IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA

ZACHARY YOUNG and
NEMEX ENTERPRISES INC.,

Plaintiffs,

v.

Case No.: 03-2022-CA-000608
(Public, Redacted Version)

CABLE NEWS NETWORK, INC.,

Defendant.

OPPOSITION OF DEFENDANT CABLE NEWS NETWORK, INC. TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT TO ADD CLAIMS FOR PUNITIVE DAMAGES

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INTRODUCTION

Following the U.S.'s abrupt withdrawal from Afghanistan in 2021, many Afghans were desperate to leave the country, fearing reprisals from the Taliban. In covering their plight, Cable News Network, Inc. ("CNN") truthfully reported that, with little help available from the U.S. government, desperate Afghans and their families were forced to turn to an unregulated market of private operators charging extremely high fees for evacuation services. In its reporting, CNN discussed one such operator, Plaintiff Zachary Young, who justified his large fees with the terse explanation, "[t]hat's how economics works, unfortunately."

Young and his company, Nemex Enterprises Inc. (collectively, "Young"), brought this lawsuit against CNN for that accurate reporting, asserting claims for defamation and trade libel.[1] Young has now moved, pursuant to Section 768.72, Florida Statutes, for leave to amend his complaint to assert claims for punitive damages. Young's motion ("Mot.") should be denied.

Under the statute, a plaintiff asserting a claim for punitive damages must first provide an evidentiary basis for the recovery of such damages. Fla. Stat. § 768.72(1). In this case, which involves claims for defamation arising out of publications on a matter of public concern, Young has the burden to make three separate evidentiary showings. He must come forward with evidence that would reasonably support findings that (1) CNN published the alleged defamation with actual malice – *i.e.*, with knowledge of its falsity, or an actual, subjective, belief in its probable falsity; (2) CNN published the alleged defamation with express malice – *i.e.*, with the primary purpose to injure him specifically; and, (3) CNN's conduct rose to the level of egregiousness and

[1] For purposes of evaluating Young's entitlement to assert claims for punitive damages, none of the distinctions between the tort of defamation and the tort of trade libel matters, as the showing necessary to recover punitive damages for either claim is the same. This opposition will, therefore, treat the two claims interchangeably.

outrageousness necessary to permit an award of punitive damages. As set forth below, Young has not come close to making any of those showings, let alone all three.

Young faces even greater difficulty in meeting this weighty burden than most defamation plaintiffs. That is because he accuses CNN of reporting something it expressly did not report. Young principally argues that he has made the requisite showing under Section 768.72(1) because CNN reported that he was directly exploiting Afghans in an illegal market for evacuation services, despite knowing that to be false. But, CNN did not report that. Its reporting made clear that Young was seeking payment from third-party sponsors, not individual evacuees.

Likewise, CNN never stated that Young's business activities in Afghanistan were illegal. Instead, CNN used the phrase "black market" to broadly characterize the market for private evacuation services in which Young and others were operating as one entirely lacking in regulations or safeguards. And, when Young complained that the word choice "black market" was potentially misleading, CNN promptly issued a correction in accordance Section 770.02, Florida Statutes. That bars any claim for punitive damages based on the use of that phrase. Section 770.02 expressly provides that where, as here, a publisher issues a prompt correction after an error is brought to its attention, "the plaintiff . . . shall recover only *actual damages*." Fla. Stat. § 770.02(1) (emphasis added).

Because Young has failed to put forth evidence sufficient to provide a reasonable basis for the recovery of punitive damages at trial, he has failed to carry his burden under Section 768.72(1).[2] His motion for leave to amend should be denied.

[2] Separate from his request to add punitive damages claims, Young also "seeks to add additional pleading regarding the facts of his medical condition." Mot. at 28. Any such amendment would be superfluous because the operative pleading already requests emotional damages – simply stated differently. *Compare* Am. Compl. ¶¶ 109, 118, 128, *with* Mot. Ex. A (Proposed 2d Am. Compl.)

FACTUAL BACKGROUND[3]

I. CNN'S REPORTING ABOUT THE DIFFICULTIES AFGHANS FACED TRYING TO FLEE THE COUNTRY

Young bases his claims on three publications: (1) a video segment (the "Segment") that aired on November 11, 2021 as part of the CNN program *The Lead with Jake Tapper*; (2) a cnn.com article published two days later, under Alex Marquardt's byline, entitled "Some Afghans trying to flee country face exorbitant costs as Blinken touts success of efforts to help Americans" (the "Article"); and (3) a series of Tweets sharing the Segment. Mot Ex. A (Proposed 2d Am. Compl.) ¶¶ 44, 71, 79-82.[4] The research for and preparation of the journalism was primarily undertaken by CNN journalists Marquardt and Katie Bo Williams (now known as Katie Bo Lillis)

¶ 133. Thus, re-requesting emotional damages is duplicative and unnecessary. *See Hewitt v. Avis Rent a Car Sys., Inc.*, 2004 WL 5819478 (Fla. 2d Jud. Cir. Sep't 2, 2004) (denying leave to amend because "[t]he proposed amendment to her claim for compensatory damages adds nothing to her existing claim."). In addition, Young's assertion that that this request "does not prejudice CNN," Mot. at 28, is incorrect because the "full psychiatric file" upon which he intends to rely consists of, in total, 16 pages of records from a Viennese psychiatrist that CNN, per international law, may not be able to verify or impeach.

[3] The facts set forth in this section are primarily taken from the evidentiary proffer Young submitted with his motion. However, as noted below, CNN also references and relies on other relevant documents that Young omitted from his proffer. This Court can and should consider those additional materials in assessing whether Young has met his burden under Section 768.72(1). As the Fourth DCA recently explained, determining whether there actually is a "reasonable basis" for a plaintiff to recover punitive damages necessarily requires going beyond the plaintiff's one-sided proffer, at least where that proffer leaves critical material out. *See Marder v. Mueller*, 2023 WL 2777783, at *2, *3 & n.1 (Fla. 4th DCA Apr. 5, 2023) (Section 768.72's mandate that a trial court only permit assertion of punitive damages claims upon a "reasonable showing . . . which would provide a reasonable basis for recovery of such damages" requires a trial court to consider evidence submitted by the non-moving party in order to determine "whether a reasonable evidentiary basis exists to recover punitive damages").

[4] Young also references a re-publication of the Segment on a program anchored by CNN reporter Jim Acosta. *See* Mot. Ex. A (Proposed 2d Am. Compl.) ¶ 70. That publication has not been pleaded as part of Young's claims for recovery. Regardless, Young alleges the Acosta segment was identical to the Segment originally aired on *The Lead with Jake Tapper*, except for some immaterial differences between the two lead-ins. *Id*.

("Lillis"). *Id.* at ¶¶ 47-54, 57, 61, 66-67, 71; Mot. Ex. B at CNN000708-27 (internal messages between Marquardt and Lillis as they worked on the reporting). Before publication, the journalism was reviewed, vetted, and approved by the "Triad," which is a shorthand term used at CNN to represent three independent CNN departments that provide pre-publication review of certain reporting. The three departments are (1) legal; (2) "S&P", CNN's standards and practices department; and (3) the "Row," CNN's editorial department. Mot. Ex. B at CNN00158; Mot. Ex. Q; Mot. Ex. S ¶ 8.

Jake Tapper introduced the Segment by highlighting the desperate circumstances faced by Afghans seeking to leave the country, noting that, while the U.S. government had assisted in evacuating U.S. citizens and permanent residents, it was largely abandoning Afghans to fend for themselves. Tapper stated:

> In our world lead today, the U.S. government, the Biden administration says that as of last week it had assisted in the departure of at least 377 U.S. citizens and 279 lawful permanent residents of the U.S. from Afghanistan since August 31st. Still, many Afghans, Afghans who desperately want to flee Taliban rule and Afghans who say their lives are at stake, they remain behind.

Girones Decl. Comp. Ex. A at 0:04 – 0:30 (filed July 29, 2022).[5] The Segment then transitioned to Marquardt's pre-recorded package about the travails of Afghans seeking to flee the country, with this lead-in from Tapper: "As CNN's Alex Marquardt has discovered, Afghans trying to get out of the country, face a black market full of promises, demands of exorbitant fees, and no guarantee of safety or success." *Id.* at 0:30 – 0:41.

[5] In his motion, Young cites to both the official transcript of the Segment, attached as Exhibit E to his motion, and a copy of the Segment itself, which was previously filed with the Court on August 2, 2022 as Girones Decl. Comp. Ex. A via a Notice of Filing Audiovisual Exhibit. Because there are some inaccuracies in the transcript, CNN cites here exclusively to the Segment itself, referenced as "Girones Decl. Comp. Ex. A."

The pre-recorded package began with two unidentified men (their identities obscured for their safety) speaking about their experiences dealing with the private market for evacuation services and how the high fees demanded to get their families safely out of Afghanistan were well beyond what they could afford. The first unidentified man described how his family was facing death threats from the Taliban, saying the situation was "desperate" and involved imminent "danger." *Id.* at 0:53 – 0:56. Marquardt's narration then stated: "Desperate, he turned to Facebook, finding people offering ways to Afghans out of the country for a price." *Id.* at 1:34 – 1:40. The first unidentified man then explained that the private operator he found on Facebook demanded a price of $10,000 per person, which was far beyond what he could pay to get his ten family members out. *Id.* at 1:40 – 1:55.

The second unidentified man featured in the Segment told CNN that he was being asked to pay $50,000 upfront to get his family out of Afghanistan, which was well beyond what he could afford. *Id.* at 2:13 – 2:30. He observed that, for those demanding the fees, "it is only [a] business matter. People are making . . . $100,000 per day." *Id.* at 2:30 – 2:35. The Segment explained that the second unidentified man "worked as a contractor for USAID," and described him as "the kind of Afghan citizen the Biden administration says they are working to evacuate." *Id.* at 2:35 – 2:47. It then quoted the second unidentified man as saying that the U.S. was not offering any help to get his family out, with the narration adding: "So, he went online, where he found a man named Zachary Young, who was one of many advertising evacuations from Afghanistan." *Id.* at 3:05 – 3:11.

CNN's reporting continued with LinkedIn messages in which Young quoted prices of "$75,000 for a car to Pakistan," "$14,500 per person to get to the United Arab Emirates," and an additional "$4,000" to get to Albania. *Id.* at 3:14 – 3:34. The Segment characterized these as

"[p]rices well beyond the reach of most Afghans." *Id.* The Segment then quoted a text message from Young in which he said, "Afghans trying to leave are expected to have sponsors pay for them," and described "evacuation costs" as "highly volatile and based on environmental realities." *Id.* at 3:36 – 3:53. Marquardt's narration added: "Young repeatedly declined to break down the costs, or say if he's making money." *Id.* at 3:53 – 3:58.

After the end of the pre-recorded package, Marquardt told Tapper: "Now the Biden administration continues to work on evacuating people. But as you can see there, there are just so many more Afghans who want to get out of the country, and that just drives prices higher and higher." *Id.* at 4:32 – 4:42. The Segment closed with Marquardt telling Tapper that Young stated in another communication: "Availability is extremely limited and demand is high," and "that's how economic works, unfortunately." *Id.* at 4:42 – 4:55.

Two banners appeared at various points throughout the Segment. One banner read: "Afghans trying to flee Taliban face black markets, exorbitant fees, no guarantee of safety or success." *Id.* at :05 – 1:48, 3:16 – 3:37, 3:45 – 4:03, 4:32 – 5:01. The other banner read: "Afghans and activists report demands of $10k-$14k for attempts to get family members out of the country." *Id.* at 1:49 – 3:15, 4:04 – 4:26.

Although Young accuses CNN of reporting that he was seeking money directly from Afghans, *see, e.g.*, Mot. at 1-3, 8, 11-12, CNN explicitly and repeatedly stated that Young was seeking payment from third-party sponsors. Specifically, CNN:

- Displayed a screen shot from Young's LinkedIn account that stated, "If you are a sponsor, WITH FUNDING, serious to evacuate people from Afghanistan on short notice, please reach out." Girones Decl. Comp. Ex. A at 3:13 – 3:14 (emphasis in the original).
- Quoted a text message from Young in which he stated that "Afghans trying to leave are expected to have sponsors pay for them." *Id.* at 3:36 – 3:43.

- Put the following words on the screen in ALL CAPS, which it attributed to Young: "IF SOMEONE REACHES OUT, WE NEED TO UNDERSTAND IF THEY HAVE A SPONSOR BEHIND THEM TO BE ABLE TO PAY [EVACUATION] COSTS." *Id.* at 3:48 – 3:52 (emphasis in the original).

The cnn.com Article largely mirrored the Segment, with the exception that the Article did not use the phrase "black market" to describe the circumstances faced by Afghans looking to purchase private evacuation services. Instead, the Article stated: "The increased sense of desperation and limited space on evacuation routes have fostered a private market with private operations demanding exorbitant amounts, sometimes tens of thousands of dollars to transport people outside the country by different means and routes, with no guarantee of success." Mot. Ex. L at CNN000002. Like the Segment, the Article explicitly reported that Young was seeking payment from third-party sponsors, stating: "Young declined to speak on the phone but said in a text message that he asks ***Afghans who want to leave to have sponsors to cover them***." *Id.* at CNN000004 (emphasis added). The Article also quoted Young as follows: "If someone reaches out, we need to understand if they have a sponsor behind them to be able to pay [evacuation] costs." *Id.*

As for the Twitter posts Young complains about, in one, *The Lead with Jake Tapper* posted a link to the Segment along with a quote from Tapper's lead-in that read: "Afghans trying to get out of the country face a black market of promises, exorbitant fees and no guarantee of safety or success." Mot Ex. A (Proposed 2d Am. Compl.) ¶ 80. In the other post, Marquardt retweeted the Tweet from *The Lead with Jake Tapper*, adding: "There is growing exploitation of desperate Afghans trying to get out. Private operators telling them it'll take families 10s of 1000s dollars. We spoke with two Afghans trying to get their families out." *Id.* ¶ 82. Underneath that Tweet, Marquardt posted screen shots of Young's social media posts under a caption that read: "Here's an example of someone advertising evacuations on LinkedIn. $75k to Pakistan, $14.5k to UAE.

'availability is extremely limited and demand is high . . . That's how economics works, unfortunately.'" *Id.*

II. CNN'S NEWSGATHERING

Because the parties are still in the midst of discovery, the Court does not yet have a complete record that recounts CNN's newsgathering. Nonetheless, the limited record makes two things clear: (1) CNN assembled substantial evidence regarding Young's activities that, at a minimum, suggested he was seeking to make a significant profit off a situation in which many Afghans were desperate to flee the country, and (2) the CNN reporters who worked on the story interpreted the facts they gathered as evidence that Young was, indeed, seeking to profit off of the desperate circumstances in Afghanistan. This record also makes clear that, contrary to Young's contentions, CNN provided him with ample opportunity to tell his side of the story.

A. CNN Based Its Reporting On Substantial Evidence That Young Was Charging Exorbitant Sums To Help Afghans Get Out Of The Country

At the time of its reporting, CNN was in possession of abundant materials that suggested Young was looking to use the desperation of Afghans to make money for himself. Those materials, many of which were included in CNN's published reporting, primarily consisted of Young's activity on LinkedIn. As CNN will explain in its forthcoming Motion for Spoliation Sanctions, Young deleted his LinkedIn account after filing this lawsuit, including all of his posts and direct messages. Those deleted materials are certainly relevant to this case, and would likely provide additional support for CNN's characterization of Young's business activities.

Included within the materials CNN reviewed were a series of social media posts in which Young quoted prices of "$14.5k" per person to get someone out of Afghanistan, adding: "we can offer onward to Albania for an additional $4k which includes refugee status on arrival." Mot. Ex. N at CNN000046-47. Most tellingly for these purposes, in one of those posts, Young said that he

was able to charge such high rates because of the high demand created by the large number of Afghans eager to leave the country, stating: "Per [person] is expensive because ***availability is extremely limited and demand is high***." He added: *"**That's how economics works, unfortunately***." *Id.* (emphases added).

CNN journalists also had reviewed a LinkedIn exchange between Young and a news source, U.S. activist [redacted] Mot. Ex. B at CNN000719.[6]

In another LinkedIn exchange that CNN reviewed, Young rudely shut down questions from a potential sponsor about the affordability of his rates. In that exchange, [redacted] Ex. 1 to Declaration of Allison S. Lovelady ("Lovelady Decl.") at CNN000723.[7] The potential sponsor responded with: [redacted]

[6] In this particular exchange, and some of the others cited here, Young is identified as "Linkedin Member," rather than by name. There is no dispute that the person identified as "Linkedin Member" in these documents is Young, or that Marquardt and Lillis believed it was Young at the time of their reporting.

[7] Young declined to include this particular exchange in his proffer. Indeed, he went out of his way deliberately to exclude it, breaking up the internal messages between Marquardt and Lillis so they skip from CNN000719 to CNN000724, thereby omitting CNN000723, where Lillis shares this exchange with Marquardt. *See* Mot. Ex. B (excluding CNN00072-23 from exchange between Lillis and Marquardt). That is an additional reason why the Court should consider the exchange – *i.e.*, basic rule-of-completeness considerations.

[redacted] *Id.*

CNN journalists also reviewed materials that indicated Young refrained from asking for payment directly from Afghans only because they could not afford the prices he was demanding, not based on any moral stance. Young admitted as much in a text to Lillis, in which he told her: "No Afghan is expected to pay for evac costs, ***none would ever be able***." Mot. Ex. I at Young_000263 (emphasis added). In addition, at least one social media exchange that CNN reviewed made clear that Young was willing to accept payment directly from Afghans, if they could pay. In the interaction, the [redacted]

Lovelady Decl. Ex. 2 at CNN000717.[8]

In a subsequent text message exchange, Lillis confronted Young over the evidence she had seen indicating that, rather than connecting Afghans with sponsors willing to pay, he was leaving it up them to find a way to meet his demand, whether through finding sponsors or otherwise. In the message, she said:

> So I'm looking at some text exchanges with a potential evac case who you ask[ed] if he has a sponsor to cover the 15k cost – and when he didn't, it looks like you

[8] This exchange likewise was not included in Young's proffer. Once again, he split up the internal message exchange between Marquardt and Lillis to exclude it. *See* Mot. Ex. B (skipping from CNN000716 to CNN000719, and leaving out CNN000717, where Lillis shares this exchange with Marquardt).

> ended the engagement. That's not exactly "lining up sponsors." Can you point me to some cases where you've successfully connected a sponsor and an evac case?
>
> Some other folks engaged in this kind of work we spoke to have characterized your prices as inflated – so I want to understand if this is a for-profit model . . . .

Lovelady Decl. Ex 3 at Young_000265.[9] Young did not respond substantively to any of Lillis' queries. *Id.*

B. The Record Contains Substantial Evidence That CNN's Reporters Believed That Young Was Engaged In Exploitative And Profiteering Behavior.

The record also makes clear that CNN's journalists came to view Young as a profiteer based on what they learned while investigating his operation. For instance, in a text exchange, Marquardt directly confronted Young with the specific sums he was charging. Marquardt told Young that, "[o]thers involved in evacuations have said your prices are too high," and then asked: "Are you making money off of this? If so, how do you justify ***profiting from Afghans desperate to get out***?" Mot. Ex. H at Young_000250-51 (emphasis added). Young did not answer Marquardt's questions or otherwise substantively respond. *Id.*

Another communication from Marquardt, this one with his CNN colleagues, makes clear that Young's claim to be seeking payment exclusively from third-payment sponsors did not change Marquardt's view that Young was engaged in profiteering. In that communication, [redacted] Mot. Ex. B at CNN000716.

In addition, while Young's motion quotes selectively from the occasionally harsh language CNN reporters used in their internal discussions about him, the context makes clear that that

[9] This text message exchange, though produced by Young, also was not included in his proffer.

language reflected those journalists' beliefs in the truth of the damning information they were learning about Young, not any pre-existed animus against him. Here is one revealing exchange between Marquardt and Lillis, in which they discussed [redacted]

Id. at CNN000708 (emphases added).

In other exchanges, Lillis described specific bad behavior by Young to Marquardt and he reacted to what he was being told with coarse language. *See id.* at CNN000708 [redacted] *id.* at CNN000724 [redacted]; *id.* at CNN000726 [redacted]; *see also id.* at CNN000632 [redacted]

[redacted]. As explained below, these [redacted] about Young are not evidence of either actual malice or express malice on the part of CNN. On the contrary, the comments self-evidently reflect the journalists' belief that the facts they discovered and later reported about Young (a) were true, (b) indicated Young was profiteering from the Afghans' plight, and (c) were in the public's interest to know. Belief in the accuracy and newsworthiness of one's own reporting is not actual or express malice – it is the antithesis of both. *See infra* at 33-35 (explaining that the beliefs evidenced by these [redacted] are the opposite of either actual or express malice).

C. CNN Gave Young Extensive Opportunities To Tell His Side Of The Story.

In his motion, Young falsely represents that CNN gave him just a few hours to respond to the information it planned to report. He focuses solely on his text exchange with Marquardt on the day the Segment aired, in which Marquardt posed a series of questions, giving Young a response deadline for that afternoon, and Young responded with: "That's not a realistic deadline. I will need a few days to review and provide comment." *See, e.g.*, Mot. at 10 (citing this exchange, found at Mot. Ex. H at Young_000249-51, and asserting that "CNN failed to give Young a fair opportunity to reply"); *id.* at 24 (same). Young fails to note, however, that CNN had reached out to him about the story well before that November 11 exchange.

In the very text message chain Young selectively cites, Marquardt detailed his multiple efforts to reach Young, explaining, "[t]his piece is running this afternoon DC time, that's why I reached out to you yesterday," and, "I tried to reach out last week on Linkedin, you did not accept my request. I called you last week and I texted you yesterday." Mot. Ex. H at Young_000249. In addition, Young's own proffer contains a text message exchange between himself and Lillis from November 3, 2021, eight days prior to publication. *Compare* Mot. Ex. I at Young_000263

(November 3 exchange between Young and Lillis), *with* Mot. Ex. H at Young_000249-51 (November 11 exchange between Young and Marquardt). The messages exchanged between Lillis and Marquardt likewise demonstrate that Lillis began communicating with Young eight days before publication. Mot. Ex. B at CNN000708-16. Those messages also show that Marquardt called Young on November 3, and he did not answer or otherwise reach out in response. *Id.* at CNN000726-27. That is why (in a message Young highlights in his motion papers) [redacted] *id.* at CNN000728, when he finally received a response from Young on the day of publication. Marquardt was expressing exasperation that Young waited so long to get back him, just as CNN was preparing to publish.

And, despite Young's complaints about not being given adequate time to provide comment, the Segment and the Article both featured quotes Young supplied to CNN in which he said he was seeking payment only from third-party sponsors, a fact he falsely accuses CNN of not reporting. *See* Girones Decl. Comp. Ex. A at 3:36 – 3:53; Mot. Ex. L at CNN000004.

III. CNN ISSUES A CORRECTION AS TO THE USE OF THE PHRASE "BLACK MARKET."

On March 17, 2022, Young submitted a correction demand to CNN pursuant to Section 770, Florida Statutes. Mot. Ex. A (Proposed 2d Am. Compl.) ¶ 83. A little more than a week later, CNN aired a correction regarding the use of the phrase "black market" in the Segment, even though the Segment did not use that phrase with reference to Young specifically. Mot. Ex. E at CNN000024, CNN000037. The correction, which aired on *The Lead with Jake Tapper*, stated as follows:

> In November, we ran a story about Afghans desperate to pay high sums beyond the reach of average Afghans. The story included a lead-in and banner throughout the story that referenced a black market. The use of the term black market was in error.
>
> The story included reporting on Zachary Young, a private operator who had been contacted by family members of Afghans trying to flee the country. We didn't

> mean to suggest that Mr. Young participated in the black market. We regret the error and to Mr. Young, we apologize.

Id. at CNN000037.

ARGUMENT

The Court may only grant Young leave to assert punitive damages if he puts forth a reasonable evidentiary basis to support three separate findings: (1) that CNN published the subject journalism with actual malice – *i.e.*, with knowledge of its falsity, or a subjective belief in its probable falsity; (2) that CNN published the subject journalism with express malice – *i.e.*, with the primary purpose to injure him specifically; and (3) that CNN's overall conduct rose to the level of egregiousness and outrageousness required to permit an award of punitive damages. As explained below, Young has not made, and cannot make, any of those evidentiary showings. There is no evidence that CNN published anything about Young knowing, or strongly suspecting, that it was false. There is no evidence that CNN's journalists were specifically motivated by an intention to harm Young personally, as opposed to report news that CNN believed was of public interest. And, there is certainly no evidence that CNN did anything that comes close to the level of egregiousness or outrageousness that Florida law demands before a defendant can be exposed to punitive damages. Young's motion should, accordingly, be denied.

I. IN ORDER TO ASSERT PUNITIVE DAMAGES CLAIMS, YOUNG MUST PROVIDE EVIDENCE OF ACTUAL MALICE, EXPRESS MALICE, AND CONDUCT DISPLAYING SUFFICIENT EGREGIOUSNESS AND OUTRAGEOUSNESS.

In his motion, Young asserts that "[l]eave to amend a complaint should be freely granted." Mot. at 17 (citing *Drish v. Bos*, 298 So. 3d 722 (Fla. 2d DCA 2020)). That, however, is the standard that governs ordinary motions for leave to amend a complaint. Motions for leave to amend to assert claims for punitive damages are subject to a much more stringent standard.

Under Section 768.72(1), a plaintiff is not permitted to assert punitive damages claims unless he first makes "a reasonable showing by evidence . . . which would provide a reasonable basis for recovery of such damages." Fla. Stat. § 768.72(1). As the Florida Supreme Court has explained, the statute "create[s] a substantive legal right not to be subject to a punitive damages claim and ensuing financial worth discovery *until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages*." *Globe Newspaper Co. v. King*, 658 So. 2d 518, 519 (Fla. 1995) (emphasis added); *see also Tallahassee Mem. Healthcare, Inc. v. Dukes*, 272 So. 3d 824, 825 (Fla. 1st DCA 2019) ("A defendant has a substantive legal right not to be subject to punitive damages claims if there is no reasonable basis for recovery.").

Thus, "[t]he statute requires the trial court to act as a gatekeeper and precludes a claim for punitive damages where there is no reasonable basis for recovery." *Bistline v. Rogers*, 215 So. 3d 607, 611 (Fla. 4th DCA 2017). The Florida Supreme Court recently amended Florida Rule of Appellate Procedure 9.130 to provide for immediate appeals from orders granting or denying motions for leave to amend under Section 768.72, underscoring the importance of legal gatekeeping at this stage. *In re Amendment to Fla. Rule of App. Proc. 9.130*, 345 So. 3d 725, 725-26 (Fla. Jan. 6, 2022) (per curiam); *see also TRG Desert Inn Venture, Ltd. v. Berezovsky*, 194 So. 3d 516, 520 n.5 (Fla. 3d DCA 2016) (urging amendment of Rule 9.130 to permit direct appeals in this context on the ground that "the granting of a motion for leave to amend a complaint to add a punitive damages claim can be a 'game changer' in litigation").

Under Section 768.72(2), to be eligible to recover punitive damages, a plaintiff must demonstrate, by clear and convincing evidence, that the defendant was "personally guilty of intentional misconduct or gross negligence." Fla. Stat. § 768.72(2). As Young acknowledges, in a case such as this one, in which the plaintiff is asserting defamation claims based on speech on a

matter of public concern, "intentional misconduct" requires that the statement at issue was published with "actual malice." Mot. at 20 (conceding application of the actual malice standard).[10] That is because, "[i]f allegedly defamatory statements involve a matter of public concern," the First Amendment requires that "punitive damages can be recovered only if actual malice is shown." *Rabren v. Straigis*, 498 So. 2d 1362, 1363 (Fla. 2d DCA 1986)); *see also Mid-Fla. Television Corp. v. Boyles*, 467 S. 2d 282, 283 (Fla. 1985) (in a defamation case, "there cannot be . . . punitive damages without *New York Times* malice").

To demonstrate actual malice, a plaintiff must show that the publisher "either knew the defamatory statements were false" and published them anyway, or else "published them with reckless disregard despite awareness of their probable falsity." *Mile Marker, Inc. v. Peterson Publ'g, LLC*, 811 So. 2d 841, 845 (Fla. 4th DCA 2002). In other words, actual malice "is a subjective test, which asks whether the publisher in fact entertained serious doubts as to the truth of his publication." *Berisha v. Lawson*, 973 F.3d 1304, 1312 (11th Cir. 2020) (cleaned up)), *cert. denied*, 141 S. Ct. 2424 (2021). Thus, to be entitled to assert punitive damages claims, Young must make a preliminary evidentiary showing that CNN published statements about him that, at the time, it knew, or strongly suspected, were false.

[10] Young does not appear to be arguing that a showing a "gross negligence" is sufficient to recover punitive damages in this context. Nor could he. The U.S. Supreme Court has made clear that, under the First Amendment, states may not permit awards of punitive damages on a standard lower than actual malice in cases arising out of publications on matters of public concern. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). That rules out any objective standard, such as gross negligence or recklessness. *See* Robert D. Sack, *Sack on Defamation* ("*Sack*") § 5:5.1 (5th ed. 2017) ("'Reckless disregard' as to falsity as that term is applied in the *New York Times* test is virtually unrelated to 'recklessness' in the ordinary sense [of] gross negligence or wanton behavior."); *see also Bistline*, 215 So. 3d at 609 ("gross negligence" standard set out in Section 768.72(2) did not apply to analysis under Section 768.72(1) where cause of action required showing beyond negligence to recover punitive damages).

In addition, to demonstrate "intentional misconduct" under Section 768.72(2), a plaintiff must also show "express malice."[11] As the First DCA has explained, under Florida law, "[i]n order to award punitive damages in a libel action, ill will, hostility or an evil intention to defame . . . must be present." *Matthews v. Deland State Bank*, 334 S. 2d 164, 166 (Fla. 1st DCA 1976); *see also Hunt v. Liberty Lobby*, 720 F.2d 631, 650 (11th Cir. 1983) (identifying Florida as one of the states that "do[es] not permit punitive damages" in a defamation case "unless the plaintiff can show that the defendant entertained 'common law' or 'express' malice"); *Brown v. Fawcett Publ'ns, Inc.*, 196 So. 2d 465, 473 (Fla. 2d DCA 1967) (in a defamation case, recovering punitive damages requires showing "express malice"). To demonstrate express malice, a defamation plaintiff must show "the *primary* motive for the statement . . . to have been an intention to injure the plaintiff." *Nodar v. Galbreath*, 462 So. 2d 803, 806 (Fla. 1984) (emphasis added); *see also Crestview Hospital Corp. v. Coastal*, 203 So. 3d 978, 981 (Fla. 1st DCA 2016) ("The question of express malice largely turns on whether the speaker intended to harm the plaintiff personally."). Thus, to be entitled to leave to assert punitive damages claims, Young must also make a preliminary evidentiary showing that CNN published the subject journalism with the primary intent to harm him personally.

[11] Young asserts that he is not required to make a preliminary evidentiary showing of express malice at this stage. *See* Mot. at 26. As noted above, under Florida law, express malice is an essential element for recovery of punitive damages in a defamation case. *See supra* 18. That makes it part of the showing that must be made at the Section 768.72(1) stage. Young relies for the contrary position on the trial court's decision in *Black v. Cable News Network* et al., Case No. 50-2016-CA-001517 (Fla. 15th Cir. June 1, 2022), which permitted the plaintiff to assert punitive damages claims in a defamation case against CNN (and others) without a showing of express malice. *See* Mot. at 26-27 (citing to that decision). That ruling is currently on appeal, with oral argument having taken place on March 28, 2023. *See Cable News Network v. Black*, Case No. 4D22-1674 (Fla. 4th DCA). In addition, after the appeal was filed, the trial court granted CNN's motion to stay financial-worth discovery pending resolution of this appeal, observing, at the hearing on the motion, that CNN had demonstrated a "likelihood of success on appeal." Lovelady Decl. Ex. 4 (transcript of July 22, 2022 hearing) at 4:14-5:18.

Finally, for a defendant's conduct to rise to a level sufficient to permit an award of punitive damages, it must be especially egregious in nature. That is because "[t]he conduct punitive damages properly condemns and hopefully deters is willful and wanton misconduct of a character no less culpable than what is necessary to convict of criminal manslaughter." *Tiger Point Golf & Country Club v. Hipple*, 977 So. 2d 608, 610 (Fla. 1st DCA 2007); *see also Marder*, 2023 WL 2777783, at *2 (to warrant punitive damages, "[t]he conduct must be so outrageous in character, and so extreme in degree . . . that the facts of the case to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" (cleaned up); *Grove Isle Ass'n v. Lindzon*, 350 So. 3d 826, 830 (Fla. 3d DCA 2022) ("punitive damages are reserved for truly culpable behavior and are intended to express society's collective outrage"). Accordingly, to be entitled for leave to assert punitive damages claims, Young must additionally make a preliminary evidentiary showing that CNN's conduct rose to that level of egregiousness or outrageousness.

As set forth below, Young has not made <u>any</u> of the requisite evidentiary showings.[12] His motion should be denied.

II. YOUNG HAS FAILED TO PROFFER A REASONABLE EVIDENTIARY BASIS THAT CNN PUBLISHED THE SUBJECT JOURNALISM WITH ACTUAL <u>MALICE.</u>

Young contends that he has made a reasonable evidentiary showing of actual malice because his "[p]roffer directly establishes that, while calling Young a black-market exploiter of

[12] Because Young is suing CNN, he must additionally show that any conduct by a CNN employee meeting the standard for an award of punitive damages can be imputed to CNN as an organization, either because CNN actively participated in the conduct at issue, or because it ratified, or consented to, that conduct. *See* Mot. at 20-21 (citing Fla. Stat. § 768.72(2)-(3)). Since no CNN employee engaged in conduct that would permit an award of punitive damages in the first place, it is not necessary to reach the question of whether CNN as an organization can be liable for punitive damages based on that conduct.

desperate Afghans, CNN knew that Young's evacuations were legal and that he never accepted a penny from any individual Afghans." Mot. at 23. Young cannot demonstrate actual malice on that basis. As explained below, even accepting as true for the purpose of this motion only that "CNN knew that Young's evacuations were legal and that he never accepted a penny from any individual Afghans," this claim does not demonstrate that CNN published anything about Young that it believed, or suspected, to be false.

A. CNN Did Not Report That Young Was Soliciting, Or Receiving, Payment Directly From Afghans.

Young's central argument on actual malice is that his proffered evidence demonstrates that CNN knew he was seeking/receiving payment from third-party sponsors for facilitating evacuations from Afghanistan, not from the Afghans being evacuated. *See, e.g.*, Mot. at 8 ("[A] reasonable jury could conclude that CNN accused Young of charging exorbitant fees to desperate Afghans, knowing that accusation against Young was false."). But CNN never reported that Young took money directly from evacuating Afghans. In fact, CNN explicitly reported that Young was seeking payment from third-party sponsors.

The Segment informed its audience at three separate points that Young was seeking payment from third-party sponsors, not directly from Afghans. *See supra* at 6-7 (describing those instances). This included displaying the following words in ALL CAPS during the Segment and attributing them to Young: "IF SOMEONE REACHES OUT, WE NEED TO UNDERSTAND IF THEY HAVE A SPONSOR BEHIND THEM TO BE ABLE TO PAY [EVACUATION] COSTS." *Supra* at 7. The Article was just as explicit on this point. It informed readers that Young "said in a text message that he asks Afghans who want to leave to have sponsors to cover them," and quoted from the same text message from Young that was displayed in ALL CAPS in the

Segment. *See supra* at 7 (describing the instances in which the Article stated that Young was seeking payment from sponsors).

CNN clearly reported exactly what Young told its journalists – that he was soliciting payment from third-party sponsors. Since CNN's reporting was truthful, Young cannot demonstrate actual malice as a matter of law.

B. Young Has Proffered No Evidence To Suggest That CNN Doubted That He Was, In Fact, Exploiting The Desperation Of Afghans.

Nor can Young resuscitate his actual malice case by contending that, even if CNN did not report that he was taking money directly from Afghans, it falsely implied that he was exploiting their desperation. *See, e.g.*, Mot. at 9 (accusing CNN of lumping him in with the "growing exploitation of desperate Afghans trying to get out," despite knowing that "Young did not exploit Afghans"). That alleged implication cannot support a finding of actual malice.

As an initial matter, Young cannot premise a claim of intentional or knowing falsity on a disagreement of opinion as to whether his admitted conduct – charging significant sums to third parties to facilitate evacuations – amounted to exploitation. Under well-established Florida law, a characterization of a plaintiff's undisputed conduct, even a derogatory characterization, constitutes a statement of opinion, not fact. *See, e.g.*, *Pullam v. Johnson*, 647 So. 2d 254, 257 (Fla. 1st DCA 1994) (characterizing politician as "drug pusher" based on his public policy views was a statement of opinion, not fact); *Hay v. Indep. Newspapers, Inc.*, 450 So. 2d 293, 295 (Fla. 2d DCA 1984) (labelling plaintiff a "crook and a criminal" was a matter of opinion where facts on which those labels were based were "disclosed in the article"); *Fid. Warranty Servs., Inc. v. Firstate Ins. Holdings, Inc.*, 74 So. 3d 506, 515-16 (Fla. 4th DCA 2011) (accusation that plaintiff charged "fraudulent rates" was opinion where facts on which accusation was based were disclosed); *Palm Beach Newspapers, Inc. v. Early*, 334 So. 2d 50, 52 (Fla. 4th DCA 1976) (accusation that school

superintendent was "unfit to hold the office . . . because of his ineptness, incompetence, and indecisiveness . . . were clearly matters of opinion, not statements of fact"); *Coleman v. Collins*, 384 So. 2d 229, 231 (Fla. 5th DCA 1980) (characterizing plaintiff as "sneaky" was statement of opinion, not fact).

Thus, whether Young's conduct amounted to exploitation is a matter of opinion, not a fact capable of being true or false. Because a statement of opinion cannot be intentionally or knowingly false, Young cannot demonstrate actual malice as to any implication CNN allegedly conveyed that his conduct amounted to exploitation. *See Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1108 (Fla. 2008) (implications that convey opinions, not facts, cannot be false for purposes of a defamation claim).

Moreover, even if the implication that Young was exploiting the desperation of Afghans can be construed as a fact, Young has put forth no evidence that CNN believed that implication to be false. Instead, the evidence overwhelmingly demonstrates that CNN, in fact, believed Young was exploiting the desperation of Afghans for profit, whether he was receiving money directly from Afghans or from third party sponsors.

As explained above, at the time of its reporting, CNN had reviewed substantial materials that painted of picture of Young as someone looking to profit from Afghans' desperation to flee the country. *See supra* at 8-11 (describing that evidence). These materials included:

- A social media post in which Young attributed his high prices to the "high demand" created by the circumstances on the ground in Afghanistan, adding, "That's how economics works, unfortunately." Mot. Ex. N at CNN000046-47.
- A text message from Young to Lillis in which he admitted that he was not looking for payment by Afghans of the fees he was charging because "***none would ever be able***." Mot. Ex. I at Young_000263 (emphasis added).
- And, a social media exchange [redacted]. Lovelady Decl. Ex. 2 at CNN000478.

The record also shows that the journalists who worked on the reporting interpreted these materials to mean Young was trying to make money off of the desperation of Afghans. As previously noted, Marquardt put that exact accusation directly to Young, asking him: "Are you making money off of this? If so, ***how do you justify profiting from Afghans desperate to get out***?" Mot. Ex. H at Young_000250 (emphasis added). Young did not respond substantively, and, instead, asserted vaguely that "some of your facts/assertions [are] not accurate." *Id.* at Young_000251.

Likewise, Marquardt opined in real time that Young's claim to be seeking payment from sponsors did not in any way exonerate him from the charge of profiteering, observing about Young:

[redacted]

[redacted] Mot. Ex. B at CNN000716. And, as also documented in the record before this Court, the internal messages CNN journalists exchanged as they worked on the reporting demonstrate in no uncertain terms that they sincerely believed Young was engaged in morally dubious profiteering. *See, e.g.*, *supra* at 12-13 [redacted]

[redacted]

[redacted]. Accordingly, even assuming the implication that Young's business activities were exploitative is factual in nature – which it is not – the record makes clear that the CNN journalists who worked on the story believed that to be an accurate assessment of Young. Young has proffered no evidence suggesting otherwise.

C. Young Has Proffered No Evidence That CNN Believed That Its Use Of The Term "Black Market" Implied Anything False About Him.

Young also cannot prove actual malice based on his assertion that CNN used the phrase "black market" while knowing that his activities were not prohibited by any laws. Even assuming for these limited purposes both that the technical definition of the phrase "black market" connotes

illegality, and that CNN knew that Young's dealings in Afghanistan were not technically illegal, that still does not add up to a reasonable showing of actual malice. That is because CNN used – and understood itself to be using – the phrase "black market" in its colloquial and non-technical sense, not to describe actual criminal transactions.[13]

Young concedes that his activities in Afghanistan were outside the law because he was operating in an environment that was "***not even regulated by law***." Mot. at 6 (emphasis added). And, that is the sense in which CNN used the phrase "black market" – *i.e.*, to broadly characterize the emerging market for private evacuation services as one in which profit-minded actors were operating in the absence of any legal regulation, and which, therefore, was ripe for predatory behavior. This is apparent from Tapper's lead-in to Marquardt's report, which, along with the banners and a tweet that echoed the lead-in, are the only places where CNN used the phrase "black market." The lead-in stated: "As CNN's Alex Marquardt has discovered, Afghans trying to get out of the country, ***face a black market full of promises, demands of exorbitant fees, and no guarantee of safety or success***." Mot. Ex. E at CNN000018 (emphasis added). That phrasing

[13] Although Young suggests that the term "black market" has only one obvious meaning, which necessarily involves an element of illegality, *see* Mot. at 4-5, the term itself is vague and can refer simply to an informal or underground market. *See, e.g.*, "Black Market," *Wikipedia*, https://en.wikipedia.org/wiki/Black_market (using phrases "underground economy" and "shadow economy" as synonyms for "black market," and defining the term as "a clandestine market or series of transactions that *has some aspect of illegality or is characterized by noncompliance with an institutional set of rules*" (emphasis added)); Online Etymology Dictionary, https://www.etymonline.com/word/black%20market (providing, as one definition of "black market" a "dark, invisible" or "shady, improper" market). Regardless, the actual malice analysis does not hinge on any dictionary definition of the term. No witnesses have been deposed in this case yet. Thus, there is simply no evidence in the record that CNN intended the words "black market" to mean illegal activity under the definitions Young cites, as opposed to in accordance with the less technical sense of that phrase. Without such evidence, Young has not proffered a case from which a reasonable jury could find actual malice under Section 768.72(1). *See infra* at 25-26 (explaining that Young must show that CNN intended the phrase "black market" to convey that his activities were illegal to show actual malice).

makes clear that the salient feature of what was being referred to as a "black market" was not any trafficking in illegal goods or services. Instead, it was that the market was operating in the absence of a functioning legal system, with the result being that Afghans looking for evacuation services lacked the protections present in properly regulated markets.

This reading of CNN's intent with the phrase "black market" is also supported by the Segment as a whole. At no point did the Segment characterize any economic transaction as illegal. Rather, the journalism emphasized that vulnerable Afghans had no safeguards in place to protect them from exploitative behavior. This applies equally to the portions of the Segment reporting on Young, where the entire focus was on the high price he was demanding for his services.

Under well-established law, Young cannot prove actual malice by pointing to an allegedly imprecise word choice that might have conveyed an implication of illegality. He must also put forward evidence demonstrating that CNN intended to convey that implication of illegality, while knowing that implication to be false. This he has not done.

The U.S. Supreme Court articulated this stringent standard for libel by implication in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). There, the plaintiff sued over a critical review of its loudspeaker system, which had inaccurately depicted the system as causing the sound from the instruments to "wander 'about the room.'" *Id.* at 488. In attempting to prove actual malice, the plaintiff pointed to testimony from the author indicating that he had not, in fact, perceived the sound from the speakers in the way his article described it. *Id.* at 512. The plaintiff argued, just as Young does here, that, because the author used language with a standard meaning that contradicts the author's own understanding of the facts, the author made knowingly false claims. *Id.* The Supreme Court rejected that argument. It held that the article's use of inaccurate phrasing was not itself evidence of actual malice without further evidence that the author realized at the

time that the phrasing was inaccurate. As the Court explained: "The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella." *Id.* at 513. Otherwise, "any individual using a malapropism might be liable, simply because an intelligent speaker would have known that the term was inaccurate in context, even though he did not realize his folly at the time." *Id.*

Following *Bose*, courts have consistently held that demonstrating actual malice requires more than showing that a publication may have conveyed an implication that the publisher knew at the time to be false. As a leading treatise explains, "A person who believes and intends to say one thing is not lying, and is therefore not guilty of 'actual malice,' merely because he or she chooses the wrong language to say it or because those who hear the statement reasonably believe it to mean something different." *Sack* § 5:5.1[B]. Thus, courts have held that, "to find actual malice in defamation-by-implication cases, the plaintiff must show . . . that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material." *Kendall v. Daily News Publ'g Co.*, 716 F.3d 82, 91 (3d Cir. 2013); *see also Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446, 463 (Ind. 1999) ("[C]ourts have determined that use of an inaccurate word as a result of a misconception or poor interpretation is not actual malice."); *Hodges v. State Journal Publ'g Co.*, 617 P.2d 191, 195-96 (Okla. 1980) (inaccurate use of term "slush fund" in connection with plaintiff was not actual malice where there was no evidence that publisher intended to use term in manner that would render article inaccurate).[14]

[14] *See also, e.g.*, *Howard v. Antilla*, 294 F.3d 244, 252 (1st Cir. 2002) ("[W]here the plaintiff is claiming injury from an allegedly harmful implication arising from the defendant's article, he must show . . . that the defendant intended or knew of the implications that the plaintiff is attempting to draw" (cleaned up)); *Newton v. NBC*, 930 F.2d 662, 681 (9th Cir. 1990) (in defamation-by-implication case, it was improper to find actual malice based on assumption that reporters, as "trained journalists," must have intended to covey alleged implication); *Saenz v. Playboy Enters/,*

These principles control here. Young has not made an adequate evidentiary proffer that CNN intended to imply that Young was engaged in illegal dealings in Afghanistan, as opposed to taking advantage of the ability to operate where there were no laws at all. Without such evidence, he has no reasonable basis for a jury to find actual malice arising out of the use of the phrase "black market."

This conclusion is further bolstered by the fact that CNN issued a correction and apology after it was brought to its attention that the phrase "black market" potentially implied that Young was operating in an illegal market. The correction underscores that CNN never intended to imply that Young was personally engaged in illegal business activities, and so did not publish that alleged implication with actual malice. *See, e.g.*, *Wash. Nat'l Ins. Co. v. Administrators*, 2 F.3d 192, 196 (7th Cir. 1993) (publisher's after-the-fact willingness to "dispel" alleged defamatory implication refuted imputation of actual malice as it "demonstrat[ed] that the speaker did not contemplate the defamatory reading in the first place"); *Hoffman v. Wash. Post Co.*, 433 F. Supp. 600, 605 (D.D.C. 1977) (subsequent publication of retraction "tend[ed] to negate any inference of actual malice"), *aff'd without op.*, 578 F.2d 442 (D.C. Cir. 1978).

Indeed, not only does CNN's compliance with the correction statute, Section 770.02, negate any inference of actual malice, it independently bars Young from recovering punitive damages based on the use of the phrase "black market." The statute provides that where a publisher issues a prompt correction after having an error brought to its attention, "the plaintiff . . . shall recover only actual damages." Fla. Stat. § 770.02(1). As the Florida Supreme Court long ago

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Inc., 841 F.2d 1309, 1318 (7th Cir. 1988) ("[W]here the plaintiff is claiming defamation by innuendo, he also must show with clear and convincing evidence that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material.").

emphasized, the legislative purpose of the statute is to encourage publishers "to correct inadvertent errors prior to suit." *Ross v. Gore*, 48 So. 2d 412, 415 (Fla. 1950). It does so by providing that, where a publisher promptly corrects a mistake once it is brought to its attention, the publisher will "be relieved . . . of punitive damages." *Id.* That squarely applies here.

Young has not put forward a reasonable evidentiary basis for recovery of punitive damages based on CNN's use of the phrase "black market."

D. Each Of Young's Grab-Bag Of Actual Malice Theories Fails As A Matter Of Law.

In addition to his main actual malice arguments, Young tosses out no fewer than thirteen additional theories. *See* Mot. at 23-26. Many actually double back on his previous arguments. Not one provides a reasonable basis for a finding of actual malice. Those theories are addressed (as briefly as possible) below.

1. At least three of Young's additional theories – the ones labelled "fourth," "sixth" and "thirteenth," *see* Mot. at 24, 26 – simply rehash his contention that CNN reported he was exploiting desperate Afghans and engaged in illegal business activities, despite knowing he was getting paid by third-party sponsors and not operating in an area governed by law. The legal insufficiency of those theories of actual malice is addressed in detail above. *See supra* at 20-28.

2. Another two of Young's theories – the "first" and "eleventh" theories – accuse CNN of failing to conduct an adequate investigation and/or failing to adhere to standards of professional journalism. *See* Mot. at 24-26. There is no factual support for either charge. Regardless, both accusations fail as theories of actual malice under well-established law. *See, e.g.*, *Readon v. WPLG, LLC*, 317 So. 3d 1229, 1235 (Fla. 3d DCA 2021) ("[A] failure to investigate, standing on its own, does not indicate the presence of actual malice." (quoting *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 703 (11th Cir. 2016)); *Harte-Hanks Commc'ns, Inc. v. Connaughton*,

491 U.S. 657, 665-66 (1989) (explaining that even "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" does not establish actual malice).

3. Two more of Young's theories – the "second" and "third" ones – revolve around the accusation that CNN supposedly did not give him sufficient time to comment before publishing. *See* Mot. at 24. As explained above, Young's own evidentiary proffer shows that accusation to be false. Both Marquardt and Lillis reached out to Young for comment multiple times, well in advance of the publication date. *See supra* at 13-14. Lillis was actively communicating with Young via text message and social media starting eight days before the reporting first aired. And, both the Segment and the Article quoted from statements Young provided to Lillis, including a statement in which he said he only received payment from third-party sponsors. Having squandered multiple opportunities to respond to CNN's repeated inquiries, Young cannot now concoct a claim of "insufficient time to respond" as a basis for seeking punitive damages.[15]

[15] In addition, the case Young cites in support of his contention that failure to give a subject sufficient time to comment constitutes evidence of actual malice – *Southern Air Transport, Inc. v. Post Newsweek Stations Florida, Inc.*, 568 So. 2d 927 (Fla. 3d DCA 1990) – does not stand for the proposition that such a failure, on its own, supports such a finding. In that case, there was extensive circumstantial evidence of actual malice that, taken together, the court deemed sufficient to permit a reasonable jury to find actual malice. Here is the Court's complete recitation of the actual malice evidence assembled by the plaintiff in that case, which is worth quoting in full to underscore the stark contrast to the evidence Young has assembled for purposes of his proffer:

> (1) the defendants aired an investigative television news show in which a silhouetted, unidentified informer was shown accusing the plaintiff of drug trafficking while engaged in its covert arm shipments to the Nicaraguan Contras, stating that the plaintiff allegedly received illegal drugs in exchange for arms at an airport in Colombia; (2) the credibility of this informer was greatly suspect because (a) the informer had an extensive drug trafficking background and a motive to lie in order to obtain immunity therefor, (b) the informer's drug trafficking accusation against the plaintiff was completely uncorroborated by any other evidence, (c) the informer claimed to have photographs of the plaintiff's guns-for-

4. In his "fifth" theory, [redacted] *See* Mot. at 11-12, 24 [redacted]. The U.S. Supreme Court has made clear that "the state of mind required for actual malice . . . ha[s] to be brought home to the persons in the [defendant's] organization having responsibility for the publication." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964). [redacted].[16]

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drugs exchange, was paid $ 350 by the defendant WPLG staff for same, but was never able to produce such photographs, (d) when the defendant WPLG's staff interviewed the informer she was described as a 'woman out of control,' crying one minute and laughing the next, (e) the informer was given lie detector tests on her story by the FBI with inconclusive results, although the defendants' report of this result on the air falsely infers just the opposite, and (f) the Justice Department has declined to prosecute anyone based on the informer's testimony because it could never obtain any corroboration of such testimony, the informer was difficult to work with, and the information was not valuable; (3) the defendants did not give the plaintiff a fair opportunity to reply to this drug trafficking accusation because (a) they never informed the plaintiff they intended to air the aforesaid drug trafficking accusation, (b) the plaintiff did not itself learn of this intention until it was so announced on television at a prior news show the day before the alleged libel was aired, (c) the defendant refused the plaintiff's subsequent written request that the broadcast of the drug trafficking accusations be delayed for ten days so that it could demonstrate that the accusations were false, and (d) the defendant misrepresented on the air that the plaintiff had declined any comment on such charges; (5) the investigative news show strongly supported the credibility of the informer and did not reveal any of the information which tended to undermine this credibility; and (6) the defendants admit that they have no evidence that the plaintiff's executive officials were involved in drug trafficking, although the alleged libelous broadcast implies the opposite.

568 So. 2d at 928-29. Suffice to say, Young's proffer contains nothing even remotely like this.

[16] To the extent Young claims that CNN published an article "it recognized was not fit to print," Mot. at 12, this is inaccurate. The record is not yet fully developed; however, the current evidence shows, and depositions will further support, that the Article went through CNN's pre-publication vetting process and was ultimately approved for publication.

5. Young's "seventh" theory accuses CNN of using "sensationalistic effects to hide its factual flaws." Mot. 24-25. Even assuming for the purpose of this motion only that that were a fair characterization of CNN's journalism (which it is not), Young cites no proper authority for the proposition that such an accusation can support a finding of actual malice. His sole legal support is from a concurring opinion to an out-of-state decision in which the author was generally opining about the limits of a free press, not assessing the adequacy of the actual malice evidence in that particular case. *See id.* (quoting *Anderson v. The Augusta Chronicle*, 619 S.E.2d 428, 433 (S.C. 2005) (Burnett, J., concurring) to the effect that "[a] publication that systematically panders to sensationalism and degradation at the expense of the truth presents a cost too high for a free society to tolerate").

6. In his "eighth" theory, Young faults CNN for not retracting its publications in their entirety (as opposed to correcting its word choice). *See* Mot. at 25. Once again, this theory of actual malice fails under well-established law. *See Sullivan*, 376 U.S. at 286 (1964) ("[F]ailure to retract upon respondent's demand . . . [is] not adequate evidence of malice for constitutional purposes."); *Klayman v. City Pages*, 2015 WL 1546173, at *15 (M.D. Fla. Apr. 3, 2015) ("[T]he fact that Plaintiff alerted Defendants after publication that he believed the statements were false and that he wanted some kind of correction or retraction does not help Plaintiff to establish actual malice."), *aff'd*, 650 F. App'x 744 (11th Cir. 2016).

7. Young's "ninth" theory accuses CNN of spoliation. *See* Mot. at 25. This charge is baseless. The only support Young offers is his vague assertion that "despite being on notice of Young's stated intent to seek legal damages, . . . CNN did not suspend its 60-day document retention policy." *Id.* at 12. However, Young did not send his Section 770 correction demand until March 17, 2022. Mot. Ex. A (Proposed 2d Am. Compl.) ¶ 83. That was more than 120 days

after publication of the journalism. If some documents were destroyed in the regular course of business in the interim, pursuant to CNN's standard document-retention policies, that does not support any inference of spoliation.

Moreover, even if there were evidence of spoliation, that would not provide grounds to grant Young leave to assert punitive damages claims. As one Florida appellate court recently explained, the accusation that a defendant failed "to preserve 'evidence'" does not provide a reasonable basis for the recovery of punitive damages because conduct post-dating the alleged tort is irrelevant to whether the conduct giving rise to the suit merits punitive damages. *Cleveland Clinic Fla. Health Sys. Nonprofit Corp. v. Oriolo*, 357 So. 3d 703, 707-08 (Fla. 4th DCA 2023) (reversing trial court order granting leave to amend to assert punitive damages claims).[17]

8. Young's "tenth" theory accuses CNN of "intentionally manipulate[ing] and mischaracterize[ing]" one of his statements. *See* Mot. at 25. This appears to refer to this sentence from the Article, "CNN has not confirmed whether these operators charging the high fees have successfully evacuated anyone who paid to exit the country, as Young claims," which Young contends falsely implied that he admitted to charging his fees directly to Afghans. *See id.* at 12-13 (quoting Mot. Ex. L at CNN000004 and contending that the statement is false because he "never claimed that evacuees had paid to exit the country"). The statement, however, does not say that Young was specifically charging the Afghans themselves high fees for evacuations. And, to the

[17] In the case Young cites for the proposition that spoliation is evidence of actual malice – *Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085 (7th Cir. 1990) (Mot. at 25) – the court concluded the opposite. *Id.* at 1090. It held that, even where (unlike in this case) there is evidence of spoliation, brute speculation about how the destroyed documents might have impacted the actual malice inquiry is not sufficient to support an inference of actual malice. *See id.* at 1090 (remote possibility that destroyed notes might have contained some confession of actual malice, such as "Tipster says X, but because I have not verified it I know X is untrue," was insufficient to support actual malice finding). That applies especially here, as Young does not explain what materials CNN supposedly spoliated, or how that would impact the actual malice analysis.

extent that the sentence contained any ambiguity as to who was paying Young, such ambiguity was dispelled by other portions of the Article, which stated explicitly that Young "asks Afghans who want to leave ***to have sponsors to cover them***." Mot. Ex. L at CNN000004 (emphasis added).

9. In his "twelfth" theory, Young accuses CNN of bias, citing [redacted]. *See* Mot. at 9-10, 26 (citing those internal documents). The use of such language does not support a finding of actual malice. As one Florida appellate court explained, in a case that involved the use of similarly harsh language in internal discussions between journalists, "[a]n intention to portray a [plaintiff] in a negative light, even when motivated by ill will or evil intent, is not sufficient to show actual malice unless the publisher intended to inflict harm through knowing or reckless falsehood." *Don King Prods. v. Walt Disney Co.*, 40 So. 3d 40, 44-45 (Fla. 4th DCA 2010) (emails exchanged among producers of documentary about Don King referring to him as a "greedy conniver," "huckster," "thug," and an "evil mob connected guy" were not evidence of actual malice); *see also Tavoulareas v. Piro*, 817 F.2d 762, 795 (D.C. Cir. 1987) (evidence that investigative reporter bragged that he was going to "knock off" plaintiff was not evidence of actual malice because such adversarial braggadocio was "well within the everyday parlance of an investigative reporter"); *Margoles v. Hubbart*, 760 P.2d 324, 330 (Wash. 1988) (evidence that reporter threatened "to get" plaintiff was not evidence of actual malice because "[a] reporter can 'get' someone . . . by telling the truth as well as by resorting to defamation").

This applies especially here. The context makes clear that, [redacted], they were reacting to information about Young that they believed revealed his conduct to be exploitative and predatory. *See supra* at 12-13 (describing the context for that language). In

other words, CNN's journalists did not undertake to report about Young because they had a negative opinion of him. Rather, they had that negative opinion of him because they believed the facts they discovered and later reported about him were true and reflected very badly on him. Belief in one's own reporting is the opposite of actual malice.

* * * * *

Young has failed to put forth a reasonable evidentiary basis for a finding of actual malice. His motion for leave to amend to add punitive damages claims should be denied on that basis.

III. YOUNG HAS SEPARATELY FAILED TO PROFFER A REASONABLE EVIDENTIARY BASIS THAT CNN PUBLISHED THE SUBJECT JOURNALISM WITH EXPRESS MALICE.

Young's case to amend and state punitive damages claims fails on the additional ground that he has not put forth a reasonable evidentiary basis to find that CNN published the statements about him with express malice. He must additionally make that showing to recover punitive damages. *See supra* at 18.

The Florida Supreme Court has explained that "[e]xpress malice under the common law of Florida . . . is present where the *primary* motive for the statement is shown to have been an intention to injure the plaintiff." *Nodar*, 462 So. 2d at 806 (emphasis added); *see also Boehm v. Am. Bankers Ins. Grp.*, 557 So. 2d 91, 94 (3d DCA 1990) (for express malice to be present, "[i]t is insufficient that the speaker have generalized feelings of hostility and malice towards the Plaintiff"). Accordingly, evidence of "[s]trong, angry, or intemperate words," or the "incidental gratification of personal feelings of indignation," does not alone show express malice. *Nodar*, 462 So. 2d at 811-12. Rather, the plaintiff must show that the publisher acted out of an "inten[t] to harm the plaintiff personally," and not some other motivation. *Crestview Hospital*, 203 So. 3d at 981.

Young contends that he has made a preliminary evidentiary showing of express malice based on [redacted]

[redacted]. *See* Mot. at 27 (referencing those comments). Such comments are not evidence that CNN's reporting was motivated by its journalists' negative views of Young. As discussed above, Young gets the causality exactly backwards. [redacted] *See supra* 12-13, 33-34 [redacted].

Thus, far from showing that the "primary" motivation of CNN's reporting was to injure Young, the comments he focuses on make plain that CNN's motivation was to bring to the public's attention business conduct that it believed was exploiting the situation in Afghanistan to reap windfall profits. Even assuming for the purpose of this motion only that CNN's journalists were wrong in their assessment of Young, a motivation to expose perceived bad behavior is not express malice.

Nor, contrary to what he suggests, can Young prove express malice by pointing to CNN's alleged knowledge of the falsity of what it reported. *See* Mot. at 27 (suggesting that he could prove express malice on that basis). Even if Young had established a reasonable basis for a finding that CNN published the journalism with actual malice, that would not help him in proving express malice. The First DCA has made clear that "[t]he mere fact that a statement is untrue and made with knowledge of its falsity or made recklessly without regard to its truth or falsity is not the test" for express malice. *Crestview Hospital*, 203 So. 3d at 982. Rather, there must be additional evidence that the primary motivation for the intentional falsehood was "to harm the plaintiff personally." *Id.* at 981. There is no such evidence here.

Young has made no proffer that would reasonably show that CNN published this journalism with express malice. His motion should be denied on this ground as well.

IV. NONE OF THE CONDUCT ALLEGED RISES TO THE LEVEL THAT WOULD SUPPORT AN AWARD OF PUNITIVE DAMAGES.

Finally, Young's motion should be denied on the additional ground that his evidentiary proffer falls far short of providing a reasonable basis for a jury's finding that CNN acted so egregiously and outrageously as to permit an award of punitive damages.

Under Florida law, "punitive damages are reserved for truly culpable behavior and are intended to express society's collective outrage." *Grove Isle*, 350 So. 3d at 830. In this case, Young's grievances, at their core, boil down to accusations that CNN blurred two distinctions: (1) the difference between directly charging extremely high sums to Afghans to get them out of the country and charging those sums to third-party sponsors, and (2) the difference between operating in an illegal market and operating in an environment that lacked any legal regulation. Even if CNN did blur those lines – and the journalism simply does not bear the assertion out – the flaws Young ascribes to CNN's journalism plainly do not fall within the category of the "extreme wrongdoing" necessary to support an award of punitive damages. *CSX Transp., Inc. v. Palank*, 743 So. 2d 556, 558 (Fla. 4th DCA 1999). Young's motion should be denied on this additional ground.

CONCLUSION

For the reasons set forth above, CNN respectfully requests that Young's Motion for Leave to Amend his Complaint to Assert Claims for Punitive Damages be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy has been furnished via the Florida Courts E-Filing Portal this 5th day of May 2023 to Velvel Freedman (vel@fnf.law), Peter Bach-y-Rita (pbachyrita@fnf.law), Richard Cipolla (rcipolla.fnf.law), and Alex Potter (apotter@fnf.law) of Freedman Norman Friedland LLP, 1 SE 3d Avenue, Suite 1250, Miami, FL 33131.

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