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

EROS INTERNATIONAL PLC,

Plaintiff,

-against-

MANGROVE PARTNERS, NATHANIEL H. AUGUST, MANUEL P. ASENSIO, ASENSIO & COMPANY, INC., MILL ROCK ADVISORS, INC., GEOINVESTING, LLC, CHRISTOPHER IRONS, DANIEL E. DAVID, FG ALPHA MANAGEMENT, LLC, FG ALPHA ADVISORS, FG ALPHA, L.P., CLARITYSPRING INC., CLARITYSPRING SECURITIES LLC, NATHAN Z. ANDERSON AND JOHN DOES NOS. 1-30,

Defendants.

Index No. 653096/2017E

Assigned to Hon. Eileen Bransten
IAS Part 3

Motion Sequence # ___

MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS COMPLAINT
AS TO CLARITYSPRING INC., CLARITYSPRING SECURITIES LLC
AND NATHAN Z. ANDERSON

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The Defendants, ClaritySpring, Inc. ("ClaritySpring"), ClaritySpring Securities LLC ("ClaritySpring Securities") and Nathan Z. Anderson ("Anderson")[1] submit this Memorandum of Law in Support of their Motion to Dismiss Eros International, PLLC's ("Eros") Complaint, dated September 29, 2017 ("Complaint").

PRELIMINARY STATEMENT

The ClaritySpring Defendants move to dismiss the Complaint because it fails to state any viable cause of action against them. Although it contains multiple counts, the Complaint focuses almost entirely on Defendants' purported defamation and a so-called "conspiracy" to defame Eros.[2] Indeed, Plaintiff does not seriously attempt to plead specific facts concerning the basic elements of its other claims for tortious interference or commercial disparagement with respect to the ClaritySpring Defendants. As to defamation, not even Plaintiff's cherry-picking and twisting of certain statements can save the Complaint from its fatal defects: Upon review of the full quotes and their surrounding context – which the law requires – it becomes clear that Plaintiff has failed to meet its burden of showing both that the ClaritySpring Defendants' statements are false and/or that they are not protected opinions.

Plaintiff does not allege, nor can it, that any ClaritySpring Defendant did anything other than opine based on publicly available facts. Nor is there any allegation that any of those opinions is based on false information or special facts in the possession of the ClaritySpring Defendants. Instead, a review of the full documentary record reveals that the ClaritySpring Defendants engaged in pure market commentary, clearly disclosed their short positions, and even reached out to Eros

[1] Anderson does not dispute that he publishes research as Hindenburg Research ("Hindenburg"), which is a John Doe Defendant in the Complaint. Thus, for purposes of this brief, "ClaritySpring Defendants" refers to ClaritySpring, ClaritySpring Securities, Anderson *and* Hindenburg.

[2] It is unclear why ClaritySpring Securities is named in the Complaint, insofar as nothing in the Complaint remotely suggests that ClaritySpring Securities made any statements. To the extent that the Complaint is read to include allegations as to ClaritySpring Securities, it fully joins each and every section of this Memorandum.

for comment prior to publishing certain statements. There is nothing defamatory about that behavior and, therefore, the Complaint should be dismissed.

Even less viable are Plaintiff's claims of a conspiracy. Indeed, Eros fails to plead any facts suggesting the ClaritySpring Defendants somehow joined any supposed conspiracy. At most, Plaintiff allege that certain tweets and articles appeared in relatively close proximity to one another – and that they were primarily negative. There is nothing conspiratorial, or even remarkable, about that. Online market commentary is ubiquitous and strongly held views are the norm. Moreover, Mr. Anderson reached out to Eros for comment on at least one occasion before publishing a research report on Eros. It defies logic to claim that someone conspiring against Eros would allow Eros the opportunity to comment and present its side. Accordingly, the conspiracy claim must be dismissed as to the ClaritySpring Defendants.

* * * *

For the reasons set forth further herein, Counts I and II for defamation and defamation *per se* must be dismissed because: (i) all statements attributable to the ClaritySpring Defendants are constitutionally protected opinion; (ii) none of the statements is alleged to be false with any specificity; and (iii) Plaintiff fails to adequately allege facts to support actual malice.

The remaining claims against the ClaritySpring Defendants should be dismissed because they are merely duplicative of the defamation claims. Count III for commercial disparagement must be dismissed because there is no allegation that the ClaritySpring Defendants made any statements concerning the goods and services of Plaintiff. Nor does the Complaint allege facts to establish either actual malice or special damages, both of which are required for Count III to succeed.

Count V for tortious interference with prospective business relations fails because Plaintiff fails to allege with any specificity how or when the ClaritySpring Defendants interfered with any

business relationship. Nor does Plaintiff allege that the ClaritySpring Defendants were motivated by an intent other than economic interests. Similarly, Count VI for tortious interference with a contract should be dismissed because Plaintiff fails to identify any contract with which the ClaritySpring Defendants have interfered.

Finally, Count VII for conspiracy must fail because it is not an independent tort. Additionally, Plaintiff fails to allege any specific facts supporting any underlying violation that would support a claim for a conspiracy as a matter of law.

STATEMENT OF FACTS

1. The ClaritySpring Defendants

Eros is a publicly traded, global entertainment company based in India, and listed on the New York Stock Exchange. Cmplt. ¶ 2.[3]

Founded in 2012, ClaritySpring is a research and consulting firm focused on providing detailed due-diligence on hedge funds to lend transparency to the hedge fund market. Cmplt. ¶ 89. ClaritySpring wholly-owns a brokerage firm, ClaritySpring Securities. *Id.* Anderson is a due-diligence entrepreneur who created ClaritySpring and ClaritySpring Securities. Cmplt. ¶ 90. Anderson also runs ClaritySpring's Twitter account, formerly "@Clarityspring" and now "@ClarityToast." *Id.*

ClaritySpring made certain statements on Twitter concerning Eros in March 2017 and July 2017. Cmplt. ¶ 91. Eros claims that certain tweets are defamatory, and that certain tweets were "timed" to align with those of other Defendants in this case. *Id.* Cmplt. ¶ 294. ClaritySpring's Twitter page contains, and at all relevant times has contained, the following disclaimer displayed prominently: "Opinions too inane to be anything other than my own." *See* Affirmation of Stephen Ryan, Jr. ("Ryan Aff."), Exhibit 1.

[3] "Cmplt." refers to the Complaint.

2. The Allegedly Defamatory ClaritySpring Tweets

Plaintiff alleges that a set of tweets made by ClaritySpring in March 2017 were defamatory. On March 9, 2017, ClaritySpring allegedly tweeted at "Quoth the Raven," "seems perfectly normal, perfectly healthy" ("March 9 Tweet"). Cmplt. ¶ 295. The March 9 Tweet did not "tag" Eros (which allows other Twitter users to cross-reference a tweet with its specific subject) or even include the company's name. *See* Ryan Aff., Ex. 2. On March 17, 2017, ClaritySpring allegedly re-tweeted a link to a GeoInvesting article about Eros ("March 17 Tweet"). Cmplt. ¶ 295; Ryan Aff., Exs. 3 and 3A. On March 31, 2017, ClaritySpring allegedly tweeted a "reply" to "Quoth the Raven," stating: "I'm just impressed that they're catching a bid anywhere right now" ("March 31 Tweet"). Cmplt. ¶ 295. Each of those tweets is annexed hereto in full. *See* Ryan Aff., Exs. 4 and 4A.

Plaintiff further alleges that on June 26, 2017, ClaritySpring tweeted "$EROS up big on air. No word on annl [sic] report release date. Prior annual report dates: 2013: 5/30 2014: 6/12 2015: 6/10 2016: 6/28 2017: ???" ("June 26 Tweet"). Cmplt. ¶ 296; *See* Ryan Aff., Ex. 5.

Plaintiff alleges that the "centerpiece" of ClaritySpring's "attacks" was a series of tweets on July 21, 2017, the day Eros's put options were set to expire that month ("July 21 Tweets"). Cmplt. ¶ 298. Relying on FY 2016 financial results (which were embedded as images in the July 21 Tweets), ClaritySpring identified that Emerging Power Singapore Pvt. Ltd. f/k/a Eros Energy Singapore Pvt. Ltd ("Emerging Power" or "Eros Energy") owns a 99% stake in another Eros subsidiary, Eros Television India Private Limited ("Eros TV"). Cmplt. ¶ 298. ClaritySpring further analyzed the documents and determined that Emerging Power "sits outside the $EROS corporate structure." Cmplt. ¶ 298. The July 21 Tweets, as cited in Paragraph 298 of the Complaint, are reproduced in full to accompany this Motion. *See* Ryan Aff., Ex. 6. The July 21 Tweets by ClaritySpring are also set forth below, along with screen shots of actual documentary

evidence that the reader would have seen while viewing the tweets on a computer or other device (emphasis added for particular words excluded from Plaintiff's Complaint):

1. Eros TV is 99% owned by "Emerging Power" (fka Eros Energy Singapore), ***and appears to sit*** outside the $EROS corporate structure

EROS TELEVISION INDIA PRIVATE LIMITED

EROS TELEVISION INDIA PRIVATE LIMITED

Shareholding pattern of Eros Television India Private Limited as on March 31, 2016:

Sr. No.	First Name	Middle Name	Last Name	Folio Number	DP – ID Client ID Account Number	Number of Shares held	Class of Shares
1.	Sunil	Arjan	Lulla	01	--	100	Equity Shares
2.	M/s Eros Energy Singapore Pte Ltd			03	--	9,900	Equity Shares
Total						**10,000**	**Equity Shares**

2. The entity records little financial activity w/ the exception of cash transfers through a series of borrowings and advances $EROS (2/3)

Particulars	For the year ended 31 March 2016		For the year ended 31 March 2015	
Cash flow from operating activities				
Net profit before tax	52,770		17,79,459	
Adjustments:				
Bank charges	-		23,302	
Operating profit before working capital changes	52,770		18,02,761	
Increase/(Decrease) in other current liabilities	4,42,781		(37,54,420)	
Increase/(Decrease) short term loans and advances	(1,400)			
Cash generated from operations	4,94,151		(19,51,659)	
Taxes paid (net of refunds)	(51,148)		(23,68,490)	
Net cash from operating activities		4,43,003		(43,20,149)
Cash flow from investing activities				
Long term advances given	(16,04,60,327)		-	
Advances received back			25,35,08,558	
Net cash from investing activities		(16,04,60,327)		25,35,08,558
Cash flow from financing activities				
Proceeds from long - term borrowings	16,00,00,000		(25,00,00,000)	
Interest and bank charges (net)			(23,302)	
Net cash from financing activities		16,00,00,000		(25,00,23,302)
Net cash increase in cash equivalents		(17,324)		(8,34,893)
Cash and cash equivalents at the beginning		4,20,959		12,55,852
Cash and cash equivalents at the ending		4,03,635		4,20,959

3. Despite being a subsidiary to an apparent energy company, the advances are described in its audits as "Advances given for film" (3/3)

Note 3.5 : Long term loans and advances (Amount in ₹)

Particulars	As at 31 March 2016	As at 31 March 2015
Unsecured considered good		
Advances given for Film	16,41,16,840	36,56,513
Total	16,41,16,840	36,56,513

4. The Singapore entity (fka as Eros energy), received a qualified audit opinion, adverse opinion, then NO AUDIT $EROS

Corporate Compliance and Financial Profile of EMERGING POWER SINGAPORE PTE. LTD. (201006055Z) Date :15/02/2017

Non-Financial Information

Extracted From: #	XBRL accounts for period ended 31 MAR 2016	XBRL accounts for period ended 31 MAR 2015	XBRL accounts for period ended 31 MAR 2014
Audit Opinion in Auditors' Report:	*	Adverse opinion	Qualified opinion
Audit Firm:	*	TKNP INTERNATIONAL	TKNP INTERNATIONAL
In the Statement by Directors, are the Directors of the opinion that the accounts are drawn up to exhibit a true and fair view?	No	Yes	Yes

See Ryan Aff., Ex. 6.

Plaintiff alleges that on the same date as the July 21 Tweets, purportedly as a result of ClaritySpring's and the other Defendants' "attacks" on Eros's accounting, Eros's stock price dropped by nearly 21% within three and a half hours of the start of trading that day. Cmplt. ¶ 299.

According to Plaintiff's allegations, ClaritySpring's next allegedly defamatory tweet occurred on July 27, 2017 ("July 27 Tweet"). Cmplt. ¶ 302. That tweet is comprised of a tweet with a screen shot image of additional text. *See* Ryan Aff., Ex. 7. The annexed copy includes ClaritySpring's clear disclaimer ("Not investment advice"), which Plaintiff conveniently excluded from the Complaint:

1. Continued issues with collection of accounts receivables
2. Large and inexplicable "Rest of World" and UAE sales despite y/y sales declines in India
3. Slightly negative to slightly positive net income driven by "high margin catalogue sales"
4. Negative cash flow and significantly lower cash balance
5. Large headline ErosNow user growth but little insight on revenue or cash flow. Possible announcement of an LOI or unfinalized "deal" that seeks to peg ErosNow at a valuation
6. Worse terms on revolving credit line
7. Non-definitive statements about late-stage negotiations with new creditors
8. Jefferies to re-iterate "Buy" rating following the call no matter what. If the CEO executes herself in front of everyone on the call, Jefferies: "optimistic about new talent brought in to refresh management team"
9. New auditor.
10. Lastly, that this will be Eros's last annual report as an NYSE-listed company

*Not investment advice. Good luck to all

Plaintiff goes on to claim that Mangrove, ClaritySpring and the other Defendants' allegedly false tweets "accomplished their goal, causing Eros' share price to drop by over 16% on July 31, 2017, compared to the opening price on July 28, 2017." Cmplt. ¶ 310. There is no allegation as to whether or in what manner ClaritySpring or Anderson had any contact with Mangrove concerning Eros.

3. <u>Hindenburg Research</u>

Mr. Anderson publishes market research online under the name Hindenburg Research ("Hindenburg"). Plaintiff attacks Hindenburg over the publication of three online research articles in late-July and August 2017. Plaintiff first alleges that a July 31, 2017, Hindenburg article posted on *Twitter* and, later, the website Seeking Alpha ("July 31 Article")[4] "regurgitates many of Defendants' themes throughout their conspiracy, attacking Eros' liquidity, refinancing negotiations, accounting, Eros' movie library and Eros Now." Cmplt. ¶ 319. Plaintiff further broadly takes issue with Hindenburg's statements in the July 31 Article by quoting snippets of the article and characterizing them as false. Cmplt. ¶¶ 320-324. The July 31 Article, which on its face

[4] The July 31 Article was not posted to Seeking Alpha until August 2, 2017. *See* Ryan Aff., Ex. 8.

indicates that it was published in response to Eros's recently released earnings and cites to multiple documents as the basis for its commentary, contained the following disclosure: "I am/we are short EROS. I wrote this article myself, and it expresses my own ***opinions***. I am not receiving compensation for it. I have no business relationship with any company whose stock is mentioned in this article." *See* Ryan Aff., Ex. 8 (emphasis added).

Similarly, Plaintiff attacks Hindenburg's article published on *Twitter* on August 7, 2017 ("August 7 Article"). Cmplt. ¶ 325. It is not clear what specific statements, if any, Plaintiff contends are defamatory in the August 7 Article. *See* Ryan Aff., Ex. 9. The August 7 Article, which in its title makes clear that the author is not fully certain of his conclusion ("Eros's Latest Buyout Rumors ***Seem*** Suspect"), focused on a recent article in the *Economic Times of India*. *See id.* (emphasis added). The August 7 Article noted that it is "curious" that the *Economic Times of India* ran a story about Eros having talks with the likes of giants such as Apple, Amazon and Netflix:

> Given the signs of distress and the filing of a shelf offering on Friday, we find it rather curious that a mere one day later anonymous sources had a discussion with the *Economic Times of India* about vague 'talks' with Apple, Amazon, and Netflix.
>
> After all, if Eros really was in late stage discussions to close a deal for $1 billion, why file to raise equity the day before?

See Ryan Aff., Ex. 9. The August 7 Article also raised questions about the sourcing of the *Economic Times of India* article and noted that the rumors appear similar in nature to past rumors concerning Eros that did not come to fruition. Here, too, the August 7 Article contained broad disclaimer language and specifically disclosed Hindenburg's short position in Eros:

> You should assume that as of the publication date of any short-biased report or letter, Hindenburg Research (possibly along with or through our members, partners, affiliates, employees, and/or consultants) along with our clients and/or investors has a short position in all stocks (and/or options of the stock) covered herein, and therefore stands to realize significant gains in the event that the price of any stock covered herein declines. Following publication of any report or letter, we intend to continue transacting in the securities covered herein, and we may be long, short, or

> neutral at any time hereafter regardless of our initial recommendation, conclusions, or opinions.

See Ryan Aff., Ex. 9.

Plaintiff further attacked Hindenburg's August 24, 2017, article published on Seeking Alpha ("August 24 Article") that raised renewed questions as to Eros's receivables accounting practices. Cmplt. ¶¶ 327-329. Once again, as grounds for the opinions presented in the August 24 Article, Hindenburg made reference to specific documents that are publicly available. *See* Ryan Aff., Ex. 10. Also, once again, the August 24 Article contains a clear statement about Hindenburg's position in the stock: "Disclosure: I am/we are short EROS. I wrote this article myself, and it expresses my own ***opinions***. I am not receiving compensation for it. I have no business relationship with any company whose stock is mentioned in this article." *See* Ryan Aff., Ex. 10 (emphasis added).

Finally, Plaintiff alleges that certain tweets posted by Hindenburg "parrot false and misleading accusations about Eros." Cmplt. ¶ 330. The tweets singled out by Plaintiff are provided with this Motion. *See* Ryan Aff., Exs. 11-13A. As is clear from the attached tweets, both were posted closely in time with the tweet linking to the full July 31 Article, from which the information contained in the tweets is drawn. With respect to the two August 4 Hindenburg tweets, the Complaint does not include the fact that both tweets provided a URL link to the support for each statement in each respective tweet:

Thus, Hindenburg made accurate statements in the allegedly defamatory tweets and provided the source documents for those statements. Notably, with respect to the four Hindenburg Tweets, the Complaint does not contain any specific allegation as to how they are false or otherwise violate Plaintiff's rights.

ARGUMENT

1. Motion to Dismiss Standard

It is well settled that "[i]n assessing the adequacy of a complaint under CPLR 3211(a) (7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff "the benefit of every possible favorable inference." *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324, 334 (2013) (citation omitted).

On a motion to dismiss where the parties have submitted evidentiary material or where the bare legal conclusions and factual allegations are flatly contradicted by documentary evidence, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint. *See Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). "Bare legal conclusions,

as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference." *M&B Joint Venture, Inc. v. Laurus Master Fund, Ltd.*, 49 A.D.3d 258, 260, 853 N.Y.S.2d 300 (1st Dep't 2008).

In the context of defamation, the Court "must give the disputed language a fair reading in the context of the publication as a whole." *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 177 (2d Cir 2000) (citation omitted). The material in question should not be read in isolation, but "must be perused as the average reader would against the 'whole apparent scope and intent' of the writing." *Id.*, quoting *November v. Time Inc.*, 13 N.Y.2d 175, 178 (1963).

2. <u>Defamation, Defamation Per Se and Pure Opinion</u>

a. Elements of defamation and defamation per se

The elements of a defamation claim are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se. *Dillon v City of New York*, 261 A.D.2d 34, 38 (1st Dept 1999). Though a state-based cause of action, the elements of a libel action are heavily influenced by the minimum standards required by the First Amendment. *See Celle*, 209 F.3d at 176, citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986) (public figure must "surmount a much higher barrier"). The showing of fault necessary to recover for libel varies depending on a plaintiff's position in society, requiring a higher degree of fault – actual malice – for public officials and public figures. *See Celle*, 209 F.3d at 176.[5]

[5] As noted by GeoInvesting Defendants, Eros, a company publicly traded on the New York Stock Exchange, is a "public figure" for purposes of a defamation claim and, therefore, Eros has to prove actual malice to prevail on Counts I and II. *Mahoney v. Adirondack Pub. Co.*, 71 N.Y.2d 31, 35-36 (N.Y. 1987).

CPLR 3016 (a) requires that in a defamation action, "the particular words complained of ... be set forth in the complaint." *Dillon*, 261 A.D.2d at 38 (citation omitted). The complaint also must allege the time, place and manner of the false statement and specify to whom it was made. *(Id.)* Since falsity is a necessary element of a defamation cause of action and only facts are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action. *See Galanos v. Cifone*, 84 A.D.3d 865, 866 (2nd Dept 2011).

b. Pure opinion is absolutely protected under New York Law

New York law absolutely protects statements of pure opinion, such that they can never be defamatory. *See Kirch v. Liberty Media Corp.*, 449 F.3d 388, 402 (2d Cir 2006). Whether a statement may constitute non-actionable "opinion" is one of law for the court and one that must be answered on the basis of what the average person would understand the statement to mean. *See Horowitz v. Mannoia*, 10 Misc. 3d 467,471 (Sup. Ct., Nassau County 2005). The factors for consideration in determining whether a statement constitutes opinion include: (1) whether the statement at issue has a precise meaning so as to give rise to clear factual implications; (2) the degree to which the statements are verifiable, *i.e.*, "objectively capable of proof or disproof;" (3) whether the full context of the communication in which the statement appears signals to the reader its nature as opinion; and (4) whether the broader context of the communication so signals the reader. *Sandals Resorts Intern. Ltd. v. Google, Inc.*, 86 A.D.3d 32, 43 (1st Dep't 2011). The last element includes consideration of the existence of any applicable customs or conventions that might signal to readers or listeners that what is being read or heard is likely to be opinion, not fact. *See Kirch*, 449 F.3d at 402, citing *Steinhilber v. Alphonse*, 68 N.Y.2d 283 (1986). Where the context reveals that a reasonable reader would understand an assertion as an *allegation* to be investigated, rather than as a *fact*, the statement constitutes opinion. *See Brian v. Richardson*, 87 N.Y.2d 46, 53 (1995) (emphasis added).

In determining whether a particular communication is actionable, the Court must distinguish "between a statement of opinion that implies a basis in facts which are not disclosed to the reader or listener ... and a statement of opinion that is accompanied by a recitation of the facts on which it is based or one that does not imply the existence of undisclosed underlying facts." *Gross v. New York Times Co.*, 82 N.Y.2d 146, 154 (1993). The burden rests with the plaintiff to establish that in the context of the entire communication a disputed statement is not protected opinion. *Celle*, 209 F.3d at 179.

3. ClaritySpring's Tweets are Not Defamatory

None of the ClaritySpring tweets in the Complaint is defamatory. In reviewing those tweets, the essential task is to determine whether the allegedly defamatory statements "may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion," when considering the statements in the immediate context of the communication as a whole and the broader context in which the statements were published. *Steinhilber*, 68 N.Y.2d at 290; *see also Brian*, 87 N.Y.2d at 51; *Immuno AG. V. Moor-Jankowski*, 77 N.Y.2d 235, 254 (1991). "Speculations as to the motivations and potential future consequences of proposed conduct generally are not readily verifiable, and are therefore intrinsically unsuited as a foundation for libel." *Immuno AG. V. Moor-Jankowski*, 74 N.Y.2d 548, 559-60 (1989).

For all tweets by the ClaritySpring Defendants, the nature of the medium itself must be kept in mind. *See Sandals Resorts*, 86 A.D.3d at 43. By confining a single "tweet" to 140 characters (at the time relevant hereto) and constantly refreshing content, *Twitter* intrinsically encourages the expression of quick, opinionated statements. A reasonable *Twitter* user is unlikely to expect that most tweets will contain pure "hard news" or objectively verified facts. *See, e.g.*, *Jacobus v. Trump*, 55 Misc. 3d 470; 51 N.Y.S.3d 330 (N.Y. Sup. Ct. 2017) ("[…]*Twitter* verbiage […] seems to roll off the national consciousness like water off a duck's back").

a. The Complaint fails to plead facts demonstrating falsity

As a threshold matter, Eros utterly fails to allege how any of ClaritySpring's tweets are in any way *false* statements of fact. *See* Cmplt. ¶ 295. The Complaint merely groups most of those tweets together without attempting to demonstrate how any of them is false. This alone is fatal to Plaintiff's defamation claims. *See Fleischer v. NYP Holdings, Inc.*, 104 A.D.3d 536, 537, 961 N.Y.S.2d 393, 394 (2013).

b. Eros is a "public figure" and has failed to plead facts demonstrating actual malice by the ClaritySpring Defendants

As correctly noted by the GeoInvesting defendants, Eros, a company publicly traded on the New York Stock Exchange, is a "public figure" for purposes of a defamation claim and therefore Eros had to plead "actual malice." *Gear Up, Inc. v. City of New York*, 140 A.D.3d 515, 516 (1st Dep't 2016). Nothing in the Complaint establishes that any of the statements attributed to the ClaritySpring Defendants were made with actual malice. On their face, the documents discussed herein make clear that the ClaritySpring Defendants were engaging in market commentary, and took pains to provide citations and links for their work.

c. ClaritySpring's tweets are all protected opinion

Moreover, taken one by one, Plaintiff fails to allege that ClaritySpring's tweets are anything other than protected opinion. This is also grounds, on its own, for dismissal of the Complaint.

The March 9 Tweet merely consists of ClaritySpring's commentary on a prior tweet by "Quoth the Raven," which showed an image of a badly declining stock chart labeled "EROS." ClaritySpring made the unexceptional, if sarcastic, remark "seems perfectly normal, perfectly healthy." That is it. Plaintiff does not make any allegation as to why such light sarcasm constitutes actionable defamation. Moreover, the March 9 Tweet does not even mention Eros's name specifically, nor does it "tag" Eros, which is a common and well-known method of highlighting

the subject of a given tweet. All of these factors severely undermine the allegation that the March 9 Tweet purported to make a statement of fact directed toward Eros.

The March 17 Tweet is nothing more than a "retweet" of a link to an article by GeoInvesting on the platform Seeking Alpha. By retweeting a link to the article, ClaritySpring did not speak to the truth or falsity of the statements therein. Nor does the Complaint set forth facts to show that the mere retweet of an article, without more, establishes the required actual malice on the part of ClaritySpring. Moreover, as the GeoInvesting Defendants set forth, there is nothing defamatory contained in the article: GeoInvesting's article provided opinions about Eros's financial status, was supported by disclosed and hyperlinked sources, and did not even contain certain words attributed to it in the Complaint (including the term "doomsday," which nowhere appears in the article). *See* Ryan Aff., Ex. 3A. The GeoInvesting article also disclosed that the author was shorting Eros stock. *See id.*

The March 31 Tweet constitutes the first of multiple instances where Plaintiff has removed words from a tweet and added some of its own in brackets. While perhaps intended to explain how a tweet is defamatory, instead it needlessly confuses the process of getting to the truth. ClaritySpring's actual tweet, a "reply" to "Quoth the Raven," stated: "I'm just impressed that they're catching a bid anywhere right now." *See* Ryan Aff., Exs. 4 and 4A. The underlying tweet by "Quoth the Raven" was itself a reply to a pro-Eros string of tweets by an anonymous user going by the pseudonym "eye's [sic] wide open" with a handle of EyesWideOpen_61. "Quoth the Raven" replied to EyesWideOpen_61's string of glowing statements about Eros and negative statements about short sellers with some cold water: "He's right that somebody sounds desperate. It's not shorts, though." *See* Ryan Aff., Ex. 4A. Ultimately, ClaritySpring's contribution to this *Twitter* spat is nothing more than a vague, slightly sarcastic, statement of opinion. It does not purport to claim any special knowledge. Nor does it indicate that ClaritySpring's commentary is

somehow uttered in coordination with "Quoth the Raven"—any *Twitter* user can view and "retweet" tweets posted by another user. Furthermore, that exchange highlights one of the critical problems with Plaintiff's entire claim of defamation: Plaintiff and its supporters, such as the anonymous EyesWideOpen_61, are more than capable of hitting back with statements of their own on *Twitter* should they want to present the record from their perspective, real or imagined. Eros is a public company with vast resources at its disposal, and is well equipped to handle a public relations issue such as negative *Twitter* commentary.

The June 26 Tweet merely states an opinion and notes that, based on past history, the annual report release date likely should have been announced, yet had not been: "$EROS up big on air. No word on annl [sic] report release date. Prior annual report dates: 2013: 5/30 2014: 6/12 2015: 6/10 2016: 6/28 2017: ???" That tweet represents the textbook case of pure opinion. It states certain facts: the prior dates on which Eros released its annual report and that there was currently no word on this year's annual report, despite Eros's history of May or June annual report release dates. It then bases an opinion on those facts: that the report is later than usual, and thus the surge in Eros's stock is not based on concrete data published by the company—"up big on air." There is nothing defamatory about raising legitimate questions where there is an uncharacteristic silence from a public company about the timing of its annual report.

The July 21 Tweets allegedly forming the "centerpiece" of ClaritySpring's "attack" on Eros actually consist of nothing more than the analysis of publicly available documents, sourced directly from the Indian Ministry of Corporate Affairs, relevant portions of which are ***embedded as images*** in the tweets themselves (which the Complaint does not make clear). There is no claim in the Complaint that those images are anything other than accurate representations of publicly available documents. Nor is there any serious claim that ClaritySpring distorts the plain meaning of the public documents with its tweets. A comparison of each of the tweets with the documents

embedded therein reveals that, in actuality, ClaritySpring is providing insightful, useful commentary on otherwise opaque financial documents. Contrary to Plaintiff's conflicting allegations, at no point did ClaritySpring claim that Eros Energy Singapore Pvt. Ltd was a subsidiary of Eros. On their face, the tweets merely identified factual information about entities that sat outside of Eros's corporate structure yet shared common ownership with at least one Eros executive. As such, there is nothing about the tweets that expresses anything other than protected opinion based on verifiable facts (embedded within the tweet itself). Accordingly, the tweets are simply not defamatory as a matter of law.[6]

The July 27 Tweet begins by using one of the most commonly used methods available to signal that it is mere opinion: "FWIW," which any reasonable *Twitter* user knows is customary shorthand for "for what it's worth," signaling that what follows is not to be taken as a statement of fact. ClaritySpring proceeds to introduce the tweet as "my predictions on $EROS's annual results being reported tomorrow morning.*" The asterisk is defined at the end of the tweet to mean: "Not investment advice. Good luck to all." Bracketed by those clear caveats, the rest of the tweet must be considered as pure opinion. Indeed, the writer presumes that the accuracy of the predictions will be tested the very next morning, when the results come out. Any reasonable reader on *Twitter* would make the same presumption. Even the use of the phrase "Good luck to all" indicates that a degree of speculation underpins these prognostications. If the speaker were purporting to state a fact, he would not need luck on his side. Further, with exception of one clearly hyperbolic opinion (number eight on the list), the rest constitute predictions that will be easy to test when the report comes out.

[6] Further, ClaritySpring's statement that "it makes me happy when pumpers get mad" is clearly a statement of opinion about those who, in ClaritySpring's view, uncritically promote company stocks.

Eros claims that the hyperbolic joke about the CEO "executing herself on the call" is grounds for defamation because it allegedly insinuates collusion—despite that the tweet nowhere uses that term. To the contrary, while perhaps intemperate, the statement is clearly a joke meant to express investors' frustration at the continued rosy analysis from Eros and others despite what certain close followers of the company believe to be serious accounting and operational problems. "Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable." *Dillon*, 261 A.D.2d at 38, citing *Gross*, 82 N.Y.2d at 146.

Numerous analysts and investors seek to identify, process, and understand new information prior to, during, and after the release of a public entity's annual report to the market. Commenting on or sharing information at or around such critical times is ubiquitous on virtually all business media platforms. Simply because such commentary might be negative as to a particular company is no grounds for defamation. That is particularly the case where the commentary concerns a publicly traded company, such as Eros, where the plaintiff must prove actual malice in order to recover for defamation. As shown above, it is clearly unable to allege such actual malice with respect to the ClaritySpring Defendants, based on the plain text of the documentary evidence.

4. Hindenburg Research's Tweets and Research Papers are Not Defamatory[7]

The Hindenburg Articles all contain clear language disclosing that the author is shorting Eros stock. Thus, it is no mystery to the reasonable reader what to expect—a negative opinion on the stock in question. Numerous courts have found this type of disclosure the kind that alerts the average reader to the likelihood that the article is setting forth opinion. *See Silvercorp Metals, Inc. v. Anthion Mgt. LLC*, 36 Misc. 3d 1231(A), 2012 N.Y. Slip Op 51569(U), *10 (Sup Ct, N.Y. County 2012) ("Such motive … indicates to the reader that the author is expressing his opinion").

[7] The Complaint as to Hindenburg should be dismissed for the same reasons as the other ClaritySpring Defendants, including failure to plead falsity, failure to show actual malice, and the nature of the statements as pure, protected opinion.

Hindenburg goes further, expressly acknowledging "I wrote this article myself, and it expresses my own ***opinions***." *See* Ryan Aff., Ex. 9 (emphasis added). The reasonable reader is thus appropriately notified that this article does not purport to make staunch factual assertions, but is rather a typical piece of self-published analysis.

As to the content of the articles themselves, Eros utterly fails to allege anything specifically defamatory therein. Sifting through a communication for the purpose of isolating and identifying assertions of fact should not be the central inquiry; rather, it is necessary to consider the writing as a whole, as well as the over-all context of the publication, to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff. *See Sandals Resorts*, 86 A.D.3d at 42. Moreover, the author's anonymity constitutes further basis to view the articles as opinions intended to foment questions as opposed to assertions of fact. *See Id.* at 44.

While Eros points out the statement in the July 31 Article that Eros is "short on time and short on options," in the context of the article, that is clearly protected opinion concerning the ability of Eros to achieve its financial ends. All of the bases for the opinion are provided in the article itself. Further, the July 31 Article contains additional analysis concerning Eros's highly unconventional relationship with Eros Energy. As with the ClaritySpring tweet about this topic, Hindenburg provides the facts on which the analysis is based within the article. Plaintiff's arguments concerning the "Rest of the World" revenue show that it is nothing more than an academic debate about whether it makes sense for this category of revenue to see a sudden surge considering the target audience for Eros's films. It is at least possible that the opinion proposed by Hindenburg may ultimately prove incorrect (although Hindenburg certainly stands by it), but that does not mean that the analysis on this issue suddenly becomes defamatory. This is yet again an instance of Hindenburg pointing out a legitimate issue to the market for its consideration. To

leave the issue untouched for fear of a lawsuit would truly chill necessary speech in the business community.

Tellingly, Eros devotes only two paragraphs to the August 7 Article. That article made reference to a recent rumor circulated by a foreign publication concerning the "potential" that a major industry player such as Apple, Netflix or Amazon was in talks with Eros for its library. In light of that rumor, Hindenburg merely pointed out various reasons to think critically about its veracity—indeed, as a matter of judicial notice, it must be said that no such blockbuster deal has been announced. The only actual statement attributed to Hindenburg from the August 7 Article in the Complaint is cropped from the following paragraph:

> The evidence also suggests that one or potentially all of the sources for the article are affiliated with Eros. The article described how Eros planned to reverse IPO the company near the end of the year to apparently delist from NYSE and trade solely in India. That, in addition to details on alleged talks with multiple parties independent from Eros gives a strong indication that one or potentially all of the sources could be Eros affiliated. *See* Ryan Aff., Ex. 9.

Hindenburg is merely pointing out its opinion, which is based on certain items contained in the foreign publication that seemingly only an insider would know, that it is likely that at least one of the sources for the story is an Eros affiliate. Once again, that article contained a very broad disclaimer alerting the reader to the potential that Hindenburg was shorting Eros stock, and that the reader should not rely on the opinions therein as investment advice.

The August 24 Article is another clear example of pure opinion, protected under New York law. The August 24 Article again contains the statement that Hindenburg is short Eros, and that the article represents Hindenburg's opinion. The body of the article only cements that conclusion. The article bases its analysis on public documents for which Hindenburg provides links in the article itself. Hindenburg uses the information contained in those documents (in this case a Director's Report filed by Ayngaran International Films Private Limited ("AIFPL")) to raise legitimate questions about Eros's relationship with AIFPL. Based on that evidence, Hindenburg

states that "the filing *seems to show* that Eros lends to AIFPL which then simultaneously owes large payables to Eros controlled or related parties" (emphasis added). No reasonable person would interpret that language as a false factual statement designed to impugn Eros. Rather, it can only be reasonably interpreted as a measured commentary on publicly available facts presented in the article itself.

Moreover, the Complaint fails to provide the entire context that the reasonable reader would have had in reviewing the August 24 Article. The reader would have seen that Hindenburg actually "reached out to Eros's investor relations contact," as well as its CEO, seeking comment on the rationale behind the AIFPL transactions. *See* Ryan Aff., Ex. 10. Hindenburg then waited a week before publishing to receive a response from Eros, which never came. *See id.* In other words, Hindenburg, like the free press, provided Eros with an opportunity to rebut the claims in the article prior to publication, which Eros chose not to do. Thus, at a minimum, the reader would know that the August 24 Article was published without Eros's comment on the story, and could draw his or her own conclusions from Eros's failure to respond. If anything in the article were false, it would have been reasonable for Eros to respond forcefully *before* publication. The Complaint contains no allegation that this occurred; nor does it allege that Hindenburg's statements about providing it with an opportunity to comment were false, because it cannot.

The Hindenburg tweets are equally immune to allegations of defamation. Both of the August 1 Tweets were posted in close proximity to Hindenburg's tweeting of the July 31 Article, and essentially restate certain critiques set forth by Hindenburg therein. Any reasonable reader would have seen that the tweets clearly related to the newly published article, which provides additional context for one looking to determine the intent behind the tweets. *See* Ryan Aff., Ex. 11. Further, there is no *specific* allegation that the August 1 Tweets contain false information—the Complaint labels them false in conclusory fashion. The same is true of the August 4 Tweets,

both of which provide hyperlinks to the articles on which they are based (although that is not clear from reading the Complaint, it is clear from reviewing the actual tweets). *See* Ryan Aff., Exs. 12, 12A, 13 and 13A. Eros does nothing to specifically challenge or undermine the statements contained in those tweets. A plaintiff in a libel action must identify a plausible defamatory meaning of the challenged statement or publication. *See Celle*, 209 F.3d at 178. The Hindenburg tweets are not defamatory because there is literally no identified plausible defamatory meaning.

5. <u>The Commercial Disparagement Claim Must Be Dismissed</u>

To state a claim for commercial disparagement (also known as trade libel), a plaintiff must adequately plead: (1) falsity of the statement; (2) publication to a third person; (3) malice (express or implied); and (4) special damages. *See Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp 3d 263, 291 (SD NY 2016). "[W]hereas defamation (in the commercial context) entails a statement that 'impugns the basic integrity or creditworthiness of a business,' trade libel is based on statements 'confined to denigrating the quality of a business' *services* [*or products*].'" *See Id.*, quoting *Ehrenkranz v. 58 MHR, LLC*, 47 Misc. 3d 1226(A), 2015 NY Slip Op 50859, *10-11 (Sup Ct, Suffolk County 2015).

Aside from the fact that Plaintiff claims certain statements published by Defendants are false, absolutely nothing in the Complaint establishes a potential claim for commercial disparagement, at least with respect to the ClaritySpring Defendants. There is no specific allegation against any of the ClaritySpring Defendants sufficient to show malicious intent in making any statement. Nor is there any claim that the ClaritySpring Defendants in any way denigrated the quality of Eros's products, whether it be the movie library or streaming services. Accordingly, the claim for commercial disparagement must be dismissed.

6. The Tortious Interference Claims Must Be Dismissed

Plaintiff asserts claims for tortious interference with a contract and tortious interference with business relations. Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom. *See Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (1996). Similarly, to make out a claim for tortious interference with business relationships, a plaintiff must show that the defendant interfered with the plaintiff's business relationships either with the sole purpose of harming the plaintiff, or by means that were unlawful or improper. *See 71 Pierrepont Assoc. v. 71 Pierrepont Corp.*, 243 AD2d 625, 625-26 (2nd Dept 1997), quoting *Nassau Diagnostic Imaging & Radiation Oncology Assoc. v. Winthrop-University Hosp.*, 197 A.D.2d 563, 563-64 (2nd Dept 1993).

Here, however, Plaintiff fails to "identify any specific ... business relationship that [it] was prevented from entering into as a result of defendants' [alleged] interference." *Baker v Guardian Life Ins. Co. of Am.*, 12 A.D.3d 285, 285-86 (1st Dept 2004). Plaintiff's conclusory statement that Defendants "interfered" with Plaintiff's contracts and/or prospective contracts is insufficient, especially since plaintiff should be in possession of identities of parties and the relationships with which Defendants interfered. *See Deer Consumer Products, Inc. v. Little Group*, 2012 WL 5983641, *23 (Sup Ct, NY County, Nov. 29, 2012, No. 650823/2011). Nor does Plaintiff provide any insight as to how the ClaritySpring Defendants, specifically, caused harm to any such contracts or relationships.

Lastly, as noted by the GeoInvesting Defendants, Plaintiff cannot prevail on tortious interference with prospective business relations where it admits that Defendants were motivated by economic self-interest (by shorting Eros stock, as Defendants disclosed to the world), as

opposed to the sole purpose of harming Eros. *See Steiner Sports Mktg., Inc. v. Weinreb,* 88 A.D.3d 482, 483, 930 N.Y.S.2d 186, 187 (2011); *Phoenix Capital Investments LLC v. Ellington Mgmt. Group LLC,* 51 A.D. 3d 549, 551 (1st Dep't 2008).

7. The Civil Conspiracy Claim Fails

There is no independent tort to recover damages for civil conspiracy. *See Gould v. Community Health Plan of Suffolk*, 99 A.D.2d 479, 480 (2nd Dept 1984). Since Plaintiff asserts no colorable independent tort claim, the civil conspiracy claim also must fail. *See Antares Mgt. LLC v. Galt Global Capital, Inc.*, 2014 WL 2116018, *16 (SD NY, May 19, 2014, No. 12 CIV. 6075 KBF). Accordingly, Plaintiff's civil conspiracy claim should be dismissed as to the ClaritySpring Defendants.

Even if this Court were to find an underlying tort claim, the civil conspiracy claim still fails because there are no substantive allegations that the ClaritySpring Defendants took any specific action to "conspire" with the other "co-conspirators." The most Plaintiff can claim is that certain tweets and articles were published in relatively close proximity. Yet, given the timing of the publication of quarterly and annual reports, it is hardly unusual to have numerous pieces of commentary about particular companies by the analysts and researchers following them prior to and following major earnings statements. The ClaritySpring Defendants, in particular, do not even begin factoring into Plaintiff's claims until March 2017, long after the so-called "conspiracy" began—making them extremely late to the party, if indeed there were any. The bottom line is Plaintiff fails to allege a conspiracy with the requisite specificity. Therefore, the conspiracy claim must be dismissed.

CONCLUSION

For all of the reasons set forth herein, the ClaritySpring Defendants respectfully request that the Court dismiss the Complaint in its entirety, with prejudice.

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