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

CHRISTOPHER DOEBLIN, individually and derivatively on behalf of BOOK CULTURE ON COLUMBUS, LLC, *Plaintiff*, - against - JOHN R. MACARTHUR, *Defendant*.	Index No.: 156356/2020 (Masley, J.) Part 48 Mot. Seq. No. 2 **Oral Argument Requested**

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

LAW OFFICES OF JOHN V. GOLASZEWSKI, P.C.
1740 Broadway, 15th Floor
New York, New York 10019
P:646-872-3178
Attorneys for Plaintiff

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

This case concerns defendant John R. MacArthur's ("MacArthur" or "Defendant") attempt to achieve through calculated lies and smears what he could not achieve at the negotiating table. In August 2019, MacArthur contacted the *West Side Rag* and informed it that his business partner, plaintiff Christopher Doeblin ("Doeblin" or "Plaintiff"), was defrauding the public out of hundreds of thousands of dollars pursuant to a false and deceptive fundraising campaign. As detailed in Plaintiff's First Amended Complaint,[1] these smears were intended to devastate Doeblin's fundraising and reputation and secure for MacArthur the buyout of Doeblin's shares in the company they co-owned, which he had been actively pursuing for more than a year. Now faced with the consequences of his libels, MacArthur seeks refuge behind the First Amendment, claiming his allegations of fraud and deceptive fundraising against Doeblin were merely non-actionable "opinions" he was free to air and to which Doeblin is powerless to object, and that some of Doeblin's allegations are flat-out wrong. Such arguments hinge not merely on an attempted revision of Doeblin's claims, but on a fundamental misunderstanding and/or disregard of New York libel law as pertains to what constitutes an "opinion." Because each of the Defamatory Statements is capable of being proven true or false, would be understood by reasonable readers of the *West Side Rag* to be factual assertions concerning Doeblin's alleged fraudulent activity levied at him by his partner, and were in fact understood as fraud charges by those readers, this Court should deny MacArthur's motion in its entirety.

[1] Dkt. 22 ("FAC"). Plaintiff respectfully incorporates by reference all definitions set forth in the FAC.

FACTS AS SET FORTH IN THE FAC

A. Background.

Book Culture on Columbus, LLC ("BCC") was formed in 2014 for the purpose of operating a bookstore, Book Culture, on Columbus Avenue in Manhattan ("Book Culture on Columbus"). FAC, ¶ 42, 45. Plaintiff is a 46% owner of BCC, *id.*, 40, and Defendant owns 40% *id.,* ¶ 41, but has no ownership stake in the company that owns Book Culture on Columbus' three sister Book Culture stores, an entity called Book Culture, Inc. ("BCI"), of which Doeblin was majority owner and president during the relevant period. *Id.*, ¶44.[2] It is undisputed that since its formation in 2014, Book Culture on Columbus has been known as "Book Culture," has used the same trademark as its sister Book Culture stores and has shared a website with its sister stores, www.bookculture.com, which advertised and promoted all four Book Culture stores.[3] At no point in five (5) years of operation did MacArthur ever object to these marketing arrangements.[4]

B. BCC's Financial Deterioration.

Beginning in 2018, Book Culture on Columbus and its sister stores began experiencing significant financial hardship. FAC., ¶ 48. These hardships were memorialized not only in financial statements but in reams of correspondence which make clear that over an 18-month period starting in March 2018 -- when Doeblin first informed MacArthur of BCC's need "to find outside investors or lenders to assist us or we will be in a crisis soon," and that BCC was "in dire

[2] The remaining approximately 14% of BCC shares are owned by non-party Annie Hendricks ("Hendricks"). FAC, ¶ 42.

[3] *See* MacArthur's November 20, 2020 Memorandum of Law in Support of his Motion to Dismiss ("Mov. Br."; Dkt. 44) at 1.

[4] *See* January 8, 2021 Affidavit of Christopher Doeblin ("Doeblin Aff."), annexed as Exhibit 1 to the January 8, 2021 Affirmation of John V. Golaszewski ("Golaszewski Aff."), ¶¶ 2-3.

need of cash," *id.*, ¶ 50 -- up through the summer of 2019 -- when Doeblin informed MacArthur BCC was "virtually dead in the water," MacArthur acknowledged BCC was "going down very fast now," and his lawyer asserted BCC was "*in extremis.*" *id.*, ¶¶ 71-73 -- BCC was in an increasingly precarious downward financial spiral and desperately in need of financing.

C. MacArthur Uses BCC's Strained Finances as a Buyout Opportunity.

Correspondence from as early as July 2018 confirms MacArthur viewed BCC's spiral downward and Doeblin's inability to raise capital as a buying opportunity:

> Perhaps, he is starting to feel the pressure … <u>It seems that he will not find funding as he has exhausted all of his sources and has been looking unsuccessfully for quite a while.</u> It is sort of a flip of the coin as whether to open up a discussion now or <u>let him keep sweating.</u>

Id., ¶ 53.[5] Two days after that e-mail, MacArthur's team "opened up a discussion" with its first foray into buyout negotiations, emphasizing BCC's distressed finances and the fact that BCC had "run up payables with the major publishers in the hundreds of thousands of dollars, and now you are unable to maintain current inventory." *Id.,* ¶ 54. The answer to this problem (according to MacArthur) was for Doeblin to sell his interest in BCC, and over the next 12 months, as BCC's financial condition deteriorated, MacArthur regularly returned to the issue of a buyout, on each occasion emphasizing BCC's distressed financial situation. *See generally, Id.*, ¶¶ 89-95, and Ex. J thereto, wherein MacArthur's lawyer asserts MacArthur "is offering to take over BCC with its negative cash flow and negative net worth."

D. MacArthur Actively Blocks Doeblin's Attempt to Raise Capital.

Making clear to MacArthur that he was "open to … trying any and every avenue available" to save Book Culture, Doeblin attempted in February 2019 to secure $1.5 million in

[5] Unless otherwise indicated, all emphases set forth herein are added and none were contained in the original correspondence.

financing from an entity called Burnley Capital. *Id.*, ¶ 61. MacArthur refused to sign off on the loan. *Id*. ¶ 62. MacArthur's obvious strategy in refusing to sign off on the Burnley Capital financing was to make sure Doeblin would "keep sweating" such that MacArthur could secure for himself a lower buyout number, a transparent and bad faith tactic on which Doeblin immediately called him out:

> Let's proceed with trying to separate your client from his connections to me via BCC[.]…. I do think squeezing me out by refusing to allow me every opportunity ie Burnley, will not be good citizenship. Especially in light of the utter capitulation of my own family finances to the efforts to keep BCC alive….

Id., ¶ 64.

E. BCC is Out of Options.

MacArthur having refused to sign off on the Burnley Capital financing, Doeblin spent the next months trying to secure other avenues of financing to save BCC. These efforts were unsuccessful, and in late April 2019 Doeblin informed MacArthur of BCC's various options, including liquidation and a public-directed fundraising campaign, also noting that "[v]ery soon the evidence of our distress will require address to our customers and the public." *Id.*, ¶ 67.

F. Doeblin Commences the Crowdfunding Campaign.

After more than a year struggling to secure financing, in June 2019 Doeblin wrote an open plea to local and state government officials: "Our 4 stores are in danger of closing soon and we need financial assistance or investment on an interim basis to help us find our footing." *Id.*, ¶ 80. As of the date of this letter, BCC owed approximately $100,000 in back rent and $600,000 to vendors and others. *Id.*, ¶ 82. When that plea returned no government assistance, Doeblin determined that the only way to save the four Book Culture stores was a public crowdfunding program:

> A couple of weeks ago in an effort to keep our four book shops open, we began our Community Lender program. It empowers individual members of the community to lend directly to Book Culture ensure that we keep our stores in

New York City open.

Id., ¶ 86. Within six weeks, Doeblin's had raised approximately $200,000 for the four stores, and by September 2020 he had raised approximately $300,000, well on his way to his goal of raising $750,000 for the stores, and thereby, *inter alia*, securing the jobs of the stores' 75 employees. *Id.*, ¶ 88.

G. MacArthur is on Notice that BCC is Benefiting from the Crowdfunding.

Considering that (as detailed *infra*) MacArthur has much invested in trying to recast the allegations in the FAC and rewrite his Defamatory Statements, it is worth noting that prior to the publication of the Defamatory Statements, MacArthur was on notice that the fundraising was greatly benefitting Book Culture on Columbus, just as Doeblin always represented it would. *Three days before* MacArthur contacted the *West Side Rag* to smear Doeblin, Doeblin informed MacArthur how the fundraising efforts had benefitted BCC:

> The [fundraising] has allowed us to purchase inventory in significant amounts. It has generated optimism in our staff and our customers. It has allowed us to renew the service of our customer's special orders. It has been the start of tentative reparations with our vendors. You recall in June that our sales were down and the store was visually emptying. This program has allowed us to get to September, on a high note no less.[6]

MacArthur's awareness that the fundraising benefitted BCC is also evident in the verified complaint he filed in this Court, wherein he accuses Doeblin of breaching the BCC operating agreement by borrowing more than $50,000 for BCC without unanimous approval of all members.[7] This sworn to and verified acknowledgment by MacArthur that the money raised by

[6] *See* Golaszewski Aff., Ex. 2 at DEF00461.

[7] Golaszewski Aff., Ex. 3, Verified Complaint in *MacArthur v. Doeblin*, Index No. 656694 (Sup. Ct. N.Y. Cnty. 2019), ¶ 64 ("Doeblin did not seek unanimous consent of the BCC members prior to initiating the public offering, in breach of the [Amended Operating Agreement.]").

Doeblin was in fact going to BCC obviously contradicts his baseless and self-serving arguments now that the funds raised by Doeblin were only benefitting the non-BCC bookstores.

H. MacArthur's Defamatory Statements.

Frustrated by Doeblin's refusal to acquiesce to his buyout demands, on notice that Doeblin's fundraising had been extraordinarily beneficial for BCC, but aware that continued fundraising success would destroy his buyout chances, in late August 2019 MacArthur contacted the *West Side Rag* and attempted to discredit Doeblin's fundraising activities and smear Doeblin personally. As set forth in the Article, MacArthur accused Doeblin of perpetrating a fraud on those individuals who had partaken in the community lending program:

a. "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."

b. "MacArthur believes Doeblin is **misleading 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."

c. "'Nobody seems to know that these are two separate companies,' said MacArthur during a phone interview with WSF. '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."

d. "'I want to halt the **deceptive fundraising**,' said MacArthur."

e. "'I don't want ordinary, neighborhood people lending money to [Doeblin] on a **false premise**. In effect they are lending money to me, and I'm not asking for it – I don't want it!'"

f. 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**."

As MacArthur no doubt calculated, public accusations of fraud against Doeblin -- levied at him by his partner, a BCC-insider -- would devastate Doeblin's fundraising activities and thus ramp up the financial pressure he and BCC were experiencing thereby making MacArthur's buyout

offer Doeblin's only alternative.

Though MacArthur now argues that his goal in contacting the *West Side Rag* was merely to put the community on notice of an alleged "disagreement" he had with Doeblin (thus bolstering the claim that his allegations of fraud were mere "opinion"), Mov. Br. at 13, MacArthur's true motive was to cause the termination of Doeblin's fundraising altogether, as made clear by his threats to Doeblin the day he contacted the *West Side Rag*, when he told him that "one way or another, you are going to have to stop your deceptive fundraising campaign." *See* Golaszewski Aff., Ex. 2, at DEF00457.[8] MacArthur's orchestration of the Article -- immediately preceded by a threat he was going to shut down the fundraising -- leaves no question about his motivations, which were not to air a disagreement but to cripple Doeblin's fundraising with a smear, thus forcing Doeblin into a sale of his shares.

I. MacArthur's Smears Have Their Intended Consequence.

Almost immediately after the Article was published, all fundraising for the Company ceased, FAC, ¶ 105, and Doeblin began receiving e-mails from would-be donors who clearly believed MacArthur's libels.[9] Indeed, a review of the responses to the Article published on the

[8] *See also,* Golaszewski Aff., Ex. 4, PLA003539, e-mail from MacArthur's assistant, peddling MacArthur's purported grievances to the *West Side Rag*, written 40 minutes after MacArthur issued his threat to Doeblin on August 29, 2019.

[9] *See, e.g.,* Golaszewski Aff., Ex. 5, September 11, 2019 e-mail from Aaron Goodwin to Doeblin, stating: "I recently renewed my membership specifically to support the store during its financial difficulties, but after reading the recent article in the *West Side Rag*, I regret having done so. As long as the current fundraising tactics (and misinformation) are employed, I won't be supporting you. And frankly, I think you should be ashamed."

West Side Rag website leave no question that MacArthur's goal of smearing Doeblin with a fraud charged was a success.[10] Adding insult to injury -- and underscoring the rank absurdity of MacArthur's claims that 1) BCC was not in need of a financing, 2) the fundraising was not helping BCC, and 3) MacArthur stood ready to contribute funds to BCC -- within five months of the Article, Book Culture was shuttered by the landlord for unpaid rent. FAC, ¶ 106. Though of no moment to MacArthur because he was not personal guarantor of the lease, the landlord then sued BCC and Doeblin personally for $140,000 in Manhattan Supreme Court. *Id.*, ¶ 108. That case is pending.

LEGAL ARGUMENT

I.
STANDARD AND BURDEN ON A MOTION UNDER CPLR § 3211

A defendant seeking dismissal on a CPLR 3211 motion bears a heavy burden as the court will "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y. 2d. 83, 87-88 (1994) (citations omitted).

---

[10] *See* Golaszewski Aff., Ex. 6 at 4 (comments to the *West Side Rag* Article which include "I think there might need to be an investigation into this whole mess. When your own partners are essentially accusing you of fraud and misrepresentation…well, let's just say it's no surprise their creditors are hedging their bets"; "Gotta love it when the co-owner of your business comes out and calls out your BS loan program;" MacArthur's statements "make Doeblin and Hendrick's crowdfunding effort seem even more dubious;" "It has the stench of religious affinity fraud;" "the deceptiveness detailed here is illuminating;" "Having read this latest chapter, I'll never shop in or support this store;" "Doeblin apparently attended the [T]rump college of business practices;" "Nope, nothing sounds scammy about any of this; "When the story first broke several months ago, I noted in Comments that John MacArthur was a co-owner of the Columbus Ave store and a logical source of funding in case the shop did indeed have a shortfall. His current statement makes Doeblin and Hedrick's crowdfunding effort seem even more dubious.")

Under CPLR 3211(a)(7), "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Id.* (citations omitted). *See also, Duncan-Watt v. Rockefeller*, Index No. 655538/2016, 2018 WL 1794744, at *5 (Sup. Ct. N.Y. Cnty. Apr. 16, 2018) (Masley, J.)(same).

II.
MACARTHUR CANNOT ESCAPE THE CONSEQUENCES OF HIS FALSE FACTUAL ASSERTIONS

A. New York Authority Concerning Alleged "Opinions."

A defamatory statement is a false statement published either negligently or intentionally and without privilege. *Dillon v. City of New* York, 261 A.D.2d 34, 38 (1st Dep't 1999). Nowhere averring the Defamatory Statements are privileged or not susceptible to defamatory meaning, MacArthur pins his motion on the argument that when he charged Doeblin with fraud and deceptive fundraising he was merely issuing his protected "opinion." (Mov. Br. 8-13). Considering this defense, the dispositive inquiry is "whether a reasonable [reader] could have concluded that [the Defamatory Statements were] conveying facts" about Doeblin and his fundraising efforts. *Gross v. New York Times Co.*, 82 N.Y.2d 146, 152 (1993); *Gorilla Coffee, Inc. v. N.Y. Times Co.*, 936 N.Y.S.2d 58, 2011 WL 3502777 (Sup. Ct. Kings Cnty. Aug. 8, 2011) ("If the statement could be construed as factual, and therefore could possibly be construed as having been defamatory, the question of whether the statement is in fact defamatory is placed properly before a jury.").

New York courts consider the following factors to determine whether a statement could be construed as factual:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are

> such as to signal … readers or listeners that what is being read or heard is likely to be opinion, not fact.

Gross v. New York Times Co., 82 N.Y.2d 146, 153 (1993) (internal citations and quotations omitted). Even in cases where a court determines the challenged statement is an opinion, a "second level of inquiry is required concerning the stated factual basis" of the opinion, *Jewell v. NYP Holdings*, 23 F.Supp.2d 348 (S.D.N.Y. 1998), because while a "pure opinion" is not actionable, where a "statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a 'mixed opinion' and actionable." *Steinhilber v. Alphonse*, 68 N.Y. 2d 283, 289 (1986) (citations omitted). "The actionable element of a 'mixed opinion' is not the false opinion itself -- it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking," *id.*, 68 N.Y. 2d at 290 (citations omitted), and a court's task in such circumstances "is to decide whether the words complained of, considered in the context of the entire communication and of the circumstances in which they were spoken or written, may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion." *Id.* Finally, in situations where "the words are susceptible to multiple meanings, some of which are not defamatory … it is for the trier of fact to determine how the words are to be understood." *Mitre Sports Intern. Ltd. v. Home Box Office, Inc.*, 22 F.Supp.3d 240, 252-53 (S.D.N.Y. (citations omitted)).

B. The Defamatory Statements Are Capable of Being Proven True or False.[11]

i. *BCC was "not in need of financial assistance."*

[11] MacArthur nowhere argues the Defamatory Statements do not have a precise meaning that is readily understood and has thus conceded the first prong of *Gross.*

Whether a company needs financial assistance is a factual determination that can be made by a review of the company's balance sheets and an analysis of contemporaneous attempts by the company to secure financial assistance. As early as March 2018 Doeblin informed MacArthur that BCC was in "dire need of funding," and the FAC quotes and incorporates reams of correspondence over the ensuing 18 months attesting to BCC's increasingly precarious financial prospects, attempts to secure financing, and pleas to government authorities and the public. BCC's "need of financial assistance" is indisputable, and MacArthur's factual assertions to the contrary are provably false factual statements, not "opinions."

MacArthur argues that in evaluating this statement, the Court must give special attention to the "from the neighborhood" portion of the quote. Mov. Br. at 8. Since (the theory goes) MacArthur allegedly stood ready to "contribute funds" to BCC to provide "financial assistance," BCC did not need it "from the neighborhood." But this at most means there is an issue of fact as to the truth of MacArthur's statement -- *i.e.*, was he truly prepared to contribute funds to BCC? -- which of course cannot be adjudicated on a motion under CPLR 3211; it does not transform this factual statement into a non-actionable "opinion." To say nothing of the fact in 18 months of correspondence detailed in the FAC, MacArthur never once offered to "contribute funds" to BCC and this invented offer cannot be squared either with: 1) his stated desire to buy Doeblin's BCC shares; 2) his silence in the face of Doeblin's pleas for assistance before the fundraising began; and 3) his failure to "contribute funds" when the fundraising ceased. MacArthur's defense that he was offering to "contribute funds" and thus BCC did not need funding "from the neighborhood" must be explained in light of this evidence, which cannot be done on a motion to dismiss.

As this line of argument underscores, though ostensibly seeking dismissal of Doeblin's defamation claim because his statements were non-actionable "opinions," MacArthur's true aim is to rewrite and self-servingly contextualize the Defamatory Statements. To take another example: MacArthur pins much on the theory that the "deception" he was concerned with was *not* Doeblin's misrepresentation of BCC's financial health, but rather Doeblin's use of Book Culture on Columbus to raise money for his three other financially struggling Book Culture stores. *See, e.g.* Mov. Br. at 1 ("MacArthur became concerned that Doeblin was using this bookstore to induce investors to contribute support of Doeblin's three other bookstores."). But this is a distinction with no difference, because at the core of this rewriting remains the fiction that Book Culture on Columbus was not in need of funding and that it was only the other three Book Culture stores that were struggling. MacArthur will have the opportunity to prove the truth of his statements -- which turn on BCC's financial health and whether BCC was in fact benefiting from Doeblin's fundraising -- but under no conceivable interpretation are these statements "opinions."

ii. *Doeblin was "misleading potential investors."*

This statement of fact charging Doeblin with fraud is also capable of being proven true or false by an objective review of BCC's finances, Doeblin's public statements, and an analysis of whether monies received from the fundraising were in fact benefiting BCC. The notion that this accusation of fraud was merely MacArthur's "opinion" ignores the plain meaning of the words and the fact that the public believed these statements.[12] Either one is "misleading" people by raising funds based on lies and misrepresentations or is telling them the truth and is therefore not

[12] *See, supra,* n.10 ("I think there might need to be an investigation into this whole mess. When your own partners are essentially accusing you of fraud and misrepresentation…well, let's just say it's no surprise their creditors are hedging their bets.")

"misleading" them; the statement can thus be proven true or false under the second prong of *Gross*.

Even assuming *arguendo* the Court deemed MacArthur's statement that Doeblin was "misleading" people to be statement of opinion, it is one which at minimum "implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it," *Steinhilber*, 68 N.Y.2d at 289, and is thus an actionable mixed opinion insofar as it implies that MacArthur -- a BCC insider and Doeblin's partner -- knows something about BCC's finances the public does not and which Doeblin is not disclosing for his own nefarious motives. MacArthur's effort to temper his libel by arguing that his statement that Doeblin was "misleading potential investors" was modified by his statement that he merely "believed" this be true, is a tired tack from defamation defendants which is routinely rejected. *See, e.g.*, *Gross,* 82 N.Y. 2d at 155 ("if the statement "'John is a thief' is actionable when considered in its applicable context, the statement *'I believe* John is a thief' would be equally actionable when placed in precisely the same context") (emphasis in original).

iii. *Doeblin was "raising money on the false premise that Book Culture is on the verge of failure when it's not"* and *"I don't want ordinary, neighborhood people lending money to [Doeblin] on a false premise."*

These factual statements alleging fraud are not merely *capable* of being proven true or false but have already been proven false because Book Culture on Columbus was shuttered, owing $140,000 in unpaid rent, within months of MacArthur's Defamatory Statements. Doeblin was raising money because Book Culture on Columbus and the three other Book Culture stores were in severe financial straits; these financial problems were repeatedly acknowledged by MacArthur and his agents over 18 months; and there is no dispute the money Doeblin raised was benefitting each of the four bookstores: *ergo*, there is nothing "false" about the "premise" upon

which Doeblin was raising funds. MacArthur's argument that these statements are protected opinion is a tautology and ultimately nonsensical because whether something is "false" is not an opinion; it is a factual assertion capable of being proven true or false in court. These statements also at minimum imply they are based on facts unknown to the public but known to MacArthur, and MacArthur's special status as a BCC-insider was specifically referenced by readers of the Article. *See, supra,* n.10 ("Gotta love it when the co-owner of your business comes out and calls out your BS loan program.") Further, and as noted *supra*, MacArthur's self-aggrandizing boast that BCC was not on the verge of failure because he would not allow that to happen is, again, ridiculous: 18 months of correspondence confirm that he viewed BCC's financial struggles as an *opportunity* for himself; there is no evidence he ever offered to contribute funds to BCC (which would have been wholly antagonistic to his buyout plans in all events); Doeblin has confirmed under oath he never offered to contribute funds to the store, Doeblin Aff. ¶ 12; and the store closed once his smears eviscerated Doeblin's fundraising with no offer of contribution from MacArthur.

iv. *Doeblin was engaged in "deceptive fundraising."*

Since whether BCC was having severe financial problems can be proven true or false, and whether BCC was benefitting from Doeblin's fundraising can be proven true or false, whether Doeblin's fundraising was "deceptive" can also be proven true or false, and readers of the *West Side Rag* confirmed that they believed MacArthur's factual allegations upon reading them in the Article. *See, supra,* n. 10 ("The deceptiveness detailed here is illuminating."). As set forth *supra*, *three days before* MacArthur contacted the *West Side Rag* to smear Doeblin, Doeblin provided him with a detailed overview of how the fundraising was benefitting BCC, and

it will be incumbent on MacArthur at trial to explain, against the backdrop of these irrefutable financial facts, exactly how Doeblin's fundraising was "deceptive."

v. "*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."*

This is also a factual statement capable of being proven true or false, and MacArthur will have to demonstrate the truth of this statement -- including that "until recently" BCC was "doing just fine" -- in light of the documented financial free fall BCC had been in for 18 months when he made that statement. Likewise: either there is a record of MacArthur offering to "contribute the funds" to BCC, or there is not, *i.e.,* it can be proven true or false, which is the only question at issue considering MacArthur's argument that this statement is a protected "opinion." Like MacArthur's other Defamatory Statements, this statement also was relied upon by *West Side Rag* readers in reaching their conclusions about Doeblin and his fundraising.[13]

vi. *MacArthur Acknowledges Under Oath He Was Charging Doeblin With Fraud, Eviscerating His Entire "Opinion" Defense.*

Finally, MacArthur's own sworn testimony dispels any argument that he was merely airing a "disagreement" with Doeblin and underscores exactly what his charge against Doeblin was in the Article. When questioned what he meant by his threat, levied on the same day he contacted the *West Side Rag*, that Doeblin was going to have to "stop [his] deceptive fundraising," MacArthur testified as follows:

Q: Anything else you meant by, "You are going to have to stop your deceptive fundraising"?
A: Well, I figured also maybe the community would realize *they were being conned* or a politician might step in to make him stop because *it was a fraud.*

[13] *See, supra*, n. 10 ("When the story first broke several months ago, I noted in Comments that John MacArthur was a co-owner of the Columbus Ave store and a logical source of funding in case the shop did indeed have a shortfall. His current statement makes Doeblin and Hedrick's [sic] crowdfunding effort seem even more dubious.").

Golaszewski Aff., Ex. 7, at 220:11-17 (emphasis added). Considering MacArthur testified under oath Doeblin was a conman engaged in a fraud, is something more than disingenuous for him to now argue he was merely offering his nonactionable "opinion" concerning his purported "different views" from Doeblin on the issue of fundraising. MacArthur will be afforded the opportunity to demonstrate the truth of his statements, but the notion that he was merely offering his "opinions" is deeply flawed and contradicted both by the plain meaning of the statements, his own sworn testimony, and the reaction of *West Side Rag* readers.

C. No Reasonable Reader Would Consider the Defamatory Statements to be Opinions.

The third prong of *Gross* instructs the court to consider whether the challenged statements, in the full context of the communication, would signal to readers that what is being said is likely to be opinion, not fact. *See Gross,* 82 N.Y.2d at 153. All parties agree the broader context in which the Defamatory Statements were made was Doeblin's fundraising efforts, MacArthur's accusations of fraud were levied in a public forum in an article entitled "Book Culture Owners Split on Lending Program, *Raising New Questions*" (emphasis added), and MacArthur's stated objective was to bring about an end to the fundraising, though this was in furtherance of his concealed overall strategy to buy Doeblin and Hendrick's BCC shares at a pittance.

MacArthur strains to argue that since the Article included comment from both him and Doeblin, he is somehow inoculated from a defamation claim and afforded free reign to articulate whatever libelous statements he wanted. Mov. Br. at 10. MacArthur of course offers no authority for this, and none exists. Though MacArthur tells the Court that he and Doeblin merely had "different views concerning the situation," Mov. Br. at 10, and that readers of the Article were on notice of a "fundamental disagreement between Doeblin and MacArthur," *id.* at 13, this of

course is a gross distortion of the plain language of the Defamatory Statements. MacArthur did not state that he "disagreed" with the fundraising, or had a "different view" from Doeblin, or even that he thought Doeblin had done a bad job running BCC; rather, he accused Doeblin of engaging in "deceptive fundraising" and raising hundreds of thousands of dollars on a "false premise." This is not the language of mere "disagreement" and no reasonable reader would interpret it as such. To the contrary, it is the language of fraud and that is how it was understood by readers of the *West Side Rag*.[14]

MacArthur is correct that this Court's decision in *Duncan-Watt* is instructive on the third prong of *Gross*, but it is not for the reason he thinks. This Court's conclusion there -- that a reasonable recipient of the challenged statements would have understood it merely be defendant's "belief that [plaintiff] is incorrect in his view of the Canadian Licensing Agreement," *Duncan-Watt*, 2018 WL 1794744 at *5 -- hinged on *who* that reasonable recipient was:

> Rockefeller bases his statements on his reading of the Agreement and the circumstances that led to its terms. A reasonable recipient *in Apolonio's role,* enlisted to pressure Rockefeller into providing a copy of the Canadian Licensing Agreement, would view Rockefeller's statement as opinion, and not fact, given the parties' fundamental disagreement on the operative terms of that Agreement.

Duncan-Watt, 2018 WL 1794744, at *5 (emphasis added). Putting aside the fact that the challenged statements at issue in *Duncan-Watt* -- that plaintiff misstated to a writer's guild member his legal standing and self-servingly misinterpreted a licensing agreement -- pale in comparison to MacArthur's accusations in a newspaper that Doeblin was bilking the public out

[14] *See, supra*, n. 10. *See also*, *Qureshi v. St. Barnabas Hosp. Ctr.*, 430 F.Supp. 279, 287 (S.D.N.Y. 2006) (courts consider what reasonable impression a reasonable person reading or hearing an allegedly defamatory statement might take from it and are not to "interpret potentially defamatory statements in their mildest and most inoffensive sense to hold them nonlibelous.") (quotation marks and internal citations omitted).

of hundreds of thousands of dollars, MacArthur rushes past the fundamental point on which *Duncan-Watt* turned, which is that the challenged statements must be put in context and a court must consider whether it would be deemed an opinion by a "reasonable recipient" of the challenged statement, not some abstract "objective reader," as MacArthur incorrectly asserts. *See* Mov. Br. at 12. This Court in *Duncan-Watt* went to significant lengths to specify that it was determining what a "reasonable recipient *in Apolonio's role*," who had been enlisted by the plaintiff to assist in a writer's guild dispute would conclude, *i.e.,* someone privy to all the facts, who could put the challenged statements in context, and who had already heard plaintiff's side of the story. Considering the context and the recipient, it concluded the challenged statements were opinions under *Gross.*Contrast that with this case, where a corporate insider takes to the pages of a newspaper to assert that his partner is fraudulently and deceptively raising hundreds of thousands of dollars. That Doeblin is quoted in the Article does not mean he was privy to MacArthur's fraud allegations or had the opportunity to refute them and the *West Side Rag* specifically noted*, in the title of the Article*, that MacArthur's accusations "*Raised New Questions*," *i.e.,* is Doeblin perpetrating a fraud on the public?

Finally, and devastating to MacArthur's entire "opinion" argument, the most cursory review of the comments to Article underscores that "reasonable recipients" of the Article did in fact conclude that MacArthur's statements were conveying "facts" about Doeblin, *Gross*, 182 N.Y.2d at 152, and those "facts" were that Doeblin was a fraudster who should be subject to investigation. Considering that MacArthur has acknowledged under oath he was charging Doeblin with fraud, and reasonable recipients of the Article also concluded based on MacArthur's statements that Doeblin was engaged in fraud, any argument that his statements would reasonably be understood as "opinions" must be rejected out-of-hand.

D. All of the Defamatory Statements are "Of and Concerning" Doeblin.

MacArthur's argument that two of the Defamatory Statements are not "of and concerning" Doeblin but rather concern Book Culture on Columbus not only seeks to impermissibly extract the statements from their context but rests on a tortured analysis of the authority he offers, which involve lawsuits brought by corporate employees and/or shareholders who claimed that a negative statement about their business caused them personal damages. *See* Mov. Br. at 12-14. These cases taken together stand merely for the unremarkable proposition that a defamation plaintiff must himself be the subject of the challenged statements and that a statement about a business is not a statement about all of its employees even if it causes those employees harm, as succinctly stated by the Second Circuit in a case MacArthur himself cites. *See Kirch v. Liberty Media Group*, 449 F.3d 388, 398 (2d Cir. 2006) ("A false disparaging statement about IBM, for example, would not, we think, ordinarily be a defamatory statement "of and concerning" all of IBM's suppliers, employees and dealers, however much they may be injured as a result."). But Doeblin's defamation claim is not based on MacArthur's libel of BCC, that a necessary component of MacArthur's fraud charge was that BCC was not in need of financial assistance does not diminish the accusation or mean that Doeblin was not the subject of MacArthur's attack.

E. Doeblin is No Public Figure and Actual Malice Has in All Events Been Averred.

In *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 136-37 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985), the Second Circuit laid out a four-part test for determining whether a person is a limited purpose public figure:

> (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained

regular and continuing access to the media.

MacArthur argues Doeblin is imbued with limited-purpose public figure status because he "wrote an open letter to local and state government employees pleading for financial assistance" which he published on Facebook, Mov. Br. at 15, but such proposed doctrine -- that any person who writes a letter to state and local government or starts a fundraising effort via Facebook or another platform is transformed into a public figure -- is flatly wrong, ignores decades of authority, and would effectively mean every one of the hundreds of thousands people who start fundraising campaigns on Kickstarter or GoFundMe are limited purpose public figures.

Instructive on this point is *Krauss v. Globe Int'l, Inc.*, 251 A.D.2d 191 (1st Dep't 1998), wherein the First Department reversed a grant of summary judgment and held that plaintiff's status as a television producer did not transform him into limited purpose public figure because he had not voluntarily injected himself into a public controversy with a view toward influencing it:

> Significantly, in order to be considered a public controversy for this purpose, the subject matter must be more than simply newsworthy…. Instead, it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way.

Krauss, 251 A.D.2d at 192 (internal citations and quotations omitted). Doeblin cannot be said to have injected himself into a "public controversy," because when he started the fundraising campaign there was no "controversy" at all: his bookstores were failing, and he sought to save them by raising money.

Even assuming *arguendo* starting a fundraising campaign constituted Doeblin "inviting public attention" in an effort to "influence others" under prong one of *Lerman*, MacArthur cannot demonstrate Doeblin meets any other *Lerman* prong and makes no attempt to: 1) since it was MacArthur who contacted the *West Side Rag*, Doeblin cannot be said to have "voluntarily

inject[ed] himself" into any "public controversy;" 2) Doeblin has never assumed a "position of prominence in [a] public controversy" but merely initiated a fundraising campaign which led his partner to publicly charge him with fraud; and 3) Doeblin at no point had "regular and continuing access to the media," and nowhere does MacArthur claim he does. MacArthur has thus not met his burden of proving there are no issues of fact as to Doeblin's public figure status.

Further, should this Court conclude that starting a fundraising campaign somehow transformed Doeblin into a public figure, the FAC nevertheless details a calculated smear effort by MacArthur to devastate the Book Culture fundraising and secure for himself a buyout of Doeblin's BCC shares. MacArthur was thus not merely making a public pronouncement he knew to be false (thereby demonstrating the requisite malice towards the truth), but his motivations leave no question as to his bad faith tactics. Though MacArthur tells the Court that MacArthur's buyout motivations are "irrelevant to whether his comments are fully protected opinion," Mov. Br. at 11, n.5, his motivations to terminate the fundraising such that he could purchase Doeblin's shares are important to this Court's -- and a jury's -- understanding why MacArthur contacted the *West Side Rag* in the first place, and why he told lies about BCC's finances and Doeblin's fundraising, *i.e.*, why he was malicious towards the truth. The FAC plausibly and in detail alleges that the purpose of MacArthur's statements was to destroy the fundraising efforts and help his buyout talks and the argument that these are not colorable allegations of actual malice must be rejected.

III.
MACARTHUR HAS NOT MET HIS BURDEN OF DISMISSING DOEBLIN'S OTHER TORT CLAIMS

A. MacArthur Has Not Met His Burden of Dismissing Plaintiff's Fiduciary Duty Claim.

Though MacArthur tells the Court that, as a minority member of BCC, he cannot owe a

fiduciary duty to Doeblin and BCC, it is well-settled that "[t]he members of an LLC may stand in a fiduciary relationship to each other and the LLC." *Jones v. Voskresenkaya*, 125 A.D.3d 532, 533 (1st Dep't 2015) (citations omitted) (reversing dismissal of breach of fiduciary duty claim because "plaintiff's allegations are entitled to the benefit of every favorable inference."). MacArthur's argument that he could owe no fiduciary relationship to Doeblin or BCC rushes past the actual allegations in the FAC, and the fact that MacArthur regularly injected himself into management activities, Doeblin Aff., ¶ 4, and the fact that the breach of fiduciary duty claim is predicated primarily on MacArthur's decision to usurp a corporate opportunity from BCC by attempting to secure BCC's lease for a competing bookstore while Doeblin was negotiating with the landlord to try to save BCC. FAC, ¶¶ 111-115. MacArthur self-servingly posits a bright-line rule whereby no non-managing member of an LLC can ever owe a fiduciary duty to the LLC and other members, but this rushes past the fact that MacArthur was only entrusted by Doeblin to contact the landlord for the purpose of exploring whether MacArthur could assume the role of personal guarantor of the lease if Doeblin sold MacArthur his BCC shares. Doeblin Aff., ¶¶ 5-7 Considering this, MacArthur was in fact participating in the management of BCC *vis a vis* its lease and communications with the landlord, and thus owed fiduciary duties to BCC and its members as pertains to those communications. *See Landes v. Provident Realty Partners II. L.P.*, 2017 WL 413168 (Sup. Ct. N.Y. Cnty. Jan. 31, 2018) (non-managing member of LLC owes no fiduciary duty to LLC "except to the extent he participates in the management of the LLC."). Since MacArthur was acting in a managerial capacity as pertains to the lease, he has not met his burden on his motion to dismiss Doeblin's breach of fiduciary duty claim.

B. MacArthur Has Not Met His Burden of Dismissing Doeblin's Tortious Interference Claims.

"Tortious interference with prospective economic relations requires an allegation that

plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct." *Vigoda v. DCA Prods. Plus*, 293 A.D.2d 264, 266-67 (1st Dep't 2002) (citations omitted). As detailed *supra*, though discovery has not yet begun in this action, Doeblin is already aware of at least one prospective investor who declined to invest based exclusively on the MacArthur's libelous statements and this clearly constitutes evidence which "demonstrate[s] that a contract would have been entered into 'but for' defendant's conduct." *Am Preferred Prespcription Inc. v. Health Mgt., Inc.*, 252 A.D.2d 414, 418 (1st Dep't 1998); *Wash. Diamonds Corp. v. Diamonds by Israel Standard, Inc.*, Index No. 656450/2016, NYSCEF # 146, at *24-25 (Sup. Ct. N.Y. Cnty. Nov. 9, 2017) (Masley, J.) (quoting same). Contrary to MacArthur's implication, Doeblin is under no obligation in his FAC to provide evidence of all prospective investors who declined to invest due to MacArthur's statements; he is obligated to aver plausibly that but for MacArthur's libels, a contract would have been entered, and that is exactly what he has done.

The elements of tortious interference with contractual relations are "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" *M.J. & K. Co., v. Matthew Bender and Co., Inc.*, 631 N.Y.S.2d 938, 940 (2d Dep't 1995) (citations omitted). The FAC alleges that after raising $300,000 in two months from investors, immediately upon publication of the Article Doeblin's fundraising cratered, and Doeblin is afforded discovery into those investors who backed out of his fundraising efforts due to MacArthur's smears and to offer evidence to prove this claim.

Finally, it is long settled that the "wrongful" conduct which forms the predicate of this claim includes "misrepresentation," (*Snyder v. Sony Music Entertainment, Inc.*, 252 A.D.2d 294,

299-300 (1st Dep't 1999), which is what Doeblin has charged MacArthur with here. That these misrepresentations were in furtherance of MacArthur's buyout strategy does not mean they are not actionable as defamation and does not mean that they cannot constitute the "wrongful" means for purposes of Doeblin's tortious interference claim. Contrary to MacArthur's argument, his misrepresentations were not merely an attempt at "economic persuasion;" as detailed in the FAC, the reason he took to the pages of the *West Side Rag* to defame Doeblin was because he could *not* persuade him to sell his shares. That he thus resorted to accusations of fraud form the predicate of Doeblin's defamation claim and the wrongful conduct for purposes of his tortious interference causes of action.

CONCLUSION

Plaintiff requests the Court deny Defendant's motion to dismiss each cause of action in the FAC. To the extent this Court is inclined to grant Defendant's motion on any claim, Plaintiff requests leave to amend the FAC to address any perceived deficiencies therein.

Dated: New York, New York
January 8, 2021

LAW OFFICES OF JOHN V. GOLASZEWSKI, P.C.

/s/ John V. Golaszewski
1740 Broadway, 15th Floor
New York, NY 10019
T: 646-872-3178
jvgolaszewski@gmail.com

Attorneys for Plaintiff

CERTIFICATE PURSUANT TO COMMERCIAL DIVISION RULE 17

I, John V. Golaszewski, hereby certify that, in accordance with Commercial Division Rule 17, and the leave to include excess words granted by this Court on January 5, 2021, this memorandum of law is 7,740 words.

/s/ John V. Golaszewski