

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

MARK ANTHONY BURK,

Plaintiff,

v.

**CNN CABLE NEWS NETWORK LLLP. CNN
Delaware Corporation
TURNER BROADCAST SYSTEMS
TIME WARNER AOL. CNN
INTERNATIONAL
DOES 1-20**

Defendants.

Case No. 14-CV-1930 (FAB)

**DEFENDANT CABLE NEWS NETWORK, INC.'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT
AND INCORPORATED MEMORANDUM OF LAW**

**TO THE HON. FRANCISCO A. BESOSA
UNITED STATES DISTRICT JUDGE:**

Pursuant to Rule 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendant Cable News Network, Inc. ("CNN"), incorrectly named in the Complaint as "CNN Cable News Network LLLP.CNN," respectfully moves this Court for an order dismissing Plaintiff Mark Anthony Burk's Complaint for Defamation. (Dkt. No. 2). CNN, a Delaware corporation with its principal place of business in Atlanta, Georgia, is not subject to general or specific jurisdiction in this Court for the claims alleged in Plaintiff's Complaint, which arise from an event that occurred entirely outside of Puerto Rico. Plaintiff's Complaint may be dismissed on that ground alone.¹ For that reason, CNN files the instant Motion without

¹ In addition to CNN, Plaintiff's Complaint also names as defendants "Turner Broadcast Systems," "Time Warner AOL," and "CNN International." There are no active or inactive legal entities related to or affiliated with CNN that have the names "Turner Broadcast Systems," "Time Warner AOL" or "CNN International." The proper names of

voluntarily submitting itself to the jurisdiction of this Court.

Additionally, as an alternative ground for dismissal, the Court may dismiss Plaintiff's Complaint with prejudice because Plaintiff has failed to state a claim upon which relief can be granted. The statements that form the basis of Plaintiff's Complaint are not of and concerning him, were not made by CNN, and those that were made by CNN are a fair and true report of Plaintiff's well-documented history of domestic violence and vexatious litigation in the California courts.

I. THE COURT LACKS PERSONAL JURISDICTION OVER CNN

A. Facts Relevant To The Lack Of Jurisdiction Over CNN

CNN is organized under the laws of the state of Delaware and maintains its principal place of business in Atlanta, Georgia. (*See* Declaration of Michelle Hylton, dated March 17, 2015, attached as Exhibit ("Ex.") A, ¶ 3). CNN is not registered to conduct business in Puerto Rico. (*Id.* at ¶ 4). It does not maintain an office, any business operations, or employees in Puerto Rico. (*Id.* at ¶¶ 4-7). It has no mailing address, bank accounts or property in Puerto Rico. (*Id.*). CNN has no other lawsuits pending in Puerto Rico. (*Id.* at ¶ 8).

Plaintiff is the ex-boyfriend of model Beverly Johnson. (Dkt. No. 2, ¶ 5). In December 2014, in the course of reporting on Ms. Johnson's allegations against comedian Bill Cosby, a CNN reporter interviewed Plaintiff over the telephone. (Dkt. No. 2, ¶¶ 5-7). After further investigating Plaintiff in the course of news-gathering, CNN ultimately decided not to use any part of Plaintiff's interview in its news report on Ms. Johnson's allegations. (*See* Dkt. Nos. 2-1 and 2-2).

each of these entities is Turner Broadcasting System, Inc., Time Warner, Inc., and Cable News International, Inc. However, Plaintiff's Complaint contains no allegations against any of these entities and none have been served with a Summons and Complaint. (*See* Declaration of Michelle Hylton dated March 17, 2015 attached as Exhibit A, ¶ 14). For these reasons, "Turner Broadcast Systems," "Time Warner AOL," and "CNN International" should also be dismissed from this suit.

Plaintiff's claims against CNN in this case arise, not from CNN's telephone call with him, but from a correspondence exchange between an attorney for CNN in Atlanta, Georgia, and an attorney for Mr. Cosby in Los Angeles, California, concerning CNN's editorial decision not to include Plaintiff's statements in its news report. (*See* Dkt. Nos. 2, 2-1, 2-2). Plaintiff alleges the information CNN's attorney provided to Mr. Cosby's attorney about Plaintiff during that exchange obtained from California court records defamed him. (*See id.*). Plaintiff was not a party to the correspondence exchanged between the attorneys for CNN and Mr. Cosby. (Dkt. Nos. 2-2 and 2-3). CNN did not transmit its letter to Puerto Rico. (Ex. A, ¶ 9). Plaintiff became aware of the communications between the attorneys only after they were obtained and published by TMZ.com—an entity that is not a party to this lawsuit. (Dkt. No. 2, ¶ 11).

B. Plaintiff's Burden To Establish Jurisdiction

A plaintiff bears the heavy burden of establishing that the court has personal jurisdiction over a non-resident defendant, like CNN in this case. *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). To meet this burden, a plaintiff must proffer evidence that, if credited, will support findings as to every fact required to make a showing that the exercise of personal jurisdiction over the out-of-state defendant is authorized by the forum's long-arm statute and the Due Process Clause of the Constitution. *Id.*; *Swanson v. Coffeen*, 952 F. Supp. 2d 390, 393 (D.P.R. 2013). The Due Process Clause protects non-residents from being hauled into courts in states where they have "established no meaningful 'contacts, ties or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319). In this case, Plaintiff has alleged no basis for the exercise of personal jurisdiction over CNN in his Complaint. (*See* Dkt. No. 2, ¶¶ 1-2). Indeed, there is none. CNN, a

foreign corporation, is not subject to this Court's jurisdiction for an allegedly defamatory communication that occurred outside of Puerto Rico between two out-of-state parties.

C. The Court Does Not Have General Jurisdiction Over CNN

General jurisdiction should only be asserted where there is a sense of "home." *Goodyear v. Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. —, —, 131 S.Ct. 2846, 2853-54 (2011). "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *Id.* at 2853-54. CNN is not "at home" in Puerto Rico.

Last year, in *Daimler AG v. Bauman*, the U.S. Supreme Court clarified that absent exceptional circumstances, a corporation is "at home" *only* at its place of incorporation or its principal place of business. 134 S.Ct. 746, 760 (2014). Simply operating a business or having a subsidiary in the forum state does not suffice to establish the "continuous and systematic" contacts necessary to make a corporation "at home" for purposes of general jurisdiction. *Id.* at 760-61 (holding that a formulation that would approve the exercise of general jurisdiction in every state where a corporation "engages in a substantial, continuous, and systematic course of business" would be "unacceptably grasping"). *See also Goodyear*, 564 U.S. at —, 131 S.Ct. at 2853-54, 2857 (holding no general jurisdiction where out-of-state defendant corporation was not registered in the forum state, had no offices, employees, or bank accounts in the forum state, and did not design, manufacture, or advertise their products in forum state).

In this case, Plaintiff cannot dispute that CNN is "at home" in Delaware, where it is incorporated, and in Atlanta, Georgia, where it has its principal place of business—not Puerto Rico. (Dkt. No. 2, ¶ 4; Ex. A, ¶ 3). Plaintiff makes no allegation in the Complaint, nor could he, that CNN has any "continuous and systematic" business contacts in Puerto Rico that would

permit the Court to entertain this suit for claims which arose entirely outside of Puerto Rico. As a result, CNN is not subject to this Court's general jurisdiction.

D. The Court Does Not Have Specific Personal Jurisdiction Over CNN

"A court may exercise specific personal jurisdiction over a defendant when the forum state has a long-arm statute that authorizes jurisdiction over the defendant and the defendant 'has certain minimum contacts with [the forum] such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Rivera-Olivera v. Antares Oil Servs., LLC*, 957 F. Supp. 2d 119, 124 (D.P.R. 2013), *appeal dismissed* (Apr. 23, 2014) (quoting *Int'l. Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (citations omitted) (internal quotation marks omitted)).

In relevant part, Puerto Rico's long-arm statute allows for the court to exercise jurisdiction over a non-resident defendant if the action or claim arises because *inter alia* the defendant:

- (1) transacted business *in* Puerto Rico personally or through an agent; [or]
- (2) participated in tortious acts *within* Puerto Rico personally or through his agency.

T. 32 Ap. III, Rule 4.7 (emphasis added). "Puerto Rico's long-arm statute provides personal jurisdiction to the full extent of constitutional authority, and, therefore, the Court proceeds to the due process analysis." *Rivera-Olivera*, 957 F. Supp. 2d at 124 (internal quotations and citations omitted). In the First Circuit, the constitutional analysis for specific jurisdiction considers three factors: relatedness, purposeful availment, and reasonableness. *Platten v. HG Bermuda Exempted Ltd.*, 437 F.3d 118, 135 (1st Cir. 2006). "An affirmative finding on *each* of the three elements of the test is required to support a finding of specific jurisdiction." *Phillips Exeter Academy v. Howard Phillips Fund*, 196 F.3d 284, 288 (1st Cir. 1999) (emphasis added). In this case, all

three elements militate towards a finding that CNN is not subject to specific personal jurisdiction in Puerto Rico.

1. Relatedness

Relatedness considers whether the lawsuit arises directly out of the defendant's contacts with the forum state. It requires a "nexus" between the defendant's contacts with Puerto Rico and the Plaintiff's injury "such...[that] the litigation itself is founded directly on those activities." *Mass. Sch. Of Law at Andover v. Am. Bar. Ass'n*, 142 F.3d 26, 34 (1st Cir. 1998).

In this case, the only alleged contact CNN had with Puerto Rico was a telephone conversation between a CNN reporter outside of Puerto Rico and Plaintiff some time before CNN's attorney sent the allegedly defamatory letter to Mr. Cosby's attorney. (Dkt. No. 2, ¶¶ 5-7). Plaintiff's allegations in this case, however, are not founded on the telephone call. They are founded on a letter sent by a CNN attorney in Atlanta to Mr. Cosby's attorney in Los Angeles—an event that occurred entirely outside of Puerto Rico. (Dkt. No. 2, ¶¶ 14-33; Dkt. No. 2-2). *See Swanson*, 952 F. Supp. at 390 (holding that specific jurisdiction was improper where the alleged defamation occurred outside of Puerto Rico).

2. Purposeful Availment

A court may exercise jurisdiction over a defendant, when among other things, the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Cossaboon v. Maine Med. Ctr.*, 600 F.3d 25, 32 (1st Cir. 2010). The defendant must engage in purposeful acts such that it "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). This ensures that a defendant will not be subjected to personal jurisdiction on the basis of "random, fortuitous, or attenuated contacts" or "the unilateral activity

of another party or a third person.” *Burger King*, 471 U.S. at 475 (internal quotation marks and citations omitted). The two cornerstones of purposeful availment are foreseeability and voluntariness. *Rodriguez v. Fullerton Tires Corp.*, 937 F. Supp. 122, 128 (D.P.R. 1996) *aff’d*, 115 F.3d 81 (1st Cir. 1997) (finding court lacked specific jurisdiction over defendants located in California that manufactured product that gave rise to cause of action in Puerto Rico).

Here again, Plaintiff has put forth no evidence that CNN voluntarily established contacts in Puerto Rico such that it was foreseeable it would be sued there. CNN has negligible, if any contacts with Puerto Rico.

- CNN is not organized under the laws of Puerto Rico; its principal place of business is not in Puerto Rico (Ex. A, ¶ 3);
- It is not registered to conduct business in Puerto Rico, nor does it have a parent company or joint venture relationship in Puerto Rico (*Id.* at ¶¶ 4, 7);
- CNN does not maintain an office, employees, or conduct any business operations in Puerto Rico (*Id.* at ¶ 4);
- It has no mailing address, bank accounts or property in Puerto Rico. (*Id.* at ¶¶ 4-6); and
- CNN has no other legal actions pending in Puerto Rico (*Id.* at ¶ 8).

Indeed, as Plaintiff admits, the only contact he had with CNN in Puerto Rico was answering a phone call that came from Atlanta. (Dkt. No. 2, ¶¶ 5-7, 28, Ex. A, ¶ 10). That is not enough to establish personal jurisdiction over CNN for claims arising not from that telephone call, but from a letter between counsel for CNN and Mr. Cosby that was sent from Atlanta, Georgia to Los Angeles, California, not to Puerto Rico. (Ex. A, ¶ 9).² *See Inamar Inv., Inc. v.*

² In any event, even if the telephone call with a CNN reporter was related to the claims in this case, a single telephone call is not sufficient to establish jurisdiction over an out-of-state defendant. *See Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 211 (1st Cir. 1994) (defendant’s telephone call into forum state insufficient to create a nexus between plaintiff’s cause of action and defendant’s in-state activities to confer personal jurisdiction); *Weinstock v. Gannett, Inc.*, No. 1:00-CV-2935-ODE, 2001 WL 1147214, at *3 (N.D. Ga. June 20, 2001) (reporter

Lodge Props., Inc., 737 F. Supp. 12, 13–14 (D.P.R. 1990) (finding no purposeful availment by Colorado defendant where defendant's only contacts with Puerto Rico were "1) the mailing of a contract to [plaintiff], a resident of the forum, 2) the mailing of numerous communications related to the contract to an address in Puerto Rico unilaterally designated by plaintiff, and 3) the mailing of at least six additional communications in response to contacts initiated by plaintiff").

Additionally, CNN's general presence on the internet is not sufficient to confer personal jurisdiction over it, particularly in this case where the letter was not even published on the internet by CNN, but by TMZ.com—an entity which is not part of this lawsuit. (*See* Dkt. No. 2, ¶ 11; Dkt. No. 2-3). *See Ingeniador, LLC v. Interwoven*, 874 F. Supp. 2d 56, 64 (D.P.R. 2012) ("The maintenance of an interactive website, alone, is not sufficient to establish purposeful availment in any jurisdiction which has the internet."); *Advanced Ink Sys. Corp. v. Ink Half Price, Inc.*, No. CIV. 05-1899, 2007 WL 995287, at *3 n.5 (D.P.R. Mar. 30, 2007) (same).

3. Reasonableness

In considering the overall reasonableness of exercising jurisdiction, the Court balances the "Gestalt factors." *See Lee v. United Parcel Serv., Inc.*, 731 F. Supp. 2d 194, 199 (D.P.R. 2010) (citing *Cossaboon v. Maine Med. Ctr.*, 600 F.3d 25, 33 n. 3 (1st Cir. 2010)).

The Gestalt factors are: (1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.

CNN did not expect to be hauled into court in Puerto Rico. (Ex. A, ¶ 11). The alleged events giving rise to Plaintiff's claims in this case occurred in Atlanta. (Dkt. No. 2-2; Ex. A, ¶¶

who prepared allegedly defamatory story in Washington, D.C., was not subject to jurisdiction under state's long-arm statute where her only contact with the forum state was telephone calls).

9-10). The employees with relevant information and the documents relevant to Plaintiff's claim are at CNN's offices in Atlanta or New York; no one with relevant information is located in Puerto Rico. (Ex. A, ¶¶ 12-13). Indeed, other than affording Plaintiff a local forum in which to litigate, Puerto Rico has no connection to this case, and no interest in the defamation claims at issue here. CNN should not be forced to expend resources to have its employees and other witnesses travel thousands of miles to defend an action that does not relate to Puerto Rico.

Because, as set forth above, the Court cannot make an affirmative finding on even one of the three elements—*all three of which must be met*—to support a finding of specific jurisdiction over CNN, the Court may not exercise specific personal jurisdiction over CNN under Puerto Rico's long-arm statute, and, as a result, Plaintiff's Complaint should be dismissed.

II. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED BECAUSE HE HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST CNN

In the alternative, this Court should dismiss Plaintiff's claims with prejudice because Plaintiff has failed to state a claim upon which relief can be granted against CNN. At base, the Complaint arises from two statements that Plaintiff admits were published by TMZ.com—not CNN (*See* Dkt. No. 2, ¶¶ 15, 19; *see* Dkt. No. 2-3), one statement that is plainly about another person unrelated to Plaintiff (*Id.*, at ¶ 28; *see* Dkt. No. 2-2); and statements that arise from CNN's fair and true reporting of California court records establishing a lengthy history of domestic violence-related restraining orders against Plaintiff and at least two misdemeanor convictions arising from such violent conduct. (*Id.*, at ¶¶ 21, 26; *see* Dkt. No. 2-2). As discussed in detail below, none of the statements alleged in Plaintiff's Complaint are actionable as a matter of law, and, his Complaint should be dismissed with prejudice.

A. Facts Alleged In The Complaint And Readily Capable of Judicial Determination On This Motion

1. Plaintiff Mark Anthony Burk

Plaintiff is an unemployed golfer who has “oral agreements to pay back sponsors that in the past invested in future possibilities” with him, although “at this time the reward is not available.” (Dkt. No. 1, at 2). Plaintiff has a website where he promotes himself, www.markburk.com. (Dkt. No. 2, ¶ 29). He admits he had hoped that CNN would fly him on a “private jet to CNN headquarters in Atlanta Georgia,” (Dkt. No. 2, ¶ 23), and to one day have his own program on CNN “Bourdain Meets Burk” or “Surviving Golf.” (Dkt. No. 2, ¶ 30). He now alleges “that option is ‘off the table.’” (*Id.*). Instead, he is suing CNN for \$19 million in unspecified damages for statements that are not actionable. (Dkt. No. 2, at 12).³

2. Plaintiff’s Allegations Against CNN

Plaintiff alleges that he was defamed by a letter CNN’s counsel wrote to Mr. Cosby’s attorneys concerning CNN’s editorial decision not to use Plaintiff’s statements in their reporting of Ms. Johnson’s allegations and by TMZ.com’s reporting on that letter. (*See* Dkt. No. 2). As is readily ascertainable from the letter, which Plaintiff attached to the Complaint, it was drafted by CNN’s counsel to Mr. Cosby’s lawyers to respond to a letter from Mr. Cosby’s attorneys. (*See* Dkt. No. 2-2; *see also* Dkt. No. 2-1). The letter was subsequently obtained by TMZ and published on their website. (*See* Dkt. No. 2-3).

³In the second half of 2014, in addition to the instant suit, Plaintiff filed two other *pro se* lawsuits in the U.S. District Court for the District of Puerto Rico. On July 14, 2014, Plaintiff filed a *pro se* complaint against various parties alleging *inter alia* fraud, breach of oral or implied contract and intentional infliction of emotional distress arising from a failed reality show venture that would have featured Plaintiff. *See Burk v. Bald Bull Entertainment et al.*, Case No. 3:14-cv-01557 (Gelpi, J.). Plaintiff subsequently obtained counsel and filed an amended complaint in the matter. (*Id.*, Dkt. No. 11-1). He is seeking \$2.6 million in damages. (*Id.*). The case is pending. On November 5, 2014, Plaintiff filed another *pro se* complaint against the city of Bayamon and various city contractors for *inter alia* employment discrimination and intentional infliction of emotional distress. *Burk v. Prestamo et al.*, Case No. 3:14-cv-01807 (Domínguez, J.). He seeks to recover \$1.5 million in damages. (*Id.*). On January 7, 2015, the Court denied Plaintiff’s motion to appoint counsel. (*Id.* at Dkt. No. 28). The case is also pending.

CNN's letter to Mr. Cosby's counsel states in relevant part:

What you neglected to inform CNN about Mr. Burk was that he has a history of threatening and abusive behavior towards Ms. Johnson. Indeed, he is the subject of multiple restraining orders relating to her. This includes choking Ms. Johnson and even threatening to kill her, for which he pled guilty, was convicted and a criminal protective order was issued. Burk suggested to CNN that this conviction was subsequently vacated, but a review of the docket shows only that it was *affirmed* several months later. CNN even had a California attorney search the docket for anything that supported Burk's claim. No record of the conviction being vacated was found.

(Dkt. No. 2-2, at 2). Plaintiff alleges the statements concerning his threats to kill Ms. Johnson and his choking Ms. Johnson were made with "absolutely no proof or support." (Dkt. No. 2, ¶ 21). He also alleges that the facts that he "pled guilty" to threatening to kill Ms. Johnson, a "criminal protective order" issued, and the conviction upheld are facts CNN cannot prove "actually exist." (Dkt. No. 2, ¶ 26).

Plaintiff further alleges that the following statement in CNN's letter about the criminal history of another witness, Mr. Gible, defamed him: "And, like Mr. Burk, our research shows that Mr. Gible also has a criminal history. Indeed, he is a convicted felon." (See Dkt. No. 2-2, at 3). Plaintiff alleges that this statement is about him and that CNN was "without any facts" to make it. (Dkt. No. 2, ¶ 28).

Finally, Plaintiff alleges that the 1) labeling of Plaintiff as a "criminal," and 2) the statement that "CNN says Burk isn't credible because he filed a bogus lawsuit against Johnson for palimony," which, as evident from the Complaint and the story he attached to it, appeared in TMZ.com's story about the letter—not CNN's letter—are actionable against CNN. (Dkt. No. 2, ¶¶ 15, 19; Dkt. No. 2-3).

3. Court Records Detailing Plaintiff's Lengthy History Of Domestic Violence And Vexatious Litigation

Plaintiff's history of domestic violence and vexatious litigation against Ms. Johnson summarized in CNN's letter is well documented in California court records.⁴ These records confirm that the Superior Court of California issued at least two temporary restraining orders against Plaintiff and three permanent restraining orders as a result of his violent behavior toward Ms. Johnson.

- In March 2007, Ms. Johnson obtained a temporary restraining order against Plaintiff after he was alleged to have hit her, attempted to extort her, and threatened to kill her: "I have nothing to lose. I'll kill you and then kill myself." (Ex. B1-004-005, B1-010-012; *see* B2). After a hearing (*see* Ex. B3), the Superior Court entered a permanent restraining order requiring Plaintiff not to contact Ms. Johnson, and to stay 100 yards away from her at all times for five years. (*See* Ex. B4). The order was terminated on May 22, 2008. (*See* Ex. B5).
- In December 2008, Ms. Johnson obtained another temporary restraining order against Plaintiff after he was alleged to have "violently pushed [her] against the car in the garage," "grabbed [her] face with his hand, and squeezed [her] jaw and mouth," "put his hands around [her] throat," and "left bruises on [her] face." (Ex. C1-004; *see* C2). After a hearing (*see* Ex. C3), the Superior Court issued another permanent restraining order against Plaintiff again requiring he stay away from Ms. Johnson for five years. (*See* Ex. C4).

⁴ CNN submits with its Motion certified copies of court records detailing Plaintiff's violent and harassing history obtained from the Superior Court of California, County of Riverside. As discussed in detail below, the Court may properly consider these records on a motion to dismiss. *See infra* II.B.2.

- As discussed below, the Superior Court issued a third protective order following Plaintiff's conviction for making terrorist threats of death against Ms. Johnson. (Ex. C9-006-007).

Court records also demonstrate that Plaintiff was convicted of at least two misdemeanors.

- Plaintiff pled guilty to making terrorist threats of death against Ms. Johnson in January 2009. (Ex. C9-006-014). As a result of this misdemeanor conviction, Plaintiff was sentenced to probation, community service and to complete a domestic violence program, among other things. (C9-007). The Court further issued a criminal protection order requiring Plaintiff have no contact with Ms. Johnson. (*Id.*). Plaintiff's conviction was affirmed in 2010. (*See* Ex. E).⁵
- In January 2010, Plaintiff was found guilty of violating the restraining order against him by entering into Ms. Johnson's home, and calling her by telephone. (*see* Ex. C12).

Court records from the Superior Court of California also show that the court declared Plaintiff a vexatious litigant as a result of the litany of meritless litigation he pursued against Ms. Johnson and "prohibited [Plaintiff] from filing any new litigation *in propria persona* in the courts of California without approval of the presiding judge of the court in which the action is to be filed." (*see* Ex. C11; *see also* Ex. C6-C7). Even after being declared a vexatious litigant, Plaintiff attempted to pursue two additional actions against Ms. Johnson.

- Plaintiff filed a Palimony action in December 2009 seeking Ms. Johnson "provide for all of Plaintiff's support and need for the rest of his life in the same style and manner that was established during the parties' relationship consistent with [her]

⁵ On November 6, 2013, the Superior Court of California granted a post-conviction dismissal in this matter after Plaintiff's probationary period expired.

annual earning and accumulations,” and seeking \$5 million in damages. (*see* Ex. D1). The court ordered the action be dismissed unless Plaintiff posted a vexatious litigant bond, which he did not do and the action was dismissed. (*See* Ex. D2-D3).

- Plaintiff attempted to open proceedings to void the permanent restraining order Ms. Johnson obtained against him in January 2009 nearly two years after the court issued it and the request was denied. (*See* C13).

B. Applicable Standards

1. Rule 12(b)(6) Standard

A complaint that fails to state a claim upon which relief can be granted should be dismissed. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the complaint must contain sufficient facts to state a claim that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Santiago v. Santiago*, 731 F. Supp. 2d 202, 206 (D.P.R. 2010) *quoting* *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Iqbal*, 556 U.S. at 678 (*quoting* *Twombly*, 550 U.S. at 555).

Moreover, “[i]t is well established that affirmative defenses ... may be raised in a motion to dismiss an action for failure to state a claim.” *Estate of Alicano Ayala v. Philip Morris, Inc.*, 263 F. Supp. 2d 311, 316 (D.P.R. 2003) (*quoting* *Blackstone Realty LLC v. FDIC*, 244 F.3d 193, 197 (1st Cir. 2001)). The facts establishing an affirmative defense must: (1) be “definitively ascertainable from the complaint and other allowable sources of information,” and (2) “suffice to

establish the affirmative defense with certitude.” *Gray v. Evercore Restructuring L.L.C.*, 544 F.3d 320, 324 (1st Cir. 2008).

The Court may further dismiss a complaint filed *in forma pauperis*, like the instant one, if it determines the complaint is “frivolous or malicious” or “fails to state a claim on which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(i)-(ii). This occurs when a plaintiff’s factual contentions are clearly baseless, or the legal theory is indisputably meritless. *Potter v. Ledesma, et al.*, No. CIVIL 07-1060, 2009 WL 1767659, at *2 (D.P.R. June 19, 2009); *Villaran v. Soto*, 404 F. Supp. 2d 416, 418 (D.P.R. 2005) (dismissing complaint brought *in forma pauperis* where “the claim is based on such an indisputably meritless legal theory, no response could possibly cure it.”).

In this case, as discussed in detail below, Plaintiff’s claims against CNN for statements it did not publish, for a statement concerning another person unrelated to Plaintiff and for privileged fair and true reports of court records concerning Plaintiff fails to state a plausible entitlement to relief. For the same reasons, this meritless action may also be dismissed under 28 U.S.C. § 1915(e)(2)(B)(i)-(ii).

2. The Public Documents In Plaintiff’s Criminal And Civil Cases May Be Considered By The Court On A Rule 12(b)(6) Motion

The court documents from Plaintiff’s multiple criminal and civil cases are subject to judicial notice, and the Court may properly consider them on a motion to dismiss.⁶ Particularly relevant to Plaintiff’s claims, as detailed above are the following cases from the Superior Court of California, County of Riverside:

⁶ Matters subject to judicial notice include facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). Judicial notice may be taken at any stage of the proceeding. Fed. R. Evid. 201(d). The Court may take judicial notice of a given matter if requested by a party and supplied with the necessary information. Fed. R. Evid. 201(c)(2).

- *Johnson v. Burk*, Case No. INV 010815, Riverside County, Indio Branch (2007) (*See Ex. B*);
- *Johnson v. Burk*, Case No. INV 012815, Riverside County, Indio Branch (2008) (*See Ex. C*);
- *Burk v. Johnson*, Case No. INC 092189, Riverside County, Indio Division (2009) (*See Ex. D*);
- *The People of the State of California v. Burk*, Case No. 193973, Indio Superior Court (2009) (*See Ex. C9-006-014*); and
- *The People of the State of California v. Burk*, Case No. APP004737, Riverside County, Appellate Division (2010) (*See Ex. E*).

“It is well-accepted that federal courts may take judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand.” *Kowalski v. Gagne*, 914 F.2d 299, 305–06 (1st Cir. 1990) (upholding lower court’s decision to take judicial notice of uncertified copy of relevant court record); *E.I. Du Pont de Nemours & Co. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986) (taking judicial notice of a complaint filed in a state action); *Rodriguez v. Henry Schein, Inc.*, 813 F. Supp. 2d 257, 261–62 (D.P.R. 2011) (holding that Plaintiff’s administrative charge was a public record subject to judicial notice which would not convert a motion to dismiss to a motion for summary judgment); *Oquendo-Claudio v. Santander Fin. Servs., Inc.*, No. CIV. 10-2185, 2011 WL 5163319, at *2 n.5 (D.P.R. Oct. 31, 2011) (holding that records in the plaintiffs’ bankruptcy actions are official public records subject to judicial notice on a motion to dismiss). In this case, the court may properly consider the certified court records from the Superior Court of California, County of Riverside Court that were fairly and accurately reported by CNN concerning the multiple restraining orders and protective orders Ms. Johnson obtained against Plaintiff as a result of his violent behavior (*see Ex. B2; Ex. B4; Ex. C2; Ex. C4; Ex. C9-006-007*), his conviction for violating a protective order (*see Ex. C12*) and for making terrorist threats of death to Ms. Johnson (*see Ex. C9-006-014*), and the Court’s adjudication of Plaintiff as

a vexatious litigant (*see* Ex. C11).⁷

3. Plaintiff's Burden Under The First Amendment And Puerto Rico Law With Respect To Claims For Defamation

Under Puerto Rico law, in order to state a cause of action for defamation a Plaintiff must plead that the defendant (1) made a false and defamatory statement that is "of and concerning" the plaintiff, (2) in a negligent manner to another, and (3) that the statement caused real damage to plaintiff's reputation or honor. *Segarra Jimenez v. Banco Popular, Inc.*, 421 F. Supp. 2d 452, 458 (D.P.R. 2006) *aff'd sub nom. Segarra-Jimenez v. Banco Popular de Puerto Rico*, 235 F. App'x 2 (1st Cir. 2007); *see Santiago*, 731 F. Supp. 2d at 209-10 (granting motion to dismiss defamation claim where plaintiff made only conclusory allegations as to falsity and damages); *Caguas Satellite Corp. v. EchoStar Satellite LLC*, 824 F. Supp. 2d 309, 315 n.5 (D.P.R. 2011) (In order for plaintiff to state a claim, "the defamatory statement must be 'specifically of and concerning' the plaintiff.>"). To survive dismissal, the Plaintiff must plead factual allegations as to each element of the claim, conclusory "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" of defamation are not sufficient. *Santiago*, 731 F. Supp. 2d at 209-10 (internal quotation and citation omitted).⁸ Truth is an absolute defense in libel cases, regardless of the reasons for the publication. *Segarra Jimenez*, 421 F. Supp. 2d at 452 (noting that only statements that are actually false may create liability for defamation). The law does not require perfect accuracy, only that the publication be substantially true. *See Villaneuva v. Hernández Class*, 128 P.R. Dec. 618, 650 (1991).

⁷ A red seal from the Superior Court of California County of Riverside certifying the documents appears on the back of each court document filed with the Court.

⁸ Plaintiff's conclusory statements in this case that he has been "affected...as a person," (Dkt. No. 2, ¶ 20) and his reputation "ruined," (Dkt. No. 2, ¶ 24), are precisely the type of conclusory statements the court in *Santiago* held failed to meet a plaintiff's burden to plead real damages, and thus, failed to state a claim upon which relief can be granted.

The Puerto Rico Supreme Court has stated that Puerto Rico law on libel and slander follows the common law tradition. *See Aponte v. Calderon*, 284 F.3d 184, 197 (1st Cir. 2002) (dismissing defamation claims) *citing Villaneuva*, 128 P.R. Dec. at 646 (“Our libel and slander law—which follows the Anglo–Saxon common law....” and relying on decisions from both state and federal courts in the U.S.). Moreover, “[i]t is well established that libel falls within the purview of the First Amendment and is not merely a matter of state law.” *Rivera Rodriguez v. First Bank Puerto Rico*, 184 F. Supp. 2d 162, 165 (D.P.R. 2002). To this end, federal courts have recognized the importance of resolving defamation suits at the pleadings stage where possible. *See Adelson v. Harris*, 973 F. Supp. 2d 467, 481 (S.D.N.Y. 2013) (“Because a defamation suit ‘may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself,’ courts should, where possible, resolve defamation actions at the pleading stage.”); *see also Biro v. Conde Nast*, 883 F.Supp.2d 441, 457 (S.D.N.Y. 2012) (noting that there “is particular value in resolving defamation claims at the pleading stage”).

4. Puerto Rico’s Fair Report Privilege

Under Puerto Rico law, “[a] publication or communication shall not be presumed to be malicious when made . . . [i]n a *fair and true report* of a judicial, legislative, official or other proceeding, or of anything said in the course thereof.” 32 L.P.R.A. § 3144. A communication is “fair” if it “captures the substance of the proceeding measured by the nature and probable effect on the mind of the average reader and listener.” *Villanueva*, 128 P.R. Dec. at 647-48. (holding report of plaintiff’s arrest based on criminal report was a privileged fair and true report). It is “true” for purposes of the privilege if it “reflect[s] the truth of what happened or what was said in the course” of the subject proceeding. *Id.* “To be fair and true, a report need not be perfectly ‘accurate’; it suffices that it be a substantially accurate summary of the occurrence reported.” *Id.*

Moreover, information that is not actually true, and that is false and defamatory, is also protected by the privilege, so long as the communication is a fair and true report of the proceeding. *Id.* at 648.

“Where the defendant claims a privilege that appears on the face of the communication, such as the absolute privilege to report judicial proceedings, the court may resolve the case as a matter of law.” *See Gierbolini Rosa v. Banco Popular de Puerto Rico*, 930 F. Supp. 712, 717 (D.P.R. 1996) *aff’d sub nom. Gierbolini-Rosa v. Banco Popular De Puerto Rico*, 121 F.3d 695 (1st Cir. 1997). *See also, e.g., Schroeder v. De Bertolo*, 912 F. Supp. 23, 27 (D.P.R. 1996) (dismissing defamation claim arising from a privileged communication); *Boateng v. Inter Am. Univ.*, 190 F.R.D. 29, 32 (D.P.R. 1999) (same).

C. Statements That Form The Basis Of Plaintiff’s Complaint Are Not Actionable And The Complaint Should Be Dismissed

Plaintiff’s Complaint is rife with conclusory statements that fail to state a plausible claim for relief. Indeed, of the statements that form the basis of Plaintiff’s Complaint, the only two that he actually pleads are false—statements describing him as a “criminal” and his palimony lawsuit as “bogus”—were made not by CNN, but by TMZ.com, which is not a party to this suit. (*See* Dkt. No. 2, ¶¶ 15, 19; Dkt. No. 2-3). The other statement concerning another person CNN interviewed, Mr. Gobble, is not of and concerning Plaintiff, and therefore not actionable by him. (*Id.* at ¶ 28). Plaintiff pleads no facts concerning the actual falsity of the statements made by CNN in its letter to Mr. Cosby’s counsel based on information obtained from court records. (*Id.* at ¶¶ 21, 26; *see* Dkt. No. 2-2) Instead, he merely pleads that the statements in CNN’s letter were made in a “malicious manner” (Dkt. No. 2, ¶ 14) to “discredit and defame” him. (*Id.* at ¶ 18). Such conclusory allegations are not sufficient to meet his burden to state a claim under *Iqbal* or *Twombly*. *See supra* II.B.1. For these reasons, as explained in detail below, Plaintiff’s

complaint fails to state a claim upon which relief can be granted and it should be dismissed.

1. The statements in CNN's letter concerning Burk's history of restraining orders and threats to Ms. Johnson were fair, true and privileged reports of court records

The statements in CNN's letter concerning Plaintiff's lengthy and well-documented history of violence are fair and true reports of court records that are not actionable. Specifically,

Plaintiff alleges he was defamed by the following statement in CNN's letter:

[Plaintiff] is the subject of multiple restraining orders relating to Ms. Johnson. This includes choking Ms. Johnson and even threatening to kill her, for which he plead guilty, was convicted and a criminal protective order issued....a review of the docket shows only that [his conviction] was affirmed...

(Dkt. No. 2, ¶¶ 21, 26; Dkt. No. 2-2 at 2).

These statements are a privileged fair and true report of court records. As discussed above, the Superior Court of California issued multiple restraining orders requiring Plaintiff to stay away from Ms. Johnson. *See supra* at 12-13. Court records indicate that Ms. Johnson obtained at least three permanent restraining orders against Plaintiff, including one after he choked her (*see* Ex. C1, C4), and one after he pled guilty to threatening to kill her. (*see* Ex. C9-006-007). Court records further show that Plaintiff pled guilty to a misdemeanor charge of terrorist threat/death for threatening to kill Ms. Johnson and was convicted and sentenced on this charge. (*see* Ex. C9-006-014). His conviction was affirmed in a *per curiam* opinion of the Superior Court of California, Riverside County Appellate Division. (*see* Ex. E).⁹ There can be no doubt that CNN accurately captured the substance of these records in its letter.

Plaintiff's claim that CNN cannot prove the facts reflected in these court records "actually exist" cannot survive dismissal. As an initial matter, Plaintiff's dispute with the events

⁹ The California Superior Court's decision three years later to grant Plaintiff's petition for post-conviction relief, after he had served probation (*see supra* 13, at FN 5) does not alter the substantial truth of CNN's statement that he was convicted and that his conviction was affirmed.

reflected in these court records, or his disagreement with the court's actions as reflected in these records, does not make CNN's fair and true report of these records actionable. *See supra* at 18-19; *Villanueva*, 128 P.R. Dec. at 647-48 (information that is false and defamatory is also protected by the privilege, so long as the communication is a fair and true report of the proceeding.). Moreover, as demonstrated by the court records, the statements in CNN's letter that Plaintiff had multiple restraining orders issued against him and was convicted of threatening to kill Ms. Johnson are true. *See, e.g., Callahan v. United States*, 426 F.3d 444, 454 (1st Cir. 2005) (court documents are presumed accurate); *Torres Silva v. El Mundo, Inc.*, 6 P.R. Offic. Trans. 581, 598 (1977) (holding that newspaper could "absolutely rely on the veracity of information" ultimately obtained from police sources); *Drury v. Feeney*, 505 So. 2d 111, 113 (La. Ct. App.) *writ denied*, 506 So. 2d 1225 (La. 1987) (holding that substantially accurate report of plaintiff's convictions based on court records were true and not actionable); *J. Maki Const. Co. v. Chicago Reg'l Council of Carpenters*, 379 Ill. App. 3d 189, 204, 882 N.E.2d 1173, 1186 (2008) (same); *Adi v. Prudential Prop. & Cas. Ins. Co.*, No. 14-01-01001-CV, 2003 WL 22908129, at *5 (Tex. App. Dec. 11, 2003) (same)

For these reasons, the statements concerning the multiple restraining orders against Plaintiff and his conviction for threatening to kill Ms. Johnson are not actionable.

2. The statement in CNN's letter concerning Mr. Gible is not of and concerning Plaintiff

Plaintiff cannot maintain an action for defamation based on a statement from the CNN letter concerning another person. Plaintiff alleges that the statement "[a]nd like Mr. Burk, our research shows that Mr. Gible also has a criminal history. Indeed, he is a convicted felon" is an accusation without any factual support. (Dkt. No. 2, ¶ 28). As an initial matter, the statement concerning Plaintiff's criminal history is a fair and true report of the records discussed in the

previous section, which demonstrate that Plaintiff was found guilty of at least two criminal offenses—contempt of court for violating a restraining order and making terroristic threats to Ms. Johnson. *See supra* at 12-13. Moreover, as the plain text of the letter attached to Plaintiff's Complaint makes clear, the statement refers to Mr. Gibble being a felon, not Plaintiff. (*See* Dkt. No. 2-2 at 3). This statement is thus not a statement of and concerning Plaintiff for which Plaintiff can maintain an action. *See Caguas Satellite Corp.*, 824 F. Supp. 2d at 315 n.5 (“In order for plaintiff to state a claim, ‘the defamatory statement must be ‘specifically of and concerning’ the plaintiff.”); *Colon Perez v. Televiscentro de P.R.*, 175 P.R. Dec. 690, 728 (2009) (dismissing cause of action where allegedly defamatory statements not of and concerning plaintiff).

3. The statements that Plaintiff is a “criminal” and that the palimony lawsuit he filed against his ex-girlfriend were “bogus” were not made by CNN

Plaintiff cannot state a claim against CNN for defamation based on allegedly false statements that his Complaint makes clear were not made by CNN. As Plaintiff admits, and as is confirmed by the TMZ article attached to his Complaint (*see* Dkt. No. 2-3), Plaintiff was labeled a “criminal” in the TMZ.com article—not in CNN’s letter. (*See id.*; *see also* Dkt. No. 2-2). The palimony action Plaintiff filed against Ms. Johnson was characterized as “bogus” by TMZ.com—not CNN. (*Id.*). As a result, Plaintiff cannot maintain a claim for defamation against CNN based on these statements, which, in any event, are substantially true and would be protected by the fair report privilege.

III. CONCLUSION

For the foregoing reasons, CNN respectfully requests this Court dismiss Plaintiff’s Complaint for lack of personal jurisdiction, or in the alternative, for the additional reason that Plaintiff has failed to state a claim upon which relief can be granted.

Dated: March 19, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served this 19th day of March

2015, via first-class mail, postage prepaid, upon the following:

Mark Anthony Burk
At his address of record
Plaintiff

/s/

Oreste R. Ramos