State of New York

Court of Appeals

ROY DEN HOLLANDER,

Plaintiff-Appellant,

-against-

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

Defendants-Respondents.

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS WITH SUPPORTING PAPERS

Roy Den Hollander, Esq.
Plaintiff-Appellant
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Appellate Division, First Department
Supreme Court, New York County, Index No. 152656/14

COURT OF APPEALS OF THE STATE OF NEW YORK

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Roy Den Hollander,

Plaintiff-Appellant,

-against-

Tory Shepherd, Advertiser Newspapers Pty Ltd., Amy McNeilage, Fairfax Media Publications Pty Ltd.,

Defendants-Respondents.

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New York County Clerk Index No.: 152656/14

Notice of Motion for Leave to Appeal to the Court of Appeals

PLEASE TAKE NOTICE that, upon the annexed supporting papers, the briefs and record filed in the Appellate Division, First Department on the prior appeal in this action, and upon all papers and prior proceedings in this action, the Plaintiff-Appellant, Roy Den Hollander, will move this Court at the Courthouse of the Court of Appeals, 20 Eagle Street, Albany, N.Y. 12207, on September 12, 2016, for an order granting Plaintiff-Appellant leave to appeal to the Court of Appeals from an Order of the Appellate Division, First Department, dated August 25, 2016, dismissing Plaintiff-Appellant's appeal to the First Department of a Decision, Order and Judgment of the Supreme Court, New York County, and for such other and further relief as this Court finds just and proper.

Dated: New York, N.Y.
August 29, 2016

/S/ Roy Den Hollander

By: Roy Den Hollander,
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COURT OF APPEALS OF THE STATE OF NEW YORK

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Roy Den Hollander,

Plaintiff-Appellant,

-against-

Tory Shepherd, Advertiser Newspapers Pty Ltd., Amy McNeilage, Fairfax Media Publications Pty Ltd.,

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New York County Clerk Index No.: 152656/14

Affidavit in Support of Motion for Leave to Appeal

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

I, Roy Den Hollander, the Plaintiff-Appellant and an attorney admitted to practice in the State of New York, being duly sworn, depose and say:

Statement of Procedural History

1. Plaintiff-Appellant brought this action in the Supreme Court of New York County against two multi-billion dollar global media corporations—Advertiser Newspapers Pty Ltd. (wholly owned by Rupert Murdoch's News Corporation headquartered in New York City) and Fairfax Media Publications Pty Ltd. Also included as Defendants-Respondents are Tory Shepherd, a reporter employed by Advertiser Newspapers, and Amy McNeilage, a reporter employed by Fairfax Media Publications. All Defendants-Respondents work out of Australia and are represented by attorney Katherine M. Bolger ("Bolger").

2. Each Defendant-Respondent was accused of injurious falsehoods that harmed Plaintiff-Appellant's business product and tortious interference with Plaintiff-Appellant's prospective contract to teach a course online from New York City to students at the University of South Australia. Defendant-Respondent Tory Shepherd was also accused of libel.

3. The injurious falsehoods and tortious inference causes of action stemmed from Defendants-Respondents publishing false and misleading articles about Plaintiff-Appellant's copyrighted business product, which was the course section he was slated to teach on how the law in America and England treated women and men differently since the Industrial Revolution.

4. The libel cause of action against only Defendant-Respondent Tory Shepherd was based on a series of published articles she wrote libeling Plaintiff-Appellant.

5. An order by the Supreme Court (Jennifer G. Schecter, J.) dismissed the case for lack of personal jurisdiction over Defendants-Respondents, which was entered January 12, 2016. Ex. A. The Supreme Court did not reach any of the merits of the causes of action.

6. Plaintiff-Appellant appealed Justice Schecter's Order to the Appellate Division, First Department on February 2, 2016. Ex. B, Notice of Appeal.

7. Plaintiff-Appellant, a 68 year-old, semi-retired sole practitioner who earned $35,000 last year, served and filed his Brief and Appendix on March 15, 2016.

8. On April 1, 2016, attorney Bolger filed a motion to dismiss that included exhibits attached to the "Affirmation of Katherine M. Bolger" submitted with the motion to dismiss and including18 exhibits, totaling 383 pages. Bolger was complaining, among other things, that not all the exhibits were included in Plaintiff-Appellant's Appendix. Ex. C, Bolger Mem, April 1, 2016. Some of the 18 Exhibits were already included in Plaintiff-Appellant's Appendix, some were duplicates and triplicates, and some had nothing to do with the Supreme Court's dismissal for lack of personal jurisdiction.

9. Plaintiff-Appellant filed an Opposition to the motion on April 7, 2016, arguing that attorney Bolger wanted to add more pages to the Appendix in order to price Plaintiff-Appellant out of the appeal. Ex. D, Plaintiff-Appellant's Opposition Mem., April 7, 2016.

10. On May 3, 2016, the Appellate Division issued an Order requiring Plaintiff-Appellant "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." Ex. E.

11. Since the only motion to dismiss that was before the Appellate Court at that time was the April 1, 2016, motion to dismiss with its 18 exhibits, Plaintiff-Appellant interpreted the Appellate Division's Order to require him to include all those exhibits in his Appendices, which he did by filing a Supplemental Appendix

at a cost of $1,600 that was added to the $2,000 already spent on printing for the appeal—nearly three-months rent for Plaintiff-Appellant.

12. After Plaintiff-Appellant timely served and filed the Supplemental Appendix, attorney Bolger made another motion to dismiss on July 15, 2016. Ex. F, Bolger, Mem., July 15, 2016.

13. In this motion to dismiss, attorney Bolger accused Plaintiff-Appellant of intentionally violating the Appellate Division's May 3, 2016, Order, Ex. E. Plaintiff-Appellant submitted an Opposition arguing that he had complied with the Order by including in his Appendices all of the 18 Exhibits that Bolger had submitted with her April 1, 2016, motion to dismiss. Ex. G, Plaintiff-Appellant's Mem., July 28, 2016.

14. On August 25, 2016, the Appellate Division issued an Order dismissing Plaintiff-Appellant's appeal (Ex. H) for violation of its May 3, 2016, Order (Ex. E). The August 25, 2016, Order and Notice of Entry was served on August 25, 2016.

15. The 68 year-old Plaintiff-Appellant may have misinterpreted the Appellate Division's Order to require that all the exhibits submitted with Bolger's April 1, 2016, motion to dismiss be included in his Appendices—it was not an intentional misinterpretation.

16. Prior to the Appellate Division's August 25th dismissal Order, Bolger filed on August 10th her own Appendix of 627 pages (included in documents provided), which in effect is the entire record on appeal. However, in her April 1, 2016, Memorandum at page 9 (Ex. C), she refers to 24 exhibits, but there are only 496 pages in those exhibits (Sup. Ct. Doc. No. 46). So how was Plaintiff-Appellant or the Appellate Division to know what she wanted—the 383 pages of exhibits she filed with her April 1, 2016, motion to dismiss, or the 496 pages of exhibits she refers to in her April 1, 2016, Memorandum, or the 627 pages of exhibits she filed in the Defendants-Respondents' Appendix on August 10, 2016?

17. If the Appellate Division had wanted the entire record on appeal or nearly all of it, then Plaintiff-Appellant would have tried to appeal its May 3, 2016, Order to the Court of Appeals.

18. Further, the issue on appeal was personal jurisdiction, which centered on Bolger and her clients submitting perjurious affidavits to the lower court over her clients' contacts with New York. Those affidavits of false and materially omitted facts resulted in the denial of Plaintiff-Appellant's request for discovery on personal jurisdiction and dismissal of the action for lack of personal jurisdiction.

19.There was no motion for leave to appeal at the Appellate Division.

Court of Appeals has Jurisdiction.

20. The Appellate Division Order disposed of all the issues in the action. Ex. H

Question Presented.

21. Did the Appellate Division effectively overrule, or at least ignore, the policies behind this Court's ruling in *E. P. Reynolds, Inc., v. Nager Electric Company, Inc.*, 17 N.Y.2d 51, 55-56 (1966) and the policies of the *Second Preliminary Report of Advisory Comm. on Practice and Procedure* [N. Y. Legis. Doc., 1958, No. 13], pp. 344-347; Eleventh Annual Report of N. Y. Judicial Council, 1945, pp. 414-416.)?

22. It was the growing concern over the high and continually increasing cost of printing entire records on appeal and the use of it by "deep-pockets" to deter appellate review that led to the appendix system in the first place. The Court of Appeals in *E. P. Reynolds, Inc., v. Nager Electric Company, Inc.*, 17 N.Y.2d 51, 55-56 (1966) stated:

> We note that the appendix system was adopted in New York after extended study indicated the need to reduce the cost of printing records on appeal. (*Second Preliminary Report of Advisory Comm. on Practice and Procedure* [N. Y. Legis. Doc., 1958, No. 13], pp. 344-347; Eleventh Annual Report of N. Y. Judicial Council, 1945, pp. 414-416.). . . .
>
> The draftsmen [of CPLR 5528] assumed that the main practice problem would be the printing of appendices that were too extensive rather than too attenuated. Thus, while the provision for sanctions in subdivision (e) of CPLR 5528 allows the court to "withhold or impose costs" for "any failure to comply with subdivision (a), (b) or (c)" (see 7 Weinstein-Korn-Miller, *N. Y. Civ. Prac.*, par. 5528.03, p. 55-208 [1965]), the draftsmen assumed that the power would be exercised "if unnecessary parts of the record are printed;" (*Second Preliminary Report of Advisory Comm. on Practice and Procedure* [N. Y. Legis.

> Doc., 1958, No. 13], p. 354; italics supplied). This, of course, is the situation in which sanctions are most useful.
>
> The most effective guarantee against an inadequate appendix, of course, is an attorney's desire to supply the court with all material necessary to convince it to adopt his client's position. And with the tactical and practical risk of omission so great, the main danger to be guarded against, in the view of the draftsmen, is the too verbose rather than the too cryptic appendix.

23. The Appellate Division's August 25, 2016, Order of dismissal (Ex. H), indicates it wanted the Plaintiff-Appellant to pay the cost of submitting the entire record on appeal, or nearly the entire record—whether 496 pages or 627 pages is still unclear—based on Bolger's false assertion that she needed all those documents for her Brief.

24. In Bolger's Brief, filed August 10, 2016, she only cited to 226 pages of the 627 pages in her Appendix, and, of those 226 pages, 117 were already included in Plaintiff-Appellant's Original Appendix and his Supplemental Appendix. If Bolger's citations to a website in which she included 53 pages of mainly viewer comments are reduced to the five pages that support her assertion, then she only cited to 178 pages of which 117 were already included in Plaintiff-Appellant's Appendices. Bolger's Brief at 8 citing to her Appendix at RA 129-162, RA 356-385.

25. The Plaintiff-Appellant ended up printing 439 pages in his Appendices that cost him $2,850.

26. “Subdivision (b) [of CPLR 5528] provides that [Defendants] Respondent[s’] appendix ‘shall contain only such additional parts of the record as are necessary to consider the questions involved.’” *E. P. Reynolds, Inc.*, 17 N.Y.2d at 55 (quoting CPLR 5528). Bolger’s Appendix went way beyond that with 627 pages. If the Appellate Division had intended for Plaintiff-Appellant to pay for 627 pages by submitting the same “unnecessarily extended appendix,” *id.*, it would have cost him $3,250.

27. “There can be no equal justice where the kind of [appeal] a man gets depends on the amount of money he has.” *Griffin v. Ill.*, 351 U.S. 12, 19 (1956)(Justice Hugo Black)(the word “appeal” is substituted for “trial” in the original quote).

28. The portions of the record where the questions sought to be reviewed were raised and preserved in the Appellate Division are at Exhibits C to G.

Sworn to before me on the
29th day of August 2016

/S/ Roy Den Hollander
Roy Den Hollander

_____/S/_____
Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER J.S.C. PART 57
Justice

Index Number : 152656/2014
DEN HOLLANDER, ESQ, ROY
vs
SHEPHERD, TORY
Sequence Number : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1
Answering Affidavits — Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision

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

Dated: 1/8/16

_____, J.S.C.
HON. JENNIFER G. SCHECTER

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

----------x

ROY DEN HOLLANDER,

Plaintiffs,

Index No. 152656/14

-against-

TORY SHEPHERD, ADVERTISERS NEWSPAPERS PTY LIMITED., AMY McNEILAGE, FAIRFAX MEDIA PUBLICATIONS PTY LIMITED,

Defendants.

----------x

JENNIFER G. SCHECTER, J.:

Defendants move to dismiss the complaint pursuant to, among other sections, CPLR 3211(a)(8). Their motion is granted.

Background

Plaintiff Roy Den Hollander (Den Hollander) is a New-York County resident (Bolger Aff, Ex 1, Amended Complaint [Complaint] ¶ 21). In 2014, he commenced this action against (1) Tory Shepherd (Shepherd), the Political Editor of *The Advertiser-Sunday Mail Messenger* (*The Advertiser*) (*id.* at ¶ 22), (2) Advertiser Newspapers Pty Ltd. (Newspapers), "which does business under the name of *The Advertiser-Sunday Mail Messenger*" (Complaint at ¶ 23), (3) Amy McNeilage, the Education Reporter for *The Sydney Morning Herald* (*The Herald*), which is part of Fairfax Media Publications Pty Limited (Fairfax) (*id.* at ¶¶ 24-25) and (4) Fairfax. All of the defendants are based in Australia.

Den Hollander claims that because of newspaper articles that Shepherd wrote in *The Advertiser* and an article that McNeilage wrote in *The Herald*, he and his copyrighted

property--"Males and the Law," a section of a Males-Studies course that he was supposed to teach at the University of South Australia (University)--were damaged. He claims that because of the articles, the University canceled his course, causing him to lose up to $1,250 in compensation. He further alleges that an article written by Shepherd in June 2014 damaged his reputation. In his amended complaint, Den Hollander asserts causes of action against all of the defendants for "injurious falsehoods, tortious interference with a prospective contractual relation and *prima facie* tort" (Complaint at 1). He also asserts a libel claim against Shepherd.

Defendants move to dismiss for lack of personal jurisdiction. In support of the motion, Shepherd states that she wrote articles about the prospective male-studies course, which appeared in *The Advertiser* and were available on its website (Bolger Aff, Ex 3 [Shepherd Aff] at ¶¶ 4-9). She explains that the articles were related to a controversy in Australia and "were directed at an Australian audience" (*id.* at ¶ 9). Shepherd asserts that, in researching the article, she sent one email to Den Hollander "requesting comment on the controversy" and spoke to him by telephone (*id.* at ¶¶ 11-12). In connection with her articles, she also exchanged several emails with a professor in New York (*id.* at ¶ 14). She swears

that besides the emails with the professor, "the email sent to Mr. Den Hollander, and the single telephone call with Mr. Den Hollander," she had no contact with anyone else in New York in preparing the articles (*id.* at ¶ 15).

McNeilage swears that her piece was intended to target an Australian audience and that she "made no contact with anyone in the United States or New York in the process of reporting on the controversy" (Bolger Aff, Ex 5 at ¶¶ 5, 7).

Defendants also submit affidavits from employees of Newspapers and Fairfax who swear that their newspapers are targeted to Australians, published in Australia and are available online. Michael Cameron, counsel to Newspapers, swears that Newspapers "does not publish in New York and does not directly sell any products in New York" (Bolger Aff, Ex 2 at ¶ 7). Richard Coleman, a Solicitor of Fairfax, swears that Fairfax and *The Herald* "do not directly publish in New York and do not sell any products in New York" (Bolger Aff, Ex 4 at ¶ 4). He explains that Fairfax has a contract with an independent company that prints copies of *The Herald* to be distributed in the United States, but neither Fairfax . . . nor *The Herald* . . . has any control over whether copies printed by [the independent company] are distributed in New York" (*id.* at ¶ 5). Coleman also swears that *The Herald* "formerly had correspondents in New York City, but has not

done so since 2012, almost two years before the Article was published" (*id.* at ¶ 8). The newspaper defendants both make plain that they have no offices or employees in New York and do not target New York (Bolger Aff, Ex 2 at ¶¶ 9-11; Ex 4 at ¶¶ 6,8).

In opposition to the motion, Den Hollander urges that the newspapers have global ties and have written articles about New York (Affidavit in Opposition [Opp Aff] at ¶¶ 22, 24, 32, 35). He emphasizes that the allegedly defamatory articles were available on the newspapers' interactive websites and on apps and that the websites give the newspaper defendants a "virtual office in the State" (Opp at ¶¶ 36, 38, 43, 53, 123). He seeks discovery to ascertain whether defendants expected publication of the article to have consequences in New York, to explore the newspaper defendants' relationships with advertising representatives, affiliates and agents and to see if defendants pay taxes in New York (*id.* at ¶¶ 31, 37, 40, 41). He maintains that there is jurisdiction in New York based on CPLR 302(a)(1) and (a)(3) (Opp at ¶¶ 87-166). Based on precedent, the Court disagrees.

Analysis

CPLR 302 sets forth acts that can serve as a basis for obtaining jurisdiction over non-domiciliaries in New York (*SPCA of Upstate N.Y., Inc. v American Working Collie Assn.*,

18 NY3d 400, 403-404 [2012]). Generally, long-arm "jurisdiction can be premised on the commission of a tortious act—perpetrated either within the state or outside the state, causing injury within the state" (*id.* at 403). Defamation, however, is specifically carved out of the rule "to reflect the State's policy of preventing disproportionate restrictions on freedom of expression" (*id.* at 404; *see also Legros v Irving*, 38 AD2d 53, 56 [1st Dept 1971] [Advisory Committee did not "wish New York to force newspapers published in other states to defend themselves in states where they had no substantial interests"], *appeal dismissed* 30 NY2d 653 [1972]).

Long-arm jurisdiction in defamation actions is governed by CPLR 302(a)(1), which provides that a court may exercise personal jurisdiction over a non-domiciliary that "transacts any business within the state" so long as the cause of action arises from the in-State activity. "New York Courts construe 'transacts any business within the state' more narrowly in defamation cases than they do in the context of other sorts of litigation" (*SPCA of Upstate N.Y., Inc.*, 18 NY3d at 405; *Best Van Lines, Inc. v Walker*, 490 F3d 239, 248 [2d Cir 2007]).

Particular "care must be taken to make certain that non-domiciliaries are not haled into court in a manner that potentially chills free speech" (*SPCA of Upstate N.Y., Inc.*, 18 NY3d at 406). There must therefore be a showing that

defendants engaged in purposeful activities within the State that would justify bringing them before New York courts and that there is a "substantial relationship" between these in-State activities and the defamation (*id.* at 404). When contacts are not directly related to the defamatory statements, defendants have prevailed in obtaining dismissal on jurisdictional grounds (*id.*).

There is no jurisdiction over Defendants in New York. The contacts here "are not as significant as the few cases finding long-arm jurisdiction when defamation was asserted" (*see SPCA of Upstate N.Y., Inc. v American Working Collie Assn.*, 74 AD3d 1464, 1466 [3d Dept 2010], *affd* 18 NY3d 400, 403-404 [2012]; *see also Trachtenberg v Failedmessiah.com* 4 F Supp 3d 198, 202 [EDNY 2014] [stating that New York courts have only found transaction of business in New York in satisfaction of CPLR 302(a)(1) "when the content in question was based on research physically conducted in New York"]).

In *Montgomery v Minarcin*, for example, it was undisputed that "all of the operative facts giving rise to plaintiff's claims occurred in this State. The television news reports were broadcast by Minarcin in this State . . . [and the] newscasts were researched, written, produced and reported by Minarcin in this State" (263 AD2d 665, 667 [3d Dept 1999]). Minarcin "extensively investigated" the reports over a six-

week period in New York, interviewing New York residents and elected officials and reviewing documents located in New York. These activities were deemed substantial enough for purposes of concluding that Minarcin transacted business in New York "within the intendment of CPLR 302(a)(1)" (*id.* at 668).

Similarly, in *Legros v Irving*, New York jurisdiction was upheld as it was "clear that virtually all the work attendant upon publication of the [allegedly defamatory] book occurred in New York. The book was in part researched in this State by defendant . . . ; negotiations with McGraw-Hill [the publisher and distributer] took place in New York; the contract with McGraw-Hill was executed in New York [and] the book was printed in New York" (38 AD2d at 56).

Here, in stark contrast, defendants have very minimal, attenuated New York contacts. The only defamation-related contacts with New York were Shepherd's limited emails, which could have been retrieved by their recipients wherever they may have been, and her phone call to Den Hollander. She was never physically present in the State and no research or other work was performed by anyone associated with Newspapers in New York. McNeilage had no arguable contact whatsoever with New York. Defendants certainly did not engage in any activities within New York related to the allegedly defamatory articles whereby they invoked the benefits and protections of New

York's laws (*see Best Van Lines, Inc.*, 409 F3d at 249 ["courts have found jurisdiction in cases where the defendants' out-of-state conduct involved defamatory statements projected into New York and targeting New Yorkers, but only where the conduct also included something more"]; *Symmetra Pty Ltd. v Human Facets, LLC*, 2013 WL 2896876 at *9 [SDNY 2013] [controlling "precedent establishes that jurisdiction over a claim for defamation will lie (under CPLR 302[a][1]) only if the plaintiff shows that: (1) the defamatory utterance was purposefully directed at New York, as opposed to reaching New York fortuitously; and (2) the defendant transacted other business in New York that was directly connected to the claim asserted"]; *see also see Talbot v Johnson Newspaper Corp.*, 71 NY2d 827, 829 [1988] [no jurisdiction over individual who participated in phone interview from California]; *Trachtenberg v Failedmessiah.com* 4 F Supp 3d at 204 [reliance on a New York source and research through a New York State Court website insufficient]).

Courts, moreover, have repeatedly held that placement of defamatory content on the internet and making it generally accessible to members of the public does not constitute transaction of business in New York even when it is likely the material will be read by New Yorkers (*see e.g. SPCA of Upstate N.Y., Inc.*, 18 NY3d at 402 [no personal jurisdiction in action

based on placement of comments on a website despite the fact that defendant had members in New York]; *Best Van Lines, Inc.*, 409 F3d at 250; *Rakofsky v The Washington Post*, 39 Misc 3d 1226[A] [Sup Ct, NY County 2013] ["it is insufficient to gauge the overall commercial activity of the defendant on its website alone, without determining whether such purposeful activities in this state were substantially related to the defamatory statements"--there were no purposeful activities in the State as "defendants neither wrote the alleged defamatory statements in this state nor did they direct them to our state alone" the "statements were posted on the internet with potential world-wide accessibility"]).

In the end, there is no authority for subjecting defendants to jurisdiction in New York based on articles published outside New York for a non-New York audience. Shepherd's phone calls and emails do not allow the court to hale her into this forum and McNeilage has zero contacts with the State. Potential relationships that the newspaper defendants have with other entities are unavailing as no purposeful New York contacts are alleged <u>that are substantially related to the defamation</u>. Therefore, there is no basis for granting discovery or a hearing/trial limited to personal jurisdiction (*Findlay v Deadhead*, 86 AD2d 789, 791 [1st Dept 1982]).

In fact, much of the discovery that plaintiff seeks is relevant only if CPLR 302(a)(3) were applicable and it is not regardless of how his causes of action are denominated (*see Cantor Fitzgerald, L.P. v Paisley*, 88 F3d 152, 157 [2d Cir 1996] [CPLR 302(a)(2) and (3) inapplicable to injurious falsehood and tortious interference with prospective economic advantage causes of action as plaintiffs "may not evade the statutory exception by recasting their cause of action as something other than defamation"]; *Reich v Lopez*, 38 F Supp 3d 436, 458-459 [US Dist Ct, SD NY 2014]; *cf. Perez v Violence Intervention Program*, 116 AD3d 601, 602 [1st Dept 2014]; *Entertainment Partners Group, Inc. v Davis*, 198 AD2d 63, 64 [1st Dept 1993]).

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted and the complaint is dismissed in its entirety with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision, Order and Judgment of the Court.

Dated: January 8, 2016

HON. JENNIFER G. SCHECTER

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

----------X

Roy Den Hollander,

Plaintiff-Appellant,

Index No. 152656/2014

-against-

NOTICE OF APPEAL

Tory Shepherd, Political Editor of The Advertiser-Sunday Mail Messenger;
Advertiser Newspapers Pty Ltd., d/b/a The Advertiser-Sunday Mail Messenger;
Amy McNeilage, Education Reporter for The Sydney Morning Herald; and
Fairfax Media Publications Pty Ltd., d/b/a The Sydney Morning Herald;

Defendants-Respondents.

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PLEASE TAKE NOTICE, that the plaintiff appeals to the Appellate Division of the New York Supreme Court in and for the First Department, from the Decision, Order and Judgment in the above-entitled proceeding granting motion to dismiss in favor of the defendants against the plaintiff, Motion No. 002, document number 119, entered in the office of the Clerk of the County of New York on the 12th day of January, 2016,. This appeal is taken from each and every part as well as the whole of the Decision, Order and Judgment.

Dated: New York, N.Y.
February 2, 2016

/S/ Roy Den Hollander
Roy Den Hollander
Attorney-Plaintiff

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Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

ROY DEN HOLLANDER, Plaintiff-Appellant, -against- TORY SHEPHERD, ADVERTISER NEWSPAPERS PTY LTD., AMY McNEILAGE, FAIRFAX MEDIA PUBLICATIONS PTY LIMITED, Defendants-Appellees.	:	New York County Ind. No. 152656/2014 Hon. Jennifer Schecter

MEMORANDUM OF DEFENDANTS TORY SHEPHERD, ADVERTISER NEWSPAPERS PTY LTD., AMY McNEILAGE, FAIRFAX MEDIA PUBLICATIONS PTY LIMITED IN SUPPORT OF MOTION TO DISMISS THE APPEAL AND FOR A STAY

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Counsel for Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & 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 memorandum of law in support of their motion to dismiss the appeal or in the alternative a motion to strike Plaintiff-Appellant Roy Den Hollander's ("Plaintiff" or "Hollander") brief and appendix and for a stay pending resolution of this motion pursuant to Rule 5528 and Section 2105 of the New York Civil Practice Law and Rules and Sections 600.2, 600.10, 600.11, and 600.12 of this Court's Rules.

PRELIMINARY STATEMENT

Plaintiff's appeal should be dismissed because it is based on an appendix that includes documents not in the record below or in the record but altered by Plaintiff and fails to include nearly all of the evidence relied on by Defendants. Alternatively, the brief and the appendix on which it is based should be stricken from the record. To prevent undue burden to Defendants, Defendants respectfully request that the Court stay this appeal pending resolution of this motion or adjourn it to the September Term.

Here, Plaintiff appeals from a judgment dismissing a defamation lawsuit for lack of personal jurisdiction over two Australian newspapers and two Australian reporters. Defendants' articles mentioned that Hollander, an anti-feminist men's rights "advocate," was to be a lecturer in a men's rights course. Plaintiff sought damages in a New York court for the publication of these articles in Australia. The court below (Hon. Jennifer Schecter) found that "defendants have very minimal, attenuated New York contacts" and dismissed the suit on jurisdictional grounds. Affidavit of Katherine M. Bolger ("Bolger Aff."), Ex. 1 at 7 (Jan. 8, 2016 Decision and Order).

Before this Court, Plaintiff, a lawyer who has been warned by the Second Circuit of his Rule 11 responsibilities, has filed an appendix that is incomplete and inaccurate. First, the appendix, which is certified by Plaintiff as true and accurate, includes documents that were never filed in the court below. Second, the appendix includes documents that were filed in the court below but that Plaintiff has edited on appeal. Third, the appendix includes an index that is both argumentative and violates the Court's rules. Fourth, the appendix fails to include, as it must, necessary exhibits on which Plaintiff should have reasonably assumed Defendants would rely. Neither Defendants nor this Court should be required to entertain this appeal on a record whose authenticity cannot be credited. Plaintiff's appeal should be dismissed, or alternatively, his brief and appendix stricken from the record.

BACKGROUND

A. The Defendants

Advertiser Newspapers is an Australian-based corporation that publishes *The Advertiser*, a newspaper that focuses on news related to South Australia. Bolger Aff., Ex. 2 (Cameron Affidavit ¶¶ 3, 6, 7). 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. *Id.*, Ex. 3 (Shepherd Affidavit ¶¶ 1, 2, 16). Defendant Fairfax Media is also an Australian-based corporation that publishes *The Sydney Morning Herald* based out of Sydney, Australia. *Id.*, Ex. 4 (Coleman Affidavit ¶¶ 2, 3, 6). 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. *Id*, Ex. 5 (McNeilage Affidavit ¶¶ 1, 2, 9).

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 the members of a distinct group, such as men, are entitled

to." *Id.*, Ex. 6 (FAC ¶¶ 67, 79). Hollander is convinced that this erosion of men's rights by feminists who he calls, among other things, "witches," *id.* ¶ 14, 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," *id.* ¶ 79. Otherwise, Hollander 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 and where females' fears remain entombed." Bolger Aff., Ex. 7 at ECF p.6.

Spurred by these beliefs, Hollander 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. *See id.*, Ex. 8 at ¶¶ 2-28. He has also claimed that "ladies' nights" at New York nightclubs impermissibly "discriminat[e] against men," *see id.*, Ex. 9 at 2, and that the Violence Against Women Act violates the Equal Protection Clause, *see id.*, Ex. 10 at 48-55. Plaintiff's complaints along these lines have been unsuccessful, *see, e.g.*, *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 in support of an Establishment Clause claim, 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).

C. The Publications at Issue

Plaintiff's lawsuit targets five articles published in two different Australian publications. On January 12, 2014, Shepherd wrote an article reporting that Plaintiff, a "self-professed 'anti-feminist lawyer,'" was one of the lecturers for a planned "men's rights" course at the University

of South Australia. FAC, Ex. C. As a follow up on January 14, Shepherd reported that the University had decided against approving the men's studies courses. *Id.*, Ex. E. On the same day, Shepherd also wrote a column related to men's rights, which never mentions Hollander. *Id.*, Ex. H. Finally, on June 18, Shepherd wrote a column discussing this litigation. *Id.*, Ex. F. All four Shepherd articles were published in *The Advertiser* in Adelaide, Australia.

McNeilage wrote just one article, which noted that the University had not approved several males studies courses, "some of which were to be taught by hardline anti-feminist advocates." *Id.*, Ex. D. The McNeilage article was published in the *Sydney Morning Herald.*

D. The Court's Decision and Order

On January 8, 2016, the court dismissed Hollander's lawsuit for a lack of personal jurisdiction. *See generally* Decision and Order. Because Plaintiff's claims all sounded in defamation, the court found that jurisdiction was governed by CPLR § 302(a)(1) of the long-arm statute, which required Plaintiff to show that each defendant "transact[ed] any business within the state" out of which the cause of action arose. *Id.* at 5. The court also recognized that this section of the long-arm statute is construed "more narrowly" in defamation-related cases. *Id.*

The court held that there was no jurisdiction over any defendant because their "very minimal," *id.* at 7, contacts in the record below were "not as significant as the few cases" finding jurisdiction in these kinds of cases, *id.* at 6. First, the court recognized "that placement of defamatory content on the internet and making it generally accessible" cannot subject Defendants to jurisdiction. *Id.* at 8. At any rate, as the court explained, "The only defamation-related contacts with New York were Shepherd's limited emails" and a phone call to Plaintiff. *Id.* at 7. Moreover, Shepherd never entered New York. *Id.* McNeilage "had no arguable contact whatsoever with New York." *Id.* The corporate Defendants too were not subject to jurisdiction

based on any relationships with other entities in New York, because the contacts Hollander alleged were not "substantially related to the defamat[ion]" claims. *Id.* at 9. For the same reason, there was no need for the court to order discovery on contacts that could not support jurisdiction in the first place. "In the end," the court found, "there is no authority for subjecting defendants to jurisdiction in New York based on articles published outside New York for a non-New York audience." *Id.*

E. Plaintiff's Appeal

On February 2, 2016, Plaintiff filed a notice of appeal. Bolger Aff., Ex. 11. In his Pre-Argument Statement, Plaintiff asserts, without record support, that the court below relied on "perjurious affidavits by defendants-respondents that were suborn by their attorney." *Id.*, Ex. 12 at ¶ 11. Plaintiff had previously made the same unsupported allegations in the trial court, which the trial court did not credit.[1]

Thereafter, on March 9, 2016, Plaintiff filed proposed statements in lieu of transcripts and Defendants' objections to the same. *Id.*, Exs. 14-15. Prior to the court settling those statements, Plaintiff had the record below transferred to this Court. *Id.*, Ex. 16.

On March 15, 2016, Plaintiff served Defendants with his brief as well as the appendix. Plaintiff certified that he "personally compared" his appendix "with the originals on file in the office of the Clerk" and that he found them to be "true copies of those originals of the record on appeal." A192. This motion to dismiss the appeal follows.

ARGUMENT

Plaintiff's appendix is a collection of unauthenticated, altered, and entirely new documents not in the record below and is thus patently insufficient. The deficiencies permeate

[1] Plaintiff also accused Defendants, their counsel, or their agents of hacking into his computer. The court did not credit this allegation either. Bolger Aff., Ex. 13.

the appendix and cannot be corrected by merely striking discrete portions of the appendix. For this reason, Defendants respectfully request that the appeal be dismissed, or in the alternative, that Plaintiff's brief and the appendix on which it relies be stricken from the record, and for a stay pending the resolution of this motion. This relief is particularly justified in this case because Plaintiff, an attorney who has spent scores of pages making unfounded accusations that Defendants have submitted "perjurious affidavits," signed a knowingly false "certification" swearing that the intentionally incorrect appendix he submitted to this Court was an accurate reflection of the record below.

I.
THE APPENDIX IS PATENTLY INSUFFICIENT FOR THE PURPOSES OF PASSING ON THIS APPEAL

A. Standards Governing Appendices on Appeal

The appealing party has the burden of preparing an adequate appendix. *Robert B. Samuels, Inc. v. Cauldwell-Wingate Co., Inc.*, 262 A.D.2d 178, 178 (1st Dep't 1999). The Appellate Divisions are "not required to determine an appeal with . . . an appendix which [they] consider[] inadequate." *E.P. Reynolds, Inc. v. Nager Elec. Co.*, 17 N.Y.2d 51, 54 (1966); *see also Feigelson v. Allstate Ins. Co.*, 36 A.D.2d 929, 929 (1st Dep't 1971) (same). An appendix may be deemed inadequate where it contains an incomplete notice of appeal filed in the court below, *Copp v. Ramirez*, 62 A.D.3d 23, 27 (1st Dep't 2009), necessary evidence presented below, *Kenan v. Levine & Blit, PLLC*, 136 A.D.3d 554, 555 (1st Dep't 2016), or those parts of the record "'appellant reasonably assumes will be relied upon by the respondent,'" *Wittig v. Wittig*, 258 A.D.2d 883, 885 (4th Dep't 1999) (citations omitted). An appendix may also be inadequate where the appellant inaccurately describes necessary papers or proceedings below, *Copp*, 62 A.D.3d at 27-28, or fails to follow a court's rules relating to appendices, *Wittig*, 258 A.D.2d at 884-85; *accord Aguiar-Consolo v. City of N.Y.*, 113 A.D.3d 707, 708 (2d Dep't 2014)

("Since, under the circumstances presented here, the appendix is inadequate to enable this Court to render an informed decision on the merits, the appeals must be dismissed.").

Rule 5528 of the CPLR sets forth the required content of the appendix. The appendix must contain "such parts of the record on appeal as are necessary to consider the questions involved." CPLR Rule 5528(a)(5). This includes "those parts [of the record] the appellant reasonably assumes will be relied upon by the respondent." *Id.* Where counsel do not stipulate to authenticity of the record or appendix on appeal, counsel for the appellant must file a certification pursuant to CPLR § 2105 certifying that the appendix is accurate. *Id.*, Rule 5532. Any appellant who violates these rules may be subject to the imposition of costs or the dismissal of the suit. *See id.*, Rule 5528(e); *see also Kenan*, 136 A.D.3d at 554-55.

This Court has supplemented these requirements. An appendix "must contain all the testimony or averments upon which appellant relies or upon which appellant has reason to believe respondent will rely." 22 NYCRR § 600.10(c)(2). These "must not be misleading because of incompleteness or lack of surrounding context." *Id.* Moreover, the appendix must include "[c]opies of critical exhibits," which may be omitted only "upon stipulation of the attorneys for the parties." *Id.* In that case, a copy of a stipulation among counsel excluding exhibits shall be included in the appendix. *Id.* Once compiled, the appellant must prepare an "index of the record's contents, listing and describing each paper separately." *Id.* § 600.10(b)(1)(i) (as incorporated through § 600.10(c)(2)). The index relating to exhibits shall also "concisely indicate the contents or nature and date, if given of each exhibit and the pages in the record where it is reproduced and where it is admitted to evidence." *Id.* As with the CPLR, this Court's rules also require that the appellant's attorney "certify[] to the correctness of the

papers." *Id.* § 600.10(b)(1)(viii). Failure to abide by these rules "may result in rejection of the appendix or . . . the imposition of costs." *Id.* § 600.10(c)(1).

B. Hollander's Appendix Is Patently Insufficient

Hollander has violated the CPLR and this Court's rules in compiling his appendix in four ways.

1. Documents Not In The Record Below. First, Plaintiff's appendix is insufficient because it includes documents never presented to the district court below. For example, the appendix includes two unauthenticated documents relating to Plaintiff's alleged plans to teach the "men's rights" course. A95-98. Plaintiff also includes unauthenticated documents relating to alleged contacts that *The Herald* has with New York. A159-63. These documents, however, were never submitted to the trial court in response to Defendants' motion to dismiss. In fact, one of these documents is dated February 13, 2016, over a month *after* the trial court granted Defendants' motion to dismiss. A160.

The appendix also includes other documents not properly a part of the record on appeal. Plaintiff, for example, includes statements in lieu of a transcript, which he submitted to the trial court along with Defendants' objections. A182-91. Despite Defendants' objections to much of the substance of Plaintiff's statements, Plaintiff never waited for the trial court to settle the differences among the statements and objections. *People v. Roldan*, 96 A.D.2d 476, 477 (1st Dep't 1983) (remanding appeal for settlement of transcript). Thus, including those statements in the appendix and relying on them for factual support on appeal is improper. *See* Appellant's Brief at 7 (citing statement in lieu of transcript).

2. Documents In The Record Below, But Modified On Appeal. In addition, Plaintiff has also included modified versions of documents filed below. For example, Plaintiff included

what he called a "List of Perjuries and Omissions by Defendants" in his reply affidavit in support of a trial on personal jurisdiction.[2] Bolger Aff., Ex. 17. Plaintiff has included a similar list in his appendix. A100-08. In the appendix version, however, he has changed the title of the document and added additional content like the new introductory paragraph elaborating on the list. A100. He has also added to the list cross-references to other parts of the appendix and edited other parts of the list leaving no doubt that he has altered this document. *Compare, e.g.*, Bolger Aff., Ex 17 at 1 ("Does Advertiser sell products in New York through agents?") *with* A100 ("Does Advertiser sell *its papers and other* products in New York through agents?"). Additionally, several other documents, while similar in substance to those filed in the record below, appear to be in a different format from those filed in the trial court and related to this appeal. *See, e.g.*, A81-92, A99. As a result, it is simply impossible to tell whether the documents submitted in the appendix accurately represent the record before the court or were ever considered by the court.

3. Documents In The Record Below, But Omitted On Appeal. Hollander has also failed to include nearly all of the evidence on which Defendants relied on below. The Affirmation of Katherine M. Bolger, submitted in support of Defendants' motion to dismiss, for example, included twenty-four exhibits. Bolger Aff., Ex 18. Yet Plaintiff has omitted almost all of these exhibits from the appendix, choosing instead to include only the affidavits of Defendants (which he alleges, with no support, are perjurious) and an exhibit to one of those affidavits (which he also alleges, with no support, is fraudulent). Plaintiff's omission of exhibits that he reasonably should have believed Defendants would rely on violates this Court's Rules and the CPLR: "The omission from the appeal record . . . of much of the record before the Supreme Court . . . is not only in violation of the [CPLR] but is highly unprofessional . . . ." *2001 Real*

[2] The trial court did not credit these allegations and denied Plaintiff's request for additional discovery. Decision and Order at 9.

Estate v. Campeau Corp. (U.S.), Inc., 148 A.D.2d 315, 316 (1st Dep't 1989); *see also* CPLR Rule 5528(a)(5); 22 NYCRR § 600.10(c)(2).

4. Plaintiff's Deficient Index. Hollander has also improperly compiled his index. 22 NYCRR § 600.10(c)(2). First, Plaintiff's index does not indicate where the documents were submitted in the proceeding below. *See generally* Ai-iv. Making matters worse, rather than complying with this Court's rules prohibiting misleading descriptions of documents, Plaintiff has on several occasions chosen to mischaracterize documents below. 22 NYCRR § 600.10(c)(2). For example, he describes one exhibit submitted by Defendants as the "Forgery of the McNeilage article . . . ." Aii. That article is not only not a forgery; the trial court never found it to be a forgery. Moreover, he describes documents never before the trial court inaccurately. For example, Hollander describes unauthenticated printouts of websites as showing employment profiles of "correspondent[s]" for *The Herald*. *See* Aiii. In fact, those documents indicate only that those individuals had done freelance work for *The Herald*. A159-62. Plaintiff's argumentative index further undercuts the adequacy of the appendix.

C. The Appeal Should Be Dismissed, or, Alternatively, Plaintiff's Brief and Appendix Should Be Stricken

Hollander certified that he "personally compared" the documents in the appendix with originals in the record and that they were "true copies of those originals." A192. They are not and thus Plaintiff's appeal should be dismissed or his brief and appendix should be stricken.

This Court has not hesitated to dismiss appeals based on insufficient appendices. Just this year, in fact, this Court dismissed an appeal where the plaintiff had failed to submit the motion papers and a single evidentiary exhibit. *Kenan*, 136 A.D.3d at 555. Here, Plaintiff has failed to submit scores of documents submitted by Defendants below and added, without

explanation or notice, several others—not to mention altering other filings below. Simply, the appendix cannot be reasonably relied on. *Id.*

Even setting aside the nature of the documents themselves, this Court has also dismissed appeals where appellants have inaccurately represented the action below. For example, in *Copp v. Ramirez*, this Court dismissed an appeal in part because the notice of appeal did not "contain an accurate description" of the order dismissing the plaintiff's action. 62 A.D.3d at 27-28. Here, Plaintiff alleges in his Pre-Argument Statement (again, without record support) that the court's decision is based on perjurious affidavits. A2. He made that same argument to the trial court, but the court chose not to credit that allegation, choosing instead to rely on the affidavits submitted by ~~Defendants~~. A8-10. Along the same lines, Plaintiff's added gloss to several of the documents in the index makes the appendix argumentative and untrustworthy. For these reasons too, Plaintiff's appeal should be dismissed, or alternatively, his brief and appendix stricken.

II.
THIS COURT SHOULD STAY PROCEEDINGS PENDING RESOLUTION OF DEFENDANTS' MOTION TO DISMISS THE APPEAL

Pursuant to the Court's inherent power, Defendants respectfully request that this Court stay all proceedings in this appeal pending resolution of Defendants' motion or, alternatively, Defendants request that the appeal be adjourned to the September Term. "'[C]ourts have the inherent power, and indeed responsibility, so essential to the proper administration of justice, to control their calendars and to supervise the course of litigation before them.'" *Catalane v. Plaza 400 Owners Corp.*, 124 A.D.2d 478, 480 (1st Dep't 1986) (citations omitted). This inherent power should be exercised here to stay these proceedings and prevent the waste of judicial resources and the resources of the parties to this lawsuit.

Plaintiff—not Defendants—carries the responsibility of providing this Court with an adequate appendix. *Robert B. Samuels, Inc.*, 262 A.D.2d at 179. He has clearly failed to do so

for all the reasons explained above. Defendants have raised multiple, independent reasons as to why this appeal should be dismissed altogether in light of Plaintiff's deficient appendix. Indeed, because the authenticity of the entirety of the appendix is seriously in question, Defendants will have to create an entirely new appendix to defend this appeal. Thus, were Defendants forced to proceed while this motion is pending, they will incur much of the harm that they are attempting to avoid now. Moreover, a delay in the appeal will not prejudice Plaintiff nor could Plaintiff show otherwise as this lawsuit has already been pending for well over a year.

For these reasons, this appeal should be stayed pending the resolution of this motion. Alternatively, should the Court not grant Defendants a stay in this matter, Defendants respectfully request that the Court adjourn the appeal until the September Term to give Defendants enough time to prepare a proper appendix and brief in lieu of relying on Plaintiff's deficient appendix.

CONCLUSION

For each and all the foregoing reasons, Defendants respectfully request that this Court dismiss the appeal or, alternatively, strike from the record Plaintiff's opening brief and the appendix. Defendants further request a stay pending resolution of this motion. Alternatively, Defendants request that this appeal be adjourned for the September Term to provide them with sufficient time to prepare an adequate appendix.

Dated: April 1, 2016

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: _____

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Counsel for Defendants

Exhibit D

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

----------X

Roy Den Hollander,

Plaintiff-Appellant,

-against-

New York County
Ind. No. 152656/2014
Hon. Jennifer Schecter

Tory Shepherd, Advertiser Newspapers Pty Ltd.,
Amy McNeilage, Fairfax Media Publications Pty Ltd.,

Defendants-Appellees.

----------X

Memorandum of Plaintiff-Appellant in Opposition to Defendants-Appellees' Motion to Dismiss the Appeal or Strike the Plaintiff-Appellant's Brief and Appendix

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

Treatises

Preliminary Statement

"There can be no equal justice where the kind of [appeal] a man gets depends on the amount of money he has." *Griffin v. Ill.*, 351 U.S. 12, 19 (1956)(Justice Hugo Black) (substituting the word "appeal" for "trial").

Defendants-Appellees' law firm is a major national media-firm that in this case is effectively representing Rupert Murdoch's News Corp and another multi-billion dollar global company—Fairfax Media Publications Pty Ltd. ("Fairfax"). (News Corp owns Advertiser Newspapers Pty Ltd. ("Advertiser") and considers Advertiser a "segment" of its corporation in News Corp's *10-K Filing*, August 14, 2014, Plaintiff-Appellant's Brief ("Br.") at 47-48).

I am the Plaintiff-Appellant, Roy Den Hollander ("Den Hollander," which is my last name). I am 68 years old, a semi-retired sole-practitioner attorney, who earned all of $35,000 last year thanks, in part, to the typical PC *ad hominem* attacks of lawyers such as Katherine M. Bolger ("Bolger") and her clients, the Defendants-Appellees ("Defendants"). I do not believe it is fair to grant a couple of billion-dollar corporations any additional advantage then they already have by saddling me with unnecessary expenses in order to create a precedent that only the rich can appeal to this Court and that the barely middle-class must lose by default.

Bolger submitted in her motion to dismiss in the lower court 496 exhibit pages of mainly irrelevant documents. (Doc. No. 46). To put all of her pages in my Appendix would have cost around $5,000 for printing, which I could not afford, rather than the $2,000 I spent on printing the relevant documents. Bolger's intention was, and is, to price me out of this appeal. Bolger's 496 pages, some of which were not even searchable as required by the lower court's e-filing rules, included pictures of fire, screaming men, and other bizarre matter that had nothing to do with the lower court's decision. The lower court's decision relied on the affidavits of Defendants

to rule that personal jurisdiction did not exist. (*Order* at 2-4, 7, 9; A-8-10, 13, 15, Doc. No. 119). Bolger even admits that the lower court "rel[ied] on the affidavits submitted by Defendants." (Bolger Mem. at 11). All of Defendants' affidavits and Bolger's affirmations are in the Appendix. (A-109-144).

Adding Bolger's superfluous documents will, in effect, result in the entire record on appeal. Such a request makes a mockery of the Judicial Advisory Committee's aim to make the appendix method the principal method for an appeal when it amended CPLR 5528 in 1963. David D. Siegel, *Practice Commentaries C5528:1*.

Additionally, most of Bolger's exhibits that are not in the Appendix argue that I am not PC or not a Feminist. That, of course, depends on the definitions used, but regardless of the definitional issue, I will go her one better—I am a volunteer on Trump's campaign. So if this Court believes that a person's political beliefs determine how it will decide, then there's not much I can do other than to seek justice in the Court of Appeals.

Background

I am not going to waste this Court's time by refuting all the lying, prevaricating, and dissembling comments that Bolger employs in her attempt to bias this Court against me in her all too familiar strategy of litigation by personal destruction.

Bolger submitted to the lower court on three different occasions a forged document by deleting a material part of one of the articles at issue in this case. (Br. at 6-7; A-145-146, Doc. No. 9 Ex. 5(A), Doc. No. 46 Ex. 5(A), Doc. No. 114 Ex. 5(A) and 9(A)). Bolger falsely claims there is "no support" in the record that the version of McNeilage's article submitted by her was a forgery. (Bolger Mem. at 9). However, a simple comparison of the article as published on the Internet (A-93-94, Doc. No. 15), which is part of the record, and the article submitted three times

by Bolger shows she deleted a material portion of the article—that's forgery. The portion deleted was material to showing common-law malice, which is an element of injurious falsehoods and tortious interference alleged in the complaint.

Bolger also clearly suborned perjury by her clients (A-100-108), and knowingly violated the Supreme Court's rules by filing a number of unsearchable PDF documents (Doc. No. 46) in order to cheat her way to victory in the lower court—she is not exactly in a position to make personal attacks.

My business for over 30 years has been lawyering, which includes researching the law, drawing conclusions about the law, and presenting such research and conclusions in written and oral form to laypersons, other attorneys, and the courts. These are the products and services that I sell, and they are what I was selling to the University of South Australia ("University") before Bolger's clients pulled a Joseph McCarthy.

I had prepared a course section titled "Males and the Law" as part of the "Facts and Fallacies of Male Power and Privilege" course, which was one of eight graduate courses to be taught in the newly formed Male Studies Program at the University. My section, which was to be taught online from New York, was an abridged version of how the law in America and England treated the two sexes differently since the Industrial Revolution. This history of the law was based on law review articles from the 1800s to the early 2000s; recent civil rights cases; studies of U.S. criminal sentencing guidelines; various newspaper articles; recent changes in self-defense laws; and the writings of Prof. Howard Zinn. The section was copyrighted.

Two articles in a series of articles published in New York via Advertiser and Fairfax's websites, *see Firth v. State*, 98 N.Y.2d 365, 370 (2002)(state making document available on its website constituted publication), disparaged my work product, the "Males and the Law" section,

and resulted in the University canceling six of the eight graduate courses of which one was the course that included my section for which I would have been paid. Defendant Shepherd and Defendant McNeilage each authored one of the two articles both of which named me. Defendant Shepherd also published another three articles of which the last two contained most of her personal attacks against me. Her last article named me, and her second to last article clearly indicated me by referring to her first article that had named me. (Bolger's Affirmation Exhibits, Doc. No. 46 Ex. 3(C) and 3(D)).

I brought causes of action against all Defendants for injurious falsehoods and tortious interference with prospective contractual relations. Additionally, I sued only Defendant Shepherd for libel. (First Am. Verified Compl. A-17-76, Doc. No. 11). In a hearing before Justice Tingling, I made a standing motion requesting a discovery trial on the issue of personal jurisdiction because a modicum of research on the Internet of periodicals of general circulation showed Defendants, over two sets of affidavits, had repeatedly committed perjury and omitted material information concerning their contacts with New York. The Addendum to my Reply in that motion (Doc. No. 111 at 25-30) listed some of those perjuries, omissions, and possible discovery questions.

That Addendum (Doc. No. 111 at 25-30) is presented in the Appendix (A-100-108) with a few explanatory additions for understanding the document that were not included in the Reply because in the context of the Reply, the explanatory notes were not needed. To the title of "Addendum: List of Perjuries and Omissions by Defendants" was added "concerning respondents' contacts with New York"; just below the title, a terminology key was added that stated "'1st Aff.' refers Bolger's First Affirmation that presents Respondents first set of affidavits and '2nd Aff.' to Bolger's Second Affirmation. Each falsehood includes discovery

questions that the lower court prevented from being asked because it denied discovery;" and to a discovery question, "Does Advertiser sell products in New York through agents?" was added does it sell "its paper and other," products. As for the exhibit references in the Addendum, (Doc. No. 111 at 25-30), they were changed so as to cite to the Appendix page locations of those exhibits; otherwise, how would this Court be able to find them without wasting time.

Bolger alleges there were other changes or additions to the Addendum, but she fails to cite to them. (Bolger Mem. at 9). If she had other accusations of changes or additions, she should have specified them in her memorandum so that I would have had the opportunity to respond. Bolger's memorandum, as this Court in effect stated on April 1st, had obviously been in the works for a period of time. Bolger actually had the time from March 15th, when my Brief and Appendix were personally served (Ex. B) and she responded to the oral argument request (Ex. C), to April 1st, when she filed her motion to dismiss the appeal. She also clearly had the resources of a major law firm to specify all her objections to the list of her clients' perjuries and omissions. By not doing so, she waived those objections.

Bolger is well aware of that list and all the accusations I made throughout my papers in the lower court of her clients' perjuries and omissions under oath, yet she falsely claims there is no support in the record indicating her clients committed such. (Bolger Mem. at 9).

The lower court denied my request for discovery on personal jurisdiction and concluded that all the causes of action were for libel and that personal jurisdiction under libel did not exist.

The Notice of Appeal was filed on February 2, 2016, and on the same day, I served on Bolger my version of a "Statement in lieu of stenographic transcript[s]" before Justices Tingling and Schecter because the one hearing before each Justice was not recorded. (Ex. D, mail receipt). On February 11, 2016, Bolger's paralegal served Bolger's request that the lower court

reject my statement, and if it did not, then Bolger listed her objections to my statement. (Ex. E). On March 9, 2016, I went to the lower court's clerk's office to submit Bolger's and my statements but was told I must file them electronically, which I did. (Doc. Nos. 127-130). As of the date of this Opposition, the lower court has not settled a statement in lieu of stenographic transcript.

Argument

Bolger's strategy with her motion to dismiss my appeal or strike my Brief and Appendix is clear—she wants to make my printing costs so prohibitively expensive that she will win by default. Her motivation is also clear—she wants to hide from this Court the perjuries and omissions of her wealthy clients, her aiding in such perjuries and omissions, and her submitting on three separate occasions a forged document to the lower that had material value to my case.

It was the growing concern over the high and continually increasing cost of printing entire records on appeal and the use of it by "deep-pockets" to deter appellate review that led to the appendix system in the first place. The Court of Appeals in *E. P. Reynolds, Inc., v. Nager Electric Company, Inc.*, 17 N.Y.2d 51, 55 (1966) stated:

> We note that the appendix system was adopted in New York after extended study indicated the need to reduce the cost of printing records on appeal. (*Second Preliminary Report of Advisory Comm. on Practice and Procedure* [N. Y. Legis. Doc., 1958, No. 13], pp. 344-347; Eleventh Annual Report of N. Y. Judicial Council, 1945, pp. 414-416.).
>
> In accordance with this policy, paragraph 5 of subdivision (a) of CPLR 5528 provides that an appellant's appendix shall contain "only such parts of the record on appeal as are necessary to consider the questions involved, including those parts the appellant reasonably assumes will be relied upon by the respondent."

Since the lower court relied on the affidavits of Bolger's clients, as she admits (Bolger Mem. at 11), and her affirmations, all of which are in the Appendix (A-109-144), to rule that personal jurisdiction did not exist, (*Order* at 2-4, 7, 9; A-8-10, 13, 15, Doc. No. 119), it was

reasonable to assume she had what was necessary to oppose the appeal. But that would mean Bolger's multi-billion dollar clients would not be able to make my appeal so costly that I would have to default, which, of course, was one of the key reasons for Bolger including so many extraneous exhibits in the court below.

The Court of Appeals noted in *E. P. Reynolds, Inc.* that

> The draftsmen assumed that the main practice problem would be the printing of appendices that were too extensive rather than too attenuated. Thus, while the provision for sanctions in subdivision (e) of CPLR 5528 allows the court to "withhold or impose costs" for "any failure to comply with subdivision (a), (b) or (c)" (*see* 7 Weinstein-Korn-Miller, *N. Y. Civ. Prac.*, par. 5528.03, p. 55-208 [1965]), the draftsmen assumed that the power would be exercised "if unnecessary parts of the record are printed;" (*Second Preliminary Report of Advisory Comm. on Practice and Procedure* [N. Y. Legis. Doc., 1958, No. 13], p. 354 . . .). This, of course, is the situation in which sanctions are most useful.
>
> The most effective guarantee against an inadequate appendix, of course, is an attorney's desire to supply the court with all material necessary to convince it to adopt his client's position. And with the tactical and practical risk of omission so great, the main danger to be guarded against, in the view of the draftsmen, is the too verbose rather than the too cryptic appendix.

Those reasons for the appendix method of appeal, however, do not serve Bolger's objective to win by default rather than on the merits. Therefore, she calls for dismissal of the appeal or striking of my Brief and Appendix, which would in effect result in this Court affirming the lower court's dismissal because I cannot afford the printing costs that Bolger is trying to levy against me.

A merits disposition based solely on a defective appendix, however, will not be permitted. *E.P. Reynolds, Inc.*, 17 N.Y.2d at 55. The appeal in *Reynolds* had originally sought a reversal on the ground of the insufficiency of the evidence. Of a trial transcript in *Reynolds* of close to 1,000 pages, the appendix reproduced only 13. The Court of Appeals held that even an appendix as defective as that would <u>not</u> justify a merits decision.

> To hold otherwise would inevitably decrease the value to be derived from an appendix by encouraging the inclusion of material unnecessary to the questions sought to be reviewed. In the final analysis, an unnecessarily extended appendix proves as burdensome as one which is too short. *E. P. Reynolds, Inc. v. Nager Elec. Co.*, 17 N.Y.2d 51, 55 (1966).

Bolger and her clients are not without a remedy. They can submit the additional documents that comprise most of their lower court exhibits as their own appendix, which her clients could easily afford. Of course, by doing so she may incur sanctions under CPLR 5528(e).

Bolger's Objections

Throughout Bolger's objections, she is either nit-picking or exaggerating in order to increase my cost to a prohibitive level.

Bolger alleges that certain documents in my Appendix are "unauthenticated," (Bolger Mem. at 2, 5, 8, 10), even though there was never a trial on personal jurisdiction. In effect, Bolger is arguing that I was required to present in the lower court "admissible evidence" that Defendants had sufficient contacts with New York. A plaintiff need not establish *prima facie* jurisdiction under CPLR 302 before disclosure may be allowed in a hearing pursuant to CPLR 3211(d)—a hearing that never occurred in this case. CPLR 3211(d) "protects the party to whom essential jurisdictional facts are not presently known, especially where those facts are within the exclusive control of the moving party [Defendants]. The opposing party [Plaintiff] need only demonstrate that facts 'may exist' whereby to defeat the motion." *Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463, 466 (1974).

The documents found on the Internet concerning Defendants' contacts with New York point to further information that is exclusively within Defendants' control and possession, such as why the business address of the Chairman of Advertiser is at News Corp on Sixth Avenue; does News Corp treat Advertiser as a mere department; the number of New Yorkers Advertiser

and Fairfax contract with to sell their online papers and other products and services; the extent of Advertiser and Fairfax's solicitations for customers in New York; the nature of Advertiser and Fairfax's partnerships with other companies to further their media operations, including companies in New York; and are Fairfax's independent contracting reporters in New York really independent contractors or employees under New York law. Without discovery, it was impossible for me to answer these questions and many more; however, the Internet data from newspapers and periodicals of general circulation, CPLR 4532, made a "sufficient start," showing that my assertion of jurisdiction was "not frivolous.[1] *Peterson*, 33 N.Y.2d at 467.

Despite Bolger's over-hyped-exaggerations of a defective Appendix, she really only makes picayune, irrelevant objections to a small number of specific documents, and then tries to spin-off of those few documents the false conclusion that such "deficiencies permeate" the Appendix. (Bolger Mem. at 5-6). Bolger is a partner in a major national media-firm, yet she and her associates employ the short-cut of failing to specify all the documents they allege result in a defective Appendix. Rather, they rely on a few "anecdotes, and stitch them into a . . . creation that mimics valid inquiry." *Pathetic bid for victimhood by portraying women as villains*, Tory Shepherd, January 14, 2014, (A-87).

<u>Bolger objects to the inclusion of the following documents in the Appendix:</u>

1. The University's "Information Sheet" on the Males Studies program (A-95-96) of which Defendants were well aware, since Defendant Shepherd had obtained a copy of it and wrote about it in her article titled *University of South Australia gives controversial Male Studies course the snip*, January 14, 2014, (A-84, Bolger Doc. No. 46 Ex. 3(B)("An information sheet on the Male Studies course . . . ."). In the court below, this "Information sheet" was also referred to in the First Amended Complaint at ¶ 38 (A-25,

[1]All the documents submitted in the lower court by me were either part of my verified complaints or affidavits.

Doc. No. 11) and the Opposition Affidavit to Defendants' Motion to Dismiss at ¶¶ 12(a) and 205 (Doc. No. 48). So where is the surprise; where is the prejudice?

2. Publicly available Internet data about two correspondent reporters located in New York that Defendant Fairfax uses to source stories. (A-159-162). This Court can take judicial notice of such because an appellate court may take judicial notice of matters not in the record on appeal in order to support a reversal of the lower court's decision. *See, e.g. Zouppas v. Yannikidou*, 16 A.D.2d 52, 54 (1st Dept. 1962).
3. The agreement between the University and me that was the very basis for my creating and agreeing to teach the "Males and the Law" section with which Defendants interfered giving rise to the causes of action. (A-97-98). The arguments in the lower court swirled around what that agreement created through 131 documents and four motions. Bolger cannot seriously assert that by including it in the Appendix she was taken by surprised or was somehow prejudiced.
4. The opposing statements in lieu of a transcript. (Doc. Nos. 127-130). Since both sides are presented but disagree, it is clear there exist factual issues over what took place at the two hearings—issues this Court may or may not consider material. As of the date of this Opposition, the lower court has not settled the statements.

Bolger objects to the form but not the substance of the following documents:

1. Bolger alleges that the articles by Shepherd and McNeilage have been edited but doesn't say how. (Bolger Mem. at 9). The two articles at A-81-85 appear as they did in Bolger's Second Affirmation Exhibit 3(A) and 3(B) of Shepherd's Second Affidavit, Doc. No. 46 Ex. 3(A) and 3(B) —that is Bolger's Affirmation not mine! The article at A-86-88 is how it appears in Bolger's Second Affirmation Exhibit 3(C), Doc. No. 46 Ex. (C), but for

some computer copying reason "News" at the top is in italics in the Appendix. The article at A-89-92 is the article that appears on the Internet and is substantively identical to that submitted in the lower court by both Bolger's Second Affirmation Exhibit 3(D), Doc. No. 46 Ex. (D), and my First Amended Verified Complaint's Exhibit F, Doc. No. 17. Documents on the Internet appear different in format and advertisements depending on the browser used to view them, but the substance remain the same. Even the articles submitted by Bolger appear differently in different submissions. For example, compare her submissions at Doc. No. 46 Ex. 3(A) and 3(B) with her Doc. No. 71 Ex. 3(A) and 3(B). Bolger is trying to use this well-known fact about the Internet to assert I intentionally tried to mislead this Court. Her argument is neither logical nor accurate—but hypocritical.

5. The email from Defendant Shepherd to me (A-99) is also substantively identical to that submitted in the lower court but because of different browsers, it looks different. (Doc. No. 96). Bolger also duplicitously used a "*see e.g.*" cite to imply there are other examples that make the Appendix defective, but, once again, she does not specify. (Bolger Mem. at 9).

Bolger's objection that I failed to include necessary documents for her appeal was dealt with above at pages 1-2, 6-8.

Bolger's objections to the Appendix Index:

1. Bolger objects that the forged document that she submitted to the lower court on three different occasions is titled "Forgery of the McNeilage article by attorney Bolger in her First Affirmation at Exhibit 5(A), her Second Affirmation at Exhibit 5(A) and her Affirmation in opposition to discovery at Exhibits 5(A) and 9(A),"—but that is what it is. (A-145-146, Doc. No. 9 Ex. 5(A), Doc. No. 46 Ex. 5(A), Doc. No. 71 Ex. 5(A) and

9(A)). Forgery is the crime of altering a written instrument so that it appears to be authentic. *See* N.Y. Penal § 170.05. Bolger swore three times under penalty of perjury that the exhibits of McNeilage's article were "true and correct cop[ies]"—they were not. (Bolger's Affirmations, Doc. No. 9 ¶ 6, Doc. No. 45 ¶ 6, and Doc. No. 70 ¶¶ 6 and 10). The forgeries created by Bolger deleted a chart prominently displayed as part of the original article that was published online. (A-93, Doc. No. 15). The chart is evidence of common-law malice by McNeilage when she wrote her article. Common-law malice is a material element of injurious falsehoods and tortious interference. By deleting the chart, Bolger eliminated evidence of common-law malice, which assisted her in arguing that the only cause of action was libel of a minor public figure that requires constitutional malice.

2. As for Bolger's objection that Laura Parker and Andrew Purcell are not "correspondents" for Fairfax's newspaper the Sydney Morning Herald but freelancers, (Bolger Mem. at 10), this seems to be a distinction without a difference. The bylines on their articles for the Herald are their names, not Laura Parker or Andrew Purcell Freelance Journalists. Further, this Court can take judicial notice of the public Internet information indicating these two are correspondents for the Herald. *See, e.g. Zouppas v. Yannikidou*, 16 A.D.2d at 54 (judicial notice of matters not in the record).
3. Bolger attacks the Appendix Index for "not indicat[ing] where the documents were submitted" in the lower court. (Bolger Mem. at 10). However, "[t]he specification in rule 235 that the index . . . contain a reference to the pages where a motion for a dismissal of the complaint or for the direction of a verdict appears is omitted." McKinney's Legislative Studies and Reports, CPLR 5528, Subd. (a).

Bolger also argues for a merits determination by dismissing the appeal or striking my Brief and Appendix because my Pre-Argument Statement states the lower court's decision on personal jurisdiction was based on her clients' "perjurious affidavits." (Bolger Mem. at 11). As Bolger admits, the lower court based its decision on Defendant's affidavits, and did not "credit" the allegations of perjury. (Bolger Mem. at 11). I may be wrong, but I always thought that the purpose of an appeal was to challenge a lower court's decision on issues believed to have been wrongly decided. In this appeal, I am arguing, in part, that the lower court's decision denying personal jurisdiction was wrong because it was based on Defendants perjurious and misleading affidavits, which is what I also argued below. Bolger, however, asserts that to challenge on appeal a lower court's decision on a pertinent issue is grounds to dismiss the appeal. (Bolger Mem. at 11).

In her Pre-Argument objection, Bolger also claims that my assertions of perjury by her clients are "without record support." (Bolger Mem. at 5, 11). That is false. The Appendix provides documents that show her clients repeatedly lied under oath about their connections with New York. Such documents were submitted to the lower court, usually on more than one occasion, and are in the lower court's records at Doc. No. 49-52, 57, 60, 61, 85-89, 92, 95, 116. This Court has the authority to review the documents in the Appendix to determine whether Defendants' lied, prevaricated, and dissembled in their affidavits, which is why those documents are in the Appendix.

One final point, according to this Court's Rules of Procedure § 600.2(a)(8)(d)(1), "oral argument will not be heard" on motions such as Bolger's request to dismiss the appeal or strike my Brief and Appendix, (Bolger Mem. at 13). Yet, on April 1, 2016, in this Court, Bolger was permitted to orally argue her motion in which she frequently referred to some of the 18

Exhibits—comprising over 200 pages, that she submitted with her motion to dismiss or strike. I was handed those exhibits and her memorandum in the lobby of this Court on that same day just before she made her application for an interim stay to which she had notified me that I was required to attend. (Ex. F). I asked her, "Couldn't you have sent this to me?" She replied "No!" Had she sent those papers to me, I would have had time to review them. Clearly, she once again arranged to secure to her and her clients another unfair advantage even in violation of this Court's stated procedures of no oral argument on such motions.

Conclusion

In all her objections, Bolger has betrayed a remarkable instinct for the capillaries and exaggeration. She has wasted this Court's time in an effort to make the cost of appealing prohibitively expensive, so she can win by default; otherwise, she would have contacted me in an effort to informally resolve her objections—she did not. Her motion should be denied.

Dated: April 7, 2016

/s/ Roy Den Hollander
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At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on May 3, 2016.

PRESENT: Hon. Angela M. Mazzarelli, Justice Presiding,
David Friedman
Richard T. Andrias
Karla Moskowitz
Marcy L. Kahn, Justices.

Roy Den Hollander,
Plaintiff-Appellant,

-against-

M-1708
Index No. 152656/14

Tory Shepherd, et al.,
Defendants-Respondents.

An appeal having been taken from an order of the Supreme Court, New York County, entered on or about January 12, 2016, and said appeal having been perfected,

And defendants-respondents having moved to dismiss the appeal, or in the alternative, for an order striking plaintiff-appellant's brief and appendix, for certain costs and to adjourn the appeal to the September 2016 Term,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is granted to the extent of directing plaintiff-appellant 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. Plaintiff-appellant is directed to serve and file said supplemental appendix on or before July 11, 2016. Page 163 of plaintiff-appellant's appendix is deemed stricken and judicial notice is taken of the documents reproduced on pages A.159-162 of said appendix. The motion is otherwise denied. The appeal will be maintained on this Court's calendar for the September 2016 Term.

ENTER:

CLERK

Exhibit F

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

ROY DEN HOLLANDER, Plaintiff-Appellant, -against- TORY SHEPHERD, ADVERTISER NEWSPAPERS PTY LTD., AMY McNEILAGE, FAIRFAX MEDIA PUBLICATIONS PTY LIMITED, Defendants-Appellees.	New York County Ind. No. 152656/2014 Hon. Jennifer Schecter

MEMORANDUM OF DEFENDANTS TORY SHEPHERD, ADVERTISER NEWSPAPERS PTY LTD., AMY McNEILAGE, FAIRFAX MEDIA PUBLICATIONS PTY LIMITED IN SUPPORT OF MOTION TO DISMISS THE APPEAL

LEVINE SULLIVAN KOCH & SCHULZ, LLP

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Counsel for Defendants

Defendants Tory Shepherd, Advertiser Newspapers Pty Ltd., Amy McNeilage, and Fairfax Media Publications Pty Limited (together, "Defendants"), by and through their undersigned attorneys, submit this memorandum of law in support of their motion to dismiss the appeal of Plaintiff-Appellant Roy Den Hollander ("Plaintiff" or "Hollander") pursuant to Rule 5528 and Section 2105 of the New York Civil Practice Law and Rules and Sections 600.2, 600.10, 600.11, and 600.12 of this Court's Rules.

This appeal should be dismissed outright. Plaintiff knowingly disregarded this Court's May 3, 2016 order requiring that he remedy his original and inadequate appendix by filing the exhibits attached to the Affirmation of Katherine M. Bolger in support of Defendants' motion to dismiss the First Amended Complaint. Instead of complying with this order, Plaintiff filed just four of the required twenty-four exhibits, along with additional exhibits of his own on which he apparently intends to rely. It is time to apply the doctrine of enough is enough and dismiss this appeal outright.

BACKGROUND[1]

A. The IAS Court's Decision and Order

On January 8, 2016, the IAS court dismissed Hollander's defamation lawsuit against four Australian defendants for a lack of personal jurisdiction. *See generally* Affirmation of Katherine M. Bolger ("Bolger Aff."), Ex 1. Because Plaintiff's claims all sounded in defamation, the court found that jurisdiction was governed by CPLR § 302(a)(1) of the long-arm statute, which required Plaintiff to show that each defendant "transact[ed] any business within the state" out of which the cause of action arose. *Id.* at 5 (internal marks and citation omitted). The court also

[1] Additional factual background is set out in further detail in Defendants' first motion to dismiss the appeal, filed with this Court on April 1, 2016. Affirmation of Katherine M. Bolger, Ex. 4 at 2-5.

recognized that this section of the long-arm statute is construed "more narrowly" in defamation-related cases. *Id.*

The court held that there was no jurisdiction over any defendant because their "very minimal" contacts in the record below were "not as significant as the few cases" finding jurisdiction in these kinds of cases. *Id.* at 6-7 (internal marks and citation omitted). "In the end," the court found, "there is no authority for subjecting defendants to jurisdiction in New York based on articles published outside New York for a non-New York audience." *Id.* at 9.

B. Procedural History in This Court

On February 2, 2016, Plaintiff filed a notice of appeal. Bolger Aff., Ex. 2. A month later, on March 15, 2016, Plaintiff served Defendants with his brief as well as the appendix on appeal, which largely omitted the exhibits on which Defendants relied in support of their motion to dismiss the First Amended Complaint. *See generally* Appendix.

On April 1, 2016, Defendants brought a motion to dismiss the appeal or strike Plaintiff's brief and appendix because the appendix, certified as containing accurate copies of filings in the record below, "include[d] materials not in the record below while excluding papers upon which the Appellees may reasonably rely." Bolger Aff., Ex. 3. Those excluded papers were the "twenty-four exhibits" attached to the Affirmation of Katherine M. Bolger and "submitted in support of Defendants' motion to dismiss" the complaint in the supreme court. *Id.*, Ex. 4 at 9.

In opposition, Plaintiff admitted that his appendix contained documents not in the record below and documents in the record below but altered by him on appeal and further admitted that it omitted many of the "496 exhibit pages" attached to the Bolger Affirmation submitted in support of the motion to dismiss below. *Id.*, Ex. 5 at 1-2, 9-12. Plaintiff nevertheless asserted

that the objections to the appendix were "nit-picking" and that he "could not afford" to print an appendix with Defendants' exhibits and thus should be excused from doing so. *Id.*, Ex. 5 at 1, 8.

C. The Order

In light of Defendants' motion to dismiss the appeal, on May 3, 2016, this Court ordered Plaintiff, by July 11, 2016, "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 and taking judicial notice of four pages of the appendix. *Id.*, Ex. 6.

D. Plaintiff's Supplemental Appendix

On the afternoon of July 8, Plaintiff served the supplemental appendix on Defendants' counsel. *See generally* Supplemental Appendix ("SA"). Rather than including "all exhibits" attached to the Bolger Affirmation submitted in support of the Defendants' motion to dismiss as ordered by this Court to do, Plaintiff's supplemental appendix included (1) extraneous documents not attached to the Bolger Affirmation, *see* SA2-19, SA213-246, and (2) just four of the twenty-four exhibits originally attached to the Bolger Affirmation, *see* SA20-230.

This motion to dismiss the appeal follows.

ARGUMENT

Just two months ago, this Court gave Plaintiff a very simple order: file a supplemental appendix that included all of the exhibits to the Bolger Affirmation, which was submitted in support of Defendants' motion to dismiss the First Amended Complaint below. This appeal should be dismissed because Plaintiff failed to abide by that order and because, as a result, his appendices on appeal remain inaccurate and incomplete.

First, the appeal should be dismissed for failure to comply with this Court's order. Defendants filed their original motion to dismiss the appeal, in part because Hollander "failed to include nearly all of the evidence on which Defendants relied below." Bolger Aff., Ex. 4 at 9. Specifically, he failed to include the "twenty-four exhibits" attached to the affirmation of Defendants' counsel in support of their motion to dismiss in the supreme court. *Id.* This failure, Defendants argued, violated the rule that the appellant include in the appendix those documents he "'reasonably assumes will be relied upon by the respondent.'" *O'Rourke v. Long*, 41 N.Y.2d 219, 229 (citing CPLR 5528(a)(5)); *see also, e.g.*, *Wittig v. Wittig*, 258 A.D.2d 883, 884-85 (4th Dep't 1999). Despite Hollander's arguments that the "496 exhibit pages" to the Bolger Affirmation were irrelevant, Bolger Aff., Ex. 5 at 1, this Court agreed with Defendants and ordered Hollander to file "all exhibits attached to the Affirmation of Katherine M. Bolger submitted with defendants' motion to dismiss." *Id.*, Ex. 6.

Rather than simply comply with this order, Hollander took the opportunity to lard up the record with additional exhibits on which *he* apparently intends to rely, *see* SA2-19, SA213-246, while filing just four of the exhibits originally attached to the Bolger Affirmation submitted in the supreme court, *see* SA20-230. No reasonable interpretation of this Court's order can support Hollander's conduct here. There is no question that he violated this Court's order. For that reason, Hollander's appeal should be dismissed. *Ramirez v. Smith*, 128 A.D.2d 511 (2d Dep't 1987) (granting leave to file supplemental appendix, and ordering dismissal should plaintiff fail to do so); *see also Termini v. Tronolone & Surgalla, P.C.*, 207 A.D.2d 1037 (4th Dep't 1994) (striking brief and dismissing appeal for failure to comply with the court's order); *Derderian v. Derderian*, 556 N.Y.S.2d 484 (1st Dep't 1990) (granting *sua sponte* leave to enter order dismissing appeal for failure to perfect appeal).

Second, the appeal should be dismissed because the record is incomplete. This Court has not hesitated to dismiss appeals based on incomplete appendices. Just this year, this Court dismissed an appeal where the plaintiff had failed to submit motion papers and a single exhibit filed below. *Kenan v. Levine & Blit, PLLC*, 136 A.D.3d 554, 555 (1st Dep't 2016). And in *Copp v. Ramirez*, this Court dismissed an appeal in part because the notice of appeal was not an "accurate description" of the order dismissing the case below. 62 A.D.3d 23, 27-28 (1st Dep't 2009). These results are not unique. *See Quezada v. Mensch Mgmt. Inc.*, 89 A.D.3d 647 (1st Dep't 2011) ("Dismissal of the appeal is warranted because Taveras failed to assemble a proper appellate record."); *Lynch v. Consol. Edison, Inc.*, 82 A.D.3d 442 (1st Dep't 2011) (same).

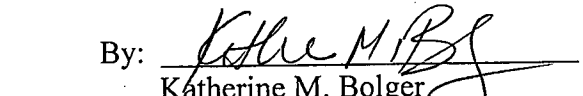
Here, the record on appeal remains incomplete, which provides another, independent basis for dismissal. All this Court required Hollander to do was file a supplemental appendix containing the exhibits on which *Defendants* relied below. Bolger Aff., Ex. 6. He did not do so. Thus, Hollander's appendices still contain a lopsided, incomplete, and often inaccurate view of the record below. Plaintiff simply does not have a right to prosecute an appeal based on appendices this Court has already found to be incomplete and which he has declined to correct.

CONCLUSION

For the above reasons, Defendants respectfully request that this Court dismiss the appeal.

Dated: July 15, 2016

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: 

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Counsel for Defendants

Exhibit G

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

----------X

Roy Den Hollander,

Plaintiff-Appellant,

-against-

Tory Shepherd, Advertiser Newspapers Pty Ltd.,
Amy McNeilage, Fairfax Media Publications Pty Ltd.,

Defendants-Appellees.

----------X

New York County
Ind. No. 152656/2014
Hon. Jennifer Schecter

Memorandum of Plaintiff-Appellant in Opposition to Defendants-Appellees' Latest Motion to Dismiss the Appeal

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Table of Contents

Table of Authorities

Rules

Preliminary Statement

Defense Counsel Katherine M. Bolger ("Bolger") continues to pad her billing to her multi-billion dollar clients and waste this Court's precious time with another "Motion to Dismiss"—her words, and her third so far in this case. Her scheme this time, as perhaps intended all along, is to confuse her original motion to dismiss with her April 1, 2016, "Motion to Dismiss,"—words that are written on that motion's cover sheet (Ex. A) that is attached to the 18 exhibits she wanted added to the filed Appendix and written on the caption page to her accompanying memorandum of law (Ex. B). Additionally, the April 1st Notice of Motion requested "dismissing the appeal in its entirety . . . ." (Ex. C)

Argument

Plaintiff-Appellant complied with this Court's May 3, 2016, Order.

On April 1, 2016, Bolger submitted to this Court a "Motion to Dismiss" the appeal (Ex. A, B & C) arguing, among other points, that the Plaintiff-Appellant's Original Appendix, filed March 15, 2016, did not contain all the documents that she intended to rely on for her opposition brief. As part of that "Motion to Dismiss," she submitted an affirmation with 18 exhibits and a memorandum of law in support of her motion to dismiss.

On May 3, 2016, this Court denied Bolger's request to dismiss the appeal and ordered Plaintiff-Appellant "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." (Ex. D, Appellate Division-First Dep't Order). Plaintiff-Appellant complied with this Court's Order by serving and filing a Supplemental Appendix on July 8, 2016. If the Supplemental Appendix and the Original Appendix are taken together, all of Bolger's 18 exhibits attached to her affirmation in her April 1st motion to dismiss are now part of the full appendix.

When Bolger made her motion to dismiss in April, she was clearly hoping the 68 year-old Plaintiff-Appellant, who earned all of $35,000 last year, would forego the additional $1,600 expense for a supplemental appendix and she would win by default. That did not happen, so now she claims that the exhibits she really wanted added to the Appendix were not the 18 that accompanied her April 1st motion to dismiss and which this Court's Order refers to, but everything she filed in the lower court no matter how irrelevant to an appeal of the only issue before this Court—are the defendants within this State's personal jurisdiction?

A sampling of some of the documents that Bolger's change-of-mind believes this Court needs to decide the personal jurisdiction issue and she needs to reasonably rely on are at Exhibit E. The exhibits she now wants added to the full appendix even include documents that have duplicates and triplicates in the exhibits. It is simply all part of her scheme to increase the cost of the appendix beyond Plaintiff-Appellant's means and win by default.

Once again Bolger violates the CPLR.

Bolger's April 1, 2016, motion to dismiss submitted two false affidavits of service concerning her reply on that motion. The affidavits falsely asserted that service was made before Bolger's reply was filed—it was not. Federal Express tracking records showed that her reply was actually filed first and served later. (Plaintiff-Appellant's Reply to Defendants-Appellees' Opposition to Plaintiff-Appellant's Motion to Strike the Defendants-Appellees' Reply in their Motion to Dismiss the Appeal, dated May 1, 2016).

This time, Bolger violates CPLR 2214(b) and 2103(b) in serving her July 15, 2016, motion to dismiss via Federal Express.

When Bolger created the Fed Ex label on Friday, July 15, 2016, (Ex. F, Fed Ex tracking) to ship her third motion to dismiss, Fed Ex gave her an option to have it delivered Saturday, July

16th, or Monday July 18th. Even though the label states Priority Overnight (Ex. G), according to Fed Ex, when the shipment is made on a Friday, the sender has a choice to specify delivery on Saturday or it will be delivered Monday. Bolger chose Monday. Exhibit H is a test run by Plaintiff-Appellant on Fed Ex's procedure. Exhibit H's documents show a clear choice for Saturday delivery, and if Saturday is not chosen, then Monday delivery will result.

Bolger's current Notice of Motion at 2 states "that pursuant to CPLR 2214(b), answering affidavits, if any, are to be served . . . no later than seven days before the return date," here August 1, 2016.

CPLR 2214(b) requires that answering papers will be served at least seven days before the return date if a notice of motion was served at least sixteen days before and the movant will then be allowed to serve a reply at least one day before the return date. CPLR 2103(b)(2) requires adding five days for serving papers by mail, and CPLR 2103(b)(6) requires adding one day if service is overnight. Bolger tries to trick this Court into believing that she complied with CPLR 2103(b)(6) by serving her motion overnight, when she actually intentionally served it over three nights. Had she chosen the option to actually serve the motion overnight by having Fed Ex deliver the papers on Saturday, she would have complied with CPLR 2103(b)(6)—but she did not. She chose instead a mail-type of delivery with Fed Ex delivering the papers three days later on Monday—three days were previously the additional time required for mail service. Since she failed to comply with CPLR 2103(b)(6), she failed to comply with CPLR 2214(b), so she is prohibited from submitting a reply. She did, however, comply with serving her papers at least eight days before the return date, so Plaintiff-Appellant's answering papers need to be served two days before the return date of August 1, 2016, under CPLR 2214(b).

Conclusion

Once again Bolger has wasted this Court's time in an effort to make the cost of appealing prohibitively expensive. Appellant requests that her motion be denied.

Dated: July 28, 2016

/S/ Roy Den Hollander
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

ROY DEN HOLLANDER, Plaintiff-Appellant, -against- TORY SHEPHERD, ADVERTISER NEWSPAPERS PTY LTD., AMY McNEILAGE, FAIRFAX MEDIA PUBLICATIONS PTY LIMITED, Defendants-Appellees.	New York County Ind. No. 152656/2014 Hon. Jennifer Schecter **NOTICE OF ENTRY**

PLEASE TAKE NOTICE THAT the annexed decision and order was entered by the Clerk on August 25, 2016.

Dated: August 25, 2016
New York, New York

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: /s/ Katherine M. Bolger
Katherine M. Bolger
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Counsel for Defendants

TO: Roy Den Hollander
545 East 14 Street, 10D
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At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on August 25, 2016.

Present: Hon. Karla Moskowitz, Justice Presiding,
Paul G. Feinman
Judith J. Gische
Barbara R. Kapnick
Ellen Gesmer, Justices.

Roy Den Hollander,
Plaintiff-Appellant,

M-3470

-against- Index 152656/14

Tory Shepherd, et al.,
Defendants-Respondents.

An appeal having been taken from an order of the Supreme Court, New York County, entered on or about January 12, 2016, and said appeal having been perfected and calendared (Cal. No. 875) for the September 2016 Term of this Court,

And defendants-respondents having moved to dismiss the aforesaid appeal for plaintiff's violations of an order of this Court, entered May 3, 2016 (M-1708), directing plaintiff to file a supplemental appendix with certain requirements,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon, it is

Ordered that the motion is granted and plaintiff's appeal is dismissed.

ENTER:

DEPUTY CLERK