

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT**

Case No. 4D2023-3043

AXIS SPACE, LLC, ETC., ET. AL.,

Appellants,

v.

LORH INVESTORS GROUP LLC, ET AL.,

Appellees.

ANSWER BRIEF OF APPELLEES

ON APPEAL FROM A FINAL ORDER ENTERED IN THE SEVENTEENTH JUDICIAL
CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

SHUTTS & BOWEN LLP

Geoffrey L. Travis (FBN 988812), gtravis@shutts.com
Stephen Gillman (FBN 196734), sgillman@shutts.com
Julissa Rodriguez (FBN 0165662), jrodriguez@shutts.com
200 S. Biscayne Blvd., Ste. 4100, Miami, FL 33131
(305) 358-6300

Counsel for Appellees, LORH Investors Group LLC, Philip Klein, Jeffrey Chircus, Steven Yaroslawitz, Kenneth Weiss, William Barrett, Louis Bial, Audie Rolnick, and Eileen Rolnick

KELLEY KRONENBERG, PA

Kaitlin Ann Coyle (FBN 1025101), kcoyle@kelleykronenberg.com
10360 W. State Road 84 Fort Lauderdale, FL 33324
Co-Counsel for Appellee, William Barrett

TABLE OF CONTENTS

| | Page(s) |
|---|---------|
| TABLE OF AUTHORITIES | iii |
| INTRODUCTION | 1 |
| STATEMENT OF THE CASE AND FACTS | 3 |
| I. Nature of the Case and Course of Proceedings..... | 3 |
| A. The Parties | 3 |
| B. Plaintiffs' Claims | 5 |
| C. The Proceedings on Defendants' Motion to Dismiss..... | 6 |
| D. The Proceedings on Plaintiffs' Motion for Reconsideration | 9 |
| E. The Proceedings Leading to Entry of the Final Judgment | 11 |
| II. Statement of the Facts..... | 12 |
| A. The Events Giving Rise to Plaintiffs' Claims | 12 |
| B. The Alleged Defamatory Statements | 14 |
| SUMMARY OF THE ARGUMENT | 15 |
| ARGUMENT | 18 |
| I. Plaintiffs Waived the Issues They Have Raised on Appeal Because They Did Not Adequately and Timely Preserve Them for Appeal | 18 |
| II. The Trial Court Correctly Dismissed the Amended Complaint (<i>addressing IB/Argument Point I</i>)..... | 23 |
| A. Standard of Review | 23 |
| B. Plaintiffs Have No Actionable Claim for Defamation | 24 |
| 1. Defendants' statements (a) interpreting provisions of the Association's Governing Documents and (b) about the potential sale of the Axis commercial units and concerns | |

| | |
|--|----|
| over the unknown use to which a prospective buyer might put those units cannot be actionable as defamatory statements because they are <i>not</i> statements “ <i>about</i> ” or “ <i>concerning</i> ” Plaintiffs. | 27 |
| 2. All other statements allegedly made are campaign rhetoric or merely expressions of Defendants’ opinions..... | 34 |
| 3. Even if the challenged statements had been “ <i>about</i> ” Plaintiffs and were statements of fact rather than <i>opinion</i> , they are still <i>not</i> actionable because, as a matter of law, none <i>are defamatory</i> | 38 |
| 4. There is no allegation that <i>any</i> Defendant made <i>any</i> statement regarding Plaintiffs LOBC, LOBC2, or Axis. .. | 42 |
| 5. Plaintiffs also failed to allege that 6 of the 9 Defendants made <i>any</i> statements regarding <i>any</i> Plaintiff. | 43 |
| C. Plaintiffs Have No Actionable Claim for Civil Conspiracy | 45 |
| D. Additional Deficiencies That Warrant Dismissal (<i>addressing IB/Argument Points I.C.5 and 6</i>) | 51 |
| 1. Plaintiffs cannot plead an actionable “publication” | 52 |
| 2. Plaintiffs failed to allege “express malice” in any count and failed to adequately allege “actual malice” in Counts I and III (<i>addressing IB/Argument Point I.C.4</i>) | 53 |
| E. The Ruling on the Motion to Dismiss Was Based Solely on the Defects Within the Four Corners of the Amended Complaint (<i>addressing IB/Argument Point I.D</i>) | 56 |
| III. The Trial Court Did Not Abuse Its Discretion In Dismissing the Amended Complaint With Prejudice (<i>addressing IB/Argument Point II</i>) | 57 |
| CONCLUSION | 58 |
| CERTIFICATE OF SERVICE | 60 |
| CERTIFICATE OF COMPLIANCE | 60 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|----------------|
| Cases | |
| <i>American Airlines, Inc. v. Geddes</i> , 960 So.2d 830 (Fla. 3d DCA 2007)..... | 38, 42 |
| <i>Applegate v. Barnett Bank of Tallahassee</i> , 377 So.2d 1150 (Fla. 1979) | 18 |
| <i>AT&T Mobility LLC v. Phone Card Warehouse, Inc.</i> , 2009 WL 10671270 (M.D. Fla. June 25, 2009) | 47 |
| <i>Bank of Am., N.A. v. Bank of N.Y. Mellon</i> , 338 So.3d 338 (Fla. 3d DCA 2022)..... | 20 |
| <i>Barrett v. City of Margate</i> , 743 So.2d 1160 (Fla. 4th DCA 1999)..... | 23, 25, 43, 45 |
| <i>Berenato v. Tonkel</i> , 2012 WL 473933 (M.D. Fla. Feb. 14, 2012)..... | 41 |
| <i>Best v. Educ. Affiliates, Inc.</i> , 82 So.3d 143 (Fla. 4th DCA 2012)..... | 20 |
| <i>Borislow v. Canaccord Genuity Group Inc.</i> , 2014 WL 12580259 (S.D. Fla. June 27, 2014) | 35 |
| <i>Bortell v. White Mountains Ins. Grp., Ltd.</i> , 2 So.3d 1041 (Fla. 4th DCA 2009)..... | 57 |
| <i>Buckner v. Lower Florida Keys Hosp. Dist.</i> , 403 So.2d 1025 (Fla. 3d DCA 1981)..... | 51 |
| <i>Cabrera v. Alam</i> , 197 Cal. App.4th 1077 (Cal. 4th Dist. App. 2011) | 53 |
| <i>Chris Thompson, P.A. v. GEICO Indemnity Co.</i> , 349 So.3d 447 (Fla. 4th DCA 2022)..... | 20 |

| | |
|---|------------|
| <i>Cooper v. Miami Herald Publishing Co.</i> , 31 So.2d 382 (Fla. 1947) | 39 |
| <i>De Ford v. Koutoulas</i> , 2023 WL 2709816 (M.D. Fla. Mar. 30, 2023) | 47 |
| <i>DeMoya v. Walsh</i> , 441 So.2d 1120 (Fla. 3d DCA 1983) | 34 |
| <i>DHBH Atlantic L.L.C. v. City of Delray Beach</i> , 334 So.3d 332 (Fla. 4th DCA 2022) | 23 |
| <i>Falic v. Legg Mason Wood Walker, Inc.</i> , 347 F.Supp.2d 1260 (S.D. Fla. 2004) | 55 |
| <i>Flogrown, LLC v. Dixie Heritage, LLC</i> , 2019 WL 12536735 (M.D. Fla. Jan. 28, 2019) | 33 |
| <i>Gallego v. Wells Fargo Bank, N.A.</i> , 276 So.3d 989 (Fla. 3d DCA 2019) | 24, 43 |
| <i>Gastón v. NNN Investment Advisors</i> , 359 So.3d 1195 (Fla. 4th DCA 2023) | 24, 45, 48 |
| <i>Gladstone v. Smith</i> , 729 So.2d 1002 (Fla. 4th DCA 1999) | 57 |
| <i>Hay v. Independent Newspapers, Inc.</i> , 450 So.2d 293 (Fla. 2d DCA 1984) | 35, 37 |
| <i>Hullick v. Gibraltar Priv. Bank & Tr. Co.</i> , 279 So.3d 809 (Fla. 3d DCA 2019) | 52 |
| <i>Jews For Jesus, Inc. v. Rapp</i> , 997 So.2d 1098 (Fla. 2008) | 25 |
| <i>Keech v. Yousef</i> , 815 So.2d 718 (Fla. 5th DCA 2002) | 21 |

| | |
|---|--------|
| <i>Klayman v. Judicial Watch, Inc.</i> , 22 F.Supp.3d 1240 (S.D. Fla. 2014) | 26 |
| <i>Kovic v. Kovic</i> , 336 So.3d 22 (Fla. 4th DCA 2022) | 20, 21 |
| <i>Las Olas River House Condo. Ass'n, Inc. v. LORH, LLC</i> , 181 So.3d 556 (Fla. 4th DCA 2015) | 52 |
| <i>Mancinelli v. Davis</i> , 217 So.3d 1034 (Fla. 4th DCA 2017) | 49 |
| <i>McCrary v. Post Pub. Co.</i> , 147 So. 259 (Fla. 1933) | 9, 39 |
| <i>N.Y. Times Co. v. Sullivan</i> , 376 US. 254 (1964) | 36 |
| <i>Nodar v. Galbreath</i> , 462 So.2d 803 (Fla. 1984) | 54, 55 |
| <i>Northeast Ohio College of Massotherapy v. Burek</i> , 1999 WL 34781568 (Ohio Com. Pl. Sept. 14, 1999) | 33 |
| <i>Ozyesilpinar v. Reach PLC</i> , 365 So.3d 453 (Fla. 3d DCA 2023) | 27 |
| <i>Perez v. City of Key West, Florida</i> , 823 F.Supp. 934 (M.D. Fla. 1993) | 9, 39 |
| <i>Precision Tune Auto Care, Inc. v. Radcliff</i> , 731 So.2d 744 (Fla. 4th DCA 1999) | 20 |
| <i>Raimi v. Furlong</i> , 702 So.2d 1273 (Fla. 3d DCA 1997) | 8, 46 |
| <i>Ramos v. Mast</i> , 789 So.2d 1226 (Fla. 4th DCA 2001) | 27 |
| <i>Rasmussen v. Collier Cnty. Publ'g Co.</i> , 946 So.2d 567 (Fla. 2d DCA 2006) | 35 |

| | |
|---|----------------|
| <i>Renpak, Inc. v Oppenheimer</i> , 104 So.2d 642 (Fla. 2d DCA 1958) | 8 |
| <i>Richard v. Gray</i> , 62 So.2d 597 (Fla.1953) | 39 |
| <i>Scott v. Busch</i> , 907 So.2d 662 (Fla. 5th DCA 2005) | 34 |
| <i>Skupin v. Hemisphere Media Group, Inc.</i> , 314 So.3d 353 (Fla. 3d DCA 2020) | 23, 24, 26, 57 |
| <i>Stein v. BBX Capital Corp.</i> , 241 So.3d 874 (Fla. 4th DCA 2018) | 24, 48 |
| <i>Sunset Harbour Condo. Ass’n v. Robbins</i> , 914 So.2d 925 (Fla. 2005) | 21 |
| <i>Transflorida Bank v. Miller</i> , 576 So.2d 752 (Fla. 4th DCA 1991) | 57 |
| <i>Trinchitella v. D.R.F., Inc.</i> , 584 So.2d 35 (Fla. 4th DCA 1991) | 20 |
| <i>Verna v. Links at Valleybrook Neighborhood Ass’n, Inc.</i> , 371 N.J. Super. 77 (N.J. Sup. Ct. 2004) | 53 |
| <i>Vorbeck v. Betancourt</i> , 107 So.3d 1142 (Fla. 3d DCA 2012) | 22 |
| <i>W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc.</i> , 728 So.2d 297 (Fla. 1st DCA 1999) | 54 |
| <i>Weisman v. Southern Wine & Spirits of America, Inc.</i> , 297 So.3d 646 (Fla. 4th DCA 2020) | 49 |
| <i>White Egret Condo., Inc. v. Franklin</i> , 379 So.2d 346 (Fla. 1979) | 36 |
| <i>Wolfson v. Kirk</i> , 273 So.2d 774 (Fla. 4th DCA 1973) | 39 |

World Class Yachts, Inc. v. Murphy,
731 So.2d 798 (Fla. 4th DCA 1999).....8, 48

Rules

Fla. R. App. P. 9.045(b)60

Fla. R. App. P. 9.200(b)(5)..... 19

Fla. R. App. P. 9.210(a)(2)(B) 19

Fla. R. Civ. P. 1.110(b)23

INTRODUCTION

This is an appeal of a final order dismissing Plaintiffs' First Amended Complaint (**Amended Complaint**) with prejudice for failing to state a cause of action for defamation (**Final Judgment**). The trial court entered that judgment after it had first dismissed the Amended Complaint *without* prejudice, and only after Plaintiffs elected to stand on the Amended Complaint and expressly declined further amendment. R:560-561.

The case involves a dispute between members of a condominium association (the Las Olas River House Condominium Association, Inc. - the **Association**). As the trial court succinctly summarized, the dispute arose in the context of a campaign before an Association member vote on whether to approve the sale of rooftop units owned by the Association in The One Las Olas River House Condominium (**Condominium**) (R:239):

1. Plaintiffs sue...for alleged defamatory statements in emails sent to [Condominium] residents...before a vote on the sale of commercial RU space in the building that would determine the majority voting rights on the [Association] Board...
2. ...Inside the [Condominium] building were 285 residential units that had 3 seats on the board of directors governing the association. There were 5 commercial units that had 2 seats on the board of directors. The[re] were 2 roof units (RU) classified as commercial units controlled by the association but titled in a different entity that[,] because the ... law appeared to prohibit the association from voting those votes[,] did not vote those two votes at meetings. Thus, the [2022] proposed sale of the two RU ignited the controversy between the two groups in this suit, the

commercial and residential units. The residential group won the vote and the Plaintiff commercial group lost and sue[d] for defamation based on emailed statements circulated to all the members of the association by various residential members who had formed their own group to purchase the 2 RU's. ...

After being out-voted by two-thirds of the Association members, Plaintiffs did not challenge the vote, or the sale of the rooftop units. Still, Plaintiffs could not let go of the loss. So, they resorted to complaining about opinions that some of the Defendants voiced while campaigning for votes to approve the sale and sued, raising insufficient defamation claims as punishment against Defendants for, in effect, having won the vote permitting the sale. The court found the claims insufficient on their face and, after giving Plaintiffs another opportunity to amend, which they declined, the court dismissed the action with prejudice.

The dismissal ruling is reviewed de novo and the prejudice component, which precluded Plaintiffs from amending the pleading again, is reviewed for abuse of discretion. This brief sets out numerous grounds for affirming the trial court's Final Judgment, including, as a threshold matter, waiver because Plaintiffs did not adequately and timely preserve the issues raised in the Initial Brief.

On the merits, Plaintiffs fare no better. As the court correctly identified, "[t]he crux of the problem with the Plaintiffs' Complaint is that in the 48 pages

of allegations, there is no claim that any of the statements are defamatory per se nor is there any pleading as to how the words are defamatory or of their defamatory character.” R:240. The court correctly determined that Plaintiffs complaint is fatally defective based upon the lack of defamatory statements pled, a necessary element for any defamation case. Plaintiffs were given multiple opportunities to amend their complaint to include any and all alleged defamatory statements, however, Plaintiffs did not do so and instead advised they have pleaded all statements claimed to be defamatory.

For the reasons discussed in this brief, Appellees respectfully request this Court to affirm the trial court’s November 18, 2023 Final Order of Dismissal with Prejudice.

STATEMENT OF THE CASE AND FACTS

I. Nature of the Case and Course of Proceedings

A. The Parties

As alleged, all of the parties in this case are Association members or related thereto. R:99[¶21] (“the Parties to this litigation either reside or conduct business as ‘owners’ of either residential, commercial and/or ‘rooftop’ units” or their representatives), 100[¶25] (“By virtue of the Declaration, all Unit Owners (whether residential or commercial) in the Condominium are automatically members of the Association”).

Appellants are the following 5 Plaintiffs—all part of the Association community—who filed the underlying action:

- Las Olas Business Center, LLC (**LOBC**), owner of a commercial unit (CU-1), R:104;
- Las Olas Business Center 2, LLC (**LOBC2**), owner of a commercial unit (CU-3), R:104;
- Axis Space, LLC (**Axis**), a company formed to operate and manage LOBC and LOBC2's commercial units, and a co-working office space business that rents CU-1, CU-3 and CU-4 from their respective owners, R:105;
- Albert Yokana (**Yokana**), Axis member and previously an Association director elected by the voting commercial unit owners, R:110, 115; and
- Jairo Vela (**Vela**), Axis member and previously an Association director elected by the voting commercial unit owners, R:110, 115.

Appellees are the 9 Defendants—all Association members—who Plaintiffs sued:

- LORH Investors Group LLC (**LIG**), owner of the 2 rooftop units (previously owned by the Association) and 2 commercial units (CU-5 and CU-6), R:113, 122;

- Philip Klein (**Klein**), LIG member and residential unit owner, R:99-100, 107;
- William Barrett (**Barrett**), LIG member and residential unit owner, *id.*;
- Louis Bial (**Bial**), LIG member and residential unit owner, *see id.*;
- Audie Rolnick (**A.Rolnick**), LIG member and residential unit owner, *id.*;
- Eileen Rolnick (**E.Rolnick**), LIG member and residential unit owner, *id.*;
- Kenneth Weiss (**Weiss**), LIG member, residential unit owner, and is/was an Association director elected by the residential unit owners, *id.*;
- Jeffrey Chircus (**Chircus**), residential unit owner and is/was an Association director elected by the residential unit owners, R:99-100, 111, 114, 119, 144; and
- Steven Yaroslawitz (**Yaroslawitz**), residential unit owner and is/was an Association director elected by the residential unit owners, R:99-100, 111, 114, 119.

B. Plaintiffs' Claims

Plaintiffs' original Complaint raised three claims for defamation and one for invasion of privacy. R:12-53. Defendants moved to dismiss the original Complaint based on numerous procedural and substantive deficiencies. R:148-189. Plaintiffs voluntarily dismissed the invasion of

privacy claim (R:146-147), and then filed a “First Amended Complaint for Damages” (the operative **Amended Complaint**), which raised only the three purported defamation claims—Count I, common law defamation; Count II, defamation per se; and Count III, defamation by implication. R:96-145.

C. The Proceedings on Defendants’ Motion to Dismiss

The Motion to Dismiss. On June 5, 2023, Defendants moved to dismiss the Amended Complaint (**Motion**). R:149-189. Defendants sought dismissal based on any one of the following independent reasons:

1. Contrary to Fla. R. Civ. P. 1.110’s requirement that a plaintiff plead a “short and plain” statement of the ultimate facts and set forth separate claims in separate counts, the Amended Complaint is a long narrative with pages of immaterial allegations that lumps together each Plaintiff and each Defendant as groups in a shot-gun pleading of commingled claims, which makes it impossible to decipher “for which” statement(s) each Defendant is being called upon to answer.
2. The Amended Complaint fails to allege any defamatory statements.
 - A. Defendants’ statements interpreting provisions of the Association’s Governing Documents [i.e., the Condominium’s Bylaws, Articles of Incorporation, Declaration, and Rules and Regulations] cannot be actionable by Plaintiffs because they are not statements about or concerning Plaintiffs.
 - B. All other challenged statements are *campaign* rhetoric or merely expressions of Defendants’ opinions.

- C. Even had Defendants' alleged statements been about Plaintiffs and were statements of fact rather than opinion, they are still not actionable because, as a matter of law, none are defamatory.
 - D. There is no allegation that any Defendant made any statement regarding either Plaintiffs LOBC, LOBC2 or Axis.
 - E. No statements at all are alleged to have been made by six of the nine Defendants regarding any Plaintiff.
3. Plaintiffs cannot plead an actionable "publication" because the only statements alleged to have been made were made by Association members to others in the Association community regarding an Association vote in which each Association member had a common interest.
 4. Plaintiffs failed to allege operative facts to support the element of fault, failing to plead "actual malice" and the requisite "express malice."
 5. Plaintiffs' mere conclusory damages allegations, devoid of any facts, are insufficient as a matter of law.
 6. In addition to each of the foregoing grounds, Count III (Defamation by Implication) also fails because Plaintiffs' allegations of a defamatory implication are insufficient as matter of law, nonsensical and their other allegations expressly contradict any possible defamatory implication.

R:154-155 (original emphasis; footnotes omitted).

On July 27, 2023, the trial court held a 1-hour special set hearing on the Motion. See R:239. Ahead of that hearing, Plaintiffs did not file any written response to the Motion, nor did they upload or disclose any opposing case law. See R:239; R:413. There is no transcript of the July 27 hearing.

The Ruling on the Motion. At the conclusion of the July 27 hearing, the court orally announced it would be dismissing the Amended Complaint with prejudice. See *Initial Brief (IB)* at 14. No such order, however, was entered because, after further consideration, the court entered an order dismissing the pleading *without* prejudice (**8/7/23 Order**). R:239-240.

In the 8/7/23 Order, the court ruled, in relevant part:

3. For all the reasons stated in the Motion to Dismiss, the 48 page First Amended Complaint is fatally defective.

4. The Plaintiffs sued Nine Defendants and alleges a civil conspiracy to try to take all these different statements, at different times by different defendants and use the co-conspirator theory to make them all responsible so they can be lumped together into one defamation count. The problem with that theory is that the elements of a civil conspiracy are impossible to plead. Everyone involved is a member of the association or one of the pled LLC's and the entity can only act through its members, there's no alleged third party to conspire with. See, *Raimi v. Furlong*, 702 So.2d 1273, 1284 (Fla. 3d DCA 1997) [two or more parties are required for a conspiracy]. The conspiracy theory also fails because a conspiracy requires an agreement to do "an unlawful act or do a lawful act by unlawful means". *Id.* This element is completely missing in spite of the extensive facts pled in the Complaint. The Plaintiffs can't lump these statements together in each count and they must be pled with particularity. *Renpa[jk[, Inc.] v Oppenheimer*, 104 So.2d 642 (Fla. 2d DCA] 1958); *World Class Yachts[, Inc. v. Murphy*, 731 So.2d 798 (Fla. 4th DCA 1999) [the ultimate facts for each element must be set forth clearly, positively and specifically]. On this basis alone the Complaint must be dismissed, but arguably without prejudice as these are pleading defects.

5. The crux of the problem with the Plaintiffs' Complaint is that in the 48 pages of allegations, there is no claim that any

of the statements are defamatory per se nor is there any pleading as to how the words are defamatory or of their defamatory character. *Perez v. City of Key West, Florida*, 823 F. Supp. 934, 938 (M.D. Fla. 1993) citing, *McCrary v. Post Pub. Co.*, 147 So. 259 (Fla. 1933). The many quoted statements made throughout are opinions and campaign argument to vote yes and protected by the First Amendment and the Florida Constitution. ...

R:239-240 (original emphasis; citations omitted [c.o.]). Although the court noted that “the lack of defamatory statements pled appears fatal to the case and futile,” it gave Plaintiffs the opportunity to amend the complaint and cure these fatal deficiencies (R:240), ruling:

1. The grounds raised in Defendants Motion are all well founded. The **Motion to Dismiss** is **GRANTED without Prejudice** for Plaintiff to allege any additional statements, if any, that they consider Defamatory. The alleged statements must be specified pled and either alleged individually in a count against the defendant who allegedly made it or truthfully allege what unlawful act or lawful act done unlawfully was involved and the elements of a civil conspiracy, with more specificity as to who are the co-conspirators, not upon information and belief.

D. The Proceedings on Plaintiffs’ Motion for Reconsideration

The Reconsideration Motion. Plaintiffs initially asked for an extension to amend their pleading. R:244-246; R:242-243. But, ultimately, Plaintiffs chose to file a Motion for Reconsideration of the 8/7/23 Order, asking the court to vacate the dismissal order. R:247-411. Although Plaintiffs asked alternatively for leave to file a Second Amended Complaint,

they did not submit a proposed amendment, and later confirmed they had no intention of amending the complaint again.

Defendants opposed reconsideration because:

(i) reconsideration is not a vehicle to re-argue points previously considered and rejected by the court (R:419-420);

(ii) reconsideration is also not a vehicle to raise new arguments or law that could have previously been raised but were omitted or disregarded (R:420-421 [including “new argument and law on conspiracy (pages 26-27), defamation (pages 33-35; 46-47), the element of publication (pages 48-49), and pleading privilege (pages 50-51)”]); and

(iii) the Amended Complaint is not a viable pleading (R:421-422 [“Plaintiffs continue to ignore many of the defects in the Amended Complaint ... See Motion to Dismiss, p’s 8-13, 23-28, 30-34, and 35-37.”]).

The Ruling on Reconsideration. On September 27, 2023, the court denied reconsideration, ruling in relevant part (R:428-429) (c.o.):

1. ... The September 1 deadline has long passed and Plaintiff has not filed the Court ordered, allowed amended complaint.

2. ... The Court has reviewed the Plaintiff’s motion, the response thereto and the Court file and concluded that the Motion for Reconsideration does not raise any viable issue, is discretionary with the Court and does not require any further hearing.

E. The Proceedings Leading to Entry of the Final Judgment

November 13, 2023, Status Conference. At a status conference on November 13, 2023, Plaintiffs' counsel confirmed:

- (i) Plaintiffs "decided not to amend [the complaint] based upon the language [in the 8/7/23 Order] about alleging additional statements," if any, that Plaintiffs consider to be defamatory, (R:558-561); and
- (ii) Plaintiffs made that decision because they asserted that all of the alleged defamatory statements they were relying upon are "contained in the Amended Complaint," *id.* at 560.

Based on Plaintiffs' representations, the court announced it would dismiss the case with prejudice and enter a final judgment. R:561.¹

The Final Judgment. On November 18, 2023, the court entered its written Final Judgment. R:456-457. The court dismissed the case with prejudice and entered final judgment, making the following pertinent findings and rulings (R:456-457):

3. Plaintiffs have advised the Court that based upon the language in Paragraph 1 of the August 7, 2023 Order they have

¹ During that conference, in response to Plaintiffs' objection of inclusion of a description of the Condominium, the trial court explained that it included a descriptive reference to the Condominium in the 8/7/23 Order (R:239), not as a finding, but rather to remember the case (R:557):

THE COURT: ... I put that in there [in the 8/7/23 dismissal order on appeal] so that I could remember the case. This is the building that I see out my window. It wasn't any kind of finding or anything else ...

pleaded all statements claimed to be defamatory; therefore, they do not seek further amendment.

Therefore, based on the above-stated record and findings, it is hereby

ORDERED AND ADJUDGED as follows:

1. For the reasons stated in the August 7, 2023 Order and Plaintiffs' notice that they do not seek further amendment, this case is DISMISSED WITH PREJUDICE.

II. Statement of the Facts²

A. The Events Giving Rise to Plaintiffs' Claims

The parties' dispute concerns a mixed-use Condominium in Fort Lauderdale, which consists of: 285 residential units; 5 commercial units (CU-1, CU-3, CU-4, CU-5, and CU-6); and 2 rooftop units (RU-1 and RU-2) (collectively, the commercial units and the rooftop units are the **Commercial Units**). R:99-100, 104-105, 107, 112-113. The Condominium is managed by the Association through a five-person board of directors—two are elected by the owners of the Commercial Units; and three are elected by the residential unit owners. R:113, 128.

² As Defendants did in the Motion (R:155 [n.8]), this Answer Brief also accepts as true the well-pled factual allegations in the Amended Complaint and reasonably deductible inferences from those facts—but not conclusory allegations, unwarranted deductions, contradicted allegations or mere legal conclusions included in the Amended Complaint. See *infra* Argument/Point II.A (Standard of Review).

Until December 2022, the Association indirectly owned the two rooftop units, but did not have the right to vote in an election because the rooftop unit votes could not be cast on Association matters. R:105-106, 122. Appellants controlled the votes of three commercial units, and the Association's inability to use the two votes allocated to the rooftop units meant that an election for the two commercial unit director seats was controlled by a vote of 3 commercial unit owners, not 4. R:239[¶2].

In 2022, Defendant LIG offered to purchase the two rooftop units. R:113. Because those units were indirectly owned by the Association, their sale required approval by an affirmative vote of the Association members ("Sale Vote"). R:113-114.

The allegedly defamatory statements were all made during the campaign for the Sale Vote. R:105-145. Other than the Association's property manager and the company administering the vote, all alleged defamatory statements were made solely by Association members to other Association members or related parties regarding the Association's Sale Vote. R:113-114[¶43], 115[¶46, n.5], 115-122.

The Association members approved the sale to LIG on December 16, 2022. R:122. Plaintiffs did not allege that the Sale Vote was procedurally infirm or improper, and did not challenge the outcome of the Association's

vote nor the validity of the sale. See *generally* R:96-145. Rather, they only complained that pro-sale opinions and rhetoric voiced by some, but not all, of the nine Defendants to other members of the Association during the voting campaign were defamatory. R:155-122, 122-145.

B. The Alleged Defamatory Statements

Plaintiffs complained about three types of statements (see R:157, 164):

1. Statements interpreting the meaning of the Association's Governing Documents (specifically, that the Board of the Association may pass reasonable rules and regulations governing all unit owners, including Commercial Unit Owners; Plaintiffs contend no such authority exists)[.]
2. Statements that Axis had listed its Commercial Units for sale, and that it was unknown who might purchase the Units or what type of business they might operate in the space[.]
3. Statements that the directors elected by the Commercial Unit Owner[s,] Plaintiffs (Yokana and Vela) had in the past, and were permitted to, act, in the interest of the Commercial Units, not the Residential Unit Owners.

Plaintiffs argue that "Paragraphs 46-51, 54-55, and 60-67 (A-006-028) of the Complaint all specify the defamatory statements published by the conspiracy via various Co-Conspirators alleged to have been acting in concert with each other in furtherance of the goals of the conspiracy." IB:40. Appellees discuss the lack of sufficiency of the allegations on which Plaintiffs rely in the Argument Section below.

SUMMARY OF THE ARGUMENT

The Final Judgment should be affirmed because Plaintiffs cannot carry the burden of showing reversible error.

First, Plaintiffs waived the issues raised in the Initial Brief because they did not adequately and timely preserve them. They did not file a written response to the Motion, did not transcribe or make a proper substitute of the July 27, 2023 proceeding to show what specific legal arguments they presented at the hearing, and they waited until reconsideration to raise new arguments, which the trial court was not required to consider. Even if the Court accepts the *general* arguments that Plaintiffs assert they raised at the July 27 hearing, at the very least, Plaintiffs waived the arguments that they decided to belatedly present for the first time on reconsideration.

Second, on the merits, Plaintiffs have no viable basis for relief. To begin with, there is no actionable defamation claim because:

i. The statements (a) interpreting the Board's authority under the Association's Governing Documents to pass reasonable rules and regulations applicable to all units, and (b) about the potential sale of the Axis commercial units and concerns over the unknown use to which a prospective buyer might put those units ***are not statements "about" or "concerning" Plaintiffs.***

ii. The following statements, based on the totality of the circumstances pled by Plaintiffs, were also not statements of fact but rather non-actionable *opinions* as to what Defendants believed was best for the Association community: (1) the directors elected by the Commercial Unit owners (Yokana and Vela) had the right and did act in the interest of the Commercial Units, not the Condominium as a whole; and (2) the Axis units were being marketed for sale (a true statement), which Defendants feared could lead to an unwanted use of the space.

iii. A bona fide look at those statements (identified in point ii) also shows they are not defamatory in substance. Particularly in the context of an Association vote campaign, it is not defamatory to state those pro-sale opinions—especially given that the alleged statement acknowledged that those commercial unit directors *had the right* to vote solely in the interests of the controlling commercial units who elected them. Accordingly, none of those statements, alone or in combination, could subject any of the Plaintiffs to hatred, distrust, ridicule, contempt, or disgrace or tends to injure any of them in their business or profession.

iv. The Amended Complaint fails to allege that any Defendant made any statement regarding Plaintiffs LOBC, LOBC2, or Axis.

v. There are also no allegations that 6 of the 9 Defendants made any statements regarding any Plaintiff, nor do Plaintiffs propose they could amend to address that deficiency. And because there is no actionable conspiracy pled, dismissal of those 6 Defendants³ was proper.

No actionable conspiracy is pled because: (1) Plaintiffs make no factual allegations that there was an agreement between Defendants; (2) the intra-corporate conspiracy doctrine forecloses any conspiracy claim between corporate Defendant LIG and its members (Defendants Klein, Weiss, Barrett, Bial, A.Rolnick and E.Rolnick); (3) Plaintiffs failed to allege an underlying actionable tort or wrongdoing; and (4) they also failed to allege with particularity that each Defendant took some action to further the conspiracy.

Although not specifically discussed in the 8/7/23 Order, the court also found that the claims are subject to dismissal based on all reasons stated in the Motion, including that the publication and malice elements of defamation were not sufficiently pleaded. The record and governing law fully support that ruling.

The record also plainly shows that the ruling on the Motion was based solely on the defects within the four corners of the Amended Complaint.

³ The six Defendants are: Yaroslawitz, Barrett, Bial, A.Rolnick, E.Rolnick, and LIG.

Lastly, after the court gave Plaintiffs leave to amend and Plaintiffs declined, dismissal with **prejudice** was proper. Plaintiffs' argument that they should be given "liberal" leave to amend is really just an argument that they should be allowed to proceed with the claims they alleged in the Amended Complaint. That is not a basis for leave to amend—it is a challenge to the trial court's dismissal ruling, which should be affirmed for numerous independent reasons.

ARGUMENT

I. Plaintiffs Waived the Issues They Have Raised on Appeal Because They Did Not Adequately and Timely Preserve Them for Appeal

On appeal, "the burden is on the appellant to demonstrate error." *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150, 1152 (Fla. 1979). Even under a *de novo* standard of review, a final judgment "has the presumption of correctness and the burden is on the appellant to demonstrate error." *Id.* at 1151. Plaintiffs are unable to carry that burden. Their Initial Brief glosses over where in the record Plaintiffs preserved the issues that they are asking this Court to decide (IB:13-14)—because they did not adequately preserve them.⁴

⁴ Although unsupported by a hearing transcript, Plaintiffs assert (IB:12-14) that the extent of what they addressed at the July 27 hearing was this: They objected to Defendants' use of a PowerPoint presentation and addressed

As detailed in the Facts section, Plaintiffs did not file a written response to the Motion and did not upload or disclose any opposing case law. See R:239; R:413. Further, there is also no transcript of the July 27, 2023 hearing and no proper substitute of that transcript. See Fla. R. App. P. 9.200(b)(5) (requirements for obtaining proper substitution of proceedings).

In short, there is no record substantiating the arguments that Plaintiffs allegedly presented in the trial court—until they moved for reconsideration. It was on reconsideration that Plaintiffs raised for the first time many of the arguments they have presented in their Initial Brief. See R:420-421 (***including new argument and law on*** “conspiracy ([Motion to Dismiss] pages 26-27), defamation ([*id.*] 33-35; 46-47), the element of publication (pages 48-49), and pleading privilege ([*id.*] 50-51),” which Plaintiffs could have argued before dismissal but chose not to). The court denied

[T]he “opinion” statement issue; the “election speech” issue, and once reaching the issue of “privilege” argued to the Trial Court that privilege issues are typically properly raised as affirmative defenses. While the Trial Court questioned Appellees’ counsel about that issue (the privilege issue), the Trial Court asked whether there were any other statements complained of, to which Appellants’ counsel responded with identifying the paragraph numbers of the Complaint where they were located in the Complaint ...”

Plaintiffs suggest they did not have enough time to argue at the hearing (IB:13-14), a point which Defendants contest (R:413, 416, 419), and which is undermined by Plaintiffs’ failure to request more time or a continuance if they in fact thought they needed additional time to preserve their arguments.

reconsideration, concluding that “the Motion for Reconsideration does not raise any viable issue, is discretionary with the Court and does not require any further hearing.” R:428-429.

The trial court was not required to consider Plaintiffs’ new arguments raised for the first time on reconsideration. As this Court explained in *Chris Thompson, P.A. v. GEICO Indemnity Co.*, 349 So.3d 447, 448-49 (Fla. 4th DCA 2022), a party risks not preserving issues for appeal if it waits until reconsideration to raise those issues for the first time:

It is true that “a trial court has the inherent authority to reconsider a non-final order and modify or retract it.” *Precision Tune Auto Care, Inc. v. Radcliff*, 731 So.2d 744, 745 (Fla. 4th DCA 1999). Yet, it is not an abuse of discretion to deny a motion for reconsideration which raises an issue that could have been, but was not, raised in a pre-hearing filing or at the entitlement hearing. See *Bank of Am., N.A. v. Bank of N.Y. Mellon*, 338 So.3d 338, 341 n.2 (Fla. 3d DCA 2022) (“A trial court does not abuse its discretion in denying a motion for reconsideration or rehearing which raises an issue that could have [been], but wasn’t, raised in the initial motion or at the initial hearing.”); see also *Kovic v. Kovic*, 336 So.3d 22, 25 (Fla. 4th DCA 2022) (stating that an issue was not preserved because “[t]he first time this argument was raised was in the motion for rehearing of the order on appeal”); *Best v. Educ. Affiliates, Inc.*, 82 So.3d 143, 146 (Fla. 4th DCA 2012) (declining to consider new evidence or argument raised for the first time in a motion for rehearing in the trial court); *Trinchitella v. D.R.F., Inc.*, 584 So.2d 35, 35 (Fla. 4th DCA 1991) (“We cannot consider the issues raised for the first time in a motion for rehearing in the trial court.”).

Accord Keech v. Yousef, 815 So.2d 718, 720 (Fla. 5th DCA 2002) (“The failure to preserve an issue for appellate review constitutes a waiver of the right to seek reversal based on that error.”).

Plaintiffs took that risk by not filing a written response to the Motion to Dismiss, by not transcribing or making a proper substitute of the July 27, 2023 hearing to show what specific legal arguments they presented at the hearing, and by waiting until reconsideration to raise new arguments. See *Sunset Harbour Condo. Ass’n v. Robbins*, 914 So.2d 925, 928 (Fla. 2005) (“to be preserved for further review by a higher court, an issue must be presented to the lower court and the **specific legal argument or ground to be argued on appeal** or review must be part of that presentation....”) (c.o.; emphasis added); *Kovic*, 336 So.3d at 25.

The result is that Plaintiffs waived the arguments in Point I of their Initial Brief because they did not properly and timely preserve them for appeal. Even if the Court accepts as preserved the *general* arguments that Plaintiffs assert they raised at the July 27 hearing (IB:13-14), at the very least, Plaintiffs waived the arguments that they decided to belatedly present for the first time on reconsideration (see R:420-421).

Plaintiffs also failed to preserve Point II of the Initial Brief, where they claim the court erred by not permitting them to amend based upon the same

statements the court found not to be actionable. IB:61-64. The reality is the court gave Plaintiffs the opportunity to amend and Plaintiffs declined. R:239-240; R:558-561. Although Plaintiffs' reconsideration motion alternatively asked for leave to amend, Plaintiffs did not submit a proposed amendment, and after moving for reconsideration, they again confirmed no intention of amending the complaint to assert any additional allegations. R:558-561.

“[F]ailure to raise an issue regarding an improper dismissal with prejudice at the trial level constitutes a waiver of this issue on appeal.” *Vorbeck v. Betancourt*, 107 So.3d 1142, 1148 (Fla. 3d DCA 2012) (c.o.). Plaintiffs did not preserve any argument that they should have been allowed to further amend the complaint to state a claim. Rather, Plaintiffs' position is that the court should have ruled that their defamation claims are actionable as alleged in the Amended Complaint—because all of the alleged defamatory statements are already “contained in the Amended Complaint.” R:561. That is an argument challenging the merits of the dismissal ruling, not a challenge to denial for leave to amend.

To the extent the Court disagrees with Defendants' position on lack of preservation and resulting waiver, Defendants address below the merits of the issues raised in Plaintiffs' Initial Brief.

II. The Trial Court Correctly Dismissed the Amended Complaint (addressing IB/Argument Point I)

A. Standard of Review

Defendants agree that a ruling on a motion to dismiss for failure to state a cause of action is reviewed *de novo*. *DHBH Atlantic L.L.C. v. City of Delray Beach*, 334 So.3d 332, 335 (Fla. 4th DCA 2022); see IB:26-27.

A motion to dismiss should be granted when, as here, a complaint fails to state a cause of action as a matter of law. *Skupin v. Hemisphere Media Group, Inc.*, 314 So.3d 353, 355-57 (Fla. 3d DCA 2020) (affirming dismissal of complaint with prejudice, determining as a matter of law that complaint was not actionable on any grounds alleged by plaintiff, including defamation, and “no amendment of the complaint would change the non-defamatory statements to defamatory ones”). “The complaint must set out the elements and the facts that support them so that the court and the defendant can clearly determine what is being alleged.” *Barrett v. City of Margate*, 743 So.2d 1160, 1162 (Fla. 4th DCA 1999); see Fla. R. Civ. P. 1.110(b) (“A pleading which sets forth a claim for relief ... must state a cause of action and shall contain ... a short and plain statement of the ultimate facts showing that the pleader is entitled to relief ...”).

In ruling on a motion to dismiss, the Court “must limit itself to the four corners of the complaint, including any attached or incorporated exhibits,

assuming the allegations in the complaint to be true and construing all reasonable inferences therefrom in favor of the non-moving party.” *Skupin*, 314 So.3d at 355-56 (c.o.). But the Court “need not accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party.” *Gallego v. Wells Fargo Bank, N.A.*, 276 So.3d 989, 990 (Fla. 3d DCA 2019) (“If legal conclusions are alleged [in a complaint], they are not deemed true for purposes of a motion to dismiss”) (c.o.); accord *Stein v. BBX Capital Corp.*, 241 So.3d 874, 876 (Fla. 4th DCA 2018) (“While we must accept the facts alleged as true and make all reasonable inferences in favor of the pleader, conclusory allegations are insufficient.”) (c.o.).

And “while affirmative defenses ... are generally raised in an answer, dismissal is proper where the facts that support the defense affirmatively appear on the face of the complaint and establish conclusively that the action is barred as a matter of law.” *Gastón v. NNN Investment Advisors*, 359 So.3d 1195, 1199 (Fla. 4th DCA 2023).

B. Plaintiffs Have No Actionable Claim for Defamation

The alleged defamation claims are based on three related theories—common law defamation, defamation per se, and defamation by implication. With one exception, each claim requires five elements: (1) publication to a

third party; (2) falsity; (3) fault in the making of the publication; (4) actual damages; and (5) the statement is defamatory. *Jews For Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1106 (Fla. 2008).⁵ Each Plaintiff must sufficiently allege each of these elements with well-pled operative facts against each separate Defendant. *Barrett*, 743 So.2d at 1162.

As the trial court correctly found (R:240), Plaintiffs failed to allege, among other elements, that the challenged statements are in fact defamatory:

The crux of the problem with the Plaintiffs' Complaint is that in the 48 pages of allegations, there is no claim that any of the statements are defamatory per se nor is there any pleading as to how the words are defamatory or of their defamatory character. The many quoted statements made throughout are opinions and campaign argument to vote yes and protected by the First Amendment ...

Plaintiffs ask this Court to reject the trial court's ruling based on: (1) the incorrect premise that the issue whether the statements are actionable is "more appropriately dealt with by the trier of fact at trial," IB:52 (see IB:49-52 [Point I.C.1]); and (2) the mistaken argument that "the actual allegations

⁵ Defamation by implication also requires allegations that the underlying statements are true. See *id.* at 1108 ("defamation by implication applies in circumstances where literally true statements are conveyed in such a way as to create a false impression").

of the Complaint belie [the trial courts] ‘findings,’” IB:40 (see IB:36-48 [Point I.B]). Both assertions are wrong.

On the first point, Plaintiffs overlook that courts decide, as a matter of law, whether the complained of words are actionable expressions of fact or non-actionable expression of opinion. *Skupin*, 314 So.3d at 356 (“in Florida, whether a statement is one of fact or opinion is a question of law for the court and not a jury”; “[f]urthermore, ‘[w]hether statements are privileged expressions of pure opinion or unprivileged mixed expressions of opinion is a question of law properly resolved by the trial court.’”);⁶ see *infra* Argument/Point II.B (more detailed discussion on these issues). The campaign rhetoric/opinions issue that Plaintiffs try to deflect was properly considered in a motion to dismiss.⁷

⁶ *Klayman v. Judicial Watch, Inc.*, 22 F.Supp.3d 1240, 1247 (S.D. Fla. 2014), on which Plaintiffs rely (IB:39, 42), is readily distinguishable. There, the court found that “on its face, the statement [in question] is reasonably capable of a defamatory meaning as it accuses Klayna of being convicted of a crime relating to his moral character.” Not so here, where the purported statements are not defamatory on their face. Plaintiffs are missing an entire step/element—the final element of defamation per se is not reached until a plaintiff first pleads an actual defamatory statement.

⁷ Plaintiffs’ attempt to limit campaign rhetoric only to voting campaigns where someone is elected (IB:49, 56) is without any cited support, and lacks any logical basis.

Second, the Amended Complaint—stripped of internally inconsistent factual claims, conclusory allegations, unwarranted deductions, and legal conclusions— belies Plaintiffs’ position that the statements are actionable. As demonstrated below, none of the allegations referenced in the Amended Complaint are actionable as defamatory statements. Because *on their face*, the statements allegedly made are not defamatory in nature but rather opinions and/or campaign rhetoric, the court properly dismissed the pleading even if based on an affirmative defense because the deficiency appears on the face of the complaint. See *Ozyesilpinar v. Reach PLC*, 365 So.3d 453, 460 (Fla. 3d DCA 2023); *Ramos v. Mast*, 789 So.2d 1226 (Fla. 4th DCA 2001).

- 1. Defendants’ statements (a) interpreting provisions of the Association’s Governing Documents and (b) about the potential sale of the Axis commercial units and concerns over the unknown use to which a prospective buyer might put those units cannot be actionable as defamatory statements because they are *not* statements “*about*” or “*concerning*” Plaintiffs.**

In addition to the fact that none of the statements complained about are defamatory in substance (an independent ground for dismissal detailed in the next section), most of the challenged statements are not actionable because they are not statements “*about*” Plaintiffs. Rather, they are: (1) statements of opinion about the Board’s powers under the Association’s

Governing Documents and law; or (2) statements that Axis had listed its units for sale, and that it was unknown who might purchase those units or what type of business they may operate thereafter. R:115-119[¶¶47-50], 120-122[¶¶54-55]; 123-137[¶¶60-67].

The challenged statements were pro-sale and made during the campaign leading up to the Association's vote on whether to approve the sale of its rooftop units to LIG. See R:115-122[¶¶46-55] (the alleged "*False Statements/Publications Made by Defendants to Induce LORH Owners to Vote in Favor of LIG's Acquisition of Rooftop Units/The Lead Up to the Vote for Approval of LIG's Offer to Purchase Rooftop Units/The Subject Vote*"—general allegations realleged in Counts I-III).

As alleged, one of Defendants' concerns at that time was that Plaintiffs had obtained City approval to convert their space into a restaurant and that Plaintiffs had put the space up for sale. Fearing what use an unknown potential commercial buyer might make of the space in the building where they live, Defendants campaigned to approve the sale of the 2 rooftop units to LIG. The significance being that, if the sale of these units to LIG were to be approved and the sale consummated, LIG would replace the Axis owners as the commercial unit owners holding the majority of votes necessary to

elect the 2 commercial unit owner allocated directors to the Association's Board.

As seen on the face of their statements, Defendants were voicing their positions on the vote to their fellow Association members with the aim of persuading Association members to vote to approve the sale. More specifically, they vowed to: support commercial Board candidates who would prioritize the interests of all Association members (residential and commercial), not just the commercial unit owners; and to pursue rules, policies and regulations permitted by the Declaration to protect the building's living environment in the event a new business purchases the Axis units and disrupts the building's environment.

For example, as alleged in Paragraph 48 (R:116-117; original emphasis in Amended Complaint), Defendant "LIG through Klein" advised fellow Association members that:

[T]he owners of Axis Space have listed Axis Space for immediate sale with a major commercial brokerage. **While trying their best to intimidate and threaten the Association**, residents and other commercial owners merely for following the exact required legal procedures set out in our Bylaws, **the owners of Axis Space are simultaneously planning to exit our building and are actively seeking new businesses to occupy Axis's large space in our building (without ever disclosing that critical information to us---unless those very few residents supporting Axis knew but chose not to tell us).**

Why are the stakes now higher than ever? No one can possibly have any idea what new businesses Axis will bring into our building. Restaurants? Bars? Retail stores? Fast food outlets? Music venues? No one can possibly know. Anyone familiar with the very serious disruptions, traffic, loud music and noise caused to nearby residents (e.g., the Grand and Icon) by the Salt7 bar/restaurant in the Icon knows that the very real dangers now posed to River House's living environment are immense and must be taken seriously. **We should be vitally concerned that equity values in our building will fall considerably and substantially if our Board is not in a position to protect us by issuing appropriate rules, policies and regulations to respond to this very concerning situation and to protect our building's living environment.**

Unless we protect ourselves by voting to approve the sale of the Roof Units, brand new businesses about to be brought into River House by Axis's owners will control the same two commercial Board seats now occupied by Axis's owners. There is no possible way of knowing how new commercial business owners, controlling 40% of our Board (2 of 5 Board seats), will act; what policies they will pursue; what protections for us they will try to veto; what regulations (e.g., noise, odors, traffic, parking) they will oppose.

Our group consists of thirteen highly concerned residents today and, we hope, will include many more of our fellow residents in the future. We strongly urge and encourage you, our fellow residents, to join us, join our efforts to **protect our building**, join our efforts to re-gain control of our Board, join our LLC and become fellow residents/commercial owners, and actively participate in choosing the two commercial Board members **so that our Board will be able to protect our rights and home equity interests in light of this serious and concerning situation.**

Please vote YES to approve the sale of the Roof Units to help us protect and preserve our homes in River House. Now is the time to act before it is too late.

In another post (R:130-131[¶64]; original emphasis in Amended Complaint), Defendant Chircus urged unit owners to approve the sale, in part, because:

We should be deeply concerned about what businesses the Axis owners will impose upon us when they sell. Fortunately, our Board is empowered to set reasonable policies, rules and regulations to protect those living here. For instance, were the Axis owners to sell to a large, busy restaurant or nightclub, the Board may pass reasonable regulations dealing with maximum noise levels, odors, crowds, traffic, valet parking, food deliveries, alcohol, use of our facilities (gym, pool) by restaurant customers, etc. The Board can regulate the everyday operations of our building with reasonable policies, rules and regulations. That is why this vote is so vitally important to all of us. . . .

The statements addressed in Paragraphs 47 (R:115-116), 49 (R:117-118), 50 (R:118), 54 (R:120-121), 63 (R:129-130), 64 (R:131-134), 66 (R:134-136) are to the same effect.

None of these statements are actionable because they do not claim any wrongdoing had occurred, and they are not statements **“about”** or **“concerning”** Plaintiffs. As to statements regarding future harm that may occur from Plaintiffs’ sale of their units to unknown buyers, those statements are definitionally incapable of being statements **“about”** or **“concerning”** any Plaintiff or statements of fact. That is because they only express concern over what the future might possibly bring. In any event, the statements of future concerns are not directed at anything any Plaintiff did; they are

directed at potential buyers and what they may do. In sum, they are not statements of existing fact required for defamation.

Likewise, Defendants' statements regarding the Board's authority under the Association's Governing documents are not "**about**" or "**concerning**" Plaintiffs. Those statements concern Defendants' *interpretation* of the Board's authority under the Association's Governing Documents to pass reasonable rules and regulations as to the use of the commercial units. See R:100[¶23], 104[¶28], 107-111[¶¶34-35], 113[¶41], 117-118[¶49], 126-128[¶61], 134-136[¶66], 141[¶84]. Plaintiffs' assertion of defamation is that their interpretation of the Association's Governing Documents (an opinion) is correct, and Defendants' *interpretation* (opinion) of the Governing Documents voiced in their campaign statements to Association members is mistaken.

However, just like the statements made regarding a potential buyer of Plaintiffs' units, whether Plaintiffs' or Defendants' interpretation of the Governing Documents is accurate or inaccurate is immaterial because Defendants' statements about the Board's authority under the Association's Governing Documents are not statements "**about**" Plaintiffs. Statements regarding an interpretation of the Governing Documents does not constitute

a defamatory statement against anyone. As a matter of law, those statements cannot support a defamation claim.

Additionally, Defendants' interpretation of the Board's rights and powers under the Governing Documents are not actionable because they are merely statements of their opinions, not statements of fact. See *Flogrown, LLC v. Dixie Heritage, LLC*, 2019 WL 12536735, *2 (M.D. Fla. Jan. 28, 2019) (where speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable); *Northeast Ohio College of Massotherapy v. Burek*, 1999 WL 34781568 (Ohio Com. Pl. Sept. 14, 1999) (statements regarding as to interpretation of agreement do not constitute defamation, interpretation or opinion, are incapable of truth or falsity, and are not "of and concerning" plaintiff). See R:166 (citing *Flogrown* and *Northeast Ohio* in support of dismissal).

Plaintiffs' Initial Brief addresses only *Flogrown* (in the context of arguing that the issue should be decided at trial) and then only to summarily conclude that "*Flo[]grown* is inapposite as Appellants have clearly alleged false statements of fact published by the Appellee Co-Conspirators concerning Plaintiffs." IB:50. Plaintiffs do not, and cannot, dispute that one's

interpretation of the Association's Governing Documents is merely an opinion, not a statement of fact that can support a defamation claim.

2. All other statements allegedly made are campaign rhetoric or merely expressions of Defendants' opinions.

The other challenged statements are, on their face, Defendants' opinions that Plaintiffs Yokana and Vela, as Board members elected by the commercial unit owners, acted in the interests of the commercial units, not the Condominium as a whole. R:115-117[¶¶46-49], 123-137[¶¶60-67]. Those statements are not actionable statements of fact—they are only opinions about what those campaigning for the sale vote believed was best for the Association community based on disclosed facts and concerns (the concern over the fact that Yokana and Vela have the *right* to look after the interests of the Commercial Unit owners, as opposed to all unit owners, the fact that the Axis units were for sale, and the concern of potential unwanted use by an unknown purchaser).

“Pure opinions’ are not actionable out of a deference for free speech and the First Amendment.” *Scott v. Busch*, 907 So.2d 662, 668 (Fla. 5th DCA 2005) (citing, e.g., *DeMoya v. Walsh*, 441 So.2d 1120 (Fla. 3d DCA 1983), in which the Third District held that “Appellee’s characterization of his government co-worker as a ‘raving maniac’ and ‘raving idiot’, during the course of a heated professional disagreement in the presence of a small

group of other co-workers, may have been personally insulting, but did not constitute actionable slander”; “as a matter of law, the statements sued on were pure opinion based on disclosed facts.”) (c.o.).

To determine if an allegedly defamatory statement constitutes an actionable statement of fact, courts must examine the statement in its totality, including but not limited to: the context in which the statement was made, the medium used, the audience to which it was published, and any cautionary terms used by the speaker to indicate that the statements were the author’s opinion. See *Hay v. Independent Newspapers, Inc.*, 450 So.2d 293, 295 (Fla. 2d DCA 1984). The use of “cautionary” terms such as “I believe” or “in my experience,” show that the speaker is presenting an opinion. See *Borislav v. Canaccord Genuity Group Inc.*, 2014 WL 12580259, *4 (S.D. Fla. June 27, 2014); *Rasmussen v. Collier Cnty. Publ’g Co.*, 946 So.2d 567, 571 (Fla. 2d DCA 2006).

Here, based on the totality of the circumstances as alleged in the Amended Complaint, the challenged statements are non-actionable opinions. First, context, medium, and audience: the statements were made to other members and community parties of the Association during the campaign for the sale vote—with certain Defendants stating their position on the vote and conveying their opinion as to why other unit owners should vote

yes. The statements were communicated through the Association's closed-system, BuildingLink, which is available only to Association members, directors and agents. The subject matter of the opinions and campaign rhetoric communicated in that context involved a matter of concern to all unit owners. See *White Egret Condo., Inc. v. Franklin*, 379 So.2d 346, 350 (Fla. 1979) ("Condominium unit owners comprise a little democratic sub society ...") (c.o.). As such, the statements were highly protected to avoid chilling that speech. See *N.Y. Times Co. v. Sullivan*, 376 US. 254, 270 (1964) (the protections of the First Amendment embody "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

Next, use of cautionary terms: the statements used cautionary terms extensively, letting the other Association members know that Defendants were conveying their opinions, nothing more. For example, Defendants used the following cautionary words:

- "I believe ..." (Klein, R:115-116[¶47], 123-126[¶60], 126-129[¶61]);
- "In my view ..." (Klein, R:123-126[¶60], 126-129[¶61]);
- "In my experience ..." (Klein, R:115[¶46], R: 123-126[¶60]);
- "I hope you will give due consideration to my thoughts" (Chircus, ¶54);

- “what I believe ...” (Chircus, R:120-121[¶54], 130-131[¶64]);
- The subject of one of the complained of posts was “Personal Thoughts...” (Chircus, R:144);
- When speaking about Yokana and Vela, their voting patterns “appeared to be...” (Klein, R:123-126[¶60]);
- “I encourage you to contemplate...” (Weiss, R:128-129[¶62]);
- “we need a Board that will have the needed votes to pass protective rules, regulations and policies...” (LIG, R:134-136[¶66]); and
- “wouldn’t you rather have a group of concerned owners who care about our quality of life helping to choose the 2 commercial board seats ...” (E.Rolnick, R:136-137[¶67]).

Plaintiffs’ acknowledge that the test, as set out in *Hay*, requires a holistic view of the circumstances in which the statements were made and their substance, but then they do not actually apply the test. See IB:50-52. Instead of analyzing the totality of the circumstances (the full import of the statements’ context, audience, and cautionary words as discussed above), Plaintiffs merely offer the unsupported conclusion that “a full examination of all the words contained in the alleged statements clearly supports Appellants’

claims for defamation.” IB:51. The only basis Plaintiffs provide for this conclusion is that they say so.

Plaintiffs also overlook that their own allegations confirm Defendants were expressing their opinions and advocating for their position on the vote. They expressly described Defendants’ speech as “**advocating a rationale**” for a “yes” vote. R:115[¶46] (emphasis added); see R:106[¶33]. Plaintiffs own allegations as read, and as contained within the four corners of the complaint, show the purported statements are merely statements of opinion.

Looking at the totality of the circumstances, the trial court correctly recognized that, accepting Plaintiffs’ allegations as true, Defendants’ words are merely their opinions voiced during a campaign vote, which are not wrongful and do not constitute defamation. Dismissal of Counts I-III was proper on this issue.

- 3. Even if the challenged statements had been “*about*” Plaintiffs and were statements of fact rather than *opinion*, they are still *not* actionable because, as a matter of law, none are *defamatory*.**

To state a claim for defamation, a plaintiff must show that the defendant published false and ***defamatory*** statements of fact concerning plaintiff, without reasonable care as to whether those statements were true or false, which resulted in actual damage to the plaintiff. *American Airlines, Inc. v. Geddes*, 960 So.2d 830, 833 (Fla. 3d DCA 2007). Words are defamatory

when they tend to subject one to hatred, distrust, ridicule, contempt or disgrace, or tend to injure one in one's business or profession. *Id.*

If the words at issue are not defamatory per se, then to claim defamation, a plaintiff must plead *how* the words are defamatory *or their defamatory character*; it is insufficient merely to allege as a legal conclusion that the words are false and defamatory. See *Perez*, 823 F.Supp. at 938 (alleged defamation not actionable per se, where there was no allegation explaining the defamatory character) (citing *Cooper v. Miami Herald Publishing Co.*, 31 So.2d 382 (Fla. 1947); *McCrary*, 147 So. at 260).

To pursue a defamation per se claim, a plaintiff must plead and prove statements that are so “obviously defamatory and damaging to [plaintiff’s] reputation[.]” *Wolfson v. Kirk*, 273 So.2d 774, 776 (Fla. 4th DCA 1973) (c.o.); A published statement is libelous per se if: “(1) it charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to hatred, distrust, ridicule, contempt, or disgrace; or (4) it tends to injure one in his trade or profession.” *Richard v. Gray*, 62 So.2d 597, 598 (Fla.1953) (en banc) (c.o.).

Here, in the context of an Association vote campaign, it is not defamatory to say that the directors elected by the commercial unit owners acted in the interest of the Commercial Units; and/or that the Axis commercial

units had been listed for sale and, not knowing what type of business the new owner may operate, there was concern over what inconvenience or nuisance (to other Association members) might follow. None of those statements, alone or in combination, could subject any of the corporate Plaintiffs to hatred, distrust, ridicule, contempt, or disgrace or tends to injure any of them in their business or profession because they are not statements about them.

As to the former director plaintiffs, arguments that they were accused of improper conduct (i.e., by acting in the interest of the commercial unit owners) is specifically negated by the challenged statements. As alleged, the challenged statements never state it was improper for Yokana and Vela to vote in the interests of the Commercial Unit owners or that there was a requirement for the Commercial Unit owners (or their designated directors) to act only to benefit the Association as a whole. ***To the contrary, the challenged statements specifically state that Yokana and Vela had the right to vote solely in the interests of the Commercial Unit owners.*** See R:132[¶64], alleging Defendant Chircus posted:

“The historical **problem we have** and still face with current voting restrictions for the roof units **are the perpetual seating of 2 commercial directors annually who need not serve the interests of the Association as a whole, but rather can and do push self-serving interests.**”) (original emphasis in Amended Complaint).

It was precisely because the Commercial Unit directors had that right, that the unit owners were being urged to support the sale of the rooftop units to LIG, so that the concerns arising from the directors' right could be avoided. Because the statements do *not* accuse Yokana or Vela of acting improperly, but rather acknowledged they "can and do" vote in the interest of the controlling commercial units who elected them, these statements cannot subject them (much less any of the other Plaintiffs) to hatred, distrust, ridicule, contempt, or disgrace or tend to injure any of them in their business or profession.⁸

As to the statements regarding the sale of the Axis commercial units, or the uncertainty of what any eventual buyer would do with the property, there is no allegation that the statements are false (another necessary element for defamation). In any event, these statements cannot be defamatory because no reasonable person could dispute that a property owner has the right to sell their property at the best price they can obtain.

⁸ Even if Yokana and Vela had been accused of acting improperly by voting in the interests of the Commercial Unit owners, rather than the interests of all Condominium owners, that would not be enough to constitute defamation per se. See *Berenato v. Tonkel*, 2012 WL 473933, *2 (M.D. Fla. Feb. 14, 2012) (statements that President of condominium homeowners' association took action that seriously harmed the association's interests "falls well short of Florida's threshold for slander per se.").

Accordingly, as a matter of law, such a statement cannot subject any Plaintiff to hatred, distrust, ridicule, contempt or disgrace or tend to injure them in their business or profession. Likewise, any statements regarding what a potential buyer may do with the rooftop units after purchasing them are not about any of the Plaintiffs, are speculative expressions of concern about what might happen, and under settled law cannot be defamatory of Plaintiffs.

In sum, as a matter of law the challenged statements are not defamatory, and the claims were properly dismissed.

4. There is no allegation that *any* Defendant made *any* statement regarding Plaintiffs LOBC, LOBC2, or Axis.

Even if any of the statements could be deemed defamatory statements of fact, the Amended Complaint would still need to be dismissed as to Plaintiffs who fail to plead that any statement was directed at them. LOBC and LOBC2 are listed as parties to *each* of the three counts in the Amended Complaint, but there is no allegation that any Defendant made any statement (defamatory or otherwise) against either entity. Without those allegations, claims by LOBC and LOBC2 were properly dismissed. *Geddes*, 960 So.2d at 833.

The same is true for Plaintiff Axis. Plaintiffs allege that Axis is only the holding company for LOBC and LOBC2 and that it manages the business operated in the Axis commercial units. Importantly, Plaintiffs do not allege

that any Defendant made statements directed at Axis. In the context of the campaign in which this dispute arose, that makes sense because Axis has no vote or involvement in the Association. There are no allegations made in the Amended Complaint that give rise to any claims by Axis or even any basis to afford Axis standing to assert any claims. The dismissal of Axis' claims was proper and should be affirmed.

Without any meaningful analysis, Plaintiffs ask the Court to reject this point because "it is quite clear from a simple reading of the alleged Defamatory Statements that the Appellee Co-Conspirators made defamatory statements against all of the Appellants, whether they did so by name, or by reference (i.e., by using the moniker – Axis they were actually referring to LOBC and LOBC2 as is alleged in the Complaint in Paragraphs 29-31)." IB:53. That is contrary to Florida's pleading requirements and calls for an unwarranted deduction based on conclusions asserted in the Amended Complaint. See *Barrett*, 743 So.2d at 1162; *Gallego*, 276 So.3d at 990.

5. Plaintiffs also failed to allege that 6 of the 9 Defendants made *any* statements regarding *any* Plaintiff.

Plaintiffs do not dispute that 6 of the 9 Defendants did not make *any* statements regarding *any* Plaintiff, nor do they propose they could amend to address that deficiency. See IB:34-35, 53-54 & n.29. Instead, their only

response to this point is that “Florida law does not require each of them to have made a statement in this instance – they merely had to have been a member of the conspiracy.” IB:34 (emphasis omitted). Except that, as discussed in the next section, there is no actionable conspiracy pled. As a result, the Amended Complaint cannot survive as to 6 of the 9 Defendants who made no statements regarding any Plaintiff, a necessary element to any defamation claim.

First, the Amended Complaint contains no allegation that Defendant Yaroslawitz made any statements of any kind on any topic.

Second, the Amended Complaint fails to allege any defamatory statements *from* Defendants Barrett, Bial, A.Rolnick, E.Rolnick, and LIG *to* any Plaintiff in any of the three defamation claims.

With respect to Defendants Barrett, Bial, A.Rolnick, E.Rolnick, and LIG, the Amended Complaint lumps them together as a unit in two paragraphs (R:119[¶51], 129-130[¶63]) to allege that they made statements—but ***not “about” Plaintiffs***; rather, Plaintiffs take issue with statements those Defendants made about the powers of the Board to pass reasonable regulations for the use of the Commercial Units. See Point II.B.1. The additional problem for Plaintiffs is that lumping those Defendants together is insufficient because each Plaintiff must inform each Defendant of

each statement allegedly made upon which the claim is made. See *Barrett*, 743 So.2d at 1162.

The only other place Plaintiffs mentioned Defendant E.Rolnick is in paragraph 67 (R:136-137), where they alleged that she voiced her opinion and position on the vote to other unit owners:

Wouldn't you rather have a group of concerned owners who care about our quality of life helping to choose the 2 commercial board seats, rather than the Axis commercial space controlling 2 Board seats in perpetuity?

Please vote yes! **It's not too late. You can still change your no vote to a YES.**

As discussed in Argument/Point II, those statements, on their face, constitute campaign rhetoric and opinion, which are not actionable.

Third, there is no allegation in Counts II and III that Defendant Chircus made any statements that are the subject of those two claims. See R:138-140 [Count II], 140-143 [Count III]; cf. R:12-121[¶54], 130-134[¶64].

C. Plaintiffs Have No Actionable Claim for Civil Conspiracy

For the reasons discussed in Point II.B, the challenged statements are not defamatory and Plaintiffs have no actionable claim for defamation. Without the underlying defamation claim, Plaintiffs have no basis to claim any conspiracy. *Gastón*, 359 So.3d at 1200 (“Without a tort, there can be no conspiracy to commit a tort.”).

But even if there was a viable underlying defamation claim, as a matter of law, the allegations do not give rise to a conspiracy. To state a claim for civil conspiracy, Plaintiffs were required to allege: “(1) an agreement between two or more parties, (2) to do an unlawful act or to do a lawful act by unlawful means, (3) the doing of some overt act in pursuance of the conspiracy, and (4) damage to plaintiff as a result of the acts done under the conspiracy.” *Raimi v. Furlong*, 702 So.2d 1273, 1284 (Fla. 3d DCA 1997).

As the trial court ruled (R:240[¶4]) (c.o.), Plaintiffs’ conspiracy allegations are insufficient as a matter of law because:

The problem with [Plaintiffs’ conspiracy] theory is that the elements of a civil conspiracy are impossible to plead. Everyone involved is a member of the association or one of the pled LLC's and the entity can only act through its members, there’s no alleged third party to conspire with. The conspiracy theory also fails because a conspiracy requires an agreement to do ‘an unlawful act or do a lawful act by unlawful means.’ This element is completely missing in spite of the extensive facts pled in the Complaint. The Plaintiffs can’t lump these statements together in each count and they must be pled with particularity. (internal citations omitted)

Plaintiffs try to deflect this issue, too. IB:53-55 (arguing the Court should not consider either that the Amended Complaint does not allege 6 of the 9 Defendants made any statements about Plaintiffs or the argument on the intra-corporate conspiracy doctrine). Plaintiffs’ position has no merit.

As argued in the Motion (R:175-178), Plaintiffs do not meet the

requirements for pleading civil conspiracy for the following reasons.

First, Plaintiffs' conspiracy allegations are based on mere legal conclusions. For example, Plaintiffs make no factual allegations as to the first element—an alleged agreement between the Defendants. Without alleging any facts as to who, how, when and where, Plaintiffs merely assert the legal conclusion that a conspiracy existed and do so solely “based upon information and belief.” R:111[¶37].

Pleading on information and belief that an agreement was entered, without supporting facts, is insufficient as a matter of law. *De Ford v. Koutoulas*, 2023 WL 2709816 (M.D. Fla. Mar. 30, 2023) (also noting that parallel conduct by the defendants does not suffice to plead a conspiracy agreement); *AT&T Mobility LLC v. Phone Card Warehouse, Inc.*, 2009 WL 10671270, *4 (M.D. Fla. June 25, 2009) (dismissing conspiracy claim where allegations of conspiratorial agreement were pled upon information and belief because such pleading is “simply a variation of pleading an element of a cause of action without factual support and will not withstand a motion to dismiss.”).

Plaintiffs cannot merely surmise by insufficient conclusions that an agreement was reached. They were required to allege with particularity a factual predicate for that conclusion, and failed to do so.

Second, the intra-corporate conspiracy doctrine forecloses any conspiracy claim between LIG and its members (Defendants Klein, Weiss, Barrett, Bial, A.Rolnick and E.Rolnick). Contrary to Plaintiffs' assertion (IB:54-55), the court did not go outside the four corners of the Amended Complaint to decide this issue. The facts supporting this defense affirmatively appear on the face of the Amended Complaint and establish conclusively that the action is barred as a matter of law. *Gastón*, 359 So.3d at 1199.

The Amended Complaint alleges that Defendants are LIG members, residential unit owners, and/or Association directors who made statements to persuade other Association members to vote to approve LIG's purchase of the rooftop units. See Facts/Point I (Nature of the Case, which identifies Defendants' roles as alleged in the Amended Complaint). Plaintiffs' conclusory allegation that—despite Defendants' alleged ties to LIG, their status within the Association, and the goal of their statements—they acted solely in their individual capacities, is not a conclusion the Court must accept. *Stein*, 241 So.3d at 876 (“conclusory allegations are insufficient.”) (c.o.).

An essential element of a conspiracy is an agreement “between two or more persons.” *World Class*, 731 So.2d at 799. A business entity is not a separate legal party from its members. As a result, under Florida's intra-

corporate conspiracy doctrine, a corporation's agents, employees, officers, or those acting within the scope of their employment as agents of the corporation, are deemed incapable as a matter of law to conspire among themselves or with the corporation. See *Weisman v. Southern Wine & Spirits of America, Inc.*, 297 So.3d 646 (Fla. 4th DCA 2020) (corporate agents could not conspire with corporation because their actions are attributed to the corporation itself, thereby negating the multiplicity of actors needed for conspiracy); *Mancinelli v. Davis*, 217 So.3d 1034 (Fla. 4th DCA 2017) (because a civil conspiracy requires an agreement between two or more parties, it is not possible for a single legal entity consisting of the corporation and its agents to conspire with itself). Thus, as a matter of law, LIG could not have conspired with its members, with other members of the Association or with their representatives.

Third, Plaintiffs failed to allege the second element of a conspiracy—an underlying actionable tort or wrongdoing. They merely alleged the “ultimate goal” of the conspiracy was to “obtain control over the Commercial [Director] Seats” on the Association’s Board *through* LIG’s purchase of the 2 rooftop units, thereby securing 4 of the 7 votes for the commercial director seats. R:107[¶35], 122-123[¶59]; see R:112[¶38] (making legal conclusions about the goal of the conspiracy and based only “upon information and

belief”). But they did not allege anything tortious, wrongful, or inconsistent with the Association’s Governing Documents about LIG’s purchase of the rooftop units, which the Association voted to approve. Had there been anything unlawful or inconsistent with the Association’s Governing Documents, Plaintiffs could have challenged the vote or outcome, but they did not. Without identifying an underlying tort or wrong, Plaintiffs have no actionable conspiracy to pursue.

Fourth, nor do Plaintiffs allege with particularity any acts to satisfy the third prong of a conspiracy—that each Defendant took some action to further the conspiracy. The only actions alleged to have been taken by the alleged co-conspirators was the making of defamatory statements. But, as discussed above (Point II.B.5), 6 of the Defendants made no statements about Plaintiffs. Without allegations that those 6 Defendants took *any* action in furtherance of a conspiracy, they cannot be charged with a conspiracy and thereby held responsible for statements made by others.

Because Plaintiffs cannot state an actionable conspiracy, they must plead each element of defamation as to each Defendant. As discussed above, Plaintiffs cannot satisfy that requirement: they failed to allege that 6 of the 9 Defendants made any statements about any Plaintiff and they have confirmed that all of the alleged defamatory statements are already

contained in the Amended Complaint. Plaintiffs' inability to allege any type of defamatory statement, much less allege any statements from 6 of the 9 defendants, is fatal to their position. See *Buckner v. Lower Florida Keys Hosp. Dist.*, 403 So.2d 1025, 1026 (Fla. 3d DCA 1981) (To support claim for conspiracy to defame, plaintiff must "properly allege those elements which would establish a defamation ... [Plaintiff] failed to allege a publication and therefore failed to state a cause of action for conspiracy to defame.").

In short, Plaintiffs' conspiracy allegations are insufficient and cannot be cured. While no defamatory statements were sufficiently alleged as to any Defendant, the claims against the 6 Defendants who made no statements regarding any Plaintiff were correctly dismissed with prejudice even if any defamatory statement had been alleged as to others.

D. Additional Deficiencies That Warrant Dismissal (*addressing IB/Argument Points I.C.5 and 6*)

Although not specifically discussed in the 8/7/23 Order, nor necessary to affirm the judgment, the court also found that the Amended Complaint is subject to dismissal because of other arguments raised in the Motion—including that the publication and malice elements were not met. R:239[¶3], 240[¶1].

1. Plaintiffs cannot plead an actionable “publication”

“A defamatory statement does not become actionable ... until it is published or communicated to a third person; statements made to the person alleging the defamation do not qualify.” *Hullick v. Gibraltar Priv. Bank & Tr. Co.*, 279 So.3d 809, 812 (Fla. 3d DCA 2019) (c.o.). “[S]tatements made to corporate executive or managerial employees of [corporate] entity are, in effect, being made to the corporation itself, and thus lack the essential element of publication.” *Id.* (c.o.)

As alleged, the statements were made by Association members (Defendants) solely to fellow Association members or their agents on the Association’s closed-system, BuildingLink, which is available only to Association members and their agents. R:115[¶46 & n.5], 117-118[¶49], 118-119[¶51], 129-130[¶63]. Because the Association members are all part of the same entity (the Association), Defendants’ comments to other Association members is not a publication to a third party.

Plaintiffs’ allegation that the Association’s property management company or agents of other members also had access to BuildingLink are immaterial and insufficient. R:115[¶46 & n.5]. Agents of the Association or its members are not third parties, and, therefore, cannot satisfy the publication element. *Las Olas River House Condo. Ass’n, Inc. v. LORH*,

LLC, 181 So.3d 556, 558-559 (Fla. 4th DCA 2015) (finding that communications between legal counsel to the Las Olas River House Condominium Association—the Association involved in this case—and its management company may be attorney-client privileged because the management company is an agent of the Association).

2. Plaintiffs failed to allege “express malice” in any count and failed to adequately allege “actual malice” in Counts I and III (*addressing IB/Point I.C.4*)

Actual Malice. Contrary to Plaintiffs’ assertion (IB:55-56), as alleged in the Amended Complaint, Plaintiffs Yokana and Vela served as directors on the Association’s Board (R:110), and by virtue of holding those positions, they are limited public figures as a matter of law and an allegation of actual malice is required. See *Verna v. Links at Valleybrook Neighborhood Ass’n, Inc.*, 371 N.J. Super. 77, 82-84 (N.J. Sup. Ct. 2004) (holding that, in context of asserting defamation claim, candidate for election to association’s board of directors should be considered a “public figure”); *Cabrera v. Alam*, 197 Cal. App.4th 1077, 1092-1093 (Cal. 4th Dist. App. 2011) (in case involving alleged defamatory statements by current board member of homeowners’ association against past president of association board of directors, past president was limited purpose public figure). Actual malice *must* be pled with

facts, not mere legal conclusions. *W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc.*, 728 So.2d 297, 300 (Fla. 1st DCA 1999).

In Counts I and III, Plaintiffs' fault allegations are that the statements were made with "improper motives," "actual malice," and "with knowledge that the statements were false and/or were made with reckless disregard of whether they were false or not." R:137[¶70], 142[¶86]. Those empty legal conclusions do not show facts constituting malice and are insufficient as a matter of law.

Express Malice. Plaintiffs were required to plead express malice because the allegations within the four corners of the Amended Complaint show that a common interest privilege exists. *Nodar v. Galbreath*, 462 So.2d 803, 809-810 (Fla. 1984) ("A communication made in good faith on any subject matter by one having an interest therein, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which would otherwise be actionable, and though the duty is not a legal one but only a moral or social obligation.").

"Common interests are usually found among members of identifiable groups in which members share similar goals or values or cooperate in a single endeavor...The idea is to promote free exchange of relevant information among those engaged in a common enterprise or activity and to

permit them to make appropriate internal communications and share consultations without fear of suit.” *Falic v. Legg Mason Wood Walker, Inc.*, 347 F.Supp.2d 1260, 1266 (S.D. Fla. 2004); see *Loeb v. Geronemus*, 66 So.2d 241 (Fla. 1953) (generally, statements and communications within organization, made in connection with activities of organization, enjoy qualified privilege).

As alleged, Defendants share a common interest with the other Association members to whom the challenged statements were made, and particularly as to the vote to approve the sale of the rooftop units. All Association members are affected by, *inter alia*, the activities within the Condominium. The sale of the rooftop units was subject to an Association vote as to whether it should be sold to LIG. As alleged, Defendants were “advocating” (R:115[¶46]) a position and “rationale” to other Association members in which those other members had a common stake.

Where, as here, a privilege exists, the statements of common interest are cloaked with a legal presumption of good faith. *Nodar*, 462 So.2d at 810. To overcome this presumption, a plaintiff bears the burden of alleging and proving the words were made with express malice—that is, that the defendant made the statement with the primary intent to injure the plaintiff. *Id.* at 806, 811-812 (“Strong, angry, or intemperate words do not alone show

express malice... If the occasion of the communication is privileged because of a proper interest to be protected, and the defamer is motivated by a desire to protect that interest, he does not forfeit the privilege merely because he also in fact feels hostility or ill will toward the plaintiff. The incidental gratification of personal feelings of indignation is not sufficient to defeat the privilege where the primary motivation is within the scope of the privilege.”) (c.o. and internal quotations omitted).

The Amended Complaint does not allege express malice, which is another deficiency that warrants dismissal.

E. The Ruling on the Motion to Dismiss Was Based Solely on the Defects Within the Four Corners of the Amended Complaint (*addressing IB/Argument Point I.D*)

Plaintiffs argue the court went outside the four corners of the Amended Complaint by considering the demonstrative PowerPoint that Defendants used during the July 27, 2023 hearing as a visual aid. IB:59-61 (Point I.D). Not so. The record shows that (1) the PowerPoint merely highlighted the arguments contained in the Motion to Dismiss, which were limited to the allegations made in the Amended Complaint (*see* R:148-189; *compare with* R:210-224); and (2) there is no indication in the record that the court’s ruling was based on anything outside the four corners of the Amended Complaint (*see* R:239-240; R:557; *supra* n.1 [dismissal was not based on any ancillary

facts, such as what the Condominium looks like or its location]).

III. The Trial Court Did Not Abuse Its Discretion In Dismissing the Amended Complaint With Prejudice (*addressing IB/Argument Point II*)

Defendants agree the decision to dismiss with prejudice is reviewed for abuse of discretion. *Transflorida Bank v. Miller*, 576 So.2d 752, 753 (Fla. 4th DCA 1991); see IB:27.

As discussed in Argument/Point II, it is legally impossible for Plaintiffs, based upon the statements pled, to state a claim for defamation as a matter of law. The court gave Plaintiffs leave to file a Second Amended Complaint to allege any additional statements they considered defamatory. Plaintiffs confirmed there are no other statements at issue and, as a result, they chose not to amend again because they have no basis to do so.

Based on those facts and representations, the court properly dismissed Plaintiffs' claims with prejudice. *Skupin*, 314 So.3d at 357 (dismissing complaint, including defamation claim, with prejudice because "no amendment of the complaint would change the non-defamatory statements to defamatory ones"); accord *Bortell v. White Mountains Ins. Grp., Ltd.*, 2 So.3d 1041, 1049 (Fla. 4th DCA 2009) (affirming dismissal with prejudice after plaintiff already had been given opportunity to amend complaint to correct pleading deficiency and failed to do so); *Gladstone v.*

Smith, 729 So.2d 1002, 1003 (Fla. 4th DCA 1999) (claim may be dismissed with prejudice when it is “apparent that the pleading cannot be amended to state a cause of action”) (c.o.).

From Plaintiffs’ standpoint, the defamation claims alleged in the Amended Complaint were actionable as is and, in the trial court, they offered no basis or willingness to amend. We remain in the same position now. Plaintiffs’ argument that they should be given “liberal” leave to amend their pleading is really just an argument that they should be allowed to proceed with the claims they alleged in the Amended Complaint. That is not a basis for leave to amend—it is a challenge to the dismissal ruling, which Defendants have addressed in Point II above.

CONCLUSION

Appellees respectfully ask the Court to affirm the Final Judgment.

Respectfully submitted,

By: /s/ Geoffrey L. Travis

Geoffrey L. Travis, FBN 988812
gtravis@shutts.com

Stephen Gillman, FBN 196734
sgillman@shutts.com

Julissa Rodriguez, FBN 165662
jrodriguez@shutts.com

SHUTTS & BOWEN LLP

200 S. Biscayne Blvd.

Suite 4100

Miami, FL 33131

Phone: (305) 358-6300

Fax: (305) 381-9982

Kaitlin A. Coyle, FBN 1025101

Kcoyle@kelleykronenberg.com

Kelley Kronenberg, PA

10360 W. State Road 84

Fort Lauderdale, FL 33324

Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that, on July 12, 2024, this answer brief was efiled through the Florida Courts E-Filing Portal, which will send an electronic copy of the filing to counsel listed below.

Marc A. Silverman
msilverman@fwblaw.net
Steven W. Marcus
smarcus@fwblaw.net
FRANK, WEINBERG & BLACK, P.L.
7805 S.W. 6th Court
Plantation, FL 33324
Counsel for Appellants

/s/ Geoffrey L. Travis

CERTIFICATE OF COMPLIANCE

I hereby certify that this answer brief complies with the font and word count limit requirements of rules 9.045(b) and 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure. The brief was prepared in Arial, 14-point font, and consists of 12,946 words.

/s/ Geoffrey L. Travis