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 Number 653096/2017

Hon. Eileen Bransten

MEMORANDUM OF LAW IN 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)

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Defendants GeoInvesting, LLC, Christopher Irons, Daniel E. David, FG Alpha Management, LLC, FG Alpha Advisors, and FG Alpha, L.P. (the "GeoInvesting Defendants") submit this Memorandum of Law in support of their Motion to Dismiss pursuant to CPLR 3211(a)(7) and CPLR 3211(a)(1), the claims against the GeoInvesting Defendants in the Complaint filed by Plaintiff, Eros International, PLC ("Eros") pursuant to CPLR 3211(a)(7) and CPLR 3211(a)(1).

PRELIMINARY STATEMENT

Eros brings this Complaint in an attempt to stifle those who dare to express unflattering opinions about its business practices. The GeoInvesting Defendants did nothing more than express their opinions, including valid concerns—based on well-documented and clearly cited sources—about Eros relevant to the American investing public. This activity is constitutionally protected, and the Complaint should be dismissed.

Between March and July 2017, the GeoInvesting Defendants published five Internet articles (the "GeoInvesting Articles") alerting the investing public to certain important developments regarding Eros, an India-based Bollywood[1] production company that trades on the New York Stock Exchange.[2] These well-researched articles addressed, among other things, financial irregularities, self-dealing transactions, unsavory partnerships, and liquidity concerns. The articles made clear, several times over—in no uncertain terms—that they were expressions of opinion. Moreover, the GeoInvesting Defendants disclosed all the bases for all of their opinions and included extensive citations, hyperlinks to relevant sources and embedded screenshots from primary sources into the text of the articles. Indeed, the GeoInvesting Defendants gave Eros the opportunity to identify any misstatements—and Eros failed to

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1 "Bollywood" refers to the Indian film industry.

2 Notably, Eros failed to attach these articles to its Complaint. The GeoInvesting Articles are attached as Exhibits 1-5 of the Affirmation of Michael de Leeuw dated November 30, 2017.

respond.[3] Finally, the GeoInvesting Defendants clearly and prominently disclosed to their readership that they are short sellers of Eros stock, not completely disinterested authors—making it clear to readers and the investing public that they stood to profit financially if Eros stock decreased in value. Readers were therefore fully equipped with all the information necessary to assess the authors' intent, credibility and to make their own determination about the opinions stated in the articles.

The Complaint repeatedly misrepresents the content of the GeoInvesting Articles, taking statements out of context, omitting important qualifiers and complaining about inflammatory and embellished language that appears nowhere in any of the articles. It is on the basis of this twisted and truncated version of events that Eros sues the GeoInvesting Defendants for defamation, commercial disparagement, false light, tortious interference and civil conspiracy. For the reasons set forth herein, Eros's claims must all be dismissed as against the GeoInvesting Defendants.

As an initial matter, the GeoInvesting Articles are constitutionally protected opinion. Each article is clear on its face that it is an expression of GeoInvesting's opinion. Indeed, the articles contain express disclaimers to this very effect and reveal the author's short position in Eros. Moreover, the articles are replete with qualifying language such as "we believe" and "seems to be"—far from expressions of factual certainty. Finally, the articles were published on the Internet and specifically on a website *devoted* to publishing analysts' opinions and interpretations—both positive and negative, bullish and bearish—about public companies and their corresponding financial data.

Plaintiff also fails to allege how the specific statements in these articles are defamatory. Every one of the allegedly defamatory statements in the GeoInvesting Articles also includes

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[3] GeoInvesting's April 4, 2017 letter to Plaintiff's counsel is attached to the de Leeuw Affirmation as Exhibit 10. GeoInvesting never received a response to this letter.

citations to—often with hyperlinks—the sources on which GeoInvesting relied in reaching its stated opinions. Plaintiff fails to challenge the veracity of these sources or explain how the GeoInvesting Defendants' opinions were unsubstantiated, which would be necessary to plead (much less prevail on) a defamation claim. In other instances, Plaintiff fails even to allege that some of the statements in the articles were false.

This same problem infects Eros's allegations that statements published on Twitter by some of the GeoInvesting Defendants are defamatory. Courts have been clear that tweets do not suggest recitation of fact to the reasonable reader and are therefore inappropriate for defamation claims. Moreover, the Complaint omits the links and embedded evidence in those tweets—proof that the Twitter authors disclosed the sources on which their opinions relied. The tweets are also not actionable to the extent they contain hyperbolic and rhetorical language, as such language makes clear to the reader that the tweets are not intended to be statements of fact.

Finally, Eros's non-defamation claims must be dismissed because they rely on the same allegedly false statements and alleged harm and are therefore duplicative of the defamation claims. Moreover, each of the additional common law claims fails because the allegations in the Complaint do not satisfy the elements of those claims.

For these reasons, as set forth more fully herein, the Complaint should be dismissed in its entirety as against the GeoInvesting Defendants.

STATEMENT OF FACTS

Plaintiff, Eros, is a global entertainment company that is a preeminent co-producer and distributor of Bollywood films. (Compl. ¶ 2.) In 2013, Eros became the first Indian media company listed on the New York Stock Exchange. (*Id.*) One of Eros's largest sources of revenue is its Eros Now online streaming platform. (*Id.*)

Defendant GeoInvesting, LLC ("GeoInvesting"), is a Pennsylvania corporation that was founded in 2008 by Defendant Daniel E. David and Maj Soueidan. (*Id.* ¶¶ 25, 81.) GeoInvesting's affiliates—Defendants FG Alpha Management, LLC, FG Alpha Advisors, LLC, and FG Alpha, L.P.—are companies affiliated with Defendant David. (*Id.* ¶¶ 28-30, 87.) GeoInvesting is an independent research firm that gathers, analyzes, and disseminates information on public companies trading on the U.S. financial markets. (*Id.* ¶ 81.) GeoInvesting's objective is to "provid[e] investors with the tools to make informed decisions." (*Id.*) GeoInvesting publishes articles about the public companies it tracks. (*Id.* ¶ 88.) Many of these articles are published on the Seeking Alpha blog, a website catering to financial information for investors. (*Id.* ¶¶ 47, 224.)

From as early as the Fall of 2015, various others published reports on Eros. (Compl. ¶¶ 102-216.) GeoInvesting began reporting on Eros nearly two years later. It published five articles about Eros dated March 9, 2017; March 16, 2017; March 29, 2017; July 14, 2017; and July 18, 2017. (*See* Affirmation of Michael de Leeuw dated November 30, 2017 ("de Leeuw Aff."), Exhibits 1-5.) These articles addressed topics of concern to Eros investors, such as:

- Claims that Eros was engaging in self-dealing as reflected in confidential testimony by an Indian film producer who has co-produced films with Eros, in a publicly-filed complaint;
- Analyses of Eros's earnings reports and troubling financial health, including looming debt and liquidity concerns, from its public filings;
- Investigation into Eros's refinancing concerns based on its press releases and public filings;
- Lack of timely disclosure to shareholders regarding the company's efforts to refinance one of its credit facilities and raise capital;
- Eros's self-described connections to accused money launderers as exposed in a CNN India report; and
- Eros's sale of its primary subsidiary's stock in order to raise capital, as revealed through public filings and press releases.

(*Id.*) Notably, at all relevant times, GeoInvesting held a short position in Eros stock and disclosed this fact—in bold letters—in each of its articles. (*Id.*; *see also* Compl. ¶ 88.)

GeoInvesting uses several Twitter accounts to publish information from its articles and other real-time tracking of its investments. GeoInvesting uses the "GeoInvesting" Twitter account. (*Id.* ¶ 289.) Defendant David maintains a Twitter account under the pen name "FG Alpha Management." (*Id.* ¶ 88.) Defendant Christopher Irons, a Senior Business Writer and Equity Analyst at GeoInvesting, maintains a Twitter account under the name "Quoth the Raven." (*Id.* ¶ 85.) These three Twitter accounts posted tweets about Eros that largely relied on the content of the GeoInvesting Articles. (*Id.* ¶ 289.) The Twitter posts at issue in this action are attached as Exhibits 6-8 of the Affirmation of Michael de Leeuw.[4]

Eros's stock has been declining since 2015—long before GeoInvesting published any of its Eros articles or tweets. (*Id.* ¶¶ 5, 105; *see also* de Leeuw Aff. Ex. 8, March 9, 2017 tweet (embedding chart showing steady decline in stock price from June 2016 to July 2017).) The most profound drop in Eros's stock—from closing prices of $36.32 on July 24, 2015 to $7.00 on January 12, 2016 —occurred before GeoInvesting had published a single article on Eros.[5] The first of the GeoInvesting Articles was published in early March 2017—over a year after this period of decline in Eros's share price—and since that time, the stock has steadied, closing in a range between $7.20 and $14.75.

Eros filed this suit on September 29, 2017, alleging that the GeoInvesting Articles and tweets by the GeoInvesting Defendants caused harm to Eros and its shareholders. Eros sues for defamation per se (Count I), defamation (Count II), commercial disparagement (Count III), false

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[4] Exhibits 6-8 of the de Leeuw Affirmation include other Eros-related tweets by the GeoInvesting Defendants that were not cited by Plaintiff but which provide relevant context for the Court's consideration of the tweets cherry-picked by Plaintiff to include in the Complaint. The GeoInvesting Defendants were unable to locate a few of the tweets referenced in the Complaint: a July 14, 2017 and the July 15, 2017 tweet by FG Alpha Mgmt (Compl. ¶ 290); and the March 22, 2017 and a July 28, 2017 tweet by Quoth the Raven (*Id.* ¶ 291).

[5] The Court can take judicial notice of a stock price. *See, e.g., Mahoney-Buntzman v. Buntzman*, 824 N.Y.S.2d 755, at *2 (N.Y. Sup. Westchester Cty. 2006) (citing *Scoville v. Surface Transit, Inc.*, 242 N.Y.S.2d 319, 322 (N.Y. Sup. N.Y. Cty. 1963)).

light under Pennsylvania law (Count IV), tortious interference with prospective business relations (Count V), tortious interference with contract (Count VI), and civil conspiracy (Count VII). For the reasons set forth herein, the Complaint should be dismissed in its entirety as against the GeoInvesting Defendants.

ARGUMENT

I. Relevant Pleading Standard

A motion to dismiss a complaint pursuant to CPLR 3211(a)(7) is properly granted if the pleading fails to state a cause of action within the four corners of the complaint. *Scott v. Bell Atl. Corp.*, 282 A.D.2d 180, 183 (1st Dep't 2001). "[B]are 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." *Ullmann v. Norma Kamali, Inc.*, 207 A.D.2d 691, 692 (1st Dep't 1994). "Where the motion to dismiss is based on documentary evidence under CPLR 3211(a)(1), the claim will be dismissed "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Int'l Publishing Concepts, LLC v. Locatelli*, 9 N.Y.S.3d 593, at *2-7 (N.Y. Sup. N.Y. Cty. 2015) (Bransten, J.) (internal citations omitted).

New York courts regularly dismiss claims for defamation at the pleading stage. *See, e.g., Brian v. Richardson*, 87 N.Y.2d 46, 50-54 (1995); *Frechtman v. Gutterman*, 115 A.D.3d 102, 104 (1st Dep't 2014); *Fleischer v. NYP Holdings, Inc.*, 103 A.D.3d 536, 537-38 (1st Dep't 2013); *O'Neill v. New York Univ.*, 97 A.D.3d 199, 212-13 (1st Dep't 2012); *Jaszai v. Christie's*, 279 A.D.2d 186, 187-91 (1st Dep't 2001); *Vengroff v. Coyle*, 231 A.D.2d 624, 624-66 (2d Dep't 1996); *Int'l Publishing Concepts,* 9 N.Y.S.3d 593, at *2-7; *Biro v. Canadian Broadcasting Corp.*, 2014 WL 5788825, at *4 (N.Y. Sup., N.Y. Cty. Sept. 30, 2014); *Nanoviricides, Inc. v. Seeking Alpha, Inc.*, 2014 WL 2930753, at *5-6 (N.Y. Sup., N.Y. Cty. June 26, 2014); *Silvercorp Metals Inc. v. Anthion Mgmt. LLC*, 959 N.Y.S.2d 92, at *7-12 (N.Y. Sup. N.Y. Cty. 2012).

II. The Defamation Claims Should Be Dismissed Because Plaintiff Has Failed To Plead That GeoInvesting's Articles Are Defamatory[6]

Under New York law, a plaintiff states a claim for defamation only if it can plead a "false statement, published without a 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*." *O'Neill*, 97 A.D.3d at 212. Moreover, "[i]t is now beyond dispute that expressions of opinion are cloaked with the absolute privilege of speech protected by the First Amendment and 'false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions.'" *Jaszai*, 279 A.D.3d at 188 (internal citations omitted); *see also Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 38 (1st Dep't 2011) (defamation claim can only succeed if "'it is premised on published assertions of fact,' rather than assertions of opinion") (quoting *Brian*, 87 N.Y.2d at 51).

New York courts will take into consideration the following factors in determining whether a statement constitutes protected opinion:

(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 an opinion, and

(4) whether the broader context of the communication so signals the reader.

Frechtman, 115 A.D.3d at 105; *Sandals Resorts*, 86 A.D.3d at 39-40. Whether particular words constitute nonactionable opinion is a question of law for the Court's determination. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290 (1986).

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[6] The only difference between the claims alleged in Counts I and II is the harm Plaintiff must show to prevail. 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.

"[I]n distinguishing between actionable factual assertions and nonactionable opinion, the courts must consider the content of the communication as a whole, as well as its tone and purpose." *Brian*, 87 N.Y. 2d at 51 (citing *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 254 (1991)). "Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the overall context in which the assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the [defamation] plaintiff.'" *Id.*

A. All Five GeoInvesting Articles Plainly Conveyed Protected Opinion

Each of the five GeoInvesting Articles is explicitly clear that it is a pure expression of opinion, and a reasonable reader would certainly understand this. The broader context in which the articles were published confirms this. As an initial matter, each of the five articles disclosed—in bold lettering—that its authors held short positions in Eros stock and that the authors would therefore benefit financially from a dip in Eros's stock price. (*See* de Leeuw Aff. Exs. 1-5.) Where an author reveals a short position and has a motive to lower the stock's value, "[s]uch motive, as noted in [First Department precedential cases], indicates to the reader that the author is expressing his opinion." *Silvercorp Metals Inc.*, 959 N.Y.S.2d 92, at *9 ("That [the author] did not disclose the extent to which it stood to profit is immaterial; that it disclosed its short position, namely to the particular group of addressees who would appreciate the significance of a short-position, is sufficient to indicate to these particular readers that [the author] was not disinterested."); *Int'l Publishing Concepts*, 9 N.Y.S.3d 593, at *7 (holding that letters and emails drafted by a law firm detailing potential claims were not actionable defamation because the authors were clearly not "disinterested observers," signaling to the reader that the content was expression of opinion); *Brian*, 87 N.Y. 2d at 53 ("At the outset of the article, defendant disclosed that he had been Inslaw's attorney, thereby signaling that he was not a disinterested observer" rendering the statements more like opinion than fact"); *see also Bellavia*

Blatt & Crossett, P.C. v. Kel & Partners LLC, 151 F. Supp. 3d 287, 296 (E.D.N.Y. 2015) ("where circumstances surrounding an allegedly defamatory statement indicate that the person making the statement has a special interest in the matter, courts have routinely held that a reasonable observer would understand such a statement to be one of opinion, rather than fact").

Second, to further drive home this point, each of the articles included an extensive disclaimer warning readers that the content of the article "***expresses opinions*** which have been based upon generally available information, field research, inferences and deductions through due diligence and our analytical process." (*See* de Leeuw Aff. Exs. 1-5 (emphasis added).) Any reasonable reader would therefore immediately understand that the content of the articles was GeoInvesting's opinion, rather than statement of fact. *See, e.g.*, *Silvercorp Metals*, 959 N.Y.S.2d 92 at n. 5 (finding disclaimer stating the report contained the author's opinion dispositive in holding that challenged statements were "claims to be investigated rather than assertions of fact").[7]

Third, the articles were posted on Internet blogs, rather than in print magazines or newspapers, which readers and courts alike understand to signal that content is more informal and represents the authors' opinions. The First Department has held that "[t]he observation that readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts … is equally valid for … blogs." *Sandals*, 86 A.D.3d at 44. Indeed, a New York trial court specifically addressed this issue with respect to articles posted on Seeking Alpha, a free online platform and the site on which three of the five articles at issue were published (Compl. ¶ 224):

> As an initial matter, Seeking Alpha's website's tagline is "Read. Decide. Invest." This clearly gives the impression that the website is designed to give people a place to express their opinions and for

[7] That the disclaimer, making clear the article is the authors' opinion, is at the end of the article does not change its import to the reader. *Nanoviricides*, 2014 WL 2930753, at *5.

> the reader to then form his or her own assumptions based on the posted articles. Further, the articles published on the website are almost exclusively published by third-parties and not actual reporters. ... Thus, readers are likely to give less credence to the articles found on this website and view the assertions in the articles, like the one herein at issue, with some skepticism and to treat its contents as opinion rather than fact.

Nanoviricides, 2014 WL 2930753 at *6.

Finally, a review of the articles in their entirety reveals a pervasive use of qualifiers indicating the presence of opinion rather than fact. For example, the March 8, 2016, article contains over 20 such qualifiers, including "we believe," "seems to," and "appear to show" and relevant equivalents. (*See* de Leeuw Aff., Ex. 1; *see also* de Leeuw Aff. Exs. 2-5 (using similar qualifying language, such as "in our opinion," "we think," and "appears to us," among others).) The use of such language makes clear to the reader that the author is conveying opinions rather than facts. *See, e.g.*, *Vengroff*, 231 A.D.2d at 625 ("given the use of the words 'apparently,' rumored,' and 'reportedly' in the letter, a reasonable reader would understand the statements made about the plaintiffs as mere allegations to be investigated rather than as facts'") (quoting *Brian*, 87 N.Y.2d at 53); *see also Silverman v. Clark*, 35 A.D.3d 1, 16 (1st Dep't 2006) (dismissing complaint on summary judgment finding, upon review of the allegedly defamatory letter only, that "[author]'s use of the phrases 'it is possible' and 'if this is true' unmistakably signals that [it] is not asserting fact in these circumstances. The language constitutes a concession by the writer that the truth of the statement is unknown."); *Bellavia Blatt & Crossett,* 151 F. Supp. 3d at 293 ("There are certain "rhetorical indicators' that the writer or speaker is expressing an opinion," like 'appeared to be, 'might well be, 'could well happen,' and 'should be' which signal presumptions and predictions rather than facts.") (internal citation omitted).

Because it is clear from the immediate and larger context of the articles that they are conveying GeoInvesting's opinions, Counts I and II for defamation must be dismissed.

B. The Specific Statements In Each Article Are Not Defamatory

Counts I and II should be dismissed for the additional, independent reason that the specific statements Plaintiff alleges are defamatory are not actionable. Instead, they are either protected opinion or they are not alleged to be false.

Where a statement is "accompanied by a recitation of the facts upon which it is based," there is no implication that there were additional undisclosed facts concealed from the reader and such a statement is considered protected opinion. *Sandals Int'l*, 86 A.D.3d at 43; *see also Brian*, 87 N.Y.2d at 54 (author of article set out sources for the basis for his opinion, "[t]hus, there was no suggestion in the article that there were additional undisclosed facts on which its [opinion] had been based"); *Silvercorp Metals Inc.*, 959 N.Y.S.2d 92, at *10 (opinions about misstatements in financial statements and value of company's shares premised on disclosed and hyperlinked public filings and other sources, "giving readers the opportunity to review the underlying facts and form their own conclusions"); *Rakofsky v. Washington Post*, 971 N.Y.S.2d 74, at *12 (N.Y. Sup. N.Y. Cty. 2013) (dismissing defamation claim on the ground, *inter alia*, that "[t]his court did not view the words in isolation but considered the entirety of the communications which contained references to [articles] or contained hyperlinks to them. These references and hyperlinks provide sufficient basis for the reader to understand the facts upon which they were based."); *Maldonado v. O'Keefe*, 2016 WL 7243278, at *5 (N.Y. Sup. Bx. Cty. 2016) ("Where the source of the opinion is provided, and where there is no implication that the opinions expressed in the publication were based on undisclosed facts, the statements, no matter how caustic and even mean-spirited, are reasonably understood as expressing the opinion of the writer.").

Moreover, as falsity is the *sine qua non* of a defamation claim, Eros's failure to allege the falsity of each statement in the GeoInvesting Articles is fatal to Eros's claims that such statements are defamatory. *See Fleischer*, 103 A.D.3d at 537 (dismissing defamation claim

where plaintiff did not allege statements in article were false and did not deny truth of statements made in the article).

Finally, Eros's Complaint is rife with misquotes from the GeoInvesting Articles. In paraphrasing the allegedly defamatory statements, and in an attempt to paint GeoInvesting's articles in as negative a light as possible, Eros frequently inserts hyperbolic and pejorative rhetoric that is simply not found in the articles themselves. When Eros's self-serving embellishment is stripped away, it is clear that the articles present well-supported opinion about Eros's business operations—opinion that is not actionable as defamation.

The Complaint alleges that the following statements in each of the individual articles are defamatory. For the reasons set forth herein, the statements are not actionable defamation because they are either true statements or protected opinions.

1. <u>March 8 Article</u>

- *Allegations that Eros channeled money to family members through related party transactions* (Compl. ¶¶ 227-29)

Statements in the March 8 Article about self-dealing cited—and were accompanied by hyperlinks—to an amended complaint setting forth the testimony of a confidential witness, identified in the amended complaint as "an Indian film producer who had co-produced films with Eros," regarding Eros's self-dealing. (*See* de Leeuw Aff. Ex. 1, pp. 1-3.) The March 8 Article also set forth the amounts of film rights sold in 2014 by NextGen, a production company controlled by Eros's founders and their families. (*Id.*, p. 3) The March 8 Article cited three different Eros financial filings that each disclosed the amount of film rights sold by NextGen in 2014. (*Id.*) The March 8 Article pointed out a $10 million inconsistency in the amount of money in film rights sold by NextGen in 2014 as disclosed by Eros's own filings. (*Id.*)

Moreover, Eros does not even allege that some of these statements are false. Eros does not dispute that it 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—only that such payments were "disclosed." (Compl. ¶ 230.)

- *Allegations about Eros's earnings* (*id.* ¶¶ 231-32, 238)

The March 8 Article also included opinions about the integrity of Eros's earnings. These opinions were also amply supported by disclosed evidence showing that Eros's "Rest of World" ("RoW") segment revenues should be called into question, given that the company makes Bollywood movies and its RoW segment was up 72.8% on a year over year basis while the company's India segment was down 26.2% for the same period. (*See* de Leeuw Aff. Ex. 1, pp. 4-5.) The March 8 Article pointed out why these figures were questionable, citing a recent UN report showing that the rest of the world, minus India, has only about 1% of India's Indian population. (*Id.*, p. 5) The March 8 Article also explained that, while Eros argued that RoW revenue growth stemmed from its catalogue sales rather than theater revenues, Eros itself admitted that its catalogue sales had longer payment cycles. (*Id.*, pp. 5-6) Based on this disclosed evidence, the March 8 Article concluded that high RoW data was "dubious," (*id.*, pp. 5-6), a word that clearly expresses opinion.

Indeed, Eros does not dispute this evidence; instead, it simply says that it is "credible" that its RoW revenue would be high "because its films are enjoyed by consumers in countries all across the non-Western world." (Compl. ¶ 233.) This conclusory allegation does not establish the falsity of the well-supported opinion in the March 8 Article. Indeed, it establishes nothing.

- *Allegations that Eros failed to disclose important details about ErosNow and LeEco partnership and its demise* (*id.* ¶ 234)

GeoInvesting cited specific sources to support its opinions on this issue, including hyperlinks to relevant sources, and pasted other specific evidence, including Eros press releases, a Phone Radar article, and Eros's Indian subsidiary's quarterly results from November 2016 and February 2017. (*See* de Leeuw Aff. Ex 1, pp. 6-13.) All of this evidence supported

GeoInvesting's opinion that: (1) every LeEco phone, which contained the Eros Now service as part of a prepaid bundle, was being counted as a 'paid subscriber' which inflated Eros's numbers relating to number of paid subscribers; (2) by early 2017, the subscriber relationship with LeEco ended; and (3) Eros did not tell its investors that the relationship had ended. (*Id.*) Eros does not dispute any of this information. That is, Eros does not dispute that LeEco phone bundles were counted as part of Eros Now subscribership, that Eros terminated its partnership with LeEco, and that this termination of a self-described substantial source of its subscribership was not disclosed to investors. Instead, Eros argues that "[i]f any such termination did occur, it would have been immaterial to Eros's business." (Compl. ¶ 236.). Again, this is woefully insufficient to support a defamation claim.

- *Allegations about Eros's inability to achieve a cash flow positive state* (*id.* ¶ 238).

Finally, Eros does not dispute that it has had free cash flow problems. Indeed, the free cash flow concerns raised in the March 8 Article were based on an admission *by Eros's CEO* during the company's February 21, 2017, earnings call cited to in the March 8 Article—with a link to the transcript— that Eros "do[es] not expect to be free cash flow positive by the end of this current fiscal year." (*See* de Leeuw Aff. Ex. 1, p. 4.) Ignoring this clearly substantiating evidence for GeoInvesting's opinion, Eros insists that, as of its FY 2016 annual report, it had "over $274 million in total revenue and a net increase in cash and cash equivalents of over $30.8 million for the year ending March 2016." (Compl. ¶ 238.) However, Eros's explanation flatly ignores that the ***free cash flow*** calculation from that annual report—the cash flow from operations minus any capital expenditures—had been mostly negative and largely inconsistent—and that this interpretation of the data was acknowledged by its own CEO. (*See* de Leeuw Aff. Ex. 1, p. 4.) The March 8 Article further made it crystal clear that it was referring to free cash

flow by bolding the statement, "… ***we do not expect to be free cash flow positive by the end of this current fiscal year***." (*Id.*)

2. March 16 Article

- *Allegations about liquidity concerns at Eros and equity dilution proposal* (Compl. ¶ 240)

GeoInvesting's opinions about liquidity concerns at Eros were supported by disclosed and hyperlinked sources in the March 16 Article, and its predecessor from March 8 (also linked to in the March 16 Article), showing: a looming $126.1 million debt due in one year; $155.4 million in unrecorded contractual obligations due even sooner; Standard & Poor's downgrading the credit rating of Eros from B+ to B- on March 10, 2017 (below investment-grade); Eros's own assessment that it did not expect to be free cash flow positive this fiscal year; Eros "postponing" a bond offering; and an end of month deadline to pay off or refinance an approximately $95 million credit facility. (*See* de Leeuw Aff. Ex. 2, pp. 1-4; Ex. 1, p. 4.) These sources supported the opinion that Eros needed much more cash to meet its obligations than it had on hand, triggering liquidity concerns. (*Id.*) Ultimately, based on this evidence, GeoInvesting stated its opinion that it believed a dilutive equity raise "***could be*** the only option left for EROS to generate some liquidity." (de Leeuw Aff. Ex. 2, p. 5.)

Eros's response—pointing out how much cash it had on hand as of the FY 2016 report (Compl. ¶ 241)—does not demonstrate the falsity of the liquidity concern or undermine the validity of the opinion reached based on the evidence cited by GeoInvesting in the March 16 Article. Eros's explanation fails to take into account the company's debt, future free cash flow concern, or the decrease in cash for FY 2017, as set forth in the linked annual report. *Eros itself* ultimately validated GeoInvesting's concerns when only five months later it filed SEC documents necessary to raise $350 million in capital through an equity sale. *See* Eros Int'l Plc, Form F-3 Registration Statement (filed August 4, 2017),

https://www.sec.gov/Archives/edgar/data/1532981/000117152017000337/0001171520-17-000337-index.htm.[8]

- *Allegations about Eros not being able to generate cash* (Compl. ¶ 240)

GeoInvesting's opinion that Eros "can't ***seem*** to consistently generate cash on its own" was well supported by evidence linked to in the March 16 Article—the March 8 Article's documented statements that Eros had difficulty collecting on its accounts receivable as well as a link reflecting Eros's delayed high yield bond offering. (*See* de Leeuw Aff. Ex. 2, pp. 1-2; Ex. 1, p. 6.) Eros's response points only to their cash on hand as of the FY 2016 annual report (Compl. ¶ 241)—it does not address, let alone allege the falsity of, an opinion that the company was having trouble with generating free cash going forward.

- *Allegations about skepticism for reason given for delayed bond offering* (*id.* ¶¶ 240, 243)

Eros mischaracterizes the March 16 Article as stating that Eros's delayed bond offering "means doomsday for the company." (*Id.* ¶ 243.) The March 16 Article did no such thing. Indeed, the word "doomsday" never appeared in the March 16 Article. (*See* de Leeuw Aff. Ex. 2.) Instead, GeoInvesting merely cited the reasons given by Eros for its delayed bond offering: that despite its strong balance sheet and self-proclaimed healthy relationships with its lenders, Eros simply decided to "postpone" the bond offering. (*Id.*, pp. 2-3) GeoInvesting then opined that the stated reason is dubious and that, instead, it may not have been Eros's choice to delay the bond offering. (*Id.*, pp. 2-4) The March 16 Article also disclosed the source of GeoInvesting's opinion, citing additional reports that the "offering failed to attract attention" and including a

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[8] The Court may take judicial notice of public filings with the SEC. *In re Avon Prods., Inc. Shareholders Litig.*, 2013 WL 4022625, at *1 n. 1 (N.Y. Sup. N.Y. Cty. Mar. 5, 2013) (Bransten, J.) ("This statement of facts is taken from the Complaint and from other publicly available documents, including Securities and Exchange Commission filings and press releases, which the court may consider for the purpose of this motion.").

portion of the bond prospectus showing that Eros had $155.4 million in unrecorded contractual obligations due in less than one year, indicating that the company may have needed the cash from the bond offering more than it let on. (*Id.*, p. 4)

- *Allegations about lack of disclosure surrounding the extension of the credit facility* (Compl. ¶ 242)

The March 16 Article stated that Eros let the termination date of its credit agreement lapse and failed to disclose to its investors how it would proceed accordingly. (*See* de Leeuw Aff. Ex. 2, pp. 2-3.) This statement—as is clear in the March 16 Article—was based on the February 21, 2017, earnings call, which was linked to in the March 8 Article (hyperlinked in the March 16 Article), and Eros's failure to disclose any information about the credit facility maturity date. (*Id.*) Eros attacks this statement but does not allege that it was false. Eros points out only that S&P analysts later shared that the company had extended the maturity date from January to March (Compl. ¶ 242)—but this explanation does not show that it was a false assertion to say that the company did not make this disclosure to its investors. Indeed, Eros does not dispute that it failed to disclose to its investors the extension of the credit facility when it was originally due in January.

3. March 29 Article

- *Allegations about Eros working closely with accused Bollywood money launderers in Bollywood* (*id.* ¶¶ 246, 248)

The March 29 Article presented, and linked to, evidence, that Eros worked closely with film executives who were caught on hidden camera in a 2012 CNN exposé explaining how to launder money through films. (*See* de Leeuw Aff. Ex. 3, pp. 1-6.) The evidence in the March 29 Article included a link to the exposé itself showing these four individuals discussing methods for laundering money, as well as links to articles showing that Eros had business dealings with each of these individuals. (*Id.*, pp. 3-6.) Eros's response—that the exposé was aired five years ago,

that its accusations have not been substantiated, and that the CNN report never mentions Eros (Compl. ¶¶ 247, 250)—does not show how GeoInvesting's statements were false, nor does it undermine the GeoInvesting's opinion set forth in the March 29 Article. Indeed, Eros *again confirmed GeoInvesting's findings* by conceding in the Complaint that it had "collaborations with the individuals featured in the CNN India report." (*Id.* ¶ 247.) Most importantly, the March 29 Article makes clear on its face that GeoInvesting was "not alleging outright that Eros is involved with money laundering"—a point Eros concedes in its Complaint. (*Id.* ¶ 248.)

Finally, Eros does not allege why it was false for GeoInvesting to opine that Eros's money launderer ties "raise[s] serious questions about Eros's use of numerous offshore asset havens and its byzantine entity structure." (*Id.* ¶ 249)

- *Allegations about Eros's financing concerns and prospective future equity issuances* (*id.* ¶¶ 245, 251)

The March 29 Article opined that, because of Eros's liquidity concerns, "we continue to believe that its only option for raising capital, and possibly staying in business, is to issue equity at a discount to market" and that "[t]hese equity issuances, if they occur, ***could be*** the beginning stages of what ***we believe to be*** a toxic financing death spiral for the company." (*See* de Leeuw Aff. Ex. 3, p. 7) (emphasis added). This opinion (clearly stated as such) was supported by evidence linked to in the March 29 Article (linking to the March 16 Article) about the extent of Eros's upcoming obligations and the lack of cash flow to meet these obligations—*i.e.*, a looming $126.1 million debt due in one year; $155.4 million in unrecorded contractual obligations due even sooner; Eros's own assessment that it did not expect to be cash flow positive this fiscal year; Eros's postponed bond offering; and an end of month deadline to refinance. (*See* de Leeuw Aff. Ex. 3, p. 7; Ex. 2, pp. 1-4; Ex. 1, p. 4.) This disclosed evidence supported GeoInvesting's opinion that an equity dilution—of 40%—could have been Eros's only option to raise cash in light of its bond offering being postponed. (*See* de Leeuw Aff. Ex. 3, p. 7.)

Eros's response—that "to this day, [it] has neither diluted current shareholders by over 40% to sustain operations … nor plunged into any toxic financing death spiral" (Compl. ¶ 252)—does not affect the position that GeoInvesting's opinion in the March 29 Article, when written, was well-supported with disclosed evidence, allowing the reader to make its own determination. In any event, however, GeoInvesting's suggestion that Eros might need to dilute its equity by 40% was actually supported by Eros's subsequent filing, in August 2017, of a shelf registration for $350 million, representing nearly exactly 40% of Eros's market cap as of that date. *See* Eros Form F-3 Registration Statement, *supra*. The SEC then approved the shelf registration days after Eros filed this suit, giving the green light to Eros to issue $350 million worth of new shares—validating Eros's 40% equity dilution suggestion set forth in its March 29 Article months earlier. *See also* Securities and Exchange Commission, Notice of Effectiveness of Eros Form F-3 Registration Statement (October 2, 2017), https://www.sec.gov/Archives/edgar/data/1532981/000117152017000337/0001171520-17-000337-index.htm.

- *Allegations about calling for investigation of Eros* (Compl. ¶¶ 245, 251)

The March 29 Article opined that Eros "should be investigated by regulators." (*See* de Leeuw Aff. Ex. 3, pp. 1, 7.) Instead of arguing the falsity of this statement, or arguing that it has no basis, Eros simply claims this is an "outrageous assertion" that is "nothing more than a transparent attempt to create hysteria and instigate shareholder uncertainty." (Compl. ¶¶ 251-52.) Reading the March 29 Article in its entirety, however, the evidence presented regarding ties to money launderers and liquidity concerns amply supported GeoInvesting's opinion. *See, e.g.*, *Silvercorp Metals*, 959 N.Y.S.2d 92, at *11 (calls for investigation "signal to the reasonable reader that the statements are non-actionable opinion").

- *Allegations about Eros's changes of auditors* (Compl. ¶ 249)

In the March 29 Article, GeoInvesting questioned why Eros used nine different auditors and why there had been 12 auditor resignations at its subsidiaries in the past four years. (*See* de Leeuw Aff. Ex. 3, pp. 1, 7.) The March 29 Article then went on to list the different auditors and detail the switches and resignations made in the last several years at Eros's auditors. (*Id.*, pp. 8-11.) Eros does not explain why the statements in the March 29 Article are false; rather, it deflects the criticism by instead addressing the company's Outside Auditor that oversees the parent corporation—not the subsidiary auditors referenced in the March 29 Article. (Compl. ¶ 250.) Indeed, Eros never claims that the underlying factual assertions in the March 29 Article are false.

4. July 14 Article[9]

- *Allegations about Eros's sales of its subsidiary EIML to raise cash* (¶¶ 272-73)

The July 14 Article discussed Eros's undisclosed selling off or pledging a significant portion of its stake in its primary Indian subsidiary, EIML, and opined that "***we can only assume*** that the disposition of Eros's key Indian operating asset ***is likely*** to have a material impact on both future revenue and cash flow." (*See* de Leeuw Aff. Ex. 4, pp. 1-2 (emphasis added).) The July 14 Article supported this statement with citations to Eros's public filings showing the decline in EIML holdings as well as pointing to the significant revenue received from its Indian operating assets. (*Id.*)

Once again, the Complaint validates the July 14 Article, conceding that it was selling shares in EIML (Compl. ¶ 275) and noting that it "was transparent in disclosing the existence, degree and purpose of its sale in EIML when it released its FY 2017 annual and Q4 earnings"

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[9] Eros also argues that the July 14 Article contains a defamatory statement about a liquidity crisis at Eros (Compl. ¶ 272). This statement was not defamatory for the same reasons it was not defamatory in the March 16 Article.

(*id.* ¶ 276)—yet the company's disclosure was made ***long after*** GeoInvesting published the July 14 Article alerting investors to the EIML share pledges.

- *Allegations about Eros's inadequate or otherwise lacking disclosures about long-term financing options* (*Id.* ¶¶ 272, 277)

The July 14 Article stated that Eros disclosed in April that it was in "advanced stages of executing multiple long-term refinancing options" but then never followed up with investors. (*See* de Leeuw Aff. Ex. 4, p. 3.) In the Complaint, Eros does not dispute that it made the initial disclosure; nor does it dispute that the company made no further disclosures about its "long-term refinancing options." Instead, Eros simply argues that it had "no obligation to disclose the details of its refinancing alternatives" prior to the extended maturity date. (Compl. ¶ 278.)

The July 14 Article then explained that those initial disclosures were "troublesome." (*See* de Leeuw Aff. Ex. 4, p. 2.) Specifically, the article pointed to Eros filings and press releases that disclosed initially a $125 million credit facility and then later an $85 million revolving credit line. (*Id.*) These disclosed facts suggested a $40 million tightening of the facility, supporting GeoInvesting's use of the adjective "troublesome." (*Id.*)

- *Allegations about Eros's entry into insider real estate transaction* (Compl. ¶¶ 272, 279)

The July 14 Article stated that Eros made an $8 million purchase of real estate from a related party via a private subsidiary and that this transaction was not disclosed to the Bombay Stock Exchange or the New York Stock Exchange. (*See* de Leeuw Aff. Ex. 4, pp. 3-5.) This statement was based upon a screenshot, pasted into the article, of a resolution filed with India's Ministry of Corporate Affairs. (*Id.*) Eros does not allege that these statements are false. Eros argues instead that the transaction was in fact disclosed through a filing with India's Ministry of Corporate Affairs and that it was purchased "for a business purpose and at a discount." (Compl. ¶ 280.) These responses, however, do not undermine the truth of the statements made in the July

14 Article. GeoInvesting's opinion that this transaction "drained cash out of the company" and that "the board agreed to purchase real estate directly from Eros's key insiders Kishore Lulla and Sunil Lulla," are both well supported by a screenshot of the Board's resolution clearly stating the ownership of the premises and describing the transaction details. (*See* de Leeuw Aff. Ex. 4, pp. 3-5.)

- *Allegations about possibilities surrounding departure of company's auditor* (Compl. ¶¶ 272, 281)

The July 14 Article stated that there was a switch of the auditor at a key Eros subsidiary, (*see* de Leeuw Aff. Ex. 4, p. 5), a proposition that Eros does not dispute. GeoInvesting then opined that this resignation "***could signal an even larger issue***" and creates an "***additional lingering question***" as to whether the parent Eros's auditor will remain on board—an opinion supported by the disclosed fact that the auditor that had resigned was an affiliate of the auditor for the Eros parent company. (*Id.* (emphasis added).)

- *Allegations about late FY 2017 earnings release* (Compl. ¶¶ 272, 283)

The July 14 Article reported that, as of the date of publication, Eros had not yet released its annual 20-F report, which represented a significant delay relative to previous years. (*See* de Leeuw Aff. Ex. 4, p. 6.) This statement was supported by a disclosed list, with hyperlinks, of the previous years' earnings release dates, all of which were in June. (*Id.*) Eros claims that this statement is defamatory because it had previously ***filed*** its annual reports in July and therefore its July 2017 filing was not "delayed." (Compl. ¶ 284.) But this ignores the point that GeoInvesting made; the July 14 Article did not concern the date on which Eros's annual report was ***filed***; instead, it addressed the date on which ***earnings*** were ***released***. (*See* de Leeuw Aff. Ex. 4, p. 6.) And Eros does not—and cannot—dispute that it released earnings on the dates set forth in the July 14 Article and that those dates were at least a month before any earnings release was made in 2017.

5. July 18 Article[10]

- *Allegations about Eros's block sale of EIML shares and loss of voting rights* (Compl. ¶ 286)

The July 18 Article explained that Eros made a block sale of EIML shares, representing 1.32% of the company. (*See* de Leeuw Aff. Ex. 5, p. 1.) This statement was supported by Eros's linked public filings, which show the number of shares EIML had outstanding and a chart showing the sale on July 14, 2017. (*Id.*, pp. 1-2.) The July 18 Article set forth the opinion that Eros, "***by our calculation***," held less than 50% of EIML voting rights and "***may***" have lost majority voting control. (*Id.* (emphasis added).) These calculations were set forth in the July 18 Article with a link to Eros's and EIML's public filings for further support. (*Id.*)

- *Allegations about new share pledges in EIML demonstrating need for new borrowings* (Compl. ¶ 286)

The July 18 Article linked to Eros's share pledge of 7.41% of EIML in July 2017. (*See* de Leeuw Aff. Ex. 5, p. 2.) It also included a filing from an EIML subsidiary, also from July 2017, showing additional pledges of EIML shares at an interest rate of 13.75%. (*Id.*, pp. 2-3.) GeoInvesting opined in the July 18 Article that the high interest rate on the "fresh senior debt" "***likely*** reflects the company's need for new borrowings," (*id.* (emphasis added)), appropriately based on these disclosed facts. Eros does not dispute the existence of these share pledges or their interest rate; instead, it simply says that "Eros had ample cash on hand." (Compl. ¶ 287.) This conclusory statement does not undermine GeoInvesting's well-supported opinion.

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The five GeoInvesting Articles contain statements of fact that are not alleged to be false and/or statements of opinion that are not actionable. As such, Counts I and II should be dismissed.

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[10] Eros also argues that the July 18 Article contains a defamatory statement about a liquidity crisis at Eros (Compl. ¶ 286). This statement was not defamatory for the same reasons it was not defamatory in the March 16 Article.

C. GeoInvesting's Twitter Statements Are Not Defamatory

Eros also alleges that the GeoInvesting Defendants used Twitter to "promulgate its defamatory, disparaging articles to the broader Twitter audience." (Compl. ¶ 289). The Complaint then purports to list a series of allegedly defamatory statements made by three different GeoInvesting-affiliated Twitter handles. (*Id.* ¶¶ 289-91.) To the extent that Eros is alleging that the enumerated tweets are simply rebroadcasting of the allegedly "defamatory, disparaging [GeoInvesting A]rticles," for the reasons set forth above, the GeoInvesting Articles do not contain any actionable defamation. In any event, the Twitter statements are not, on their own, defamatory.

As an initial matter, courts have generally treated statements made on Twitter as nonactionable because reasonable readers do not assume they are reading statements of fact. In fact, one New York court recently went so far as observing that "truth itself has been lost in the cacophony of online and Twitter verbiage to such a degree that it seems to roll off the national consciousness like water off a duck's back." *Jacobus v. Trump*, 51 N.Y.S.3d 330, 343 (N.Y. Sup. N.Y. Cty. 2017).

In any event, the specific Twitter statements cited in the Complaint are not actionable. All of the tweets set forth in Paragraph 289 of the Complaint were published on March 8, March 16, and March 29—dates on which corresponding GeoInvesting Articles were published—and the tweets link to the corresponding date's article. (*See* de Leeuw Aff. Ex. 6.) The March 29, July 14, and July tweets in Paragraph 290 of the Complaint, and the March 8 tweets in Paragraph 291 of the Complaint, similarly link to the corresponding GeoInvesting Article or to another tweet linking to the article. (*Id.* Exs. 7-8.) Eros fails to disclose to the Court that the tweets hyperlink to the longer, more extensive GeoInvesting Articles. Reviewing these tweets in the context of the full-length articles to which they are expressly linked, the statements are not defamatory for the same reasons the articles are not defamatory.

Many of the other tweets are protected opinion because they disclose the sources on which the tweets rely—even though Eros suspiciously failed to include these disclosed sources in its Complaint. For example, the FG Alpha Management tweet on March 8 concerning allegations of potential fraud at Eros disclosed that the statement was based upon "court documents." (*Id.* Ex. 7.) Its March 16 tweet about an Eros liquidity crunch was followed by two tweets—omitted by Eros in the Complaint—giving sources and delineating reasons for the tweet. (*Id.*) The March 22, March 30, and March 31 FG Alpha Management tweets linked to and embedded articles or a LinkedIn profile on which the tweets relied—but Eros omits these linked sources in their Complaint. (*Id.*) Similarly, the March 9 Quoth the Raven tweet embedded a graph showing Eros stock price dropping over 11 months, substantiating the accompanying (sarcastic) opinion that "[e]verything's fine [at Eros]." (*Id.* Ex. 8.) And the March 22 and March 31 Quoth the Raven tweets contained screenshots of, and linked to articles saying, respectively, that Eros was not paying its producers and that Eros amended and extended its revolving credit facility—providing context and substantiation for other comments posted on those days. (*Id.*)

The remaining tweets are not actionable because they contain such obviously qualified or hyperbolic language that no reasonable reader would expect those them to be expressing anything other than opinion. *See Frechtman*, 115 A.D.3d at 106. For example, these tweets talk about what their author "believes," or are preceded with the phrase "in my opinion"—or thank other analysts for their "ineptitude" which "created the opportunity for [GeoInvesting] and others to actually publish the truth [about Eros]." (*See* de Leeuw Aff. Ex. 8.) Or the tweets provide "on the fly," brief commentary about how Eros stock was performing from day to day, *i.e.*, "Eros about to go red after being green all day" and "Eros continues to fall apart." (*Id.*) Selectively, the Complaint ignores additional tweets put out on other dates making note of Eros's stock performance on days when the stock was trading at its highs of the day. Rather, Eros chose only

to include in its Complaint tweets focusing on days when the stock was trading lower. But none of these tweets are actionable.

D. Eros Has Not Pled Actual Malice

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"—*i.e.*, that the GeoInvesting Defendants acted with "knowledge that the statements were false or a high degree of awareness of falsity." *Gear Up, Inc. v. City of New York*, 140 A.D.3d 515, 516 (1st Dep't 2016). But the Complaint makes no allegations that the GeoInvesting Defendants knew—or had a high degree of awareness—that their statements were false. To the contrary, the GeoInvesting Articles and tweets were replete with citations to reputable sources supporting the statements made. For this separate, independent reason, Counts I and II should be dismissed.

III. Eros's Non-Defamation Claims Must Be Dismissed[11]

Where the same statements and alleged harm underlie plaintiff's non-defamation claims, these claims must be dismissed as duplicative of the claim for defamation. *See, e.g.*, *Perez v. Violence Intervention Program*, 116 A.D.3d 601, 602 (1st Dep't 2014) (holding that claims for injurious falsehood and tortious interference with prospective contractual/business relations, among others, should have been dismissed as duplicative of the defective defamation claim, "as they allege no new facts and seek no distinct damages from the defamation claim"); *see also Hengjun Chao v. Mount Sinai Hosp.*, 476 Fed. App'x 892, 895 (2d Cir. 2012) (holding "district court correctly dismissed [trade libel and tortious interference] claims as duplicative of [] defamation claim" where "the factual allegations underlying [those] claims [were] virtually

[11] The GeoInvesting Defendants adopt and incorporate as if fully set forth herein the arguments made in favor of dismissal of Counts III, V, VI, and VII set forth in the Memorandum of Law In Support of Defendants Mangrove Partners' and Nathaniel H. August's Order to Show Cause.

identical to the facts underlying his defamation claim" and "harms that [plaintiff] contend[ed] he suffered as a result of the[ ] other torts ... all flow[ed] from the effect on his reputation caused by defendants' allegedly defamatory statements") (internal quotation marks and citations omitted).

Because all of Eros's non-defamation claims rest on the same statements and damages as the defamation claims in Counts I and II (*see* Compl. ¶¶ 348, 350, 353, 357-58, 364-65, 369, 373-74, 379-80, 386-87, 392-93), these claims must be dismissed as duplicative. Separately, Eros also fails to plead the elements of each of these claims, as set forth below.

A. Eros Fails To State A Claim For Commercial Disparagement[12]

Like a claim for defamation, a claim for commercial disparagement under New York law requires false statements of fact, not opinion. *Vitro S.A.B. de C.V. v. Aurelius Capital Mgmt., L.P.*, 99 A.D.3d 564, 565 (1st Dep't 2012). Thus, for the same reasons that the defamation claims are not actionable, neither is Eros's claim for commercial disparagement.

Eros's claim for commercial disparagement fails for the additional reason that such a claim lies only when the defamatory statements are directed at the quality of the defendant's goods and services, rather than the integrity or creditworthiness of its business—and the latter constitutes defamation per se. *Ruder & Finn Inc. v. Seaboard Sur. Co.,* 52 N.Y.2d 663, 670-71 (1981). Because Eros does not allege that the GeoInvesting Defendants disparaged any of their goods and services, but rather the integrity of their business, Eros has not pled a claim for commercial disparagement.[13] (*See* Compl. ¶ 333 ("Defendants' short and distort scheme has inflicted damage on Eros' reputation, business operations, and financial condition.").)

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12 This tort is sometimes referred to as "injurious falsehood" or "trade libel."

13 In Count III, Eros makes the unsupported statement that Defendants "knowingly and intentionally published false, misleading and disparaging statements attacking … the quality of [Eros's] products and services, including Eros Now." (Compl. ¶ 362.) Eros includes this allegation in an attempt to meet the requirements of a commercial disparagement claim, but none of the allegations in the 394-paragraph pleading support the proposition that GeoInvesting made any statements about the quality of Eros Now. The GeoInvesting Articles discussed how data

B. Eros Fails to State a Claim For Tortious Interference With Prospective Business Relations and with Contract

Eros fails to state claims for tortious interference with prospective business relations and tortious interference with contract because it does not specify which business relationships were threatened by or which contracts were damaged by the GeoInvesting Defendants' alleged conduct. *See Rondeau v. Houston*, 118 A.D.3d 638, 639 (1st Dep't 2014) (affirming dismissal of claim for tortious interference with prospective business relations where complaint "failed to allege any specific business relationship he was prevented from entering into by reason of the purported tortious interference."); *Vigoda v. DCA Productions Plus Inc.*, 293 A.D.2d 265, 267 (1st Dep't 2002) (affirming dismissal of tortious interference with prospective economic relations claim where plaintiff did not name the specific parties to the specific contract they would have obtained but for defendant's misconduct); *Chemical Bank v. Ettinger*, 196 A.D.2d 711, 716 (1st Dep't 1993) (affirming dismissal of tortious interference with contract claim where "no specific reference was made to any particular contract with which plaintiff interfered"). The Complaint's reference to "potential" customers, producers, distributors, investors, lenders, and acquirers, (Compl. ¶ 377), is conclusory and lacks the requisite specificity to state a claim. *Steiner Sports Mktg., Inc. v. Weinreb*, 88 A.D.3d 482, 482-83 (1st Dep't 2011).

Moreover, because Eros contends that the GeoInvesting Defendants, who were short Eros stock, published their articles with an intent to maximize their profits, Eros cannot also argue that the GeoInvesting Defendants interfered with prospective relations for the sole purpose of harming Eros, as is required for a claim of tortious interference. *Steiner Sports*, 88 A.D.3d at 483; *Vitro S.A.B. de C.V.*, 99 A.D.3d at 565 (where defendants had clear economic interest in matter, plaintiff "failed to establish malice as the sole motive for defendants' actions).

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related to Eros Now subscribership and revenue was dubious (*id.* ¶¶ 232-37), but never addressed the quality of the actual Eros Now product.

C. Eros Fails to State a Claim for False Light Under Pennsylvania Law

New York does not recognize a claim for the tort of false light. *Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115, 123 (1993); *Freeman v. Johnston*, 192 A.D.2d 250, 253 (1st Dep't 1993). Plaintiff, aware of this limitation, therefore tries to shoe-horn a claim under Pennsylvania law into a Complaint it chose to file in New York. But Pennsylvania law does not apply to this action. In a defamation case where, as here, the statements at issue are published nationally, the tort "injures plaintiff everywhere at once." *Dickerson v. Novartis Corp.*, 315 F.R.D. 18, 31 (S.D.N.Y. 2016). "In such cases, there is a presumptive rule that the law of the plaintiff's domicile applies." *Id.* (quoting *Broadspring, Inc. v. Congoo, LLC*, 2014 WL 4100615, at *6 (S.D.N.Y. Aug. 20, 2014)).

Here, Plaintiff is a New Jersey corporation. (Compl. ¶ 19.) As such, Pennsylvania law does not apply and a claim for "false light under Pennsylvania law" is improper and must be dismissed.[14] But even under New Jersey law, a claim for false light fails. Under New Jersey law, "a fundamental requirement of the false light tort is that the disputed publicity be ***in fact false***, or else 'at least have the capacity to give rise to a false public impression as to the plaintiff.'" *Romaine v. Kallinger*, 109 N.J. 282, 294 (1988) (emphasis added). For the reasons set forth herein at length, Eros does not plead the falsity of the statements in the GeoInvesting Articles. As such, the claim must be dismissed.

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[14] The GeoInvesting Defendants applied New York law to the non-false light claims because, on those claims, there is no conflict between New York and New Jersey law. *See Kersey v. Becton Dickinson and Co.*, 433 Fed. App'x 105, 109 (3d Cir. 2011) (no conflict between New York and New Jersey on defamation); *Hahn v. OnBoard LLC*, 2009 WL 4508580, at *7 (D.N.J. Nov. 16, 2009) (no conflict between New York and New Jersey on tortious interference with contract or prospective economic advantage); *NXIVM Corp. v. Sutton*, 2007 WL 1876496, at *6 (D.N.J. June 27, 2007) (no conflict between New York and New Jersey on trade libel); *1766-68 Assocs., LP v. City of New York*, 91 A.D.3d 519, 520 (1st Dep't 2012) (listing elements of civil conspiracy under New York law); *Marrero v. Twp. Of N. Bergen*, 2016 WL 4046740, at *8 (N.J. App. Div. Jul. 29, 2016) (listing elements of civil conspiracy under New (N Jersey law). In the absence of a conflict of law on these claims, the law of the forum—New York—applies. *SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 354 (1st Dep't 2004).

D. Eros Fails to State a Claim for Civil Conspiracy

Finally, Eros's claim for civil conspiracy fails because "New York does not recognize an independent tort cause of action for civil conspiracy." *Montan v. Saint Vincent's Catholic Med. Ctr.*, 81 A.D.3d 431, 431 (1st Dep't 2011) (citing *Jebran v. LaSalle Bus. Credit, LLC*, 33 A.D.3d 424, 425 (1st Dep't 2006)). In any event, the Complaint fails to allege that the GeoInvesting Defendants entered into any agreement with any other party in furtherance of a purpose to damage Eros, as is required to state a claim for civil conspiracy. *1766-68 Assocs., LP v. City of New York*, 91 A.D.3d 519, 520 (1st Dep't 2012).

CONCLUSION

For the reasons set forth herein, Plaintiff fails to state a claim against Defendants GeoInvesting, LLC, Christopher Irons, Daniel E. David, FG Alpha Management, LLC, FG Alpha Advisors, and FG Alpha, L.P., and the Complaint should be dismissed as against them, with prejudice.

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