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,	:	Civ. A. No. 2:20-456-CFK
v.	:	
JOHN DOE 1, *et al.*	:	
Defendants.	:	

ORDER

AND NOW, this _____ day of _____, 2021, after considering Defendant Jaime Roe's Motion to Dismiss and Plaintiffs' Opposition thereto, it is hereby ORDERED that Defendant's Motion is DENIED in its entirety. It is further ORDERED that Defendant Jaime Roe answer the Amended Complaint within ____ days of this Order.

So ORDERED:

_____
J.

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Defendants.	:	

PLAINTIFFS' OPPOSITION TO DEFENDANT JAIME ROE'S MOTION TO DISMISS

I. INTRODUCTION:

Plaintiffs, Delaware Valley Aesthetics, PLLC, d/b/a Rumer Cosmetic Surgery ("Rumer Cosmetic"), and Kathy Rumer, DO, FACOS, ("Rumer") (collectively, "Plaintiffs") by and through their counsel, Rogers Counsel, hereby oppose the Motion to Dismiss Plaintiffs' Amended Complaint, filed by Defendant "Jaime Roe"[1] ("Defendant" or "Roe") on May 31, 2021. For the reasons set forth in the following, the Court should deny Defendant's Motion in its entirety.

Each of Roe's arguments for dismissal are deeply flawed. First, Roe has failed to demonstrate from the face of the Amended Complaint that Plaintiffs' libel claim is barred by the purported statute of limitations. In addition, the purported "publication" dates are patently unreliable and have undergone later (undated) "republications."

[1] Pursuant to her request for privacy, Plaintiffs have agreed to refer to the named Defendant by the pseudonym, "Jaime Roe."

Roe has also failed to demonstrate that Plaintiffs cannot state a claim for libel as a matter of law. Specifically, Roe has failed to show that any defamatory statements alleged in the Amended Complaint—let alone ***all of them***—are privileged as "pure opinion." Roe has also failed to demonstrate that Plaintiffs inadequately alleged "actual malice"—even though they are not required to do so. Furthermore, Roe has failed to demonstrate that Plaintiffs inadequately pleaded general damage to their reputations in support of their claim for libel *per se*. Because Roe's argument for dismissal of Plaintiffs' other claims depend on dismissing Plaintiffs' libel claim, the Court must deny her motion for their dismissal too.

With respect to subject matter jurisdiction, Roe has failed to demonstrate "to a legal certainty" that the value of Plaintiffs' claims are below $75,000 as alleged in the Amended Complaint. Moreover, both the U.S. Supreme Court and Third Circuit have recognized that "the sum claimed by the plaintiff controls if the claim is apparently made in good faith." This is especially true if, as here, Plaintiffs are appropriately seeking punitive damages.

Finally, even though Defendant's motion lacks any merit, if the Court determines that some pleading defect does exist, the Court should liberally grant Plaintiffs leave to amend, pursuant to Third Circuit precedent, because Roe has failed to demonstrate that an amendment would be inequitable or futile.

II. FACTUAL AND PROCEDURAL BACKGROUND:

Dr. Rumer is a leading aesthetic and reconstructive plastic surgeon. *See* Am. Compl. at ¶7. She and her surgical practice, Rumer Cosmetics, offer a variety of cosmetic surgeries to potential patients, which focus on altering the body. *Id.* at ¶6. Of the services offered by Rumer Cosmetics, Dr. Rumer is most renowned for specializing in gender reassignment surgery. *Id.* at ¶7. She performs surgeries on hundreds of patients a year, who travel from all across the country

because of Dr. Rumer's stellar track record and reputation for excellence. *Id.* at ¶¶7-8. Rumer Cosmetics derives the bulk of its annual income from these gender reassignment surgeries performed by Dr. Rumer, and the success of the business is due to the reputation of Dr. Rumer in both the medical and lay-person communities. *Id.* at ¶¶8-9.

Dr. Rumer discovered in 2019 a website—known as "Kathy Rumer's Anonymous," a blog dedicated to "Chasing the #ButcherofArdmore"—with the URL: rumersanonymous.blogspot.com (hereinafter the "Website").[2] *Id.* at ¶10. The Website's unambiguous purpose is to destroy the professional reputation of Dr. Rumer and her surgical practice. *See id.* at ¶11. In fact, in the latest post to the blog (purportedly dated November 17, 2020), the author of the Website holds a mock trial and reviews, reiterates, and even admits to various defamatory statements alleged in the original Complaint.[3] *See* https://rumersanonymous.blogspot.com/2020/11/subpoenas-lawyers-and-lawsuits-oh-my.html. For example, the Website quotes paragraph 11 of Plaintiffs' original Complaint and then admits that she created the blog with the "goal of tarnishing Dr. Rumer and Rumer Cosmetic's reputation in the medical community as well as her reputation amongst potential clients." *Id.*

The Website is comprised of a series of blog entries that falsely attack Dr. Rumer's surgical practice, reputation, medical skills, professionalism, and personal character. *See id.* at ¶12. For example, one blog entry accuses Plaintiffs of "false advertising," faking patient

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[2] Plaintiffs' original Complaint correctly listed the URL as rumersanonymous.blogspot.com. *See* D.E. #1 at ¶11. Unfortunately, it appears that when Plaintiffs filed their Amended Complaint, the spelling of "rumer" was inadvertently changed (possibly by spelling autocorrect software) to "rumor" in the URL. As of the filing of this document, the correct URL is still operable and Plaintiffs request that the Court take judicial notice that this is the Website, relating to Dr. Rumer, that is at issue in the Amended Complaint.

[3] Curiously, no new blog posts have been made since Plaintiffs filed their Amended Complaint on December 4, 2020, identifying Jaime Roe by her legal name.

testimonials, and stealing stock photographs: https://rumersanonymous.blogspot.com/2019/01/kathy-rumers-false-advertising.html. *See id.* at ¶12(a)&(b). The same blog entry also recounts a defamatory anecdote: "I heard a story once where one of her FTM patients was having an anxiety attack on the surgery table and Rumer stormed out of the room demanding her staff to 'Deal with it!'" *See id.* Another blog entry, https://rumersanonymous.blogspot.com/2018/05/cut-it-off-with-scissors.html, falsely accuses Dr. Rumer of a "botched" vaginoplasty and instructing "her patient to cut off a portion of her own labia with scissors." *See id.* at ¶12(c).

A third blog entry, https://rumersanonymous.blogspot.com/2018/07/credible-list-of-botched-rumer-surgeries.html, is labeled "NSFW" (implying that it is so explicit that it is "Not Safe For viewing while at Work"). It purports to describe a "botched Rumer surgery" about a "poor girl [who] went to Dr. Rumer in 2014 and has never been able to fix what she did to her…." *See id.* at ¶12(f). The blog entry then links to extraordinarily graphic pictures of a post-surgical genitalia during the healing process that are intended to shock and horrify a lay person into believing that any abnormalities or complications are Dr. Rumer's fault or that she did something wrong during the surgery. *See id.*

Yet another blog entry, https://rumersanonymous.blogspot.com/2019/01/kathy-rumers-home-address.html, is designed to incite hate against Dr. Rumer and discloses her home address, which Dr. Rumer does not publicly list under her own name. *See id.* at ¶12(g). The blog entry purports to post pictures of her home with captions like: "Many people had they're [*sic*] lives ruined so she can live like this;" "The pool could [be] fill[ed with] the blood from all of her botched surgeries combined;" and "Maybe that Jacuzzi is where she sips on the wine fresh from the cellar while ignoring calls as one of her client's labia's [*sic*] falls off." *See id.* The blog entry

concludes with the publication Dr. Rumer's home address and encourages the public "to send her your thank you letters for all she has 'done' for the trans community…." *See id.*

Each of the blog entries has a date associated with it, which the Defendant suggests are "publication dates" for each entry. *See* Def.'s Br. at 4. Even if these were original "publication dates" for some of the blog entries, they are patently unreliable because they contain undated "updates" or were subsequently republished in later blog entries. For example, in the blog post relating to Dr. Rumer's home address, which was purportedly published on January 2, 2019, the blog's author repeatedly referenced and pasted a graphic from Plaintiffs' original Complaint, ***which was not filed until over a year later on January 23, 2020***. *See* https://rumersanonymous.blogspot.com/2019/01/kathy-rumers-home-address.html. Thus, the post purportedly published on January 2, 2019 was updated and republished sometime after January 23, 2020.

As a direct result of these repeated defamatory attacks posted on the Website, Dr. Rumer and her surgical practice have suffered not only a massive blow to their professional and business reputations, but also ongoing economic harm and financial losses. *See* Am. Compl. at ¶¶20, 25, 27, 30 & 38. Moreover, the Website's efforts to incite hate against Dr. Rumer and Rumer Cosmetics, have smeared the personal reputation of Dr. Rumer and led to harassment of her and her surgical practice. *See id.* at ¶¶36-38. In fact, Dr. Rumer and the staff of Rumer Cosmetics have been approached by existing and prospective patients who have seen the defamatory statements posted on the Website and have commented or questioned Dr. Rumer and her staff about it. *Id.* at ¶22. Indeed, Plaintiffs believe that they have lost a number of patients directly related to Roe's defamatory statements.

In addition to posting blog entries, Plaintiffs have received threatening emails from the Website's author. *Id.* at ¶13. For example, on January 5, 2020, Dr. Rumer received an email from "rualooker555@gmail.com" that provided:

> Please allow me to introduce myself, I am the bringer of bad news and taste.
>
> The trans community is about to have its own #metoo movement. I'm the one who has been running the Rumer's Anonymous blog. Do you like it? I know you read it, I know you scan reddit for the horror stories people post about you. I know you are slowly going insane from watching your reputation slowly on the decline. Do you know how many submissions I get from people that you hurt? It's all going to come to light soon enough.
>
> Enjoy the inevitable.
>
> Pleased to meet you, I hope you try to guess my name.

Id. This is one of a number of harassing and threatening messages, often referencing The Rolling Stones' lyrics, made by the Website's anonymous author. *Id.*

Because the author of the Website actively concealed her identity by paying extra money to an internet company so that she could remain anonymous, Plaintiffs filed their original Complaint in this action against "John Doe 1" and "Jane Doe 1" on January 23, 2020, asserting claims for libel *per se*, commercial disparagement, intentional interference with business relationships, and invasion of privacy. *See* Compl. at ¶¶16-39 (D.I. #1). After learning of the lawsuit, the anonymous blogger sent Plaintiffs' counsel a taunting e-mail, suggesting that she would never be served with process: "Your case is sh[*]t. Even if by some miracle you somehow managed to find my identity. [*sic*] (serving me would also be downright impossible as I have no physical address) [*sic*.]" After relentlessly investigating the identity of the Website's author, including with the help of an expert, Plaintiffs discovered the legal name and contact information of Defendant Jaime Roe.

On December 2, 2020, Plaintiffs moved to amend the Complaint to add Roe as a Defendant under her legal name. D.I. #9 . The Court granted Plaintiffs' motion on December 4, 2021. D.I. #10. Plaintiffs filed their Amended Complaint on December 4, 2020, naming Jamie [Roe] as a Defendant. D.I. #11.

Plaintiffs repeatedly attempted to serve Roe, pursuant to Federal Rule of Civil Procedure 4(e)(1) and Pennsylvania Rule of Civil Procedure 403(1), by Certified Mail (return receipt requested) and subsequently by Federal Express. *See, generally,* D.I. #12. After Roe refused to accept service by mail, Plaintiffs' process server unsuccessfully attempted to hand-deliver the Amended Complaint and Summons to Roe four times over the course of a number of days at different times, and ultimately returned the Amended Complaint and Summons to Plaintiffs' counsel as undeliverable. *See id.*

Because of Roe's success in evading service of process, Plaintiffs filed a motion with the Court on March 17, 2021, to extend the time to formally serve Roe and to approve an alternative means of serving process. The Court granted Plaintiffs' Motion the following day and Plaintiffs successfully served Roe.

On May 5, 2021, the Court issued a letter to Plaintiffs' counsel, Ordering Roe to respond to the Amended Complaint by May 31, 2021, or risk a default judgment. *See* D.I. #17. Roe's counsel and local counsel contacted Plaintiffs' counsel on May 7, 2021, requesting consent that Jaime Roe be allowed to proceed under a pseudonym and seeking an offer of proof that Roe was indeed the author of the website—both of which Plaintiffs' counsel promptly provided. On May 26, 2021, Defendant's counsel and local counsel informed Plaintiffs' counsel that they would only be representing Roe in a "limited capacity" and would not be entering their appearance in

this action as Roe's attorneys.[4] Roe filed her "*pro se*" motion to dismiss the Amended Complaint *via* e-mail to the Court on May 31, 2021.

III. LEGAL STANDARD:

A Rule 12(b)(6) motion to dismiss challenges the legal sufficiency of a complaint, which may be dismissed for the "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The moving party "bears the burden of showing that no claim has been presented." *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005). When reviewing a motion to dismiss, the Court must accept all well-pleaded facts and allegations as true, and must draw all reasonable inferences therefrom in favor of the plaintiff. *Burtch v. Milberg Factors, Inc.,* 662 F.3d 212, 220 (3d Cir. 2011). The Court of Appeals for the Third Circuit has reiterated that Fed. R. Civ. P. 8(a)(2) "requires only a short and plain statement of the claim showing that the pleader is entitled to relief' in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007)(internal quotations omitted).

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[4] Plaintiffs object to the failure of Roe's attorneys to enter an appearance in this matter or, if necessary, file *pro hac vice* motions. As Roe admits, her counsel provided substantial assistance in researching and drafting her motion. *See* Def.'s Br. at 1 n.1. Plaintiffs understand that Roe's attorneys may not want to or be able to provide full representation to her, but attorneys researching and writing briefs filed with a federal court should enter a formal appearance with the court because "ghost writing arrangements interfere with the Court's ability to superintend the conduct of counsel and parties during the litigation." *United States v. Eleven Vehicles*, 966 F. Supp. 361, 367 (E.D. Pa. 1997). Moreover, federal courts in the Third Circuit have recognized: "The practice serves as a means of misrepresentation to the Court, gives *pro se* Plaintiffs an unfair advantage, as they are already entitled to special leniency, and violates an attorney's duty of candor to the Court." *Gordon v. Kartri Sales Co.*, No. 3:17-CV-00320, 2018 U.S. Dist. LEXIS 39731, at *5 n.3 (M.D. Pa. Mar. 12, 2018) (noting that ghostwriting may be sanctionable conduct in federal court and requiring any attorney found to ghostwrite a brief must enter an appearance). Furthermore, pursuant to Federal Rule of Civil Procedure 11, attorneys drafting filings are accountable to ensure that no misrepresentations are being made to the Court. This is especially true if they are not members of the Pennsylvania bar or admitted to practice in this U.S. District Court.

In *Ashcroft v. Iqbal,* the Supreme Court explained the requirement that a complaint must state a plausible claim for relief to survive a motion to dismiss: "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. 662, 678 (2009). Nevertheless, "the plausibility standard is not akin to a 'probability requirement,' but requires a plaintiff to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* This determination will be "'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Id.* at 679. Nothing in *Twombly* or *Iqbal* changed the Rule 12(b)(6) requirement that "the facts must be taken as true and a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on those merits." *Phillips*, 515 F.3d at 231.

IV. ARGUMENT:

A. Roe has failed to demonstrate from the face of the Amended Complaint that Plaintiffs' claims are barred by the purported statute of limitations.

Jaime Roe's statute of limitations arguments lack any merit for a number of reasons. As an initial matter, she has failed to carry her burden by demonstrating that Plaintiffs' claims are time-barred from the face of the Amended Complaint. In general, a statute of limitations "is an affirmative defense, and the burden of establishing its applicability to a particular claim rests with the defendant." *Drennan v. PNC Bank, NA (In re Comty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.)*, 622 F.3d 275, 292 (3d Cir. 2010); *see also* Fed. R. Civ. P. 8(c). Moreover, the Court of Appeals for the Third Circuit has repeatedly held that if a time-bar "is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6)." *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002); *see also Bethel v. Jendoco* Constr. Corp., 570 F.2d 1168, 1174 (3d Cir. 1978)

("[T]the limitations defense may be raised on a motion under Rule 12(b)(6), but only if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.")(internal quotations omitted).

Here, Plaintiffs do not know and ***do not allege when*** Roe published various blog entries—only that they were discovered by the Plaintiffs in 2019. *See* Am. Compl. at ¶10. It is undisputed that these purported publication dates do not appear in Plaintiffs' pleadings. In asserting that certain blog entries fall outside Pennsylvania's one-year statute of limitations for defamation claims, Roe asks this Court to dismiss Plaintiffs' Amended Complaint with prejudice on the ***unproven assumption*** that the purported "publication dates" appearing next to various blog entries are authentic and accurate—***which they clearly are not***. For example, in the blog post relating to Dr. Rumer's home address, which was purportedly published on January 2, 2019, Roe referenced and pasted a graphic from Plaintiffs' original Complaint, ***which was not filed until over a year later on January 23, 2020***. *See* https://rumersanonymous.blogspot.com /2019/01/kathy-rumers-home-address.html. Accordingly, the purported "publication dates" for the posts are clearly unreliable and, in some cases, ***demonstrably false***. Thus, this Court must reject Roe's statute of limitations argument because it is based on nothing more than ***unverified hearsay*** as to when the individual blog posts were published.

Even assuming *arguendo* that purported "publication dates" of the various blog entries were accurate and undisputed—***which they are not***—Roe's later blog entries are "republications" of the defamatory statements made in the purportedly earlier, time-barred blog posts. The Court of Appeals for the Third Circuit has repeatedly recognized: "Republishing material (for example, the second edition of a book), editing and reissuing material, or placing it in a new form that includes the allegedly defamatory material, resets the statute of limitations."

McClenaghan v. Turi, 567 F. App'x 150, 154 (3d Cir. 2014); *In re Phila. Newspapers*, 690 F.3d 161, 174 (3d Cir. 2012).

In the present case, Roe repeatedly updated and "republished" her defamatory statements by reiterating, expanding upon, and commenting on her supposedly time-barred statements. Indeed, in her latest post to the blog (purportedly dated November 17, 2020), Roe holds a mock trial and reviews, reiterates, and even admits to various defamatory statements alleged in the original Complaint: "Allow me to 'annotate' these court documents with my own commentary your Honor."[5] *See* https://rumersanonymous.blogspot.com/2020/11/subpoenas-lawyers-and-lawsuits-oh-my.html. For example, Roe quotes paragraph 11 of Plaintiffs' original Complaint and then admits that she created the blog with the express goal of "goal of tarnishing Dr. Rumer and Rumer Cosmetic's reputation in the medical community as well as her reputation amongst potential clients." *Id.*

In that same post, Roe reiterated a shocking story she admits might be apocryphal "that Dr. Rumer stormed out of a surgery room demanding her staff to 'deal with it' because her patient was having an anxiety attack." *Id.* Then, Roe admitted that she was just maliciously propagating a rumor: "Yeah, I said that was something that I heard. Didn't actually try to say it was true. I said it was a Rumer, eh, I mean. a rumor. (See what I did there?)." *Id.*

Similarly, in that same post, Roe reiterated from a prior post a horrific story she heard "that Dr. Rumer instructed a patient to cut off a portion of her own labia with scissors." *Id.* Then, Roe insinuated that it might be true:

> I didn't make the claim, the person on reddit [*sic*] did, and whoever she is, she's anonymous so you can't question her. I simply just mirrored it and even noted that it came from an anonymous source.

[5] Curiously, no new blog posts have been made since Plaintiffs filed their Amended Complaint on December 4, 2020, identifying Jaime Roe by her legal name.

> ***But then again, the scissors story sounds VERY familiar to one of the horror stories featured in the Jezebel article***.

Id. (emphasis added). Indeed, Roe suggested in multiple posts that different versions of this false story might be credible for the apparent purpose of inciting hate against Dr. Rumer. For instance, in the blog post relating to Dr. Rumer's home address—which was purportedly published on January 2, 2019, but demonstrably updated ***after Plaintiffs filed their original Complaint***—Roe posted an alleged picture of Dr. Rumer's whirlpool bathtub and suggested: "Maybe that Jacuzzi is where she sips on the wine fresh from the cellar while ignoring calls as one of her client's labia's [*sic*] falls off. Want to send her your thank you letters for all she has "done" for the trans community? Here you go." https://rumersanonymous.blogspot.com /2019/01/kathy-rumers-home-address.html. Simply put, it is clear that the purported "publication dates" are not correct and that Roe repeatedly "republished" her earlier defamatory posts with new posts or more recent undated "updates" that reiterated and expanded upon her defamatory statements. Accordingly, this Court must deny Roe's motion to dismiss because she has failed to carry her burden to demonstrate that Plaintiffs' claims are time-barred from the face of the Amended Complaint.[6]

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[6] Incredibly, after actively concealing her identity, taunting Plaintiffs that they would never discover her identity, and repeatedly evading service of process, Roe has the audacity to assert the ***meritless argument*** that that Plaintiffs' claims might be time-barred because they failed to discover her identity or serve her promptly. *See* Def.'s Br. at 5-6. Roe is clearly estopped from asserting such a defense. *See Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 556 (3d Cir. 1985) ("[I]f through fraud or concealment the defendant causes the plaintiff to relax vigilance or deviate from the right of inquiry, the defendant is estopped from invoking the bar of limitation of action."); *Nesbitt v. Erie Coach Co.*, 416 Pa. 89, 96, 204 A.2d 473, 477 (1964) ("[I]f by concealment, through fraud or otherwise, a screen has been erected by his adversary which effectually obscures the view of what has happened, the statute remains quiescent until actual knowledge arises"); *see also McNair v. Weikers*, 300 Pa. Super. 379, 388, 446 A.2d 905, 909 (1982)("Moreover, the defendants' conduct need not rise to fraud or concealment in the strictest sense, that is, with an intent to deceive; unintentional fraud or concealment is sufficient.").

B. Roe has failed to demonstrate that Plaintiffs cannot state a claim for libel.

1. Roe has failed to demonstrate that *any* defamatory statements alleged in the Amended Complaint—*let alone all of them*—are privileged as "pure opinion."

Roe has built a straw man by incorrectly distilling the entirety of Plaintiffs' libel claim into her use of the professional slur, "butcher," to describe Dr. Rumer's surgical abilities and professionalism. *See* Def.'s Br. at 8. Roe then wrongly suggests that her use of this slur is protected as "pure opinion." *See id.* at 8-9. A cursory review of the Amended Complaint and Roe's blog reveals, however, that Plaintiffs' libel claim comprises much more than Roe's childish name-calling. Rather, Roe accuses Dr. Rumer of lying in her advertisements, callously storming out of a surgery while a patient was having an anxiety attack, cruelly suggesting that a patient cut off a portion of her own labia with scissors, and suggesting that Dr. Rumer "botched" a number of surgeries without disclosing any supporting facts and juxtaposing her defamatory statements with graphic photos of post-operative genitalia during the healing process. *See* Am. Compl. at ¶12. None of these statements are protected as "pure opinion." *See Hill v. Cosby*, No. 15cv1658, 2016 U.S. Dist. LEXIS 15795, at *8 (W.D. Pa. Feb. 9, 2016) (recognizing that Pennsylvania has adopted the Section 566 of the Restatement (Second) of Torts); *Braig v. Field Commc'ns*, 310 Pa. Super. 569, 580, 456 A.2d 1366, 1372 (1983)("A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."). For this reason alone, the Court should reject Roe's conclusory assertion that ***all of her defamatory statements*** alleged in the Amended Complaint are protected as "pure opinion."

Here, the only false statement that could plausibly be construed as partially based in "opinion" is the Roe's false allegation that Dr. Rumer "botched" a former patient's surgery and directing the reader to a website containing extremely graphic pictures of a person's post-

surgical genitalia during the healing process. *See* https://rumersanonymous.blogspot.com/2020/11/subpoenas-lawyers-and-lawsuits-oh-my.html. Roe discloses no supporting facts or reasons why the surgery was purportedly "botched" in her "opinion." *See id.* Rather, the graphic pictures of a post-surgical genitalia are clearly 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. Indeed, Roe admits in her opening brief that the pictures are "extraordinarily graphic and disturbing." Def's. Br. at 13 n.16. This is precisely the sort of "opinion"—suggesting undisclosed facts—that Pennsylvania courts have recognized as actionable defamation. *See Braig*, 456 A.2d at 1372. Accordingly, this Court must reject Roe's theory that ***all*** of her defamatory statements are protected as "pure opinion."

2. Roe has failed to demonstrate that Plaintiffs inadequately alleged "actual malice."

Assuming *arguendo* that Plaintiffs must allege that Roe acted with "actual malice,"[7] the Amended Complaint and Roe's own admissions demonstrate that Roe made her defamatory statements with "reckless disregard for the truth." *See Patel v. Patel*, No. 14-2949, 2015 U.S. Dist. LEXIS 149571, at *18 (E.D. Pa. Nov. 4, 2015) (concluding that tortfeasor acted with "actual malice" upon admission that defamatory statements were made in an attempt to destroy the litigant's personal and business reputation). The Supreme Court of Pennsylvania has explained that "if the plaintiff is a public figure he or she must prove that the defendant published the offending statement with 'actual malice,' i.e., with knowledge that the statement

[7] Plaintiffs do not concede that they are limited purpose "public figures" or that they must plead or prove "actual malice." *See Goldfarb v. Kalodimos*, No. 20-5667, 2021 U.S. Dist. LEXIS 92176, at *32 (E.D. Pa. May 14, 2021) ("The question of whether a plaintiff is a limited-purpose public figure is a difficult and fact-specific question not suitable for resolution under Rule 12(b)(6).").

was false or with reckless disregard of its falsity." *Weaver v. Lancaster Newspapers, Inc.*, 592 Pa. 458, 466, 926 A.2d 899, 903 (2007). A litigant can demonstrate "actual malice" if "the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation, or where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Id.* (internal quotations omitted). For example, both the Pennsylvania Supreme Court and U.S. Supreme Court have described the sort of evidence that can show "actual malice":

> The existence of actual malice may be shown in many ways. As a general rule, any competent evidence, either direct or circumstantial, can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, provided they are not too remote, including ***threats***, ***prior or subsequent defamations***, ***subsequent statements of the defendant***, circumstances indicating the existence of rivalry, ***ill will***, or ***hostility*** between the parties, facts tending to show a reckless disregard of the plaintiff's rights….

Weaver, 592 Pa. at 471, 926 A.2d at 906 (quoting *Herbert v. Lando*, 441 U.S. 153, 164 n. 12, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) (emphasis added).

In the present case, Plaintiffs expressly alleged in paragraph 12(g) of the Amended Complaint that Roe made her defamatory statements with "knowledge of their falsity and/or recklessness as to their veracity with the intention of injuring Plaintiffs reputation."[8] Moreover, in the blog, Roe quotes paragraph 11 of Plaintiffs' original Complaint and then concedes that she created the blog with the express "goal of tarnishing Dr. Rumer and Rumer Cosmetic's reputation in the medical community as well as her reputation amongst potential clients." *See*

[8] For some reason, Roe suggests that paragraph 12(g)'s "reckless disregard for the truth" allegation is limited to "other" defamatory statements that are not specifically identified in the Amended Complaint—rather than the immediately preceding list of specifically averred defamatory statements. *See* Def.'s Br. at 14. Plaintiffs do not agree with the logic of Roe's assertion, but they assure the Court that Plaintiffs' allegation that Roe acted with "reckless disregard for the truth" was clearly intended to apply to the ***entire list*** of Roe's defamatory statements.

https://rumersanonymous.blogspot.com/2020/11/subpoenas-lawyers-and-lawsuits-oh-my.html. Similarly, with respect to the shocking story "that Dr. Rumer stormed out of a surgery room demanding her staff to 'deal with it' because her patient was having an anxiety attack," Roe admitted in her blog that she was just maliciously propagating a rumor: "Yeah, I said that was something that I heard. ***Didn't actually try to say it was true.*** I said it was a Rumer, eh, I mean. a rumor. (See what I did there?)." *Id.* (emphasis added). Furthermore, many of the other hallmarks of "actual malice" that the *Weaver* court identified are alleged in the Amended Complaint and readily apparent from the blog, such as the threatening e-mails (Am. Compl. at ¶¶13-15), repeated defamations (id. at ¶11), and open hostility and ill-will towards Dr. Rumer. For instance, Roe's stated purpose for the blog is to collect "stories" so that "this bitch [Rumer] never practices surgery again!" *See* https://rumersanonymous.blogspot.com/2018/04/welcome-to-rumers-anonymous.html. Thus it is clear from the express allegations in the Amended Complaint, along with the admissions and tone of the blog and subsequent e-mails, that Roe's defamatory statements are undoubtedly made with "actual malice." Accordingly, this Court must reject Roe's claim that Plaintiffs have failed to adequately allege "actual malice."

3. Roe has failed to demonstrate that Plaintiffs inadequately pleaded damages in support of their claim for libel *per se*.

Roe wrongly asserts that Plaintiffs failed to adequately plead damages for their claim of "defamation *per se*." *See* Def.'s Br. at 15. Roe mistakenly confuses Plaintiffs' specific "libel" (written defamation) claim for the more general "defamation" claim. *See* Am. Compl. at ¶¶16-20. Although the elements of both torts are nearly identical, "Pennsylvania case law holds that proof of special harm, i.e., monetary damages, is not a prerequisite to recovery in a defamation libel matter." *Joseph*, 634 Pa. at 78 n.10, 129 A.3d at 429. Rather, a libel plaintiff need only demonstrate generalized "actual harm" to her reputation: "Pecuniary loss is not the only, or even

the most significant harm resulting from defamation. Injury to reputation, impairment of standing in the community, personal humiliation and mental anguish are types of actual harm 'not limited to out-of-pocket loss' compensable for defamation." *Pilchesky v. Gatelli*, 2011 PA Super 3, 12 A.3d 430, 444. Moreover, where a plaintiff demonstrates that a tortfeasor acted with "actual malice," the Pennsylvania's supreme court has reaffirmed its ***long-standing rule that damages may be presumed***. *See Joseph*, 634 Pa. at 82, 129 A.3d at 432; *see also Patel v. Patel*, No. 14-2949, 2015 U.S. Dist. LEXIS 149571, at *14 (E.D. Pa. Nov. 4, 2015) ("[T]his Court is bound to conclude that Pennsylvania permits presumed damages in defamation per se claims when actual malice is pleaded and proven.").

As demonstrated above, Plaintiffs have alleged—and the Roe essentially admits in her blog—that she acted with "actual malice." Thus, under Pennsylvania law, Plaintiffs do not need to allege "actual harm" to their reputations. *See id.* Nevertheless, it is clear from the Amended Complaint that Plaintiffs have adequately alleged actual harm to their reputations. Specifically, paragraph 11 of the Amended Complaint provides: "The Website is maintained and edited by Ms. [Roe], either individually or with the assistance of John Doe 1, with the goal of tarnishing Dr. Rumer and Rumer Cosmetic's reputation in the medical community as well as her reputation amongst potential clients." Indeed, Roe specifically admits as much during the "mock trial" that she holds on her blog: "Hmm... mmm... Handsome lawyer face here isn't wrong about that." *See* https://rumersanonymous.blogspot.com/2020/11/subpoenas-lawyers-and-lawsuits-oh-my.html. The defamatory statements alleged in paragraph 12(a)-(g), paint Dr. Rumer as a deceptive, lying, and heartless surgeon, who inflicts pain and suffering by mutilating her patient's genitals. Paragraph 20 of the Amended Complaint intuitively alleges that as a result of these malicious, defamatory statements "Plaintiffs have suffered a permanent false taint and substantial harm to

their business reputations." Moreover, later in the Amended Complaint, Plaintiffs specifically allege that they have and will continue to suffer, financial loss as a direct result of the defamatory statements described in paragraphs 11 and 12 of the Amended Complaint. *See* Am. Compl. at ¶¶27 & 30. Indeed, Plaintiffs expressly alleged: "Dr. Rumer and the staff of Rumer Cosmetics have been approached by existing and/or prospective customers who have seen the defamatory statements posted on the Website by Ms. [Roe] and….Said customers commented and/or question Dr. Rumer and Rumer Cosmetics' staff about the statements." *Id.* at ¶22. Indeed, Plaintiffs believe that they lost patients as a direct result of Roe's defamatory statements. Thus, it is clear that Plaintiffs have more than adequately alleged "actual harm" to their reputations—even though they are not required to do so since Roe clearly acted with "actual malice." Accordingly, this Court should reject Roe's assertion that Plaintiffs' failed to adequately plead damages to support their claim of libel *per se*.

C. Roe has failed to demonstrate "to a legal certainty" that the value of Plaintiffs' claims are below $75,000.

Roe mistakenly suggests that this Court "likely lacks subject matter" jurisdiction because she wrongly claims that the possible damages for Plaintiffs' claims cannot meet the $75,000 threshold to qualify for diversity jurisdiction. *See* Def.'s Br. at 16. Both the U.S. Supreme Court and Third Circuit have recognized that "the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *Huber v. Taylor*, 532 F.3d 237, 243 (3d Cir. 2008), quoting *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289-90, 58 S. Ct. 586, 82 L. Ed. 845 (1938). Moreover, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *Id.* Furthermore, if appropriately made, "claims for punitive damages will generally satisfy the amount in controversy requirement because it cannot

be stated to a legal certainty that the value of the plaintiff's claim is below the statutory minimum." *Id.* at 244 (internal quotations omitted).

In the present case, Roe has provided no reason—apart from hopeful speculation that the Court will dismiss all of Plaintiffs' claims with prejudice—as to why Plaintiffs claim cannot possibly amount to $75,000. Through her medical practice at Rumer Cosmetics, Dr. Rumer is renowned as a leading aesthetic and reconstructive plastic surgeon specializing in gender reassignment surgery, who treats hundreds of patients from all across the United States every year. *Id.* ¶¶7-8. Plaintiffs have alleged that the success of Dr. Rumer's medical practice is directly attributable to her stellar track record and reputation for excellence in both the medical and lay communities. *Id.* ¶¶8-9. Roe's defamatory statements alleged in paragraph 12(a)-(g), falsely paint Dr. Rumer as a deceptive, lying, and heartless surgeon, who inflicts physical pain and emotional suffering by mutilating her patient's genitals. As a natural consequence of Roe's malicious and false statements, Plaintiffs have asserted that they have suffered significant financial loss and damage to their business reputation. *See id.* ¶¶25, 30. Indeed, based on the comments and questions that they have received from patients and prospective patients, Plaintiffs firmly believe that they have lost significant business as a direct result of Roe's defamation. *See id.* at ¶¶ 12, 22, 27. Furthermore, Plaintiffs are appropriately seeking punitive damages for Roe's outrageous and malicious conduct. *See id.* ¶39. Thus, Plaintiffs have alleged in good faith that their claims meet the $75,000 threshold for diversity jurisdiction. *See id.* at ¶¶20, 25, 30, 39. Accordingly, the Court should reject Roe's assertion that, as a legal certainty, Plaintiffs' damages do not amount to $75,000.

D. Roe has failed to demonstrate that Plaintiffs' non-libel counts should be dismissed.

Without providing any individualized analysis of the elements of Plaintiffs' non-libel claims, Roe incorrectly concludes that "because the claims are all fully subsumed in the defamation theory, they rise and fall together." Def.'s Br. at 17. Nevertheless, assuming *arguendo* that Roe's theory is correct—which it is not—Roe has failed to show that Plaintiffs' claim for libel *per se* must fail as a matter of law. Accordingly, the Court should deny Roe's motion to dismiss Plaintiffs' non-libel claims.

E. If the Court determines that some pleading defect exists, the Court should grant Plaintiffs leave to amend because Roe has failed to demonstrate that an amendment would be inequitable or futile.

As explained above, Roe's motion to dismiss is meritless and should be denied in its entirety. If, however, the Court finds a reason to dismiss one or more of Plaintiffs' claims, the Court should grant Plaintiffs leave to amend their pleading as a matter of course. The Court of Appeals for the Third Circuit has held "that if a complaint is vulnerable to 12(b)(6) dismissal, a district court ***must permit a curative amendment***, unless an amendment would be inequitable or futile." *Phillips*, 515 F.3d at 236 (emphasis added).

Here, Roe provides no plausible reason why allowing Plaintiffs to amend their pleading would be inequitable or futile. Instead, she briefly rehashes her fallacious "statute of limitations" and "opinion" affirmative defenses to Plaintiffs' libel *per se* claim. *See* Def.'s Br. at 18. As Plaintiffs have explained above, neither of these have any merit—especially at the pleading stage of this litigation. Accordingly, if the Court finds any technical defect with Plaintiffs' pleading, this Court should liberally grant them the opportunity to amend.

V. CONCLUSION:

For all of the foregoing reasons, Plaintiffs respectfully request that this Honorable Court deny Roe's motion to dismiss in its entirety.

Dated: June 14, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2021, in addition to causing the foregoing document to be filed *via* the Court's ECF system, I caused the foregoing document to be served upon the following individuals directly *via* e-mail:

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