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. 653096/2017 Hon. Eileen Bransten Mot. Seq. No. 006

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE CLARITYSPRING DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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Plaintiff Eros International Plc ("Eros" or "Plaintiff") respectfully submits this memorandum of law in opposition to the Memorandum of Law in Support of the Motion to Dismiss by Defendants ClaritySpring Inc., ClaritySpring Securities LLC, and Nathan Z. Anderson (collectively, "ClaritySpring" or the "ClaritySpring Defendants"),[1] which seeks dismissal of the Complaint pursuant to New York Civil Practice Law and Rules ("CPLR") 3211(a)(1) and (7).[2]

PRELIMINARY STATEMENT

Plaintiff's Complaint alleges in substantial detail a multi-year market manipulation scheme pursued by a group of corrupt short-sellers that are trying to eviscerate Eros' reputation and business for their own financial gain. To fraudulently profit from their short positions, Defendants have published hundreds of false and defamatory statements about Eros between 2015 and present, and have repeatedly sabotaged its share price.

ClaritySpring – a short-seller and purported research firm led by defendant Anderson that claims to be engaged in "transparent" investing but now has been sued on multiple occasions for its involvement in large coordinated short selling schemes – joined the scheme in March 2017. Upon joining, ClaritySpring published numerous tweets defaming Eros and amplifying the attacks of its co-conspirator, GeoInvesting. Likely aware that its attacks were baseless and

[1] ClaritySpring also includes the alias "Hindenburg Investment Research." ClaritySpring admitted it was doing business under the "Hindenburg Investment Research" alias, identified as "John Doe No. 6" in Eros' Complaint, for the first time in this litigation.

[2] Citations to "¶¶ __" refer to paragraph numbers of Plaintiff's Complaint, dated September 29, 2017 (Dkt. No. 3) (the "Complaint"). "Ex. __" refers to the exhibits of the Affirmation of Michael J. Bowe, dated January 23, 2018, in support of Eros' opposition to the orders to show cause submitted by Mangrove, the GeoInvesting Defendants, and the ClaritySpring Defendants. Citations to "CSB at __" refer to the page numbers of ClaritySpring's Memorandum of Law in Support of Motion to Dismiss Complaint (Dkt. No. 95).

exposed it to liability, ClaritySpring in July 2017 began to use an anonymous persona, "Hindenburg Investment Research," to further attack Eros in three reports it published in the course of a month. ClaritySpring later, in a clear attempt to destroy evidence demonstrating its culpability for its attacks against Eros, deleted tweets relating to Eros from the ClaritySpring Twitter account shortly after Eros instituted this action – before it was served with the Complaint and before there was any press about the lawsuit – but after GeoInvesting had been served.

Notably, and demonstrative of the Defendants' highly orchestrated campaign against Eros, ClaritySpring repeatedly attacked Eros at moments intended to do the most damage to Eros. Its first attacks in March were, in part, intended to disrupt Eros' negotiations over a U.S. Dollar Reg-S bond offering. Its July 2017 attacks began exactly one week before Eros was set to announce its FY 2017 annual and Q4 results. Most egregiously, ClaritySpring unveiled the Hindenburg alias on July 31, 2017, the exact date that Eros filed its annual report with the SEC. Yet, ClaritySpring still has the audacity to suggest it did not act with malice in attacking Eros.

For these reasons and others, all of which are detailed herein, ClaritySpring's motion to dismiss fails to demonstrate that the Complaint is either legally or factually deficient so as to mandate dismissal of the claims against the ClaritySpring Defendants. Though ClaritySpring argues that Eros has not demonstrated that any of its statements were false, this challenge is both legally improper and factually incorrect. Similarly, while ClaritySpring claims that all of its defamatory statements are mere opinions that enjoy Constitutional protection, they ignore that the clear context of its "opinions" – including that they (i) were based on research and investigation, (ii) reflected some statements grounded in "evidence," and (iii) were picked up and disseminated broadly over international newswires – conveyed to a reasonable investor that ClaritySpring was asserting provable facts about Eros.

Accordingly, Eros respectfully submits that the Court should deny ClaritySpring's motion to dismiss and permit this case to proceed to discovery.

FACTUAL ALLEGATIONS

ClaritySpring publicly joined the short-and-distort campaign against Eros in March 2017.[3] ¶ 294. Not coincidentally, ClaritySpring's emergence perfectly corresponded with that of its co-conspirators GeoInvesting,[4] which published defamatory "research" about Eros at that time. ¶¶ *Id.*, 297.

ClaritySpring regularly attacked Eros on Twitter – using both ClaritySpring's twitter and the anonymous "Hindenburg Research" account – with the most fervent attacks occurring in July 2017, again corresponding with GeoInvesting publishing additional short reports about Eros and also with Mangrove[5] reappearing under its own alias, "Alpha Exposure." *E.g.*, ¶¶ 297, 303. Among ClaritySpring's tweets dating from this time is a July 21, 2017 tweet concerning an entity, Emerging Power Singapore Pvt. Ltd. ("Emerging Power" or "Eros Energy"), that ClaritySpring alleged was an Eros subsidiary. ¶ 298. From this allegation, ClaritySpring called into question Eros' financial reporting and its audit practices. ¶ 299. However, as is made clear in Eros' filings with the SEC, Emerging Power was not, and never has been, an Eros subsidiary and thus ClaritySpring's statements tying Emerging Power to Eros simply were false. ¶ 300.

While at first ClaritySpring published its false and defamatory statements about Eros

[3] For a more fulsome discussion of the initial attacks on Eros, please see Eros' Memorandum Of Law In Opposition To The Mangrove Defendants' Order To Show Cause, which was filed contemporaneously with this brief.

[4] As used herein, "GeoInvesting" refers to defendants Geoinvesting, LLC, Christopher Irons, Daniel E. David, FG Alpha Management, LLC, FG Alpha Advisors, and FG Alpha, L.P.

[5] As used herein, "Mangrove" refers to defendants Mangrove Partners and Nathaniel H. August, as well as the previously anonymous "Alpha Exposure."

under the ClaritySpring handle, in July 2017, on platforms such as Twitter and seekingalpha.com, they began to employ an anonymous persona, "Hindenburg Investment Research" ("Hindenburg"). ¶ 318. As Hindenburg, ClaritySpring continued to attack Eros and to further the impression that concerns over Eros were both widespread and legitimate. *E.g.*, ¶¶ 318-19, 322-23, 325. Notably, after joining Twitter in July 2017 through the time Eros filed its Complaint, all but one tweet from Hindenburg focused on Eros. ¶ 330.

Under the auspices of the Hindenburg alias, ClaritySpring published several short reports and additional tweets espousing false statements. ¶¶ 318-30. In the Hindenburg reports, ClaritySpring made many false statements about Eros, including some that echoed the false statements of Mangrove and GeoInvesting, such as the following: that Eros faced "ever-tightening liquidity issues with no clear solution on hand" (¶ 320); and that Eros allegedly engaged in impermissible self-dealing via related party transactions with an entity that sat outside of Eros' corporate structure (¶ 328). As Eros alleges in its Complaint, each of these accusations are false. *E.g.*, ¶¶ 320-24, 326, 329. For one, ClaritySpring's claim that Eros was facing liquidity issues is belied by Eros' financial statements, which reflected cash *increases* rather than any perceived "liquidity crisis." ¶ 316. Furthermore, as discussed *infra*, the entities that ClaritySpring claimed are "related parties" were in no way related to Eros. ¶ 321.

Regardless of the identity they used or the platform on which they posted, ClaritySpring made its statements for the purpose of harming Eros so that ClaritySpring and its co-conspirators could profit from their admittedly short positions in the company. This is evidenced, in part, by the timing of the attacks perpetrated by ClaritySpring and others, which occurred at opportune moments that would maximize the attention that their defamatory statements would receive. For instance, ClaritySpring's and GeoInvesting's March 2017 attacks were purposely timed to

disrupt both Eros' negotiations over a U.S. Dollar Reg-S bond offering, which Defendants were aware that Eros was in the final stages of securing around this time, and negotiations regarding the extension of Eros' credit facility agreement.[6] ¶¶ 339, 380. Additionally, ClaritySpring attacked with heightened intensity exactly one week before Eros announced its FY 2017 annual and Q4 results, and they unveiled the Hindenburg alias on July 31, 2017, the exact date that Eros filed its annual report with the SEC. ¶ 318. These attacks coincided with similar defamatory statements published by Mangrove and GeoInvesting. *See Id.*

Tellingly, on October 2, 2017 (after Eros filed its Complaint on September 29, 2017) (Dkt. No. 3), ClaritySpring deleted all of the tweets about Eros available on ClaritySpring's Twitter feed. Ex. A. Notably, they did so before they were served with the Complaint – which occurred on October 11, 2017 (Dkt. No. 24) – and before there was any press, or a press release had been issued, concerning the filing of the lawsuit.[7] Indicative of the fact that ClaritySpring was in league with GeoInvesting, at the time ClaritySpring deleted the tweets, the only parties aware of the Complaint were the GeoInvesting Defendants, who had been served several hours earlier. (Dkt. Nos. 1-15.)

ARGUMENT

I. MOTION TO DISMISS STANDARD

"The scope of a court's inquiry on a motion to dismiss under C.P.L.R. 3211 is narrowly circumscribed." *Aris Multi-Strategy Offshore Fund, Ltd. v. Devaney*, 2009 WL 5851192, at *4

[6] As set forth in Eros' Memorandum Of Law In Opposition To The GeoInvesting Defendants' Order to Show Cause (at 20), ClaritySpring's appearance in March 2017 coincided with the largest single-day purchase of put options on Eros stock in all of 2016 and the first half of 2017.

[7] Eros put out a press release on October 3, 2017, the day after the tweets were deleted. https://www.businesswire.com/news/home/20171003005903/en/Eros-International-Plc-Commences-Legal-Action-Market.

(Sup. Ct. N.Y. Cty. Dec. 14, 2009) (Bransten, J.). "Thus, it is well established that, on a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference[,] and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.*

Moreover, on a defendant's motion to dismiss pursuant to CPLR 3211(a)(7), "the Court of Appeals has consistently [held] that evidence in an affidavit used by a defendant to attack the sufficiency of a pleading 'will seldom if ever warrant the relief [the defendant] seeks ***unless [such evidence] conclusively establishes that plaintiff has no cause of action***." *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 115 A.D.3d 128, 138 (1st Dep't 2014) (emphasis in original).[8]

II. EROS PROPERLY PLEADS A CLAIM FOR DEFAMATION AND DEFAMATION PER SE (COUNTS I AND II)

To plead a claim for defamation under New York law, a plaintiff must allege (i) a false statement of fact, (ii) published without privilege or authorization to a third party, (iii) constituting fault judged by, at a minimum, a negligence standard, (iv) that has caused special harm or constitutes defamation per se. *Int'l Pub. Concepts, LLC v. Locatelli*, 2015 WL 321852, at *3 (Sup. Ct. N.Y. Cty. Jan. 15, 2015) (Bransten, J.). Similarly, "[w]here a statement impugns 'the basic integrity' of a business, an action for defamation *per se* lies, and general damages are presumed." *Boule v. Hutton*, 328 F.3d 84, 94 (2d Cir. 2003) (citations omitted).

Significantly, rather than address the merits of each element, ClaritySpring spends the bulk of its brief arguing that its defamatory statements are immune from liability because they

[8] Except where noted, all internal citations have been omitted and all emphasis has been added.

are constitutionally protected opinions. But, as detailed below, 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]." *Restis v. Am. Coalition Against Nuclear Iran, Inc.*, 53 F. Supp. 3d 705, 718 (S.D.N.Y. 2014).

As set forth below, the Complaint's detailed allegations – which include demonstrably false statements that were widely disseminated by ClaritySpring at critical junctures – easily satisfy the "liberal standard" for construing defamation pleadings espoused by the Court of Appeals. *See Davis v. Boeheim*, 24 N.Y.3d 262, 268 (2014) ("If, upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint ***must*** be deemed to sufficiently state a cause of action.").

A. Eros' Complaint Adequately Pleads Falsity

In a further attempt to argue that its false and misleading statements are not actionable, ClaritySpring claim that the Complaint fails to plead facts demonstrating how any of the challenged statements are false. CSB at 14. MB at 14. This argument, however, undermines ClaritySpring's claim that its false and defamatory statements are protected opinion, see *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 281 (S.D.N.Y. 2016) (only facts are capable of being proven true or false), [9] and fails for several other reasons.

First, New York law presumes falsity on a motion to dismiss, and thus, ClaritySpring's argument is legally irrelevant at this juncture. *See Treppel v. Biovail Corp.*, 2005 WL 2086339, at *8 (S.D.N.Y. Aug. 30, 2005) ("because the Court accepts the allegations as true, it assumes that the alleged statements are false and that declarants were culpable in making the

[9] Indeed, courts have held that a dispute as to the truth of an alleged defamatory statement compels the denial of a motion to dismiss. *See, e.g.*, *Daniels v. Provident Life & Cas. Ins. Co.*, 2002 WL 31887800, at *5 (W.D.N.Y. Dec. 4, 2002).

statements"); *see also Garcia v. Puccio*, 17 A.D.3d 199, 201 (1st Dep't 2005) (defense of truth, which must be raised in defendants' answer, is "premature" at the motion to dismiss stage).

Second, the argument that Eros did not plead facts showing that ClaritySpring's statements are false is simply incorrect. As detailed in the Complaint, Eros alleges the reasons why the string of tweets ClaritySpring published on July 21, 2017 were false. These tweets falsely accused Eros of owning a subsidiary, Eros Energy Singapore Pvt. Ltd ("Eros Energy" or "Emerging Power"), that (i) sat outside its corporate structure, (ii) owned a 99% stake in another Eros subsidiary, (iii) "record[ed] little financial activity w/ the exception of cash transfers through a series of borrowings and advances," and (iv) was not audited. ¶¶ 298-99. However, "[a]s Eros' SEC filings make clear, Emerging Power is ***not*** a subsidiary of Eros." ¶ 298.

ClaritySpring also ignores the fact that Eros pleads how the statements made by Hindenburg – its pseudonymous identity – are false. As the Complaint demonstrates, Hindenburg published blatant falsehoods in three short reports and numerous tweets. ¶¶ 318-30. For instance, in its July 31, 2017 report published on both Twitter and Seeking Alpha, Hindenburg broadcasted the false claim that Eros is "rapid[ly] selling [] shares" in Eros subsidiary Eros International Media Limited ("EIML"), falsely implying that Eros was giving up its control in EIML out of "a current and ongoing need for liquidity." ¶ 320. But, as Eros stressed on its earnings call on July 28, 2017, was not undwinding EIML and intended to retain its controlling stake in the subsidiary. *Id.* Also in its July 31, 2017 report, Hindenburg rehashed ClaritySpring's false claim that Eros self-deals through a related party, Eros Energy. ¶ 321. Yet, as explained immediately above, Eros Energy (nor any other entities that it controls or owns) is not "related" to Eros. *Id.*

B. ClaritySpring's "Opinion" Defense Is Not Applicable

ClaritySpring contends that ***all*** of its defamatory statements are mere expressions of opinion that enjoy Constitutional protection, and touts its self-serving use of "opinion" phrases like "we believe" that purportedly insulate such statements from liability. CSB at 13-22. As detailed below, the plain context of ClaritySpring's statements demonstrates, however, that it explicitly conveyed that its defamatory statements were predicated upon provable facts.

1. Reasonable Investors Understood That ClaritySpring's Defamatory "Opinions" Were Supported By Provable Facts

When determining whether a statement constitutes an actionable fact or protected opinion, New York courts consider three factors: whether (i) the specific language at issue has a precise meaning which is readily understood; (ii) the statements are capable of being proved true or false; and (iii) the full context of the communication in which the statement appears would signal to a reader or listener that what is being read or heard is likely to be opinion, not fact. *Locatelli*, 2015 WL 321852, at *5.[10] In conducting this analysis, "a court must determine whether a 'reasonable reader would understand the statements' to be opinion or fact." *Id.* at *6.[11]

Contrary to well-settled New York precedent, ClaritySpring spends the bulk of its brief challenging the context of its statements, under the third prong, by cherry-picking isolated opinion language and engaging in hyper-technical parsing. *See, e.g.*, *Gross v. New York Times Co.*, 82 N.Y.2d 146, 156 (1993) ("we stress once again our commitment to avoiding the 'hypertechnical parsing' of written and spoken words" in defamation actions); *Davis*, 24 N.Y.3d

[10] ClaritySpring does not dispute that its defamatory statements satisfy the first two prongs.

[11] Even a "mixed" statement of fact and opinion, in contrast with pure opinion, is actionable when based on "falsely misrepresented or grossly distorted" facts, or implies the existence of undisclosed facts supporting the speaker's opinion. *Chalpin v. Amordian Press, Inc.*, 128 A.D.2d 81, 85 (1st Dep't 1987); *accord Silsdorf v. Levine*, 59 N.Y.2d 8, 11-13 (1983).

at 270 ("[r]ather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believe that the challenged statements were conveying facts about the . . . plaintiff").

Applying these standards, courts have frequently held that the inclusion of opinion language in a short seller's "research" report does not insulate the speaker from liability, particularly where, like here, it purports to convey provable facts about a purported fraud.[12] For example, in one recent matter, a hedge fund with a short position in Amira Nature Foods, Ltd. ("Amira") issued two research reports that purported to "prove" that Amira was engaged in fraudulent activity. Almost precisely as ClaritySpring argues here, the hedge fund defendant in *Amira* – represented by Mangrove's lead defense counsel – urged the court to dismiss Amira's defamation claim because: (i) the hedge fund's reports were couched with opinion language, such as "we believe"; (ii) it purportedly "disclosed in detail how [it] arrived at its opinions"; (iii) the reports "contained hyperlinks and backup for everything that led to the ultimate opinion"; and (iv) the reports disclosed that the hedge fund "had a short position and stood to profit if the stock price of Amira went down." Motion to Dismiss Hearing Transcript at 2-3, *Amira Nature Foods v. Prescience Point LLC,* No. 15-cv-9655, Dkt. No. 66 (S.D.N.Y. Oct. 17, 2016); *accord* Order, *Amira Nature Foods v. Prescience Point LLC*, No. 15-cv-9655, Dkt. No. 65 (S.D.N.Y. Oct. 7, 2016).

In her decision on the record, Judge Caproni flatly rejected each of the hedge fund's

[12] As the U.S. Supreme Court recently held in *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1327, 1331 (2015), even when examined under the rigorous pleading requirements of the federal securities laws, statements that "begin with opinion words like 'I believe' [still] contain embedded statements of fact" and can therefore be subject to liability, as "the resulting statements . . . remain perfectly capable of misleading investors."

arguments and permitted Amira's defamation claim to proceed. Indeed, Judge Caproni reasoned that, "[e]xamining the [hedge fund's] statements as a whole, the Court is left with the clear impression that a reasonable investor would have understood [the hedge fund was] conveying provable facts about [the plaintiff]." *Id.* at 59. In particular, she observed that the hedge fund's two research reports read not as opinion, but "as fact," in that "***[i]t read[] as this company is a house of cards. It is lying to its investors about its revenue, about its exports***." *Id.* at 15-16. Accordingly, consistent with well-settled law, Judge Caproni concluded that "[d]efendants cannot avoid liability simply by including a legal disclaimer or sprinkling their [short] reports with words that they believe connote opinion." *Id.* at 16, 59.[13]

The court's decision in *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688 (2007), is also instructive. Similar to *Amira*, the short seller in *Overstock* published a series of research reports accusing Overstock of engaging in accounting fraud. In support of its motion to dismiss, the short seller argued it could not be held liable for defamation because the reports were "liberally couched in terms of opinion," and were accompanied by a disclaimer that the contents represented the author's "interpretations" and were "based on nondefamatory, disclosed facts." *Id.* at 704. In rejecting these arguments, however, the *Overstock* court held that, "without question," a short-seller's publication of a report stating that Overstock was "cooking the books" and "manipulating accounting procedures to boost the price of its stock" was actionable. *Id.* at 673; *see also Enigma*, 194 F. Supp. 3d at 265 (S.D.N.Y. 2016) (defendants' statements actionable where, "[v]iewed holistically, the overall thrust of [the] thematically similar and mutually reinforcing statements is that [plaintiff] is engaged in a deliberate and fraudulent scam

[13] *See also Gross*, 82 N.Y.2d at 156 (speaker's charges – that Gross was "corrupt" was guilty of "possibly illegal" conduct – can be read as fact, in view of the reports' "length," "copious" documentation and apparent basis in "thorough investigation" and "deliberation").

in which it is peddling . . . a rogue product designed to loot customers").[14]

The reasoning in these analogous cases compel the same result here. Mirroring the tenor and tone of the statements of Mangrove and GeoInvesting, the full context of ClaritySpring's statements confirms that ClaritySpring claims to have had "proof" that Eros was engaged in fraud. In reports published under the alias "Hindenburg," for instance, ClaritySpring trumpeted that "***evidence*** [] renews questions relating to Eros' accounting receivables practices" and "***evidence*** [] suggests that potentially all of the sources for the [rumors] are affiliated with Eros." ClaritySpring further characterized its analyses as "***findings***," which serve as "reinforcement" and are "indicative of" the short theses its co-conspirators have advanced. Indeed, ClaritySpring has even described its allegations as "the truth," tweeting: "It makes me happy when pumpers get mad. ***The truth stings*** $EROS." In short, "[t]he tone and content is serious, and a typical subscriber would take the materials seriously," and would have left a reasonable investor with the "clear impression" that ClaritySpring was conveying provably false facts about Eros. *Overstock*, 151 Cal. App. 4th at 705.[15]

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[14] While ClaritySpring cherry-picks a few cases where the use of opinion language rendered a short seller's defamatory research reports non-actionable, it ignores the unique facts in those cases. For instance, in *Silvercorp Metals Inc. v. Anthion Mgmt. LLC*, 2012 WL 3569952, at *10 (Sup. Ct. N.Y. Cty. Aug. 16, 2012), which was decided before *Amira* and *Silvercorp*, "[t]he complaint never actually allege[d] that the postings are false or identif[ied] any particular aspects as false." Our case is dramatically different. Eros' Complaint set forth specific allegations identifying each statement that was false and why those statements was false.

[15] Even if ClaritySpring's statements are read as opinions, they would still be actionable as "mixed" opinions based on false or grossly misrepresented facts. For instance, ClaritySpring's brief skewers Eros' allegations about what ClaritySpring deems as a "hyperbolic joke." But this argument misses the mark entirely. While the "joke," on its face, may indeed constitute opinion, it is nonetheless based the grossly misrepresented fact that "Jefferies to re-iterate 'Buy' rating following the [Eros FY 2017 and Q4 earnings] call no matter what." Thus, because ClaritySpring's supposed "opinion" is based on a grossly mispresented fact, it is actionable. *See Silsdorf*, 59 N.Y.2d at 11-13; *see also Overstock*, 151 Cal. App. 4th at 705 ("Even where the speaker states facts upon which he or she bases an opinion, if the facts are incorrect or

ClaritySpring also cast Hindenburg as a "research boutique" that "specializes in forensic research and activist short-selling" and has "experience . . . span[ning] over a decade." Ex. B. Again, these self-characterizations of "specialized knowledge" and attempts to drum up reader confidence create a context in which its statements can only be construed as factual. *See Overstock*, 151 Cal. App. 4th at 706. ClaritySpring further framed all of Hindenburg's short reports as serious, unbiased "investment research reports." On its Seeking Alpha profile, for instance, Hindenburg affirms its legitimacy by averring that it conducts "fundamental analysis" and "uncover[s] hard-to-find information from atypical sources concerning a company's "(i) accounting irregularities (ii) bad actors in management . . . (iii) undisclosed related-party transactions (iv) or illegal/unethical business or financial reporting practices." Ex. B. Therefore, the context of ClaritySpring's statements only serves to confirm their already clear factual import and in turn defamatory connotation.

For these reasons, ClaritySpring's statements cue, to any reasonable reader, that they can be construed as fact. *See, e.g.*, *Restis*, 53 F. Supp. 3d at 718, 721 (S.D.N.Y. 2014) (denying motion to dismiss where "statements [we]re alleged to have been made as part of a sophisticated and coordinated campaign" and "accusations were grounded in assertions of fact about Plaintiffs' business activities and . . . purport[ed] to rely on documents that establish the existence of Plaintiffs' scheme").

2. <u>ClaritySpring's Additional Arguments Fail</u>

In an effort to downplay the severity of its attacks, ClaritySpring muses that because its defamatory reports and commentary were published anonymously, and were published on

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incomplete, or if the speaker's assessment of them is erroneous, the statement can still imply an actionable statement.").

Twitter where a "reasonable user is unlikely to expect that most tweets will contain pure 'hard news' or objectively verifiable facts," their statements are "simply not defamatory as a matter of law." CSB at 13-17. This is nonsense.

First, ClaritySpring contends that its use of an anonymous alias counsels in favor of reading the challenged statements as opinion. Not so. The reports published under the "Hindenburg Research" persona frequently tout their data, research, and investigation. *See, e.g.*, Ex. B (describing Hindenburg as "research boutique" that "specializes in forensic research and activist short-selling" and has "experience in the investment managing industry span[ning] over a decade"). *See Gross*, 82 N.Y.2d at 156 (disputed reports' "length," "copious" documentation and apparent "thorough investigation" strengthened their factual import); *see also Restis*, 53 F. Supp. 3d at 721 (online statements' "ground[ed] in assertions of fact about Plaintiffs' business activities" and reliance on documents that establish the existence of Plaintiffs' 'scheme' counsel in favor of finding them factual). These facts plainly demonstrate that Hindenburg Research held itself out as a legitimate investor, such that "a typical [reader] would take [its] materials seriously." *See Overstock*, 151 Cal. App. 4th at 705.[16]

Second, the mere fact that ClaritySpring's statements were published online, in our modern day and age, does not strip them of their serious import or erase their fact-filled content. In fact, ClaritySpring ignores the fact that many of its online "research" reports were reported and carried on international news wires, including Bloomberg's real-time news feed. Ex. C. And any suggestion that ClaritySpring's defamatory reports were not taken seriously is plainly

[16] ClaritySpring relies on *Sandals Resorts, Ltd. v. Google, Inc.*, 86 A.D.3d 32 (1st Dep't 2011) for its proposition that anonymity presumes opinion rather than fact. However, *Sandals Resorts* pertained to an obscure, anonymous emailer that was using a seemingly fake Gmail account. *Id.* at 34-35. This is a far cry from ClaritySpring's activity in this lawsuit.

belied by precipitous decline of Eros' share price, which plummeted in response to the attacks that ClaritySpring carried out in March 2017 with GeoInvesting. ¶¶ 301, 310.[17]

For these reasons, when all of ClaritySpring's defamatory statements are examined holistically and in the light most favorable to plaintiffs, a reasonable investor would conclude that they were "objectively verifiable" and "provably false." They are therefore actionable.

C. <u>While Not Required, Eros Pleads Particularized Evidence Of Actual Malice</u>

Without any explanation or citations to supporting case law, ClaritySpring claims that Eros is a public figure and must therefore plead factual support that ClaritySpring acted with actual malice.[18] CSB at 14. ClaritySpring's superficial discussion of this issue is not surprising, as Eros does not come close to qualifying as a public figure under New York law.

For example, Eros did not thrust itself to the forefront of a public controversy. *See Krauss v. Globe Int'l, Inc.*, 251 A.D.2d 191, 192 (1st Dep't 1998) (limited purpose public figure must "voluntarily inject[] [itself] into a public controversy with a view toward influencing it"). Nor does the mere fact that Eros is a public company automatically convert it into a public figure. *See Behr v. Weber*, 1990 WL 270993, at *2 (Sup. Ct. N.Y. Cty. Jan. 5, 1990), *aff'd*, 172 A.D.2d 441 (1st Dep't 1991). Nevertheless, even if the Court indulges ClaritySpring's self-

[17] Defendants' reliance on *Jacobus v. Trump*, 51 N.Y.S.3d 330 (Sup. Ct. N.Y. Cty. Jan. 9, 2017) is misplaced. The court in *Jacobus*, in granting dismissal of the plaintiff's allegations, noted that the context of the allegedly defamatory statements was the "familiar back and forth between a political commentator and the subject of her criticism," and found the statements to be "imprecise and hyperbolic political dispute *cum* schoolyard squabble." *Id.* at 343. Here, there is nothing "familiar" about the short-and-distort campaign that Defendants waged against Eros, and, as discussed throughout this brief, the context of the false statements of fact at issue here rendered those statements anything but "imprecise and hyperbolic."

[18] The case ClaritySpring relies on, *Gear Up, Inc. v. City of New York*, 140 A.D.3d 515, 516 (1st Dep't 2016), merely reflects the standard for actual malice and nowhere holds that a company is rendered a public figure simply because it is listed on an exchange.

serving pleading standard (which it should not), the Complaint provides numerous particularized examples of ClaritySpring's malice.[19]

First, Eros' Complaint is inundated with facts showing that Defendants had a pecuniary motive to harm Eros. *See, e.g.*, *Overstock*, 151 Cal. App. 4th at 711-12 ("[M]alice is in the very business model and practices that preordain [short-seller's] negative reports, and provides probative evidence that Gradient acted in reckless disregard of the truth in making the false statements and implications that it did"). Eros alleges in detail that ClaritySpring had a short position in Eros' stock and profited from the substantial declines in Eros' share price that resulted from the defamatory reports and commentary made by them and their co-conspirators. The ClaritySpring Defendants do not dispute their short position, nor do they dispute that they profited therefrom.[20]

Second, Eros pleads specific examples of instances where ClaritySpring (as well as other Defendants) strategically timed its defamatory statements to coincide with critical events. *See, e.g.*, *Coclin v. Lane Press, Inc.*, 210 A.D.2d 98, 99 (1st Dep't 1994) (timing of false communications probative of malice); Amira Tr. at 60 ("alleg[ation] that defendant strategically timed the publication to maximize plaintiff's injury" probative of "intent to injure").

For instance, ClaritySpring attacked with heightened intensity exactly one week before Eros announced its FY 2017 annual and Q4 results, and debuted "Hindenburg Research" on the date Eros filed its annual report with the SEC. ¶ 318. These attacks coincided with similarly

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[19] Regardless, courts have declined to resolve at the pleading stage whether the actual malice standard applies, preferring instead to defer the issue until after the case has developed further. *See Enigma*, 194 F. Supp. 3d at 288 (while "the facts adduced in discovery may yet show that [plaintiff] is a limited-purpose public figure, [one] cannot, on the pleadings, conclude that [plaintiff] must be so").

[20] While pecuniary interest alone may be insufficient to demonstrate malice, Eros alleges far more conduct that corroborates that Defendants acted with malice. *See infra*.

malicious statements from Mangrove and GeoInvesting. *See id.* The timing of ClaritySpring's actions was not merely a coincidence, but a direct result of considered efforts to protect their short position from a surging share price, and to maximize the attention that their defamatory statements would receive.

Third, Eros alleges that ClaritySpring took steps to evade detection for its false statements. For instance, ClaritySpring utilized the alias "Hindenburg Investment Research" (CSB at 1 n.1) to defame Eros without being detected. Moreover, ClaritySpring, evincing knowledge of its wrongful conduct, systematically deleted the ClaritySpring tweets about Eros promptly after Eros filed its Complaint. Ex. A.

Fourth, the Complaint provides specific examples of instances where ClaritySpring continued to recycle its defamatory themes of purported fraud, even after they had been discredited by independent sources, including by Eros' Audit Committee, aided by Skadden. *See, e.g.*, *Horton v. Guillot*, 2016 WL 4444875, at *5-6 (N.D.N.Y. Aug. 23, 2016) (malice inferable from defendant's re-iteration of false statement that plaintiff cheated in horse race after independent review had debunked the statement). Further, ClaritySpring's allegations of misconduct based on allegedly improper and undisclosed related-party transactions ignore that every related-party Eros entered into was fully disclosed in its SEC filings, including in every registration statement and annual report.

In sum, the combined weight of all these circumstantial factors, set forth with specificity in Eros' Complaint, sufficiently meet the threshold for pleading actual malice.

III. EROS SUFFICIENTLY PLEADS ITS NON-DEFAMATION CLAIMS

ClaritySpring also urges the Court to dismiss Plaintiff's non-defamation claims, arguing that they are duplicative of defamation and suffer from other purported deficiencies. It is wrong.

ClaritySpring claims, as an initial matter, that Eros' claims for commercial disparagement, tortious interference, and civil conspiracy must be dismissed because "they are merely duplicative of the defamation claims." CSB 2. ClaritySpring fails to offer any authority in support of this proposition. This is not surprising as courts in New York recognize non-defamation claims even where they may be based on the same set of operative facts as the defamation claim, especially where, as here, Eros' non-defamation claims seek redress for specific economic harm. *See Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 47-48 (1st Dep't 2009) (claim sounding in tortious interference rather than defamation where complaint alleged economic injury to specific business relationships as opposed to reputational harm); *Stapleton Studios, LLC v. City of New York*, 26 A.D.3d 236, 273 (1st Dep't 2006) (similar).

Specifically, Eros has alleged that ClaritySpring's conduct harmed Eros' negotiations concerning the extension of Eros' credit facility and resulted in Eros extending the facility "on less desirable terms" than would otherwise have been available. ¶¶ 18, 339, 380. Further, Eros alleged in its Complaint that ClaritySpring participated in undermining "a significant U.S. Dollar Reg-S bond offering," which had the effect of damaging Eros' credit worthiness and foreclosing entirely Eros' access to that source of capital. ¶¶ 223, 339, 380. As Eros pleads the specific business relationships affected and the economic harms suffered, its non-defamation claims are not duplicative of its defamation claims, and should not be dismissed.

A. Eros Sufficiently Pleads Commercial Disparagement (Count III)

ClaritySpring raises two arguments for Eros' commercial disparagement claim, both of which gloss over key aspects of the Complaint's particularized allegations and misstate the applicable legal standard.

First, Eros' detailed pleadings evince that ClaritySpring published false statements that

impugned the value, quality and condition of Eros' products and services – in particular, its streaming service Eros Now. As just one example, ClaritySpring stated "Large headline ErosNow user growth but little insight on revenue or cash flow." *See, e.g.*, ¶¶ 302, 323.

Second, ClaritySpring cannot avoid liability for commercial disparagement based on its claim that Eros has not pled malice, because Eros *does* plead highly particularized evidence of malice, including that ClaritySpring (i) had a pecuniary motive to harm Eros, (ii) strategically timed its defamatory statements, (iii) tried to evade detection for its false statements, and (iv) recycled debunked claims. *See infra*, at 15-17.

Accordingly, the Complaint properly states a claim for commercial disparagement.

B. Eros Sufficiently Pleads Tortious Interference With Prospective Business Relations And Contract (Counts V and VI)

ClaritySpring claims that Eros' causes of action for tortious interference with prospective business relations and tortious interference with contract must be dismissed because Eros fails to specify the business relationships ClaritySpring threatened or the contracts it damaged. However, Eros in fact has adequately alleged both of these claims, as ClaritySpring's argument ignores the allegations in the Complaint that clearly pleads these facts.

For example, with regard to Eros' claim for tortious interference with prospective business relations, Eros specifically alleges that ClaritySpring interfered with Eros' ability to raise capital through a U.S. Dollar Reg-S bond offering in March 2017. ¶¶ 339, 380. As to Eros' cause of action for tortious interference with contract, Eros pleads that ClaritySpring's conduct interfered with Eros efforts to extend its revolving credit facility and ultimately led to that facility being extended "on less desirable terms" than Eros otherwise would have achieved. ¶¶ 18, 339, 380. Thus, Eros sufficiently pleads these causes of action. *See McGill v. Parker*, 179 A.D.2d 98, 105 (1st Dep't 1992) (a complaint only need make a "particular allegation of

interference with a specific contract or business relationship").

ClaritySpring also argues that, because Eros has alleged that ClaritySpring "w[as] motivated by economic self-interest," Eros cannot claim that ClaritySpring interfered with Eros' prospective business relations. CSB at 23. Yet, this argument misrepresents what Eros does allege, namely that ClaritySpring's motivation *was* to harm Eros, and profit as a result. Further, ClaritySpring misstates the applicable law in claiming that Eros must allege that ClaritySpring's sole motivation was to harm Eros. The court in *Steiner Sports Marketing, Inc. v. Weinreb* was interested in protecting the "normal economic interest[s]" of the defendants, a legitimate competitor, that existed separate and apart from any malicious intent. 88 A.D.3d 482, 483 (1st Dep't 2011) (former employer had economic interest in interfering with former employee's prospective employment with competitor). Tellingly, ClaritySpring does not specify what "normal economic interest" they possess here. Indeed, it is because they have none.

Phoenix Capital Investments LLC v. Ellington Mgmt. Group LLC, 51 A.D.3d 549 (1st Dep't 2008), is also distinguishable. There, the court enumerated multiple reasons that the plaintiff had failed to plead the requisite malice, including that the complaint did not allege that the defendant's conduct "constituted a[n] . . . independent tort" – not just that there were no allegations that the defendant "acted solely to harm plaintiff." *Id.* at 551. But as dicussed *infra*, Eros sufficiently pleads claims for defamation and commercial disparagement, which is enough to sustain a tortious interference claim. *See, e.g.*, *Amaranth*, 71 A.D.3d at 48 ("Defamation is a predicate wrongful act for a tortious interference claim.").

C. Eros Sufficiently Pleads Civil Conspiracy (Count VII)

ClaritySpring contends that Plaintiff's claim for civil conspiracy must be dismissed because (i) conspiracy is not an independent tort in New York and (ii) Eros purportedly fails to

plead that ClaritySpring entered into an agreement to damage Eros. In both instances, ClaritySpring misstates the applicable law.

While a claim for civil conspiracy cannot be asserted on its own, New York law permits a plaintiff to plead conspiracy in connection with a separate underlying tort 'in order to connect the actions of the individual defendants." *Litras v. Litras*, 254 A.D.2d 395, 396 (2d Dep't 1998). This is precisely what Eros has done here, as it adequately pleads several causes of action against multiple defendants, and also pleads conspiracy based on the coordinated conduct of these defendants to damage Eros through their short and distort campaign.

As to pleading an agreement, it is not necessary for Eros to overtly plead that ClaritySpring entered into an agreement with the other defendants to harm Eros. Rather, such an agreement can be inferred from the factual allegations that Eros alleges in its Complaint. *See FIA Leveraged Fund Ltd. v. Grant Thornton LLP*, 150 A.D.3d 492, 495 (1st Dep't 2017) (rejecting motion to dismiss conspiracy claim where complaint did not allege an agreement but contained "factual allegations from which such an agreement can be inferred"). Indeed, courts generally afford "great leeway" to plaintiffs in pleading that they were victims of a conspiracy. *Maersk, Inc. v. Neewra, Inc.*, 554 F. Supp. 2d 424, 458 (S.D.N.Y. 2008). This "leeway" is intended to counteract "the nature of the conspiracy," which "often make[s] it impossible to provide details at the pleading stage." *In re Harvard Knitwear, Inc.*, 153 B.R. 617, 628 (E.D.N.Y. 1993).

When considering Eros' Complaint in light of these doctrines, Eros' pleadings set forth more than sufficient factual allegations from which an agreement to harm Eros can be inferred. Specifically, Eros alleges, among other things, that Defendants, including ClaritySpring, acted in coordinated phases, in particular during critical business milestones, such as Eros' first Reg-S

bond offering, the extension and re-negotiation of its revolving credit facility, and the release of significant financial reports such as the FY 2016 and 2017 annual reports. ¶¶ 16, 175, 243. In addition, Eros alleges that the Defendants each admitted to having short positions in Eros and that there were conspicuous surges in the volume of put options acquired during the months that Defendants attacked, which surges coincided with the timing of Defendants' publications. ¶¶ 17, 123, 220. Also, the Complaint reflects numerous instances in which Defendants parroted and referenced each other's defamatory and disparaging facts. ¶¶ 207, 292, 305, 325. Moreover, Eros' Complaint highlights the numerous anonymous aliases employed by participants in the short-and-distort scheme, many of which were created solely in connection with the scheme in order to hype and further disseminate the false statements made by Defendants. *See, e.g.*, ¶ 20 ("Alpha Exposure"), ¶ 39 ("Hindenburg"), ¶ 93 ("Spotlight Research," "Orange Peel," "Parke Shall" and "Thom Lachenmann"), ¶ 215 ("Forest Gump"), and ¶ 216 ("Market Farce").

Further, the uncanny synchronization and similarity of Defendants' conduct makes it implausible that they were acting independently of one another; rather they distinctly suggest that Defendants agreed to coordinate their conduct. At the very least, Eros should be allowed an opportunity to obtain discovery to unearth details related to its conspiracy claim, as the evidence showing collusion likely will be found in non-public communications in Defendants' possession. *See, e.g.*, *In re Harvard Knitwear*, 153 B.R. at 628 (due to the "impossibility" of alleging details of conspiracy, "[a] plaintiff [] should be allowed to resort to the discovery process").

Lastly, and specifically demonstrating that at the very least ClaritySpring was coordinating their conduct with GeoInvesting, ClaritySpring deleted all of the tweets about Eros from the ClaritySpringTwitter account after the Complaint was filed but *before* the Complaint was served on it, *before* Eros publicly announced the lawsuit, and within hours *after*

GeoInvesting had been served. Ex. A; Dkt. Nos. 1-15.

CONCLUSION

Based on the foregoing, plaintiffs respectfully request that this Court deny Defendants' motions to dismiss in its entirety. [21]

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KASOWITZ BENSON TORRES LLP

By: */s/ Michael J. Bowe*

Michael J. Bowe (mbowe@kasowitz.com)
Stephen W. Tountas (stountas@kasowitz.com)
1633 Broadway
New York, New York 10019-6022
(212) 506-1700

Attorneys for Plaintiff Eros International Plc

[21] In the event the Court dismisses any defendant and/or cause of action, Eros should be freely granted leave to replead. *See Lester v. Capo*, 2016 WL 469647, at *16 (Sup. Ct. N.Y. Cty. Feb. 5, 2016) ("Because the Court determines that the defamation claims might possibly be cured through supplemental factual allegations, leave will be granted to replead this portion of the Complaint.") (Bransten, J.).