IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION: AG
CASE NO.: 50-2012-CA-023358-XXXX-MB

JAMES TODD WAGNER,
SUPERCAR ENGINEERING INC,.a Florida corporation,
Plaintiff/Petitioners
vs.
MOSLER AUTO CARE CENTER, INC.(MACC),
WARREN MOSLER,
Defendant/Respondents.

_____/

The Court, having reviewed the Motions; having reviewed Plaintiffs' responses to the Motions (D.E. 851; D.E. 852; D.E. 853); having reviewed Defendants' reply in support of the Sanctions Motion; having reviewed the record; having heard arguments of counsel; and being otherwise advised in the premises, it is hereupon **ORDERED AND ADJUDGED** as follows:

I. DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT IS GRANTED.

The Court first considers Defendants' Motion for Judgment Notwithstanding the Verdict (D.E. 836) (the "**JNOV Motion**"), which Defendants properly filed after the Court invited Defendants to file a written motion. Trial Tr. at 2638:10-12. Defendants' JNOV Motion seeks a judgment notwithstanding the verdict with respect to three claims:

(1) Count C – Plaintiff SEI's claim for breach of contract against Defendant MACC based on certain alleged unpaid work to obtain EPA approval;

(2) Count F – Plaintiff Wagner's Defamation Claim against Defendant Warren Mosler based on "Statement 1," which appears within a single comment authored by non-party Matthew Farah in Plaintiffs' Trial Exhibit 40; and

(3) Count G – Plaintiff SEI's Trade Libel Claim against Defendant Warren Mosler, which is based on the same single comment that appears in Plaintiffs' Trial Exhibit 40.

For the reasons set forth below, the Court grants Defendants' JNOV Motion.

A. STANDARD OF REVIEW

"Trial courts may grant motions for JNOV only when there is no evidence or inferences which may support the opposing party's position." *Citizens Prop. Ins. Corp. v. Hernandez*, No. 4D21-2469, 2023 WL 2904053, at *3 (Fla. 4th DCA 2023). The Court "must view all of the evidence in a light most favorable to the non-movant, and, in the face of evidence, which is at odds or contradictory, all conflicts must be resolved in favor of the party against whom the motion has been made." *Id.*

"While a court may consider inferences arising from facts, **these inferences must be reasonable**." *Realauction.com, LLC v. Grant St. Group, Inc.*, 82 So. 3d 1056, 1059 (Fla. 4th DCA 2011) (emphasis added). Reasonable inferences do not contradict clear evidence. *See Kam Seafood Co. v. State*, 496 So. 2d 219, 219 (Fla. 1st DCA 1986).

B. JNOV IS APPROPRIATE WITH RESPECT TO COUNT C.

Count C concerned Plaintiff SEI's breach of contract claim against Defendant Mosler Auto Care Center, Inc. ("**MACC**") for alleged unpaid work to obtain EPA approvals between April 16, 2011, and September 28, 2011.

1. Applicable Law

"The three elements of a breach-of-contract action are: (1) a valid contract; (2) a material breach; and (3) damages." *Rauch, Weaver, Norfleet, Kurtz & Co., Inc. v. AJP Pine Island Warehouses, Inc.*, 313 So. 3d 625, 630 (Fla. 4th DCA 2021). "A valid contract, in turn, is generally composed of four basic elements: offer, acceptance, consideration, and sufficient specification of

essential terms." *Id.* "In order to create a contract, it is essential that there should be a reciprocal assent to a certain and definite proposition. So long as any essential matters are left open for further consideration, the contract is not complete, and the minds of the parties must assent to the same thing in the same sense. . . ." *Goodman v. Goodman*, 290 So. 2d 552, 555 (Fla. 1st DCA 1973).

2. Analysis

The Court finds that there is no evidence or possible inference that supports the existence of the contract necessary to support the jury's verdict in Count C: an alleged contract between Plaintiff SEI and Defendant MACC under which Plaintiff SEI was to be paid to perform EPA approval work between April 16, 2011, and September 28, 2011.

a. Exhibits Referenced in Plaintiffs' Motion to Amend and Response to Defendants' JNOV Motion.

First, this breach of contract claim by Plaintiff SEI in Count C did not exist in Plaintiffs' Sixth Amended Complaint (the operative pleading in this case). D.E. 491.

Instead, Plaintiffs added this claim during trial by Plaintiffs' Motion to Amend Pleadings to Conform to Evidence at Trial, filed on May 23, 2023. D.E. 820. Specifically, Plaintiffs sought amendment based on Plaintiffs' Trial Exhibit 5 and Defendants' Trial Exhibit 78, both admitted during trial. D.E. 820 at page 1-2. Plaintiffs' motion to amend stated that, "Since both documents and their related testimony were admitted without objection, the issue of a 'contract' (and therefore 'Breach of Contract as to EPA approval work') has been tried to this jury by the consent of the parties." D.E. 820 at page 2.

However, as set forth below, it is now uncontroverted that Plaintiffs' Trial Exhibit 5 and Defendants' Trial Exhibit 78 do not evidence the existence of a contract that supports the jury's verdict.

Plaintiffs' Trial Exhibit 5 is an email dated April 12, 2011, and includes an attached invoice that records work until April 15, 2011. Neither the email nor its accompanying attachment makes any reference to payments or work for EPA approval after April 15, 2011.

Defendants JNOV Motion asserted that Plaintiffs' Trial Exhibit 5 did not support the existence of a contract for the alleged unpaid work. Plaintiffs admitted in their response to Defendants' JNOV Motion that they have "never asserted" that Plaintiff's Exhibit 5 "constitute[d] a contract for doing EPA certification work." D.E. 853 at 5.

The Court finds that no reasonable inference can be taken from Plaintiffs' Trial Exhibit 5 to establish the existence of a contract necessary to support the jury's verdict for Count C.

Similarly, as to Defendants' Trial Exhibit 78, both Plaintiffs and Defendants agree that Defendants' Trial Exhibit 78 does not evidence the existence of a contract between Plaintiff SEI and MACC for the alleged unpaid EPA approval work because that document expired. D.E. 853 at 5. In fact, Plaintiffs specifically agreed, in their response to Defendants JNOV Motion, with the statement that "There is simply no evidence that this contract was extended *ever*." D.E. 853 at 5.

After examining Defendants' Trial Exhibit 78, the Court finds that by its own terms, Defendants' Trial Exhibit 78 could not have supported the existence of a contract for the allegedly unpaid work. Therefore, Defendants' Trial Exhibit 78 does not support the jury's verdict for Count C.

b. None Of The Other Exhibits Admitted Into Evidence Support The Existence of A Contract.

Next, the Court considers Plaintiffs' Trial Exhibits 109 and Defendants' Trial Exhibit 134. Plaintiffs do not argue that Plaintiffs' Trial Exhibits 109 and Defendants' Trial Exhibit 134 demonstrate the existence of a contract for the alleged unpaid work. Instead, Plaintiffs argue that

Plaintiffs' Trial Exhibits 109 and Defendants' Trial Exhibit 134 are evidence of the value of the work that Plaintiff SEI performed and that therefore Plaintiffs' Trial Exhibits 109 and Defendants' Trial Exhibit 134 support the jury's award of damages.

Plaintiffs then attempt to assert the alleged value of work is alone sufficient to form a contract for the breach of contract claim in Court C. This is legally insufficient for a claim for breach of contract at issue in Count C.

Neither is the value of the alleged work relevant to damages for Plaintiff SEI's claim for breach of contract in Count C. The Fourth District Court of Appeal explained that the measure of damages in breach of contract cases is that which brings the injury party to the same position as if the other party had not breached the contract:

> **[i]t is well-settled that the purpose of damages is to restore an injured party to the same position that he would have been in had the other party not breached the contract**. *Capitol Envtl. Servs., Inc. v. Earth Tech, Inc.,* 25 So.3d 593, 596 (Fla. 1st DCA 2009); *Mnemonics, Inc. v. Max Davis Assocs., Inc.,* 808 So.2d 1278, 1280 (Fla. 5th DCA 2002). **In restoring the injured party to the "same position," he "is not entitled to be placed, because of that breach, in a position better than that which he would have occupied had the contract been performed**." *Madison Fund, Inc. v. Charter Co.,* 427 F.Supp. 597, 608 (S.D.N.Y.1977) (applying Florida law); *see* Restatement (Second) of Contracts § 347 cmt. **A (1981) ("Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will ... put him in as good a position as he would have been in had the contract been performed**.").

Sch. Bd. of Broward Cnty. v. Pierce Goodwin Alexander & Linville, 137 So. 3d 1059, 1070 (Fla. 4th DCA 2014) (citing *Lindon v. Dalton Hotel Corp.*, 49 So.3d 299, 305–06 (Fla. 5th DCA 2010))(emphasis added).

In this case, contrary to Plaintiffs' arguments, the alleged value of the allegedly unpaid work is irrelevant not only *to the formation of a contract* but also to the damages from any breach of an alleged contract regarding the work.

Plaintiffs do not even argue that Plaintiffs' Trial Exhibits 109 and Defendants' Trial Exhibit 134 provide evidence that Plaintiff SEI ever entered into an agreement to receive this alleged value. Nor could they, given a review of the exhibits and the relevant testimony. Thus, the Court finds that neither of Plaintiffs' Trial Exhibits 109 and Defendants' Trial Exhibit 134 support the jury's verdict for Count C.

Finally, during the hearing on Defendants' JNOV Motion, Plaintiffs argued that an e-mail from Defendant Warren Mosler that merely says "Good job!!!! Jill will prepare a press release" means that a jury could infer there was a contract for the alleged unpaid work. This e-mail is Defendants' Trial Exhibit 70.

Plaintiffs' argument fails because Defendants' Trial Exhibit 70 does not contain any indication of agreement to pay for work done after April 15, or even discussion of any terms necessary to show or enter into an agreement nor adoption of express terms. Where a dialogue does not contain such terms, the necessary indication of mutual assent to a contract is lacking.

"While a court may consider inferences arising from facts, these inferences must be reasonable." *Realauction.com, LLC v. Grant St. Group, Inc.*, 82 So. 3d 1056, 1059 (Fla. 4th DCA 2011) (citing *Kam Seafood Co. v. State,* 496 So.2d 219 (Fla. 1st DCA 1986) (citing as "reversing trial judge's ruling which was based on an inference that was unreasonable because it contradicted clear direct evidence")

It is unreasonable the court infer facts that are contrary to clear direct evidence. Wagner's testimony stating that there was no contract is such clear and direct evidence:

In the last document with you and Warren Mosler and Jill Wagner, you see how you wanted to extend the credit until the end of April?

A Yes.

Q Now let's go back to the email before, 340. So even though, in this document you admit that you extended the credit until April, you're still claiming that you did work that was unpaid from the middle of April, approximately, on, correct?

A You're saying I admit that I extended it through April, that is not what I testified. That is not what I said. I was asking could I, and Mr. Mosler said no.

Q So your testimony sitting here today is that Mr. Mosler said no to this?

A He agreed to April 15th and that's the end of it.

Trial Tr. at 1571:19-1572:10 (emphasis added).

The Court finds that Defendants' Trial Exhibit 70 does not support the jury's verdict for Count C.

c. None of the Testimony Supports the Existence of a Contract.

Even if the court ignored the clear and direct evidence of the absence of a contract, none of the testimony at trial identified by Plaintiffs or Defendants supports an inference that there was a contract between Plaintiff SEI and Defendant MACC for the alleged unpaid work that supports the jury's verdict for Count C.

Defendants' JNOV Motion, Defendants identified multiple portions of the transcript where Plaintiff Wagner directly and unambiguously stated that there was no contract during this time period for the alleged unpaid work and Plaintiff Wagner sent no invoices for work performed after April 15th because Plaintiff Wagner knew there was no contract for that work and Defendants did not agree to pay for that work:

Q And again, you're agreeing in an email -- in fact, you're requesting to extend your credit until the

end of April, correct?
A Right. Yes. I would like to continue until certification has been achieved. That's what makes the company profitable.
And Mr. Mosler kept, you know, trying to go month by month getting approval, and he cut it off in the middle of April instead of the end of April or even beyond. It says "I'm told" –

Trial Tr. at 1567:24-1568:8.

Q Well, that's not what it says, right? You're claiming that you did additional work sometime starting in April **that was not covered by your email to Warren Mosler** --
A Yes.

Trial Tr. at 1569:24-1570:3 (emphasis added).

Q Now let's go back to the email before, 340. So even though, in this document you admit that you extended the credit until April, you're still claiming that you did work that was unpaid from the middle of April, approximately, on, correct?
A You're saying I admit that I extended it through April, that is not what I testified. That is not what I said. I was asking could I, and Mr. Mosler said no.
Q So your testimony sitting here today is that Mr. Mosler said no to this?
A He agreed to April 15th and that's the end of it.

Trial Tr. at 1571:23-1572:10.

Q Now today, during your testimony, you claimed that you were --
Well, have you submitted any invoices for this work that you're claiming?
A Mr. Mosler made it clear that he would not pay credits past April 15th, so why would I send in an invoice just to like, you know, have them thrown back in my face?
Q Well, the fact is you don't know whether SEI submitted invoices for work, correct?
A Well, I -- since SEI is my company, I don't

remember sending any invoice in after April 15th because I knew Mr. Mosler wouldn't pay them.

Trial Tr. at 1572:19-1573:6.

The Court notes that Plaintiff Wagner testified that Plaintiff SEI kept working, despite fully understanding that no contract existed and that Plaintiff SEI would not be paid, because Plaintiff SEI wanted to maintain the value of his distributorship agreement after Defendant Warren Mosler told him that he would stop paying him on April 15, 2011.

Q So what's really the first operative date that's important in this case as far as --
A Mr. Mosler wanted to stop paying me and told me he was going to stop paying me on April 15th, 2011.
Q Okay. Did they?
A They did stop, yes.
Q Did you agree to that?
A I didn't want that, but I also -- my distributorship, I wanted to maintain the value of that and Mr. Mosler said he wanted it to keep going. So I presumed I'd be getting a payoff from having the exclusive distributorship, but he stripped that away from me too.
Q So because he took all those things away, you want to get paid for your work, right?
A Absolutely.

Trial Transcript at 1785:14-1786:4.

Plaintiffs' response to Defendants JNOV Motion identified the above portion of the trial transcript, Trial Transcript at 1785:14-1786:4, as evidence that the jury could have used to find "that the parties had reached an agreement." D.E. 853 at page 3. Plaintiffs again identified this portion of the transcript during the hearing on Defendants' JNOV Motion. September 14 Tr. at 76:8-22.

Plaintiffs' cited portion of the transcript at pages 1785:14-1786:4 does not evidence the existence of a contract for the alleged unpaid work, and does not provide any inference supporting

the existence of a contract for the alleged unpaid work. Instead, the trial transcript clearly evidences that there was no contract because the testimony at trial unambiguously says there was no contract, and that Defendant Warren Molser, and thus Defendant MACC, were not willing to pay for the work. Such testimony is consistent with Plaintiffs' above testimony that there was no contract for Plaintiff SEI to perform the work after April 15, 2011 because Defendant Warren Mosler only agreed to the work until April 15, 2011. Trial Tr. at 1568:2-8; Trial Tr. at 1569:24:1570:3; Trial Tr. at 1572:3-10; Trial Tr. at 1572:23-1573:6.

The Court finds the portion of the transcript at pages 1785:14-1786:4 that states "Mr. Mosler said he wanted it to keep going" refers to Plaintiff SEI's distributorship agreement.

In Plaintiffs' Response to Defendants' JNOV Motion, Plaintiffs also argued that because Defendant Warren Mosler allegedly did not tell Plaintiff SEI to stop working on the EPA approval work, or that Plaintiff SEI would not be paid, a contract could be inferred;

> There is not testimony or evidence that at any time, Mr. Mosler told SEI/Mr. Wagner, "Stop working on the EPA Certifications" or "I'm not paying for your work." Plaintiffs further argue that Defendant Mosler agreed to compensate SEI/Mr. Wagner (as inclusive of several "related agreements" as testified by Mr. Wagner) and then refused to honor any of them.

D.E 853 at 4.

Again, Plaintiffs' position is refuted by Plaintiffs' own testimony, whereby Plaintiffs testified that (1) Mosler specifically told Plaintiffs "no" in response to their request for an agreement, (2) Plaintiffs knew that Defendants did not agree to pay Plaintiff SEI; and (3) Plaintiffs knew that there was no agreement for the alleged unpaid work that occurred after April 15:

> 23 Q Now let's go back to the email before, 340.
> 24 So even though, in this document you admit that you
> 25 extended the credit until April, you're still claiming
> 1 that you did work that was unpaid from the middle of
> 2 April, approximately, on, correct?

A You're saying I admit that I extended it through April, that is not what I testified. That is not what I said. **I was asking could I, and Mr. Mosler said no.**

Q So your testimony sitting here today is that Mr. Mosler said no to this?

A He agreed to April 15th and that's the end of it.

Trial Tr. at 1571:23-1572:10 (emphasis added).

Q Now today, during your testimony, you claimed that you were --

Well, have you submitted any invoices for this work that you're claiming?

A Mr. Mosler made it clear that he would not pay credits past April 15th, so why would I send in an invoice just to like, you know, have them thrown back in my face?

Q Well, the fact is you don't know whether SEI submitted invoices for work, correct?

A Well, I -- since SEI is my company, I don't remember sending any invoice in after April 15th because I knew Mr. Mosler wouldn't pay them.

Trial Tr. at 1572:19-1573:6 (emphasis added).

Also, in light of Plaintiffs' acknowledgment above that Defendants told Plaintiffs that there was no agreement and that Defendants would not pay Plaintiffs.

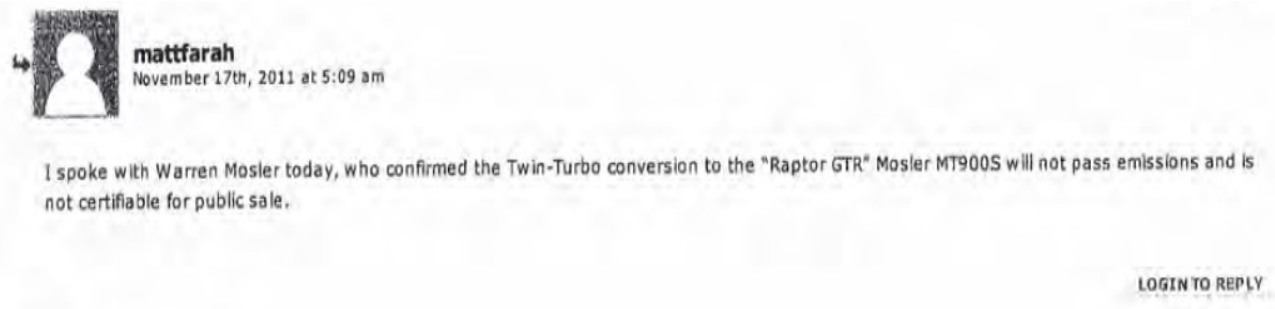
The Court finds that there is no evidence or inference from the testimony presented at trial that supports the existence of a contract required for the jury's verdict for Count C.

Accordingly, there is no evidence or inference that support the existence of a contract between Plaintiff SEI and Defendant MACC for EPA approval work after April 15, 2011. Therefore, the Court **GRANTS** Defendants' JNOV Motion as to Count C. Even if the Court denied Defendants' JNOV Motion as to Count C, the Court would nonetheless have reduced the jury's award pursuant to Defendants' Remittitur Motion – which is addressed in Section II of this Order below.

C. PLAINTIFFS' CLAIMS AS TO STATEMENT 1 IN COUNTS F AND G.

The remainder of Defendants' JNOV Motion concerns the jury's verdict with respect to Plaintiff Wagner's claim in Count F for defamation and Plaintiff SEI's claim in Count G for trade libel with respect to Statement 1.

Statement 1 is "the Twin-Turbo conversion to the 'Raptor GTR' Mosler MT900S will not pass emissions and is not certifiable for public sale." D.E. at 825 at page 11. Statement 1 appears in Plaintiffs' Trial Exhibit 40; as follows:


mattfarah
November 17th, 2011 at 5:09 am

I spoke with Warren Mosler today, who confirmed the Twin-Turbo conversion to the "Raptor GTR" Mosler MT900S will not pass emissions and is not certifiable for public sale.

LOGIN TO REPLY

1. Plaintiffs' Republication Claims.

As a threshold issue, the Court considers whether Plaintiffs are categorizing their claims in Counts F and G, as to Statement 1, as claims based on republication. During the hearing on Defendants' Directed Verdict Motion, the Court questioned Plaintiffs over whether Plaintiff Wagner's defamation and Plaintiff SEI's trade libel claims were based on the alleged oral statements made by Defendant Warren Mosler to a journalist or the written statement that someone other than Defendant Warren Mosler wrote, as in Plaintiffs' Trial Exhibit 40 above, and that were admitted into evidence at trial:

> And just so that the Court is aware, one of the big issues is Your Honor said you need to consider "the statement," and you read the whole article. That's not the statement that was sued

upon, Your Honor. In all the jumble and everything yesterday, it got lost in the translation here.

I think at one point I did say -- I don't have the transcript, but at one point I did say that's not what we've sued upon. The statements that we've sued upon are Warren Mosler's statements to the journalists. To consider what others did with that or whatever when considering whether or not the statement itself is defamatory we assert is improper review of something that even Mr. Wagner -- excuse me, even Mr. Weber's case law does not suggest -- the case law that he presents is all stuff about media people and what the journalists actually said as being a defamatory statement. **Here, we're not suing for what journalists said; we're suing for what Mr. Mosler said to the journalists.**

So even under their analysis, the only things that you should be considering is the statements that Mr. Mosler is quoted as having said to the journalists. And at this point, in a directed verdict motion, I think it is very important.

And further, in this instance, remember we already had -- this is -- the timing of this is really weird and suspect, and I dealt with that because it doesn't consider --

THE COURT: Hold on.

MR. ZAPPOLO: -- their motion --

THE COURT: Let's say you do that. Let's say you argue to me right now -- let's say I entertain this for a second -- which I'm not sure I'm going to, but let's say I entertain this. And you're suing about statements that Mr. Mosler made to a journalist, not the statements that the journalist printed and published, correct?

MR. ZAPPOLO: Well, that's -- that's a differential thing. I'm suing about what Mr. -- and I want to clarify: **I'm suing about what Mr. Mosler said to the journalist that then prompted the journalist to write that whole article.**

THE COURT: Okay. Same analysis, we're good. I'm not going to change my mind.

MR. ZAPPOLO: All right. So --

MR. WEBER: Can we begin, Your Honor?

MR. ZAPPOLO: Thank you, Your Honor, for

allowing me to make a record.

THE COURT: Because I thought you were talking about statements made to the journalist, in which case there would have been no damage, and then I probably would have granted all of them, you know.

MR. ZAPPOLO: No, because the journalist repeated, so that's the -- that's the gist of it, but what you -- the statement in the case law is what is actually said.

THE COURT: Okay. No, I follow. I understand.

MR. ZAPPOLO: Okay.

Trial Tr. at 1941:11-1943:22 (emphasis added).

During Plaintiffs' closing arguments at trial, and during the hearing on Defendants' JNOV Motion, Plaintiffs made clear that they are alleging that only the words allegedly **orally spoken** by Defendant Warren Mosler to Matthew Farah—the author and publisher of the words at issue Plaintiffs' Trial Exhibit 40—was the defamatory action and that Plaintiffs' Trial Exhibit 40, which does not contain a direct quote from Defendant Warren Mosler, is only evidence of the alleged defamation:

Now, ladies and gentlemen, the statement is Warren Mosler's statement to Matt Farah; it's not this whole article. We're not suing Mr. Mosler for the contents of this article, be crystal clear on that. **We're suing Mr. Mosler for what he said to Matt Farah.** That's the statement. And the statement was, as I just read to you, what Mr. Farah conveyed.

Trial Tr. at 2521:10-17.

MR. ZAPPOLO: -- you'll see at the bottom of the page there, it says Count 9, defamation per se, and we basically track the elements of defamation per se, and we say, Warren Mosler -- at Paragraph 59, Warren Mosler published and/or caused to be published the following false and defamatory statements to a third-party which were **republished** in international trade publications, magazines,

internet, et cetera, following over on Page 17.
Important, Paragraph A, Warren Mosler stated to a journalist for Car and Driver magazine in reference to Wagner, that is what we sued upon. We didn't sue upon the article, Your Honor. The article is merely evidence of what Mr. Mosler stated and we know that Mr. Mosler stated certain things because we had Mr. Atiyeh's deposition read to the jury and Mr. Atiyeh said, if it's in quotes -- I don't remember particularly. If it's in quotes, I stand by that because my memory was better then, and when I put it in quotes, that's what Mr. Mosler said to me, okay.
So we have now what Mr. Mosler said to Mr. Atiyeh, and what Mr. Mosler said to Mr. Atiyeh that we complained of at Paragraph A on Page 17 of the Sixth Amended Complaint is, quote, he is nothing, he has severe mental problems. He goes around saying that he has everything, but he has nothing, and we parenthetically said, obviously speaking, that SEI doesn't have distribution rights.

September 14, 2023 Hearing Tr. at 20:25-22:3 (emphasis added).

2. Applicable Law

As the Florida Supreme Court has explained, "[b]ecause the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability." *Markle v. Markle*, 2023 WL 2711341, at *5 (M.D.Fla., 2023).

"Florida law does not recognize defamation claims based on third-party republication." *Id.* at *7. Therefore, third-party republication, **even if third-party republication is foreseeable, does not satisfy the publication element**. *See, e.g., Markle v. Markle*, No. 8:22-CV-511-CEH-TGW, 2023 WL 2711341, at *7 (M.D. Fla. Mar. 30, 2023); *Anderson v. Smith*, No. 319CV00222J20JRK, 2019 WL 12384796, at *4–5 (M.D. Fla. July 17, 2019); *Pierson v. Orlando Reg'l Healthcare Sys., Inc.*, No. 6:08CV466-ORL-28GJK, 2010 WL 1408391, at *12 (M.D. Fla. Apr. 6, 2010), *aff'd*, 451 F. App'x 862 (11th Cir. 2012); *Klayman v. City Pages*, No. 5:13-CV-143-OC-22PRL, 2015 WL

1546173, at *10 (M.D. Fla. Apr. 3, 2015), *aff'd,* 650 F. App'x 744 (11th Cir. 2016), and aff'd, 650 F. App'x 744 (11th Cir. 2016).

3. Analysis

Plaintiffs are improperly seeking to amend their claims. Even if Plaintiffs were allowed to proceed on Counts F and G as described during the hearing on September 14, Plaintiff Wagner's defamation claim in Count F and Plaintiff SEI's trade libel claim in Count G are both at least in part based on third-party republication. Plaintiffs stated that they are suing Defendant Warren Mosler based on the words in Statement 1 that Defendants Warren Mosler allegedly spoke to Matthew Farah and not the words in Statement 1 contained in Plaintiffs' Trial Exhibit 40. However, Plaintiffs also state that they are suing based on the words in Statement 1 in Plaintiffs' Trial Exhibit 40 because those words are allegedly evidence of Defendant Warren Mosler's words to Matthew Farah. Plaintiffs' Trial Exhibit 40 is a third-party republication, and therefore Defendant Warren Mosler cannot be held liable for the words in Plaintiffs Trial Exhibit 40.

For the reasons set forth below, the Court finds that a judgment notwithstanding the verdict is appropriate under both of Plaintiffs' theories. There is no evidence or inference that supports the jury's verdict with respect to Statement 1 in Plaintiff Wagner's Count F or Plaintiff SEI's Count G, under Plaintiffs' theory that their claims are based on the words that Defendant Warren Mosler allegedly spoke to Matthew Farah or under Plaintiffs' theory that their claims are based on the words in Plaintiffs' Trial Exhibit 40.[1]

[1] During the hearing on Defendants' JNOV Motion, Plaintiffs argued that they were not suing based on republication and instead were suing based on defamation by implication as set forth in *Jews For Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1108 (Fla.,2008). However, "defamation by implication applies in circumstances where literally true statements are conveyed in such a way as to create a false impression." *Jews For Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1108 (Fla.,2008). Plaintiffs' pleadings have never asserted a claim for defamation by implication and Plaintiffs are not claiming now that the words in Statement 1 are literally true. Accordingly, Plaintiffs have not

D. JNOV IS APPROPRIATE AS TO PLAINTIFF WAGNER'S DEFAMATION CLAIM IN COUNT F AS TO STATEMENT 1.

"Defamation has the following five elements: (1) publication; (2) falsity; (3) actor must act 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) statement must be defamatory." *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008)

1. There Is No Evidence Or Inference That Supports Defendant Warren Mosler Published Statement 1.

Statement 1, again, is "the Twin-Turbo conversion to the 'Raptor GTR' Mosler MT900S will not pass emissions and is not certifiable for public sale" and that only appears through a comment written by Matthew Farah in Plaintiffs' Trial Exhibit 40; D.E. at 825 at page 11.

First, if Plaintiff Wagner's claim is based on the words in Plaintiffs' Trial Exhibit 40, then it is undisputed that Defendant Warren Mosler did not write Statement 1 in Plaintiffs' Trial Exhibit 40. Statement 1 is not a direct quote, and there is no evidence or inference, nor are Plaintiffs alleging any, supporting that Defendant Warren Mosler published Statement 1 through Plaintiffs' Trial Exhibit 40. It is uncontroverted that Matthew Farah wrote Statement 1 in Plaintiffs' Trial Exhibit 40. Therefore, Statement 1 in Plaintiffs' Trial Exhibit 40 is a third-party republication and Florida law does **not** recognize defamation claims based on third-party republication. Accordingly, JNOV is appropriate as to Plaintiff Wagner's claim in Count F as to Statement 1.

To the extent that Plaintiffs are suing Defendant Warren Mosler over the words in Statement 1 that Defendant Warren Mosler allegedly spoke to the author of Plaintiffs' Trial Exhibit 40, it is undisputed that there is no evidence of the exact words that Defendant Warren Mosler said to Matthew Farah. Statement 1 appears in Plaintiffs' Trial Exhibit 40 as a comment, from someone

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and fail to state a claim for defamation by implication.

other than Defendant Warren Mosler, and that states "I spoke with Warren Mosler today, who confirmed the Twin-Turbo conversion to the 'Raptor GTR' Mosler MT900S will not pass emissions and is not certifiable for public sale."

Statement 1 is not a direct quote and is allegedly confirming information. The statement contains no quotation marks attributing the exact language (if any) used by Defendant Warren Mosler. Matthew Farah wrote the statement and he does not recall exactly what was said between him and there is no testimony as to what exact was said:

> Q Okay. And he said -- and he confirmed that the twin-turbo conversion to the RaptorGTR Mosler 900S will not pass emissions and is not certifiable for public sale, correct?
> A That -- yeah. I mean, again, I don't recall some of the more specific details of that conversation, but if I wrote that, that's what he told me at the time. My memory would have been very fresh then, so I would say that if I said that, then I would stand by it now.

Trial Tr. at 1104:2-10.

There is no evidence or inference in the record as to the exact words that Defendant Warren Mosler said to Matthew Farrah. Accordingly, there is no evidence or inference that supports that Defendant Warren Mosler published Statement 1 and JNOV is appropriate.

2. Defendant Warren Mosler Did Not Act Negligently Concerning Plaintiff Wagner.

Statement 1 is "the Twin-Turbo conversion to the 'Raptor GTR' Mosler MT900S will not pass emissions and is not certifiable for public sale" and only appears in Plaintiffs' Trial Exhibit 40; D.E. at 825 at page 11.

Under both Plaintiffs' republication theory based on the contents of Plaintiffs' Trial Exhibit 40 and the Plaintiffs' theory based on the words that Defendant Warren Mosler allegedly spoke to

Matthew Farah, Defendant Warren Mosler could not have acted negligently concerning Plaintiff Wagner in making Statement 1. It is clear that Statement 1 does not mention Plaintiff Wagner at all. Statement 1 refers only to the vehicle – does not reference Plaintiff Wagner at all – and the statement was based on information obtained from Plaintiff Wagner himself. The undisputed evidence shows that Defendant Warren Mosler obtained the information about whether the RaptorGTR would pass emissions entirely from Plaintiff Wagner himself, which Plaintiff Wagner did not deny. Trial Tr. at 864:7-23; 2228:22-2229:5. There was also unrebutted testimony that the vehicle simply could not pass the cold start test and that Defendant Warren Mosler obtained this information from Defendant Wagner. Trial Tr. at 862:10-12, 20-22; 2229:1-15. Defendant Warren Mosler cannot be 'at fault' for relying on information that was undisputedly given to him by Plaintiff Wagner. Furthermore, Defendant Warren Mosler cannot be held liable for a third-party republication.

Accordingly, judgment notwithstanding the verdict is appropriate on this element of the claim because there is no evidence or inference that Defendant Warren Mosler acted negligently concerning Plaintiff Wagner.

3. There Is No Evidence That the Statement Is Defamatory To Plaintiff Wagner.

Judgment notwithstanding the verdict is also appropriate because the statement is not defamatory as to Plaintiff Wagner.

"Under Florida law a cause of action for defamation…requires…a defamatory statement." *Lowery v. McBee*, 322 So. 3d 110, 114 (Fla. 4th DCA 2021). "Words are defamatory when they tend to subject one to hatred, distrust, ridicule, contempt or disgrace or tend to injure one in one's business or profession." *Am. Airlines, Inc. v. Geddes*, 960 So. 2d 830, 833 (Fla. 3d DCA 2007) (internal quotations omitted). To be actionable, a defamatory publication "must convey to a

reasonable reader the impression that . . . it describes actual facts about the plaintiff or activities which she participated." *Ford v. Rowland,* 562 So.2d 731, 735 (Fla. 5th DCA 1990).

Under Plaintiffs' theory that Plaintiffs are only suing on the words that Defendant Warren Mosler allegedly spoke to Matthew Farah, Statement 1 is not defamatory as to Plaintiff Wagner. There is no mention of Plaintiff Wagner in the words "the Twin-Turbo conversion to the 'Raptor GTR' Mosler MT900S will not pass emissions and is not certifiable for public sale" nor are there any words that are defamatory to Plaintiff Wagner. Accordingly, judgment notwithstanding the verdict is appropriate.

If Plaintiffs are suing based on Matthew Farah's language of Statement 1 in Plaintiffs' Trial Exhibit 40, then judgment notwithstanding the verdict is still appropriate because Defendant Warren Mosler cannot be liable for a third-party republication.

The context of Plaintiffs' Trial Exhibit 40 negates any alleged defamatory inference as to Plaintiff Wagner because, as set forth above, the statement does not concern him at all; the statement only refers to aspects of the vehicle.

Furthermore, on November 16, 2011, after Matthew Farah authored his comment in Plaintiffs' Trial Exhibit 40 that contains Statement 1, Wagner joined the discussion in Plaintiffs' Trial Exhibit 40 and left a comment stating that the vehicle is owned by Plaintiff *SEI* (not Plaintiff Wagner). Therefore, the statement "the RaptorGTR will not pass emissions and is not certifiable for public sale" does not imply Plaintiff Wagner to be dishonest or committing a crime and further demonstrates that the statement is not about Plaintiff Wagner. Statement 1 does not tend to suggest anything about Plaintiff Wagner himself. Rather, the comment speaks solely about the vehicle.

Accordingly, judgment notwithstanding the verdict is appropriate.

4. There Is No Evidence that Plaintiff Wagner's Damages were Proximately Caused by Statement 1.

"[T]o recover for defamation, a plaintiff must show that damages were proximately caused by the defamatory statements." *Bernstein v. Mary Malloy & Questex Media Grp., LLC*, No. 9:14-CV-81062, 2015 WL 4273235, at *2 (S.D. Fla. July 14, 2015); *Cape Publications, Inc. v. Reakes*, 840 So. 2d 277, 281 (Fla. 5th DCA 2003) ("In order to recover for defamation, a plaintiff must show that the damages were proximately caused by the defamatory statements").

"On the issue of the fact of causation…, [a] mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984). "When the facts are unascertainable or so meager as they are here and an effect may follow from one of several causes it is a false generalization to suppose that because a sinking follows a collision thirty-nine days later, the sinking necessarily was an effect of the collision." *Dreijer v. Girod Motor Co.*, 294 F.2d 549, 555 (5th Cir. 1961).

First, there is no evidence or inference that Plaintiff Wagner's alleged damages were caused by the words allegedly spoken by Defendant Warren Mosler to Matthew Farah. Plaintiff Wagner admits that he was not on the phone with Matthew Farah when he allegedly spoke to Defendant Warren Mosler:

17 Q Were you there when the author of those
18 articles wrote those articles?
19 A No, I was not there in his presence.
. . .
24 Q You were not on the phone with any of these
25 authors when they allegedly spoke to Mr. Mosler,
1 correct?
2 A No, sir, I was not.

Trial Tr. at 1431:20-1432:2.

There is no evidence of any person being involved in any conversation between Defendant Warren Mosler and Matthew Farah such that anyone could have heard the words allegedly spoken by Defendant Warren Mosler to Matthew Farah.

None of the damages that Plaintiff Wagner complains about in this case were proximately caused by Matthew Farah hearing the words that Defendant Warren Mosler allegedly spoke to him. Nor was there any evidence that Plaintiff Wagner's alleged damages were proximately caused by Matthew Farah's third-party republication in Plaintiffs' Trial Exhibit 40 (for which Defendant Warren Mosler cannot be held liable).

Nor is there any evidence or inference that supports that any of Plaintiff Wagner's alleged damages were proximately caused by the words allegedly spoken by Defendant Warren or Matthew Farah's third-party republication as opposed to some other cause. To the contrary, all of the evidence and inference in this case show that Plaintiff Wagner's damages were proximately caused by sources other than Defendant Warren Mosler's alleged words to Matthew Farah or Statement 1 in Plaintiffs' Trial Exhibit 40.

Plaintiff Wagner testified under oath, at trial, that Plaintiff Wagner was damaged by things other than the words that Defendant Warren Mosler allegedly spoke to Matthew Farrah and other than the single Statement 1 in the comment that Matthew Farah published in Plaintiffs' Trial Exhibit 40.

During the hearing on Defendants' JNOV Motion, Plaintiffs argued that Plaintiff Wagner changed his name. However, Plaintiffs admitted that there was no legal change in Plaintiff Wagner's name because Plaintiff Wagner's legal name is James Todd Wagner and Plaintiff Wagner previously went by Todd Wagner and now goes by James Wagner. There is no evidence

of damages due to the alleged name change.

Finally, Plaintiffs argue that damages do not need to be caused solely by the defamatory statements or that a "'damages train' was set in motion by the defamatory statements from Defendant Warren Mosler to the journalists (all of the 'pile on conversations in the chat room' which were emphasized by Defendants at trial would not have been had were it not for Defendant Warren Mosler's initial comments to the journalists)." D.E 853 at 19.

Plaintiffs' argument is at best a fallacious *post hoc, ergo procter hoc* in that Plaintiff Wagner claimed that because some type of damages followed Matthew Farah's comment, that comment, among all of the possible causes, was the cause because the alleged Statement 1 preceded the damages.

This is a "false generalization" according to *Dreijer*. Even if that were true, it would be "so meager" as to not be enough to support a finding of causation by the jury. There is simply no evidence or inference, let alone expert testimony, that it was the statement, as opposed to any other statements entered into evidence, that caused any damages to Plaintiff Wagner. Plaintiff Wagner's speculation and guesswork is not proper and judgment notwithstanding the verdict is appropriate.

E. JNOV IS APPROPRIATE AS TO PLAINTIFF SEI'S CLAIM IN COUNT G AS TO STATEMENT 1.

"A group of torts recognized under the collective title of 'injurious falsehood' are often interchangeably called slander of title, disparagement of property, or trade libel." *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381, 386 (Fla. 4th DCA 1999). "The gist of the tort of injurious falsehood is the 'intentional interference with another's economic relations.'" *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381, 386 (Fla. 4th DCA 1999).

"In a disparagement action the plaintiff must allege and prove the following elements: (1) A falsehood (2) has been published, or communicated to a third person (3) when the defendant publisher knows or reasonably should know that it will likely result in inducing others not to deal with the plaintiff and (4) in fact, the falsehood does play a material and substantial part in inducing others not to deal with the plaintiff; and (5) special damages are proximately caused as a result of the published falsehood." *Bothmann v. Harrington*, 458 So. 2d 1163, 1168 (Fla. 3d DCA 1984).

1. There Is No Evidence or Inference That Supports Defendant Warren Mosler Published the Statement.

Plaintiff SEI's trade libel claim in Count G as to Statement 1 is based on the same statement as Plaintiff Wagner's above defamation claim. D.E. 825 at 11, 20. For the same reasons as set forth above with respect to Plaintiff Wagner, there is no evidence or inference that supports the jury's finding that Defendant Warren Mosler published the statement at issue. Accordingly, judgment notwithstanding the verdict is appropriate.

2. There Is No Evidence or Inference That Defendants Mosler Knew of or Should Have Known that the Alleged Statement Would Induce Others Not to Deal with Plaintiff SEI.

This Court agrees with Defendants' contention there is no evidence whatsoever as to what Defendant Warren Mosler allegedly specifically said to Matthew Farah, or that whatever was allegedly said was done under circumstances such that it was done to cause others not to work Plaintiff SEI. There is no evidence or inference upon which the jury could find that Defendant Warren Mosler reasonably knew or should have known that the statement would induce others to not work with Plaintiff SEI. Furthermore, Defendant Warren Mosler cannot be held liable for Matthew Farah's third-party republication in Plaintiffs' Trial Exhibit 40. Accordingly, judgment notwithstanding the verdict is appropriate.

3. There Is No Evidence Or Inference that the Alleged Statement Actually Caused Others Not to Deal with Plaintiff SEI or Caused Damages.

Florida law requires a plaintiff to establish that "special damages proximately caused by the making of false statements." *First Ins. Funding v. Stonemark, Inc.*, No. 8:22-CV-1975-WFJAAS, 2022 WL 17551748, at *3 (M.D. Fla. Dec. 9, 2022). "The 'special damage rule requires the plaintiff to establish pecuniary loss that has been realized or liquidated, as in the case of specific lost sales.'" *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381, 388 (Fla. 4th DCA 1999).

Plaintiffs must demonstrate that a defendant's alleged conduct was **the sole cause** of Plaintiff SEI's losses, which is a requirement of special damages. *See, e.g., Wound Care Concepts, Inc., v. Vohra Health Services, P.A.*, No. 19-62078-CIV, 2022 WL 320952, at *14 (S.D. Fla. Jan. 28, 2022) (emphasis added).

In this case, there is simply no evidence or inference that supports that the words themselves that Defendant Warren Mosler allegedly spoke to Matthew Farah were the sole cause of Plaintiff SEI's losses. In fact, Matthew Farah's third-party republication in Plaintiffs' Trial Exhibit 40 (for which Defendant Warren Mosler cannot be held liable), along with all the other articles in evidence and the testimony regarding them, is fatal to any claim that the words that Defendant Warren Mosler stated to the author of Plaintiffs' Trial Exhibit 40 were the sole cause of Plaintiff SEI's losses.

There is no evidence or inference that supports that anyone heard the words that Defendant Warren Mosler allegedly spoke to Matthew Farah much less that those words specifically caused Matthew Farah to publish anything that then caused anyone to not to deal with Plaintiff SEI or cause Plaintiff SEI damages. Accordingly, judgment notwithstanding the verdict is appropriate.

Also, Defendant Warren Mosler cannot be held liable for Matthew Farah's third-party republication of Statement 1 in Plaintiffs' Exhibit 40. Thus, as a matter of law Defendant Warren Mosler cannot be held liable for someone not dealing with Plaintiff because of Matthew Farah's third-party republication of Statement 1 in Plaintiffs' Trial Exhibit 40 or because Matthew Farah's third-party republication caused Plaintiff SEI damages. Accordingly, judgment notwithstanding the verdict is appropriate.

F. THE SINGLE ACTION RULE HAS BEEN VIOLATED.

Similarly, the single action rule is applicable in this case.

1. Applicable Law

"In Florida, a single publication gives rise to a single cause of action." *Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp.*, 831 So. 2d 204, 208 (Fla. 4th DCA 2002). "The various injuries resulting from it are merely items of damage arising from the same wrong." *Id.* "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." *Id.* (quoting Messenger v. Gruner + Jahr USA Publ'g, 994 F. Supp. 525, 531 (S.D.N.Y. 1988), *vacated on other grounds by*, 208 F.3d 122 (2d Cir. 2000)).

"Florida's single publication/single action rule precludes the recasting of defamation claims as additional, distinct causes of action in tort if all of the claims arise from same defamatory publication." *Int'l Sec. Mgmt. Grp., Inc. v. Rolland*, 271 So. 3d 33, 48 (Fla. 3d DCA 2018), *reh'g denied* (Feb. 28, 2019).

In other words, "[w]hen claims are based on analogous underlying facts and the causes of action are intended to compensate for the same alleged harm, a plaintiff may not proceed on

multiple counts for what is essentially the same defamatory publication or event." *Kinsman v. Winston*, No. 615CV696ORL22GJK, 2015 WL 12839267, at *5 (M.D. Fla. Sept. 15, 2015).

2. Analysis

In this case, Plaintiffs presented the same evidence for both Plaintiff Wagner's defamation claims and Plaintiff SEI's trade libel claim as to alleged Statement 1. Defendants are not disputing that Plaintiff Wagner and Plaintiff SEI are separate plaintiffs, but that they are trying to sue on the same statement for the same alleged harm. Here, Plaintiffs' counsel admits that all the harm flows from the same alleged wrong when attempting to identify the damages to Plaintiff SEI versus Plaintiff Wagner stemming from the exact same Statement 1 in Plaintiffs' Trial Exhibit 40 or the exact same words allegedly spoken by Defendant Warren Mosler to Matthew Farah:

> MR. ZAPPOLO: Trade libel, right. Well, it all goes to the car itself. I'm saying that and then it flows -- so I was arguing like G and then it flows backwards to F-1 because that's Mr. -- Mr. Farah concluded Mr. Mosler's a con man -- or, excuse me, Mr. Wagner as a con man.

September 14, 2023 Tr. at 103:19-24

As such, this Court takes the position of Defendants. Plaintiff SEI's claim for trade libel is based on the same statement as Plaintiff Wagner's defamation claim, and Plaintiff SEI and Plaintiff Wagner cannot both maintain claims based on the same statement for the same alleged harm, which they have done in this case.

Due to the foregoing, this Court finds that there is no evidence or inferences that support Plaintiffs' positions, or the jury's findings, with respect to both claims and therefore, Judgment Notwithstanding the Verdict is appropriate as to both claims.

The Court **GRANTS** Defendants' Motion for Judgment Notwithstanding the Verdict**;** and (1) enters a verdict in favor of Defendant MACC, and against Defendant SEI, as to Count C; (2)

enters a verdict in favor of Defendant Warren Mosler, and against Plaintiff Wagner, as to Count F as to Statement 1; and (3) enters a verdict in favor of Defendant MACC, and against Plaintiff SEI, as to Count G as to Statement 1.

II. DEFENDANTS' MOTION FOR REMITTITUR IS DENIED AS MOOT.

Defendants' Motion for Remittitur ("**Remittitur Motion**") is now moot given the Court granting Defendants' JNOV Motion as to Plaintiff SEI's Count C.

III. DEFENDANTS' MOTION FOR SANCTIONS BASED ON PLAINTIFFS' COUNSEL'S MISCONDUCT DURING TRIAL IS GRANTED.

The next motion considered by the Court is Defendants' Motion for Sanctions Based on Plaintiffs' Counsel's Misconduct During Trial, the Court has reviewed the Motion (D.E. 850) ("**Sanctions Motion**"). The Court notes that it admonished Plaintiffs and Defendant Warren Mosler based on their conduct during their testimony and denies the Motion as to all instances identified in the Motion where there was no objection made at trial. The Court's Authority to sanction is inherent - and discretionary. The Court Denies the motion for sanctions.

IV. DEFENDANTS' MOTION FOR SANCTIONS AND TO STRIKE PLAINTIFFS' AFFIDAVIT OF JAMES FREDERICK WILLIAM ROWE IS GRANTED.

Finally, the Court considers Defendants' Motion for Sanctions and To Strike Plaintiffs' Affidavit of James Frederick William Rowe, the Court has reviewed the Motion (D.E. 855) ("**Motion to Strike**").

As a brief background, one Plaintiff Wagner's defamation claims in this case concerned an article that contains, among other things, the statement '"He's nothing. He's got some serious mental problems,' Mosler said. 'He's out there billing himself as everything and he doesn't have anything.'" Following Plaintiffs' case-in-chief, the Court granted Defendants' Directed Verdict Motion as to Plaintiff Wagner's defamation claim regarding this statement because the Court found the statement was not defamatory.

On September 11, 2023, approximately four months after trial in this case, Plaintiffs filed the Affidavit of James Frederick William Rowe (the "**Affidavit**"). The Affidavit's affiant is a non-

party. The Affidavit purports to give the affiant's opinion as to whether the above statement is defamatory.

Defendants' Motion to Strike asserts that Plaintiffs' filing of the Affidavit is in violation of the timelines set by this Court's Trial Order and is maliciously and vexatiously multiplying the proceedings and litigation in this case. As such, Defendants seek that this Court enter an Order striking the Affidavit from the docket, preventing the Affidavit from being entered into evidence, and imposing sanctions.

A. APPLICABLE LAW ON MOTION TO STRIKE

Florida Rule of Civil Procedure 1.140(f) provides in part that, any "party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleadings at any time." Fla. R. Civ. P. 1.140(f).

"A motion to strike a matter as redundant, immaterial, or scandalous should only be granted if the material is 1) wholly irrelevant, 2) can have no bearing on the equities (of the case), and 3) has no influence on the decision." *Rice-Lamar*, 853 So. 2d 1125, 1133-34 (Fla. 4th DCA 2003).

When reviewing a publication that is allegedly defamatory and the language that is the subject of the publication is common and ordinary and the "court must evaluate the publication, not by extremes, but as the common mind would naturally understand it." *Byrd v. Hustler Magazine, Inc.*, 433 So.2d 593, 595 (Fla. 4th DCA 1983). "[P]ublications that are in question in defamation actions are not to be dissected and judged word for word or phrase by phrase, but rather the entire publication must be examined". *Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841, 847 (Fla. 4th DCA 2002).

B. ANALYSIS OF MOTION TO STRIKE

Firstly, the Court finds that the statement contains common and ordinary words and that the Affidavit purports to give an expert opinion as to whether the words in the statement are defamatory.

In addition, the Court finds that the Affidavit is irrelevant because Plaintiffs filed it after trial. The Affidavit purports to support Plaintiffs' motion for new hearing as to a claim that the Court already decided adverse to Plaintiffs when the Court granted Defendants' Motion for Directed Verdict. The Court granting Defendants' Motion for Directed Verdict took into account all of the evidence admitted at the close of Plaintiffs' case. Even when all facts and inference from all evidence admitted at trial are construed in the Plaintiffs' favor, the Affidavit is still irrelevant because it was not admitted at trial. Effectively, the Affidavit would introduce facts that were never even proffered at trial and to admit them as the truth in opposition to Defendants' Motion for Directed Verdict.

Lastly, the Court finds that the Affidavit's late disclosure is fatal. Whatever relevance the Affidavit could have had cannot be considered because Plaintiffs never disclosed the author of the Affidavit on Plaintiffs' witness list, and Plaintiffs never called the author of the Affidavit as a witness at trial. Plaintiffs filed the Affidavit after trial, and filed the Affidavit 9 months after the deadline in this Court's September 1, 2022 Trial order. D.E. 694. Thus, the Affidavit is irrelevant with regard to the May 2023 trial.

The Affidavit is not only irrelevant, but it also has no bearing on the decision of this court.

Here, the Court finds that Defendants would be prejudiced if Plaintiffs were able to use the Affidavit. Plaintiffs' disclosure of the Affidavit is untimely and improper, and this late disclosure compromises Defendants' ability to defend themselves. Moreover, the Court finds that

Defendants do not have the ability to cure the prejudice because the Affidavit's testimony has no relevant relationship to the case because the Affidavit seeks to introduce irrelevant testimony. Plaintiffs' disclosure of the Affidavit after the conclusion of trial and three days before the parties' hearing with the Court on September 14, only increased this prejudice, and the Court finds it was an intentional act defying the Court's September 2022 Trial Order.

Plaintiffs may not use the Affidavit to disrupt the efficiency of the post-trial matters in this case. The Affidavit only serves as a bad faith attempt burden the Defendants by forcing them to incur additional fees and costs.

C. CONCLUSION

Defendants' Motion to Strike is **GRANTED** as follows. The Affidavit shall be stricken from the docket.

Furthermore, the motion to exclude the testimony in the Affidavit is granted, and the Court imposes sanctions against Plaintiffs and their counsel.

Defendants are entitled to reasonable attorney's fees for filing the Motion to Strike. Unless the parties can agree to an amount of reasonable attorney's fees, the Court orders an evidentiary hearing to determine the amount of reasonable attorney's fees incurred by Defendants' for filing the Motion to Strike.

For the reasons stated above, the Court **GRANTS** and **DENIES** the Motions as follows:

1) Defendants' JNOV Motion is GRANTED. The Court enters a judgment notwithstanding the verdict in favor of Defendant MACC and against Plaintiff SEI as to Count C; enters a judgment notwithstanding the verdict in favor of Defendant Warren Mosler, and against Plaintiff Wagner, as to Count F as to Statement 1; and enters a judgment notwithstanding the verdict in favor of Defendant Warren Mosler,

and against Plaintiff SEI, as to Count G Statement 1.

2) Defendants' Remittitur Motion is **DENIED** as moot.

3) Defendants' Sanctions Motion is **DENIED.**; **AND**

4) Defendants' Motion to Strike is **GRANTED.** The Affidavit shall be stricken from the docket. Furthermore, the motion to exclude the testimony in the Affidavit is granted, and Defendants are entitled to monetary sanctions to be entered against Plaintiffs and Plaintiffs' counsel in accordance with the procedure set forth herein.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida

502012CA023358XXXXMB 05/06/2024
Luis Delgado
Circuit Judge

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