To be Argued by:
KATHERINE M. BOLGER

New York County Clerk's Index No. 152656/14

New York Supreme Court

Appellate Division—First Department

ROY DEN HOLLANDER,

Plaintiff-Appellant,

– against –

TORY SHEPHERD, ADVERTISER NEWSPAPERS PTY LTD.,
AMY MCNEILAGE and FAIRFAX MEDIA PUBLICATIONS PTY LIMITED,

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS

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COUNTER STATEMENT OF THE QUESTIONS INVOLVED

1. Should Plaintiff's amended complaint be dismissed for a lack of personal jurisdiction where (a) Defendants, two Australian Newspapers and two Australian journalists, researched, wrote, and published articles in Australia that were directed at an Australian audience, (b) Plaintiff's claims sounded in defamation, limiting the application of this State's long-arm statute, and (c) Plaintiff could not show that this was one of those rare cases where jurisdiction could be asserted over non-residents based on their speech?

The court below answered this question in the affirmative.

2. Should Plaintiff be granted leave to take discovery where he failed to make a "sufficient start" toward showing that long-arm jurisdiction could be asserted here?

The court below answered this question in the negative.

3. Alternatively, should Plaintiff's amended complaint be dismissed on the merits because he failed to show (a) that Defendants made the statements complained of and (b) the statements Defendants did make were nonactionable as a matter of law because they were (1) true, (2) a matter of pure opinion, (3) not capable of any defamatory meaning, or (4) not "of and concerning" Plaintiff?

The court below did not reach these questions.

NATURE OF THE CASE

This is a defamation case. In January 2014, Defendants, two Australian newspapers and two Australian journalists, reported on proposed men's studies courses set to take place at the University of South Australia. Tory Shepherd ("Shepherd") wrote and Advertiser Newspapers Pty Ltd. ("*The Advertiser*") published two news articles and two opinion columns. RA103-04. Amy McNeilage ("McNeilage") wrote and Fairfax Media Publications Pty Limited ("*The Herald*") published just one news article. RA124-25. They discussed that Plaintiff-Appellant Roy Den Hollander, a self-described "anti-feminist," was scheduled to teach one of the courses and was associated with extreme anti-feminist groups. All five articles at issue were researched, written, and published in Australia to websites directed at an Australian audience.

In response, Plaintiff sued Defendants in New York County Supreme Court for "publishing false and misleading information concerning [his] copyright[ed course materials] and himself." RA22. Based on these statements Plaintiff asserted claims for injurious falsehood, tortious interference with prospective contractual relations, and *prima facie* tort. He also brought a claim of defamation against Shepherd based on the articles and columns she wrote.

The IAS court properly dismissed the amended complaint, finding that no long-arm jurisdiction existed. It did so based on settled principles. First, it

determined that Plaintiff's complaint sounded in defamation no matter how he chose to label his claims. RA626 (citing *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 157 (2d Cir. 1996)). Second, it recognized that long-arm jurisdiction in defamation cases like this one are governed exclusively by CPLR 302(a)(1)'s transaction of business prong. RA620-21 (citing *SPCA of Upstate N.Y., Inc. v. Am. Working Collie Ass'n*, 18 N.Y.3d 400, 406 (2012) (hereinafter, "*SPCA*")).

Applying this law, the court held that Defendants did not transact any business out of which Plaintiff's claims arose because their contacts with New York were "very minimal" and "attenuated." RA623. In fact, McNeilage, *The Herald*, and *The Advertiser* had *no* contacts related to the articles with the forum. RA623. And Shepherd's only contacts about the articles were "limited emails" and a single phone call made to New York from Australia. RA623. The only other possibly relevant conduct alleged was the publication of the articles to the internet, but the court rejected that as a basis for jurisdiction because courts "have repeatedly held that placement of defamatory content on the internet . . . does not constitute transaction of business in New York." RA624-25 (citing *SPCA*, 18 N.Y.3d at 402).

In the opening brief, Plaintiff largely sidesteps this case law. Instead, he argues that the IAS court "improperly changed [his] causes of action . . . into one[s] for defamation" because he is seeking damages not for his personal

reputation but for damage to his "business product" a "compilation" called "Males and the Law." Br. for Plaintiff-Appellant at 5 ("Opening Brief"). As a result, Plaintiff asserts, the court erroneously applied this State's narrow view of the long-arm statute in defamation cases. *Id.* at 5-6. But this argument fails on the facts and the law.

As an initial matter, this new theory is sheer pretext. On its face, the complaint seeks damages for injury to reputation caused by false speech. RA31 (describing one Defendant's "intent to defame and disparage" plaintiff); RA54 (asserting that another Defendant had "set out to injure the courses' creators by . . . publication of disparaging comments about the courses[']s . . . creators"); RA69 (describing this suit as plaintiff "exercis[ing] his historic right to vindicate harm to his reputation via the courts"). As such, it "sound[s] in defamation." *Findlay v. Duthuit*, 86 A.D.2d 789, 790 (1st Dep't 1982). As a result, the reach of the long-arm statute is dramatically curtailed here.

The IAS court was also correct in denying Plaintiff any jurisdictional discovery. In defamation cases, long-arm jurisdiction can only be based on conduct that gave rise to the cause of action, namely the researching, writing, and publication of an article. RA621-23. Plaintiff's demand for wide-ranging discovery on other matters ranging from Defendants' advertising strategies to their

online financial advising was as irrelevant as it would have been futile had discovery been granted.

Finally, even if four Australian Defendants thousands of miles from this courthouse were subject to jurisdiction here, there is another reason to affirm. All of Plaintiff's claims fail as a matter of law. Even a cursory review of the overwrought complaint in which he calls the reporters here "witches," "harp[ies]," and "bigots," RA7, 24-25, makes it clear that this case is about his deeply held dislike of "feminazis," as he puts it. Plaintiff has a right to hold these opinions, but he does not have a right to sue based on others' discussion of them. At any rate, many of the statements complained of are constitutionally protected opinions, not of and concerning Plaintiff, or were never even uttered by Defendants. For all these reasons, Plaintiff's claims fail.

BACKGROUND

A. The Defendants

Advertiser Newspapers is an Australian-based corporation that publishes *The Advertiser*, a newspaper that focuses on news related to Adelaide and South Australia. RA100-01. Tory Shepherd, at all times relevant to this suit, was the Political Editor for *The Advertiser* and is a citizen of Australia who has never been to the State of New York. RA103, 105.

Defendant Fairfax Media is also an Australian-based corporation that publishes *The Sydney Morning Herald* based out of Sydney, Australia and focused on Australian-related news. RA121-22. At all times relevant to this suit, Amy McNeilage was a reporter for *The Herald* and a citizen of Australia who has never been to the State of New York. RA124-25.

B. Plaintiff Roy Den Hollander

Plaintiff is a self-professed "anti-feminist" who believes that the "feminist" movement is a plot to "eliminate[] the rights that . . . men[] are entitled to." RA35, 37. He believes this means that one of the only "remaining sources of power" for men is the right to bear arms, which gives men "a fighting chance against unjust state violence" RA37. Otherwise, Plaintiff hypothesizes, men will be "reduced" to living "in protective hamlets surrounded by armed guards and barbed wire where females can safely pick out their pleasure for the night."[1] RA188.

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[1] In the IAS court, Defendants moved to dismiss the amended complaint pursuant to Rules 3211(a)(1), (7), and (8) of the New York Civil Practice Law and Rules ("CPLR"). On a motion to dismiss pursuant to CPLR 3211(a)(1), a court may consider all documentary evidence so long as it is "'proved or conceded to be authentic.'" *Erich Fuchs Enters. v. ACLU Found., Inc.*, 95 A.D.3d 558, 558 (1st Dep't 2012) (citation omitted). The "typical[]" example of documentary evidence is judicial records, *see, e.g.*, *Giuliano v. Gawrylewski*, 40 Misc. 3d 1210(A), 2013 WL 3497611, at *2 (Sup. Ct. N.Y. Cnty. June 27, 2013), but a plaintiff's own writings are properly considered documentary evidence as well, *see Love v. William Morrow & Co*., 193 A.D.2d 586, 588 (2d Dep't 1993) ("[a] comparison of the disputed language employed by [defendant] with the plaintiff's own words in his term paper . . . demonstrates the 'substantial truth' of [defendant's] words") (citation omitted); *Grimaldi v. Ho*, No. 6909/2012, slip op. at 6 (Sup. Ct. Dutchess Cnty. Sept. 3, 2013) (relying on plaintiff's own "December 2011 newsletter" to support truth finding) (available at RA484-91).

Courts are also entitled to take judicial notice of certain materials, such as court records and newspaper articles. *See, e.g.*, *Saleh v. N.Y. Post*, 78 A.D.3d 1149, 1151-53 (2d Dep't 2010); *see*

Plaintiff has appeared on *The Colbert Robert*, the Opie & Anthony radio show, and *Your World with Neil Cavuto*, has been interviewed by multiple media outlets, including *The New Yorker*, and has had his exploits followed closely by *The New York Times*. RA98, 420-29, 492-511. In many of his public appearances, Plaintiff proudly refers to himself as an "anti-feminist" or the news outlet notes that he is a "self-described anti-feminist." RA98; RA456. His now-defunct website even bore a banner that quoted *The New York Times* calling him an "anti-feminist lawyer." RA430.

Plaintiff has filed multiple civil suits alleging that various programs he believes favor women are unconstitutional or illegal. He has claimed in litigation that feminism is a religion, and, therefore, U.S. government funding of educational institutions with women's studies courses violates the Establishment Clause. RA401-03. He has also claimed that "ladies' nights" at New York nightclubs impermissibly "discriminat[e] against men," RA212, and that the Violence Against Women Act violates the Equal Protection Clause and is motivated by "animus toward American citizens, mainly men, who marry foreigners," RA312-313. Plaintiff's complaints along these lines have been unsuccessful, *see, e.g.*,

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also Gomez-Jimenez v. N.Y. Law Sch., 36 Misc. 3d 230, 258 n.13 (Sup. Ct. N.Y. Cnty.) (judicial notice of newspaper article reporting a 25% decline in law school admissions), *aff'd*, 103 A.D.3d 13 (1st Dep't 2012); *People v. Larsen*, 29 Misc. 3d 423, 425 (Crim. Ct. N.Y. Cnty. 2010) (judicial notice of certain statements on a private website); *Sprewell v. NYP Holdings, Inc*., 1 Misc. 3d 847, 850 (Sup. Ct. N.Y. Cnty. 2003) (judicial notice of various articles on topics related to defamation plaintiff).

Hollander v. Members of Bd. of Regents of Univ. of N.Y., 524 F. App'x 727, 730 (2d Cir. 2013) ("Before again invoking his feminism-as-religion thesis . . . , we expect [Plaintiff] to consider carefully whether his conduct passes muster under Rule 11."); *Hollander v. Inst. For Research On Women & Gender at Columbia Univ.*, 372 F. App'x 140, 141-42 (2d Cir. 2010) (expressing its "grave doubts" over same). In some instances, Plaintiff has blamed this lack of success on judges who are women. RA130 (arguing that a judge's opinion was "factually wrong, but try telling that to a lady judge if you're a man"); *see also Hollander v. Swindells-Donovan*, No. 08-CV-4045 (FB)(LB), 2010 WL 844588, at *1 (E.D.N.Y. Mar. 11, 2010), *aff'd sub nom. Hollander v. Steinberg*, 419 F. App'x 44 (2d Cir. 2011); RA520.

Outside the courts, Plaintiff contributes articles to *A Voice for Men*, a controversial men's rights website. RA129-162, 356-385. There he has called for the end of women's studies (or as he "affectionately call[s] them[,] 'Witches' Studies,'" RA130) and complained that he was discriminated against because of "prejudice against Euro-Americans of protestant ancestry, divorced husbands who criticize their ex-wives, and men who choose not to meekly submit to feminist and political correctionalist totalitarianism." RA151.

Elsewhere, Plaintiff has written that "[t]he purpose of the Feminist Movement is not equality, justice or freedom, but . . . power over men." RA188.

He believes that men have been victimized by women because, "Beyond [having to provide] food and housing, [a man] must satiate . . . [his wife's] relentless vanity with expensive jewelry, perfumes, clothes and cosmetics," RA177, and argues against domestic violence hotlines because there are no "advertisements paid for by taxpayer dollars giving men a number to call to get some ragging, nagging, malicious slut to shut her yap," RA180.

C. The Publications at Issue

1. The Shepherd Articles and Columns.

On January 12, 2014, Shepherd wrote an article titled "Lecturers in world-first male studies course at University of South Australia under scrutiny." RA81-83 (the "First Shepherd Article"). In that Article, Shepherd notes that some men's studies courses scheduled to be held at the University of South Australia would be led by lecturers "linked to extreme views on men's rights and websites that rail against feminism." RA81. She reported that Plaintiff, a "self-professed 'anti-feminist lawyer,'" was one of the lecturers. RA81. Shepherd cited Plaintiff as "argu[ing] that feminists oppress men in today's world and referring to women's studies as 'witches' studies.'" RA81. She then quotes the course founder who defended the men's studies courses as well as more traditional masculinity scholars who argued that "'populist' male studies" lent themselves to the "more extreme activists." RA82.

As a follow up on January 14, Shepherd wrote another article titled "University of South Australia gives controversial Male Studies course the snip." RA86-87 (the "Second Shepherd Article"). The Second Shepherd Article reported that the University had decided against approving the men's studies courses. RA86-87. Shepherd also summarized her interview with Plaintiff, wherein, among other things, he said he was "preparing a course that looked at how the law favours females when it comes to employment, crime, domestic relations, property, divorce and illegitimate children." RA86. She also noted that Plaintiff "stood by his claim that men's remaining source of power was 'firearms.'" RA86.

On the same day, Shepherd also wrote a column on the Opinion page of the News section of *The Advertiser* website titled, "Tory Shepherd: Pathetic bid for victimhood by portraying women as villains." RA91-92 (the "First Shepherd Column"). This Column never mentions Plaintiff but criticizes men's rights advocates generally and their efforts to establish men's right courses in academia.

Finally, on June 18, Shepherd wrote a column on the Opinion page of the News section of *The Advertiser* discussing Plaintiff's initial complaint in this action. RA88-90 (the "Second Shepherd Column"). That Column, titled, "Men's rights campaigner Roy Den Hollander attacks *The Advertiser*'s Tory Shepherd in bizarre legal writ filed in New York County," discusses this lawsuit, calling it in a tongue-in-cheek manner, "gold and genius," and taking Plaintiff to task for his *ad*

hominem attacks in his complaint by quipping, for example, "I may be a harpy, and somewhat bacchanalian, but I never, ever wear stilettoes." RA88-90.

Neither the Shepherd Columns nor the Articles mention Plaintiff's "business product" "Males and the Law." RA107-20.

2. The McNeilage Article.

On January 14, McNeilage wrote an article, titled "University of South Australia distances itself from males studies proposals," which noted that the University had not approved several males studies courses, "some of which were to be taught by hardline anti-feminist advocates." RA84-85 (the "McNeilage Article"). After introducing Plaintiff as one of the lecturers for the courses and as a "self-described anti-feminist," McNeilage spent the remainder of her short article focusing on an academic at the University who was linked to Plaintiff. RA84-85. The McNeilage Article does not mention Plaintiff's "business product" "Males and the Law." RA127-28.

D. Procedural History

1. The Original Complaint and Motion to Dismiss.

Plaintiff filed his original complaint against Defendants on March 24, 2014. In that complaint, he asserted two claims, one for "authoring . . . injurious falsehoods about Plaintiff" and another for "tortious interference with the prospective economic advantage of Plaintiff teaching the section 'Men and the

Law.'" RA18. Plaintiff served that complaint through the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.

On August 29, 2014, Defendants made a motion to dismiss the complaint, arguing that the IAS court lacked jurisdiction over them and that Plaintiff's claims all failed as a matter of law. Thereafter, on October 7, 2014, Plaintiff filed both an affidavit in opposition to the motion to dismiss while, at the same time, filing an amended complaint ("FAC"). Because the FAC mooted Defendants' motion to dismiss the original complaint, they submitted a letter requesting the withdrawal of their motion to dismiss, which the IAS court permitted on October 23, 2014.

2. The FAC.

In the FAC, Plaintiff asserted three causes of action against Shepherd and McNeilage for injurious falsehood, RA61, tortious interference with prospective contractual relations, RA62-64, and *prima facie* tort, RA64-65. Plaintiff also asserted a claim of libel against Shepherd. RA65-75.

In his first cause of action, Plaintiff alleged that the First Shepherd Article and the McNeilage Article constituted injurious falsehoods about the "property interest of Roy in his copyrighted compilation the 'Males and the Law' section of a Male Studies course" and about Plaintiff "so as to intentionally harm him by aborting that section of the Male Studies course." RA61. Plaintiff, however, never

alleges that Defendants had access to his alleged "copyrighted compilation," or that Defendants made any comments specific to it. RA61.

In his second cause of action, Plaintiff alleged that Shepherd wrote the First Shepherd Article and McNeilage wrote the McNeilage Article "to keep the creators of the Male Studies courses from teaching their course sections at the University." RA62. The tortious conduct alleged was "characterizing" Plaintiff as "extreme right wing, railing against feminism [women], referring to women as bitches and whores, advocating gun violence, lacking in academic rigor, on the margins of society, extreme activists, hostile toward women and nonwhites, opposed to an equal and fair world, not objective and dangerous to women." RA63.

In the alternative, Plaintiff alleged that Shepherd and McNeilage "are liable under *prima facie* tort" because "their sole motivation" in writing the First Shepherd Article and the McNeilage Article was their "'disinterested malevolence' to invidiously discriminate against men's rights activists." RA64.

In his final cause of action, Plaintiff alleged that Shepherd libeled him in the First and Second Shepherd Articles and the First and Second Shepherd Columns. RA65. In support of this claim, Plaintiff listed thirty-six separate statements throughout those Articles and Columns that he alleged to be false, defamatory, and damaging to his reputation as a lawyer and a lecturer of men's studies. RA65-66.

Notably, Plaintiff does not appear to allege any of the four claims as against the newspaper Defendants specifically. Although *The Herald* and *The Advertiser* are named in the FAC, he made no separate factual allegations underpinning these causes of action. *See generally* RA61-75.

After filing this lawsuit, Plaintiff posted a "Responses to Media" handout on his website explaining that he brought this case out of "vengeance" after Shepherd and McNeilage published their articles "depict[ing] Plaintiff as a dangerous loony" and "target[ing] the guys involved in the course for [their] political beliefs."[2] RA518, 524. He characterizes Shepherd and McNeilage as "Feminazis," "Commies," "pigs" and "dog[s]-in-heat," and "stupid little girls wagging their tongues to harm people they don't like." RA519, 525.

3. The IAS Court's Order Granting the Motion to Dismiss.

On January 8, 2016, Justice Schecter issued an opinion granting Defendants' motion to dismiss for a lack of long-arm jurisdiction. RA616. The court found that Defendants' contacts with New York "'are not as significant as the few cases finding long-arm jurisdiction when defamation was asserted.'" RA622 (quoting *SPCA of Upstate N.Y., Inc. v. Am. Working Collie Ass'n*, 74 A.D.3d 1464, 1466 (3d Dep't 2010), *aff'd*, 18 N.Y.3d 400).

[2] Plaintiff has affirmed the authenticity of this document, RA567-78. *Love*, 193 A.D.2d at 588 (taking judicial notice of the plaintiff's own writings).

Specifically, the court explained that long-arm jurisdiction pursuant to CPLR § 302 may be based on "'the commission of a tortious act . . . either within the state or outside the state.'" RA621 (quoting *SPCA*, 18 N.Y.3d at 403-04). Cases sounding in defamation, however, were subject to a "carve[] out" from the long-arm statute's normal application that "'reflect[ed] the State's policy of preventing disproportionate restrictions on freedom of expression.'" RA621 (quoting *SPCA*, 18 N.Y.3d at 403). Defendants in defamation cases could only be subject to jurisdiction pursuant to CPLR § 302(a)(1), which required the plaintiff to show that a non-domiciliary actually "'transact[ed] business *within* the state'" and that his cause of action arise out of that transaction. RA621 (quoting CPLR 302(a)(1) (emphasis added)). And even then, the court recognized, that section of the long-arm statute is construed "'more narrowly'" in defamation-related cases. RA621 (quoting *SPCA*, 18 N.Y.3d at 405).

Turning to the case law, the court noted that those few cases finding jurisdiction over out-of-state defendants in actions sounding in defamation shared a common denominator: "'virtually all'" or "'all the operative facts giving rise to plaintiff's claims,'" including the researching, writing, and distribution of the allegedly defamatory statements, occurred in or emanated from this State. RA62-23 (quoting *Montgomery v. Minarcin*, 263 A.D.2d 665, 667 (3d Dep't 1999); *Legros v. Irving*, 38 A.D.2d 53, 56 (1st Dep't 1971)).

Here, on the other hand, three Defendants had no contacts whatsoever with New York, and the fourth had very minimal contacts with the State. None of the Defendants entered New York in the process of researching or writing the articles and the articles were published to the internet in Australia. RA618-20. The only New York contacts related to the articles, the court found, were emails and a phone call placed by Shepherd from Australia to New York. RA618-19. Under settled precedent, the court found that these limited contacts did not form a transaction of business. RA623-24 (citing *Talbot v. Johnson Newspaper Corp.*, 71 N.Y.2d 827, 829 (1988)). Finally, the court held that publication of the articles to the internet where New Yorkers may read them could not alone satisfy the narrow application of CPLR § 302(a)(1).[3] RA624-25 (citing *SPCA*, 18 N.Y.3d at 402).

The court also rejected Plaintiff's request for discovery as to the corporate Defendants. RA625. It did so because even if Plaintiff discovered that the out-of-state corporate Defendants had "global ties," interactive websites, expectations that the articles would have an effect in New York, various business relationships with New York entities, or paid New York taxes, these contacts could not subject them

[3] The IAS court also found against Plaintiff on two other occasions after Plaintiff accused defendants or their counsel of lying to the court. In one instance, Plaintiff sought an order to show cause why defendants or their counsel should not "be referred to the proper authorities" after they filed as an exhibit a document available on Plaintiff's public website, which he alleged they hacked. RA564-65. The court declined to sign that order. RA563-65. The IAS court also denied Plaintiff's subsequent motion to strike that same document, finding that "[t]here [wa]s no basis for granting the relief sought." RA627.

to jurisdiction under CPLR § 302(a)(1) because none of Plaintiff's claims arose out of them as they must. RA625 (citing *Findlay*, 86 A.D.2d at 791).

4. The Appeal and Subsequent Motion Practice.

On February 2, 2016, Plaintiff filed a notice of appeal. A month later, on March 15, 2016, he served Defendants with his brief and appendix. The appendix largely omitted the exhibits on which Defendants relied in support of their motion to dismiss the FAC in the IAS court.

On April 1, 2016, Defendants brought a motion to dismiss the appeal or strike Plaintiff's brief and appendix because the appendix was inaccurate and insufficient. Defendants-Appellees' Notice of Motion to Dismiss the Appeal (filed April 1, 2016).

On May 3, 2016, this Court granted, in part, Defendants' motion and ordered Plaintiff "to file a supplemental appendix, at his own expense, which shall include all exhibits attached to the Affirmation of Katherine M. Bolger submitted with defendants' motion to dismiss," in addition to striking a document from the appendix itself. Order on Motion to Dismiss the Appeal at 1 (May 3, 2016).

Plaintiff failed to comply fully with the order and Defendants again made a motion to dismiss the appeal. Defendants-Appellees' Second Notice of Motion to Dismiss (filed July 15, 2016). As of the date of this filing, this motion remains pending.

ARGUMENT

This Court should affirm the decision below. It is Plaintiff's burden to establish personal jurisdiction, *O'Brien v. Hackensack Univ. Med. Ctr.*, 305 A.D.2d 199, 200 (1st Dep't 2003), and he cannot do so here.

The IAS court correctly granted Defendants' motion to dismiss on the grounds that "there is no authority for subjecting [out-of-state] defendants to jurisdiction in New York based on articles published outside New York for a non-New York audience." RA625. The court was also right to deny Plaintiff leave to conduct discovery as the contacts alleged, even were they supported by evidence after discovery, would not have conferred jurisdiction over these Defendants.

This Court could also affirm on the alternative grounds that Plaintiff failed to meet his burden of showing that each of the statements were made by Defendants or that the statements were false statements of fact that were of and concerning Plaintiff.

POINT I

THIS COURT LACKS PERSONAL JURISDICTION OVER DEFENDANTS

A. Defendants Are Not Subject to Long-Arm Jurisdiction under CPLR § 302(a)(2) or (3)

Long-arm jurisdiction is governed by CPLR § 302. CPLR § 302(a)(2) and (3) explicitly preclude the exercise of long-arm jurisdiction over an out-of-state defendant in cases sounding in defamation. *See, e.g.*, *Pontarelli v. Shapero*, 231

A.D.2d 407, 410 (1st Dep't 1996) (jurisdiction over non-domiciliary defendants barred by the "specific language" of CPLR § 302(a)(2)-(3)). Indeed, the Legislature specifically limited the application of the long-arm statute to such claims, and the Court of Appeals has recognized that "particular care must be taken to make certain that non-domiciliaries are not haled into court in a manner that potentially chills free speech." *Id.* at 405-06; *see also id.* at 404 (these "claims are accorded separate treatment to reflect the state's policy of preventing disproportionate restrictions on freedom of expression."). This jurisdictional bar extends to claims creatively labeled as some tort other than defamation so long as the complaint seeks recovery for damage to reputation based on allegedly false speech. *See, e.g.*, *Findlay*, 86 A.D.2d at 790; *see also Copp v. Ramirez*, 62 A.D.3d 23, 30 (1st Dep't 2009). A court determines whether a complaint sounds in defamation, and is thus subject to the jurisdictional bar, by looking to "the reality and the essence of the action[] and not its mere name." *Findlay*, 86 A.D.2d at 790. And in doing so, it should apply the well-established New York law that holds that where a plaintiff seeks damages to reputation for allegedly false speech, the claim is to be construed as a defamation claim. *Morrison v. NBC*, 19 N.Y.2d 453, 459 (1967) (claims of reputational damage "fall within the ambit of tortious injury which sounds in defamation").

In *Findlay*, for example, the plaintiff filed suit against the daughter of Henry Matisse, a French citizen, after she alleged in a telephone call she received from New York that a painting sold by the plaintiff was "'fake.'" 86 A.D.2d at 790. The plaintiff sued for unjust enrichment, alleging that the daughter used her position to manipulate the art market and devalue the painting. *Id.* at 791 (Kupferman, J., dissenting). Despite this creative twist on the claim, the majority concluded that a "fair reading of" it demonstrated that it sounded in defamation based the description of the phone call impugning the plaintiff's character as an art dealer. *Id.* at 790. Similarly, in *Copp*, the plaintiff brought three causes of action, including defamation, intentional infliction of emotional distress, and fraud against NBC and several New Mexico defendants after they reported on the plaintiff's abuse of the 9/11 victim compensation fund. 62 A.D.3d at 26. Concluding that each claim "stem[med] from the alleged defamatory statements aired," this Court held that the plaintiff could not rely on CPLR § 302(a)(2) or (3). *Id.* at 28.

Following this approach, state and federal courts have repeatedly construed claims like those brought by Plaintiff here as sounding in defamation and subject to the jurisdictional bar. *Accord Cantor*, 88 F.3d at 157 (claims of injurious falsehood and tortious interference with prospective economic advantage arising out of allegedly false and defamatory statements subject to jurisdictional bar for defamation claims); *Fischer v. Stiglitz*, No. 15-CV-6266(AJN), 2016 WL 3223627,

at *5 (S.D.N.Y. June 8, 2016) (same as to claims of tortious interference and intentional infliction of emotional distress); *Tannerite Sports, LLC v. NBCUniversal Media LLC*, 135 F. Supp. 3d 219, 233 (S.D.N.Y. 2015) (same as to claim of product disparagement); *Competitive Techs., Inc. v. Pross*, 14 Misc. 3d 1224(A), 2007 WL 283075, at *4 (Sup. Ct. Suffolk Cnty. Jan. 26, 2007) (same as to claim of intentional infliction of emotional distress).

Here, the IAS court correctly found that Plaintiff's claims sounded in defamation and, as a result, concluded that CPLR § 302(a)(2)-(3) are inapplicable. RA623-24. Each of Plaintiff's claims "stem[] from the alleged defamatory statements" in the Articles or Columns.[4] *Copp*, 62 A.D.3d at 28. The injurious falsehood claim, for example, is based in part on Shepherd and McNeilage "publish[ing] falsehoods and false factual connotations concerning . . . Roy." RA61; *see also* Opening Br. at 13-14 (noting that injurious falsehood claim was based on "published false statements"). The same is true of the tortious interference claim, RA62-63 ("dishonestly characterizing the creators, including Roy . . . as extreme right wing."); RA63-64 (alleging that Shepherd and McNeilage

[4] Plaintiff now asserts that his defamation claim was "primarily" limited to just two of Shepherd's articles. This is false. RA65 (Plaintiff noting that his libel claim is based on "four news articles authored by" Shepherd). Moreover, Plaintiff devoted ten pages in 88 separate paragraphs and bullet points to his defamation claims while all of his other claims combined span just four pages. RA65-75. In similar circumstances, courts have concluded that fulsome pleading of defamation is evidence that a complaint sounds in defamation. *Fischer*, 2016 WL 3223627, at *5 (complaint sounded in defamation where it took up "far more space in the complaint than any other cause of action").

"desire[d] to harm *the creators* of the Male Studies courses" (emphasis added)); Opening Br. at 23 (tortious conduct was the "researching, sourcing, and writing" of the Articles), and the *prima facie* tort claim, RA64 (wrongful conduct was "authoring and publishing their articles" that caused "injur[y] to . . . Roy").

Moreover, the FAC makes clear that Plaintiff seeks damages for injury to his own reputation and characterizes the publications at issue as *ad hominem* attacks on him—not on his course materials. RA69 (noting that by this lawsuit he is "exercis[ing] . . . his historic right to vindicate harm to his reputation via the courts"); RA31 (noting that one article "defame[s]" men's rights lecturers); RA43-44 (describing defendants as feminist bloggers seeking to "destroy . . . reputations"); *see also* RA51-52; RA53-54. Plaintiff's FAC, therefore, sounds in defamation and is subject to the jurisdictional bar in CPLR § 302(a)(2) or (3).

In an effort to avoid this outcome, Plaintiff makes two unconvincing arguments.

First, he faults the IAS court for not "even indicat[ing] which elements of the legal theories of injurious falsehoods and tortious interference were allegedly missing." Opening Br. at 7. This argument misses the point. Whether a cause of action "sounds in defamation" does not turn on whether a plaintiff properly pleaded each cause of action in his complaint, it depends on whether a plaintiff's claims (no matter their label) stem from allegedly false and defamatory statements,

and here they clearly do. *See supra at* 12-14, 21-22. Thus, Plaintiff's extended discussion about each element of each claim alleged is entirely beside the point.

Second, he argues that his claims do not sound in defamation because they seek to recover damage to a property rather than his reputation. Opening Br. at 2-3. But regardless of whether Plaintiff seeks damages for injury to his personal reputation or his business's reputation, he is still seeking damages for injury to his reputation by the publication of allegedly false speech. *Findlay*, 86 A.D.2d at 790. New York courts construe all such claims as ones for defamation. *Morrison*, 19 N.Y.2d at 459. Thus, the argument that this case is about the disparagement of some copyright interest in his course materials—course materials never mentioned in any of the Articles and that he concedes Defendants did not have—cannot save his FAC from the jurisdictional bar even if it was not disingenuous. RA76 (noting that Defendants did not even know "what was going to be taught in the Male Studies courses").

For these reasons, Plaintiff's emphasis on cases finding jurisdiction under CPLR § 302(a)(3) is irrelevant because that section of the long-arm statute does not apply here. It is not surprising then that not a single case he cites sounds in defamation. *See* Opening Br. at 31 (citing *Penguin Grp. (USA) Inc. v. Am. Buddha*, 16 N.Y.3d 295, 300 (2011) (copyright infringement)); *id.* at 32 (citing *DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001) (unlawful

termination)); *id.* at 33 (citing, e.g., *Newman v. Charles S. Nathan, Inc.*, 55 Misc. 2d 368, 369 (Sup. Ct. Kings Cnty. 1967) (products liability)). These cases have no relevance in this lawsuit.

In sum, Plaintiff's claims sound in defamation and thus are subject to the jurisdictional bar in CPLR § 302(a)(2) and (3).

B. Defendants Are Not Subject to Long-Arm Jurisdiction under CPLR § 302(a)(1)

In light of the bar, the "the provision solely at issue" here is CPLR § 302(a)(1), and that section cannot confer jurisdiction in this case. *Copp*, 62 A.D.3d at 28.

Jurisdiction may be asserted under CPLR § 302(a)(1) if Plaintiff can show that (1) his causes of action "aris[e] from" (2) Defendants' "transact[ion of] any business within the state or contracts anywhere to supply goods or services in the state." CPLR § 302(a)(1). The Court of Appeals has instructed that this provision of the statute be construed "more narrowly in defamation cases than . . . in the context of other sorts of litigation." *SPCA*, 18 N.Y.3d at 405 (marks and citation omitted); *see also Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 248 (2d Cir. 2007) (same). Consistent with this narrow compass, the transaction of business must be "something more" than distributing the allegedly defamatory statements in New York. *SPCA*, 18 N.Y.3d at 404; *see also Best Van Lines, Inc.*, 490 F.3d at 248.

Generally, courts find the "something more" requirement satisfied where "the defendant [1] engaged in some purposeful activity *within New York* [2] that was *directly related to the creation* of the allegedly defamatory work." *Biro v. Condé Nast*, No. 11 Civ. 4442(JPO), 2012 WL 3262770, at *10 (S.D.N.Y. Aug. 10, 2012) (emphasis added). The Court of Appeals has highlighted this physical presence requirement and it is found throughout the case law. *Compare SPCA*, 18 N.Y.3d at 404 (no jurisdiction where defendants conducted no in-state research substantially related to the alleged defamation) *with Legros*, 38 A.D.2d at 56 (jurisdiction based on negotiating a book deal and writing a book here); *Minarcin*, 263 A.D.2d at 667-68 (jurisdiction based on researching, writing, and producing an allegedly defamatory broadcast in New York). And even then, physical presence in New York has been found incapable of conferring jurisdiction where there is no sufficient relationship between the New York presence and the underlying defamation. *See SPCA*, 18 N.Y.3d at 404 (citing *Talbot*, 71 N.Y.2d at 829; *Copp*, 62 A.D.3d at 23).

The IAS court correctly applied this settled law. It recognized that it was required to find that "defendants engaged in purposeful activities within the State . . . *and* that there is a 'substantial relationship' between these in-State activities and the defamation." RA621-22 (quoting *SPCA*, 18 N.Y.3d at 404). Noting that there was no physical researching, writing, or production of the allegedly

defamatory material in New York, it rightly concluded that Defendants' contacts were "'not as significant as the few cases finding long-arm jurisdiction when defamation was asserted.'" RA622 (quoting *SPCA*, 74 A.D.3d at 1466).

This conclusion was correct. All of the conduct relating to the production of the Articles and Columns took place thousands of miles away in Australia. They were about a course taught at an Australian university, were researched and written in Australia, RA124-25; RA103-04, published by Australian newspapers, RA124; RA104, to websites with Australian domain names, RA122; RA101, that targeted an Australian audience, RA125; RA104.[5]

The only contacts that any Defendant had with New York were Shepherd's out-of-state contacts and those were "very minimal." RA623. All Shepherd did in preparing the Articles was exchange several emails from Australia with Plaintiff and another individual and place a phone call to Plaintiff. RA623. But the Court of Appeals has already rejected these kinds of contacts as insufficient to confer jurisdiction. *See, e.g.*, *Talbot*, 71 N.Y.2d at 829 (finding no jurisdiction based on phone interview conducted from California); *see also SPCA*, 18 N.Y.3d at 405 ("three phone calls and two short visits" to New York insufficient to establish jurisdiction).

[5] Not surprisingly, common words used in the Articles and Columns are given Australian spelling. *See, e.g.*, RA108-10 ("organisers," "Centre," and "legitimise"), RA112 ("organisations"), RA118-20 ("favour").

In any event, Shepherd's contacts with New York cannot bind McNeilage or *The Herald*. *Haar v. Armendaris Corp.*, 40 A.D.2d 769, 770 (1st Dep't 1972) (Capozzoli, J., dissenting) (jurisdiction pursuant to CPLR § 302(a)(1) must be based on "defendant's independent activities"), *dissent adopted on appeal*, 31 N.Y.2d 1040 (1973); *see also Realuyo v. Abrille*, 93 F. App'x 297, 299 (2d Cir. 2004) (noting that the lower court properly analyzed "the defendants' *respective* alleged contacts with New York" (emphasis added)). Plaintiff has identified no contacts whatsoever in New York for these defendants.

Next, the IAS court also properly rejected Plaintiff's argument that Defendants transacted business in New York because the Articles and Columns were "published" in New York when they were made available online. Opening Br. at 44-45, 51. Four years ago, however, the Court of Appeals held, unequivocally, that publishing articles "on a medium that was accessible in this state," like a website, does not constitute a transaction of business in New York. *SPCA*, 18 N.Y.3d at 405. This approach has been followed time and again. *See, e.g.*, *Best Van Lines, Inc.*, 490 F.3d at 253; *Penachio v. Benedict*, 461 F. App'x 4, 5 (2d Cir. 2012) ("defamatory comments on a website . . . were insufficient to establish the 'something more' required by C.P.L.R. § 302(a)(1)."); *Trachtenberg v. Failedmessiah.com*, 43 F. Supp. 3d 198, 203 (E.D.N.Y. Aug, 29, 2014) (maintenance of website from Minnesota not a transaction of business even where

one-third of the articles related to New York); *Gary Null & Assocs., Inc. v. Phillips*, 29 Misc. 3d 245, 250 (Sup. Ct. N.Y. Cnty. 2010) (accepting plaintiff's concession "that the posting of defamatory material on a Web site accessible in New York does not, without more, constitute transacting business in New York" (internal marks and citations omitted)). Simply, non-domiciliaries' maintenance of a website accessible in this State does not subject them to "transacting business" jurisdiction under CPLR § 302(a)(1).

Plaintiff merely ignores this case law, choosing instead to rely on inapposite non-defamation cases where businesses sold regular commercial services or products over their websites. *See, e.g.*, *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 165 (2d Cir. 2010) (jurisdiction based on website selling counterfeit goods to New Yorkers); *Brown v. Web.com Grp., Inc.*, 57 F. Supp. 3d 345, 357 (S.D.N.Y. 2014) (website hosting company subject to jurisdiction for maliciously deleting plaintiff's website); *M. Shanken Commc'ns, Inc. v. Cigar500.com*, No. 07 CIV. 7371 (JGK), 2008 WL 2696168, at *1 (S.D.N.Y. July 7, 2008) (jurisdiction over retail website infringing plaintiff's trademarks and copyrights); *Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 565 (S.D.N.Y. 2000) (jurisdiction over defendant company that allowed customers to apply for loans online); *Grimaldi v. Guinn*, 72 A.D.3d 37, 46 (2d Dep't 2010) (jurisdiction over defendant who developed a months-long business relationship to remodel plaintiff's car). These

cases, however, do not reflect the "narrow[]" approach to jurisdiction in defamation cases. *SPCA*, 18 N.Y.3d at 405-06.

Finally, the IAS court found unavailing the various alleged relationships between *The Advertiser* and *The Herald* and other New York entities because these relationships, even if real, were not "*substantially related to the defamation*." RA625. This finding is consistent with the long, unbroken line of cases finding disparate corporate contacts with the State unrelated to the underlying cause of action insufficient to support jurisdiction. *SPCA*, 18 N.Y.3d at 405 ("limited activity within the state," including the provision of "financial and medical assistance for . . . dogs" that were the subject of a later allegedly defamatory article found not substantially related to the defamatory article); *Trachtenberg*, 43 F. Supp. 3d at 204-05 (relationships with New York entities irrelevant unless the "allegedly defamatory statements . . . refer[ed] to" that relationship) (citing *Talbot*, 71 N.Y.2d 827)).

In the Opening Brief, Plaintiff offers little in the way of rebuttal except to call Defendants and their counsel liars, cite inapposite case law, and offer a grab bag of various irrelevant contacts he alleges Defendants have with New York. These arguments are futile.

First, Plaintiff's assertion that Defendants and their counsel are liars barely merits a response. Opening Br. at 27-28. Plaintiff, in fact, has a habit of lobbing

these kinds of baseless attacks at his opponents. *See, e.g.*, Reply Br. for Pet'r-Appellant Hollander, *Hollander v. Am. Organized Crime Gang 1*, Nos. 04-6700-cv; 04-6703-cv, 2005 WL 4962020 (2d Cir. Nov. 9, 2005) (accusing opposing counsel of "fabricat[ing] allegations"); RA595 (accusing other defendants of "prevaricat[ing]")); Reply Br. for Pet'r-Appellant Hollander, *Hollander v. The City of N.Y. Comm'n on Human Rights*, No. 12635, 2013 WL 9679520, at *3-4 (1st Dep't Mar. 3, 2013) (accusing the Commission on Human Rights of "falsely recount[ing]" its own order).[6] And even a cursory review of Plaintiff's invective demonstrates that it is unfounded.

Initially, for example, Plaintiff asserts that Defendants withdrew their first motion to dismiss because he "caught them in a series of perjuries." Opening Br. at 27. This is nonsense. Defendants withdrew that motion because Plaintiff filed an amended complaint thereby mooting it.[7] RA513-14. Plaintiff also argues that

[6] Plaintiff went as far as filing a motion to strike in this Court asserting that Defendants' paralegal committed perjury in executing a certificate of service. This Court denied that motion. Order on Motion to Dismiss, or in the alternative Strike (May 24, 2016).

[7] In particular, Plaintiff makes much of the fact that Shepherd's affidavit in support of the motion to dismiss the FAC corrected an error in her affidavit in support of the motion to dismiss the original complaint. Specifically, in the first affidavit, Shepherd stated that she had not contacted anyone in New York other than Plaintiff. RA105. In his opposition to the first motion to dismiss, Plaintiff produced email correspondence between Shepherd and another individual in New York. SA242. When confronted with this evidence, Shepherd reviewed her records and swore out a new affidavit that read "In my original affidavit in support of the Defendants' motion to dismiss the complaint, I erroneously stated that I had no other contact with anyone in New York besides the telephone call with Mr. Den Hollander. I regret this inadvertent error." RA105.

The Herald "prevaricated" because it did not disclose the existence of "employees" in New York. Opening Br. at 28. But the only evidence Plaintiff provides are website printouts showing that some New York *freelancers* (not *Herald* employees) have written for *The Herald*. A159-60. Moreover, several other alleged "lies" are not lies at all; Plaintiff simply disagrees with them. *See, e.g.*, SA241, 245 (characterizing as a "lie" the averments that *The Advertiser* and *The Herald* "do[] not publish in New York" because they publish "via . . . website[s]" accessible in New York); SA246 (characterizing Shepherd's proffer that she did not intend to target New York as a "lie" because her articles were available to New Yorkers online). The IAS court was right to rely on Defendants' affidavits despite Plaintiff's baseless allegations.

Next, Plaintiff alleges that the IAS court "ignored whether under CPLR 302(a)(1)" the Defendants "contract[ed] anywhere to supply goods or services in the state," namely via the distribution of their newspapers to subscribers online. Opening Br. at 39-40. In doing so, he fails to cite a single defamation case finding jurisdiction based on "contracting" to deliver newspapers into New York citing instead, for example, *Island Wholesale Wood Supplies, Inc. v. Blanchard Indus., Inc.*, 101 A.D.2d 878 (2d Dep't 1984), which is about a "firewood processor." No such case exists; instead, as discussed, mere distribution (even to "subscribers" of a newspaper) cannot create jurisdiction under the long-arm statute. *See, e.g.*, *SPCA*,

18 N.Y.3d at 405 (placing little stock in publication online because "the statements were equally accessible in any other jurisdiction"); *Am. Radio Ass'n v. A. S. Abell Co.*, 58 Misc. 2d 483, 484-85 (Sup. Ct. N.Y. Cnty. 1968) (circulation to subscribers of *Baltimore Sun* in New York insufficient to establish jurisdiction); *Sino Clean Energy Inc. v. Little*, 35 Misc. 3d 1226(A), 2012 WL 1849658, at *7 (Sup. Ct. N.Y. Cnty. May 21, 2012) (offering an "email subscription . . . to the website users" was "insufficient to support" jurisdiction). As this Court has noted, the very purpose of the jurisdictional bar was to prohibit "forc[ing] newspapers published in other states to defend themselves in states where they had no substantial interests, as the *New York Times* was forced to do in Alabama." *Legros*, 38 A.D.2d at 55 (internal marks and citations omitted); *see N.Y. Times Co. v. Sullivan*, 144 So. 2d 25, 34 (Ala. 1962) (finding jurisdiction because "*The Times* sent its papers into Alabama, with its carrier as its agent," had advertising agents in Alabama, and had a stringer in Alabama), *rev'd*, 376 U.S. 254 (1964). To agree with Plaintiff, however, is to force these newspaper Defendants to do just that.

Additional contacts alleged by Plaintiff also cannot support jurisdiction because they are not substantially related to the creation of the allegedly defamatory articles. *See, e.g.*, *Biro*, 2012 WL 3262770, at *10 (noting that relevant inquiry is into contacts "directly related to *creation*" of allegedly defamatory statements (emphasis added)). Plaintiff's claims, for example, do not

arise out of a dispute over Defendants' subscription contracts, Opening Br. at 40. *A. S. Abell Co.*, 58 Misc. 2d at 484-85. Nor do they arise out of Shepherd's and McNeilage's "employment contracts" with Australian corporations, Opening Br. at 41. *A. S. Abell Co.*, 58 Misc. 2d at 484-85. Plaintiff's claims also do not arise out of the placement of advertisements by a New York company, Opening Br. at 42. *Trachtenberg*, 43 F. Supp. 3d at 204 (contracting with New York advertising house irrelevant). Nor do they arise out of *The Herald*'s relationship with Press Reader, an independent distribution company that distributes *The Herald* in the United States; indeed, even if *The Herald* exercised control over Press Reader, distribution alone cannot support jurisdiction. *See supra* 32. And, of course, his claims do not arise out of interactive website features, *see* Opening Br. at 49. *Best Van Lines, Inc.*, 490 F.3d at 252 (disregarding interactive donation function on website because there was no nexus "between the donations and the allegedly defamatory conduct"); *Biro*, 2012 WL 3262770, *12 (interactive website features permitting transactions of business irrelevant where claims did not arise from them); *Realuyo v. Villa Abrille*, 2003 WL 21537754, at *7 (S.D.N.Y. July 8, 2003) (same). Thus, none of these contacts even if accepted as true could support jurisdiction.

Plaintiff also asserts as to *The Advertiser* that it is subject to jurisdiction because its ultimate parent has its offices here. Opening Br. at 47. A corporate relationship alone, especially one where the parent does not exercise control over

the subsidiary's day-to-day operations and had nothing to do with the allegedly defamatory statements, RA101, cannot support jurisdiction, *Oriska Ins. Co. v. Brown & Brown of Texas, Inc.*, No. 02-CV-578, 2005 WL 894912, at *2-4 (N.D.N.Y. Apr. 8, 2005) (companies with consolidated finance reporting, shared address, and a board member's president being listed as the other company's representative were insufficient for jurisdiction under Section § 302(a)(1)); *Ingenito v. Riri USA, Inc.*, 89 F. Supp. 3d 462, 476 (E.D.N.Y. 2015) (noting that at-home corporation must "'exercise[] some control over' the subsidiary in the matter *that is the subject of the lawsuit*" (emphasis added)). To the extent Plaintiff believes this contact is relevant because it may indicate that *The Advertiser* uses New York financial institutions, this too is not germane because his claim does not arise out of those uses. *Compare Licci v. Lebanese Canadian Bank*, 20 N.Y.3d 327, 340 (2012) (use of New York financial institutions relevant to CPLR § 302(a)(1) inquiry in case challenging the *funding* of terrorism *from that account*).

In sum, Defendants do not transact business in New York within the meaning of CPLR § 302(a)(1) and this Court, therefore, has no jurisdiction over them.

C. Defendants Are Not Subject To "Doing Business" Jurisdiction under CPLR § 301

Plaintiff also claims that *The Advertiser* and *The Herald* are subject to general jurisdiction under CPLR § 301 because they "continuously ship[] their

online newspapers into the State." Opening Br. at 60-61. This argument is frivolous. The Supreme Court has recently made clear that a corporation may be subject to general jurisdiction (like that under CPLR § 301) only when it is "at home" in a state. *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014). In other words, it must be incorporated in New York or have its principal place of business here. *D & R Glob. Selections, S.L. v. Pineiro*, 128 A.D.3d 486, 487 (1st Dep't 2015). Neither *The Advertiser* nor *The Herald* are incorporated here or have their principal places of business here.[8] Thus, they are not subject to jurisdiction under CPLR § 301.

D. The IAS Court Properly Denied Plaintiff's Motion for Discovery on Jurisdiction

The IAS court properly denied Plaintiff's demand for discovery. Plaintiff is owed jurisdictional discovery only if he can make a "sufficient start" toward meeting his burden and his position is not "frivolous." *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463, 467 (1974). But where it appears that there are no facts that

[8] To the extent Plaintiff attempts to use the presence of News Corp, the indirect parent company of *The Advertiser*, as a hook to subject *The Advertiser* to jurisdiction, New York courts have already established the general rule that foreign subsidiary is not subject to general jurisdiction in New York simply because its parent is. *See, e.g.*, *Grove Valve & Regulator Co. v. Iranian Oil Servs. Ltd*., 87 F.R.D. 93, 95 (S.D.N.Y. 1980); *Saraceno v. S.C. Johnson & Son, Inc*., 83 F.R.D. 65, 67 (S.D.N.Y. 1979). Rather, jurisdiction is appropriate only "in the very limited circumstances where one corporation is so completely controlled by the other that it may be found to be 'merely a department' of the latter." *Grove Valve & Regulator Co.*, 87 F.R.D. at 95. Here though, News Corp and *The Advertiser* are distinct corporate entities and News Corp does not exercise any day-to-day control or make "policy decisions" for *The Advertiser*. RA101.

can be found that would support jurisdiction, discovery should be denied. *Findlay*, 86 A.D.2d at 791. That is the case here.

As the IAS court rightly concluded, there was no reason to grant the discovery Plaintiff sought because it did not relate to the conduct out of which his causes of action arose—which is what matters here. RA625-26. In doing so, the court joined company with multiple other courts declining to order discovery of random, fortuitous contacts with New York that, even if proved, would not support jurisdiction under CPLR § 302(a)(1). *See Realuyo*, 93 F. App'x at 299 (2d Cir. 2004); *Best Van Lines, Inc.*, 490 F.3d at 255; *Copp*, 62 A.D.3d at 31; *Findlay*, 86 A.D.2d at 791; *Gary Null & Assocs., Inc.*, 29 Misc. 3d at 252. As one court aptly put it, "Plaintiff has a problem of kind, not degree—[]he needs new jurisdictional theories, not more evidence substantiating the theories []he has already advanced." *Trachtenberg*, 43 F. Supp. 3d at 205. For the same reasons, jurisdictional discovery is unnecessary in this case. The court was right to deny Plaintiff's request.

POINT II

PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED ON ITS MERITS

In the alternative, this Court could affirm because Plaintiff's claims cannot withstand a motion to dismiss on the merits. *Fenton v. Consol. Edison Co. of New York*, 165 A.D.2d 121, 125 (1st Dep't 1991) (respondent may raise as basis for

affirmance any ground raised below). When evaluating a motion to dismiss for failure to state a claim pursuant to CPLR § 3211(a)(7), courts determine whether a complaint evidences facts "'which taken together manifest any cause of action cognizable at law.'" *McGill v. Parker*, 179 A.D.2d 98, 105 (1st Dep't 1992) (citation omitted) (dismissing defamation claim). And, while courts must accept as true allegations in a complaint, they need not accept as true "'bare legal conclusions.'" *Cangro v. Marangos*, 61 A.D.3d 430, 430 (1st Dep't 2009) (citation omitted).

In addition, "[u]nder CPLR 3211(a)(1), a dismissal is warranted" when "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). "A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint." *Uzamere v. Daily News, L.P.*, 34 Misc. 3d 1203(A), 2011 WL 6934526, at *2 (Sup. Ct. N.Y. Cnty. Nov. 10, 2011).

Where, as here, libel and related tort claims are facially defective, New York courts do not hesitate to dismiss them. *See, e.g.*, *Muhlhahn v. Goldman*, 93 A.D.3d 418, 419 (1st Dep't 2012). This is especially so where claims implicate defendants' First Amendment rights to report newsworthy information, requiring courts to "consider [the] case against the background of a profound national

commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Sullivan*, 376 U.S. at 270.

A. Plaintiff's Claims Based on Statements Defendants Did Not Make Must Be Dismissed

There is no question that a defendant only can be held liable for statements she actually makes. *Frechtman v. Gutterman*, 115 A.D.3d 102, 104 (1st Dep't 2014). Yet Plaintiff makes several claims based on statements Defendants never uttered. *See* RA479-81 (Statements A, H, I, L, M, V, & AA). For example, Plaintiff alleges that Shepherd stated he "has been 'identified as belonging to extreme right wing groups in the USA,'" RA69; *see also* RA34, 37, accuses Defendants of calling him an "'extreme' right-winger," RA34, and argues that Defendants said his beliefs were "'inappropriate,'" RA34, 36. Those words, however, are not used in the challenged Articles or Columns. RA81-92. Thus, claims based on these allegations should be dismissed.

B. The Injurious Falsehood and Libel Claims Must Be Dismissed

Next, Plaintiff's injurious falsehood and libel claims fail as a matter of law. In New York, the elements of an injurious falsehood claim are: "(i) falsity of the alleged statements; (ii) publication to a third person; (iii) malice; and (iv) special damages." *Biro v. Condé Nast*, 883 F. Supp. 2d 441, 483 (S.D.N.Y. 2012). The elements of defamation are: (1) a false statement; (ii) publication to a third party; (iii) with fault; and (iv) special harm or defamation *per se*. *Frechtman*, 115

A.D.3d at 104. Injurious falsehood claims are subject to the same constitutional protections as are defamation claims. *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988); *Newport Serv. & Leasing, Inc. v. Meadowbrook Distrib. Corp.*, 18 A.D.3d 454, 455 (2d Dep't 2005); *see also Biro*, 883 F. Supp. 2d at 483. Plaintiff cannot make out these elements.[9]

1. The Vast Majority of Complained of Statements Are True

First, the *sine qua non* of both an injurious falsehood and a libel claim is falsity. A plaintiff bears the burden of pleading and proving falsity. *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 245 (1991). It is, therefore, axiomatic that truth is a complete defense to libel. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986) (plaintiff has burden of proving falsity); *see also Diaz v. Espada*, 8 A.D.3d 49, 50 (1st Dep't 2004) (construing defamation case law); *Pitcock v. Kasowitz, Benson, Torres, & Friedman, LLP*, 74 A.D.3d 613, 615 (1st Dep't 2010) (injurious falsehood claim must be dismissed where no falsity).

Truth need not be established "to the extreme, literal degree." *Yarmove v. Retail Credit Co.*, 18 A.D.2d 790, 790 (1st Dep't 1963); *see also Cusimano v. United Health Servs. Hosps., Inc.*, 91 A.D.3d 1149, 1151 (3d Dep't 2012) ("substantial truth is all that is required"). So long as the statements complained of

[9] As an aside, Plaintiff simply misstates the law of injurious falsehood, relying almost exclusively on case law from the first half of the twentieth century before the Court constitutionalized the tort of defamation in the landmark case *New York Times v. Sullivan*, 376 U.S. 254.

are substantially true (or conversely, not materially false), a claim sounding in defamation must be dismissed. *See Muhlhahn*, 93 A.D.3d at 419 (affirming grant of CPLR § 3211(a)(1) motion because "[b]ased on the documentary evidence," the challenged statements were "true or substantially true"); *see also Aguinaga v. 342 E. 72nd St. Corp.*, 14 A.D.3d 304, 305 (1st Dep't 2005) (where letter written by plaintiff admitted "the truth of an expressed opinion, the words cannot be actionable"); *Torres v. CBS News*, No. 121646/93, 1995 WL 810041, at *3 (Sup. Ct. N.Y. Cnty. Oct. 11, 1995) (where plaintiff admitted statement was true, dismissal under CPLR § 3211 was proper).

Here, most of the statements that form the basis of the FAC are substantially true. Plaintiff sets forth these statements in a scattershot manner,[10] but for the sake of analysis, these disparate allegations can be categorized into four groups:

> **Category 1**: Statements that Plaintiff is a "hardline" "radical" "anti-Feminist" or has controversial views himself. RA479-83 (Statements F, I, K, M, Q, V, Y, EE, LL, MM, NN, & PP);
>
> **Category 2**: Statements that Plaintiff has been linked to people with extreme views on men's rights. RA479-83 (Statements B, D, I, J, X, DD, & OO);
>
> **Category 3**: Statements that the only remaining source of power left to men are firearms. RA479-81 (Statements E, N, & Z); and
>
> **Category 4**: Statements that Plaintiff blames feminists for oppressing men and refers to women's studies as "witches' studies." RA479-80 (Statements G, O, & P).

[10] To aid the Court, the relevant statements are set forth at RA479-83.

All of these statements are substantially true and indeed their truth is largely pleaded in the FAC. As to Category 1, Plaintiff admits that he is an "anti-feminist." RA35 ("Roy does describe himself as an anti-feminist"). And he has admitted it to media outlets throughout the world. RA98 (noting on *The Colbert Report* that he is an "anti-feminist"). The FAC also establishes his radical and extreme views. In it, he makes myriad attacks on Shepherd and McNeilage, calling them "bacchae," "Harp[ies]," "book-burners," "bigots," "yellow, female-dog[s]-in-heat," RA22-25, 34, claiming that Shepherd "figuratively picked up Lizzie Borden's hatch and set off whacking any men's rights activist" and wondering whether she is desirous "for the emasculation or circumcision of men's rights advocates," RA32, 44. In addition, he takes hardline positions about the right to bear arms, RA37, the Violence Against Women's Act, RA40, and rape and abuse statistics, RA45. These statements echo those he has published, RA188 ("Feminazis will not stop until they reshape America and eventually the world into an intolerant hell complete with thought-control, inquisitions, intimidation, [and] enslavement."); *see also* RA168. And, Plaintiff himself, admits that his ideas are not widely available to others. RA24; *see also Biro*, 883 F. Supp. 2d at 459 (where plaintiff admitted in the complaint that he was part of an "emerging field," statement that plaintiff had a "radical approach" not false). It is, therefore, substantially true to say Plaintiff is a hardline anti-feminist lawyer.

The statements in Category 2 are also true. Plaintiff has written articles for the anti-feminist website *A Voice for Men*. The Southern Poverty Law Center found that *A Voice for Men* is a hate site. RA418-19. Quoting the website's founder, SPLC explains *A Voice for Men*'s credo: "'AVfM regards feminists, manginas [a derisive term for weak men], white knights [a similar derisive term . . .] and other agents of misandry as a social malignancy.'" RA419. Plaintiff has, therefore, been linked to individuals who hold extreme viewpoints.

Next, the statements in Category 3 are also true. Plaintiff has argued that "there is one remaining source of power in which men still have a near monopoly—firearms." RA357; *see also* RA37 ("As for mainly men exercising their right to bear arms in the U.S.—it's the truth . . . ."); RA527. And he has advocated strapping feminists to missiles and bombing the Middle East with them. RA187. These statements, therefore, cannot form the basis for his claims because they are substantially true.

Finally, the statements in Category 4 are also true because Plaintiff does believe that feminists oppress men, *see, e.g.*, RA40 (noting that the Violence Against Women Act does not even "allow[] [men] on the bus"); RA188 (describing attempts to subvert men), and he does call women's studies "'witches' studies,'" RA34; RA130 ("The third in my trilogy of anti-feminist cases is against 'Women's Studies Programs,' or as I affectionately call them 'Witches'

Studies.'"); RA404 ("the IRWG Women's Studies program demonizes men and exalts women in order to justify discrimination against men . . . .").[11]

In short, "[w]hile plaintiff might not have found [Defendants'] tone of voice to his liking, he has admitted that the factual matter contained in [their] statement[s] is true. Therefore, the statement[s are] non-actionable." *Torres*, 1995 WL 810041, at *3. This Court should dismiss Plaintiff's FAC as to Statements B, D-G, I-K, M-Q, T, V, X-Z, DD, EE, GG, and LL-PP.

2. Multiple Statements Are Pure Opinion

Next, Plaintiff's claims as to Statements B, D, F, I-K, M, Q-Y, BB-OO, QQ, and as to the First and Second Shepherd Columns should be dismissed because they are non-actionable opinion. *Vitro S.A.B. de C.V. v. Aurelius Capital Mgmt., L.P.*, 99 A.D.3d 564, 565 (1st Dep't 2012) ("expression of opinion is constitutionally protected and cannot serve as the basis for plaintiff's injurious falsehood claim."). In *Milkovich v. Lorain Journal Co.*, the Supreme Court held that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection," so long as such a statement does not "reasonably impl[y] false and

[11] One statement that does not fit neatly into these categories is also true. Plaintiff argues that McNeilage injured him by reporting on his lawsuit against Columbia University premised on feminism being a religion. RA58. But Plaintiff himself described the lawsuit as arguing, "Feminism is a religion; therefore, the state and federal governments cannot provide aid to Women's Studies because it would violate the Establishment Clause." RA130.

defamatory facts." 497 U.S. 1, 20 (1990). New York's Constitution goes even further. *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 152 (1993). When determining if a statement is opinion, a court must "take into consideration the larger context in which the statements were published, including the nature of the particular forum." *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995). A court should begin by "looking at the content of the whole communication, its tone and apparent purpose" to "determine whether a reasonable person would view them as expressing or implying any facts." *Immuno AG*, 77 N.Y.2d at 235-36.

Here Statements B, D, F, I-K, M, Q-Y, BB-OO, and QQ are non-actionable opinion. RA479-83 ("Opinion Statements"). Plaintiff, for example, claims that McNeilage injured him by using words like "hardline," RA55, and "radical," RA57, and that Shepherd did so when she repeated the statement that men's studies courses "'represent[] the margins,'" RA41, 66. These are opinions that do not imply any underlying facts.[12] *Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976). Indeed, Plaintiff's comparison of these statements to "certain words" from McCarthy's days like "'fellow traveler,'" RA43, actually proves the point. In

[12] Even if they did imply facts, the Articles and Columns disclose facts on which the opinions are based. McNeilage discloses that (1) the lecturers had been published on men's rights websites; (2) Plaintiff believes that feminism is a religious belief; and (3) Plaintiff brought a lawsuit against Columbia University for offering a women's studies course, RA84-85; and Shepherd explains that (1) the lecturers were linked with "websites that rail against feminism"; (2) two lecturers had been published on *A Voice for Men*, which "regularly refers to women as 'bitches' and 'whores'"; (3) Plaintiff believes that men must defend themselves with guns from oppressive feminists; and (4) Plaintiff sued nightclubs for ladies' nights, RA81-83.

Buckley, the Second Circuit held that words like "'fellow traveler' and 'radical right'" are not provably false because "because of the tremendous imprecision of the meaning and usage of these terms in the realm of political debate." 539 F.2d at 893. Based on his own comparison, it must, therefore, be opinion to call him "radical," "hardline," or on "the margins." *See also Pitcock*, 74 A.D.3d at 614 (use of the word "extreme[]" is a statement of opinion). For this reason, the Opinion Statements must be dismissed.

There can be no doubt that the First and Second Shepherd Columns, both of which were published in the Opinion section of the newspaper, contained Shepherd's constitutionally protected opinion. As an initial matter, the fact that the Columns were in the Opinion section weighs in favor of a finding of opinion. *Richardson*, 87 N.Y.2d at 52 (material in editorial section "typically regarded by the public as a vehicle for the expression of individual opinion"). Moreover, Shepherd wrote the Columns in the first person and used loose, figurative language that alerts the reader that she is expressing her opinion. *Immuno AG*, 77 N.Y.2d at 244 ("imprecise language . . . signal[s to] the reasonable observer that no actual facts were being conveyed"). Shepherd, for example, discussed her hair style, used words like 'bizarre," "phony," and "gold and genius" to describe Plaintiff's lawsuit, and posed rhetorical, tongue-in-cheek questions. RA88-90. Shepherd's loose language, for example, claiming, "I may be a harpy, and somewhat

bacchanalian, but I never, ever wear stilettoes," RA88-90, flags to even the most blasé reader that she is commentating not reporting. Even Plaintiff recognizes exactly what Shepherd is doing, noting that she is being sarcastic. RA68.

Therein lies the crux of this lawsuit: Plaintiff does not like feminists and he strongly disagrees with those, including Shepherd and McNeilage, who are critical of "males studies" courses. His dislike is so strong, that he resorts to calling Shepherd and McNeilage names in almost every paragraph of his sixty-page FAC, makes snide comments about their appearance, RA37, 60, their morality, RA45-50, 54, their intelligence, RA69, and their families, RA36, and cautions them that but for men, they would have ended up "suffering the fate of Nanking, China," RA38, a not so veiled reference to the "Rape of Nanking." What he misses is that just as he is free to make these statements about Shepherd and McNeilage, it is also their right to criticize him. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

For these reasons, claims based on the Opinion Statements and the First and Second Shepherd Columns must be dismissed.

3. Multiple Statements Are Not Defamatory

Next, Statements C, R, S, V, II, and PP-SS are simply not defamatory and cannot form the basis of a claim. Whether statements are capable of sustaining the

defamatory meaning alleged is a question of law for the court. *Golub v. Enquirer/Star Grp., Inc.*, 89 N.Y.2d 1074, 1076 (1997). A statement is defamatory if it "tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community." *Id.* (internal marks and citation omitted). When defamation by implication is alleged and the facts are substantially true, "the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference" and endorse it. *Stepanov v. Dow Jones & Co.*, 120 A.D.3d 28, 37-38 (1st Dep't 2014).

Here, Plaintiff complains of multiple statements that are simply not defamatory. RA479-83 (Statements C, R, S, V, II, PP-SS ("Non-Defamatory Statements")). He argues, for example, that the statement "some men have difficulties going to doctors" is defamatory because it is "meant as derision toward men in general." RA60. But it is not shameful to refuse to go to a doctor. He also alleges that the statement "'populist' male studies" in the First Shepherd Article is defamatory. RA41. But it does not hold someone up to ridicule to suggest that their studies are populist—such political labels are not susceptible of defamatory meaning. *Cf. Buckley*, 539 F.2d at 893. Finally, it is not defamatory to say a course has "no prerequisites." RA31. Most introductory courses do not.

For these reasons, the claims as to these Non-Defamatory Statements must be dismissed.

4. Multiple Statements Are Not "Of and Concerning" Plaintiff

Finally, Statements F, R, T, BB, QQ, and RR and the entirety of the First Shepherd Column are not "of and concerning" Plaintiff. RA479-83. A statement is only actionable if it is about, or "of and concerning" a plaintiff. *Sullivan*, 376 U.S. at 288; *Commercial Programming Unlimited v. CBS*, 50 A.D.2d 351, 352 (1st Dep't 1975) (noting that allegedly defamatory and injurious falsehoods were "of and concerning" plaintiffs). The "of and concerning" requirement is a constitutional one, *Sullivan*, 376 U.S. at 288, that places a "significant limitation on the universe of those who may seek a legal remedy," *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 399 (2d Cir. 2006).

Here, for example, the First Shepherd Column, about which Plaintiff alleges that it "clearly includes Roy in the group of men [Shepherd] is attacking with her stiletto words," RA67, in fact does not mention Plaintiff by name or implication, RA91-92. Because no reasonable reader could therefore, associate it with Plaintiff, his claims as to the First Shepherd Column and Statements F, R, T, BB, QQ, and RR, which also are not about Plaintiff, must be dismissed.

C. Plaintiff's Tortious Interference with Prospective Contractual Relations Claim Should Be Dismissed

Similarly, Plaintiff's claim for tortious interference with prospective contractual relations fails as a matter of law. The elements of a claim for tortious interference with a prospective contractual relations are: "(1) business relations with a third party; (2) defendants' interference with those business relations; (3) defendants acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means; and (4) injury to the relationship." *Purgess v. Sharrock*, 33 F.3d 134, 141 (2d Cir. 1994).

First, this claim must be dismissed because it is based on the same statements as the defamation and injurious falsehood claims, making it duplicative of those claims. *Perez v. Violence Intervention Program*, 116 A.D.3d 601, 602 (1st Dep't 2014) (dismissing tortious interference and injurious falsehood claims as "duplicative of the defamation claim"). *Second*, it fails because Plaintiff cannot show that either Shepherd or McNeilage acted with the *sole* purpose of harming him. *Alvord & Swift v. Stewart M. Muller Constr. Co.*, 46 N.Y.2d 276, 281 (1978) ("the interference must be intentional, not merely negligent or incidental to some other, lawful, purpose."). Under this standard, "a [publisher] whose motive and conduct is intended to foster public awareness or debate cannot be found to have engaged in the wrongful or improper conduct required to sustain a claim for interference." *Huggins v. Povitch*, No. 131164/94, 1996 WL 515498, at *9 (Sup.

Ct. N.Y. Cnty. Apr. 19, 1996); *see also Trachtman v. Empire Blue Cross & Blue Shield*, 251 A.D.2d 322, 323 (2d Dep't 1998). Here, any "interference" with Plaintiff's alleged contractual relationship with the University of South Australia was merely incidental to Shepherd's and McNeilage's primary purpose of gathering and reporting the news. For this reason, the tortious interference claim fails as a matter of law.[13]

D. Plaintiff's *Prima Facie* Tort Claim Should Be Dismissed

Similarly, Plaintiff's claim in the alternative for *prima facie* tort must be dismissed. *Prima facie* tort is a "cause of action that is *highly disfavored* in New York." *Nevin v. Citibank, N.A.*, 107 F. Supp. 2d 333, 346-47 (S.D.N.Y. 2000) (emphasis added). Under New York law, "[t]he requisite elements of a cause of action for *prima facie* tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142-43 (1985). "Where relief may be afforded under traditional tort

[13] Plaintiff's tortious interference claim against McNeilage should also be dismissed because the course was cancelled *before* she wrote the Article. In fact, the story reports on the cancellation. *See* RA61; RA84-85 (noting that the University did not approve "a course called 'males and sexism,' which named lecturers who have been published on radical men's rights websites"); RA86-87 (reporting that "the university says the subject he is down to teach was never approved"). McNeilage could not, therefore, have committed tortuous interference. *See, e.g.*, *Connolly v. Wood-Smith*, No. 11 Civ. 8801 (DAB) (JCF), 2014 WL 1257909, at *2 (S.D.N.Y. Mar. 27, 2014).

concepts, *prima facie* tort may not be invoked as a basis to sustain a pleading which otherwise fails to state a cause of action in conventional tort." *Id*. at 143.

Moreover, "[t]he touchstone [of *prima facie* tort] is 'disinterested malevolence,' meaning that the plaintiff cannot recover unless the defendant's conduct was not only harmful, but done with the *sole intent to harm*. . . ." *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 571 (2d Cir. 1990) (emphasis added, internal marks and citations omitted). When an act "is a product of mixed motives, some of which are perfectly legitimate then recovery in *prima facie* tort is impossible." *Fabry v. Meridian Vat Reclaim, Inc.*, Nos. 99 Civ. 5149 NRB, 99 Civ. 5150 NRB, 2000 WL 1515182, at *2 (S.D.N.Y. Oct. 11, 2000) (internal marks and citations omitted). In particular, "[i]n the context of cases involving acts of expression, wherever a defendant's actions can be seen, at least in part, as having been motivated by the desire to express some opinion, a cause of action for prima facie tort will fail." *McKenzie v. Dow Jones & Co.*, 355 F. App'x 533, 536, (2d Cir. 2009); *see also Freihofer*, 65 N.Y.2d at 143 ("The newsworthy content of the articles constitutes sufficient justification for its publication.").

As discussed above, even assuming that Shepherd or McNeilage intended to harm Plaintiff (and they did not), Plaintiff could not, as a matter of law, demonstrate that their *sole* motivation in publishing the columns and the articles was to do so. Plaintiff's *prima facie* tort claim must be dismissed.

CONCLUSION

This case does not belong in this Court. The Court lacks jurisdiction over the Australian defendants and the claims fail on their merits. For each of the foregoing, independent reasons, Defendants respectfully request that the Court affirm the IAS court's order dismissing the FAC with prejudice.

Respectfully submitted,

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