

Plaintiff's Response in Opposition to Defendant's Motion to Dismiss

**IN THE CIRCUIT OF THE 15TH JUDICIAL CIRCUIT IN AND  
FOR PALM BEACH COUNTY, FLORIDA**

**MARCIO SOUSA SALES,**

**Plaintiff,**

**CASE NO: 50-2025-CA-000969-XXXX-MB**

**vs.**

**ANTONIO DE ANDRADE,**

**Defendant,**

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**Plaintiff's Response in Opposition to Defendant's Motion to Dismiss**

Plaintiff, MARCIO SOUSA SALES, submits this response in opposition to Defendant ANTONIO DE ANDRADE's Motion to Dismiss filed March 18, 2025. For the reasons below, the Motion to Dismiss should be denied in its entirety.

**I. The Court Has Subject Matter Jurisdiction** – This Lawsuit Is a Separate Cause of Action, not a Collateral Attack



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Defendant's argument that the Court lacks subject matter jurisdiction is misplaced. The plaintiff is not seeking to overturn or invalidate the prior small claims judgment; rather, he is pursuing independent tort claims (malicious prosecution, abuse of process, defamation, and IIED) for damages caused by Defendant's wrongful litigation conduct. These causes of action are distinct from the underlying case and are expressly recognized under Florida law. They do not constitute an impermissible collateral attack on the judgment, but a separate legal remedy for misuse of the judicial process. *Separate Cause of Action vs. Collateral Attack*: Florida courts have long allowed parties harmed by baseless or malicious lawsuits to bring a subsequent tort action for damages, once the original proceeding has concluded. The Florida Supreme Court has "reaffirm[ed] a party's right to pursue a claim for malicious prosecution where the elements are present, notwithstanding their genesis in the course of litigation". In other words, the fact that Plaintiff's claims arise from Defendant's prior lawsuit does not strip this Court of jurisdiction – such post-litigation claims are contemplated by Florida law and may co-exist with the policy favoring finality of judgments. The plaintiff is not asking this Court to disturb the

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prior judgment; he seeks compensation for torts (malicious prosecution, etc.) that could not have been adjudicated within the original case.

Res Judicata/Collateral Estoppel Do Not Bar These Claims: Defendant's motion invokes res judicata and the rule against collateral attacks, but those doctrines are inapplicable here. By definition, res judicata bars only claims or issues that were or could have been litigated in the prior proceeding. Plaintiff's tort causes of action could not have been raised in the small claims case itself – for example, a malicious prosecution claim accrues only after termination of the prior case in the accused party's favor, and an abuse of process claim addresses misuse of process during litigation, which is not an issue adjudicated in that litigation. Thus, these claims were not and could not be litigated previously, and res judicata poses no bar. Florida law draws a clear line between a forbidden "attack" on a judgment's validity (which must be done by appeal) and a permissible separate action seeking damages for wrongful conduct. Here, Plaintiff accepts the prior judgment as extant (indeed, he is appealing it through the proper appellate channels) but independently alleges that Defendant's conduct in that case was tortious. This lawsuit therefore does not "re-litigate" the merits of the

prior case and is not an attempt to undo that result – it seeks different relief (compensatory damages) for different wrongs.

Pending Appeal Does Not Divest Jurisdiction: The fact that Plaintiff has a pending appeal of the prior case (Case No. 4D2024-3229) does not preclude this separate lawsuit. Defendant cites the general principle that a judgment should be challenged on appeal, not via a new suit. Plaintiff is following that principle – he is pursuing an appeal to address errors in the judgment. But nothing in Florida law prevents him from simultaneously pursuing tort claims for damages. Importantly, Florida courts have held that when the prior proceeding is on appeal, a malicious prosecution claim based on that proceeding technically does not fully accrue until the appeal is resolved (since a “bona fide termination” is an element). However, the proper course in that scenario is to abate or pause the malicious prosecution count pending the appellate outcome, not to dismiss it outright. In C.A. Hansen Corp. v. Wicker, Smith, etc., the Third DCA explained that “[i]f an appeal is taken, the proceedings are not terminated until the final disposition of the appeal”. Accordingly, courts faced with a pending appeal will hold the malicious prosecution claim in abeyance until the appeal concludes. Here, if the Court believes the malicious prosecution count is

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premature due to the ongoing appeal, the solution is a temporary stay of that count – not dismissal with prejudice. In any event, Plaintiff's other claims (abuse of process, defamation, IIED) do not require a favorable termination and are not dependent on the appeal's result; those counts can proceed regardless of the appellate status.

In sum, this Court does have jurisdiction because Plaintiff's lawsuit asserts legitimate, independent causes of action authorized by Florida law. It is not a prohibited "collateral attack" on the prior judgment, but an attempt to vindicate separate rights – the right "not to be subjected to slander or malicious conduct" in litigation.

Defendant's reliance on cases like *Palmer v. Palmer* (re: collateral challenges to a judgment) is misplaced; those cases involved parties essentially trying to nullify or avoid a judgment by suing over issues already decided. That is not the case here. Plaintiff is not asking this Court to declare the small claims judgment wrong or void – that is for the Court of Appeal. Rather, Plaintiff seeks damages for Defendant's tortious conduct (e.g. filing a baseless suit with malice, abusing court process, defaming Plaintiff, etc.). Florida's recognition of malicious prosecution and similar torts reflects a balance: while judicial proceedings must be

final, individuals should still have recourse if those proceedings were perverted to cause them harm. Therefore, Defendant's "subject matter jurisdiction" argument fails. The Court has jurisdiction, and Plaintiff's claims are properly before this Court.

## **II. The Complaint States Valid Claims Upon Which Relief Can Be Granted**

The defendant next argues that each count fails to state a cause of action. In fact, each claim in the Complaint is sufficiently pled or can be readily cured by amendment. When evaluating a motion to dismiss, the Court must accept the well-pled factual allegations as true and determine only whether those facts, if proven, would entitle Plaintiff to relief. Florida's pleading standards do not require hyper-technical precision, especially from a pro se litigant – the allegations need only give fair notice of the claim and ultimate facts supporting each element. Here, liberally construing the Complaint, Plaintiff has alleged the necessary elements of each tort. We address each count in turn:

### ***A. Malicious Prosecution (Count I)***

Plaintiff's Count I alleges malicious prosecution arising from the prior case Defendant initiated. Under Florida law, a malicious prosecution plaintiff

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must establish six elements: (1) an original judicial proceeding was commenced or continued by the defendant against the plaintiff, (2) the original proceeding's instigation was by or at the direction of the present defendant, (3) a bona fide termination of that proceeding in favor of the present plaintiff, (4) an absence of probable cause for the original proceeding, (5) malice on the part of the defendant, and (6) damages to the plaintiff as a result of the original proceeding. Plaintiff's complaint, viewed in totality, covers these elements:

**Initiation by Defendant:** It is undisputed that Defendant (or his alter ego business) filed the 2023 small claims lawsuit against Plaintiff. The Complaint makes clear that Defendant "filed legal proceedings" against Plaintiff without legitimate cause (Complaint ¶ \_\_). This satisfies elements (1) and (2).

**Termination in Plaintiff's Favor:** Plaintiff acknowledges that the trial of the prior case resulted in a judgment for Defendant. However, he has also alleged that the case was wrongful and is on appeal. If the Fourth District reverses or otherwise rules in Plaintiff's favor, the element of favorable termination will be met. Courts have held that when an appeal is pending,

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the underlying proceeding is not considered “terminated” until the appeal is resolved. Thus, strictly speaking, the malicious prosecution claim is premature until the appellate mandate. Plaintiff respectfully avers that this count should not be dismissed, but at most stayed pending the outcome of the appeal. In the alternative, Plaintiff requests leave to amend the pleading to clarify that the prior proceeding will terminate in his favor if his appeal succeeds – and to explicitly plead that element is contingent on the appellate result. The key point is that a temporary lack of final termination is not grounds for permanent dismissal. The Court can accommodate this timing issue without extinguishing Plaintiff’s claim.

Lack of Probable Cause: The Complaint alleges that Defendant’s lawsuit was baseless and lacked any true factual or legal merit (Complaint ¶ \_\_\*). Plaintiff asserts that Defendant pursued the case with knowledge that Plaintiff did not owe the claimed amounts or had not committed the alleged wrong, indicating an absence of probable cause. Notably, just because Defendant obtained a judgment at trial does not conclusively prove the existence of probable cause. Probable cause in this context means the initiator had a reasonable belief, based on the facts known at the time, that a valid claim existed. Plaintiff alleges that no reasonable person in



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Defendant's position would have believed the claim was valid – indeed, Plaintiff contends the judgment was procured through misrepresentations or errors that are being challenged on appeal. At the pleading stage, Plaintiff's allegation of baselessness is sufficient to allege lack of probable cause. The Florida Supreme Court recognizes that the probable cause can be a jury issue if facts are disputed. Here, Plaintiff should be allowed to develop evidence that Defendant had no legitimate grounds to sue him.

**Malice:** Malice in a malicious prosecution case means the suit was instituted primarily for a wrongful purpose. Florida law allows malice to be inferred from a lack of probable cause. Plaintiff explicitly alleges that Defendant acted out of malice – for example, filing the suit to harass and burden Plaintiff rather than to resolve a genuine dispute. Given the inference arising from want of probable cause, Plaintiff has adequately pled malice. The Complaint's description of Defendant's vindictive motives (e.g. an intent to ruin Plaintiff financially and reputationally) supports this element.

**Damages:** Plaintiff alleges that he suffered damages as a result of being wrongfully sued – including attorney's fees incurred, time lost, stress, reputational harm, and the imposition of an \$8,350 judgment (which

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Defendant has aggressively tried to enforce). Contrary to Defendant's claim that Plaintiff "has not paid" the judgment and thus has no damages, the law does not limit damages to amounts paid. Plaintiff has been forced to spend time and resources defending the baseless suit (and now appealing it), and he faces a judgment on his record, which is a concrete harm. Additionally, the Complaint notes emotional distress and other losses flowing from Defendant's actions. These suffice to plead the damages element.

In sum, the malicious prosecution count, while filed slightly before the appellate mandate, contains all the substantive allegations required. If the Court is concerned about the termination element, the appropriate remedy is to abate Count I until the Fourth DCA appeal is concluded, or allow an amendment to plead that element conditional on the appeal. Dismissal of this count would be premature and unjust. Florida law wants to protect individuals from malicious litigation just as it protects the finality of judgments. The plaintiff is navigating both by appealing the judgment and seeking damages here. Once his conviction (so to speak) is overturned on appeal, the malicious prosecution claim will crystallize fully. It would be a waste of judicial resources to dismiss the claim now and force Plaintiff

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to re-file later, when a simple stay or amendment can cure the timing issue. Therefore, the Defendant's motion to dismiss Count I should be denied (or at most the count stayed). The plaintiff stands ready to amend the allegations in Count I to reflect the outcome of the appeal in due course.

**B. Abuse of Process (Count II)**

Count II of the Complaint asserts abuse of process. Defendant argues Plaintiff failed to plead with the elements. This is not so. In Florida, abuse of process involves the misuse of legal process after it has been issued, for some collateral purpose other than that for which the process was designed. The elements are usually stated as: (1) the defendant made an illegal, improper, or perverted use of process, (2) the defendant had an ulterior motive or purpose in using the process, and (3) the plaintiff was harmed by the misuse of process. Crucially, "there is no abuse of process when the process is used to accomplish the result for which it was created, regardless of an incidental or concurrent motive of spite or ulterior purpose."

In other words, abuse of process typically involves using the legal system to obtain a result it was not intended to achieve – "the usual case of abuse of process involves some form of extortion.". Plaintiff's Complaint, liberally read, does allege that Defendant misused the legal process for an

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improper purpose. Specifically, Plaintiff alleges that Defendant did not file or pursue the small claims case to adjudicate a legitimate debt or claim, but “primarily to accomplish a purpose for which [the process] was not designed” – namely, to harass Plaintiff, damage his reputation, and force him into submission (financially and personally). Key allegations include: Defendant filed and maintained the lawsuit “not for a legitimate purpose, but to harass and financially burden Plaintiff.” (Compl. ¶\_\_\*; Motion Excerpt). Harassment is not the proper purpose of a lawsuit; the proper purpose is to resolve an actual dispute. Thus, Plaintiff asserts the legal action was perverted beyond its intended scope – a classic abuse of process scenario (using the courts as a weapon of intimidation rather than adjudication). After obtaining the judgment, Defendant “continued to abuse the judicial system by opposing efforts to correct the record and wrongfully enforcing [the] judgment against Plaintiff.” (Compl. ¶\_\_\*; see Motion Excerpt). These allegations point to Defendant’s post-judgment conduct: for example, if Plaintiff filed motions to relieve a clerical error or stay enforcement due to the appeal, Defendant allegedly opposed such efforts in bad faith and rushed to enforce the judgment to inflict harm. Using the enforcement process (intended to collect a legitimately owed

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debt) to punish and pressure Plaintiff, despite knowing the debt is disputed on appeal or that the record was flawed, is an abuse of that process. The Complaint even mentions a specific act: Defendant's letter to the trial court falsely alleging incomplete financial disclosures by Plaintiff. Sending a false letter to the court to influence post-judgment proceedings is not a routine use of process – it suggests an attempt to pervert the process (perhaps to block Plaintiff's access to relief or tarnish his credibility). This is pleaded as "further evidence of misuse of the legal process."

Taken together, Plaintiff paints a picture of Defendant who didn't merely seek a judgment and accept it, but who wielded the litigation process at every stage as a cudgel to bludgeon Plaintiff (through false accusations, vexatious motions, etc.).

These allegations cover the elements: (1) an improper use of process (filing and pressing the case to harass, not to adjudicate a genuine claim; using enforcement mechanisms wrongfully), (2) an ulterior motive (spite, harassment, financial ruin of Plaintiff), and (3) harm to Plaintiff (legal fees, stress, damage from the judgment enforcement). Defendant contends Plaintiff "fails to even state the required elements", but as shown above, the elements are indeed stated in substance. Plaintiff may not have listed

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them in formulaic fashion, but the factual allegations clearly correspond to each element. That is sufficient under Florida's notice pleading standards. Defendant also argues that because the small claims case achieved a result (a judgment), the process accomplished its intended purpose, defeating abuse of process. However, the inquiry is not simply whether a judgment was entered; it is whether Defendant's primary purpose in using the process was improper. Even an ostensibly valid lawsuit can be an abuse of process if used as a tool of extortion, coercion, or harassment beyond its legal purpose. Plaintiff alleges exactly that – Defendant's primary goal was not to recover on a valid claim, but to injure Plaintiff. The presence of an ulterior motive coupled with acts that extend beyond normal prosecution of a case (for example, the false letter to the court, or perhaps unnecessarily multiplying proceedings) make out a viable abuse of process claim. Whether Plaintiff can ultimately prove these allegations is a question for summary judgment or trial. At this stage, he has pled enough to proceed. Additionally, Florida law draws a distinction between malicious prosecution and abuse of process: "the latter is concerned with the improper use of process after it has been issued. The maliciousness or lack

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of foundation of the cause of action itself is actually irrelevant to abuse of process.”. This means even if the original claim had arguable merit, abuse of process can still occur if Defendant misused procedures during litigation for wrongful ends. Plaintiff’s complaint highlights such misuse during and after the case (e.g., using motions, enforcement, and court communications to oppress Plaintiff). Thus, even setting aside the merit of the underlying suit, these allegations stand on their own as abuse of process. Should the Court find any technical pleading deficiency in Count II, Plaintiff requests leave to amend to provide additional details. For instance, Plaintiff can amplify what specific “process” was abused (such as subpoena power, court motions, execution writs, etc.) and how. At minimum, however, the current allegations put Defendant on notice of the claim: that he deliberately misused the lawsuit and related processes as a means to harm Plaintiff (beyond the normal scope of litigation). Under Florida’s liberal pleading rules, this is enough to survive a motion to dismiss. There is no prejudice to Defendant in letting this claim proceed to discovery – he obviously knows what his actions were and why Plaintiff believes they were improper. Therefore, the motion to dismiss Count II should be denied.

### **C. Defamation (Count III)**

Count III alleges defamation. The defendant argues the defamation claim is not pled with the required elements. It is true that a properly pled defamation claim in Florida should allege: (1) publication of a statement, (2) the statement was false, (3) the defendant acted with at least negligence as to the falsity (for a private plaintiff), (4) actual damage (or per se damage), and (5) the statement was defamatory (tended to harm reputation). To be clear, Plaintiff's complaint is less detailed in this count than ideal – likely due to Plaintiff's pro se status. However, a fair reading of the whole complaint demonstrates the gist of a defamation claim: Plaintiff asserts that Defendant made false accusations against him in the context of the lawsuit which has harmed Plaintiff's reputation and livelihood. For example, the Complaint references that Defendant falsely accused Plaintiff of owing money or breaching obligations (in the lawsuit filings), and that Defendant even wrote a letter to the court falsely alleging Plaintiff hid financial information. These false statements not only impacted on the court proceedings but also impugned Plaintiff's honesty and integrity. Furthermore, Plaintiff alleges that Defendant's actions



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“forced [him] to defend against baseless legal actions, wasting time, money, and court resources.”

The clear implication is that Defendant made false claims (the “baseless” allegations in the lawsuit) which Plaintiff had to refute. While the complaint might not explicitly list a specific defamatory sentence, it identifies the substance: accusing Plaintiff of liability without basis (which effectively labels Plaintiff a wrongdoer when he was not). Plaintiff acknowledges that much of Defendant’s false statements occurred “during the course of litigation” (e.g., in pleadings or hearings). Defendant argues, and the law generally holds, that such statements are protected by the absolute litigation privilege. Indeed, Florida’s litigation privilege is very broad – “Statements made during a judicial proceeding are absolutely privileged, provided that such statements are related to the proceeding’s subject matter.”(citing Levin, Middlebrooks, et al. v. U.S. Fire Ins. Co., 639 So.2d 606, 607 (Fla. 1994)). To the extent Plaintiff’s defamation claim is based solely on statements made in pleadings or in court, we concede those particular statements cannot form the basis of a defamation lawsuit due to this absolute immunity. However, that does not necessitate dismissal of the count – instead, Plaintiff can clarify and narrow the defamation

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claim to focus on any unprivileged false statements Defendant made. It is possible (and Plaintiff is investigating) that Defendant published defamatory assertions about Plaintiff outside the courtroom. For instance, Defendant may have told third parties in the industry that "Plaintiff is a cheat" or communicated the false allegations to individuals not involved in the case. Such statements would not be protected by litigation privilege or the anti-SLAPP statute (which only covers statements made in connection with official proceedings on public issues). Furthermore, even statements to the court, while not actionable via defamation, can be evidence of malice and are addressed via the other torts. The main concern here is that Plaintiff's pleading of defamation needs refinement. Plaintiff respectfully requests leave to amend Count III to clearly allege: (a) the exact false statements made by Defendant, (b) when, where, and to whom they were published, (c) why they are false, and (d) that they caused harm to Plaintiff's reputation (for example, Plaintiff has suffered personal humiliation and damage to his business prospects due to Defendant's spreading of false accusations). Given Plaintiff's pro se status when drafting, any omission in pleading with these specifics was not out of bad

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faith but lack of legal training. Florida courts favor permitting amendments in exactly this situation – where a potentially valid claim is inartfully pled. To be sure, if Plaintiff's defamation claim were exclusively based on statements made in the lawsuit, then Count III would be barred by privilege and the anti-SLAPP statute (which protects the right to petition) to the extent applicable. We will avoid that pitfall by focusing on statements outside the core litigation. For instance, the Complaint hints at a defamatory letter Defendant sent to the judge (which is privileged as it's part of the case), but perhaps Defendant also sent that letter or its contents to others or made unprivileged comments. The plaintiff will refine this. At this juncture, the Court need not dismiss the defamation claim with prejudice. The prudent course is to allow Plaintiff to re-plead it with the requisite detail and to exclude any privileged communications. Dismissal with prejudice would be too harsh when a short amendment can cure the deficiencies. Defendant suffers no prejudice by this, as he is fully aware of what statements he has made and can easily respond once they are properly articulated in the complaint. In summary, Plaintiff's defamation count, though thinly pled, can be made viable. Florida law provides that leave to

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amend should be freely given, especially for a first amendment and where the underlying facts might support relief. Therefore, the Plaintiff requests that, if the Court is inclined to dismiss Count III for insufficient detail, it do so without prejudice and with leave to amend. Alternatively, the Court can simply defer the ruling on the adequacy of Count III until Plaintiff files an amended complaint clarifying the claim. Plaintiff will allege, for example, that on or about [date], Defendant told [Third Party] that "Plaintiff stole money from me" (a false statement), and/or Defendant published the false claim that "Plaintiff doesn't pay his debts" to other business owners, etc. These kinds of allegations would squarely meet the elements of defamation and lie outside any privilege.

**D. Intentional Infliction of Emotional Distress (Count IV)**

Count IV asserts intentional infliction of emotional distress (IIED). To state an IIED claim under Florida law, Plaintiff must allege: (1) the defendant's conduct was intentional or reckless, (2) the conduct was outrageous in character, beyond all bounds of decency, (3) the conduct caused the plaintiff emotional distress, and (4) the emotional distress was severe. Defendant contends the Complaint's allegations are conclusory and that Defendant's alleged conduct (using legal processes) cannot be the

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basis of an IIED due to a “legal rights” privilege. Plaintiff acknowledges that IIED is a high threshold tort, reserved for truly egregious behavior. However, at the pleading stage, the Court should not summarily conclude that Plaintiff can prove no set of facts meeting that threshold. The Complaint, when read as a whole, describes a pattern of deliberate, malicious harassment by Defendant that transcends ordinary litigation conduct. Plaintiff essentially alleges that Defendant maliciously dragged him through a baseless lawsuit, lied and cheated in the process, smeared his reputation, and exploited the courts to inflict maximum emotional and financial pain – all with the intent to cause Plaintiff extreme distress. Being unjustly sued and threatened with a judgment one does not owe, accompanied by personal attacks, can indeed cause severe emotional turmoil. Plaintiff asserts that he has suffered profound anxiety, embarrassment, and depression as a result of Defendant's actions. These are real injuries. Addressing the elements:

**Intentional or Reckless Conduct:** Plaintiff plainly alleges that Defendant's actions were intentional and taken with knowing disregard of the high probability of causing distress. Defendant's entire course of conduct – filing a false claim, pursuing it vindictively, and continuing harassment

after judgment – was done “intentionally or recklessly” with respect to Plaintiff’s well-being. There is no benign explanation for Defendant’s behavior as alleged; it was calculated to harm.

**Outrageousness:** What counts as “outrageous” is often a question of law, but borderline cases are typically left for the jury. Florida follows the Restatement definition that the conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.” Plaintiff has described more than just a routine lawsuit – he describes abuse of legal process, defamation, and malicious prosecution rolled together. While one might argue that “merely” filing a lawsuit, even with ill motive, isn’t outrageous, it is the totality and malevolent abuse alleged here that could be deemed outrageous. Florida courts have noted that “the assertion of legal rights in a legally permissible manner” generally will not give rise to IIED liability. We agree with that principle – but crucially, Defendant’s conduct was not legally permissible. Filing a lawsuit, one knows is baseless is not a “legally permissible” act; it is an abuse of the legal system. Likewise, making false statements in court documents is not “legally permissible” simply because it occurs in litigation – perjury and misrepresentation to a court are sanctionable and

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outside legitimate advocacy. In short, Defendant cannot cloak himself in the “privilege” of using legal process when his use was illegitimate and abusive. The cases Defendant cites (e.g., *Canto v. J.B. Ivey & Co.*, 595 So.2d 1025 (Fla. 1st DCA 1992)) hold that one cannot be liable for IIED for merely insisting on one’s legal rights, even if doing so harshly. But here, Defendant’s “rights” (to sue and collect a debt) were pursued in bad faith and via wrongful means. Such conduct is not protected. This distinction is subtle but important: A creditor who lawfully and politely sues a debtor will not face IIED even if the debtor is upset; by contrast, someone who fabricates a claim and uses the courts to terrorize an innocent person could be liable for IIED because that is not a legitimate exercise of rights but rather a form of extreme harassment. Thus, we maintain that a jury could find Defendant’s conduct, as alleged, “outrageous.” It certainly should not be deemed acceptable as a matter of law at this stage.

**Causation of Emotional Distress:** Plaintiff has alleged that Defendant’s actions caused him severe emotional distress (the Complaint references the toll on Plaintiff’s mental state, the humiliation, etc.). It is entirely plausible that being on the receiving end of a malicious lawsuit and character assassination caused Plaintiff sleepless nights, humiliation in his

community, and fear for his financial security. We can further detail these emotional damages in an amended complaint (e.g., Plaintiff sought therapy, or suffered panic attacks – if such facts exist, we will plead them). For now, it suffices that Plaintiff claimed serious emotional harm.

**Severity:** Severe emotional distress means distress so substantial that no reasonable person should be expected to endure it. Again, given the alleged prolonged malicious conduct by Defendant, it is reasonable to infer Plaintiff's distress is severe. Being falsely accused and dragged through court can be devastating to one's psyche. Plaintiff has essentially lost trust in the justice system and in his personal reputation due to Defendant's actions, which is severe. To the extent more specificity is needed (like physical manifestations or medical treatment), the Plaintiff can amend to add that. But the absence of those details in the initial complaint is not fatal; severity can be inferred from the outrageousness if the allegations are believed.

In resisting this claim, Defendant leans on the idea that everything he did was within his legal rights (filing a lawsuit, enforcing a judgment) and thus cannot be "outrageous." As explained, that argument fails because Plaintiff alleges those acts were shamed done with the intent to harm. If one accepts



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Plaintiff's allegations as true (which we must, at this stage), then Defendant essentially weaponized the judicial process to emotionally torment Plaintiff. That goes beyond all bounds of decency for an ordinary citizen. The courts must be open to people with real disputes, not as instruments of personal vendetta. Using a lawsuit as a personal weapon is not decent or permissible. It is noteworthy that Plaintiff's IIED claim is largely derivative of the other torts – meaning, if he proves malicious prosecution, abuse of process, or defamation, the same facts support the outrage element. Some courts disallow IIED as a separate count if it's entirely duplicative. However, others permit it as an alternative theory of recovery for emotional damage not fully addressed by the other counts. We are prepared to refine or even withdraw the IIED count at a later stage if it appears redundant. But at pleading, there is no rule against pleading it in the alternative. We emphasize that at minimum Plaintiff should be allowed an opportunity to develop evidence on the impact and extreme nature of Defendant's conduct. Dismissing the IIED claim now would be premature. For instance, through discovery, we might uncover emails or messages where Defendant explicitly states he wants to "make [Plaintiff] suffer" or other evidence of outrageous intent. That would cinch the IIED claim.

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Without discovery, Defendant's intent and the full context are not before the Court. If the Court finds Count IV too generally pled, Plaintiff asks for leave to amend. We can add more "ultimate facts" — e.g., that Defendant's actions were done in such a way as to maximize embarrassment (perhaps scheduling depositions on Plaintiff's birthday, as a hypothetical example, or confronting Plaintiff publicly at his place of work about the lawsuit). We can also particularize Plaintiff's emotional distress (e.g., "Plaintiff has experienced severe anxiety requiring medical attention, directly attributable to Defendant's relentless harassment"). Such details will bolster the claim. In conclusion, Count IV should not be dismissed with prejudice. Plaintiff has a colorable IIED claim malicious abuse of litigation can qualify as extreme and outrageous, especially when done with the ulterior motive to inflict emotional harm. Florida law does not immunize malicious litigants from accountability simply by labeling their conduct "legal." If the conduct is proven as Plaintiff alleges, a jury could find it beyond the bounds of decency. Therefore, the motion to dismiss Count IV should be denied, or Plaintiff given leave to replead it with additional supporting facts.

### **III. Defendant Andrade is Properly Sued in His Individual Capacity; No Indispensable Party Omission Warrants Dismissal**

Defendant contends that Plaintiff failed to join an “indispensable party,” pointing to STR Sunrise Truck Repair LLC d/b/a Union Motor Sports (the business entity associated with Defendant). Defendant argues the Complaint “centers around” this LLC yet does not name it as a defendant, rendering the pleading defective. This argument is unavailing. Mr. Andrade himself is properly sued as the sole defendant, and any issue of the LLC’s involvement can be handled without dismissing the case. First, as a factual matter, Plaintiff’s claims do center on Mr. Andrade’s conduct. While Mr. Andrade may have acted through a company name (perhaps the small claims suit was filed under the LLC’s name or trade name), the wrongs alleged – filing a malicious lawsuit, making false statements, abusing process – were all directed and performed by Mr. Andrade. Florida law is clear that a corporate officer or agent who personally participates in a tort can be held personally liable, even if he was acting on behalf of a corporate entity. “All that needs to be alleged is that the agent or officer

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personally participated in the tort, even if the complained-of action was because of and entirely within the scope of his or her employment.”. Here, Plaintiff has alleged that Mr. Andrade personally committed wrongful acts (he is not being sued vicariously for someone else’s conduct; he is the primary actor). Therefore, Mr. Andrade’s individual liability is well-founded in law. The LLC was merely an instrument or alias he used. Florida does not allow individuals to hide behind a corporate entity to avoid tort liability for their own misconduct. (See, e.g., Vesta Constr. v. Lotspeich, 974 So.2d 1176, 1183 (Fla. 5th DCA 2008), quoting the above principle that a corporate employee can be individually liable for his torts). Second, the LLC is not truly “indispensable” to adjudicate this case. An indispensable party is one whose interest is such that no final resolution can be had without either affecting that interest or risking inconsistent obligations. Here, what is LLC’s interest? If the LLC was the nominal plaintiff in the prior suit, it might also be liable for malicious prosecution as an entity. But Plaintiff has chosen (for now) to seek recovery from Mr. Andrade personally. Plaintiff is master of his complaint and may choose to pursue one joint tortfeasor and not another. Florida law does not require all joint tortfeasors to be named in one lawsuit. The absence of the LLC does

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not prevent the Court from determining Mr. Andrade's liability; nor does it subject Mr. Andrade to a risk of double or inconsistent obligations (he is the one being sued, and if the LLC later were sued separately, those would be separate liabilities – also Mr. Andrade likely controls the LLC, so no conflict in interests). In short, complete relief (an award of damages to Plaintiff) can be achieved between the existing parties (Plaintiff and Mr. Andrade) without the LLC. Mr. Andrade is fully capable of satisfying any judgment (and if he chooses, he could seek contribution from his LLC or insurer, but that's his issue). Furthermore, to the extent the LLC may be considered a "necessary" party, the remedy is joinder, not dismissal. Florida Rule of Civil Procedure 1.250 explicitly provides that misjoinder or nonjoinder of parties is not a ground for dismissal of an action. Parties may be added by the Court at any stage on terms that are just. If this Court determined that Union Motor Sports LLC must be in the case to afford complete relief or to bind it to the results, the Court could simply order its joinder or allow Plaintiff to amend the complaint to add it. Plaintiff has absolutely no objection to adding the LLC as a defendant if the Court deems it appropriate. There is certainly no prejudice to Defendant in doing so – Mr. Andrade obviously is aware of his own company's role, and

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presumably the same counsel would represent the company. The LLC's presence would mainly be a formality, since Mr. Andrade's actions and the company's actions are one and the same in this context. Defendant cites Rule 1.140(b)(7) (failure to join indispensable party) as grounds for dismissal. But courts rarely dismiss outright on that basis, especially when the missing party can be easily added. Dismissal is a last resort if a party is truly indispensable and cannot be joined (for example, if adding them destroys jurisdiction or they are beyond jurisdiction of the court). Here, there is no obstacle to joining the LLC – it is a Florida company presumably, subject to this Court's jurisdiction. So even if it is indispensable (which we maintain it is not), the proper course is to join it, not to throw out the case. Dismissing with prejudice for lack of an LLC would be legal error. In summary, Mr. Andrade is properly sued in his individual capacity because he personally engaged in the alleged tortious conduct. The LLC is at most a joint tortfeasor or alter ego. Its absence from the caption does not cripple the case. Florida law does not mandate dismissal due to a missing defendant – “Misjoinder of parties is not a ground for dismissal of an action.”

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This aligns with the strong policy of resolving cases on their merits rather than procedural technicalities. If the Court believes the LLC should be added to ensure all parties are bound by the judgment or to provide Plaintiff with complete relief, Plaintiff is ready and willing to amend to add the LLC. The plaintiff could also amend to plead explicitly that Mr. Andrade was acting through the LLC such that liability is shared (under a theory of agency/alter ego). These are amendable matters. Therefore, Defendant's "indispensable party" argument does not warrant dismissal. At most, it warrants a directive to amend. But given that Mr. Andrade's personal liability is independent of the LLC's, we urge the Court to simply proceed with Mr. Andrade as a proper defendant. The Motion to Dismiss on this ground should be denied. (As an aside, Defendant also noted a formatting issue: that the Complaint's paragraphs were not numbered. While technically pleadings should have numbered paragraphs (Fla. R. Civ. P. 1.110(f)), this is a minor, non-prejudicial defect easily curable by amendment. Courts do not dismiss actions with prejudice over such format issues. The plaintiff will, of course, renumber and properly format the complaint if required. This minor issue should not distract from the substantive sufficiency of the claims.)

**IV. The “Frivolous Litigation” Accusation is Unfounded –  
Plaintiff Has a Good-Faith Basis for Each Claim, and  
Defense Counsel’s Tactics are Improper**

Defendant’s motion goes beyond legal arguments and accuses Plaintiff of engaging in frivolous, bad-faith litigation. Defendant even requests attorney’s fees and asserts that amendment would be futile. Plaintiff strongly rejects the characterization of his lawsuit as frivolous. All four causes of action he asserts are recognized by Florida law, and as demonstrated above, the complaint (especially if amended as offered) contains ample factual allegations to support each. A claim is only frivolous if it has no basis in fact or law. Here, there is a clear factual basis: the prior lawsuit and Defendant’s conduct in relation to it. There is also a clear legal basis: the longstanding torts of malicious prosecution, abuse of process, defamation, and IIED, which have been sustained in similar contexts by Florida courts. Thus, Defendant’s insinuation that Plaintiff is misusing the court is ironic – in truth, Plaintiff is seeking justice for a wrong. It appears Defendant’s counsel is attempting to intimidate Plaintiff (who has been pro se) by threatening sanctions and painting this case in a



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false light. Florida encourages citizens to use the courts for redress of grievances (see Fla. Const. art. I, §21, guaranteeing access to courts). Just because Plaintiff lost the first case does not strip him of the right to sue for tort damages if the first case was wrongfully brought. If anything, Defendant's counsel's motion – which misstates the nature of Plaintiff's claims – verges on bad faith. For example, counsel repeatedly calls this suit a “collateral attack” knowing that malicious prosecution is a well-established separate cause of action, not an attack on the judgment. This mischaracterization is an attempt to mislead the Court into thinking Plaintiff is doing something impermissible, when he is not. The Court should see through that. Moreover, counsel's insistence that any amendment would be “futile” is flatly incorrect given the discussion above. Florida's liberal amendment policy expects that one amendment, at least, should be allowed unless it is clear no facts exist that could state a claim. Here, we have shown how, with slight modifications, Plaintiff's pleading can unquestionably meet all requirements. There is nothing “futile” about adding detail on the defamation statements or including the LLC or finalizing the malicious prosecution after appeal. By asking for dismissal with prejudice at this early stage, Defendant is effectively asking the Court

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to slam the courthouse door on Plaintiff without ever reaching the merits. That outcome would be contrary to Florida law and basic fairness. As the First DCA recently reiterated, “a trial court should grant leave to amend, rather than dismiss a complaint with prejudice, unless the privilege to amend has been abused, amendment would prejudice the opponent, or the complaint is clearly not amendable.”. None of those exceptions apply here – Plaintiff has not yet amended at all, Defendant would suffer no legal prejudice from an amendment (other than having to defend on the merits), and we have shown the complaint is amendable. Thus, any request to be dismissed with prejudice and for fees is overreaching. To the extent Defendant’s counsel has served a Fla. Stat. §57.105 safe-harbor motion (which was alluded to in correspondence), Plaintiff assures the Court that he has conducted a reasonable factual investigation and research and believes his claims are supported by material facts and current law (or a good-faith argument for extending the law). Plaintiff’s position is far from the 57.105 threshold of complete absence of justiciable issue. In fact, the Florida Supreme Court itself recognizes the viability of malicious prosecution claims stemming from prior litigation. Abuse of process

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claims have been upheld when evidence showed a lawsuit was used for an ulterior purpose. Even defamation and IIED have their place in egregious cases. Therefore, any motion for sanctions would itself lack merit. The Court should not entertain the Defendant's fee request, as Plaintiff's case is brought in good faith. On the contrary, if anyone is misusing the legal process at this juncture, it is Defendant's counsel by seeking an improper preemptive adjudication of factual matters (like probable cause and malice) on a motion to dismiss, and by asking for fees in a motion to dismiss without basis. The Court has the inherent authority to award fees against a party who acts in bad faith. While Plaintiff hopes that will not be necessary, he notes that accusing a pro se litigant of frivolousness to deter him from pursuing a legitimate claim could be viewed as bad-faith conduct. We simply request the Court be aware of the context: Plaintiff prevailed on certain motions in the underlying case and strongly believes he was wronged by Defendant; he is not filing this suit out of spite but out of a genuine desire for justice. Pro se litigants are entitled to have their pleadings construed liberally and to be heard on the merits whenever possible. Counsel's tactic of smearing Plaintiff's complaint as frivolous is an attempt to short-circuit that right. In resolving this motion, Plaintiff asks

the Court to remain mindful of Florida's policy of resolving cases on their merits. The detailed arguments above show Plaintiff's claims are far from frivolous – they invoke substantial legal principles worthy of adjudication. Dismissing them at inception would be a miscarriage of justice given the available remedies of amendment or abatement for any minor issues. The Court should deny the motion, caution that allegations of frivolousness are unwarranted at this stage and allow the case to move forward. (If Defendant's counsel persists in baselessly labeling this case as a shame, Plaintiff reserves the right to seek appropriate relief, including Rule 1.150 (Motion to Strike scandalous matter) or even reciprocal sanctions under §57.105 for a frivolous fees request. However, we do not press that here, preferring to focus on getting to the merits.)

### **Misconduct and Legal Violations by Antonio Andrade's Attorney**

Antonio Andrade's attorney is now attempting to argue that the lawsuit against Andrade should include Andrade's LLC. However, this argument contradicts the fact that Antonio himself chose to personally sue Marcio Sousa Sales Sr., not LLC, in the initial lawsuit. This is a clear manipulation of the judicial process and a violation of professional ethics.

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Antonio Andrade's lawsuit contains multiple fatal errors, including:

Naming the Wrong Defendant – The lawsuit was filed against Marcio Sousa Sales Sr., but all the factual allegations in the complaint pertain to the LLC owned by Marcio Luis Sales Jr.

Failure to Serve the Correct Party – Antonio failed to serve the registered agent of the LLC, which is required under Florida Statute § 48.062(1).

Procedural Due Process Violation – The court conducted a trial against the son, but the final judgment was entered against the father, violating Florida's fundamental due process requirements.

**Judicial Errors and Bias** – The trial court judge acknowledged the errors but still proceeded to enforce the wrongful judgment, including forcing Marcio Sousa Sales Sr. to submit financial disclosure forms under the threat of contempt. Contradictory Positions Taken by Antonio Andrade – Antonio is now contradicting his own legal claims by arguing that both the father and son should be liable, despite knowing that he failed to sue the proper entity.

Antonio Andrade's attorney has no basis to now argue that the lawsuit should have been filed against an LLC. The responsibility to name the

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correct defendant was solely on Antonio, and his failure to do so is a legal malpractice issue, not an issue for the court to correct post-judgment.

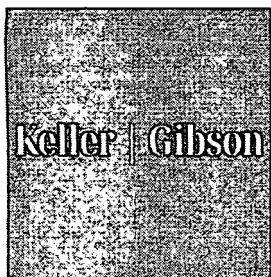
Additionally, the attorney's attempt to intimidate and harass a pro se litigant is an ethical violation and an abuse of legal process. The Florida Bar has strict rules prohibiting attorneys from using their position to mislead or bully self-represented individuals.

### **V. Conclusion**

For the foregoing reasons, Plaintiff respectfully requests that the Court DENY Defendant's Motion to Dismiss in its entirety. This Court does have jurisdiction over Plaintiff's claims, and each count of the Complaint states a cognizable cause of action (or can do so with modest amendment). Defendants' arguments misstate the law and overlook the well-pled factual allegations that must be taken as true at this stage. In the alternative, should the Court find any pleading deficiencies, the Plaintiff requests leave to file an Amended Complaint to address them, rather than a dismissal with prejudice. Florida law favors amendments so that cases may be decided on the merits, and the Plaintiff is prepared to promptly clarify any allegations

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as directed by the Court. There is no undue prejudice to Defendant in allowing one amendment, especially given that the case is in its infancy and no discovery has taken place. The plaintiff has brought this action in good faith to seek redress for genuine wrongs he believes Defendant committed through prior litigation. He asks for the chance to prove his case. Defendant's motion seeks to foreclose that opportunity by mischaracterizing this lawsuit as something it is not. Plaintiff trusts that the Court, upon reviewing this response, will recognize that his claims are grounded in established law and factually supported, and that he should be allowed to pursue them. WHEREFORE, Plaintiff prays that Defendant's Motion to Dismiss be **DENIED**. Plaintiff also requests any further relief the Court deems just and proper, including, if appropriate, an award of fees to Plaintiff should the Court find that Defendant's motion was filed without merit solely to harass (as arguably evidenced by the baseless "futile to amend" stance). At a minimum, Plaintiff asks the Court to permit him to amend the Complaint to cure any issue the Court finds meritorious in Defendant's motion, rather than dismissing any part of his case. Plaintiff is confident that once the procedural sparring is over, the evidence will



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March 14, 2025

Sent by email to: [unionmoving@hotmail.com](mailto:unionmoving@hotmail.com) and [info@legalhelp4u.com](mailto:info@legalhelp4u.com)

Sent by USPS First class mail, and by certified mail, return receipt requested to:

Marcio Sousa Sales  
22187 Aquila Street  
Boca Raton, FL 33528

Case No. 50-2025-CA-000969-XXXXA-MB  
Case Name: Marcio Sousa Sales V. Antonio De Andrade

Re: Formal demand pursuant to Fla. Stat. § 57.105 to dismiss your complaint with prejudice.

Dear Mr. Sales,

This Law Firm represents Antonio De Andrade in the above-mentioned matter. For your review, and pursuant to Fla. Stat. § 57.105, we have the enclosed motion entitled "Defendant Antonio De Andrade's Motion for Sanctions for Raising Frivolous Claims Unsupported in Law and Fact Directed to Plaintiff Marcio Sousa Sale", which we will file if your case is not dismissed with prejudice within 21 days.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Seth R. Keller", written over a large, diagonal watermark that says "NOT A CERTIFIED COPY".

---

SETH R. KELLER, ESQ.

**Enclosures:** As stated herein



**From:** Seth Keller  
**To:** unionmoving@hotmail.com; Legal Help LLC  
**Cc:** Maribel Rosado  
**Subject:** SERVICE OF COURT DOCUMENT CASE NUMBER 502025CA000969XXXAMB SALES, MARCIO SOUSA - DE ANDRADE, ANTONIO  
**Date:** Friday, March 14, 2025 1:47:27 PM  
**Attachments:** 57.105 packet.pdf

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Good afternoon

Attached please find our letter and copy of our motion pursuant to Fla. Stat. § 57.105.

Regards,

**Notice of Service of Court Documents**

**Service Information**

**Service Time:** 03/14/2025 12:44 pm PM ET  
**Served from:** Seth R Keller 954-999-5769, counsel for Defendant  
**Court:** Fifteenth Judicial Circuit in and for Palm Beach County, Florida  
**Case #:** 502025CA000969XXXAMB  
**Court Case #:** 50-2025-CA-000969-XXA-MB  
**Case Style:** SALES, MARCIO SOUSA - DE ANDRADE, ANTONIO

**Documents** COVER LETTER AND DEFENDANT ANTONIO DE ANDRADE'S MOTION FOR SANCTIONS FOR RAISING FRIVOLOUS CLAIMS UNSUPPORTED IN LAW AND FACT DIRECTED TO PLAINTIFF MARCIO SOUSA SALES

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Keller Gibson, PLLC  
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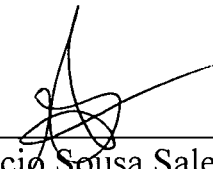
Plaintiff's Response in Opposition to Defendant's Motion to Dismiss

substantiate his claims and justice will be done. He respectfully asks for his day in court on these claims.

Marcio Sousa Sales  
Plaintiff, Pro Se  
160 W Camino Real, 102  
Boca Raton, FL 33432  
Phone Number: (561) 770-8909  
Email Address: [info@legalhelp4y.com](mailto:info@legalhelp4y.com)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Plaintiff's Response in Opposition to Defendant's Motion to Dismiss was served on Antonio de Andrade, at his e-mail [tjlmable@yahoo.com](mailto:tjlmable@yahoo.com) as well his attorney [seth@kellergibson.com](mailto:seth@kellergibson.com) on this March 19, 2025.

  
\_\_\_\_\_  
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