IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE VALLEY AESTHETICS, PLLC d/b/a RUMER COSMETIC SURGERY, et al.

Plaintiffs,

20-cv-456 (CFK)

- against –

JOHN DOE 1, et al.

Defendants.

DEFENDANT JAMIE ROE'S MOTION TO DISMISS

Defendant Jamie Roe respectfully moves that this Court dismiss this action for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Because Defendant Roe is *pro se*, the Court's Individual Rule II(C)(1) is not applicable.

Under Fed. R. Civ. P. 27(a)(3), a response must be served within 10 days of this motion, unless the Court shortens or extends the time. Any reply shall be filed within 7 days of service of any response.

Date: 5/31/2021

Jamie Roe

Jamie Roe, *pro se*[1]

[1] In the interest of full disclosure, this motion was prepared with the assistance of counsel providing limited scope and "unbundled" assistance. *See*, Pennsylvania Bar Association, Joint Formal Opinion 2011-100, *Representing Clients in Limited Scope Engagements*. Despite her significant efforts, Ms. Roe has been unable to find counsel able to appear in their full capacity before the Court at a rate she can afford. And the counsel that have helped are only able to provide *pro bono* services in a limited capacity in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE VALLEY AESTHETICS, PLLC d/b/a RUMER COSMETIC SURGERY, et al.

Plaintiffs,

20-cv-456 (CFK)

- against –

JOHN DOE 1, et al.

Defendants.

MEMORANDUM IN SUPPORT OF
DEFENDANT JAMIE ROE'S MOTION TO DISMISS

I. Introduction

Plaintiffs have sued Defendant, "Jamie Roe," for defamation based on allegations that she has operated a blog that (Plaintiffs believe) unfairly maligns Plaintiffs' medical practice, and named Ms. Roe in an amended complaint ("FAC"; Doc. 11). The FAC is sparse on allegations, and thinner on law. It all but begins with a tacit acknowledgement that the case likely cannot proceed, alleging only that "In or around 2019, Dr. Rumer discovered a website…" FAC Para. 10. But Pennsylvania law is clear that there is no discovery rule for public statements.[2] And, of course, there is a single publication rule — so nothing preserves the statements for statute of limitations purposes past their initial publication.[3]

[2] *See, e.g. Barrett v. Catacombs Press*, 64 F. Supp. 2d 440, 446-47 (E.D. Pa. 1999) ("It does not matter whether Barrett became aware of the defamatory writings, so long as a publication has occurred.").

[3] *See In re Phila. Newspapers, LLC*, 690 F.3d 161, 174 (3d Cir. 2012) ("We believe that Pennsylvania courts would extend the single publication rule to publicly accessible material on the Internet based on similar reasoning"); *Slozer v Slattery*, 134 A3d 497 (Pa. Super. Ct 2015) ("We agree with the reasoning of the Third Circuit and conclude it accurately reflects Pennsylvania law regarding the doctrines of single publication and republication in defamation actions as they apply to internet communications"), *citing* 690 F.3d at 174.

So, the fact that the blog[4] Plaintiffs appear to *intend* to have sued over[5] only has two posts within the arguable statute of limitations knocks out most of Plaintiffs' claims — and quite likely any colorable argument that Plaintiff can satisfy the jurisdictional minimum amount in controversy.

Most importantly, as a First Amendment matter, the FAC concerns things that are *entirely* opinion — or at the least, opinions based on disclosed fact. Plaintiff objects to being called the "Butcher of Ardmore." But, it is unclear how that description is anything other than an opinion, based on the disclosed facts of the horrifying complications — shown at length and in graphic detail at the blog at issue in the original complaint — that is protected speech. And, calling someone names is simply not defamatory: "So-called 'Nazis,' 'racists,' 'terrorists,' 'scabs,' 'fraudsters,' and 'traitors,' no doubt a woefully incomplete list, have all come up empty-handed in court." *Rosado v. Daily News, L.P.*, 2014 NY Slip Op 33736(U), ¶ 4 (Sup. Ct.).

For these, and the reasons discussed below, the FAC should be dismissed with prejudice.

---

[4] While not contested for the purposes of this motion, Defendant Roe did not write the blog at issue. And Plaintiffs fail to plead even that fact in a plausible fashion. *See, e.g., Ayyadurai v. Floor64, Inc*., 270 F. Supp. 3d 343, 368 n.12 (D. Mass. 2017) ("the bare allegation that 'it is certainly possible' that Beadon authored the comment is insufficient") *Comyack v. Giannella*, 2020 N.J. Super. LEXIS 49, at *118 n.16 (Super. Ct. Apr. 21, 2020); *Levitt v. Yelp! Inc*., 765 F.3d 1123, 1136 (9th Cir. 2014) ("the inaccuracy does not make it plausible that it was Yelp — as opposed to a competitor, or a disgruntled customer hiding behind an alias, or an angry neighbor, just to give a few possibilities — that authored the offending review."). *Compare, contra, Wilferd v. Dig. Equity, LLC*, Civil Action No. 1:20-cv-01955-SDG, 2020 U.S. Dist. LEXIS 217547, at *27 (N.D. Ga. Nov. 20, 2020) ("These allegations contain enough *specific facts* to plead that either Dhanani or Digital Equity authored or created the at-issue blog articles and posted them to the website") (emphasis added); *Scott v. Moon*, No. 2:19CV00005, 2019 U.S. Dist. LEXIS 11856, at *6 (W.D. Va. Jan. 24, 2019) ("Scott alleges that Moon posts content on Kiwi Farms under the username 'Null,' and Moon has confirmed that his username is 'Null.' She alleges that Null posted the allegedly defamatory statements on Kiwi Farms. I find that these allegations make it plausible that Moon created these statements himself, and thus Moon may be held liable for them.").

[5] Plaintiffs amended their complaint to change the web address "rum**e**rsanonymous.blogspot.com" to "rum**o**rsanonymous.blogspot.com" (*see* Para. 10 in Doc. 1; Doc. 11 (emphasis added)). This presumably intentional change makes the case about a blog where the most recent post was made on July 28, 2009 — far, far beyond the statute of limitations. And the blog the FAC now identifies makes no mention of Plaintiffs.

II. Argument

Plaintiffs' FAC fails to state a claim. "To survive a motion to dismiss [pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Though the Court must accept as true all well-pleaded facts, this does not extend to legal conclusions. *Iqbal*, 556 U.S. at 678. Ultimately, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," or where a plaintiff has "not nudged [its] claims across the line from conceivable to plausible, the[] complaint must be dismissed." *Twombly*, 550 U.S. at 570.

As explained below, Plaintiff fails to plead a cause of action for a number of reasons. First, Plaintiff's FAC amended to link a blog that hasn't been active since 2009, and does not mention either Plaintiff. Thus, the entire complaint is time-barred and does not state a claim. Second, because a party cannot simply file a suit naming Doe defendants on the eve of the statute of limitations, and amend to add the real parties later. Relation back simply doesn't allow such gamesmanship. Relatedly, and third, even with relation back, Plaintiffs are simply wrong that defamation claims operate with a discovery rule — and so they try to bring numerous stale claims. Finally, even reaching the merits, Plaintiffs fail to live up to the procedural and Constitutional minimum standards of pleading required of a defamation plaintiff. So the FAC can and should be dismissed — and that dismissal should be with prejudice.

A. As Pled, the FAC is About Statements Far Outside the Statute of Limitations.

As noted above (*see* note 5), Plaintiff's FAC — presumably intentionally amended from the initial complaint — identifies a blog where the most recent post was made on July 12, 2009.

The statute of limitations for defamation[6] in Pennsylvania is one year. 42 Pa.C.S. § 5523. Thus, any action regarding posts at rumorsanonymous.blogspot.com (FAC Para. 10) necessarily fails. And even if it didn't for that reason, the RumorsAnonymous blog does not mention either Plaintiff. And so, the FAC — in amending specifically to change to linking the Rumors Anonymous blog — fails to state a claim.[7]

B. Construing the FAC to be About RumersAnonymous.blogspot.com, the Statute of Limitations Bars All Claims.

Assuming away the problem in Point A, and treating the FAC as if it identifies the posts on RumersAnonymous.blogspot.com (rather than RumorsAnonymous.blogspot.com), it still fails to fall within the statute of limitations. By way of relevant timeline:

- Jul. 30, 2018 – The fourth most recent post on RumersAnonymous
- Jan. 2, 2019 – The third most recent post on RumersAnonymous
- Jan. 23, 2019 – The second most recent[8] post on RumersAnonymous
- Jan. 23, 2020 – Plaintiff files the original Complaint (Doc. 1)
- Dec. 4, 2020 – Plaintiff names Jaime Roe for the first time in the FAC (Doc. 11).
- Apr. 2021 – On receipt of mailing, Plaintiff arguably completes service on Jaime Roe (Doc. 15)

Plaintiffs appear to have intentionally filed their complaint on the eve of the statute of limitations for a post titled "KATHY RUMER'S FALSE ADVERTISING." *See also*, FAC Para. 12(a). That means that the Court may view statute of limitations analysis "in a light less favorable to plaintiff

[6] Because Plaintiffs' claims are wholly co-extensive, the defamation and invasion of privacy statute of limitations in § 5523 applies to all claims. *Evans v. Phila. Newspapers, Inc*., 411 Pa. Super. 244, 252, 601 A.2d 330, 334 (1991).

[7] Following this section, this motion discusses the case as if it concerns statements on RumersAnonymous. That argument is intended to be in the alternative, and any statement suggesting otherwise is inadvertent. That is, Plaintiffs chose to amend their complaint to point to a different website. And that amended complaint is the operative complaint.

[8] The most recent post on RumersAnonymous is a post that appears to simply describe this lawsuit, on November 17, 2020, and is presumably not included in the complaint.

than might otherwise be the case." *McCurdy v. Am. Bd. of Plastic Surgery*, 157 F.3d 191, 196 (3d Cir. 1998). *See also*, *Dandrea v. Malsbary Mfg. Co*., 839 F.2d 163, 170 (3d Cir. 1988).

a. The FAC does not relate back as against Jaime Roe.

"Replacing the name John Doe with a party's real name amounts to the changing of a party or the naming of a party under Rule 15(c), and thus the amended complaint will relate back only if the three conditions specified in that rule are satisfied." *Garvin v. City of Phila*., 354 F.3d 215, 220 (3d Cir. 2003). "The parties to be brought in by amendment must have received notice of the institution of the action within 120 days following the filing of the action, the period provided for service of the complaint by Rule 4(m) of the Federal Rules of Civil Procedure. If the amendment relates back to the date of the filing of the original complaint, the amended complaint is treated, for statute of limitations purposes, as if it had been filed at that time." *Id*., *citing Singletary v. Pa. Dep't of Corr*., 266 F.3d 186, 189 (3d Cir. 2001).

Plaintiffs filed this suit — with no attempt at service of *any* kind for some time — against a pair of Doe defendants, when the "the statute [of limitations ran] on the date the original complaint was filed." *McCurdy v. Am. Bd. of Plastic Surgery*, 157 F.3d 191, 196 (3d Cir. 1998). Parties do not get to relate back past the statute of limitations against Doe defendants unless they can show the following:

> (1) the claim or defense set forth in the amended pleading arose out of the conduct, transaction or occurrence set forth in the original pleading;
>
> (2) within the time period provided in Rule 4(m), the party or parties to be added received notice of the institution of the suit and would not be prejudiced in maintaining a defense; and
>
> (3) the party sought to be added knew that, but for a mistake concerning his or her identity, he or she would have been made a party to the action.

Garvin v. City of Phila., 354 F.3d 215, 222 (3d Cir. 2003) (spacing added). Plaintiff cannot show either (2) or (3) because the statute of limitations ran the day they filed — and Plaintiffs' first *attempt* at service didn't take place until much later. There is no possible argument on factor (3): filing a Doe complaint on the eve of the statutes of limitations means there is *no* way any Doe "knew that, but for a mistake concerning his or her identity, he or she would have been made a party to the action."

There are consequences to waiting until the "eve of the running of the statute of limitations" — one primary consequence being that such waiting will rarely, if ever, "afford … notice of the suit." *Dandrea v. Malsbary Mfg. Co*., 839 F.2d 163, 170 (3d Cir. 1988). This case is no exception. And without relation back, nothing in the FAC filed on December 4, 2020 — nearly *two* years after the latest-in-time statement identified in the unamended complaint — is remotely within the statute of limitations. So, the FAC should be dismissed.

b. Plaintiffs' attempt to invoke the discovery rule, or any attempt to evade the single publication rule, is misguided.

Plaintiffs' FAC pleads as if there is a discovery rule for defamation. *See* FAC Para. 10. But there is not. Courts sitting in this district, applying Pennsylvania law have long held that in cases involving mass publications, blogs, books, or the internet, the statute of limitation starts on publication. *Barrett v. Catacombs Press*, 64 F. Supp. 2d 440, 446-47 (E.D. Pa. 1999) ("It does not matter whether Barrett became aware of the defamatory writings, so long as a publication has occurred."). *See also*, *Wolk v. Olson*, 730 F. Supp. 2d 376, 379 (E.D. Pa. 2010) ("The Court is not aware of any case in which the discovery rule has been applied to postpone the accrual of a cause of action based upon the publication of a defamatory statement contained in a book or newspaper or other mass medium" and collecting cases); *Weinik v. Temple Univ. of the Commonwealth Sys.*

of Higher Educ., No. 19-350, 2020 U.S. Dist. LEXIS 121340, at *9 (E.D. Pa. July 10, 2020) ("Generally, under Pennsylvania law, in cases of 'media-public defamation'—i.e., where the publication is widely disseminated—the cause of action accrues on the date of publication of the defamatory statements, regardless of when the plaintiff became aware of the statements."); *Curtis v. CIGNA Tel-Drug, Inc*., 2014 Phila. Ct. Com. Pl. LEXIS 386, *4 ("For a defamation claim, an injury is inflicted on the date of publication"). Indeed, "[t]his District has repeatedly held that the discovery rule is inapplicable to mass-media defamation claims." *Stein v. City of Phila*., No. 13-4644, 2013 U.S. Dist. LEXIS 172172, at *21-22 (E.D. Pa. Dec. 5, 2013) (analyzing claims for defamation on Twitter and collecting cases). Courts across the country reach similar results for cases involving blogs, Facebook posts, and the like. *See, e.g.,* Crabb v. Greenspun Media Group, 2016 Nev. Dist. LEXIS 312 (Clark Cty. Dist. Sept. 2, 2016) ("[t]hat Plaintiff only recently discovered the link to Ms. Gentry's internet blog on muckrack.com is inconsequential"); *Tu Nguyen v. Duy Tu Hoang*, 318 F. Supp. 3d 983, 1013 (S.D. Tex. 2018) (Facebook post). So, the only post even colorably at issue here — with a single day on the statute of limitations left upon filing — is the January 23, 2019 post. Claims related to anything else should be dismissed.

In opposition, Plaintiff may attempt to claim that the fact that a website is online may be some kind of "continuous" defamation. Courts have uniformly rejected this theory. In Pennsylvania, the so-called "single publication" rule is codified in part in 42 Pa. C.S. § 8341, and otherwise well-settled. "[U]nder the single publication rule, 'it is the original printing of the defamatory material and not the circulation of it which results in a cause of action.'" *Pendergrass v. ChoicePoint, Inc*., No. 08-188, 2008 U.S. Dist. LEXIS 99767, at *8 (E.D. Pa. Dec. 9, 2008) (*quoting Graham v. Today's Spirit*, 503 Pa. 52, 468 A.2d 454, 457 (Pa. 1983)).[9]

[9] On this point, Plaintiffs' FAC might be read to allege a theory of liability for republishing (though no facts are alleged on this point). *See* FAC Para 19 ("Ms. Miller and/or Defendants have gone out of her/their way to promote

"Courts considering the single publication rule in internet-based defamation cases generally have found it applicable to postings made on websites accessible to the general public." *Id*. There are good policy reasons for this on the internet in particular: "communications posted on Web sites may be viewed by thousands, if not millions, over an expansive geographic area for an indefinite period of time. Thus, a multiple publication rule would implicate an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants." *Id*. (*quoting Firth v. State*, 98 N.Y.2d 365, 775 N.E.2d 463, 466, 747 N.Y.S.2d 69 (N.Y. 2002)) (alteration adopted). "The single publication rule is designed to protect defendants from harassment through multiple suits and to reduce the drain of libel cases on judicial resources." *Oja v. U.S. Army Corps of Eng'rs*, 440 F.3d 1122, 1131 (9th Cir. 2006). Here, there is no reason to depart from this well-settled rule.

C. Plaintiffs Do Not and Cannot State A Claim for Defamation.

a. The statements in the one relevant post if the FAC relates back are pure opinion and, in context, opinions based on disclosed facts.

Plaintiffs are upset to be called the "#ButcherofArdmore." They are also upset to see a picture of a non-existent billboard, use of stock images, and anonymized (and possibly invented) quotes described as "false advertising." Fair enough — such things are not pleasant. But they are well within the realm of First Amendment protected opinion.

---

the Website by posting links to it on other social media websites such as Reddit.com."). Any theory of liability that turns on republication is barred completely by Section 230 of the Communications Decency Act. 47 U.S.C. § 230(c)-(e) (""No … user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider … No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."). That is, liability only exists for the original speaker of a statement. *See, e.g., Donato v. Moldow*, 374 N.J. Super. 475, 501 (App. Div. 2005) (after a "canvas of decisions interpreting and applying § 230," concluding the "construction" of § 230 is "not one that has welcomed creative theories," and that the defendant's "status as a provider or user of an interactive computer service garners for him the broad general immunity of § 230(c)(1)," regardless of allegations of actual malice).

Far, far worse labels than "butcher" have been found protected. *See, e.g.*, *Stepien v. Franklin*, 528 N.E.2d 1324, 1329 (Ohio Ct. App. 1988) (collecting examples and observing that "scum," "a cancer," "an obscenity," and a "pathological liar," among others, are statements of opinion and thus not actionable); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 235 (Ct. App. 2008) ("mega scum bag," "crook," and a "cockroach" are "not actionable under Florida's defamation law"); *Lund v. Chi. & Nw. Transp. Co*., 467 N.W.2d 366, 369 (Minn. Ct. App. 1991) ("'shit heads' does not suggest verifiably false facts about Lund"); *Grillo v. John Alden Life Ins. Co.*, 939 F. Supp. 685, 688 (D. Minn. 1996) ("'cocksucker' with a 'two-inch dick'" do not "suggest verifiably false facts"); *Int'l Shoppes, Inc. v. Spencer,* 2011 NY Slip Op 32340(U), ¶ 5 (Sup. Ct.) (statement that "'you are an asshole - I should have sued your ass before' conveyed an opinion"); *Leidholdt v. L.F.P. Inc*., 860 F.2d 890 (9th Cir. 1988) (statements that plaintiff was a "pus bloated walking sphincter," "wacko," and had "bizarre paranoia" are opinion); *Straka v. Lesbian Gay Bisexual & Transgender Cmty. Ctr., Inc*., 2020 NY Slip Op 32116(U), ¶ 18 (Sup. Ct.) (statements that plaintiffs were "bigoted," "dangerous," and "share[d] responsibility for incitement to violence"); *Comyack v. Giannella*, No. SOM L 1356-19, 2020 N.J. Super. LEXIS 49, at *82 (Super. Ct. Apr. 21, 2020) (among other things, "He has a long history of being real scummy to women"; "predator"; "scumbag"; "you can see his picture and what a douche he looks like"). "Butcher" falls well within the ambit of statements of this kind. Given that "[s]o-called 'Nazis,' 'racists,' 'terrorists,' 'scabs,' 'fraudsters,' and 'traitors,' no doubt a woefully incomplete list, have all come up empty-handed in court," (*Rosado v. Daily News, L.P.*, 2014 NY Slip Op 33736(U), ¶ 4 (Sup. Ct.)), there is no reason "butcher" should fare any differnelty.

Beyond that, however, the phrase "butcher" doesn't appear alone. It appears above a link labeled "*Psssssst, you there! If you really want to see examples of Rumer's work. Click me!*" That

link (and the text accompanying it) places all the statements firmly in the fully protected category of opinions based on disclosed facts. Pennsylvania has adopted the Restatement approach to such opinions: "**A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable this opinion may be or how derogatory it is**." *Alston v. PW-Philadelphia Weekly*, 980 A.2d 215, 221 (Pa. Commw. Ct. 2009) (*quoting* Restatement (Second) of Torts (1977), Section 566) (emphasis in original).[10] That is, where a person states a conclusion — even if false — and discloses the basis for drawing the conclusion, the First Amendment leaves it up to the reader or listener to evaluate whether the conclusion is justified. And here, the statement — "Butcher of Ardmore" — is unquestionably a "simple expression of opinion based on" the "disclosed" facts in the link. A reader can go and decide for themselves if, in the words the post uses, the "examples of Rumer's work" support the blogger's opinion.

That these statements are fully protected is even more clear in context: "readers give less credence to allegedly defamatory remarks published on the Internet," whether on "message boards and in chat rooms" or on "anonymous weblogs, known as blogs." *Sandals Resorts Int'l Ltd. v. Google, Inc*., 86 A.D.3d 32, 44 (N.Y. App. Div., 1st Dept. 2011). That is in part because the "culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a 'freewheeling, anything-goes writing style.'" *Id*. (*citing* Cheverud, Comment, *Cohen v. Google, Inc*., 55 NY L Sch L Rev 333, 335 (2010/11)). The short version is that no reader of RumersAnonymous would interpret the statements at issue as implying some *special* factual knowledge, or as anything other than opinion commentary, based

[10] *See also, Balletta v. Spadoni*, 47 A.3d 183, 198 (Pa. Commw. Ct. 2012) (same); *Braig v. Field Commc'ns*, 310 Pa. Super. 569, 581, 456 A.2d 1366, 1373 (1983) (same).

on the facts disclosed. Those readers could follow the various links and evaluate for themselves whether, for example, the graphic and horrifying complications linked amounted to "butcher[y]."[11] Or whether they believed glowing, anonymous patient reviews were invented.[12] Or whether a linked video (link here: https://www.youtube.com/watch?v=yMNFuK9JC48) was sufficient to support the statement it was linked to ("[Dr. Rumer doesn't] exactly have a reputation for your bedside manner").[13] In short, nothing in the sole post arguably at issue can be read as "implying the assertion of the existence of undisclosed facts about the plaintiff." *Braig v. Field Commc'ns*, 310 Pa. Super. 569, 581, 456 A.2d 1366, 1373 (1983). *See also, Kane v. Chester Cty.*, No. 18-1894, 2019 U.S. Dist. LEXIS 71312, at *13 (E.D. Pa. Apr. 26, 2019) (collecting cases). Without such an implication, everything at issue is protected opinion — and non-actionable.

b. Plaintiffs do not allege fault.

The bare constitutional minimum for defamation is that states cannot "impose liability without fault." *Gertz v. Robert Welch*, 418 U.S. 323, 347 (1974). Fault can take different forms, depending on the case. That can range from "a showing of negligence, as contrasted with a showing of willful or reckless disregard" (*id.,* 418 U.S. at 353 (Blackmun, J., concurring)), to so-called "actual malice." *St. Amant v Thompson*, 390 US 727, 731 (1968). While Plaintiff fails to

[11] Again, while the images are extremely graphic, to the extent the Court does not think the opinions are fair comments on the disclosed facts, Defendant Roe urges the Court to follow a number of the links in order to determine whether it would be within the realm of fair opinions to describe the surgeries as "butcher[y]."

[12] That is, any reader would understand the blog was saying, essentially, "it is my opinion that this review is invented *because* it is anonymous."

[13] To be clear, this is the question a *reader* asks. The Court need not — and should not — evaluate whether the disclosed fact actually supports the opinion it is linked to. The First Amendment places that question firmly in the hands of the public. And otherwise, "the best remedy for" what one believes to be "false or unpleasant speech is more speech, not less speech." *Rickert v. Pub. Disclosure Comm'n*, 161 Wash. 2d 843, 855-56 (2007) (*citing Brown v. Hartlage*, 456 U.S. 45, 61 (1982)).

plead fault by any standard, that failure is all the more striking because this case requires actual malice.[14]

"To survive a motion to dismiss, defamation plaintiffs … must plead abuse of a conditional privilege, at least where the potential relevance of a privilege is clear from the complaint." *Udodi v. Stern*, 438 F. Supp. 3d 293, 303 (E.D. Pa. 2020). Such privileges exist, for example, when "potentially defamatory statements were on legitimate matters of public interest and as such 'enjoy[ed] a qualified privilege' requiring plaintiff to plead malice in the complaint. *Id.*, *citing Den Hollander v. Township of Franklin*, No. 190-09, 2010 N.J. Super. Unpub. LEXIS 2314, at * 13-15 (N.J. Super. Ct. Law Div. Jan. 22, 2010) (granting motion to dismiss) and 53 C.J.S. Libel and Slander; Injurious Falsehood § 206 (2019) ("While privilege is an affirmative defense in a defamation action, and thus generally does not need to be actual malice . . . A conclusory allegation of actual malice is not sufficient."). Such privileges are "clear from the complaint" here (or at least, clear from the original complaint).

"In Pennsylvania, we recognize a conditional privilege when the speaker and recipient share a common interest in the subject matter and both are entitled to know about the information." *Foster v. UPMC S. Side Hosp*., 2010 PA Super 143, 2 A.3d 655, 664. And as the website identified

---

[14] Actual malice pleading requires a plaintiff to state sufficient facts for a jury to find "a "defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v Thompson, 390 US 727, 731 (1968). Thus, "[a] publisher's hostility or ill will is not dispositive of malice." *Matter of Trump v Sulzberger*, 20 Misc 3d 1140[A], 1140A, 2008 NY Slip Op 51810[U], *4 (Sup Ct, NY County 2008), *quoting DeAngelis v Hill*, 180 NJ 1, 14 (N.J. 2004). Instead, "only evidence demonstrating that the publication was made with knowledge of its falsity or a reckless disregard for its truth will establish the actual malice requirement." *Id, quoting DeAngelis*, 180 NJ at 15.

As the U.S. Supreme Court has observed, "the term ['actual malice'] can confuse as well as enlighten [and i]n this respect, the phrase may be an unfortunate one." *Masson v New Yorker Mag*., 501 US 496, 511 (1991). But "[a]ctual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Id*. Instead, it is simply "a shorthand to describe the First Amendment protections for speech injurious to reputation." Id. For this reason, the FAC's allegation that the "Website is maintained … with the goal of tarnishing [Plaintiffs'] reputation in the medical community as well as her [sic] reputation amongst potential clients" is neither here nor there.

in the original complaint makes clear, its visitors share an interest in knowing of the conduct of Dr. Rumer — and the graphic complications from her surgeries.[15,16]

Beyond that, Dr. Rumer is likely at least a limited purposes public figure, meaning "actual malice" is the relevant fault element no matter what. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974). As Plaintiff herself alleges, she is a well-known surgeon and while she is renowned generally, she "is *most renowned* as a leading aesthetic and reconstructive plastic surgeon specializing in gender reassignment surgery." FAC Para. 7 (emphasis added). She is so well known that "[p]atients travel from all across the United States to receive gender reassignment surgery at Rumer Cosmetics because of [her] stellar track record and reputation for excellence." *Id*. Para. 8. And she has been at the center of a public debate about GRS. *See generally,* Katelyn Burns, *When Surgeons Fail Their Trans Patients*, JEZEBEL (2020). She has appeared in a documentary about one patient's surgery. *See* Rosemary Connors et al., *Jude's Journey: Transgender Man and His Family Shine Light on Life Before and After Surgery*, NBC (Apr. 4., 2018).[17] And in her own words, she has "has received both regional and national recognition for her contributions in the field of Plastic and Reconstructive Surgery."[18] In short, when it comes to the subject of RumersAnonymous — surgeries (and failed surgeries in particular) for transgender patients — Dr. Rumer is at the front of the controversy.

---

[15] In its evaluation of privilege, even on a motion to dismiss, "the Court must consider the alleged conduct to be true *only for the purpose* of analyzing whether the statements in dispute implicate the [relevant] privilege." *Comyack v. Giannella*, No. SOM L 1356-19, 2020 N.J. Super. LEXIS 49, at *105 (Super. Ct. Apr. 21, 2020) (emphasis in original).

[16] With the warning that the photographs are extraordinarily graphic and disturbing, some pictures of the "botched" surgeries alleged on RumersAnonymous can be found by following the links here: https://rumersanonymous.blogspot.com/2018/07/credible-list-of-botched-rumer-surgeries.html

[17] https://www.nbcphiladelphia.com/news/local/jude-navas-transgender-journey-surgery/175490/

[18] *See* http://www.rumercosmetics.com/#the-practice

No matter the standard, Plaintiffs fail to allege any statement was made with fault even nominally. While the FAC alleges "[m]any ***other*** claims that are made with either knowledge of their falsity and/or recklessness as to their veracity with the intention of injuring Plaintiffs' reputation" (FAC Para. 12(g)), Plaintiffs never allege any of the statements they *do* identify were made with any degree of fault. So, as a matter of pleading, there are two groups of statements: (1) statements where what was said is (arguably) pleaded, with no allegation of fault; and (2) statements where what was said is not pleaded, with a conclusory allegation of fault. On its face, that merits dismissal. *See Rhoads v. Maryland*, No. 13-1913, 2013 U.S. Dist. LEXIS 56831, at *10-11 (E.D. Pa. Apr. 19, 2013).

Beyond that, however, conclusory allegations of fault do not suffice in defamation actions. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. "[T]o properly allege a plausible malice claim, the plaintiff must still lay out enough facts from which malice might reasonably be inferred." *Earley v. Gatehouse Media Pa. Holdings, Inc*., No. 3:12-1886, 2013 U.S. Dist. LEXIS 140631, at *16 (M.D. Pa. Sep. 30, 2013) (*citing Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2010)). In short, "[a] conclusory allegation of actual malice is not sufficient," and that is all the Plaintiffs plead. *Udodi*, 438 F. Supp. 3d 293 at 303 n.84 (*quoting* 53 C.J.S. Libel and Slander; Injurious Falsehood § 206 (2019)). *See also*, *Pace v. Baker-White*, Nos. 20-1308, 20-1401, 2021 U.S. App. LEXIS 7433, at *6 (3d Cir. Mar. 15, 2021) ("Pace merely labels the PVP defendants' conduct as malicious and alleges that they had knowledge of, or acted in reckless disregard as to the falsity of the matter they communicated. These conclusory allegations are insufficient.") (alterations adopted); *Reese v. Pook & Pook, LLC*, 158 F. Supp. 3d 271, 289 (E.D. Pa. 2016)

(same); *Lapinski v. Poling,* 169 A.3d 1147 (Pa. Super. Ct. 2017); *Berkery v. Gudknecht*, No. 17-5574, 2018 U.S. Dist. LEXIS 123262, at *7 (E.D. Pa. July 24, 2018) (collecting cases).

c. Plaintiffs fail to plead damages.

Plaintiffs technically label their claims defamation *per se*. But defamation *per se* is limited, as relevant here, to "a publication in which the speaker imputes to another conduct, characteristics, or a condition that would adversely affect her in her lawful business or trade." *FJW Inv., Inc. v. Luxury Bath of Pittsburgh, Inc*., 216 A.3d 418 (Pa. Super. Ct. 2019). That's not what Plaintiffs plead. They merely plead that Plaintiffs *in fact* "suffered … substantial professional harm to their business reputation." FAC Para. 20. Allegations of all kind that *in fact* harm people in their business do not necessarily count, particularly since anything defamatory would obviously cause people harm in their business. Instead, the "conduct, characteristics, or [] condition" named must specifically harm the person in their trade. *See, e.g., Liberman v Gelstein*, 80 NY2d 429, 436 (1992) ("charges against a clergyman of drunkenness and other moral misconduct affect his fitness for the performance of the duties of his profession, although the same charges against a business man or tradesman do not so affect him") (*quoting* Restatement (Second) Section 573, comment c). Or, as Prosser puts it, trade-based defamation *per se* is "limited to defamation of a kind incompatible with the proper conduct of the business, trade, profession or office itself. The statement must be made with reference to a matter of significance and importance for that purpose, rather than a more general reflection upon the plaintiff's character or qualities." Prosser and Keeton, Torts § 112, at 791 (5th Ed.). Thus, by way of example, New York's highest court rejected that saying a landlord "threatened to kill" a tenant was defamation *per se*: threats to kill a tenant, while horrifying, bear no particular connection to the trade of a landlord. 80 NY2d at 436.

The same is true here: while the blog says Dr. Rumer engages in deceptive advertising, and has a terrible bedside manner, that does not make her inherently unfit as a surgeon. Indeed, surgeons stereotypically — or at least, as a matter of popular humor — have exactly that kind of personality. *See, e.g.,* Scrubs, "My Kingdom" (2003). But beyond that, the characteristics identified would make Dr. Rumer a poor match for *any* profession. And thus, they are not a fit for the trade-based *per se* exception.

Without a *per se* exception, a defamation plaintiff must show actual harm (*FJW Inv., Inc. v. Luxury Bath of Pittsburgh, Inc*., 216 A.3d 418 (Pa. Super. Ct. 2019)), and to plausibly state a claim must plead it like any other element. And here, Plaintiffs fail to plead it with any specificity, dooming the claim. *Bonilla v. Am. Heritage Fed. Credit Union*, No. 20-2053, 2020 U.S. Dist. LEXIS 87634, at *27 (E.D. Pa. May 19, 2020).

D. The Court Likely Lacks Subject Matter Jurisdiction.

Plaintiffs' sole basis for federal jurisdiction is diversity. They claim, based on their mistaken belief that the discovery rule applies to defamation actions, that the amount in controversy is sufficient. But since, even with relation back, Plaintiffs get a single post, it is hard to see how Plaintiffs can allege that single blog post, on a free platform, caused $75,000.00 in harm. On this, Plaintiffs do not actually identify, pseudonymously or otherwise, a *single* client that has been lost, a single bit of pecuniary harm, or any other objective measure of damage. They do not allege the cost of services to that client or any others, to approximate lost revenue for purposes of damages. So, the Court likely lacks subject matter jurisdiction, even by Plaintiffs' own accounting, once the claims that are stale even *with* relation back fall out.

E. Plaintiffs' Other Claims Are Duplicative.

While Plaintiffs make what they dub "Commercial Disparagement," "Intentional Interference with Business Relationships," and "Invasion of Privacy: Public Disclosure of Private Fact" claims, those claims do not allege any particular facts distinct from Plaintiffs' defamation claim. Nor do they allege — factually speaking — the elements of those claims (at least, as distinct from their defamation claims). That is, for example, "aside from stating that [s]he had 'potential business relationships," Plaintiffs "fail[] to describe them in any way." *Sylk v. Bernsten*, 2003 Phila. Ct. Com. Pl. LEXIS 75, *23-24.

Given that, because the claims are all fully subsumed in the defamation theory, they rise and fall together. *See, Pelagatti v. Cohen*, 370 Pa. Super. 422, 435-6, 536 A.2d 1337, 1343-4 (1988) ("In the absence of pecuniary loss, an action for interference with contract brought for the purpose of recouping damages for loss of reputation only, would be nothing more than a defamation action under a different caption"); *Carescience, Inc. v. Panto*, 2003 Phila. Ct. Com. Pl. LEXIS 22, *3. *Cf. G.D. v. Kenny*, 411 N.J. Super. 176, 194, 984 A.2d 921 (App. Div. 2009) ("since there was no actionable defamation here, there can be no claim for damages flowing from the alleged defamation but attributed to a different intentional tort whose gravamen is the same as that of the defamation claim"); *Comyack v. Giannella*, 2020 N.J. Super. LEXIS 49, at *131-32 (Super. Ct. Ch. Div. Apr. 21, 2020) ("a plaintiff cannot effectively 'circumvent' the requirements of and defenses to a defamation claim by pursuing an alternative cause of action."). Thus, because Plaintiffs' defamation claims fail, their other claims fail as well.

F. The Court Should Grant Dismissal With Prejudice.

At this stage, the Court should grant dismissal with prejudice. Plaintiffs have already had a chance to amend, and issues discussed above are — by and large — uncurable. For example, there is no allegation Plaintiffs could add that would change the label "Butcher of Ardmore" from an opinion to a statement that is "capable of being proven false." *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995). The statement is pure opinion, and is accompanied by a link that literally invites a reader to evaluate the disclosed facts that form the basis for the opinion. Similarly, no allegation could fix the many statute of limitations issues here, because there are no facts that could change the law: the discovery rule doesn't apply to the statements at issue, and without notice of *any* kind, the FAC cannot relate back to a complaint filed against Does, on the eve of the statute of limitations. For these, and the reasons above, the Court need not — and, for important First Amendment reasons,[19] should not — give Plaintiffs another bite at this long-rotten apple.

[19] As one judge in New York put it:

> The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism. Needless to say, an ultimate disposition in favor of the target often amounts merely to a pyrrhic victory. Those who lack the financial resources and emotional stamina to play out the 'game' face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle. To ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. ***Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.***

Gordon v. Marrone, 155 Misc. 2d 726, 736, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992) (emphasis added)

III. Conclusion

For all of the foregoing reasons, Defendant Jamie Roe's motion to dismiss should be granted, and the FAC should be dismissed with prejudice.

Respectfully submitted,

Jamie Roe

_____

Jamie Roe, *pro se*