SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ROY DEN HOLLANDER, Plaintiff, -against- TORY SHEPHERD, ADVERTISER NEWSPAPERS PTY LTD., AMY McNEILAGE, FAIRFAX MEDIA PUBLICATIONS PTY LIMITED, Defendants.	Index No. 152656/2014 **AFFIRMATION OF KATHERINE M. BOLGER** Hon. Milton A. Tingling

KATHERINE M. BOLGER, a duly admitted attorney at law, does hereby affirm that the following is true under penalty of perjury pursuant to CPLR 2106:

1. I am a member of Levine Sullivan Koch & Schulz, LLP, counsel to Tory Shepherd, Advertiser Newspapers Pty Ltd., Amy McNeilage, and Fairfax Media Publications Pty Limited, defendants in the above-captioned action. I submit this affirmation in support of Defendants' Reply Memorandum of Law of in further support of Defendants' Motion to Dismiss the First Amended Complaint and Memorandum of Law in Opposition to Plaintiff's Cross-Motion Requesting Discovery. I make this statement upon my personal knowledge, and I would be competent to testify at trial to the facts set forth herein.

2. A true and correct copy of an email exchange between the undersigned and the Plaintiff in this action from October 14-15, 2014 is attached hereto as **Exhibit 1**.

Dated: New York, New York
November 13, 2014

KATHERINE M. BOLGER

Exhibit 1

Kate Bolger

From: Kate Bolger
Sent: Wednesday, October 15, 2014 5:25 PM
To: 'Roy Den Hollander'
Subject: RE: Hollander v. Shepherd, et al.

Hello Roy

I just left you a voicemail. Will you let me know why you won't sign the stipulation?

The filing of the amended complaint moots the motion, *see, e.g.*, *Plaza PH2001 LLC v. Plaza Residential Owner LP*, 98 A.D.3d 89, 99 (1st Dep't 2012) ("Once plaintiff served the amended complaint, the original complaint was superseded, and the amended complaint 'became the only complaint in the action.' The action was then required to proceed 'as though the original pleading had never been served.'"), and the Defendants have 20 days to respond to the amended complaint, *see* CPLR 3025(d). The purpose of the stipulation was simply to clean up the docket.

Given that, what is your objection to signing?

Kate Bolger

Katherine M. Bolger

LSKS LEVINE SULLIVAN KOCH & SCHULZ, LLP

(212) 850-6123 | Phone
www.lskslaw.com

From: Roy Den Hollander [mailto:roy17den@gmail.com]
Sent: Wednesday, October 15, 2014 4:42 PM
To: Kate Bolger
Subject: Re: Hollander v. Shepherd, et al.

Hello Kate,

I will not be signing the stip.

Roy

Roy Den Hollander
Attorney at Law
New York, N.Y.
roy17den@gmail.com
(917) 687-0652

On Tue, Oct 14, 2014 at 4:20 PM, Kate Bolger <KBolger@lskslaw.com> wrote:

Hello Roy.

We received your amended complaint and opposition to the motion to dismiss in the above-referenced action. As we understand the rules, the fling of the First Amended Verified Complaint mooted the defendants' motion to dismiss the original complaint. Accordingly, we propose to file the attached stipulation to that effect. The stipulation simply also sets forth that defendants will respond to the new complaint, which is October 27 (20 days after service.)

I did not set forth a briefing schedule on any motion in this stipulation, but if you would like to do so, please let me know.

Please let me know if this looks OK to you and, if so, please return a signed stipulation at your convenience and we will see that it is filed.

Kate Bolger

Katherine M. Bolger

LSKS LEVINE SULLIVAN KOCH & SCHULZ, LLP

321 West 44th Street
Suite 1000
New York, NY 10036
(212) 850-6123 | Phone
(212) 850-6299 | Fax
www.lskslaw.com

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ROY DEN HOLLANDER, Plaintiff, -against- TORY SHEPHERD, ADVERTISER NEWSPAPERS PTY LTD., AMY McNEILAGE, FAIRFAX MEDIA PUBLICATIONS PTY LIMITED, Defendants.	:	Index No. 152656/2014 Hon. Milton A. Tingling

REPLY MEMORANDUM OF LAW OF IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AND MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION REQUESTING DISCOVERY

Katherine M. Bolger
LEVINE SULLIVAN KOCH & SCHULZ, LLP
321 West 44th Street, Suite 1000
New York, NY 10036
Tel.: (212) 850-6100
Fax: (212) 850-6299
Counsel for Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Defendants Tory Shepherd, Advertiser Newspapers Pty Ltd. ("Advertiser Newspapers" or "*The Advertiser*"), Amy McNeilage, and Fairfax Media Publications Pty Limited ("Fairfax Media" or "*The Herald*"), by and through their undersigned attorneys, submit this reply memorandum of law in support of their motion to dismiss the First Amended Complaint ("Complaint" or "FAC") of Plaintiff Roy Den Hollander ("Plaintiff" or "Hollander") pursuant to Rules 3211(a)(1), (7), and (8) of the New York Civil Practice Law and Rules ("CPLR") and in opposition to Plaintiff's cross-motion requesting discovery.

PRELIMINARY STATEMENT

Defendants moved to dismiss Hollander's complaint on the grounds that, as Australian citizens, writing and publishing for an Australian newspaper about an Australian course taught at an Australian university, they were not subject to personal jurisdiction in this Court and on the ground that all of Plaintiff's claims fail on their merits. In response, Hollander filed ninety-two pages that are more full of *ad hominem* attacks on Shepherd, McNeilage, and Defendants' counsel than they are of substance. Setting aside Hollander's rhetoric, this case does not belong in this Court.

Plaintiff's opposition makes it clear that the only conduct Defendants engage in that is relevant to personal jurisdiction is the publication of the Articles and Columns on a website accessible in the United States. Because this conduct alone does not constitute the transaction of business in New York such that personal jurisdiction is justified, this Court lacks jurisdiction over Defendants.[1]

Even if the Court had jurisdiction over Defendants, however, Plaintiff's claims fail on their merits. The Articles and Columns report truthful facts and well-founded opinions about

[1] For clarity, Defendants use the same defined terms used in their Opening Memo.

Plaintiff. Indeed, Plaintiff admits that he said and did the things reported in the Articles and Columns, and, remarkably, he makes some of the very same statements again in the affidavit in opposition to the motion to dismiss. Plaintiff would just prefer that the stories be written differently to more fully flesh out what he really means when he says "anti-feminist." But the Court of Appeals has held that First Amendment requires that "determining what editorial content is of legitimate public interest and concern is a function for editors." *Gaeta v. N.Y. News, Inc*., 62 N.Y.2d 340, 349 (1984). As such, while Plaintiff may not like the Articles and Columns, he is constitutionally prohibited from recovering based on them.

For this reason, this Court should not only grant Defendants' motion to dismiss, but also deny Plaintiff's cross-motion for discovery. Any and all jurisdictional discovery would be fruitless – this Court has no personal jurisdiction over Defendants – and, even if it did, there is no legal basis for Plaintiff to proceed on his claim.

ARGUMENT

POINT I

PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED

A. This Court Should Strike Plaintiff's Affidavit

As an initial matter, this Court should strike Hollander's affidavit in opposition to the motion to dismiss for failure to comply with the Court's rules. New York County Justices Rules Rule 14(b) mandates that "[u]nless advance permission otherwise is granted by the court for good cause, memoranda of law shall not exceed 30 pages each (exclusive of table of contents and table of authorities) and affidavits/affirmations shall not exceed 25 pages each." "[R]ejection of papers that fail to comply with" page limits is "appropriate." *Macias v. City of Yonkers*, 65 A.D.3d 1298, 1299 (2d Dep't 2009). Here, Hollander exceeded the page limit by a staggering sixty-seven pages. The Court should, therefore, not consider it.

B. Plaintiff Misstates The Posture Of This Case

Hollander wastes the first thirty-four pages of his affidavit attacking the credibility of the Defendants and the undersigned in this action. Parsing through his purple prose, it appears that his central claim is that Defendants withdrew their initial motion to dismiss in order to cover up perjurious statements in the affidavits filed in support of the motion to dismiss. Opp. ¶ 6. This claim is foolishness.

On August 29, 2014, Defendants filed a motion to dismiss Plaintiff's original complaint, arguing that this Court lacked personal jurisdiction and Plaintiff failed to state a claim. Original Motion [Dkt. 7]. Defendants attached affidavits responding to Plaintiff's allegations. On October 7, 2014, Plaintiff filed an affidavit in opposition to Defendants' motion to dismiss, [Dkt. 26], *and* an Amended Complaint ("FAC"), [Dkt. 11]. The Amended Complaint mooted both the original complaint *and* Defendants' motion to dismiss. *See, e.g.*, *Plaza PH2001 LLC v. Plaza Residential Owner LP*, 98 A.D.3d 89, 99 (1st Dep't 2012) ("Once plaintiff served the amended complaint, the original complaint was superseded . . . . The action was then required to proceed 'as though the original pleading had never been served.'" (citation omitted)). Defendants' counsel, therefore, contacted Plaintiff via email conveying Defendants' understanding that the filing the Amended Complaint mooted Defendants' original motion to dismiss and proposing to file a stipulation stating that the original motion was moot and setting a new schedule. Plaintiff refused to sign the stipulation or give a reason why he would not do so. Second Bolger Aff., Ex 1. Defendants, thereafter, filed a letter withdrawing their original motion to dismiss and indicating that they would respond to the Amended Complaint in a timely fashion, [Dkt. 41], which they did on October 27, 2014 ("Opening Memo.") [Dkt. 44].

Both Hollander's Amended Complaint and the affidavit in opposition to Defendants' original motion to dismiss contain significantly more allegations regarding personal jurisdiction

than did the original complaint. *Compare* Original Compl. [Dkt. 1] ¶¶ 78-82 *with* FAC ¶¶ 26-34 *and* Original Opp. ¶¶ 17-48. For example, in the Amended Complaint, Hollander makes new allegations regarding News Corp and its relationship to *The Advertiser*, FAC ¶ 31, and the alleged distribution of *The Herald* in the United States, *id.* ¶¶ 37, 40, and claims that *The Herald* had an office here, *id.* ¶ 115. As a result, Defendants submitted new affidavits from the same individuals responding to the *different* jurisdictional allegations in the Amended Complaint (and in his first opposition affidavit). *Compare* Original Compl. ¶¶ 78-82 *with* FAC ¶¶ 26-34. Hollander argues that this is "perjury" and "prevarication." He is wrong. It is nothing more than Defendants' responses to new allegations in a new complaint.[2]

C. The Court May Consider Defendants' Exhibits Without Converting Their Motion Into One For Summary Judgment

Plaintiff also argues that counsel's "inclusion of 496 pages of affidavits and exhibits . . . make[] it clear that she [a reference to Defendant's counsel] is really moving for summary judgment." Opp. ¶ 14. Plaintiff is incorrect.

As explained in Defendants' Opening Memo, 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). Although judicial records are the "typical[]" example of documentary evidence, *see, e.g.*, *Giuliano v. Gawrylewski*, 40 Misc. 3d 1210(A), 2013 WL 3497611, at *2 (Sup. Ct. N.Y. Cnty. June 27, 2013), a plaintiff's own writings are properly considered

[2] There was one error in the affidavits, that was admittedly a mistake. In her original affidavit, Shepherd "erroneously stated that [she] had no other contact with anyone in New York" besides Plaintiff. Shepherd Aff. ¶ 13. As Plaintiff pointed out in his opposition, Shepherd also had brief email exchanges with Miles Groth, a professor in New York. *Id.* ¶ 14. Accordingly, in her new affidavit in support of the pending motion to dismiss, Shepherd admits that she mistakenly forgot to include her contact with Professor Groth in the origianl affidavit. Shepherd Aff. ¶ 13. She explained that it was "inadvertent error" and apologized for the error. *Id.* ¶ 13.

documentary evidence, *see Love v. William Morrow & Co*., 193 A.D.2d 586, 588 (2d Dep't 1993); *Grimaldi v. Ho*, No. 6909/2012 (Sup. Ct. Dutchess Cnty. Sept. 3, 2013) at 6 (considering the contents of Plaintiff's newsletter to establish truth).[3] In *Love*, for example, on a motion to dismiss pursuant to CPLR 3211(a)(1), the Second Department compared the allegedly defamatory statements "with the plaintiff's own words in his term paper." 193 A.D.2d at 588. In doing so, the Court held that "since [the plaintiff] has never denied the term paper's contents, the court properly dismissed the complaint based on the defense of truth." *Id.* at 587.

Here, as in *Love*, Plaintiff does not deny that the materials submitted by Defendants are authentic. For example, Hollander admits that he sat for interviews and made the statements quoted by various media outlets and put before this Court by Defendants, Opp. ¶ 12(j)(v), (vi), (vii),[4] that he wrote for *A Voice for Men*, *id.* ¶ 62(g), and that he filed a copyright action with exhibits attached wherein he affirmed to a federal court that the articles were "created by" him, *id.* ¶ 62(h);[5] *see also* Affirmation of K. Bolger, Ex. 11 ("Bolger Aff.") [Dkt. 45]. Therefore, these materials are properly considered on a motion to dismiss pursuant to CPLR 3211(a)(1).

Even if the Court found that such exhibits were not documentary evidence, the Court, alternatively, is entitled to take judicial notice of those exhibits reflecting court records and newspaper articles without converting the motion to one for summary judgment. *See, e.g.*, *Saleh v. N.Y. Post*, 78 A.D.3d 1149, 1151-53 (2d Dep't 2010); *see also Gomez-Jimenez v. N.Y. Law*

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[3] For the convenience of the Court and counsel, a copy of *Grimaldi v. Ho*, No. 6909/2012 (Sup. Ct. Dutchess Cnty. Sept. 3, 2013), which is not readily available, is attached to the Bolger Affirmation at Exhibit 19.

[4] The only interview offered by Defendants which Plaintiff challenges is an exhibit reflecting a Media Matters interview. Plaintiff argues that he was never interviewed by Media Matters. Opp. ¶ 12(j)(vii). The video embedded on the Media Matters website is a video of Plaintiff being interviewed by FOX News host Neil Cavuto.

[5] Plaintiff makes the remarkable claim in the Opposition that these essays have no relevance to this action and were submitted solely to "demonize" him. To the contrary, these essays establish the truth of the allegedly defamatory statements. Opening Memo. at 19-22.

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). In *Sprewell v. NYP Holdings, Inc.*, for example, this Court took judicial notice of multiple newspaper articles to establish the truth of actions previously taken by the plaintiff that related to the underlying defamation suit. 1 Misc. 3d 847, 850-51 (Sup. Ct. N.Y. Cnty. 2003). Defendants ask the Court to do so here as well.

All of the documents submitted by Defendants are properly before the Court either as documentary evidence, documents of which a court may properly take judicial notice, or both. This is properly a motion to dismiss.

D. <u>This Court Lacks Jurisdiction Over Defendants</u>

Next, despite Hollander's scattershot recitation of isolated (and largely inaccurate) allegations about personal jurisdiction, it is clear that this Court lacks jurisdiction over Defendants. Defendants are all Australian domiciliaries who researched and wrote articles in Australia aimed at an Australian audience for an Australian newspaper about an Australian university. For the reasons set forth in the Opening Memo, it is clear that they did not transact any business in this jurisdiction sufficient to confer jurisdiction on this Court. In the face of this truth, Hollander takes a "kitchen sink" approach, citing and misrepresenting a variety of completely irrelevant alleged "facts" relating to Defendants, their business relationships (or lack thereof), and their websites, but these efforts are unavailing.

First, this Court does not have jurisdiction over Defendants pursuant to CPLR § 302(a)(1). As discussed in the Opening Memo, the New York Court of Appeals and the United States Court of Appeals for the Second Circuit have held that merely posting an article on a website accessible in this state is *not* a transaction of business in New York such that jurisdiction is appropriate. *SPCA v. Am. Working Collie Ass'n*, 18 N.Y.3d 400, 405 (2012); *Best Van Lines,*

Inc. v. Walker, 490 F.3d 239, 248 (2d Cir. 2007) ("more than the distribution of a libelous statement must be made within the state to establish long-arm jurisdiction over the person distributing it"). And Hollander's belated allegation that *The Advertiser* and *The Herald* have "subscribers" in New York does nothing to change the analysis. Indeed, long before the Internet, this Court specifically rejected the argument that it could exercise jurisdiction over a foreign newspaper based solely on the existence of subscribers in New York. *Am. Radio Ass'n v. A. S. Abell Co.*, 58 Misc. 2d 483, 484-85 (Sup. Ct. N.Y. Cnty. 1968) (holding that because defamation claims do not arise out of the offering of subscriptions, presence of subscribers could not form the basis of jurisdiction). Thus, the publication of the Articles and the Columns on *The Advertiser* and *The Herald* websites and/or in a print version circulated in New York is insufficient to provide a basis for personal jurisdiction here.

In the Opposition, Plaintiff simply ignores these cases, claiming disingenuously that the Court of Appeals has had "little opportunity" to explore the question, Opp. ¶ 94,[6] and then relying on several cases about commercial websites,[7] *id.* ¶¶ 97 (citing *Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549 (S.D.N.Y. 2000)), 98 (citing *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158 (2d Cir. 2010)), 112 (citing *Thomas Publ'g Co. v. Indus. Quick Search,*

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[6] Incongruously, Plaintiff then asserts that the Court of Appeals has held only that posting of material on *passive* websites is insufficient for personal jurisdiction. Opp. ¶ 95 (citing *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 510 n.7 (2007). The court, however, made no such . In the very footnote Hollander cites: "Plaintiff's reliance upon defendant's posting of the result of the English action on his Web site also fails to establish purposeful availment." *Id.,* 9 N.Y.3d at 513 n.7.

[7] Plaintiff's reliance on copyright and trademark cases is simply misplaced. Multiple courts have explained that whether a court has jurisdiction over a website that sells infringing is an entirely different question from whether jurisdiction is proper in the defamation context. *Trachtenberg v. Failedmessiah.com*, ---F. Supp. 2d---, 2014 WL 4286154, at *6 n.5 (E.D.N.Y. Aug. 29, 2014) (holding that the plaintiff's reliance on copyright case law was misplaced "because it defines transaction in a copyright context – again, defamation has a unique transaction test"); *Realuyo v. Villa Abrille*, No. 01 Civ. 10158(JGK), 2003 WL 21537754, at *7 (S.D.N.Y. July 8, 2003) (distinguishing *Citigroup* on the same grounds), *aff'd sub nom. Realuyo v. Abrille*, 93 F. App'x 297 (2d Cir. 2004).

Inc., 237 F. Supp. 2d 489 (S.D.N.Y. 2002)), to argue that there should be jurisdiction here.[8] But, the Court of Appeals *has* spoken and held that to demonstrate jurisdiction here, Hollander must prove there is "something more" than maintaining a website to which the allegedly defamatory statements are published. "Courts have typically found" this "something more" 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)). In reviewing prior case law, the Court of Appeals agreed explaining that negotiating a book deal and writing the book here, *SPCA*, 18 N.Y.3d at 404 (citing *Legros v. Irving*, 38 A.D.2d 53, 56 (1st Dep't 1978)), or physically researching, writing, and producing an allegedly defamatory broadcast in New York may support "transacting business" jurisdiction in a defamation action, *id.* (citing *Montgomery v. Minarcin*, 263 A.D.2d 665, 667-68 (3d Dep't 1999)). These acts are absent here.

The only purposeful acts by any defendant culminating in any of the allegedly defamatory statements here are a few emails between Shepherd and Plaintiff or another New York professor and a single telephone call placed by Shepherd to Plaintiff. Opp. ¶ 114; FAC ¶ 34. Similar such out-of-state email and telephone contacts have been repeatedly rejected by courts as insufficient to constitute the transaction of business in New York. *SPCA*, 18 N.Y.3d at 405; *Penachio v. Benedict*, 461 F. App'x 4, 5 (2d Cir. 2012) (noting that "contact[ing] New York residents by email and telephone," among other acts, did not constitute transacting business). As

[8] Plaintiff also relies on *Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327, 341 (2012), which found that jurisdiction was proper based on the maintenance of a bank account in New York. *Licci* has no relevance here; Defendants have no bank accounts in the United States. Bolger Aff., Ex. 3 (Shepherd Aff. ¶ 18); *id.*, Ex.2 (Cameron Aff. ¶ 11); *id.*, Ex. 4 (Coleman Aff. ¶ 8); *id.*, Ex. 5 (McNeilage Aff. ¶ 12). Moreover, its general statement that "CPLR 302 (a)(1) does not require that every element of the cause of action pleaded must be related to the New York contacts" cannot support Plaintiff's argument that "publi[cation] to third parties in New York" is sufficient to confer jurisdiction, Opp. ¶ 130, because, as explained, *in defamation actions*, publication alone is not enough.

one court put it while emphasizing that courts focus on acts committed *within New York*, "Basing an article on information received out-of-state from a New York source is simply not the same as coming to New York to conduct research." *Trachtenberg v. Failedmessiah.com*, ---F.Supp.2d ---, 2014 WL 4286154, at *4 (E.D.N.Y. August 29, 2014).

Left with no other relevant contacts to point to, Plaintiff catalogues a litany of irrelevant contacts Defendants allegedly have with New York.[9] In the process, Hollander argues that CPLR § 302(a)(1) should be "expansively" interpreted. *Id.* ¶ 85. The Court of Appeals, though, has held that the relevant contacts for the jurisdictional analysis are *only those related* to the allegedly tortious act and has held that the long-arm statute's "'transacts any business within the state' *more narrowly* in defamation cases than they do in the context of other sorts of litigation." *SPCA*, 18 N.Y.3d at 405 (emphasis added and citation omitted).

Despite these legal principles, which Plaintiff chooses simply to ignore, Hollander tries to argue that because *The Advertiser* and *The Herald* websites have interactive components, they are transacting business in New York such that jurisdiction is proper here. This is incorrect. As discussed in the Opening Memo, New York courts have rejected website interactivity as a basis for jurisdiction *unless* there is a connection between the alleged defamatory article and the interactivity of the website. *See, e.g.*, *Best Van Lines, Inc.*, 490 F.3d at 252; *Gary Null & Assocs., Inc. v. Phillips*, 29 Misc. 3d 245, 246-50 (Sup. Ct. N.Y. Cnty. 2010) (no personal jurisdiction where there was no "relationship" between the advertising links and plaintiff's

[9] Plaintiff argues that these contacts are important because "Defendants' New York activities, and their nature and quality, are to be considered in their totality." Opp. ¶ 92. In support of this proposition, Plaintiff cites the 1965 Court of Appeals case *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.* 15 N.Y.2d 443, 457 n.5 (1965). Opp. ¶ 92. *Barnes & Reinecke* does not support the "totality" of contacts argument offered by Plaintiff though. Instead, in that breach of contract case, the Court of Appeals merely explained, "[E]ven though the last act marking the formal execution of the contract may not have occurred within New York, the statutory test may be satisfied by a showing of other purposeful acts performed by the appellant in this State *in relation to the contract*, albeit preliminary or subsequent to its execution." *Id.* at 457 (emphasis added).

defamation claim); *Realuyo v. Villa Abrille*, No. 01 Civ. 10158(JGK), 2003 WL 21537754, at *7 (S.D.N.Y. July 8, 2003) ("While those advertising links may cause the web site to fall within the middle ground of possible jurisdiction, the claim in this case, unlike the claim in *Citigroup,* does not arise from that set of interactive links."), *aff'd sub nom. Realuyo v. Abrille*, 93 F. App'x 297 (2d Cir. 2004). Here, Plaintiff claims for example that *The Advertiser* "allows its readers to personalize and advertise on Mosthtix, an entertainment forum," Opp. ¶ 109, *The Herald* "provides a forum and community for online dating," *id.* ¶ 110, and *The Herald* has a "'Member Center'" where readers can "[g]et access to exclusive offers and competitions," *id.* But none of these allegations have any relation whatever to the articles about males studies courses at the University of South Australia at issue here. The interactivity of Defendants' websites, therefore, provides no basis for jurisdiction here.[10]

Plaintiff also argues that *The Herald* is subject to personal jurisdiction because it has a non-party representative in New York City for selling advertisements and it has a relationship with non-party Press Reader to distribute copies of *The Herald* in the United States. Opp. ¶¶ 103-05.[11] These claims are not relevant to the Court's inquiry, because Hollander's claims do not result from any advertisements in *The Herald*, *see Trachtenberg*, 2014 WL 4286154, at *4; *Am. Radio Ass'n*, 58 Misc. 2d at 484-85 (in a defamation action, defendant's use of "an independent advertising firm with offices in New York City" was irrelevant because the defamation claim did not arise from that relationship), and, as discussed above, cannot be based solely on the distribution of allegedly defamatory newspapers (especially by a third party like

[10] Plaintiff simply makes no argument as to why Defendant McNeilage – who had no contacts at all with New York in the process of writing her single article about the university course – is subject to jurisdiction here. McNeilage Aff. ¶ 7 ("I made no contact with anyone in the United States or New York in the process of reporting on the controversy.").

[11] Plaintiff makes a similar claim as to News Corp Australia, *The Advertiser*'s parent company. Opp. ¶ 30.

Press Reader) in New York, *Best Van Lines, Inc.*, 490 F.3d at 248 ("more than the distribution of a libelous statement must be made within the state to establish long-arm jurisdiction over the person distributing it"). Like his other alleged jurisdictional facts, these alleged facts, even if credited as true, would not create jurisdiction over any of the Defendants.[12]

Plaintiff next appears to argue that jurisdiction is appropriate here because Defendants "targeted" Plaintiff in New York. But "making defamatory statements outside of New York about New York residents does not, without more, provide a basis for jurisdiction, even when those statements are published in media accessible to New York readers." *Best Van Lines, Inc.*, 490 F.3d at 253; *see also Gary Null & Assocs., Inc.*, 29 Misc. 3d at 250 (accepting plaintiff's concession "that the posting of defamatory material on a website accessible in New York does not, without more, constitute transacting business in New York" (internal marks and citations omitted)); *Realuyo*, 2003 WL 21537754, at *6 (business operating out of Philippines and preparing and posting content for its website from there was not subject to jurisdiction in New York). Accordingly, as a matter of law, Plaintiff's "targeting" allegations are insufficient to confer jurisdiction.

Finally, as to Shepherd, Plaintiff argues that jurisdiction is appropriate over her pursuant to CPLR § 302(a)(1) based on the Supreme Court decisions in *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984) and *Calder v. Jones*, 465 U.S. 783 (1984). Opp. ¶ 122. But, the Court of Appeals rejected this argument thirty-years ago, holding that jurisdiction could not be exercised under CPLR § 302(a)(1) where doing so was only "premised on broader standards articulated by

[12] Plaintiff, without citation to legal authority, argues that *The Advertiser* is subject to jurisdiction because it is a subsidiary of News Corp and a third-party website suggests that Advertiser Newspapers has a corporate officer in New York. Opp. ¶¶ 26, 29. In its motion to dismiss, *The Advertiser* explained why neither of these purported facts are relevant here. Opening Memo. at 14-15. Plaintiff simply did not respond to either of these arguments.

the United States Supreme Court." *Talbot v. Johnson Newspaper Corp.*, 71 N.Y.2d 827, 829 (1988). In doing so, the court emphasized that "the New York long-arm statute (CPLR 302) does not provide for *in personam* jurisdiction in every case in which due process would permit it." *Id.*at 829-30 (emphasis added). As one district court recently explained, "Although New York could let its courts exercise 'impact-' or 'effects-only' jurisdiction [under *Calder v. Jones*], it has chosen not to do so; § 302(a)(1)'s transaction requirement sets a decidedly stricter test for defamation cases." *Trachtenberg*, 2014 WL 4286154, at *3 (internal citation omitted). Thus, Plaintiff's reliance on Supreme Court jurisprudence interpreting *other states'* long-arm statutes that extend beyond New York's to the limits of due process is misplaced. Opp. at 122-125.[13]

Second, Hollander also wastes seven pages of his Opposition arguing that this Court has jurisdiction over all Defendants for the purposes of his injurious falsehoods, tortious interference, and *prima facie* tort claims under CPLR § 302(a)(3). Opp. ¶¶ 137-66. Although Plaintiff acknowledges that this section of the long-arm statute does not apply to defamation actions, *id.* ¶ 139, he nevertheless attempts to circumvent this fact by emphasizing that his claims are (1) for "injurious falsehood" (aimed at remedying damage to a "copyrighted work"), *id.* ¶ 141,[14] and (2) "tortious interference" (aimed at remedying Plaintiff's alleged lost teaching engagement), *id.* ¶ 147. As explained in Defendants' motion to dismiss, Plaintiff cannot avoid the jurisdictional bar to claims sounding in defamation by creative pleading. Opening Memo. at 10.

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[13] In any event, Plaintiff's argument that *Calder* requires a finding of jurisdiction here because Defendants posted articles on their websites that discussed him and he would feel the effects of the libel in New York falls flat, because "*Calder* does not sweep that broadly." *Young v. New Haven Advocate*, 315 F.3d 256, 262 (4th Cir. 2002); *see also Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002) (same).

[14] For example, Plaintiff asserts that Defendants' articles injured his copyright in "Males and the Law." Opp. ¶ 141. Notably, this purported injury was nowhere to be found in Plaintiff original complaint. Assuredly, if Plaintiff's opponents made such a drastic about-face in their legal theory, he would accuse them of "prevaricating" and "dissembling."

Indeed, the First Department rejected the same slight-of-hand Plaintiff attempts to pull herein. *Findlay v. Duthuit*, 86 A.D.2d 789, 790 (1st Dep't 1982); *see also Cantor Fitzgerald, L.P, v. Peaslee*, 88 F.3d 152, 157 (2d Cir. 1996) (holding that "Plaintiffs may not evade the statutory exception by recasting their cause of action as something other than defamation"). In *Findlay*, the defendant alleged that the plaintiff's painting by Henri Matisse was a "fake." 86 A.D.2d at 790. As a result, the Houston Museum of Fine Arts refused to accept the painting for its collection. *Id.* Even though the statements related to plaintiff's painting and plaintiff's claim was one for "unfair competition," the court looked to the "reality and the essence of the action and not its mere name." *Id.* The court then concluded that a "fair reading of the complaint" demonstrated that "plaintiff's claims do indeed sound in defamation of character which cause is exempt from acts by a nondomiciliary which may serve as a basis for long-arm jurisdiction." *Id.*

Plaintiff's Amended Complaint – even more clearly than in *Findlay* – demonstrates that all of his claims sound in defamation. In fact, Plaintiff alleges that the individual defendants "author[ed] and publish[ed] false and misleading information concerning Plaintiff's copyrighted property *and himself*." FAC ¶¶ 1 (emphasis added), 17 (describing Defendants as "vent[ing] their personal animosities against men's rights advocates"), 60 (arguing that Shepherd "intentionally created" the "false impression" that Plaintiff was "evil and should . . . have his tongue cut out"). Just as in *Findlay*, which was decided on a motion to dismiss, Plaintiff's mere averment to damage to his copyright like the *Findlay* plaintiff's averment to damage to her painting does not dissolve the jurisdiction bar in CPLR § 302(a)(3) in the case of defamation claims. Therefore, because Plaintiff's claims sound in defamation, the Court need not address Plaintiff's specious jurisdictional arguments under CPLR § 302(a)(3).

This Court lacks personal jurisdiction over Defendants in this action. The Amended Complaint should be dismissed.

E. The Claims Are Meritless

Moreover, even if the Court had jurisdiction over this matter, Plaintiff's claims are utterly lacking in merit. In fact, despite fully ninety pages of rhetoric, Plaintiff fails to address the arguments made by Defendants in the Point II of the Opening Memo ("Plaintiff's Complaint Should Be Dismissed On Its Merits"), choosing instead to simply repeat the allegations in the Amended Complaint. Simply repeating allegations, however, is insufficient to stave off dismissal where, as here, a plaintiff's allegations, even taken as true, are not sufficient as a matter of law. *Phillips v. Carter*, 58 A.D.3d 528, 528 (1st Dep't 2009) (complaint alleging that statements were false and defamatory failed to state a claim where "factual allegations [therein] demonstrate that defendant's statements were either true or unactionable opinion"). And here, there is no doubt, Plaintiff's claims fail on their face.[15]

1. The Injurious Falsehood And Libel Claims Must Be Dismissed

Plaintiff's claims for injurious falsehood and libel must be dismissed as a matter of law because (1) the vast majority of the statements are true and (2) the remaining statements are either statements of opinion or not "of and concerning" Plaintiff.

First, other than simply repeating the allegations from his Amended Complaint (and stepping up his personal attacks), Plaintiff fails to address the central weakness of his Complaint – the vast majority of the statements that form the basis of his Complaint, Statements B, D, E, F, G, I, J, K, M, N, O, P, Q, V, X, Y, Z, DD, EE, LL, MM, NN, OO, and PP are true, *see* Bolger

[15] Plaintiff's Opposition fails completely to address the fact that Statements A, H, I, L, M, V & AA are not, in fact, contained in the Articles or the Columns. It goes without saying that Defendants cannot be liable for statements they did not make, and Plaintiff's claims as based on those statements must, therefore, be dismissed.

Aff., Ex. 18, and, therefore, Plaintiff will never be able to establish that the Articles and Columns were false. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778-79 (1986) (affirming dismissal of defamation claim where plaintiff carried burden of establishing truth).

In the Opposition, Plaintiff touts his academic credentials and his former affiliation as an associate in a well-known law firm as evidence that "[i]f the Defendants' statements were true, Plaintiff never would have brought this case. He has better things to do, such as rehearse for an Alvin Ailey Hip Hop show." Opp. ¶ 12(g). But neither Plaintiff's past academic glories nor his preference for dancing represent a meaningful response to the documentary evidence or the Complaint in which Plaintiff does, indeed, describe himself as an "anti-feminist," FAC ¶ 67, advocate the use of arms, *id.* ¶ 185 (describing as "accurate" quote that "there is one remaining source of power in which men still have a near monopoly—firearms"), refer to women as "witches," *id.* ¶ 14, and women's studies as "witches' studies," Bolger Aff., Ex. 6, write for the *A Voice for Men* website, Opp. ¶ 62(g), which has been called a hate website, Bolger Aff., Ex. 14,[16] and take extremist views about feminists, including his suggestion that we strap a "Feminazi . . . to a missile and drop her [it] on the Middle East," *id.*, Ex. 8 at 25. In the Complaint in this action, Plaintiff calls women he has unilaterally decided are "feminists" the following names: "witches," FAC ¶ 14, "harpies," *id.* ¶ 62, "Bacchae," *id.* ¶ 1, "female dog[s] in heat," *id.* ¶ 59, suggests they would have been raped, *id.* ¶ 80, comments on their appearance and their education, questions their honesty and integrity, *id.* ¶ 75, and compares them to the Islamic State, *id.* ¶ 65. In his other writings, he has called the women he deems "feminists": "malicious

[16] In the Opposition, Plaintiff admits to writing for *A Voice for Men* two times and then claims that "two articles do not a contributor make." Opp. ¶ 62(g). Not only is this statement nonsense on its face – even one contribution makes a person a contributor under the plain meaning of the word – it is also incorrect. Defendants attached *three* articles Plaintiff published on the *A Voice for Men* website and there could be more. Bolger Aff., Exs. 6, 7, 11.

slut[s]" who will not "shut [their] yap[s]" giving men "no choice but to . . . slap the slut across the chops." Bolger Aff., Ex. 8 at 18. There is no question, then, that the Articles and Columns' statements about Plaintiff are substantially true.

The only other argument Plaintiff appears to make that the Articles and Columns are false is that while he uses the words attributed to him therein, he uses them differently. This argument fails as a matter of law. As Plaintiff himself acknowledges throughout the Opposition, the Court of Appeals has instructed that a court must not strain and "torture" the meaning of an allegedly defamatory communication, but is instead to give the words their plain meaning. *Golub v. Enquirer/Star Grp.*, 89 N.Y.2d 1074, 1076 (1997). It has been the law in New York for more than fifty years that it is a question of law for the court to decide whether particular challenged words are reasonably capable of a defamatory meaning ascribed to it by the Plaintiff. *Tracy v. Newsday, Inc*., 160 N.Y.S.2d 152, 154 (Sup. Ct. Bx. Cnty. 1957), *aff'd*, 5 N.Y.2d 134 (1959); *see also Aronson v. Wiersma*, 65 N.Y.2d 592, 593 (1985) (same). The threshold question is whether the challenged statement *reasonably* conveys the alleged implication. *James v. Gannett Co.*, 40 N.Y.2d 415, 419 (1976) ("The court must decide whether there is a reasonable basis for drawing the defamatory conclusion."); *Ava v. NYP Holdings, Inc.*, 64 A.D.3d 407, 414 (1st Dep't 2009).

No reasonable reader would understand the Articles or the Columns to convey the false, defamatory implication Plaintiff has ascribed to it. Plaintiff seems to claim, for example, that the average reader would understand that when Defendants used the word "anti-feminist," they mean it to say "anti-female." *See, e.g.*, Opp. ¶ 256. Hollander further claims that it is false by this definition to call him an anti-feminist because when he says he is an "anti-feminist" he means anti-"hardcore, extreme, manhating or rabid" feminists. *Id.* ¶ 4. But this is nonsense. Plaintiff

calls himself an anti-feminist; the Article says he is anti-feminist. No reasonable reader would construe the use of the same word to mean two different things.

What Plaintiff is really arguing is that he should be permitted to control the way he is discussed – that when Defendants call him a "self-described anti-feminist," they should also be compelled to state that "when Hollander uses the word 'anti-feminist' he means anti-'hardcore, extreme, manhating or rabid' feminists." But there is no such obligation. As the United States Supreme Court has held, "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Or, as the Court of Appeals has put it, "Determining what editorial content is of legitimate public interest and concern is a function for editors." *Gaeta*, 62 N.Y.2d at 349. For this reason, "[t]he press, acting responsibly, and not the courts must make the ad hoc decisions as to what are matters of genuine public concern, and while subject to review, editorial judgments as to news content will not be second-guessed so long as they are sustainable." *Id.*; *see also Copp v. Ramirez*, No. 109122/06, 2007 WL 6139779 at *2 (Sup. Ct. N.Y. Cnty. Oct. 9, 2007) ("The press does not have to report all sides to a story, and unbalanced reporting is a matter of editorial judgment, not actionable defamation."), *aff'd*, 62 A.D.3d 23, (1st Dep't 2009); *Torres v. CBS News*, No. 121646/93, 1995 WL 810041, at *3 (Sup. Ct. N.Y. Cnty. Oct. 11, 1995) ("While 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."). Defendants had a constitutional right to tell the story as they saw fit – and they chose to report on the Plaintiff, his anti-feminist beliefs, and his desires to teach them in a local university classroom. Plaintiff does

not like the way he is described in the Articles or the Columns, but that does not make them false. Plaintiff's claims of injurious falsehood and libel must be dismissed.[17]

Second, in a rejoinder to Defendants' arguments that Statements B, D, F, I-K, M, Q-Y, BB-OO, QQ, many of which are found in the Second Shepherd Column, and the statements in the First Shepherd Column generally, *see* Bolger Aff., Ex. 18, are non-actionable opinion, Plaintiff makes just two points: (1) the statements were "published in the 'News' sections of the media outlets for which they work," and, as such, they cannot be "opinions," Opp. ¶ 12(h), and (2) to the extent they are opinions, they imply false facts and, as such, are not protected, *id.* ¶ 205. Both are unavailing.

Initially, Plaintiff is wrong on the facts. In fact, the First and Second Shepherd Columns, while under the "News" section, were under the "Opinion" sub-section. Shepherd Aff. ¶¶ 7-8. As explained, readers are less likely to consider columns in an editorial section to convey facts rather than opinions. *Brian v. Richardson*, 87 N.Y.2d 46, 52 (1995) (material in editorial section "typically regarded by the public as a vehicle for the expression of individual opinion"); *see also Millus v. Newsday, Inc.*, 89 N.Y.2d 840, 842 (1996) (holding that column was protected opinion based, in part, on column's appearance on the editorial page). Thus, Hollander's argument along these lines is misplaced as to Statements BB-OO and the First Shepherd Column.

Moreover, even if the statements were all found in the "News" section of the newspapers, this does not preclude a finding that the statements are opinion. Indeed, the general context of the statements is just one element to be considered. *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 254 (1991). Courts should also considered whether the immediate context of the statements

[17] As an aside, Plaintiff simply misstates the law of injurious falsehood, relying almost exclusively on case law from the first half of this century before the court constitutionalized the tort of defamation in the landmark case *New York Times v. Sullivan*, 376 U.S. 254 (1964). Plaintiff is simply wrong on the law.

and whether they are verifiable. *Id.* at 253-54. Here, all the statements refer to what Plaintiff characterizes as competing "theor[ies]" resulting from opposing sides' willingness "to tell the truth *as they understood it*" relating to Male Studies. FAC ¶¶ 217-220. This "public controversy" context, like the academic debate in *Immuno AG*, "would induce the average reader . . . to look upon the communication as an expression of opinion rather than a statement of fact." *Immuno AG*, 77 N.Y.2d at 254.

The language itself also supports this conclusion. Shepherd, for example, uses charged language such as "extreme," "rails," and "hostile." FAC, Ex. C. None of these hyperbolic words lend themselves to verification. *See, e.g.*, *Pitcock v. Kasowitz, Benson, Torres, & Friedman, LLP*, 74 A.D.3d 613, 615 (1st Dep't 2010) (use of the word "extreme[]" is a statement of opinion). McNeilage quotes a source merely explaining that men being cast as victims "does worry" her, FAC, Ex. D, which is especially emblematic of opinion – indeed, the source is explaining how she feels, which by its very nature is *opinion*. *Immuno AG*, 77 N.Y.2d at 255 ("writer's presumptions and predictions . . . would not have been viewed by the average reader . . . as conveying actual facts"). In short, Statements B, D, F, I-K, M, Q-Y, BB-OO, and QQ are all statements of opinion, as evidenced by the context of the statements and their language.

Next, Plaintiff is incorrect that the Articles and Columns imply undisclosed false facts. This simply is not the case. In fact, as explained throughout the Articles and Columns, Shepherd and McNeilage base their statements on, among other things, Plaintiff's statements on guns, *id.* ¶¶ 71, 259(c), women, *id.* ¶ 268, his own description of himself as an "anti-feminist," *id.* ¶¶ 2-3, and on his "novel" legal actions aimed at having women's rights classes cancelled based on the argument that they unconstitutionally establish a government religion of feminism, *id.* ¶ 268.

Shepherd, for example, lays out the following facts in the First Shepherd Article: (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) Hollander believes that men must defend themselves with guns from oppressive feminists; and (4) Hollander sued nightclubs for ladies' nights. FAC, Ex. C. In the second, Shepherd notes: (1) the lecturers were linked with men's rights organizations that "believe men are oppressed"; (2) Hollander "stood by his claim that men's remaining source of power was 'firearms'"; and (3) Hollander believes that powerful men are "enforcing the belief system of feminism." *Id*., Ex. E. In the Second Shepherd Column, her opinions are based *entirely and obviously* on the allegations in Plaintiff's original complaint here, which she reproduces and then comments on. *Id.*, Ex. F.[18]

McNeilage similarly discloses in her article: (1) the lecturers had been published on men's rights websites; (2) Hollander believes that feminism is a religious belief; and (3) Hollander brought a lawsuit against Columbia University for offering a women's studies course. *Id*., Ex. D. Because the basis for the challenged opinions are supported by truthful facts disclosed in the articles, these statements are non-actionable.

Finally, Defendants also argued that Statements F, R, T, BB, QQ and RR and the entirety of the First Shepherd Column are not "of and concerning" Plaintiff. Opening Memo. at 27; *see also* Bolger Aff., Ex. 18. Plaintiff entirely fails to engage this argument at all. Instead, he merely asserts that Shepherd's First Article "referred to Plaintiff" as did the McNeilage Article. Opp. ¶¶ 205-06. And, as to the First Shepherd Column, Hollander speciously rests on his allegation that it "clearly includes Roy in the group of men [Shepherd] is attacking with her stiletto words." FAC ¶ 181. But none of the alleged defamatory statements in the First Shepherd

[18] The First Shepherd Column is also protected opinion. Opening Memo. at 23-26.

Column refer to Hollander at all – either by name or implication. FAC, Ex. H. For these reasons, Hollander's claims as to Statements F, R, T, BB, QQ and RR and the entirety of the First Shepherd Column must be dismissed as not "of and concerning" Hollander.[19]

2. Plaintiff's Claims For Tortious Interference With Prospective Economic Advantage Should Be Dismissed

Next, in the Opening Memo, Defendants argued that Plaintiff's claim for tortious interference with prospective economic advantage should be dismissed because (1) it is duplicative of the libel claim, *see Perez v. Violence Intervention Program*, 116 A.D.3d 601, 602 (1st Dep't 2014), and (2) Plaintiff, *as a matter of law*, will be unable to demonstrate that Defendants acted with the *sole* intent of interfering with Plaintiff's relationship with the University of South Australia in publishing the Articles and Columns because as a matter of law, "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 of interference." *Huggins v. Povitch*, No. 131164/94, 1996 WL 515498, at *9 (Sup. Ct. N.Y. Cnty. April 19, 1996) (citing *Alvord & Swift v. Muller Constr. Co.*, 46 N.Y.2d 276, 276 (1978); *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 196, (1980)).

Plaintiff simply ignores this case law in the Opposition – reiterating his allegations that because Defendants knew that he was planning to teach a course at the university, they therefore necessarily must have intended to interfere with that relationship in publishing the Articles and Columns. Opp. ¶¶ 207-12. Plaintiff then spends several pages articulating his "evidence" that Defendants Shepherd and McNeilage bore him ill will. *Id.* ¶¶ 218-21. Even if this Court were to take this "evidence" at face value, however, it would fail as a matter of law to establish that

[19] Plaintiff also failed to even address Defendants' arguments that Statements C, R, S, V, II, and PP-SS are not defamatory. Opening Memo. 26-27. As such, he has conceded that they are not.

Defendants acted with the *sole* intent of harming Defendants as required by the First Department. *Rondeau v. Houston*, 118 A.D.3d 638, 639 (1st Dep't 2014). To the contrary, Defendants had an expressive purpose in writing and publishing the Articles and Columns – *i.e.*, to inform their Australian audience about a proposed course at the university. Because Defendants had this wholly lawful and non-tortious intention in publishing the Articles and Columns, Plaintiff cannot as a matter of law prevail on his tortious interference claim. Moreover, Plaintiff's tortious interference claim is based on the same conduct as his claims for injurious falsehood. *Compare* FAC ¶¶ 159-69 (tortious interference claims based on "authoring and publishing the[] articles") *with id.* ¶¶ 156-58 (injurious falsehood based on same "published falsehoods"). For this reason, it is duplicative and must be dismissed.

3. Plaintiff's Alternative Claim For *Prima Facie* Tort Should Be Dismissed

Finally, Plaintiff's alternative claim for *prima facie* tort should similarly be dismissed because, as set forth in the Opening Memo, Plaintiff will not be able to demonstrate that Defendants acted with "disinterested malevolence" in writing and publishing the Articles and Columns. Disinterested malevolence is the "touchstone" of *prima facie* tort, *Twin Labs, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 571 (2d Cir. 1990), and where an alleged tortious act "is a product of mixed motives some of which are perfectly legitimate then recover in *prima face* tort is impossible." *Fabry v. Meridian Vat Reclaim, Inc.*, No. 99 Civ. 5149 NRB, 2000 WL 1515182, at *2 (S.D.N.Y. Oct. 11, 2000) (internal marks and citation omitted). As a matter of law, the publication of newsworthy content – like the articles about courses to be taught a public university at issue here – has a protected, expressive motive. *See, e.g.*, *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 143 (1985). The *prima facie* tort claim must be dismissed.

Faced with this fact, Plaintiff imports an outdated case from 1958 to argue that this Court should weigh the "public's gain" in publishing the Articles and Columns against the "harm" Plaintiff suffered. Opp. ¶ 241 (citing *Brandt v. Winchell*, 3 N.Y.2d 628 (1958)). This archaic test, however, is no longer in use. First, it was articulated six years before the United States Supreme Court concluded in *New York Times v. Sullivan*, that in order that "debate on public issues should be uninhibited, robust, and wide-open," the First Amendment required that there be protection afforded to even false and defamatory speech, 376 U.S. 254, 270, 278-79 (1964), and thirty years before those protections were extended to all actions seeking damages for injury reputation based on the publication of allegedly false speech, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52-53 (1988). Moreover, in the context of a *prima facie* tort claim brought based on speech, the Court of Appeals has been clear that the publication of "newsworthy content [] constitutes sufficient justification for [] publication." *See, e.g.*, *Freihofer*, 65 N.Y.2d at 143.[20]

Here, there is no question that the Articles and Columns are newsworthy. For this reason, Plaintiff cannot prevail on his alternative *prima facie* tort claim as a matter of law.

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[20] New York courts are quite expansive in their views of which matters may be regarded as within the sphere of legitimate public concern. As the New York Court of Appeals held:

> Determining what editorial content is of legitimate public interest and concern is a function for editors. . . . The press, acting responsibly, and not the courts must make the *ad hoc* decisions as to what are matters of genuine public concern, and while subject to review, editorial judgments as to news content will not be second-guessed so long as they are sustainable.

Gaeta, 62 N.Y.2d at 349; *see also Huggins v. Moore*, 94 N.Y.2d 296, 303 (1999) ("courts will not second-guess editorial decisions as to what constitutes matters of genuine public concern"). It should go without saying, then, that a local news report's discussion about a course taught at a university is a matter of public interest. *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 200 (1975) (holding that article relating to public school teacher's arrest was an "abundantly clear" example of public concern); *see also* Bolger Aff., Ex. 13 at 6 (Hollander describing male studies course as a "public benefit").

POINT II

PLAINTIFF'S CROSS-MOTION FOR DISCOVERY SHOULD BE DENIED

"In order to obtain jurisdictional discovery pursuant to CPLR 3211(d), plaintiffs must demonstrate the possible existence of *essential* jurisdictional facts that are not yet known." *Copp*, 62 A.D.3d at 31 (emphasis added); *Findlay*, 86 A.D.2d at 790-91. In other words, "[w]hen it does not appear that facts exist which might support jurisdiction, an attempt to avoid dismissal by seeking discovery must be rejected as frivolous." *Ward by Ward v. Bonanza Steak House*, No. 84 Civ. 3097 (CBM), 1985 WL 171, at *2 (S.D.N.Y. Jan. 7, 1985). Plaintiff's requests for discovery, *see, e.g.*, Opp. ¶¶ 27, 29, 31(b), (e), 37, all relate to conduct that is entirely irrelevant to the narrow jurisdictional question before this Court, and, therefore, should be denied as frivolous.

By way of example, Plaintiff argues discovery is needed because *The Advertiser* allegedly has a corporate officer with an office in New York. This, Hollander asserts, raises the specter that "perhaps Advertiser uses New York financial institutions." *Id.* ¶ 29. Discovery on this point, however, is not needed, because Plaintiff's cause of action would not "aris[e] out of" the maintenance of a bank account, *Am. Radio Ass'n*, 58 Misc. 2d at 484, and similarly would not subject *The Advertiser* to general jurisdiction in New York, Opening Memo. at 15 n.8. In any event, *The Advertiser* has already affirmed that it does not have a bank account in New York. Cameron Aff. ¶ 11. Plaintiff also argues that discovery is needed to determine the relationship between *The Herald* and a New York company "News Alert LLC to create News Alert Asia-Pacific." Opp. ¶ 41. Once again though, Hollander's claims for defamation against *The Herald* and McNeilage for a single article written in Australia and published to an Australian website *do not* arise out of any alleged agreement to create "News Alert Asia-Pacific." *See, e.g.*, *Trachtenberg*, 2014 WL 4286154, at *4.

Like the plaintiff in *Trachtenberg*, Hollander has "a problem of kind, not degree—[]he needs new jurisdictional theories, not more evidence substantiating the theories []he has already advanced." *Id.* at *5. Because none of the evidence sought by Plaintiff is relevant to the question of whether Defendants conducted any pre-publication research in New York, Plaintiff's requests for discovery should be denied as frivolous.

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 grant their motion to dismiss and dismiss the First Amended Complaint with prejudice and deny Plaintiff's motion for discovery.

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: */s/ Katherine M. Bolger*
Katherine M. Bolger

321 West 44th Street, Suite 1000
New York, NY 10036
(T): (212) 850-6100
(F): (212) 850-6299
Counsel for Defendants