IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

DONNA L. PETTIS, an individual,
LYNDA L. SANCHEZ, an individual,
GALE L. RATHBONE, an individual,
and ANNE MCQUEEN, an individual,
Plaintiffs,

CASE NO.: 20-CA-6289

v.

DIVISION: F

CAROLE BASKIN, an individual,
HOWARD BASKIN, an individual,
BIG CAT RESCUE CORP., a Florida corporation d/b/a "BIG CAT RESCUE," and BIG CAT RESCUE AND SANCTUARY, a Florida corporation d/b/a "BIG CAT RESCUE",
Defendants.
_____/

ORDER GRANTING CAROLE BASKIN'S VERIFIED MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT ON SECOND AMENDED COMPLAINT AND FOR ATTORNEY'S FEES AND COSTS UNDER FLORIDA'S ANTI-SLAPP STATUTE AND ENTERING FINAL JUDGMENT IN FAVOR OF DEFENDANT CAROLE BASKIN

THIS MATTER came before the Court for hearing via the teleconferencing platform Zoom on October 6, 2021, on Defendant *Carole Baskin's Verified Motion to Dismiss and/or for Summary Judgment on Second Amended Complaint and for Attorney's Fees and Costs under Florida's Anti-SLAPP Statute*, filed July 9, 2021.[1] Plaintiff, Anne McQueen, filed her *Memorandum of Law in Opposition* on September 30, 2021. Thereafter, on October 5, 2021, Defendant filed *Carole Baskin's Reply & Objection to Plaintiff's Memorandum of Law in Opposition to Anti-SLAPP Motion*. Having reviewed the Motion, Response, and Reply, considered the arguments of counsel at the hearing, as well as the summary judgment evidence, the court file and applicable legal authority,

[1] The Court notes that the only remaining parties in this litigation are Plaintiff, Anne McQueen, and Defendant, Carole Baskin. Therefore, Plaintiff, Anne McQueen, will be referred to as "Plaintiff" and Defendant, Carole Baskin, will be referred to as "Defendant" throughout this Order.

the Court finds that dismissal, entry of summary judgment, and entry of final judgment on all counts of the *Second Amended Complaint* are warranted.

Pursuant to Florida Rules of Civil Procedure 1.140 and 1.510, as well as section 768.295, Florida Statutes, Defendant seeks dismissal of the *Second Amended Complaint* with prejudice, or alternatively, entry of final summary judgment on all of Plaintiff's claims. Alleged in the *Second Amended Complaint* are claims for defamation per se (Count I), defamation by negligence (Count II), defamation by malice (Count III), and breach of contract and fiduciary duty (Count V).[2] Defendant further seeks an award of attorney's fees and costs. In support of her request, Defendant contends that Plaintiff has filed a Strategic Lawsuit Against Public Participation ("SLAPP") in an attempt to censor, intimidate, and silence Defendant. Additionally, Defendant contends that Plaintiff failed to comply with the mandatory pre-suit notice requirement outlined in section 770.01, Florida Statutes, which cannot be cured through late notice or through an amendment to the pleadings. Defendant also claims that Plaintiff failed to state a cause of action for breach of contract/fiduciary duty. Because Defendant seeks entry of summary judgment, the Court can and must look beyond the four corners of the *Second Amended Complaint* and consider the summary judgment evidence filed in support of Defendant's position.

First, the Court finds that Plaintiff failed to comply with Rule 1.510(c)(5) which requires that "[a]t least 20 days before the time fixed for the hearing, the nonmovant must serve a response that includes the nonmovant's supporting factual position as provided in subdivision (1)." Subsection 1.510(c)(1)(A) requires that factual positions be supported by "citing to particular parts of materials in the record." Plaintiff filed her Opposition on September 30, 2021, only five days before the hearing on Defendant's Motion. Plaintiff's Opposition cites to only the *Second Amended*

[2] The Court notes that there is no Count IV in the *Second Amended Complaint*.

Complaint and Exhibits A and B,[3] which, for the reasons outlined below, are insufficient to meet the burden of demonstrating genuine disputes in material facts. Plaintiff's lack of compliance with Rule 1.510(c) is one of several reasons why Defendant's Motion must be granted.

NOTICE REQUIREMENT

Section 770.01, Florida Statutes (2021), provides:

> Before any civil action is brought for publication or broadcast, in a newspaper, periodical, or other medium, of a libel or slander, the plaintiff shall, at least 5 days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he or she alleges to be false and defamatory.

It is undisputed that Plaintiff did not provide timely notice pursuant to section 770.01 before bringing her defamation claims against Defendant in this action.[4] "Compliance with section 770.01, *where necessary*, is a condition precedent to maintaining an action, and one cannot satisfy the statute by providing notice subsequent to filing the complaint." *Gifford v. Bruckner*, 565 So. 2d 887, n. 1 (Fla. 2d DCA 1990) (*citing Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607 (Fla. 4th DCA 1975)) (emphasis added). The applicability of section 770.01 depends on whether the statements at issue were published in an "other medium" and whether Defendant is a "media defendant."

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[3] Exhibit A is a January 27, 2021, letter from Plaintiff's counsel to defense counsel with the subject line, in relevant part, "Pre-Suit Notice Pursuant to Section 770.01, Fla. Stat." Exhibit B consists of what appears to be two separate documents. One is labeled "Anne McQueen" signed by Carole Lewis on September 9, 1998, the substance of which reads:

> I, Carole Lewis, apologize to Anne McQueen for all the allegations that I have made about Anne McQueen. I never would have done so, if I had not felt that Anne McQueen was trying to take over mine and Don's business. Upon further investigation, I have found that the allegations made were without full knowledge of the facts, which I now know are unfounded.

The second document in Exhibit B is a September 9, 1998, Stipulation signed by Carole Lewis and Anne McQueen filed in the matter of Jack Donald Lewis's conservatorship litigation.

[4] Plaintiff did attempt to remedy the problem by serving such notice on January 27, 2021, while still disputing any obligation to serve notice under section 770.01.

Other Medium

"The presuit notice requirement of section 770.01 applies to allegedly defamatory statements made in such a public medium the purpose of which is the free dissemination of news or analytical comment on matters of public concern." *Comins v. Vanvoorhis*, 135 So. 3d 545, 560 (Fla. 5th DCA 2014) (*relying on Ross v. Gore*, 48 So. 2d 412 (Fla. 1950)). The allegedly defamatory statements upon which Plaintiff sues were all published on either Defendant's YouTube vlog or on Big Cat Rescue's website. The Court finds that both constitute forms of "other medium" covered by the statute. *See Five for Entertainment S.A. v. Rodriguez*, 877 F.Supp.2d 1321, 1371 (S.D. Fla. 2012) ("Whether the phrase 'other medium' in § 770.01 includes the internet is [. . .] not even open for debate. That the internet constitutes a 'other medium' for the purposes of § 770.01 should be well-settled."); *accord Comins*, 135 So. 3d at 559 (finding the blog and blog posts at issue to fall "within the ambit of the statute's protection as an alternative medium of news and public comment"); *Plant Food Sys., Inc. v. Irey*, 165 So. 3d 859, 861 (Fla. 5th DCA 2015) (finding a website was a public medium engaging in the free dissemination of information or disinterested and neutral commentary or editorializing on matters of public interest); *Tobinick v. Novella*, 108 F.Supp.3d 1299, 1308 (S.D. Fla. 2015) (finding two blog posts were made on a public forum and in connection with an issue of public interest—the efficacy of treatments for stroke and Alzheimer's disease—and therefore were made in furtherance of free speech and protected by California's anti-SLAPP statute). Having reviewed the vlog entries and articles posted to the Big Cat Rescue website, which form the basis for Plaintiff's claims, the Court finds that they qualify as "other medium" under section 770.01.

Media & Non-media Defendants

Plaintiff contends that Defendant is not a "media defendant" and therefore, section 770.01 does not apply to this action, meaning Plaintiff was not required to provide pre-suit notice. As such, the Court must evaluate whether Defendant is a private individual or a media defendant as contemplated by the statute to receive pre-suit notice. Section 770.01 does not apply when an action is brought against a non-media defendant. *See Zelinka v. Americare Healthscan, Inc.*, 763 So. 2d 1173, 1175 (Fla. 4th DCA 2000) ("Every Florida court that has considered the question has concluded that the presuit notice requirement applies only to 'media defendants,' not private individuals."). "The terms media and non-media defendants are meant to distinguish between 'third parties who are not engaged in the dissemination of news and information through the news and broadcast media from those who are so engaged.'" *Id.* at 1175 (*quoting Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So. 2d 1376, 1380 (Fla. 4th DCA 1997)); *see Davies v. Bossert*, 449 So. 2d 418 (Fla. 3d DCA 1984) (finding that section 770.01 did not apply to a private citizen who made allegedly defamatory statements over an emergency channel of a citizen's band radio) (*disapproving of Laney v. Knight-Ridder Newspapers, Inc.*, 532 F.Supp. 910 (S.D. Fla. 1982), which had previously held that section 770.01 applied to all defendants, both media and non-media).

Not all persons or entities that disseminate information automatically qualify as news media. *See Ortega Trujillo v. Banco Cent. Del Ecuador*, 17 F.Supp.2d 1334 (S.D. Fla. 1998) (finding that a public relations firm was not a media defendant). "The function of the media is to inform and to initiate 'uninhibited, robust, and wide-open' debate on public issues." *Id.* at 1338 (quoting others). The Second District Court of Appeal has characterized media defendants as "the press," explaining that "[b]ecause section 770.01 is meant to protect the free press, it only applies to media that publish news relatively quickly" and in turn, could also publish a retraction or correction quickly. *Mazur v.*

Ospina Baraya, 275 So.3d 812, 816 (Fla. 2d DCA 2019); *see also Mancini*, 702 So. 2d at 1380 (finding a columnist for a local newspaper was entitled to pre-suit notice under section 770.01).

Plaintiff cites to *Five for Entertainment S.A.*, wherein a musical performer posted a press release on his personal website and the website of his booking agent, as support for her contention that Defendant is not a media defendant. In *Five for Entertainment S.A.,* both websites were available to the public, and no additional details about the information available on those websites was alleged in the complaint.[5] The federal court, applying Florida law, assumed for its analysis that the press release constituted news, and found that "the one-time publication of that press release does not render [the defendants] members of the news media." *Five for Entertainment S.A.,* 877 F.Supp.2d at 1327. Rather, "[t]hey are private parties with their own websites who released information about the cancellation of [performer's] tour on one occasion." *Id.* In making this finding, the court noted that the defendants could have introduced evidence to establish that they should be considered media parties, thus entitling them to the pre-suit notice, but they did not. *Id.* at 1327, n. 3. In *Zelinka*, the Fourth District Court of Appeal concluded that the notice requirement in section 770.01 did not apply to a private individual who posted a message on a computer service that was owned and operated by someone else, but acknowledged that "[i]t may well be that someone who maintains a web site and regularly publishes internet 'magazines' on that site might be considered a 'media defendant' who would be entitled to notice." 763 So. 2d at 1175; *see also Alvi Armani Med., Inc. v. Hennessey*, 629 F.Supp.2d (S.D. Fla. 2008) (finding section 770.01 applicable where suit was brought against owner, host, and publisher of a website who had control of the website's operations, in contrast to *Zelinka*).

[5] The court noted: "For example, there is no indication that the websites ever disseminated any other information, whether it be traditional news or simply self-promotional or 'infomercial' materials." *Five for Entertainment S.A.*, 877 F.Supp.2d at 1327.

Here, the Court finds that Defendant is a media defendant as contemplated by the statute to receive pre-suit notice. While Defendant is not a traditional media defendant such as The Washington Post or The New York Times, the Court finds that Defendant falls into the modern, more expansive understanding of media. She is not a mere internet-using, private individual. Rather, Defendant owns and/or controls both the vlog and website where the allegedly defamatory statements were made and where she regularly posts information. As such, she has the ability to quickly publish information to those mediums. Defendant shares information that is of public interest—to persons interested in big cats and those interested in the March 2020 Netflix series "Tiger King: Murder, Mayhem and Madness" (hereinafter "*Tiger King*"). Her posts certainly initiate uninhibited, robust, and wide-open debate on public issues. Defendant has a wide following as demonstrated by the summary judgment evidence. The Court finds distinguishable those cited cases, which found the subject not to be a media defendant.

"The statute is designed to allow a defendant the opportunity to be put on notice so as to take necessary steps to mitigate potential damages and perhaps avoid precisely the type of litigation now before the Court." *Nelson v. Associated Press, Inc.*, 667 F.Supp. 1468, 1475 (S.D. Fla. 1987) (finding that defamation claim must fail where plaintiff did not comply with section 770.01 "since the statute is a condition precedent to her maintaining the suit"); *see also Mancini*, 702 So. 2d at 1377 ("Section 770.01, the notice provision, and section 770.02, the retraction provision, grant valuable rights by allowing certain defendants in defamation actions to avoid punitive damages by the timely publication of a correction, apology or retraction."). Defendant was not given such opportunity as Plaintiff failed to provide the required pre-suit notice. Moreover, the failure to comply with section 770.01 cannot be cured. *Orlando Sports Stadium, Inc.*, 316 So. 2d at 610 (confirming that compliance with section 770.01 cannot be done subsequent to filing suit); *see also Gifford*, 565 So. 2d at 887, n. 1 ("Compliance with section 770.01, where necessary, is a condition

precedent to maintaining an action, and one cannot satisfy the statute by providing notice subsequent to filing the complaint."). Although failure to provide notice pursuant to section 770.01 necessitates dismissal of this case, there are also substantive grounds, which further require a finding that the claims fail as a matter of law.

STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION
SECTION 768.295, FLORIDA STATUTES (2021)

Defendant next contends that even if Plaintiff's factual allegations are true, her claims are legally unsupported and constitutionally prohibited because they are based on "free speech in connection with public issues." § 768.295(2)(a), Fla. Stat. (2021). The statutory prohibition on SLAPP actions provides in relevant part "[a] person . . . may not file . . . any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue . . . as protected by the First Amendment." § 768.295(3), Fla. Stat. The statute defines "[f]ree speech in connection with public issues" as follows:

> any written or oral statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration or review by a governmental entity, or is made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work.

§ 768.295(2)(a), Fla. Stat.

A person sued "in violation of the section has a right to an expeditious resolution of a claim that the suit is in violation of this section." § 768.295(4), Fla. Stat. ("It is the public policy of this state that a person or governmental entity not engage in SLAPP suits because such actions are inconsistent with the right of persons to exercise such constitutional rights of free speech in connection with public issues."); *see also Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 310 (Fla. 2d

DCA 2019) (confirming that because SLAPP can have a "chilling effect" on constitutional rights, such suits must be expeditiously resolved). The person sued may seek dismissal of the action, may request final judgment in their favor, and may file a motion for summary judgment seeking a determination that claimant's lawsuit violates the SLAPP statute. *Id.* "The 'initial burden [is] on the SLAPP defendant to set forth a prima facie case that the Anti-SLAPP statute applies." *Baird v. Mason Classical Academy, Inc.*, 317 So. 3d 264, 268 (Fla. 2d DCA 2021) (*quoting Gundel*, 264 So. 3d at 314). "Upon doing so, the burden shifts 'to the claimant to demonstrate that the claims are not primarily based on First Amendment rights in connection with a public issue and not without merit.'" *Id.*

Plaintiff's claims are based on statements published on Defendant's YouTube vlog and on statements in articles published on the Big Cat Rescue website, which Defendant controls. Defendant contends that the statements address matters of widespread public interest and discussion, namely, the disappearance of Don Lewis ("Lewis"), the Don Lewis conservatorship litigation, and the *Tiger King* series. Defendant asserts that her statements were made in response to accusations and innuendo that Plaintiff and others made about Defendant during episode three of *Tiger King* wherein it is suggested that Defendant killed Lewis to inherit his estate. Defendant contends that she then joined the public debate sparked by *Tiger King* and publicly defended herself against these accusations.

Subsequent to the hearing, on October 8, 2021, Defendant filed corrected exhibits, including Exhibit 1, which is a chart outlining the 59 specific statements at issue and reflecting Plaintiff's withdrawal of Statements 50-52. Also provided to the Court was a thumb drive containing the full version of each statement's publication. The Court has considered all the materials provided by the parties, the entirety of the statements and the context in which they were made, and all the circumstances surrounding the publications. *See Hay v. Indep. Newspapers, Inc.*, 450 So. 2d 293,

295 (Fla. 2d DCA 1984).[6] Defendant makes several contentions that Plaintiff's claims are without merit and are primarily presented because Defendant has exercised her First Amendment right to speak on the subject matters. The Court finds that Defendant met her initial burden of demonstrating a prima facie case that the Anti-SLAPP statute applies. As discussed below, the Court further finds that Plaintiff failed to meet her shifted burden of demonstrating that her claims are not primarily based on First Amendment rights in connection with a public issue and that those claims are meritorious. *See Baird*, 317 So.3d at 268.

Statements Do Not Convey a Defamatory Meaning

First, Defendant contends that the statements upon which Plaintiff sues are legally incapable of supporting a defamation claim because they cannot be construed as conveying a defamatory meaning, or are nonactionable statements of opinion or rhetorical hyperbole.[7] *See Keller v. Miami Herald Publ'g Co.*, 778 F.2d 711, 714-15 (11th Cir. 1985) (explaining that the threshold question for a court is whether as a matter of law "the statement at issue is reasonably capable of a defamatory interpretation"); *Demby v. English*, 667 So. 2d 350, 355 (Fla. 1st DCA 1995) ("The determination of whether a statement is one of opinion is a question of law.") (*citing From v.*

[6] "In determining whether an alleged libelous statement is pure opinion, the court must construe the statement in its totality, examining not merely a particular phrase or sentence, but all of the words used in the publication. The court must consider the context in which the statement was published and accord weight to cautionary terms used by the person publishing the statement. All of the circumstances surrounding the publication must be considered, including the medium by which it was disseminated and the audience to which it was published." *Hay*, 450 So. 2d at 295 (affirming a final judgment dismissing a libel action with prejudice upon a finding that the alleged libelous language was an expression of un-actionable opinion).

[7] The elements of "a legally sufficient cause of action for libel involving a public figure [include]: (1) publication, (2) falsity, (3) the defendant's knowledge of, or reckless disregard for, the falsity (i.e., actual malice), (4) actual damages, and (5) the false statement must be defamatory." *Greene v. Times Pub. Co.*, 130 So.3d 724, 729 (Fla. 3d DCA 2014) (citing *Jews for Jesus, Inc. v. Rapp,* 997 So. 2d 1098, 1106 (Fla. 2008) (providing the elements of a defamation claim)); *see also Rasmussen v. Collier Cnty. Publ'g Co.*, 946 So. 2d 567, 570 (Fla. 2d DCA 2006) ("To prevail in a libel action, Mr. Rasmussen, who conceded that he was a public figure, had to prove that the Daily News published defamatory statements that were (1) statements of fact, (2) false, and (3) made with actual malice (knowledge of their falsity or with reckless disregard of their truth or falsity).").

Tallahassee Democrat, Inc., 400 So. 2d 52, 57 (Fla. 1st DCA 1981)). Viewing the fifty-six allegedly defamatory statements in total and considering all the circumstances surrounding their publication, the Court finds that the average reader or viewer could not reasonably consider them as stating actual facts or having defamatory meaning. *See Hay*, 450 So. 2d at 295; *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983). Defendant's video diary entries are prefaced with cautionary language. *See Hay*, 450 So. 2d at 295 (explaining that "[t]he court must consider the context in which the statement was published and accord weight to cautionary terms used by the person publishing the statement"). In the first vlog entry, Defendant prefaced the series of videos by explaining that they were her personal recollections and that her diaries could be "skewed." She cautioned the viewer that these videos, during which she reads from her diary entries, represented what she remembers and her perception of events in her life. She expressed hope that people would not take her diary entries out of context. She stated she wanted to, "get the big picture out there." She also stated that the videos are for entertainment purposes only.

Throughout the vlog entries, Defendant read from what she stated were written, historical diary entries. To the common viewer, it is clear that Defendant was expressing her own mental impressions, opinions or commentary, or simply recounting her past perception of events as they unfolded decades ago, and then brought back to life in recent time. *See Turner v. Wells*, 198 F.Supp.3d 1355, 1370 (S.D. Fla. 2016) (statements about an individual's state of mind are not actionable); *Hoon v. Pate Constr. Co.*, 607 So. 2d 423, 429 (Fla. 4th DCA 1992) ("opinions cannot be defamatory"). The videos and statements therein showcased Defendant's feelings and thoughts, and did not constitute assertions of provable facts. *See Obsidian Finance Group, LLC v. Cox*, 812 F.Supp.2d 1220, 1233 (D. Or. 2011) (where statements read like a journal or diary entry revealing feelings or stream of consciousness, statements are protected by the First Amendment as opinion and are not actionable); *see also Horsley v. Rivera*, 292 F.3d 695, 701 (11th Cir. 2002) (explaining

that both the Supreme Court and the Eleventh Circuit "have long recognized that a defamation claim may not be actionable when the alleged defamatory statement is based on non-literal assertions of 'fact'") (citing others). To the extent facts were stated, they were disclosed facts along with Defendant's opinions and feelings about those disclosed facts. *See Skupin v. Hemisphere Media Group, Inc.*, 314 So. 3d 353, 356 (Fla. 3d DCA 2020) (commentary and opinion based on facts set forth in the publication or that are otherwise known or available, are not actionable); *Turner*, 198 F.Supp.3d at 1366 (where a defendant "presents the facts at the same time he or she offers independent commentary, a finding of pure opinion will usually result"); *Rasmussen v. Collier Cnty. Publ'g Co.*, 946 So. 2d 567, 606 (Fla. 2d DCA 2006) (same result where facts were in the articles or in "the extensive coverage of the controversy"). The same is true of the statements on the Big Cat Rescue website. *See Zambrano v. Devanesan*, 484 So. 2d 603, 606 (Fla. 4th DCA 1986) ("Where the speaker or writer presents the facts at the same time he or she offers independent commentary" or "where the facts are already known to the audience," then "a finding of pure opinion will usually result.").

Defendant provided adequate factual information from which a reader or viewer could differentiate the facts from her commentary or opinions on those facts. *See id.* ("Conversely, where the speaker or writer neglects to provide the audience with an adequate factual foundation prior to engaging in the offending discourse, liability may arise."). The common viewer or reader would understand that Defendant's statements were one-sided responses to the events that occurred decades ago but were reinvigorated by the *Tiger King* series. *See Horsley*, 292 F.3d at 702.[8] The statements rehashed past accusations, some of which were within the confines of the prior court

[8] In relevant part, the *Horsley* court stated: "Examining the context surrounding the statement, we conclude that it consisted of the sort of loose, figurative language that no reasonable person would believe presented facts. A reasonable viewer would have understood Rivera's comments merely as expressing his belief that Horsley shared in the moral culpability of Dr. Slepian's death, not as a literal assertion that Horsley had, by his actions, committed a felony."

action regarding Lewis's estate. *See Brake & Alignment Supply Corp. v. Post-Newsweek Stations of Fla., Inc.*, 472 So. 2d 517, 518 (Fla. 3d DCA 1985) ("It is not libelous to restate prior accusations when winding up a news story"). The average viewer of the vlog entries or reader of the website articles knew the context in which the statements were made, or could easily uncover the renewed animosity of the parties brought about by the *Tiger King* series. Certainly, the average viewer or reader knew about or could easily learn about *Tiger King*, the disappearance of Lewis, the litigation surrounding his estate, and Plaintiff's statements expressing her opinions about the same topics.

The Court finds that Defendant's statements are figurative, exaggerated, hyperbolic and rhetorical, and as such, un-actionable. *See Hay*, 450 So. 2d at 295-96 (statement calling plaintiff a "crook" and "criminal" was un-actionable opinion protected by First Amendment); *Demby*, 667 So. 2d at 352, n.1 (accusation that animal control director was "inhumane," "unreasonable," and "Cruella DeVille" for locking dog in pound and refusing veterinary care was un-actionable); *Horsley*, 292 F.3d at 701-702 (accusing plaintiff of being "accomplice to homicide" un-actionable, non-literal, rhetorical hyperbole); *see also Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 13 (1970) (use of the term "blackmail" in heated public debate not libel or slander because, in context, listener or reader would not think the crime had been charged).

Viewing these statements in context, the common mind would not understand them to be defamatory but rather Defendant's one-sided responsive opinions on matters of public interest in the midst of a heated public debate sparked by the *Tiger King* series and subsequent media involvement of the parties. *See Byrd*, 433 So. 2d at 595 (explaining that the court "must evaluate the publication not by 'extremes, by as the common mind would understand it'") (*quoting McCormick v. Miami Herald Publ'g Co.*, 139 So. 2d 197, 200 (Fla. 2d DCA 1962)); *see also Fla. Med. Ctr., Inc. v. N.Y. Post Co.*, 568 So. 2d 454, 457-58 (Fla. 4th DCA 1990); *see Manufactured Home Communities, Inc. v. Cnty. of San Diego*, 544 F.3d 959, 963 (9th Cir. 2008) ("[W]here potentially defamatory

statements are published in a public debate . . . or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by the use of epithets, fiery rhetoric, or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.") (quoting others). When viewed in context, Defendant's statements were part of a multi-year dialogue and debate between these parties, and more recently, the nation fascinated by the subjects and issues highlighted in the *Tiger King* series. Such opinions are protected by the First Amendment and Florida's anti-SLAPP statute. *See generally Isaac v. Twitter, Inc.*, 2021 WL 3860654, *7 (S.D. Fla. Aug. 30, 2021) (finding that a defamation claim that fails to state a cause of action is "without merit" under section 768.295(3)).

Lack of Proximate Causation

Defendant next contends that Plaintiff fails to allege and cannot establish proximate causation because all the statements upon which Plaintiff sues were previously published and widely circulated. As such, Defendant contends that the statements could not have been the "but for" cause of Plaintiff's alleged damages. *See Barry College v. Hull*, 353 So. 2d 575, 578 (Fla. 3d DCA 1977) (damages for libel per quod (as opposed to libel per se) must be "caused by the language alleged to be libelous"). Proximate causation can be determined as a matter of law. *See Smith v. Cuban Am. Nat. Found.*, 731 So. 2d 702, 705 (Fla. 3d DCA 1999) (the court has a "prominent function" to determine if statement is defamatory, i.e., a "false statement which naturally and proximately result[s] in injury to another"); *see also Byrd*, 433 So. 2d at 595 ("Defamation (libel and slander) may generally be defined as the unprivileged publication of false statements which naturally and proximately result in injury to another.").[9]

[9] *See also Zimmerman v. Allen*, 2014 WL 3731999, *9 (Fla. Cir. Ct. June 30, 2014), *aff'd* 212 So. 3d 376 (Fla. 5th DCA 2015) ("The question of whether allegedly tortious conduct was the 'but for' cause of a plaintiff's claimed injuries can be resolved by the court as a matter of law 'where the facts are unequivocal,

The summary judgment evidence demonstrates that the same or substantially the same statements over which Plaintiff sues were made numerous times before and after the subject statements by non-parties. The Court finds that Plaintiff cannot allege or establish that her purported damages are directly caused by the alleged defamatory statements over which she sues. *See Zimmerman v. Allen*, 2014 WL 3731999, *9 (Fla. Cir. Ct. June 30, 2014), *aff'd* 212 So. 3d 376 (Fla. 5th DCA 2015)[10] ("In Florida, a defamation plaintiff not only must plead and prove actual injury, he must also demonstrate that the allegedly defamatory statements proximately caused that injury.") (*citing Smith*, 731 So. 2d at 705 and *Byrd*, 433 So. 2d at 595). Where these same or substantially similar statements were previously made long before the statements over which Plaintiff sues, the Court finds that the statements at issue cannot be the "but for" cause of Plaintiff's purported damages.

Plaintiff is a "Public Figure" & Cannot Establish Actual Malice

Next, Defendant contends that Plaintiff is herself a "public figure" and as such, cannot assert traditional claims for "defamation per se" (Count I) or "defamation by negligence" (Count II). *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 ("Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures."). Additionally, Defendant contends Plaintiff's claim for "defamation by malice" (Count III) fails as a matter of law because the allegations are insufficient to establish actual malice. *See Frieder v. Prince*, 308 So. 2d 132 (Fla. 3d DCA 1975) (affirming dismissal where complaint failed to set forth legally sufficient facts establishing actual malice). The

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such as where the evidence supports no more than a single reasonable inference.'") (*quoting McCain v. Fla. Power Corp.*, 593 So. 2d 500, 504 (Fla. 1992)).

[10] The *Zimmerman* court found that the undisputed evidence showed that Zimmerman experienced negative publicity well before the statements at issue were published.

determination of whether someone is a "public figure" is a question of law for the court to decide. *Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841, 845 (Fla. 4th DCA 2002) (*citing Saro Corp. v. Waterman Broad. Corp.*, 595 So. 2d 87 (Fla. 2d DCA 1992)); *see also Bair v. Clark*, 397 So. 2d 926, 927 (Fla. 4th DCA 1981) ("By public figure we mean one who has commanded a substantial amount of public interest by his position alone, or one who has thrust himself by purposeful activity into the vortex of an important public controversy.").

The Court finds that Plaintiff is a "limited purpose public figure" by virtue of her voluntary participation in the *Tiger King* series.[11] *See Mile Marker*, 811 So. 2d at 845 ("limited public figures" are those "who have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved") (*citing Gertz*, 418 U.S. at 345 (noting that public figures "invite attention and comment")); *Arnold v. Taco Props., Inc.*, 427 So. 2d 216, 218 (Fla. 1st DCA 1983) (elaborating that to become a limited public figure one must "thrust himself into the vortex of that [public] controversy"). The Court finds that the issues raised by the *Tiger King* production, including the disappearance of Lewis and the subsequent litigation surrounding his estate, constituted a "public controversy." *Della-Donna v. Gore Newspapers Co.*, 489 So. 2d 72, 76 (Fla. 4th DCA 1986) (explaining that a "public controversy" for purposes of the public figure analysis is defined as "any topic upon which sizable segments of society have different, strongly held views," or a dispute that a reasonable person would expect to affect people beyond its immediate participants) (citing others). Plaintiff further willingly injected herself into this public controversy and the media frenzy surrounding *Tiger King* by subsequently appearing on media outlets to further the discourse and provide her opinions on these issues. *See Arnold*, 427 So. 2d at 218-19 (explaining that a plaintiff plays a sufficiently important role in a public controversy when

[11] Alternatively, at minimum, Plaintiff is an "involuntary public figure." *Gertz*, 418 U.S. at 345 (describing an involuntary public figure as one who becomes well-known to the public after finding himself embroiled through no desire of his own in a public controversy); *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, 742 (D.C. Cir. 1985) (finding that a person can become an involuntary public figure by "sheer bad luck").

she either voluntarily injects herself into the debate in an attempt to influence its outcome or has been drawn into the controversy by her own voluntary actions). Plaintiff became a limited public figure by engaging in conduct and making her own statements, which continued to draw public attention. *See Della-Donna*, 489 So. 2d at 77 (explaining that plaintiffs become limited public figures when they act in a fashion that is reasonably likely to draw public attention and comment, regardless of whether they affirmatively seek out such public scrutiny); *see also Friedgood v. Peters Pub.*, 521 So. 2d 236, 239 (Fla. 4th DCA 1988) (highlighting case law which explains that active participation in a controversy, such as through press interviews and promoting one's version of the case or issue, supports a finding of public figure status).

As revealed by the summary judgment evidence, Plaintiff was one of the focal points of the stories, both in traditional media and more recent social media and media production, surrounding Lewis's disappearance and the subsequent litigation over his estate. She was featured in the popular *Tiger King* production, voluntarily thrusting herself into the spotlight by providing her opinions on these matters. She continued her participation by voluntarily participating in interviews and advertisements thereafter. Therefore, the Court finds that Plaintiff is a limited public figure. As a limited public figure, Plaintiff must plead and prove actual malice. *See Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1498 (11th Cir. 1988) (finding plaintiffs became limited purpose public figures by voluntarily placing themselves in a position and acting in a manner to invite public scrutiny and comment, and therefore "must present clear and convincing evidence that the defendants acted with actual malice to defeat defendants' summary judgment motion"). Plaintiff has not pled and cannot prove actual malice. *See generally Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1431 (8th Cir. 1989) (once defendant is found to be a public figure and the statements concern a public matter, the standards of *New York Times v. Sullivan*, 376 U.S. 254 (1964) are applied to evaluate whether the statements are protected opinion); *see also Sharkey v. Fla. Elections Comm'n*, 90 So.3d 937, 939

(Fla. 2d DCA 2012) (stating that "the question of whether the evidence supports a finding of actual malice is a question of law").

Actual malice is not simply "[i]ll will, improper motive or personal animosity." *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1198 n.17 (11th Cir. 1999). Rather, it is generally limited to circumstances where a "story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call." *St. Amant v. Thompson*, 390 U.S. 727, 732 (Fla. 1968). Actual malice is a subjective standard; a plaintiff must prove that the defendant acted with "a high degree of . . . probable falsity," or "in fact entertained serious doubts as to the truth of his publication," but published it anyway. *Id.*, at 731 (citing others); *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (explaining that actual malice exists where the speaker makes a false statement of fact with specific knowledge that it was false or with reckless disregard of the statement's probable falsity).

The Court finds that Plaintiff has failed to allege actual malice. Specifically, Plaintiff cites to a 1998 "apology" as evidence of malice. This does not demonstrate actual malice as it was signed over twenty years ago and explicitly provided that it was not an admission of anything. The Court cannot find that the twenty-year-old "apology" has any bearing on Defendant's subjective state of mind at the time the statements at issue were made. For the same reasons discussed above finding that the statements are not defamatory, the Court further finds that Plaintiff cannot allege or establish actual malice under the circumstances. Again, Defendant's statements were mental impressions, commentary, and her opinions about events for which she had documentary and factual materials to support. Defendant refers to and links that evidence in her vlog entries and website articles. *See Klayman v. City Pages*, 650 Fed.Appx. 744, 751 (11th Cir. 2016) ("Evidence that an article contains information that readers can use to verify its content tends to undermine claims of actual malice.").

The Court finds that Plaintiff has not and cannot allege or establish actual malice where the summary judgment evidence demonstrates Defendant's statements were made on a good faith belief that they were accurate, as supported by cited information, and where such statements rebutted the statements made by Plaintiff and others on the same subjects. The Court finds that Plaintiff has failed to present summary judgment evidence which would demonstrate a genuine issue of material fact that would allow a jury to find the existence of actual malice under the *Sullivan* standard. *See also Dockery v. Fla. Democratic Party*, 799 So. 2d 291, 294 (Fla. 2d DCA 2001) (noting that summary judgments are to be more liberally granted where brought by a defendant against a public-figure plaintiff where actual malice must be proven with clear and convincing evidence). Rather than seek legal action against Defendant, Plaintiff can continue to make use of the media to rebut any of Defendant's statements, as she has previously done. *See Berisha v. Lawson*, 378 F.Supp.3d 1145, 1157 (S.D. Fla. 2018) (noting that "public figures usually have greater access to the media which gives them 'a more realistic opportunity to counteract false statements than private individuals normally enjoy'") (*quoting Silvester*, 839 F.2d at 1493 and *Gertz*, 418 U.S. at 344).

"Fair Report" Privilege Applies

Defendant contends that the "fair report" privilege applies to several of the allegedly defamatory statements. "[T]he constitutionally protected right to discuss, comment upon, criticize, and debate, indeed, the freedom to speak on any and all matters is extended not only to the organized media but to all persons." *Demby*, 667 So. 2d at 354 (*quoting Nodar v. Galbreath*, 462 So. 2d 803 (Fla. 1984)); *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 502 (Fla. 3d DCA 1993) (explaining that the privilege was originally extended to the news media "to accurately report on the information they receive from government officials" including reporting "the contents of an official document, so long as their account is reasonably accurate and fair"). Yet, the fair comment

privilege is not absolute. "To prevail at trial, a plaintiff must establish not only the falsity of the claimed defamation, but also demonstrate through clear and convincing evidence that the defendant knew the statements were false or recklessly disregarded the truth." *Demby*, 667 So. 2d at 354 (*citing Sullivan*, 376 U.S. 254). "Reckless disregard is not measured by whether a reasonably prudent person would have published or would have investigated before publishing; the plaintiff must show the defendant 'in fact entertained serious doubts as to the truth of his publication.'" *Id.* (*quoting St. Amant*, 390 U.S. at 731).

To the extent any of the statements are deemed libelous or slanderous per se, and they address the conservatorship litigation, the Court finds that the fair comment or fair report privilege applies to insulate Defendant from liability for those statements. *See Klayman v. Judicial Watch, Inc.*, 22 F.Supp.3d 1240, 1247 (S.D. Fla. 2014) (explaining that a defamation per se claim can proceed under a theory of libel per se or slander per se, and noting that both types find actionable statements charging someone of a felony or infamous crime); *Miami Herald Pub. Co. v. Brautigam*, 127 So. 2d 718, 722 (Fla. 3d DCA 1961) (explaining that fair comment is one defense to a claim of libel per se); *see also Alan v. Palm Beach Newspapers, Inc.*, 973 So. 2d 1177, 1180 (Fla. 4th DCA 2008) (affirming trial court's determination that the record supported a finding that the statements were fair, accurate and impartial, even if some of the information was phrased to catch readership attention). With respect to those statements related to court filings in connection with the conservatorship litigation, Defendant's statements were fair reports of court records or proceedings. *See Rasmussen*, 946 So. 2d at 570 ("In conveying news and comment to its readers, [media defendant] need not describe legal proceedings in technically precise language."). Within the publications, Defendant often displayed and/or hyperlinked the related court documents. While Defendant may have phrased her reports in such a way to grab the attention of her website and/or

vlog followers, those statements about the court proceedings fairly relayed information about the litigation.

Attorney's Fees Under SLAPP

The Court finds that this action is a Strategic Lawsuit Against Public Participation in violation of section 768.295. The only basis for Counts I, II, and III of Plaintiff's *Second Amended Complaint* was Defendant's protected speech. Section 768.295(4) provides that "[t]he court shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of this section." *See also Berisha*, 378 F.Supp.3d at 1157, n.8 (noting that the statute provides for fees and costs incurred in connection with the SLAPP motion itself). The Court reserves jurisdiction to consider the issue of reasonable attorney fees and costs upon the filing of a proper motion, notice, and hearing. Should Defendant pursue an award of attorney fees and costs, she must notify the Court so that the Court may enter any other orders on procedures related to this issue.

BREACH OF CONTRACT/FIDUCIARY DUTY CLAIM FAILS

With respect to Count V (breach of contract and fiduciary duty), Defendant contends that Plaintiff failed to identify any provision of the alleged contract that Defendant breached, failed to allege facts establishing a fiduciary duty, and failed to establish that Defendant waived her First Amendment rights in the alleged contract. The Court agrees and finds that the claim must be dismissed with prejudice for several reasons.

Plaintiff's written Opposition did not make any responsive argument to Defendant's contention that Count V failed to state a cause of action upon which relief may be granted. Plaintiff cannot point to a provision of the Stipulation that was violated by Defendant's statements. A plain

reading of the Stipulation does not prohibit Defendant from making such statements. Such a waiver cannot be implied. *See Tucker v. State*, 559 So. 2d 218, 219 (Fla. 1990) ("An effective waiver of a constitutional right must be voluntary, knowing, and intelligent."). Because no provision of the Stipulation prohibits the statements at issue, a claim for breach of contract based on these statements must fail as a matter of law. Thus, Count V must be dismissed with prejudice. Allowing amendment would be futile. *See Geer v. Jacobsen*, 910 So. 2d 391, 393 (Fla. 2d DCA 2005).

Aside from the pleading problem of combining her breach of contract and breach of fiduciary duty claims, Plaintiff failed to identify the purported fiduciary duty Defendant owes to her and how such purported duty was breached. *See Gracey v. Eaker*, 837 So. 2d 348, 353 (Fla. 2002) (plaintiff must allege "the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damages"). Moreover, the summary judgment evidence demonstrated that there is no special relationship between Plaintiff and Defendant that would give rise to a fiduciary duty related to the subject statements. Any purported claim for breach of fiduciary duty must also fail as a matter of law. Again, amendment would be futile under the circumstances.

It is therefore **ORDERED** and **ADJUDGED** that:

1. Defendant *Carole Baskin's Verified Motion to Dismiss and/or for Summary Judgment on Second Amended Complaint and for Attorney's Fees and Costs under Florida's Anti-SLAPP Statute* is hereby **GRANTED**.
2. Summary judgment is entered in favor of Defendant, Carole Baskin, and against Plaintiff, Anne McQueen on Counts I (defamation per se), II (defamation by negligence), and III (defamation by malice).
3. Dismissal with prejudice is entered on Count V (breach of contract and fiduciary duty).
4. Final judgment is entered in favor of Defendant, Carole Baskin, and against Plaintiff, Anne McQueen on all counts. Defendant shall go hence without day.

5. The Court **RESERVES** jurisdiction to consider the issue of reasonable attorney fees and costs pursuant to section 768.295(4), upon proper motion, notice, and hearing.

DONE AND ORDERED and effective as of the date and time imprinted below with the Judge's signature.

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JENNIFER GABBARD,
Circuit Court Judge

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