is the *pleading stage*. The Court reiterates that the following alleged facts are sufficient to give rise to a reasonable inference that Defendants made the false statements with knowledge that they were false or with reckless disregard for whether they were false or not: Defendants profited by using donations from wealthy conservatives to denigrate liberal political candidates through negative advertisements; Defendants targeted Plaintiff with the intent to ruin his 2018 congressional campaign; and Defendants issued false statements that Plaintiff misused his public office and published Lolita Carson-Grayson's publicly recanted statements to tarnish Plaintiff's reputation. In fact, the Amended Complaint supplies more allegations that lend additional support to the Court's conclusion: Defendants edited images to portray Plaintiff lounging on the

beach in the Cayman Islands (Plaintiff has never been to the Cayman Islands); Defendants edited images to show Plaintiff walking to a plane bound for the Cayman Islands with a silver attaché case full of "bricks" of cash (Plaintiff has never boarded a jet in the commission of money laundering); and Defendants edited Plaintiff's passport photograph to replace his eyes with dollar signs. (Doc. 29, ¶¶ 11–42).

Although Defendants' reliance on other sources may be a valid defense, the Amended Complaint adequately pleads actual malice.

C. Count II: Invasion of Privacy

Defendants contend that Count II amounts to a false light invasion of privacy claim, which is not a cognizable tort. (Doc. 30, pp. 14–15). It is true that Florida law does not recognize the tort of false light because it is largely duplicative of existing torts. (Doc. 28, p. 12 n.10). However, there are still three types of wrongful conduct that can be remedied with an invasion of privacy claim: (1) appropriation; (2) intrusion; and (3) public disclosure of private facts. (*Id.*). Count II asserts an invasion of privacy claim based on the public disclosure of private facts. (*See* Doc. 29). To the extent that Count II also alleges that Defendants conveyed literally true statements in such a way as to create a false impression, this is a defamation by implication claim, not a false light claim. *See Jews for Jesus*, 997 So.2d at 1105– 08.

As stated in subsection A, invasion of privacy based on public disclosure of private facts and defamation by implication are distinct claims that require separation into distinct counts under general pleading rules. *See Weiland*, 792 F.3d at 1321–23. Thus,

Plaintiff must replead his defamation by implication claim into a separate count.[3] *See Wagner*, 464 F.3d at 1280.

However, Plaintiff may not replead his invasion of privacy claim because he cannot sustain this cause of action. To state a claim for invasion of privacy based on public disclosure of private facts, a plaintiff must allege that the defendant: (1) published, (2) private facts, (3) that are offensive, (4) are not of public concern, and (5) are true. *Tyne ex rel. Tyne v. Time Warner Ent. Co.*, 204 F. Supp. 2d 1338, 1344 (M.D. Fla. 2002). "Matters of public concern" are at the heart of the First Amendment's protection:

> Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.

Gawker Media, LLC v. Bollea, 129 So.3d 1196, 1200–01 (Fla. 2d DCA 2014) (citing *Snyder v. Phelps*, 562

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[3] The Court notes that defamation and defamation by implication are also distinct claims and that the Court will not engage in the "onerous task of sifting through the [Second] Amended Complaint" to determine which statements constitute defamation or defamation by implication. *See Mangel v. Daza*, No. 2:19-cv-525, 2019 WL 5068580, at *2 (M.D. Fla. Oct. 9, 2019) (dismissing the amended complaint without prejudice because it pled two separate causes of action—defamation and defamation by implication—into one count).

U.S. 443, 453 (2011)) (finding that professional wrestler Hulk Hogan's sex tape constituted a matter of public concern due to the public controversy surrounding his extramarital affair).

Here, the true facts alleged in the Amended Complaint—including Carson-Grayson's recanted statements, Plaintiff's employment of a congressional staffer at his hedge fund, and Plaintiff's call for the arrest of a reporter—are matters of public concern. (*Id.* ¶¶ 23–24, 31 n.11, 33 n.13). A political candidate's domestic turmoil, congressional activities, and interactions with the media are undoubtedly subjects of "legitimate news interest." *See id.* And, clearly, the manner in which a political candidate conducts his life—including his professional life and his personal life— is of value and concern to the voting public, who desires the best representation of their interests in Congress. *See id.*[4]

D. Count III: Civil Conspiracy

To state a claim for civil conspiracy, the plaintiff must allege: (1) an agreement between two or more parties; (2) to do an unlawful act or to do a lawful act by unlawful means; (3) the doing of some overt act in pursuance of the conspiracy; and (4) damage to the

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[4] Defendants also argue that they based their statements on facts previously published by other sources, citing appellate cases that affirmed the lower courts' grants of summary judgment. (Doc. 30, p. 17). The Court already addressed this argument above, and it sees no reason to regurgitate its analysis again.

Furthermore, Defendants assert that the single publication rule bars the invasion of privacy claim. Because the invasion of privacy claim is dismissed for the reasons provided, the Court does not address this argument.

plaintiff as a result of the acts done under the conspiracy. *United Techs. Corp.*, 556 F.3d at 1271 (citing *Charles v. Fla. Foreclosure Placement Ctr., LLC*, 988 So.2d 1157, 1159–60 (Fla. 3d DCA 2008)). Florida law does not recognize an independent cause of action for civil conspiracy; "the plaintiff must allege an underlying illegal act or tort on which the conspiracy is based." *Alhassid v. Bank of Am., N.A.*, 60 F. Supp. 3d 1302, 1316 (S.D. Fla. 2014) (citing *Kee v. Nat'l Rsrv. Life Ins.*, 918 F.2d 1538, 1541–42 (11th Cir. 1990); *Raimi v. Furlong*, 702 So.2d 1273, 1284 (Fla. 3d DCA 1997)); *see also Liappas v. Augoustis*, 47 So.2d 582 (Fla. 1950). Here, the Amended Complaint alleges a viable underlying tort: defamation.

Defendants argue that the intra-corporate conspiracy doctrine—which negates a civil conspiracy claim where the only members of the alleged conspiracy are a corporation and/or its officers—bars this cause this of action. *Grider v. City of Auburn*, 618 F.3d 1240, 1261 (11th Cir. 2010); *Mancinelli v. Davis*, 217 So.3d 1034, 1036–37 (Fla. 4th DCA 2017); (Doc. 30, pp. 20–21). Notably, Florida courts recognize the "personal stake" exception to this doctrine, which makes an agent liable for civil conspiracy where the agent has a personal stake in the activities separate from the principal's interest. *Mancinelli*, 217 So.3d at 1037.

As to the corporate Defendants, the Amended Complaint alleges that Defendants United Together and Progress Tomorrow conducted "[Defendant] No Labels-related campaign activity" and "worked together" to disparage Plaintiff and shield their donors from scrutiny. (Doc. 29, ¶¶ 14, 64). But, viewing the Amended Complaint in the light most favorable to

Plaintiff, these allegations do not necessarily equate to an agency relationship. *See Hunnings*, 29 F.3d at 1483; *Am. Home Assur. Co. v. Weaver Aggregate Transp., Inc.*, 990 F. Supp. 2d 1254, 1275 (M.D. Fla. 2013) ("By definition, a conspiracy involves a combination in which every member of the scheme becomes the agent of every other member for purposes of carrying out the object of the agreement.").

As to the individual Defendants, the Amended Complaint alleges that Defendant Jacobsen is the president and founder of Defendant No Labels, that Defendant Penn owns or controls the various shell companies involved in Defendant No Labels' campaign work, and that Defendants Jacobsen and Penn "called all the shots" in the smear campaign against Plaintiff. (*Id.* ¶¶ 1, 7, 12–13, 64). It also alleges that Defendants Jacobsen and Penn personally solicited funds to disparage Plaintiff and personally profited from the conspiracy. (*Id.* ¶ 64). Therefore, it is unclear whether Defendants Jacobsen and Penn acted purely in their corporate capacities and whether their alleged personal profit constituted an interest distinct from those of the corporate Defendants. *See Am. Home Assur. Co.*, 990 F. Supp. 2d at 1275 ("To come within [the intra-corporate conspiracy] doctrine the agency relationship must be one in which the 'agent' is joining the conspiracy or making the conspiratorial agreement *for the corporation*, not for himself or on behalf of a separate corporation."). Cognizant to resolve any doubts as to the sufficiency of the Amended Complaint in Plaintiff's favor, the Court finds that it is possible that the personal stake exception applies to Defendants Jacobsen and Penn. *See Mancinelli*, 217 So.3d at 1037.

Lastly, contrary to Defendants' assertion, it is difficult to imagine more "clear, positive, and specific allegations of civil conspiracy" than those set forth in the Amended Complaint. *World Class Yachts, Inc. v. Murphy*, 731 So.2d 798, 799 (Fla. 4th DCA 1999). The Amended Complaint describes, in detail, each member's role in the conspiracy, the purpose of the conspiracy, and the maneuvers and actions taken to further the conspiracy. (*See id.*). The fact that the Amended Complaint alleges these facts "on information and belief" is inapposite—in fact, such a qualifier is expected in the instant action, a complex civil conspiracy case where Plaintiff has not yet had the opportunity to conduct extensive discovery.

IV. Conclusion

Accordingly, it is ORDERED AND ADJUDGED as follows:

1. Defendants' Motion to Dismiss (Doc. 30) is GRANTED;
2. Plaintiff's Amended Complaint (Doc. 29) is DISMISSED WITHOUT PREJUDICE; and
3. On or before April 21, 2021, Plaintiff must file a Second Amended Complaint consistent with the directives of this Order.[5]

[5] Other than as expressly provided by this Order, Plaintiff is prohibited from alleging new causes of action or legal theories in the Second Amended Complaint.

DONE AND ORDERED in Orlando, Florida on April 7, 2021.

/s/ Paul G. Byron
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties

ORDER GRANTING MOTION TO DISMISS WITHOUT PREJUDICE, UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION (JANUARY 26, 2021)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ALAN GRAYSON,

Plaintiff,

v.

NO LABELS, INC., PROGRESS TOMORROW, INC., UNITED TOGETHER, INC., NANCY JACOBSON, MARK PENN and JOHN DOES,

Defendants.

Case No. 6:20-cv-1824-Orl-40LRH

Before: Paul G. BYRON, United States District Judge.

ORDER

This cause is before the Court on Defendants' Motion to Dismiss (Doc. 16 (the "Motion")) and Plaintiff's response in opposition (Doc. 17). Upon consideration, Defendants' Motion is due to be granted.

I. Background[1]

Plaintiff Alan Grayson, a former congressional candidate, filed suit in state court against Defendants No Labels, Inc., Progress Tomorrow, Inc., United Together, Inc., Nancy Jacobson, Mark Penn, and John Does for "the vitriolic, hateful, false, and maliciously defamatory statements published about him" during his 2018 campaign. (Doc. 1-1, ¶ 1). On October 2, 2020, Defendants removed the action to this Court. (Doc. 1).

Plaintiff's Complaint asserts the following causes of action: (1) Defamation (Count I); (2) Invasion of Privacy (Count II); (3) Cyberstalking (Count III); (4) Civil Conspiracy (Count IV); and (5) Fraudulent Transfer (Count V). (Doc. 1-1, ¶¶ 29–58). Defendants moved to dismiss the Complaint, and the matter is now ripe for review. (Doc. 16).

II. Standard of Review

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(1). Thus, to survive a motion to dismiss made pursuant to Rule 12(b)(6), the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face when the plaintiff "pleads factual content that

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[1] This account of the facts comes from the Complaint. (Doc. 1-1). The Court accepts these factual allegations as true when considering motions to dismiss. *See Williams v. Bd. of Regents*, 477 F.3d 1282, 1291 (11th Cir. 2007).

allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* To assess the sufficiency of factual content and the plausibility of a claim, courts draw on their "judicial experience and common sense" in considering: (1) the exhibits attached to the complaint; (2) matters that are subject to judicial notice; and (3) documents that are undisputed and central to a plaintiff's claim. *See Iqbal*, 556 U.S. at 678; *Parham v. Seattle Serv. Bureau, Inc.*, 224 F. Supp. 3d 1268, 1271 (M.D. Fla. 2016).

Though a complaint need not contain detailed factual allegations, mere legal conclusions or recitation of the elements of a claim are not enough. *Twombly*, 550 U.S. at 555. Moreover, courts are "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. Courts must also view the complaint in the light most favorable to the plaintiff and must resolve any doubts as to the sufficiency of the complaint in the plaintiff's favor. *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1483 (11th Cir. 1994) (per curiam).

In sum, courts must (1) ignore conclusory allegations, bald legal assertions, and formulaic recitations of the elements of a claim; (2) accept well-pled factual allegations as true; and (3) view well-pled allegations in the light most favorable to the plaintiff. *Iqbal*, 556 U.S. at 679.

III. Discussion

The Motion challenges all counts of the Complaint under Rule 12(b)(6).[2] The Court addresses each count seriatim.[3]

A. Count I: Defamation

Defendants assert four grounds for dismissal of Count I: (1) the Complaint alleges malice in a conclusory manner; (2) the fair report privilege protects the allegedly defamatory statements; (3) the statute of limitations at least partially bars the claim; and (4) the Complaint fails to identify with specificity the allegedly defamatory statements. (*Id.* at p. 14). The Court addresses each argument in turn.

1. Malice Allegations

First, Defendants assert that the Complaint fails to plead malice as required for this defamation claim. (*Id.* at pp. 15–17). The Court disagrees.

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[2] The Motion also moves for dismissal under Rule 12(b)(2) and general pleading standards. However, there is no need for the Court to assess personal jurisdiction or shotgun pleading rules at this time because the Complaint is due to be dismissed without prejudice pursuant to Rule 12(b)(6), as discussed below. Plaintiff would be well advised to consider the principles of shotgun pleading in redrafting a Complaint.

[3] All five counts of the Complaint assert violations of Florida law. As a federal court sitting in diversity jurisdiction, the Court applies the substantive law of the forum state—in this case, Florida law—alongside federal procedural law. *See Horowitch v. Diamond Aircraft Indus., Inc.*, 645 F.3d 1254, 1257 (11th Cir. 2011) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

Under Florida law, the elements of a defamation claim are: (1) publication; (2) falsity; (3) the statement was made with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) the statement must be defamatory. *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018) (citing *Jews For Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1106 (Fla. 2008)). It is undisputed that Plaintiff is a public figure, and therefore he must establish "actual malice" on behalf of the publisher in order to maintain his defamation action. *Id.* at 1273 (citing *Nodar v. Galbreath*, 462 So.2d 803, 806 (Fla. 1984); *N.Y. Times v. Sullivan*, 376 U.S. 254, 280 (1964)); (Doc. 16, p. 16; Doc. 17, p. 11).

The Eleventh Circuit has previously held that the "plausibility pleading standard applies to the actual malice standard in defamation proceedings." *Id.* (quoting *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016)). Thus, to plead actual malice, Plaintiff must allege sufficient facts to give rise to a reasonable inference that the false statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. *Id.* (internal quotations and citations omitted). "This is a subjective test, focusing on whether the defendant actually entertained serious doubts as to the veracity of the published account, or was highly aware that the account was probably false." *Id.* (internal quotations and citations omitted).

In disputing the sufficiency of the Complaint's malice-related allegations, Defendants point to three paragraphs, each of which conclusively asserts the existence of actual malice. (Doc. 1-1, ¶¶ 24, 32–33).

However, Defendants ignore the rest of the Complaint. For example, the Complaint alleges that Defendants intended "to ruin" Plaintiff's congressional campaign for "personal profit," that their business model relies on "money from right-wing millionaires and billionaires" to "denigrate, disparage, and destroy the reputations of progressive political candidates" with negative advertisements, and that they "knowingly published" recanted statements without any disclaimer as well as "edited and altered" news reports in "misleading" ways. (*Id.* ¶¶ 1, 11, 20–22). Given these allegations, the Complaint provides sufficient facts to give rise to a reasonable inference that the false statements were made with knowledge that it was false or, at the least, with reckless disregard as to its truthfulness. *See id.* Thus, the Court concludes that the Complaint adequately alleges actual malice.

2. Fair Report Privilege

Next, Defendants contend that dismissal is appropriate because the fair report privilege bars the claims. (Doc. 16, pp. 17–18). The Court disagrees.

The fair report privilege grants journalists and news media a qualified privilege to report on information received from government officials or to publish the contents of official documents, as long as the account is "reasonably accurate and fair." To qualify as "reasonably accurate and fair," the publication must be a substantially correct account of information contained in public records or derived from a government source. *See Larreal v. Telemundo of Fla., LLC*, No. 19-22613-Civ, 2020 WL 5750099, at *7–8 (S.D. Fla. Sept. 25, 2020) (collecting cases); *Rasmussen v. Collier*

Cnty. Pub. Co., 946 So.2d 567, 570– 71 (Fla. 2d DCA 2006).[4]

Defendants' argument stumbles at the first hurdle: there are no allegations that they are news media entities and/or journalists as required for the application of the privilege, and Defendants themselves do not argue as such. It is not patently obvious that Defendants are members of the news media industry, and Defendants do not attempt to define who qualifies as a "news media entity" or a "journalist." (*See id.*).

Moreover, even if Defendants are news media entities and/or journalists, the defamation claim is not wholly premised on information received from government officials or contained in official government documents. For example, although the Complaint asserts that Defendants published certain false statements based on a 2015 Office of Congressional Ethics report,[5] it also alleges that Defendants published

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[4] To the extent that Plaintiff seems to imply that the Court cannot rule on the fair report privilege at the motion to dismiss stage, the Court notes that the application of the fair report privilege is a question of law that can be assessed at this time. *See Larreal*, 2020 WL 5750099, at *7–8 (citing *Folta v. N.Y. Times Co.*, No. 1:17cv246, 2019 WL 1486776, at *1); *Huszar v. Gross*, 468 So.2d 512, 515–16 (Fla. 1st DCA 1985) (stating that "when the facts and circumstances of a communication are revealed, the issue of whether a privilege has been established is a question of law for the court to decide" at the motion to dismiss stage of litigation); (Doc. 17, pp. 12–13); *see also Nix v. ESPN, Inc.*, 772 F. App'x 807 (11th Cir. 2019) (affirming an order dismissing with prejudice statements protected by the fair report privilege and holding that a trial court may determine the applicability of the fair report doctrine as a matter of law).

[5] Plaintiff argues that the report is not properly before the Court as "the Court is limited to the four corners of the Complaint."

publicly recanted statements made by Plaintiff's ex-spouse, Lolita Carson-Gray, and altered news reports in misleading ways.[6] (*See* Doc. 1-1, ¶¶ 20–21, 34). Thus, the Court holds that the fair report privilege is not a basis for dismissal of the defamation claim.

3. Statute of Limitations and Failure to Identify with Specificity

Finally, Defendants argue that Florida's two-year statute of limitations for defamation claims at

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(Doc. 17, p. 3). However, the Court notes that it may consider an extrinsic document when ruling on a motion to dismiss where the document is central to the plaintiff's claim and its authenticity is not challenged. *SFM Holdings, Ltd. v. Banc of Am. Secs., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010); *Legacy Ent. Grp., LLC v. Endemol USA Inc.*, No. 3:15-cv-0252, 2015 WL 12838795, at *3 (M.D. Fla. 2015) (quoting *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005)) ("In ruling on a motion to dismiss under Rule 12(b)(6), a court may only consider extrinsic evidence attached to the motion when that evidence has been 'incorporated by reference' into the pleading.").

Additionally, Plaintiff argues that "Defendants' statements were not accurate or fair" and that they "completely mischaracterize[]" the report. (*Id.* at p. 3 n.13–14). The Court does not reach the question of whether Defendants' statements were "reasonably fair and accurate" for the reasons provided above. But the Court notes that this is a fairly low bar, resulting in certain practical ramifications such as editorial style and selective focus. *See Larreal*, 2020 WL 5750099, at *8.

[6] Provided that Defendants address the scope of the fair report privilege, the Court does not preclude the possibility of applying it to the alleged defamatory statements based on the 2015 Office of Congressional Ethics report at a later time, such as on a motion to strike or at summary judgment. However, dismissal of the defamation claim in its entirety is improper because the claim is not solely premised on government sources, as stated above.

least partially bars this action. (Doc. 16, pp. 19–20). Florida's two-year statute of limitations period begins running and the defamation claim accrues when the last element constituting the cause of action occurs. Fla. Stat. §§ 95.031, 95.11. The last cause of action necessary for the accrual of a defamation claim is publication, and therefore the date of publication—not the date of discovery—triggers the statute of limitations. *Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan*, 629 So.2d 113, 114–15 (Fla. 1993); *see also* § 770.07 ("The cause of action for damages founded upon a single publication or exhibit or utterance . . . shall be deemed to have accrued at the time of the first publication or exhibition or utterance thereof in this state.").

Defendants argue that Plaintiff filed his Complaint on August 19, 2020, and therefore the statute of limitations bars any defamation claims based on allegedly false statements made before August 19, 2018. (*Id.* at pp. 19–20). Confusingly, Defendants simultaneously argue that the Complaint lacks specificity regarding the time period in which the allegedly defamatory statements were made, and they do not identify which statements are supposedly time-barred in their Motion. (*See id.*).

In fact, it is unclear whether Defendants published any of the allegedly false statements before August 19, 2018. The Complaint does not specify the exact dates on which Defendants published the allegedly defamatory statements, instead broadly stating that publication occurred in 2018. (*See* Doc. 1-1). Because it is not facially apparent from the Complaint that the statute of limitations bars the defamation claim, it is logically improper to grant the Motion on this

basis. *Cali. Fin., LLC v. Perdido Land Dev. Co.*, 303 F. Supp. 3d 1306, 1311 (M.D. Fla. 2017) (quoting *Rigby v. Liles*, 505 So.2d 598, 601 (Fla. 1st DCA 1987)).

However, Defendants validly dispute this ambiguity. "In a defamation case, a plaintiff must allege certain facts such as the identity of the speaker, a description of the statement, and provide a time frame within which the publication occurred." *Five for Ent. S.A. v. Rodriguez*, 877 F. Supp. 2d 1321, 1328 (S.D. Fla. 2012) (internal quotations omitted) (dismissing the defamation claim for failure to plead when the allegedly defamatory statements were made and a sufficient description of those statements); *see Jackson v. N. Broward Cnty. Hosp. Dist.*, 766 So.2d 256, 257 (Fla. 4th DCA 2000) (finding that the defamation count failed to state a cause of action because it failed to specifically identify the persons to whom the allegedly defamatory comments were made and to link a particular remark to a particular defendant).

Here, the Complaint asserts that Carson-Grayson made "a handwritten statement . . . in which she made false allegations against [Plaintiff]" and that "Defendants knowingly published this false information, without noting that it had been recanted and demonstrated to be false." (Doc. 1-1, ¶ 20). The Complaint fails to answer two important questions: (1) *when* were the allegedly defamatory statements made, and (2) *what* did they say?[7] (*Id.*). Similarly, the allegations concerning Plain-

[7] The Complaint later states that "One or more of these statements charged that Grayson had committed a crime; or that Grayson possesses characteristics that make him unfit as a lawyer or an elected official; or tended to subject Grayson to hatred, distrust, ridicule, contempt or disgrace; or was meant to injure Grayson in the political and legal arenas." (*Id.* ¶ 34). However, this is a

tiff's congressional ethics investigation fails to provide a time frame in which the listed statements were made.[8] (*Id.* ¶¶ 17–19). The Complaint's repeated reference to the year 2018 is too vague; Plaintiff must provide a more definite date of publication. Thus, the Court dismisses Count I without prejudice and directs Plaintiff, in repleading, to specify the contents and dates of the allegedly defamatory statements made by Defendants.[9]

B. Count II: Invasion of Privacy

Defendants challenge Plaintiff's invasion of privacy cause of action on two grounds: (1) it cannot proceed under Florida's single publication rule; and (2) the Complaint fails to allege the essential elements of

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general allegation that summarizes all of the allegedly defamatory statements made by Defendants—the substance of Carson-Grayson's handwritten statement is still unknown.

[8] The Court notes that the Complaint sufficiently describes content of the allegedly defamatory statements made in relation to Plaintiff's congressional ethics investigation. It lists the following published communications: "Congressional Ethics Investigation Found Alan Grayson Abused His Office for Financial Gain"; "A Congressional Ethics Investigation found evidence that Alan Grayson Abused His Position in Congress to enrich himself"; ". . . as a congressman, he . . . Hid income on his public disclosures"; ". . . as a congressman, he . . . Used taxpayer resources to conduct his high-risk investor scheme"; "Alan Grayson Used His Congressiotnal [sic] Office For His Own Financial Gain." (*Id.* ¶ 18).

[9] The Court realizes that the Complaint alleges all Defendants published the allegedly tortious statements rather than articulating exactly which Defendant made what statement. However, the Court does not address the merits of Defendants' shotgun pleading argument at this time because the Complaint is due to be dismissed on Rule 12(b)(6) grounds.

the claim. (Doc. 16, pp. 20–22). The Court finds that Count II is due to be dismissed without prejudice under either theory.

First, Defendants contend that because the invasion of privacy claim is premised on the same facts as the supposedly defective defamation claim, the former must be dismissed with the latter. (*Id.* at p. 20). Florida law provides that "a single publication gives rise to a single cause of action," and, consequently, the "various injuries resulting from it are merely items of damage arising from the same wrong." *Callaway Land & Cattle Co. v. Banyon Lakes C. Corp.*, 831 So.2d 204, 208 (Fla. 4th DCA 2002) (citing *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So.2d 607, 609 (Fla. 4th DCA 1975)). For example, in *Callaway* the trial court dismissed claims for tortious interference with a contractual relationship and abuse of process as based on the same facts and circumstances as a time-barred disparagement of title claim. *Id.* at 205–10 (citing Fla. Stat. § 95.11(4)(g)). In affirming this decision, the Fourth District Court of Appeal reasoned:

> The single publication/single action rule [] does not permit multiple actions when they arise from the same publication upon which a failed defamation claim is based. The rule is designed to prevent plaintiffs from circumventing a valid defense to defamation by recasting essentially the same facts into several causes of action all meant to compensate for the same harm. Thus, if the defamation count fails, the other counts based on the same publication must fail as well

> because the same privileges and defenses apply.

Id. at 205 (internal citations and quotations omitted).

Here, Defendants assume that the defamation claim is defective, and, as previously discussed, the Court indeed dismissed Count I. But the Court also gave Plaintiff leave to amend his defamation claim to allege, with specificity, the contents of and the dates on which Defendants published the allegedly defamatory statements. Thus, the Court acknowledges that it must dismiss Count II with Count I at this time but notes that Count I—and, accordingly, Count II—is not necessarily *permanently* defective. *Cf. Callaway*, 831 So.2d at 208; *Ovadia v. Bloom*, 756 So.2d 137, 141 (Fla. 3d DCA 2000); *Daly v. Morris Pub. Grp., LLC*, No. 16-2005-CA-005096, 2009 WL 5876239 (Fla. 4th DCA Mar. 17, 2009).

Regardless of Count I's legitimacy, Count II still fails to state a claim. To state a claim for invasion of privacy based on public disclosure of private facts, a plaintiff must allege that the defendant: (1) published, (2) private facts, (3) that are offensive, (4) are not of public concern, and (5) are true. *Tyne ex rel. Tyne v. Time Warner Ent. Co.*, 204 F. Supp. 2d 1338, 1344 (M.D. Fla. 2002). Here, the Complaint expressly alleges that the publications at issue are *false*. (*See* Doc. 1-1). The Complaint therefore fails to allege all the elements necessary to support an invasion of privacy claim based on public disclosure of private facts, and Plaintiff does not argue that it does.

Instead, Plaintiff states that there are three types of wrongful conduct that can be remedied with an invasion of privacy claim under Florida law, and

an invasion of privacy claim based on the public disclosure of private facts is only one of the three. (Doc. 17, p. 16); *see Jews for Jesus*, 997 So.2d at 1100; *Agency for Health Care v. Associated Indus. of Fla., Inc.*, 678 So.2d 1239, 1252 n.20 (Fla. 1996).[10] But Plaintiff goes no further—he does not argue that the Complaint satisfies the elements required to state a claim under another type of invasion of privacy claim.[11]

Plaintiff also emphasizes that he has a right to plead in the alternative under Rule 8. (*Id.*). This is true. *See Allstate Ins. Co. v. James*, 779 F.2d 1536,

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[10] In *Jews for Jesus*, the Supreme Court of Florida ruled that Florida law does not recognize the tort of false light as largely duplicative of existing torts. 997 So.2d at 1115. The remaining three types of wrongful conduct that can be remedied with an invasion of privacy claim are: (1) appropriation; (2) intrusion; and (3) public disclosure of private facts. *Agency for Health Care*, 678 So.2d at 1252 n.20.

[11] Plaintiff states that the case cited by Defendants is inapplicable because the court dismissed the complaint for its failure to plead the *proper type* of invasion of privacy claim rather than its failure to state a claim. (*Id.* at p. 16 n.18). This characterization of the case is inaccurate. In that case, the court granted summary judgment in favor of the defendants because the plaintiffs argued that the facts at issue were false, and therefore failed to support their invasion of privacy based on public disclosure of private facts claim. The court merely noted that the plaintiffs failed to assert a defamation claim, which would have constituted a valid cause of action. *See Tyne*, 204 F. Supp. 2d at 1344 ("The *Restatement (Second) of Torts* has recognized that an essential element of the tort of public disclosure of private facts is that the facts at issue be true. . . . In a situation where the 'facts' disclosed in a publication are, in actuality, false, 'the interest invaded is that protected by the defamation . . . the interest in being represented truthfully to the world.'" (internal citations omitted)).

1540–41 (11th Cir. 1986); Fed. R. Civ. P. 8(d)(2). But Plaintiff misconstrues Defendants' argument. They do not argue that Plaintiff cannot plead alternative theories of liability (*i.e.*, defamation and invasion of privacy). Rather, they assert that the Complaint fails to allege that the published statements were *true*, an "essential element" of an invasion of privacy claim based on public disclosure of private facts. *Tyne*, 204 F. Supp. 2d at 1344. Consequently, the Court dismisses Count II without prejudice.[12]

C. Count III: Cyberstalking

Defendants further argue that the Complaint fails to allege the essential elements of a cyberstalking claim. Specifically, Defendants contend that the Complaint merely alleges that they published the purportedly defamatory statements about Plaintiff

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[12] Plaintiff's response includes a footnote which states that "Whether the statements are true or false, the Defendants may also be liable for 'defamation by implication.'" (*Id.* at p. 16 n.19). The Supreme Court of Florida has held that "defamation by implication is a well-recognized species of defamation that is subsumed within the tort of defamation." *Jews for Jesus*, 997 So.2d at 1108. But it also noted that "defamation by implication applies in circumstances where *literally true* statements are conveyed in such a way as to create a false impression." *Id.* (emphasis added). Again, there are no explicit allegations that Defendants published true statements at all—much less true statements conveyed in such a way as to create a false impression. (*See* Doc. 11). Furthermore, while there may be some allegations in the Complaint that could implicitly support a defamation by implication claim, it is inappropriate for the Court to act as counsel for Plaintiff by formulating an argument that he briefly raised in a footnote. Regardless, a defamation by implication claim is a subset of a defamation tort claim and therefore would not save Plaintiff's invasion of privacy claim.

for third parties to read, and therefore they did not "direct" the statements to Plaintiff. (Doc. 16, p. 21). The Court agrees.

Under Fla. Stat. § 784.048(1)(d)1, "cyberstalk" means to "engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person . . . causing substantial emotional distress to that person and serving no legitimate purpose." Section 784.048(1)(d)1 and Florida courts require the communications to be *directed at* the plaintiff. *See Chevaldina v. R.K./FL Mgmt., Inc.*, 133 So.3d 1086, 1091–92 (Fla. 3d DCA 2014) (finding that the record did not support a cyber-stalking claim because "the appellees failed to introduce evidence that specific blog posts were being used 'to communicate, or to cause to be communicated, words, images, or language . . . directed at a specific person'").

For instance, in *Scott v. Blum* the Second District Court of Appeal held that the appellee failed to satisfy his evidentiary burden for an order enjoining the appellant from cyberstalking because the appellant "did not communicate words, images, or language via email or electronic communication directly to [the appellee]." 191 So.3d 502, 503–05 (Fla. 2d DCA 2016). Although the appellant sent derogatory emails about the appellee to over 2,000 third parties, none of the emails were sent directly to the appellee. *Id.* The court stated, "'[W]here comments are made on an electronic medium to be read by others, they cannot be said to be directed to a particular person.'" *Id.* at 504 (quoting *David v. Textor*, 189 So.3d 871, 875 (Fla. 4th DCA 2016)). Moreover, the appellee's

distress related to his personal and professional reputation among his colleagues, which the court found did not constitute "substantial emotional distress" under the statute. *Id.* at 505.

Likewise, the Complaint only asserts that Defendants' allegedly defamatory statements were directed to Florida voters. *See id.* There are no allegations that Plaintiff directly received these derogatory communications from Defendants, and the Complaint asserts that Defendants publicly posted comments on an electronic medium to influence Florida residents and thereby harm Plaintiff's campaign. (*See* Doc. 1-1, ¶¶ 17–25, 47). Furthermore, the Complaint only alleges harm to Plaintiff's personal and professional reputation—there are no allegations that Plaintiff received threats from Defendants or experienced some other form of severe electronic harassment by them. (S*ee id.*). Thus, the Court dismisses Count III without prejudice.[13]

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[13] Plaintiff cites to *Thoma v. O'Neal*, stating that "the court ruled that handing out a threatening flier in the plaintiff's neighborhood was a violation of [§ 784.048(1)(d)1]." (Doc. 17, p. 17); *see* 180 So.3d 1157 (Fla. 4th DCA 2015). Plaintiff misreads this case. The flier at issue in *Thoma* was not an *electronic* communication as required for a cyberstalking claim, and therefore the court held that the flier constituted "stalking" rather than "cyberstalking." 280 So.3d at 1159–62. Furthermore, even if *Thoma* could apply to a cyberstalking case, the facts at issue here are distinguishable. First, the *Thoma* court determined that the appellee produced "substantial and competent evidence" of the appellant's harassing behavior because he followed her home more than once in order to obtain her residence address. *Id.* at 1160. Second, the flier was sent directly to the appellee's home, unlike the present case. *Id.* at 1159–60.

D. Count IV: Civil Conspiracy

Defendants also oppose Plaintiff's civil conspiracy claim, contending that it is defective because it lacks a legally cognizable tort. (Doc. 16, pp. 23–24). To state a claim for civil conspiracy, the plaintiff must allege: (1) an agreement between two or more parties; (2) to do an unlawful act or to do a lawful act by unlawful means; (3) the doing of some overt act in pursuance of the conspiracy; and (4) damage to the plaintiff as a result of the acts done under the conspiracy. *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1271 (11th Cir. 2009) (quoting *Charles v. Fla. Foreclosure Placement Ctr., LLC*, 988 So.2d 1157, 1159–60 (Fla. 3d DCA 2008)). Florida law does not recognize an independent cause of action for civil conspiracy; "the plaintiff must allege an underlying illegal act or tort on which the conspiracy is based." *Alhassid v. Bank of Am., N.A.*, 60 F. Supp. 3d 1302, 1316 (S.D. Fla. 2014) (citing *Kee v. Nat'l Rsrv. Life Ins. Co.*, 918 F.2d 1538, 1541–42 (11th Cir. 1990); *Raimi v. Furlong*, 702 So.2d 1273, 1284 (Fla. 3d DCA 1997)); *see Liappas v. Augoustis*, 47 So.2d 582 (Fla. 1950) ("The gist of a civil action for conspiracy is not the conspiracy itself, but the civil wrong which is done pursuant to the conspiracy and which results in damage to the plaintiff. Thus, it is generally held that an act which constitutes no ground of action against one person cannot be made the basis of a civil action for conspiracy." (internal citations omitted)). Accordingly, if the alleged underlying tortious claims fail to survive a motion to dismiss, then the civil conspiracy claim likewise fails. *See Alhassid*, 60 F. Supp. 3d at 1317.

For the reasons provided above, Plaintiff's claims for defamation, invasion of privacy, and cyberstalking fail to survive the instant Motion. Furthermore, Plaintiff's claim for fraudulent transfer fails because he is not a creditor—as discussed in detail below—and therefore it likewise fails to support the civil conspiracy claim. Thus, the Complaint fails to allege underlying tortious conduct or acts to form the basis of its civil conspiracy cause of action.

Plaintiff mentions—without analysis—the "force of numbers" exception, which permits a civil conspiracy to exist without an underlying tort or wrong if the plaintiff can show some "peculiar power of coercion of the plaintiff possessed by the defendants in combination which any individual standing in a like relation to the plaintiff would not have had." *Liappas*, 47 So.2d at 583 (internal quotations and citations omitted). Notably, the exception only applies where "'the result of the defendants' concerted action [is] different from anything that could have been accomplished separately.'" *Alhassid*, 60 F. Supp. 3d at 1319 (quoting *Kee*, 918 F.2d at 1542). "While the combined actions of two or more persons might exert more pressure on the person affected," the exception does not apply when "the nature of the individual act is not altered, nor its character affected or changed, by the combination." *Liappas*, 47 So.2d at 583.

Here, neither the Complaint nor Plaintiff's response maintains that the purported conspiracy between Defendants was *necessary* to accomplish the alleged tortious conduct. *See Alhassid*, 60 F. Supp. 3d at 1319. Plaintiff does not discuss—and the Court cannot surmise—any circumstances in which Defendants' combined actions "would assume a new and

different character and thus amount to an independent tort." *Liappas*, 47 So.2d at 583. In other words, while Defendants' combined actions might have increased the damage to Plaintiff's reputation, the nature of the defamatory acts themselves are not altered by the combination. *See id.* One person with internet access can destroy an individual's reputation alone—multiple people with Internet access, acting in concert, simply increases the volume of defamatory online content, not its effect. Thus, the Court finds this exception inapplicable and dismisses the civil conspiracy claim without prejudice.[14]

E. Count V: Fraudulent Transfer

Finally, Defendants assert that the Complaint fails to state a claim for fraudulent transfer. The Court agrees.

Florida's fraudulent transfer statute provides:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

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[14] Additionally, Defendants argue that the Complaint's allegations are too imprecise to support a civil conspiracy claim. However, the Court does not need to address this argument because Count IV is dismissed for the above reasons.

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

1. Was engaged or about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Fla. Stat. § 726.105(1).

Although Defendants argue that the Complaint simply regurgitates components of the statute, they concede that it alleges that Defendant United Together transferred $500,000 to Defendant Progress Tomorrow. (*Id.* at p. 23). These allegations appear to sufficiently describe the nature of the allegedly fraudulent transaction, and Defendants do not identify any other deficiencies with the fraudulent transfer claim. (*See* Doc. 1-1, ¶¶ 15–17).

Nevertheless, the Court finds that the Complaint fails to state a claim for fraudulent transfer. *Cf. Smith v. Psychiatric Sols., Inc.*, 750 F.3d 1253, 1262 (11th Cir. 2014) ("District courts have unquestionable authority to control their own dockets. This authority includes broad discretion in deciding how best to manage the cases before them." (internal citations and quotations omitted)); *BankWest, Inc. v. Baker*, 446 F.3d 1358, 1364 (11th Cir. 2006) (stating that Article III's case or controversy requirement demands that the case be viable at all stages of the litigation).

The plain language of the statute clearly states that "A transfer made or obligation incurred by a debtor is fraudulent *as to a creditor*" and includes the words "*creditor's* claim." § 726.105(1) (emphasis added). Thus, Florida's fraudulent transfer statute pertains to debtor-creditor relations. *Cf. In re Rollaguard Sec., LLC*, 591 B.R. 895, 907 (S.D. Fla. 2018) (stating that the Bankruptcy Code's fraudulent transfer provisions "are analogous 'in form and substance'" to Florida's fraudulent transfer counterparts); *Berman v. Smith*, 510 B.R. 387, 394 (S.D. Fla. 2014) (stating that Florida's fraudulent transfer statute applies to present and future creditors).

Here, the Complaint alleges that Defendants defrauded their creditors by transferring assets among each other to "mak[e] them[selves] judgment-proof" and that they used these assets to disparage Plaintiff, ultimately harming his political career. (*Id.* ¶¶ 13–18). But it never alleges that *Plaintiff himself* is one of Defendants' creditors. (*See id.*). The gravamen of the Complaint is Defendants' alleged defamation of Plaintiff's character, and their allegedly fraudulent transfers only tenuously relate to Plaintiff, a non-creditor. (*See id.*). Section 726.105 does not seem to address Plaintiff's injury, and therefore Count V is dismissed without prejudice.

IV. Conclusion

Accordingly, it is ORDERED AND ADJUDGED as follows:

1. Defendants' Motion to Dismiss (Doc. 3) is GRANTED;

2. Plaintiff's Complaint (Doc. 1-1) is DISMISSED WITHOUT PREJUDICE; and

3. On or before Tuesday, February 9, 2021, Plaintiff may file an Amended Complaint consistent with the directives of this Order, if it believes it can do so in accordance with Rule 11. Failure to timely file an Amended Complaint will result in dismissal of this action without further notice.

DONE AND ORDERED in Orlando, Florida on January 26, 2021.

/s/ Paul G. Byron
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties

ORDER DENYING PETITION FOR REHEARING, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (DECEMBER 14, 2022)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALAN GRAYSON,

Plaintiff-Appellant,

v.

NO LABELS, INC., PROGRESS TOMORROW, INC., UNITED TOGETHER, INC., NANCY JACOBSON, MARK PENN, ET AL.,

Defendants-Appellees.

No. 22-11740-AA

Appeal from the United States District Court
for the Middle District of Florida

Before: WILLIAM PRYOR, Chief Judge, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Reconsideration En Banc construed as The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Reconsideration

construed as The Petition for Panel Rehearing is also denied. (FRAP 40)