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

X

Index Number 653096/2017

Hon. Eileen Bransten

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.

REPLY IN FURTHER SUPPORT OF ORDER TO SHOW CAUSE BY DEFENDANTS GEOINVESTING, LLC, CHRISTOPHER IRONS, DANIEL E. DAVID, FG ALPHA MANAGEMENT, LLC, FG ALPHA ADVISORS, AND FG ALPHA, L.P TO DISMISS THE COMPLAINT PURSUANT TO CPLR 3211(a)(1), (7)

Motion Seq. 4

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Eros's Opposition Brief does nothing to salvage its weak claims against the GeoInvesting Defendants. Eros fails to address—let alone refute—the lengthy argument in the GeoInvesting Defendants' opening brief demonstrating how each and every alleged defamatory statement is either 1) a statement of opinion well supported by and based upon disclosed facts and sources; or 2) simply not alleged to be false. In response, Eros offers nothing more than misquotes and half-quotes from the GeoInvesting Articles, inapt and non-controlling case law, and copious bluster. It is clear under New York law that each of the alleged defamatory statements is constitutionally protected speech, and, therefore, the Complaint—and each of its counts (all of which stem from these allegedly defamatory statements)—must be dismissed.

I. Eros Misrepresents Its Pleading Burden

Eros wrongly claims that New York courts do not "'regularly dismiss claims for defamation at the pleading stage.'" (Opp. at 8.) The opposite is true. Eros ignores the long list of New York decisions cited by the GeoInvesting Defendants—including one by this Court—dismissing, at the pleadings stage, insufficiently pled defamation claims. (GeoInvesting Defendants' Opening Brief ("Geo. Op. Br." at 6.)

Eros also argues that "the only question at this juncture is 'whether a reasonable listener is likely to have understood the[ir] statements as conveying provable facts about Eros.'" (Opp. at 8, quoting *Restis v. Am. Coalition Against Nuclear Iran, Inc.*, 53 F. Supp. 3d 705, 719 (S.D.N.Y. 2014)). But Eros tellingly leaves out the next sentence of the *Restis* case, which clarifies Eros's pleading burden: "When the defendant's statements, read in context, are readily understood as conjecture, hypothesis, or speculation, this signals the reader that what is said is opinion and not fact." *Restis*, 53 F. Supp. 3d at 719. As discussed herein, and in the

GeoInvesting Defendants' opening brief, the context of the GeoInvesting Articles demonstrates it is opinion and not fact—and therefore not actionable defamation.

II. Eros Cannot Salvage Its Defamation Claims

A. Eros is Wrong About its Claim for Defamation Per Se

Contrary to Eros's bald statement to the contrary, the GeoInvesting Defendants ***did*** move to dismiss Eros's per se defamation claim (Count I). In Footnote 6 of their opening brief, the GeoInvesting Defendants made clear that:

> because an essential element of both a defamation and defamation per se claim is a false statement of fact (not an opinion), and Plaintiff has failed to properly allege false statements of fact, the GeoInvesting Defendants treat Counts I and II together.

And the GeoInvesting Defendants argued *extensively* and *clearly* that all of the alleged defamatory statements in the Complaint are not capable of defamatory meaning because they are protected opinion. They cannot, therefore, constitute defamation *per se*.

B. The Alleged Defamatory Statements Are All Nonactionable Opinion

Eros argues that the GeoInvesting Articles are not constitutionally protected opinion because the Articles "conveyed to a reasonable investor that GeoInvesting had evidence that Eros was committing securities fraud" and that GeoInvesting cannot "insulate [its] statements from liability" by using "opinion phrases." (Opp. at 11, 14.) This is a blatant misrepresentation of both the law and GeoInvesting Defendants' arguments in their opening brief—indeed, the phrase "securities fraud" does not appear anywhere in the GeoInvesting Articles.

First, as in its Complaint, Eros clumsily manipulates the content of the GeoInvesting Articles to suit its argument that the Articles were conveying facts, not opinions. In its Opposition, Eros sets forth a list of 12 bulleted excerpts from the Articles, positing that they "left a reasonable reader with the 'clear impression' that GeoInvesting was conveying provable facts

about Eros." (Opp. at 15.) But Eros presents each of these statements in isolation, omitting important words and, more importantly, stripping them of their context. Indeed, each statement to which Eros refers is accompanied by a discussion of, and link to, *the facts on which it is based*. In their opening brief, the GeoInvesting Defendants devoted considerable space—19 bullets across 12 pages—to ***each*** of these statements, and the others alleged in the Complaint to be defamatory, meticulously showing that the Articles disclosed, and provided readers access to, the information on which they were based. (Geo. Op. Br. at 12-23).

Even the case law Eros cites makes clear that such statements are constitutionally protected "pure opinion," as opposed to actionable "mixed opinion," because they are accompanied by a recitation of the supporting facts. Indeed, "there was no suggestion in the article that there were additional undisclosed facts on which [the statements] had been based." *Brian v. Richardson*, 87 N.Y.2d 46, 53-54 (1995) ("although defendant unquestionably offered his own view that these sources were credible, he also set out the basis for that personal opinion, leaving it to the readers to evaluate it for themselves"); *Davis v. Boeheim*, 24 N.Y.3d 262, 269 (2014) ("What differentiates an actionable mixed opinion from a privileged, pure opinion is the implication that the speaker knows certain facts, unknown to [the] audience, which support [the] opinion and are detrimental to the person being discussed."); *Restis*, 53 F. Supp.3d at 723 (same).

Eros's Opposition simply ***ignores*** these 12 pages in the GeoInvesting Defendants' opening brief. It fails to address them and certainly fails to refute them. Instead, in a footnote, Eros argues that the GeoInvesting Articles are actionable, even if opinion, because they were "based on false or grossly misrepresented facts." (Opp. fn 17.) In support, Eros provides one unpersuasive example. Eros claims that the March 29 Article's statement that "[a] CNN India expose catches four Eros International associated director/producer/writers on hidden camera

discussing methods for laundering money through their films" is "based on grossly distorted facts" because the "expose had nothing to do with Eros [and] [t]hey were never charged or subject to any publicly known investigations." (Opp. fn 17.) But as GeoInvesting explained in its opening brief, the article *specifically states* that the CNN expose was not about Eros itself, but rather "Eros-associated" film industry executives with whom Eros collaborated—a point Eros *concedes* in its Complaint. (Compl. ¶ 247.) Eros resorts to arguing that the CNN expose was "stale" (Opp. at 1)—but the article concerns what Eros did *subsequent* to the CNN report. (Geo. Op. Br., de Leeuw Aff. Ex. 3, p. 1 ("Rather than disassociate themselves with these film executives following the expose, Eros instead worked closely with all of the individuals and even acquired a 50% interest in one of their production companies in 2016.") There was therefore nothing "grossly distorted" about the statements in the article and certainly nothing false.

Other than that one misleading example, Eros does not even attempt to explain why any of the alleged defamatory statements are "based on false or grossly misrepresented facts." Nor does Eros point to any opinion statement that it claims is based on undisclosed facts. And it is clear why Eros does not do so—because it would be futile. Eros simply does not allege that the supporting facts on which the GeoInvesting Defendants based their thoroughly analyzed conclusions about Eros are false. Eros cannot plead a claim for defamation just on the basis of disagreeing with the GeoInvesting Defendants' conclusions.

For this reason, the cases on which Eros's Opposition relies are simply inapposite. Eros makes the sweeping statement that courts "frequently" find short-seller reports to be actionable non-opinion—but fails to cite a single published New York case for this proposition.[1] Instead,

[1] Indeed, in January 2018, a Southern District of New York magistrate submitted a report and recommendation dismissing defamation and related claims against a short-seller. *MiMedx Group, Inc. v. Sparrow Fund Mgmt. LP*, 1:17-cv-07568-PGG-KHP, Dkt #83 (S.D.N.Y. 2017).

Eros cites a transcript from a federal case where Judge Caproni ruled from the bench to deny a motion to dismiss, without an opinion. *See Amira Nature Foods v. Prescience Point LLC*, No. 15-cv-9655, Dkt No. 66 (S.D.N.Y. Oct. 17, 2016) ("*Amira* Motion to Dismiss Transcript). Eros also cites a California state case, *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688 (2007). Neither of these cases is controlling. Moreover, they are both distinguishable because plaintiffs in those cases adequately alleged that the facts on which the reports relied were either not disclosed or demonstrably false. *Amira* Motion to Dismiss Transcript at 60-61; *Overstock.com*, 151 Cal. App. 4th at 704, 706-708; *see also Davis*, 24 N.Y.3d at 268(denying motion to dismiss defamation claim because "a reasonable reader could view [the] statements as supported by ***undisclosed facts***") (emphasis added). Moreover, in the cases Eros cites, the statements were contained in full-blown investment analyst reports (*i.e.*, the Amira reports were 30-40 pages in length)—distinguishable from the articles at issue here, which were posted on a blog known for publishing amateur opinion pieces. *Nanoviricides, Inc. v. Seeking Alpha, Inc.*, 2014 WL 2930753, at *6 (N.Y. Sup., N.Y. Cty. June 26, 2014). And, while relying on these factually distinguishable cases, Eros's Opposition relegates to footnotes the two most important cases in this jurisdiction, *Silvercorp Metals Inc. v. Anthion Mgmt. LLC*, 959 N.Y.S.2d 92 (N.Y. Sup. N.Y. Cty. 2012) and *Nanoviricides*, where the courts dismissed defamation claims against short-sellers on the grounds of protected opinion.[2]

Eros concedes that the Court must make a holistic evaluation of the GeoInvesting Articles to determine whether the allegedly defamatory statements are statements of fact or

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[2] Curiously, Eros cites to the U.S. Supreme Court's opinion in *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318 (2015) for the proposition that "words of opinion" may not insulate a securities issuer from liability for misstatements in a registration statement for publicly offered securities. *Omnicare* concerns securities fraud—not defamation. As this is not a case brought under the federal securities laws, *Omnicare* is irrelevant.

opinion, but Eros then engages in absurd analysis to try to preserve its Complaint. For example, Eros cherry-picks six isolated instances, spread across the five articles at issue, in which the word "evidence" or "proof" was used. (Opp. at 16.) On this basis alone—and without any legal support—Eros makes the far-reaching assertion that "GeoInvesting's reports cue, to any reasonable reader, that they can be construed as fact." (*Id.*) Eros also argues that the "length" and "sheer frequency" of the GeoInvesting Articles should suggest to the reader that they are conveying fact. But there is no basis in law for this analysis and, in any event, the Articles are by no means lengthy (the shortest is four pages and the longest is 14 pages) and certainly not "frequent," with five articles published over a span of five months. Finally, in a last-ditch attempt, Eros even cites to a tiny portion of the disclaimer that GeoInvesting places at the end of each article. Eros quotes only the following language: "***all information contained herein is accurate and reliable.***" The entirety of the disclaimer, however, makes it crystal clear that GeoInvesting is expressing its opinions about Eros:

> ***The research contained herein expresses opinions*** which have been based upon generally available information, field research, inferences and deductions through due diligence and our analytical process. ***To the best of our ability and belief, all information contained herein is accurate and reliable***, and has been obtained from public sources we believe to be accurate and reliable, who are not insiders or connected persons of the stock covered herein or who may otherwise owe any fiduciary duty or duty of confidentiality to the issuer. ***However, such information is presented "as is," without warranty of any kind, whether express or implied***.

(*See, e.g.*, Geo. Op. Br., de Leeuw Aff. Exs. 1-5 (emphasis added).)

Eros's purported "holistic" review of the articles ignores the types of contextual considerations that New York law requires courts to take into account. In particular, Eros does not address the extensive New York case law holding that an author's disclaimer of potential bias is a signal to the reader that the content is an expression of opinion. (Geo. Op. Br. at 8

(citing *Silvercorp Metals*, 959 N.Y.S.2d 92, at *9, *Int'l Publ'g Concepts, LLC v. Locatelli*, 9 N.Y.S.3d 593, at *7 (N.Y. Sup. N.Y. Cty. 2015), *Brian*, 87 N.Y.2d at 53).) Nor does Eros explain why readers would assume publications on an Internet blog "designed to give people a place to express their opinions" contain statements of fact—even where the First Department has held that "readers give less credence" to blog postings. *See Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 44 (1st Dep't 2011) ("readers give less credence to alleged defamatory remarks published on the Internet"); *Nanoviricides, Inc.*, 2014 WL 2930753, at *6 (dismissing defamation claims published on Seeking Alpha). Eros also makes the conclusory assertion that readers must have taken the GeoInvesting Articles seriously because of a subsequent decline in Eros's share price. This argument ignores the very real possibilities that Eros's stock moved for reasons unrelated to the GeoInvesting Articles or that Eros's investors read the disclosed facts on which these articles were based and arrived at the same opinion about concerns about Eros.

Tellingly, Eros provides no citation for its statement that "GeoInvesting framed all of its short reports as neutral 'investment research reports.'" (Opp. at 18.) This phrase—and certainly the word "neutral"—appears nowhere in the Articles and is just another example of Eros's self-serving laxness with "paraphrasing" or—rather—making things up from whole cloth. Indeed, GeoInvesting's disclosure of its short position in Eros undermines any reporting "neutrality."

C. Eros Fails To Allege Falsity

Eros is wrong when it suggests that "New York law presumes falsity at the motion to dismiss stage, and thus, any defense of 'truth' is legally irrelevant at this stage." (Opp. at 9.) Falsity can only presumed if it is ***properly pled***. But if falsity is not properly pled, a plaintiff has

not made its prima facie case of defamation to withstand a motion to dismiss.[3] *Fleischer v. NYP Holdings, Inc.*, 104 A.D.3d 536, 537 (1st Dep't 2013); *Tennerite Sports, LLC v. NBCUniversal News Group*, 864 F.3d 236, 247 (2d Cir. 2017).

As set forth extensively in the GeoInvesting Defendants' opening brief, Eros's Complaint fails to plead the falsity of a number of the allegedly defamatory statements. (Geo. Op. Br. at 12, 14-22.) Eros only attempts to tackle a handful of these, and only half-heartedly at that. For example, Eros has not pled that the statement that "Eros was using NextGen for the purpose of 'siphon[ing] money from company shareholders into the coffers for the Lulla family" is false. Indeed, Eros simply says that it disclosed these transactions and claims that the transactions were beneficial to Eros. (Opp. at 10.) While these allegations may explain *why* Eros engaged in the practice, they do not demonstrate it was false that Eros used NextGen to make payments to family members or that there were suspicious fluctuations in NextGen's numbers in Eros's filings from year to year, which is what the March 8 Article says. (Geo Op. Br. at 12-13.)[4]

Eros also asserts that "Eros's annual reports regularly reflected cash *increases* during the years underlying these reports rather than any perceived 'liquidity crisis.'" (Opp. at 5.) But as the GeoInvesting Defendants made clear in their opening brief, this doesn't demonstrate the falsity of statements in the GeoInvesting Articles about ***free cash flow*** which had been mostly negative—*as acknowledged by Eros's own CEO*. (Geo. Op. Br. at 14.) Finally, Eros makes the

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[3] *Garcia v. Puccio*, 17 A.D.3d 199 (1st Dep't 2005), to which Eros cites, does not warrant a different conclusion. The plaintiff in *Garcia* alleged that the defamatory statements were false because they left out important context that would have changed the reader's impression of the statements. *Tennerite Sports, LLC v. NBCUniversal News Group*, 864 F.3d 236, 246 (2d Cir. 2017) (explaining *Garcia*). Thus, in *Garcia*, the plaintiff pled falsity and the court declined to consider a defense of truth on the pleadings. Here, Eros did not plead falsity in the first instance.

[4] Eros's footnote 10 is irrelevant. The GeoInvesting Defendants are not disputing the falsity of the alleged defamatory statements; they argue that Eros failed to even ***allege*** falsity.

bizarre claim that the GeoInvesting Defendants falsely accused it of an "unhealthy relationship with its credit facility"—but then Eros concedes GeoInvesting "debunked [that statement] within its own article."[5] (Opp. at 5.) Eros would be hard-pressed to find case law precedent that an article that provides all the relevant facts constitutes actionable defamation where a court must look at the entire publication as a whole in making the determination.[6]

D. Eros Misstates The Pleading Standard For Actual Malice

Eros's attempt to show that it pled "actual malice," as it must when bringing a defamation claim against a public figure, falls well short of the mark.[7]

Eros fails to allege in its Complaint—or even argue in its Opposition—that the GeoInvesting Defendants were aware of any falsity in any of their allegedly defamatory statements, as required by New York law and the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and New York law. Instead, Eros tries to cobble together allegations it characterizes as "circumstantial factors"—having nothing to do with knowledge of falsity—which it then asks the Court to "combine[]" to meet the well-established "actual malice" standard. Eros points to, for example, GeoInvesting's short-seller status (which GeoInvesting

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[5] Eros distorts the wording of GeoInvesting's article beyond recognition. The March 16 Article poses a rhetorical question: "If [Eros] had a ***healthy relationship*** with ***the provider of their revolving facility***, why not extend beyond 2 months and just renew?" (Geo. Op. Br., de Leeuw Aff. Ex. 2, p. 4 (emphasis added).)

[6] Eros's argument that the Complaint "plainly" pleads the falsity of GeoInvesting's statement that "Eros has 9 different auditors [for its myriad of entities]" (Opp. at 10) is incorrect. While Eros pled that its outside auditor "has been its only independent outside auditor since its IPO in 2013" (*id.*), this does not refute the March 29 Article's statement that Eros had nine auditors "for its myriad of entities." (Geo. Op. Br., de Leeuw Aff. Ex. 3, pp. 1, 7.)

[7] Eros is a public figure because it is a publicly-traded company (*MiMedx*, 17-cv-0768-PGG-KHP, Dkt. # 83, at p. 15), and it publicly solicited investments with its debt offering. *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1348 (S.D.N.Y. 1977). Moreover, given Eros's self-characterization as "a global entertainment company," a "leading international media company," with a platform of "over 68 million registered users" (Compl. ¶¶ 19, 97-98), it would be disingenuous for it to now argue it is *not* a public figure.

amply disclosed), that GeoInvesting published its articles at allegedly specific times of year, and that GeoInvesting allegedly published statements "even after they had been discredited by independent sources" (but fails to cite to any allegation showing such a discredited statement, let alone naming such "independent source"). (Opp. at 21.) Eros points to no precedential case law for this novel proposition—nor can it. As the New York Court of Appeals has held:

> The Supreme Court has emphasized 'that the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term. It must be established that the 'defendant made the false publication with a 'high degree of awareness of ... probable falsity' or must have 'entertained serious doubts as to the truth of his publication."

Prozeralik v. Capital Cities Comm'ns, Inc., 82 N.Y.2d 466, 474 (N.Y. 1993) (quoting *Harte-Hanks Comm'ns v. Connaughton*, 491 U.S. 657, 667 (1989)).[8]

III. The Complaint Should Be Dismissed Against Defendants Daniel E. David and Christopher Irons And All Claims Relating to GeoInvesting Defendants' Tweets Should Be Dismissed

Eros's claims against Defendants Daniel E. David and Christopher Irons rest exclusively on their allegedly defamatory Tweets. (Compl. ¶¶ 85, 88, 289-91.) But Eros fails to address any of these Twitter posts or the arguments in GeoInvesting Defendants' opening brief concerning them. As such, all claims relating to the Twitter posts are waived and the Complaint must be dismissed as against Defendants David and Irons. *See Ng. v. NYU Langone Med. Ctr.*, 2018 WL 411634, at *1 (1st Dep't Jan. 16, 2018) ("Plaintiff's failure to oppose so much of the motion as sought dismissal of [certain] claim constituted an abandonment of the claim."); *Saidin v. Negron*, 136 A.D.3d 458, 458 (1st Dep't 2016); *Josephson LLC v. Column Fin., Inc.*, 94 A.D.3d 479, 480 (1st Dep't 2012); *Kronick v. L.P. Thebault Co., Inc.*, 70 A.D.3d 648, 649 (2d Dep't 2010).

[8] The one First Department case Eros cites, *Coclin v. Lane Press, Inc.*, 210 A.D.2d 98 (1st Dep't 1994) does *not* opine on whether timing of communications is probative of actual malice.

IV. Eros Has Not Adequately Pled Its Non-Defamation Claims

Eros fails to refute the case law in New York dismissing, as duplicative, claims that rely on the same alleged defamatory statements and harm as a defamation claim. Eros tries to argue that it alleges different types of harm for its defamation and non-defamation claims. But the Complaint belies this assertion. Eros plainly alleges the same type of harm and seeks the same types of damages for its defamation and non-defamation claims. *See* Compl. ¶¶ 358 (Count II, Defamation: "Defendants' false statements directly harmed Eros' business and reputation in numerous and specific ways, including causing lost profits, increased capital costs, increased expenses, legal fees and costs expended to mitigate the impact …"); 365 (Count III, Commercial Disparagement: "Defendants' false statements directly harmed Eros' business in numerous specific ways, including without limitation: lost profits resulting from lost underwriting business, increased capital costs; increased expenses; legal fees, and costs expended to mitigate the impact …"); 374 (Count IV, False Light: "As a proximate result of Defendants' publication of false and highly offensive statements cited herein, Eros has suffered injury to its business and reputation …"); 380, 387 (Counts V, VI, Tortious Interference: "As a direct and proximate cause of Defendants' intentional interference with Eros' prospective business relationships with third-parties, Eros' business relationships were damaged, including in connection with its U.S. Dollar Reg-S bond offering in March 2017 and revolving credit facility agreement extensions.").[9] And, in any event, all of the harms Eros alleges "flow[] from the effect on [its] reputation." *Hengjun Chao v. Mount Sinai Hosp.*, 476 Fed. App'x 892, 895 (2d Cir. 2012).

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[9] Moreover, the two cases on which Eros relies are inapposite. *Amaranth LLC v. JP Morgan Chase & Co.*, 71 A.D.3d 40, 47-48 (1st Dep't 2009) considered the statute of limitations to apply to a tortious interference claim. And *Stapleton Studios, LLC v. City of New York*, 26 A.D.3d 236, 273 (1st Dep't 2006), discussed defamation as the "wrongful means" prong of a tortious interference claim. Neither case is related to whether claims are duplicative.

A. Eros Fails to Allege A Disparaged Product For Its Commercial Disparagement Claim

Eros cannot salvage its claim for commercial disparagement by arguing that the GeoInvesting Articles "impugned the value, quality and condition" of Eros Now. (Opp. at 23.) As the GeoInvesting Defendants argued in its opening brief—and as Eros itself concedes in its Opposition—the Articles spoke only of Eros's financials and Eros Now's subscriber base numbers, never addressing the quality of the actual product as required to state a claim for commercial disparagement. *Amira* Motion to Dismiss Transcript at 62-63. Eros's claim for commercial disparagement must therefore be dismissed.

B. Eros Fails To Allege Tortious Interference

Eros's attempt to salvage its inadequately-pled tortious interference claims is also unavailing. The only allegation Eros points to in support of its claim for tortious interference is that "[unspecified] [d]efendants' disinformation campaign impaired Eros's creditworthiness and affected its reputation among and relationships with potential lenders with whom Eros needed to negotiate with to extend and/or refinance its credit facility agreement and raise capital." (Opp. at 23, citing Compl. ¶ 339; *see also* Compl. ¶ 380 (same).) This allegation fails to address the deficiencies raised by the GeoInvesting Defendants in their opening brief: *i.e.*, the failure to identify any such "potential lenders" or to allege that Eros would have raised capital from specified parties or extended its revolving credit facility with a particular lender but for the GeoInvesting Articles. *See, e.g.*, *Vigoda v. DCA Prods. Plus, Inc.*, 293 A.D. 2d 265, 266-67 (1st Dep't 2002) ("As plaintiffs cannot name the parties to any specific contract they would have obtained …, they have failed to satisfy the 'but for' causation"); *Schoettle v. Taylor*, 282 A.D.2d 411, 411 (1st Dep't 2001) (dismissing claim where "plaintiffs failed to allege any specific business relationship they were prevented from entering into by reason of the [tort]").

Moreover, despite Eros's attempt to refashion its allegations through its Opposition, the Complaint does not allege that it was "the defamatory reports and tweets published by GeoInvesting between March 8, 2017 and March 29, 2017 [that] interfered with Eros's ability to raise capital" and that it was "these same reports and tweets [that] interfered with Eros's efforts to extend its revolving credit facility. (Opp. at 23-24.) The Complaint nowhere specifically links the GeoInvesting Articles to this alleged harm. To the contrary, Eros alleges that it suffered harm as a result of the conduct of unspecified "defendants." (Compl. ¶¶ 18, 339, 380.) The tortious interference claims are therefore improperly pled and must be dismissed.

C. Eros's Claim For False Light Fails Under Any State's Law

Eros argues that the Court cannot make a choice of law analysis at this juncture. But its argument applies only when the Complaint does not set forth sufficient facts for a court to make a choice of law determination. (*See* Opp. at 25, citing, *e.g.*, *Bristol-Myers Squibb Co. v. Matrix Lab. Ltd.*, 655 Fed. App'x 9, 13 (2d Cir. 2016) (declining to engage in choice of law analysis where applicable law depended on a contract between one of the parties and a third party, about whom the plaintiff had "only limited information" at the pleading stage); *Gerffert Co., Inc. v. Fratelli Bonella, SRI*, 2015 WL 6127078, at *6 (N.Y. Sup. Nassau Cty. Oct. 7, 2015) (holding the Court did not have enough information to determine where the parties contracted and performed their agreement to make a choice of law determination).)

Eros ignores that New York courts have given specific instructions for the unique facts of this type of case: where, as here, a plaintiff brings a defamation claim relating to statements published on the Internet, the "presumptive rule [is] that the law of the plaintiff's domicile applies." *Dickerson v. Novartis Corp.*, 315 F.R.D. 18, 31 (S.D.N.Y. 2016) (quoting *Broadspring, Inc. v. Congoo, LLC*, 2014 WL 4100615, at *6 (S.D.N.Y. Aug. 20, 2014)). Indeed,

the only fact necessary for the Court's analysis—Eros's domicile—is pled in the Complaint. *Davis v. Costa-Gavras*, 580 F. Supp. 1082 (S.D.N.Y. 1984), a federal case on which Eros relies extensively, is inapplicable because it concerns the publication of a book, not the "national publication" of Internet material which warrants different legal treatment.[10]

In any event, the false light claims under any relevant law fail for the same reasons the defamation claims fail—*i.e.*, Eros does not plead any false statements of fact. *See, e.g.*, *Parano v. O'Connor*, 641 A.2d 607, 610 (Pa. Super. 1994) (opinion can sustain false light claim only if opinion was "far out of proportion with the facts" or underlying facts are false); *Walko v. Kean Coll.*, 235 N.J. Super. 139, 156 (N.J. Super. 1988) (dismissing false light claim where statements were opinion); *see also Cibenko v. Worth Publishers, Inc.*, 510 F. Supp. 761, 766 (D.N.J. 1981) (for false light liability, "it is essential that the matter publicized be untrue …" and dismissing false light claim because, *inter alia*, "picture and caption constitute opinion"). Moreover, under Pennsylvania law, only an individual—not a corporation—can bring such a claim. *See, e.g.*, *Teri Woods Pub., LLC v. Williams*, 2013 WL 1500880, at *7 (E.D. Pa. Apr. 12, 2013) ("a corporation … has no right to privacy, and therefore, causes of action for false light [] are precluded"); *Acad. Indus., Inc. v. PNC Bank, N.A.*, 2002 WL 1472342, at *18 (Pa. Com. Pl. May 20, 2002) ("invasion of privacy can be maintained only by a living individual whose privacy is invaded").

D. Eros Fails To Plead The Elements Of Civil Conspiracy

In its Opposition, Eros argues that it sufficiently alleged a conspiracy "agreement," citing one First Department case, *FIA Leveraged Fund Ltd. v. Grant Thornton LLP*, 150 A.D. 3d 492 (1st Dep't 2017). But *FIA* was not a case about pleading civil conspiracy, but rather "conspiracy

[10] Eros cites a Pennsylvania case in its choice of law argument, but choice of law analysis is under the law of the forum state. *Tanges v. Heidelberg N. Am., Inc.*, 93 N.Y.2d 48, 54 (N.Y. 1999) ("Because New York is the forum State, we must look to New York choice of law rules").

jurisdiction." *Id.* at 495 (emphasis in original).[11] Eros's attempt to point to a few circumstantial details in the Complaint—*i.e.*, that all defendants were short sellers, or that they "parroted and referenced each other's defamatory and disparaging facts," or "the uncanny synchronization and similarity of Defendants' conduct"—is insufficient to plead an agreement to damage Eros.

V. The Court Should Not Grant Eros Leave To Replead

Eros's claims against the GeoInvesting Defendants stem from the five GeoInvesting Articles. The universe of possible defamatory statements is fixed and therefore there are no additional allegations Eros can plead to avoid dismissal. Moreover, Eros "neither submits a proposed amended pleading nor explains how [it] would amend the complaint if [its] request were granted." *Reno v. Mellon*, 2009 WL 1106538 (N.Y. Sup. N.Y. Cty. 2009) (leave to amend "is not granted upon mere request without a proper showing"). Further, allowing Eros to replead would prejudice the GeoInvesting Defendants. It is plain as day that Eros is attempting to use this action to chill legitimate speech by silencing and intimidating its critics.

CONCLUSION

For the reasons set forth herein, and in the GeoInvesting Defendants' opening brief, the Complaint should be dismissed, with prejudice, as against the GeoInvesting Defendants.

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[11] Eros argues for "leeway" in pleading conspiracy, citing *In re Harvard Knitwear, Inc.*, 153 B.R. 617 (E.D.N.Y. 1993). (Opp. at 28.) However, in that case, the court found that the conspiracy claim was inadequately pled: "[l]umping together [defendants] in collective charges of misconduct, absent allegation of any connecting thread, is inadequate to sweep [defendant] under the rubric of a sustainable pleading asserting conspiracy … ." *Id.* at 628.

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