SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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CHRISTOPHER BRUMMER,

Plaintiff,

Index No.: 153583/2015

-against-

BENJAMIN WEY, FNL MEDIA LLC, AND NYG CAPITAL LLC d/b/a NEW YORK GLOBAL GROUP

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Defendants Benjamin Wey, FNL Media LLC, and NYG Capital LLC (collectively "Defendants") respectfully submit this memorandum of law in support of their motion seeking an order:

(i) dismissing Plaintiff Christopher Brummer's ("Plaintiff" or "Brummer") Complaint, dated April 22, 2015 ("Complaint")[1] in its entirety, pursuant to CPLR 3211(a)(1) and (7), or, at a minimum;

(ii) dismissing the Complaint as to Defendant Benjamin Wey in its entirety pursuant to CPLR 3211(a)(8); and

(iii) any other and further relief that this Court deems just and proper.

PRELIMINARY STATEMENT

Plaintiff's Complaint is an attempt to chill the free speech rights afforded by both the United States and New York State Constitutions to individuals who voice their opinions in protest of unjust decisions, matters of public concern, and the individuals responsible for such injustice. In Plaintiff's capacity as a member of FINRA's National Adjudicatory Council, a panel of 14 people who review appeals from the decisions of FINRA to discipline brokers, Plaintiff undisputedly co-authored a 36-page decision, available to the public on FINRA's website, in which Plaintiff affirmed FINRA's lifetime ban from the securities industry of two African-American stockbrokers who had never previously been the subject of any disciplinary proceedings based upon the testimony of a convicted felon and a witness who changed her story several times during FINRA's investigation.

Plaintiff, a limited-purpose public figure, now attempts to silence an internet website called theBlot.com that (1) expressly disclaims to its readers that it prints sensationalist and opinionated contents, and (2) is allegedly owned and controlled by Defendants, including Defendant Wey, who has successfully petitioned to compel FINRA to remove references to him that FINRA improperly included in its original decision to ban these brokers. Yet as a matter of well-settled law decided by both the Court of Appeals and the First Department, the content that these authors have posted to the Blot, a well-known and self-described repository of opinions, cannot state a claim for defamation as a matter of law.

[1] The Complaint is attached as **Exhibit A** to the Attorney Affirmation of Edward C. Wipper, Esq. ("Wipper Aff."), submitted herewith. The exhibits attached to the Wipper Aff. shall hereafter be styled as ("**Ex. _**").

SUMMARY OF ALLEGATIONS

Plaintiff alleges that Defendants own and control a self-styled "sensationalist" internet website called "TheBlot.com" (the "Blot"). In addition to describing its style as "sensationlist," the Blot also disclaims to its readers on its "About Us" page that it is a website on which third party users, including internet journalists, post their own "opinionated content" on, among other things, matters of public concern. A copy of the Blot's "About Us" page, a link to which is contained on every other page of the Blot, including the Posts attached to the Complaint is attached to the Wipper Aff. as **Ex. B.** The Blot also self-styles to readers that its own motto is sex, scandal, sarcasm, and sensationalism. It features pictures of individuals satirically posted, who feel they were "wronged" and who are "pouring out their opinions" and "complaints."

Plaintiff's defamation claims are based solely upon statements contained three internet posts on the Blot, dated January and February 2015, which, on their face were by three separate individuals, Noah Zuss, whose Linkedin.com profile page and other personality profile pages are attached to the Wipper Aff. as **Ex. C** and Thomas Greenfield, and Sam Patterson (the "Posts"). (Compl. Ex. A, C, D, E.) Plaintiff alleges that Defendants published these three Posts to the Blot as part of a larger series of posts that retaliated against Plaintiff and other members of FINRA's regulatory and disciplinary arm for the decisions they wrote in 2013 and 2014, all of which are publicly available on FINRA's website, banning for life two African-American stockbrokers, William Scholander and Talman Harris who prior to that proceeding had unblemished records as brokers. (Compl. ¶ 43.)

Plaintiff alleges that, in retaliation for his writing a December 2014 decision, the Blot began publishing content about him one month later, just as it had published content about FINRA and its judges who were involved in the original decision to ban Mr. Scholander and Mr. Harris.

On their face, in a forum that is devoted to opinionated content, editorials, and sensationalism, the Posts express the authors' opinions that Messrs. Scholander and Harris are innocent and the ban was unjust, not least of which because FINRA's judicial panel, Plaintiff included, Maureen Gearty, who

undisputedly changed her sworn testimony several times during FINRA's investigation and who was closely associated with Ronen Zakai, a person who is presently serving a sentence in prison after his conviction for 11 felonies. (Compl. ¶ 11,16.) In addition, the authors of the Posts also express their opinions about the various individuals at FINRA who participated in and coauthored the decisions made publicly available on FINRA's website resulting in the lifetime ban. The Posts discuss the publicly available information about their close associations, such as Plaintiff's employment by the Milken Institute, an institute associated with and controlled by Michael Milken, an individual known for his felony conviction for securities fraud, Milken's lifetime ban from the securities industry and for being the subject of a recent investigation probing a suspected violation of that ban.

Because the content of the Posts about Plaintiff are unquestionably protected opinions about a public figure in the arena of investor protection and the discipline of licensed securities brokers, the Complaint avoids a substantive discussion of the statements that allegedly defamed Plaintiff until paragraph 33. Prior to that, Plaintiff details statements published on the Blot about other people at FINRA. Underscoring the fact that Plaintiff, a law professor, knows that the Blot's statements about him are protected opinions, his citations to statements on the Blot that discuss him are far less detailed that those about his associates. The Complaint's discussion of the Blot's statements is bulleted, quoted in full, and discussed in depth. But when Plaintiff moves on to discussing statements alleged to be about him and his role in this public controversy, his allegations abruptly shift from the detailed discussion contained in the previous allegations about others to a hodgepodge of soundbites, partial sentences and fragments from the Posts. (*Id.* ¶ 27.)

Plaintiff's blunderbuss of statements from the Blot in the 13 paragraphs of his complaint purporting to discuss statements that defame him can be distilled to four categories:

(i) Name-calling, including statements Plaintiff characterizes as "Race baiting," both in the text of the posts to the Blot and in text superimposed onto satirical pictures of him, calling Plaintiff an "Uncle Tom," a "racist," a "vacuum brain," an "abuser," a "failure," "worthless academic," and a "bookworm" who can't "survive a day in real life." (Compl. ¶¶ 34-35.)

(ii) Loose and imprecise assertions, made after a fulsome discussion of the author's basis for making them, which conclude that "Plaintiff ruined the lives of innocent black men," "many investors lost their life savings thanks to Chris Brummer's endorsement [of the Milken Institute]," Plaintiff was "implicated in a fraud," and that Plaintiff "messed with another man's wife;" (*Id.* ¶¶ 34-36, 42.)

(iii) Quotes attributed to Plaintiff but which, according to Plaintiff, were "fabricated" and never spoken by him; (*Id.* ¶ 35) and

(iv) Statements about Plaintiff's close associates, such as Michael Milken who the Blot accurately describes as "a criminal" and Charles Senatore who the Blot states was "caught on tape lying."

In addition to alleging defamation based upon statements that are, as a matter of law, opinions of the author, Plaintiff's own Complaint pleads ample facts to demonstrate that he is a public figure for purposes of the publicly available decision he authored banning Mr. Harris and Mr. Scholander as well as for many other related matters. Yet the Complaint makes only a conclusory assertion that the statements were made with actual malice. Plaintiff parrots the legal standard for actual malice, but fails to specify any facts demonstrating that the author of these statements knows any of them to be false. Plaintiff also fails to allege facts demonstrating that any of the Defendants is the author of those statements.

SUMMARY OF ARGUMENT

As demonstrated *infra* in Section I, all of Plaintiff's claims must be dismissed because (i) all of the statements posted on the Blot are constitutionally protected statements of opinion and (ii) many of the statements are not about Plaintiff at all.

As demonstrated *infra* in Section II, Plaintiff's defamation claims must be dismissed because Plaintiff is a limited purpose public figure who has failed to plead actual malice with specificity.

As demonstrated *infra* in Section III, Plaintiffs' claims against Defendants, who are the alleged "publishers," are immune under the Communications Decency Act of 1996 because Plaintiff fails to plead facts showing that any of the defendants authored these posts.

As demonstrated *infra* in Section IV, Plaintiffs' third cause of action for Intentional Infliction of Emotional Distress fails because its allegations are duplicative of the defamation claims and the conduct alleged does not satisfy the legal standard for extreme and outrageous conduct.

Finally, as demonstrated *infra* in Point V, at a minimum, Defendant Wey must be dismissed from this lawsuit because Plaintiff failed to serve him in accordance with CPLR 308(2).

ARGUMENT

I. THE COMPLAINT MUST BE DISMISSED BECAUSE THE STATEMENTS ALLEGED ARE NOT DEFAMATORY AS A MATTER OF LAW

A plaintiff in a defamation lawsuit must base his or her claim on false statements of fact, not opinion, and those statements must be about him. *See Golub v. Enquirer/Star Group*, 89 N.Y.2d 1074 (1997). As a matter of law, opinions cannot be proven untrue, and they are constitutionally protected. *Thomas H. v. Paul B.*, 18 N.Y.3d 580, 584, (2012); *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 380 (1977); *Jaszai v. Christie's*, 279 A.D.2d 186, 188 (1st Dep't 2001). To be actionable, a statement must be factual, and thus, capable of being shown to be false, and as such, loose, figurative imprecise, or hyperbolic statements, even if deprecating the plaintiff, are not actionable. *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept 1999). The determination of whether a statement is one of fact or opinion is for the court to undertake on a pre-answer motion to dismiss. *See Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290 (1986).

The New York Court of Appeals distilled the following three factors which courts are instructed to consider in determining whether a statement is one of fact or opinion:

> (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 [to] 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).

The third factor is critical to determining whether the alleged defamatory statements consist of "assertions of facts [or] nonactionable expressions of opinion." *Id*. It is important for a court to "consider the content of the communications as a whole, as well as its tone, forum, and apparent purpose." *Id*. (citation omitted). "Even apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which

an audience may anticipate the use of epithets, fiery rhetoric or hyperbole." *Steinhilber*, 68 N.Y.2d at 294. "Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to 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." *Brian*, 87 N.Y.2d at 51. (internal quotation marks omitted).

Beyond the "immediate context in which the disputed words appear," the New York Court of Appeals requires courts "to take into consideration the larger context in which the statements were published, including the nature of the particular forum." *Couloute v. Ryncarz*, No. 11 CV 5986, 2012 U.S. Dist. LEXIS 20534, at *16-18 (S.D.N.Y. Feb. 15, 2012). Assertions made on the editorial pages of newspapers, in opinion columns, and more importantly, on internet sites that on their face purport to be forums for contributors to place pejorative and salacious content have almost always been held to contain nonactionable opinions and not facts. *See, e.g.*, *Brian*, 87 N.Y.2d at 46 (finding statement to be non-actionable, in part, because it was published on the NY Times Op-Ed page, "a space that is traditionally reserved for the expression of opinion and encouragement of public debate.")

Indeed, internet websites, such as the Blot, which hold themselves out to be repositories of emotionally charged rehetoric and opinion, in particular are a forum whose content Courts have expressly held are most likely to be understood by readers to assume the character of opinions rather than statements of fact is. In the words of the First Department, "[t]he culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a 'freewheeling, anything-goes writing style.'" *Sandals*, 86 A.D.3d at 43. The Court concluded that readers give less credence to allegedly defamatory remarks published there than to similar remarks made in other contexts because the internet is "the repository of a wide range of casual, emotive, and imprecise speech." *Id.* As such, inflammatory and pejorative internet posts, far more salacious and lascivious than any posted about Plaintiff, on websites like "liarsandcheatersrus.com," or the "truthaboutJonWender.com," have all been held to be immune from liability for defamation. Courts have

reasoned that, on their face, they purport to be repositories of opinion and emotionally charged statements that the "average reader would know" were "emotionally charged rhetoric" and not facts. *See, e.g.*, *Wender v. Silberling*, 160505/2013, 2014 N.Y. Misc. Lexis 3048 (Sup. Ct., N.Y. County Jul. 8, 2014); *Sandals*, 86 A.D.3d at 43. Those courts have expressly distinguished posts on these forums from identical comments posted on professional advertising sites, such as yellowpages.com, where the average reader expects to read facts rather than opinion.

Both the First Department's holding in *Sandals* and the Second Department, in *Le Blanc v. Skinner,* 103 A.D.3d 202 (2d Dep't 2012), which relied on *Sandals*, likened the additional protections afforded to the internet to the long-standing protections that have been afforded to forums for public debate such as town meetings, where virtually all communications are deemed to be constitutionally protected opinion. *LeBlanc v. Skinner*, 103 A.D.3d 202, 211 (2d Dep't 2012). As the Second Department in *LeBlanc* wrote:

> Internet forums are venues where citizens may participate and be heard in free debate involving civic concerns. It may be said that such forums are the newest form of the town meeting. We recognize that, although they are engaging in debate, persons posting to these sites assume aliases that conceal their identities or "blog profiles." Nonetheless, falsity remains a necessary element in a defamation claim and, accordingly, only statements alleging facts can properly be the subject of an action. Within this ambit, the Supreme Court correctly determined that the accusation on the newspaper site that the plaintiff was a "terrorist" was not actionable. Such a statement was likely to be perceived as rhetorical hyperbole, a vigorous epithet. <u>This conclusion is especially apt in the digital age, where it has been commented that readers give less credence to allegedly defamatory Internet communications than they would to statements made in other milieus</u>.

LeBlanc, 103 A.D.3d at 211-212 (internal quotation marks and citations omitted)).

THE BLOT'S DISCLOSURES MAKE CLEAR THAT
<u>ITS CONTENTS ARE TO BE UNDERSTOOD BY READERS AS OPINIONS</u>

Just as with the webpages that courts in this Department have previously held to be protected forums for the expressions of opinion, the Blot's "About Us" webpage makes it clear that its posts should be read in the same vain by the readers. Specifically, the Blot's About Us webpage makes plain that (i) its readers should take its content to be expressions of opinion, particularly the opinions of those who feel they have been wronged by others and (ii) its readers should expect the salacious "freewheeling anything

goes style of the internet" that the First Department in *Sandals* has held in protected by both the United States and New York State Constitutions. The Blot's "About us" page states, in pertinent part, as follows:

> The Blot Magazine is a digital publication open platform that brings traditional journalism to the modern day with smart, witty and opinionated content. You, the readers and third parties contribute the articles and we publish them.
>
> If you do not like certain articles, please DO NOT read them and go away, because other readers may like them. . .
> .
> The Blot Magazine's motto: SEX, SCANDAL, SARCASM, SENSATIONALISM.
>
> Our Style: All of our articles should reflect these basic styles: humorous, entertaining, opinionated, sensational and salacious.
>
> THEBLOT MAGAZINE: *THE VOICE FOR THE VOICELESS…THE VOICE FOR THE WRONGED…THE VOICE FOR YOU!*
>
> We build our stories around four S's: sex, scandal, sarcasm and sensation. Our writers are encouraged to assert their voices as much as possible and turn breaking news into breaking editorial.
>
> The final thought: Have you ever been wronged by the media and feel helpless? Do you have a comment prepared on the off chance you'll run into a celebrity? Do you have any complaints about anyone or anything? Let us be your outlet for your opinions, pouring it all out…
>
> TheBlot Magazine, opinionated and fearless. B BRAVE. B BOLD.

The fact that the Blot holds itself out to its readers to be a repository of sensationalist opinions, particularly from those who allegedly were wronged by others is alone enough to mandate that the court conclude that an average reader would assume its contents are constitutionally protected opinions. Accordingly on this basis alone, the Complaint must be dismissed.

NAME CALLING AND "RACE-BAITING" ARE NOT ACTIONABLE AS DEFAMATION

While the overall context of the Blot and the self-styled, sensationalist nature and other disclaimers independently demonstrate that any statements would likely be taken by a reader as expressions of opinion, the fact that so much of Plaintiff's allegations allege defamation based upon name-calling in the text of the Posts and in satirical photographs and collages further underscores that the Complaint must be dismissed. This is so for two reasons: (i) name-calling and race-baiting have long

been held as insufficient to sustain defamation claims; and (ii) they are also indicative to the reader that the context of all of the statements is to be taken as opinion, particularly if it is in response to something that Plaintiff had done or said publicly.

As courts have repeatedly held, name calling—even vulgar name calling—is tolerated and not considered to be defamatory because it is loose, figurative, imprecise, hyperbolic, and would not be viewed as communicating facts about a person. *Ward v. Zelikovsky*, 643 A.2d 972, 983 (N.J. 1994). It has been long held that "to call a person a bigot or other appropriate name descriptive of his political, racial, religious, economic or sociological philosophies gives no action to a claim for defamation." *Raibile v. Newsweek*, 341 F. Supp. 804, 807 (W.D. Pa. 1972). In denying defamation claims based upon insults identical or similar to those alleged in the Complaint, the Courts have stated that "Americans have been hurling epithets at each other for generations. From charging "copperhead: during the Civil War, we have come down to 'Racist,' 'Pig,' 'Fascist,. . . 'Uncle Tom,'" and as such Courts "do not consider words of bigotry and racism to constitute actionable defamation, thus protecting the freedom to express even unpopular, ugly and hateful political, religious and social opinions." *Ward*, 136 N.J. 516.

Indeed, in *Wender v. Siebling*, Justice Singh dismissed claims by an individual who alleged defamation based upon name-calling and epithets hurled on a website called "thetruthaboutJohnWender.com" because the overall context of the website and the fact that it engaged in name calling lead the average reader to believe that the statements contained on it were opinions. *Wender*, 2014 N.Y. Misc. LEXIS 3048 at *15. The name calling in the text of the Posts and in satirical photographs on the Blot bearing Plaintiff's face with the name "fraud," "Uncle Tom" and "racist" mandate that the Court reach the same conclusion about the posts on the Blot about Plaintiff.[2] They are opinions and would be viewed as such by any reasonable reader.

[2] Indeed, the law is so well-settled that Plaintiff, who knows that these are non-actionable epithets, attempts to circumvent this fact with self-serving allegations that "Epithets were not merely hurled in these articles, they were falsely presented as having a basis in fact." (Compl. ¶ 46.) But Plaintiff's conclusory assertions are insufficient to overcome the protections of the Constitution.

The conclusion that these would be so read is further underscored by Plaintiff's allegations that the Posts were "retaliation" by Wey for Plaintiff's 36-page, publicly-available opinion affirming a decision (i) banning Scholander and Harris from the securities industry and (ii) naming Wey as their associate. These are the circumstances similar to those addressed by the First Department's decision in *Sandals*, where it held that the internet is the modern forum akin to town hall meeting where citizens must be allowed to speak freely about matters of public concern. The authors of the Posts clearly disagree with the conclusion reached by FINRA, and in particular by Plaintiff, in a disciplinary proceeding the results of which were made public and is undisputedly a matter of public concern that impacts the lives of two men.

Indeed, the types of statements pleaded by Plaintiff and presented as retaliatory are similar to those that led Justice York, who relied on the holding in *Sandals*, to dismiss a defamation claim by a journalist whose "rival," an internationally renowned expert on HIV/AIDS issues in response to one of his critical articles called him a "liar," a "fraud," and a "criminal." In *Farber v. Jefferys*, 103 A.D.3d 514, 515-16 (1st Dep't 2013), Justice York held that not only would a reader view those statements, in their context, to be opinions because they were in response to a publicly available writing, on a matter of public concern, authored by a plaintiff that the defendant vehemently disagreed. Justice York also added that, in general, the "hyperbolic rhetoric which intends to discredit a rival also is not actionable." *Id.*

Not surprisingly, in affirming that decision, the First Department expressly agreed with Justice York's conclusion, stating that "[P]laintiff's assertion that [the defendant] was biased against her and bore her ill will does not aid her cause." *Id.* at 515-16. Therefore, the name-calling in the Posts published on the Blot are, as a matter of law, statements of the author's opinion, and not actionable. The name-calling further underscores that the tone, apparent purpose and broader context of all of the statements about Plaintiff as any reasonable reader would likely view any of the statements in the Blot about Plaintiff as protected opinion. Accordingly, in light of these facts, this is yet another reason that the Complaint must be dismissed.

IMPRECISE AND AMBIGUOUS ASSERTIONS CANNOT BE DEFAMATORY, PARTICULARLY WHEN THE AUTHOR PROVIDES THE BASIS FOR HIS OPINION

While the name-calling on the Blot precludes any finding that its content would be viewed as anything other than opinion, other statements that Plaintiff complains of are also not actionable because courts have expressly held identical or similar statements to be too imprecise and ambiguous to support a defamation claim. Specifically:

- **Brummer is "implicated in a fraud" and was "courting fraud." (Compl. ¶ 34, Ex. A; Compl. ¶ 42; Ex. D).** *See Brian*, 87 N.Y.2d 46 **(**finding that an article in the New York Times Op-ed section asserting that plaintiff was "linked to a scheme" to take stolen software and use it to gain the inside track" was a non-actionable, imprecise opinion); *Hollander v. Cayton*, 145 A.D.2d 605, 606 (2d Dep't 1988) (finding that statements defendant, the head of staff at a hospital, made that plaintiff-doctor "mismanaged cases" and was "unethical" were not actionable as defamation because they were indefinite, ambiguous and incapable of being objectively characterized as true or false);

- "**In December 2014, Brummer was caught messing with another man's wife." (Compl. ¶ 34, Ex. A).** *See Wender*, 2014 N.Y. Misc. LEXIS 3048 (finding that statements in which defendant called plaintiff a "Sex addict" and "a cheater riddled with addiction" on his blog were non-actionable because they were imprecise rhetoric not capable of being proven true or false);

- Similes and metaphorical hyperbole like **Chris Brummer does "enough bragging to make even a donkey blush;" and he "enjoys blowing up his academic credentials on his website like some hot air balloon flying over Somalia" (Compl. ¶ 34; Exs. A and D).** *See Stoner v. Young Concert Artists, Inc.*, 2012 U.S. Dist. LEXIS 141892, (metaphoric descriptions such as "like an adult repeating the first grade" and "less than stellar" and were non-actionable because they amounted to rhetorical hyperbole).

Accordingly, in as much as the statements that Plaintiff complains of are the kind consistently held by courts to be opinion, the Court should dismiss Plaintiff's defamation claims.

Moreover, conclusions and assertions such as the ones cited above are deemed as a matter of law to be pure opinion when the author discloses the basis for his or her assertions, because the reader is permitted to draw his own conclusions as to their accuracy. *See, e.g., Brian*, 87 N.Y.2d at 54; *Steinhilber*, 68 N.Y.2d at 289; *Flowers v. Carville*, 310 F.3d 1118, 1129 (9th Cir. 2002) (an assertion in a writing is a protected expression of an opinion rather than a statement of fact, when the assertion is "accompanied by a recitation of the facts upon which it is based" or "does not imply that it is based upon undisclosed facts.") *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

For example, the Posts state that Plaintiff "destroyed the lives of two innocent black men" and that he "messed with another man's wife." These facts are opinion because the author discloses that his opinion is based on the following:

- In 2014 Plaintiff affirmed a decision banning two African American brokers from the securities industry;
- FINRA's decision to ban them relied upon testimony from Maureen Gearty, who admitted to changing her story several times during FINRA's investigation and who had close business associations with Ronen Zakai; and[3]
- Prior to the case, Scholander and Harris each had unblemished records as brokers for 20 years and are now unable to work in their profession and support their wives and children.[4]

Yet another example of this is that Plaintiff was "implicated in a fraud," and "that many investors lost their life savings, thanks to Chris Brummer's endorsement." The Posts specifically state that

- Milken is a convicted felon and was banned from the securities industry (Compl., Ex. D);
- Milken is under investigation by the SEC for violating a ban that prohibits him from engaging in any investment-related activities (*Id.)*;
- Milken and his institute are associated with the sale and promotion of "highly risky biotech stocks" which have cost investors their lifesavings (*Id.)*; and
- Despite championing the cause of investor protection and securities regulation, including but not limited to participating in the lifetime bans of other brokers, Plaintiff remains on Milken's institute's payroll and continues to offer the institute his public persona (*Id.*).

Indeed, so transparent is the article about the basis for asserting that Plaintiff is "implicated in fraud" that the author provides a link to the *Fortune Magazine* article that discusses the investigation in full and allows the reader to draw his own conclusions. *Brian*, 87 N.Y.2d at 46 (statement that plaintiff was linked to a scheme involving insider information and stolen software was a claim to be investigated

[3] The fact that Gearty changed her testimony several times in the investigation is plainly set forth in a footnote to at least two opinions written by FINRA in which FINRA judges brushed the inconsistencies aside in order to achieve the results they desired.

[4] Indeed, in a Blot post attached to papers previously submitted to the Court, Talman Harris himself stated that Brummer messed with his pregnant wife and unborn child." *See* Wipper Aff., Ex. D (originally Ex. G. to Broche Aff. in Sup. Of Pl.'s Mt. to Accelerate Def.'s Mt. to Extend Time, Dkt. No. 41)Thus, not only did the Blot fully disclose its source for the assertion, but as a matter of law, it is, on its face, an opinion based upon the statements of the individual wronged by Brummer.

that a reasonable reader would understand as an opinion that needed to be investigated further). Adding links and citations is yet another factor that Courts utilize to preclude a plaintiff for suing for defamation when the offending statements disclose the basis on which they were made and allow the reader to reach his own conclusions. *See Silvercorp Metals Inc. v. Anthion Mgm't. LLC*, 2012 N.Y. Misc. LEXIS 3964 at *4, *28 (Sup. Ct., N.Y. County, Aug. 16, 2012). Thus, regardless of whether Plaintiff or any other reader of the Blot agrees or disagrees with the conclusions the Blot reaches, the statements are nonactionable opinion and protected.

PLAINTIFF'S RELIANCE ON QUOTES ATTRIBTUTED TO HIM IS MERITLESS

Just as disclosing the basis for an assertion makes it pure opinion, the law is equally well-settled is that where a statement purports to be a report or an allegation, it is not actionable because the reader is invited to investigate and draw his own conclusions. *See Wender*, 2014 N.Y. Misc. Lexis 3048 (third-person and first person quotes on blog quotes are not actionable). Plaintiff seeks to recover because of quotes purportedly attributed to him. Fatal to these allegations is that the Blot discloses that these quotes were "allegedly" or reportedly" things Plaintiff said and leave the reader to investigate further and make his own conclusions. Accordingly, they cannot support a claim for defamation. Compl. ¶ 35.

PLAINTIFF CANNOT RECOVER FOR STATEMENTS THAT ARE NOT ABOUT HIM

Knowing that the statements about him are protected opinion and cannot support a claim for defamation, in the same vein that he downplays his public figure status, Plaintiff also attempts to plead defamation based upon statements that are not about him. This is a separate and independent basis to dismiss his lawsuit because a plaintiff in a defamation lawsuit has a heavy burden, even at the pleading stage, of establishing that the statements were actually about him. *See Lihong Dong v Ming Hai*, 108 A.D.3d 599, (2d Dep't 2013). Failure to do so mandates dismissal under CPLR 3211(a)(7) because one of the elements of defamation is that a statement must be about the plaintiff. *Id.*

As noted above, four pages of the Complaint address statements made only about Plaintiff's associates. Naturally, Plaintiff cannot plead a claim for defamation based upon any of these claims. But

this pattern of attempting to allege defamation based on statements about others also pervades the portion of the Complaint that purports to discuss statements that are supposed to be about him. For example, paragraph 45 the Complaint alleges that Defendants have falsely stated that Plaintiff was "caught on tape lying." Yet the actual text of the Post, read in its entirety, belies the allegation that this statement is about Plaintiff. The Post states as follows:

> **Charles Senatore**, Chairman of the racist FINRA National Adjudicatory Council has distancing himself from the FINRA sex scandal. When reached by telephone on a recorded phone line, Charles Senatore bizarrely lied about his affiliation with FINRA. Senatore said he had left FINRA NAC in 2013 therefore he had nothing to do with "burning the black brokers into charcoal" in a December 2014 NAC decision against the two black investment brokers in New York. Charles Senatore lied **and was caught on tape lying**.

See Compl. at **Exhibit D.**

In yet another of Plaintiff's slipshod allegations designed to give the misimpression that he was defamed, Plaintiff falsely assert that Defendants "falsely present[ed] [Brummer] as a criminal." The author of the Posts did not state anywhere that Plaintiff had committed a crime or that he has been convicted of a crime. To the contrary, in the 50 pages of printouts from the Blot that are attached to the Complaint, the authors of the Posts make clear that the only individuals labeled as "criminals" or "convicted felons" in these articles are Michael Milken, an individual who was undisputedly convicted of securities fraud, and Ronen Zakai, who was convicted of 11 felonies. For example, the Posts state that:

- No one knows exactly what Chris Brummer has been told to promote his criminal boss, Michael Milken;
- As of January 2015, Chris Brummer is still on the payroll of convicted felon Michael Milken;
- Chris Brummer enjoys bragging about his close affiliations with Michael Milken, one of the most notorious Wall Street felons in American history.

Compl. Ex. A and D; see also, Compl. Ex. E (stating that Zakai was convicted of 11 felonies.)

As is evident, these statements are not about Plaintiff and they do not label him as a criminal or even imply that he committed a crime. As such, just like the allegations stating that Defendants defamed

Plaintiff by stating that he was "caught on tape lying," they are not false statements about him and he cannot maintain a claim for defamation based upon them. Accordingly, to the extent the defamation claims are based upon such statements, they must be dismissed.

II. THE COMPLAINT ALSO MUST BE DISMISSED, BECAUSE PLAINTIFF IS A LIMITED PURPOSE PUBLIC FIGURE WHO DID NOT SUFFICIENTLY PLEAD ACTUAL MALICE

In addition to failing to plead two critical elements of any defamation claim, Plaintiff's defamation claim fails for the additional reason that he fails to plead actual malice with specific facts rather than conclusions that merely parrot the legal standard for malice. As demonstrated below, pleading actual malice is necessary because Plaintiffs' own allegations and the undisputed documentary evidence establish that Plaintiff is a limited public figure because he has thrust himself into at least two areas of public concern: (i) his role as an NAC judicial officer who purports to protect the "investor public" by disciplining brokers in publicly-published opinions, and in particular in banning Messrs. Harris and Scholander; and (ii) the areas of investor protection, securities regulation, and broker discipline. *New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964) (seminal case establishing that in order for a plaintiff, who is a limited public figure to recover for defamation, he must sufficiently allege that defendant acted with actual malice to recover for defamation); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (noting that compared to a private figure, who may recover under a lower standard of culpability for a defamation claim, a public figure must allege actual malice to recover damages).

A. Plaintiff is a Limited Purpose Public Figure For Purposes of This Lawsuit

Limited-purpose public figures are individuals who inject themselves into a public controversy in an attempt to influence a resolution therein. *See, e.g., Gertz*, 418 U.S. at 344. New York Courts have adopted the same standard applied nationwide in determining whether an individual is a limited public figure with regard to a specific subject. *Lee v. Rochester*, 92/1304, 1997 N.Y. Misc. LEXIS 468 (Sup. Ct., Monroe County, Feb 19, 1997). That determination requires examination of four factors: whether the plaintiff (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. *See Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-137 (2d Cir. 1984); *Biro v. Condé Nast*, 963 F. Supp. 2d 255, 270 (S.D.N.Y. 2013).

Applying these factors, Courts have found many individuals such as regulators, authors, judicial and quasi-judicial officers, and those who testify before governmental agencies and Congress to be limited public figures in the areas in which they author articles, render judicial decisions, profess to have expertise or testify before Congress and other governments. In *Southall v. Little Rock Newspapers*, 332 Ark. 123 (1984), the Arkansas Supreme Court held that a regulator was a limited public figure with respect to the issue of hazardous waste because he conducted interviews with the media on the topic, had been a lobbyist at the state legislature, and by his own admission had been fairly prominent in the public debate over the regulation of hazardous waste. Likewise, in *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 708-709 (4th Cir. 1991), the Fourth Circuit held that a scientist at the National Cancer Institute was a limited-purpose public figure because he had testified before Congress and the EPA, had significant access to media and sources of public health and scientific communications, lectured on various topics related to cancer and the environment, published 35 or more papers, and his findings were discussed in numerous media reports. *Reuber*, 925 F.2d at 708-09. Time and again, the New York Court of Appeals has held that judges and judicial officers are public figures with regard to the opinions they render. *See Rinaldi,* 42 N.Y.2d at 380-81.

Here, Plaintiff's own allegations and the publicly available statements made by both FINRA and Plaintiff amply demonstrate that Plaintiff satisfies all of the factors necessary for the Court to determine that he is a limited public figure with regard to matters of public concern: (i) securities regulation, (ii) investor protection, and, most importantly, (iii) the 36-page opinion he co-authored and FINRA publicly filed on the internet affirming the ban of Messrs. Scholander and Harris from the securities industry.

For example, FINRA's own self-serving promotional marketing materials contain a web page entitled, In Their Own Words: Interview with National Adjudicatory Council Member Christopher Plaintiff. The statements of both FINRA and Plaintiff, which are attached to the Wipper Aff. as **Ex. E**, in an of themselves underscore Plaintiff's status as a limited public figure with respect to his judicial role on the NAC as someone responsible for disciplining and banning members from practicing as brokers. For example:

- FINRA's Chairman and CEO, Rick Ketchum, states that "Prof. Brummer's work on the NAC as 'extremely important to FINRA' and that "by lending his expertise to service on the NAC, **Chris is making a significant contribution to an effective disciplinary process and to advancing FINRA's mission of investor protection."**

- In its introduction to Plaintiff's interview, FINRA further states, "In this interview, Prof. Brummer describes the NAC's role in protecting investors and his views about this **very important public service role**.

- Plaintiff himself goes on to state that "In playing this role, the NAC—and the individuals on it—are deeply involved in the task of investor protection. . . It involves being as fair and understanding as possible, but also recognizing that there are **serious threats to market integrity and to the investing public** that must be addressed fearlessly and vigorously. One of the challenges going forward will be tackling these challenges in an Internet age, and pursuing scurrilous actors seeking to defraud investors and undermine investor confidence with increasingly sophisticated technological tools."

While these statements by Plaintiff underscore that his role in the NAC makes him a limited public figure with respect to the decisions he issues and the individuals who are the subject of the discipline meted out in those opinions, Plaintiff's allegations reinforce that he has thrust himself into the public not just with respect to his work on the NAC but to matters of securities regulation, investor protection, and financial regulation generally.

- Plaintiff alleges that he is an internationally recognized "expert" in matter of public concern such as business organization and securities regulation, international finance, and international law" (Compl. ¶ 17);

- Plaintiff alleges that he makes his views on these topics known to the public as he has "testified before Congress and foreign governments to offer his perspective on international regulatory policy" and published numerous articles on the subject (Compl. ¶ 19);

- Through both his articles, publicly published and available biographies attesting to his public commitment to investor protection and securities regulation, his publicly available decisions as a FINRA judicial officer, and his hosting numerous conferences on investor protection and securities regulation on behalf of the Milken Institute.

The Complaint's own allegations repeatedly demonstrate that these matters for which Plaintiff is a limited public-figure are the same matters that are alleged to be the subject of the defamation. The very first paragraph of the Complaint expressly alleges that all of the Posts were retaliation for the NAC's affirmation of the ban of Messrs. Harris and Scholander. Similarly, the pages and pages of Posts attached to the Complaint discuss in detail the decision, the flimsy evidence it was based upon, the abusiveness and harshness of the penalties meted out, and the authors' clearly expressed viewpoint that the panel members who banned Messrs. Scholander and Harris abused their discretion and power, acted hypocritically, and were biased by, among other things, racial and other prejudices. Accordingly, Plaintiff is a limited public figure for purposed of the statements made about him in the Complaint.[5]

B. Plaintiff Has Failed to Plead Facts Demonstrating Actual Malice

When a plaintiff is a limited public figure, a failure to plead actual malice in a complaint for defamation mandates dismissal. *Mahoney v. Adirondack Publishing Co.*, 71 N.Y.2d 31, 40 (1987); *Jimenez v. United Federation of Teachers*, 239 A.D.2d 265, 266 (1st Dept. 1997). "[S]pecificity in the pleading of . . . actual malice is required." *Themed Restaurants, Inc. v. Zagat Survey, LLC*, 4 Misc 3d 974, 781 N.Y.S.2d 441 (Sup. Ct. N.Y. County 2004). Bald allegations that state mere conclusions parroting the legal standard for malice without specific facts that support those conclusions do not suffice. *See Biro*, 963 F. Supp. 2d at 280; *Adelson v. Harris*, 973 F. Supp. 2d 467, 502 (S.D.N.Y. 2013).

Here, the first and second causes of action for defamation per se and defamation plead only conclusions, alleging that Defendants knew or should have known they were false and that they published them with actual malice. Compl. ¶¶ 61,70. There are no facts offered to support these conclusions. Accordingly, Plaintiff's first and second cause of action for defamation must be dismissed.

[5] Once again, Plaintiff tried to sidestep the law with his own self-serving allegations by stating that he is a private individual and not public figure. Plaintiff cannot simultaneously aggrandize his accomplishments and escape the consequences.

III. SECTION 230(C)(1) OF THE COMMUNICATIONS DECENCY ACT OF 1996 MANDATES DISMISSAL OF THE COMPLAINT

The Court of Appeals has expressly held that Section 230(c)(i) of the Communications Decency Act ("Section 230") bars lawsuits seeking to hold a web site operator liable for its exercise of a publisher's traditional editorial functions such as deciding whether to publish, withdraw, postpone or alter content provided by third parties. *See Shiamili v. Real Estate Grp. Of N.Y.*, 17 N.Y.3d 281, 289 (2011). As the Court of Appeals wrote in *Shiamili*, state and federal courts around the country have generally interpreted Section 230 immunity broadly so as to effectuate Congress's policy choice not to deter harmful online speech through the route of imposing tort liability, for defamation or any other cause of action, on companies that serve as intermediaries for other parties' potentially injurious messages. *Id.* at 290. The CDA does not differentiate between neutral and selective publishers. *Id.* It precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message. *Id.* (*citing Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003)). Congress has made a policy choice by providing immunity even where the publisher has an active, even aggressive role in making available content prepared by others. *Id.* at 289 (*citing Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998)).

To survive dismissal under CPLR 3211, a complaint purporting to plead any cause of action against an individual or entity for publishing allegedly defamatory statements on a website must allege facts showing that the defendant is the "content provider" of a defamatory statement. *See id.*; *see also* Section 230. The plain language of the CDA limits the definition of a "content provider" to someone who is responsible for the "creation and development" of purportedly false information. If a defendant creates and runs a web site that implicitly encourages users to post negative comments about another person, he is not a "content provider" because he is not responsible for creating or developing offensive content. *Id.* Likewise, if a defendant is alleged only to have posted or reposted potentially defamatory information, such as a defamatory article, edited a defamatory article, or posted to a web site selective portions of an

article whose defamatory content was submitted by a third party, he is still immune because these are all part of the traditional editorial functions of a publisher that are protected by the CDA. *Id.*

Here, it is undisputed that all three causes of action are based upon statements published on a website. Thus, the restrictions of the CDA apply. In the 12 paragraphs of the Complaint in which Plaintiff delineates the purportedly defamatory statements, Plaintiff does not allege that any of the defendants are the "content providers" of the defamatory information contained in the articles in question, and it is devoid of any allegation that Defendants contributed to the creation or the development of any of the defamatory content at all. The allegations in the sections of the Complaint, even read in a light most favorable to the Plaintiff, state only that Wey and the LLC defendants "published" the articles and "altered" them from time to time. Compl. ¶¶ 33-45.

Instead, once again, Plaintiff attempts to circumvent the CDA by make a sweeping, conclusory statement that Wey "hide[s]" his authorship of certain articles on the Blot by attaching "fake bylines" to them. Plaintiff then makes the further conclusory assertion that this practice was also used in articles "in which Defendant Wey attacks Brummer." But this allegation, which does not specify for which of the articles Wey allegedly employed this so-called tactic, is flatly contradicted by documentary evidence demonstrating that it is false. Plaintiff claims he was defamed by a Blot post that states on its face that it was authored by Noah Zuss in February 2015. The documentary evidence conclusively demonstrates that Noah Zuss is not a fake byline for Ben Wey at all. Noah Zuss is a real person, with a page on *Linked-in* and a public profile on *Twitter* that expressly states that he is a writer for the Blot, links to which are provided on the actual article. Wipper Aff. Ex. C. Accordingly, without specifying facts demonstrating that Zuss and the other individuals in the bylines of the articles are actually one of the Defendants and not who they purport to be, Plaintiff's conclusory allegations, which are belied by the documentary evidence, fail as a matter of law. *See, e.g., Leder v. Spiegel,* 31 A.D.3d 266, 267 (1st Dep't 2006) (finding that allegations that are conclusory, inherently incredible, or flatly contradicted by documentary evidence are insufficient to support a cause of action). Accordingly, in as much as the only acts alleged against the

Defendants are the traditional roles of a publisher and editor of a web site, *i.e.* publishing and altering content, each of the three causes of action in the Complaint is barred by the CDA and must be dismissed.

IV. PLAINTIFF'S THIRD CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS MUST BE DISMISSED

Equally unviable is Plaintiff's third cause of action purporting to plead a claim for intentional infliction of emotional distress. Plaintiff's claim fails for two independent reasons: (1) it is duplicative of the defamation claims; and (2) its allegations fall far short of the legal standard for pleading extreme and outrageous conduct necessary for a cause of action for intentional infliction of emotional distress.

Where the underlying allegations of emotional distress are based on the same facts as a defamation claim or other traditional tort liability, a plaintiff's cause of action for IIED **must** be dismissed as duplicative. *See, e.g., Fleischer v. NYP Holdings, Inc.*, 104 A.D.3d 536, 539 (1st Dep't 2013); *Akpinar v. Moran*, 83 A.D.3d 458, 459 (1st Dep't 2011); *Restis v. Am. Coal. Against Nuclear Iran, Inc.*, 53 F. Supp. 3d 705, 731 (S.D.N.Y. 2014) (dismissing intentional infliction of emotional distress claim as "duplicative" of a remaining defamation claim). In addition, Courts have also held that racial slurs, name-calling, epithets and similar conduct, particularly over a brief period, does not rise to a level sufficient to plead the "rigorous" and "difficult to satisfy," element of "extreme and outrageous conduct." *Howell*, 81 N.Y.2d at 126; *Herlihy v. Metro. Museum of Art*, 214 A.D.2d 250, 262-263 (1st Dep't 1995) (use of racial or ethnic epithets and allegations of sexual harassment and discrimination at issue in that case were "not so outrageous in character or so extreme in degree as to be wholly intolerable in a civilized community."); *see also, Daniels v. Alvarado*, No. 03 CV 5832, 2004 U.S. Dist. LEXIS 3893, at *6 (E.D.N.Y. Mar. 12, 2004) ("Racial slurs on their own do not constitute conduct so 'extreme and outrageous' in nature as to sustain a claim for intentional infliction of emotional distress.")

Here, the Complaint expressly alleges on its face that the defamation claim and the intentional infliction of emotional distress claim are based on the same conduct. Likewise, calling someone a "fraud" an "Uncle Tom," and a "racist," are exactly the types of "racial epithets" and name-calling that the court

in *Herlihy* found do not rise to the level of outrageous and extreme conduct. Accordingly, Plaintiff's Third Cause of Action for IIED must be dismissed for failure to state a claim.

V. AT A MINIMUM, THE COMPLAINT MUST BE DISMISSED FOR IMPROPER SERVICE OF PROCESS ON DEFENDANT BENJAMIN WEY

Any failure to strictly comply with the service requirements of the CPLR constitutes a jurisdictional defect that requires dismissal under CPLR 3211(a)(8). *See Feinstein v. Bergner*, 48 N.Y.2d 234, 241 (1979); *Kearney v. Neurosurgeons of N.Y.*, 817 N.Y.S.2d 502 (2d Dep't 2006). Where service is defective, dismissal is mandatory even where defendant actually receives notice of the action because "notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court." *Feinstein*, 48 N.Y.2d at 241. The Affidavits of Service on Benjamin Wey and mailed to Wey's "home address." Where, as here, the defendant is a natural person, CPLR 308(2) requires that the plaintiff serve the summons and complaint on the defendant by (1) delivering the summons and complaint to the defendant's actual place of business, dwelling place or usual place of abode, (2) mailing a copy to the defendant's last known residence or actual place of business, and (3) filing proof of such service with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later. See CPLR 308(2). CPLR 306(a) provides that a valid proof of such service must "specify the papers served, the person who was served and the date, time, *address*, or, in the event there is no address, place and manner of service, and set forth facts showing that the service was made by an authorized person and in an authorized manner." See CPLR 306(a) (emphasis added).

Here, in clear contravention of CPLR 306, both Affidavits of Service filed by Plaintiff purport to have been delivered and mailed to Wey's "home address," with delivery to a "Jason P" – described as a "cotenant." But no specific address for Defendant Wey is set forth therein. (Wipper Aff. Ex. F.) As this is an omission that renders the proof of service defective, Defendant Wey has not been properly served pursuant to CPLR 308(2). See *Bank Hapoalim, B.M. v. Kotten Machine Co.*, 151 A.D.2d 374, 377 (1st Dep't 1989) (judgment reversed and action against defendant dismissed because affidavit of service listed

incorrect address for personal service, demonstrating that defendant was not properly served). Accordingly, the Complaint must be dismissed as to Defendant Wey

Moreover, Plaintiff's Summons and Complaint were never served on Wey. See Wey Aff., ¶ 2. Wey denies that any individual named Jason is a "co-tenant" at his home address or that anyone at his home address received a copy of the documents set forth in the Affidavit of Service. See Wey Aff., ¶ 3. Accordingly, this action must be dismissed for lack of personal jurisdictional pursuant to CPLR 3211(a)(8). *Feinstein*, 48 N.Y.2d at 241; *Kearney v. Neurosurgeons of N.Y.*, 817 N.Y.S.2d 502 (2d Dep't 2006).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion in all respects and award them their costs and reasonable attorneys' fees.

Dated: New York, New York
August 10, 2015

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