TO BE ARGUED BY:
ROY DEN HOLLANDER, ESQ.

Supreme Court, New York County, Index No. 152656/14

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, AND FAIRFAX MEDIA PUBLICATIONS PTY LTD.,

Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT

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Questions Presented

1. Did the lower court improperly change the plaintiff-appellant's causes of action for injurious falsehoods and tortious interference with prospective contractual relations into one for defamation of character?

   Yes.

2. On the issue of personal jurisdiction, was the lower court defrauded by defendants-respondents and their attorney with perjurious affidavits hiding the extent of defendants-respondents contacts with New York State?

   Yes.

3. Did the lower court have personal jurisdiction over all the defendants-respondents for injurious falsehoods and tortious interference with prospective contractual relations?

   Yes.

4. Did the lower court also have personal jurisdiction over defendant-respondent Tory Shepherd for defamation of character?

   Yes.

Nature of the Case and Facts

Thanks to the Internet, the world is a much smaller place than it once was. Untrue and harmful acts in one part of the connected world instantaneously wreak havoc on businesses and persons in another part, especially by multi-billion dollar

corporations that use websites to sell their products and services globally. Today, huge corporations in one country can destroy small businesses in another with impunity unless the businesses targeted by these oligarchs can hale them into local courts. It has long been observed that technological advances affecting the nature of commerce require the doctrine of personal jurisdiction to adapt and evolve along with those advances. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-223 (1957).

The Rupert Murdoch owned Australian daily newspaper, The Advertiser, published on its website four articles authored by its editor-reporter Tory Shepherd ("Shepherd") that harmed the business product of plaintiff-appellant ("appellant")—a copyrighted, abridged compilation of English and American law from the industrial revolution to the present on how the law discriminated against men and women.[1] The work is titled "Males and the Law." (A-79). The Advertiser is operated by Respondent Advertiser Newspapers Pty Ltd. ("Advertiser").

The four news articles published by the The Advertiser were

1. *Lecturers in world-first male studies course at the University of South Australia under scrutiny*, January 12, 2014, (A-81);

[1] Appellant is 68 years-old, runs his small business of a sole-practitioning attorney in New York City who would have hired a lawyer in Australia to sue if his business could afford it.

2. *University of South Australia gives controversial Male Studies course the snip*, January 14, 2014, (A-84);

3. *Pathetic bid for victimhood by portraying women as villains*, January 14, 2014, (A-86); and

4. *Men's rights campaigner Roy Den Hollander* [appellant] *attacks The Advertiser's Tory Shepherd in bizarre legal writ filed in New York County*, June 18, 2014, (A-89).

The Sydney Morning Herald ("Herald"), another major Australian newspaper run by another multi-billion dollar corporation, Respondent Fairfax Media Publications Pty Ltd. ("Fairfax"), published on its website one article by its education-reporter, Amy McNeilage ("McNeilage"), which also harmed appellant's business product "Males and the Law": *University of South Australia distances itself from males studies proposals*, January 14, 2014, (A-93). The Advertiser and Herald have a combined online readership of 6,380,000 and print of 950,000.

"Males and the Law" (A-79) was part of the curriculum for a graduate Male Studies program of eight courses at the University of South Australia ("University"), which would have been the first of its kind in the world had defendants-respondents ("respondents") not published articles attacking the program's curriculum. The "Males and the Law" section would have been taught

online, originating in New York and sent over the Internet to any student anywhere who registered for the "Facts and Fallacies of Male Power and Privilege" course in which the section was included. (A-96). The University agreed to pay appellant a maximum of $1250 for authoring and teaching his section, depending on the hours involved.

On January 10, 2014, appellant read an email from Shepherd requesting his telephone number, which he provided. She wrote, "I'm trying to get in touch for a story I'm doing on the UniSA [University] course you're involved with …." (A-99). By her own words, the story was to be about appellant's business product, "Males and the Law." Shepherd published her first article on January 12, 2014, without ever having interviewed appellant, either by telephone or email. McNeilage also published her one article without ever having interviewed appellant.

The first article by Shepherd and the one article by McNeilage caused the University to cancel six of the eight courses in the Males Studies program, including the course containing appellant's "Males and the Law" section. Shepherd in her June 18, 2014, article admitted that six of the eight courses were "canned" as a result of the articles. (A-90).

Appellant filed suit in the New York County Supreme Court against all four respondents. All four were accused of the business torts: (1) injurious falsehoods

about the copyrighted business product "Males and the Law" and (2) tortious interference with prospective contractual relations between appellant and the University.

Shepherd was also accused of defamation of character primarily from her last two articles: *Pathetic bid for victimhood by portraying women as villains*, January 14, 2014, (A-86) and *Roy Den Hollander attacks The Advertiser's Tory Shepherd in bizarre legal writ filed in New York County*, June 18, 2014, (A-89).

The lower court recast the First Amended Verified Complaint ("Complaint") so that it only alleged libel, refused discovery on the issue of personal jurisdiction, and dismissed for lack thereof by relying on the perjurious affidavits of respondents that appellant had clearly exposed. (A-15-16, Order at 9-10; A-100, List Perjuries and Omissions).

Arguments

I. The lower court improperly changed plaintiff-appellant's causes of action for injurious falsehoods and tortious interference with prospective contractual relations into one for defamation of character.

In considering personal jurisdictional, the courts should give added weight to the requirement that a complaint be liberally construed in the plaintiff's favor, which means taking the pleadings and affidavits in the light most favorable to the plaintiff and resolve all doubts in his favor. *See Armouth Int'l, Inc. v. Haband Co*., 277 A.D.2d 189, 190 (2nd Dept. 2000). Additionally, the U.S. Supreme Court

views more expansively long-arm efforts aimed at intentional as opposed to unintentional torts. *New York State Law Digest* No. 297.

The lower court failed to do either because it changed appellant's causes of action for injurious falsehoods and tortious interference with prospective contractual relations into an action for libel. In doing so, the lower court relied on respondents' perjurious affidavits, suborned by their attorney Katherine M. Bolger ("Bolger"), and their material omissions to disprove appellant's factual allegations and evidence concerning respondents' contacts with New York. (A-100, List Perjuries and Omissions).

The lower court even relied on a forged copy of McNeilage's article that Bolger submitted to the court three times: Bolger's August 29, 2014, Affirmation Ex. 5; October 27, 2014, Affirmation Ex. 5; January 12, 2015, Affirmation Opposing Discovery Ex. 5 and 9.[2] (A-110, A-125, A-143-144). Bolger swore under penalty of perjury that these exhibits were "true and correct cop[ies]" of McNeilage's article—they were not. The forgeries created by Bolger deleted a chart prominently displayed as part of the original article that was published online. (A-93). 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

[2] Forgery is the crime of altering a written instrument so that it appears to be authentic. *See* N.Y. Penal § 170.05.

evidence of common-law malice, which assisted her in arguing that the only cause of action was libel. The forgeries helped Bolger defraud the lower court into ignoring personal jurisdiction under CPLR 302(a)(3)(i) & (ii) for the injurious falsehoods and tortious interference causes of action.

In dismissing the case, the lower court actually ended up following the old Civil Practice Act that forbade the pleading of legal theories. Today, of course, the Complaint's inclusion of legal theories is required, Weinstein, Korn and Miller, *New York Civil Practice* at ¶ 3013.03(2), and greater emphasis is placed on discovery. The lower court, however, refused discovery, even though the first of the three Justices assigned to the case stated respondents' argument on personal jurisdiction raised a "fact question," (A-182), and even though appellant demonstrated numerous perjuries and omissions of facts in respondents affidavits concerning their contacts with New York, (A-100, List Perjuries and Omissions).

While determining the reality and essence of actions pleaded requires a fair reading of the Complaint, *see Findlay v. Duthuit*, 86 A.D.2d 789, 790 (1st Dept. 1982), the lower court simply cited a few cases stating it had the power to change all the causes of action to libel and did so without any analysis whatsoever. (A-16, Order at 10). It did not even indicate which elements of the legal theories of injurious falsehoods and tortious interference were allegedly missing and why they could not be inferred from what was alleged. "Draftsmanship is secondary if a

cause of action can be spelled out from the four corners of the pleading ….” Siegel, *New York Practice* § 208. In accordance with CPLR 3013, the Complaint stated the material elements of each cause of action.

A. The distinctions between injurious falsehood and defamation of character

The distinctions between injurious falsehood and defamation are very real and stem from the historical roots of their respective remedial goals. Injurious falsehood dates back to the period in the English Commonwealth when a person's greatest wealth lay in real property. It arose in the context of "actions on the case" for special damages caused by the publication of false statements that harmed realty and later on included injury to business products and services, personal property, and intangible things. *New York Law of Torts* § 3:4; *N.Y. Pattern Jury Instr.—Civil* 3:55.

"The law of defamation is concerned only with injuries to one's reputation." *Kimmerle v. New York Evening Journal*, 262 N.Y. 99, 102 (1933). "Reputation is said in a general way to be injured by words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society." *Id.* (citing *Sydney v. MacFadden Newspaper Pub. Corp.*, 242 N. Y. 208, 212 (1926)). The language is of such a nature that it constitutes a reflection on a

person's character or qualities, both personally and professionally. 43A N.Y. Jur. 2d, *Defamation and Privacy* § 6.

While both causes of action share the requirement that a speaker publish a falsehood to a third party, they differ with respect to the required subject matter of the speaker's statement. *Ruder & Finn Inc. Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 670-671 (1981). Where the statement disparages or negatively reflects upon the condition, value or quality of the party's business goods or services, then the action is for injurious falsehoods. *Ruder* at 670-671; *see Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 59 (2d Cir. 2002). Defamation, however, lies where a statement impugns the basic integrity or creditworthiness of a party's business and the injury is conclusively presumed. *Ruder* at 670; *see also Angio–Med. Corp. v. Eli Lilly & Co.*, 720 F.Supp. 269, 274 (S.D.N.Y.1989).

Prosser points out that "'[f]or the most part the injurious falsehood cases have been concerned with aspersions upon the title to property, or its quality. Any type of legally protected property interest that is capable of being sold may be the subject of [injurious falsehood].'" *Lampert v. Edelman*, 24 A.D.2d 562, 562 (1st Dept. 1965)(Prosser, *Torts*, 3d ed. p. 941)(The confusion of the lower court in *Lampert* stemmed solely from treating the actions as one only in defamation.). Utterances that disparaged property, such as goods or services, are actionable as

injurious falsehoods. *Hirschhorn v. Town of Harrison*, 210 A.D.2d 587, 588 (3rd Dept. 1994). According to *Restatement Torts* § 624:

> One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.

"[D]efamation [however] is defined in terms of the injury, damage to reputation, and not in terms of the manner in which the injury is accomplished." *Morrison v. National Broadcasting Co.*, 19 N.Y.2d 453, 458 (1967). "A statement which injures the plaintiff in his reputation is governed by the very stringent rules of libel and slander, but a statement (whether written or verbal) which injures him only by misleading other persons into action that is detrimental to him falls within the more lenient rules of liability …." for injurious falsehood. *Lucci v. Engel*, 73 N.Y.S.2d 78, 79 (Sup.Ct. N.Y. Cnty. 1947)(quoting Salmond, *Law of Torts*, 10th ed., p. 588). Here, the first articles by Shepherd and McNeilage disparaged the quality of appellant's business product, "Males and the Law," which caused the University to withdraw offering it.

In libel *per se*, which is charged only against Shepherd, the statements, primarily in her last two articles (A-86, A-89), diminished the opinion in which others held appellant with regard to his personal character and professional ability. "In reviewing defamation cases, it is the principal duty of the courts to reconcile

the individual's interest in guarding his good name …." *Frank v. Nat'l Broad. Co.*, 119 A.D.2d 252, 256 (2nd Dept. 1986). It is the plaintiff's good name, personally and professionally, that defamation of character protects—not his business products and services.

Injurious falsehood

Injurious falsehood requires (1) intentional publication, (2) of false information about a person's property, (3) done maliciously (common-law malice) or in reckless disregard for the truth or falsity, and (4) results in loss measured by special damages. *New York Law of Torts* § 3:26.

The statements could be facially false or the writer indulged in an attempt to create a false impression. *See Cornwell v. Parke*, 5 N.Y.S. 905, 907 (1st Dept. 1889). The test for falsity is whether the statement would have a different effect on the mind of the reader from that which the whole truth would have produced. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991).

The false statements published must play a substantial part in inducing others not to purchase a business's products or services. *Waste Distillation Tech., Inc. v. Blasland & Bouck Engineers, P.C.*, 136 A.D.2d 633, 633 (2nd Dept. 1988). "An important factor in determining the amount of damages for such disparagement of property is the resultant impairment of vendibility." *105 E. Second St. Associates v. Bobrow*, 573 N.Y.S.2d 503, 504 (1st Dept. 1991). This

special damage requirement is another distinction that makes injurious falsehoods different from defamation.

Common-law malice may be found from the making of a statement with deliberate intent to do harm even though in the honest belief that the statement is true or with knowledge that it is false even though there is no motive to harm. Prosser, *Injurious Falsehood: The Basis of Liability*, 59 Col. L. Rev. 425, 437–38 (1959).

> It logically follows that to sustain a complaint, it is not necessary that the pleading must allege that the defendant was solely motivated to injure the plaintiff. It is enough if the falsehoods charged were intentionally uttered and did in fact cause the plaintiff to suffer actual damage in his economic or legal relationships.

Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co., 7 A.D.2d 441, 444 (1st Dept. 1959),

<u>Injurious falsehood standards applied to appellant's allegations.</u>

Appellant's business for over 30 years has been that of 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. Those are the products and services that appellant's business sells. The "Males and the Law" copyrighted curriculum was such a product and teaching it would have been such a service.

Copyrights are considered property in New York, N.Y. Jur. 2d, *Property*, § 3, and compilations are protected by U.S. Copyright Law, 17 U.S.C. § 103, which are vendible under 17 U.S.C. § 204. Shepherd and McNeilage's false statements and false factual connotations published in their first two articles about the "Males and the Law" curriculum disparaged its quality, diminished its value, and caused the University to withdraw it from being offered to its students.

Shepherd's injurious falsehoods published by the The Advertiser.

Shepherd's first news article, (A-81), published false statements about all the curricula, which included "Males and the Law." She communicated that it and the other courses were part of a "right wing" conspiracy of groups with "extreme" views against females and relied on quotes from so-called experts that believed as she did:

> Dr Michael Flood, from the University of Wollongong's Centre for Research on Men and Masculinity, said these types of male studies "really represents the margins". "It comes out of a backlash to feminism and feminist scholarship. The new male studies is an effort to legitimise [sic], to give academic authority, to anti-feminist perspectives," he said.
>
> Flinders University School of Education senior lecturer Ben Wadham, who has a specific interest in men's rights, said there was a big difference between formal masculinity studies and "populist" male studies. He said there were groups that legitimately help men, and then the more extreme activists. "That tends to manifest in a more hostile movement which is about 'women have had their turn, feminism's gone too far, men are now the victims, white men are now disempowered", he said. "I would argue that the kinds of masculinities which these populist movements represent are anathema

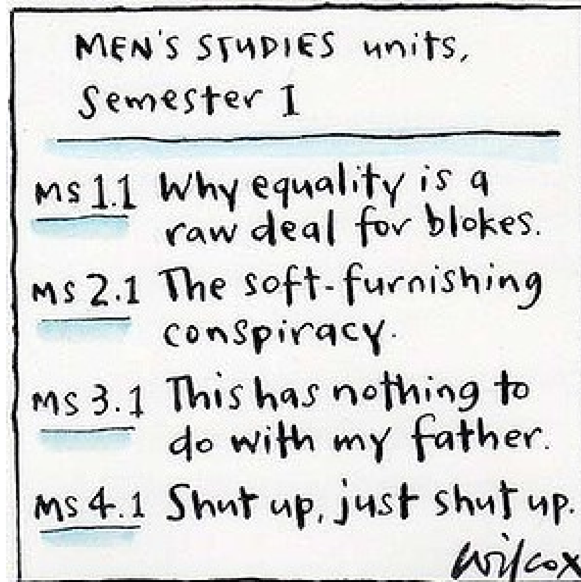
> to the vision of an equal and fair gendered world." Dr Wadham said that universities needed to uphold research based traditions instead of the populist, partisan approach driven by some.

The false imputations in both statements were that the content of the "Males and the Law" section was anti-women, opposed to equal rights for females, hostile toward women, a threat to equality, and based on flawed research. The truth, however, was that the "Males and the Law" section was based on law review articles from the mid-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 simply presented an abridged history of the law over the last 250 years on how the sexes were treated differently concerning various issues. (A-79).

McNeilage's injurious falsehoods published by the Herald.

McNeilage published false statements about all the curricula, which included "Males and the Law."

At the very heart of her article was



The false imputations of this were that the "Males and the Law" section advocated against equality of opportunity for females, was the product of psychological problems with father figures, and the section would be taught as a dialectic in which females were muzzled. The section did not advocate against the rights of either sex, was the result of an agreement with the University, (A-97), and what dialectic discussions did ensue would have been open as in Plato's *Republic*.

McNeilage's article also published:

> National Union of Students president Deanna Taylor said …. "It's a slippery slope once you open the door to people with these views and give them a platform … it's not long before proposals like the ones that were rejected actually get approved," she said.

The false imputation here was that the content of the "Males and the Law" section was so improper that college students should be protected from hearing about how the law had treated the different sexes over the last 250 years.

Neither Shepherd nor McNeilage nor their alleged experts knew what the section was going to teach. They simply assumed that their statements described right-wing conspiratorial propaganda fashioned to enslave women.

As to common-law malice, had Shepherd and McNeilage reasonably believed their statements accurate, they still set out to stop the courses from being taught, which meant they intended to interfere with appellant's commercial interest in teaching his section by disparaging his business product. Even without such malice, the two reporters clearly acted recklessly by (1) failing to interview appellant before they published their first articles, (2) failing to review the contents of the "Males and the Law" section before publishing their first articles, and (3) violating their respective newspapers' ethical procedures for reporting a story.

The Advertiser's *Code of Conduct* requires that "[e]very effort must be made to contact all relevant parties." (A-148, Code Conduct at 1.4). Shepherd's effort to contact appellant before publishing her first article was woefully inadequate. She sent appellant an email asking for his telephone number, (A-99), which raises the question as to how she obtained the email address. Email addresses are more difficult to find than telephone numbers. Also, on every federal court document that appellant ever filed, including in the cases Shepherd refers to in her articles, his telephone number is listed and those documents are available to the public online. Further, there have been a number of news reports concerning appellant

that Shepherd accessed. A call by Shepherd to one of the reporters would have resulted in appellant's number. McNeilage violated the Australian Press Council, *General Statement of Principles* to which the Herald subscribes, specifically: ¶¶ 1 (fair and balanced), 3 (opportunity to respond), 6 (relevant facts not suppressed), 8 (no gratuitous emphasis on gender). (A-157-158).

Shepherd's subsequent articles admitted and even bragged that her first article was a substantial factor in canceling six of the eight courses. For example in her two articles of January 14, 2014, two days after her first article, she headlined one article with *University of South Australia gives controversial Male Studies course the snip*, (A-84), and wrote:

> CONTROVERSIAL aspects of a Male Studies course will not go ahead.
>
> A statement from the university issued yesterday said only UniSA [University] staff would develop and teach courses, and that the university did not 'endorse or support the controversial comments on gender issues' revealed in yesterday's [January 12th] Advertiser.

In her article *Pathetic bid for victimhood by portraying women as villains*, (A-86), she wrote:

> But I'm pretty keen to go over some of the ground that's been covered this week after uncovering plans to have a Male Studies course at the University of South Australia. Most of the courses now won't go ahead ….
>
> Big ups to UniSA [University] for having the sense to reject anything linked to those at the very fringe of the men's rights spectrum ….

> You'd think I'd shut up now the plans are off the table ….

And from her June 18, 2014, article *Men's rights campaigner Roy Den Hollander attacks The Advertiser's Tory Shepherd in bizarre legal writ filed in New York County*, (A-90), she wrote:

> After The Advertiser revealed UniSA was planning a course in men's studies … the course was canned.

The special damages for the injurious falsehoods published by the The Advertiser and Herald is the maximum amount of $1250 appellant would have received for creating and teaching the "Males and the Law" section depending on the number of hours invested.

B. The distinctions between tortious interference with prospective contractual relations and defamation

Tortious interference with prospective contractual relations developed very early in the common law to deal with improper efforts to drive away prospective customers from a plaintiff's business. *New York Law of Torts* § 3:19. It protects a businessman's efforts to enter into contracts with potential clients and the damages alleged are to the business rather than professional reputation, which is protected by the defamation tort.

A general duty exists for persons not to interfere in the business affairs of others. N.Y. Jur.2d, *Interference* § 1. Tortious interference is a violation of that duty by intentionally interfering with another's business affairs causing injury

without just cause or excuse. "[T]he principal underlying the rule is that he who has a reasonable expectancy of contract has a property right which may not be invaded maliciously or unjustifiably." *Hardy v. Erickson*, 36 N.Y.S.2d 823, 826 (Sup.Ct. N.Y. Cnty. 1942). The public policy behind the tort of libel, however, is that individuals are entitled to have their personal character as perceived by the public unimpaired by false and defamatory attacks. *See Frank*, 119 A.D.2d at 256. Libel also falls within the term "personal injury," as used in the General Construction Law of New York, § 37-a.

Interferences with the prospect of obtaining employment are reachable by this cause of action. *Restatement (Second) Torts* § 766B, comment c.

Tortious inference with prospective contractual relations

The pleading requirements are that the plaintiff (1) had a business relationship with a third party that created an expectancy of future contractual rights; (2) the defendant knew of that relationship and intentionally interfered with it; (3) defendant used dishonest, unfair, or improper means, or was motivated solely by a desire to harm the plaintiff; and (4) the defendant's interference caused injury to plaintiff's relationship with the third party resulting in pecuniary and consequential losses. *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 47 (1st Dept. 2009), *leave to appeal dismissed in part, denied in part*, 14 N.Y.3d 736 (2010).

Interference includes inducing or otherwise causing a third party not to enter into the prospective contractual relation.

Use of dishonest, unfair, or improper means includes fraudulent misrepresentation; an intentionally fallacious communication to a prospective employer of plaintiff, *Freedman v. Pearlman*, 271 A.D.2d 301, 305 (1st Dept. 2000); or "[v]iolation of recognized ethical codes for a particular area of business activity or of established customs or practices regarding disapproved actions or methods," *Restatement (Second) Torts* § 767 comment c (1979).

Pecuniary harm results from the loss of the benefits of the prospective contract and consequential harm from the opportunities for profits diverted by the interference. *See Duane Jones Co. v. Burke*, 306 N.Y. 172, 190 (1954)(citing *Keviczky v. Lorber*, 290 N.Y. 297, 306 (1943)).

<u>Tortious interference standards applied to appellant's allegations.</u>

Shepherd and McNeilage's first articles drove the University away from being a customer of appellant's business product, the "Males and the Law" section, and his services in teaching it. Before the reporters' two articles, appellant and representatives for the University had already reached an agreement on the content and teaching of the "Males and the Law" section. (A-97).

Shepherd and McNeilage knew before they published their first articles that the Male Studies courses, one of which included the "Males and the Law" section,

would be offered commencing in February 2014. (A-95). Shepherd's knowledge is reflected in the headline of her January 12, 2014, article: *Lecturers in world-first male studies course at the University of South Australia under scrutiny.* (A-81). In that article she also specifically referred to appellant by name as one of the lectures in the program. Additionally, Shepherd's January 14, 2014, article, *University of South Australia gives controversial Male Studies course the snip*, indicates she had previously obtained the University's information sheet that listed the courses and their respective sections that were going to be offered. (A-84). McNeilage's knowledge is shown in her one article in which she reported the University had distanced itself from a series of male studies courses. (A-93). This article indicated that the courses had not yet been canceled. McNeilage also referred to appellant by named as one of the lecturers.

The two reporters were clearly aware that appellant would be teaching part of a Male Studies course commencing in the 2014 Spring Term, unless they did something about it. It was not necessary that they know the specific terms of the prospective contractual relationship between appellant and the University. *See N.Y. Pattern Jury Instr.—Civil* 3:57 at 1.

Interference with another's prospective contractual relation is intentional if the actor desires to bring it about or she knows that the interference is substantially certain to occur as a result of her actions. *Restatement (Second) Torts* § 766B,

comment d. Shepherd and McNeilage's articles were not only aimed at their readership but specifically at the third party University because according to their first articles both contacted University officials to apprise them of the alleged "extreme" and "radical" nature of the courses to be offered, even though neither had determined what the courses would actually teach. (A-81, A-93).

Shepherd and McNeilage's articles depicted the Male Studies courses as extreme right-wing propaganda that railed against feminism, referred to women as bitches and whores, advocated gun violence, lacked academic rigor, existed on the margins of societal beliefs, were openly hostile toward women and non-whites, opposed to an equal and fair world, not objective, and essentially dangerous to women. (A-81, A-93).

Given higher education's proclivity to adhere to politically-correct concepts in carrying out its educational mission and the on-going culture wars fought with invectives that prevent objectively presenting both sides to social issues, Shepherd and McNeilage's articles manifest an intent to deep-six the courses, or, at the very least, a firm belief that such would occur as a result of their articles, which had a circulation of 7,330,000. Shepherd even credited her first article with "cann[ing]" the Male Studies courses. (A-90).

"Where the parties are not competitors, there may be a stronger case that the defendant's interference with the plaintiff's relationships was motivated by spite."

Carvel Corp. v. Noonan, 3 N.Y.3d 182, 191 (2004). Shepherd and McNeilage are "reporters"—not lawyers. Appellant has been in the business of interpreting and communicating about the law for over 30 years. Shepherd and McNeilage are not in competition with him; therefore, their motive to interfere with his prospective contract to teach legal history was not a legitimate economic self-interest of theirs. Neither were they motivated to further the education of students at the University but to "purify" that education in the tradition of censoring courses that do not adhere to their version of a PC-feminist paradigm, which meant using their power of the press to stop the courses from being taught. McNeilage also demonstrated common-law malice with the chart at the head of her article that relies on stereotypical discriminatory beliefs about males. (A-93).

Shepherd and McNeilage used unfair and improper means in researching, sourcing, and writing their initial articles because they (1) failed to interview appellant; (2) failed to review the content of the "Males and the Law" section; (3) failed to do any original research for their articles by conducting a sampling of material concerning the law's discrimination of the sexes over the last 250 years; (4) relied on anti-male propaganda whose reliability the press community considered low and which would have raised in an objective and fair-minded reporter substantial questions as to its accuracy; and (5) violated the Australian Press Council's *General Statement of Principles* at ¶¶ 1 (fair and balanced), 3

(opportunity to respond), 6 (relevant facts not suppressed), 8 (no gratuitous emphasis on gender), (A-157-158).

Shepherd also violated the The Advertiser's, *Code of Conduct* at ¶¶ 1.1 (impartiality), 1.2 (fair and balanced), 1.3 (distinguish fact, conjecture, and opinion), 1.4 (contact relevant parties). (A-148).

Had Shepherd and McNeilage followed the ethics of their profession, the University would not have faced nation-wide media disapproval over the courses that resulted in canceling six of the original eight. The University, therefore, would have gone ahead with all the courses.

No allegation of special damages is required to make out a claim for tortious interference. The measure of damages "is the loss suffered by the plaintiff, including the opportunities for profits on business diverted from it." *Mandelblatt v. Devon Stores*, 132 A.D.2d 162, 168 (1st Dept. 1987)(quoting N.Y. Jur. *Interference* § 40). Appellant's loss was a maximum of $1250 from the University and lost opportunities for teaching the "Males and the Law" section at other colleges alleged at $5,000.

For both injurious falsehoods and tortious interference, New York law permits punitive damages where a wrong is aggravated by recklessness or willfulness, whether or not the wrong is directed against the public generally. *Roy Export Co. Establishment of Vaduz v. Columbia Broadcasting System, Inc.*, 672

F.2d 1095, 1106 (2d Cir. 1982), *cert. denied*, 459 U.S. 826. Here, appellant also requested punitive damages for a total of $50, 000 from injurious falsehoods and tortious interference.

C. The distinctions between libel *per se* of a minor public figure and injurious falsehood and tortious interference

The only action dealt with by the lower court was personal jurisdiction under CPLR 302(a)(1) for libel. The lower court ignored allegations of injurious falsehoods about the "Males and the Law" copyrighted business product of appellant and tortious interference with appellant's prospective contract with the University to teach the "Males and the Law" section.

The common law first recognized the tort of defamation in the 16th century as a means of allowing an individual to vindicate his good name and obtain redress for the harm caused by the publication of false and injurious remarks about him personally or professionally. *See New York Law of Torts* § 1:41.

Libel *per se*, the defamation action against Shepherd, includes the false written publication about a living person's professional reputation. *Id*. at 1:46. By contrast, the tort of trade libel or injurious falsehood consists of the publication of false matter derogatory to a person's business products and services that prevent others from purchasing his products and services. *Waste Distillation Tech., Inc. v. Blasland & Bouck Engineers, P.C.*, 136 A.D.2d 633, 634 (2nd Dept. 1988).

The elements for a libel *per se* action are (1) a false statement; (2) publication without privilege or authorization to a third party; (3) the statement was made with constitutional malice, which is knowing falsity or reckless disregard for the truth when a public figure, as here, is the plaintiff; and (4) the statement constitutes defamation *per se*. *See Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept. 1999). “Damages will … be presumed for statements that … tend to cause injury to a person’s profession or business.” *Geraci v. Probst*, 15 N.Y.3d 336, 344 (2010)(citation omitted). .

“Unlike defamation, injurious falsehood is entirely an economic tort; its damages are strictly pecuniary in nature,” *N.Y. Law of Torts* § 3.8, and must be specially pleaded, *Cromarty v. Prentice-Hall, Inc.*, 421 N.Y.S.2d 603, 604-605 (2nd Dept. 1979). Tortious interference is also an economic tort with pecuniary damages, *N.Y. Law of Torts* § 3.24, but its damages do not have to be specially pleaded; they are compensatory, which allows recovery of “the amount of loss sustained … including opportunities for profit,” *Duane Jones*, 306 N.Y. at 192. Neither of these two torts allow for presumed damages as in libel *per se*.

The Complaint provided the required specificity for each separate and distinct cause of action pleaded, CPLR 3013, but the lower court ignored the distinctions among the causes of action.

II. Personal jurisdiction

A. Respondents committed perjuries and intentionally omitted material facts in order hide their contacts with New York so as to trick the lower court into finding that personal jurisdiction did not exist.

Respondents filed a number of affidavits with their first motion to dismiss concerning personal jurisdiction. Research on the Internet caught them in a series of perjuries and material omissions regarding their contacts with New York. That led appellant to list some of respondents' perjuries and omissions in his affidavit in opposition to the motion to dismiss (001), to file an amended complaint, and subsequently to move for a trial on the issue of personal jurisdiction. Bolger and her clients submitted a second motion to dismiss (002) with affidavits that continued their efforts to defraud the lower court with perjurious statements and material omissions on the issue of personal jurisdiction.

A list of respondents' perjuries and material omissions from both sets of their affidavits are at A-100. The list illustrates respondents' falsehoods, prevarications, dissemblances, and cover-ups on the issue of personal jurisdiction. Each listed falsehood is followed with the actual truth if found on the Internet and discovery questions that the lower court prevented from being asked because it denied discovery, even though many of the answers were solely within respondents' knowledge.

For example, questions as to the full extent of respondents' readership in New York, how respondents interact with their New York subscribers, and what respondents offer and sell to their New York subscribers. Additionally for Advertiser, details of its relationship with News Corp, which is headquartered at 1211 Avenue of the Americas, New York, N.Y., and has turned its five Australian tabloids, including the The Advertiser, into a single political instrument, according to Robert Manne, *The political empire of the News Corp chairman [Murdoch]*, The Monthly, February 18, 2016. For Fairfax, which prevaricated about not having any correspondents in New York, the extent to which it uses freelance correspondents in New York to provide stories—correspondents such as Laura Parker who has been providing the Herald with stories since 2010 and Andrew Purcell whose principal client is the Herald, (A-159, A-161). If these and other correspondents receive their assignments from Australia, then they are employees, and Fairfax committed perjury about not having any employees in New York. (A-119, Coleman 1st Aff. at ¶¶ 5, 10; A-137, 2nd Aff. at ¶ 8). Also for Fairfax, questions about its partnership with the New York Times, (A-163), since it swore it did not have any "business ventures" in New York, (A-119, Coleman 1st Aff. at ¶ 9; A-137, 2nd Aff. at ¶ 7). For both Advertiser and Fairfax, questions concerning the money they make from New Yorkers by way of their websites and the activities of the companies they have partnered with to support their media

operations in New York may reveal that they pay New York State or New York City taxes.

The lower court refused to order discovery even though facts favoring jurisdiction clearly existed but could not then be fully stated by appellant. *See Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463, 467 (1974)(CPLR 3211(d) may be invoked when the plaintiff, in opposition to a motion to dismiss, has made a "sufficient start," showing that his assertion of jurisdiction is "not frivolous."). The *Peterson* Court explicitly rejected any requirement that the plaintiff make a "prima facie showing of jurisdiction" as a prerequisite to discovery. The Court stated that such a requirement

> may impose undue obstacles for a plaintiff, particularly one seeking to confer jurisdiction under the 'long-arm' statute …. In these cases especially, the jurisdictional issue is likely to be complex. Discovery is, therefore, desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits.

Id.

If a modicum of research on the Internet was able to expose respondents' perjuries and omissions in which attorney Bolger clearly played a role, then had the lower court allowed discovery on the issue of jurisdiction, it would surely have revealed additional contacts respondents have with New York.

B. Under CPLR 302(a)(3), the lower court had personal jurisdiction over all respondents for injurious falsehoods and tortious interference with prospective contractual relations.

CPLR 302(a)(3) provides jurisdiction

> over a non-domiciliary ... who in person or through an agent … commits a tortious act without the state causing injury to … property within the state … if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce ....

The threshold questions in applying CPLR 302(a)(3) are whether the allegations of the Complaint concern (1) a tortious act, (2) that caused injury within the State and (3) the causes of action arose from the tortious act. McKinney Commentaries, *C302:11 Tortious Injury in New York, In General; see LaMarca v. Pak–Mor Mfg. Co.,* 95 N.Y.2d 210, 214 (2000). "All types of tortious acts (other than defamation) fall within the scope of coverage." McKinney Commentaries at *C302:11*. Allegations of the actions constituting tortious conduct are sufficient; the plaintiff need not prove the tort in order to withstand a motion to dismiss for lack of jurisdiction. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 125 (2nd Cir. 2002).

"The very point of Section 302(a)(3) jurisdiction is its recognition of the possible division of the locus of a tortious act from the locus of injury it causes." *Rothstein v. Carriere*, 41 F.Supp 2d 381, 385 (E.D.N.Y. 1999). Here respondents

committed tortious acts without the State causing property injury to a resident within the State. Appellant's business product, the copyrighted "Males and the Law," and his business expectancy in a contract with the University are located in New York, as is his law practice.

By analogy with *Penguin Group (USA), Inc. v. American Buddah*, 16 N.Y. 3d 295 (2011), the situs of the injurious falsehood injury is the site of the copyright owner. "[T]he injury to a New York copyright holder, while difficult to quantify, is not as remote as a purely indirect financial loss due to the broad spectrum of rights accorded by copyright law." *Id*. at 306. "This, then, is not a case of mere 'resultant damages' in New York." *Rothstein*, 41 F. Supp. 2d at 385 (citation omitted).

In *Penguin*, injury occurred in New York when a New York copyright holder's interest in his bundle of rights was diminished by out-of-state defendants uploading his work to the Internet without permission. The Court of Appeals held that the site of injury was in New York where the copyright owner was headquartered, not where the material was uploaded. *Penguin* at 307.

Here, the site of injury is the location of appellant's business—New York. Respondents uploaded in Australia their disparaging statements about appellant's business product, the copyrighted compilation "Males and the Law," which diminished his business's interest in its bundle of rights in the work, resulting in a

loss. The injury, therefore, occurred in New York while the injurious falsehood tort occurred in Australia. The first effect of the tort's damage was to the business's intangible rights in "Males and the Law," and the situs of those rights is New York. *See DiStefano v. Carozzi North America, Inc.*, 286 F.3d 81, 84-85 (2nd Cir. 2001).

As for respondents' tortious interference with a prospective contract to teach from New York via the Internet the "Males and the Law" section, "the principal underlying the rule is that he who has a reasonable expectancy of contract has a property right …." *Hardy* 36 N.Y.S.2d at 826. Appellant's expectancy of contract was a property right of his that would have required his performance in New York, and the place where a cause of action for breach of contract arises is almost universally the place of performance, *Richard v. Am. Union Bank*, 241 N.Y. 163, 166-167 (1925). Therefore, the situs for the expectancy of contract property right was New York and damage to that right was the first effect of respondents' tortious interference.

"[T]he 'arising from' requirement of [CPLR 302(a)(3)] is satisfied if the cause of action arises from defendant's out-of-state tortious act." McKinney Commentaries at *C302:12. Subset (i)*. The injurious falsehoods were the false factual statements and false factual connotations by the first two articles about the "Males and the Law" section, and those statements interfered with appellant's

prospective contract to teach that section. Therefore, those two causes of action arose from respondents' acts of writing, editing, and uploading the two articles in Australia.

CPLR 302(a)(3)(i)

Since the three threshold questions for CPLR 302(a)(3) are satisfied, the next inquiry is whether under subset (i) anyone of four alternative forms of ongoing New York activity was engaged in by respondents:

1. Regularly does business within New York requires more than a one shot business transaction but less than "doing business" of CPLR 301, N.Y. Jud. Conf., *Twelfth Ann. Rep.* 339, 343 (1967)). As argued below under CPLR 302(a)(1) "transaction of business," respondents "regularly do business" in New York.

2. Advertiser and Fairfax "regularly solicit business" in New York by maintaining their newspapers' websites from which they solicit, advertise, and sell their online newspapers along with various other products and services. Where a defendant regularly solicited business through a trade magazine, the court held that "alone would warrant jurisdiction under CPLR 302(a)(3)(i)." *Newman v. Charles S. Nathan, Inc.*, 55 Misc.2d 368, 370 (Sup.Ct. Kings Cnty. 1967). The Advertiser's website has been in existence for at least 8 years, and the Herald's for 10 years. Whois.domaintools.com.

Under CPLR 302(a)(3)(i), the combination of regular solicitation to sell products in New York plus a tortious injury in New York, will suffice for personal jurisdiction even if there is no relationship between the solicitation and the injury. *See* Joseph McLaughlin, *Practice Commentary to CPLR* § C302:21 at pp. 109-10 (McKinney's 1990).

3. The extent to which Advertiser and Fairfax engaged in any "other persistent course of conduct" within New York required discovery, but the lower court denied such.

4. Respondents derive substantial revenue from goods used or consumed or services rendered within New York. Gross and net profit are looked at under CPLR 302(a)(3)(i), but whether the sums involved here are "substantial" required a factual inquiry, *see Allen v. Auto Specialties Mfg. Co.*, 45 A.D.2d 331, 333 (3rd Dept. 1974), which the lower court prohibited.

Substantial revenue can be satisfied by respondents' New York revenue being a sizable percentage of respondents' overall revenue, or, alternatively, a large dollar amount of revenue being generated in New York. *See, e.g., Tonns v. Spiegel's*, 90 A.D.2d 548, 549 (2nd Dept. 1982)(4-7% sales in New York, generating between $41,000-$113,000); *Evans v. Planned Parenthood of Broome County, Inc.*, 43 A.D.2d 996, 997 (3rd Dept. 1994)(sales in New York over $4 million was substantial); *Allen v. Canadian General Electric Co.*, 65 A.D.2d 39, 42

(3rd Dept. 1978), *affirmed*, 50 N.Y.2d 935 (1980)(1% of sales in New York, generating nine million dollars).

The causes of action sued on need not be related to any of the above four New York activities. Requiring those activities is designed to assure only that the defendant's overall contact with New York is substantial enough to make it reasonable to subject the defendant to jurisdiction here." Siegel, *N.Y. Practice.* § 88 p.165 (5th ed.). Unlike 302(a)(1), "CPLR 302(a)(3)(i) does not require any connection between defendants' regular activities and the particular tortious act or the cause of action arising from it." *Hearst Corp. v. Goldberger*, 1997 WL 97097 *14 (S.D.N.Y. 1997)(citing Weinstein, *New York Civil Practice:* CPLR § 302.14 at 3-156 to 3-157 (1996)).

CPLR 302(a)(3)(ii)

CPLR 302(a)(3)(ii) requires forseeability or a reasonable expectation by respondents that their tortious acts could have consequences in New York, and that they are earning substantial revenue from interstate or international commerce. Foreseeability ties the case to New York and satisfies due process. *Ingraham v. Carroll*, 90 N.Y.2d 592, 598-599 (1997). The causes of action are not required to arise out of a defendant's foreseeability, just the out-of-state tort. *See id.*

The forseeability requirement is a general one, since the defendant does not have to foresee the specific injury-producing event in New York caused by its

product. *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d at 215. It is sufficient that a defendant knew its product was likely to end up in New York. *Id.*

New York courts have found a reasonable expectation of direct New York consequences in the following fact situations:

- consumers throughout the U.S. and in New York could purchase a defendant's goods online or from a non-state dealer, *McGlone v. Thermotex, Inc.*, 740 F.Supp.2d 381, 384 (E.D.N.Y. 2010);
- defendant ran a website soliciting New Yorkers, *Boris v. Bock Water Heaters, Inc.*, 3 Misc.3d 835, 839 (Sup.Ct. Suffolk Cnty. 2004);
- defendant sells its products worldwide with direct and indirect sales into New York, *Reynolds v. Aircraft Leasing, Inc.*, 194 Misc.2d 550, 555 (Sup.Ct. Queens Cnty. 2002);
- manufacturer used exclusive distributor covering all of the U.S., *Adams v. Bodum Inc.*, 208 A.D.2d 450 (1st Dept. 1994); and
- defendant shipped its product into New York State, *Tonns*, 90 A.D.2d at 549; *Prentice v. Demag Material Handling, Ltd.*, 80 A.D.2d 741, 742 (4th Dept. 1981).

Both newspapers' websites offer for sale their respective online newspapers throughout the U.S. and New York. (A-130, Cameron 2nd Aff. at ¶ 6; A-137, Coleman 2nd Aff. at ¶ 6). So when Shepherd and McNeilage submitted their

articles for publication and their editors approved them, they and the editors knew the articles would be viewable in New York, and all of them had reason to expect that any defects in statements or connotations concerning the business product of the two New Yorkers specifically named in the articles would have consequences in New York.

Additionally, Fairfax's partnership with PressReader, which distributes printed versions of the Herald in the U.S., gave Fairfax a reasonable expectation of consequences in New York from McNeilage's article, since one of its officers admitted to having knowledge that distribution of its printed newspaper was being made in the United States. (A-137, Coleman 2nd Aff. at ¶ 5). The same may be true for Fairfax as a result of its business relationships with News Alert LLC and World Media, Inc., and for Advertiser because of News Corp Australia (sole-owner of Advertiser) relationship with Digital First Media in New York. (A-168, A-170, A-166). The lower court's denial of discovery prevented the finding of such facts.

The second clause of CPLR 302(a)(3)(ii), the "commerce" prong, requires that respondents derived substantial revenue from interstate or international commerce, even though that commerce may not include New York. Siegel, *New York Practice*, § 88 p. 166 (5th ed.). This requirement is intended to cover only defendants with "extensive business activities on an interstate or international

level" not "business operations [that] are of a local character," in order to assure that a defendant was economically big enough to be able to defend a New York lawsuit without undue hardship. *Ingraham*, 90 N.Y.2d at 599.

Determining whether the revenue from interstate or international commerce is "substantial," can be based on either percentages or raw dollar amounts. *Allen*, 65 A.D.2d at 43; *Torrioni v. Unisul*, Inc., 176 A.D.2d 623, 624 (1st Dept. 1991)(sales via 800 telephone number sufficient). Making that determination, however, required a factual inquiry, which the lower court denied. This Court, however, can take judicial notice that both Advertiser, as part of the Murdoch Empire, and Fairfax clearly conduct extensive business activities internationally and are able to defend this suit in New York without undue hardship.

The "commerce" prong of clause (ii) requires no direct contact with New York State; that is, defendant need not make substantial revenue in New York. *Ingraham*, 90 N.Y.2d at 598. Additionally, "[i]t must be noted that there need be no connection between the tortious act and the deriving of substantial revenues from interstate or international commerce"; that is, the causes of action are not required to arise out of a defendant's "bigness." *Gonzales v. Harris Calorific Co.*, 64 Misc.2d 287, 291 (Sup.Ct., Queens Cnty. 1970).

C. Under CPLR 302(a)(1), the lower court had personal jurisdiction over all respondents because they contracted to supply goods or services in the state or transacted business within the state.

CPLR 302(a)(1) provides jurisdiction "over any non-domiciliary … who in person or through an agent … transacts any business within the state … or contracts … to supply goods or services in the state …" when the cause of action arises from those acts. CPLR 302(a)(1) permits personal jurisdiction over all respondents for injurious falsehoods, tortious interference, and provides jurisdiction over Shepherd for libel.

Contracts anywhere to supply goods or services in the state.

The lower court's analysis of whether respondents' contacts with New York were sufficient for jurisdiction relied solely on whether respondents transacted business in the State but ignored whether under CPLR 302(a)(1) they "contract[ed] anywhere to supply goods or services in the state."

In *Island Wholesale Wood Supplies, Inc. v. Blanchard Industries, Inc.*, 101 A.D.2d 878 (2nd Dept. 1984), the court examined the language of "contracts anywhere" and found that it was to be given a broad construction. *Id*. at 880. The clause "deems the shipment of goods into the State or the performance of services in the State to be an act by which a nondomiciliary avails itself of the privilege of conducting activities in the State." *Id*. at 879 (citations omitted). "Every time a New Yorker orders something by mail [internet] and the seller at the other end

sends it on, he has contracted 'to supply goods' in the state and on the face of CPLR 302(a)(1) that would mean jurisdiction." Siegel, *N.Y. Practice* § 86A p. 160 (5th ed.). Under this clause, there is no requirement that a plaintiff be a party to whom the goods or services were to be delivered, or that a plaintiff be in privity with the supplier. Weinstein, *New York Civil Practice*, ¶ 302.10.

When injury within New York results from those goods or services, then the creator of those goods or provider of those services is within the jurisdiction of New York. *See Tonns*, 90 A.D.2d at 549-550.

Advertiser and Fairfax contracting to supply goods and services in New York.

According to the Australian Community of New York, "many" of its 20,000 members living in the metropolitan area subscribe for a fee to The Advertiser and Fairfax newspaper websites. (A-147, smh.com.au is the Herald and adelaidenow.com.au is the The Advertiser). Such subscriptions are contracts that supply goods—news stories via online newspapers to New Yorkers. Advertiser's online paper also contracts to sell readers any of the photographs that appear in it, starting at around $25. www.adelaidenow.com.au at Photo Sales. How many of these contracts and other contracts supplying goods or services to New Yorkers by both Advertiser and Fairfax are unknown to appellant because the lower court denied discovery.

Advertiser does have a contract with Akamai Technologies, 352 Park Avenue South #8, New York, N.Y., and Fairfax with Amazon Web Services, Seattle, Washington, to create and maintain their newspapers' websites in order to provide online access for New Yorkers and others in the U.S. (http://whois.ausregistry.com.au/whois/whois_local.jsp?tab=0, enter newspaper URL, then click on Name Servers). The specifics of those contracts are unknown to appellant because the lower court denied discovery.

Shepherd and McNeilage contracting to supply goods and services in New York.

Upon information and belief, Shepherd and McNeilage's employment contracts with their respective newspapers contain provisions in which their articles will be distributed in New York via their newspapers' websites or otherwise. Therefore, both have contracted to supply goods—their articles, and services—their reporting, to New Yorkers. The facts concerning those contracts have not been revealed by respondents because the lower court denied discovery.

All of the causes of action against all the respondents, including libel against Shepherd, arose from the articles at issue here that were supplied into New York as a result of various contracts; therefore, jurisdiction is satisfied under the second clause of CPLR 302(a)(1).

Transacts any business within the state and arising from those transactions.

Respondents' interactions with and activities in New York, along with their

nature and quality, are to be considered in their totality in order to determine whether a court has personal jurisdiction over them. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 457-458 (1965)(still precedential for whether circumstances constitute transaction of business); *Farkas v. Farkas*, 36 A.D.3d 852, 853 (2nd Dept. 2007)).

The long-arm category for "transaction of business" is applicable when a defendant has engaged in one business transaction in New York and a plaintiff's claim arises out of that particular transaction. The transaction, at a minimum, must be a purposeful act by which a defendant avails itself of the benefits and protections of New York's laws. *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007)(citations omitted). The Court of Appeals has eschewed the need for actual physical presence at the time of a transaction, noting that "in this day of instant long-range communications, one can engage in extensive purposeful activity here without ever actually setting foot in the State." *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 17 (1970). It is well settled that "long-arm jurisdiction [lies] over commercial actors … using electronic and telephonic means to project themselves into New York to conduct business transactions." *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65, 71 (2006), *cert. denied*, 549 U.S. 1095. Typical business transactions include sales, soliciting customers, contracting,

providing services, and shipping products into the state. *Halas v. Dick's Sporting Goods*, 105 A.D.3d 1411, 1411 (4th Dept. 2013).

In *Realuyo v. Abrille*, 93 F.App'x 297, 299 (2nd Cir. 2004), the court affirmed the decision in *Realuyo v. Villa Abrille*, 2003 WL 21537754, (S.D.N.Y. July 8, 2003), "for substantially the same reasons put forth by the district court." The district court held that "the uses of the internet where the 'defendant makes information available on what is essentially a passive website' and the defendant's use of the website is akin to taking out an advertisement in a newspaper with national circulation" did not create personal jurisdiction over a defendant under CPLR 302(a)(1). *Realuyo*, 2003 WL 21537754 at *6 (quoting *Citigroup Inc. v. City Holding Co.*, 97 F.Supp.2d 549, 565 (S.D.N.Y.2000)). However, "where the defendant 'clearly does business over the internet, and where it knowingly and repeatedly transmits computer files to customers in other states' …. can be the basis for specific jurisdiction under § 302(a)(1) for a claim arising from that business activity." *Realuyo* at *6 (quoting *Citigroup*). The *Citigroup* case involved a website permitting New Yorkers to apply for loans and communicate with defendant's employees; therefore, it was "unqualifiedly commercial in nature," rising to the level of transacting business under CPLR 302(a)(1)). *Citigroup*, 97 F.Supp.2d at 565.

Modern methods of business transactions conduct commerce over the Internet, and "where a corporation maintains a 'highly interactive' website in an effort to facilitate such commerce, personal jurisdiction has readily been found to exist." *Baggs v. Little League Baseball, Inc.*, 17 Misc.3d 212, 215 (Sup.Ct. Richmond Cnty. 2007). Jurisdiction exists where a website "provides information, permits access to [email] communication, describes the goods or services offered, downloads a printed order form, or allows online sales with the use of a credit card, and sales are, in fact, made ... in this manner in the forum state." *Grimaldi v. Guinn*, 72 A.D.3d 37, 50 (2nd Dept. 2010). A website conducts business over the Internet when it sells goods or services through its website and charges membership fees. *Cf. Capitol Records, LLC v. VideoEgg, Inc.*, 611 F.Supp.2d 349, 358 (S.D.N.Y. 2009). In *Brown v. Web.com Grp., Inc.*, 57 F.Supp.3d 345, 357-58 (S.D.N.Y. 2014), defendant marketed services to and entered into transactions with New York-based customers via its website, and the cause of action arose out of those activities, so personal jurisdiction existed under CPLR 302(a)(1).

Sales activity conducted by means of the Internet served as transacting business for long-arm jurisdiction in *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158 (2nd Cir. 2010). The defendant Queen Bee operated a website which offered handbags for sale to New Yorkers, permitted New Yorkers to purchase

such bags, and facilitated the shipment of those bags into New York. *Id*. at 166. Queen Bee engaged in fifty-two separate transactions in which merchandise was shipped into New York. *Id*. at 166. Queen Bee, therefore, had extensive business contacts with New York customers, and those contacts demonstrated Queen Bee's purposeful availment of the New York forum for business activity to which the cause of action related. *Id*. at 167. Websites, such as in *Chloé*, where consumers can access the site from anywhere and purchase products are commercial and courts will generally confer jurisdiction over the defendant based on the website alone. *See, e.g., Energy Brands, Inc. v. Spiritual Brands, Inc.*, 571 F.Supp.2d 458, 469 (S.D.N.Y. 2008).

In *M. ShankenCommc'ns, Inc. v. Cigar500.com*, 2008 WL 2696168, at *5 (S.D.N.Y. July 7, 2008), the court found CPLR 302(a)(1) jurisdiction over defendants because the website was primarily used to carry out commercial transactions; even though the website did not target the New York market, a significant portion of the website's revenue was derived from New York consumers. Here, the amount of revenue raised from New Yorkers via the newspapers' websites is unknown because the lower court prohibited discovery.

Advertiser and Fairfax activities under CPLR 302(a)(1)

Every day of the year, both Advertiser and Fairfax offer/sell their newspapers over the Internet and, on information and belief, through agents to

residents of New York. For example, the "Australian Community" has a mission to connect Australians living in New York through social, professional and charitable initiatives. (www.aucommunity.org). Many of its members in New York subscribe electronically to the The Advertiser and the Herald, which provide articles pertinent to that community in New York. (A-147). Advertiser uses Akamai Technologies in New York City as a provider of website services.

The Advertiser and Herald websites exist in order to serve and expand their readership, solicit business, offer for sale, sell, and deliver various goods and services to New Yorkers as well as others. (www.adelaidenow.com.au; www.smh.com.au). The number of transactions involving New Yorkers, however, is within respondents' possession. The websites also facilitate the transmittal of information among respondents and their New York subscribers, among their readers, and between other companies and their readers.

Fairfax also sells the print edition of the Herald through PressReader in the United States, (A-137, Coleman 2nd Aff. at ¶ 5), which creates a reasonable expectation that the print edition also enters New York. *See Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 241 (2nd Cir 1999). Whether PressReader qualifies as a Fairfax agent for jurisdictional purposes does not turn on legalistic distinctions between being an agent or independent contractor. It is sufficient that the representative acted "for the benefit of and with the knowledge and consent of

[Fairfax] and that [Fairfax] exercised some control over [PressReader] in the matter." *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988)(citations omitted).

Fairfax has admitted it has a contract with PressReader to distribute copies of the Herald in the United States, and, according to the media "PressReader has developed major partnerships in Australia … [with] Fairfax Media [and] News Corp … [that gives] publishers the ability to target audiences … [and] allow publishers to use [its] technology and adapt it to their market." (A-164). Partnership and contract infer "some control," but the lower court refused discovery to determine the degree of control Fairfax or News Corp has over PressReader.

Interestingly, PressReader's partnership concerning the Australian newspaper The Advertiser is not with News Corp Australia, which owns Advertiser which runs The Advertiser, but with News Corp in New York City. News Corp on Sixth Avenue is therefore engaging in business transactions on behalf of Advertiser in Australia.

Further, News Corp lists "News Corp Australia (which includes ... its subsidiaries)" as part of News Corp's "News and Information Services segment." *News Corp, 10-K Filing*, August 14, 2014. Advertiser is a wholly-owned subsidiary of News Corp Australia (A-130, Cameron 2nd Aff. at ¶ 4); therefore,

Advertiser is included in News Corp's "News and Information Services segment." "Segment" means an identifiable part of an organization. Horngren, Foster, Datar, *Cost Accounting* at 549, Prentice Hall, 8th ed. Public companies, such as News Corp, publish income and expense data on the various departments or segments of their operations so that financial analysts can determine the profitability of those departments. Shillinglaw, McGahran, *Accounting* at 534-535, Irwin, Inc. 9th ed. Advertiser, therefore, is treated as an integral section of News Corp, thereby making it susceptible to personal jurisdiction in New York. Additionally, Bloomberg L.P. lists the Chairman for Advertiser as Brian Leonard Sallis with a corporate address of 1211 Avenue of the Americas, N.Y., N.Y—News Corp's headquarters. (A-172).

Since Advertiser is treated as a department of News Corp and its chairman's business address is in New York, it is reasonable to infer that Advertiser uses New York financial institutions to help fund its business operations, which would amount to "purposeful availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States." *Licci v. Lebanese Canadian Bank*, 20 N.Y.3d 327, 339 (2012). Confirmation would require discovery, but the lower court denied such.

In *Chestnut Ridge Air, Ltd. v. 1260269 Ontario Inc.*, 13 Misc.3d 807 (Sup.Ct. N.Y. Cnty. 2006), the Court found that a non-domiciliary using its website forums to (1) enable prospective customers to post questions directly to the non-domiciliary, (2) to allow viewers to offer services to other viewers of the website and (3) to monitor events relevant to a customer "created a virtual community in New York that meets all its clients' needs," which substantially supported personal jurisdiction. *Id.* at 810. The Advertiser and Herald do the same.

The Advertiser allows its readers to personalize and advertise on Mosthtix, an entertainment forum; to access a wide range of electronic entertainment that provides for a community of users; to communicate via email directly with its staff; and to access investment advice and research. (www.adelaidenow.com.au).

The Herald provides a forum and community for online Internet romance. It also creates a community through its "Member Center" where readers can "sign up for newsletters on a range of topics that interest [them], [r]eceive customized alerts by email or SMS . . . , [g]et access to exclusive offers and competitions, [s]et up an investment portfolio," and communicate via email directly with its staff. (www.smh.com.au at Member Center).

Advertiser and Fairfax's highly interactive newspaper websites are basically an effort to facilitate their commerce in New York and elsewhere. Personal

jurisdiction has readily been found to exist in such a situation. *See, e.g. Uebler v. Boss Media, AB*, 363 F.Supp.2d 499, 505 (E.D.N.Y. 2005)(citing various cases concerning interactive websites).

Advertiser and Fairfax cannot complain that personal jurisdiction based on their newspaper websites would unfairly subject them to jurisdiction everywhere that their websites reach.

> This argument is unavailing, for technological advances enable [respondents] to transact business in every state via an interactive website, where those in the state can communicate directly via its internet route back to [respondents]. With that ability, however, comes the responsibility for actionable conduct. [Respondents'] presence in New York, by way of an interactive website, is more closely akin to actual physical presence in New York than it is to running an advertisement in a national magazine. If [respondents] wish[] to operate an interactive website accessible in New York, there is no inequity in subjecting [respondents] to personal jurisdiction here. If [respondents] do[] not want [their] website[s] to subject [them] to personal jurisdiction here, [they are] free to set up a "passive" website that does not enable [respondents] to transact business in New York. Having decided to create an interactive website that enables [each] to transact business in New York, [respondents] [are] subject to personal jurisdiction here under CPLR 302(a)(1) because the cause of action for infringement arises directly out of the transaction of business, to wit, the use of … website[s].

Thomas Pub. Co. v. Industrial Quick Search, Inc., 237 F.Supp.2d 489, 492 (S.D.N.Y. 2002).

Advertiser and Fairfax's contacts with the State's citizens are not fortuitous because they consciously decided to process applications from New York for subscribers to their online newspapers, goods, and services, such as those

applications from the Australian Community in New York. Both have projected themselves into the State where they actively compete with other media outlets for New York readers. As such, the lower court wrongly stated in reliance on respondents' perjurious affidavits that the articles were only "for a non-New York audience," (A-15, Order at 9), even though the articles highlighted by name the business activities of two New Yorkers.

The lower court also wrongly concluded "there is no authority for subjecting defendants to jurisdiction in New York based on articles <u>published outside</u> New York …." (A-15, Order at 9, emphasis added). The articles were not "published outside" New York because the act of making a document available on the Internet constitutes a publication. *See Firth v. State*, 98 N.Y.2d 365, 370 (2002)(State making document available on its website constituted publication). "Communications accessible over a public Website resemble those contained in traditional mass media, only on a far grander scale." *Id.*

> The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services. From the publisher's point of view, [the World Wide Web] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers.

Reno v. American Civ. Liberties Union, 521 U.S. 844, 853 (1997).

Advertiser and Fairfax as agents for Shepherd and McNeilage in New York

This Court's jurisdiction over Advertiser can be imputed to Shepherd, and its jurisdiction over Fairfax imputed to McNeilage under an agency theory where Advertiser and Fairfax are respectively considered Shepherd and McNeilage's agents in New York.

In *Chloé*, an employer's sales activity was imputed to its employee under New York's liberal jurisdictional agency doctrine. *Id*. 616 F.3d at 165, 167-168. Agency requires that Shepherd and McNeilage exercised "some control" over their employer's activity in the particular matter, *see Kreutter*, 71 N.Y.2d at 467 (citations omitted), and that they were primary actors in orchestrating the allegedly tortious conduct, *Karabu Corp. v. Gitner*, 16 F.Supp.2d 319, 323 (S.D.N.Y.1998)(citing *Kreutter*, 71 N.Y.2d at 470). Here, Shepherd as researcher and reporter gathered the information, did the interviews, authored four pieces, and, as editor, approved their publication. Without Shepherd's efforts, The Advertiser articles at issue in this case would not have existed to cause the harm they did and are doing. McNeilage researched, conducted interviews, and authored one article for the Herald. Without her efforts the Herald article at issue in this case would not have existed to cause the harm it did and is doing.

Arising from under CPLR 302(a)(1)

The publications in New York via The Advertiser website of Shepherd's articles are related to all the causes of action against Advertiser and Shepherd, since it is those articles and their public availability that form the bases for the causes of action. The publication in New York via the Herald website and the alleged distribution of printed copies of the Herald in New York of McNeilage's article is related to all the causes of action against Fairfax and McNeilage, since it is those articles and their public availability that form the bases for the causes of action.

"It is sufficient if the cause of action is related to and grows out of the transaction of business in New York." *Legros v. Irving*, 38 A.D.2d 53, 56 (1st Dept.1971), *appeal dismissed*, 30 N.Y.2d 653 (1972). The arising from prong of section 302(a)(1) does not require a causal link between a defendant's New York business activity and a plaintiff's injury. *Licci*, 20 N.Y.3d at 339. Arising from "is relatively permissive" and requires, "at a minimum, a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former." *Id.* "[It] does not require that every element of the cause of action pleaded must be related to the New York contacts; rather, where at least one element arises from the New York contacts, the relationship between the business

transaction and the claim asserted supports specific jurisdiction under the statute." *Id.* at 341.

As argued above, the injurious falsehood element of publication was carried out in New York on the newspapers' websites, and appellant's copyright injury occurred in New York. Appellant's property right in a prospective contract was also injured in New York.

In *Singer v. Walker*, 21 A.D.2d 285, 290 (1st Dept. 1964) *affirmed* 15 N.Y.2d 443 (1965), defendant solicited business in New York and shipped substantial quantities of a hammer into New York where plaintiff's aunt bought one and gave it to plaintiff who was injured while using it in Connecticut. Jurisdiction was upheld as arising out of defendant's transaction of business in New York. Both Advertiser and Fairfax newspapers solicit subscribers in New York, ship a substantial number of online newspapers into the State, and appellant's injury resulted from the publication of articles by those newspapers.

Additionally, Advertiser and Fairfax clearly have a financial interest in New Yorkers purchasing their online newspapers, products, and services and have taken actions in New York with an eye toward promoting those sales. *See Gleason Works v. Klingelnberg-Oerlikon Geartec Vertriebs-GmbH*, 58 F.Supp.2d 47, 51 (W.D.N.Y. 1999).

Arising from under agency for CPLR 302(a)(1)

The causes of action do not have to arise only out of respondents' activities, but can arise out of their agents' activities in New York. CPLR 302(a).

News Corp Australia, the sole owner of Advertiser, has a partnership with Digital First Media of New York concerning Advertiser websites, (A-166); Fairfax and News Corp Australia have major partnerships with PressReader, which expands print and online circulation in international markets, (A-164-165); Fairfax has a joint venture with the New York company News Alert LLC to provide news to the U.S. market (A-169); and Fairfax has a "representative," World Media Inc., in New York City for selling advertisements in its Sunday newspaper edition, which indicates New Yorkers' interest in the Herald, (A-170-171).

The specifics of Advertiser and Fairfax's partnerships, joint ventures, and contracts with these companies have not been revealed due to the lower court's denial of discovery, but, on information and belief, they are arrangements to provide and facilitate the reporting of stories by their newspapers into the New York market, such as the five articles at issue in this case from which the causes of action arise.

On information and belief, the above companies are agents of Advertiser or Fairfax because they acted in New York for the benefit of, with the knowledge and consent of, and under some control of Advertiser or Fairfax. *Kreutter*, 71 N.Y.2d

at 467; *New Media Holding Co. LLC v. Kagalovsky*, 97 A.D.3d 463, 464 (1st Dept. 2012). Under New York law, "where there is joint control of a business enterprise—similar to that existing in a partnership or joint venture" there is enough control to establish *prima facie* the element of agency so as to satisfy long-arm jurisdiction. *CutCo Industries, Inc. v. Naughton*, 806 F.2d 361, 366 (2nd Cir. 1986). Therefore, where any of the above agent-companies distributed any of the articles, then jurisdiction over Advertiser or Fairfax exists.

Further, on information and belief, Advertiser and Fairfax contracted with some or all of those agent-companies to distribute articles, including the ones by Shepherd and McNeilage, in New York, so under the "contracts anywhere" clause of CPLR 302(a)(1), jurisdiction also exists.

The problem, of course, is that Advertiser and Fairfax are in possession of the information concerning their agents and their agents' activities in New York, which was denied appellant because the lower court prohibited discovery.

Shepherd transacting business in New York and arising from for injurious falsehoods, tortious interference, and libel per se.

Where the information used to commit a tort comes from business activity in New York, it is sufficient for personal jurisdiction under CPLR 301(a)(1). *See Southridge Capital Management, LLC v. Lowry*, 188 F.Supp.2d 388, 398 (S.D.N.Y. 2002). Shepherd admits that her business responsibilities included researching, sourcing, and writing the four articles, so her activities concerning

New York were business activities. (A-133-132, Shepherd 2nd Aff. at ¶¶ 3, 4). All the causes of action against Shepherd arose from her New York business activities because those activities substantially contributed to the researching, sourcing, and writing of her articles on which the causes of action for her injurious falsehoods, tortious interference, and libel *per se* are based. *See Davis v. Costa-Gavras*, 595 F.Supp. 982, 986 (S.D.N.Y. 1984).

The lower court relied on *SPCA of Upstate New York, Inc. v. American Working Collie Ass'n*, 18 N.Y.3d 400, 405 (2012)(citing *Best Van Lines, Inc. v Walker*, 490 F3d 239, 248 (2d Cir 2007), to construe the "transacts any business" requirement "more narrowly in defamation cases than … in the context of other sorts of litigation." (A-11, Order at 5). The lower court, however, failed to take into account because of respondents' perjurious affidavits that "[w]here purposeful transactions of business have taken place in New York, it may not be said that subjecting the defendant to this State's jurisdiction is an unnecessary inhibition on freedom of speech or the press." *SPCA* at 404 (quoting *Legros*, 38 A.D.2d at 55-56). When a non-domiciliary engages in purposeful business transactions in New York and makes defamatory statements based on those transactions that she knows will be published in New York via her employer's website, New York courts may exercise jurisdiction over her for defamation. *See GTP Leisure Products, Inc. v. B-W Footwear Co., Inc.*, 55 A.D.2d 1009, 1010 (4th Dept. 1977). Therefore, "long-

arm" jurisdiction for libel requires allegations that a defendant transacted purposeful business activity bearing a substantial relationship to the subject matter of the lawsuit in this State. *Cf. Pontarelli v. Shapero*, 231 A.D.2d 407, 410 (1st Dept. 1996)(citing *Kreutter*, 71 N.Y.2d at 467).

As political editor for The Advertiser, Shepherd knew her articles would be circulated via the Internet in New York. (A-133, Shepherd 2nd Aff. at ¶¶ 5, 6, 7, 8). The headline for Shepherd's last article specifically stated appellant by name and "New York County." (A-89). Presumably, such was intended to attract New York readers. Shepherd engaged in business activities involving New York that included a telephone call to appellant's number over which she interviewed him and six emails in a running conversation with Prof. Miles Groth over a two month period, (A-174-181). The lower court held that "Shepherd's emails … could have been retrieved by their recipients wherever they may have been"; therefore, they did not count as adding to the totality of Shepherd's contacts with New York. (A-13, Order at 7). The six emails to Prof. Groth, however, were addressed to mgroth@wagner.edu. The URL "wagner.edu" is located on a server at Wagner College in Staten Island, New York, according to Whois. So those emails are contacts with New York.[3] Shepherd swore she did not contact "anyone" else in New York, (A-134, Shepherd 2nd Aff. at ¶ 15), but "anyone" does not include the

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[3] Security professionals and law enforcement agents use Whois to identify individual and business locations.

websites she contacted that are on New York servers, and that she continues to hide. The very content of Shepherd's articles indicate she contacted numerous such websites in her research, but the full extent and number of those contacts have not been revealed because the lower court denied of discovery.

The lower court wrongly relied on *Trachtenberg v. Failedmessiah.com*, 43 F.Supp.3d 198 (E.D.N.Y. 2014), (A-12, A-14, Order at 6, 8), and *SPCA of Upstate New York, Inc.*, 18 N.Y.3d at 405, (A-14, Order at 8), to find Shepherd did not transact business with regard to libel. The *Trachtenberg* defendant's only contact with New York was accessing a State government website from out of state. *Id.* at 204. The *SPCA* defendant's only contacts with New York were <u>not</u> "to conduct research, gather information or otherwise generate material to publish on [defendant's] Website." Here, all of Shepherd's contacts were for gathering and sourcing information for her articles to be posted on <u>The Advertiser</u> website.

Additionally relied on by the lower court to deny jurisdiction over Shepherd's libel was *Legros*, 38 A.D.2d 53, which the lower court wrongly distinguished from Shepherd's activities. (A-13, Order at 7). *Legros* held that "There is a clear distinction between a situation where the only act which occurred in New York was the mere utterance of the libelous material and on the other hand, a situation where purposeful business transactions have taken place in New York giving rise to the cause of action." *Id*. at 55.

In *Legros* a book libeling the plaintiff was published in New York, *id*. at 56, as were Shepherd's libelous articles via The Advertiser website. The book in *Legros* was partly researched in New York, *id*. at 56, as were Shepherd's articles by contacting on multiple occasions two New York residents, reviewing appellant's cases in the New York Supreme, U.S. Southern District, and the U.S. Second Circuit courts, accessing New York centered websites, and other activities that are solely within her knowledge, but unknown to appellant because the lower court denied discovery. While the contract for the book in *Legros* was executed in New York, Advertiser has thousands of contracts with subscribers in the New York Australian community and other contracts with agents in New York, all of which facilitated the publishing of Shepherd's libelous articles.

Shepherd's libel *per se* statements were published to third parties in New York and were about a New York resident who suffered damages from such. Each is an element of libel, therefore, under *Licci*, 20 N.Y.3d at 341, the relationship between her New York contacts and the claim supports specific jurisdiction under CPLR 302(a)(1).

D. Under CPLR 301, Advertiser and Fairfax were "doing business" in New York through their agent—the Internet.

Under CPLR 301, Advertiser and Fairfax were "doing business" in New York by continuously shipping their online newspapers into the State to the Australian Community, as well as other New Yorkers, and soliciting subscribers

from New York to purchase their newspapers via the modern method of doing business—the Internet. In *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259 (1917), Judge Cardozo relied on *International Harvester Co. v. Kentucky*, 234 U. S. 579 (1914), to find that the defendants were doing business in New York because "there has been a steady course of shipments from one state into the other. The business done in New York may be interstate business, but business it surely is." *Tauza* at 266.

In 1917, the place of today's Internet was taken by a local office with salesmen to "systematically and regularly solicit[] and obtain[] orders which result in continuous shipments" from the non-domiciliary company into New York. *Tauza* at 265. Advertiser and Fairfax, as with many businesses today, rely on the Internet to conduct "a continuous course of business in the solicitation of orders which [are] sent to another [country] and in response to" which online newspapers are sent to New York and other jurisdictions. *See International Harvester Co.*, 234 U.S. at 585.

Conclusion

As President Obama recently said concerning college education, "[Y]ou shouldn't silence [others] by saying, 'You can't come because I'm too sensitive to hear what you have to say.' That's not the way we learn …." David Rutz, *Obama*

Slams Liberal PC Culture on College Campuses, Washington Free Beacon, September 15, 2015.

Appellant requests this Court reverse the lower court's decision.

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New York, N.Y.

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Pre-Argument Statement

1. The title of the action is Roy Den Hollander, Esq. - v. - Tory Shepherd, et al.
2. There has been no change in the title of the action.

3. The plaintiff-appellant is Roy Den Hollander, an attorney representing himself, 545 East 14th Street, 10D, New York, N.Y. 10009, (917) 687-0652, rdenhollander97@gsb.columbia.edu.
4. Defendants-respondents are Tory Shepherd, Advertiser Newspapers Pty Ltd., Amy McNeilage, Fairfax Media Publications Pty Ltd.
5. Defendants-respondents are represented by Katherine M. Bolger of Levine Sullivan Koch & Schulz LLP, 321 West 44th Street, Suite 1000, New York, N.Y. 10036, Tel: (212) 850-6100, Fax: (212) 850-6299, Email: kbolger@lkslaw.com
6. Court and County from which appeal is taken: Supreme Court, New York County.
7. This appeal is from a Decision, Order and Judgment granting defendants-respondents motion to dismiss entered on January 12, 2016.
8. There is no related action or proceeding or appeal now pending in any court of this or any other jurisdiction.
9. This is action against all the defendants-respondents for Injurious Falsehoods, Tortious Interference with a Prospective Contractual Relation, and, in the alternative to either, Prima Facie tort. It is also an action for Libel against ONLY defendant-respondent Tory Shepherd.

10. Justice Schecter of the Supreme Court, New York County found that the Court did not have personal jurisdiction over the defendants-respondents and dismissed the action.

11. Justice Schecter of the Supreme Court, New York County recast all the causes of action as one for Defamation of Character only and relied on perjurious affidavits by defendants-respondents that were suborn by their attorney Katherine M. Bolger to wrongly concluded that New York's long arm statute did not allow personal jurisdiction over defendants-respondents.

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

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