Exhibit

APPENDIX "A"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CHRISTOPHER L TAKHVAR,

Plaintiff,

v. Case No: 5:22-cv-576-PGB-PRL

WARNER BROS. DISCOVERY INC., INVESTIGATION DISCOVERY CHANNEL, APPLE INC, AMAZON INC., MICROSOFT INC, FUBU TV, SLING TV, VUDU, HULU, ALPHABET INC., YOUTUBE, YIDIO, AARON LEVY, MARION COUNTY SHERRIFF'S OFFICE, MARION COUNTY FLORIDA, WALT DISNEY COMPANY, PHILO, NBC UNIVERSAL MEDIA LLC, DISH NETWORK, FACE BANK GROUP, TIM BANEY, BRANDON EATROS and ADAM ETROS,

Defendants.
_____/

ORDER

Plaintiff Christopher L. Takhvar, a state prisoner proceeding *pro se* and *in forma pauperis*, initiated this action by filing a civil rights complaint. (Docs. 1, 7). Thereafter, he filed an amended complaint. (Doc. 3). A June 1, 2023 Order dismissed the amended complaint without prejudice and afforded Plaintiff an opportunity to file an amended complaint. (Doc. 9). Plaintiff filed his second

amended complaint on June 20, 2023. (Doc. 10). The case is currently before the Court for screening pursuant to the Prison Litigation Reform Act (PLRA).

LEGAL STANDARD

The PLRA requires the Court to dismiss a case if the Court determines that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A; *see also* 28 U.S.C. § 1915(e)(2)(B) (applying the same standard to *in forma pauperis* proceedings). The Court must liberally construe a *pro se* Plaintiff's allegations. *See Haines v. Kerner*, 404 U.S. 519 (1972); *see also Miller v. Stanmore*, 636 F.2d 986, 988 (5th Cir. 1981).

PLAINTIFF'S ALLEGATIONS

Plaintiff, an inmate within the Florida Department of Corrections, alleges that video recordings of his interrogation conducted prior to his charge and subsequent conviction for second degree murder were wrongly used in a documentary about his offense. According to Plaintiff's second amended complaint (Doc. 10), an episode of the television series The Murder Tapes entitled "The Robin Tattoo" was first broadcast on June 23, 2021; the episode was thereafter released on several streaming services. Plaintiff claims that the footage used in the episode and statements made by cast members were defamatory and portrayed Plaintiff in a false light, causing permanent damage to his reputation, significant

financial loss, and physical and mental pain. He further complains that the broadcast interfered with his due process rights while pursuing federal habeas relief.

DISCUSSION

In his second amended complaint, Plaintiff brings the following claims: (1) trespass on the case; (2) "defamation plus" pursuant to 42 U.S.C. § 1983; (3) conspiracy pursuant to 42 U.S.C. 1985; (4) "false light/invasion of privacy"; and (5) "defamacast." (Doc. 10). For relief, Plaintiff seeks declaratory judgment, an injunction ordering the removal of all publication and broadcast of "The Robin Tattoo," and nominal, compensatory, special, punitive, irreparable, and discretionary damages. (*Id.* at 29-30). Plaintiff's second amended complaint (Doc. 10) is substantially similar to his first amended complaint (Doc. 3), except he no longer seeks a claim for wire fraud and has added some allegations as to claims 1 through 3.

Despite being afforded an opportunity to cure the deficiencies of his claims, Plaintiff has failed to do so. Thus, the second amended complaint is due to be dismissed. *See* 28 U.S.C. § 1915A. The Court addresses each of Plaintiff's claims in turn, although not in the order in which Plaintiff presented them in his second amended complaint.

At the core of his claims, Plaintiff contends the broadcast of his interrogation in the episode "The Robin Tattoo"—which aired after he was convicted and sentenced—interfered with his ability to pursue his collateral attack in federal court. As an initial matter, Plaintiff misunderstands the purpose of suppression of evidence in a criminal case. Defendants may invoke the protection guaranteed by the Fourth Amendment by filing a motion to suppress the evidence resulting from the unconstitutional search or seizure. A suppression motion asks the court to apply the "exclusionary rule," which is the rule that evidence illegally seized cannot be admitted in evidence in a criminal trial. It does not mean that the evidence ceases to exist. Instead, courts considering suppression motions are aware of the evidence that is being sought to be excluded. *See Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (discussing the exclusionary rule). "[T]he exclusionary rule is not an individual right[.]" *Herring v. United States*, 555 U.S. 135, 141 (2009).

A. Count II: § 1983 Defamation Plus

Plaintiff asserts that defamatory statements made by cast members in the video, as well as releasing the video of his interrogation, caused the denial of his due process rights under the Fourteenth Amendment by interfering with the federal collateral review of his conviction. (Doc. 10 at 28-33). He also asserts that statements made by cast members caused permanent injury to his personal and

professional reputation. (*Id.*) Plaintiff's § 1983 claim is due to be dismissed for failure to state a claim.

The Court interprets Plaintiff's allegation as a due process claim under 42 U.S.C. § 1983 based on harm to his reputation. However, Plaintiff's allegation fails to state a claim of constitutional proportion; the Constitution does not forbid defamation, whether libel or slander. *See Almand v. DeKalb County*, 103 F.3d 1510, 1513 (11th Cir. 1997) ("[S]ection 1983 must not supplant tort law; liability is appropriate solely for violations of federally protected rights."); *see also Davis v. City of Chicago*, 53 F.3d 801, 803 (7th Cir. 1995) (citing *Siegert v. Gilley*, 500 U.S. 226, 233–34 (1991) (holding that defamation, which encompasses libel and slander, is a tort that may be actionable under state law but is not a constitutional deprivation) and *Paul v. Davis*, 424 U.S. 693, 708–09 (1976) (recognizing that an interest in reputation alone is not a liberty or property interest protected by the Due Process Clause, thus holding that defamation does not give rise to a claim under 42 U.S.C. § 1983)).

The Eleventh Circuit Court of Appeals has held that "damages to a plaintiff's reputation are only recoverable in a section 1983 action if those damages were incurred as a result of government action significantly altering the plaintiff's constitutionally recognized legal rights." *Cypress Ins. Co. v. Clark*, 144 F.3d 1435, 1438 (11th Cir. 1998). The Supreme Court has established "what has come to be

known as the 'stigma-plus' test," which is to be applied in assessing Fourteenth Amendment Due Process claims. *Cannon v. City of W. Palm Beach*, 250 F.3d 1299, 1302 (11th Cir.2001). The "stigma-plus" test requires that "a plaintiff claiming a deprivation based on defamation by the government must establish the fact of the defamation 'plus' the violation of some more tangible interest before the plaintiff is entitled to invoke the procedural protections of the Due Process Clause." *Behrens v. Regier*, 422 F.3d 1255, 1260 (11th Cir. 2005) (citing *Cannon*, 250 F.3d at 1302). In considering what satisfies the "plus" prong of this analysis, the Eleventh Circuit has stated that a "state action had [to have] significantly altered or extinguished 'a right or status previously recognized by state law.'" *Id.* (quoting *Paul*, 424 U.S. at 711).

As stated above, Plaintiff misunderstands the purpose of suppression of evidence. And despite his displeasure that the footage of his interview with law enforcement was released, Plaintiff does not establish how the release of the footage interfered with his federal habeas proceeding. Thus, he has not satisfied the "plus" prong that the state action significantly altered or extinguished any state law rights. Thus, he has only a defamation claim, which is not actionable under § 1983.

To the extent that Plaintiff alleges Officer Levy defamed him by appearing in the episode, he cannot state a claim. Although imputing criminal behavior to an

individual is generally considered defamation and actionable without proof of special damages, the Supreme Court has held that a claim of being defamed by a police officer is not actionable under § 1983. *See Paul*, 424 U.S. at 711-12; *see also Walker v. Atlanta Police Dep't Public Affairs Unit*, 322 F. App'x 809, 810 (11th Cir. 2009) ("[D]efamation by a police officer is not actionable under 42 U.S.C. § 1983"); *Thomas v. Kipperman*, 846 F.2d 1009, 1010 (5th Cir. 1988) (rejecting defamation claim under Section 1983 by prisoner against police officer, pawn shop owner, and sheriff).").

Next, Plaintiff asserts that the Marion County Sheriff's Office has a policy or custom establishing state-actor liability because the Sheriff's Office responded to Plaintiff's complaint by stating, "as far as monetary gain, the television companies do not pay law enforcement officers for their participation in the productions." (Doc. 10 at 20). "In order for a plaintiff to demonstrate a policy or custom, it is 'generally necessary to show a persistent and wide-spread practice.'" *McDowell v. Brown*, 392 F.3d 1283, 1290 (11th Cir. 2004) (quoting *Wayne v. Jarvis*, 197 F.3d 1098 (11th Cir. 1999)). Despite his contention, this statement that law enforcement officers are not paid for their participation does not establish that the Sheriff's Office has a policy or custom of defaming criminal defendants or violating their rights to pursue federal habeas claims. Thus, he fails to state a claim against the Marion County Sheriff's Office.

Further, Plaintiff has not established that the named streaming services, their individual owners, and executive producer Baney are state actors for purposes of suit under § 1983. For these defendants to qualify as "state actors" under § 1983, one of the following three tests must be satisfied:

> (1) the State has coerced or at least significantly encouraged the action alleged to violate the Constitution ("State compulsion test"); (2) the private parties performed a public function that was traditionally the exclusive prerogative of the State ("public function test"); or (3) "the State had so far insinuated itself into a position of interdependence with the [private parties] that it was a joint participant in the enterprise[]" ("nexus/joint action test").

Rayburn ex rel. Rayburn v. Hogue, 241 F.3d 1341, 1347 (11th Cir. 2001) (citing *NBC, Inc. v. Commc'ns Workers of Am., AFL-CIO*, 860 F.2d 1022, 1026-27 (11th Cir. 1988)). The application of these three tests patently establishes these defendants were not state or federal actors.

Under the "State Compulsion Test," Plaintiff does establish that any government official did anything to coerce or encourage these media entities to act in some kind of conspiracy against him. At most, Plaintiff alleges that Officer Levy was interviewed for the episode about Plaintiff's offense. And because a defamation claim against Officer Levy is not actionable under § 1983, Plaintiff cannot establish that Officer Levy's participation coerced these defendants to violate the Constitution. The "public function analysis is a stringent test requiring a showing that private actors have been given powers or are performing functions

that are 'traditionally the exclusive prerogative of the State." *Weaver v. James Bonding Co.*, 442 F. Supp. 2d 1219, 1224 (S.D. Ala. 2006) (quoting *Harvey v. Harvey*, 949 F.2d 1127, 1131 (11th Cir. 1992)); *see also Campbell v. Civ. Air Patrol*, 131 F. Supp. 2d 1303, 1311 (M.D. Ala. 2001) (same). Nothing indicates the defendants have been given powers or are performing functions that generally belong to the state or federal government. Finally, to satisfy the Nexus/Joint Action Test, "the governmental body and private party must be intertwined in a 'symbiotic relationship.'" *Rayburn*, 241 F.3d at 1348 (citations omitted). Again, nothing in his second amended complaint shows that the defendants were symbiotic. Officer Levy was interviewed for the episode and did not receive compensation for his participation. This does not establish interdependence between the defendants. Consequently, Petitioner fails to meet the Nexus/Joint Action Test. These defendants were not state actors, and Plaintiff fails to state a § 1983 claim against them.

Plaintiff's § 1983 claim rests on alleged defamatory statements of Officer Levy. Such a claim is not actionable under § 1983. Nor has Plaintiff established a Sheriff's Office policy or custom of defaming criminal defendants and interfering with their civil rights. Finally, Plaintiff has not established that the other defendants were state actors. Thus, Plaintiff has failed to state a claim as to Count II.

B. Count III: § 1985 Conspiracy

Plaintiff brings a claim against all Defendants pursuant to 42 U.S.C. § 1985(3). Plaintiff alleges that Defendants conspired to injure him by ruining his professional reputation in making and publishing false statements about him. By broadcasting the video about his offense, Plaintiff claims that Defendants have deprived him of his right to "reputational liberty" and have permanently damaged his personal and professional reputation. (Doc. 10 at 33-36).

To state a claim under § 1985(3), a plaintiff must establish the following six elements:

> (1) a conspiracy, (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy, (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Childree v. UAP/GA AG CHEM, Inc., 92 F.3d 1140, 1146-47 (11th Cir. 1996). As to the second element, "a plaintiff must allege that some racial or other 'class-based invidiously discriminatory animus lay behind the conspirators' action.'" *Barth v. McNeely*, 603 F. App'x 846, 850 (11th Cir. 2015) (per curiam) (quoting *Childree*, 92 F.3d at 1146-47).

Here, Plaintiff contends that "he has been thrust into a known class of persons due to being unlawfully convicted[.]" (Doc. 10 at 34). He asserts that his status as a state prisoner puts him in a class that is regularly discriminated against.

(*Id.* at 34-35). Despite this contention, Plaintiff's status as a state prisoner does not place him in a class entitled to protection under § 1985. Courts have determined that state prisoners are not entitled to protection as a class under § 1985. *See Lewis v. Green*, 629 F. Supp. 546 (D.D.C. 1986) ("Classes based on non-political, non-religious criteria, on the other hand, have not been afforded protection under the statute."); *Nakao v. Rushen*, 542 F. Supp. 856, 859 (N.D. Cal. 1982) (class of "state prisoners" not protected under § 1985(3) because there has been no congressional determination that it requires special federal civil rights assistance, and because it does not possess "discrete, insular and immutable characteristics comparable to those characterizing classes such as race, national origin and sex"); *see also Smith v. Gomez*, 550 F.3d 613, 617 (7th Cir. 2008) ("status as a parolee is not considered a 'suspect class' for equal-protection purposes").

Thus, Count III is due to be dismissed because Plaintiff has failed to establish he is in a class entitled to protection under § 1985.

C. Count I: Trespass on the Case; Count IV: False Light; and Count V: Defamacast

Plaintiff uses the label "trespass on the case" to contend that Defendants, by broadcasting the episode with the video of his interrogations, interfered with his ability to challenge the introduction of that evidence on his collateral attack. (Doc. 10 at 25-28). As an initial matter, "trespass on the case" is not the appropriate cause of action. "Negligence law," as it currently exists, "evolved from the intentional

tort of trespass on the case." *Monroe v. Sarasota Cty. Sch. Bd.*, 746 So. 2d 530, 534 (Fla. 2d DCA 1999). However, Plaintiff does not allege negligence. And even if he did, negligence is a state law claim.

Further, Plaintiff attempts to bring claims of defamation under the labels of "false light" and "defamacast." (Doc. 10 at 36-39). However, these defamation claims are state law claims, not violations of the United States Constitution or federal law.

As Plaintiff has failed to state a claim of a constitutional violation, these three claims cannot proceed because this Court lacks jurisdiction to hear a purely state law claim where there is no diversity between the parties. *See* 28 U.S.C. §§ 1331, 1332. Plaintiff has not established that he is a citizen of different states from all defendants. 28 U.S.C. § 1332. Because Plaintiff has failed to state a federal claim, the Court will not exercise supplemental jurisdiction over these state law claims. 28 U.S.C. § 1367(c)(3).

Accordingly, it is **ORDERED** that:

1. Plaintiff Christopher L. Takhvar's Second Amended Complaint (Doc. 10) is **DISMISSED** under 28 U.S.C. § 1915A for failure to state a claim.
2. The Clerk is **DIRECTED** to enter judgment, terminate any pending motions and deadlines, and close this file.

DONE AND ORDERED in Orlando, Florida on August 17, 2023.

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CHRISTOPHER L TAKHVAR,

Plaintiff,

v. Case No. 5:22-cv-576-PGB-PRL

WARNER BROS. DISCOVERY INC., et al,

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to this Court's Order, entered August 17, 2023, judgment is hereby entered dismissing this case for failure to state a claim.

Any motions seeking an award of attorney's fees and/or costs must be filed within the time and in the manner prescribed in Local Rule 7.01, United States District Court Middle District of Florida.

Date: August 18, 2023

ELIZABETH M. WARREN,
CLERK

s/BD, Deputy Clerk

Copy to:

Counsel of Record
Unrepresented Parties

Appendix "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-12809-G

CHRISTOPHER L. TAKHVAR,

Plaintiff - Appellant,

versus

WARNER BROS. DISCOVERY INC.,
INVESTIGATION DISCOVERY CHANNEL,
APPLE, INC.,
AMAZON INC.,
MICROSOFT INC, et al.,

Defendants - Appellees.

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

ORDER: Pursuant to the 11th Cir. R. 42-1(b), this appeal is DISMISSED for want of prosecution because the Appellant Christopher L. Takhvar failed to pay the filing and docketing fees (or file a motion in the district court for relief from the obligation to pay in advance the full fee) to the district court within the time fixed by the rules.

Effective September 28, 2023.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

FOR THE COURT - BY DIRECTION

Additional material from this filing is available in the Clerk's Office.