SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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JENA GARDNER, JG WORLD WIDE LLC, JG BLACK BOOK OF TRAVEL LTD, CITY ESCAPES INC. D/B/A DISCOVER OUTDOORS, BIA LLC D/B/A MILLENNIUM VOYAGES USA, MERCURY ADVERTISING INC. D/B/A MERCURY CSC, REVEALED ENTERPRISES LLC D/B/A REVEALED CALIFORNIA D/B/A REVEALED AMERICA, and HERITAGE TOURS USA LLC,

Plaintiffs,

- v -

VIRTUOSO LTD and MATTHEW D. UPCHURCH,

Defendants.

INDEX NO. 656244/2019

MOTION DATE 11/13/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

In motion sequence number 004, defendants Virtuoso Ltd (Virtuoso) and Matthew D. Upchurch move to dismiss the first amended complaint (FAC) pursuant to CPLR 3211(a)(1) and (7). Plaintiffs Jena Gardner, JG World Wide LLC (JGWW), JG Black Book of Travel LTD (JGBB), City Escapes Inc. (City) d/b/a Discover Outdoors, BIA LLC (BIA) d/b/a Millennium Voyages USA, Mercury Advertising Inc. (Mercury) d/b/a Mercury CSC, Revealed Enterprises LLC (Revealed) d/b/a Revealed California d/b/a Revealed America, and Heritage Tours USA LLC (Heritage) cross-move to strike the affirmation of defendants' counsel.

In the FAC, plaintiffs allege against both defendants (1) defamation, (2) product or trade disparagement, (3) tortious interference with contract, (4) tortious interference with prospective economic advantage, and (5) negligence. Additionally, plaintiff Gardner alleges against both defendants (6) negligent infliction of emotional distress and (7) intentional infliction of emotional distress. (NYSCEF Doc. No. [NYSCEF] 42, FAC ¶¶ 102-136.)

Background

Unless indicated otherwise, the following facts are taken from the FAC and for the purposes of this motion are accepted as true.

Gardner is an owner, manager, and officer for the "high-end luxury travel" branding and marketing companies she formed or acquired: JGWW, JGBB, City, BIA, Mercury, Revealed, and Heritage. (*Id*. ¶¶ 14, 16-19.) The corporate plaintiffs reported gross revenue of $28,179,272 in 2018. (*Id*. ¶ 29.) In December 2016, Gardner was offered $43 million to sell the corporate plaintiffs. (*Id*. ¶ 26.)

"Virtuoso is a for-profit network of travel agencies and suppliers" with more than 20,000 members. (*Id*. ¶¶ 31, 32.) Upchurch is the Chief Executive Officer of Virtuoso. (*Id*. ¶ 36.) Members of the Virtuoso network pay a membership fee, plus a percentage of travel booked through the network. (*Id*. ¶ 31.) Gardner did business with Virtuoso for 21 years. (*Id*. ¶ 33.) Heritage and Revealed were members of the Virtuoso network, not Gardner's other businesses. (*Id*. ¶ 34.) However, most of plaintiffs' business and revenue stemmed from Gardner's relationships with the Virtuoso network. (*Id.*)

Virtuoso's Tour Operator Preferred Supplier Agreements (Agreements) provide

that Virtuoso is to "consistently review" members "on an ongoing basis," and as a result of Virtuoso's review,

> "if Virtuoso determines that a member is problematic due to… outstanding commission payments, outstanding fee payments, operational problems, financial instability, service issues, or other problems determined by Virtuoso… then Virtuoso, in its sole discretion, may place [Heritage or Revealed] on 'probation.' [Heritage or Revealed] specifically consents to Virtuoso's notification to its Member Agencies of any change in status of [Heritage or Revealed] to 'probationary' as set forth herein. In such instances, Virtuoso reserves the right to advise its Member Agency base via Virtuoso.com and/or by other appropriate means."

(NYSCEF 54, Tour Operator Preferred Supplier Agreement ¶ 4.6[2].) The Agreements also include a forum selection provision which states: "[v]enue of any suit brought to enforce the provisions of this Agreement shall lie exclusively in Tarrant County, Texas… hereby waive[] any and all objections to exclusive venue and jurisdiction of any dispute hereunder lying in Tarrant County, Texas." (*Id*. ¶ 6.4.)

In February 2019, Virtuoso allegedly contacted 24 companies, some within the Virtuoso network, and told them during phone calls orally that

> "(i) Gardner was not trustworthy and neither her nor her companies should be trusted; (ii) Gardner and her companies had poor business practices which had caused a deteriorating customer satisfaction rate; (iii) Gardner and her companies did not provide customers with satisfactory trips; (iv) they should wind down and terminate their business relationships with Gardner and her companies; and (v) if these entities did not stop doing business with Garner's businesses immediately, it would be at their own business' peril" (the Statements).

(NYSCEF 42, FAC ¶ 38.) In paragraphs 38(a) to (x), plaintiffs detail the subsequent calls plaintiffs received from the 24 entities, including details of when and what Virtuoso said and who made the call from Virtuoso to the members. For example,

> "i. Virtuoso telephoned Gateway Travel and made the [Statements] and stated that Gardner and her companies would soon no longer be Virtuoso suppliers. These statements were made by Virtuoso on February 6, 2019. . . . Gateway

> Travel informed Gardner: 'I heard what happened with Virtuoso and I have to say it's got me very concerned.'" and
>
> "p. Virtuoso telephoned Smart Flyer and made the [Statements]. It advised Smart Travel that it should not do business with Heritage. These statements were made by Virtuoso on February 6, 2019. Smart Flyer put a 'Stop Sell' on any company owned by Gardner."

Virtuoso contacted nonmembers too. For example, plaintiffs allege:

> "u. Virtuoso contacted the Travel Agency Management Solution ('TAMS') group, which is not a Virtuoso member, which then sent a 'Stop Sell' advisory regarding Gardner and Heritage to all of its travel agency members. Upon information and belief, Virtuoso representatives were in attendance at the TAMS meeting that took place a few days after the February 6, 2019 suppression notice. Many Virtuoso agency owners were also at this meeting and were discussing what they had heard from Virtuoso."

Virtuoso also made the Statements about Gardner's other company, JGBB, which was not Virtuoso members. For example, plaintiffs allege:

> "w. Costas Christ, a director at Virtuoso, telephoned Islas Secas/Belvedere Properties, a [JGBB] client who was not a client of Heritage or Revealed, and made the [Statements] on or about February 28, 2019. That client terminated JG Black Book for all trade, public relations and marketing services. The Belvedere Properties team had been in talks with [JGBB] to build out its entire hotel brand from a marketing, PR and sales perspective, but that business opportunity was irretrievably lost as a result of Virtuoso's statements."

On February 6, 2019, Virtuoso allegedly posted the following notice to its network: "'[i]n response to recent issues experienced with Heritage Tours related to late commission payments, service issues and non-responsiveness, Virtuoso has made the decision to place them on probation and suppress their profile from the network.'" (*Id.* ¶ 42.) On February 15, 2019, Virtuoso made an identical on-line statement about Revealed. (*Id.* ¶ 43.) Afterwards, industry contacts reduced or terminated their business relationships with Gardner and her companies. (*Id.* ¶ 44.)

On April 17, 2019, Heritage and Revealed ended their membership in the Virtuoso network. (*Id.* ¶ 46.) On April 19, 2019, Virtuoso emailed members acknowledging that Heritage and Revealed were no longer preferred partners but misstating that JGBB continued its membership. (*Id.* ¶ 47.) Later that day, Virtuoso sent another email stating JGBB was no longer part of the network. (*Id.* ¶ 48.) However, JGBB was never a member of the Virtuoso network, and a clarification was not issued. (*Id.* ¶ 49.) Plaintiffs allege that this communication implied that JGBB was not qualified to be a member of the Virtuoso network and was being preemptively rejected. (*Id.* ¶ 51.) Plaintiffs assert Virtuoso's statements were non-privileged, false, misleading, and designed to inhibit or destroy the plaintiffs' businesses. (*Id.* ¶ 37.) As to Upchurch, plaintiffs complain that he directed and instructed Virtuoso's actions which were motivated by "personal antipathy and malice toward Gardner." (*Id.* ¶ 79.)

Plaintiffs deny any late commission payments, service issues, or non-responsiveness. (*Id.* ¶¶ 57-59, 67.) Moreover, plaintiffs contend that even if Virtuoso were to identify one or two late payments, placing the plaintiffs on probation from the network is drastic, commercially unreasonable, and malicious. (*Id.* ¶ 60.) Rather, plaintiffs blame Virtuoso and its new invoicing procedure that went into effect on February 6, 2019. (*Id.* ¶¶ 62, 63.) Moreover, plaintiffs complain that after 21 years without incident, in early 2019, Virtuoso suddenly emailed Gardner and her companies at the wrong addresses to resolve payment issues and failed to provide invoices to plaintiffs in a timely manner. (*Id.* ¶¶ 63-64.) Plaintiffs assert that Virtuoso has never required instantaneous commission payments, nor have members been comparably

publicly scrutinized by Virtuoso. (*Id.* ¶¶ 65-66.) Rather, plaintiffs assert defendants "set up" or trapped plaintiffs. (*Id.* ¶ 64.)

Plaintiffs allege that Upchurch was on a personal crusade to ruin Gardner and her businesses. (*Id.* ¶¶ 79-80.) Plaintiffs contend that Upchurch was motivated by his anger from being excluded from a leadership council being formed by Gardner and Gardner's success in their industry. (*Id.* ¶ 80.) Plaintiffs assert that Gardner's gender is also a factor in Upchurch's animosity. (*Id.*) As to Upchurch's malice, plaintiffs' source of information is a Virtuoso employee who said Upchurch "'flagged' Gardner and her companies and instructed Virtuoso employees to find ways to get Gardner in trouble." (*Id.* ¶ 80[a].) Other Virtuoso employees warned plaintiffs that "Upchurch put 'a target on your back' and was actively looking for ways to hurt her professionally" and "Upchurch and his closest associates were looking for ways to 'take Gardner down.'" (*Id.* ¶ 80[b-c].) Indeed, one of the 24 entities informed plaintiffs that Upchurch was involved in the calls to the booking agencies with Heritage to say there were problems. (*Id.* ¶ 38[e]). Additionally, plaintiffs assert that Upchurch had equity interests in at least two of Gardner's competitors based upon which plaintiffs claim malice. (*Id.* ¶¶ 81, 82.)

In the aftermath, plaintiffs experienced substantial cancellations and financial losses. (*Id.* ¶¶ 91-94.) Gardner was no longer able to draw a salary from her businesses. (*Id.* ¶ 96.) Further, Gardner allegedly suffered emotionally and lost her reputation, business connections, and friendships. (*Id.* ¶ 97.) As a result, Gardner allegedly takes medication for depression, loss of sleep, anxiety, and severe distress. (*Id.* ¶¶ 98-99.) Plaintiffs contend that the destruction of her businesses and personal angst were initiated and accomplished by Virtuoso and Upchurch. (*Id.* ¶¶ 100-101.)

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) "[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

To prevail on a CPLR 3211 (a)(1) motion to dismiss, the movant has the "burden of showing that the relied upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted].) "A cause of action may be dismissed under CPLR 3211 (a) (1) 'only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted].) "The documents submitted must be explicit and unambiguous." (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623, 626 [1st Dept 2017].) Their content must be "essentially undeniable.'" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [citation omitted].) The authenticity of documentary evidence must not be subject to genuine dispute, and it must be enough to "support the ground on which the motion is based." *(Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014].) In

addition to contracts and other legal instruments, "emails can qualify as documentary evidence if they meet the 'essentially undeniable' test." (*Id.* at 433.)

Plaintiffs' cross motion to strike defendants' attorney Shapiro's affirmation (NYSCEF 52) submitted in support of defendants' 3211(a)(1) motion is denied. Shapiro attaches 15 documents to his three-page affirmation. (*Id.*; NYSCEF 53-67, ex 1 to 15.) Defendants' submission of an affirmation does not automatically convert a motion to dismiss to a motion for summary judgment. Indeed, a plaintiff is welcome to submit an affidavit to remedy a poorly pled complaint. (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976].) While it is inappropriate for an attorney to contradict plaintiff's factual assertions, *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007], using an attorney affirmation to put documentary evidence, such as a contract, before the court on a motion to dismiss is entirely appropriate under CPLR 3211(a)(1). (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134-135 [1st Dept 2014] [see discussion].) Likewise, it is appropriate to use an affidavit to put emails before the court, though an affidavit from a person with knowledge is preferable to an attorney affirmation. (*Art and Fashion Group Corp.,* 120 AD3d at 438.) Either way, the court must evaluate whether the emails conclusively establish a defense. (*Id.*)

Defamation

In their first cause of action, plaintiffs allege that Upchurch, using Virtuoso as a megaphone, made false statements, both oral and written, about plaintiffs that Upchurch intended to produce negative opinions towards plaintiffs. (NYSCEF 42, FAC ¶¶ 103-104.)

Defamation is a false statement which can expose the plaintiff to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion from contemporaries, and inhibit positive societal interaction. (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014] [citations omitted].) The elements of a defamation claim are: (1) "a false statement", (2) "published to a third party", (3) "without privilege or authorization", and (4) "that causes harm, unless the statement is one of the types of publications actionable regardless of harm." (*Id.* [citation omitted].) "[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 Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 38 [1st Dept 2011] [internal quotation marks and citation omitted].) A statement's truth or substantial truth is an absolute defense. (*Stepanov*, 120 AD3d at 34.) On a motion to dismiss, the court considers the context of whether the statement is reasonably interpreted to be defamatory. (*Id.*) Consent to the defamatory statements being published is an absolute privilege. (*Teichner v Bellan*, 7 AD2d 247, 251 [4th Dept 1959].)

First, defendants challenge whether plaintiffs pled the alleged defamatory statements with particularity. CPLR 3016(a) requires that in a defamation action, "the particular words complained of ... be set forth in the complaint." To survive a motion to dismiss, a defamation action requires particular false words, and the time, place, and manner in which those words were stated. (*Dillon v City of NY*, 261 AD2d 34, 38 [1st Dept 1999].) The words are assessed within the context of the entire statement and method of publication. (*Id.*) Implications in a defamation claim cannot be vague or conclusory. (*Id.* at 40.)

Plaintiffs Gardner, JGBB, Heritage, and Revealed have sufficiently pled the defamatory statements. Plaintiffs quoted the written statements published on the Virtuoso network and include dates and an article number. These published articles specifically name Heritage and Revealed. Plaintiffs also quoted the emails sent out regarding JGBB and include the dates of these emails.

As to the oral statements, the Statements themselves are sufficiently specific.[1] Although defendants argue that the Statements must be in quotes, "the offending words need not be in quotations." (*Torres v Prime Realty Servs.*, 7 AD3d 343, 344 [1st Dept 2004].) Further, although plaintiffs do not specifically allege which Virtuoso employees made the Statements to certain third parties, a plaintiff's "failure to specify exactly what words were spoken by which principal is not fatal to the claim," where there are allegations of the dates, text, etc., and it is alleged who, in this case Upchurch, was "responsible for authoring, publishing, or causing others to publish them." (*Cedeno v Pacelli*, 192 AD3d 533, 534 [1st Dept 2021] [citation omitted].)

Plaintiffs explain that the Statements were reported to plaintiffs during plaintiffs' conversations with each of the 24 entities after they were called by Virtuoso. Plaintiffs organized the amended complaint by compiling all of Virtuoso's oral statements

[1] "If at the trial it turns out that the words were not precisely the same, but close enough and unequivocally defamatory, the plaintiff can then move for an order conforming the pleadings to the proof under CPLR 3025(c). (*See Rossignol v Silvernail*, 185 AD2d 497, 499 [3d Dept 1992] ['In situations ... where the slanderous words or dates proved are not identical to those alleged in the complaint but sufficiently analogous as to cause no undue prejudice, the most cautious course of action is for the plaintiff to move at the close of the evidence for an order pursuant to CPLR 3025(c) conforming the pleadings to the proof'].) There is nothing in CPLR 3016 to preclude that, and CPLR 3026 offers further corroboration that defects that turn out to be unprejudicial are not to be penalized." (CPLR 3016, McKinney's 3016:2.)

followed by the details of each call in ¶¶ 38(a) to (x). Plaintiffs' detailed allegations regarding the third parties' responses and reactions to the Statements made about Gardner, Heritage, JGBB, and Revealed by Virtuoso further support their allegations of the Statements themselves. Quotes of the third parties' reactions after hearing the Statements from Virtuoso include: "'it goes without saying that all the news coming out on Heritage Tours is extremely depressing and of great concern to us'"; "'I'm going to be frank: we've be advised to be suspen[d] bookings with Revealed America as they're under review with Virtuoso due to complaints and lack of commission payments'"; "'hearing some nasty rumors' about Gardner"; "'I heard what happened with Virtuoso and I have to say it's got me very concerned'"; "'I've learned … today that Heritage is experiencing some pretty serious financial problems'"; "'I received a phone call last week from Virtuoso which made me nervous about Heritage's future'"; and heard "'some disturbing things about Revealed….'" (NYSCEF 42, FAC ¶ 38[a], [e], [h], [i], [n], [s], [x].) Plaintiffs also allege with sufficiency that Costas Christ, a director at Virtuoso, telephone a JGBB client and made the Statements directly to them. (*Id.* ¶ 38[w].)

As to the remaining corporate plaintiffs, plaintiffs have not pled their claims with the requisite particularity, and the defamation claims by those plaintiffs are dismissed.

Plaintiffs insist that the reasons Virtuoso placed Heritage and Revealed on probation are untrue. As to JGBB, plaintiffs challenge Virtuoso's statement since JGBB was never a member, and thus, could not continue its membership or be terminated. Plaintiffs allege that this misstatement caused foreseeable reputational harm to JGBB by implying that JGBB was not up to Virtuoso's standards. Plaintiffs' allegations are sufficient unless the statements can be proven true.

Defendants claim that the written statements are true, submitting in support 10 emails that request overdue commission payments or refund requests. (NYSCEF 57-61, 62, 64-67.) On the face of the emails, defendants' submission is dubious, incomplete, contradictory, and inconclusive. For example, one alleged complaint about a July 2019 commission not being paid is dated November 12, 2018. (NYSCEF 58, email chain.) Another email supports plaintiffs' contention that defendants' practice of invoicing changed; defendants embed invoices with contracts without alerting plaintiffs. (NYSCEF 60, email chain.) Further, some of the emails support plaintiffs' contention that the inquiries about commissions were sent to the wrong address or phone number. (*See e.g.*, NYSCEF 58, email chain at 7 or 12.) The same email demonstrates that plaintiffs respond within minutes while the complainant apologizes for not responding to plaintiffs for three weeks. (*Id.*) In one case, the wire instructions given to plaintiffs were wrong. (NYSCEF 59, email chain.) Moreover, plaintiffs challenge the authenticity of the emails which are submitted by an attorney who is neither the sender nor the recipient of the emails. The emails do not utterly refute plaintiffs' allegations and appear to tell only part of the story.

Next, defendants argue that the written statements are not susceptible to a defamatory meaning. Defamation per se requires a showing that the statement "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society." (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977] [internal quotation marks and citation omiited].) "[I]t is for the court to decide

whether…the contested statements are reasonably susceptible of a defamatory connotation." (*James v Gannett Co.*, 40 NY2d 415, 419 [1976] [citations omitted].)

Defamation "is not actionable unless the plaintiff suffers special damage." (*Liberman v Gelstein*, 80 NY2d 429, 434 [1992].) Special damages mean economic or financial loss. (*Sharratt v Hickey*, 20 AD3d 734, 735 [3d Dept 2005].) The exceptions to the special damage requirement "(collectively 'slander per se') consist of statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman." (*Liberman*, 80 NY2d at 435). In the business context, "a defamatory statement that is a direct attack upon the business, trade or profession of the plaintiff is considered defamation *'per se,'* and therefore actionable without any proof of special damages." (*Yesner v Spinner,* 765 F Supp 48, 52 [EDNY1991].) For defamation per se, "statements must allege a link between a particular profession and a particular disreputable vice of that profession. The words must 'tend to injure ... in [the professional] capacity.'" (*Kforce, Inc. v Alden Personnel, Inc.*, 288 F Supp 2d 513, 516 [SDNY 2003].)

Here, plaintiffs allege both defamation per se and special damages. Plaintiffs' loss of over $20 million in revenues would constitute special damages. Virtuoso's written statements: late commission payments, service issues, and non-responsiveness go to the heart of plaintiffs' luxury travel, branding and marketing companies. Likewise, Virtuoso's oral statements: Gardner is untrustworthy, and her companies should not be trusted, plaintiffs have poor business practices, customer satisfaction is deteriorating, trips are unsatisfactory, are a direct attack on Gardner and her businesses. As plaintiffs

explain "[i]n the niche luxury-travel business, developing and maintaining a strong reputation for reliability, integrity, and customer service is of paramount importance. It is essential that a company cultivate its reputation for first-rate customer service and good business practices. Otherwise, a bad reputation spreads quickly and the company will soon lose most or all of its referral sources in its professional networks." (NYSCEF 42, FAC ¶20.)

Defendants argue that the FAC must be dismissed due to the forum selection clause in the Agreements with Heritage and Revealed. The Agreements provide that Tarrant County, Texas shall be the jurisdiction for contract disputes. Plaintiffs counter that this is a tort claim, not a contract claim, and thus, the forum selection clause is inapplicable. A "defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations." (*New York Univ. v Contl. Ins. Co.*, 87 NY2d 308, 316 [1995].) Therefore, the court rejects defendants' forum selection argument.

Next, defendants insist that Heritage and Revealed consented to the publication. Defendants point to the Agreements §4.6 which allows Virtuoso to place members on probation due to outstanding commission, or fee payments, operational or services issues or other problems. Heritage and Revealed consented to Virtuoso notifying its members of any change in their status. However, defendants allegedly communicated with entities not within the Virtuoso network. Moreover, defendants concede that JGBB was never part of the Virtuoso network, therefore, JGBB could not have consented to the email stating it was no longer part of the Virtuoso network. Finally, plaintiffs

consented to truthful information, not false, defamatory statements. (*See Teichner v Bellan*, 7 AD2d 247, 251 [4th Dept 1959] [Dr.'s letter to a collection agency does not constitute consent to the dunned debtor making a defamatory statement to the collection agency about the Dr.].) The court cannot find consent as a matter of law on this record.

Defendants insist that this contract provision provides an absolute privilege. Defendants also assert a qualified privilege. (*Liberman,* 80 NY2d at 437 ["One such conditional, or qualified, privilege extends to a 'communication made by one person to another upon a subject in which both have an interest.'"] [citation omitted].) However, privilege is eliminated when the plaintiff can demonstrate malice. (*Id.*) A malicious statement can be made from spite, ill will, with knowledge of falsity or with reckless disregard for the truth. (*Id*. at 437-438.) Knowing that something is probably false establishes a reckless disregard for a defamation claim. (*Id*. at 439.) Malice can be established by context; evidentiary facts are not needed. (*Pezhman v City of NY*, 29 AD3d 164, 168-169 [1st Dept 2006]; *Trim-A-Way Figure Contouring, Ltd. v National Better Business Bureau, Inc.*, 37 AD2d 43, 45 [1971] [on Summary Judgment, plaintiff required to come forward with evidence of falsity and actual malice when statements are presumptively privileged].) Here, plaintiffs detail defendants' malice toward plaintiffs, and particularly Upchurch's misogyny-based discrimination toward Gardner and her successful companies.

For all of these reasons, defendants' motion to dismiss the first cause of action for defamation is denied in part. Moreover, the court notes defendants' hyper focus on

the libel claims to the exclusion of the oral statements about which plaintiffs also complain.

Product or Trade Disparagement

Defendants contend that "product disparagement" is the appropriate title for the second cause of action because "trade disparagement" is not explicitly recognized by New York Law. While commercial disparagement is recognized as a cause of action in New York, which is similar to defamation because it requires allegations of "'falsehoods published to third parties,'" commercial disparagement "'is confined to denigrating the quality of the business' goods or services.'" (*Eros Intl. PLC v Mangrove Partners*, 2019 NY Slip Op 30604[U], *21 [Sup Ct, NY County 2019] [citation omitted].) "Where a statement impugns the basic integrity or creditworthiness of a business, an action for defamation lies and injury is conclusively presumed. Where, however, the statement is confined to denigrating the quality of the business' goods or services, it could support an action for disparagement, but will do so only if malice and special damages are proven." (*Ruder & Finn Inc. v Seaboard Sur. Co.*, 52 NY2d 663, 670-71 [1981] [citations omitted] [product libel case about weight reducing pill dismissed on 3211(a) motion in the absence of special damages allegation].)

Plaintiffs' allegations are sufficient because plaintiffs allege written falsities regarding the quality of Gardner, JGBB, Heritage, and Reveal's work connected to their industry reputation. Moreover, these plaintiffs have sufficiently asserted that the statements made by Virtuoso were the cause of the loss or reduction in business volume and thus special damages are alleged. Again, as to the remaining corporate

plaintiffs have not alleged statements denigrating the work of those companies specifically.

Tortious Interference with Contract

Plaintiff claims that Virtuoso and Upchurch intentionally interfered with third-party contracts by telling businesses to cease operations with the plaintiffs. Defendants argue that this is duplicative to the defamation claim, or alternatively, that the plaintiffs have not adequately identified any third-party contracts in which the defendant caused a breach.

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996] [citations omitted].) A claim for tortious interference must be more than simple speculation and contain allegations that but for the defendant's action, the contract would not have been breached. (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006].)

Although plaintiffs allege that Heritage, Revealed, and JGBB had contracts with third-party vendors that defendants knowingly and intentionally interfered with, this claim is duplicative of their defamation claim as they allege no new facts or damages. (*Perez v Violence Intervention Program*, 116 AD3d 601, 602 [1st Dept 2014].) The motion to dismiss the third cause of action is granted.

Tortious Interference with Perspective Economic Advantage

To state a tortious interference with prospective economic advantage claim, a plaintiff "must allege that: (a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship." (*Thome v Calder Found.*, 70 AD3d 88, 108 [1st Dept. 2009] [citations omitted].) Plaintiffs must specifically show that defendants prevented plaintiffs from entering an economic relationship either by using wrongful means, which "as a general rule… must amount to a crime or an independent tort" or by "engag[ing] in conduct for the sole purpose of inflicting intentional harm on [Plaintiffs]." (*Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004].)

This claim seeks damages for defendants' interference with plaintiffs' prospective business relations with the third parties which defendants allegedly defamed plaintiffs to. Plaintiffs allege that they lost prospective business from these third parties because of defendants' defamatory statements. Again, this claim is duplicative of the defamation claim as plaintiffs allege no new facts or damages. (*Perez v Violence Intervention Program*, 116 AD3d at 602.)

Negligence

Defendants argue that they owed no duty to plaintiffs. Plaintiffs claim defendants owed a duty of care based on truth.

> "[G]enerally a negligent statement may be the basis for recovery of damages, where there is carelessness in imparting words upon which others were expected to rely and upon which they did act or failed to act to their damage but such information is not actionable unless expressed directly, with knowledge or notice that it will be acted upon, to one to

> whom the author is bound by some relation of duty, arising out of contract or otherwise, to act with care if he acts at all."

(*White v Guarente*, 43 NY2d 356, 362-63 [1977] [citations omitted].) The fifth cause of action must be dismissed because plaintiffs have not pled that they relied on the allegedly negligent statements made by Virtuoso. (*See Sprecher v Thibodeau*, 148 AD3d 654 [1st Dept 2017] [Plaintiff, an aspiring Broadway producer, did not reply on statements by defendant press agent, about plaintiff in connection with a Broadway musical plaintiff was producing entitled "Rebecca - The Musical" and whether he was involved in a nonparty's fraud on the musical involving the invention of fictitious investors].)

Infliction of Emotional Distress

Plaintiff Gardner alleges that the statements made by defendants negligently (sixth cause of action) and intentionally (seventh cause of action) caused her substantial emotional distress. Defendants argue that the statements were made to third parties and Gardner did not rely on them and that any alleged statements were not outrageous.

"A cause of action to recover damages for negligent infliction of emotional distress generally requires a plaintiff to show a breach of a duty owed to him which unreasonably endangered his physical safety or caused him to fear for his own safety." (*Sacino v Warwick Val. Cent. School Dist.*, 138 AD3d 717, 719 [2d Dept 2016] [citations omitted].) A mental injury must be a direct result. (*Taggart v Costabile*, 131 AD3d 243, 253 [2d Dept 2015] [citations omitted].)

"The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causations; and (4) severe emotional distress."

(Petkewicz v Dutchess County Dept. of Community & Family Services, 137 AD3d 990, 990 [2d Dept 2016] [citations omitted].) By comparison, a claim for negligent infliction of emotional distress removes the element of intentional conduct and imposes negligence as an essential element. (*Taggart*, 131 AD3d at 247.)

The seventh cause of action is dismissed because defendants' statements were not made to Gardner. (*See Owen v Leventritt*, 174 AD2d 471, 471-472 [1st Dept. 1991] [threat to kill plaintiff at a public meeting later relayed to plaintiff through a third person not actionable].) Plaintiffs rely on Virtuoso's oral statements to 24 entities and written statements published on its network. Moreover, Gardner fails to state a valid claim for negligent infliction of emotional distress because she does not allege that the conduct "either unreasonably endangers a plaintiff's physical safety or causes the plaintiff to fear for his or her own safety." (*E.B. v Liberation Publs.*, 7 AD3d 566, 567 [2d Dept 2004].) Gardner's claim for intentional infliction of emotional distress is also lacking because making statements, even if false and defamatory, does not constitute extreme and outrageous conduct. (*See Bement v NYP Holdings, Inc.,* 307 AD2d 86, 92 [1st Dept. 2003]; *Ostrowsky v Dept. of Ed. of NYC*, 2013 WL 5963137, at *11 [ED NY Nov. 7, 2013] ["Defamatory statements—even when motivated by a desire to see an employee terminated or prevented from securing new employment—are generally not sufficiently extreme and outrageous to support a claim of intentional infliction of emotional distress."].) Therefore, the motion to dismiss the sixth and seventh cause of action counts is granted.

Accordingly, it is

ORDERED that the defendants' motion to dismiss is granted, in part, in so far as the first cause of action (defamation) is dismissed as to plaintiffs JG World Wide LLC, City Escapes Inc. d/b/a Discover Outdoors, BIA LLC d/b/a Millennium Voyages USA, and Mercury Advertising Inc. d/b/a Mercury CSC, the second cause of action (product or trade disparagement) is dismissed as to plaintiffs JG World Wide LLC, City Escapes Inc. d/b/a Discover Outdoors, BIA LLC d/b/a Millennium Voyages USA, and Mercury Advertising Inc. d/b/a Mercury CSC, and the third cause of action (tortious interference with contract), fifth (negligence), sixth (negligent infliction of emotional distress), and seventh (intentional infliction of emotional distress) causes of action are dismissed; and it is further

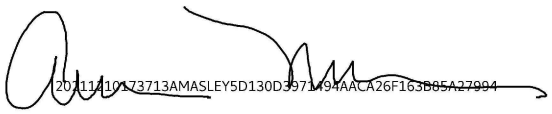
ORDERED that the Clerk of the Court is directed to amend the caption as the claims of plaintiffs JG World Wide LLC, City Escapes Inc. d/b/a Discover Outdoors, BIA LLC d/b/a Millennium Voyages USA, and Mercury Advertising Inc. d/b/a Mercury CSC are dismissed and all future papers filed with the court shall bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases*

(*access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that defendants shall file an answer within 20 days of this decision and the remaining parties shall file a proposed PC order to which all parties agree or competing PC orders if the parties cannot agree to a discovery schedule.



12/10/2021
DATE

ANDREA MASLEY, J.S.C.

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