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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

GEORGE ZIMMERMAN, **Plaintiff,** **v.** **NBC UNIVERSAL MEDIA, LLC** **and** **RON ALLEN** **and** **LILIA RODRIGUEZ LUCIANO** **and** **JEFF BURNSIDE** **Defendants.**	**CASE NO. 2012-CA-006178**

DEFENDANTS' MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

1. On December 6, 2012, plaintiff George Zimmerman commenced this civil action in which he claims that defendants NBCUniversal Media, LLC ("NBC") and three of its present and former employees defamed him by allegedly mischaracterizing the recording of his call to police the night Zimmerman shot and killed Trayvon Martin. As defendants explain in the pages that follow, Zimmerman's complaint should be dismissed because (1) he has failed to comply with Florida's retraction statute, which precludes his claims with respect to one of the five broadcasts he challenges; (2) he is a public figure who cannot carry his burden of demonstrating, by the clear and convincing evidence required by the First Amendment, that any of NBC's

reports were broadcast with a high degree of awareness of their probable falsity, or, indeed, that they are false in any material respect; (3) he cannot demonstrate that the NBC broadcasts caused the debilitating damages to his reputation and well-being that he claims are attributable to NBC; and (4) he has, for these and other reasons, failed to state a claim for intentional infliction of emotional distress.

2. By Order dated March 19, 2013**,** this action was stayed pending the conclusion of all proceedings in the criminal case brought against Zimmerman arising from Martin's death. That stay has now been lifted.

3. There is no valid legal basis for Zimmerman's claims. Accordingly, they should be dismissed pursuant to Fla. R. Civ. P 1.140(b)(6). In the alternative, since there are no disputed issues of material fact, defendants are entitled to the entry of summary judgment in their favor pursuant to Fla. R. Civ. P. 1.510(c).[1]

STATEMENT OF UNDISPUTED FACTS

On February 26, 2012, Zimmerman shot and killed Martin as he walked to the residence of his father's fiancé from a convenience store in Sanford. The public controversy surrounding Martin's death, which the New York Times described as having "stirred the pot of racial strife," galvanized the nation.[2] In his complaint, Zimmerman attempts to place responsibility for the

[1] The allegations set forth in the complaint are incorrect in numerous and material respects. Defendants here challenge the legal sufficiency of Zimmerman's claims, and seek dismissal of the complaint on grounds that can properly be adjudicated as a matter of law at this juncture of the litigation. Defendants intend to refute Zimmerman's allegations should his claims survive these motions.

[2] Affidavit of Kathleen Snyder ("KS Aff."), ¶¶ 33-34. Defendants submit herewith the Affidavit of Kathleen Snyder and its accompanying exhibits in support of this motion. Hereafter, exhibits to this affidavit will be referred to by number as "Ex. X." The media accounts cited in this motion are offered solely for purposes of documenting when and what they reported, not for the truth of that reporting. They are, therefore, not hearsay and are admissible for that limited purpose. See § 90.801 Fla. Stat. (1995)("'Hearsay' is a statement . . . offered in evidence to prove the truth of the matter asserted."); see id. § 90.902(6) (2003) (news reports are self-authenticating). In adjudicating this motion, the Court may also take judicial notice of such "[f]acts that are not subject to dispute because they are generally known

racial overtones that permeated that controversy on NBC, asserting that its editing and description in a few news reports of his call to police that night caused the viewing public to conclude falsely that he is a racist. Specifically, Zimmerman challenges isolated portions of four news reports broadcast nationally by NBC News and a fifth broadcast in the Miami area by NBC's owned and operated television station WTVJ. As defendants demonstrate below, Zimmerman's contentions cannot be squared with the undisputed facts surrounding the incident itself or the news media's reporting about it.

Race Relations and Public Safety in Sanford

The issues of race relations and public safety have been the subject of substantial and ongoing controversy for decades in the Sanford community in which Zimmerman resided. In 2005, that controversy flared – as it had many times previously[3] – when two white security guards involved in the shooting death of African-American teenager Travares McGill, both of whom had ties to the Sanford Police Department, were not immediately arrested. See KS Aff. ¶ 37 (quoting leader of local NAACP chapter vowing at public meeting to "get to the bottom of" case). In December 2010, the white son of a Sanford police lieutenant was captured on videotape beating a homeless African-American man named Sherman Ware. See id. ¶¶ 38-39. Ware's beating and the Sanford police's allegedly slow response to it drew national attention, prompting the then-police chief's ouster and calls for a federal investigation. Id.

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within the territorial jurisdiction of the court" as well as those '[f]acts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned." Id. § 90.202(11), (12) (1978).

[3] See KS Aff. ¶ 35 ("[t]he issues that have been brought to my attention regarding the black community and the Sanford police department go back 10 years") (quoting Sanford City Manager Norton Bonaparte Jr.). Indeed, the highly acclaimed motion picture "42," released last year to commemorate the anniversary of Jackie Robinson's historic quest to break the "color barrier" in major league baseball, contains a pivotal scene – based on actual events – in which Robinson was not permitted to play in a Spring training game held in Sanford because of the color of his skin. See, e.g., id. ¶36 (official press release reporting that Sanford's police chief had ordered Robinson removed from field).

By his own account, Zimmerman, who had aspired to a career in law enforcement, was moved by the Ware incident to inject himself into the ongoing controversy about the intersection between public safety and race relations. See id. ¶ 106 ("I decided that I would have to do whatever I could to help raise awareness for Mr. Ware"). Among other things, Zimmerman and his wife "drove around to churches on Sunday, put flyers on people's cars and most of the time approached people, handing out flyers" criticizing the Sanford police. Id. ¶ 40; see also, e.g., id. ¶ 41 (Zimmerman's counsel explaining that Zimmerman "took [a] stand"). Zimmerman's relatives have long maintained that it was his activism that finally prompted Sanford police to arrest Ware's assailant. See id. ¶ 42 ("'Eventually, largely due to George's efforts, the police officer's son was charged with the assault,' the family has said."). As Zimmerman's mother explained, "[m]y son took the time to elaborate and to go and make flyers and go to churches, African-American churches, leave flyers on every car, stay there for every church session and pass [out] flyers, and get the community together to go to a council meeting." Ex. 1.

The flyers that Zimmerman distributed urged the Sanford community to attend a January 8, 2011 forum at the Sanford City Hall held by the city's mayor-elect and several city commissioners. Zimmerman again spoke out at that meeting and strongly criticized Sanford's police force. KS Aff. ¶ 43; see also Ex. 2. Among other things, he informed his fellow citizens that he had participated in a ride-along with a Sanford officer and had witnessed what he described as other "disgusting" behavior within the department. Id.

During this period, public safety was much on the collective mind of the Sanford community. Some 50 citizens attended a Sanford City Commission meeting in September 2011 to voice their concerns that burglaries and other crimes were increasing. KS Aff. ¶ 44. Then-Police Chief Bill Lee acknowledged the problem, telling the audience that more than 300

burglaries and 400 thefts had been reported in Sanford during April, May and June of that year alone. Id. Once again, Zimmerman assumed a leadership role in organizing and leading a community response to what he and others perceived as an alarming increase in crime and the failure or inability of local law enforcement to respond to it in an effective manner. As Zimmerman has explained it, in 2011, he decided to be even "more proactive" and took the lead in spearheading a Neighborhood Watch Program in the Retreat at Twin Lakes neighborhood where he lived. Ex. 3. In that cause, he engaged in extensive discussions with Sanford police officials, explaining in an email to the then-Chief of Police: "I have recently become active within my community**,** initiating a Neighborhood Watch Program and working with Sanford Police Department [sic] in an effort to curtail the spike in robberies and home invasions in neighborhood [sic] within the past two months." Ex. 4. In addition, Zimmerman took steps to publicize his stewardship of the Neighborhood Watch Program by holding public meetings about it and providing reports of its activities in his homeowners' association newsletter. Ex. 5.

Zimmerman thereafter assumed personal charge of the Watch Program and, in that capacity, took an active role both in patrolling his community and in otherwise assisting his neighbors in matters relating to public safety. Id.; see also KS Aff. ¶¶ 45-46. In the seven months prior to Martin's death, Zimmerman made multiple calls to police about young men he observed while on patrol in his neighborhood whom he considered suspicious. Ex. 6 at 1; see also Ex. 7(b)-(e) (recordings of calls). On August 3, 2011, for example, Zimmerman reported to police that his wife had seen a young black man earlier in the day who she suspected of having "burglarized or robbed" a neighbor and that they both saw "someone that matches his description in the neighborhood right now." Ex. 7(b). Three days later, Zimmerman called police again, this time to report that "two youths" in their "late teens," who he also suspected of robberies, were in

the neighborhood. These young men were also black. Ex. 7(c). Two months after that, on October 1, 2011, Zimmerman again sought police intervention because, he told them, "we've had a lot of break-ins in our neighborhood recently and I'm on the neighborhood watch and there's two suspicious characters at the gate of my neighborhood." Ex. 7(d). This time, Zimmerman told police, "I've never seen them before. I have no idea what they're doing. They're just hanging out . . . loitering." Id. Without being asked their race, Zimmerman volunteered that they were "two African-American males." Id. And, four months later, on February 2, 2012, Zimmerman once again invoked the specter of "burglaries and vandalisms lately" when he called police to report that a black man "keeps going up to [a Caucasian neighbor's] house and going along the side of it." Ex. 7(e).

The Death of Trayvon Martin

On February 26, 2012, Zimmerman spotted another young black man, Trayvon Martin, walking through the neighborhood. Deeming him suspicious as well, Zimmerman followed Martin, once again called the police and requested that an officer be dispatched. Ex. 8. At the time, Zimmerman was carrying a lawfully concealed Kel Tec 9 mm pistol, which he used to shoot and kill Martin. Id. Police at the scene determined that Martin was unarmed at the time. He was carrying a cell phone, a bag of candy and a soft drink. Id.

When he first spotted Martin, Zimmerman made a telephone call to the Sanford Police Department seeking its assistance ("the Call"). Ex. 7(a). The Call, which was recorded, see Ex. 9 at 2-5, contains the following colloquy between Zimmerman and the police dispatcher:[4]

[4] For the Court's convenience, defendants have provided, in support of this motion, a complete copy and transcript of the Call as well as copies of each of the broadcasts that Zimmerman has placed at issue. Exs. 7, 9 & 17. The Court may properly consider such evidence on a motion to dismiss because, in a defamation action such as this, the requirement that all documents "upon which action may be brought . . . shall be incorporated in or attached to the pleading," Fla. R. Civ. P. 1.130(a), means that the challenged publications and public records on which they are based are deemed to be incorporated into the pleadings.

Zimmerman: Hey, we've had some break-ins in my neighborhood and there's a real suspicious guy. It's Retreat View Circle. The best address I can give you is 111 Retreat View Circle. This guy looks like he's up to no good or he's on drugs or something. It's raining and he's just walking around looking about.

Dispatcher: Okay. And this guy, is he white, black or Hispanic?

Zimmerman: He looks black.

Dispatcher: Did you see what he was wearing?

Zimmerman: Yeah. A dark hoodie, like a grey hoodie, and either jeans or sweatpants and white tennis shoes. He's here now and he was just staring --

Dispatcher: Oh, he's just walking around the area?

Zimmerman: -- looking at all the houses.

Dispatcher: Okay.

Zimmerman: And now he's just staring at me.

Dispatcher: Okay. And you said its 1111 Retreat View or 111?

Zimmerman: That's the clubhouse.

Dispatcher: That's the clubhouse? Do you know what the –

Zimmerman: (inaudible to court reporter)

Dispatcher: He's near the clubhouse right now?

Zimmerman: Yeah. Now he's coming towards me.

Dispatcher: Okay.

Zimmerman: He's got his hand in his waistband. And he's a black male.

See, e.g., Hammond v. Times Publ'g Co., 162 So. 2d 681, 682 (Fla. 2d DCA 1964) (evaluating publication claimed to be defamatory in affirming judgment on the pleadings); Boyle v. S. Jersey Publ'g Co., 39 Media L. Rep. (BNA) 1476, 1476 (Fla. 15th Cir. Ct. Nov. 19, 2010) (dismissing defamation action for failure to attach publication to complaint); Commerce Ltd. P'ship No. 9219 II v. Brightway Builder, Inc., 751 So. 2d 1285, 1285 (Fla. 5th DCA 2000) (vacating order of dismissal "to allow appellant the opportunity to amend by attaching all relevant documents"). Both the contents of the Call and the broadcasts are addressed in the Complaint. Alternatively, defendants have introduced these exhibits in support of their motion for summary judgment on the ground that their contents are undisputed in any event. See note 2 supra.

Dispatcher: Okay. How old would you say he looks?

Zimmerman: He's got a button on his shirt. Late teens.

Dispatcher: Late teens? Okay.

Zimmerman: Um-hum. Something's wrong with him. Yep, he's coming to check me out. He's got something in his hands. I don't know what his deal is.

Dispatcher: Sounds good. Just let me know if he does anything, okay?

Zimmerman: Please just get an officer over here.

Dispatcher: Yeah, and we've got them on the way. Just let me know if this guy does anything else.

Zimmerman: Okay. These assholes, they always get away. When you come to the clubhouse, you come straight in and make a left. Actually you would go past the clubhouse.

Dispatcher: Okay. So it's on the left-hand side from the clubhouse?

Zimmerman: No. You go in straight through the entrance and then you make a left -- uh, yeah. You go straight in, don't turn, and make a left. Shit. He's running.

Dispatcher: He's running? Which way is he running?

Zimmerman: Down towards the other entrance of the neighborhood.

Dispatcher: Okay. Which entrance is that, that he's heading towards?

Zimmerman: The back entrance. These fucking (inaudible to court reporter).

Dispatcher: Are you following him?

Zimmerman: Yeah.

Dispatcher: Okay. We don't need you to do that.

Zimmerman: Okay.

Dispatcher: All right sir. What is your name?

Zimmerman: It's George. He ran.

The Immediate Aftermath

Following Martin's death, Zimmerman was interviewed repeatedly by Sanford police but, for more than two weeks thereafter, no arrests were made. At that juncture, Martin's parents retained a lawyer, Benjamin Crump, who assisted the family in calling national attention to their son's death. Ex. 10. By then, the shooting, and Zimmerman's role in it, had already been the subject of news reports throughout Florida, in both newspapers such as the Orlando Sentinel, Miami Herald, and Sanford Herald, and on multiple television stations. See Ex. 10 & KS Aff. ¶¶ 47-52. During this period, Zimmerman relocated to the Washington, D.C. area where he felt "safe" in the face of the multiple death threats he and his family had received . Ex. 3 ("when I realized the gravity of the situation and when my family began to receive death threats, at that time I became terrified"). He remained there for almost a month. Id.

On March 7, Reuters published an article about the incident, first reporting to a national audience that Martin's parents wanted to see Zimmerman arrested and that, because Martin was black and "Zimmerman is white, Crump said race is 'the 600 pound elephant in the room.'" KS Aff. ¶ 53. The next day, CBS became the first national television network to report the story, broadcasting a segment on "CBS This Morning." Ex. 12 & KS Aff. ¶ 54. That network introduced its story as one about "a case that has serious racial overtones." Id. Later that afternoon, Martin's parents and Crump held a widely publicized news conference. See, e.g., KS Aff. ¶¶ 55-57.

On March 12, Chief Lee held his own news conference in which he announced both that his department did not have probable cause to arrest Zimmerman and that there was evidence to support his contention that he acted in self-defense. Id. ¶ 58. The police also told reporters that Zimmerman had received death threats. Ex. 13.

By March 14, Martin's death had become the focal point of the ongoing controversy regarding race relations and public safety in Sanford. As the Orlando Sentinel reported at the time, "[i]n almost any community, the shooting death of a black teen by a white crime-watch volunteer would raise accusations of racism. But this one occurred in Sanford, a city that has struggled with racial tensions for a century." KS Aff. ¶ 60. Thus, as local NAACP president Turner Clayton explained at the time, "[p]eople are outraged because they never recovered from the last shooting, or recovered from the beating a year or so ago with the policeman's son." Id. ¶ 61. He and other "black community leaders" protested publicly that, like Travares McGill and Sherman Ware, Martin had been "profiled and targeted because he was young and black." Id.

On March 15, the Sentinel reported that Zimmerman's father, Robert Zimmerman Sr., had, on his son's behalf, written a letter and given an interview to the newspaper that day claiming that "[t]he media portrayal of George as a racist could not be further from the truth." Id. ¶ 62. The Sentinel's report on his father's statement noted that George Zimmerman and the Sanford Police Department were already "at the center of a firestorm." Id. The letter itself became the subject of multiple news reports in both the local and national press. Id. ¶¶63-67.

Release of the Call

On March 16, Sanford Police released to the press and public the recording of Zimmerman's call to police as well as recordings of seven 911 calls made by witnesses that night. Id. ¶ 68. The recording of Zimmerman's call is four minutes and ten seconds long and a transcript of it spans seven full pages. Exs. 7(a), 9. As a result, newscasts across the country played only excerpts from the recording and newspapers and other publications similarly quoted only portions of it. On March 19, for example, the Los Angeles Times reported that "[t]he slaying has dominated social media and national news outlets in the wake of Friday's release of

911 tapes in the Feb. 26 shooting. On the tapes is Zimmerman's call to report Martin. 'He's got his hand in his waistband and he's a black male,' Zimmerman can be heard telling the dispatcher, saying he's following Martin." KS Aff. ¶ 69. Similarly, Fox News reported a summary of the Call on its national cable television channel as follows: "On the 911 call, Zimmerman is heard describing Trayvon Martin as a black man who appears to be, quote, up to no good and reaching in his pocket." Id. ¶ 70. PBS's "McLaughlin Group," in a program taped March 23 and broadcast the weekend of March 24-25, summarized the Call this way, see id. ¶ 71:

> MR. MCLAUGHLIN: Here's Zimmerman on the phone reporting to a 911 operator the presence of a suspicious person.
>
> (Begin audiotaped segment)
>
> GEORGE ZIMMERMAN: He's got his hand in his waistband and he's a black male.
>
> 911 OPERATOR: Are you following him?
>
> MR. ZIMMERMAN: Yeah.
>
> 911 OPERATOR: OK, we don't need you to do that. (End audiotaped segment.)

Florida media accounts of the Call were crafted in a similar fashion. The South Florida Sun-Sentinel, for example, reported the contents of the Call as follows: "The day of the Sanford shooting, Zimmerman called a police non-emergency line to report a person unknown to him as suspicious. Zimmerman can be heard pursuing Martin, even after dispatchers tell him not to. He describes Martin as a black male who looked like he was 'up to no good.'" Id. ¶ 72. Similarly, the Orlando Sentinel's report about the release of the tape included this summary of the Call: "In one call, placed by the shooter George Zimmerman, he actively pursues the teen before the deadly shooting. 'Are you following him,' an emergency dispatcher asks after Zimmerman

describes Trayvon as a black male who was acting suspiciously. Zimmerman responds: 'Yeah.' 'OK, you don't need to do that,' the dispatcher says." Id. ¶ 68.

NBC News first broadcast a report about Martin's death and the by-then national controversy surrounding it, public safety and race relations in Sanford on the TODAY weekend show on March 17.[5] The report included an interview with Martin's parents and Crump by an NBC correspondent, who noted that "police are saying there is not enough evidence, they believe, to convict Zimmerman on charges of manslaughter." Ex. 14(a). That night, on NBC's Nightly News, defendant Lilia Luciano first reported on the release of the Call. In that report, Luciano noted that, on the recording, Zimmerman can be heard saying that Martin looked "real suspicious," and she played an excerpt in which Zimmerman says, "This guy looks like he's up to no good." Ex. 14(b). The report also recounted that Zimmerman's father disputed that his son was a racist. Id.

The Ongoing National Debate and Media Coverage

Media coverage of the Martin case intensified on March 19 when several members of Congress called for a federal hate crime investigation, protests and demonstrations in Sanford continued, and the White House press secretary acknowledged that President Obama was aware of the case. See KS Aff. ¶ 73. That same day, Time published an article with a headline asking, "was the motive self-defense or racism?" and quoted from the Call as follows: "'And he's a black male…Something's wrong with him…These a**holes, they always get away.'" Id. ¶ 74.

By this time, Martin's killing had unquestionably become the focus of nationwide public debate centered on emotionally charged issues of race, justice, public safety and guns. "This case has reignited a furor about vigilante justice, racial-profiling and equitable treatment under

[5] Unless otherwise noted, the NBC News broadcasts described herein are not placed at issue in Zimmerman's Complaint.

the law, and it has stirred the pot of racial strife," New York Times columnist Charles Blow wrote on March 16, several days before any of the broadcasts at issue in this lawsuit. Id. ¶ 33. Three days later, the Los Angeles Times reported that the controversy surrounding Martin's death had "dominated social media" and that nearly 400,000 people had signed an online petition calling for Zimmerman's arrest. Id. ¶ 69. On March 18, ABC News reported that the Seminole County State's Attorney's office "was so bombarded by emails demanding that it prosecute Zimmerman that its website had to be taken down for 45 minutes." Id. ¶ 75.

On March 19, the State released to the press and public recordings of Zimmerman's previous calls to police about other "suspicious persons." Exs. 14(a), 15. In describing those calls, ABC News reported that Zimmerman "seemed suspicious of black people" and excerpted statements from those recordings, playing Zimmerman's voice from two separate telephone calls together over a single graphic containing only these lines: "Two African-American males . . ." and "Two black males in their late teens . . . ." KS Aff. ¶ 76.

Late that same night, the Justice Department announced that its Civil Rights Division and the FBI would investigate Martin's death. Ex. Id. ¶ 77.[6] The following morning, March 20, Fox News broadcast a report about the federal investigation, which observed that, "[o]n the 911 call, Zimmerman is heard describing Trayvon Martin as a black man who appears to be, quote, up to no good and reaching in his pocket." Id. ¶ 70. Similarly, "CBS This Morning" reported that federal authorities would investigate "whether Zimmerman violated Martin's civil rights,

[6] Contrary to the Complaint's allegations, the Department of Justice has neither "refused to prosecute" Zimmerman, nor "conclud[ed] that there was no evidence that Zimmerman had committed a hate crime." Compl. ¶ 56. Rather, the Attorney General has publicly stated that the Department's investigation remains active and that it involves the criminal section of the department's Civil Rights Division , the FBI, and the U.S. Attorney's Office for the Middle District of Florida, KS Aff. ¶ 78, and Zimmerman has conceded that the Justice Department is investigating him, id. ¶ 79 at 16:30 ("[b]ecause of the ongoing civil rights violation investigation by the Department of Justice, I wouldn't say anything to them.").

specifically whether he was targeted because of his race," and that Zimmerman's previous calls to police show "a pattern of reporting African-Americans." Ex. 16. A national survey conducted on March 22-25 by the Pew Research Center found that news of Martin's death was the most closely followed story in the preceding week. KS Aff. ¶ 80.

The Challenged WTVJ Broadcast

On its 6 p.m. newscast on March 19, WTVJ broadcast to its viewers in the greater Miami metropolitan area the first of the news reports placed at issue in Zimmerman's Complaint. Defendant Jeff Burnside reported about the 911 calls, a rally that day at the Seminole County courthouse, and presidential spokesman Jay Carney's remarks that the White House was "aware of the incident." Ex. 17(a). In the portion of the report recapping the Call, Burnside explained to viewers, "[h]ere are excerpts of that call," id. (emphasis added), followed immediately by these portions of the audio of Zimmerman's voice:

- "There is a real suspicious guy."
- "Ah, this guy looks like he is up to no good or he is on drugs or something."
- "He looks black."[7]

Id. In addition, the broadcast's audio includes the exchange in which the dispatcher asks if Zimmerman is following the suspicious person. Id. Burnside also reported that police "are calling it self-defense, and say they have a lot more investigating to do." Id.

The First Challenged NBC News Broadcast

Shortly after 7 a.m. on March 20, NBC News broadcast on the TODAY show the first of its news reports that Zimmerman has placed at issue. It includes an interview that Luciano conducted with Zimmerman's neighbor and friend Frank Taaffe, in which she paraphrases

[7] The Complaint challenges only this excerpt from the Call. Compl. ¶ 48.

Taaffe as saying that Zimmerman "is neither trigger-happy nor a racist." Ex. 17(b). In addition, Luciano's report includes excerpts from the Call in which Zimmerman says, with no prompting from the dispatcher:

- "This guy looks like he's up to no good or on drugs or something."
- "He's got his hand in his waistband. And he's a black male."[8]

Id. These words appear sequentially on separate screens at the same time Zimmerman's voice is heard uttering the quoted words. Id. The broadcast also includes an excerpt from the portion of the tape in which the dispatcher tells Zimmerman he need not follow Martin. Id.

The Epithet Controversy

Meanwhile, numerous commentators who had listened to the then-recently released recording began asserting, in published accounts, that Zimmerman could be heard saying "fucking coons" during the Call. See, e.g., Ex. 18 & KS Aff. ¶¶ 81-82. This quickly became the subject of multiple news reports. Early on March 20, for example, ABC's "Good Morning America" broadcast a report stating that on "a tape of one of Zimmerman's 911 calls the night of the shooting, he is heard saying under his breath what sounds like 'f**ing coons.'" Id. ¶ 83. Miami's CBS television station also reported that day that "Zimmerman was heard using a racial slur against African-Americans under his breath." Id. ¶ 84. ActionNewsJax, a website co-produced by CBS and FOX affiliates, reported that "[n]ew 911 calls reveal Zimmerman has a pattern of reporting African American males. In one call, you can even hear Zimmerman make a racial slur." Id. ¶ 85.

[8] The Complaint challenges only this excerpt from the Call. Compl. ¶ 50.

The Second Challenged NBC News Broadcast

NBC News first referenced the epithet issue in its report about the Martin investigation on the March 20 edition of NBC Nightly News. In that broadcast, defendant Ron Allen reported that "Sanford Police say George Zimmerman shot and killed Trayvon Martin in self-defense, a shooting with no racial overtones, no hate crime. But when Zimmerman was calling police the night Trayvon Martin was killed, he described the victim using a racial epithet." Ex. 17(c).[9] The broadcast included the relevant audio excerpt from the Call, with both of the words Zimmerman muttered "bleeped." Id. Contrary to the allegations of the Complaint, see Compl. ¶ 57, Allen does not say the word "coons" in the March 20 broadcast. Ex. 17(c).

The next day, NBC's reporting on the racial epithet controversy continued. Luciano explained on the TODAY show that the recording of Zimmerman's call to police was "fueling speculation online that Zimmerman may have used a racial epithet, though some news outlets believe he muttered the word 'punks.'" Ex. 14(d). The report then played the relevant clip from the Call, again with the two words in question "bleeped." Id.

Ultimately, some two weeks later, two FBI experts concluded that the second word Zimmerman used could not be determined conclusively. According to the official report issued by the FBI's Digital Evidence Laboratory, "audio enhancement and signal analyses were conducted by Kenneth Marr," and a "voice comparison analysis was conducted by Dr. Hirotaka Nakasone," both of the Operational Technology Division of the FBI's Forensic Audio, Video and Image Analysis Unit. Ex. 19. They both concluded that "the specific request to identify the word following 'fucking' . . . could not be done due to weak signal level and poor recording quality." Id.

[9] The Complaint challenges only this statement in the broadcast. Compl. ¶ 53.

The Third Challenged NBC News Broadcast

On March 22, the TODAY show broadcast the third NBC News report at issue. In it, Luciano described expanding public protests and reiterated the Sanford Police's conclusion that the evidence supported Zimmerman's claim of self-defense. Ex. 17(d). By way of background, the broadcast also included excerpts from the Call in which Zimmerman is heard saying:

- "He looks like he's up to no good. . . ."
- "He looks black."[10]

Id. As the audio played, the broadcast depicted each of these lines sequentially on different screens, separated by an ellipsis. Id.[11] These excerpts were followed by another in which Zimmerman tells the dispatcher that Martin was wearing "a dark hoodie." Id.

Three days later, the TODAY show broadcast the first of six extended, live interviews with Craig Sonner, who was then Zimmerman's counsel. Ex. 14(e). In those interviews, Sonner reiterated at some length Zimmerman's assertions that he acted in self-defense, explaining that Martin had attacked his client, broken his nose, and knocked him down. Id. TODAY also interviewed Zimmerman's friend Joe Oliver, who asserted that there had been a rash of criminal activity in Zimmerman's neighborhood, which explained his decision to follow Martin. Id. On March 26, Sonner and Oliver again appeared on the TODAY show. During that broadcast, Sonner repeated that Zimmerman had been attacked, had shot Martin in self-defense, and was

[10] The Complaint challenges only this excerpt from the Call. Compl. ¶ 60.

[11] When the issue was first brought to NBC's attention several days later, it acknowledged that it had not made it explicit during the broadcast that the audio reflected two separate excerpts from the Call and that a question had preceded the statement "he looks black." NBC issued a statement publicly acknowledging that and apologizing to its viewers. See KS Aff. ¶ 86. Similarly, when it learned that the March 19 WTVJ broadcast had also not been entirely clear in this regard, the station broadcast an apology to its viewers as well. Ex. 14(g).

not a racist. Ex. 14(f). Asked by host Ann Curry if he thought Zimmerman was capable of racial profiling, Oliver responded emphatically that the answer was "no." Id.

The Fourth Challenged NBC News Broadcast

On March 27, NBC News broadcast on the TODAY show the final report that Zimmerman has placed at issue. In it, Allen reported that "George Zimmerman's defenders say there was a life and death struggle that night, with Zimmerman bloodied and beaten on the ground because of Trayvon Martin," a version of events Allen explained was set out in the materials Sanford Police had sent to prosecutors. Compl., ¶ 53; Ex. 17(e). The broadcast also included excerpts from the Call, in which Zimmerman is heard to say:

- "He looks like he's up to no good. . . ."
- "He looks black."[12]

Id. Once again, these excerpts are depicted sequentially on two separate screens as the corresponding audio plays and are separated by an ellipsis. Id.

Zimmerman's Media Campaign

Zimmerman was arrested on April 11 and charged with second-degree murder. Exs. 20-21. On April 30, his newly retained counsel launched what CNN's HLNtv described at the time as a "social media blitz" that included a Facebook page, a website and a Twitter account. See Ex. 22 & KS Aff. ¶¶ 87-88. On July 6, Zimmerman's lawyers issued a public statement:

> For those who have given in the past, for those who have thought about giving, for those who feel Mr. Zimmerman was justified in his actions, for those who feel they would do the same if they were in Mr. Zimmerman's shoes, for those that think Mr. Zimmerman has been treated unfairly by the media, for those who feel Mr. Zimmerman has been falsely accused as a racist, for those who feel this case is an affront to their constitutional rights -- now is the time to show your support.

[12] The Complaint challenges only the inclusion of this excerpt from the Call. Compl. ¶ 68.

Id. ¶ 89. Thereafter, Zimmerman and his counsel made a series of media appearances, see, e.g., id. ¶¶ 40-41 & 90, and his website sought contributions to make the public aware of "the well-documented assertion that George Zimmerman was the victim of a coordinated public relations attack designed to assert that George acted with racial bias, a public relations attack that was perpetrated with the intent to prejudice the media and the citizens of this country with unfounded misinformation about George, and with the purpose of profiting from a tragedy." Ex. 23.

Zimmerman's December 2012 commencement of this defamation action coincided with his efforts both to raise additional funds for his criminal defense and to engender public sympathy for his cause. Promptly upon filing his Complaint, Zimmerman established yet another website ostensibly devoted to developments in this case. See KS Aff. ¶ 91. Its home page asserted that "this site is necessary to counter the avalanche of negative publicity" against Zimmerman. Id. At the same time, Zimmerman's original website was retooled so that it too was devoted largely to this lawsuit. See Ex. 24. On it, Zimmerman claimed he was the victim of a "media frenzy seeking ratings over truth" and that NBC caused him "unjustified public persecution." Id. Adjacent to this post was a large red button reading, "Donate to the George Zimmerman Defense Fund," which when clicked took the potential donor to Zimmerman's fundraising site. Id.

This Lawsuit

Before filing the Complaint in this case, Zimmerman's counsel sent a letter dated September 4, 2012, to Steve Capus, then the president of NBC News, and to defendants Allen and Luciano, advising them that he was "sending this because Florida has as [sic] statute that requires me to let you know 5 days before I start a libel suit that a suit is coming." ("the Letter").

Ex. 25.[13] In the Letter, counsel asserted that the March 20, 22 and 27 NBC News broadcasts each contained "intentionally manipulated audio recordings . . . to make it appear that Zimmerman was a racist" and alleged that an otherwise unspecified broadcast on March 20 had falsely stated that Zimmerman used "a racial epithet" in describing Martin during the Call. Id.

Zimmerman filed his Complaint on December 6, 2012, this time identifying as defamatory the five broadcasts described above. The Complaint alleges that NBC's inclusion of excerpts from the Call in four of those broadcasts (March 19, 20, 22 and 27), as well as its characterization of a portion of that tape in a fifth broadcast (March 20), were purposefully designed to make "it appear that Zimmerman was a racist, and that he was racially profiling Trayvon Martin." Compl. ¶¶ 7, 9. The Complaint asserts claims for defamation and intentional infliction of emotional distress, alleging that the five news reports were all intended "to create the myth that George Zimmerman was a racist and predatory villain." Id. ¶ 1. The broadcasts, the Complaint alleges, collectively "destroyed" Zimmerman's reputation and "transformed [him] into one of the most hated men in America." Id. ¶¶ 74, 75. According to the Complaint, NBC caused Zimmerman to "suffer[] greatly, with death threats, a bounty placed on his head, threats of capture, and a constant, genuine fear for his life resulting in his need to, among other things, live in hiding and wear a bullet proof vest." Id. ¶ 23.

On February 20, 2013, defendants filed a motion to stay this litigation until the conclusion of post-trial proceedings in the criminal case. Zimmerman ultimately concurred and, on March 19, 2013, this Court entered an agreed Order to that effect. On March 5, 2014, the Court entered an order vacating the stay in this case.

[13] The Letter was also directed to the News Director of WESH-TV in Orlando, which is not a defendant in this action and is neither owned nor operated by NBC. The March 19 broadcast by WTVJ, NBC's television station in Miami, was not referenced in the Letter. The Letter was not addressed either to WTVJ or to defendant Burnside.

The Criminal Trial

Zimmerman's nationally televised criminal trial commenced on June 10, 2013, and was presented to the jury on July 12, 2013. It has been estimated that some 42 percent of adults across the country watched all or part of the trial proceedings on television. KS Aff. ¶ 92. While the jury was deliberating, Zimmerman's counsel told CNN: "I see race being injected into this case in the first week that it existed. And I see that it's never left this case." Id. ¶ 93 (emphasis added).

On July 13, 2013, Zimmerman was acquitted of all the criminal charges against him. The jury's verdict provoked strong reactions across the country, which included expressions of support for Zimmerman and the criminal justice process that led to his acquittal as well as renewed charges of racism and protests and demonstrations nationwide. See, e.g., id. ¶¶ 94-98.

ARGUMENT

Florida courts have long recognized that the prompt dismissal of defamation claims that lack merit serves First Amendment values by protecting the robust discussion of public issues. See, e.g., Stewart v. Sun Sentinel Co., 695 So. 2d 360, 363 (Fla. 4th DCA 1997) ("Where the facts are not in dispute in defamation cases, . . . pretrial dispositions are 'especially appropriate' because of the chilling effect these cases have on freedom of speech.") (quoting Karp v. Miami Herald Publ'g Co., 359 So. 2d 580, 581 (Fla. 3d DCA 1978)); see also Southard v. Forbes, Inc., 588 F.2d 140, 145 (5th Cir. 1979) (the "very pendency of a [defamation] lawsuit may exert [a] chilling effect" on speech). As a result, Florida courts traditionally have performed a "prominent function" at the pleading stage in defamation cases by making an initial determination whether a challenged publication is actionable as a matter of law. Smith v. Cuban Am. Nat'l Found., 731 So. 2d 702, 704 (Fla. 3d DCA 1999). For the same reason, Florida law requires that summary

judgments be "more liberally granted" in defamation cases. Don King Prods., Inc. v. Walt Disney Co., 40 So. 3d 40, 44 (Fla. 4th DCA 2010) (citing Dockery v. Fla. Democratic Party, 799 So. 2d 291, 294 (Fla. 2d DCA 2001)); see also Cronley v. Pensacola News-Journal, Inc., 561 So. 2d 402, 405 (Fla. 1st DCA 1990).

I. Zimmerman Cannot State a Viable Defamation Claim

To state a viable claim for defamation, Zimmerman must demonstrate that the broadcasts he challenges contained false and defamatory statements of fact about him, that NBC disseminated them with the requisite degree of fault, and that Zimmerman in fact suffered damages as a result. Don King Prods., 40 So. 3d at 43; Mile Marker, Inc. v. Petersen Publ'g, L.L.C., 811 So. 2d 841, 845 (Fla. 4th DCA 2002). A court determining whether a plaintiff has stated a viable defamation claim should analyze the challenged publication "in its natural sense without a forced or strained construction." Byrd v. Hustler Magazine, Inc., 433 So. 2d 593, 595 (Fla. 4th DCA 1983). The court must evaluate the entire publication, not just the discrete portions of it that the plaintiff claims are defamatory. See, e.g., Smith, 731 So. 2d at 705. Construing an allegedly defamatory broadcast in its entirety is particularly important since such "publications" typically combine printed words, sounds, and images:

> When words and pictures are presented together, each is an important element of what, in toto, constitutes the publication. Articles are to be considered with their illustrations; pictures are to be viewed with their captions; stories are to be read with their headlines.

Byrd , 433 So. 2d at 595.

Because Zimmerman has failed to state a claim on which relief can be granted, his defamation claim should be dismissed with prejudice pursuant to Rule 1.140(b)(6). Alternatively, to the extent that the Court determines it cannot otherwise consider material outside the Complaint in adjudicating this motion, summary judgment is appropriate pursuant to

Fla. R. Civ. P. 1.510(c) because there is no genuine issue of material fact and defendants are entitled to judgment as a matter of law.

A. The Claims Based on the March 19 Broadcast and All Claims Against Defendant Burnside Are Precluded by the Florida Retraction Statute

The Florida Retraction Statute, § 770.01 Fla. Stat. (1997), provides, in relevant part:

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

Satisfaction of this statutory requirement constitutes a condition precedent to the institution of a defamation claim. Thus, a plaintiff's failure to comply with the statute by sending the prescribed notice requires the dismissal of any subsequent lawsuit he might initiate. See, e.g., Orlando Sports Stadium, Inc. v. Sentinel Star Co., 316 So. 2d 607, 610 (Fla. 4th DCA 1975) (to comply with § 770.01, notice to potential defendants must specify the challenged publication and the allegedly defamatory statements within it); Gannett Fla. Corp. v. Montesano, 308 So. 2d 599, 600 (Fla. 1st DCA 1975) (same); see also Nelson v. Associated Press, Inc., 667 F. Supp. 1468, 1474-75 (S.D. Fla. 1987) (dismissing defamation claim because plaintiff's notice did not contain the text of the portions of the reports alleged to be defamatory).

The Letter was ostensibly written to comply with this statute. See Ex. 25. However, Zimmerman did not provide the requisite notice describing the March 19 WTVJ broadcast and did not purport to serve any notice, of any kind, on defendant Burnside. For that reason, Zimmerman's claims arising from the March 19 broadcast must be dismissed and no claims can now be asserted against Burnside. See Mancini v. Personalized Air Conditioning & Heating, Inc., 702 So. 2d 1376, 1380 (Fla. 4th DCA 1997) (notice under § 770.01 must be provided to

employee of news media entity who made allegedly defamatory statement, not just her employer).

B. Zimmerman Is a Public Figure

To prevail in a defamation action, a plaintiff bears the burden of proving that the statements about which he complains are false. See Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 775-76 (1986), cited in, e.g., Smith, 731 So. 2d at 706. In addition, a plaintiff who is a "public figure" must demonstrate that defendants published such a defamatory falsehood with a high degree of awareness of probable falsity, or "actual malice." Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974); Mile Marker, 811 So. 2d at 845. In contrast, a "private figure" who sues for defamation under Florida law must show that the defendant negligently disseminated the defamatory falsehood at issue. See Don King Prods., 40 So. 3d at 43. Whether the plaintiff in a given case is a public figure is a question of law for the Court to decide. Mile Marker, 811 So. 2d at 845.

As the United States Supreme Court has explained, public figures are obliged to carry this heavy burden for two compelling reasons. First, by virtue of their conduct or the position in which they find themselves, they have assumed the risk of unfavorable public scrutiny. Gertz, 418 U.S. at 342 ("Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures. . . ."). Second, public figures have access to the media and other channels of mass communication, access that affords them the opportunity to rebut allegedly false and defamatory statements and thereby renders it less important or necessary for the law to provide them with a judicial remedy. Id. at 344 ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract

false statements [than] private individuals normally enjoy."). Determining whether a defamation plaintiff is a public figure cannot be decided "by the mechanical application of general rules." Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 433 (5th Cir. 1987). See also Tavoulareas v. Piro, 817 F.2d 762, 772 (D.C. Cir. 1987) (public figure analysis is "unsusceptible to the application of rigid or mechanical rules").

Nevertheless, as a general proposition, courts have recognized three categories of public figures: (1) general purpose, (2) limited purpose, and (3) involuntary. Gertz, 418 U.S. at 345. "General purpose" public figures are those celebrities who have achieved such pervasive fame or notoriety that they are deemed to be public figures for all aspects of their lives. See id. "Limited purpose" public figures are those who voluntarily inject their views or are otherwise drawn by their conduct into a particular public controversy, and are therefore treated as public figures when they sue about statements bearing on that controversy. See, e.g., Arnold v. Taco Props., Inc., 427 So. 2d 216, 218 (Fla. 1st DCA 1983). An "involuntary" public figure is one who becomes well-known to the public after finding himself embroiled "through no desire of his own" in a public controversy. See, e.g., Dameron v. Wash. Magazine, Inc., 779 F.2d 736, 742 (D.C. Cir. 1985). A plaintiff's public figure status is assessed at the time of the alleged defamation. See Rosanova v. Playboy Enters., Inc., 580 F.2d 859, 861 (5th Cir. 1978). In this case, Zimmerman was both a "limited purpose" and an "involuntary" public figure at the time of each of the broadcasts he has placed at issue.

1. Limited Purpose Public Figure

To determine whether a defamation plaintiff is a limited purpose public figure, a court typically considers (1) whether one or more public controversies existed at the time of the alleged defamation, (2) whether the plaintiff played an important role in such a controversy, and (3) whether the publication or broadcast at issue was germane to the plaintiff's role in the

controversy. See, e.g., Silvester v. ABC, 839 F.2d 1491, 1494 (11th Cir. 1988); Friedgood v. Peters Publ'g Co., 521 So. 2d 236, 239 (Fla. 4th DCA 1988); Della-Donna v. Gore Newspapers Co., 489 So. 2d 72, 76-77 (Fla. 4th DCA 1986). For purposes of this analysis, a "public controversy" includes "'any topic upon which sizeable segments of society have different, strongly held views,'" id. at 76 (quoting Lerman v. Flynt Distrib. Co., 745 F.2d 123, 138 (2d Cir. 1984)), or a dispute that a reasonable person would expect to affect people beyond its immediate participants, see Mile Marker, 811 So. 2d at 846. A plaintiff is held to have played a sufficiently important role in such a controversy when he has either voluntarily injected himself into the debate that surrounds it in an attempt to influence its outcome or he has been drawn into the controversy by his own voluntary actions. Arnold, 427 So. 2d at 218-19. And, a challenged publication or broadcast is "germane" to the public figure's participation in a controversy so long as it is not "wholly unrelated to the controversy" and "could have been relevant to the public's" assessment of the plaintiff and his role in it. Waldbaum v. Fairchild Publ'ns, 627 F.2d 1287, 1298 (D.C. Cir. 1980).

Defamation plaintiffs become limited purpose public figures when they act in a fashion that is reasonably likely to draw public attention and comment, regardless of whether they affirmatively seek out such public scrutiny. See, e.g., Friedgood, 521 So. 2d at 241-42 (plaintiff, who concealed evidence after her father killed her mother and became a witness at her father's murder trial, was a public figure because "by her voluntary actions, [she] thrust herself into the criminal investigation and prosecution of her father"); Della-Donna, 489 So. 2d at 77 (attorney who served as trustee and lawyer for trust that attempted to rescind a multi-million-dollar gift to a private university was a public figure). As one court explained, in a case in which the plaintiff petitioned a court to be appointed guardian of her husband, she thereby became a public figure

because she "undertook purposeful, considered actions intended to affect the outcome of the guardianship case. She could have, and should have, realistically expected that her actions would have an impact on the resolution of the action." Thomas v. Patton, 34 Media L. Rep. (BNA) 1188, 1190 (Fla. Duval Cty. Ct. Oct. 21, 2005).

In this case, Zimmerman became a limited purpose public figure because he played a prominent role in several overlapping public controversies surrounding the issues of race relations, public safety, and the death of Trayvon Martin and the broadcasts he has placed at issue were all germane to his participation in those controversies. See, e.g., Associated Press v. Walker, 388 U.S. 130, 146, 155 (1967) (public reaction to admission of first black student at University of Mississippi was public controversy, participation in which caused plaintiff to be deemed a public figure); Friedgood, 521 So. 2d at 239-40 (noting case involving allegation of rape of a white woman by African-American defendants was "the focus of major public debate over the ability of our courts to render even-handed justice" in a racial context and constituted a "public controversy") (citing Street v. NBC, 645 F.2d 1227, 1235 (6th Cir. 1981)); Mistrot v. True Detective Publ'g Corp., 467 F.2d 122, 123-24 (5th Cir 1972) (double murder a public controversy); Hobbs v. Pasdar, 682 F. Supp. 2d 909, 927 (E.D. Ark. 2009) (killings of three eight-year-old boys and alleged wrongful convictions of those charged with murders was a public controversy).

Zimmerman, like the plaintiff in Della-Donna, "initiated a series of purposeful, considered actions, igniting a public controversy in which he continued to play a prominent role." Della-Donna, 489 So. 2d at 77. Indeed, as his Complaint concedes, by the time NBC disseminated the first of its challenged broadcasts on March 19, 2012, Zimmerman had already become the subject of "national attention." Compl. ¶ 62.

Zimmerman became a limited purpose public figure because he both (1) voluntarily injected his views into the long simmering public controversy surrounding race relations and public safety in Sanford and (2) pursued a course of conduct that ultimately led to the death of Trayvon Martin and the specific controversy surrounding it. Della Donna, 489 So. 2d at 77.

First, well before any of the broadcasts at issue, Zimmerman spearheaded public opposition to the Sanford Police Department's perceived lethargy in investigating the relative of a law enforcement official who was allegedly involved in the beating of a black man. Later, he successfully and publicly advocated the establishment of a Neighborhood Watch Program in his Sanford community as a means of combatting what he perceived as law enforcement's inability to stem an increase in crime there. And, after he shot Martin, Zimmerman's representatives took to the airwaves and the Internet on his behalf to disseminate to the public his views concerning whether his actions were racially motivated and otherwise appropriate.

Second, Zimmerman embarked on a course of conduct that renders him a limited purpose public figure. By assuming control of his Neighborhood Watch Program; by initiating a series of calls to police about "suspicious" persons, including Martin; by voluntarily undertaking to follow Martin and continuing to pursue him even after being advised not to do so by a police dispatcher; and by shooting Martin and thereby causing his death; Zimmerman both assumed the risk of adverse public scrutiny and gained access to the channels of mass communication to rebut it.

Conduct of this sort is the hallmark of the limited purpose public figure. When, for example, Zimmerman took a leading and "proactive" role in the formation of his community's Neighborhood Watch Program and thereafter took charge of its operations, he necessarily assumed the risk of public scrutiny with respect to how he performed those quasi-public functions. See, e.g., Compl. ¶ 45; id. ¶ 87 (alleging that broadcasts diminished the "respect and

effectiveness as a leader in the community" Zimmerman had previously enjoyed) (emphasis added). Persons who assume such leadership positions are, by virtue of that conduct alone, public figures for purposes of public scrutiny of their performance of such roles. See, e.g., Martin v. Comm. for Honesty & Justice at Star Valley Ranch, 101 P.3d 123, 129 (Wyo. 2004) (member of homeowners association board ("HOA") is public figure for purposes of dispute over firing of HOA employee).[14] The public's interest in such a person's conduct is heightened where, as here, the activities in which he has voluntarily engaged involve matters of public safety. See Bracco v. Vercruysse, No. 185303, 1997 WL 33349374, at *5-6 (Mich. Ct. App. May 30, 1997) (unpublished) (private security guard was public figure because he exercised "police-like duties").

Furthermore, Zimmerman's shooting of Martin rendered him a public figure in the ensuing controversy. Fatal shootings constitute public controversies and those responsible for them thereby become limited purpose public figures for purposes of news reports about such incidents. As the Utah Supreme Court has explained, "[o]ne who takes a life under any circumstances cannot be expected to escape public scrutiny." Madsen v. United Television, Inc., 797 P.2d 1083, 1085 (Utah 1990), overruled on other grounds by O'Connor v. Burningham, 165 P.3d 1214 (Utah 2007). "Clearly, killing another person is a matter of public interest" and

[14] See also Vice v. Kasprzak, 318 S.W.3d 1, 15-16 (Tex. Ct. App. 2009) (HOA board president is public figure for purposes of controversy regarding his dual role as attorney for developer suing homeowners); Gulrajaney v. Petricha, 885 A.2d 496, 505 (N.J. Super. Ct. App. Div. 2005) (candidate for seat on condominium board is public figure for purposes of discussions of candidate's qualifications for office); Smith v. A Pocono Country Place Prop. Owners Ass'n, Inc., 686 F. Supp. 1053, 1057-58 (M.D. Pa. 1987) (former director of homeowners' association is public figure regarding controversy over leadership of association).

constitutes an action that causes the perpetrator, whether or not he is guilty of a criminal offense, "to become a public figure." Berry v. NBC, 480 F.2d 428, 431 (8th Cir. 1973).[15]

Finally, Zimmerman also satisfies the essential attribute of the public figure first identified by the Supreme Court in Gertz – i.e., both before and after the broadcasts at issue, he has had largely unfettered access, of which both he and his representatives have taken full advantage, to the channels of mass communications to tell his side of the story. See 418 U.S. at 344. Indeed, well before any of the broadcasts at issue, his father wrote a widely publicized letter on his behalf to the Orlando Sentinel, and his friends and relatives similarly took to the public airwaves to protest that he is not a racist and that he shot Martin in self-defense. See, e.g., Ex. 26 & KS Aff. ¶¶ 62, 66 & 99. And, in each of the challenged broadcasts, NBC quotes friends or relatives making statements on his behalf. See Ex. 17(a)-(e). Thus, for example, the first challenged broadcast quotes from the letter Zimmerman's father had published. Ex. 17(a). Similarly, the final broadcast includes interviews NBC conducted with two of Zimmerman's friends and spokespersons, both of whom vigorously defended his actions. Ex. 17(e).

Indeed, Zimmerman's brother, his friends and his attorneys became regular fixtures on

[15] The Eighth Circuit's decision in Berry has particular resonance in this context. The plaintiff, Baxter Berry, was a white South Dakota rancher who claimed he was acting in self-defense when he killed an American Indian. Berry, 480 F.2d at 429. Following a jury trial, Berry was found not guilty. Id. NBC thereafter broadcast a news report that contrasted Berry's case with that of Thomas White Hawk, an American Indian man who had been convicted and sentenced to death for killing a white man in South Dakota two years earlier. Id. Berry sued NBC for "false light" invasion of privacy, contending that the broadcast falsely implied that he had been acquitted only because there was a double standard for whites and Indians in South Dakota. Id. at 429-30. The Eighth Circuit reversed a jury verdict in Berry's favor and, in so doing, recognized that, by virtue of the undisputed fact that he had killed another man, albeit in self-defense, Berry had become a public figure. Id. at 431-32. See also Ruebke v. Globe Commc'ns Corp., 738 P.2d 1246, 1251-52 (1987) (criminal defendant charged with triple murder is public figure for purposes of article reporting on his prosecution); Talley v. WHIO TV-7, 722 N.E.2d 103, 107 (Ohio Ct. App. 1998) (holding that defamation plaintiff, by attempting to murder his wife, is a public figure because his conduct "invited comment and attention, and even though he does not directly try or even want to attract the public's attention, he is deemed to have assumed the risk of such attention") (internal marks and citation omitted); Friedgood, 521 So. 2d at 241-42 (plaintiff, deemed complicit in her father's attempt to hide evidence of murder of his wife, and a witness at his subsequent trial, is public figure).

television and in print, all for the purpose of telling Zimmerman's story, and he himself sat for a widely publicized interview on national television prior to his criminal trial. See, e.g., KS Aff. ¶¶ 40-42, 62, 86 & 90. His attorneys maintained, throughout the course of his criminal prosecution, a series of publicly available websites that have not only allowed him to communicate directly with the public, but have served as a vehicle through which he successfully raised hundreds of thousands of dollars for his defense. See, e.g., Exs. 25-27 & KS Aff. ¶¶ 88 & 91. Unlike "private figure" plaintiffs, therefore, Zimmerman has extensive access to multiple channels to redress perceived harm to his reputation and, for this overarching reason as well, he is properly deemed a public figure for purposes of this litigation.[16]

2. Involuntary Public Figure

Even if he did not qualify as a "limited purpose" public figure, Zimmerman would nevertheless be obliged to satisfy the "actual malice" standard imposed on such defamation plaintiffs because he is, at the very least, an "involuntary" public figure. See, e.g., Dameron, 779 F.2d at 741, cited in Della-Donna, 489 So. 2d at 77; Wells v. Liddy, 186 F.3d 505, 539-40 (4th Cir. 1999). The "involuntary" public figure is a defamation plaintiff who shares some, but not all of the hallmarks of both his "general purpose" and "limited purpose" counterparts. Like the "general purpose" public figure, the involuntary public figure has become generally well-known to the public, although he did not necessarily achieve celebrity status prior to the alleged defamation. Like the "limited purpose" public figure, his notoriety is also a function of his involvement in a "public controversy," but that involvement can arise through no voluntary

[16] Most recently, Zimmerman has made use of his ready access to the media by granting a series of extended television interviews with national media, offering for sale to the public works of art that he has painted, and agreeing, until he changed his mind, to participate in a highly publicized "celebrity fight" to raise money for charity. See Ex. 3 & KS Aff. ¶¶ 79, 100-102.

conduct or "desire of his own" – it can be solely the result of "sheer bad luck." Dameron, 779 F.2d at 742.

Most famously, involuntary public figures have included the likes of Richard Jewell, the security guard falsely accused of the Atlanta Olympics bombing, and Steven Hatfill, the person wrongly named a "person of interest" in the investigation of the 2001 anthrax mailings. See Atlanta Journal-Constitution v. Jewell, 55 S.E.2d 175, 186 (Ga. Ct. App. 2001) ("Whether he liked it or not, Jewell became a central figure in the specific public controversy with respect to which he was allegedly defamed: the controversy over park safety"); Hatfill v. N.Y. Times Co., 488 F. Supp. 2d 522, 530 (E.D. Va. 2007) ("Because Plaintiff engaged in a course of conduct that was likely to invite attention and scrutiny, Plaintiff cannot now claim that he was a private figure who was dragged into this controversy unwillingly."), aff'd on other grounds, 532 F.3d 312, 322-24 (4th Cir. 2008). In a less celebrated case, one court held that the brother-in-law of a police official became an involuntary public figure in the context of broadcast news reports regarding the official's punishment for allegedly interceding to prevent his brother-in-law's arrest. See Lewis v. NewsChannel 5 Network, L.P., 238 S.W.3d 270, 299-300 (Tenn. Ct. App. 2007) ("An involuntary public figure . . . may simply be an unfortunate victim of circumstance pulled into the whirlwind caused by a public official's allegedly improper conduct.").

In another influential decision, a federal appeals court held that a secretary employed at the Democratic National Committee at the time of the Watergate break-in was not an involuntary public figure because she had played, at best, a "minor role" in the controversy surrounding it. See Wells, 186 F.3d at 539-40. As the Fourth Circuit explained, see id. at 540:

> [A]n involuntary public figure has pursued a course of conduct from which it was reasonably foreseeable, at the time of the conduct, that public interest would arise. A public controversy must have actually arisen that is related to, although not

> necessarily causally linked, to the action. The involuntary public figure must be recognized as a central figure during debate over that matter.

Zimmerman is an involuntary public figure under this analysis. "Whether he liked it or not, [he] became a central figure in the specific public controversy with respect to which he was allegedly defamed." Jewell, 55 S.E.2d at 186. Indeed, he became the central figure (or at least the sole surviving central figure) in what quickly became a national, and indeed international, public controversy, encompassing not only whether Zimmerman killed Martin lawfully but also the broader issues of racial profiling, vigilantism, and "stand your ground" laws. The allegedly defamatory broadcasts unquestionably were aired during the ongoing debate surrounding that controversy. And, Martin's death, as well as Zimmerman's singular role in causing it, were reasonably likely to result in public scrutiny. As the California Supreme Court has explained, an involuntary public figure, "despite never having voluntarily engaged the public's attention in an attempt to influence the outcome of a public controversy, nonetheless has acquired such public prominence in relation to the controversy as to permit media access sufficient to effectively counter media-published defamatory statements." Khawar v. Globe Int'l, Inc., 965 P.2d 696, 702 (Cal. 1998). Zimmerman, at the very least, is an "involuntary public figure."

C. Zimmerman Has Failed to State a Claim with Respect to Any of the Broadcasts at Issue

Zimmerman has failed to state a viable defamation claim with respect to any of the five broadcasts. Because the March 20 Nightly News and TODAY show broadcasts are substantially accurate, Zimmerman cannot carry his burden of proving either that they are false in any material sense or that they were disseminated with "actual malice." In addition, even if the defamatory implication of racism that Zimmerman attributes to the March 19 WTVJ and March 22 and 27 TODAY show broadcasts is both reasonably conveyed by those broadcasts and

capable of being proven false (which they are not), he cannot carry his burden of proving actual malice with respect to them.

1. The March 20 Nightly News Broadcast

Zimmerman bases his claim that the March 20 Nightly News broadcast defamed him solely on his allegation that defendant Allen falsely reported that, during the Call, Zimmerman uttered a "racial epithet." That claim must fail for two separate reasons – Zimmerman cannot carry his burden of proving either that the challenged statement is false or that Allen and NBC broadcast it with "actual malice."

All defamation plaintiffs, whether or not they are public figures, shoulder the burden of proving material falsity where, as here, the publication or broadcast at issue involves a matter of public concern. As the Supreme Court explained in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986), to "ensure that true speech on matters of public concern is not deterred, . . . the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant."

In this case, Zimmerman simply cannot carry his burden of proving that the use of the phrase "racial epithet" in the March 20 Nightly News broadcast was false. To be sure, Zimmerman denies that he used such an expression. Nevertheless, the FBI has concluded that it is impossible to verify what Zimmerman actually said "due to weak signal level and poor recording quality." Ex. 19. Under such circumstances, whether Zimmerman in fact used a racial epithet "cannot be verified as false." Auvil v. CBS 60 Minutes, 836 F. Supp. 740, 742 (E.D. Wash. 1993), aff'd, 67 F.3d 816 (9th Cir. 1995). And, as a result, he cannot, as a matter of law, carry his burden of proving material falsity. See id. at 743 ("Even if CBS' statements are false, they were about an issue that mattered, cannot be proven as false and therefore must be protected. To hold as plaintiffs request would have required CBS to take the EPA report and

perform a highly technical scientific study before issuing a public broadcast about that report. A news reporting service is not a scientific testing lab . . . .").

In addition, where, as here, the plaintiff is a public figure, he must prove "actual malice," a heavy burden that requires him to demonstrate by clear and convincing evidence that, at the time the defendant disseminated a challenged publication or broadcast, it "realized that [its] statement was false or . . . subjectively entertained serious doubt as to the truth." Bose Corp. v. Consumers Union, 466 U.S. 485, 511 n.30 (1984). This constitutional standard permits liability only for a category of speech the United States Supreme Court has characterized as a "calculated falsehood." Garrison v. Louisiana, 379 U.S. 64, 75 (1964); see also Levan v. Capital Cities/ABC, Inc., 190 F.3d 1230, 1239 (11th Cir. 1999); Palm Beach Newspapers, Inc. v. Early, 334 So. 2d 50, 52 (Fla. 4th DCA 1976).

The Supreme Court has emphasized that the actual malice requirement "should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991); Palm Beach Newspapers, 334 So. 2d at 53 ("while most of the articles and cartoons can fairly be described as slanted, mean, vicious, and substantially below the level of objectivity that one would expect of responsible journalism, there is no evidence called to our attention which clearly and convincingly demonstrates that a single one of the articles was a false statement of fact made with actual malice as defined in the New York Times case.") (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)). The question whether a plaintiff can carry his burden of proving actual malice is, as a threshold matter, an issue of law to be decided by the court. Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 685 (1989), cited in Sharkey v. Fla. Elections Comm'n, 90 So. 3d 937, 939 (Fla. 2d DCA 2012).

In applying the actual malice standard, the Supreme Court has identified certain recurring scenarios in which a plaintiff's allegations with respect to a defendant's conduct, even if credited, are insufficient as a matter of law to constitute the clear and convincing evidence necessary to support a finding of actual malice. See, e.g., Bose Corp., 466 U.S. at 486; Time, Inc. v. Pape, 401 U.S. 279, 290 (1971). One of those – the "rational interpretation" doctrine articulated by the Court in Pape and Bose – precludes, as a matter of law, a finding of liability with respect to the March 20 Nightly News broadcast's reference to a "racial epithet."

In Time, Inc. v. Pape, the Supreme Court affirmed a series of decisions by a trial judge, dismissing as a matter of law a defamation action arising from an article that purported to summarize a report about police misconduct issued by the United States Commission on Civil Rights. 401 U.S. at 292. The challenged article "quote[d] at length" from the Commission's summary of facts surrounding an incident involving the plaintiff, a police officer, in a manner that indicated he had in fact brutalized a Chicago family, even though those facts were presented by the Commission only as the unproven allegations contained in a civil complaint that had not yet been adjudicated. Id. at 281-83. Examining the Commission's report, and determining that its description of the referenced incident of alleged brutality was at best "ambiguous," the Supreme Court determined that it could "not agree" with the plaintiff's contention that the author "falsified the [challenged article] when he omitted the word 'alleged.'" Id. at 289. Rather, the Court concluded, the "omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under New York Times." Id. at 289-90.

The Court again applied this "rational interpretation" doctrine in Bose. In that case, a publisher of product reviews was sued in the wake of its published evaluation of plaintiff's speaker system which stated that, when music was heard through the speakers, the "instruments tended to wander about the room." Bose Corp., 466 U.S. at 488. The plaintiff, the company that manufactured the speakers, contended that the published description was false because it is scientifically impossible for sound to move around a room, rather than across a wall. Id. at 490. As a result, the plaintiff asserted, the defendants could not have heard sound moving "about the room" and their assertion that they had was therefore knowingly false. Id. at 512. The Supreme Court rejected this contention, explaining that its decision in Pape foreclosed a finding of actual malice as a matter of law where, as in the case before it, the defendants' "adoption of the language chosen was 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities.'" Id. at 512-13 (quoting Pape, 401 U.S. at 290). In other words, what the sound emanating from the plaintiff's speakers actually did was, at best, ambiguous, and the defendants could therefore not be held to have published what was, on its face, a "rational interpretation" of what they heard.

Following the Supreme Court's lead, courts throughout the country "have held that a plaintiff does not create a jury issue of actual malice by demonstrating that a publisher misinterpreted his source material." Liberty Lobby, Inc. v. Anderson, No. 81-cv-2240, 1991 WL 186998, at *8 (D.D.C. May 1, 1991) (citing Pape, 401 U.S. at 290); accord, e.g., Torgerson v. Journal/Sentinel, Inc., 563 N.W.2d 472, 482 (Wis. 1997) ("a court cannot infer actual malice sufficient to raise a jury issue from the deliberate choice of a rational interpretation of ambiguous materials"); Moldea v. N.Y Times Co., 22 F.3d 310, 315 (D.C. Cir. 1994) ("[Supreme Court] cases establish that when a writer is evaluating or giving an account of inherently ambiguous materials

or subject matter, the First Amendment requires that the courts allow latitude for interpretation."); Hunter v. Hartman, 545 N.W.2d 699, 707 (Minn. Ct. App. 1996) ("First Amendment protection [extends] to statements that are 'substantially true' – that is, 'supportable interpretations' of ambiguous underlying situations") (citation omitted).[17]

In this case, application of the rational interpretation doctrine precludes, as a matter of law, a finding that the March 20 Nightly News broadcast's description of the Call as containing a "racial epithet" was disseminated with actual malice – i.e., with the requisite "high degree of awareness" that it was "probabl[y] false." Garrison, 379 U.S. at 216. The tape recording itself is, at best, ambiguous. FBI experts have concluded that it is impossible to determine what Zimmerman actually said and have issued a formal report reflecting that conclusion. Not surprisingly, therefore, prior to the broadcast, a host of others who had listened to the recording, including several other news organizations, similarly reported that Zimmerman had uttered a racial epithet, while still others said they could not definitively make out the word that Zimmerman had used.[18] Under such circumstances, the broadcast's interpretation of that ambiguous portion of the recording, like Time's interpretation of the Commission report in Pape

[17] See also, e.g., Dunn v. Gannett N.Y. Newspapers, Inc., 833 F.2d 446, 452 (3d Cir. 1987) (alleged mischaracterization resulting from translation from English to Spanish was "realistically … a rational interpretation of remarks that bristled with ambiguities" and therefore did not constitute actual malice); Orr v. Argus-Press Co., 586 F.2d 1108, 1116 (6th Cir. 1978) (vacating judgment against news media defendant in part because "any rational interpretation of" the criminal indictment reported on by defendant "is a sufficient defense as a matter of law to a suit for defamation" "[w]here the document reported on is so ambiguous as this one was"); Simmons Ford, Inc. v. Consumers Union of U.S., Inc., 516 F. Supp. 742, 749 (S.D.N.Y. 1981) (granting judgment for publisher that relied on underlying document that could "hardly qualify as a model of clarity").

[18] See, e.g., KS Aff. ¶ 83 (ABC "Good Morning America" reported that on a "tape of one of Zimmerman's 911 calls the night of the shooting, he is heard saying under his breath what sounds like 'f**ing coons.'"); id. ¶ 84 (Miami's CBS television station reported that "Zimmerman was heard using a racial slur against African-Americans under his breath"); id. ¶ 85 (report on website co-produced by CBS and FOX affiliates that "[n]ew 911 calls reveal Zimmerman has a pattern of reporting African American males. In one call, you can even hear Zimmerman make a racial slur.").

and Consumers Union's interpretation of what its reviewers heard on the audio recording at issue in Bose, cannot support a finding of actual malice as a matter of law.

2. The March 20 TODAY Show Broadcast

Zimmerman is equally unable to carry his burden of proving either material falsity or actual malice with respect to NBC's selection of excerpts from the Call for the March 20 TODAY Show broadcast. This conclusion flows, as a matter of law, both from the undisputed fact that the broadcast accurately reported what Zimmerman actually said and, at the very least, did not effect a "material change" in the meaning of the statements he concededly made. See Air Wis. Airlines Corp. v. Hoeper, 134 S. Ct. 852, 861 (2014); Masson, 501 U.S. 496.

In Masson, the Supreme Court considered an article published in the New Yorker magazine containing several lengthy passages that "purport[ed] to quote" verbatim statements made by the plaintiff during tape recorded interviews conducted by the defendant author. Id. at 502. The defendants conceded that, "in each instance no identical statement appear[ed] in the more than 40 hours of taped interviews." Id. Accordingly, Masson claimed the author published the article with actual malice because she "fabricated all but one [quoted] passage" and rendered another one misleading by editing it to "omit[] a crucial portion." Id.

The Supreme Court, however, rejected Masson's contention that, by proving that the author intentionally altered or edited what he had actually said, he had carried his burden of proving actual malice. Rather, the Supreme Court held, "a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of New York Times Co. v. Sullivan, unless the alteration results in a material change in the meaning conveyed by the statement." Id. at 517 (citations omitted). The Court explained that, before a public figure complaining that he has been defamed by a defendant's deliberate editing or alteration of quotations attributed to him may be permitted to pursue a defamation claim, the trial judge must

first determine, as a threshold issue of law, whether the altered quotations, as published, carried the same gist or sting as the plaintiff's actual statements, regardless of the words used. Id. at 515-517. In other words, "[i]f an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as defamation." Id. at 516.

The Court formulated this "material change in meaning" standard because it recognized that, as a matter of practical necessity, reporters and editors must edit the words spoken or written by the persons and other source material they quote, for reasons of space, comprehensibility and context. See id. at 515 ("[e]ven if a journalist has tape-recorded the spoken statement of a public figure, the full and exact statement will be reported in only rare circumstances" because of the "practical necessity to edit"). Thus, the Court concluded, "if every [such] alteration constituted the falsity required to prove actual malice, the practice of journalism, which the First Amendment standard is designed to protect, would require a radical change, one inconsistent with our precedents and First Amendment principles." Id. at 514-15.

In his complaint, Zimmerman claims that, in the March 20 TODAY show broadcast, defendants employed "deceptive and exploitative" manipulations of Zimmerman's "own words . . . to create the illusion of statements that Zimmerman never actually made." Compl. ¶¶ 3, 4. Specifically, Zimmerman asserts that NBC purposefully created the false and defamatory impression that he is a racist by excerpting, quoting and playing in its broadcast a recording of his statement to the dispatcher that the man he was following has "his hand in his waistband and he's a black male" following another excerpted quotation from the Call in which he said that the same "guy looks like he's up to no good or on drugs or something." Compl. ¶¶ 50-51.[19]

[19] As an entirely separate matter, Zimmerman cannot demonstrate that the defamatory implication he attributes to this and NBC's other broadcasts – that he is a "racist" – is capable of being proven false in

Zimmerman's contention fails to state a viable defamation claim for two separate reasons. First, it is undisputed that Zimmerman spoke the words attributed to him in the broadcast and that he made the challenged statement about Martin's race with no prompting from the dispatcher. Accordingly, he cannot carry his burden of showing that NBC's inclusion of the quoted passage was false in any material sense. As the Supreme Court most recently emphasized in Air Wisconsin Airlines Corp. v. Hoeper, 134 S. Ct. at 856, a plaintiff cannot carry its burden of proving material falsity if the allegedly defamatory statement is substantially accurate. In other words, "a 'statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" Id. (quoting Masson, 501 U.S. at 517). Simply put, a "party's accurate quoting of another's statement cannot defame the speaker's reputation since the speaker is himself responsible for whatever harm the words might cause." Thomas v. Pearl, 998 F.2d 447, 452 (7th Cir. 1997); see Broker's Choice of Am., Inc. v. NBC Universal, Inc., No. 09-cv-00717, 2011 WL 97236 (D. Colo. Jan. 11, 2011) (broadcast that repeated plaintiff's statements was substantially true).

It is undisputed that, during the relevant portion of the Call, after the dispatcher asked him to confirm his previous statement that the man he was following was then "near the clubhouse," Zimmerman volunteered, for no apparent reason related to the dispatcher's inquiry, both that the man had "his hand in his waistband" and that he was "a black male." There is

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the first place. A host of courts have recognized that whether a plaintiff is "racist" is an inherently subjective assessment that is incapable of being proven false and cannot, therefore, form the basis of a defamation claim. See, e.g., Stevens v. Tillman, 855 F.2d 394, 400-02 (7th Cir. 1988) (concluding accusation of racism is not capable of being proven false); Smith v. Sch. Dist. of Phila., 112 F. Supp. 2d 417, 429–30 (E.D. Pa. 2000) ("While the Court acknowledges that a statement that plaintiff is 'racist and anti-Semitic,' if it was made, would be unflattering, annoying and embarrassing, such a statement does not rise to the level of defamation as a matter of law"); see also Martin v. Brock, No. 07C3154, 2007 WL 2122184, at *3 (N.D. Ill. July 19, 2007) ("As a matter of law, this statement [regarding racism] is an opinion and thus is not actionable.").

nothing about NBC's airing of Zimmerman's unprompted statement in its broadcast, whether following his separate statement that the man "looks like he's up to no good or on drugs or something" or otherwise, that can reasonably be alleged to be false in any material sense. See, e.g., Texas Beef Group v. Winfrey, 201 F.3d 680, 689 (5th Cir. 2000) (per curiam) ("Although the show's producer undeniably spliced questions and answers, the editing did not misrepresent Dr. Weber's responses."); cf. Janklow v. Newsweek, Inc., 788 F.2d 1300, 1306 (8th Cir. 1986) ("Courts must be slow to intrude into the area of editorial judgment, not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories.").

Second, and for essentially the same reason, Zimmerman cannot carry his burden, as required by Masson, of proving that, by quoting what he concededly told the dispatcher during the Call about the race of the man he was following, the March 20 TODAY show broadcast effected a "material change" in the meaning of what Zimmerman said. A reasonable viewer would readily understand that the two brief quotations that NBC selected for inclusion in that broadcast were merely excerpts from the much longer telephone conversation Zimmerman had with the dispatcher. The broadcast presented each quoted statement as a separate excerpt by accompanying the audio of Zimmerman speaking with two separate screens, on which the two quotations were separately and sequentially written out. Newspapers, magazines and television news broadcasts excerpt quotations in this manner all the time. See, e.g., Ollman v. Evans, 750 F.2d 970, 989 (D.C. Cir. 1984) (such editing is "entirely commonplace"); Peter Scalamandre & Sons, Inc. v. Kaufman, 113 F.3d 556, 563 (5th Cir. 1997) ("It is common knowledge that television programs . . . edit the tape they collect down to a brief piece. TV Nation was entitled to edit the tape it shot to fit into the short time frame allotted to the sludge segment."). Not surprisingly, therefore, multiple news outlets, both print and broadcast, disseminated analogous

excerpts from the Call in precisely the same manner. See, e.g., KS Aff. ¶ 69 (Los Angeles Times article reporting that "[o]n the tapes is Zimmerman's call to report Martin. 'He's got his hand in his waistband and he's a black male,' Zimmerman can be heard telling the dispatcher, saying he's following Martin."); id. ¶ 70 (Fox News broadcast reporting that, "[o]n the 911 call, Zimmerman is heard describing Trayvon Martin as a black man who appears to be, quote, up to no good and reaching in his pocket"); id. ¶ 71(McLaughlin Group excerpted same portion of Call in same manner as NBC broadcast); id. ¶ 74 (Time excerpted portions of Call as follows: "'And he's a black male…Something's wrong with him…These a**holes, they always get away'").

For all of these reasons, Zimmerman cannot carry his burden of proving that the single, allegedly defamatory statement he challenges in the March 20 TODAY show broadcast was disseminated with actual malice. As the Supreme Court explained in Masson, defendants cannot be said to have published that statement despite a "high degree of awareness of [its] probable falsity," Garrison, 379 U.S. at 74, where, as here, its selection of excerpts from the Call for inclusion in its broadcast did not effect a "material change in [the] meaning" of what Zimmerman actually said, Masson, 501 U.S. at 516. Accord, Air Wis. Airlines Corp., 134 S. Ct. at 861 ("we have long held that actual malice requires material falsity") (emphasis added).

3. The WTVJ, and, March 22 and March 27 TODAY Show Broadcasts

Zimmerman's final contention – that three other NBC broadcasts falsely implied that he is a racist by omitting the dispatcher's question before playing and quoting Zimmerman's response – is similarly unpersuasive because he is, as a matter of law, unable to make the requisite showing that omission of the question resulted in a material change in the meaning of what he actually said.[20] Both of the TODAY show broadcasts that Zimmerman has challenged

[20] Zimmerman is also unable to carry his burden of proving that any of these broadcasts can reasonably be construed to communicate the proffered implication that he is a "racist." Each of them accompanied

on this basis included two excerpts from the Call – one in which Zimmerman tells the dispatcher that the man he is following "looks like he's up to no good . . . ," and another in which he says that the man "looks black." In both broadcasts, these excerpts are presented to viewers as separate statements – as the audio plays, the viewer is shown two separate screens, each quoting verbatim one of the two statements. In addition, the first screen includes an ellipsis at the end of the first quotation, indicating to the viewer that something has been omitted between the two statements. In the WTVJ broadcast, defendant Burnside similarly advised viewers, in so many words, that they were about to hear "excerpts" from the Call. There followed immediately three such "excerpts," in which Zimmerman is quoted as saying, (1) "There is a real suspicious guy," (2) "Ah, this guy looks like he is up to no good or he is on drugs or something," and (3) "He looks black."

Watching these broadcasts, a reasonable viewer would understand that NBC was not purporting to play the Call in its entirety and that it was instead presenting only excerpts from it. Indeed, multiple other news organizations either quoted or paraphrased these and analogous excerpts in their own news reports in the same manner. See, e.g., KS Aff. ¶ 72 (South Florida Sun-Sentinel report that the "day of the Sanford shooting, Zimmerman called a police non-emergency line to report a person unknown to him as suspicious. Zimmerman can be heard pursuing Martin, even after dispatchers tell him not to. He describes Martin as a black male who looked like he was 'up to no good.'"); id. ¶ 68 (Orlando Sentinel's report that in "one call, placed

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the excerpts from the Call about which Zimmerman complains with information supportive of his contention that he is not a racist and that he had done nothing wrong, see pp. 13-18 infra, and, viewed in their entirety, cannot reasonably be said to endorse a contrary conclusion. See Chapin v. Knight-Ridder, 993 F.2d 1087, 1092-93 (4th Cir. 1993) ("[B]ecause the Constitution provides a sanctuary for truth, . . . [t]he [defamatory] language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference."), quoted in Jews For Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1107 (Fla. 2008).

by the shooter George Zimmerman, he actively pursues the teen before the deadly shooting. 'Are you following him,' an emergency dispatcher asks after Zimmerman describes Trayvon as a black male who was acting suspiciously. Zimmerman responds: 'Yeah.' 'OK, you don't need to do that,' the dispatcher says."); id. ¶ 103 (New York Times reported that "Mr. Zimmerman had reported a 'suspicious' person to 911 shortly before the encounter, saying a black male was checking out the houses and staring at him. . . . In the 911 call, Mr. Zimmerman, using an expletive and speaking of Trayvon, said they 'always get away.'").

In addition, as noted supra, during another portion of the Call, Zimmerman volunteered that the person he was following was "a black male," and did so without prompting from the dispatcher. In other analogous reports he had phoned in to police about "suspicious" persons in his neighborhood, Zimmerman had similarly volunteered, also without prompting, that those persons were "black" and, in the Call itself, he referred, again without prompting, collectively to "these assholes" who, he asserted, "always get away." And, finally, each of the broadcasts that contained the "he looks black" quotation also included information that rebutted the defamatory meaning that Zimmerman seeks to ascribe to them – the March 22 broadcast reiterated the Sanford Police Chief's conclusion that Zimmerman had shot Martin in self-defense, the March 27 broadcast reported that "George Zimmerman's defenders say there was a life and death struggle that night, with Zimmerman bloodied and beaten on the ground because of Trayvon Martin," and the WTVJ broadcast advised viewers that police "are calling it self-defense, and say they have a lot more investigating to do." Ex. 17(a), (d)-(e).

The Supreme Court's analysis of two of the contested quotations at issue in Masson demonstrates why, under these undisputed circumstances, NBC's inclusion of the "he looks black" excerpt in these three broadcasts cannot be held, as a matter of law, to have effected a

material change in the meaning of what Zimmerman actually said. In one of the altered quotations before the Court in Masson, the challenged article explained that Masson's grandfather, whose family name was "Moussaieff," had emigrated to Paris from Bessarabia and there changed his name to "Masson." In the article, Masson is quoted as saying, "My parents named me Jeffrey Lloyd Masson but in 1975 I decided to change my middle name to Moussaieff – it sounded better.'" Masson, 501 U.S. at 505. The tape recorded interviews, however, revealed that Masson had never said "it sounded better," although he had said that he had changed his middle name to Moussaieff "because he 'just liked it.'" Id. Despite the author's deliberate alteration of Masson's actual words, the Supreme Court affirmed the trial judge's entry of summary judgment in favor of the defendants with respect to this portion of Masson's claim, concluding that "any difference between the petitioner's tape-recorded statement that he 'just liked' the name Moussaieff, and the quotation that 'it sounded better' is, in context, immaterial." Id. at 524. In other words, the published quotation, although deliberately altered from what Masson had actually said, nevertheless "convey[ed] the gist of [Masson's] explanation," and thus could not support a finding of actual malice as a matter of law. Id.

With respect to a second passage, Masson objected to the author's omission of "a crucial portion" of what he had actually said when his words were quoted in her article. Id. at 502. The article quoted Masson describing how, when he was asked by his mentor, Dr. Kurt Eissler, to do "the honorable thing" and remain silent after he lost his job, Masson told Eissler he "had the wrong man." The tape recording, however, revealed that a portion of what Masson had actually said had been omitted from the quotation as it appeared in the article – in fact, Masson had told Eissler he "had the wrong man" in response to Eissler's suggestion that, if Masson "save[d] face" and remained silent, he might get his job back. Id. at 525. The Supreme Court concluded that

this omission could be read to create a "material change" in the meaning of the passage because it arguably turned an assertion by Masson that his silence could not be bought in exchange for the prospect of regaining his job into a declaration by him that he was the "wrong man" to ask to do the "honorable" thing. Accordingly, the question whether the author had deleted the relevant portion of the quotation with knowledge that, by doing so, she was effecting a material change in its meaning – could properly be the subject of further litigation. Id.

Most recently, in Air Wisconsin Airlines Corp., the Court held, inter alia, that the defendant, an airline, had not described the conduct of the plaintiff, a pilot, in a manner that could be considered materially false within the meaning of Masson when it told a federal agency that he was "unstable," rather than simply relating the fact that he had "blown up" during a flight simulation session. 134 S. Ct. at 857. As the Court explained, the operative question was whether the defendant's statement "accurately conveyed 'the gist' of the situation; it is irrelevant whether trained lawyers or judges might with the luxury of time have chosen more precise words." Id. Accordingly, the Court concluded that, "from the perspective of a reasonable security officer," there was no "material difference between a statement that [plaintiff] had just 'blown up' in a professional setting and a statement that he was unstable." Id.

Especially in the wake of the Supreme Court's analysis of the allegedly fabricated quotations at issue in Masson, and the Court's reaffirmation of that analysis in Air Wisconsin Airlines Corp., Zimmerman cannot base a defamation claim on NBC's airing of his recorded statement that the man he was following "looks black" when he volunteered precisely that same information at another point during the Call without prompting from the dispatcher. Unlike the "wrong man" quotation in Masson, where there was no statement in more than 40 hours of recorded interviews in which the plaintiff had said even roughly the same thing, in this case, it is

undisputed that Zimmerman volunteered to the dispatcher that the person he was following was "a black male." The fact that his separate statement that the man "looked black" was preceded by a question, which was not included in the broadcasts, does not result in the kind of material falsity necessary to support a finding of actual malice as a matter of law. Rather, like the "it sounded better" quotation with respect to which the Supreme Court affirmed the entry of summary judgment for the defendants in Masson, and the multiple statements at issue in Air Wisconsin Airlines Corp. that the Court concluded were not false in any material sense, the excerpt from the Call quoted in NBC's broadcasts accurately captured the "gist" and "sting" of what Zimmerman actually said. Id. (citation omitted).

As the Supreme Court explained in Masson, an edited quotation cannot be held to have been published or broadcast with actual malice unless the alteration "'would have a different effect on the mind of the reader'" than what the plaintiff actually said. 501 U.S. at 517 (citation omitted). See Air Wis. Airlines Corp., 134 S. Ct. at 856 (same). Absent such a showing, the First Amendment protects such editorial decisions from defamation liability because, as the Supreme Court has also emphasized, "editing is what editors are for; and editing is the selection and choice of material." CBS v. Democratic Nat'l Comm., 412 U.S. 94, 124 (1973). The decision as to what portions of a recorded statement to quote in a news report cannot typically result in liability

> because [the report] failed to include additional facts which might have cast the plaintiff in a more favorable or balanced light. To permit recovery in such circumstances violates the First Amendment since "the choice of material to go into a newspaper, and the decisions made as to the limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment."

Machleder v. Diaz, 801 F.2d 46, 54-55 (2d Cir. 1986) (quoting Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)). See also Air Wis. Airlines Corp., 134 S. Ct. at 865 (even

where "statement could have been misinterpreted by some," it was not materially false). In this case, because Zimmerman is unable to demonstrate that the editing choices at issue resulted in a materially false change in the meaning of what he actually said, he cannot pursue his defamation claims arising from those choices as a matter of law.

D. Zimmerman Cannot Carry His Burden of Proving that the Broadcasts Caused the Harm He Alleges

Under Florida law, a plaintiff suing a news media defendant for defamation must plead and prove that he sustained actual injury, regardless of whether the plaintiff is a public figure or private person. See, e.g., Mid-Fla. Television Corp. v. Boyles, 467 So. 2d 282, 283 (Fla. 1985); Edelstein v. WFTV, Inc., 798 So. 2d 797, 798 (Fla. 4th DCA 2001). Moreover, in Florida, a defamation plaintiff not only must plead and prove actual injury, he must also demonstrate that the allegedly defamatory statements proximately caused that injury. See, e.g., Smith, 731 So. 2d at 705 (citing Byrd, 433 So. 2d at 595). In other words, a defamation plaintiff is required to prove that "but for the statement, the damage would not have occurred." In re Standard Jury Instructions In Civil Cases-Report No. 09-01, 35 So. 3d 666, 726 (Fla. 2010) (instruction 405.6(a)); see also, e.g., Borenstein v. Raskin, 401 So. 2d 884, 886 (Fla. 3rd DCA 1981) (proximate cause requires "such a natural, direct and continuous sequence between the negligent act and the injury that it can reasonably be said that but for the act, the injury would not have occurred"); Fellows v. Citizens Fed. Sav. & Loan Ass'n of St. Lucie Cty., 383 So. 2d 1140, 1141 (Fla. 4th DCA 1980) ("Proximate cause means that the alleged wrong of the defendant caused the damage plaintiff claims.").

Zimmerman cannot carry this burden as a matter of law. In his Complaint, he contends that the five challenged broadcasts exposed him "to public contempt, ridicule, hatred and threats to his life," as well as to "severe and permanent emotional distress, mental anguish,

embarrassment and humiliation." Compl. ¶¶ 86, 87. He further alleges that, as a result of the broadcasts, he has had to live in hiding and wear a bulletproof vest. Id. ¶¶ 23, 72. Even assuming that Zimmerman has sustained all of these damages, he simply cannot carry his burden of proving that they were caused by the manner in which NBC edited or characterized the statements he made during the Call.

The undisputed record evidence reveals a virtual firestorm of negative publicity directed at Zimmerman well before the first broadcast at issue here – including accusations from several quarters that he killed Martin after profiling him because of the color of his skin and demands that he be charged with murder as a result. These accusations made against Zimmerman were widely circulated by the Martin family's lawyer, by civil rights activists, and by a litany of news media entities well before the Call was released to the public and before NBC broadcast *any* of the news reports at issue. See, e.g., Ex. 26 (Zimmerman's counsel blames attorneys for Martin's family for a "coordinated public relations attack" meant to paint Zimmerman as a racist); see also Exs. 10, 12-13, 26-28 & KS Aff. ¶¶ 33, 53-63, 67-68, 73-75. Indeed, prior to any of the challenged broadcasts, multiple national news organizations – from wire services to newspapers and television networks – had disseminated detailed accounts of the Martin family's contention that their unarmed son had been profiled and killed by Zimmerman because of his race. See, e.g., id. ¶ 53 (March 7 Reuters dispatch quoting Crump saying race is "the 600 pound elephant in the room"); id. ¶ 60 (March 14 Orlando Sentinel article quoting Sanford minister saying that "because people are viewing this as a racially motivated crime, it has the community aggravated"); Ex. 27 (guest on March 18 CBS News program asserts case "reeks of racial profiling"). After those reports, and again before any of the broadcasts at issue, public demonstrations were held demanding Zimmerman's arrest and members of Congress called for a

federal investigation of what they described as a "hate crime." See Ex. 28 & KS Aff. ¶¶ 60, 63, 69, 104.

Zimmerman and his family had received death threats and had gone into hiding long before any of the challenged broadcasts; his father and friends therefore felt compelled to reach out to the media to make the case that he is not a racist. See, e.g., Exs. 3, 13 & 26 & KS Aff. ¶¶ 62, 105. At that same time, Zimmerman had already told police that his doctor had diagnosed him as suffering from post-traumatic stress disorder. Ex. 8 at 6.

Although the question whether allegedly tortious conduct was the "but for" cause of a plaintiff's claimed injuries must often be submitted to the trier of fact, it can be resolved by the court as a matter of law "where the facts are unequivocal, such as where the evidence supports no more than a single reasonable inference." McCain v. Fla. Power Corp., 593 So. 2d 500, 504 (Fla. 1992). Defendants respectfully submit that this is such a case. No reasonable person assessing the undisputed evidence before this Court could conclude that the harm Zimmerman says he suffered was caused by a few lines in the five NBC broadcasts on which he has based his claims. Rather, that evidence reasonably supports only one inference: that the challenged excerpts from and characterization of Zimmerman's statements during the Call could not have been the required "but for" cause of Zimmerman's asserted injuries. In re Standard Jury Instructions In Civil Cases-Report No. 09-01, 35 So. 3d at 726.

II. Zimmerman Cannot State a Claim for Intentional Infliction of Emotional Distress

For all of the foregoing reasons, Zimmerman cannot state a viable claim for intentional infliction of emotional distress ("IIED"). In Florida, a plaintiff alleging IIED must show that: (1) the alleged wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous; (3) it caused emotional distress; and (4) the emotional distress was severe. E.g., Williams v. Worldwide Flight Servs., Inc., 877 So. 2d 869, 870 (Fla. 3rd DCA 2004) (per curiam). The

outrageousness of the alleged conduct is the "threshold test" for recovery, Ponton v. Scarfone, 468 So. 2d 1009, 1011 (Fla. 2nd DCA 1985), and "is a legal question in the first instance for the court to decide as a matter of law," Baker v. Fla. Nat'l Bank, 559 So. 2d 284, 287 (Fla. 4th DCA 1990). "Under Florida law, liability for [IIED] will lie only where the conduct in question has been so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." Johnson v. Knupp, No. 99-cv-50-OC-10C, 2000 WL 1238976, at *3 (M.D. Fla. Mar. 28, 2000) (citing Metro. Life Ins. Co. v. McCarson, 467 So. 2d 277, 278-79 (Fla. 1985)).

Given this daunting standard of liability, "[f]ew cases applying Florida law have upheld claims of this type" and, to defendants' knowledge, none have done so in a case involving "emotional distress" allegedly caused by a news media publication or broadcast. Johnson, 2000 WL 1238976, at *3; see Williams, 877 So. 2d at 870 (even reprehensible conduct is non-actionable because liability for IIED "does not extend to mere insults, indignities, threats, or false accusations"); Lay v. Roux Labs., Inc., 379 So. 2d 451, 452 (Fla.1st DCA 1980) (per curiam) ("vicious verbal attacks" marked by humiliating language and racial epithets not sufficiently outrageous to establish IIED); Lopez v. Target Corp., 676 F.3d 1230, 1236-37 (11th Cir. 2012) (rejecting IIED claim because outrageousness element not met).[21] In this case, where it is undisputed that multiple other news reports characterized and edited Zimmerman's statements in virtually the same manner as the challenged broadcasts, those editorial judgments cannot be deemed "outrageous" as a matter of law.

[21] In fact, in one of the few reported Florida cases permitting an IIED claim to proceed, the court emphasized Florida's stringent approach to the tort, stating "[i]t has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." Williams v. City of Minneola, 575 So. 2d 683, 690 (Fla. 5th DCA 1991).

Even if Zimmerman were able to make out a prima facie case of IIED, the Florida Supreme Court has foreclosed such claims where, as here, the plaintiff has attempted to "transform a defamation action into a claim for intentional infliction of emotional distress simply by characterizing the alleged defamatory statements as 'outrageous.'" Fridovich v. Fridovich, 598 So. 2d 65, 69-70 (Fla. 1992) (citation omitted) (plaintiff could not pursue IIED claim based on same statements underlying his unsuccessful defamation claim because litigants are "not permitted to make an end-run around" First Amendment); Ortega Trujillo v. Banco Cent. del Ecuador, 17 F. Supp. 2d 1340, 1343 (S.D. Fla. 1998) ("In Florida, a single publication gives rise to a single course of action. An attempt to state a claim for intentional infliction of emotional distress based on the same publication as the defamation count must fail."); Boyles v. Mid-Fla. Television Corp., 431 So. 2d 627, 636 (Fla. 5th DCA 1983), aff'd, 467 So. 2d 282 (Fla. 1985) (same); Silvester, 650 F. Supp. at 780 (dismissing IIED claim because it "merely reincorporate[d] the allegations in the libel counts" and therefore did "not set forth [an] independent tort[]"); see also Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (plaintiffs may not circumvent First Amendment-based requirements limiting defamation tort by pleading claim for intentional infliction). As in the foregoing cases, Zimmerman's IIED claim is based on the same broadcasts he has placed at issue in his defamation claim. He has therefore failed to state an IIED claim as a matter of law.

CONCLUSION

For all of these reasons, defendants respectfully request that plaintiff's Complaint be dismissed with prejudice.

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Respectfully submitted,

THOMAS & LoCICERO PL

/s/ Gregg D. Thomas

Gregg D. Thomas
Florida Bar No. 223913
gthomas@tolawfirm.com
Rachel E. Fugate
Florida Bar No. 0144019
Rfugate@tolawfirm.com
THOMAS & LOCICERO PL
601 South Boulevard
Tampa, FL 33602
Telephone: (813) 984-3060
Facsimile: (813) 984-3070

Attorneys for Defendants

Lee Levine (*pro hac vice*)
llevine@lskslaw.com
Gayle C. Sproul (*pro hac vice*)
gsproul@lskslaw.com
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, NW, Suite 200
Washington, DC 20036
Telephone: (202) 508-1110
Facsimile: (202) 861-9888

Susan E. Weiner
Hilary Lane
NBC UNIVERSAL MEDIA, LLC
30 Rockefeller Plaza
New York, NY 10112

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Florida Court E-Portal and Overnight Delivery to James E. Beasley, Esq., THE BEASLEY LAW FIRM, LLC, 1125 Walnut Street, Philadelphia, PA 19107, jim.beasley@beasleyfirm.com and Henry Didier, Didier Law Firm, 1203 North Orange Avenue, Orlando, FL 32804, Didier@ProductSafetyAttorneys.com on this 21st day of March, 2014.

/s/ Gregg D. Thomas
Attorney