

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

**DAVID ROBERTSON and
DANIEL RODNI,**

Plaintiffs,

v.

RYAN UPCHURCH,

Defendant.

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Case No. 3:23-cv-00770

District Judge William L. Campbell, Jr.

Magistrate Judge Barbara D. Holmes

**MEMORANDUM IN SUPPORT OF RYAN UPCHURCH'S
MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

Mr. Upchurch respectfully requests that the Court dismiss the case with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. Facts Alleged In The Amended Complaint¹

This case involves alleged statements Mr. Upchurch made in videos posted on YouTube from August 13, 2022 through September 13, 2022 and one additional video posted on December 22, 2022. *See* Doc. No. 11: Exhibit A. The videos were related to the tragic disappearance, search, and death of a California teenager, Kiely Rodni, whose disappearance became a public controversy. Plaintiff Daniel Rodni is her father, and Plaintiff David Robinson is her grandfather. *See* Doc. No. 9: Amended Complaint at ¶ 4. The search and investigation for Ms. Rodni garnered worldwide attention from the press and the online community. *Id.* at ¶¶ 4, 7, 111, and 156.

On August 6, 2022, Ms. Rodni went missing after a party at the Prosser Family Campground. *See* Doc. No. 9: Amended Complaint at ¶ 55, n.5. On August 7, 2023, a friend of

¹ As required, allegations in the Amended Complaint (Doc. No. 9) are accepted as true for the purposes of this Motion.

Ms. Rodni's mother started "a GoFundMe page." *Id.* at ¶ 31. "...Upchurch began posting about Kiely Rodni on YouTube on August 13, 2022," at which time, "the whereabouts of Kiely Rodni were unknown." *Id.* at ¶¶ 33-34. Mr. Upchurch only began posting after the disappearance "became a viral international news story." *Id.* at ¶ 4. Plaintiffs admit that Mr. Upchurch's posts were made up of his "theories" about "what happened to Kiely Rodni." *Id.* at ¶ 35 (emphasis added). On August 21, 2022, AWP discovered a "submerged car" with a deceased person inside that "was 'more than likely' Kiely Rodni." *Id.* at ¶ 44-45, n.3.

On August 23, 2022, the Placer County, California Sheriff's Office made a Facebook post stating that the "Sheriff-Coroner has identified the decedent as...Kiely Rodni..." *Id.* at ¶ 52. It was not until October 13, 2023 that "news outlets began to report the results of the Coroner's 'Final Report of Investigation'...", which "concluded that the 'manner of death' was an 'accident.'" *Id.* at ¶¶ 105-108. Ms. Rodni was missing for over two weeks; it took another two months until there was any reported answer as to her cause of death.

During the two weeks Ms. Rodni was missing, the media—in particular, social media—was teeming, in real time, with participants in discussion of what happened to Ms. Rodni and whether she was ever at the party. *See* Doc. No. 9: Amended Complaint at ¶ 7; Doc. No. 11: Exhibit A at 002.. Many, including Mr. Upchurch, took to YouTube to use internet sources, interviews, and local media coverage to try and aid in her return and find answers to the mystery of her disappearance. *See* Doc. No. 11: Exhibit A at 001-017. Mr. Upchurch offered and paid \$100,000 and a Hellcat to anyone who could find Ms. Rodni. *See* Doc. No. 11: Exhibit A at 007 (5:54), 018 (8:06), and 027 (27:41-29:08). This belies Plaintiffs' conclusory statement that Mr. Upchurch, a singer, was somehow using the Rodni debate to make money. *See* Doc. No. 9: Amended Complaint at ¶ 117.

Because of a number of facts he describes in detail, Mr. Upchurch ultimately expressed the opinion that the entire story on Ms. Rodni was an internet creation and not real. *See, e.g.*, Doc. No. 11: Exhibit A at 029. He expressly stated in one video “If you were bothering me do you think I would go in depth for two weeks and make all these videos of different angles of scenarios of what possibly could have happened?” *See* Doc. No. 11: Exhibit A at 021 (2:38),

Plaintiffs only cite allegedly actionable statements from six of the attached thirty-eight videos and one additional video. *See* Doc. No. 9: Amended Complaint at ¶¶ 64-65, 85-88, 91-93, 99, 112-114; Doc. No. 11: Exhibit A at 020, 021, 022, 024, 029, and 038. Thirty-seven of the thirty-eight videos attached to the Amended Complaint (Doc. No. 9) were published in a one-month period, from August 13, 2022 to September 13, 2022, directly during the time of the search and investigation. *Id.* The only video Mr. Upchurch posted after that time was “Kiely Rodni ONLY Logic (part 1).” *See* Doc No. 11: Exhibit A at 038. Mr. Upchurch explained the video was made because he reviewed the case to see if anything new had developed and to explain why he formed the opinion he did. *See* Doc No. 11: Exhibit A at 038. He disclosed again all the information he reviewed and why he reached his opinions. *Id.* He concluded by saying “we are only going off logical things that can be seen and stuff that people are saying.” *Id.* at 10:55. When considering the language of Mr. Upchurch’s statements as a whole and the context of those statements, it is clear his statements are protected opinion and often hyperbolic.

II. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) permits dismissal of a complaint for failure to state a claim upon which relief can be granted. “...The very purpose of Fed. R. Civ. P. 12(b)(6) ‘is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery.’” *Hall v. O’Brien*, No. 22-3663, 2023 U.S. App. LEXIS 6774, at *4 (6th

Cir. Mar. 21, 2023) (citing *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 566 (6th Cir. 2003) (quoting *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987))). This is critically important in cases impacting the First Amendment, where the filing of a lawsuit alone imposes a chilling effect. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

“[T]o survive a motion to dismiss, the plaintiff must allege facts that, if accepted as true, are sufficient ‘to raise a right to relief above the speculative level’ . . . and to ‘state a claim to relief that is plausible on its face.’” *Hensley Mfg. v. Propride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

While the Court should accept “well-pleaded” facts as true in determining whether a facially plausible claim exists, it “need not accept as true a legal conclusion couched as a factual allegation.” *Hensley Mfg.*, 579 F.3d at 609. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III. Choice Of Law

Plaintiffs allege in their Amended Complaint that “California...has the most significant relationship to the parties and occurrence at issue, and California’s substantive law should apply.” *See* Doc. No. 9: Amended Complaint at ¶ 167. A federal court sitting in diversity must apply the choice-of-law rules of the forum state, which, in this case, is Tennessee. *Montgomery v. Wyeth*, 580 F.3d 455, 459 (6th Cir. 2009); *MacDonald v. Gen Motors Corp.*, 110 F.3d 337, 341 (6th Cir. 1997). As an initial matter, “[a] court need not make a choice of law, in fact, if there is not a real difference or conflict between the relevant laws of the states involved” and the application of either states’ laws produces the same result. *See Armstrong v. U.S. Fire Ins. Co.*, 606 F. Supp 2d 794,

802 (E.D. Tenn. 2009) (citing *Hataway v. McKinley*, 830 S.W.2d 53, 57 (Tenn. 1992)). In this case, a conflict does exist between Tennessee and California law.

Where a conflict of laws does exist, Tennessee follows “the most significant relationship” approach of the *Restatement (Second) of Conflict of Laws* to decide choice-of-law questions. *Montgomery*, 580 F.3d at 459 (citing *Hataway*, 830 S.W.2d at 59) (adopting from *Restatement (Second) of Conflict of Laws* § 6, § 145, § 146).

Moreover, because this particular case deals with multi-state defamation, this Court should also take *Restatement (Second) of Conflict of Laws* § 150 into account. *See Moore v. Weinstein Co., LLC*, 2012 U.S. Dist. LEXIS 72929, at *94 (M.D. Tenn. May 23, 2012). That section provides in pertinent part:

When a natural person claims that he has been defamed by an aggregate communication, the state of the most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state.

See Restat. 2d of Conflict of Laws, §150 (2nd 1988). However, the Restatement also recognizes that another state could have a more significant relationship to the occurrence and the parties. [and] the extent of the interest of each potentially interested party should be determined on the basis, among other things, of the purpose sought to be achieved by their relevant local law rules and the particular issue involved.” *See Restat. 2d of Conflict of Laws*, §150, cmt. B (2nd 1988).

Here, Tennessee has a more significant relationship. First, the relevant local laws of Tennessee provide significantly more protections for speakers than those of California. First, Tennessee does not recognize defamation per se and requires all plaintiffs to plead and prove damages. *See Steele v. Ritz*, 2009 Tenn. App. LEXIS 843, at *2, n.3 (Tenn. Ct. App. Dec. 16, 2019). Moreover, Tennessee has a statutory cap to damages recoverable in civil actions including defamation. *See Tenn. Code. Ann.* § 29-39-102. The Second Circuit has found in multistate

defamation cases where the defendant's state has special speech protections, that state's law should apply. *See Adelson v. Harris*, 973 F. Supp. 2d 467, 478 (S.D.N.Y. 2013).

Here, Mr. Upchurch is an entertainer and artist solely based in Tennessee. Though his content is often broadcast worldwide, it is published almost exclusively in Tennessee and his speech and conduct is molded by the legal norms of Tennessee. In particular, all the statements at issue were published in Tennessee. Thus, because the conflict of laws indicates a higher protection for speech in Tennessee, this court should find the relationship is more significant to Tennessee in these circumstances. Any final determination of the "choice-of-law" is likely premature should the case continue.

IV. Argument

Plaintiffs' claims of defamation, defamation per se, invasion of privacy-false light, and intentional/negligent infliction of emotional distress are all based solely on statements made by Mr. Upchurch in YouTube videos regarding the mysterious disappearance and death of Ms. Rodni. Under Tennessee, California, and Supreme Court precedent of First Amendment protections, Mr. Upchurch's statements are protected opinion speech.

Because the entirety of Plaintiffs' action against Mr. Upchurch is based on his constitutionally protected speech, each cause of action should be dismissed. "First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement." *Nagler v. Henderson*, 2008 U.S. Dist. LEXIS 136818, *22 (E.D. Mich. 2008) (quoting *Carafano v. Metroplash.com Inc.*, 207 F. Supp. 2d 1055, 1076 (C.D. Cal. 2002)); *see also Peak Health Ctr. v. Dorfman*, 2019 U.S. Dist. LEXIS 197026, at *21 (N.D. Cal. Nov. 12, 2019) (quoting *Films of Distinction Inc. v. Allegro Film Prods., Inc.*, 12 F. Supp. 2d 1068, 1082 (C.D. Cal. 1998)) ("The First Amendment limits California state law claims 'whose gravamen is

the alleged injurious falsehood of a statement.”); *Blatty v. New York Times Co.*, 728 P.2d 1177, 1182-1183 (Cal. 1986) (“Although the limitations that define the First Amendment’s zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement.”).

As explained herein, Mr. Upchurch’s speech fits within a protected category of speech as his statements are opinions that cannot be reasonably construed as stating actual fact.

A. Plaintiffs’ Amended Complaint Should Be Dismissed Because Mr. Upchurch’s Statements Are Protected By The First Amendment – California Law.

1. *Mr. Upchurch’s statements are not stating fact but instead opinion.*

Plaintiffs’ Amended Complaint incorporates by reference and by attachment thirty-eight YouTube videos which they allege are related to and/or contain defamatory statements made by Mr. Upchurch. *See* Doc. No. 9: Amended Complaint at ¶ 124; Doc. No. 11: Exhibit A. Only the statements Plaintiffs chose to set out and allege in the Amended Complaint, however, should be considered by this Court. *See Tull v. Higgins*, 2021 U.S. Dist. LEXIS 246126, *27 (N.D. Cal. 2021) (“Citing to exhibits attached to the complaint is not a substitute for asserting actual allegations about [defendant’s] ‘attitude or state of mind with respect to the veracity’ of the statements [he] posted or retweeted. *See Ampex Corp. v. Cargle*, 128 Cal. App. 1569, 1579, 27 Cal. Rptr. 3d 863 (2005). It is not the court’s responsibility to speculate about potential inferences that [plaintiff] might be trying to make. It is Plaintiff’s duty to assert clear allegations in his pleading.”).

Under California law:

“Defamation requires the intentional publication of a false statement of fact that has a natural tendency to injure the plaintiff’s reputation or that causes special damage.” (*Burrill v. Nair* (2013) 217 Cal.App.4th 357, 383 [158 Cal. Rptr. 3d 332].) The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes

special damage. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720 [54 Cal. Rptr. 3d 775, 151 P.3d 1185]; *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369 [117 Cal. Rptr. 3d 747].)

J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP, 247 Cal. App. 4th 87, 97 (Cal. Ct. App. 2016). Additionally, “[t]he defendant’s statement must specifically refer to, or be ‘of and concerning,’ the plaintiffs.” *John Doe 2 v. Superior Court*, 1 Cal. App. 5th 1300, 1312 (Cal. Ct. App. 2016) (quoting *Blatty v. New York Times Co.*, 728 P.2d 1177, 1182 (Cal. 1986)).

“[The] publication in question must be considered in its entirety; [it] may not be divided into segments and each portion treated as a separate unit.” It must be read as a whole in order to understand its import and the effect which it was calculated to have on the reader, and construed in the light of the whole scope and apparent object of the writer, considering not only the actual language used, but the sense and meaning which may have been fairly presumed to have been conveyed to those who read it.

Baker v. Los Angeles Herald Examiner, 721 P.2d 87, 91 (Cal. 1986).

The standard under California law for a private individual to prove defamation is “negligence.” *Carney v. Santa Cruz Women Against Rape*, 221 Cal. App. 3d 1009, 1015 (Cal. Ct. App. 1990). However, “[i]f the person defamed is a public figure, he must show, by clear and convincing evidence, that the defamatory statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false.” *Mitchell v. Twin Galaxies, LLC*, 70 Cal. App. 5th 207, 218 (Cal. Ct. App. 2021) (citing *Reader’s Digest Assn. v. Superior Court*, 690 P.2d 610 (Cal. 1984); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285–286 (1964)).²

Opinion speech has long been held as broadly protected by the First Amendment. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) (“[u]nder the First Amendment there is no

² For the purposes of this Motion, Mr. Upchurch is not arguing that Plaintiffs are limited purpose public figures.

such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.”).

Based on these principles, California courts have found that:

“‘The sine qua non of recovery for defamation ... is the existence of falsehood.’ Because the statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected.” (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 112 [64 Cal. Rptr. 3d 467] (*McGarry*).)

Sanders v. Walsh, 219 Cal. App. 4th 855, 862 (Cal. Ct. App. 2013). While “statements of opinion” do not “enjoy blanket protection... the critical question is not whether a statement is fact or opinion but ‘whether as reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.’” *Id.* (quoting *Wong v. Jing*, 189 Cal. App. 4th 1354, 1370 (Cal. Ct. App. 2010)).

California courts use a “totality of circumstances test of whether the statement in question communicates or implies a provably false statement of fact.” *Id.* at 862. “[F]irst, the language, of the statement is examined.” *Id.* “For words to be defamatory they must be understood in a defamatory sense...next, the context in which the statement is made must be considered.” *Id.* (citing *McGarry*, 154 Cal. App. 4th at 113) (emphasis added). This “‘crucial question of whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court.’” *Id.* at 862-63. Based on Mr. Upchurch’s language and the context, no reasonable fact finder could conclude he declared or implied a statement of fact.

- a. The specific language of Mr. Upchurch’s statements shows he is not asserting an objective fact but instead opinion.**

When “considering the language of the statement itself, [courts] look at whether the purported opinion discloses all of the facts on which it is based and does not imply that there are other, unstated facts which support the opinion.” *Dickinson v. Cosby*, 17 Cal. App. 5th 655, 686 (Cal. Ct. App. 2017) (citing *Franklin Dynamic Details, Inc.*, 116 Cal. App. 4th 375, 387 (Cal. Ct. App. 2004)). If the opinion “discloses all of the facts on which it is based and does not imply there are other, unstated facts which support the opinion . . . the statement is defamatory only if the disclosed facts themselves are false and defamatory.” *Id.* at 686 (citation omitted); *see also Franklin v. Dynamic Details, Inc.*, 116 Cal. App. 4th 375 (Cal. Ct. App. 2004) (although plaintiff claimed that defendant sent three defamatory emails to plaintiff’s business partners describing his theft of copyrighted material and plagiarized data, court found that statements were protected opinion because defendant disclosed the facts on which he based his statements.).

Additionally, when examining the language of the allegedly defamatory statements, courts “consider whether the statement was cautiously phrased in terms of the author’s impression.” *Dickinson*, 17 Cal. App. 5th at 686 (citing *Baker v. Los Angeles Herald Examiner*, 721 P.2d 87, 90-91 (Cal. 1986)). The *Dickinson* court reversed the trial court’s order granting the motion to dismiss. *Id.* at 693. The court found that the statement was not “phrased cautiously in terms of opinion.” *Id.* at 687. Although “not dispositive,” the court found notable that the statement did not indicate it was the defendant’s belief and further that the defendant did not disclose the facts on which it was based. *Id.* at 687-88. Instead, the defendant’s unqualified statement was that the plaintiff was a liar, a fabricator, and was giving false information about being raped, which a reasonable fact finder could find was a false statement of fact. *Id.* at 687, 689. The court also found it “important” that the publication was authored by someone with first-hand knowledge and

explained that the result in the case might have been different if the same statements were published by a person with no first-hand knowledge. *Id.* The court explained:

The rape allegations against Cosby were a subject of national attention and much public speculation. It would perhaps be unactionable opinion if an unrelated individual, with no actual knowledge of the rape, chatting in a public forum, were to say, “Dickinson lied about the rape; after all, she told a different story in her book.” That may be unactionable opinion because it is based on disclosed facts and the speaker would not be presumed to be basing the opinion on anything else.

Id. at 689.

In *Carr v. Warden*, 159 Cal. App. 3d 1166, 1168 (Cal. Ct. App. 1984), the court affirmed the granting of the motion to dismiss without leave to amend. In that case, the defendant made the following statement in a political dispute: “I think someone is being bought on the Planning Commission, otherwise, how could you explain a 3-3 vote at one meeting on an issue and then at the very next meeting, a 6-1 vote?” *Id.* at 1168. The Court of Appeals upheld the trial court’s decision that the statement was “opinion and therefore not defamatory as a matter of law.” *Id.* at 1171.

The plaintiff in that case argued that the statement could not be protected opinion because it alleged “criminal conduct or personal dishonesty.” *Id.* at 1170. The court disagreed, holding that all “statements of opinion, no matter how outrageous or pernicious, are protected” so long as there is no implication ““of undisclosed defamatory facts as the basis for the opinion....”” *Id.* (emphasis original) (quoting *Okun v. Superior Court*, 629 P.2d 1367 (Cal. 1981)). There, the basis for the opinion was disclosed. *Id.* The defendant’s “apparent aim was to disclose the precise facts on which his opinion was based [and,] [r]ather than implying unstated facts, [the] statement appears “cautiously phrased in terms of apparency.”” *Id.* (quoting *Okun v. Superior Court*, 629 P.2d 1367 (Cal. 1981); *Gregory v. McDonnell Douglas Corp.*, 552 P.2d 429 (Cal. 1976).

When considering the language in and surrounding the alleged defamatory statements, it is clear Mr. Upchurch is asserting protected opinions and not facts. The statements at issue, as set out in the Amended Complaint, are set out in Paragraphs 62, 64, 65, 74, 75, 76, 92, 93, 95, 96, 97, 100, and 113.

Plaintiffs allege that the statements amounting to defamation are: (1) “Kiely Rodni was not real”; (2) Plaintiffs were “not real”; (3) Ms. Rodni was a “b***** person”; (4) Ms. Rodni’s disappearance was a “‘scam’ to raise money on GoFundMe”; (5) “Plaintiffs were involved in a GoFundMe scam which imputed criminal activity”; (6) Plaintiffs were, in fact, relatives of a person named Callie Ross, implying that the Plaintiffs were actors pretending to be someone other than they, in fact, were;” (7) “Plaintiffs were involved in a scheme to ‘catfish fake a death.’” *See* Doc. No. 9: Amended Complaint at ¶¶ 125-130.

Plaintiffs further allege that Mr. Upchurch’s statements amounting to defamation per se are: (1) comments accusing “Plaintiffs of participation in a GoFundMe ‘scam’,” which statements “accuse Plaintiffs of committing acts of moral turpitude, including fraud;” (2) comments accusing “Plaintiffs of participation in a GoFundMe ‘scam’ while pretending to be Kiely Rodni’s family,” which statements “falsely accuse Plaintiffs of crimes of. Moral turpitude.” *See* Doc. No. 9: Amended Complaint at ¶¶ 140-141.

Finally, Plaintiffs allege that the statements supporting their false light invasion of privacy claim are: (1) accusing Plaintiffs of “participating in a ‘scam’ to profit from GoFundMe”; (2) accusing Plaintiffs “of having misrepresented themselves and their identities, lying about who they are, and who their loved ones are;” (3) accusing Plaintiffs “of being ‘fake’ and ‘not real’ while grieving the tragic death of a loved one, whom Upchurch also referred to as a ‘b***** person,’ ‘fake,’ and ‘not real’”; (4) calling Plaintiffs “‘fake’ and ‘not real’ in the days after their daughter /

granddaughter suffered a tragic fatal accident.” *See* Doc. No. 9: Amended Complaint at ¶¶ 147-150.

As explained *supra*, these are the only statements the Court should consider. As explained herein, however, other statements in the videos cited in the Amended Complaint help establish the protected nature of Mr. Upchurch’s commentary and are, therefore, cited herein. The statements as to Ms. Rodni and Plaintiffs not being real, them being other people, or statements about GoFundMe are clearly only his opinion formed based on facts he disclosed. *See* Doc. No. 11: Exhibit A at 020, 021, 024, 038. In addition, Mr. Upchurch never opined that Plaintiffs were involved in any type of scam, which will be addressed in Section V(C).

First, Mr. Upchurch is like the hypothetical defendant the *Dickinson* court discussed—one without any personal knowledge. Also, in each of his videos, Mr. Upchurch walks through and shows the listener the information that leads him to his opinions. In fact, the Amended Complaint directly alleges this process. *See, e.g.*, Doc. No. 9: Amended Complaint at ¶¶ 63-64 (“In this video Upchurch played a video of law enforcement press conference...Upchurch then commented”); ¶ 85 (“This video was a phone screen recording of Upchurch performing internet searched relating to Daniel Rodni”); ¶ 88 (“Upchurch zoomed into a pixelated image, which, per the title of the video, he claimed was ‘another picture of Kiely’s CRV.’”); ¶ 93 (“In this video, Upchurch posted photographs of Plaintiff David Robertson, with quotation marks around the phrases ‘Kiely Rodni’s grandpa’ and ‘Kiely’s grandpa.’”).

In fact, in every video in which Mr. Upchurch makes statements alleged in the Amended Complaint to be defamatory as well as the other videos attached to the Amended Complaint, he demonstrably is forming that opinion based on reports, statements, photographs, interviews, and information that he discloses to his audience. *See, i.e.*, Doc. No. 11: Exhibit A at 001, 002, 020,

021, 022, 024, 029, and 038. Because of this, Mr. Upchurch's viewers are able to draw their own conclusions based on these disclosures. Viewers are certainly not led to think that Mr. Upchurch is presenting objective assertion of facts rather than his opinion on facts that they have an equal opportunity to analyze.

On August 13, 2022, Mr. Upchurch posted his first video discussing the disappearance of Ms. Rodni and introduced himself to the "true crime" community. *See* Doc. No. 11: Exhibit A at 001. Mr. Upchurch makes clear that he is a singer, not a "true crime" YouTuber, and that he is only giving "scenarios" of what could have happened. *See* Doc. No. 11: Exhibit A at 001 (00:00-00:43) ("I know a lot of you true crime people think you're f***** Inspector Gadget...and I'd love to break it to you, and I am, you're not and guess what I'm not either. But, in the past I've gave plausible realistic scenarios that other people have not given....and which is why a lot of these other true crime people are like, boo stop, you can't do this, you're a singer."). Mr. Upchurch also recognizes that others are putting forth "theories," as well; he acknowledges that there are many people posting discussions of Ms. Rodni's disappearance; and he has been watching their videos. *Id.* at 1:00-1:42 ("I've already seen some ridiculous theories...if you do want to see the timeline perfectly, I suggest you go to the YouTube page of a lady named Plunder. She has the full breakdown on her page. I just want to point out odd stuff."). Mr. Upchurch painstakingly discloses all the facts and information he is seeing and hearing about the disappearance in real time that leads to what he "thinks" and his opinions. *Id.* at 00:00-13:29. When the video is viewed in its entirety, there is but one conclusion: Mr. Upchurch does not purport to have any first-hand knowledge of anything and is merely giving his possible scenarios. The same can be said for each of Mr. Upchurch's videos. *See* Doc. No. 11: Exhibit A. In his August 29, 2022 video cited by Plaintiffs, Mr. Upchurch is expressing his opinion and speculating. He says, "Show me that it's

real. Show me proof of Kiely Rodni.” See Doc. No. 9: Amended Complaint at ¶ 76; and Doc. No. 11: Exhibit A at 021.

When looking at the entirety of the language in Mr. Upchurch’s videos that surround the alleged defamatory statements, there is nothing about the language in Mr. Upchurch’s statements that would allow a fact finder to find he was expressing a fact. As Mr. Upchurch says in one of his later videos: “I still think the same exact thing...I still think it’s b*****. Still not buying it. Just not.” See Doc. No. 9: Amended Complaint at ¶ 100; Doc. No. 11: Exhibit A at 029. This language certainly clarifies that his statements, even when made assertively, are hyperbole and opinion. See e.g., Doc. No. 11: Exhibit A at 002 (1:00) (“I don’t think Jagger did sh*t...I think Kate Kuno is innocent as well”); 020 (“I was getting frustrated and started going through this case from the beginning...it’s all b*****t ...you know with all these crazy leads we’ve been getting to rabbit holes...it’s been like a reality show from the beginning.”).

Such cautionary language is even evident within the alleged defamatory statements set out in the Amended Complaint. See Doc. No. 9: Amended Complaint at ¶ 113 (“Let’s be honest with ourself [sic], at this point in the video, there is nothing to lead me to believe that this person is real. The Kiely Rodni Person. There is nothing that shows me she’s real yet.”); ¶ 76 (Mr. Upchurch is asking for proof that indicates the situation is real); ¶ 64 (“All of it. It’s all b*****. Show me one thing that’s real. You can’t.”). The same is true for all alleged defamatory statements. Thus, his language indicates his speech is to be construed by the reasonable audience as opinion.

b. The context of the statements also show the statements are opinion.

When “considering the context of the statement, [courts] look at:

facts including the audience to whom the statement was directed (*Baker v. Los Angeles Herald Examiner, supra*, 42 Cal.3d at p. 261 [consider how the average reader of the statement would reasonably have understood it]), the forum in which the statement was made (e.g., *Summit Bank v. Rogers, supra*, 206 Cal.App.4th at p.

699 [anonymous misspelled rants on an internet board devoted to rants and raves are generally not expected to be taken seriously]), and the author of the statement [***53] (e.g., *Franklin v. Dynamic Details, Inc.*, *supra*, 116 Cal.App.4th at p. 389 [finding it significant that the author did not purport to be a lawyer stating opinions as legal truths in legal verbiage]).

Dickinson, 17 Cal. App. 5th at 686. “Another factor to consider in the context portion of the totality of the circumstances test is whether the statement is so-called ‘predictable opinion.’” *Id.* Under the “totality of the circumstances” test, courts examine “whether the statements were made by participants in an adversarial setting.” *Id.* at 687. “[W]here potentially defamatory statements are published in a ... setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.” *Id.* at 686-687 (quoting *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1401-1402 (Cal. Ct. App. 1999)).

The California Court of Appeals considered a case in which the defendant posted on the “Rants and Raves” section of Craigslist, an advertisements website, which contained twenty-one allegedly defamatory statements. *Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 679-80 (Cal. Ct. App. 2012). On the platform, defendant stated, in summary, that:

(1) The Bank didn’t pay dividends in 2009; (2) the “b**** CEO” who runs the Bank “thinks that the Bank is her personel [*sic*] Bank to do with as she pleases”; (3) the CEO should not be allowed to provide an executive position to her “worthless, lazy fat ass son”; (4) depositors should move their accounts immediately, “before its [*sic*] too late”; (5) the Bank is “screwed up,” “piss poor,” and a “problem Bank”; (6) the Federal Deposit Insurance Corporation (FDIC) and California’s Department of Financial Institutions have “look[ed] at Summit Bank” three times in less than one year and that is “not a good thing”; (7) service was poor at the Bank’s Hayward branch and the Bank closed it; (8) after the Hayward branch was closed, the customers “were left high and dry”; and (9) the Bank’s depositors should leave “before they close.”

Id. at 696-97. In reviewing the context in which these statements were made, the *Summit* court took note that “because Rogers’s alleged defamatory statements appeared in a section of the Craigslist Web site entitled ‘Rants and Raves,’ the reader of the statements should be predisposed to view them with a certain amount of skepticism, and with an understanding that they will likely present one-sided viewpoints rather than assertions of provable facts.” *Id.* Furthermore, “[a]ny reader familiar with the culture of ... most electronic bulletin boards ... would know that board culture encourages discussion participants to play fast and loose with facts. ... Indeed, the very fact that most of the posters remain anonymous, or pseudonymous, is a cue to discount their statements accordingly.” *Id.* (citing Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 936-937.). The *Summit* court ultimately found that the “context further undermines the reader’s expectation that the posts are to be understood as assertions of fact.” *Id.* at 699. “To put it mildly, these postings...lack the formality and polish typically found in documents in which a reader would expect to find facts.” *Id.* (citing *Global Telemedia Internat., v. John Doe I*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001)).

Mr. Upchurch’s comments are certainly published in a similar setting with a similar expectation of the audience. To begin, his statements are made on his personal YouTube where, as stated in the Amended Complaint, Mr. Upchurch is known primarily as a “musician” and “media personality.” Doc. No. 9: Amended Complaint at ¶ 3. Plaintiffs further allege that Mr. Upchurch’s videos pertinent to this case were made as part of the growing industry of “true crime” sleuths who “began wildly speculating as to ‘what really happened’” to Ms. Rodni. Doc. No. 9: Amended Complaint at ¶¶ 5, 7. This YouTube world in which he was participating is certainly one in which an audience would expect “fiery rhetoric,” or where publishers lack the “polish” that would lead a viewer to expect to hear assertions of fact, much like the “Rant and Raves” section in *Summit*.

Additionally, the titles of Mr. Upchurch's YouTube videos show that the videos are clearly to be taken in the context of asserting opinions and theories rather than defaming facts. *See, i.e.*, Doc No. 11: Exhibit A at 025 ("The Kiely Rodni Case – Conspiracies Gone Wild – @UpchurchOfficial and Friends" (emphasis added)); 003 (" . . . how is this not a red flag in Kiely Rodni missing..." (emphasis added)); 014 ("EXACTLY what I think happened to Kiely Rodni ..." (emphasis added)). All of Mr. Upchurch's videos contain the same elements of drama, hyperbolic language, and heated debate that would certainly give the audience the impression Mr. Upchurch was not asserting objective fact. Mr. Upchurch is not presenting his statements with any indication of private and personal knowledge or authority on investigations.

The context of the YouTube true crime heated debates show Mr. Upchurch's statements rise to "predictable opinions" when examining the full context. As explained *supra*, Mr. Upchurch's statements were made in the midst of what became a very long and heated conversation about what could have happened to Ms. Rodni. Not only were people involved in trying to find answers on their own but were involved in trying to promote or dismantle other YouTuber theories. *See, e.g.*, Doc. No. 11: Exhibit A at 010, 015, 016, 025, 027, 030-038.

In sum, the alleged defamatory statements in Plaintiffs' Amended Complaint are all protected opinion speech. Both the specific language and context of Mr. Upchurch's statements weigh heavily in favor of finding the statements set forth in the Amended Complaint as unactionable. Thus, if California law applies, Plaintiffs' defamation claims must fail. Moreover, because the gravamen of every count in the Amended Complaint is Mr. Upchurch's speech, and that speech falls under First Amendment protection, every count should be dismissed.

B. Plaintiffs' Amended Complaint Should Be Dismissed Because Mr. Upchurch's Statements Are Protected By The First Amendment – Tennessee Law.

The analysis of the nature of Mr. Upchurch's claims is substantially similar under Tennessee law and, thus, this Court should find that the statements are protected opinion regardless of the choice of law.

Under Tennessee law:

[W]hether it be slander or libel...in order to establish a prima facie case of defamation a plaintiff must establish that the defendant communicated defamatory matter to a third person with knowledge of its falsity or defamatory nature to the plaintiff, reckless disregard for the truth of the statement, or negligence in failing to ascertain the truth of the statement. *Sullivan v. Baptist Memorial Hospital*, 995 S.W.2d 569, 571 (Tenn. 1999) (citing Restatement (Second) of Torts § 580B (1977); *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978)); see also Restatement (Second) of Torts § 558 (1977).

Steele v. Ritz, 2009 Tenn. App. LEXIS 843, *6-9 (Tenn. Ct. App. Dec. 16, 2009).

Finally, “[a] plaintiff must also allege and prove that the defaming party communicated a false or defamatory statement concerning the plaintiff.” *Steele*, 2009 Tenn. App. LEXIS at *9 (citing *Pate v. Service Merchandise Co.*, 959 S.W.2d 569, 573 (Tenn. Ct. App. 1997) (citation omitted); see also 50 Am. Jur. 2d *Libel and Slander* § 417, at 810 (2006); Thomas F. Daly, *Defamation*, in 19 Am. Jur. Trials 499, 537 (Charles S. Parnell & Milton Roberts eds., 1972).

In Tennessee, “the issue of whether a communication is capable of conveying a defamatory meaning is a question of law for the court to decide in the first instance; it is then for the jury to decide whether the communication was in fact so understood by those who received it.” *Brown v. Mapco Express, Inc.*, 393 S.W.3d 696, 708-709 (Tenn. Ct. App. 2012). “In making this determination, a court ‘must look to the words themselves and [is] not bound by the plaintiff’s interpretation of them.’” *Davis v. Covenant Presbyterian Church of Nashville*, 2015 Tenn. App. LEXIS 804, at *9 (Tenn. Ct. App. Sept. 30, 2015) (quoting *Stones River Motors, inc. v. Mid-S Pub Co.*, 651 S.W.2d 713, 719 (Tenn. Ct. App. 1983)).

Tennessee, in accord with Supreme Court precedent, has recognized that “pure opinion, hyperbole, or rhetorical exaggeration” are not capable of defamatory meaning. *Moses v. Roland*, 2021 Tenn. App. LEXIS 122, at *29 (Dec. 8, 2020) (agreeing that because Plaintiffs statement that Ms. Moses was threatening everybody was not capable of a defamatory meaning because it was rhetorical hyperbole that cannot be objectively proven or disproven.).

Moreover, like California, Tennessee recognizes that “[a] statement in the form of an opinion . . . is actionable only if it implies the allegation of undisclosed defamatory facts as the basis of the opinion. . . .” *See Carr v. Warden*, 159 Cal. App. 3d 1166, 1170 (Cal. Ct. App. 1984) (quoting *Okun v. Superior Court*, 629 P.2d 1367 (Cal. 1981)). Thus, because a defamatory statement must be “factually false in order to be actionable, comments upon characterizations of published facts are themselves not actionable.” *Stones River Motors, inc. v. Mid-S Pub Co.*, 651 S.W.2d 713, 720 (Tenn. Ct. App. 1983) (emphasis added). Accordingly, a writer’s comments upon “true and nondefamatory” published facts “are not actionable, even though they are stated in strong or abusive terms.” *Id.* These comments have “been given constitutional protection under the First Amendment. . . .” *Id.*

Thus, as argued *supra*, given the context and language of Mr. Upchurch’s statements, it is clear that they are protected opinion and hyperbole speech under Tennessee law. Therefore, if Tennessee law applies, this Court also should not only dismiss Plaintiffs’ defamation claims, but the remainder of their claims as the gravamen of each claim lies within this protected speech.

C. The Majority Of The Alleged Defamatory Statements Aren’t “Of And Concerning” Plaintiffs.

The only statements that specifically refer to Plaintiffs are statements in Paragraphs 92, 93, 96, and 97 of the Amended Complaint. None of the others are of and concerning the Plaintiffs. *See* Doc. No. 9: Amended Complaint at ¶¶ 62, 64, 65, 74, 75, 76, 95, 100, 113. In actions concerning

allegedly injurious statements, the “First Amendment also requires that the statement on which the claim is based must specifically refer to or be ‘of and concerning’ the plaintiff in some way.” *See Blatty v. New York Times Co.*, 728 P.2d 1177, 1182 (Cal. 1986) (citing *New York Times*, 376 U.S. at 288-292; *Rosenblatt v. Baer*, 383 U.S. 75 (1966)). This requirement “confines actionable defamation to statements made against an ‘ascertained or ascertainable person, and that person must be plaintiff.’” *Steele v. Ritz*, 2009 Tenn. App. LEXIS 843, *10 (Tenn. Ct. App. 2009) (citing 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 35 (2005) (citing cases)). Thus, “[a] claim for defamation based on an alleged statement that does not expressly designate its subject will survive a motion to dismiss only if it is alleged that the statement was made ‘of and concerning’ the plaintiff or referred to the plaintiff by reasonable implication.” *Id.* (quoting *Yow v. National Enquirer, Inc.*, 550 F. Supp. 2d 1179, 1187 (E.D. Cal. 2008) (applying California law)).

In *Steele*, “three female employees of adult entertainment businesses and cabarets” sued the defendant for “stating that ‘almost without exception, these girls were sexually abused by a family member...and have addiction to drugs or alcohol...these clubs feed on that.’” *Steele*, 2009 Tenn. App. LEXIS 843, at *3. The complaint, however, did not include an allegation that the plaintiffs were those girls. *Id.* Although the Court of Appeals did not adopt this Rule, the *Steele* trial court “expressly relied on what it termed the ‘Group Libel Rule’:

Under the Group Libel Rule, plaintiffs must allege that they were individually. Named in the alleged defamatory statements. Statements that are used broadly concerning the members of a class or group, absent other circumstances specifically pointing to a particular member, are not a sufficient basis for one member to have a cause of action for libel or slander.”

Id.

The Court of Appeals affirmed the trial court’s grant of the motion to dismiss, finding that the plaintiffs’ complaint failed to meet “this minimum threshold” because the statements in the

complaint did not expressly mention the plaintiffs and there were no allegations that the statement referred to the plaintiffs by reasonable implication or that it was made of and concerning plaintiffs. *Id.* at *11. The same is true here for many of the statements in the Amended Complaint.

The GoFundMe “scam” comments made by Mr. Upchurch are not targeted at Plaintiffs. In Mr. Upchurch’s very first video on the disappearance of Ms. Rodni, he mentions GoFundMe. *See* Doc. No. 11: Exhibit A at 001. He distinguishes himself from the “true crime” community by saying you will not see him put a GoFundMe link at the bottom of his videos like others do. *Id.* One thread that runs throughout his videos is his disagreements with the “true crime” community. *See* Doc. No. 11: Exhibit A at 014. Even with respect to Ms. Rodni’s family, the GoFundMe in question was set up by a friend of Ms. Rodni’s mother, who is not a plaintiff in this case. *See, e.g.*, Doc. No 9: Amended Complaint at ¶ 31. Mr. Upchurch never ties his GoFundMe opinions to Plaintiffs.

Furthermore, Plaintiffs make no non-conclusory allegations that such statements implicate Plaintiffs in wrongdoing. There is no implication of who was involved in any such alleged scam, let alone the Plaintiffs. Thus, this Court should dismiss the Plaintiffs’ claims against Mr. Upchurch that are based on these statements as they are not “of and concerning” Plaintiffs.

D. Plaintiffs’ Defamation Per Se Claim Should Be Dismissed Because Plaintiffs’ Allegations Do Not Support That Mr. Upchurch Accused Plaintiffs Of “Crimes Of Moral Turpitude.”

The Amended Complaint alleges that Mr. Upchurch is liable to Plaintiffs for defamation per se under California law because he accused Plaintiffs of involvement in a GoFundMe “scam” and, thus, implicated them in “committing acts of moral turpitude, including fraud.” *See* Doc. No. 9: Amended Complaint at ¶¶ 139-142. First, as argued *supra*, should Tennessee law apply, this claim should be dismissed on its face because Tennessee does not recognize defamation per se.

See Memphis Publ'g Co. v. Nichols, 569 S.W.2d 412, 420 (Tenn. 1978) (“The plaintiff must plead and prove injury from the alleged defamatory words, whether their defamatory meaning be obvious or not.”)

However, should California law apply, this claim should still be dismissed for, despite Plaintiffs’ portrayal of Mr. Upchurch’s statements, it is evident that Mr. Upchurch did not accuse Plaintiffs of participation in a GoFundMe “scam,” “fraud,” or any crime at all as alleged in Paragraphs 140-141. Thus, this claim should be dismissed.

Plaintiffs charge Mr. Upchurch with slander per se under California Civil Code § 46. *See* Doc. No. 9: Amended Complaint at ¶ 142. California Civil Code § 44 defines “defamation” as either libel or slander. California Civil Code § 46 provides in pertinent part:

“Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which: . . . charges any person with crime, or with having been indicted, convicted, or punished for crime. . . .”

Crowe v. County of San Diego, 608 F.3d 406, 442 (9th Cir. 2010). “If a statement falls within § 46(1)-(4), it is considered defamatory per se.” *Id.* (citing *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th Cir. 2002)).

Here, Plaintiffs allege that Mr. Upchurch made statements that charge Plaintiffs Daniel Rodni and David Robertson with a “crime of moral turpitude.” There are no statements in the Amended Complaint that do any such thing. As set forth *supra*, the opinions on GoFundMe are not “of and concerning” Plaintiffs. Mr. Upchurch’s opinion statements that Plaintiffs were “not real” (which have nothing to do with any “crime of moral turpitude”) are published several videos after Mr. Upchurch proposes his GoFundMe “scam” scenario and unrelated to them. *Compare* Doc. No. 11: Exhibit A at 020, 021 with Doc. No. 11: Exhibit A at 024.

Plaintiffs do not set out one instance of Mr. Upchurch alleging that Plaintiffs themselves were involved in any “scam” or “fraud.”

E. Plaintiffs Fail To State A Claim For False Light Invasion Of Privacy – Tennessee.

The Tennessee Supreme Court expressly recognized the separate tort of false light invasion of privacy in 2001. *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 643-44 (Tenn. 2001).

It initially defined the tort as set forth in the *Restatement (Second) of Torts*:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, 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.

Id. (quoting *Restatement (Second) of Torts* § 652E (1977)). “The court determined, however, that the appropriate standard for false light invasion of privacy claims asserted by a private plaintiff regarding a matter of private concern is “simple negligence.” *Hall v. Metro. Gov’t*, 2018 U.S. Dist. LEXIS 2365, *10-11 (M.D. Tenn. Jan 5, 2018) (citing *West*, 53 S.W.3d at 648). “‘For all other false light claims,’ in particular those asserted by a plaintiff who is a public official or public figure, or for claims asserted by a private individual about a matter of public concern, the ‘actual malice’ standard applies.” *Id.*

Mr. Upchurch’s statements are a matter of “public concern.” *West*, 53 S.W.3d. at 648. Thus, Plaintiffs must allege actual malice to avoid dismissal on their false light claim. *Id.* A matter of public concern in this context is a matter “of political, social, or other concern to the community.” *Charles v. McQueen*, 2022 Tenn. App. LEXIS 378, *36 (Tenn. Ct. App. Sept. 28, 2022) (citing *Lewis v. NewsChannel 5 Network, L.P.*, 238 S.W.3d 270 (Tenn. Ct. App. 2007)).

There, the court found that defendant, a developer of a large residential community, was a private individual who made statements of public concern when he posted a negative online review about a different subdivision calling it a “bait and switch.” Here, Mr. Upchurch’s statements are discussing a matter clearly of immense public concern to the Truckee and, ultimately, global community. Thus, Plaintiffs must adequately allege actual malice to support their false light claim.

“The ‘actual malice’ standard is a subjective one in which the ultimate question is whether the defendant made the statement with ‘knowledge that the statement was false’ or with ‘reckless disregard for the truth.’” *Cooley*, 759 F.3d at 531 (quoting *Harte-Hanks*, 491 U.S. at 667). “To make a statement with reckless disregard for the truth, a defendant must have made the statement ‘with a high degree of awareness of probable falsity,’ or must have ‘entertained serious doubts as to the truth of his publication.’” *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964) and *St. Amant v. Thompson*, 390 U.S. 727, 730, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1969)). Furthermore, a plaintiff must establish actual malice with clear and convincing evidence. *Id.*

Here, while Plaintiffs assert the falsity of Upchurch’s statements, their challenges to the statements fail to illustrate actual malice. *See e.g.*, Doc. No. 9: Amended Complaint at ¶ 12 (Mr. Upchurch “falsely stated”); *Id.* at ¶ 35 (“Upchurch offered outlandish ‘theories’ of the truth of what happened to Kiely Rodni.”); *Id.* at ¶ 38 (“Upchurch falsely claimed”); *Id.* at ¶ 42 (“Upchurch thus has a pattern of publishing reckless false views”). Plaintiffs’ Amended Complaint does not rise to the heightened pleading standard for actual malice. Finally, even under the negligence standard, Plaintiffs’ claim fails. As explained in *supra*, the statement upon which Plaintiffs base this claim are protected opinion. Thus, this claim should be dismissed.

F. Plaintiffs' False Light And Intentional/Negligent Infliction Of Emotional Distress Claims Also Should Be Dismissed Under California Because They Are Redundant.

Under California law, Plaintiffs' claims of false light and intentional and negligent infliction of emotional distress (Counts 3, 4, and 5) are based on the same alleged conduct as their defamation claims. They should, therefore, be dismissed as "redundant." *See Wong v. Jing*, 189 Cal. App. 4th 1354, 1379 (Cal. Ct. App. 2010). Here, "in essence," Plaintiffs' "infliction of emotional distress claims are merely alternative legal theories for holding defendants liable for the same conduct underlying [Plaintiffs'] [defamation] claims." *Id.*

V. Conclusion

For all of these reasons, Mr. Upchurch respectfully requests this Court dismiss Plaintiffs' Amended Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim for which relief can be granted.

Respectfully submitted,

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