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 ORAL ARGUMENT REQUESTED

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

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

PRELIMINARY STATEMENT

At issue on this motion is an article in the October 2019 edition of the *West Side Rag* that set forth in detail a dispute between business partners, Plaintiff Doeblin and Defendant MacArthur, over Doeblin's efforts back in 2019 to raise funding from the community to support Book Culture retail locations (the "Article"). MacArthur's motion established that Doeblin's defamation claims fail for several independent reasons: (1) the Challenged Statements were clearly presented in the context of an ongoing dispute and a reasonable reader would understand that they represented each side's non-actionable opinions; (2) certain statements were not "of and concerning" Doeblin personally but instead referred to the entity that owned Book Culture on Columbus; and (3) Doeblin was a limited-purpose public figure and he had failed to plead sufficient facts to support actual malice.

In opposition, Doeblin searches the Article and strains to construe the Challenged Statements as facts that can be objectively determined to be true or false. But he ignores the basic principle that "even apparent statements of fact" such as accusations of fraud or other wrongdoing can be understood to be opinions when presented, as here, in the context of an active debate between two sides. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 294 (1986). Next, Doeblin argues that MacArthur's opinions are actionable "mixed opinions" that imply undisclosed facts that justify his views. But, Doeblin does not challenge any of the key facts identified in the Article as the basis for MacArthur's opinions; nor does he point to anything in the Article that would lead a reader to conclude that MacArthur was relying on undisclosed facts other than those meticulously spelled out in the Article.

As for the two Challenged Statements that are not "of and concerning" him personally, Doeblin effectively concedes that those Statements are not defamatory of him, admitting that his defamation claims are "not based on" the Statements about Book Culture on Columbus LLC ("BCC"). Opp. 19. Finally, Doeblin argues he is not a public figure but he ignores well-settled precedent that those who have sought public attention in relation to a topic are limited-purpose public figures on statements about these subjects. He also gravely misunderstands "actual malice," making the elementary mistake of confusing this Constitutional term – defined to mean publishing with "knowledge of falsity or reckless disregard for the truth" – with common law malice, which looks to spite, ill will, or bad faith. In the end, Doeblin's defamation claims fail as a matter of law for these several and independent reasons and should be dismissed.

That leaves Plaintiff's tag-along tort claims for breach of fiduciary duty and tortious interference. To avoid the dispositive fact that he cannot state a breach of fiduciary duty claim since MacArthur, as a non-managing member, had no fiduciary duty to BCC, Doeblin now claims that he delegated some management authority to MacArthur. But he ignores that, even if this occurred, any such attempt would have been clearly prohibited by the BCC operating agreement. Doeblin's claims for tortious interference both fail because he did not identify anyone who actually withdrew their contribution or refused to contribute to his campaign because of MacArthur's comments in the Article – even after this failure was drawn to his attention in Defendant's first motion to dismiss. For all these reasons, Plaintiff's Amended Complaint should be dismissed in its entirety.

I.
PLAINTIFF'S LIBEL CLAIMS FAIL AS A MATTER OF LAW

A. The Challenged Statements Are Non-Actionable Opinion

Doeblin's efforts to avoid dismissal of his libel claims rest on a fundamental misunderstanding of New York's well-developed law distinguishing actionable factual statements from non-actionable opinion. He is correct that the Court of Appeals has articulated three separate factors that aid in this examination: "(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.'" *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995) (quoting *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 153 (1993)).

But Doeblin's fundamental error is that he steadfastly refuses to consider the overall and specific context in which the Challenged Statements appear. Thus, in an effort to show the Statements are "provably false factual statements, not 'opinions,'" he isolates the Challenged Statements from the Article as a whole or, even worse, extracts a clause from the sentence in which it appears in order to twist its obvious meaning. Opp. 11. Yet, the Court of Appeals has explicitly rejected this approach of "sifting through a communication for the purpose of isolating and identifying assertions of fact." *Brian*, 87 N.Y.2d at 51 (citing *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 254 (1991)). Instead, the law is clear that a court should begin by "look[ing] [at] the over-all context in which the assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.'" *Id.*

The Court of Appeals has repeatedly underscored the significance of context in the fact/opinion dichotomy, recognizing that statements that might be considered factual in one context can also be clear statements of opinion in a different context. In the context of an ongoing dispute, even charging someone with fraud or extortion can be understood as opinion. *Steinhilber*, 68 N.Y.2d at 294 (in connection with an acrimonious labor conflict "even apparent statements of fact may assume the character of statements of opinion"); *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 141 (1992) (remarks charging plaintiff with obtaining a "fraudulent" and "illegal lease" when made at a public hearing where "robust, controversial debate is expected" and listeners arrive with the "expectation that they are…going to hear opinion" not actionable).[1] Thus, the Court must consider the broader social context in which the statements appears as well as the "content of the whole communication, its tone and apparent purpose." *Immuno*, 77 N.Y.2d at 254. When these controlling principles are applied to the Challenged Statements, it is readily apparent that they are opinion.

Here, the overarching context is a contentious dispute between business partners – as is made evident from the outset in the Article's headline. And the more immediate context is the Article itself, which presented both sides of this ongoing contentious dispute, and, critically, laid out the key facts that MacArthur was relying on to form his opinions. Where, as here, "the facts on which [the allegedly defamatory statements] are based are fully and accurately set forth and it is clear to the reasonable reader or listener that the accusation is merely personal surmise built

[1] Similarly, in *Galasso v. Saltzman*, the court concluded defendant's accusations that plaintiff had engaged in "criminal conduct" and had "committed crimes" should be considered opinion because the recipients of the statements were aware of a heated, ongoing debate between the plaintiff and the defendant regarding whether the plaintiff had in fact trespassed on defendant's property. 42 A.D.3d 310, 311 (1st Dep't 2007).

upon those facts," they are not actionable in defamation as a matter of law. *Gross*, 82 N.Y.2d at 155; *accord Galasso*, 42 A.D.3d at 311. On this motion, MacArthur identified each of the facts that the Article spelled out as the basis for his opinions and, tellingly, Doeblin does not challenge *any* of these underlying facts. Mov. Br. 10. Instead, Doeblin persists in challenging MacArthur's conclusions – just as he did in the Article itself and for many of the same reasons he provided in the Article. Opp. 11, 12, 14.

Because Doeblin cannot contest that MacArthur's opinions were voiced in the context of a dispute between business partners and that those opinions are based on revealed and uncontested facts set forth in the Article, he resorts to a miscellany of unfounded arguments in opposition, none of which can overcome the reality that the Challenged Statements are fully protected opinions.

First, central to his claim is Doeblin's contention that MacArthur stated that the Columbus Avenue store "was not in need of financial assistance" and this is, he argues, a verifiably false fact. Opp. 11. Of course, the actual Statement at issue is that the store "was not in need of financial assistance *from the neighborhood.*"[2] Doeblin argues that MacArthur places too much emphasis on the clause "from the neighborhood," and claims that the phrase should somehow be disregarded so that the Statement means MacArthur denied the store was in need of financial assistance at all. *Id.* 11. This interpretation is impermissible, as the Court is required to consider the statement in its "immediate context," and Doeblin cannot just throw out a key part of the sentence because it is inconvenient for his argument. *Immuno*, 77 N.Y.2d at 254-55.

[2] Doeblin makes the same error when he challenges the Statement: "And 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." Doeblin excises "I won't permit it to go bankrupt," thereby disregarding the entire import of the Statement – MacArthur is prepared to stop the store from going bankrupt.

In context, as spelled out on this motion, the Article makes it clear that MacArthur was not challenging that the store was in financial distress; he took issue with the fact that the "neighborhood" was being asked to make up the shortfall since he was able and willing to address the financial issues. Mov. Br. 11 (e.g., MacArthur was aware that "sales have gone way down" at the Columbus Avenue store, and because of the store's economic woes, MacArthur offered to buy the company or loan it money to get it "back on track towards success"). Doeblin ignores this controlling context and asks this Court to adopt an interpretation that is belied by the plain language of the Article.

Alternatively, Doeblin argues that the Statement is somehow "false" because he questions whether MacArthur was "truly prepared to contribute funds to BCC." Opp. 11. But, again, the Article makes it clear that the business partners did not see eye to eye concerning MacArthur's efforts to inject funds into the Columbus Avenue store. The Article describes MacArthur's efforts to negotiate a deal with Doeblin, and then it reports that they "did not reach an agreement" and that Doeblin "attributed his rejections of MacArthur's offers to concerns about their fairness," objecting to a "very wealthy family taking control" and observing that he has "put too much into the business to allow someone else to take full control." McNamara Aff., Ex.1-A, at 4. Thus, again, Doeblin is not actually challenging any statement of fact in the Article, he is just taking issue with MacArthur's conclusions – just as he did in the Article itself. In short, in an Article that fully and fairly airs both sides of a contentious dispute, Doeblin believes his side of the argument should have been the only one reported. Doeblin's position finds no support in the law and it should be rejected.

Second, Doeblin does not even attempt to contest any of the facts that informed MacArthur's opinion that Doeblin was "misleading potential investors;" he instead now argues

that MacArthur's statement rests on undisclosed facts. Opp. 13. But, he never identifies what is said or implied in the Article that would lead one to that conclusion. The Article discloses the precise facts upon which MacArthur's opinion is based, including photos of the challenged signage in the window of the Book Culture store on Columbus and his explanation of what concerned him about the website failing to adequately distinguish between BCC and BCI. McNamara Aff., Ex 1-A, at 2-3. And Doeblin's side of the story is again fully reported in the Article, where he explains he does not see the signs as misleading because BCC receives forms of support from its "parent company" BCI.[3] Where, as here, two sides of a controversy are presented along with the underlying facts, the statement cannot be actionable. *Gorilla Coffee, Inc. v. N.Y. Times Co*., 32 Misc. 3d 1230(A), 2011 WL 3502777, at *5 (Sup. Ct. N.Y. Cty. 2011) (statements reporting views of management and views of workers during a labor dispute that did not imply undisclosed defamatory facts were opinion).

At the same time, Doeblin again seeks to twist the plain language of the Article to try and find a false "fact" concerning MacArthur's view that he was "misleading potential investors." Thus, he suggests that MacArthur falsely stated that all the monies contributed through Doeblin's campaign would go to the other Book Culture stores owned by BCI, and BCC would receive nothing. Opp. 13. But the Article says no such thing. MacArthur is quoted as being concerned, in part, that people are "lending money to me" – thereby recognizing that BCC would receive some of the funds – and Doeblin even more specifically states that BCC "*is* getting books and merchandise and support from the community Lender Program. It is designed to help *all* the Book Culture stores." McNamara Aff., Ex. 1-A, at 2.

[3] This in fact is not a correct statement, as according to the BCC Operating agreement, BCI is not the parent company of BCC. *See* McNamara Aff., Ex. 3, Schedule A.

Third, Doeblin strains to distinguish *Duncan-Watt v. Rockefeller* because the on-point holding – finding that statements accusing a business partner of misconduct during an ongoing business dispute are opinion – so clearly undermines his claim. 2018 WL 1794744, at *6 (Sup. Ct. N.Y. Cty. 2018). He argues that, unlike readers of the Article, those who received the email at issue in *Duncan-Watt* had an understanding of the facts and controversy at issue. As Doeblin explains it, the reader of the statements in *Duncan-Watt* was "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." Opp. 18. But the readers of the Article were in exactly the same position. They were privy to both sides of the debate, understood Doeblin's side of the story in detail, and the Article presents the respective underlying facts that informed each side's point of view.

Faced with this indistinguishable precedent, Doeblin next tries to argue that the Challenged Statements in the Article should be informed by private correspondence between MacArthur and Doeblin predating the Article and, even more attenuated, by statements that MacArthur made in a deposition more than a year after the Article was published. Opp. 13-16.[4] As to the former, Doeblin never identifies what in the Article could possibly lead a reader to believe that MacArthur was relying on undisclosed information he was privy to – independent of the copious facts identified in the Article that are identified as the basis for his views. As to the latter, readers obviously could not be informed by observations or events that occurred well after the publication of the Article. Doeblin cites no case law supporting the proposition that material wholly outside the context in which the allegedly defamatory statements appear should be

[4] Even if properly considered – and the evidence is not – the correspondence and testimony is all fully consistent with MacArthur's views stated in the Article, namely that MacArthur was aware the store was in financial need and he considered Doeblin's campaign to be fraudulent in not fully disclosing that monies would go to the other Book Culture stores. McNamara Aff., Ex. 1-A at 2, 3; Golazewski Aff., Exs. 2, 7 at 219:8-11, 220:11-17.

considered in the fact/opinion analysis, because there is none. Rather, this Court should consider the Challenged Statements in the context of the Article itself, as did the actual readers of the *West Side Rag*. *Brian*, 87 N.Y.2d at 52-53. That context made it abundantly clear that there was an ongoing dispute between Doeblin and MacArthur, and presented each party's perspective in fulsome detail. Doeblin cannot reinvent the context for the Article.

Finally, Doeblin's separate contention that reader comments on the Article can be used to determine whether the statements are facts or opinion is tellingly unsupported by case law, because it is an illogical proposition. Opp. 18. At bottom, he argues that, because some commentators indicated their agreement with MacArthur's side of the dispute, the Article must be conveying actual facts. *Id.* However, readers can express agreement and disagreement with either facts or opinions – indeed, one might argue that a reader is far more likely to offer their own view where, as here, differing opinions are presented. The reader comments simply have no bearing on ascertaining whether the Challenged Statements are fact or opinion. This is a question of law for the Court based on the language of the Article, not how any one or more reader viewed the Statements. *Gross*, 82 N.Y.2d at 152-53.

None of Doeblin's arguments change the inevitable conclusion that the Challenged Statements are MacArthur's fully protected opinions based on disclosed facts, and are not actionable in defamation.

B. The Challenged Statements That Only Refer to BCC Are Not "Of and Concerning" Doeblin

In his motion to dismiss, MacArthur argued that Doeblin cannot state a defamation claim arising out of the two Statements that refer to the Book Culture on Columbus store, not Doeblin personally. Mov. Br. 13 (quoting *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)).

Plaintiff does not challenge this basic defamation principle and acknowledges the "proposition that a defamation plaintiff must himself be the subject of the challenged statements." Opp. 19.

In response, Doeblin admits that the two Statements refer to BCC, conceding that "Doeblin's defamation claim is not based on MacArthur's libel of BCC," and that these Statements are merely a "necessary component" of MacArthur's fraud charge. *Id.* Because these two Statements do not refer to Doeblin, this Court should dismiss the libel claims as to these Challenged Statements on this independent basis.

C. Doeblin Is A Limited-Purpose Public Figure Who Has Not Pled Actual Malice

Defendant also argued that the defamation claims should be dismissed for the separate reason that Doeblin is a limited-purpose public figure who has failed to plead actual malice. In response, Doeblin proffers mostly rhetorical arguments entirely unsupported by case law while misstating the applicable tests for limited-purpose public figure status and actual malice.

1. Doeblin is a limited-purpose public figure because he created and thrust himself to the forefront of the public controversy over independent book stores, including the Book Culture Stores

Doeblin contends that Defendants ignored "decades of authority" in arguing that Doeblin is a limited-purpose public figure, an argument he supports with but one case as an example. Opp. 19-21. But the operative standard is well established. The Court of Appeals has made clear that limited-purpose public figures are "those who 'have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved'" and "[t]he essential element underlying the category of public figures is that the publicized person has taken an affirmative step to attract public attention." Mov. Br. 15 (citing *James v. Gannett Co.*, 40 N.Y.2d 415, 421-22 (1976) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974))). Applying these principles, the *Gannett* court held that a local professional belly dancer

was a limited-purpose public figure for the purposes of accounts of her stage performances, because she "welcomed publicity regarding her performances," had "thrust herself into the public spotlight" and "sought a continuing public interest in her activities." *James*, 40 N.Y.2d at 423. Later decisions have similarly held that a wide variety defamation plaintiffs who sought public attention on various issues are public figures in regard to statements concerning these topics. *Winklevoss v. Steinberg*, 170 A.D.3d 618, 619 (1st Dep't 2019) (investors who "attracted public attention to themselves as investors in start-ups" were limited-purpose public figures with regard to their investing activities); *Armstrong v. Simon Schuster, Inc.*, 280 A.D.2d 430 (1st Dep't 2001) (criminal attorney who repeatedly sought media attention regarding a case in an effort to influence public opinion); *Themed Rests., Inc. v. Zagat Survey*, 4 Misc. 3d 974 (Sup. Ct. N.Y. Cty. 2004) (restaurant that sought to attract the public to its establishment was a limited-purpose public figure for purpose of commentary on its food and service).

Like these plaintiffs, well before the Article, Doeblin intentionally took multiple steps to draw public attention to the plight of independent books stores generally, and Book Culture specifically, publishing an open letter to Mayor DiBlasio, Governor Cuomo, and others, framing the stores' plight as an example of yet another independent small business struggling in the face of large big-box chains. AC ¶¶ 78, 86. As the Article describes, Doeblin "sparked a community-wide conversation" when he began his fundraising campaign for the Book Culture stores, which he publicized via Facebook and in his stores, and sought coverage of it in the local press and on social media. Despite his attempts to minimize these actions, there is no doubt that Doeblin injected himself into an existing public controversy over supporting independent stores over big box stores, and such actions are the definition of taking affirmative steps to attract public attention. *Compare James*, 40 N.Y.2d at 423 (considering plaintiff's economic interest in

attracting public attention even in local venues). Although Doeblin wrings his hands that this analysis unfairly elevates every person who seeks to raise money to limited-purpose public figure status, that is not the case. Opp. 20. Rather, the law has always recognized that those who inject themselves into a public dispute and seek publicity – whether local or national – are public figures in connection with statements connected to that dispute.

The only case Doeblin cites in his attempt to refute this obvious conclusion is readily distinguishable. In *Krauss v. Globe International, Inc.*, the statements challenged as defamatory related to the plaintiff's divorce. 251 A.D.2d 191 (1st Dep't 1998). Because the plaintiff had never sought to attract public attention to this topic, and because the public was thus in no way affected by the divorce, the court found plaintiff was not a limited-purpose public figure for purposes of his divorce. *Id.* at 192-93. Neither proposition is true here. Unlike Krauss, Doeblin spent significant effort attracting public attention towards Book Culture's financial situation and his related fundraising efforts, and entreated the general public to contribute funding. Indeed, other courts have held that a single incident that attracts public attention can render someone a limited-public figure for the purposes of that incident – the key factor is the plaintiff must have sought to attract public attention on the topic *prior* to the incident leading to the challenged statements. *Compare Kellner v. Forward Ass'n*, 2016 WL 740312 (Sup. Ct. N.Y. Cty. Feb. 23, 2016) (plaintiff charged with extortion did not voluntarily thrust himself into controversy by responding to media inquiries). Doeblin did indisputably attempt to seek the attention of the public regarding Book Culture's finances well in advance of the Article, and by all accounts, must be considered a limited-purpose public figure on the topic for the purposes of the Article.

2. Doeblin has not pled that MacArthur made the challenged statements with knowledge of their falsity or reckless disregard for their truth

As Defendant explained in his motion to dismiss, because Doeblin is a limited-purpose public figure, he must plead facts from which it can be inferred that MacArthur made the Challenged Statements with actual malice, i.e., knowledge of the statements' falsity or with serious doubts as to their truth. Mov. Br. 16-17. The Amended Complaint is devoid of such pleadings, in large part because Doeblin mistakes the term of art "actual malice" for spite, ill will, or other nefarious motivations. *Id.* 17. As the Supreme Court has explained, "[a]ctual malice [in the defamation context] should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510-11 (1991).

In response, Doeblin only doubles down on his misunderstanding, averring that the Amended Complaint pleads actual malice because it sets forth MacArthur's "bad faith tactics" and "detail[s] [] that the purpose of MacArthur's statements was to destroy the fundraising efforts and help his buyout talks." Opp. 21. Doeblin pleads no facts to support MacArthur knew relevant facts were false – in contrast to his sleight of hand concerning whether he knew BCC was in financial distress – and instead rests his actual malice allegations on his contention that MacArthur acted in bad faith through ill will and an intent to injure him, he has not pled actual malice. *Cabello-Rondón v Dow Jones & Co.*, 2017 WL 3531551 (S.D.N.Y. Aug. 16, 2017) (finding pleading that defendant "intended to inflict a vicious, deliberate, and calculated assault" on plaintiff did not sufficiently allege actual malice), *aff'd*, 720 F. App'x 87 (2d Cir. 2018); *see*

also Gross v. N.Y. Times Co., 281 A.D.2d 299, 299 (1st Dep't 2001) (evidence that *N.Y. Times'* sources may have borne plaintiff ill will did not establish actual malice).[5]

II.

DOEBLIN HAS EFFECTIVELY CONCEDED HIS TAG-ALONG TORT CLAIMS MUST BE DISMISSED

As a threshold matter, Doeblin does not contest that his tort claims are duplicative of his defamation claims to the extent they arise out of the Defamatory Statements, and must be dismissed on that basis. *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 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).

A. Doeblin's Claim for Breach of Fiduciary Duty Is Refuted By Documentary Evidence

Doeblin's breach of fiduciary claim also fails because Doeblin has no fiduciary duty to BCC or to its other members. As MacArthur explained in his motion to dismiss, a non-managing member of an LLC does not owe a fiduciary duty to the other members or to the LLC itself. Mov. Br. 18 (collecting cases and authority). Yet, BCC's operating agreement expressly

[5] Doeblin does not dispute that the record shows MacArthur firmly believes the opinions he articulated in the Article. MacArthur has sworn 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, paralleling his statements to the *West Side Rag*. Mov. Br. 17. Further, MacArthur's testimony, which Doeblin inexplicably relies on, again reaffirms his firm belief in the truth of the Challenged Statements. Opp. 15-16.

provides that Doeblin is the sole manager of the LLC. McNamara Aff., Ex. 3, at 7.01. Accordingly, Doeblin is not a managing member, and owes no duties. In response, Doeblin cites to *Jones v. Voskresenskaya*, 125 A.D.3d 532 (1st Dep't 2015), but it says nothing different. *Jones* cites directly to *Pokoik v. Pokoik*, 115 A.D.3d 428, 429 (1st Dep't 2014), which reaffirms that a managing member of an LLC (like Doeblin) owes a fiduciary duty to a non-managing member (like MacArthur), but reverse is not the case. Since Doeblin provides no response to this well-settled principle, his fiduciary duty claim fails.

Doeblin makes a last-ditch effort to save his claim by averring that he "entrusted" MacArthur with some management duties by allowing him to contact the landlord on BCC's behalf (Opp. 22). But managers can only delegate their managerial responsibilities if such delegation is permitted by the operating agreement (*see* 1 N.Y. Practice, N.Y. Limited Liability Companies and Partnerships § 1:*8) and BCC's operating agreement is quite clear that Doeblin could only delegate authority to act on behalf of BCC pursuant to a specific resolution expressly authorizing such action duly adopted by the members by an affirmative vote. McNamara Aff., Ex. 3 at 7.01. Doeblin makes no reference to such a resolution because none was passed. Accordingly, because MacArthur was never designated as a manager of BCC and was never properly delegated any management authority, he cannot owe a fiduciary duty to BCC and no claim for breach exists.

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

New York law is clear that in order to state a claim for tortious interference with prospective business advantage, plaintiff must identify a third party with whom the party would have contracted but for the alleged interference in order to state a claim for tortious interference with that relationship. *Moynihan v. N.Y. City Health & Hosps. Corp.*, 120 A.D.3d 1029, 1034

(1st Dep't 2014) (dismissing claim where plaintiff failed to "identify any third party with whom she lost the prospect of doing business"). Doeblin's vague allegations that MacArthur "did in fact interfere with BCC and Doeblin's fundraising efforts" and that "fundraising for BCC unsurprisingly ceased" (AC ¶¶ 145, 105) do not sufficiently identify a third-party with whom Doeblin lost the prospect of doing business, and New York courts routinely dismiss tortious interference claims when a plaintiff makes such vague allegations of interference with an unspecified business relationship. Mov. Br. 20 (collecting cases). Notably, Doeblin was already on notice of this deficiency in his pleadings when he amended his complaint, as MacArthur pointed it out in his first motion to dismiss. Still, Doeblin failed to identify any would-be investors in his Amended Complaint, and continues to wrongly insist that he is not required to identify them now. Opp. 23. This Court has previously dismissed claims for interference with prospective business relations where plaintiff failed to "sufficiently allege which [prospective clients] [the defendant] interfered with" and should do so again here. *RVW Prods. Corp. v. Levin*, 2019 WL 4899056, at *4 (Sup. Ct. N.Y. Cty. 2019) (Masley J.).

Further, this claim independently fails because a tortious interference with prospective business relations requires the plaintiff to establish that defendant accomplished the interference via "more culpable" conduct. *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 189-90 (2004). Specifically, a plaintiff must allege defendant engaged in (a) conduct whose "sole purpose [was] inflicting intentional harm on plaintiffs," or (b) wrongful means "amount[ing] to a crime or an independent tort." *Id.* at 190 (internal quotation marks omitted). Doeblin concedes that MacArthur's conduct was not *solely* motivated by harm toward him, which alone defeats the claim. Opp. 23-24. MacArthur's statements to the *West Side Rag* were merely an attempt to persuade the public not to participate in what he believed to be Doeblin's misleading fundraising,

and 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, 191 (1980), and *Carvel*, 3 N.Y.3d at 191 (both citing Restatement (Second) of Torts § 768, cmt. e; § 767, cmt. c). Nor does Doeblin advance his argument by focusing on what he contends were MacArthur's intent to harm him. Opp. 24. The proper inquiry is whether the defendant's conduct towards third parties is wrongful. *Carvel*, 3 N.Y.3d at 192 ("[T]ortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship."). Accordingly, the actions MacArthur directed towards Doeblin – not a third party – are irrelevant to the analysis. Because MacArthur did not act with the requisite "culpable" conduct, Doeblin's claim for tortious interference with prospective business advantage must also be dismissed.

C. The Complaint Fails To State a Cause of Action for Tortious Interference With Contract

In order to withstand a motion to dismiss a claim for tortious interference with contract, a complaint must aver facts supporting the allegation that the defendant's conduct was the "but-for" cause of the breach, going beyond conclusory statements that third parties cancelled contracts because of defendant's actions. Mov. Br. 22 (citing *inter alia BGC Partners, Inc. v. Avison Young (Canada) Inc.*, 160 A.D.3d 407 (1st Dep't 2018)). The Amended Complaint is insufficient, alleging only that that "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. Doeblin simply cannot make an argument that will transform his conclusory allegations into fact-

supported pleadings, so he merely repeats his insufficient statements that investors beached their contracts after MacArthur's statements. Opp. 23. This claim too must be dismissed.

CONCLUSION

For all the foregoing reasons, and the reasons stated in Defendant's Opening Memorandum, Defendant respectfully requests that Plaintiff's Amended Complaint be dismissed with prejudice.

Dated: New York, New York
February 5, 2021

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 5,520 words.

____/s/ Elizabeth A. McNamara_____