IN THE DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA
FIRST DISTRICT

TOMMY HAMM, JR., individually, and WINTERFELL CONSTRUCTION, INC., a Florida corporation,

Appellants,

vs.

RESILIENCE FORCE, an unincorporated association; NATIONAL GUESTWORKER ALLIANCE, an unincorporated association; SAKET SONI, individually; CYNTHIA S. HERNANDEZ, individually; ALVARO GUZMÁN BASTIDA, individually; CHRISTINA CLUSIAU, individually; SHAUL SCHWARZ, individually; REEL PEAK FILMS, an unincorporated association; and NETFLIX, INC., a Delaware corporation,

Appellees.

Case No.: 1D23-2489
L.T. Case No.: 21-293 CA

On Appeal from the Circuit Court of the Fourteenth Judicial Circuit
In and for Bay County, Florida

INITIAL BRIEF

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STATEMENT OF THE FACTS AND CASE

If there ever was a textbook case of "actual malice" required under *New York Times Co. v. Sullivan*, this is it. Appellees/Defendants helped create and publish a fake "documentary" that falsely accuses Plaintiffs of stealing money from and exploiting undocumented immigrant construction workers helping rebuild Panama City after Hurricane Michael. Appellees/Defendants deliberately made Plaintiffs "*an unfortunate showroom display*" for the predetermined narrative they wanted to advance by "*portray[ing] Plaintiffs unfairly and even act[ing] with ill will toward them,*" "consciously [choosing] *to present Plaintiffs in a negative light to support the documentary's (and the political cause's) overarching purpose,*" "ignor[ing] reasons to doubt" supposed "wage theft" allegations against Plaintiffs, and failing to investigate the veracity of those accusations despite actual knowledge of facts calling them into serious doubt [R 8760-8761].

Despite abundant evidence demonstrating both actual knowledge of falsity and reckless disregard for the truth, the trial court erroneously granted summary judgment based on actual malice because it did not apply the correct summary judgment

standards, impermissibly weighed evidence and made credibility determinations, overlooked legally sufficient evidence of actual malice, and failed to consider all the evidence of actual malice cumulatively. Consequently, the summary judgment in favor of Appellees/Defendants on Appellants' defamation claims must be reversed.

I. Nature of the Case

Appellants/Plaintiffs brought this action following the release of *Immigration Nation*, a Netflix series fraudulently marketed as a "documentary" that was intended to sway public opinion on immigration policies heading into the 2020 election. The fourth episode of the series is entitled "*The New Normal*" ("**Episode 4**") and contains a fabricated storyline and staged scenes falsely depicting Appellants/Plaintiffs as engaging in a "pattern" of "wage theft" and threatening undocumented immigrant workers with arrest and deportation to create a construction "empire" "built on a pattern of abuse" and an "environment of fear."

II. Overview Of The Parties

A. Appellants/Plaintiffs

Appellant/Plaintiff, Tommy Hamm ("**Hamm**"), is a Florida Certified General Contractor and Roofing Contractor who serves on the Bay County Board of County Commissioners [R 6676]. He is an owner and the president of Appellant/Plaintiff, Winterfell Construction, Inc. ("**Winterfell**"), a small family-owned, Panama City-based certified construction company that helped rebuild Panama City after Hurricane Michael struck in 2018 [R 6776]. .

B. Appellees/Resilience Force Defendants

Appellee/Defendant, Saket Soni ("**Soni**"), is a community organizer who makes a profitable living using money raised from progressive donors to operate "fiscally sponsored projects," such as Resilience Force and National Guestworker Alliance ("NGA"), to advance progressive environmental, immigration, and labor policies [R 6777]. He is also an actor, studied theatre at the University of Chicago, considers strikes and demonstrations forms of public theatre, and uses theatrical performances as part of his "projects" to gain exposure and secure additional funding [R6776].

Resilience Force was an unincorporated immigration activism "fiscally sponsored project" of NEO Philanthropy, Inc. ("NEO"), that claimed to represent a "resilience workforce" of disaster aid workers [R 6777-6778][1] and operated through funding funneled through NEO[2] by groups like the Nathan Cummings Foundation, Four Freedoms Fund, Open Society Foundations, and the Ford Foundation in support of progressive causes [R6778].

Appellee/Defendant, Cynthia Hernandez ("**Hernandez**"), served as Resilience Force's and NGA's "Florida Director," national training director, and a consultant concerning "racial equity in the recovery to Hurricane Irma" [R 6777]. Jeff Pinzino ("**Pinzino**") was Resilience Force's Chief Operating Officer [R 6779]. Daniel Castellanos ("**Castellanos**") is a co-founder of and "organizer" for Resilience Force [R 6779]. Kerry O'Brien ("**O'Brien**") is a progressive, pro-immigration attorney who worked for Resilience Force through the "Resilience Force Justice Project," which was funded by a $75,000 grant from NEO [R6779].

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[1] On or about March 5, 2020, an entity called "Resilience Force" was incorporated in Washington D.C. [R6778]

[2] Resilience Force operated under a series of "Fiscal Sponsorship Agreements" between NEO and NGA [R 6778].

Collectively, Resilience Force, Soni, and Hernandez are referred to herein as the "**Resilience Force Defendants**." Throughout this case, they falsely claimed to be "charity workers" [R 4209] but were paid handsomely for their work [R 6777-6779].

C. The Reel Peak Defendants and Netflix

Defendants, Christina Clusiau ("**Clusiau**") and Shaul Schwarz ("**Schwarz**") are documentary filmmakers and cinematographers [R 6779] who filmed, directed, and produced the *Immigration Nation* through their production company, Defendant "**Reel Peak Films,**[3]" in collaboration with and pursuant to contractual relationships with Netflix [R 6779-6780]. Defendant, Alvaro Bastida ("**Bastida**"), is a progressive writer and filmmaker and an outspoken critic of U.S. immigration policies who worked as a researcher and field producer for Reel Peak Films on *Immigration Nation* [R 6780]. Collectively, Reel Peak Films, Clusiau, Schwarz, and Bastida are referred to herein as the "**Reel Peak Defendants**."

Defendant, Netflix, Inc. ("**Netflix**") is one of the world's leading Internet entertainment services with approximately 220 million paid

[3] Reel Peak is a fictitious name used by Shaul Schwarz Photography, Inc. [R 6779]

memberships in over 190 countries and provides a streaming service offering a wide variety of TV shows, movies, documentaries, and more on Internet-connected devices [R 6780]. In North America, Netflix has over 75 million subscribers [R 6780].

III. Episode 4—Defendants' False and Defamatory "Documentary"

On August 3, 2020, Netflix released the so-called "documentary" series *Immigration Nation* [R 6844]. The first three episodes depict emotionally charged stories about undocumented immigrants being victimized by ICE, the U.S. immigration system, and politicians. Episode 4 is described as documenting activists fighting back against ICE and "In Florida, a local politician exploit[ing] immigrant fears" [R 6844-6845]. Viewers are deceived into believing Episode 4 is completely true and based on organically obtained footage captured as real-life events unfolded in Panama City after Hurricane Michael in 2018, but have no idea that the Defendants staged, scripted, rehearsed, directed, and carefully edited the scenes featuring Resilience Force Defendants in in Episode 4.

Appellants describe in detail all the false and defamatory statements contained in Episode 4 of *Immigration Nation* in their

Counterstatement of Facts [R 6844-6868], including the false assertions that Plaintiffs abused Hamm's position as a Bay County Commissioner to exploit "over a hundred" undocumented immigrant workers by engaging in a "pattern" of "wage theft," threatening undocumented immigrant workers with arrest and deportation to coerce their silence about "wage theft," using "shell companies" to hire and steal wages from undocumented immigrant workers, passing "fake" checks, and creating a construction "empire" by using immigrant labor as part of a business model "built on a pattern of abuse" and an "environment of fear."

Appellants also describe in detail how Episode 4 uses deceptively edited footage of staged, scripted, **fictional** scenes filmed in Panama City in conjunction with knowingly false statements by Resilience Force Defendants and "workers" they controlled and manipulated images of documents to falsely portray Appellants as the villains in the immigration policy narrative Defendants wanted to advance [R 6781-6844]. Appellants also provided the trial court with a detailed summary of Defendants' false and defamatory statements and evidence of falsity and actual malice with embedded citations

and hyperlinks to supporting record evidence [11/3/2022 Hrg. Trans. at pp. 101-102; R 8857-8897].

Generally, Episode 4 interweaves footage of ICE's increased efforts to arrest undocumented immigrants in North Carolina with dishonestly edited footage of Resilience Force Defendants and footage of former-President Trump at a rally in Panama City in May 2019 to evoke a visceral emotional response from viewers, correlate the story about Panama City to the rest of *Immigration Nation*, and set the stage for the false storyline about Appellants [R 6845-6846].

Soni and Hernandez are depicted speaking with undocumented immigrants facing threats of arrest by law enforcement and "wage theft" and confronting a "contractor" supposedly stealing wages from workers and threatening to call the police when they complain [R 6846-6848]. Defendants purposefully omitted this "contractor's" identity from Episode 4 to mislead viewers into believing this "contractor" and Appellants are affiliated [R 6849].

Soni and Hernandez are also featured meeting with undocumented immigrant workers about Panama City police making arrests for ICE and in more deceivingly edited footage that makes it falsely appear that undocumented workers claimed to have worked

directly for Appellants without being paid while describing Hamm as an "untouchable" county commissioner; following which an excerpt of a Hamm campaign ad plays before Soni and Hernandez falsely accuse Appellants of "wage theft" and state that "*this is not an isolated incident.· we know of other workers that have worked under Winterfell that have also been victims of wage theft"* [R 6849-6852].

Another manipulated scene deliberately distorts Soni and Hernandez interviewing a Winterfell customer to make it falsely appear as if this homeowner ("Sue") stated that Hamm was not paying workers when she actually identifies "Tino Sanchez" as the responsible party [R 6852, 8866]. That false assertion is bolstered by another deceptively edited clip of Hernandez appearing to confirm with a worker that Winterfell failed to pay for two months and "*give me a fake check;"* but the raw footage shows that the worker was also talking about Tino Sanchez [R 6850-6852, 8867].

The next scene includes footage of a family of Resilience Force "workers" who were actually paid to appear in *Immigration Nation* and directed and encouraged to make false statements about Appellants [R 6853-6854, 8868-8871], in which Soni falsely states that Hamm is committing wage theft by using "shell companies" to exploit

immigrant labor and create an "empire," beginning with a description of supposed "evidence" establishing Hamm's and Winterfell's criminal conduct while images of what appear to be bank and payroll records and inflammatory text messages (referring to workers as "garbage that don't deserve nothing [sic]") appear on screen [R 6854-6856, 8873-8877]. These text messages were intentionally and deceptively cropped to conceal that they were actually between Tino Sanchez and Vernon Smith (Porter International)—to deliberately mislead viewers into believing the false accusations about Appellants are true [R 6856].

Soni also falsely portrays Hamm as the mastermind of an "organization" stealing wages from workers and orchestrating their arrests by ICE using staged footage of Joel Salazar supposedly diagraming Hamm's "organization" in which the names of subcontractors are intentionally blurred to avoid revealing the true "wage theft" perpetrators [R 6857-6859]. This scene and imagery were staged, directed, filmed, and edited to make it falsely appear as if undocumented immigrant workers hired directly by Appellants gathered "evidence" of Appellants' exploitation of workers and helped unravel a scheme to use "shell companies" to conceal Appellants'

criminal activities [R 6860-6861, 8876-8878, 8883]. This scene also features a deceptively edited clip of Joel Salazar appearing to claim that Appellants wrote a bad check when he was actually referring to a bad check written by Tino Sanchez [R 6860-6861, 8888].

In the next scene, Soni continues to falsely state that Hamm engaged in a "pattern" of wage theft to set the stage for a scripted, rehearsed scene confronting Hamm "at his house" during which Soni and Hernandez falsely suggest Hamm was hiding in his house and called police to arrest the workers outside because they were undocumented immigrants [R 6862-6864].

After showing more footage of ICE enforcement operations and an arrest in North Carolina [R6862-6864] Episode 4 returns to Panama City and Soni reading excerpts from a letter Hamm sent after the May 20, 2019 confrontation at his house and falsely stating that Hamm is abusing his political position and "*[has] access to the entire state apparatus in [his] hands…the laws of the state, the police force of the county, the city jail, all of this works for [[Hamm], and [he] can use it against you*" [R 6864-6865]. Hernandez then falsely asserts that Hamm requested the names and addresses of workers so he could have them arrested [R 6865].

The next scene includes selectively edited footage of a September 17, 2019 Bay County BOCC meeting, for which Defendants paid and coached Anna Salazar to act out a scripted, rehearsed scene falsely accusing Hamm and Winterfell of wage theft [R 6865-6867]. At the end of this scene, Episode 4 displays statements falsely suggesting that Hamm and Winterfell have not yet been charged with crimes and falsely stating that they refused to comment, and that Resilience Force is planning to sue Hamm and Winterfell—all of which is untrue [R 6867-6868].

IV. The Overwhelming Evidence of Actual Malice

From the outset, Defendants intended to make a film that portrayed the U.S. immigration system as "broken" and undocumented immigrants as victims [R6781], the tone and theme of which was biased and slanted [R 6782]. Soni acknowledged early on that Defendants were creating a fictional work disguised as a "documentary" ("*almost as if this was fiction* um or if you were making- this is nonfiction obviously but *if you were making a fictional film and you were writing a character, what types of characters would you really want that would help you know…*") [R 6782]. Resilience Force Defendants discussed how Panama City was a "gold mine" and

that they were "acting like producers" and "developing stories" as they planned to falsely target Plaintiffs [R 6789-6790]. Defendants also discussed how "*Escalation with Tommy Hamm*" and filming "*families in fear*" would be a "*home run*" and how Resilience Force "*earns the right to be a bigger part of the show*" [R 6791-6792].

Defendants were predetermined to construct a storyline featuring the exploitation of immigrant labor and "wage theft" in Bay County in which a local Bay County politician would serve as the villain [R 6783-6784][4] and quickly zeroed in on Hamm as their "*target*" [R 6786] despite already knowing from interviewing several workers that sub-contractors—not Plaintiffs—"*stole [the workers'] money*" [R 6786-6788]. Reel Peak Defendants even filmed Resilience Force Defendants interviewing workers who confirmed that Appellants were not responsible for stealing wages from undocumented immigrant workers and identifying subcontractors as being responsible for the non-payment of wages [R 6789].

[4]In memos, Resilience Force specifically highlighted that Bay County's Commissioners "*[a]ll are Republicans, men and white" and that Hamm* "*is licensed contractor and has owned and operated his construction company*" [R 6783-6784]]

Despite Episode 4 supposedly being a "documentary," Defendants openly discussed and coordinated "rehearsing" and "role-playing" with "workers" to ensure they would get the scenes they needed for *Immigration Nation* [R 6791] They were also committed to filming "more scripted" "Narrative Actions" against Hamm in Panama City and "constructing" a story involving a confrontation with Hamm over "wage theft" accusations [R 6795] While also working on media "pitches" to generate negative press about Appellants [R 6795].

All the while, workers provided additional information and documents confirming Appellants were not responsible for stealing wages [R 6791] and that they knew Tino Sanchez and other subcontractors were responsible for not paying immigrant workers [R 6792-6793]. Nevertheless, Defendants moved forward with the "campaign action plan" against Hamm [R 6792-6794] to advance their "core narrative," including "rehearsals" and a "script" for the events they planned on filming [R 6796]. Soni also openly discussed that Defendants decided on Hamm as their "target" because he fit the profile of the antagonist Defendants needed in their predetermined narrative [R 6796].

During May 2019, Defendants staged, scripted, and rehearsed scenes for the false "wage theft" narrative knowing that their time to film a confrontation with Hamm was running out and needed to be "compelling on camera" in scenes portraying Hamm, a "Republican, white, male" Bay County Commissioner and contractor, as the one responsible for exploiting undocumented immigrant workers [R 6797-6798]. To meet this objective, Defendants staged, scripted, rehearsed, and filmed the scene for *Immigration Nation* in which an "army" of workers confronted Hamm at his house—even though Defendants already knew Appellants did not employ or fail to pay these workers and had "no proof" Hamm had committed wage theft [R 6798-6799], and knew Hamm's house was badly damaged by Hurricane Michael and that the confrontation they were about to carry out while could *"provoke an extraordinary trauma*" [R 6799]. Nevertheless, Defendants staged and filmed this scene at Hamm's home at 8:45 at night with approximately 20 "workers," knowing it would terrorize Hamm and his family, that Hamm had done nothing wrong, and that it was unnecessary because they were already planning on attending a Bay County BOCC public meeting to confront Hamm the following day [R 6799-6803].

Winterfell's attorney sent Resilience Force Defendants a letter explaining that any unpaid laborers must have worked for a subcontractor, not Winterfell, but offered to help by contacting the subcontractor about the issue if Hernandez would provide some basic information about the laborers involved [R 6803]. But by this time, Defendants were already "furious" with Hamm and started actively making and eliciting negative comments about Appellants on camera [R 6804-6805].

Defendants also interviewed and filmed three new "workers" (Joel Salazar, Ana Salazar, and Emilio Rivamar) who confirmed working for Sanchez and Winterfell's sub-contractor, Porter International ("Porter"), that Winterfell paid Porter, and that these workers had actually gone to the police about the worthless checks written by Sanchez (not Plaintiffs) [R 6805]. Defendants brought these workers back to a house Reel Peak was renting in Panama City so they could film more scenes[5] for Episode 4 [R 6805], during which they coached and suggested facts to these workers while making derogatory comments about Hamm and Winterfell and the "American

[5] Resilience Force and NEO also paid these workers cash for appearing in these scenes [R 6806].

South" to elicit statements from the workers that were consistent with the narrative Defendants were advancing [R 6805]. Defendants also coached Joel Salazar to reenact drawing a chart of the Winterfell "organization" and "explain it like a professor" so it could be filmed for the documentary [R 6805-6806]. During this hours-long meeting, the workers still confirmed that Winterfell paid Porter and that Sanchez was to blame, and Joel Salazar provided Defendants with text messages[6] conclusively demonstrating that Sanchez—not Hamm or Winterfell—failed to pay and stole the workers' wages [R 6807-6810]—but these exculpatory facts were deliberately omitted from Episode 4.

Around this same time, Resilience Force Defendants acknowledged in a latter to Winterfell's attorney that the "ultimate source of nonpayment" of the workers claiming to be unpaid on Winterfell projects was a subcontractor (not Winterfell) and asked Winterfell's help in getting the subcontractors to pay their allegedly unpaid laborers [R 6810]. Winterfell's counsel sent Hernandez another letter asking for the names of the workers who were allegedly

[6] These text messages are between Tino Sanchez and Vernon Smith, the owner of Porter International Construction—**not** Hamm. [Id.]

unpaid, and the amounts owed to each of them [R 6811], but the requested information was not provided [R 6811].

Defendants filmed again in Panama City in June 2019, openly displaying their bias, hostility, and ill-will toward Hamm [R 6811-6812]. They decided to visit Winterfell's customers so those interactions could be filmed [R 6812]. As noted above, dishonestly edited clips from this filming appears in *Episode 4* in which it is made to appear as if the customer/homeowner ("Sue") confirmed that Hamm stole workers' money and that a worker ("Ian") spoke to Hernandez on the phone and confirmed Winterfell never paid workers and wrote the worker a bad check [R 6812]—but both the homeowner and worker actually confirmed that Sanchez stole the workers' money and wrote the worthless checks [R 6812]. During this trip, Defendants also obtained records from Joel Salazar confirming that Porter International controlled the payroll and copies of the "bad checks" from Sanchez [R 6813-6814].

In July 2019, O'Brien received copies of a Department of Labor claim including Porter payroll reports and Hernandez obtained copies of more records from Joel Salazar, including payroll records bank records, and texts, showed Joel, Ana, and Emilio working for Porter

International under Sanchez's supervision through February 2019 [R 6818]. O'Brien carefully reviewed these records because she was working on a "Wage Theft Memo" compiling numerous facts, all of which further confirmed that Hamm and Winterfell had not committed wage theft [R 6814-6815]. Nevertheless, Defendants continued working on planning for additional "actions" against Hamm, including a confrontation with him at a Bay County BOCC meeting to get the additional footage they needed [R 6812-6813, 6817-6818] because they were under "timing constraints for delivering a cut to Netflix" [R 6818-6819].

By this time, Joel and Ana Salazar and Emilio Rivamar were not only being paid to work and make public appearances for Resilience Force,[7] but also to rehearse for, appear in, and act out the scripted confrontation at the September 2019 BOCC meeting so it could be filmed [R 6819-6820]. Hernandez and Castellanos prepared a script for Ana's presentation and Defendants' carefully rehearsed what everyone would say and do at the September 17, 2019 Bay County

[7] They played such important roles within Resilience Force that it referred to them as "*worker leaders*," "*leaders of Resilience Force*," and even "*national spokespeople for the organization*" [R 6820].

BOCC meeting because this scene was the climax of the storyline about Hamm and Winterfell [R 6822-6824, 6825-6826]. At he same time, Resilience Force Defendants specifically discussed how they needed to "get ahead of" the fact that subcontractors, not Hamm or Winterfell, were responsible for the unpaid wages of undocumented immigrant workers [R 6822, 6824-6825].

Throughout October and November 2019, the Reel Peak Defendants were editing and "fact-checking" *Immigration Nation*, specifically inquiring about the status of "legal action" against Hamm [R 6827]. In December 2019, Clusiau emailed Schwarz a series of interview questions for Soni laying out the entire false narrative Defendants constructed for Episode 4 [R 6827]; and consistent with this narrative Resilience Force Defendants often referred to Hamm as a "Trump Surrogate" [R 6827].

On January 16, 2020, a Resilience Force intern prepared an update on the "bad guy search" for Sanchez and other subcontractors, and circulated copies of "bad checks" written by Sanchez to Joel Salazar—once again demonstrating Defendants' actual knowledge that Hamm and Winterfell were not responsible for unpaid wages of undocumented immigrant worker [R 6828].

Meanwhile, Netflix and Reel Peak Defendants spoke with lawyers and insurance carriers about the project and knew they needed to try to insulate themselves from liability for the false and defamatory storyline they were about to publish about Appellants; believing they needed Resilience Force Defendants to file legal action against Appellants or that they could get someone in the press to write an article about Appellants to use as cover [R 6829-6830]. Shortly after communications with "Production Counsel" performing the factual review of *Immigration Nation*, Reel Peak Defendants told the Resilience Force Defendants about their concerns over liability for defaming Appellants and efforts to get a friendly journalist to write a story about the accusations against Appellants or the storyline about them would have to be cut [R 6830- 6831].

At that point, it was obvious to all the Defendants that the storyline filmed was false and defamatory and should not be included, but because they were determined to include it anyway Defendants pursued means of trying to insulate themselves from liability rather than delete the storyline and avoid defaming Plaintiffs [R 6831-6832]. Resilience Force Defendants were intent on charging forward with the false accusations because they had financial

motives associated with the exposure a Netflix "documentary" would bring and had already submitted a Foundation Grant Report to the Nathan Cummings Foundation touting their involvement in *Immigration Nation* [R 6832-6833].

Knowing they could not bring a legitimate legal claim against Hamm and Winterfell, Resilience Force Defendants focused on trying to find a friendly journalist to publish a story and exchanged a series of emails about getting a story published to "salvage" the storyline about Appellants [R 6833-6834]. Soni even acknowledged that the Netflix Producers or Legal Team wanted a lawsuit filed or an article written [R 6834]. Throughout February 14, 2020, Defendants repeatedly communicated about trying to get the friendly journalist article published [R 6835-6836].

On March 2, 2020, Resilience Force Defendants prepared and circulated another memo summarizing an interview with another Panama City worker who confirmed that Appellants were not responsible for undocumented worker wages [R 6836-6837]. Soon thereafter, O'Brien (who previously served as Senior Counsel to the Solicitor for the DOL and worked on wage and hour and joint employer classification interpretations for the agency) admitted in an

email that there was not a legitimate claim that Hamm and Winterfell employed the Resilience Force workers [R 6838].

By the end of March 2020, Resilience Force Defendants still had not pursued any legal action against Hamm and Winterfell [R 6839] and were trying to convince a friendly journalist to write the story about Appellants; but these efforts proved futile and in early June 2020 they exchanged a series of emails lamenting about the fact that journalists would not publish the story about Appellants because of "libel concerns" [R 6839-6840] because "*the Netflix folks would like something in the public record about this before the documentary premieres*" [R 6840-6841].

In fact, *Immigration Nation* had been edited, approved by the Netflix, and was set to be released; and on July 23, 2020, Schwarz emailed the Resilience Force Defendants about the series premier on August 3, 2020, including a link to preview Episode 4 [R 6841]. They watched Episode 4 before it was released but never notified Netflix or Reel Peak about the factual inaccuracies about Appellants [R 6842].

Instead, they met on Zoom to discuss the release and the surrounding promotional efforts, deliberately choosing to remain silent [R 6842], and circulated their "ACTION PLAN" for *Immigration*

Nation, which acknowledged its "audience of millions or tens of millions," the promotional and financial opportunities it was providing, despite known problems associated with the false Hamm/Winterfell storyline [R 6842-6844].

V. The Fallout from Episode 4

After *Immigration Nation* was released, the Defendants heavily promoted themselves and their false narrative about Plaintiffs through social media, their websites, media interviews, and other marketing efforts; many of which prominently featured images of Hamm alongside false accusations of wage theft and exploitation [R 93-100]. Defendants knew they were targeting Plaintiffs for hatred and vilification and would inevitably cause Hamm and Winterfell to suffer significant harm when they created and disseminated the false and defamatory storyline in *Immigration Nation* to a potential audience of hundreds of millions of people across the globe.

Predictably, Episode 4 of *Immigration Nation* immediately resulted in intense public outrage and vicious attacks against Hamm and Winterfell [R 100-122]. Among other things, Hamm was falsely labeled a "racist" and accused of "slavery" and he and his family began receiving death threats. Hamm and Winterfell also became the

targets of coordinated online campaigns seeking to destroy and "cancel" them, have them arrested and prosecuted, and have Hamm removed from office [*id.*]

COURSE OF THE PROCEEDINGS

A. The Pleadings

Plaintiffs filed their original Complaint & Demand for Jury Trial on March 4, 2021 [R 038-138]. On July 30, 2021 (after requesting and receiving additional extensions of time to respond to the Complaint), Resilience Force Defendants filed their Answers and Affirmative Defenses to the Complaint [R 1648-1674, 1730-1757, 1813-1863] and a 58-page *Motion for Summary Final Judgment* [R 1071-1140] supported by lengthy declarations from Soni [R 1284-1374], Hernandez [R 1375-1644], and O'Brien [R 1141-1283].

B. Discovery

Plaintiffs diligently pursued several rounds of written discovery [R 183-371, 582-1070, 3101-3222], some of which was specifically tailored to factual averments in the lengthy Declarations filed in support of Resilience Force Defendants' summary judgment motion [R 3101-3222]. Defendants produced documents and materials over

an extended period [R 1675-1729, 1758-1812, 1864-1918, 1935-2376, 3274-3483, 3526-3679].[8]

Plaintiffs also sought documents from several non-parties—among them O'Brien and Elle Communications [R 2485-3100]. Resilience Force Defendants objected and their counsel assured Plaintiffs' counsel that the non-party subpoenas were not necessary because Resilience Force Defendants had already obtained and produced all documents responsive to the proposed non-party subpoenas [R 7954-7955; 3246-3277].

Netflix and Reel Peak Defendants wanted a Protective Order in place before they produced documents, so counsel cooperated in filing a Joint Motion for a Protective Order, which was entered on December 15, 2021 [R 3680-3693]. On January 1, 2022, Netflix and Reel Peak Defendants produced responsive documents [R 4094]; and over the ensuing months produced several hard drives with 17 terabytes of data containing hundreds of hours of raw footage filmed in Panama City [R 4094].

[8] Resilience Force Defendants began their "rolling" production of documents on August 6, 2021, followed by a second production on October 5, 2021 [R 4094].

Plaintiffs' counsel diligently completed the time-consuming process of reviewing tens of thousands of pages of documents and 17TB of raw footage produced by Defendants—all of which had to be completed to prepare for Defendants' depositions and revealed additional facts and evidence unavailable when this lawsuit was filed providing substantial additional support for Plaintiff's claims, particularly "actual malice." Thus, on June 7, 2022, Plaintiffs' counsel provided Defendants' counsel a copy of Plaintiffs' proposed Amended Complaint to see whether they would agree to its filing [R 4098]. In the ensuing weeks, Resilience Force's counsel started posturing to schedule a hearing on Resilience Force Defendants' summary judgment motion before the Amended Complaint was filed and without taking depositions—which Plaintiffs' counsel opposed [R 4098].

C. The Scheduling of the Summary Judgment Hearing

On July 18, 2022, Resilience Force Defendants filed their *Motion for Case Management Conference and, if Necessary, to Declare Action Complex* [R 3817-3844] and promptly emailed the Court asking for hearing times on their Motion for Summary Judgment and Motion for a case management conference [R 4100]. They also objected to

the filing of the proposed amended complaint and refused to provide dates for their depositions [R 4102].

Consequently, on August 5, 2022, Plaintiffs filed their original *Motion for Leave to Amend Complaint* [R 3864-4079] and *Response in Opposition to Resilience Force Defendants' Motion for Case Management Conference* [R 4080-4107], including its objection to the scheduling of a hearing on the summary judgment motion.

On August 10, 2022 [R 3845-3847], the trial court set a hearing on Plaintiff's *Motion for Leave to Amend* on September 28, 2022 (which was subsequently moved to November 3, 2022 due to Hurricane Ian) and a hearing on Resilience Force Defendants' *Motion for Summary Judgment* on November 3, 2022 [R 4120-4125, 4235-4236, 4249-4251]. However, the court did not grant Resilience Force Defendants' request prohibit Plaintiffs from conducting further discovery or depositions. Plaintiffs' counsel then set the depositions of Resilience Force Defendants and their key personnel—which had to be conducted (at considerable expense) to take place before October 14, 2022 to allow Plaintiffs time to obtain and file the deposition transcripts by the 20-day deadline in Rule 1.510 [R 4108-4119, 4126-4177, 4215-4230, 4237-4248].

Between September 8, 2022 and October 11, 2022, Plaintiffs deposed Clusiau [R 7101-7168], Schwarz [R 5248-5312], Bastida [R 6383-6454], Silvie Snow Thomas [R 7260-7295],[9] Hernandez [R 7192-7259], Pinzino [R 6142-6186], Joel Salazar [R 7169-7191], Soni [R 7296-7638], Castellanos [R 6187-6213], and O'Brien [R 6214-6375]. During these depositions, Plaintiffs uncovered numerous additional facts establishing the falsity of statements about Plaintiffs and Defendants' actual malice in publishing them.

D. Resilience Force Defendants' Concealment of Evidence

As explained in detail in several discovery-related motions Appellants filed [R 7669-7963, 7952-8241], Resilience Force Defendants' depositions confirmed the existence of numerous important documents that had been wrongfully withheld from discovery for over a year—only some of which were hastily produced while Plaintiffs' counsel was preparing for and conducting numerous Resilience Force depositions. Resilience Force Defendants refused to

[9] Silvie Snow Thomas is the President of Elle Communications, a communications and public relations firm that promoted Soni and Resilience Force throughout their work in Bay County and specifically in connection with the release of Episode 4 of *Immigration Nation*.

produce a significant number of critical documents relevant to the issues raised in their summary judgment motion.

E. The Summary Judgment Motion and Opposition

Resilience Force Defendants filed their Motion for Summary Judgment and supporting declarations five months after the Complaint was filed [R 1071-1644]. Because this motion was filed so early in the case, it and its supporting declarations do not address any of the evidence or deposition testimony Plaintiffs obtained after the motion was filed.

On October 14, 2022, Plaintiffs pointed this out alongside other arguments in their Opposition to Resilience Force Defendants' Motion for Summary Judgment [R 7639-7668] and Counterstatement of Facts [R 6775-6869], which is supported by substantial record evidence including deposition transcripts, internal emails and text messages, documents Defendants produced, and the raw footage [R4252-4668].

On October 24, 2022, Plaintiffs also filed several motions directed at Resilience Force Defendants' discovery misconduct, including a Motion to Impose Adverse Inferences [R 7669-7963] and Verified Motion for Sanctions and to Compel [R 7952-8241]. On

October 24, 2024, Plaintiffs also filed an Amended Motion for Leave to Amend [R 8242-8508], which sought to incorporate additional facts Plaintiffs learned through discovery conducted after their original motion for leave to amend was filed. On November 2, 2022, Plaintiffs filed their Objection to the Declarations Resilience Force Defendants submitted in support of their summary judgment motion [R 8692-8703]. Plaintiffs cross-noticed all of these filings for hearing on November 3, 3022 [R 7949-7951].

F. The Summary Judgment Hearing

The trial court heard Resilience Force Defendants' summary judgment motion on November 3, 3022. At the hearing, the trial court declined to hear or rule on Plaintiffs' discovery-related motions and objection to Resilience Force Defendants' declarations [11/3/2022 Trans. at 3-4, 10-11] During the hearing, Plaintiffs provided the Court with their demonstrative aid summarizing Defendants' false and defamatory statements and the evidence of falsity and actual malice with embedded citations and hyperlinks to supporting record evidence [11/3/2022 Hrg. Trans. at pp. 101-102; R 8857-8897].

G. The Summary Judgment Ruling

On September 1, 2023, the trial court entered its Order Granting Partial Summary Judgment [R 8742-8791] in favor of Resilience Force Defendants on all of Plaintiffs' claims against them. On Plaintiffs' defamation claims, the trial court found Plaintiffs were both "public figures" [R 8779-8780] and that the record evidence was insufficient to demonstrate a genuine issue of material fact that would allow a jury to find actual malice by clear and convincing evidence [R 8788]. The trial court decided that Plaintiffs' intentional infliction of emotional distress claim failed because the conduct at issue was not sufficiently "outrageous." [R 8785-8786]. The trial court also declined to rule on Appellant's request for leave to file an amended complaint because "the relevant counts against Defendants in the proposed Amended Complaint remain identical" [R 8743 at n. 2].

On September 19, 2023, Plaintiffs moved for rehearing [R 8792-8820]; and filed an amended motion on September 21, 2023 [R 8821-8897]. In an abundance of caution, Plaintiffs filed their Notice of Appeal on September 29, 2023 [R 8931-8984]. The trial court subsequently denied Plaintiffs' motion for rehearing on November 11,

2023 [R 9018-9020]. On February 5, 2024, the trial court granted Plaintiffs' Motion for leave to amend, but only as to the Real Peak Defendants and Netflix [R 9296-9298].

STANDARD OF REVIEW

The standard of review governing orders granting final summary judgment is *de novo*. *Rockwell at Amelia Passage, LLC v. Williams*, 343 So.3d 627, 629-630 (Fla. 1st DCA 2022); *Pickford v. Taylor Cnty. Sch. Dist.*, 298 So. 3d 707, 710 (Fla. 1st DCA 2020).

SUMMARY OF THE ARGUMENT

In granting summary judgment in favor of Resilience Force Defendants on Appellants' defamation claims (Count I and Count III), the trial court erroneously deviated from the controlling summary judgment standards, impermissibly weighed the evidence and made creditability determinations, and overlooked its obligation to view Plaintiffs' evidence of actual malice in the aggregate. The trial court's own factual findings and controlling law establish that the record evidence in this case is more than sufficient to create a jury issue on actual malice. The summary judgment should be reversed.

ARGUMENT

I. The Trial Court Erroneously Tipped the Summary Judgment Scales Against Plaintiffs

The trial court incorrectly determined that summary judgments are to be more "liberally granted" in defamation cases, and while applying the "clear and convincing" burden of proof applicable to actual malice disregarded the controlling summary judgment standards, impermissibly weighed summary judgment evidence, and made improper credibility determinations.

A. Summary judgments are not required to be more liberally granted in defamation cases

In reliance on *Don King Productions, Inc. v. Walt Disney Co.*, 40 So.3d 40, 44 (Fla. 4th DCA 2010), the trial court erroneously based its summary judgment on the belief that "summary judgments are to be more liberally granted in defamation actions against public-figure plaintiffs." [R 8767] This turns the controlling summary judgment standard on its head, contradicts controlling law, and should not have been followed.

The trial court apparently felt hamstrung by and compelled to rule against Plaintiffs based *on Don King Productions* and cases describing actual malice as an "almost impossible" burden [R 8777

(citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771 (1985)], but summary judgments are not supposed to be more liberally granted in defamation cases involving public figures and the summary judgment standards are not altered nor required to be more liberally construed in favor of defendants in defamation cases (see section B, below). This misguided "liberality" pronouncement in *Don King Productions* is based on outdated case law that has since been rejected.

Don King Productions cites to *Dockery v. Florida Democratic Party*, 799 So.2d 291, 294 (Fla. 2d DCA 2001), which relies on this Court's decision in *Cronley v. Pensacola News-Journal, Inc.*, 561 So.2d 402, 405 (Fla. 1st DCA 1990), that dates the "liberality" proposition back to *Newton v. Florida Freedom Newspapers, Inc.*, 447 So.2d 906, 907 (Fla. 1st DCA 1984), which cites to *Menedez v. Key West Newspaper Corp.*, 293 So.2d 751, 752 (Fla. 3d DCA 1974). *Menendez*, 293 So.2d at 752, identifies *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), as the genesis of the "liberality" proposition.

However, this Court recognized long ago that the U.S. Supreme Court and D.C. Circuit (which decided *Keogh*) receded from "freely"

granting summary judgment in defamation cases in decisions including *Hutchinson v. Proxmire,* 433 U.S. 111 (1979), *Herbert v. Lando,* 441 U.S. 153 (1979), and *Rolston v. Reader's Digest Assoc., Inc.*, 578 F.2d 427 (D.C. Cir. 1978). *See Gadsen County Times, Inc. v. Horne*, 382 So.2d 347, 349 at n.1 and 2 (Fla. 1st DCA 1980). In fact, the rejection of the "liberality" proposition emanating from *Washington Post Co. v. Keogh* has been recognized by numerous courts. *National Nutritional Foods Ass'n v. Whelan*, 492 F.Supp. 374, 378-79 (S.D.N.Y. 1980); *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932, 940 (2d Cir. 1980); *Loeb v. New Times Comm. Corp.*, 497 F.Supp. 85, 94 (S.D.N.Y. 1980) ("A substantial dispute of material fact does not disappear merely because a media defendant is being sued, or because a public official is the plaintiff; and plaintiff's right to a jury trial is entitled to no less respect.").

B. Actual malice's clear and convincing burden of proof does not alter the traditional summary judgment standards and their prohibitions against fact-finding

Trial courts are required to view evidence of actual malice through the "prism" of the clear and convincing burden of proof, but still are governed by the same summary judgment standards that

prohibiting them from weighing evidence, making credibility determinations, and drawing inferences against the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The Supreme Court made this very clear in *Anderson*: "[Tt]he clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury [and] by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. *Anderson*, 477 U.S. at 255 (emphasis added) (citations omitted); *see also Cole v. Plantation Palms Homeowners Association, Inc.*, 2023 WL 6278830 (Fla. 2d DCA Sept. 27, 2023) (discussing the standards governing summary judgment motions, including their prohibitions against

weighing evidence, making credibility determinations, and drawing inferences in favor of the movant).

Defamation actions are entitled to the same procedural safeguards as summary judgment standards as all other cases. *Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163, 171 (2d Cir. 2000); *see also Palin v. New York Times Co.*, 940 F.3d 804, 812 (2d Cir. 2019); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991) (citing *Anderson*, 477 U.S. at 255) (in defamation cases all reasonable inferences still are drawn in favor of the nonmoving party, "including questions of credibility and of the weight to be accorded particular evidence.").

"The inquiry is whether the evidence viewed in the light most favorable to the party opposing the motion 'presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Lelieve v. Timoney*, 2011 WL 13220999, * 3 (S.D. Fla. Apr. 14, 2011) (citing *Anderson*, 477 U.S. at 251-520; *see also Skrtich v. Thornton*, 280 F.3d 1295, 1299 (11th Cir. 2002). This includes drawing inferences in the non-moving party's favor. *Ice Portal, Inc. v. VFM Leonardo, Inc.*, 2010 WL 2351463, *6 (S.D. Fla. June 11, 2010) (citing *Reeves v.*

Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000)). *Skokan v. Royal Caribbean Cruises, Ltd.*, 2018 WL 5044603, * 2 (S.D. Fla. Oct. 17, 2018) ("If reasonable minds might differ on the inferences arising from undisputed facts, then…[c]ourt[s] should deny summary judgment."); *Moore v. Morris*, 475 So.2d 666, 668 (Fla. 1985) ("Summary Judgment is not proper if the evidence is susceptible of different reasonable inferences."); *Gonzalez v. Tallahassee Medical Center, Inc.*, 629 So.2d 945, 946 (Fla. 1st DCA 1993).

The September 1, 2023 Order strays from these summary judgment requirements—which is not surprising because evaluating summary judgment evidence through the "prism" of the clear and convincing burden of proof can easily cross into the province of the jury, including impermissible credibility determinations and weighing of the evidence. But when the Supreme Court decided *Anderson*, 477 U.S. at 255, it took pains to disavow the notion that judges should subsume the role of the jury when engaging in this analysis.

When discussing the minimal requirements to overcome a motion for summary judgment on actual malice, the Supreme Court emphasized that the overarching summary judgment standards

remain unchanged: "*We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor.*" *Id.* at 257. This assumes, of course, that the moving party has first "met the burden of showing that there is no genuine issue of fact." *Id.* at 256-257.

Here, as explained below, the trial court's own findings and numerous other facts offered by Plaintiffs presented more than sufficient evidence from which a jury might return a verdict in their favor. In reaching its decision to the contrary, the trial court crossed the line established in *Anderson* by making credibility determinations and weighing the summary judgment evidence [*see e.g.* R 8784 (finding "there is no clear and convincing evidence" of actual malice)]. Weighing the evidence—deciding whether it clearly and convincingly establishes actual malice—is a "jury function[], not [that] of a judge." *Anderson*, 477 U.S. at 255; *see also Palin*, 940 F.3d at 812.

Credibility determinations are unquestionably at play when a defendant's self-serving testimony about their mental state are involved. *See Hutchinson*, 443 U.S. 111, n. 9 (1979); *Palin*, 940 F.3d at 812-814. On summary judgment, such self-serving testimony must be rejected because credibility issues and all inferences must

be construed in favor of the non-movant.. *Palin*, 940 F.3d at 812 and 814; *Anderson*, 477 U.S. at 255; *Masson*, 501 U.S. at 520. Moreover, indirect evidence of actual malice can defeat a defendant's professions of good faith and establish a genuine issue of fact a jury must decide. *Celle*, 209 F.3d at 190 (citing *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)).

This trial court's conclusion that there is no "clear and convincing evidence" of actual malice necessarily weighed the evidence and was based on credibility determinations. For example, the court found that "there was information presented to Defendants by which they could have believed that Plaintiffs improperly benefited from immigrant labor on their construction sites without adequately insuring the compensation of such workers…[and]…by which they could have believed that Defendants were legally or morally obligated to assist the migrant workers in obtaining appropriate compensation for their work." [R 8782-8783] The court also found that supposed discussions with O'Brien and self-professed contemplation of "the fact that there were multiple workers who complained that they were not paid for their labor" "undermine[d] a conclusion that they acted with malice as is required under *Sullivan*" [R 8783]. The court also

cited evidence from O'Brien's Declaration concerning her supposed "opinion"[10] about Plaintiffs' possible status as "joint employers" [R 8783 at n. 24].

These findings necessarily credited Resilience Force Defendants' self-serving testimony as true, despite competent substantial evidence contradicting it. Notably, Resilience Force Defendants had actual knowledge that Plaintiffs were not stealing wages from immigrant workers [R 8760-8761] and O'Brien's supposed "opinion" that Plaintiffs "could be regarded as joint employers" was contradicted by her own sworn testimony and admissions [Counterstatement of Facts at ¶¶ 120-121, 123, 155-156, 168-169, 173]. The record evidence also specifically established that facts of which Defendants were aware did not support a conclusion that Plaintiffs were "joint employers" under the factors discussed in footnote 24 of the court's Order.

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[10] Notably, the Court made findings demonstrating that under the controlling summary judgment standards O'Brien's supposed "opinion" should not have been considered at all on summary judgment because "*an argument can be made that O'Brien could not have conducted a thorough analysis of Plaintiffs' responsibility for payment of these workers with the minimal information at her fingertips when the opinion was provided.*" [Order at n.23]

More importantly, the Castellanos' testimony established that Resilience Force Defendants knew all along that Plaintiffs were not legally responsible for any unpaid wages—which is why they resorted to "confront[ing]" and "encourage[ing]" [essentially extorting] people to pay workers [R 7647]. Castellanos's unrefuted testimony also contradicts the court's conclusion that Plaintiffs' lack of responsibility for the unpaid wages of subcontractors' workers "is not something that could be easily proved or disproved by the testimony of one individual" [R 8783] because one person's testimony did easily prove this fact in Plaintiffs' favor. There was ample additional evidence bolstering the conclusion that Plaintiffs had no legal responsibility for the wages of any of the workers depicted in *Immigration Nation*. [*See* Counterstatement of Facts at ¶¶ 117, 120-121, 123-124, 126, 128, 137, 141, 147, 155-156, 158, 168-169, 192, 194-197, 199, 202]

The court's findings demonstrate that it did not disregard all evidence favorable to Resilience Force Defendants that the jury is not required to believe—but rather credited and relied upon their testimony despite substantial evidence demonstrating their actual knowledge that Appellants were not responsible for the unpaid wages

allegedly owed to workers. *Ice Portal, Inc.*, 2010 WL 2351463 at *6. This is precisely what the trial judge did in *Palin*, 940 F.3d at 812-814, that led to reversal. *Palin*, 940 F.3d at 812 ("[e]ven if the plaintiff had been given notice and the court had explicitly converted the motion to one for *summary judgment*, *we still would have to vacate* because the district court's opinion relied on credibility determinations not permissible at any stage before trial.").

The decision to grant summary judgment by crediting certain evidence proffered by Resilience Force Defendants as "undermining a conclusion that they acted with malice as is required under *Sullivan*" [R 8783] was also mistaken because the evidence upon which the Court relied does not even address the **specific false statements** Resilience Force Defendants made about Appellants; which as the trial court noted include assertions that "*Hamm and Winterfell exploited undocumented immigrant workers who were trying to help rebuild Panama City after Hurricane Michael by stealing their wages and threatening them with deportation to cover up their crimes*," and "were engaging in *a 'pattern' of 'wage theft,' using 'shell companies' to hire and 'steal wages' from undocumented immigrant workers and creating a 'construction empire' by using immigrant labor*

[R 8778, 8780]. There was **no evidence** demonstrating that Resilience Force Defendants reasonably believed any of these **specific** statements were true.

To the contrary, the September 1, 2023 Order explicitly recognizes (among other things) substantial record evidence demonstrating that Resilience Force Defendants knew these specific accusations about Plaintiffs were false—including evidence of workers, homeowners, and other individuals explaining on and off camera that Winterfell's subcontractors and not Winterfell itself were responsible for the workers' stolen wages [R 8760]; Joel Salazar's records, such as texts, payroll, and bank records, confirming that Salazar, his mother, and Rivamar worked for Porter and under Tino Sanchez's supervision until February 2019, and not for Winterfell [8760], the January 16, 2020, research prepared by a Resilience Force intern [R 8760-8761], and that "Defendants had already zeroed in on Hamm as their 'target' for the 'wage theft' storyline and that they referred to Hamm as a 'Trump Surrogate' and decided to use him and Winterfell as the 'villains' in Episode 4" [R 8761]. The Order further recognizes that Defendants were developing plans for "rehearsing" and "role-playing" with "workers" and previewing and

coordinating their efforts to ensure they would get the scenes they needed, and scripted and staged many of the scenes and specifically their appearances at the BOCC meetings and at Hamm's home and targeted Hamm directly because he was a "republican, white man" and "Trump Surrogate" [R 8761].

These findings (which are well-supported by record evidence the court was required to accept as true for purposes of summary judgment) simply cannot be reconciled with the ultimate conclusion that there is not any "clear and convincing proof" of actual malice. The trial court must have disregarded competent substantial evidence of actual malice and its own findings of fact, weighed the evidence, and made credibility determinations it was prohibited from making under controlling law when it granted summary judgment. This is precisely what *Anderson,* 477 U.S. at 255, prohibits.

II. The September 1, 2023 Order Failed to View the Evidence of Actual Malice Cumulatively

The trial court also erred in its analysis of the summary judgment evidence because it was required to but did not consider the summary judgment evidence of actual malice in its totality and cumulatively. The Court was required to determine whether a

reasonable jury could find actual malice based on the "*accumulation* of that evidence." *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969). All direct and indirect evidence of actual malice and the reasonable inferences[11] to be drawn therefrom must be considered. *Celle*, 209 F.3d at 183; *Stern v. Cosby*, 645 F.Supp.2d 258, 278 (S.D.N.Y. 2009). *US Dominion, Inc. v. Powell*, 554 F.Supp.3d 42, 60 (D.D.C. 2021) ("Subjective doubt can be proven through 'the cumulation of circumstantial evidence [and] direct evidence,' (citation omitted), demonstrating that the defendant was 'subjectively aware that it was highly probable that [its] story was '(1) fabricated; (2) so inherently improbable that only a reckless person would have put [it] in circulation; or (3) based wholly on an unverified anonymous telephone call or some other source that [it] had obvious reasons to doubt.'" (emphasis added))

Here, the September 1, 2023 Order incorrectly evaluated Plaintiffs' evidence of actual malice in isolation, never as a whole. [*See e.g.*, R 8781, 8787-8788]. The court reviewed various types of

[11] *Masson*, 501 U.S. at 520, provides that in defamation cases all reasonable inferences must still be drawn in favor of the nonmoving party, "including questions of credibility and of the weight to be accorded particular evidence."

evidence of actual malice Plaintiffs' adduced, but evaluated each type **independently** while incorrectly relying on fact-specific case law discussing how certain types of evidence—**standing alone**—are insufficient to establish actual malice such as editorial discretion [Order at ¶¶ 102, 124, 128], ill-will [Order at ¶ 141], and the failure to investigate and comply with journalistic standards [Order at ¶ 142] [R 8774, 8781, 8783, 8787

Courts must evaluate a plaintiffs' direct and indirect evidence of actual malice and the inferences to be drawn therefrom cumulatively. *Goldwater*, 414 F.2d at 342; *Celle*, 209 F.3d at 183; *Dalbec v. Gentleman's Companion, Inc.,* 828 F.2d 921, 927 (2d Cir. 1987); *Stern*, 645 F.Supp.2d at 278; *US Dominion, Inc.,* 554 F.Supp.3d at 60; *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1510 (D.C. Cir. 1996); *Jankovic v. International Crisis Corp.*, 822 F.3d 576, 590 (D.C. Cir. 2016); *Stern*, 645 F. Supp.2d at 278; *Bolden v. Morgan Stanley & Co., Inc.*, 765 F. Supp. 830, 834 (S.D.N.Y. 1991). As stated in *Tavoulares v. Pino*, 817 F.2d 762, 794 at n.43 (D.C. Cir. 1987):

> We recognize that each individual piece of evidence cannot fairly be judged individually against the standard of clear and convincing

> evidence, Plaintiffs are entitled to an aggregate consideration of all their evidence to determine if their burden is met.

Here, when viewed as a whole, Plaintiffs' summary judgment evidence of actual malice is more than sufficient to demonstrate that a reasonable jury might find actual malice with convincing clarity. As explained below, the accumulation of this evidence includes legally sufficient (and often unrefuted) proof of (1) actual knowledge of falsity; (2) willful distortion of the facts; (3) purposeful avoidance of the truth; and (4) reckless disregard of the truth.

III. The Trial Court Erroneously Determined that there was Insufficient Evidence of Actual Malice

A. The Well-Established Methods of Proving Actual Malice

Legally sufficient circumstantial evidence of actual malice can take many forms. Actual malice can be established "through the defendants' own actions or statements, the dubious nature of his sources, and the inherent probability of the story [among] other circumstantial evidence." *Celle*, 209 F.3d at 183 (citing *Liberty Lobby*, 838 F.2d 1287, 1293 (D.C. Cir. 1988)). "[A] plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S.

657, 668 (1989); *Celle*, 209 F.3d at 183 ("'Malice may be proved inferentially because it is a matter of the defendant's subjective mental state, revolves around facts usually within the defendant's knowledge and control, and rarely is admitted.'" (quoting *Dalbec v. Gentleman's Companion, Inc.,* 828 F.2d 921, 927 (2d Cir. 1987)).[12]

Although a showing of bias or ill will ***alone*** may not be sufficient to demonstrate actual malice, the Supreme Court has expressly held that "evidence concerning motive" ***is*** relevant to the actual malice inquiry and can be an evidentiary building block toward proving malice. *Connaughton*, 491 U.S. at 668; *Celle*, 209 F.3d at 183 ("Evidence of ill will combined with other circumstantial evidence ...

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[12] *See also, e.g.*, *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 871 (W.D. Va. 2016), ("[B]ecause actual malice is a subjective inquiry, a plaintiff 'is entitled to prove the defendant's state of mind through circumstantial evidence.'" (quoting *Connaughton*, 491 U.S. at 668)); *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1090 (3d Cir. 1988) ("Therefore, objective circumstantial evidence can suffice to demonstrate actual malice. Such circumstantial evidence can override defendants' protestations of good faith and honest belief that the report was true."); *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1087 (9th Cir. 2002) (explaining that because courts "have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published," the actual malice inquiry is "guided by circumstantial evidence") (quotation marks and citations omitted); *Kaelin v. Globe Commc'ns Corp.*, 162 F.3d 1036, 1042 (9th Cir. 1998) (recognizing that defendants' "statements of their subjective intention are matters of credibility for a jury").

may also support a finding of actual malice.").[13] Similarly, although evidence of a failure to properly investigate ***may*** not be ***alone*** sufficient to support a finding of actual malice, courts have recognized that it is one piece of evidence that, in conjunction with other evidence, can support a finding of actual malice. *Hunt v. Liberty Lobby*, 720 F.2d 631, 645 (11th Cir. 1983) ("'[A]ctual malice may be inferred when the investigation was grossly inadequate in the circumstances'" (quoting *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir. 1971 ("*Vandenburg I*")); *see also Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024, 1026-27 (5th Cir. 1975) (same) ("*Vandenburg II*").

As discussed in *Celle*, a defamation plaintiff can also establish actual malice by providing provide evidence of "negligence, motive and intent." *Celle*, 209 F.3d at 183 (emphasis added); *see also Goldwater,* 414 F.2d at 342 ("There is no doubt that evidence of negligence, of motive and of intent may be adduced for the purpose

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[13] *See also, e.g.*, *Shoen v. Shoen*, 48 F.3d 412, 417 (9th Cir. 1995) ("[I]ll will ***is*** considered circumstantial evidence of actual malice.") (emphasis added); *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 315 n.10 (5th Cir. 1995) ("[E]vidence of ulterior motive can often bolster an inference of actual malice.").

of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity.")).

Here, there is substantial record evidence of actual knowledge of falsity, deliberate distortion of the facts, and purposeful avoidance of the truth. Independently, each of these are legally sufficient to support a jury finding of actual malice requiring summary judgment to be denied. Moreover, the accumulation of all the direct and circumstantial evidence of actual malice—some of which is acknowledged in the September 1, 2023 Order—is more than sufficient to demonstrate recklessness.

B. Actual Knowledge of Falsity

The trial court erroneously overlooked substantial summary judgment evidence demonstrating Resilience Force Defendants' actual knowledge that there statements were false—even though the court specifically cited some of this evidence in its September 1, 2023 Order [R 8759-8761 at ¶ 66-69]. This includes numerous instances of workers, homeowners, and others telling Defendants (on camera and off) that subcontractors (not Winterfell) are responsible for and "stole" the Resilience Workers' wages. Resilience Force Defendants also made glaring admissions that they knew Plaintiffs were not

legally responsible for the payment of wages to Resilience Workers—such as Castellanos' above-cited testimony and numerous other testimonial and documentary admissions conceding knowledge of facts showing their actual knowledge of the falsity of their statements. [*See* Counter Statement of Facts at ¶¶ 117, 120-121, 123-124, 126-128, 137, 141, 147, 155-156, 158, 168-169, 192, 194-197, 199, 202] Defendants also knew Plaintiffs did not give workers "bad" or "fake" checks.

Black letter law clearly establishes that a defendant "cannot feign ignorance or profess good faith when there are clear indications present which bring into question the truth or falsity of defamatory statements." *Hunt v. Liberty Lobby*, 720 F.2d 631, 644 (11th Cir. 1983). Such actual knowledge gives rise to an inference of actual malice. *Id.* at 645 ("(A)n inference of actual malice can be drawn when a defendant publishes a defamatory statement that contradicts information known to him, even though the defendant testifies that he believed that the statement was not defamatory and was consistent with the facts within his knowledge"); see also *Murray v. Bailey*, 613 F. Supp. 1276, 1286 (N.D. Cal. 1985) (Defendant admitted having "actually seen 'hard evidence,'" an arrest report,

contradicting his characterization). This inference of actual malice results from "not simply a failure to investigate, but a failure to consider contradictory evidence already in his possession." *Robertson v. McCloskey*, 666 F.Supp. 241, 250 (D.C. Cir. 1987).

Resilience Force Defendants' motion for summary judgment did not address any of this evidence because the documents and videos revealing their actual knowledge of falsity were produced long-after Defendants' motion and supporting declarations were filed. Consequently, not only did they fail to meet their burden on summary judgment, but there was more than sufficient record evidence demonstrating actual knowledge of falsity such that summary judgment based on actual malice should not have been granted.

C. Distorting and Covering Up the Truth to Support a Predetermined Narrative

Another class of conduct that independently supports a finding of actual malice arises where a defendant engaged in dishonesty and willful falsity in the editing and presentation of a story. For example, in *Westmoreland v. CBS, Inc.*, 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984), the district court denied summary judgment based on actual malice because the defendant did precisely what this Court

determined the Resilience Force Defendants did in this case, including falsely and without basis asserting that a charge was confirmed by an eyewitness, distorting statements of witnesses so that they seem to say more than in fact was said, and falsely overstating a witness' basis for his accusation.

In *Herbert*, 441 U.S. at 173, the Supreme Court recognized this same proposition, noting that where a reporter with two contradictory reports about the selects the false, defamatory one it constitutes willful falsity in the editing and presentation of a story. Similarly, in *Sisemore v. U.S. News & World Report, Inc.*, 662 F. Supp. 1529, 1536 (D. Alaska 1987), the court found the evidence sufficient to create a jury issue on actual malice under *Anderson* where the defendant used factual inaccuracies to make plaintiff fit its story methodology, including writing the article "complete with theme and slant" and then getting examples to fit the profile the article sought to portray.

In *Sharon v. Time, Inc.,* 599 F.Supp. 538, 582 (S.D.N.Y. 1984) (quoting *Westmoreland*, 596 F.Supp. at 1174 (S.D.N.Y. 1984), the court recognized that “[a]lthough a reporter may have sufficient evidence of his charge to foreclose any material issue of constitutional malice for its publication, he may nonetheless make himself liable if

he knowingly or recklessly misstates that evidence to make it seem more convincing or condemnatory than it is." Numerous other cases have reached the same conclusion. *See e.g.*, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666-68, 675-76, 684, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989) (defendants' editor "had already decided to publish [the source's] allegations, regardless of how the evidence was developed and regardless of whether or not [the source's] story was credible upon ultimate reflection"); *Norris v. Bangor Pub. Co.*, 53 F. Supp. 2d 495, 506-07 (D. Me. 1999) (A reporter sent an electronic message to his original source "promising a 'wiseass article' for Tuesday" about the plaintiff, "support(ing) an inference that [the reporter's] motives ... were at least as political as they were journalistic"); *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069, 1091-93 (3d Cir. 1988) (defendant's deletion of an important caveat was one of two grounds for constitutional malice because it significantly altered the message and showed the defendant knew its implication was false, and intended that false implication); *Stokes v. CBS Inc.*, 25 F. Supp. 2d 992, 1004-05 (D. Minn. 1998) (defendant's "highly slanted perspective" probative of constitutional malice").

As noted above, this trial court found this same type of misconduct in its September 1, 2023 Order [R 8761, 8781]. The court further found that Plaintiffs were "*targeted by individuals who believed that the 'ends justified the means' in promoting their cause and allowed somewhat sloppy journalism and questionable judgment to set the narrative for a potentially profitable documentary*" [R 8777]; and that Defendants "*portrayed Plaintiffs unfairly and even acted with ill will toward them*" while "*consciously [choosing] to present Plaintiffs in a negative light to support the documentary's (and the political cause's) overarching purpose,*" "ignor[ing] reasons to doubt" supposed "wage theft" allegations against Plaintiffs, and failing to investigate the veracity of those accusations despite actual knowledge of facts calling them into doubt [R8787-8788]. "*Make no mistake, the summary judgment record indicates that Hamm and his company, Winterfell, likely became an unfortunate showroom display for certain individuals and corporations that are participating in a national debate about how to handle migrant workers who assist in post-storm cleanups. Indeed, a ripe theory can be asserted that Plaintiffs were simply in the wrong place, at the wrong time, and ultimately got caught in the crossfire of an issue that requires*

comprehensive state and federal solutions." [R 8776]. These findings are well-supported by the summary judgment evidence, including evidence demonstrating that Resilience Force Defendants deliberately manipulated and fabricated facts to fit the predetermined narrative Defendants sought to advance. [*see e.g.*, Counter Statement of Facts at ¶¶ 133-139, 142-147, 191-205]

Defendants' conduct in this case is far worse than the conduct at issue in cases such as *Westmoreland, Sisemore*, and *Sharon*. Moreover, the evidence clearly shows that the situation presented here is not synonymous with merely exercising "editorial discretion" [R 8774, 8781, 8782, 8787 at ¶¶ 102, 124, 128, 141], but rather deliberate and conscious dishonesty and willful falsity in the editing and presentation of false statements of fact about Plaintiffs which, as a matter of law, is more than sufficient to support a jury finding of finding of actual malice. *Westmoreland*, 596 F. Supp. at 1174; *Herbert*, 441 U.S. at 173; *Sisemore*, 662 F. Supp. at 1536; *Sharon*, 599 F.Supp. at 582; *Harte-Hanks*, 491 U.S. at 666-68.

D. Purposeful Avoidance of the Truth

Similarly, there is more than sufficient evidence (including the evidence cited above) upon which a reasonable jury could conclude

by clear and convincing evidence that Resilience Force Defendants purposefully avoided the truth. The law is well-established that actual malice exists where a defendant advances or continues to advance a preconceived narrative while deliberately turning a blind-eye to obvious reasons to doubt the veracity of the falsity of their publication. *Harte-Hanks*, 491 U.S. at 692.

The trial court found that Resilience Force Defendants failed to investigate the facts and deliberately ignored obvious (indeed, known) reasons to doubt the facts they represented as true, but erroneously disregarded this evidence based on the belief that "[t]he law is well established that the failure to investigate, without more, does not constitute actual malice." [R 8788 at ¶ 142].

This conclusion is contrary to well-established law holding that "where [a] publisher undertakes to investigate the accuracy of a story [which Defendants did] and learns facts casting doubt on the information contained therein [which Defendants also did], it may not ignore those doubts, even though it had no duty to investigate in the first place." *Masson*, 960 F.2d 896, 901 (9th Cir. 1992). "Once doubt exists, however, the publisher must act reasonably in dispelling it.

Thus, where the publisher undertakes to investigate the accuracy of a story and learns facts casting doubt on the information contained therein, it may not ignore those doubts, even though it had no duty to conduct the investigation in the first place." *Id.*; *see also Young v. Gannett Satellite Info. Network, Inc.*, 734 F.3d 544, 548 (6th Cir. 2013) (*citing Harte-Hanks Communications, Inc.*, 491 U.S. at 692) (finding recklessness based on a failure to investigate further where initial research "found no definitive statement" to support an accusation because the failure to conduct additional research indicates a "deliberate decision not to acquire knowledge of facts that might confirm the probable falsity" of the accusation.")

This same principle was applied at the summary judgment stage in *Palin v. New York Times Co.*, 482 F.Supp.3d 208, 221 (S.D.N.Y. 2020) (denying summary judgment based on actual malice: because "[w]hile mere failure to conduct an investigation before publishing cannot itself establish actual malice, nonetheless, 'where there are obvious reasons to doubt the veracity' of the information, that can give rise to an inference of actual malice"). The court in *Palin* denied summary judgment because the evidence showed that the defendant "came up with the angle for the Editorial, ignored the

articles brought to his attention that were inconsistent with his angle, disregarded the results [of the] research that he commissioned, and ultimately made the point he set out to make in reckless disregard of the truth." *Id.* at 223-224. Here, Resilience Force Defendants did the exact same thing.

Overall, the evidence in this case overwhelming establishes that Resilience Force Defendants engaged in conduct amounting to a purposeful avoidance of the truth, **not** a mere failure to investigate. Accordingly, summary judgment based on actual malice should have been denied.

E. The Accumulation of Additional Evidence Establishing Reckless Disregard for the Truth

Collectively, all the aforementioned evidence and findings combined with all the other evidence set forth in Plaintiffs' Counterstatement of Facts is unquestionably sufficient to establish a genuine issue of fact with respect to actual malice that required the denial of Resilience Force Defendants' motion for summary judgment on actual malice. This evidence includes numerous established categories of proof courts have determined to demonstrate a defendant's "awareness of probable falsity" of their statements (*Curtis*

Publ'g Co. v. Butts, 388 U.S. 130, 153 (1967), such as: **(1)** a failure to investigate [*Masson, Inc.,* 960 F.2d at 901; *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968); *Harte–Hanks,* 491 U.S. at 692]; **(2)** bias, motive, and ill will [*Palin*, 940 F.3d at 814-15; *Connaughton*, 491 U.S. at 668; *Celle*, 209 F.3d at 186; *Biro v. Conde Nast*, 807 F.3d 541, 546 (2d. Cir. 2015); **(3)** failure to adhere to journalistic standards [*Sisemore*, 662 F. Supp. at 1536; *Kerwick v. Orange Cty. Publ'ns Div. of Ottaway Newspapers, Inc.*, 53 N.Y.2d 625, 627 (1981) (finding evidence of constitutional malice in a deviation from "professional standards," reliance on memory rather than investigative research); *Hinerman v. Daily Gazette Co., Inc.*, 188 W. Va. 157, 423 S.E.2d 560, 572-73, 575 (1992) (citing the Supreme Court's "ebbing tolerance for irresponsible media behavior" and the media's focus on "economic success," "a large measure" of which is "dependent upon sensational or 'entertaining' scandal," the court found substantial evidence of constitutional malice in defendant's "gross deviations from professional journalistic standards"); *Greenberg v. CBS, Inc.*, 419 N.Y.S. 2d 988, 996 n. 1, 998 (Sup.Ct.App.Div. 1979) (finding evidence of constitutional malice where defendant did not ask "many of the elementary questions"

basic to journalism); *Frisk v. News Co.*, 361 Pa. Super. 536, 523 A.2d 347, 351 (1986)]; **(4)** grossly inadequate investigation under no time pressure [*Hunt*, 720 F.2d at 645; *Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028, 1057-58 (10th Cir. 2013) (rush to publish despite lack of time pressure is evidence of actual malice); **(5)** inherently improbable defamatory statements [*St. Amant*, 390 U.S. at 732; *Dalbec*, 828 F.2d at 927; *Vasquez v. O'Brien*, 85 A.D.2d 791, 792 (3d Dep't 1981) ("The content of the statements themselves and the context in which they arose may give rise to significant suggestions of possible falsity which should alert the speaker ... [and] inaccurate or untrue use of language, in the intense political climate then prevailing, could certainly be found to be evidence of actual malice on the part of defendant."); *Sargeant v. Serrani*, 866 F.Supp. 657, 665 (D. Conn. 1994) ((reckless disregard can be found "when a defendant 'failed to investigate a story weakened by inherent improbability, internal inconsistency or apparent reliable contrary information"); *Eramo v. Rolling Stone, LLC*, 209 F.Supp.3d 862, 873 (W.D. Vir. 2016); and **(6)** blind reliance on biased sources [*American Dental Ass'n v. Khorrami*, 2004 WL 3486525, *14 (C.D. Cal. Jan. 26, 2004); *Curtis Pbl'g Co.*, 388 U.S. at

156-157; *Isuzu Motors, Ltd. v. Consumers Union of U.S., Inc.*, 66 F.Supp.2d 1117, 1125-26 (C.D. Cal. 1999).

The trial court's findings are already more than sufficient to require the denial of summary judgment on the issue of actual malice based on controlling case law. Cumulatively, these findings and the additional summary judgment evidence not addressed in the Order overwhelmingly demonstrate a genuine issue of fact on the issue of reckless disregard for the truth. Summary judgment on the issue of actual malice never should have been granted.

CONCLUSION

Based on the forgoing, Appellants respectfully request that this Court (1) reverse the trial Court's September 1, 2023 Order granting summary judgment in favor of Resilience Force Defendants based on the issue of actual malice; and (2) instruct the trial court that Counts I and III of Appellants original Complaint are legally sufficient and must proceed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 9, 2024, I caused a true and correct copy of the foregoing to be served via the Florida Court's E-Filing Portal upon the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font and word count limit requirements of Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2). It was prepared using Bookman Old Style 14-point font and contains 12,031 words.

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