AlaFile E-Notice

58-CV-2021-900032.00

Judge: PATRICK E. KENNEDY

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

DANIEL FLICKINGER V. LAWRENCE TRACY KING ET AL
58-CV-2021-900032.00

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RESPONSE TO MOTION TO DISMISS PURSUANT TO RULE 12(B)

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CIRCUIT COURT OF
SHELBY COUNTY, ALABAMA
MARY HARRIS, CLERK

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

DANIEL S. FLICKINGER,

Plaintiff,

CV-2021-900032

VS.

LAWRENCE TRACY KING;
KING SIMMONS FORD & SPREE P.C.,
et. al.,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

COMES NOW the Plaintiff and hereby moves this Honorable Court to deny Defendants' Motion to Dismiss for the reasons set forth and stated as follows:

FACTUAL BACKGROUND

Defendants misrepresent the Plaintiff's Complaint in order to frame their 12(b)(6) Motion to Dismiss. Plaintiff vigorously contests and denies that the social media profile alleged to be associated with the Plaintiff was his own. As clearly described in Plaintiff's Complaint as well as in his April 16, 2021 affidavit, the social media profile displayed to Plaintiff by the partners of Wainwright, Pope, & McMeekin, P.C. (hereinafter, "WPM") from Lonnie Wainwright's iPhone on June 10, 2020 published by Defendants on June 9, 2020 was misleadingly doctored to contain a professional photograph appropriated from WPM's website as the profile picture and WPM employment credentials situated adjacent to the professional profile picture accompanying the Plaintiff's name – images and information that Plaintiff had never used or shared in conjunction with his personal social media accounts. (Affidavit of Daniel S. Flickinger, hereinafter, "DSF Affidavit," p. 3). Surrounding this misleading depiction of Plaintiff's social media identity were likewise numerous false and libelous statements directed at the Plaintiff. (DSF Affidavit, p. 4).

Defendants – having sufficiently spied on the Plaintiff to be fully aware that Plaintiff commented in his personal capacity as a private citizen on social media, and that the Plaintiff did not advertise or share his employment credentials or professional photographs in connection with his personal social media activity -- deliberately misrepresented Plaintiff's personal social media post about George Floyd to elicit the false impression that Plaintiff was generating corporate social media posts as an official representative of WPM. (DSF Affidavit, pp. 5-6). Deducing from the September 1, 2020 letter from WPM, the named Defendants had to either be members

of, or collude with, the 1,500-plus member purportedly "private" Facebook group, "CALLING OUT ALABAMA BUSINESSES THAT SUPPORT RACISM," (hereinafter, "CALLING OUT") to have access to and publish the misleading depiction of Plaintiff's personal social media activity along with the false and defamatory statements describing it to an audience outside the purportedly private group. (See Exhibit H, attached to DSF Affidavit). Otherwise, the Defendants themselves would have had to create the false and misleading depictions of the Plaintiff, which they very well may have.

The false and disparaging statements published by Defendants about the Plaintiff were numerous and were directed toward the Plaintiff alone, not, as Defendants incorrectly suggest in their Motion to Dismiss, to WPM. (DSF Affidavit, p. 4). In fact, the only comment that explicitly described WPM was Shawn Avery's June 17, 2020 comment mirroring the Defendants' June 11, 2020 Twitter post praising WPM as purportedly having "a great reputation in town" and being "honest[1], professional, and kind" – comments clearly issued to reward WPM for swiftly terminating Plaintiff's employment in less than 24 hours from the receipt of the false and disparaging statements published by Defendants on June 9, 2020. (See Exhibit J attached to DSF Affidavit, p. 10). The doctored social media profile alleged to be associated with the Plaintiff published by the Defendants was misleadingly depicted as the Plaintiff's own social media profile if the Plaintiff had created a social media profile in his official capacity as a corporate agent of WPM, which he has never done. (DSF Affidavit, pp. 3-4). The doctored social media profile falsely referred to Plaintiff as a business. Id. at 4. The doctored social media profile falsely and disparagingly referred to Plaintiff – who deeply opposes racism and ethnic partiality of all forms – as a business that supports racism. Id. The doctored social media profile falsely and disparagingly referred to Plaintiff as a racist. Id. The comments surrounding the doctored social media profile falsely and disparagingly referred to the Plaintiff as a lawyer who had done ethical damage. Id. The comments surrounding the doctored social media profile falsely claimed that Plaintiff advocated for "running over" protestors[2] -- a position the Plaintiff has never advocated. Id. Plaintiff was only able to gain access to the "private" CALLING OUT group through a proxy social media account approximately 8 months after the false and defamatory statements made the basis of this lawsuit were originally published. Id. at 9-10. Because it was evident that comments had been deleted during the interim, there were likely other disparaging and false statements made about the Plaintiff and published by Defendants that have yet to be disclosed to the Plaintiff. Id.

Plaintiff first learned of the existence of the purportedly private CALLING OUT group from WPM's September 1, 2020 letter -- information WPM withheld for three months after terminating Plaintiff's employment until apparently receiving word from Defendants that Plaintiff intended to sue the Defendants. (See Exhibit H attached DSF Affidavit, pp. 8-9). While Defendants communicated with the Plaintiff only once when they tweeted a "large eyes" emoji directly to the Plaintiff on the night of June 9, 2020, Defendants that night also deliberately published every single misleading, false, and defamatory statement made the basis of this lawsuit behind the Plaintiff's back in such a way that the Plaintiff had no way of knowing what was

[1] But compare WPM's March 24, 2021 sworn affidavits attached to Defendants' Motion to Transfer Venue to their previous correspondence with the Plaintiff (DSF Affidavit), including WPM's September 1, 2020 letter attached as Exhibit H to the DSF Affidavit.

[2] See Jennifer Lovell comment, attached as Exhibit 1.

being published about him and effectively foreclosing any possibility for the Plaintiff to defend himself against the false statements being issued. (DSF Affidavit, p. 1).

The named Defendants, by virtue of their 34-year relationship with WPM, were fully aware that the corporate entity of WPM was not active on social media. (DSF Affidavit, p. 7). The Defendants were fully aware that no members of WPM were active on social media posting in their official capacity as agents of WPM. Id. The named Defendants were fully aware that WPM is a law firm focused only on practicing worker's compensation defense litigation. Id. Indeed, by virtue of Defendants' longtime close relationship with WPM, Defendants were intimately aware of each WPM members' idiosyncrasies and how the decision makers at WPM would become unhinged by panic in response to the publishing of false and disparaging statements about the Plaintiff falsely linked to WPM's corporate entity during the summer of 2020 when Antifa and Black Lives Matter agitators[3] were effectively given free reign through the withholding[4] and defunding[5] of police support by Democrat-run municipalities to riot and loot across nearly 220 American cities[6] under the pretext of a conspiracy theory about "racism" being involved in the death of George Floyd[7] culminating in the most destructive riots in American history[8]. Defendants even tacitly admit that the disparaging remarks describing the Plaintiff as a "racist" were false in footnote 4 on page 6 of their Motion to Dismiss where Defendants openly dispute that they believed the "social media posts" published by Defendants to WPM were "racist in nature."

Neither Plaintiff's personal social media history nor the particular post – a post that was deceptively appropriated and misleadingly portrayed as a post authored by a corporate representative of WPM in his official capacity -- remotely promote racism. (DSF Affidavit, p. 3). The particular post at issue in this case was a hypothetical that highlighted George Floyd's individual publicly available criminal and illicit drug abuse history along with some of the facts and circumstances surrounding his death. Id. The post makes zero reference to race or skin color. Id. Yet, Defendants in their Motion describe this post as "racially insensitive," seeming to suggest that any discussion of the underlying facts of an individual American citizen's highly publicized case is off limits, either because the Plaintiff lacks the privilege of having the requisite ethnic minority skin color to discuss the case, or else because George Floyd, by virtue of a privilege associated with his ethnic minority skin color, is beyond scrutiny. If this is, indeed, what Defendants and the WPM witnesses are suggesting by absurdly labeling as "racially

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[3] Media outlets ludicrously claim that the "vast majority," or 93% of 7,750 protests organized by BLM across 2,000 US locations during the summer of 2020, "were peaceful," in their feeble attempts to minimize the over 500 violent, destructive, and, many times, deadly riots across 220 American cities that were incited by BLM and Democrat politicians: https://www.theguardian.com/world/2020/sep/05/nearly-all-black-lives-matter-protests-are-peaceful-despite-trump-narrative-report-finds

[4] https://www.dallasnews.com/news/2020/05/29/protesters-torch-minneapolis-police-station-cnn-crew-arrested-during-third-day-of-protests/

[5] https://www.mprnews.org/story/2020/12/11/frey-signs-minneapolis-city-budget-with-cuts-in-police-funding

[6] https://time.com/5886348/report-peaceful-protests/

[7] During the summer of 2020 media outlets would frequently, fallaciously, and with zero evidence link George Floyd's death to racist practices that were made illegal in the U.S. long before George Floyd was born. https://time.com/5844030/george-floyd-minneapolis-history/

[8] https://fee.org/articles/george-floyd-riots-caused-record-setting-2-billion-in-damage-new-report-says-here-s-why-the-true-cost-is-even-higher/

insensitive" the text of Plaintiff's personal social media post, then it is clearly not the Plaintiff who peddles in racism[9].

Furthermore, a strong inference can be made that the named Defendants, who colluded with members of the purportedly private CALLING OUT group like "Shawn Avery," were fully aware that the purpose of the alleged private group's activity was to coerce the termination of Plaintiff's employment for his personal expressions of opinion that had nothing to do with his job performance as a worker's compensation defense lawyer. (DSF Affidavit, p. 10). The group admitted as much when the group issued positive remarks about WPM immediately after WPM "erased" the Plaintiff. Id. Indeed, never had WPM made a personnel decision, let alone a decision to hire or terminate a third-party service provider, so swiftly during the Plaintiff's nearly eleven years of employment. During Plaintiff's employment with WPM, members of the firm frequently consulted with Plaintiff on these decisions, which often took the firm weeks, if not months. The speed at which WPM reached its decision to terminate Plaintiff's employment in less than 24 hours after apparently seeing Plaintiff's personal opinions that the firm was well-aware that Plaintiff held and expressed couched within misleading, false, and defamatory statements published by the Defendants, is strongly indicative of the duress and coercion felt by the members of WPM directly caused by the Defendant's tortious publishing. (DSF Affidavit, pp. 1-2, and see Exhibits H & I attached to DSF Affidavit). In fact, while Linda Pope was berating the Plaintiff during the termination meeting on June 10, 2020, she stated that she was unable to sleep the entire night before. Id.

An overwhelming inference of unmitigated malice directed toward the Plaintiff -- who does not share Defendants' self-described "progressive" political orthodoxy including the fallacious and totalitarian[10] "anti-racist" demagoguery of Ibram X. Kendi -- can be drawn from even the small sampling of Defendants' belligerent and hateful public Twitter posts. (See Exhibits B, C, and E, attached to the DSF Affidavit). Defendants, both before and after Plaintiff's termination, publicly expressed enthusiasm over the employment termination of private citizens for the mere act of expressing opinions that do not align with those of the Defendants. Id. That Defendants immediately attempted to conceal their public Twitter profile upon receiving notice of Plaintiff's lawsuit is a testament to the unmitigated malice directed towards the Plaintiff dripping from their Twitter feed. (DSF Affidavit, p. 6).

Furthermore, the facts of this case elicit an overwhelming inference that Defendants were willing and enthusiastic hatchet men for the purportedly private CALLING OUT group – a cabal that bears a striking resemblance to an illegal extortion[11] racket designed to bully the silence of

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[9] Racism is defined by Merriam-Webster dictionary as "a belief that race is a fundamental determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race." https://www.merriam-webster.com/dictionary/racism. Thankfully in Alabama, words can be defined, and courts rely on dictionaries such as Merriam-Webster to ascertain the definition of words. See, e.g., Blevins v. WF Barnes Corp., 768 So. 2d 386 at 391 (Ala. Civ. App. 1999)

[10] https://www.city-journal.org/how-to-be-an-antiracist?wallit_nosession=1

[11] Indeed, the activity of the CALLING OUT cabal closely resembles the criminal activity described in Alabama's felony extortion statutes set out in *Ala. Code § 13A-8-13 & 14* and the definitions section contained in *Ala. Code § 13A-8-1*, which describe 1st degree extortion as knowingly obtaining by threat control over the property of another, with intent to deprive the other of the property, and "threat," in part, as "any…act which would not in itself substantially benefit the actor but which is calculated to harm substantially another person with respect to

private citizens' free speech through depriving private citizens of their ability to earn a living. Indeed, an undeniable inference can be drawn that the Defendants were the ideal recruits to function as hatchet men for this cabal as, unlike other CALLING OUT members, the Defendants could claim a semblance of plausible deniability by virtue of their purported 34-year friendship with WPM. (See Exhibit F attached to DSF Affidavit).

PLAINTIFF UNEQUIVOCALLY STATES A COGNIZABLE CLAIM OF DEFAMATION

Defendants cite no Alabama authority to support their argument that falsely maligning a private Alabama citizen with numerous misleading and false statements in the manner in which they did so and under the circumstances present during the summer of 2020 is "merely an expression of an opinion." In Alabama, the law is settled that the context in which alleged defamatory statements are made is indispensable to the analysis of whether particular statements are defamatory. See, e.g., Blevins v. WF Barnes Corp., 768 So. 2d 386, 391-392 (Ala. Civ. App. 1999); Liberty Nat'l Life Ins. Co. v. Daugherty, 840 So. 2d 152, 159 (Ala. 2002) (noting that courts will not rigidly enforce the construction of a statement as nondefamatory in order to relieve defendants of liability); Pensacola Motor Sales, Inc. v. Daphne Auto, LLC, 155 So. 3d 930, 933-952 (Ala. 2013) (affirming defamation verdict in a case where an Iraqi-American immigrant was falsely maligned by the Defendants as a terrorist sending money from his auto dealership to fund terror in the Middle East in the context of post-9/11 America).

Just as a defendant auto dealership falsely maligning a competitor of Iraqi decent within the few years following 9/11 as a money-laundering terrorist is defamatory in the context of the political landscape of post-9/11 America, so, too, is the Defendants' conduct of falsely maligning the Plaintiff – a private citizen and political conservative -- as a "racist" and "a business that supports racism" on behalf of a 1,500-plus member purportedly private cabal within the days and weeks following the death of George Floyd. See also Tanner v. Ebbole, 88 So. 3d 856, 861-887 (Ala. Civ. App. 2011) (affirming defamation verdict in a case where a tattoo artist was falsely maligned by a competitor tattoo artist as a Satan-worshipping, STD-spreading professional hack via a barrage of false and disparaging depictions of the artist's likeness and professional handiwork presented on a MySpace webpage and via a bust accurately depicting the shape of artist's torso along with actual tattoos that the artist had on her body, but misleadingly altered with tattoos of Satanic symbols not actually present on artist's body, that, when considered in the context of the totality of the false and disparaging statements and depictions, rendered Defendants' actions defamatory).

The libels present in the case at bar were published by the Defendants in the context of a political landscape where Democrat-controlled municipalities across the country were calling off police and fire support so that agitators could riot and loot under the pretext of combating "racism" in response to the death of George Floyd. While Floyd's death was tragic, it was immediately apparent from even the limited video available in the days following his death that evidence of racism was absent. Indeed, Derek Chauvin – the ex-Minneapolis police officer and

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his or her health, safety, business, calling, career, financial condition, reputation, or personal relationships." The similarities are undeniable if the word "property" in *13A-8-13* was replaced with "job" or "career."

criminal defendant convicted under the Minnesota statutes for 2nd degree murder[12], 3rd degree murder[13], and 2nd degree manslaughter[14] in connection with George Floyd's death -- was not charged with or convicted of a "hate" crime under Minnesota law. In fact, even Minnesota Attorney General Keith Ellison admitted during a "60 Minutes" interview on April 25, 2021 that there was no evidence that Chauvin committed a hate crime[15]. At no point during the three-week trial of Derek Chauvin from March 29, 2021 through April 19, 2021 was evidence presented that Chauvin's actions were motivated out of racial animus.

Nonetheless, Defendants, along with likely all of the far-left radical "progressive" participants in the CALLING OUT cabal who adhere to and promote the kind of totalitarian demagoguery espoused by individuals like Ibram X. Kendi, maintain as unassailable "fact" that "racism" was present in George Floyd's death, and, in accordance with "anti-racism" sophistry, hold as unassailable "fact" that those who dare dissent with this assertion must, too, be "racists." This bad-faith, evidence-free, fallacious, and bigoted assertion that those who disagree with "anti-racist" demagogues are "racists" echoed by the Defendants on their Twitter feed and echoed nearly daily during the summer of 2020 by mainstream media effectively weaponized and factualized the label of "racism" so as to fuel the very real riots that took place for months on end last summer. Accordingly, considered in this context that eventually culminated into a political landscape so dominated by far-left totalitarian orthodoxy that even the then-sitting President of the United States of America was unilaterally de-platformed from all social media, the demonstrably false accusations of racism leveled at the Plaintiff on June 9, 2020 -- couched within the misleading depiction of his personal social media activity and further couched within many other false and defamatory statements disparaging the Plaintiff's professional fitness published by the Defendants and their 1,500-plus member cabal co-conspirators -- coalesced to become a deadly, libelous, and weaponized "statement of fact" that effectively instantly killed the eleven years of goodwill Plaintiff had established with WPM through hard work and excellent performance. That Defendants' malicious behavior was so much more than merely "expressing an opinion" is undeniably evidenced by the extreme duress that prompted WPM's unprecedentedly swift and ambush-like termination of the Plaintiff. Indeed, the defamatory acts of the Defendants in this case must considered in their context and totality as Alabama courts considered the defamatory conduct in Pensacola Motor Sales, Inc. and Tanner,

As such, the Defendants' malicious activity in this case shatters the spirit of the First Amendment as highlighted by the Alabama Supreme Court while discussing the significance of the United States Supreme Court's seminal New York Times v. Sullivan opinion. See Sanders v. Smitherman, 776 So. 2d 68 at 74 (Ala. 2000). The Sanders Court emphasized the necessity of considering context in evaluating defamation claims when emphasizing the following language from Sullivan:

> "Thus we consider [cases] against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

[12] *Minn. Stat. 609.19*
[13] *Minn. Stat. 609.195*
[14] *Minn. Stat. 609.205*
[15] https://www.insider.com/no-evidence-to-charge-derek-chauvin-with-hate-crime-prosecutor-2021-4

> open…[T]hese liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

Sanders v. Smitherman, 776 So. 2d 68 at 74 (Ala. 2000) (quoting New York Times Co. v. Sullivan, 376 U.S. 254 at 270-71 (1964)).

In contrast to the freedom ideals espoused by the Sanders Court, which unequivocally stated that debate on public issues should be "…uninhibited, robust, and wide-open…," the Defendants' malicious collusion with the CALLING OUT quasi-extortion racket was tailored to quash the Plaintiff's essential First Amendment liberties. Indeed, the cabal's stated goal was to "erase" the Plaintiff. (See Exhibit J attached to DSF Affidavit). Therefore, Defendant's tortious conduct was clearly designed to: 1) inhibit the Plaintiff's freedom of expression and debate by targeting and irreparably damaging the Plaintiff's career and reputation for the "sin" of practicing his fundamental and essential American right to discuss highly publicized issues and thoughtfully dissent from mainstream leftist political orthodoxy; 2) strangle the life out of future debate on important public policy issues surrounding events like the death of George Floyd by instilling fear of reprisal in the Plaintiff as well as in all those who have witnessed this vicious attack upon the Plaintiff's reputation and career; and 3) secretly and insidiously occur behind Plaintiff's back so that swift and irreparable damage could be inflicted – the termination of the Plaintiff's otherwise successful 11-year career in less than 24 hours along with former bosses representing that Plaintiff would be blacklisted from engaging in his profession -- before Plaintiff could possibly have the chance to defend his reputation or even become fully aware of the actors involved and that which he was falsely being accused.

Defendants' reliance upon the protections of the First Amendment and cases from foreign jurisdictions such as New York, New Jersey, and California in their attempt to defend authoritarian and anti-American bullying intended to censor and punish the Plaintiff is unconscionable, and Defendants, by way of their own unclean hands, should be precluded from hiding behind the cloak of the First Amendment. Indeed, within the sound discretion of the trial court, enforcement of the clean hands doctrine is designed to prevent parties from asserting rights under the law when parties' own wrongful conduct renders the assertion of such legal rights "contrary to equity and good conscious." See J&M Bail Bonding Co. v. Hayes, 748 So. 2d 198, 199 (Ala. 1999). Here, the Defendants are effectively attempting to invoke the protections of the First Amendment for the very purpose of maliciously depriving the Plaintiff of his protections under the First Amendment to engage in "uninhibited, robust, and wide-open" discussion and debate. The Defendants' collusion with a cabal designed for the sole purpose of "eras[ing]" the Plaintiff's career behind his back so as to foreclose even the possibility of debate and irreparably harm his ability to earn a living render the Defendants' hands far too unclean to seek shelter under the First Amendment for the purpose of dismissing, let alone avoiding liability from, the Plaintiff's well-stated defamation claim.

In his 1838 book, *Democracy in America*, Alexis De Tocqueville predicted exactly the damage that has been inflicted upon the Plaintiff's reputation, livelihood, and career prospects when the malicious tyranny and despotism exhibited by the Defendants consumes the American democratic republic:

> "[When]…tyranny in democratic republics [is adopted]: there the body is left free, and the soul is enslaved. The master no longer says: 'You shall think as I do or you shall die': But he says: 'You are free to think differently from me and retain your life … but you are henceforth a stranger among your people … You will remain among men, but you will be deprived of the rights of mankind. Your fellow creatures will shun you like an impure being; and even those who believe in your innocence will abandon you, lest they should be shunned in their turn. Go in peace! I have given you your life, but it is an existence worse than death.'"

De Tocqueville, Alexis, *Democracy in America*, Chapter XV (1838).

Accordingly, Plaintiff's defamation count is well-stated, and Defendants' Motion to Dismiss should be denied.

PLAINTIFF UNEQUIVOCALLY STATES A COGNIZABLE CLAIM OF TORTIOUS INTERFERENCE

In an attempt to shield themselves from liability from tortious interference, Defendants 1) absurdly frame their conduct as "merely … alerting the Plaintiff's employer to the existence of what could be interpreted as racially sensitive social media posts;" 2) absurdly claim that it was not the Defendants' purpose in colluding with the CALLING OUT quasi-extortion racket to "cause Plaintiff's termination;" and 3) cite S.D. v. St. James School, 959 So. 2d 72 (Ala. 2006) for the absurd proposition in this case that "because nothing indicated that the [Defendants] coerced … the [Plaintiff's] expulsion, there is no interference…".

All of these ridiculous assertions are dispelled by the body of Plaintiff's Complaint and the DSF Affidavit and its accompanying attachments: 1) Defendants did not merely alert Plaintiff's employer to the existence of a social media post, Defendants published a social media post that was misleadingly doctored and framed within accompanying libels and other false claims and further within the context of a society frenzied over unproven conspiracy theories about "racism" triggered by the death of George Floyd; 2) In colluding with members of the CALLING OUT cabal like "Shawn Avery" whose stated goal was to "erase" the Plaintiff, and who mirrored Defendants' positive Tweet issued about WPM only after Plaintiff's swift termination, and further evidenced by the Defendants' authoring of Twitter posts both before and after the Plaintiff's termination reveling in the firing of private citizens for expressing opinions contrary to Defendants rigid authoritarian orthodoxy, Defendants undeniably intended, and were fully on board with, the termination of Plaintiff's employment; and 3) despite what members of WPM farcically claim while impeaching[16] themselves with their March 24, 2021 affidavits, a crystal clear inference can be made that the false and misleading statements published by the Defendants placed extreme duress upon the members of WPM so as to coerce the lightspeed decision to terminate Plaintiff's employment – a less than 24 hour decision that was made far more quickly than the firm had ever made an important personnel or service contract decision in

[16] It's truly shocking that lawyers who claim to care about their reputation after having written the Plaintiff on September 1, 2020 about his termination went on to issue sworn statements on March 24, 2021 that are completely undermined by their own previous oral and written communications to the Plaintiff.

11 years. Moreover, the Plaintiff's personal opinions couched within a misleadingly doctored social media profile and other false and libelous statements were opinions that WPM knew for years that the Plaintiff held and expressed, yet never terminated Plaintiff's employment nor provided any kind of employment status warning for holding and expressing such opinions.

Therefore, Plaintiff clearly states a cognizable claim of tortious interference, which includes the following elements:

> "1) [T]the existence of a … business relation; 2) the defendants had knowledge of the … business relation; 3) intentional interference by the defendant with the … business relation; 4) the absence of justification for the defendant's interference; and 5) damage to the plaintiff as a result of the interference."

Ex parte Awtrey Realty Co., 827 So. 2d 104, 108-109 (Ala. 2001).

All of these elements are clearly satisfied, and the affirmative defense that Defendants will likely attempt to exploit contained in element 4 is easily countered. While Defendants might attempt to claim some sort of justification for colluding with the CALLING OUT cabal to further publish misleading, false, and defamatory statements about the Plaintiff outside of this purportedly private group, that Defendants did not decline participation with this cowardly[17], anonymous[18], and authoritarian cabal further evinces Defendants' open and clear malice, bad faith, and unclean hands directed towards the Plaintiff, and should quash any affirmative defense of privilege or justification. See, e.g., Gross v. Lowder Realty Better Homes & Gardens, 494 So. 2d 590, 593 (Ala. 1986) (stating that an actionable tortious interference claim must be malicious OR unjustified, not malicious AND unjustified, signaling that the presence of malice rebuts whatever contrived justification a defendant might attempt to articulate for publishing misleading, false, and defamatory statements about another).

Accordingly, Plaintiff states a clear claim against Defendants for tortious interference, and Defendants' Motion to Dismiss is due to be denied.

[17] Upon learning the identity of some of the participants in this cabal through a proxy social media profile, Plaintiff reached out personally to ask some of these individuals to articulate how Plaintiff's post was racist. No participant has yet been able to articulate this in a reply, but rather "blocked" the Plaintiff from further communication, further evincing the cabal's pernicious totalitarianism and the falsity of their libelous claims.

[18] After the Plaintiff first learned about the CALLING OUT cabal in mid-September 2020 and having contacted its administrators in late September 2020 to request access to the false claims made about him and the identities of those making such claims, Plaintiff was summarily "blocked" from even seeing whether the cabal still existed at that time. According to what Plaintiff has been able to observe when having access to a proxy Facebook account, the cabal stopped being active in early October 2020.

PLAINTIFF UNEQUIVOCALLY STATES A COGNIZABLE CLAIM OF FALSE LIGHT INVASION OF PRIVACY

Defendants butcher objective reality to argue that Plaintiff failed to properly state a claim of false light. Tortfeasors engage in false light when they "give publicity to a matter concerning another that places the other before the public in a false light … if: (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." Butler v. Town of Argo, 871 So. 2d 1, 12 (Ala. 2003) (citations omitted).

The irreparable damage inflicted by the Defendants tortious conduct upon the Plaintiff's reputation and career represents the prototype law school fact pattern for illustrating why the tort of false light exists. Indeed, everything Defendants published in collusion with the 1,500-plus member CALLING OUT cabal was false and highly offensive. As previously stated, Defendants published a false and misleading portrayal of Plaintiff's personal social media activity depicted as corporate WPM social media activity. Defendants published a false statement that Plaintiff was a business. Defendants published a false statement that Plaintiff was a business that supports racism. Defendants published a false statement that Plaintiff was a racist. Defendants published a false statement that Plaintiff had violated professional ethics. Defendants published a false statement that Plaintiff had advocated for running over protestors. Defendants published these libels and falsehoods behind his back so that Plaintiff would be unable to defend himself. The framing and context of Defendants' portrayal of the Plaintiff was completely and unequivocally false and offensive.

By virtue of the knowledge gained through spying on the Plaintiff and through Defendants' 34-plus year friendship with WPM, Defendants were fully aware before publishing these misleading and false statements and depictions of the Plaintiff and his personal social media activity that the statements and depictions were false and offensive. It is probably safe to say that exactly zero reasonable people want what was done by the Defendants to the Plaintiff, done to them. Put another way, it is probably safe to say that 100% of reasonable people would consider what Defendants did to the Plaintiff, if done to them, to be highly offensive.

Also, Defendants attempt to apply their demonstrably weak defamation "opinion[19]" defense to the Plaintiff's false light claim. However, Defendants cite no authority indicating that

[19] Pragmatically speaking, attempting to differentiate between a "statement of fact" and "statement of opinion" is almost always a fallacious distinction without a difference. For example, in much the same way the Plaintiff's professional reputation was targeted and falsely maligned by the Defendants and their quasi-extortion cabal, and his career irreparably destroyed, conceivably the same tortious acts could be done to anyone else – including, say, business professionals who invest large sums of money into what turn out to be ill-advised Ponzi schemes. Indeed, malicious online quasi-extortion mobs could just as easily publish false statements claiming that those who greedily fall prey to such schemes "have double-digit IQs and no professional judgment," and publish said statements along with publicly available investment details and financial losses to groups in excess of 1,500 people that include those with whom victims maintain vital business relationships outside of their personal financial endeavors. Surely a victim targeted in such a hypothetical would hold that a published statement claiming that he or she "has a double-digit IQ and no professional judgment," if demonstrably false, in the context of real massive

publishing a false opinion[20] – when considered within the context by which it was published and in the framework of the tort of false light – is a bar to asserting a false light claim. Indeed, Alabama courts acknowledge that a false light claim is distinct from a defamation claim. See, e.g., Butler, 871 So. 2d at 12 (explaining that a false light claim puts a Plaintiff "…in a false, but not necessarily defamatory position…").

In a footnote, Defendants likewise incorrectly argue that whether Plaintiff's personal social media post was "public" or "private" should matter when evaluating Plaintiff's false light claim. Such consideration is irrelevant. As noted in S.B. v. Saint James School, "[a] false light claim does not require that the information made public be private." 959 So. 2d at 93 (Ala. 2006).

Finally, in their most egregious distortion of reality, Defendants claim that Plaintiff's false light claim should be barred because Defendants published misleading, false, and defamatory statements pertaining to the Plaintiff only to Plaintiff's managing attorney, Lonnie Wainwright – an audience allegedly too small to render a false light claim actionable. At the outset, this misrepresents the Plaintiff's Complaint as Plaintiff contends Defendants published statements to an audience that includes all three WPM partners. All three partners admit as much in their September 1, 2020 letter to the Plaintiff. Moreover, this distortion of reality completely ignores the overwhelming circumstantial evidence indicating that the Defendants conspired with a cabal comprised of 1,500 people, among whom the misleading, false, and defamatory statements about the Plaintiff had already been published. Defendants' complicity with the CALLING OUT cabal served to expand the already large audience to a larger audience – 1,503 people – so that maximum damage to the Plaintiff's career and reputation could be inflicted. Through the common law principle of conspiracy, Defendants were complicit in publishing misleading, false, and defamatory statements about the Plaintiff to an audience in excess of 1,500 people – not a small audience.

Accordingly, surely the tort of false light exists for such a devastating fact pattern as the irreparable harm that was inflicted upon the Plaintiff by the Defendants, and Defendants' Motion to Dismiss is due to be denied.

CIRCUMSTANTIAL EVIDENCE ESTABLISHING THE EXISTENCE OF A CIVIL CONSPIRACY IS UNDENIABLE.

Alabama courts identify civil conspiracies as "a combination of two or more persons to accomplish an unlawful end (by civil law standards) or to accomplish a lawful end by unlawful means." Eidson v. Olin Corp., 527 So. 2d 1283, 1285 (Ala. 1988). Indeed, if it were not already obvious from the allegations stated in Plaintiff's Complaint along with Plaintiff's fictitious party pleading, clearly more parties are involved -- many of whom the Plaintiff is still unaware due to the Defendants' insidious subterfuge in this matter -- than only the named Defendants.

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financial losses to a crackpot Ponzi scheme is misleading, false, defamatory, and highly offensive, especially if the online target in such a hypothetical forever lost vital business relationships over such online bullying.

[20] Plaintiff vigorously denies that the misleading, false, and defamatory portrayal of the Plaintiff's personal social media activity when considered in the context of the times and in the context of its presentation when published by the Defendants was merely "a statement of opinion."

The Eidson Court further stated that "[i]t is well settled, therefore, that conspiracy may be established by circumstantial evidence and inferences drawn from the relationship of the alleged conspirators." Id. As demonstrated via all of the affidavits and exhibits filed so far in this matter, the ample circumstantial evidence clearly outlines a conspiracy among the Defendants and other parties designed to irreparably harm the Plaintiff's career. Accordingly, the Plaintiff's pleading of conspiracy is proper and well-stated, and Defendants' Motion to Dismiss is due to be denied.

CONCLUSION

All of Plaintiff's claims – defamation, tortious interference, false light, and the conspiracy that ties all of the tortfeasors together – are clearly and sufficiently stated in such a manner for which relief must be granted. Accordingly, Plaintiff respectfully moves this Honorable Court to enter an Order denying Defendants' 12(b)(6) Motion to Dismiss.

Daniel S. Flickinger (FLI007)
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Hoover, AL 35236
205-470-6997

CERTIFICATE OF SERVICE

I hereby certify that I have, on the 1st day of June, 2021, served a copy of the foregoing on the following attorneys of record for Defendants via Alafile:

Joseph E. Stott
Stott & Harrington, P.C.
2637 Valleydale Road, Suite 100
Birmingham, AL 35244
205-637-0500

Daniel S. Flickinger (FLI007)

10:43

Exhibit 1

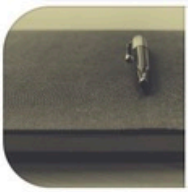
Jackie's Post

34w Like Reply 3

Jennifer Lovell
I went to school for years with this asshole. I unfriended him a while back but blocked him now. Racist condones running over protestors a few posts down 😡

34w Like Reply 6

Lisa Sharlach
The AL Bar says one can't complain about an attorney's rude behavior, but it doesn't say anything about racist behavior. I do know that they have to keep complaints on file. https://www.alabar.org/for-the-public/



For the Public | Alabama State Bar
alabar.org

34w Like Reply 5

Alliemarie Humphries
Lisa Sharlach It would still be worth trying to make a complaint to the bar and reaching out to the firm he works for— especially because he's not a partner so he

Rules

Write a comment... GIF