SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, COMMERCIAL DIVISION

CHRISTOPHER DOEBLIN, individually and derivatively on behalf of BOOK CULTURE ON COLUMBUS, LLC, Plaintiff, - against - JOHN R. MACARTHUR, Defendant.	Mot. Seq. No. 002 Index No. 156356/2020

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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Defendant John MacArthur respectfully submits this memorandum of law in support of his motion to dismiss the amended complaint in this action pursuant to CPLR 3211(a)(1) and (a)(7).

PRELIMINARY STATEMENT

This action arises out of a long-running dispute between Christopher Doeblin ("Doeblin") and John MacArthur ("MacArthur"), who until recently owned shares in a bookstore on Columbus Avenue in Manhattan. In 2019, MacArthur became concerned that Doeblin was using this bookstore to induce investors to contribute support for Doeblin's three other bookstores, which Doeblin, but not MacArthur, owned. Both sides of the business partners' dispute were fully aired in an article in *West Side Rag*, with MacArthur voicing his concerns that would-be community investors in Doeblin's fundraising campaign were being misled into loaning money to Doeblin's three other stores, particularly when MacArthur was prepared to provide necessary funding for the Columbus store. MacArthur later filed an action against Doeblin for conversion and fraud, among other claims.

Now, nearly a year later, Doeblin brings this action, claiming that MacArthur's views expressed in the article were false and defamatory. But this is nothing more than a transparent and retaliatory attempt to re-litigate the truth of the events at issue in MacArthur's pending action—indeed, in his newly amended complaint, Doeblin has deluged this court with discovery documents from the fraud action that only serve to establish that MacArthur had knowledge of the Columbus store's financial struggles. Yet, this knowledge is evident on the face of the *West Side Rag* article and does not in any way conflict with MacArthur's views expressed in the article. The amended complaint has no merit and should be dismissed for several independent reasons. *First*, all of MacArthur's challenged statements in the article reflect his fully protected opinions based on revealed and undisputed facts, and are not actionable in defamation. *Second*,

certain statements at issue are about the store Doeblin and MacArthur shared an ownership interest in, and Doeblin can only bring a claim that is "of and concerning" him. *Third*, Doeblin is a public figure with respect to his efforts to secure funding for his bookstores, and he has not alleged any facts that would begin to support a finding that the statements at issue were published with actual malice. *Finally*, Doeblin's tag-along actions for various business torts arising out of the statements challenged as defamatory must be dismissed because they are duplicative of his defective defamation claim, and, in any event, fail as a matter of law to state cognizable causes of action.

FACTUAL BACKGROUND

A. The Parties

Book Culture on Columbus LLC ("BCC") owns and operates an independent bookstore branded "Book Culture," located on Columbus Avenue in Manhattan ("Book Culture on Columbus"). Affirmation of Elizabeth McNamara ("McNamara Aff."), Ex. 1 ("AC") ¶1. Doeblin is the member manager of BCC. He is also president and majority shareholder of Book Culture, Incorporated ("BCI"), a separate corporate entity that owns three other independent bookstores, two in Morningside Heights and one in Queens, also branded "Book Culture." *Id.* ¶44. Doeblin maintains the Book Culture website ("Website"), which, at the relevant time, listed all four Book Culture stores without making any attempt to clarify that the stores have different ownership, instead creating the impression that the four stores were owned by one company. *Id.* Ex. A.

Defendant MacArthur is a minority member of BCC, owning 40% of its membership interests. AC ¶41. MacArthur has no ownership interest in or other affiliation with BCI.

B. The *West Side Rag* Article at Issue

This action arises out of a September 10, 2019, article published in the *West Side Rag* headlined "Book Culture Owners Split on Lending Program" (the "Article"). The Article meticulously reported both sides of a dispute between Doeblin and MacArthur surrounding Doeblin's then-ongoing "Community Lending Program." AC Ex. A. It opens by establishing that the two are co-owners of Book Culture on Columbus, but that the three other Book Culture stores "operate under a separate business entity, Book Culture Incorporated." *Id.* The Article reports that earlier in the year Doeblin had sparked a "community wide conversation" when he published an open letter to city and state officials requesting financial assistance for the Book Culture stores that were "in danger of closing soon." When that plea proved unsuccessful, Doeblin "turned to the community" looking for $750,000 in funding. *Id.*

The Article reports that "*MacArthur believes Doeblin is misleading patrons and potential lenders by using the Columbus store to raise money for a separate business and he wants to ensure that the public is aware of where lenders are sending their cash.*"[1] MacArthur is then quoted as observing that "*[n]obody seems to know that these are two separate companies . . . and that he's raising money on the false premise that Book Culture on Columbus is on the verge of failure when it's not. I won't permit it to go bankrupt.*" Critically, MacArthur never denied that the Columbus store was under financial strain—he simply explained that the Columbus store was not on the verge of failure because he was personally willing to provide funding. Consistent with this perspective, the Article had opened with MacArthur's contention that Book Culture on Columbus "*is not in need of financial assistance from the neighborhood.*" *Id.* MacArthur's

[1] Highlighted portions of the Article reflect the statements challenged by Plaintiff in this action. *See* AC ¶100.

emphasis was on assistance *from the neighborhood,* as he makes clear later in the Article that the store was in need of funding and he was prepared to provide it.

Immediately following MacArthur's observations, Doeblin provides his side of the dispute. He first acknowledges that the "companies may technically be separate entities" but he "doesn't see it that way." He contends that BCI is the "parent company and the administrator of the LLC," arguing that the buying, bookkeeping and strategy are provided by the parent corporation. *Id.*

Then the Article turns to the heart of the dispute: the signage and promotion for the fundraising campaign. It reports that "signage posted at Book Culture on Columbus reads 'Book Culture Needs Your Help!,' directing the community to 'invest in a business that gives back to the community.'" The Article also prominently features the Columbus store's sign, which twice indicates that supporters would be "lending directly to Book Culture," and describes the funding terms for the campaign identified on the linked Website. The Article then pointedly observes that "[n]either the website nor the signage make any distinction about the separate business entities." *Id.*

With this foundation, MacArthur observes that "*I want to halt the deceptive fundraising*" noting that he had "requested that Doeblin remove the signage from the Columbus storefront and update the website to distinguish the businesses." MacArthur then explains his view: "*I don't want ordinary, neighborhood people lending money to [Doeblin] on a false premise. In effect they're lending money to me, and I'm not asking for it – I don't want it!*" *Id.*

Doeblin's response follows. He does not dispute that the signage and Website do not distinguish between the corporate entities, but argues that he sees "the messaging as part of a larger issue," the "plight of independent businesses in the city." More specifically, he contends

that "our LLC *is* getting books and merchandise and support from the community Lender Program. It is designed to help *all* the Book Culture stores." *Id.*

The remainder of the Article focuses on the financial history and current prospects of the Book Culture on Columbus store versus Doeblin's other three stores, as well as MacArthur's efforts to buy or lend money to the Columbus store. MacArthur observes that "*Book Culture on Columbus was until recently doing just fine*" and the Article reports that "*MacArthur is willing to contribute the funds himself to get it back to where it was.*" MacArthur goes on to explain that "in the first few years" Book Culture on Columbus was a "relatively successful business," but "unquestionably sales have gone way down." Doeblin, in turn, "confirmed the past success of the LLC in relation to the other locations," which saw "double-digit growth for almost 4 years" while "there was basically no growth at our parent company's stores during that time." *Id.* With the respective financial positions laid out, the Article makes clear that MacArthur has offered to buy Doeblin out or offered to loan Doeblin funds needed for BCC to get through the summer. Again, Doeblin's side is fully presented. He confirms MacArthur's offers, but claims he rejected them because they were not a "fair offer," explaining he did not want to lose control of the store to a "wealthy family." *Id.*

In the end, the Article reports that despite his "disagreement with Doeblin's approach to fundraising, MacArthur says he is still doing what he can to support the store" and he "hopes to get Book Culture on Columbus back on track towards success – and stocked shelves." *Id.*

C. MacArthur's Legal Action

After Doeblin refused to cease what MacArthur believed to be a misleading campaign for investors, in November 2019, MacArthur initiated a lawsuit against Doeblin in this Court, seeking, *inter alia*, an injunction to stop Doeblin from soliciting investors in BCI under "several fraudulent and/or bad faith misrepresentations and omissions regarding the Book Culture public

offering," specifically including a prospectus and Promissory Note that lists BCI as the loan recipient without informing consumers that Book Culture on Columbus is "owned by a separate entity, BCC" and that contributed funds are "under the control of BCI, not BCC." *See* McNamara Aff. Ex. 2 ¶34.[2] Doeblin answered MacArthur's complaint on December 3, 2019, and that lawsuit is ongoing.

D. Doeblin's Amended Complaint in this Action

On August 13, 2020 – shortly before the statute of limitations would have expired – Doeblin filed this lawsuit challenging six statements made by MacArthur in the Article (italicized above) published by the *West Side Rag* (the "Challenged Statements"). MacArthur moved to dismiss the complaint and, on October 29, 2020, Doeblin amended his complaint to include factual allegations and documents he obtained from discovery in MacArthur's lawsuit. In the amended complaint, Doeblin alleges that the Challenged Statements "accused [him] of perpetuating a fraud on those individuals who had partaken in the community lending program." AC ¶99. As a result, Doeblin claims that MacArthur's Challenged Statements resulted in the end of his fundraising campaign and forced him to close Book Culture on Columbus. *Id*. ¶¶102-07. Based on these allegations, Doeblin brings claims for Defamation, Breach of Fiduciary Duty, Intentional Interference with Prospective Economic Advantage, and Tortious Interference with Contract. For the reasons set forth below, Plaintiff's entire action should be dismissed.

I.

[2] Related judicial proceedings involving the parties to this lawsuit are documentary evidence. *See, e.g.*, *Shawe v. Kramer Levin Naftalis & Frankel LLP*, 167 A.D.3d 481 (1st Dep't 2018).

COURTS ROUTINELY GRANT MOTIONS TO DISMISS IN LIBEL CASES SUCH AS THIS ONE

The Court of Appeals has recognized that "[t]he threat of being put to the defense of a lawsuit ... may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 545 (1980) (quoting *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966)). Indeed, "[t]o unnecessarily delay the disposition of a libel action 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 Dep't), *aff'd*, 74 N.Y.2d 548 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990), *aff'd*, 77 N.Y.2d 235 (1991). For that reason, New York courts are encouraged to dispose of libel cases on motions to dismiss, where, as here, the threshold issues can be resolved as a matter of law. *See*, *e.g.*, *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 17 N.Y.3d 281 (2011); *Brian v. Richardson*, 87 N.Y.2d 46 (1995).

When evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the Court must determine from the complaint's four corners whether "factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (citation omitted). "However, bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action." *Parsippany Constr. Co. v. Clark Patterson Assocs.*, 41 A.D.3d 805, 806 (2d Dep't 2007) (citation omitted).

Likewise, where "documentary evidence submitted 'conclusively establishes a defense to the asserted claims as a matter of law,'" dismissal is warranted pursuant to CPLR 3211(a)(1).

Scott v. Bell Atl. Corp., 282 A.D.2d 180, 183 (1st Dep't 2001) (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994)). As set forth below, and as a simple review of the Article at issue establishes, Plaintiff's defamation and related claims fail for several independent reasons.

II.

PLAINTIFF'S DEFAMATION CLAIM FAILS AS A MATTER OF LAW

Even accepting the factual allegations set forth in Doeblin's Amended Complaint as true, it plainly fails to state a defamation claim against MacArthur.

A. All of the Challenged Statements are Nonactionable Opinion

The Defamation Claim must be dismissed because the Challenged Statements are textbook expressions of MacArthur's opinion, based on fully revealed and undisputed facts, which enjoy absolute protection under the First Amendment.

The Challenged Statements set forth MacArthur's two basic beliefs, that Doeblin's fundraising campaign was "misleading potential lenders by using the Columbus store to raise money for a separate business" and that Book Culture on Columbus "is not in need of financial assistance *from the neighborhood*" since MacArthur was "willing to contribute the funds himself." AC ¶100 (emphasis added). These two core contentions are constitutionally protected opinions, based on fully revealed facts, and cannot form the basis of a defamation claim.

The Supreme Court has held that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). Hence, opinions are protected by the First Amendment, and the determination of whether a particular statement is fact or opinion is a question of law for the court. *See*, *e.g.*, *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 152-53 (1993) ("Since falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven

false, 'it follows that only statements alleging facts [rather than opinions] can properly be the subject of a defamation action.'") (citation omitted). The New York Court of Appeals has stressed that, when determining if a statement is opinion, a court must "take into consideration the larger context in which the statements were published, including the nature of the particular forum." *Brian*, 87 N.Y.2d at 51. In this inquiry, the Court should begin by "looking at the content of the whole communication, its tone and apparent purpose" to "determine whether a reasonable person would view them as expressing or implying *any* facts." *Immuno AG.*, 77 N.Y.2d at 254. Thus, the Court must not only consider the statements themselves, but their "broader social setting" as well as their "immediate context." *See id.*

Applying this analysis, statements are not actionable "if the facts on which they are based are fully and accurately set forth and it is clear to the reasonable reader or listener that the accusation is merely a personal surmise built upon those facts." *Gross,* 82 N.Y.2d at 155. This is particularly true when the two sides of a controversy are clearly presented, since reasonable readers understand opposing positions in the context of an ongoing dispute represent those parties' conflicting opinions without stating or implying "one side's position to be factual or more credible than the other." *Gorilla Coffee, Inc. v. N.Y. Times Co.*, 32 Misc.3d 1230(A), 2011 WL 3502777, at *6 (Sup. Ct. N.Y. Cty. 2011). *See also Galasso v. Saltzman*, 42 A.D.3d 310, 311 (1st Dep't 2007) (statement of criminality is opinion as "listeners were familiar with the issues in dispute and with the respective sides' positions"). Indeed, New York courts have repeatedly recognized that "even apparent statements of fact" are often actually protected opinion when made in the context of an ongoing debate. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 294 (1986); *accord Duncan-Watt v. Rockefeller*, 2018 WL 1794744, at *6 (Sup. Ct. N.Y. Cty. Apr. 16, 2018) (Masley, J.) (email written during ongoing business dispute was party's opinion); *Gisel v. Clear Channel*

Commc'ns, Inc., 94 A.D.3d 1525 (4th Dep't 2012) (statements made during an on-air radio show debate were protected opinion).

Applying these fundamental principles, pre-answer motions to dismiss are routinely granted where, as here, the Challenged Statements constitute clear expressions of opinion based on fully revealed facts.[3]

Here, any reasonable reader of the Article clearly understood that they were reading both sides of a contentious dispute—indeed, the Article was headlined "Book Culture Owners Split on Lending Program, Raising New Questions." While Doeblin and MacArthur had very different views concerning the situation, the Article makes it evident that they did not dispute the core underlying facts that formed the basis for their respective opinions. Specifically, as the Article documents—and the Complaint in this action does not challenge—certain key facts are not in dispute: (1) BCC and BCI are two separate entities, with MacArthur having no interest in BCI; (2) signage for Doeblin's fundraising campaign that appeared in the window of Book Culture on Columbus (owned by BCC) informed potential donors that they would be "lending directly to Book Culture"; (3) the Website also solicited funds for the campaign and did not distinguish between the respective corporate entities; (4) contributors to the campaign signed notes evidencing that they were loaning money to BCI (with no mention of BCC);[4] (5) Book Culture of Columbus "until recently" enjoyed "double-digit growth" (versus the BCI stores realizing "no growth . . . during that time") but "unquestionably sales have gone way down" at the Columbus Avenue store; and (6) MacArthur had offered to either buy out Doeblin's interest in the Book Culture on Columbus or loan it money to keep the store in business through the summer. AC Ex. A.

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[3] *See*, *e.g.*, *Duncan-Watt*, 2018 WL 1794744; *Brian*, 87 N.Y.2d at 53-54; *Steinhilber*, 68 N.Y.2d at 295; *Pecile v. Titan Capital Grp., LLC*, 96 A.D.3d 543 (1st Dep't 2012).
[4] McNamara Aff. Ex. 2 ¶34.

Based on these undisputed facts, MacArthur argued that he "believed" that Doeblin was "misleading potential lenders" because "nobody seems to know that these are two separate companies." In particular, he asked Doeblin to "remove the signage from the Columbus storefront and update the website language to distinguish the businesses." *Id.* In other words, MacArthur was concerned that customers of Book Culture on Columbus would believe that they were "lending directly" to that store when in fact they were unknowingly in no small part contributing to save Doeblin's *other* stores. Doeblin disputes MacArthur's positions – and his position is fully aired in the Article – but MacArthur's views expressed in the Challenged Statements are unquestionably protected opinions.

Doeblin's entire complaint rests on an erroneous and distorted reading of the Article, specifically he claims that the "deceptive fundraising" MacArthur challenged was based on Doeblin "misrepresenting the financial health of BCC" when, he alleges, MacArthur knew the Columbus store actually was in a "dire financial situation." AC ¶¶4-8. At great length, the Amended Complaint works to establish that before the Article, MacArthur was well aware that the store needed a cash infusion. AC ¶¶10, 48-77. But that fundamentally misconstrues MacArthur's actual statements in the Article regarding the misleading campaign. The Article makes it crystal clear that MacArthur knew full well the Columbus store needed a cash infusion—MacArthur is quoted as observing that "until recently" the store was doing "fine" but that "sales have gone way down" and then the Article reports that as a result of the store's economic woes MacArthur had stepped in with an offer to buy the company or loan it money to get it "back on track towards success." *Id.* Ex. A.[5] Thus, the Article read as a whole makes it clear that MacArthur took issue

[5] The Amended Complaint also seeks to undermine the legitimacy of MacArthur's efforts to buy out or financially support the store, characterizing MacArthur's interview with the *West Side Rag* as the "next iteration of MacArthur's buyout strategy." But any of such motive is irrelevant to whether his comments are fully protected opinions.

with Doeblin not coming clean on where community contributions would go – not that Doeblin was misrepresenting the financial status of the store – and that MacArthur took "offense" at the notion that the necessary financial assistance for the Columbus store would come "from the neighborhood" when he was ready and able to step in and buy the store or lend it money. In short, the Challenged Statements are nothing more than MacArthur's opinions based on revealed facts, stated in the context of an intense debate over fundraising with Doeblin.

The parallels here to *Duncan-Watt* are striking. In that case, plaintiff Duncan-Watt and defendant Rockefeller entered into a licensing agreement involving a puppet parody show, granting a worldwide license to certain producers. After the initial success of the show, the complaint alleged that Rockefeller "regretted issuing a worldwide license to the Producers" since "he was a Rockefeller, he had the resources to produce [the show] without them." 2018 WL 1794744, at *1. A dispute over the rights thereafter developed culminating in an email from Rockefeller in which he claimed Duncan-Watt was "fraudulently misrepresenting himself, and his business arrangement." *Id.* at *2. Duncan-Watt sued for, *inter alia,* defamation. This Court dismissed the defamation claim on motion, finding first that "courts analyze whether 'the full context of the communication signal[s] . . . of what is being read or heard is likely to be opinion, not fact.'" *Id.* at *6 (quoting *Gross*, 82 N.Y.2d at 154). Then, applying core principals distinguishing opinion from fact, this Court concluded that an "objective reader" considering the email in full "would consider Rockefeller's statements [alleging fraudulent misrepresentation] as opinion and not fact" since, in context, it would be understood that the parties had an ongoing dispute over the operative terms of a licensing agreement. 2018 WL 1794744, at *6. As here, in the context of an evident business dispute, readers would understand statements about "fraudulent misrepresentations" to be the opinion of one party to the dispute. *Duncan-Watt* is consistent with a long line of cases where courts find even more vituperative

statements to be fully protected opinions when stated in the context of a heated dispute. *Greenbelt Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970) (the term "blackmail" used to describe a real estate developer's bargaining position was protected opinion when spoken by a citizen during a debate at a public meeting); *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 143-45 (accusations of "bribery" and "corruption" were protected opinion when made during the discussion of a disputed topic at a public hearing) (1992); *Huggins v. Povitch*, 1996 WL 515498, at *3 (N.Y. Sup. Ct. Apr. 19, 1996) (statement that plaintiff obtained a "fraudulent, secret divorce" was protected opinion when made during an emotional debate).

Here, the readers of the Article in which the Challenged Statements appeared were on similar notice of the fundamental disagreement between Doeblin and MacArthur over Doeblin's fundraising campaign. The Article painstakingly presents the facts surrounding the "split" between the Book Culture owners, none of which are challenged in this action. Accordingly, readers of the Article would recognize that MacArthur's statements that Doeblin was "misleading potential lenders" by "raising money on a false premise" represented MacArthur's opinion on the propriety of soliciting money for the other three Book Culture stores at the Columbus Avenue location. These same readers would similarly recognize that MacArthur's statements that Book Culture on Columbus was not in need of the community's financial assistance reflected his opinion that the store would become financially stable if Doeblin accepted MacArthur's offers to provide funding. As all of MacArthur's statements are also accompanied by a full recitation of the facts underlying his views, they cannot possibly be anything other than opinion, and Plaintiff's defamation claim must be dismissed.

B. Two Challenged Statements about Book Culture on Columbus are Not "Of and Concerning" Plaintiff

Plaintiff brings his defamation claim on behalf of himself as an individual, not derivatively on behalf of BCC. AC at 18 ("FIRST CAUSE OF ACTION - Defamation-on behalf

of Doeblin"). Yet, two of the Challenged Statements (AC ¶¶100(a), 100(f)) are only "of and concerning" the store Book Culture on Columbus, not Doeblin personally and cannot form the basis of a defamation claim.

"Under New York law, it is essential in making out a prima facie case in defamation that the alleged defamatory statement be 'of and concerning' plaintiff," and a complaint must be dismissed where this requirement is not satisfied. *Amaranth LLC v. JPMorgan Chase & Co.*, 2008 WL 5653644 (Sup. Ct. N.Y. Cty. Oct. 28, 2008), *aff'd in relevant part*, 71 A.D.3d 40 (1st Dep't 2009). Whether the statement is "of and concerning" the plaintiff is a threshold question of law. *Church of Scientology Int'l. v Behar,* 238 F.3d 168, 173 (2d Cir. 2001).

Here, Doeblin challenges two statements that simply do not refer to him individually at all:

> "Contrary to signage and social media posts, Book Culture on Columbus **is not in need of financial assistance** from the neighborhood, according to co-owner John R. MacArthur." (AC ¶100(a)).
>
> That, according to MacArthur: "Book Culture on Columbus was until recently doing just fine—and **MacArthur is willing to contribute the funds himself to get it back to where it was**." (AC ¶100(f)).

These statements refer to "Book Culture on Columbus," a retail store owned by both Doeblin and MacArthur. Defamation law is clear, however, that statements referring to a corporate entity are not deemed to be "of and concerning" the natural persons who work for, manage, or own those corporations. *Kirch v Liberty Media Corp.* 449 F.3d 388, 398 (2d Cir 2006)(defamatory statement directed at a corporation is not "of and concerning" unnamed employees of that corporation); *McBride v. Crowell–Collier Publ'g Co*., 196 F.2d 187, 189 (5th Cir. 1952) (stockholder cannot recover for allegedly defamatory statements about business); *Afftrex, Ltd. v. Gen. Elec. Co.*, 161 A.D.2d 855, 856 (3d Dep't 1990) (statement about "the

owner" of a company did not defame the company); *Cohn v. Nat'l Broad. Co*., 67 A.D.2d 140 (1st Dep't 1979) (challenged statements about one of its partners is not defamatory of a law firm), *aff'd*, 50 N.Y.2d 885 (1980).

As BCC and Doeblin are entirely separate corporate and natural persons, statements about BCC and its assets cannot reasonably be considered to be "of and concerning" Doeblin. Accordingly, the defamation claim in so far as it arises from the two statements about the Book Culture on Columbus store must be dismissed for this independent reason.

C. Plaintiff Cannot Plead the Requisite Standard of Fault Because He Is A Limited-Purpose Public Figure for the Purposes of Book Culture's Finances

In the alternative, this Court should dismiss the Amended Complaint because Plaintiff is a limited-purpose public figure who has not – and cannot – plausibly allege actual malice.

1. Plaintiff Is a Limited Purpose Public Figure

Plaintiff readily meets the standard for a "limited purpose" public figure, which the Court of Appeals and U.S. Supreme Court define as "those who 'have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.'" *James v. Gannett Co.*, 40 N.Y.2d 415, 421 (1976) (quoting *Gertz*, 418 U.S. at 345). The Court of Appeals has further explained that "[t]he essential element underlying the category of public figures is that the publicized person has taken an affirmative step to attract public attention." *James*, 40 N.Y.2d at 422.

Based on the allegations of the Amended Complaint, Plaintiff meets this test. By his own admission, Plaintiff took multiple affirmative steps to attract public attention to the financial plight of independent book stores, including the Book Culture stores. In June 2019, he wrote an open letter to local and state government employees pleading for financial assistance, which was published publicly online and sent to Book Culture's customers. AC ¶¶78-79, Ex. Q. The next

month, Doeblin posted publicly on Facebook about the Community Lending Program, signing the post "Chris Doeblin and everyone at Book Culture." *Id.* Ex. C. Much like the plaintiff in *James*, he "welcomed publicity" and "sought a continuing public interest" in his efforts to raise money for the bookstores. *James*, 40 N.Y.2d at 423. Accordingly, Doeblin must be held to be a public figure with respect to dialogue about these fundraising efforts.

2. Plaintiff Has Not Plausibly Alleged Facts Sufficient to Show MacArthur Made the Challenged Statements with Actual Malice

In order to prevail on a libel claim, a public figure must plead and prove not only that the challenged statement is false, but also that the defendant published the statement with "actual malice"—that is, with "knowledge that it was false or with reckless disregard of whether it was false or not." *Gertz*, 418 U.S. at 334. To survive a motion to dismiss, is not enough for a public figure libel plaintiff to merely proffer conclusory allegations that defendant acted with "actual malice" or "knowledge of falsity"—instead, the complaint must plead "facts from which actual malice can be inferred," *Rivera v. Time Warner Inc.*, 56 A.D.3d 298, 298 (1st Dep't 2008), and New York courts routinely grant pre-answer dismissal motions where the complaint fails to allege such facts. *See, e.g. Riviera,* 56 A.D.3d at 298, *Jimenez v. United Fed'n of Teachers*, 239 A.D.2d 265, 266 (1st Dep't 1997).

Doeblin's allegations of actual malice are devoid of supporting facts from which it can be inferred that MacArthur made the Challenged Statements with knowledge that they were false or with serious doubts as to their truth. AC ¶¶120, 123. Indeed, in an effort to support knowledge of falsity, Doeblin only alleges that MacArthur knew Book Culture on Columbus was in financial distress. *Id.* ¶101. But this knowledge in no way conflicts with MacArthur's actual views concerning Doeblin's misrepresentation—which turn on his failure to reveal that the

monies he was soliciting would go to BCI, not BCC. In short, knowledge of BCC's financial distress in no way undermined his strongly held views concerning Doeblin's actions.

Further, Doeblin alleges that MacArthur acted with actual malice because the Challenged Statements were "part and parcel of [MacArthur's] attempt to destroy Doeblin's credibility and buy out Doeblin's BCC shares." AC ¶123. But even if this conjecture concerning MacArthur's motives or ill will towards Doeblin is true, it is entirely irrelevant as to whether he acted with actual malice – despite its name, "actual" or "constitutional" malice refers only to a defendant's attitude towards the truth, and not on his feelings towards the plaintiff. *See, e.g.*, *Chandok v. Klessig*, 632 F.3d 803, 815 (2d Cir. 2011) (explaining the distinction between common-law malice and constitutional malice). Allegations of spite or ill will toward the plaintiff do not establish actual malice as a matter of law.

In the end, Doeblin has not alleged facts to establish that MacArthur did not believe the Challenged Statements to be true, and this defect cannot be cured. Two months after he spoke to the *West Side Rag*, MacArthur swore to the truth of a verified complaint in which he accused Doeblin of misleading the public with his fundraising campaign for the Book Culture stores. *See* McNamara Aff. Ex. 2, ¶34, p.15. His subjective belief in the truth of the Challenged Statements is established by documentary evidence, and the defamation claim must also be dismissed for this reason alone.

III.

PLAINTIFF'S TAG-ALONG TORT CLAIMS MUST BE DISMISSED

Plaintiff also asserts claims for breach of fiduciary duty, tortious interference with prospective business advantage, and tortious interference with contract, all of which also arise out of the Challenged Statements. New York courts have repeatedly held that where a plaintiff asserts a defamation claim and additional tort claims based on the same statements challenged as

defamatory, the additional tort claims must be dismissed as duplicative. *See, e.g.*, *Ripka v. Cty. of Madison*, 162 A.D.3d 1371 (3d Dep't 2018) (tortious interference with business claim dismissed as duplicative when based on same same substantive facts as defamation claim); *Perez v. Violence Intervention Program*, 116 A.D.3d 601, 602 (1st Dep't 2014) (tortious interference with prospective contractual/business relations and other tort claims duplicative of defamation claim where plaintiff alleged no new facts and sought no distinct damages); *Charas v. Ames*, 2011 WL 5118146 (Sup. Ct. N.Y. Cty. Oct. 7, 2011) (breach of fiduciary duty claim based on same allegations as defamation claim dismissed as duplicative).

Further, as explained below, Plaintiff's pleadings on each of these claims is deficient, and the claims must be dismissed on these bases as well.

A. Plaintiff Cannot State A Claim For Breach Of Fiduciary Duty

This claim turns on the existence of a fiduciary duty. If as a matter of law no such duty exists, the claim must be dismissed. *See, e.g.*, *BGC Partners, Inc. v. Avison Young (Canada) Inc.*, 160 A.D.3d 407, 407-08 (1st Dep't 2018) (upholding dismissal of breach of fiduciary duty claim where defendant had no fiduciary duty to plaintiff); *Eden v. St. Luke's–Roosevelt Hosp. Ctr.*, 96 A.D.3d 614, 615 (1st Dep't 2012) (same).

Here, Plaintiff's allegations that MacArthur was "a fiduciary of BCC and Doeblin" "by virtue of his membership in the BCC limited liability company and his 40% ownership stake in same" are squarely refuted by his own pleadings, documentary evidence and the law. AC ¶132. The operating agreement of BCC states that Doeblin is the sole Manager of the LLC and that MacArthur has no management duties. *See* McNamara Aff., Ex. 3 , Article VII, page 6.[6]

[6] New York courts regularly consider LLC operating agreements as documentary evidence. *MFB Realty LLC v. Eichner*, 161 A.D.3d 661 (1st Dep't 2018) (considering LLC's operating agreement as documentary evidence); *First Keystone Consultants, Inc. v. DDR Constr. Servs.*, 74 A.D.3d 1135 (2d Dep't 2010) (same).

Indeed, Doeblin's allegations in this action confirms this fact. His Amended Complaint alleges that MacArthur is a "minority member" of BCC who "had no day-to-day involvement in the operation or management" of Book Culture on Columbus. AC ¶47. New York courts have consistently found that "[a] member of an LLC who is not a manager does not owe a duty to the LLC or its members except to the extent he participates in the management of the LLC." *See, e.g.*, *Landes v. Provident Realty Partners II, L.P.*, 2017 WL 413168 (Sup. Ct. N.Y. Cty. Jan. 31, 2017) (quoting 1 N.Y. Prac., New York Limited Liability Companies and Partnerships §1:8; 51 AmJur. 2d Limited Liability Companies §11 ("members of a limited liability company are like shareholders in a corporation in that they do not owe a fiduciary duty to each other or to the company, and that as long as members of a limited liability company are not acting in a managerial capacity, they do not have fiduciary duties to one another unless such fiduciary duties are set forth in the operating agreement."); *Kalikow v. Shalik*, 43 Misc.3d 817 (Sup. Ct. Nassau Cty. 2014) (observing that section 409(a) of New York's Limited Liability Company Law imposes a duty of good faith on LLC managers but not mere members). Accordingly, because MacArthur is not a manager of BCC and does not participate in its management, he owes no fiduciary duty to it or to any other member. As a result Doeblin's breach of fiduciary claim must be dismissed.

B. The Amended Complaint Fails To State a Cause of Action for Tortious Interference with Prospective Business Advantage

To state a claim for tortious interference with prospective business relationships, a plaintiff must allege "(1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with

the third party." *Amaranth*, 71 A.D.3d at 47. The Amended Complaint is deficient for two independent reasons. *First,* the Complaint fails since it does not identify any specific third party with whom plaintiff lost the prospect of doing business, as is required to survive dismissal. *See, e.g.*, *Moynihan v. N.Y. City Health & Hosps. Corp.*, 120 A.D.3d 1029, 1034 (1st Dept 2014) (dismissing claim where plaintiff failed to "identify any third party with whom she lost the prospect of doing business"); *Bus. Networks of N.Y., Inc. v. Complete Network Sols., Inc.*, 265 A.D.2d 194, 195 (1st Dep't 1999) (plaintiff must plead tortious interference with a "specific prospective relationship"); *Wash. Diamonds Corp. v. Diamonds By Israel Standard, Inc*. INDEX NO. 656450/2016, NYSCEF #146, *24-25 (Sup. Ct. N.Y. Cty. Nov. 9, 2017) (Masley, J.) (dismissing claim that failed to identify "a single specific customer" with whom the party would have contracted but for the alleged interference).

Here, the Amended Complaint alleges only that MacArthur "did in fact interfere with BCC and Doeblin's fundraising efforts" and that "fundraising for BCC unsurprisingly ceased." AC ¶¶145, 105. It never identifies the parties from which Doeblin and BCC intended to secure funding. New York courts routinely dismiss tortious interference claims when a plaintiff alleges a "business relationship" with such a broad mass of possible business partners. *See, e.g.*, *McGill v. Parker*, 179 A.D.2d 98, 105 (1st Dep't 1992) (dismissing claim where plaintiffs did not make a "sufficiently particular allegation of interference with a specific contract or business relationship"); *Vigoda v. DCA Prods. Plus Inc.*, 293 A.D.2d 265, 267 (1st Dep't 2002) (dismissing claim based on alleged loss of unspecified contracts); *RVW Prods. Corp. v. Levin*, 2019 WL 4899056 (Sup. Ct. N.Y. Cty. Oct. 4, 2019) (Masley, J.) (dismissing claim where plaintiffs did not sufficiently allege the relationships with which defendants interfered). Dismissal is proper on this basis alone.

Second, the Amended Complaint also fails to allege that MacArthur acted solely out of malice, or via wrongful means that constitute an independent crime or tort. *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 189-90. Indeed, it pleads that MacArthur's statements to the *West Side Rag* were motivated by his own economic interest to gain a strategic advantage in buyout negotiations. AC ¶¶20, 31, 97-98, 146. New York law is clear that "where the offending party's actions are motivated by economic self-interest, they cannot be characterized as 'solely malicious.'" *Law Offices of Ira H. Leibowitz v. Landmark Ventures, Inc.*, 131 A.D.3d 583, 586 (2d Dep't 2015); *accord Foster v. Churchill*, 87 N.Y.2d 744, 750 (1996) ("[E]conomic interest is a defense to an action for tortious interference with a contract unless there is a showing of malice or illegality."); *A&A Jewellers Ltd. v. Bogarz, Inc.*, 2005 WL 2175164, at *2 (W.D.N.Y. Sept. 7, 2005) ("Actions taken, at least in part, to promote or advance [a defendant's] economic self-interest are, by definition, not taken for the sole purpose of harming [the plaintiff]."). Plaintiff's repeated contentions that MacArthur acted in his own self-interest belie any argument that MacArthur was solely motivated by malice.

Nor does the Amended Complaint allege any conduct constituting an independent crime or tort –as explained *supra*, its pleadings of defamation fail. Indeed, even accepting that MacArthur's statements to the press may have persuaded some unspecified people not to donate to the fundraising campaign, that does not create a cause of action. The Court of Appeals has repeatedly recognized that "wrongful means" cannot include "persuasion alone," even if such persuasion is "knowingly directed" at interference with a prospective contract. *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 190-91 (1980); *Carvel*, 3 N.Y.3d at 191. As Plaintiff has not pled the basic elements required to state a claim for tortious interference with prospective economic advantage, his claim must be dismissed.

C. The Amended Complaint Fails To State A Cause Of Action For Tortious Interference With Contract

In order to withstand a motion to dismiss for tortious interference with contract, plaintiff must allege that the contract would not have been breached "but for" the defendants conduct. *Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dep't 2006); *Washington Ave. Assocs. v. Euclid Equip.*, 229 A.D.2d 486, 487 (2d Dep't 1996). Mere conclusory statements that third parties cancelled contracts because of defendant's action, unsupported by facts, are insufficient. *BGC Partners*, 160 A.D.3d at 407 (affirming dismissal of tortious interference with contract claim because plaintiff's allegation of but-for causation was conclusory); *Guardsman Elevator Co. v. Apartment Inv.*, 2007 WL 2176877 (Sup. Ct. N.Y. Cty. July 16, 2007) (citing *M.J. & K. Co. v. Matthew Bender & Co.*, 220 A.D.2d 488 (2d Dep't 1995)).

Plaintiff has not met these requirements to plead a cause of action for tortious interference with contract. As his sole allegation that MacArthur's actions caused third parties to cancel their contracts, he pleads "MacArthur's Defamatory Statements and lies about BCC's financial health and Doeblin's fundraising did in fact cause individuals who had entered into Community Lending contracts to back out of and thus breach those contracts." AC ¶160. This is the exact kind of conclusory statement devoid of supporting facts that is insufficient to establish but-for cause. *BGC Partners*, 160 A.D.3d at 407. Accordingly, this Court must dismiss Doeblin's claim for tortious interference with contract.

CONCLUSION

For the foregoing reasons, this Court should dismiss plaintiff's Amended Complaint in its entirety.

Dated: New York, New York
November 20, 2020

Respectfully submitted,

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CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, Elizabeth A. McNamara, certify that, pursuant to Commercial Division Rule 17, this memorandum of law is 6960 words.

____/s/ Elizabeth A. McNamara_____