SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN **PART** IAS MOTION 3EFM

Justice

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EROS INTERNATIONAL PLC,

Plaintiff,

- v -

MANGROVE PARTNERS, NATHANIEL AUGUST, MANUEL ASENSIO, ASENSIO & COMPANY, INC., MILL ROCK ADVISORS, INC., GEOINVESTING, LLC, CHRISTOPHER IRONS, DANIEL DAVID, FG ALPHA MANAGEMENT, LLC, FG ALPHA ADVISORS, FG ALPHA, L.P., CLARITYSPRING INC., CLARITYSPRING SECURITIES LLC, NATHAN ANDERSON, JOHN DOES, KNIGHT ASSETS & CO., LLP., AKSHAY NAHETA

Defendants.

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INDEX NO. 653096/2017

MOTION DATE 07/05/2018, 07/06/2018, 07/09/2018, 08/07/2018

MOTION SEQ. NO. 010 011 012 013

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 010) 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 246, 249, 253, 254, 259, 261, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 304

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 214, 215, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 247, 248, 255, 260, 286, 287, 288, 289, 305, 306, 307

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 212, 213, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 251, 252, 280, 281, 282, 283, 284, 285, 302, 303

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 308, 309, 316

were read on this motion to DISMISS.

Upon the foregoing documents:

Plaintiff Eros International PLC ("Eros") claims that a group of short-seller investors conspired, over several years, to spread false or misleading information about the company to artificially depress its stock price. Eros brought this action, alleging defamation and other related causes of action, against the following defendants: (1) GeoInvesting LLC, Christopher Irons,

Daniel E. David, FG Alpha Management LLC, FG Alpha Advisors, and FG Alpha L.P. (the "GeoInvesting Defendants"); (2) Mangrove Partners and Nathaniel H. August (the "Mangrove Defendants"); (3) ClaritySpring, Inc., ClaritySpring Securities LLC, Nathan Z. Anderson, and Hindenburg Research (the "ClaritySpring Defendants"); (4) Knight Assets & Co., LLP and Akshay S. Naheta (the "Knight Defendants"); Manuel Asensio, Asensio & Co., and Mill Rock Advisors (the "Asensio Defendants"); and (5) John Does Nos. 1-30 (the "John Doe Defendants") (collectively, "Defendants").

Pending before the Court are motions to dismiss filed by the GeoInvesting, Mangrove, ClaritySpring, and Knight Defendants (the "Moving Defendants").[1] The Moving Defendants argue, principally, that the statements at issue convey constitutionally-protected opinions and therefore cannot give rise to a claim of defamation (or defamation per se). They move to dismiss Eros's complaint under CPLR §§ 3211(a)(1) and (a)(7). Additionally, the GeoInvesting and Knight Defendants move to dismiss Eros's claims on statute of limitations grounds under § CPLR 3211(a)(5). The Knight Defendants also move to dismiss under CPLR § 3211(8) for lack of personal jurisdiction.

For the reasons set forth below, the motions are granted.

Factual Background

Eros is "a preeiminent co-producer and distributor of Bollywood films," and the first Indian media company listed on the New York Stock Exchange. (Am. Compl. ¶ 2). The

[1] On February 23, 2018, the Court granted Eros's motion for default judgments against Defendants Asensio & Co. and Mill Rock Advisors. (NYSCEF 160). A Traverse Hearing "to assess the service made on Defendant Manuel P. Asensio" is scheduled for March 19, 2019.

company also runs an online streaming service, called Eros Now, which boasts millions of users. (*Id.*).

Defendants are a collection of investors, researchers, and anonymous Internet personae who allegedly conspired to perpetrate a "short and distort" scheme to bring down Eros's stock price. (*Id.* ¶¶ 13-35).

As alleged in the Amended Complaint, such schemes work as follows. First, "short-sellers borrow securities, sell them and then drive the price of their target company's stock down by spreading materially false, misleading, defamatory and disparaging disinformation about the company." (*Id.* ¶ 43). Then, "[o]nce the company's stock drops to an artificially low price, ideally zero," the short-sellers make a profit by either "repurchas[ing] and return[ing] the borrowed securities, pocketing the difference," or by exercising a "put option" to "purchase the stock at the deflated price and resell the security at the predetermined higher price." (*Id.* ¶¶ 43-44).

According to Eros, Defendants' short and distort scheme with respect to Eros succeeded in every way. The scheme allegedly damaged Eros's "market reputation" and "credit worthiness." (*Id.* ¶ 411). And the negative coverage disseminated by Defendants allegedly caused "the sustained artificial depression and erosion of Eros' stock price." (*Id.*). For example, Eros's "stock price fell by nearly 19.5%" in the period between March 7, 2017 and April 6, 2017, purportedly "as a result of Defendants' negative reports and tweets." (*Id.* ¶ 413). To make matters worse, Defendants' statements allegedly spurred "abnormally high short interest" in the company's stock, "substantially depressing the market value of Eros over the entire course of the scheme." (*Id.* ¶ 416). All in all, Eros estimates that the harm caused by Defendants' scheme "exceed[s] hundreds of millions of dollars." (*Id.* ¶ 422).

Eros initiated this lawsuit on June 6, 2017 by filing a Summons with Notice, which named the Asensio Defendants and twenty John Doe Defendants. (NYSCEF 1.) It then filed a Complaint on September 29, 2017 against the Asensio, Mangrove, GeoInvesting, and Clarity Spring Defendants, (the "Complaint") (NYSCEF 3), which it amended on May 31, 2018 (the "Amended Complaint") to include, among other things, allegations against the Knight Defendants. (NYSCEF 163). Eros's 133-page Amended Complaint references dozens of articles, reports, and tweets published by a cast of characters that includes not only Defendants but also Defendants' various alleged online aliases. It is helpful at the outset to delineate the Moving Defendants and the allegedly defamatory content ascribed to each of them.[2]

The GeoInvesting Defendants

The GeoInvesting Defendants include: Defendant GeoInvesting, LLC ("GeoInvesting"), which is a financial research firm; Defendant Daniel E. David, who founded GeoInvesting; Defendant Christopher Irons, who works for GeoInvesting as a researcher and writer; and Defendants FG Alpha Management LLC, FG Alpha Advisors, and FG Alpha L.P., which are companies affiliated with GeoInvesting. (Am. Compl. ¶¶ 92; 96; 101). Eros also attributes two anonymous accounts to the GeoInvesting Defendants—"Orange Peel Investments" and

[2] The communications that comprise the bulk of the Moving Defendants' allegedly defamatory content bring to the fore two online mediums for circulating information about public companies: the website Seeking Alpha, and Twitter. Seeking Alpha is described as "a crowd-sourced contributor network of over 10,000 analysts, buysiders and industry experts," attracting 3.5 million subscribers and 8 million unique viewers per month. (Am. Compl. ¶ 70). Twitter is a social media platform that "allows its users to publish posts, called 'tweets,' that are public to any Internet user (not just those registered with Twitter)." (*Id.* ¶ 49). Other users can "like" a tweet, or "re-tweet" it, which instantly re-publishes that tweet on their own Twitter feed. (*Id.*) Twitter users can also "tag their tweets with particular identifiers so that they can be easily located through public searches or automatically show up in specific feeds created by Twitter users." (*Id.* ¶ 50). Finally, as we see here, both Twitter and Seeking Alpha allow users to post content under pseudonyms (or "handles," in Twitter parlance).

"Spotlight Research," which allegedly published additional defamatory content about Eros. (*Id.* ¶ 95).

Eros's allegations against the GeoInvesting Defendants are based on the following content: (i) five articles published online between March and July 2017; (ii) tweets under three different Twitter handles ("@GeoInvesting," "@FG Alpha Management," and "@Quoth the Raven"); and (iii) six other online articles attributed to Orange Peel and Spotlight Research.

The Mangrove Defendants

The Mangrove Defendants consist of Defendant Mangrove Partners, which is an investment advisory firm, and its founder, Defendant Nathaniel H. August. (NYSCEF 260). But the key name to know with the Mangrove Defendants is "Alpha Exposure," the nom de plume August used when posting content on the website Seeking Alpha and on Twitter. (*Id.*)

Eros's allegations against the Mangrove Defendants are based on the following content: (i) several Alpha Exposure reports published in 2015 and 2017; (ii) several Alpha Exposure tweets posted in 2017 and 2018; and (iii) a presentation given by August at an investment conference in April 2018. (Am. Compl. ¶¶ 67, 351, 355, 362, 366-67, 387, 394-96, 398, 400-02; *see* NYSCEF 260).

The ClaritySpring Defendants

Defendant ClaritySpring, Inc. ("ClaritySpring") is a hedge-fund research and consulting firm, with Defendant ClaritySpring Securities LLC serving as its brokerage arm. (*Id.* ¶ 103). The head of ClaritySpring is Defendant Nathan Z. Anderson, who operated ClaritySpring's Twitter account ("@Clarityspring" and later "@ClarityToast"). Anderson also published market research reports and tweeted under the name "Hindenburg Research." (*Id.* ¶¶ 104-105).

Eros's allegations against the ClaritySpring Defendants are based on: (i) tweets posted in March and July 2017; (ii) three online research articles by Hindenburg Research published in July and August 2017; and (iii) tweets posted by Hindenburg Research in 2017. (*Id.* ¶¶ 342-349, 375-380).

The Knight Defendants

Defendant Knight Assets & Co. ("Knight") is a U.K.-based investment firm founded by Defendant Akshay Naheta. (*Id.* ¶¶ 15-16). Eros alleges that Knight and Naheta operated an anonymous Twitter account called "@Market Farce," an allegation that is based on an undisclosed linguistic analysis. (*Id.* ¶ 56). The Knight Defendants deny that the account is theirs. (NYSCEF 277). In addition, Eros alleges on "information and belief" that the Knight Defendants also "ghost-wrote or contributed substantially" to other short reports about Eros. (Am. Compl. ¶ 57). The Knight Defendants deny this too. (NYSCEF 277).

Eros's allegations against the Knight Defendants are based on: (i) tweets posted by @Market Farce in 2015, 2016, and 2017 (Am. Compl. ¶¶ 124; 233; 281); and (ii) certain reports and letters written by the Asensio Defendants, but which the Knight Defendants purportedly "conspired to publish." (*Id.* ¶ 147).

Legal Analysis

In assessing a motion to dismiss under CPLR § 3211(a)(7), the Court must give the complaint a liberal construction, accept its factual allegations as true, and provide the plaintiff with the benefit of every favorable inference. *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 582 (2017); *Myers v. Schneiderman*, 30 N.Y.3d 1, 11 (2017).

Under CPLR § 3211(a)(1), "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v.*

Martinez, 84 N.Y.2d 83, 88 (1994); *Goshen v Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002) ("[S]uch motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law."). "To qualify as documentary, the paper's content must be 'essentially undeniable and ..., assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based." *Amsterdam Hospitality Group, LLC v Marshall-Alan Assocs., Inc.*, 120 A.D.3d 431, 432 (1st Dep't 2014) (citation omitted); *see Granada Condo. III Ass'n v Palomino*, 78 A.D.3d 996, 996-97 (2nd Dep't 2010) ("In order for evidence to qualify as 'documentary,' it must be unambiguous, authentic, and undeniable"). Such evidence can include emails, to the extent they "utterly refute plaintiff's allegations." *Kolchins v. Evolution Markets, Inc.*, 128 A.D.3d 47, 59 (1st Dep't 2015), *aff'd*, 31 N.Y.3d 100 (2018).

A. Statute of Limitations

As a threshold matter, the applicable statute of limitations for defamation claims under New York law bars some of Eros's claims against the Moving Defendants. Defamation claims are subject to a one-year statute of limitations under CPLR § 215(3), a period which starts to run from the first publication of the allegedly defamatory material. *See Smulyan v. New York Liquidation Bureau*, 158 A.D.3d 456, 457 (1st Dep't 2018); *Hoesten v. Best*, 34 A.D.3d 143, 150 (1st Dep't 2006). Even if that publication "consists of thousands of copies widely distributed, [it] is, in legal effect, one publication which gives rise to one cause of action"—and subject to one limitations period, which still "runs from the date of that publication." *Firth v. State*, 98 N.Y.2d 365, 369 (2002). The "single publication rule" equally applies to material posted on the Internet. *Id.* at 369-370 (rejecting argument that "each 'hit' or viewing" of online material should constitute republication and restart the statute of limitations).

The GeoInvesting Defendants

Eros's claims against certain "Spotlight Research" and "Orange Peel Investments" articles, which are attributed to the GeoInvesting Defendants, are time-barred. (NYSCEF 198). These articles were published between June and August 2016. (Am. Compl. ¶¶ 210; 219; 225; 229). Over a year later, on September 29, 2017, Eros filed its Complaint naming the GeoInvesting Defendants, Spotlight Research (as "Defendant John Doe No. 1"), and Orange Peel Investments (as "Defendant John Doe No. 2") (NYSCEF 3). Eros, however, contends that it "timely commenced this action" on June 6, 2017 by filing a Summons with Notice ("Summons"). (NYSCEF 290). But "[w]hile CPLR [§] 1024 allows a party who is ignorant of the name or identity of one who may properly be made a party to proceed by designating so much of his identity as is known, a summons served in a 'John Doe' form is jurisdictionally sufficient only if the actual defendants are adequately described and would have known, from the description in the complaint, that they were the intended defendants." *Lebowitz v. Fieldston Travel Bureau, Inc.*, 181 A.D.2d 481, 482 (1st Dep't 1992). That jurisdictional condition was not met here. The Summons names the Asensio Defendants and "John Does Nos. 1-20," providing no further description of the John Does and offering only a skeletal description of the dispute. (*See* NYSCEF 1). It is the date of the Complaint, then, and not the date of the Summons, which governs the timeliness of Eros's allegations regarding Spotlight Research and Orange Peel Investments.

As such, claims against the GeoInvesting Defendants based on the 2016 articles are time-barred. Eros's defamation claim as it relates to those articles is dismissed.

The Mangrove Defendants

Eros concedes that the reports published by the Mangrove Defendants' Alpha Exposure account in 2015 fall outside the statute of limitations. (*See* NYSCEF 321, Tr. 38:19-24) ("[I]n candor, we are not alleging that those 2015 statements are actionable defamation because the statute of limitations has passed, but what they are is they're context[.]"). Accordingly, Eros's defamation claim against the Mangrove Defendants as it relates to those articles is dismissed.

The Knight Defendants

The Knight Defendants argue that most of Eros's claims against them—all but a single tweet—fall outside the one-year limitations period. Eros did not name the Knight Defendants in their original Complaint, adding them for the first time in the Amended Complaint filed on May 31, 2018. (*See* NYSCEF 277). However, the original Complaint did identify "an anonymous user acting under the guise of the alias 'Market Farce'" who posted "false and defamatory tweets." (NYSCEF 3, Compl. ¶ 216). The Complaint then enumerated seven Market Farce tweets along with the dates those tweets were published. (*Id.*) Assuming the truth of Eros's allegation that the Knight Defendants in fact operated the Market Farce account, the Complaint provides enough detail to apprise the Knight Defendants that Eros intended to include them in this action. *See Lebowitz*, 181 A.D.2d at 482. As with the GeoInvesting Defendants, the timeliness of the Knight Defendants' claims is governed by the date of Eros's original Complaint.

Therefore, Eros's defamation claim against the Knight Defendants relating to the Market Farce tweets is timely as to the material published on or after September 29, 2016; the rest, however, are time-barred and dismissed under CPLR § 3211(a)(5).[3]

The ClaritySpring Defendants

The ClaritySpring Defendants' allegedly defamatory statements were published within the limitations period.

B. Defamation and Defamation Per Se

"In determining the sufficiency of a defamation pleading, we consider whether the contested statements are reasonably susceptible of a defamatory connotation." *Davis v. Boeheim*, 24 N.Y.3d 262, 268 (2014). To be "reasonably susceptible of a defamatory connotation," the statements in question "must come within the well established categories of actionable communication." *Id.*

Under New York law, a claim for defamation must allege "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum,

[3] To the extent Eros's claims against the Knight Defendants are based on "ghost-wr[iting] or contribut[ing] substantially" to reports published by other Defendants, (Am. Compl. ¶ 57), those claims are dismissed under CPLR § 3211(a)(7) because the Amended Complaint fails to provide any factual basis for that far-reaching allegation. The Amended Complaint repeatedly states, on information and belief, that the Knight Defendants participated in writing reports published by the Asensio Defendants, without elaborating on what that participation entailed or advancing any other basis for the allegation. (*See, e.g.*, *id.* ¶¶ 145-147; 159; 162; 167). Even on a motion to dismiss under CPLR § 3211, where the Court must accept the facts as alleged in the complaint as true, "[i]t is well settled that bare legal conclusions and factual claims" do not merit that presumption. *JFK Holding Co., LLC v. City of New York*, 68 A.D.3d 477 (1st Dep't 2009); *see also MiMedx Grp., Inc. v. Sparrow Fund Mgmt. LP*, No. 17 CIV. 7568 (PGG), 2018 WL 4735717, at *6 (S.D.N.Y. Sept. 29, 2018) (dismissing allegations where "[c]omplaint plead[ed] no facts demonstrating" that defendant operated under a certain online alias).

a negligence standard, and, it must either cause special harm or constitute defamation per se."[4] *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept 1999). "[S]ince only assertions of fact are capable of being proven false," a defamation claim therefore must be "premised on published assertions of fact, rather than on assertions of opinion." *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 38 (1st Dep't 2011).

In *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289-290, the New York Court of Appeals explained the legal distinction between fact and opinion as follows:

> A "pure opinion" is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be "pure opinion" if it does not imply that it is based upon undisclosed facts. When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a "mixed opinion" and is actionable. The actionable element of a "mixed opinion" is not the false opinion itself—it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking.

Accord. Sandals, 86 A.D.3d at 40; *Silvercorp Metals Inc. v. Anthion Mgmt. LLC*, 36 Misc. 3d 1231(A) (Sup. Ct. N.Y. Cty. 2012).

Practically speaking, "[d]istinguishing between assertions of fact and nonactionable expressions of opinion has often proved a difficult task." *Sandals*, 86 A.D.3d at 39. Courts rely on three factors in making the distinction: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to

[4] Because both defamation and defamation per se require the element of falsity, Eros's allegations as to both of these causes of action are grouped together for purposes of the Court's analysis.

signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact." *Davis*, 24 N.Y.3d at 270.

The contextual factor, which is often dispositive, "lends both depth and difficulty to the analysis, and requires that the court consider the content of the communication as a whole, its tone and apparent purpose." *Id.* Consistent with this holistic approach, "[r]ather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the [plaintiff]." *Id.*

Applying the principles outlined in *Steinhilber* and other cases to the litany of allegedly defamatory content alleged here, the Court determines that the statements at issue constitute protected opinion.[5]

Articles and Reports

The articles and reports published by the Moving Defendants expressed opinions "accompanied by a recitation of the facts" on which they were based, signaling to the reasonable

[5] Because the Court finds that the challenged statements constitute opinions rather than facts, it need not reach the issue of whether the Moving Defendants acted with "actual malice." That element of a defamation claim requires proof that "defendants published the defamatory statements with actual knowledge that they were false or with reckless disregard for their truth or falsity." *Silsdorf v. Levine*, 59 N.Y.2d 8, 17 (1983). Actual malice thus presupposes that the statements are capable of being proven false, and "only assertions of fact are capable of being proven false." *Sandals*, 86 A.D.3d at 38. Eros's allegations that the Moving Defendants' critical assessments of Eros were motivated by financial gain, *see, e.g.*, Am. Compl. ¶¶ 1, 116, 144, may bear on the issue of actual malice, but not on the antecedent issue of whether the statements conveyed opinions or facts. As noted above, "the New York constitution provides for absolute protection of opinions." *Restis v. Am. Coal. Against Nuclear Iran, Inc.*, 53 F. Supp. 3d 705, 719 (S.D.N.Y. 2014); *see Steinhilber*, 68 N.Y.2d at 290 ("While it is clear that expressions of opinion receive absolute constitutional protection . . ., determining whether a statement expresses fact or opinion may be difficult.").

reader through a mix of key words and context that the statements were not "based upon undisclosed facts."

First, the allegedly defamatory articles and reports clearly disclose the underlying facts from which their conclusions are drawn. The August 14, 2017 article posted by Alpha Exposure on Seeking Alpha, for example, excerpts Eros's publicly-available financial data and cites to previous years' earnings calls. (NYSCEF 243). Likewise, the articles published between March and July 2017 by the GeoInvesting Defendants chronicle allegations of self-dealing and improper enrichment that have been made against Eros over the years, noting the sources of these allegations and embedding links to those sources. (NYSCEF 200). And the Hindenburg Research articles follow the same pattern. The July 31, 2017 article analyzes language from earnings reports, press releases, news reports and publicly-available filings—all disclosed, all hyperlinked—to argue that "the company exhibits signs of an ever-tightening liquidity situation." (NYSCEF 226).

"[W]hile isolated portions of the [articles] are arguably factual, those portions constitute facts supporting the writer's opinion, which renders the writing[s] as a whole 'pure opinion' since it does not imply that it is based upon undisclosed facts." *Sandals*, 86 A.D.3d at 45; *see Silvercorp*, 36 Misc. 3d 1231(A) at *10 (dismissing defamation claims in alleged short-and-distort scheme where "[c]ritically, [defendant's] conclusions about [plaintiff's] misstatements in its financial statements and value of its shares were premised on 'facts' that it uncovered from the public filings and private sources, all of which were disclosed and provided"); *Nanoviricides, Inc. v. Seeking Alpha, Inc.*, No. 151908/2014, 2014 WL 2930753, at *5 (Sup. Ct. N.Y. Cty. June 26, 2014) (dismissing defamation claims in alleged short-and-distort scheme where "[t]he statements made by the author in the article are either followed by a recitation of 'facts'

uncovered from public filings . . . or no implication is given that they are based on undisclosed facts.").

Second, Eros's specific allegations belie its claims: the company targets the articles' conclusions and critique their authors' methodologies but does not dispute the underlying facts. The GeoInvesting Defendants' article cited above discusses allegations that "Eros channels money to family members through dummy production deals." (NYSCEF 200). Eros, not surprisingly, describes those allegations as "unsubstantiated," and criticizes the article for citing "stale information" from a putative class action filed against the company in July 2016. (Am. Compl. ¶ 230). Crucially, however, Eros does not dispute the existence of the source material, only the author's conclusion that the allegations therein are relevant, timely, and distressing.

At other times, Eros criticizes the methodology used to formulate certain opinions. When Alpha Exposure warns of an impending liquidity crisis and cautions that "Eros has burned $312 million of cumulative cash flow," Eros alleges not that Alpha Exposure got the numbers wrong but that it failed to consider other variables. Eros argues that it "has over $112 million in cash and cash equivalents"—a metric distinct from cash *flow*, suggesting that Eros is trying to transform a difference of opinion (*i.e.*, whether Eros has a liquidity problem) into a defamation claim. (Am. Compl. ¶ 312). One of the Hindenburg Research reports notes that despite "across-the-board declines" in Eros's stated revenue, the company's "Rest of the World segment revenues increased substantially." (NYSCEF 226). Hindenburg found this trend counterintuitive; it cited an explanation provided by Eros but offered its own reasons why the trend could signal "questionable revenue" on Eros's balance sheet. (*Id.*) Eros does not dispute the financial data in the report, nor does it dispute the language attributed to Eros in the article. Instead, Eros reckons that because of other factors, "a relative increase in Eros' 'Rest of the

World' revenues" is "not only credible, but entirely expected." (Am. Compl. ¶ 378). That is a viewpoint; it is not an actionable claim for defamation.

Third, the language of conjecture pervades these articles. The first three sentences of the summary at the top of the Mangrove Defendants' August 14 article, for instance, immediately indicate that it is conveying the authors' opinion: "We believe Eros is facing a liquidity crisis"; "In our opinion, recent sale rumors are not credible"; "[W]e believe Eros will issue equity and massively dilute shareholders." (NYSCEF 243). Similar language is interwoven throughout the other reports at issue. (*See, e.g.*, NYSCEF 200) ("We believe these statements and the numbers presented only provide ammunition for the case that the company may not be financially viable"); (NYSCEF 226) ("[W]e believe the full story is significantly worse.").

To be sure, "[s]imply couching such statements in terms of opinion" does not immunize them from claims of defamation. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990). As the United States Supreme Court noted in *Milkovitch*, "the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.'" *Id.* The "key inquiry is whether challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact." *Immuno AG*, 77 N.Y.2d at 243. In conjunction with the other aspects of the articles, however, the frequent use of opinion-like language further indicates to the reasonable reader that the author is expressing an opinion about Eros based on disclosed facts.

Fourth, many of the articles at issue here were posted on online forums that generally traffic in sharing financial opinions. The website Seeking Alpha, to take the prime example, "clearly gives the impression that the website is designed to give people a place to express their opinions and for the reader to then form his or her own assumptions based on the posted

articles." *Nanoviricides*, No. 151908/2014, 2014 WL 2930753, at *6. Contributors include "basically anyone who wants to share investment insights and ideas." Seeking Alpha, "Become a Seeking Alpha Contributor," https://seekingalpha.com/page/become-a-seeking-alpha-contributor (last visited March 4, 2019). While Seeking Alpha also includes news articles, those items generally appear in news-specific sections of the website (*e.g.*, "Market News," "Top News," and "Energy News"), contain bylines identifying the author as a "SA News Editor," and often take the form of short bullet points. *See* Seeking Alpha, "U.S. stocks sink, shrugging off trade deal optimism," https://seekingalpha.com/news/3439545-u-s-stocks-sink-shrugging-trade-deal-optimism (last visited March 4, 2019).[6] A reasonable reader who encountered the Seeking Alpha articles posted by the Moving Defendants here would understand that they were sharing opinions about Eros based on news about the company.

Web content, like all content, must be assessed on a case by case basis. Although several years ago it was suggested that "readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts," *Silvercorp*, 36 Misc. 3d 1231(A) at *11, this observation, even if it is assumed to be true, should not be read to "immunize [content] the focus and purpose of which are to disseminate injurious falsehoods about their subjects," *Sandals*, 86 A.D.3d at 44. Our "broader social context"—a necessary

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[6] Many of the articles are followed by disclosure statements, informing readers that the authors hold short positions in Eros. (*See* NYSCEF 243). Our courts have traditionally viewed an author's announced self-interest as evidence that the author's statements likely constitute opinions, not facts. In *Brian v. Richardson*, 87 N.Y.2d 46, 53 (1995), the court considered authorial motive as part of the "immediate context" of a challenged statement: "At the outset of the article, defendant disclosed that he had been Inslaw's attorney, thereby signaling that he was not a disinterested observer." *See also Immuno AG v. Moor-Jankowksi*, 77 N.Y.2d 235, 254 (letter to editor deemed non-actionable opinion where authors "were fully identified," which "made clear that its purpose was to voice the conservationist concerns of this partisan group"); *Silvercorp*, 36 Misc. 3d 1231(A) ("Such motive . . . indicates to the reader that the author is expressing his opinion.").

element of the defamation analysis—suggests that online commentary is just as capable as print or broadcast media of inflicting the kinds of harm the defamation laws are designed to protect against. Indeed, online communications can spread more quickly, and to all corners of the world, than can print or broadcast media statements. But in this case, the language of the articles and the sites on which those articles appeared weigh in favor of the conclusion that they were voicing opinions.

The recent case of *Amira Nature Foods v. Prescience Point LLC*, No. 15-cv-9655-VEC, Dkt. No. 66 (S.D.N.Y. Oct. 17, 2016), which Eros cites in its papers, does not dictate a different result. There, the court denied the defendants' motion to dismiss the plaintiff's defamation claim, stating that the plaintiff "adequately allege[d] facts, although just barely, to state a plausible claim for defamation." *Id.* at 58:20-22. Unlike in this case, the defendants in *Amira* were alleged to have misstated significant *facts* about the plaintiff, such as its debt and equity figures and total revenue. *Id.* at 19-23. Moreover, the defendants' reports relied on non-public data inaccessible to readers. *Id.* at 24-25. The court also held that the plaintiff "plausibly allege[d], although just barely, [that] the defendant's [sic] fabricated statements from interviews" in writing their reports. *Id.* at 60:25-61:2. Even under those circumstances, the court concluded that "the plaintiffs have barely pushed [their defamation claim] over the line." *Id.* at 58:20-22. Eros's allegations, by contrast, attack the conclusions reached by the Moving Defendants in their publications, but not the factual underpinnings. And there is no evidence that the Moving Defendants fabricated information to use in their articles about Eros.

Tweets

As with the articles and reports, the content and context of the tweets at issue in this case signal to the reasonable reader that the authors are expressing opinions.

The tweets identified by Eros as defamatory fall into two general categories: (i) tweets that accompany and advertise the articles discussed above, (*see* Am. Compl. ¶ 473); and (ii) tweets that provide commentary on Eros separate from those articles, (*see* Am. Compl. ¶ 352). As to the first category, Eros's claims regarding these tweets appear to overlap substantively with Eros's claims against the articles which the tweets promote. (*See* Am. Compl. ¶ 473) (Defendants "re-surfaced on Twitter at opportune times throughout 2016 to hype . . . false statements discussed herein."). Because the Court has found that the underlying articles are not defamatory, tweets that do nothing more than broadcast those articles do not take on a defamatory character.

Eros also takes aim at tweets which make allegedly defamatory statements outside the ones already alleged in the research articles. But the content of those tweets reflects protected opinions. For instance, on May 26, 2017, the day an Eros subsidiary released its quarterly financial results, Alpha Exposure tweeted the following statements:

- "$EROS Indian subsidiary cash on balance sheet only 131 Rs Lacs vs 1,719 Rs Lacs last year (-92% year over year). Looks like liquidity crisis"
- "$EROS - oldie but goodie - Indian subsidiary reported results this morning. Massive cash burn. Target price still $0"
- "$EROS Indian subsidiary borrowings more than double in last fiscal year but sales down. Looks dire to me."
- "$EROS Indian subsidiary almost all cash comes through consolidation and not in the standalone accounts. We think this is a huge red flag."

(Am. Compl. ¶¶ 352-353).

Eros's specific contentions about these tweets underscore that the author is expressing an opinion about Eros based on the subsidiary's financial disclosures. The first tweet asserts a statement of fact about the subsidiary—that the subsidiary's "cash on balance sheet [was] only 131 Rs Lacs vs 1,719 Rs Lacs last year (-92% year over year)." (Am. Compl. ¶ 352). The next sentence opines that this information "[l]ooks like liquidity crisis." (*Id.*) Eros argues that "[t]his

is false for the same reasons that the previous claims that Eros was in a liquidity crisis were false"—because *Eros* (not its subsidiary) "had a net increase in cash and cash equivalents of over $30.8 million over the prior year." (*Id.*) Again, what Eros's allegations target here is an analyst's opinion open to interpretation (*i.e.*, "liquidity crisis"), not the factual predicate for that opinion.

Eros's attacks on the Market Farce tweets, attributed to the Knight Defendants, fare similarly. For example, Eros argues that Market Farce's tweets in fall 2016 "include the baseless assertion that Eros' reported cash is 'non-existent' and that its accounting practices warrant SEC scrutiny." (Am. Compl. ¶ 233).

- November 11, 2016: "I still believe that the reported cash on $EROS balance sheet is non-existent @SEC_Enforcement"
- December 1, 2016: "When is @SEC_Enforcement going to investigate $EROS? Receivables have never been higher at $241mm & the cash is probably non-existent..."

(*Id.*) The first tweet explicitly adopts the language of belief, not settled fact. The second tweet's reference to the SEC can be understood "as an allegation to be investigated, rather than as a fact," *Sandals*, 86 A.D.3d at 43. Alternatively, a reasonable reader could see the "@SEC_Enforcement" jibe as "exactly the type of loose, figurative or hyperbolic statements, [that], even if deprecating the plaintiff, are not actionable." *MiMedx Grp., Inc. v. Sparrow Fund Mgmt. LP*, No. 17CV07568PGGKHP, 2018 WL 847014, at *7 (S.D.N.Y. Jan. 12, 2018), *report and recommendation adopted*, No. 17 CIV. 7568 (PGG), 2018 WL 4735717 (S.D.N.Y. Sept. 29, 2018).

The context of the Moving Defendants' tweets further supports their characterization as opinion. The Market Farce Twitter page, for example, bills itself as "Focused on uncovering farcical financial market and investment activity" and as "0% investment advice, 100% personal

opinions." (NYSCEF 273). And ClaritySpring's Twitter page includes a short description with the disclaimer: "Opinions too inane to be anything other than my own." (NYSCEF 217).

Presentation

Finally, Eros's allegations based on the Mangrove Defendants' April 23, 2018 presentation at an investor conference are also insufficient to state a defamation claim. Eros singles out two statements from the presentation: (i) that "there was a material discrepancy between Eros' reported theatrical revenues and third-party estimates of revenues based on independent box office sources," and (ii) that it was "implausible" for Eros's "implied average revenue per film" to have "increased nearly threefold in recent quarters compared to previous financial years." (Am. Compl. ¶¶ 404-406).

As before, however, this allegedly defamatory material consists of opinions based on disclosed sources, and Eros does not challenge any of the facts underlying the analysis. The presentation scrutinizes financial data Eros provided in its regulatory filings. Each set of data is accompanied by a note at the bottom of the PowerPoint slide indicating its source. (NYSCEF 245). Tellingly, Eros does not dispute the veracity of any data shown on these slides. (*See* Am. Compl. ¶¶ 404-406). Instead, Eros offers alternative methodologies that the Mangrove Defendants could have used to produce conclusions more favorable to Eros. (*Id.*) A dispute as to methodology is not sufficient to state a viable claim for defamation.

Eros's defamation claims against the Moving Defendants are dismissed.[7]

* * *

[7] The foregoing should not be read to suggest that a "short and distort" scheme can *never* give rise to a viable claim of defamation simply because the alleged distortion is cloaked in the form of an opinion. The Court holds only that Eros in this particular case has failed to move the needle beyond alleging that opinions were espoused that cast it in an unfavorable light and with which it disagrees.

Eros also alleges five non-defamation claims, which can be dismissed because they all stem from the same facts as the defamation claims and therefore are duplicative. *See Perez v. Violence Intervention Program*, 116 A.D.3d 601, 602 (1st Dep't 2014) ("The remaining claims of injurious falsehood, tortious interference with prospective contractual/business relations, and intentional infliction of emotional distress should have been dismissed as duplicative of the defamation claim, as they allege no new facts and seek no distinct damages from the defamation claim."); *Sladkus v. Englese*, 59 Misc. 3d 1219(A) (Sup. Ct. N.Y. Cty. April 25, 2018) (claim for tortious interference dismissed as duplicative of the defamation claims as they are based on the same allegations and fall entirely "within the ambit of . . . plaintiff's cause of action sounding in defamation").

Substantively, these non-defamation claims are dismissed on the additional, independent grounds described below.

C. Commercial Disparagement

Eros alleges that Defendants' "false, misleading and disparaging statements attacking Eros' solvency, business fundamentals and the quality of its products and services, including Eros Now," constitute commercial disparagement. (Am. Compl. ¶ 441).

Commercial disparagement is a cause of action akin to defamation in that it requires allegations of "falsehoods published to third parties," but commercial disparagement "is confined to denigrating the quality of the business' goods or services." *Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 670-71 (1981).

Eros's claim for commercial disparagement fails for at least two reasons. First, Eros has not alleged falsehoods—*i.e.*, false statements of fact—only non-actionable opinion. (*See* Part B, *supra*). Second, the Moving Defendants' statements were not "confined to denigrating the

quality of [Eros's] goods or services." *Ruder & Finn*, 52 N.Y.2d at 671. Although some of the statements did specifically discuss the Eros Now product, it was in the context of critiquing how the company valued, reported, and accounted for the product.

The Moving Defendants' motions to dismiss the commercial disparagement claim are Granted.

D. False Light (alleged only against the GeoInvesting Defendants)

Eros brings additional allegations against the GeoInvesting Defendants for "false light under Pennsylvania law." (*See* Am. Compl. ¶ 447). The Amended Complaint opts for the law of Pennsylvania, presumably, because the GeoInvesting Defendants are based there (Am. Compl. ¶¶ 20-25), and more importantly because New York "does not recognize such a tort." *See, e.g.*, *Freeman v. Johnston*, 192 A.D.2d 250, 253 (1st Dep't 1993).

Under Pennsylvania law, "a corporation, partnership or unincorporated association has no right to privacy, and therefore, causes of action for false light invasion of privacy are precluded." *Teri Woods Pub., L.L.C. v. Williams*, No. CIV.A. 12-04854, 2013 WL 1500880, at *7 (E.D. Pa. Apr. 12, 2013). Eros cites no authority to the contrary.[8]

The GeoInvesting Defendants' motion to dismiss the false light claim is Granted.

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[8] The GeoInvesting Defendants argue, alternatively, that the law of New Jersey, not Pennsylvania, governs Eros's claim. (NYSCEF 261). The Court need not evaluate which jurisdiction has the greater interest here, however, because the result is the same in both. Under New Jersey law, if a plaintiff's "arguments in support of his false-light claim are essentially the same as those he advances on his defamation claim, the result can be no different." *G.D. v. Kenny*, 205 N.J. 275, 308 (2011); *see Soobzokov v. Lichtblau*, 664 F. App'x 163, 169 (3d Cir. 2016) ("Our decision regarding [plaintiff's] defamation claim dooms his cause[ ] of action for false light. . . .").

E. Tortious Interference with Prospective Business Relations and with Contract

Next, Eros alleges that Defendants tortiously interfered with Eros's prospective business relations (*see* Am. Compl. ¶¶ 376-382) and contracts the company had with third-parties (*see id.* ¶¶ 383-389).

"[I]nducing breach of a binding agreement and interfering with a nonbinding 'economic relation' can both be torts . . . [but] the elements of the two torts are not the same." *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 189 (2004). "The required elements of a cause of action for tortious interference with prospective business relations are as follows: (a) business relations with a third party; (b) the defendant's interference with those business relations; (c) the defendant acting with the sole purpose of harming the plaintiff or using wrongful means; and (d) injury to the business relationship." *Advanced Glob. Tech. LLC v. Sirius Satellite Radio, Inc.*, 15 Misc. 3d 776, 779 (Sup. Ct. N.Y. Cty. 2007). Tortious interference with contract, meanwhile, requires: "[a] the existence of a contract, enforceable by the plaintiff, [b] the defendant's knowledge of the existence of that contract, [c] the intentional procurement by the defendant of the breach of the contract, and [d] resultant damages to the plaintiff." *Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp.*, 296 A.D.2d 103, 111 (1st Dep't 2002).

Both causes of action require some specificity as to the relationship or agreement being interfered with. *See Rondeau v. Houston*, 118 A.D.3d 638, 639 (1st Dep't 2014) (dismissing claim for tortious interference with prospective business advantage because "plaintiff failed to allege any specific business relationship he was prevented from entering into"); *Chambers Assocs. LLC v. 105 Acquisition LLC*, 37 A.D.3d 365, 366 (1st Dep't 2007) (dismissing claim for tortious interference with contract "in the absence of an enforceable agreement").

For both claims, Eros fails to allege specific relationships or contracts with which the Moving Defendants allegedly interfered. The company merely declares that it "had prospective business relationships with many third-parties, including, but not limited to: (i) potential customers; (ii) potential producers; (iii) potential distributors of Eros' services and products; (iv) potential investors; (v) potential lenders; and (vi) shareholders and management of various companies under consideration for a strategic transaction (*e.g.*, an acquisition by Eros)." (Am. Compl. ¶ 456). Although Eros does mention a "U.S. Dollar Reg-S bond offering in March 2017 and revolving credit facility agreement extensions," it does not allege any details about how Defendants' actions allegedly interfered with those transactions, let alone that they did so intentionally. Eros's claim for tortious interference with contract advances similarly threadbare allegations. The Amended Complaint names not a single specific contract with which any of the Defendants interfered. Instead, Eros alludes vaguely to "contractual relationships with third-parties" that included "customers," "investors," and "lenders." (Am. Compl. ¶¶ 459, 463).

Nor does Eros adequately allege that the Moving Defendants "act[ed] with the sole purpose of harming the plaintiff or using wrongful means," which it must do in order to state a claim for tortious interference with prospective business relations. As to harmful purpose, Eros has not made "the necessary allegation that [the Moving Defendants'] conduct was motivated solely by malice . . . beyond mere self-interest or other economic considerations." *Shared Commc'ns Servs. of ESR, Inc. v. Goldman Sachs & Co.*, 23 A.D.3d 162, 163 (1st Dep't 2005). Quite the opposite, Eros specifically alleges that the Moving Defendants conspired to short and distort its stock "for their own financial gain." (Am. Compl. ¶ 1). Even if the Moving Defendants sought to harm Eros for other, unspecified reasons, clearly it was not the *sole* purpose of the alleged scheme. In addition, Eros has not alleged the types of "wrongful means"

envisioned by the tort. In this context, wrongful means "include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone[.]" *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 (1980). The Moving Defendants' dissemination of negative opinions—in other words, persuasion—cannot support Eros's claim.

The Moving Defendants' motions to dismiss the claims of tortious interference with prospective business relations and tortious interference with contract are Granted.

F. Civil Conspiracy

Finally, Eros alleges that Defendants' actions were part of a civil conspiracy "to create and disseminate false and misleading statements and reports concerning Eros and to engage in market manipulation of its securities, with the intent of harming Eros' businesses and profiting from that harm." (Am. Compl. ¶ 470).

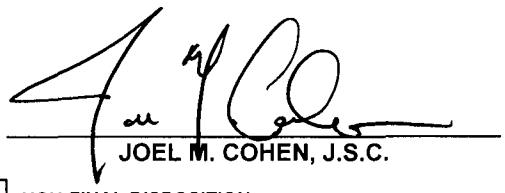
"New York does not recognize an independent tort cause of action for civil conspiracy." *Montan v. Saint Vincent's Catholic Med. Ctr.*, 81 AD3d 431, 431 (1st Dep't 2011); *Jebran v. LaSalle Bus. Credit, LLC*, 33 A.D.3d 424, 425 (1st Dep't 2006) ("New York does not recognize a substantive tort of conspiracy"). Eros seemed to concede this point at oral argument, acknowledging "[t]he tension here with the New York law" and arguing instead that the circumstances here would constitute "the very guts of what would otherwise be a conspiracy claim anywhere else." (NYSCEF 321, Tr. 69:15-19). In this jurisdiction, however, Eros's cause of action is not cognizable.

The Moving Defendants' motions to dismiss the civil conspiracy claim are Granted.

Therefore, it is:

ORDERED that the GeoInvesting Defendants', Mangrove Defendants', ClaritySpring Defendants', and Knight Defendants' motions to dismiss are GRANTED.

This constitutes the Decision and Order of the Court.



3/8/2019
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE