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**

Motion Seq. #001

Hon. Eileen Bransten

Commercial Division

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS MANGROVE PARTNERS' AND NATHANIEL H. AUGUST'S ORDER TO SHOW CAUSE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Other Authorities

Defendants Mangrove Partners ("**Mangrove**") and Nathaniel H. August ("**August**," and, together with Mangrove, the "**Mangrove Defendants**"),[1] by and through their undersigned attorneys, respectfully submit this Memorandum of Law in Support of their Order to Show Cause seeking dismissal of Plaintiff Eros International PLC's ("**Eros**") Complaint (the "**Complaint**") pursuant to New York Civil Practice Law and Rules ("**CPLR**") 3211(a)(1) and (7).

PRELIMINARY STATEMENT

In 2015, and again in 2017, the Mangrove Defendants, who operate and manage an almost one billion dollar investment fund, published a series of research reports criticizing the business model and accounting practices of Eros, an international media company whose shares trade on the New York Stock Exchange. In their five reports, each of which prominently noted the author's short position in the company, the Mangrove Defendants explained why they were critical of Eros and skeptical of its long-term viability. Many of the same concerns were shared by market analysts at Wells Fargo & Co., and reported on by Bloomberg, even before the Mangrove Defendants published their first report. In tweets posted in 2017, the Mangrove Defendants expressed their continued belief that—because of liquidity constraints, growing receivables, and unsubstantiated sale rumors, among other "red flags"—Eros was not a legitimate competitor in the online movie streaming industry and would not ultimately succeed.

The Mangrove Defendants went to great lengths to investigate Eros's practices and explain in detail the facts and bases that supported their opinions. If Eros had legitimate

[1] The Complaint references "Defendants John Does Nos. 7-9," which "refer to Mangrove's or August's affiliate(s), or any related investment fund(s) owned in whole or in part by Mangrove or August, that Mangrove or August used between January 1, 2015 and the present to short Eros' stock, whose identities are presently unknown to Eros. (Compl. (Fitts Aff. Ex. 10) ¶ 40.) The Mangrove Defendants submit this Order to Show Cause and supporting documents on behalf of Mangrove, its wholly-owned entities and affiliates, and any other person or entity that Eros purports to identify through its allegations against John Does Nos. 7-9.

explanations for the many "red flags" identified by the Mangrove Defendants, it had all the information it needed to challenge their analysis. Rather than address its own highly suspicious practices, however, Eros chose to file this baseless Complaint, built on omissions and mischaracterizations, in a transparent attempt to silence the legitimate, critical opinions voiced by the Mangrove Defendants. Tellingly, Eros did not provide the Court with the full reports, which—fatal to Eros's claims—demonstrate the well-reasoned bases for the Mangrove Defendants' opinions. Nor did Eros even present this Court with complete and accurate quotes from those reports. Instead, the Complaint includes a handful of manipulated, context-free quotes and misleading paraphrases. And instead of including the Mangrove Defendants' Twitter feed, which, read in full, makes clear to the reader that the Mangrove Defendants were expressing opinions based on financial statements and other disclosures, Eros cherry-picks certain tweets, presents them out of chronological order and stripped of context, and omits other tweets that undercut their claims.

As is evident from a review of the Mangrove Defendants' complete reports and Twitter feed (attached hereto), the Mangrove Defendants' statements regarding Eros are constitutionally protected opinion and cannot serve as the basis for a defamation claim. Accordingly, Eros's defamation claims against the Mangrove Defendants in Counts I and II should be dismissed. These claims must also be dismissed because Eros fails to plead any fact to prove actual malice, a necessary element in a defamation claim against a public figure like Eros. The remaining claims against the Mangrove Defendants in Counts III, V, VII, and VII fail for the same reason—absent the underlying defamation claim each one is precluded as a matter of law.[2] In

[2] Count IV for false light is not pled against any of the Mangrove Defendants.

addition, each of the remaining claims fails for the separate and independent reasons described herein. As a result, the Complaint should be dismissed as to the Mangrove Defendants.

SUMMARY OF ALLEGATIONS

Plaintiff Eros is a publicly-traded international media company that co-produces, acquires, and distributes Indian films through a variety of theatrical, television, and digital forums. (Compl. (Fitts Aff. Ex. 10) ¶ 19.) Its stock trades on the New York Stock Exchange (NYSE: EROS). (*Id.* ¶ 2.) Defendant Mangrove is an investment advisor incorporated in the Cayman Islands. Mangrove's founder, Defendant August, currently serves as its President and Portfolio Manager. At times relevant to the allegations in the Complaint, Defendant August posted content online using the alias "Alpha Exposure."

Eros alleges that the Mangrove Defendants, acting with others, engaged in a scheme to issue false and defamatory statements about Eros's financial condition and reporting practices in order to depress Eros's stock price. (*Id.* ¶¶ 62-65.) Specifically, Eros challenges the contents of several reports published by the Mangrove Defendants under the alias Alpha Exposure on Seeking Alpha in 2015 and 2017, as well as several tweets posted using the "Alpha Exposure" Twitter handle in 2017. (*Id.* ¶¶ 62, 304, 306, 307, 311.)

A. Fall 2015 Seeking Alpha Reports

Eros first complains of a series of articles published by the Mangrove Defendants on the website Seeking Alpha under the alias "Alpha Exposure" in the Fall of 2015 (the "**Fall 2015 Seeking Alpha Reports**").[3] Over the course of these articles, each of which disclosed the

[3] The Complaint references three articles published in "October 2015" (Compl. (Fitts Aff. Ex. 10) ¶ 104) but does not specifically identify them. In fact, Defendant August published four articles concerning Eros on Seeking Alpha in the Fall of 2015, three of which were in November 2015: (i) *Unlike the Name, Investors Should Not Love EROS* (Seeking Alpha Oct. 30, 2015) (Aff. of Jessica Fitts in Support of Order to Show Cause ("**Fitts Aff**.") Ex. 1); (ii) *Eros: Return of the*

author's short position,[4] the Mangrove Defendants presented their considered opinion that Eros was overstating its revenue and that there were other indications of serious mismanagement. The Mangrove Defendants also disclosed the facts and analysis that formed the basis for their conclusions, including raw financial data, links to underlying material, and detailed explanations of their reasoning, thus providing the reader with the means to independently assess the Mangrove Defendants' research opinions.[5]

Eros generally complains that the Fall 2015 Seeking Alpha Reports "contain[ ] a cascade of false, misleading accusations[,]" "lash[ing] out at Eros'[s] accounting practices, financials, related party transactions, film distribution counts, theatrical revenue and the competitive advantage of [Eros's content streaming service] Eros Now." (Compl. (Fitts Aff. Ex. 10) ¶ 104.) Specifically, Eros identifies four separate categories of content that it alleges to be defamatory:[6] (i) the Mangrove Defendants' conclusion that Eros is "burn[ing] cash" and has a "non-existent cash flow" (*id.* ¶ 107); (ii) the Mangrove Defendants' suspicion that Eros may have self-dealt through related parties (*id.* ¶ 108); (iii) the Mangrove Defendants' conclusion that Eros is overstating its Eros Now registered user counts (*id.* ¶ 109); and (iv) the Mangrove Defendants'

Short Seller (Seeking Alpha Nov. 10, 2015) (*id.* Ex. 2); (iii) *Eros: Is the Game Finally Over? We Think So* (Seeking Alpha Nov. 13, 2015) (*id.* Ex. 3); and (iv) *Eros: Revising Our TopCo Analysis* (Seeking Alpha Nov. 20, 2015) (*id.* Ex. 4). The fourth article, in addition to providing further analysis on Eros, recognized an error in the Mangrove Defendants' prior analysis and explained that prior reports had understated certain Eros revenues.

[4] *Unlike the Name* (*id.* Ex. 1) at 26; (ii) *Return of the Short Seller* (*id*. Ex. 2) at 16; (iii) *Game Finally Over?* (*id*. Ex. 3) at 28; and (iv) *Revising Our TopCo Analysis* (*id*. Ex. 4) at 5.

[5] On October 23, 2015, Bloomberg published an article chronicling the continued decline in Eros' stock price and the concerns voiced by market analysts at Wells Fargo & Co. (*See Id.* Exs. 5, 6, and 7.) Notably, this was one week before the Mangrove Defendants issued their first report on October 30, 2015.

[6] As the Complaint treats the Fall 2015 Seeking Alpha Reports holistically, declining to attribute particular statements to specific articles, the Mangrove Defendants will similarly treat the Fall 2015 Seeking Alpha Reports as a single unit.

belief that it has identified "irrefutable evidence" that Eros materially overstated the scope of its film releases for particular years (*id.* ¶ 111). Importantly, however, Eros does not separately challenge any of the information presented in support of the Mangrove Defendants' assertions.

B. May-August 2017 Tweets

Eros next challenges certain tweets posted to the Alpha Exposure account between May and July of 2017 (the "**Summer 2017 Tweets**"). (*Id.* ¶¶ 304, 306-307.) On May 26, 2017, Eros subsidiary EIML released its Q4 and annual financial results. (*Id.* ¶ 304.) With the introduction that Eros's "Indian subsidiary reported results this morning," the Mangrove Defendants posted five tweets in response to the reported information, repeating statistics from the financials and offering interpretations and opinions based on those statistics. (Fitts Aff. Ex. 8 at 8.) On July 28, 2017, the Mangrove Defendants followed suit with Eros's Q4 and FY 2017 financial results, listening in to the earnings call and posting reactions and raising questions in real time. (*Id.* at 5-8.) Finally, on August 1, 2017, the day after Eros filed its FY 2017 results with the U.S. Securities and Exchange Commission ("**SEC**"), the Mangrove Defendants tweeted that Eros's "20-F indicates significant liquidity risks" and foreshadowed a forthcoming report. (*Id.* at 5.) The source material is identified for each of these tweets, and Alpha Exposure's Twitter feed is replete with references to Alpha Exposure's other short positions, and contains links to various reports by Alpha Exposure explaining its bearish views. Eros simply reproduces many of the opinions expressed in the Summer 2017 Tweets in its Complaint and labels them as "false allegations" without further explanation (Compl. (Fitts Aff. Ex. 10) ¶¶ 304, 306-307.)

C. August 14, 2017 Seeking Alpha Report

Eros next challenges the Mangrove Defendants' August 14, 2017 Seeking Alpha Report (the "**August 2017 Seeking Alpha Report**") entitled *Eros: Roll the Credits* (Fitts Aff. Ex. 9).

(*Id.* Ex. 10 ¶¶ 311-317.) In that Report, the Mangrove Defendants reiterate their "belie[f]" that Eros was facing a "liquidity crisis," providing the raw financial data and analysis underlying that opinion. Eros identifies three specific categories of information provided in the August 2017 Seeking Alpha Report as "false:" (i) the assertion that Eros was facing a liquidity crisis and "pulling back on its investments in content to preserve liquidity" (*id.* ¶ 312-13); (ii) the identification of "growing payables balances" as a "telltale sign of financial distress" (*id.* ¶ 314); and (iii) speculation that a failure to secure shelf financing could force Eros into bankruptcy (*id.* ¶ 316). Eros also complains that the Mangrove Defendants do not find talk of a sale "credible" and that they "impugn[ ]" Eros's increasing receivables. (*Id.* ¶315.)

D. September 2017 Tweets

Finally, Eros challenges three tweets posted to the Alpha Exposure account between September 8 and September 12, 2017 (the "**September 2017 Tweets**"). In those tweets, the Mangrove Defendants comment that Eros's reported financials seems to be "late" and speculate that Eros may be having "trouble with the SEC" in getting its registration statement approved. (Fitts Aff. Ex. 8 at 1-2.) Eros alleges, with no specifics, that these tweets are "brazen falsehoods." (Compl. (Fitts Aff. Ex. 10) ¶ 332.)

ARGUMENT

I. MOTION TO DISMISS STANDARD

To survive a motion to dismiss pursuant to CPLR 3211(a)(7), a complaint must plead a cognizable cause of action "within the four corners of the complaint." *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (1st Dept. 2002). Only factual allegations, and not bare legal conclusions or "factual claims either inherently incredible or flatly contradicted by documentary evidence," will be presumed to be true. *Roberts v. Pollack*, 92 A.D.2d 440, 444 (1st Dept. 1983).

Pursuant to CPLR 3211(a)(1), a party may also move for judgment dismissing a cause of action on the ground "that a defense is founded upon documentary evidence." Dismissal is warranted where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994); *Berardino v. Ochlan*, 2 A.D.3d 556, 557 (2d Dept. 2003) ("Where documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim, dismissal pursuant to CPLR 3211(a)(1) is warranted."). Evidence is considered "documentary" when it is "unambiguous and of undisputed authenticity." *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 86 (2d Dept. 2010). Affidavits are an appropriate vehicle for authenticating and submitting relevant documentary evidence and in a defamation case can "provide connecting link[s] between the documentary evidence and the challenged statements." *Muhlhahn v. Goldman*, 93 A.D.3d 418, 418-419 (1st Dept. 2012) (internal citations and quotations omitted).

II. PLAINTIFF FAILS TO PLEAD A CLAIM FOR DEFAMATION AGAINST THE MANGROVE DEFENDANTS

New York courts have long favored dismissal of defamation claims at the earliest possible stage of the proceedings to protect public debate and safeguard the free exchange of ideas. *See, e.g., Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 379 (1995) (dispositive motions hold "particular value, where appropriate, in libel cases, so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms."). To delay the disposition of a defamation action unnecessarily "is not only to countenance waste and inefficiency[,] but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights." *Immuno AG. v. Moor-Jankowski*, 145 A.D.2d 114, 128 (1st Dept. 1989), *aff'd*, 77 N.Y.2d 235 (1991). Here, Plaintiff's defamation claims against the Mangrove Defendants should be dismissed under CPLR

3211(a)(1) and (7) because the reports and tweets at issue, provided in full herewith, demonstrate conclusively that the challenged statements are non-actionable.

A. Expressions of Opinion are Constitutionally Protected and Cannot Serve as the Basis for a Defamation Claim

Because defamation claims act as a constraint on free speech rights, they must always be considered against "the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The right to free speech is every bit as essential to the proper functioning of our economic system as it is to our political system. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 765 (1976).

In recognition of the importance of the free exchange of ideas, expressions of opinion are constitutionally protected and cannot serve as the basis for a defamation claim. *E.g. Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995); *Immuno AG.*, 77 N.Y.2d at 243; *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 286 (1986). And, as the Court of Appeals has repeatedly held, the New York State Constitution provides even greater protection than the First Amendment:

> This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas. That tradition is embodied in the ringing declaration that '[e]very citizen may freely speak, write, and publish . . . sentiments on all subjects.' (N.Y. Const, art I, §8.) Those words, unchanged since the adoption of the constitutional provision in 1821, reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms.

Immuno AG., 77 N.Y.2d at 249 (citations omitted).[7]

[7] *See also Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 152 (1993) (compared to the Federal

B. Distinguishing Protected Opinion from Potentially Actionable Statements of Fact Depends on the Context of the Challenged Statements

Determining whether a challenged statement expresses opinion or fact is a question of law for the court to determine. *E.g.*, *Steinhilber,* 68 N.Y.2d at 290. The "words [alleged to be defamatory] must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." *Dillon v City of N.Y.*, 261 A.D.2d 34, 38 (1st Dept. 1999). While there is no definitive set of criteria, "[t]he essential task is to decide whether the words complained of, considered in the context of the entire communication and of the circumstances in which they are spoken or written, may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion." *Id; accord Immuno AG.*, 77 N.Y.2d at 253.

In separating actionable fact from opinion, a court may consider multiple factors: (i) whether the language in issue has a precise meaning that is readily understood; (ii) whether the statements are capable of being proven true or false; (iii) whether the full context of the communication in which the statement appears signals the reader to its nature as opinion; and (iv) whether the broader social context and surrounding circumstances so signal the reader. *See, e.g., Brian,* 87 N.Y.2d at 51; *Steinhilber*, 68 N.Y.2d at 292. However, New York courts have consistently held that context is paramount to the analysis. As the court explained in *Immuno AG.*,

---

standard, New York "has embraced a test for determining what constitutes a nonactionable statement of opinion that is more flexible and is decidedly more protective of 'the cherished constitutional guarantee of free speech.'"); *O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 529 n.3 (1988) ("the protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment.").

> [W]e believe that an analysis that begins by looking at the content of the whole communication, its tone and apparent purpose better balances the values at stake than an analysis that first examines the challenged statements for express and implied factual assertions, and finds them actionable unless couched in loose, figurative or hyperbolic language in charged circumstances.

77 N.Y.2d at 254 (citations omitted).

C. The Challenged Statements are Protected Opinion

The Mangrove Defendants' communications about Eros are clearly protected opinion.

1. Fall 2015 Seeking Alpha Reports

Plaintiff first challenges a series of investor reports published on the website Seeking Alpha under the alias "Alpha Exposure" in October and November 2015. As a preliminary matter, the Fall 2015 Seeking Alpha Reports fall outside of the one-year statute of limitations for defamation claims, and any claim premised upon the content of those articles is thus time-barred. N.Y. L. of Torts § 1:58 (one-year statute of limitations for defamation accrues at the time of publication); *Firth v. N.Y.*, 98 N.Y.2d 365, 370 (2002) ("single publication rule" applies to publications on the internet). Regardless, the statements therein still are not actionable, as they clearly constitute (and are presented as) protected opinion based on disclosed facts, assumptions, and methods of analysis.

First, the language of the challenged statements themselves is crafted to signal that the author is presenting a considered opinion rather than verifiable facts.[8] In their entirety, the challenged statements read as follows:

- "**[W]e believe** EROS has infatuated investors with its story, blind to the ugly truth. Underneath the convoluted structure and reported earnings, Eros is a company that burns cash and continuously issues stock. . . . The lack of future

[8] Notably, Plaintiff does not specifically challenge the bulk of the information presented in the Fall 2015 Seeking Alpha Reports. CPLR 3016(a) ("[T]he particular words complained of . . . [must] be set forth in the complaint."); *see also Dillon*, 261 A.D.2d at 38.

prospects, absence of current cash flow, and concerns about accounting **lead us to believe** EROS is most likely worthless." *Unlike the Name* (Fitts Aff. Ex. 1) at 24.

- "**We believe** a tangled web of inter-related companies has enabled related-party transactions and high salaries for family members." "Eros states that related party transactions are all disclosed publicly. While this may be okay for reporting purposes, **the level of related party transactions should be a massive red flag** for investors." And in any event, "**[m]anagement fails to disclose why** an executive's mother owns 99% of Next Gen Films, a company with no employees, and why Next Gen received 9%, 14%, and 13% of Eros's capital spending during fiscal years 2015, 2014, and 2013, respectively." *Id.* at 2; *Return of the Short-Seller* (Fitts Aff. Ex. 2) at 15.

- "**We also believe** YouTube data calls the Eros Now subscriber numbers into question . . . . **It is inconceivable to us** that Eros Now could have half the number of users in India as YouTube yet its Alexa rank is thousands of spots below YouTube's rank. **It is also not clear to us** why a population that is happy with an advertising model rather than a subscription model would not be fully content relying on YouTube nearly exclusively for its video content." *Unlike the Name* (Fitts Aff. Ex. 1) at 24.

- "**We now believe** there is irrefutable evidence that the company's theatrical revenues are substantially below what it has reported. . . . **We believe** that the film list definitely proves that Eros has been misleading investors." *Game Finally Over?* (Fitts Aff. Ex. 3) at 1.

(Emphasis added). Read as a whole, the challenged statements, which are couched in qualifying terms, would be understood by a reasonable reader as "*allegations* to be investigated rather than as *facts*." *Brian*, 87 N.Y.2d at 53 (emphasis in original); *Silvercorp Metals Inc. v. Anthion Mgmt. LLC*, 36 Misc. 3d 1231 (A), *11 (Sup. Ct., N.Y. County 2012) (the use of language like "we believe" and similar qualifiers signifies opinion, not fact).

Second, the Fall 2015 Seeking Alpha Reports set out in painstaking detail—over the course of more than seventy-five pages—the factual basis for each of the Mangrove Defendants' allegations, both signaling the allegations' nature as opinion and providing the reader with the tools to draw his or her own conclusions. In determining whether a particular communication is actionable, a court must distinguish "between a statement of opinion that implies a basis in facts

which are not disclosed to the reader" and a "statement of opinion that is accompanied by a recitation of the facts on which it is based or one that does not imply the existence of undisclosed underlying facts." *Gross*, 82 N.Y.2d at 153. "The former are actionable not because they convey 'false opinions' but rather because a reasonable listener or reader would infer that 'the speaker [or writer] knows certain facts, unknown to [the] audience, which support [the] opinion and are detrimental to the person [toward] whom" the communication is directed." *Id.* at 153-154. "In contrast, the latter are not actionable because . . . a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture." *Id.* at 154.

Here, the Fall 2015 Seeking Alpha Reports abound with citations and hyperlinks to sources, excerpts and screengrabs of the referenced financials, detailed explanations of the Mangrove Defendants' methodology, and calculations and analysis supporting any proffered opinions. Specifically, the Mangrove Defendants substantiate their allegation that Eros is "burn[ing] cash" by explaining, with reference to an excerpt from Eros's most recent financials, their interpretation that when offset by ballooning receivables and significant reported capital investment, free cash flow has actually "been negative for the past four years." *Unlike the Name* (Fitts Aff. Ex. 1) at 6-7. With respect to related party transactions, the Mangrove Defendants provide a family tree and list of corporate relationships, summarize several reported related-party transactions, and raise several questions, including whether Eros has fully disclosed all related-party transactions. *Id.* at 11-16. Similarly, for their allegations concerning the overstatement of Eros Now's registered users and the scope of Eros's film releases, the Mangrove Defendants take the reader step-by-step through their methodology, explaining each data point and assumption and enabling readers (and, for that matter, Plaintiff) to follow and, where appropriate, critique

that methodology. *Id.* at 24; *see generally Return of the Short Seller* (*id*. Ex. 2)*; Game Finally Over?* (*id*. Ex. 3). At no point do the Fall 2015 Seeking Alpha Reports imply that they are relying upon undisclosed underlying facts; indeed, Plaintiff's attempted rebuttal on several of these topics would not even be *possible* if the Mangrove Defendants had not fully set forth their reasoning. And tellingly, Plaintiff does not specifically challenge any of the underlying facts cited by the Mangrove Defendants, instead merely disputing their *interpretations* of those facts. That Plaintiff disagrees with the Mangrove Defendants' interpretations, or even that an interpretation ultimately proved to be incorrect, is immaterial to a defamation analysis where, as here, those interpretations are non-actionable expressions of opinion.

Third, the broader context of the Fall 2015 Seeking Alpha Reports solidify their status as protected opinion. The Fall 2015 Seeking Alpha Reports are rife with qualifying language throughout, such as "we believe," "it appears that," and "our research strongly suggests." *Silvercorp Metals Inc.*, 36 Misc. 3d 1231 (A), at *9, 11 n.5 (linguistic devices such as the word "belief" support a finding of protected opinion). Moreover, not only were the Fall 2015 Seeking Alpha Reports published anonymously on the internet, a forum that encourages a "freewheeling, anything-goes writing style" that reasonably elicits caution from the reader, but Seeking Alpha has itself been recognized as particularly susceptible to scrutiny given its tagline of "Read. Decide. Invest." and the fact that its articles are "almost exclusively published by third-parties and not actual reporters." *Nanoviricides, Inc. v. Seeking Alpha, Inc.*, 2014 N.Y. Slip Op. 31681 (U),*6 (Sup. Ct., N.Y. County 2014); *LeBlanc v. Skinner*, 103 A.D.3d 202, 213 (2d Dept. 2012) ("readers give less credence" to "rhetorical hyperbole" and "vigorous epithet[s]" posted on the internet); *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 44 (1st Dept. 2011) ("readers give less credence to allegedly defamatory remarks published on the internet than to similar

remarks made in other contexts"); *Silvercorp Metals Inc.*, 36 Misc. 3d 1231 (A), at *10 ("The anonymous submission of the letter further informs a reasonable reader that the challenged statements are not to be understood as fact") (citing *Sandals*, 86 A.D.3d at 44).

Finally, each report ends with a caveat that the author is "short EROS" and that the report "expresses [the Mangrove Defendants'] own opinions." This disclosed financial interest is yet another indication that the writer is expressing an opinion. *See, e.g., Immuno AG.*, 77 N.Y.2d at 254; *Brian*, 87 N.Y.2d at 53. And in fact, New York courts have routinely held short seller reports to constitute protected opinion under circumstances similar to those presented here. *See, e.g., Silvercorp Metals Inc.*, 36 Misc. 3d 1231 (A), at *11 n.6; *Sabratek Corp. v. Keyser*, No. 99 CIV. 8589 (HB), 2000 WL 423529, at *7 (S.D.N.Y. Apr. 19, 2000) (short seller's investment newsletter constituted opinion where statements included short seller's "reasoning for those beliefs" and contained a preface that "clearly inform[ed] the reader that the information presented include[d] 'expressions of opinion.'"); *Nanoviricides*, 2014 N.Y. Slip Op. 31681 (U), at *5 (article by short-seller providing "strong sell" recommendation was pure opinion).

2. Summer 2017 Tweets

Plaintiff next challenges a series of tweets posted by the Mangrove Defendants under the same "Alpha Exposure" alias between May and August of 2017; like the 2015 Seeking Alpha Reports, the Mangrove Defendants' Summer 2017 Tweets constitute protected opinion.

The Mangrove Defendants' May 26, 2017 tweets make clear that they are discussing results reported by Eros subsidiary EIML "this morning" and follow a distinct pattern of (i) citing a fact from the reported financials and then (ii) offering commentary on it. For example, in one tweet from that date, the Mangrove Defendants note that EIML's cash on balance sheet went from 1,719[,000] Rs Lacs in FY 2016 to 131[,000] Rs Lacs in FY 2017, then add, "[l]ooks

like liquidity crisis." (Fitts Aff. Ex. 8 at 8.) Similarly, the Mangrove Defendants point out that EIML's borrowings "more than double[d] in last fiscal year but sales [are] down," followed by, "[l]ooks dire to me."[9] (*Id.*) These tweets not only clearly identify their source material (directing the reader to EIML's reported results) but then use language that clearly signals opinion (*e.g.*, "[w]e think this is a huge red flag") in offering any commentary. (*Id.*)

The Mangrove Defendants followed this same pattern on July 28, 2017, this time live-tweeting an Eros earnings call. As with the May 26 tweets, there is no insinuation that the author is privy to underlying information that is not disclosed; to the contrary, the author again follows a pattern of repeating particular information from the earnings call and offering the Mangrove Defendants' commentary on it, for example, "$EROS admitting it will decrease number of films being produced. Why? LIQUIDITY CRISIS. #liquiditycrisis."[10] (*Id.* at 6.) Importantly, Eros does not separately allege any of the underlying facts to be false, including the Mangrove Defendants' speculation that Eros is likely under SEC investigation. Nor could it; as reported separately, at the time of the Mangrove Defendants' tweets, the SEC had recently claimed the "law enforcement exemption" in denying certain Eros-related FOIA requests.[11] And Eros's feeble attempt to manufacture internal inconsistencies in the July 28 tweets concerning

[9] Inexplicably, Plaintiff chooses not to challenge one structurally identical tweet from the same date: "$EROS Indian subsidiary trade receivables nearly doubled last fiscal year. Is it collectible? I doubt it." (Fitts Aff. Ex. 8 at 8.)

[10] Again, Plaintiff chooses not to challenge several tweets from the same chain, including "$EROS trade and other payables now $120 million v $65 million last year. Days payable now 267 vs 138 last yr (calculated on COGS). Distress." and "$EROS cash almost certainly fake. Otherwise the company would be able to pay its debts. No stories then about not paying movie expenses." (*Id.* at 7.)

[11] *See, e.g.*, *SEC Investigation Update*, Probes Reporter (July 20, 2017), *available at* https://probesreporter.com/sites/default/files/uploads/documents/EROS%202017-0720.pdf.

Eros Now's revenue (Compl. (Fitts Aff. Ex. 10) ¶ 309) falls flat; it is clear that one tweet was posted before Eros Now's revenues were announced, and the other after. (*Id.* Ex. 8 at 5, 7.)

Finally,[12] Plaintiff attacks the Mangrove Defendants' August 1, 2017 tweet, "$EROS 20-F indicates significant liquidity risks. Almost begging for another article. Just wait for next week . . ." as "[f]alse and threatening." (Compl. (Fitts Aff. Ex. 10) ¶ 307.) Again, the tweet contains no false facts; rather, the Mangrove Defendants merely reference the relevant source material (here, the 20-F), indicate their opinion that it "**indicates** significant liquidity risks" (emphasis added), and foreshadow another investor report. (*Id.* Ex. 8 at 5.) While Eros may have found the prospect of a new report "threatening," that is irrelevant to its defamation claim.

The broader context of the Summer 2017 Tweets also supports the conclusion that they are protected expressions of opinion rather than facts to be tested. The Alpha Exposure Twitter feed provides links to the Mangrove Defendants' thoroughly researched Seeking Alpha Reports and is replete with references to the author's other short positions. (*See generally id.* Ex. 5.) And in addition to its anonymous, online character, which already counsels in favor of a finding of protected opinion, courts have singled out Twitter among online forums as particularly susceptible to skepticism on the part of its readers. *See, e.g., Jacobus v. Trump*, 55 Misc. 3d 470, 485 (Sup. Ct., N.Y. County 2017) ("Indeed, to some, 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.").

3. August 14, 2017 Seeking Alpha Article

As with the Fall 2015 Seeking Alpha articles, Plaintiff only challenges a small percentage

[12] Plaintiff also inexplicably declines to challenge the multiple similar tweets concerning Eros published by the Mangrove Defendants on August 7, 11, 14, and 21, 2017. (Fitts Aff. Ex. 8 at 2-5).

of the allegations contained in the Mangrove Defendants' August 14, 2017 Seeking Alpha article *Eros: Roll the Credits*. The full statements, each of which is selectively and misleadingly quoted in the Complaint, are reproduced below:

- "**We believe** Eros is facing a liquidity crisis." (Compl. (Fitts Aff. Ex. 10) ¶ 312; *Roll the Credits* (*id.* Ex. 9) at 1.)

- "With the Revolving Credit Facility maturity imminent as well as $104 million in other short-term borrowings and $120 million of accounts payable owed to suppliers, Eros **appears to be** in a liquidity crisis and financial distress." (Compl. (*id.* Ex. 10) ¶ 312; *Roll the Credits* (*id.* Ex. 9) at 3.)

- "**Eros appears to be** pulling back on its investments in content to preserve liquidity, **which we see** as a further sign of financial distress . . . . **We believe it is far-fetched** to believe that the demonetization drastically affected movie consumption, especially after the company bragged about the affordability of movies in India." (Compl. (*id.* Ex. 10) ¶ 313; *Roll the Credits* (*id.* Ex. 9) at 5.)

- "Another telltale sign of financial distress at Eros can be seen in the growing payables balances. **This indicates** that the company has drastically slowed its pace of paying its suppliers. **We believe** Eros has allowed its payables to blow out over the past two years due to its precarious liquidity situation and its inability to access the debt markets. . . . Eros **appears** to have decided to withhold payments to its suppliers." (Compl. (*id.* Ex. 10) ¶ 314; *Roll the Credits* (*id.* Ex. 9) at 6.)

- "**In our opinion**, recent sales rumors are not credible. . . . **We believe** these stories are just a distraction made necessary to a liquidity crisis at Eros . . . ." (Compl. (*id.* Ex. 10) ¶ 315; *Roll the Credits* (*id.* Ex. 9) at 1, 7.)

- "**A worst-case scenario** sees the SEC fail to approve Eros's shelf filing and the company file for bankruptcy"; "At best, **we believe** that Eros equity holders can expect significant dilution. At worst, **should** the SEC not declare the shelf registration effective, Eros **could** face bankruptcy." (Compl. (*id.* Ex. 10) ¶¶ 317, 349; *Roll the Credits* (*id.* Ex. 9) at 1, 8.)

- "**We believe** that a SEC probe or enforcement proceedings would create doubt regarding the company's ability to get a shelf approved. If the shelf is not declared effective, **we expect** the company to file for bankruptcy since it will run out of cash any day. If the shelf is declared effective, **we expect** shareholders to be massively diluted, the company to continue to burn cash, and a bankruptcy in a few years." (Compl. (*id.* Ex. 10) ¶¶ 317, 349; *Roll the Credits* (*id.* Ex. 9) at 1, 8.)

These statements are clearly couched as opinion rather than fact. *See, e.g., Silvercorp Metals Inc.*, 36 Misc. 3d 1231 (A), at *9-11. And like the Fall 2015 Seeking Alpha Reports, the August 2017 Seeking Alpha Report is an anonymous, online communication that discloses the author's short position and sets out thorough explanations for each of its opinions. *Steinhilber*, 68 N.Y.2d at 290. (A statement of opinion that is accompanied by a recitation of the facts on which it is based is not actionable because it "is readily understood by the audience as conjecture . . . . Indeed, this class of statements provides a clear illustration of situations in which the full context of the communication 'signal[s] . . . readers or listeners that what is being read or heard is likely to be opinion, not fact."). The Mangrove Defendants again make the case that Eros is in a "liquidity crisis" with detailed evidence from Eros's publicly-available financials of its negative free cash flow, apparent inability to collect on accounts receivables, attempts to re-negotiate its credit facility, wind-down of investments in content, and growing payables balances. *Roll the Credits* (Fitts Aff. Ex. 9) at 1-3, 5-6. Interestingly, Eros does not dispute any of these underlying statistics, instead merely offering alternative (and unsubstantiated) explanations for them.

Plaintiff also complains that the August 2017 Seeking Alpha Report "impugns [its] increase in receivables," speculates that sales rumors are "not credible," and "attempt[s] to goad readers into alerting the SEC about their 'concerns.'" (Compl. (*id*. Ex. 10) ¶¶ 316-317, 349.) The Mangrove Defendants merely note Eros's increase in receivables, and, importantly, Eros does not dispute that its receivables have increased; nor does it dispute the Mangrove Defendants' assertions that (i) Eros has missed receivables targets it set for itself and (ii) in the past year, receivables older than six months have increased from $30 million to $102 million. *Roll the Credits* (*id*. Ex. 9) at 2-3. The Mangrove Defendants' opinions that sales rumors are not

credible and that failing to secure financing may lead to bankruptcy are not only clearly subjective, but fully supported. *Roll the Credits* (*id.* Ex. 9) at 7-8. And the August 2017 Seeking Alpha Report's call for an investigation is a clear signal to a reasonable reader that the communication is an accusation, not an actionable statement of fact. *See Brian*, 87 N.Y.2d at 53 (the purpose of the article was to seek an independent, full-scale investigation); *Immuno AG.*, 77 N.Y.2d at 254 (the purpose of the letter was to "draw this situation to the attention of interested parties."); *Sandals*, 86 A.D.3d at 45 (the purpose of the email was "to foment questioning by native Jamaicans regarding . . . their national economy.").

4. September 2017 Tweets

Finally, Eros challenges three Alpha Exposure tweets from September 2017 as "brazen falsehood[s]":

- "**Looks like** $EROS will report its quarter late again. **Does anyone actually think** this is not a complete fraud?" (September 8, 2017)
- "**Where** are financials for $EROS? [sic] **What's happening** with registration statement? 25 business days since filed with SEC . . . still not approved." (September 11, 2017)
- "**Where** are Q1 financials $EROS? 26 business days since you filed your registration statement. **Seems like** you're having trouble with the SEC . . ." (September 12, 2017).

(Compl. (Fitts Aff. Ex. 10) ¶ 332; *id.* Ex. 8 at 1-2.) Again, these tweets simply express the Mangrove Defendants' opinions. Plaintiff does not point to "false facts," nor could it, as the tweets merely note that Eros's financials seem to be late and pose rhetorical questions.

D. Plaintiff Has Failed to Plead Actual Malice

In addition to its failure to identify any actionable false statement, Plaintiff has offered no factual support for its allegation that the Mangrove Defendants acted with actual malice, as required to make out a claim for defamation against a public figure such as Eros. To show actual

malice, a plaintiff must demonstrate "clear and convincing evidence . . . that the author in fact entertained serious doubts as to the truth of his publication or acted with a high degree of awareness of . . . probable falsity." *Kipper v. NYP Holdings Co.*, 12 N.Y.3d 348, 354 (2009). Plaintiff has made absolutely no claims that the Mangrove Defendants acted with actual malice; at most, Eros alleges that the Mangrove Defendants interpreted certain facts incorrectly.

Indeed, the facts could not support a finding of actual malice; rather, it is clear that the Mangrove Defendants took the utmost care in researching Eros and presenting their opinions, exhaustively citing the underlying data, explaining their reasoning, and consistently inviting Eros to provide rebuttal evidence. And on the occasion that the Mangrove Defendants learned that one of their analyses contained errors, they even went so far as to print a retraction, explaining why and how the mistake had been made.[13] These actions clearly show that the Mangrove Defendants were confident in their interpretations of the facts and analysis and eager that they be tested, both by their readers and by Eros itself. As such, Plaintiff's defamation claims against the Mangrove Defendants must fail.

III. PLAINTIFF FAILS TO PLEAD A CLAIM FOR COMMERCIAL DISPARAGEMENT AGAINST THE MANGROVE DEFENDANTS

Plaintiff's commercial disparagement claim is also deficient and must be dismissed. To state a claim for commercial disparagement, plaintiff must allege (1) a false statement; (2) publication to a third party; (3) actual malice; and (4) that such publication resulted in special damages. *See Abernathy & Closther v. Buffalo Broad. Co., Inc.*, 176 A.D.2d 300, 302 (2d Dept. 1991); *Drug Research Corp. v. Curtis Publ'g Co.*, 7 N.Y.2d 435, 440 (1960). The challenged statement must relate to a "product sold or service;" statements referring to the "conducting or character of business, the integrity of the business, and its viability," do not support a claim for

[13] *See generally Revising Our TopCo Analysis* (Fitts Aff. Ex. 4).

commercial disparagement. *Biovail Corp. v. S.A.C. Capital Mgmt., LLC*, 2009 WL 2844404 (N.J. Super. Ct., Essex County, Aug. 20, 2009) (unpublished) (applying New York law); *Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 670 (1981).

Here, Plaintiff has failed to make out a viable claim of commercial disparagement. First, Plaintiff does not specify a single statement by the Mangrove Defendants that impugns the quality of Plaintiff's products or services. (Compl. (Fitts Aff. Ex. 10) ¶ 264.) To the extent Plaintiff refers generally to statements included elsewhere in the Complaint, as discussed *supra*, these statements are protected opinion based upon disclosed facts. *See Prince v. Fox Television Stations, Inc.*, 137 A.D.3d 486, 488 (1st Dept. 2016). Accordingly, like its defamation claims, Plaintiff's commercial disparagement claim against the Mangrove Defendants fails to allege a false statement and must be dismissed.[14]

Second, although Plaintiff seeks to challenge several of the Mangrove Defendants' statements as "false," it has not alleged that those statements were made with actual malice, or "reckless disregard" for their veracity. *Abernathy*, 176 A.D.2d at 302. As discussed above, at most, Plaintiff simply disagrees with the Mangrove Defendants' *interpretations* of the underlying facts. Mere disagreement is insufficient to render those statements false.

Third, Plaintiff has utterly failed to plead special damages, which must be pled with specificity; general allegations are insufficient, and "[r]ound figures or a general allegation of a dollar amount . . . will not suffice." *Dentsply Int'l Inc. v. Dental Brands for Less LLC*, 2016 WL 6310777, at *6 (S.D.N.Y. Oct. 27, 2016) (internal quotation omitted); *see also Alt. Electrodes, LLC v. Empi, Inc.*, 597 F. Supp. 2d 322, 337 (E.D.N.Y. 2009). Here, Plaintiff vaguely asserts

[14] Moreover, a challenge to any of the statements contained in the Fall 2015 Seeking Alpha Reports is also time-barred. *See Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 107 (1st Dept. 2009) (The statute of limitations for commercial disparagement claims is one year from when special damages are incurred).

that certain statements—none of which were attributed to the Mangrove Defendants—"harmed Eros" in various ways. (Compl. (Fitts Aff. Ex. 10) ¶ 365.) Plaintiff does not even venture to give a dollar amount, much less establish that the challenged communication was a "substantial factor in inducing others not to conduct business with it." *Sandler v. Simoes*, 609 F. Supp. 2d 293, 302 (E.D.N.Y. 2009); *see also Waste Distillation Tech., Inc. v. Blasland & Bouck Eng'rs, P.C.*, 136 A.D.2d 633, 633 (2d Dept. 1988).

IV. PLAINTIFF FAILS TO PLEAD A CLAIM FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS AGAINST THE MANGROVE DEFENDANTS

Plaintiff's tortious interference with prospective business claim is duplicative of Plaintiff's defamation claim and should be dismissed. *See Pusey v. Bank of Am., N.A.*, 2015 WL 4257251, at *4 (E.D.N.Y. Jul. 14, 2015) (dismissing tortious interference claim and observing that "New York courts have 'kept a watchful eye for claims sounding in defamation… disguised as other causes of action.'"); *Chao v. Mount Sinai Hosp.*, 2010 WL 5222118, at *11-12 (S.D.N.Y. Dec. 17, 2010), *aff'd*, 476 Fed. Appx. 892, 895 (2d Cir. 2012) (summary order).

Of course, even if the Court were to allow such a duplicative tort claim, Plaintiff has failed to adequately plead one. First, Plaintiff's generalized claim of prospective business relationships with "many third-parties," none of whom are separately identified, does not meet Plaintiff's burden to demonstrate a "specific business relationship." *Korn v. Princz*, 226 A.D.2d 278 (1st Dept. 1996); *Deer Consumer Prods., Inc. v. Little Group*, 37 Misc. 3d 1224(A), at *15 (Sup. Ct. N.Y. County 2012) (dismissing claim as insufficient where plaintiff made a "general statement that [defendant] interfered with plaintiff's shareholders, investors, and financiers, when it would appear that plaintiff should be in possession of" their identities).

Second, Plaintiff must allege that the Mangrove Defendants' conduct was motivated "solely by malice or to inflict injury by unlawful means, *beyond mere self-interest or other economic considerations*." *Commcn's Svcs. of ESR, Inc. v. Goldman Sachs & Co.*, 23 A.D. 3d 162, 163 (1st Dept. 2005) (emphasis added); *Fogel v. Metro. Life Ins. Co.*, 871 F. Supp. 571, 576 (E.D.N.Y. 1994) (legitimate business motive excuses interference as long as unlawful restraint of trade does not result or wrongful means are not employed by defendant). Here, to the contrary, Plaintiff alleges that the very purpose of the Defendants' communications was to "profit from their admitted short positions." (Compl. (Fitts Aff. Ex. 10) ¶ 1.) Nor has Plaintiff adequately alleged wrongful means. In order to demonstrate unlawful, or "wrongful means," plaintiff must show "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, [or] some degrees of economic pressure." *NBT Bancorp Inc. v. Fleet/Norstar Fin. Grp.*, 87 N.Y.2d 614, 624 (1996) (quoting *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 (1980)). "Persuasion alone" does not constitute wrongful means, nor do non-actionable statements. *Id.*; *Berwick v. New World Network Intern., Ltd.*, 2007 WL 949767, at *14 (S.D.N.Y. Mar. 28, 2007). And as discussed *supra*, Plaintiff's assertions of defamation are premised on non-actionable opinion and do not constitute the "kind of 'wrongful means' that can form the basis for a tortious interference claim." *Id.* Accordingly, Plaintiff's claim for tortious interference with prospective business relations should be dismissed.

V. PLAINTIFF FAILS TO PLEAD A CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACT AGAINST THE MANGROVE DEFENDANTS

Plaintiff's tortious interference with contract claim is deficient because Plaintiff fails to identify any contract with which the Mangrove Defendants allegedly interfered. *See Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp.*, 296 A.D.2d 103, 111 (1st Dept.

2002). In fact, Plaintiff does not allege that *any* contract has ever been breached. *See Jack L. Inselman & Co. v. FNB Fin. Co.*, 41 N.Y.2d 1078, 1080 (1977) (It is "axiomatic that there must be a breach of that contract by the other party."); *Cash on the Spot ATM Servs., LLC v. Camia*, 144 A.D.3d 961, 963 (2d Dept. 2016); *see also NBT Bancorp Inc.*, 87 N.Y.2d at 620-21 (collecting cases). Instead, Plaintiff offers the bare assertion that that "contractual relationships were damaged" (Compl. (Fitts Aff. Ex. 10) ¶ 387.) This "mere speculation" cannot sustain a claim. *Burrowes v. Combs*, 25 A.D. 3d 370, 373 (1st Dept. 2006).

Further, even if Plaintiff had adequately pled a claim for tortious interference with contract—which it did not—New York courts do not allow plaintiffs to avoid the difficulties of a defamation claim by pleading separate tort claims that arise from the same allegations. *Anyanwu v. Columbia Broad. Sys., Inc.*, 887 F. Supp. 690, 693-94 (S.D.N.Y. 1995) ("New York cases have held that a separate cause of action for what are essentially defamation claims should not be entertained.") Thus, Plaintiff's tortious interference claim, which merely repackages its defamation allegations, should be dismissed.

VI. PLAINTIFF FAILS TO PLEAD A CLAIM FOR CIVIL CONSPIRACY AGAINST THE MANGROVE DEFENDANTS

Finally, Plaintiff's civil conspiracy claim must also fail. In order to plead a claim for civil conspiracy, a plaintiff must allege (i) a primary tort; (ii) an agreement between two or more parties; (iii) an overt act in furtherance of the agreement; (iv) the parties' intentional participation in the furtherance of a plan or purpose; and (v) damage or injury. *Abacus Fed. Sav. Bank v. Lim*, 75 A.D.3d 472, 474 (1st Dept. 2010). Plaintiff's civil conspiracy claim is deficient for several reasons. As a threshold matter, New York does not recognize civil conspiracy to commit a tort as an independent cause of action; "rather, such a claim stands or falls with the underlying tort." *Hebrew Inst. for Deaf & Exceptional Children v. Kahana*, 57 A.D.3d 734, 735 (2d Dept. 2008).

Thus, because each of Eros's proposed claims against the Mangrove Defendants is deficient—that is, it has failed to properly allege a primary tort—its conspiracy claim must also fail.

Plaintiff has also failed to offer any factual support for its assertion that the Mangrove Defendants—or, for that matter, *any* of the Defendants—"conspired" "to create and disseminate false and misleading statements and reports concerning Eros and to engage in market manipulation of its securities." (Compl. (Fitts Aff. Ex. 10) ¶ 391.) Each alleged participant in a conspiracy must enter into an agreement to and participate in the actionable tort, *Faulkner v. City of Yonkers*, 105 A.D.3d 899, 900-01 (2d Dept. 2013) (dismissing conspiracy claim against defendant for whom plaintiff did not allege agreement to participate in or specific act of participation in actionable tort), and Eros has failed to allege any agreement (or participation in furtherance of an agreement) on any Defendant's part. Rather, in support of its civil conspiracy claim, Plaintiff only offers (i) the fact that Defendants sometimes "echoed," "parroted," or "regurgitated" a point already made by another Defendant (Compl. (Fitts Aff. Ex. 10) ¶¶ 161, 200, 257, 269, 308-09); (ii) the fact that certain Defendants at various times specifically referenced one another's postings (*id.* ¶ 263), and (iii) repeated, unsubstantiated references to the Defendants as "co-conspirators." These conclusory allegations are insufficient to support a civil conspiracy claim.

CONCLUSION

For the foregoing reasons, the Mangrove Defendants respectfully request that the Court dismiss the Complaint in its entirety, with prejudice, together with any such other relief as the Court deems just and proper.

Dated: New York, New York
November 30, 2017

AKIN GUMP STRAUSS HAUER & FELD LLP

By: /s/ Michael A. Asaro
Michael A. Asaro
Joseph L. Sorkin
Jessica A. Fitts
Richard R. Williams, Jr.
One Bryant Park - Bank of America Tower
New York, New York 10036
Tel: (212) 872-1000
Fax: (212) 872-1002

Attorneys for Defendants Mangrove Partners and Nathaniel H. August