

**Three Amigos SJL Rest., Inc. v CBS News, Inc.**

2013 NY Slip Op 31081(U)

March 19, 2013

Sup Ct, New York County

Docket Number: 152184/2012

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ELLEN M. COIN

PRESENT: \_\_\_\_\_
Justice

PART 63

Index Number : 152184/2012
THREE AMIGOS SJL REST., INC.
vs.
CBS NEWS, INC.
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. \_\_\_\_\_
MOTION DATE \_\_\_\_\_
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_
Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE
WITH THE ANNEXED DECISION
AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

This constitutes the decision and order of
the Court

Dated: 3/19/13

\_\_\_\_\_, J.S.C.
HON. ELLEN M. COIN

- 1. CHECK ONE: \_\_\_\_\_ CASE DISPOSED [X] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: ..... [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 63

-----X  
THREE AMIGOS SJL REST., INC. d/b/a  
THE CHEETAH CLUB, TIMES SQUARE  
RESTAURANT NO. 1, INC., TIMES SQUARE  
RESTAURANT GROUP, DOMINICA  
O'NEILL, SHAWN CALLAHAN, PHILIP  
STEIN,

Plaintiffs,

-against-

Index No.  
152184/2012

CBS NEWS, INC., CBS-NEW YORK, MARY  
CALVI, KATHRYN BROWN, MAURICE  
DUBOIS, KRISTINE JOHNSON, "JOHN  
DOES" 1-20,

DECISION AND ORDER

Defendants.

-----X  
**Coin, J.:**

Defendants CBS Broadcasting Inc. (sued herein as CBS News, Inc. and CBS-New York),  
Mary Calvi (Calvi), Kathryn Brown (Brown), Maurice DuBois (DuBois), and Kristine Johnson  
(Johnson) move to dismiss, pursuant to CPLR 3211 (a) (1) and (7): (i) all claims by plaintiffs  
Time Square Restaurant No. 1, Inc. (Times Square No. 1), Times Square Restaurant Group, and  
Dominica O'Neill, Shawn Callahan, and Philip Stein (collectively referred to as the Individual  
Plaintiffs); (ii) all claims against Calvi, DuBois, and Johnson; (iii) the second cause of action  
against all defendants for failure to plead special damages; and (iv) the third cause of action for  
injurious falsehood/trade libel against all defendants for failure to plead special damages or to  
allege disparaging statements about the quality of plaintiffs' goods or services.

This defamation action arises from three news reports by defendants over the course of a

single day, November 30, 2011. The news reports emanated from a federal crackdown on an alleged criminal enterprise which involved the recruiting of women from Russia and other Eastern European countries to illegally enter the United States to work as exotic dancers at adult entertainment clubs controlled by the Bonnano and Gambino organized crime families (press release dated November 30, 2011; Exh. 6 to Affirmation of Jay Brown dated August 17, 2012). Federal prosecutors alleged that organized crime members and their associates used physical and economic threats to enforce a scheme in which the women performed in four strip clubs in Queens and Long Island. There was a wave of arrests, and federal agents also executed search warrants on various strip clubs, including on plaintiff Three Amigos Restaurant, Inc. d/b/a The Cheetah Club (Cheetah's).

Cheetah's, as well as two separate companies that provide services to Cheetah's, and three individuals who work for these separate companies, allege that defendant WCBS-TV news reports were defamatory per se as to them, and also seek recovery for defamation per quod and trade libel, on the ground that the news reports were false in reporting or implying that plaintiffs were involved in the mob and in sex-trafficking. They assert claims against the news reporter, the news anchors and their corporate employer.

Defendants urge that the claims fail as to the individual plaintiffs, Time Square No. 1, and Time Square Restaurant Group because these plaintiffs cannot show that the challenged statements were of and concerning them. They also argue that the claims fail as to the anchor defendants because they have not been alleged to have made the statements, and do not have the required degree of fault. Finally, defendants contend that the remaining claims are insufficient for failure to plead special damages and disparaging statements about the quality of plaintiffs'

goods or services.

### **BACKGROUND**

Plaintiff Cheetah's is an adult entertainment establishment on West 43<sup>rd</sup> Street, near Times Square, in Manhattan (Complaint, ¶¶ 2-4). Plaintiff Times Square No. 1 is a separate entity which operates its business within Cheetah's, providing management and promotional services for Cheetah's Champagne VIP rooms and admissions to Cheetah's (Complaint, ¶¶ 5-6). Plaintiff Times Square Restaurant Group operates a talent and booking agency within Cheetah's (*id.*, ¶ 7) (collectively, Times Square Companies). Plaintiff Dominica O'Neill, the president of Times Square No. 1, is involved in the day-to-day operations of Cheetah's (*id.*, ¶ 8). Plaintiff Shawn Callahan is employed by Times Square No. 1 and plaintiff Philip Stein works for Times Square Restaurant Group. Both Callahan and Stein work as managers and consultants (*id.*, ¶¶ 9-10).

On November 30, 2011, in a series of arrests, federal authorities charged seven alleged members of the Bonnano and Gambino organized crime families and 13 others with extortion, visa fraud, and transporting, harboring, and inducing the entry of illegal aliens to work at NY-area strip clubs (exhibits 6 and 11 to Brown Affirm.). Plaintiffs allege that none of the persons arrested that day are employed by or associated with Cheetah's (Complaint, ¶¶ 34-36). According to the prosecutors, the alleged organized crime defendants controlled certain strip clubs in Queens and Long Island by forcing the owners to pay them for protection from other organized crime figures (exhibit 11 [Sealed Indictment] to Brown Affirm., ¶¶ 5-6). The federal investigation was referred to as "Operation Dancing Brides" (exhibit 3[Transcript of Noon Broadcast] to Brown Affirm. at 2). On the same morning as the arrests, federal officials executed

a search warrant at Cheetah's, but Cheetah's alleges in its complaint here that there was no criminal connection between activities at its premises and the investigation in question (Complaint, ¶¶ 39, 56, 67).

On that same date, WCBS-TV broadcast a short report on this developing story in its noon broadcast (Noon Broadcast) (exhibits 2 [DVD of Noon Broadcast] and 3[Transcript of Noon Broadcast] to Brown Affirm.). Defendant Calvi, one of the anchors during that broadcast, read the following introduction:

Developing story now, federal authorities are raiding a Midtown strip club, saying it's at the center of a global scheme to bring women into the U.S. and force them into exotic dancing. CBS-2's Kathryn Brown is live in Midtown with the details for us.  
Kathryn?

(Exhibit 3 to Brown Affirm. at 2). Defendant Kathryn Brown then reported from the street in front of Cheetah's, stating "[A]nd this strip club here, Cheetah's in Midtown, they say is at the center of the operation. Cheetah's advertises exotic women and the federals – federal authorities say it is run by the mafia" (*id.* at 2). Brown reported that the federal authorities "have been here all morning" and that "they've been here for hours inside collecting evidence. They are still inside right now" (*id.*). She further reported that men "described as ringleaders" of an "elaborate operation to recruit women from Russia and eastern Europe into the U.S." and to "force the women to work as dancers in strip clubs across New York City, including Cheetah's" had been arrested (*id.* at 2-3). Brown stated that this was a "developing story and we will have much more on this tonight on CBS-2 News at 5:00" (*id.* at 3).

At the 5:00 p.m. broadcast (the Evening Broadcast), two different anchors, defendants DuBois and Johnson introduced the broadcast with the following:

DUBOIS: Federal authorities say they busted a global underground immigration ring and at the center of the scheme is a strip – set of strip clubs across Manhattan.

JOHNSON: We first brought you this developing story at noon today. CBS-2's Kathryn Brown now has the latest from Midtown.

(Exhibit 4 [Transcript of Evening Broadcast] to Brown Affirm., at 2). Kathryn Brown then reported:

Federal authorities carried out boxes of evidence from this Midtown strip club during an early morning raid. They say the club, Cheetah's, is one of several at the center of an underground immigration ring that stretches from Times Square to the heart of Russia. Investigators say Russian and Italian mobsters were working together in the elaborate scheme to bring Russian and eastern European women to the U.S., then funnel them to strip clubs to work as exotic dancers.

(*id.*). The report then included interviews with a federal law enforcement official, the director of the National Organization of Women, and an attorney for Cheetah's (*id.* at 2-4).

This news story was summarized in a report posted to the local CBS New York website, <http://newyork.cbslocal.com> at 9:25 p.m., again on November 30, 2011 (the Internet Report) (Exhibit 5 [Printed Internet Report] to Brown Affirm.). The Internet Report contained the headline "Feds Raid Midtown Club 'Cheetah's', Break Up Global Stripper Smuggling Scheme," and the sub-headline "Say Russian, Italian Mobsters Ran Huge Operation; More Than 2-Dozen Arrested" (*id.*). None of these broadcasts or reports mentioned any of the individual plaintiffs or Times Square No. 1 or Times Square Restaurant Group.

On April 26, 2012, plaintiffs commenced this action asserting four causes of action. The first claim alleges that the Noon and Evening Broadcasts and the Internet Report were defamatory per se as to all of the plaintiffs. These reports, according to the complaint, falsely

state that plaintiffs were members of or affiliated with organized crime— that Cheetah’s was “run by the mafia”— and plaintiffs were engaged in human trafficking – that Cheetah’s was “at the center of a global scheme to bring women into the U.S. and force them into exotic dancing” (Complaint, ¶¶ 43-56). The reports also allegedly implied those defamatory meanings by filming the reports in front of Cheetah’s while reporting about the arrests of mafia members in connection with the alleged scheme (*id.*, ¶¶ 69-80). The Internet Report allegedly linked Cheetah’s name in the title with “Global Stripper Smuggling Scheme,” thereby intending to depict Cheetah’s as being part of the scheme (*id.*, ¶ 98). In the second cause of action, plaintiffs allege defamation (defamation per quod), and in the third claim they allege injurious falsehood/slander of title, arising out of the same false statements and implications. The fourth claim alleges that the corporate defendant is liable for its employees’ conduct under the theory of respondeat superior (*id.*, ¶¶ 118-119).

### DISCUSSION

The motion to dismiss is granted to the extent that all claims by plaintiffs Times Square No. 1, Times Square Restaurant Group and the Individual Plaintiffs for defamation per se, defamation per quod, and injurious falsehood (the first, second, and third causes of action) are dismissed; the complaint is dismissed as against defendants Johnson and DuBois; the second claim for defamation per quod by plaintiff Cheetah’s is dismissed without prejudice and with leave to replead special damages; and the third claim by plaintiff Cheetah’s for injurious falsehood is dismissed.

The defamation claims (the first and second causes of action) by the Individual Plaintiffs and plaintiffs Time Square No. 1 and Times Square Restaurant Group are dismissed. The



elements of a defamation claim are a false statement concerning the plaintiff, published without privilege or authorization to a third party, constituting fault, and that causes either special harm or constitutes defamation per se (see *Salvatore v Kumar*, 45 AD3d 560, 563 [2d Dept 2007], *lv denied* 10 NY3d 703 [2008]; *Dillon v City of New York*, 261 AD2d 34, 38 [1<sup>st</sup> Dept 1999]; see generally Prosser and Keeton, Torts § 111 at 771-785 [5<sup>th</sup> ed 1984]). A writing constitutes libel per se if it tends to expose the person to public contempt, disgrace, aversion or induces an unsavory opinion of him or her in the eyes of the community (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379, *cert denied* 434 US 969 [1977]; see *Ava v NYP Holdings, Inc.*, 64 AD3d 407, 411-413 [1<sup>st</sup> Dept 2009], *lv denied* 14 NY3d 702 [2010]). In a claim for defamation or libel per se in one's profession, the claim must impute to the plaintiff fraud, dishonesty, misconduct, incapacity, unfitness or want of a necessary qualification in the trade or profession (see *Nichols v Item Pubs.*, 309 NY 596, 600-601 [1956]; *Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 637 [2d Dept 2007]; *Attas v Park E. Animal Hosp.*, 235 AD2d 246, 247 [1<sup>st</sup> Dept 1997]; see also *Lieberman v Gelstein*, 80 NY2d 429, 435 [1992]). Whether a statement can be found to be defamatory is a question of law for the court to decide (see *Aronson v Wiersma*, 65 NY2d 592, 593-594 [1985]).

As a threshold and constitutional matter the alleged defamatory statement must be of and concerning the particular plaintiff (*Carlucci v Poughkeepsie Newspapers*, 57 NY2d 883, 885 [1982]; see *New York Times Co. v Sullivan*, 376 US 254, 288-290 [1964]). Generally, whether the complaint sufficiently alleges facts to demonstrate a connection between the particular plaintiff and the alleged libel is an issue for the court (see *Springer v Viking Press*, 60 NY2d 916, 917 [1983]; *Gilman v Spitzer*, – F Supp 2d –, 2012 WL 4510681, \* 4, 2012 US Dist LEXIS

141830, \* 12 [SD NY, Oct 1, 2012]; *Cardone v Empire Blue Cross & Blue Shield*, 884 F Supp 838, 847 [SD NY 1995]). The plaintiff's burden on this element is not a light one (*Chicherchia v Cleary*, 207 AD2d 855, 855 [2d Dept 1994]; see *Julian v American Bus. Consultants*, 2 NY2d 1, 17 [1956] [plaintiff has affirmative burden to establish defamatory material was of and concerning him or her]). The defamatory matter and the plaintiff must be linked together by a chain of unchallenged proof for the plaintiff to reach the jury on the element "of and concerning" (*Julian v American Bus. Consultants*, 2 NY2d at 18). While reference to the allegedly defamed party may be indirect and may be shown by extrinsic facts, if the plaintiff uses such extrinsic facts, he or she must show that it is reasonable to conclude that the publication refers to the plaintiff, and those facts were known to those who read or heard the publication (*Chicherchia v Cleary*, 207 AD2d at 856). Plaintiff cannot use innuendo to enlarge, rather than explain, in an effort to have him or herself identified in the public mind as the target of the alleged defamation (see *Cole Fischer Rogow, Inc. v Carl Ally, Inc.*, 29 AD2d 423, 427-428 [1<sup>st</sup> Dept 1968], *affd* 25 NY2d 943 [1969]). Evidence that the plaintiff was shunned or avoided is admissible only to support the presumption of damages, and without proof that the libel was published of and concerning the plaintiff, there is no presumption (*Julian v American Business Consultants*, 2 NY2d at 18).

Defamatory statements published about a corporate officer or employee may not be defamatory as to the corporation unless the corporation is specifically named, or the words are such that they discredit the way by which its business is conducted (see *Carlucci v Poughkeepsie Newspapers, Inc.*, 57 NY2d 883; *Affirex, Ltd. v General Elec. Co.*, 161 AD2d 855, 856 [3d Dept 1990] [defamation claim dismissed because statement reflected on company's former principal,

not company itself]; *see also Fulani v New York Times Co.*, 260 AD2d 215, 215-216 [1<sup>st</sup> Dept 1999] [group coordinator's defamation claim dismissed because statements about group were not of and concerning coordinator individually]; *cf. Whitney Info. Network, Inc. v Weiss*, 2008 WL 731024, \*6, 2008 US Dist LEXIS 21223, \* 16 [ED NY, Mar. 18, 2008] [defamatory material specifically named the corporation, and expressly stated that the corporation was the subject of "SEC and Justice Department related issues"]]. Conversely, an alleged libel against one corporation is not of and concerning the corporation's employees, or a related agent corporation, if they are not specifically named (*Kirch v Liberty Media Corp.*, 449 F3d 388 [2d Cir 2006]). In *Kirch*, the plaintiff, ITTC, which served as KirchGroup's exclusive agent in North America, and was considered the face of KirchGroup there, could not seek recovery for statements published about KirchGroup and its cash flow problems (449 F3d at 398). The court reasoned that a party cannot recover for a defamation of another solely because the statement contained an allegedly false implication that the plaintiff is at risk of loss (*id.*). It analogized that a statement about IBM would not ordinarily be a defamatory statement of and concerning all of IBM's employees, suppliers, and dealers (*id.*; *see also RE/MAX Intl., Inc. v Smythe, Cramer Co.*, 265 F Supp 2d 882, 893-895 [ND Ohio 2003] [defamatory statement of and concerning franchisee did not permit franchisor to recover]).

Here, as alleged by plaintiffs, all of the challenged statements relate solely to Cheetah's (*see* Complaint, ¶¶ 23, 26, 43, 46-48, 50, 53, 55, 68-71, 95-98). The broadcasts reported an allegation that the mafia controlled the business entity Cheetah's. Only Cheetah's building facade is shown in the broadcast. Nothing is mentioned about, or even indirectly referred to, Times Square No. 1, the management and promotional services company for the Champagne and

VIP rooms, or Times Square Restaurant Group, the talent and booking agency, both operating inside Cheetah's. None of the statements in the Noon or Evening Broadcasts or in the Internet Report assert or even imply that the Individual Plaintiffs, or Times Square No. 1 and Times Square Restaurant Group, the Individual Plaintiffs' employers, were members of the mafia, or were at the center of a global human trafficking scheme. They did not on their face make even an oblique reference to these plaintiffs as individuals, or to these separate entities (*see New York Times v Sullivan*, 376 US at 289). Moreover, plaintiffs' attempt to argue that the statements in the challenged reports – that Cheetah's is “run by the mafia,” and that “Cheetah's is ‘at the center of a global [human trafficking] scheme’” – is the same as saying that those who run Cheetah's (O'Neill, as hostess and manager of Time Square No. 1, and Callahan, and Stein, who were involved with and managed the talent) are members of organized crime (Memorandum in Opposition, at 3, 10), is rejected. This editing of the statements in the broadcasts to artificially narrow the scope of the subject of those challenged statements to focus on these particular individual plaintiffs is not permitted (*see Gilman v Spitzer*, 2012 WL 4510681 at \*7, 2012 US Dist LEXIS 141830, \*18-19 [article referring broadly to company and its employees as engaging in criminal behavior did not defame small group of employees to which plaintiff belonged as the head of a corporate division of the company], citing *Brady v Ottaway Newspapers*, 84 AD2d 226, 237 [2d Dept 1981]).

The challenged reports do not state that all or even any employees of Cheetah's are members of organized crime, much less that employees of unnamed affiliated companies are members of organized crime, or that they were individually promoting a human trafficking scheme. The individual plaintiffs' reading here presupposes an artificially detailed understanding

of the background facts by the reader (*id.*). Their claim that their friends thought that they were mob-related and were being arrested, is not based on any statements in the broadcasts or report, and is not based on any evidence that they were so involved, but solely on the unsupported assumption that because of their positions as employees and managers of the day-to-day business of Cheetah's, they must have been (*see New York Times Co. v Sullivan*, 376 US at 289; *see also Lazore v NYP Holdings, Inc.*, 61 AD3d 440, 440 [1<sup>st</sup> Dept 2009]). This extrinsic evidence fails to provide a reasonable basis to conclude that the broadcasts were referring to the individual plaintiffs.

With respect to the entities, Times Square No. 1 and Times Square Restaurant Group, there is not even any commonality of name with Cheetah's which might reasonably identify these plaintiffs in the public's mind as the target of the alleged defamatory statements (*see Prince v Fox Television Stations, Inc.*, 33 Misc 3d 1225[A], \*7, 2011 NY Slip Op 52110U [Sup Ct, NY County 2011], *affd on other grounds* 93 AD3d 614 [2012]). It is doubtful that the general public was even aware of Times Square No. 1's and Times Square Restaurant Group's existence, or was even concerned about them or about their individual plaintiff-employees. The fact that the reports may have had a negative impact on these plaintiffs, that they were shunned by their friends, fails to demonstrate that the statements were of and concerning these plaintiffs (*see Julian v American Business Consultants*, 2 NY2d at 18).

The court further notes that the speech at issue addresses a matter of public concern, and, therefore, the First Amendment requires a closer nexus between the alleged defamatory statement and the plaintiff. Under the principles set forth in *New York Times v Sullivan* (376 US at 290-291), the individual plaintiff must be clearly identifiable to support the defamation claim. The

broadcasts here fail to so identify these plaintiffs. Accordingly, all defamation claims (the first and second causes of action) by plaintiffs O'Neill, Callahan, Stein, Times Square No.1 and Times Square Restaurant Group are dismissed.

With regard to the claims against defendant Kristine Johnson, plaintiffs have voluntarily withdrawn them based on their admission that her statements contained no mention of any of the substantive facts of the broadcasts (Memorandum in Opposition at 16 n 6).

The plaintiffs' claims against defendant Maurice DuBois, the other anchor of the Evening Broadcast, are also dismissed for failure to state a claim. Defendant DuBois's introduction of the report by defendant Brown simply stated that "[f]ederal authorities say they busted a global underground immigration ring and at the center of the scheme is a strip – set of strip clubs across Manhattan" (exhibit 4 [Transcript of Evening Broadcast] to Brown Affirm. at 2). The court finds that this introduction to the news report was not defamatory as to any of the plaintiffs. First, as to the individual plaintiffs, Time Square No. 1 and Times Square Restaurant Group, this introductory statement fails to identify them, and is not of and concerning them. As to plaintiff Cheetah's, it also fails to specifically, or even impliedly, identify it to satisfy the "of and concerning" requirement. Second, DuBois' general introduction of the news story is not reasonably susceptible of a defamatory meaning as to any of these plaintiffs. The court, therefore, finds the claims for defamation (the first and second causes of action) against DuBois are insufficient.

The branch of defendants' motion to dismiss the claims against defendant Calvi on the ground that the record establishes a lack of fault, an essential element of the defamation claims,

is denied at this early stage.<sup>1</sup> Plaintiffs have not had any discovery, and whether Calvi had any role or responsibility for the preparation of the broadcasts or report or the anchor lead, whether she was reasonable in relying on defendant Brown's statements, and, thus, whether she acted with gross irresponsibility, is information solely in defendants' knowledge and possession. Accordingly, this branch of the motion to dismiss is denied.

The branch of defendants' motion seeking dismissal of plaintiff Cheetah's claim for defamation per quod is granted, and the claim is dismissed with leave to replead. In pleading a claim for defamation per quod, harm is not presumed and the plaintiff must plead special damages (*Harris v Hirsh*, 228 AD2d 206, 209 [1<sup>st</sup> Dept], *lv denied* 89 NY2d 805 [1996]; *see Akpinar v Moran*, 83 AD3d 458, 459 [1<sup>st</sup> Dept], *lv denied* 17 NY3d 707 [2011]). General claims of economic harm are insufficient. Instead, the plaintiff must specifically allege actual concrete losses, and a causal link between such losses and defendant's statements (*see Emergency Enclosures, Inc. v National Fire Adj. Co., Inc.*, 68 AD3d 1658, 1660 [4<sup>th</sup> Dept 2009]). "[G]eneral allegations of lost sales from unidentified lost customers are insufficient" (*DiSanto v Forsyth*, 258 AD2d 497, 498 [2d Dept 1999] [citations omitted]).

Plaintiff Cheetah's complaint generally seeks damages for all claims of \$100 million in compensatory damages and \$100 million in punitive damages, and alleges that it "lost over \$1 million in gross revenues and profits to date" (Complaint, ¶ 108 and "Wherefore" clause). Plaintiff O'Neill states in her affidavit in opposition that after the broadcasts the "volume of customers was dramatically decreased," "[c]ustomers - both new and regular customers- were

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<sup>1</sup>The court notes that defendant Calvi, unlike defendant DuBois, does not seek dismissal on the ground that she made no defamatory statement of and concerning any plaintiff.

reluctant to come into the Club,” many of “our regular customers have still not returned to the Club and at least 20 of our regular dancers have still not returned” (Affidavit of Dominica O’Neill, annexed as Exhibit 2 to Affirmation of Amy L. Bellantoni, ¶¶ 14, 17-18). These allegations are insufficient. Plaintiffs fail to identify any specific lost customers, or lost business prospects, or to otherwise specify their losses (*see Akpinar v Moran*, 83 AD3d at 459; *DiSanto v Forsyth*, 258 AD2d at 498; *Fabry v Meridian Vat Reclaim, Inc.*, – F Supp 2d –, 2000 WL 1515182, \* 4, 2000 US Dist LEXIS 15092, \* 10-12 [SD NY, Oct. 11, 2000]). The court, however, is granting plaintiff Cheetah’s request for leave to replead these special damages, if any (Memorandum in Opposition at 23 n 9). Accordingly, the second claim for defamation per quod as asserted by plaintiff Cheetah’s is dismissed with leave to replead.

The third cause of action for injurious falsehood is dismissed. A claim for injurious falsehood or trade libel, which is similar to defamation, involves the “knowing publication of false matter derogatory to the plaintiff’s business of a kind calculated to prevent others from dealing with the business or otherwise interfering with its relations with others, to its detriment” (*Waste Distillation Tech. v Blasland & Bouck Engrs.*, 136 AD2d 633, 634 [2d Dept 1988] [citation omitted]). The false statements must play a material and substantial part in inducing others not to deal with plaintiff, with special damages in the form of lost dealings (*id.*). The statements must concern themselves with plaintiff’s property (*Cunningham v Hagedorn*, 72 AD2d 702, 704 [1<sup>st</sup> Dept 1979]). This claim is distinguishable from a defamation claim which involves statements which impugn the basic integrity or creditworthiness of a business (*Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 670-671 [1981] [injurious falsehood is disparagement of quality of business’s goods and services]; *see also Henneberry v Sumitomo Corp. of Am.*, 415



F Supp 2d 423, 471 [SD NY 2006]). Thus, statements about a party's integrity or business methods may constitute defamation, and those denigrating the quality of the party's goods and services may provide the basis for a claim for injurious falsehood.

Here the alleged statements giving rise to plaintiffs' third claim for injurious falsehood are the same statements used in support of plaintiffs' defamation claims. These statements essentially say that Cheetah's is run by the mafia, and is at the center of a global human trafficking scheme. Such accusations clearly may impugn a party's integrity and business methods. They do not speak to the quality of the goods and services at all. Consequently, because plaintiffs fail to plead an essential element of their injurious falsehood claim, the claim is not colorable. Under these circumstances, leave to replead is unwarranted. Therefore, this claim is dismissed. Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that all claims by plaintiffs Times Square Restaurant No. 1, Times Square Restaurant Group, Dominica O'Neill, Shawn Callahan, and Philip Stein are dismissed; and it is further

ORDERED that the motion to dismiss is also granted to the extent that the second cause of action (defamation per quod) is dismissed with leave to plaintiff Three Amigos SJL Rest., Inc. d/b/a The Cheetah Club to replead that claim, and the third cause of action (injurious falsehood) is dismissed; and it is further

ORDERED that the motion to dismiss is also granted to the extent that the complaint is dismissed in its entirety as against individual defendants Maurice DuBois and Kristine Johnson only, with costs and disbursements to these defendants as taxed by the Clerk of the Court, and the Court is directed to enter judgment accordingly in favor of defendants DuBois and Johnson; and

it is further

ORDERED that the action is severed and continued against the remaining defendants;

and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 day after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 311, 71 Thomas Street, on May 29, 2013 at 2:00 PM.

Dated: March 19, 2013

ENTER:



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A.J.S.C.