IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CA FLORIDA HOLDINGS, LLC, Publisher of *THE PALM BEACH POST*,

Plaintiff,

v.

DAVE ARONBERG, as State Attorney of Palm Beach County, Florida; SHARON R. BOCK, as Clerk and Comptroller of Palm Beach County, Florida,

Defendants.

CASE NO.: 50-2019-CA-014681-AG

RESPONSE IN OPPOSITION TO STATE ATTORNEY DAVE ARONBERG'S MOTION TO ALTER OR AMEND ORDER DENYING THE AMENDED MOTION FOR ATTORNEYS' FEES UNDER FLORIDA STATUTES SECTION 57.105

Plaintiff, CA FLORIDA HOLDINGS, LLC, the Publisher of *The Palm Beach Post* ("*The Post*"), submits this Response and Memorandum in Opposition to State Attorney Dave Aronberg's ("State Attorney" or "Mr. Aronberg") February 1, 2023 Motion to Alter or Amend Order Denying the Amended Motion for Attorneys' Fees under Florida Statutes Section 57.105 ("Motion to Alter"). For the reasons set forth below, the Motion to Alter should be denied.

INTRODUCTION

The State Attorney's Motion to alter should be denied. There is no reason to alter or amend the Court's January 31, 2023 Order Denying the Amended Motion for Attorneys' Fees Under Florida Statutes Section 57.105 (the "Order"). The Court correctly determined that the State Attorney sought relief at the September 6 and 8, 2022 evidentiary hearing (the "Hearing") based upon both his July 1, 2020 self-described "place-marker" Motion for Section 57.105 Attorneys' Fees (the "First Motion"), which he expressly incorporated into his November 9, 2020 Amended

Motion for Section 57.105 Attorneys' Fees (the "Amended Motion"), as well as the Amended Motion. The Court's Order properly disposed of both motions, even though the State Attorney had fused them together such that the Amended Motion superseded his First Motion. As the docket reflected two motions, it was appropriate for the Order to expressly dispose of both motions. Thus, the Court correctly held: "Accordingly, the July 1, 2020 Motion for Attorneys' Fees is DENIED."

ARGUMENT

The July 1, 2020 Motion for Attorneys' Fees—which the State Attorney himself referred to as a "place-marker" motion—was expressly incorporated into and superseded by the State Attorney's Amended Motion for Fees filed on November 9, 2020. The State Attorney's filings made clear that the State Attorney always intended to file an amended motion supplementing his self-described "place-marker" First Motion. The Amended Motion (an 11-page motion with exhibits, totaling 59 pages) expressly incorporated the State Attorney's barebones argument from his one-page First Motion and its accompanying two-page enclosure letter into the Amended Motion. *See* Amended Motion, at 2-3 and Ex. "A". The Amended Motion also sought fees including those for the time period covered by the First Motion. *See id.* at 7 and Ex. "F". Further, the State Attorney incorrectly argued that his Amended Motion related back to the First Motion such that the notice defects of the Amended Motion could be cured by utilizing the First Motion's 57.105 notice. *See, e.g.*, Hrg. Tr. at 15:2-11, 18:2-12. The Amended Motion was the only motion that the State Attorney set for hearing, and reset several times, before (and after) the December 20, 2021 Final Judgment. *See* Hrg. Tr. at 128: 1–4. These and other facts set forth herein demonstrate that the "place-marker" First Motion was superseded by the Amended Motion and the State Attorney abandoned the First Motion upon the filing of his Amended Motion. *See*, *e.g.*, *Gannon v. Cuckler*, 281 So. 3d 587, 596 (Fla. 2d DCA 2019) ("When a party files an amended brief in this

court, we regard the amended filing as a new and separate document and disregard the old one."); *Hayes v. State*, 59 So. 3d 384, 385 (Fla. 4th DCA 2011) ("The amended motion superseded the original one."). Once incorporating the arguments contained in the First Motion with the new arguments set forth in the Amended Motion, the State Attorney was required to provide a new safe harbor notice, and his failure to do so was fatal to "both" motions. Thus, it was entirely correct for the Court to deny both motions as it did in the Order.

Despite the State Attorney's statement in the Motion to Alter that his First Motion "was never heard by the Court," the arguments set forth in the First Motion (and carried over into the Amended Motion) were argued by the parties, heard by the Court at the Hearing, and addressed in the parties' written closing arguments. Even though it was never properly noticed for hearing by the State Attorney, during the Hearing on September 6, 2022, the State Attorney's counsel argued that the First Motion be considered, as a part of his Amended Motion, and in the alternative to his Amended Motion. *See* Hrg. Tr. at 18: 2–12 ("And we would ask Your Honor, in the alternative, . . . that you would rule on our original motion for attorneys' fees if it came down to it because, in the end, the arguments are the same, and the real difference in the filing of the amended motion for attorneys' fees is that it included the final tabulation of my firm's fees, as well as affidavits . . . of fees and an affidavit of reasonable fees from our expert."); *see also* State Attorney Aronberg's Written Closing Argument at 2. And over the objection of *The Post*, the Court heard the matters raised in the First Motion, incorporated into the Amended Motion. Thus, the State Attorney conceded that the arguments contained in the First Motion were included in the Amended Motion argued by the parties and denied by the Court.

To protect its rights, *The Post*, *over objection*, defended against the issues raised by the "place-marker" First Motion and the Amended Motion at the Hearing. *See generally* Hrg. Tr. at

26 -31; *see also* Hrg. Tr. at 28:15 – 29:7 ("So the first place-marker motion, Exhibit 14, it's – the motion itself is one page. There's an enclosure letter that came with it, and it's two pages. So three pages total. The motion itself says nothing except we're going to prevail, and this is your notice, we want fees. But the enclosure letter says, along the lines I believe Mr. Wyler said this in his opening, that the defendant Aronberg nor the office of the state attorney is in custody or control of the 2006 grand jury materials sought therein. **However, the first motion completely failed to address the main reason why the state attorney was a party to the lawsuit, because it could object to the clerk providing the grand jury records**. . . .") (emphasis added).

While *The Post* raised procedural arguments precluding the First Motion, *The Post*, by necessity, defended against the merits of the First Motion during the Hearing and in its Written Closing Argument. *See* Hrg. Tr. at 26-31; Written Closing Argument of *The Palm Beach Post* at 5-9, 10-17; *id.* at 8 ("The barebones 'place-marker' motion fails to meet the high burden of section 57.105. The Court must look at the substance, or lack thereof, of that motion, as of that moment in the timeline, to determine whether *at that time* the State Attorney met his burden of showing the claim was frivolous or, in other words, that the *Post* knew or should have known *at that time* there was no longer any justiciable claim. . . . There was only one purported basis for sanctions stated in the first 'place-marker' motion (technically, in the enclosure letter to that one-page motion) regarding the declaratory relief claim in Count I—the argument that the State Attorney did not have possession or custody of the Epstein grand jury materials. Did that argument alone end the matter as to the State Attorney? *No*. Did that argument alone make the State Attorney's joinder in this case so frivolous as to be completely untenable? *Absolutely not*.") (internal citations omitted).

The Post also noted and argued that the "place-marker" First Motion was filed months before Mr. Aronberg's fundamental change of his legal position such that he no longer objected to the Clerk's production of Epstein grand jury records if ordered by the Court, as Mr. Aronberg first stated in a reply brief in support of his First Motion on October 14, 2020. *See* Written Closing Argument of *The Palm Beach Post* at 9; Hrg. Tr. at 29:14 – 31:6 ("So clearly there's new stuff in the amended motion for fees. But Mr. Wyler said they said the same arguments. That's not -- That's not true. The amended motion clearly makes new arguments not in the first place-marker motion. It also references new documents, like the state attorney's motion for summary judgment and Mr. Aronberg's affidavit, both which were filed in August of 2020. . . . Importantly, the amended motion also raises new positions. . . . As you will see in the evidence, the position that the state attorney had, ['']no objection['], or, ['']never had any objection to the clerk producing grand jury materials['',] was new, and you'll hear from Greenberg Traurig attorney Stephen Mendelsohn that this is exactly the position that the Post was trying to get and Mr. Mendelsohn was trying to get from the state attorney. And you'll hear, in a June 23rd, 2020, letter Mr. Mendelsohn wrote to the state attorney, he said the state attorney is named here because they are a party that is tasked with protection of the grand jury system. You have the right to object to the release of grand jury materials. That's why you're here. And, once we had this notice right here of saying they don't object, we dismissed him. So he first said on the record, on October 14th, I have no objection to the production of the Epstein grand jury materials. We dismissed him October 21st.").

Faced with the denial of his only pending motion for fees (the Amended Motion), the State Attorney's Motion to Alter is an improper attempt to use a procedural sleight of hand to reargue his superseded First Motion. The State Attorney never considered the First Motion as anything other than a "place-marker" that was intended to be and was superseded by the Amended Motion.

And once that happened, the State Attorney's failure to provide the requisite safe harbor notice mandated that both motions be denied. The State Attorney now seeks to reargue matters expressly argued during the Hearing, which in any event were barred by the failure to provide the required safe harbor. The Court should deny the State Attorney's attempt to reargue the Hearing and obtain a second bite at the apple.

The State Attorneys' Motion to Alter is an attempt to have it both ways. The State Attorney's filings and arguments to the Court demonstrate that he considered his 57.105 motions to be unitary, such that the First Motion became part of and was superseded by the Amended Motion. Now, faced with an Order that denied his motions because of his failure to comply with the notice requirements of 57.105, he argues that his First Motion is somehow a separate and distinct motion from his Amended Motion. This Court should reject the State Attorneys' new attempt to split his motions. The Order is correct and need not be amended or altered.

CONCLUSION

Based on the foregoing, the State Attorney's Motion to Alter or Amend the Order should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been electronically filed with the Florida E-File Portal for e-service on all parties of record herein on February 16, 2023.

/s/ Lauren Whetstone
Lauren Whetstone, Esq.