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.

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

I. Introduction.

Plaintiffs' untimely[1] opposition to Defendant Roe's Motion to Dismiss creates more problems for Plaintiffs than it solves. First, it fails to respond to many substantive arguments in the Motion to Dismiss. Second, it opposes others by pointing to pleading defects in Plaintiffs' own complaint, and seeks for *Plaintiffs* the benefit of having failed to plead particular facts. Third, it reiterates the reputational harm to Dr. Rumer on the basis of her prominence and fame at the front of Gender Reassignment Surgery, which confirms that Plaintiffs need have alleged actual malice—which they did not. Fourth, it hints at a new theory of liability, republication, that Section 230 of the Communications Decency Act straightforwardly bars in this context. And while Plaintiffs offer a boilerplate paragraph of why they should be allowed to amend, their response confirms that amendment would be futile—the statements at issue will not change in an

[1] Roe filed her motion to dismiss on June 1, 2021. It contained a standard demand for answering papers within 10 days under Fed. R. Civ. P. 27(a)(3). ECF 19 at 1. Thus, Plaintiffs' opposition, if any, was due on or before June 11, 2021. But Defendants didn't file until June 14.

amended complaint, nor will their status as opinion based on disclosed facts or their lack of actual malice. For all of these reasons, the Motion to Dismiss should be granted with prejudice.

II. Argument.

A. Plaintiffs waive opposition to many arguments.

"[A] plaintiff's failure to address a defendant's arguments for dismissal" of certain claims in their opposition to a motion seeking that dismissal, will be "treated" as "an abandonment" of such neglected claims. *Levy-Tatum v. Navient Solutions, Inc.*, 183 F. Supp. 3d 701, 712 (E.D. Pa. 2016) ("filing a response in opposition to [a] motion to dismiss that addresses some, but not all… arguments" has "abandoned those claims upon which [they] failed to make any substantive arguments, and those claims are therefore waived"). *See also Robinson v. Sch. Dist. of Phila.*, No. 13-6632, 2014 U.S. Dist. LEXIS 92220, at *26 n.8 (E.D. Pa. July 8, 2014) ("Plaintiffs did not address this argument in their Response to Defendants' Motion to Dismiss. For this reason alone, the Court could dismiss the state law claims asserted against Defendants").

Here, Plaintiffs fail to respond in any cognizable way to the following arguments:

1. The FAC does not relate back as against Jamie Roe. ECF 19 at 5-6.[2]

[2] While they never reference relation back in any way — and do not grapple with any of the cases (e.g., *Dandrea*) or rules cited in the moving papers — Plaintiffs drop a footnote that might be read as tangentially relating to this point, citing cases about concealment of identity. *See* ECF 21 n. 6. That does not count as responding to an argument. But even if it did, it misses the mark: Plaintiffs do not identify a single thing they did *prior* to the running of the statute of limitations. So their accusations of an intent to deceive are neither here nor there — the conduct they identify took place after the statute already ran (e.g., on the day they filed the complaint). Post-statute of limitations diligence cannot cure pre-statute of limitations failures. In other words, Plaintiffs make no argument that they made efforts to ensure that Roe knew of the suit *after* the statute of limitations ran (or, as caselaw requires, that Roe *did* know of the lawsuit before the statute ran) — which bars relation back. *Garvin v. City of Phila.*, 354 F.3d 215, 222 (3d Cir. 2003). *See also*, *Dandrea v. Malsbary Mfg. Co.*, 839 F.2d 163, 170 (3d Cir. 1988) ("Since there was notice to neither Malsbary nor Koppenhafer within the limitations period, there is nothing to which the amended complaint could relate back. The attempted service upon the Nebraska attorney, on the eve of the running of the statute of limitations, failed to afford Malsbary/Koppenhafer notice of the suit.").

2. Plaintiffs' non-defamation are duplicative — and thus rise or fall with the defamation claims. ECF 19 at 17.[3],[4]
3. All statements are protected by the common interest, qualified privilege — requiring actual malice. ECF 19 at 12-13.
4. Plaintiffs are, at the least, limited purpose public figures. ECF 19 at 14.[5]
5. Section 230 of the Communications Decency Act bars liability for linked content or other digital republication of a third party's statement. ECF 19 at 7 n. 9.

Thus, any theory of liability that turned on any of these points is waived, because Plaintiffs have "failed to make any substantive arguments" to refute them. *Levy-Tatum v. Navient Solutions, Inc.*, 183 F. Supp. 3d 701, 712 (E.D. Pa. 2016)

B. Plaintiffs' publication date arguments fail.

Plaintiffs do not argue that the FAC can relate back. Instead, they argue that — despite the face of the FAC — they have pled that publication of the relevant statements took place on some unknown date. In support of this, Plaintiffs step outside the four corners of the FAC to make vague and borderline conspiratorial claims that publication dates that appear on the website at issue in the initial complaint are "clearly unreliable," and "unverified hearsay." ECF 21 at 11. In the first

[3] Plaintiffs technically say, in essence, "we disagree." See ECF No. 21 at 21. But this response fails to respond to any of the authority on this point even nominally. That is, Plaintiffs fail to cite or distinguish any of the cases on this point. And that too amounts to waiver. *Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 48 n.4 (S.D.N.Y. 2020) ("Defendants do not cite—much less distinguish—*Bush v. Gore*. This failure to respond to Plaintiff's substantial argument can be taken as a concession of the case's applicability.") (record citation omitted).

[4] Curiously, Defendants rely heavily on the non-precedential opinion in *McClenaghan v. Turi*, 567 F. App'x 150, 156 (3d Cir. 2014) elsewhere, but do not seem to notice it applies the rule they object to on this point: "Looking to the gravamen of the action brought by Appellants, we agree with the District Court below that the one-year statute of limitations for defamation actions governs all of Appellants' claims." *Id.*

[5] Like with note 3 above, Plaintiffs drop a footnote to say they disagree. *See* ECF No. 21 at 15 n. 7. But they do not make any legal argument on this point at all, much less address the fact that they literally allege that Dr. Rumer is so well known that "[p]atients travel from all across the United States to receive gender reassignment surgery at Rumer Cosmetics." FAC Para. 8; *see also* ECF 21 at 3 ("Dr. Rumer is a leading aesthetic and reconstructive plastic surgeon . . . [whose patients] travel from all across the country because of Dr. Rumer's stellar track record and reputation for excellence."). So, as with note 3, this point is waived.

instance, however, it is Plaintiff's job to allege actionable statements — and as they even seem to admit, the only way the Court can figure out what statements are even being alleged is to look to the website itself. *See* ECF 21 at 4 n. 2.[6] So, either (1) the FAC fails to identify the statements at issue, or (2) at the Plaintiffs' urging, the Court should essentially incorporate the website at rumersanonymous.blogspot.com in their FAC. And that incorporation, of course, includes the publication dates listed by Blogspot (and not modifiable by a user).

Beyond that, however, a website's source code (which the Court can access on its browser of choice[7]) provides the date of the most recent change that website. And since that source code is part of the public face of webpages that Plaintiffs have already urged the Court to take notice of (to get over the hurdle of failing to plead the statements in the first place), the Court should look at all of the page if it looks at all. From the source code, for each post, the Court can view the "dateModified" data, which shows:

- The fifth most recent post,[8] from May 5, 2018, was updated "2019-01-03";
- The fourth most recent post, from Jul. 30, 2018, was updated "2020-08-21";
- The third most recent post, from Jan. 2, 2019, was updated "2020-11-17"; and
- The second most recent post, from Jan. 23, 2019, was updated "2019-01-23."

[6] Plaintiffs claim that they identified the wrong website "possibly by spelling autocorrect software." *Id*. That's not possible, since a URL is not a word (that is, neither "rumersanonymous.blogspot.com" nor "rumorsanonymous.blogspot.com" are in any software's dictionary). Beyond that, the issue is not whether the website exists — which would possibly be judicially noticeable — but *what is pled*. The fact that a website exists is neither here nor there with regard to what is in Plaintiffs' FAC. Put differently, the Court can judicially notice that a website exists, but that judicial notice cannot change what is in Plaintiffs' FAC.

[7] On a PC, pressing Ctrl-U brings up a webpage's source code. On a Mac, the keyboard command is Option-Command-U. And on both platforms, right-clicking and selecting the option to "View page source" will also bring up the source code.

[8] This post went unmentioned in the initial memo because it did not appear Plaintiffs were suing about it: it was not identified in the FAC, it is far outside the statute of limitations, and as discussed below, any liability for this post would be barred by 47 U.S.C. § 230 as it does no more than repeat a story from another website (*see, e.g., Mitan v. A. Neumann & Assocs., Ltd. Liab. Co*., No. 08-6154, 2010 U.S. Dist. LEXIS 121568, at *19 (D.N.J. Nov. 17, 2010) (mass forwarding of an allegedly defamatory email is "shielded by the CDA, and Plaintiff's libel claim … is necessarily preempted" by Section 230)). However, Defendant discusses it now because Plaintiffs discuss it in their opposition.

Thus, on the face of it, Post 5 remains outside of the statute of limitations in all events, Post 2 requires relation back to be viable,[9] and Posts 3 and 4 might be viable. But, under *Twombly* and *Iqbal*, it is the Plaintiffs' job to present sufficient plausible facts for liability — including the date of publication. *See, e.g., Lundin v Discovery Communs. Inc*., 2017 US Dist LEXIS 10393, at *7-8 (D. Ariz. 2017) ("The complaint's other allegations are that Episode 5 was published on other platforms on unidentified dates and Episode 5 might have been published on a specific platform sometime after January 1, 2016. These vague allegations are not sufficient… [Plaintiff is] required to plead the publication dates at issue.").

In other words, Plaintiffs must plausibly allege that the *updates* contained the statements Plaintiffs allege are defamatory. That is, as the Third Circuit has explained, "websites are constantly linked and updated," and "[i]f each link or technical change were an act of republication, the statute of limitations would be retriggered endlessly and its effectiveness essentially eliminated." *In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 174 (3d Cir. 2012). Thus serving the policy goal of the single publication rule, "mere addition of unrelated information to a Web site cannot be equated with the repetition of defamatory matter in a separately published edition of a book or newspaper." *Firth v State*, 98 NY2d 365, 371 (2002) (rationale adopted in *Pendergrass v ChoicePoint, Inc*., 2008 US Dist LEXIS 99767, at *8 [ED Pa 2008]). So, since Plaintiffs fail to allege that the updates contained the statements they object to (rather than the initial publication), their claims fail.[10]

[9] Which, as noted above, Plaintiffs concede would be improper.

[10] Plaintiffs cite a non-precedential, later panel opinion in suggesting otherwise. *See* ECF 21 at 12, *citing McClenaghan v. Turi*, 567 F. App'x 150, 154 (3d Cir. 2014). Of course, a later panel cannot overrule an earlier panel, so to the extent it is inconsistent with *In re Philadelphia Newspapers*, it is non-binding. But the opinion in *McClenaghan* is simply not on point and should be read away from any conflict. *McClenaghan* involves two totally separate posts (though identical in content) — not a "technical change" or "link." And indeed, *McClenaghan* involves the Circuit reversing a jury instruction that *allowed* a discovery theory to proceed. Maybe more to the point, Plaintiffs also cite *In re Philadelphia Newspapers* on this point, which explicitly rejects their republication

Even then, the face of the two possible posts also makes clear the updates are "unrelated information." In Post 3, Plaintiffs object to the publication of Dr. Rumer's address. But Post 3 is titled "KATHY RUMER'S HOME ADDRESS," and even states "I know, I know.... The title of this post is pretty blunt, none the less, Happy New Years ya'll!"[11] And beyond that, in bold, it has "**UPDATE: IT'S REAL FOLKS! Kathy Rumer confirms it herself in her lawsuit against me.**" *Id*. So, Post 3 would have had no content at all for over a year if it didn't have the statements Plaintiffs complain of. And the post labels its update in bold and all caps. It is simply not plausible this post did not always contain the statements Plaintiffs object to — and it bears some repetition that Plaintiffs do not plead otherwise.

Post 4 is, as of today, a list of 6 former Rumer clients, along with links to *those peoples'* complaints about Dr. Rumer. And even the word "Botched" appears to come — not from the blogger — but from a Pennsylvania Record headline. *See* Philip Gonzales, Patient says Rumer Cosmetic Surgery botched gender reassignment procedure, PENN. REC. (Jul. 12, 2018). Similarly, while Plaintiffs complain that another patient's use of photographs on a linked page is "intended to shock and horrify the lay person into believing that any abnormalities or complications are Dr. Rumer's fault or that she did something wrong during the surgery," the page itself quotes one of the patient's new doctors — and *both doctors' reports*, noting among other things, "necrosis of the labia."[12] As explained below in more depth, without an allegation that Defendant *added*

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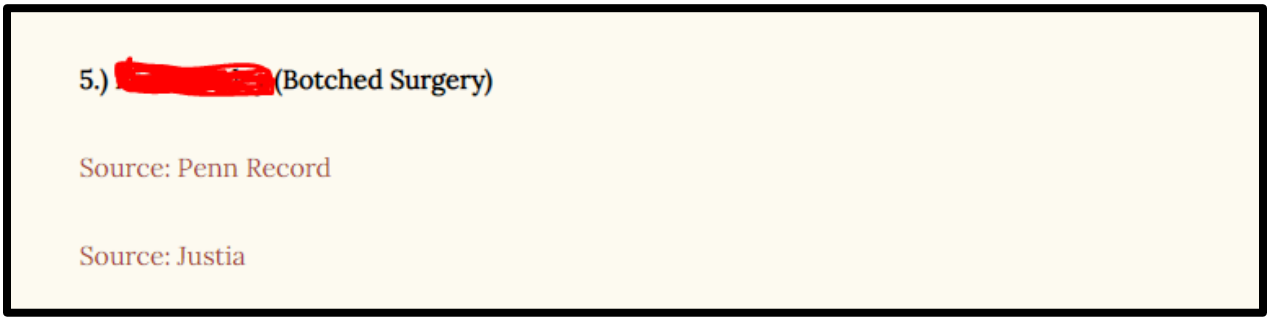
theory: "though a link and reference may bring readers' attention to the existence of an article, they do not republish the article." *In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012); *compare* ECF 21 at 11 (seemingly citing *In re Philadelphia* for the opposite point).

[11] https://rumersanonymous.blogspot.com/2019/01/kathy-rumers-home-address.html

[12] http://hannahsimpson.com/wp-content/uploads/2017/07/Hannah-Simpson-np-consult-February-28-2017-Dellon.pdf; http://hannahsimpson.com/wp-content/uploads/2017/07/Hannah-Simpson-Marci-Bowers-Operative-Report-03.12.2015.pdf.

something to the words of others, liability does not exist. So, the August 2020 update to the post may have added — for example — this link (name removed):



But that (hypothetical[13]) addition cannot give rise to liability for reasons outside the statute of limitations: it simply links another page (meaning no liability under Section 230), and adds the blogger's opinion that the allegations in a lawsuit describe a "Botched Surgery."

C. Section 230 bars liability.

In what they sweep into their opposition, without addressing the problem (*see* ECF 19 at 7 n.9), Plaintiffs seemingly suggest that they intended to plead a theory of republication liability. But that theory is barred by Section 230.

The Federal Communications Decency Act ("CDA") provides, in relevant parts:

> "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."

47 U.S.C. § 230(c)-(e) ("Section 230"). This provision stands in firm contrast "to the common law rule that a person who republishes a defamation uttered by another was subject to liability as

[13] Bloggers — perhaps like all writers — commonly find typos in previously published work. *See In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 174 (3d Cir. 2012). Amending to correct a typo would not reset the statute of limitations any more than correcting a typo in a book would. And because Plaintiffs fail to actually plead when the statements they complain of were published (to say nothing of failing to identify the statements at all), this argument is deep in a rabbit hole the Court need not dive into.

if he or she were the original defamer." *Orso v. Goldberg*, 284 N.J. Super. 446, 451 (N.J. App. Div. 1995); *see also McClenaghan v. Turi*, 567 F. App'x 150, 154 (3d Cir. 2014).

Mechanically, Section 230 operates by defining an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S. § 230(f)(3) (relevant portions underscored). That is, an "information content provider" is any person who posts anything on the internet. So, the underlying author of — for example — the video or the blog linked in the "List of Botched Rumer Surgeries" post, were "user[s] of an interactive computer system." Thus, the blogger "**shall [not] be treated as the publisher or speaker**" of the relevant information and "[n]o cause of action may be brought and no liability may be imposed under any State or local law." Section 230 (emphasis added). Or, as the Third Circuit put it, "[b]y its terms, § 230 provides immunity to … a publisher or speaker of information originating from another information content provider." *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003).

Caselaw confirms that without an alteration to or comment extending the statement being republished, Section 230 precludes liability. *See e.g.*, *La Liberte v. Reid*, No. 18-cv-5398 (DLI) (VMS), 2019 U.S. Dist. LEXIS 174542, at *11-12 (E.D.N.Y. Sep. 30, 2019) (Section 230 shields republication, but did not protect specific statement at issue *because* "Plaintiff alleges that *Defendant altered the content* because Defendant was 'the very first person to put [racial slurs] in [Plaintiff's] mouth.'") (italics added). And minor commentary or accurate summarization does not get over the preclusion bar. *See generally*, *Shiamili v. Real Estate Grp. of N.Y.*, Inc., 929 N.Y.S.2d 19, 952 N.E.2d 1011 (N.Y. 2011) (even with "material contributions" to republished

material, including promoting it, adding editorial commentary, and illustrations, Section 230 still precludes republication liability).

In considering liability for social media/internet republication, "the vast majority of courts that have addressed this issue have held that Section 230 unambiguously provides broad immunity to providers and users of interactive computer services who do not create the offending content," and Plaintiffs' republication theory amounts to "raising the issue with the wrong branch of government." Michael K. Twersky & Benjamin H. McCoy, Where Retweeting Falls in Defamation Law, Law360 (March 7, 2019); Steven D. Zansberg & Matthew E. Kelley, A Little Birdie Told Me, "You're A Crook": Libel in The Twittersphere And Beyond, 30 Comm. Lawyer 1, 38 (March 2014) (concluding "a retweeter is entitled to immunity under § 230"). *See also, Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003); *Donato v. Moldow*, 374 N.J. Super. 475, 501 (N.J. 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*); Doe v. Am. Online, Inc*., 783 So. 2d 1010, 1018 (Fla. 2001) ("We specifically concur that section 230 expressly bars 'any actions' and we are compelled to give the language of this preemptive law its plain meaning"); *Mitan v. A. Neumann & Assocs., Ltd. Liab. Co*., No. 08-6154, 2010 U.S. Dist. LEXIS 121568, at *19 (D.N.J. Nov. 17, 2010) (mass forwarding of an allegedly defamatory email is "shielded by the CDA, and Plaintiff's libel claim … is necessarily preempted" by Section 230); *and Phan v. Pham*, 105 Cal. Rptr. 3d 791, 792 (Ct. App. 2010) ("What happens when you receive a defamatory e-mail over the Internet and simply hit the forward icon on your computer, sending it on to someone else? … *you* cannot be held liable for the defamation") (emphasis in original),

citing Barrett v. Rosenthal, 51 Cal. Rptr. 3d 55, 61, 146 P.3d 510, 515-16 (2006) (Plaintiffs are free under section 230 to pursue the originator of a defamatory Internet publication. Any further expansion of liability must await congressional action").

Here, at least as to the July 30, 2018 "Credible List" post and the May 8, 2018 "Cut it Off With Scissors" post, Section 230 preempts liability and "[n]o cause of action may be brought and no liability may be imposed under any State or local law." Section 230. The Credible List post amounts to little more than a collection of links, and some very limited summary. That summary is pure opinion ("[t]his is one of the most tragic stories…"), and does not involve any alteration to the republished content. The Cut it Off With Scissors post is even clearer: it involves a republication of this Reddit post, and an image of that post. The little content provided by the blogger is a one-sentence "TL;DR Version" of the post, as well as the opinions that the story is "straight out of a horror film" and the sarcastic quip, "Great job Hahnemann Hospital for letting this lunatic practice under you." Neither of these posts can give rise to liability consistent with Section 230, and Plaintiffs do not even offer an argument on how they could.

D. Plaintiffs fundamentally misunderstand actual malice.

Plaintiffs fundamentally misunderstand actual malice in their argument. True, the blog says that it has a "goal of tarnishing Dr. Rumer and Rumer Cosmetic's reputation in the medical community as well as her reputation amongst potential clients" (ECF 21 at 16), but the full text of the blog demonstrates why such a goal may not amount to actual malice. As the blog itself explains: "it[']s no secret that I do want her already tarnished reputation to be a little more..... well known."[14] Put differently, if it is *true* that Dr. Rumer is a reckless, dangerous, and callous

[14] https://rumersanonymous.blogspot.com/2020/11/subpoenas-lawyers-and-lawsuits-oh-my.html

surgeon, a desire to have her public reputation match that fact does not show that "defendant in fact entertained serious doubts as to the truth of [any] publication." *St. Amant v Thompson*, 390 US 727, 731 (1968). Quite the opposite, and thus, in many contexts, "[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). There are many circumstances where hostility even goes hand-in-hand with truth: it makes sense, for example, for people to loathe a terrorist because they are a terrorist (even if falsely calling someone a terrorist would be defamatory).

Plaintiffs' case on this point does not provide otherwise. *See* ECF 21 at 15-16, *citing Weaver v. Lancaster Newspapers, Inc*., 592 Pa. 458, 466, 926 A.2d 899, 903 (2007).[15] Rather, *Weaver* looks carefully at context, finding that — for example — the plaintiff had alleged enough about the defendant's state of mind in showing that "he republished a statement accusing Weaver of having been arraigned on charges of sexual molestation, *after the lawsuit filed against him put him on notice that his grave accusation might be false*." *Weaver v. Lancaster Newspapers, Inc*., 592 Pa. 458, 469-70 (2007) (emphasis added). In *Weaver*, there was a readily determinable false statement: the plaintiff "had not in fact been arraigned on sexual molestation charges." *Id*. at 470. Public records authoritatively determine that fact.

Plaintiffs try to rely on *Weaver* for a categorical rule that certain facts *always* show actual malice. ECF 21 at 17 (discussing what Plaintiffs call the "hallmarks of 'actual malice' that the

[15] Plaintiffs misstate the holding of *Patel v. Patel*, No. 14-2949, 2015 U.S. Dist. LEXIS 149571, at *18 (E.D. Pa. Nov. 4, 2015). *Patel* involves an unanswered request for admission that the defendant "knew the statements he made were false." So, far from — as Plaintiffs suggest — inferring actual malice merely from an "admission that defamatory statements were made in an attempt to destroy the litigant's personal and business reputation," the admissions included the definition of actual malice.

Weaver court identified").[16] But that is not what *Weaver* says. Rather, *Weaver* discusses what "*may*" serve show actual malice — and explains that "[u]nder *certain circumstances* evidence [of subsequent acts] *might* be relevant in showing recklessness at the time the statement was published." 592 Pa. at 470. In other words, context matters. *Weaver* essentially holds that if a plaintiff can offer definitive proof that something a defendant said is false, and the defendant says it again, then that may tend to show actual malice.

But unlike the plaintiff in *Weaver*, Plaintiffs have offered nothing definitive — either in this suit or anywhere else — that shows that the many, many people who think Dr. Rumer's approach to surgery leaves something lacking are categorically wrong. Indeed, criticism of Dr. Rumer abounds — and reporter Katelyn Burns's detailed reporting includes many accounts of what appears to be malpractice. Katelyn Burns, *When Surgeons Fail Their Trans Patients*, JEZEBEL (2020). And a quick review of public dockets shows a meaningful number of malpractice suits.[17] Put differently, in *Weaver*, continuing to believe the plaintiff had been arraigned for a charge after being shown he hadn't reasonably could be read to show recklessness with regard to truth.

But nothing here definitively shows that Dr. Rumer is not a dangerous surgeon — quite the opposite.[18] Another famous GRS surgeon, Dr. Jess Ting, having been slated as an witness in a malpractice case against Dr. Rumer, publicly commented on Dr. Rumer's history of poor

[16] That Plaintiffs are wrong about this can be read from the list of supposed "hallmarks" itself. The list includes as a stand-alone item, "subsequent statements of the defendant." 592 Pa. at 471. But, of course, the simple fact that a defendant *speaks* after an allegedly defamatory statement does not show actual malice. Rather, the content and context of that statement — just like the content of context of what Plaintiffs call a "threat" — matters.

[17] In E.D. Pa., *for example*, *see, Coley v. Rumer et al*., 2:18-cv-1188; *Minto v. Rumer at al*., 2:18-cv-2800; *Valentino v. Rumer et al*., 2:18-cv-3816; *and Thompson v. Rumer et al*., 2:18-cv-3817.

[18] Plaintiffs also seem to make much of the fact that the blog explicitly qualifies things by saying it is repeating stories heard elsewhere. *See* ECF 21 at 16-17. Aside from the Section 230 issue that raises, such qualifications only serve to *insulate* the statements from liability: the blogger is accurately stating they are repeating what they heard.

outcomes, saying "As a surgeon I can tell you every surgeon has bad outcomes … We all have complications, things don't always come out the way we want them to. When you see a pattern of outcomes that suggests that maybe a surgeon isn't meeting standards of care, then you feel obliged to speak up." Burns, *supra*. Another surgeon — who has done revisions on Dr. Rumer's procedures — provided a similar comment: "Dr. Rumer falls short in some terrifying ways—blaming the patients for their surgical complications, anger and hostility towards those who complain, lack of availability or accountability." *Id*. In other words, unlike *Weaver*, the statements here by all appearances are true.[19] And thus, there is nothing in the blogger's subsequent conduct that tends to show knowledge of falsity.[20]

E. Plaintiffs cannot cure these pleading defects and the FAC should be dismissed with prejudice.

Perhaps recognizing the many defects of their complaint, Plaintiffs ask the Court for allowance for them to cure the pleading deficiencies instead of dismissal with prejudice. ECF 21 at 21. They acknowledge, however, that such amendments should not be permitted if they would be "inequitable or futile." *Id*. (citing *Phillips v. City of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008). And where the "allegations verify that they cannot be cured by repleading," the Court need not grant such leave to amend. *Beebe v. Shultz*, No. 14-1385, at *9 (D.N.J. May 27, 2014) (citing *Forman v. Davis*, 371 U.S. 178, 182 (1962)). As this Court has previously recognized, this is especially true in suits where the statements alleged in the complaint—which cannot and will not change in any amendment—fail to make out a violation as a matter of law. *See Fox v. Cheltenham*

[19] That is not to say the Court should evaluate truth on this motion. Rather, the obvious falsehood of the statement in *Weaver* goes to *what* facts might tend to show actual malice. The fact that there is real controversy in the medical profession over whether Dr. Rumer is a reckless and dangerous surgeon means that simply claiming that negative opinions of Dr. Rumer are defamatory is not sufficient to convert a take-down demand into knowledge of falsity.

[20] Followed to its conclusion, Plaintiffs' theory seems to be that actual malice exists whenever a plaintiff says, "you're lying," and a defendant says, "no I'm not." That cannot be the law.

Twp. Auth., No. 12-716 (E.D. Pa. Jun. 18, 2012). Where statements "cannot, as a matter of law" amount to defamation, "amendment would be futile and is not warranted." *Id*. at *9 n.2. And it is true as to waived arguments where "the plaintiffs' response to the motion to dismiss here was completely silent as to th[e] point." *Rosario v. First Student Mgmt. LLC*, 247 F.Supp.3d 560, 570 n.13 (E.D. Pa. 2017)

This is just such a case. The problems with the complaint in this case, discussed here and in Defendant's Motion to Dismiss, ECF 19, are legal in nature. The failure of many posts to fall within the statute of limitations cannot be cured by an amendment. Nor can the protected nature of all the statements, opinions based on disclosed facts, be cured—the statements are what they are and cannot change, so the defamation question is purely legal. Plaintiffs' response to the motion to dismiss, which raises the republication theory for the first time and perhaps hints at what an amended pleading would look like, fares no better, for the reasons discussed above regarding Section 230 of the CDA. Even Plaintiffs' request for leave to amend amounts to little more than four boilerplate sentences that rely on their disagreement with the Motion to Dismiss. They make no suggestion of how they would amend, and "[i]n the absence of any identification of how a further amendment would improve upon the Complaint, leave to amend must be denied as futile." *AG Funds, L.P. v. Sanofi*, 87 F.Supp.3d 510, 549 (S.D.N.Y. 2015).

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*[21]

[21] As noted in the opening papers, Defendant Roe is receiving *pro bono* assistance from counsel — and disclosed as much. Thus, Plaintiffs' citations to cases objecting to *undisclosed* assistance are inapposite. ECF 21 at 9 n. 4. The overwhelming weight of modern authority is that this kind of limited scope representation is proper. *See* Pennsylvania Bar Association, Joint Formal Opinion 2011-100, *Representing Clients in Limited Scope Engagements* ("JFO"); David I Grunfeld, *Ghostwriting: Limited Scope Agreements Are Allowed Under Pennsylvania Rules of Professional Conduct*, PHILADELPHIA LAWYER 13 (Spring 2012). The thrust of the point in the case Plaintiffs cite is that *undisclosed* assistance might lead courts to offer unfair consideration to a litigant — and thus runs afoul of the rule against misleading a tribunal. But the assistance here is disclosed, and Defendant Roe is asking for no special consideration (and, as Grunfeld and the JFO both point out, "In fact, in Pennsylvania, … pro se litigants are not excused from adherence to the rules, and should not expect special accommodation."). Plaintiffs' older case simply involves a fee dispute — and a court refusing to grant fees for a period of limited scope engagement. The view of the lawyers helping on these papers is that an appearance would be improper because, "[t]he lawyer is making no representation to a court. ***The entire point is that he or she has not entered an appearance*** and therefore is not before the court himself or herself." JFO at 13 (emphasis added).

With that said, and with the caveat that the counsel assisting with papers are not able to represent Defendant Roe beyond the limited terms agreed to, counsel are happy to proceed however the Court prefers — counsel have no intention to hide the fact that they have drafted papers. *Compare* ECF 19 at 1 n.1 *with, e.g.,* ECF 16 (Defendant Roe's attempt to answer the FAC on her own).