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

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MICHAEL J. KATZ, M.D. and
MICHAEL J. KATZ, MD, PC,

Plaintiff,

-against-

LESTER SCHWAB KATZ & DWYER, LLP,
PAUL L. KASSIRER, THE TURKEWITZ LAW FIRM,
ERIC TURKEWITZ, SAMSON FREUNDLICH,
JOHN DOE No. 1 THROUGH JOHN DOE No. 10 and
ABC CORP. No. 1 through ABC CORP. No. 10,

Defendants.

_____x

Index No. 153581/2014
IAS Part 55
Motion Sequence #2
Hon. Justice Cynthia Kern

MEMORANDUM OF LAW OF LESTER SCHWAB KATZ & DWYER, LLP AND PAUL L. KASSIRER IN SUPPORT OF THEIR MOTION, PURSUANT TO CPLR 3211(A), TO DISMISS ALL OF THE CAUSES OF ACTION ALLEGED AGAINST THEM

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and Paul L. Kassirer

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Defendants Lester Schwab Katz & Dwyer, LLP ("LSKD") and Paul L. Kassirer ("Kassirer") (collectively, the "LSKD Parties") by their attorneys, Ciampi LLC, respectfully submit this Memorandum of Law in support of their motion to dismiss, with prejudice, all of the causes of action alleged against them in the Verified Complaint dated April 14, 2014 (the "Complaint"), pursuant to CPLR 3211(a)(1) and (7).

The claims for defamation and the remaining tort claims alleged against the LSKD Parties which claim that an email Kassirer sent was defamatory should be dismissed because:

- the email is subject to the "common interest" qualified privilege;
- the email is subject to the "legal/moral duty" qualified privilege;

- the Complaint does not plead "common law" malice or "constitutional malice";
- the email is "pure opinion" or non-actionable opinion;
- the Plaintiff is a public figure or a limited use public figure;
- the email is not defamatory, and, even if it is, it is non-actionable because it is true;
- the email is not false;
- the email is not susceptible to a defamatory meaning;
- there has been no "republication";
- there is no defamation by implication;
- the email is protected by the "single instance rule"
- the remaining tort claims (the Fourth, Sixth, Eighth, and Tenth Causes of Action) should be dismissed because they duplicate the defamation claim; and
- the remaining tort claims each independently do not state cognizable claims.

PRELIMINARY STATEMENT

The Preamble to the New York Rules of Professional Conduct lists the first role of an attorney as "advisor."

The Complaint impermissibly seeks to punish the LSKD Parties with a $200,000,000 lawsuit for doing what lawyers are ethically bound to do – provide legal advice.

The law firm of LSKD and Kassirer, a senior partner of LSKD, are being forced to defend themselves against this action solely because Kassirer provided his legal analysis, opinions, and warnings concerning the negative effect certain judicial findings during Plaintiffs' trial testimony in *Bermejo v. Amsterdam & 76th Associates,* Queens Co. Index No. 23985/09, would have on Plaintiffs' future ability to testify as an expert witness for the insurance defense industry about his conduct of Independent Medical Examinations ("IME's").

The Complaint itself demonstrates that Kassirer's confidential email is protected by qualified privileges as the Complaint alleges that Kassirer, an attorney "well known throughout the insurance defense industry" (Ciampi Aff., Exh. A ¶¶31, 203), sent the email to members of the insurance defense industry (Ciampi Aff., Exh. A ¶¶32, 205), concerning an expert for the insurance defense industry (Ciampi Aff., Exh. A ¶45), and that, as set forth in the accompanying Affidavit of Kassirer sworn to on July 30, 2014, all of the seven (7) recipients of his email were his clients and the clients of LSKD. Five of these emails were sent to executives/officers of insurers; one was to the principals of a third party administrator; and one to the general counsel of a self-insured company.

The Complaint's conclusory allegation in paragraph 206, pled "upon information and belief," that Kassirer sent the emails to hundreds of his contacts is false, unsupportable, and incapable of defeating this motion to dismiss. Conclusory allegations that are made only "upon information and belief" are insufficient to overcome a motion to dismiss. *See Angel v. Bank of Tokyo–Mitsubishi, Ltd.,* 39 A.D.3d 368, 370 (1st Dep't 2007).

Moreover, the allegations of the Complaint, which repeatedly quote at length extremely negative judicial findings and statements concerning Dr. Katz's testimony as an expert defense witness in the *Bermejo* litigation, require dismissal of all of the claims against the LSKD Parties. Rather than demonstrate that there are viable causes of action against the LSKD Parties, the Complaint demonstrates that the advice and analysis stated in Kassirer's confidential email are Kassirer's non-actionable opinion supported by the quoted judicial findings and are not defamatory.

According to the Complaint, the *Bermejo* Court, among other things:

- "called Dr. Katz a liar no less than 25 times" at the July 1, 2013 court proceedings alone (Ciampi Aff., Exh. A ¶108);
- maintained that if Dr. Katz got "caught in a lie on something that's material at trial his future use to anyone is useless . . . . That will follow the doctor forever" (Ciampi Aff., Exh. A ¶79);
- found that, in fact, Dr. Katz did lie (Ciampi Aff., Exh. A ¶103);
- found that Dr. Katz's not doing certain medical tests he testified he conducted "is the perjury" (Ciampi Aff., Exh. A ¶128);
- "would like to put Dr. Katz out of the business of doing IME's period." (Ciampi Aff., Exh. A ¶110); and
- stated "I am going to refer this to the Administrative Judge and the District Attorney of Queens [C]ounty [sic] so they can do whatever they want to do. Perjury is a D felony." (Ciampi Aff., Exh. A ¶122).

A. Dismissal Is Merited Pursuant to CPLR 3211.

The LSKD Parties are entitled to dismissal pursuant to CPLR 3211(a) because the Complaint does not state any viable causes of action against them, and failure to grant the LSKD Parties' motion will undermine the fabric of the attorney-client relationship by chilling attorneys in this state and nationwide from providing legal advice to their clients.

Kassirer's confidential email is protected by, *inter alia*, qualified privileges, is opinion, is not defamatory, is true, and, therefore, is not actionable. The remaining tort claims are also barred because they repeat the failed defamation claim and separately do not state cognizable claims. Accordingly, the Second, Fourth, Sixth, Eighth, and Tenth Causes of Action must be dismissed with prejudice pursuant to CPLR 3211.

Pursuant to CPLR 3211(a)(1), a party may move to dismiss a cause of action on the ground that "a defense is founded upon documentary evidence." Where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law, dismissal under CPLR 3211(a)(1) is warranted. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994); *Scott v. Bell Atlantic Corp.*, 282 A.D.2d 180, 183 (1st Dep't 2001); *see Kamalian v. Reader's Digest Ass'n, Inc.*, 29 A.D.3d 527, 528 (2d Dep't 2006) (defamation claim dismissed). Here, the transcripts of the court proceedings, the confidential Kassirer email, and the Complaint itself demonstrate that there are no causes of action.

Plaintiffs' claims should also be dismissed pursuant to CPLR 3211(a)(7). It is well established that a Court may dismiss a pleading, pursuant to CPLR 3211(a)(7), if the factual allegations of the complaint do not fit within any "cognizable theory." *Leon*, 84 N.Y.2d at 87-88 (1994); *Salvatore v. Kumar*, 45 A.D.3d 560, 561 (2d Dep't 2007)

(same). Here, the Complaint fails to allege any cause of action which can be legally sustained, thus requiring dismissal of all of the claims against the LSKD Parties.

STATEMENT OF FACTS

The Complaint alleges that Dr. Katz is "well known" (Ciampi Aff., Exh. A ¶9), a "premier expert witness[] in the field of orthopedic medicine" (Ciampi Aff., Exh. A ¶41), for the insurance defense industry (Complaint ¶¶45), who is "one of the most sought after expert witnesses in his field" (Ciampi Aff., Exh. A ¶10).

It further alleges that, on April 12, 2013, Dr. Katz testified at trial for the defense in the personal injury action *Bermejo v. Amsterdam & 76th Associates*, which trial was presided over by Justice Duane Hart in the Supreme Court, Queens County. (Ciampi Aff., Exh. A ¶¶12, 13, and 51).

According to the Complaint, Dr. Katz testified about IME's he had performed on the plaintiff on May 23, 2011 and on March 4, 2013, (Ciampi Aff., Exh. A ¶¶ 48-49), and that, when questioned about a "definitive length of time" for the second IME, he could not state how long it was and did not have any notes concerning the length of that IME, (Ciampi Aff., Exh. A ¶¶14, 63).

The Complaint alleges that Justice Hart then asked Dr. Katz about "his custom and practice"; Dr. Katz responded that his custom and practice for the length of IME's was between "ten and 20 minutes." (Ciampi Aff., Exh. A ¶¶15, 65).

The Complaint further alleges that Dr. Katz testified at the April 12, 2013 hearing concerning the seven (7) tests he allegedly performed during the second IME. (Ciampi Aff., Exh. A ¶¶59-61).

As stated in the Complaint, after Dr. Katz's testimony, Plaintiff's counsel disclosed that he had a videotape of the second IME in the *Bermejo* matter which Plaintiff's counsel, in that matter, contended lasted only one minute and fifty-six seconds. (Ciampi Aff., Exh. A ¶¶16, 68-69). As alleged in the Complaint, Justice Hart accepted "in all future proceedings" that the second IME lasted only one minute and fifty-six seconds. (Ciampi Aff., Exh. A ¶72).

As also alleged in the Complaint, upon hearing the evidence concerning the videotape, Justice Hart repeatedly accused Dr. Katz both on and off the record of lying and of perjury. (Ciampi Aff., Exh. A ¶¶18, 75, 77, 79, 84, 98, 102, 103, 104, 105, 108 ["Justice Hart . . . called Dr. Katz a liar no less than 25 times" at the July 1, 2013 morning court proceedings], 121, 128, 130, 132, 135 and 138).

Justice Hart took issue with Dr. Katz's testimony regarding the length of the IME as well as the tests Dr. Katz claimed to have performed during the IME but which the Court concluded could not have been performed in only one minute and fifty-six seconds. (Ciampi Aff., Exh. A ¶¶99, 102, 103, 104, 118, 128, 130, and 135).

The Complaint alleges that Justice Hart made numerous findings concerning Dr. Katz's testimony, including, but not limited to, that Dr. Katz lied and committed perjury (Ciampi Aff., Exh. A ¶¶18, 75, 77, 79, 84, 98, 102, 103 ["Dr. Katz lied. I am finding that he lied."], 104, 105, 108 ["Justice Hart . . . called Dr. Katz a liar no less than 25 times"], 121, 128, 130, 132, 135 and 138); that the record would be unsealed (which in fact happened) and other attorneys should spread the word about Dr. Katz (Ciampi Aff., Exh. A ¶¶19, 23, 95, 103, 123, and 130); that Justice Hart was going to report Dr. Katz to various authorities for perjury (Ciampi Aff., Exh. A ¶¶19, 77, 80, 82, 85, 88, 122, 124,

128, and 130); that Justice Hart wanted Dr. Katz out of the IME business (Ciampi Aff., Exh. A ¶¶94, 105, 110, 120, 122, 123, 124, and 128); that Justice Hart wanted Dr. Katz to contribute to the settlement of the *Bermejo* matter (Ciampi Aff., Exh. A ¶¶19, 75, 77, 79, 85, 87, 92, 97); and that insurance carriers should not and would not use Dr. Katz upon learning of Dr. Katz's testimony and the Court's findings (Ciampi Aff., Exh. A ¶¶19, 104, 105, 115, 121, 123, 128, and 130).

According to the Complaint, Justice Hart's statements were made at court proceedings on April 12, 2013 (Ciampi Aff., Exh. A ¶73); April 15, 2013 (Ciampi Aff., Exh. A ¶¶75-90); April 16, 2013 (Ciampi Aff., Exh. A ¶¶91-96); July 1, 2013 (Ciampi Aff., Exh. A ¶¶97-131); and July 8, 2013 (Ciampi Aff., Exh. A ¶¶132-139).[1]

As set forth in the Complaint, and as confirmed in the July 1, 2013 court transcript, Justice Hart found, among other things, that Dr. Katz lied about the length of time of, and the tests that Dr. Katz performed during, the second IME. (*Compare* Ciampi Aff., Exh. A ¶¶102, 103, 104, 108 ["Justice Hart . . . called Dr. Katz a liar no less than 25 times" at the July 1, 2013 court proceedings], and 130 *with* Ciampi Aff., Exh. B at 5 ll. 2-16; 6 ll. 5-10; at 6 l. 22 through 7 l. 17; at 39 l. 8 through 40 l. 5).

The *Bermejo* proceedings were reported in the New York Personal Injury Law blog dated July 8, 2013. The July 8, 2013 blog post discussed the proceedings before Justice Hart and posited what "legal fallout may result" to Dr. Katz as a result of his testimony and Justice Hart's statements and findings. (Ciampi Aff., Exh. A at Exhibit 1 at 3).

[1] Paragraph 119 of the Complaint further alleges that "[u]pon information and belief, an additional proceeding, of which there is no record, occurred on July 2, 2013, where Justice Hart essentially repeated the same or similar statements concerning Dr. Katz." (Ciampi Aff., Exh. A ¶119).

The July 8, 2013 blog post also discussed the problems that Dr. Katz's testimony and the court's findings posed for insurance carriers, who are Kassirer's clients, and for attorneys for insurance carriers (Ciampi Aff., Exh. A at Exhibit 1 at 3), and quoted a statement from Justice Hart at the July 1, 2013 court proceedings concerning this very point (Ciampi Aff., Exh. B at 6 l. 22 through 7 l. 2).

The July 8, 2013 blog post in particular stated:

> These predictions regarding a wide-ranging insurance fraud scandal are backed up by Justice Hart, who repeatedly referenced the insurance carriers as being part of the problem:
>
> > I can blame the attorneys and the carrier who hired him to do an IME on this case because they should have known what this guy was doing. They should have known. And again the man is making literally millions of dollars doing IME's. Now, he gets caught lying. There is no other way to put it. He lied. There is no other way to make it nice. He said the IME took between 10 to 20 minutes. It took a minute and 56 seconds.

(Ciampi Aff., Exh. A at Exhibit 1 at 3) (emphasis added).

On July 10, 2013, Kassirer sent a confidential email which contained, as evident from the face of the email itself, a hypertext link only to the July 8, 2013 blog post (http://www.newyorkpersonalinjuryattorneyblog.com/2013/07/judge-rips-doc-for-huge-lie-perjury-prosecution-possible-victims-may-number-in-thousands.html) (Ciampi Aff., Exh. A at Exhibit 6), which attached the July 1, 2013 transcript of the court proceedings before Justice Hart (Ciampi Aff., Exh. A at Exhibit 1).

In that confidential email, Kassirer provided his legal analysis and opinion concerning the effect those proceedings would have on the future ability of Dr. Katz to testify as an expert as well as his recommendation about whether his clients should retain Dr. Katz on their matters.

Kassirer's email states in toto:

> I am uncertain to whom I should direct this email, I am sure that you can make sure that it is properly distributed.[2]
>
> Please see the link below re: Orthopedist, DR. MICHAEL KATZ. Needless to say, we do not use Dr. Katz's services, but many carriers and firms do, and what transpired in this case makes him absolutely useless as an examining "expert".
>
> More to the point, even if he is eventually arrested and convicted for perjury, NY law is clear that he is not legally "*unavailable*". Accordingly, whoever has retained him will not be entitled to another IME. As long as he was licensed and was competent at the time of the exam, he can testify and therefore is not "unavailable". The obvious issue is that he will be destroyed on cross-examination for the reasons set forth in the attached article, so that one's choice is to call him and have him crucified or not to call him and receive a missing witness charge. In short, make sure that no one is retaining him on your companies matters. Regards. PLK
>
> http://www.newyorkpersonalinjuryattorneyblog.com/2013/07/judge-rips-doc-for-huge-lie-perjury-prosecution-possible-victims-may-number-in-thousands.html

Kassirer's opinions, analysis, advice, and warnings are confirmed by the allegations of the Complaint, which quote at length Justice Hart's statements and findings concerning Dr. Katz's conduct and ability to continue to testify as an expert.

POINT I

THE EMAIL IS PRIVILEGED AND IS NOT ACTIONABLE

The email is privileged and non-actionable because it is protected by both the "common interest" and the "legal/moral duty" qualified privileges.

These privileges have been given wide application in New York because of our society's interest in fostering the free exchange of ideas among parties sharing a common interest. *Liberman v. Gelstein*, 80 N.Y.2d 429, 437 (1992); *Toker v, Pollak*, 44 N.Y.2d 211, 219 (1978); *Ashby v. ALM Media*, 110 A.D.3d 459, 459 (1st Dep't 2013). As stated

[2] As evidenced in the emails annexed as Exhibit A to the Kassirer Affidavit, not all of the emails contained this initial paragraph.

by the Court of Appeals, "the flow of information between persons sharing a common interest should not be impeded." *Liberman*, 80 N.Y.2d at 437. Accordingly, a communication is qualifiedly privileged where it "'is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned.'" *Toker*, 44 N.Y.2d at 219 (quoting *John W. Lovell Co. v. Houghton*, 116 N.Y. at 526 (1889)).

As alleged in the Complaint, Kassirer, an attorney "well known throughout the insurance defense industry" (Ciampi Aff., Exh. A ¶¶31, 203), sent an email to members of the insurance defense industry (Ciampi Aff., Exh. A ¶¶32, 205) concerning his opinions regarding certain judicial findings in a personal injury action, the *Bermejo* matter, about Dr. Katz, a medical doctor who often testifies as an expert for the insurance defense industry (Ciampi Aff., Exh. A ¶45), which were reported in a July 8, 2013 blog post to which was attached the July 1, 2013 transcript of the court proceedings. The confidential email contained Kassirer's legal analysis, opinions, warnings, and recommendations to Kassirer's insurance defense clients concerning the effect the *Bermejo* court's findings would have concerning Dr. Katz's ability in the future to testify as "an expert witness for the defense." (Ciampi Aff., Exh. A ¶46).

Kassirer's confidential email to his clients is protected by the qualified privilege because Kassirer had a common interest, as an insurance defense attorney, to share this information with members of the insurance defense industry concerning their "own affairs," that is, the litigated matters for which they provide a defense and insurance. Both Kassirer and the recipients of his email, his and LSKD's clients, certainly share an interest in trying to effectuate the best outcome for their litigated matters by retaining

experts who, unlike Dr. Katz, are not subject to cross-examination concerning judicial findings that they lied, committed perjury, should not be an expert, or should be referred to the District Attorney or the Administrative Judge.

Kassirer's confidential email is therefore protected by qualified privileges and, because the Complaint does not sufficiently allege "malice" to overcome these qualified privileges, the Second Cause of Action for defamation must be dismissed.

A. <u>Kassirer's Email is Protected By The "Common Interest" Qualified Privilege</u>.

A "common interest" qualified privilege "extends to a communication made by one person to another upon a subject in which both have an interest." *Liberman*, 80 N.Y.2d at 437. This privilege protects even a defamatory communication on "'any subject matter in which the party communicating has an interest … made to a person having a corresponding interest.'" *Stukuls v. State*, 42 N.Y.2d 272, 278-79 (1977) (quoting *Byam v. Collins*, 111 N.Y. 143, 150 (1888)).

The "common interest" qualified privilege extends to communications from attorneys on any subject matters in which attorneys and clients have a corresponding interest. *See Liberman*, 80 N.Y.2d at 437; *Stukuls*, 42 N.Y.2d at 278-79. Thus, for example, in *Brennan v. Granite Equipment Leasing Corp.*, 60 A.D.2d 877 (2d Dep't 1978), the Second Department dismissed a complaint and held that a qualified privilege applied to allegedly defamatory communications an in-house attorney made to his corporate employer-client. The lawyer opined that, based on his prior dealings with an auctioneer the corporate employer was considering engaging, the auctioneer was "'untrustworthy or dishonest" and "should not be engaged.'" *Id*. at 878.

B. Kassirer's Confidential Email To His Clients Is Protected By the "Legal/Moral Duty" Qualified Privilege.

A statement is subject to the legal/moral duty qualified privilege if it "is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned." *Toker,* 44 N.Y.2d at 219 (quoting *John W. Lovell Co. v. Houghton*, 116 N.Y. at 526 (1889)).

The "legal/moral duty" qualified privilege extends to communications from attorneys to their clients, as attorneys owe clients a legal duty to protect their clients' interests. *See* Restatement (Second) of the Law of Torts §595 and accompanying comment f (1977). In this regard, Section 595 of the Restatement (Second) of the Law of Torts states in pertinent part:

> (1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> > (a) there is information that affects a sufficiently important interest of the recipient or a third person, and
> >
> > (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter . . . .

Comment f of Section 595 specifically states that the qualified privilege extends to attorneys' communications to their clients:

> [T]he rule stated in this Section is applicable to . . . an attorney in making communications . . . to his . . . client, . . . if the communication is made in a reasonable effort to protect the interest that is entrusted to him.

Id. (emphasis added).

Morever, "[i]n some instances the common-interest privilege may overlap the moral-duty privilege, for one may have a 'moral duty to communicate … knowledge and information about a person in whom the[speaker] ha[s] an interest to another who also

has an interest in such person.'" *Chandok v. Klessig*, 632 F.3d 803, 815 (2d Cir. 2011) (quoting *Stukuls*).

Kassirer's confidential email is protected by both qualified privileges. Kassirer and his clients, who are involved in the insurance defense industry, share a "common interest" in a positive outcome for client matters, and Kassirer, by sending the confidential email, also acted pursuant his legal/moral duty by seeking to protect his clients' legal and financial interests by providing his advice to his clients. Indeed, Kassirer sending the confidential email about Dr. Katz's testimony and the *Bermejo* Court's negative findings is no different from Kassirer sending an email to his clients analyzing the effect that a negative legal decision or proposed legislation might have on those matters.

Thus, because Kassirer's statements are qualifiedly privileged, they are not actionable and the Second Cause of Action should be dismissed. *See Chandok*, 632 F.3d at 817 (director of post-doctoral research program had legal/moral obligation to and/or common interest with members of scientific community interested in specific research to inform them that he had suspicions that research associate falsified data concerning that research).

C. Plaintiffs' Bald Allegations of "Malice" Are Insufficient to Overcome the Qualified Privileges.

The Complaint fails to provide any basis to defeat the qualified privileges.

Under New York law, the qualified privileges can only be defeated if Dr. Katz meets his burden of demonstrating that Kassirer sent his confidential email to clients with malice. *See Liberman,* 80 N.Y.2d at 437. Neither conclusory allegations nor "suspicion, surmise and accusation" are enough to defeat a qualified privilege. *Shapiro v. Health Ins.*

Plan of Greater New York, 7 N.Y.2d 56, 64 (1959); *Hollander v. Cayton*, 145 A.D.2d 605, 606 (2d Dep't 1988).

The Complaint's conclusory allegations of "malice" in, for example, paragraphs 32, 205, 236, 239, and 262 are purely surmise and conjecture, and provide neither facts nor details to support these conclusions "nor any explanation of why either [Kassirer] or [LSKD] would have an interest in acting maliciously toward" Dr. Katz. *Orenstein v. Figel*, 677 F. Supp. 2d 706, 711 (S.D.N.Y. 2009) (finding no showing of malice on the part of attorney or his law firm). The latter is particularly true here where, as alleged in the Complaint, Kassirer is an insurance defense attorney (Ciampi Aff., Exh. A ¶¶30-31, 203), his clients and contacts are members of the insurance defense industry (Ciampi Aff., Exh. A ¶¶32, 205), and Dr. Katz has alleged that he testifies on behalf of defendants in insurance related matters 80% of the time (Ciampi Aff., Exh. A ¶45).

Thus, because the Complaint only makes conclusory allegations of malice, the Second Cause of Action for defamation should be dismissed.

D. <u>The Complaint Fails To Plead "Common Law" Malice</u>.

There are only two recognized types of "malice" pursuant to New York law and Dr. Katz cannot demonstrate either. The first is "common law malice." To defeat the qualified privileges by common law malice, Dr. Katz must demonstrate that <u>the only cause</u> for Kassirer's email was spite or ill will towards him. *Liberman*, 80 N.Y.2d at 439 (1992)); *Vitro S.A.B. DE CV. v. Aurelius Capital Management*, 99 A.D.3d 564, 565 (1st Dep't 2012).

The Complaint fails to allege that the only cause for Kassirer's email was spite or ill will or any facts supporting that that was the only cause, and, therefore, Plaintiffs cannot demonstrate "common law malice."

In addition, since the Complaint fails to allege that Kassirer knew or even knew of Dr. Katz prior to sending his email, it similarly cannot support any claim of "common law malice" because there is no basis, whatsoever, to conclude that there was any personal animus between Kassirer and Dr. Katz.

Finally, the text of the email plainly does not support any conclusion that Kassirer's motive was ill will towards Dr. Katz. There is no statement in the email concerning Kassirer's experience with or personal feelings toward Dr. Katz. Instead, the motive of the email, as discerned from a plain reading, was Kassirer's concern for his clients and their legal matters.

E. The Complaint Fails To Plead "Constitutional" Malice.

The LSKD Parties' qualified privilege is also not defeated by constitutional malice. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

As the New York Court of Appeals has stated, to demonstrate constitutional malice, the plaintiff must demonstrate that the "'statements were made with a high degree of awareness of their probable falsity.'" *Liberman*, 80 N.Y.2d at 438. In other words, there "must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication." *Id.* The Court of Appeals in *Liberman* further stated that "there is a critical difference between not knowing whether something is true and being highly aware that it is probably false. Only the latter establishes reckless disregard in a defamation action." *Id.* at 439.

The pleading must but fails to allege that Kassirer: "'in fact entertained serious doubts as to the truth of his publication' or acted with a 'high degree of awareness of [its] probable falsity.'" *Martin v. Daily News L.P.*, 2014 WL 3510973 at *7 (1st Dep't 2014) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). Thus, any allegation in the Complaint that Kassirer made a misstatement in his confidential email to clients or that he should have investigated does not support a finding of "constitutional malice" to overcome Kassirer's qualified privileges.

Furthermore, the Complaint fails to allege that Kassirer "in fact entertained serious doubts as to the truth" of his email. Accordingly, Dr. Katz cannot defeat the "common interest" privilege by showing constitutional malice.

To the contrary, as set forth above, the quotations of the *Bermejo* proceedings, as alleged in the Complaint, confirm that Kassirer's conclusions and advice were accurate and restrained. In addition, the hyperlink to the July 8, 2013 blog post which contained a hyperlink to the July 1, 2013 court transcript further demonstrate that there was no reason for Kassirer to doubt, no less have "serious doubt," concerning the truth[3] of his email. Indeed, because Kassirer's email was "based on documents or articles he had read[, they] . . . thus were not made with knowledge of their falsity or reckless disregard of whether or not they were true." *Konrad v. Brown*, 91 A.D.3d 545, 546 (1st Dep't 2012).

Moreover, events subsequent to the Kassirer confidential email have further demonstrated that it was well founded and not malicious. Attempts by defense counsel in actions in which Dr. Katz was the expert to obtain new IMEs by new experts have been rejected. *See Bermejo*, Second Amended Order, filed July 29, 2013 ("application

[3] As set forth in Point II below, Kassirer's email is his opinion which is not capable of being determined true or false and is, therefore, not defamatory.

sought in the instant motions and applications for a reexamination of plaintiff by an orthopedist of defendants' choosing is denied") (attached as Exhibit C to the Ciampi Affirmation is a copy of the July 29, 2013 Second Amended Order); *accord Atchison v. Metropolitan Enters, Inc.*, 43 Misc. 3d 1207(A) (February 27, 2014, Sup. Ct. Kings County 2014) (attached as Exhibit D to the Ciampi Affirmation).

In *Atchison,* the court denied a motion by defense counsel for a subsequent IME with a new expert in a case in which Dr. Katz has been disclosed as an expert. The Court reached the same conclusion as did Kassirer in his confidential email, stating: "[D]efendants are (understandably) concerned that the hearing conducted by Justice Hart may be used to attack Dr. Katz's integrity and/or credibility at trial." *Id.* at *5-6.

In short, because Plaintiffs' Complaint does not sufficiently allege common law malice or constitutional malice, the LSKD Parties' qualified privileges are not overcome and the Second Cause of Action for defamation must be dismissed.

POINT II

THE EMAIL CONSTITUTES NON-ACTIONABLE OPINION AND IS ALSO NOT DEFAMATORY, AND, EVEN IF IT IS DEFAMATORY, IT IS TRUE AND, THEREFORE, NOT ACTIONABLE

A. The Kassirer Email is Non-Actionable "Pure Opinion".

Expressions of opinion are deemed privileged and cannot, as a matter of law, under any circumstance, be the subject of an action for defamation. *Steinhilber v. Alphonse,* 68 N.Y.2d 283, 286 (1986). Moreover, whether a particular statement constitutes an opinion is a question of law. *Mann v. Abel,* 10 N.Y.3d 271, 276 (2008); *Steinhilber,* 68 N.Y.2d at 290.

In this case, Kassirer's confidential email to clients is "pure opinion" which is not actionable and presents an additional basis meriting dismissal of the Complaint.

Communications, such as Kassirer's email, which refer to, attach, or recite the underlying statements upon which they rely, are "pure opinion" which, as a matter of law, are not actionable. In *Steinhilber*, the New York Court of Appeals affirmed a dismissal of a defamation claim because it found that the statements were "pure opinion." The Court of Appeals defined "pure opinion" as "a statement of opinion which is accompanied by a recitation of the facts upon which it is based." *Id.* at 289 (emphasis added).

Similarly, in *Konrad v. Brown*, 91 A.D.3d 545 (1st Dep't 2012), the First Department affirmed the dismissal of a complaint for defamation and concluded, *inter alia*, that, in light of "defendant's reference to the videotape and transcript of [the administrative hearing]," the alleged defamatory statement was non-actionable pure opinion. *Id.* at 546 (emphasis added).

Likewise, in *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32 (1st Dep't 2011), the First Department found that alleged defamatory statements, which were in an email, were non-actionable "pure opinion" because the email, like Kassirer's, included a hyperlink text to which it was referring, and thus "is 'accompanied by a recitation of the facts upon which it is based' and therefore qualifies as 'pure opinion' under the *Steinhilber* analysis." *Id.* at 43; *accord Rakofsky v. Washington Post*, 39 Misc. 3d 1226(A) at *14 (Sup. Ct. N.Y. County 2013) (attorneys' statements on internet about ineffective assistance of counsel by another attorney who withdrew from murder case mid-trial, which statements included hypertext links to Washington Post articles on which

statements were based and which articles also quoted judge's statements during murder case concerning the attorney, were non-actionable opinion).

In *Kamalian v. Reader's Digest Ass'n, Inc.,* 29 A.D.3d 527 (2d Dep't 2006), the First Department dismissed a complaint and found that a reporter's assertions in an article that an orthopedic surgeon was "inept or dangerous" were non-actionable "pure opinion" because the article recited facts on which based. *Id.* at 528.

Similarly, Kassirer's confidential email is also non-actionable "pure opinion" because it is "'a proffered hypothesis that is offered after a full recitation of the facts on which it is based . . . [and thus] readily understood by the audience as conjecture.'" *Silvercorp Metals Inc. v. Anthion Management LLC,* 36 Misc. 3d 1231(A) at *8 (Sup. Ct. New York County 2012) (quoting *Gross v. New York Times Co.*, 82 N.Y.2d 146, 154 (1993)).

In particular, Kassirer's email is pure opinion because he:

- instructs his recipients to "[p]lease see the link below . . . .";
- refers to "what transpired in this case";
- further states "[t]he obvious issue is that he will be destroyed on cross-examination for the reasons set forth in the attached article" (emphasis added); and
- includes a hyperlink text to the July 8, 2013 blog post to which Kassirer was referring which itself contains a hyperlink to the transcript of the July 1, 2013 court proceedings during which, as the Complaint alleges, the Court found that Dr. Katz lied (Ciampi Aff., Exh. A ¶103).

Accordingly, Kassirer's confidential email is "pure opinion" and is not actionable.

B. The Context of the Kassirer Confidential Email Further Demonstrates That It Is Non-Actionable Opinion.

Even if this Court were to determine that Kassirer's email was not "pure opinion," it still should find that the email is non-actionable because it is protected opinion and merits dismissal.

In determining whether the allegedly defamatory statement is opinion, the Court of Appeals has instructed that "courts must consider the content of the communication as a whole, as well as its tone and apparent purpose" and in particular "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.'" *Mann*, 10 N.Y.3d at 276 (quoting *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 254 (1991)).

In the present case, Kassirer, as alleged in the Complaint, is writing to members of the insurance defense industry concerning his opinion about the effect judicial findings, as reported in the blog, will have on the ability of Dr. Katz to continue to act as an expert. Kassirer's confidential email was made in the context of judicial findings during the *Bermejo* trial that Dr. Katz lied, was a perjurer, should not serve as an expert and should be reported to the District Attorney and the Administrative Judge. The confidential email is Kassirer's warning to clients, based upon his best projection of future events, that retaining Dr. Katz as an expert would harm them. In this context, the confidential email is opinion.

The New York Court of Appeals has specifically held that such predictions of future events are non-actionable "opinion." *See Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 255 (1991) (expressions such as "might well be" or "could well happen"

were opinion); *accord Silverman v. Clark*, 35 A.D.3d 1, 16 (1st Dep't 2006) (attorney's statements to former clients that, as new attorney, departing attorney "may attempt to settle cases for less than its full value" is statement of "potential future conduct" and thus non-actionable opinion).

Thus, Kassirer's statements concerning future events that (i) "even if he is eventually arrested and convicted for perjury," (ii) "what transpired in this case makes him absolutely useless as an examining 'expert'" and (iii) "he will be destroyed on cross-examination" are not actionable.

Accordingly, the Kassirer email is non-actionable opinion, and the Second Cause of Action for defamation must be dismissed.

C. The Email Is Not Defamatory And, Even If It Was, Is Not Actionable.

The claims against the LSKD Parties should also be dismissed because the Kassirer confidential email is not defamatory and, therefore, not actionable, and, even if it was defamatory, is not actionable because it is true.

As a preliminary matter, the Complaint fails because it lacks the requisite legal specificity. First, it alleges merely "upon information and belief" that Kassirer sent his email to "hundreds of his contacts in the insurance defense industry" but it fails to allege to whom. (Ciampi Aff., Exh. A ¶206). The attached email is redacted (without explanation), omits the sender, the recipient, the subject matter line, or the date and the Complaint wholly fails to allege, as required, "the time, place and manner of the false statement and to specify to whom it was made." *Dillon v. City of New York,* 261 A.D.2d 34, 38 (1st Dep't 1999); *Epifani v. Johnson*, 65 A.D.3d 224, 233 (2d Dep't 2009)

(defamation complaint must "allege the time when, place where, and manner in which the false statement[s] w[ere] made, and specify to whom [they] were made").

In fact, the Complaint inconsistently describes the single email as being sent on July 9, 2013 (Ciampi Aff., Exh. A ¶¶35, 211); July 12, 2013 (Ciampi Aff., Exh. A ¶¶206, 232, 233, 234, 236); and July 12, 2014 (Ciampi Aff., Exh. A ¶224) (emphasis added).

Furthermore, the Complaint does not establish the requisite elements for defamation under New York law, that is, "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se." *Dillon*, 261 A.D.2d at 38.

1. The Email Is Not False.

Kassirer's statements in his confidential email are true or substantially true as demonstrated by the transcripts of the April 2013 and July 2013 proceedings in the *Bermejo* matter and thus is not actionable. In *Konrad*, 91 A.D.3d at 546, the First Department affirmed an order dismissing a complaint and held, under similar facts, that the "assertion that plaintiff had made a false statement before an administrative tribunal was substantially true, as shown by the video and transcript of the hearing," and truth was thus a complete defense precluding defendant's liability for statements in a letter to the editor "based on documents or articles he had read" about the proceedings. *Id.* at 546 (emphasis added).

Likewise the LSKD Parties have a complete defense as Kassirer's confidential email is supported by the Complaint itself with its detailed quotations to the April 12,

2013, April 15, 2013, April 16, 2013, July 1, 2013, and July 8, 2013 court transcripts (Ciampi Aff., Exh. A), and the July 8, 2013 blog posts (Ciampi Aff., Exh. A at Exhibit 1).

Thus, the defamation claim against the LSKD Parties should be dismissed.

2. Even If The Email Was Defamatory, It Is Non-Actionable Because It Is True.

Even if Kassirer's email can be deemed to be defamatory, it cannot be actionable because the statements contained in it were true.

In *Moreira-Brown v. City of New York*, 109 A.D.3d 761 (1st Dep't 2013), the court affirmed an order granting summary judgment dismissing the defamation claims of a political candidate who alleged that police statements about him were defamatory because all of the statements were true:

> Summary judgment was properly granted in this matter where plaintiff, a public figure, alleges that defendant Detective Rivera made false and defamatory statements about him to the press. The record demonstrates that all of the statements attributed to Rivera about plaintiff were true, namely, that plaintiff was being sought for questioning; that repeated efforts to locate plaintiff had been unsuccessful; and that the case involved an allegation of rape. The fact that these truths may have been fatal to plaintiff's bid for public office have no bearing on whether they were legally defamatory.

Id. at 761.

Here, Kassirer's email did nothing more than report on events that occurred in a public courtroom and statements made by a Justice of the Supreme Court, Queens County. Nowhere in his complaint does Dr. Katz claim that the events discussed in Kassirer's email did not happen. Indeed, as demonstrated above, Dr. Katz's complaint repeats the very statements he now attempts to claim are defamatory.

Accordingly, because the statements contained in the Kassirer email are true, the complaint should be dismissed because they are true and, therefore, not actionable.

3. **The Email Is Not Susceptible To A Defamatory Meaning.**

In addition, Kassirer's statements are "not susceptible to a defamatory meaning" and, therefore, are not actionable.

"In evaluating whether a cause of action for defamation is successfully pleaded, [t]he words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader." *Dillon*, 261 A.D.2d at 38; *see Lenz Hardware, Inc. v. Wilson*, 94 N.Y.2d 913 (2000). Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance. *Aronson v. Wiersma*, 65 N.Y.2d 592, 593 (1985). In addition, "[c]ourts will not strain" to find defamation "where none exists." *Cohn v. National Broadcasting Co.*, 50 N.Y.2d 885, 887, *cert. denied*, 449 U.S. 1022 (1980).

"[A] defamatory statement [is] one that exposes an individual 'to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or ... induce[s] an evil opinion of one in the minds of right-thinking persons, and ... deprives one of ... confidence and friendly intercourse in society.'" *Celle v. Filipino Reporter Enters., Inc.*, 209 F.3d 163, 177 (2d Cir. 2000) (quoting *Kimmerle v. New York Evening Journal*, 262 N.Y. 99, 101 (1933)).

An "average reader" would conclude that Kassirer's confidential email fails to expose Dr. Katz to the legally required "hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or ... induce[s] an evil opinion."

To the contrary, the plain reading of the entire email is that Kassirer is expressing his opinion, to his clients, concerning the effect the judicial findings and statements

concerning Dr. Katz's testimony in the *Bermejo* litigation would have on Dr. Katz's future ability to effectively act as an expert witness. The email reaches a conclusion that, based upon Dr. Katz's testimony and the *Bermejo* Court's findings and statements concerning that testimony, and, based upon the reasons set forth in the hyperlink, Dr. Katz's effectiveness as an expert for the insurance defense industry will be sharply undermined and that, as a result, he should not be retained by Kassirer's clients, who are insurance carriers. Attorneys and insurance defense professionals -- the "average reader" in this case -- reading Kassirer's email in context would believe that Kassirer was providing his legal analysis/opinion of the matter.

4. A Sentence-By-Sentence Analysis Demonstrates That There Is No Defamation.

In addition, even a line-by-line analysis of Kassirer's email demonstrates that it is not defamatory.

The first sentence of the email does not even mention Dr. Katz and cannot be considered defamatory as it merely says: "I am uncertain to whom I should direct this email, but I am sure that you can make sure that it is properly distributed."

The second sentence is also not defamatory and merely states: "Please see the link below re: Orthopedist, DR. MICHAEL KATZ." Indeed, as set forth above, this sentence demonstrates that the entire email is not defamatory as it invites the recipient to "see the link" and to determine for themselves whether Kassirer's opinions are well based.

The third sentence states that LSKD does not use Dr. Katz but that "many carriers and firms do" and states in full: "Needless to say, we do not use Dr. Katz's services, but

many carriers and firms do, and what transpired in this case makes him absolutely useless as an examining'expert.'" (Emphasis in original).

While the Complaint alleges that this statement is untrue as it regards the use by LSKD of Dr. Katz (which, as set forth below, is not the case), regardless, it is not defamatory as the fact that LSKD does not use Dr. Katz but that "many carriers and firms do" does not expose Dr. Katz to the requisite "hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or ... induce[s] an evil opinion."

In addition, Kassirer's conclusion that "this case makes him absolutely useless as an examining expert" is Kassirer's conclusion based upon the virtually identical judicial findings in *Bermejo* and the reportage in the attached article. As stated at paragraph 79 of the Complaint, the *Bermejo* Court made almost the identical statement at the April 12, 2013 proceedings:

> So the question is, do you want to settle it? I would suggest, and that's why everybody's here and even if the doctor wants to contribute because clearly…The doctor's career doing IME's might be over. If he gets caught in a lie on something that's material at trial his future use to anyone is useless, correct? That will follow the doctor forever. (emphasis added)

(Ciampi Aff., Exh. A ¶79). As the Complaint itself alleges, Justice Hart concluded that Dr. Katz lied at trial. (*See, e.g.*, Ciampi Aff., Exh. A ¶103).

Furthermore, the Complaint never states or alleges facts supporting that Kassirer knew the first clause in this sentence was untrue at the time he made this portion of the statement or that he had a high degree of awareness of its possible falsity. Moreover, on its face, all that Kassirer states is that LSKD does not "use" Dr. Katz but that "many" carriers and firms do. Rather than being defamatory, this statement simply is comparing

LSKD's use of Dr. Katz with other insurance carriers and law firms. This statement, therefore, does not hold Dr. Katz up to "hatred, shame or obloquy" and is not defamatory.

Indeed, a plain reading of the Complaint demonstrates that it is the Complaint's allegations concerning this statement in the email that are misleading. The Kassirer email, concerning LSKD, states that LSKD does not "use" Dr. Katz. The word "use" is in the present tense. It therefore, reflects the present, not past intention of LSKD. The allegations concerning falsity, however, all use the past tense and therefore cannot establish any falsity by Kassirer and in fact are themselves misleading. For example, paragraph 211 of the Complaint alleges: "Kassirer's statement that 'we do not use Dr. Katz' is patently false as Kassirer's firm Lester Schwab had specifically retained and relied on Dr. Katz as an expert witness both before and after Kassirer sent his July 9, 2013 email. In fact, one of Kassirer's partners planned to use Dr. Katz as an expert witness for a trial that was scheduled to go forward in August 2013." (Ciampi Aff., Exh. A ¶211) (emphasis added). Accordingly, all that is alleged in the Complaint is that in the past LSKD "retained" "relied on" and "planned" to use Dr. Katz. These allegations do not contradict Kassirer's email that as of the date of his email LSKD did not "use" Dr. Katz. The Complaint does not include any allegations that LSKD in fact did use Dr. Katz as an expert after the judicial findings in *Bermejo* concerning Dr. Katz. Accordingly, Kassirer's email is not untrue even as alleged in the Complaint.

The fourth, fifth and sixth sentences discuss Dr. Katz's possible legal "unavailability" and are not defamatory. The sentences state: "More to the point, even if he is eventually arrested and convicted for perjury, NY law is clear that he is not legally '*unavailable*'. Accordingly, whoever has retained him will not be entitled to

another IME. As long as he was licensed and was competent at the time of the exam, he can testify and therefore is not 'unavailable'."

As Kassirer's hypothetical is posed in the context of numerous judicial findings cited in the Complaint in which the *Bermejo court* stated that Dr. Katz lied under oath when he testified concerning the length of and the tests performed during an IME and that the *Bermejo* court was going to refer Dr. Katz to the authorities as a result, arguably Dr. Katz "could be subject to prosecution" for perjury, and, thus Kassirer's statements are not defamatory. *See Galasso v. Saltz*, 42 A.D.3d 310, 312 (1st Dep't 2007) (where plaintiff could be subject to prosecution for felonious criminal mischief for encroaching on defendant's property rights, defendant's statements referring to plaintiff's possible criminal conduct were not defamatory).

Furthermore, Kassirer's conclusion that Dr. Katz would not be deemed "unavailable" thereby requiring him to testify is well supported by established case law. *Giordano v. Wei Xian Zhen*, 103 A.D.3d 774, 774 (2d Dep't 2013) (fact that examining physician was arrested and surrendered medical license subsequent to examination and note of issue filing does not justify additional examination); *Carrington v. Truck-Rite Dist. Sys. Corp.*, 103 A.D.3d 606, 607 (2d Dep't 2013) (same); *Schissler v. Brookdale Hopsital Center*, 289 A.D.2d 469, 470 (2d Dep't 2001) (fact that examining physician was subjected to professional discipline subsequent to examination and note of issue filing does not justify additional examination); *Atchison v. Metropolitan Enters., Inc.*, 43 Misc. 3d 1207(A) at *5-6 (Sup. Ct. Kings County 2014) (denying motion to permit defense counsel to have witness other than Dr. Katz re-examine plaintiff and testify on their behalf).

The seventh sentence is not defamatory as it provides Kassirer's opinion and legal analysis about the Dr. Katz's future effectiveness as a witness and Kassirer's agreement with the reasons set forth in the July 8, 2013 blog post. The email states: "The obvious issue is that he will be destroyed on cross-examination for the reasons set forth in the attached article, so that one's choice is to call him and have him crucified or not to call him and receive a missing witness charge."

The eighth sentence is also not defamatory. There is nothing pejorative stated about Dr. Katz. Instead the sentence is Kassirer's advice to his clients to not hire Dr. Katz and states: "In short, make sure that no one is retaining him on your companies matters."

5. Kassirer's Email Is Not a "Republication".

Additionally, any claim that LSKD or Kassirer are liable in defamation for "republishing" the blog, as seemingly alleged in paragraph 234 of the Complaint, must also fail because, as a matter of law, Kassirer's attachment of the blog to his email and reference thereto is not republication. *Firth v. State of New York*, 98 N.Y.2d 365, 370 (2002) (dismissing defamation claim and applying single publication rule to internet website); *Klein v. Biben*, 296 N.Y. 638, 639 (1946) (reference to alleged defamatory article was not republication); *Haefner v. New York Media, LLC*, 27 Misc. 3d 1208(A) at *5 (Sup. Ct. N.Y. County 2009), *aff'd,* 82 A.D.3d 481 (1st Dep't 2011) (dismissing defamation claim stating "New York law provides that the inclusion of internet hyperlinks to the original article in two later articles does not give rise to republications") (emphasis added).

6. <u>There Is No Defamation By Implication</u>.

To the extent the Complaint is claiming "defamation by implication," it also fails.

The First Department recently dismissed a complaint which sought damages pursuant to "defamation by implication," stating that "[t]o survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference." *Stepanov v. Dow Jones & Company, Inc.*, __ A.D.3d __, __; 987 N.Y.S.2d 37, 44 (1st Dep't 2014).

The Kassirer email is comprised of his advice and opinions to his clients which are not capable of truth or falsity. For example, Kassirer's conclusion that "Dr. Katz was useless as an expert witness" (as alleged in ¶257 of the Complaint to support a claim of defamation by implication) is his opinion which was shared by the *Bermejo* court (as quoted in ¶79 of the Complaint). Moreover, to the extent the Court were to determine that portions of the Kassirer email are capable of truth or falsity, the email is true or substantially true and, as also set forth above, in accord with the *Bermejo* court's findings as set forth in the Complaint and in the quoted transcripts. Accordingly, the Complaint cannot sustain a claim for defamation by implication.

Furthermore, the Kassirer email neither "imports a defamatory inference" nor suggests that Kassirer "intended or endorsed that inference." The email instead relays to Kassirer's clients his prediction about the effect the *Bermejo* court's findings will have on Dr. Katz's future ability to testify as an expert. For example, the Kassirer email states:

"even if he is eventually arrested and convicted for perjury" -- which the Complaint at ¶258 refers to as implying that Dr. Katz was "charged with and convicted of criminal perjury" -- does not import a "defamatory inference" to Dr. Katz. To the contrary, it merely reflects the *Bermejo* court's repeated admonitions to Dr. Katz and his lawyers, as often alleged in the Complaint, that it was the Court's intention to refer Dr. Katz to the District Attorney.

In addition, there is nothing in the email to suggest that Kassirer endorses a defamatory inference. In fact, he attaches the internet blog which attaches the July 1, 2013 court transcript enabling his clients to read the attachments, draw their own conclusions, and act accordingly.

Accordingly, the email is not defamatory and the Second Cause of Action for defamation must be dismissed.

7. <u>The "Single Instance Rule" Also Bars The Defamation Claim</u>.

The email is also not actionable because of the "single instance rule." Under New York's "single instance rule," a claim for defamation *per se* is not actionable "'where a publication charges a professional person with a *single error in judgment,* which the law presumes not to injure reputation." *DiFolco v. MSNBC Cable L.L.C.*, 831 F. Supp. 2d 634, 649 (S.D.N.Y. 2011) (quoting *Armstrong v. Simon & Schuster, Inc.,* 85 N.Y.2d 373, 379 n. 5 (1995)). Indeed, "'[u]nder [the single instance] rule ... a statement charging an individual with a *single dereliction* in connection with his or her trade, occupation, or profession does not necessarily charge that party with general incompetence, ignorance or lack of skill and is not deemed actionable . . . ." *Id.* (quoting *Bowes v. Magna Concepts, Inc.*, 166 A.D.2d 347, 348 (1st Dep't 1990)). Where the alleged defamatory statements

"refer to only one event," the statements are not actionable under New York law. *Id.* Here, Kassirer's email refers to only one "event" or "instance" of Dr. Katz's "dereliction," that is, Dr. Katz's testimony concerning the IME in the underlying *Bermejo* lawsuit presided over by Justice Hart. Because the email involves only a "single error in judgment" by Dr. Katz, the email falls within the "single instance rule" and cannot sustain a claim for defamation.

D. Dr. Katz Cannot Establish "Constitutional Malice," And, Because He Is A Public Figure Or Limited Use Public Figure, His Claim For Defamation Must Fail.

As set forth in Point I, Dr. Katz cannot meet the standard of demonstrating that, pursuant to New York law, the Kassirer email was sent with "constitutional malice." Because Dr. Katz is a "limited use" public figure, however, he is required to demonstrate "constitutional malice" to sustain his defamation claim and he cannot. *See Konrad*, 91 A.D.3d at 546. Thus, his claim for defamation must be dismissed for this reason as well.

According to his own Complaint, Dr. Katz is a "limited use" public figure as an expert witness who is "well known," "one of the most sought after expert witnesses in his field" and "one of the premier expert witnesses in the field of orthopedic medicine." The Complaint in particular alleges that "Michael Katz, M.D. is an accomplished, well-known . . . physician." (Ciampi Aff., Exh. A ¶9) (emphasis added). It is also stated in the Complaint that "Dr. Katz has testified in countless personal injury and medical malpractice cases as an expert witness, most often for defendants, over the past twenty years. He has a unique ability to communicate his medical findings to juries, and was, at one point, one of the most sought after expert witnesses in his field." (Ciampi Aff., Exh. A ¶10) (emphasis added). It further states that "Dr. Katz [was] . . . one of the premier expert witnesses in the field of orthopedic medicine by the time he was retained in the

Bermejo case." (Ciampi Aff., Exh. A ¶41) (emphasis added).

Parties who are "well known," as Dr. Katz has alleged in the Complaint (and thus admitted), and which must be considered, in the context of this motion, to be true, have been found to be public figures or "limited use" public figures who cannot sustain a claim for defamation without a showing of "actual malice," which is absent here. *See, e.g.*, *Chandok,* 648 F. Supp. 2d 449, 459 (S.D.N.Y 2009), *aff'd*, 632 F.3d 803 (2d Cir. 2011) (doctor who admitted she was "well known" in the plant biology community was "limited use public figure"); *Celle v. Filipino Reporter Enters., Inc.*, 209 F.3d 163, 177 (2d Cir. 2000) (self-characterization of radio commentator as "well known radio commentator" within community transformed him into "public figure").

Similarly, courts, nationwide, have found experts such as Dr. Katz to be public figures who are required to demonstrate constitutional malice to sustain a claim for defamation. *Hatfill v. New York Times Company*, 488 F. Supp. 2d 522, 529-31 (E.D. Va. 2007), *aff'd,* 532 F.3d 312 (4th Cir. 2008) (biological weaponry expert); *Townshend v, Hazelroth,* 875 F. Supp. 1293, 1300 (E.D. Mich. 1995) (toolmark expert); *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) (expert on birth defects); *Park v. Capital Cities Communication, Inc.,* 181 A.D.2d 192, 197 (4th Dep't 1992) (licensed ophthalmologist).

In short, because Dr. Katz, a public figure, cannot demonstrate "constitutional malice", his defamation claim should be dismissed for this reason as well.

POINT III

THE REMAINING TORT CLAIMS MUST ALSO BE DISMISSED

A. The Remaining Tort Claims Merely Duplicate The Failed Defamation Claim.

New York law maintains that a party who cannot establish a claim for defamation cannot sue for other torts whose alleged injury flows from the alleged defamation or damage to reputation. *See Chao v. Mount Sinai Hosp.,* 476 Fed. Appx. 892, 895 (2d Cir. 2012) (dismissing injurious falsehood, tortious interference, and prima facie tort claims); *Jain v. Securities Industry and Financial Markets Ass'n,* 2009 WL 3166684 (S.D.N.Y. 2009) (dismissing tortious interference with business advantage, negligent misrepresentation, injurious falsehood, negligence, and prima facie tort claims); *O'Brien v. Alexander,* 898 F. Supp. 162, 172 (S.D.N.Y. 1995), *aff'd in part and rev'd in part on other grounds,* 101 F.3d 1479 (1996) (dismissing injurious falsehood and negligence claims).

In *Chao*, the Second Circuit stated:

> "New York law considers claims sounding in tort to be defamation claims . . . where those causes of action seek damages only for injury to reputation, [or] where the entire injury complained of by plaintiff flows from the effect on his reputation."

476 Fed. Appx. at 895 (quoting *Jain*).

Here, the Complaint's remaining tort claims against the LSKD Parties all seek damages flowing from the alleged harm to Dr. Katz's reputation caused by the purported alleged statements and should also be dismissed. In his Fourth Cause of Action for injurious falsehood and in his Sixth Cause of Action for tortious interference with contract, the Complaint repeatedly alleges damages based upon "false and misleading statements" (*see, e.g.,* Ciampi Aff., Exh. A ¶¶274, 278, 295-298) (emphasis added). In

the Eighth Cause of Action, for tortious interference with business advantage, the Complaint claims that Dr. Katz had certain business relationships and that Kassirer used "dishonest, unfair, or improper means to interfere with those business relationships," (Ciampi Aff., Exh. A ¶315), but the only "means" alleged in the Complaint are the Kassirer email which is the subject of the defamation claim. In the Tenth Cause of Action, for prima facie tort, it is alleged that Dr. Katz's harm arose from Kassirer "maliciously publishing defamatory, false and derogatory statements about Dr. Katz." (Ciampi Aff., Exh. A ¶331) (emphasis added).

Because the remaining tort claims merely duplicate the defamation claim which, as set forth above, does not state a cause of action, the Fourth, Sixth, Eighth, and Tenth Causes of Action should be dismissed.

B. The Fourth Cause of Action Fails To State A Claim.

The Fourth Cause of Action for injurious falsehood, independently, should also be dismissed. First, the same qualified privileges which bar the defamation claim and which are discussed above also bar the claim for injurious falsehood. *See Olivieri v. McDonald's Corp.*, 678 F. Supp. 996, 1001-02 (E.D.N.Y. 1988); *Chernick v. Rothstein*, 204 A.D.2d 508, 509 (2d Dep't 1994).

The Complaint fails to allege the requisite elements of a claim for injurious falsehood. To maintain a cause of action for injurious falsehood, Dr. Katz must allege: (1) falsity of the alleged statements; (2) publication to a third person; (3) malice; and (4) special damages. *Korova Milk Bar of White Plains, Inc., v. Pre Properties, LLC,* 2013 WL 417406 at *16 (S.D.N.Y. 2013).

The Kassirer confidential email is not false because, as set forth in Point II, it constitutes Kassirer's opinion about the likely future effect the blog and the *Bermejo* Court's conclusions concerning Dr. Katz's testimony will have upon Dr. Katz's ability to effectively testify in the future.

As also set forth above, Dr. Katz also cannot demonstrate malice by Kassirer and for this reason as well cannot sustain a claim for injurious falsehood.

Finally, the Complaint, which impermissibly alleges damages for injurious falsehood against the LSKD Parties in round numbers without any itemization (Ciampi Aff., Exh. A ¶279), and is not at all specific, fails to allege the requisite special damages and must be dismissed for this reason as well. *See Conte v. Newsday, Inc.,* 703 F. Supp. 2d 126, 148-49 (E.D.N.Y. 2010); *Henneberry v. Sumitomo Corporation of America,* 2005 WL 991772 at *20 (S.D.N.Y. 2005); *Wasserman v. Maimonides Medical Center,* 268 A.D.2d 425, 426 (2d Dep't 2000).

For all the above reasons, the Fourth Cause of Action against the LSKD Parties should be dismissed.

C. <u>The Sixth Cause of Action Fails To State A Claim</u>.

Plaintiffs' tortious interference with contract claim must be dismissed because of the attorney shield doctrine and because it fails to state a cause of action.

Kassirer's confidential email constitutes his advice to clients and as such cannot, pursuant to the attorney shield doctrine, state a cause of action for his client's alleged breach of their alleged contracts with Dr. Katz. *See Halevi v. Fisher,* 81 A.D.3d 504, 505 (1st Dep't 2011) (claim of tortious interference with contract against attorney and law firm were not meritorious because firm was "immunized from liability under the shield

afforded attorneys in advising their clients, even when such advice is erroneous, in the absence of fraud, collusion, malice or bad faith") (quoting *Beatie v. Long*, 164 A.D.2d 104, 109 (1st Dep't 1990)).

Here too, the LSKD Parties are shielded from liability for tortious interference with contract for Kassirer providing legal advice to his client. Dr. Katz neither alleges the requisite "fraud, collusion, malice or bad faith" nor can any such claims exist for the numerous reasons set forth above. Accordingly, the Sixth Cause of Action for tortious interference with contract against the LSKD Parties should be dismissed.

The Sixth Cause of Action, independently, also fails to state a cause of action to which relief can be granted. The Complaint fails to allege the requisite elements of a claim for tortious interference with contract which are: (1) the existence of a valid contract; (2) defendant's actual knowledge of that contract, (3) the defendant's intentional procuring of the breach; and (4) damages. *See Israel v. Wood Dolson Co.,* 1 N.Y.2d 116, 120 (1956); *Roulette Records, Inc. v. Princess Production Corp.,* 12 N.Y.2d 815, 815 (1962).

A contract terminable at will or a voidable contract cannot be basis for a "valid contract" or a claim for tortious interference with contract. *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.,* 50 N.Y.2d 183, 193-94 (1980). In addition, because the Complaint does not allege that Dr. Katz's contract was for a term, the law presumes the contract to be terminable at will and not actionable. *A.S. Rampell, Inc. v. Hyster Co.,* 3 N.Y.2d 369, 375 (1957). In fact, the Complaint fails to allege any of the terms of Dr. Katz's alleged contracts with insurance carriers but to say, in the utmost conclusory and non-actionable statement, that they are "economically and materially valuable." (Ciampi

Aff., Exh. A ¶294). Indeed, the Complaint fails to identify a single lost client, breached contract, or any specific dollar amount lost.

The Complaint also fails to adequately allege that Kassirer had the requisite "actual" knowledge of Dr. Katz's contracts. Instead, the Complaint merely alleges that: "Kassirer was aware, based upon his extensive experience in the insurance defense industry, that Plaintiffs had contractual relationships with insurance carriers and third party independent medical examination companies…." (Ciampi Aff., Exh. A ¶293).

Such conclusory allegations concerning Kassirer's alleged "constructive" knowledge of Dr. Katz's contracts are insufficient, as a matter of law, to sustain a claim for tortious interference with contract. This is the case because a defendant's actual knowledge, as opposed to mere "constructive" knowledge (which is all that is alleged in the Complaint), of an existing contract is an essential requirement to sustain a claim for tortious interference. *See Roche Diagnostics GMBH v. Enzo Biochem, Inc.*, 2013 WL 6987614 at *6 (S.D.N.Y. 2013); *Roulette Records, Inc. v. Princess Production Corp.*, 15 A.D.2d 335, 338 (1st Dep't), *aff'd*, 12 N.Y.2d 815 (1962).

Moreover, the Complaint fails to allege, with any certainty, that there has even been a breach of the alleged contracts and instead merely alleges that: "Upon information and belief several insurance carriers and third party medical examination companies terminated and/or suspended their contractual relationship with Plaintiffs …." (Ciampi Aff., Exh. A ¶295) (emphasis added).

For all these reasons, the Sixth Cause of Action should be dismissed.

D. The Eighth Cause of Action Fails To State A Claim.

The Eighth Cause of Action for tortious interference with business advantage should also be dismissed because it fails to allege the requisite elements.

To state a cause of action for tortious interference with prospective business advantage, it must be alleged with "sufficient nonconclusory allegations" that the defendant's conduct that "allegedly interfered with plaintiff's prospects either was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby." *Jacobs v. Continum Health Partners, Inc.,* 7 A.D.3d 312, 313 (1st Dep't 2004) (emphasis added).

Here, the Complaint fails to allege any facts to support even an inference that Kassirer was motivated "solely" by the desire to harm Dr. Katz. As previously stated, the Complaint fails to allege that Kassirer knew of Dr. Katz. The email was sent to Kassirer's clients who are members of the insurance defense industry, with whom he had a professional, business, and economic relationship. As such, the email was not sent "solely" to harm Dr. Katz. In fact, the Court of Appeals has held that any "legitimate economic self-interest" is enough to defeat a claim for tortious interference with business advantage. *Carvel Corp. v. Noonan,* 3 N.Y.3d 182, 191 (2004).

Moreover, the Complaint has failed to allege the requisite "wrongful means" to sustain a claim. To demonstrate "wrongful means," Dr. Katz must have alleged facts to support that Kassirer acted with "'physical violence, fraud or misrepresentation, civil suites and criminal prosecutions, and some degree of economic pressure.'" *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.,* 50 N.Y.2d 183, 191 (1980)).

Here, there are no such allegations; accordingly, the Eighth Cause of Action must be dismissed for these reasons as well.

E. <u>The Tenth Cause of Action Fails To State A Claim</u>.

The Tenth Cause of Action for prima facie tort should be dismissed because it fails to allege that Kassirer acted "only" with "disinterested malevolence" in sending the email, and also fails to allege any facts supporting "disinterested malevolence" by the LSKD Parties. *See Burns Jackson Miller Summit & Spitzer v. Lindner,* 59 N.Y.2d 314, 333 (1983) (quoting Justice Holmes). Furthermore, "[m]otives other than disinterested malevolence, 'such as profit, self-interest, or business' will defeat a prima facie tort claim." *Margrabe v. Sexter Warmflash, P.C.,* 353 Fed. Appx. 547, 549 (2d Cir. 2009) (quoting *Twin Labs., Inc. v. Weider Health & Fitness,* 900 F.2d 566, 571 (2d Cir. 1990)). In light of the fact that Kassirer did not know or know of Dr. Katz and that he sent the email to clients with whom he had a professional and a business relationship to protect their legal and financial interests, his sole intent cannot be "disinterested malevolence."

Plaintiffs' claim for prima facie tort must also fail because (i) the Complaint does not demonstrate that the LSKD Parties intentionally inflicted harm on Dr. Katz and does not sufficiently plead special damages; and (ii) the LSKD Parties have excuse and justification in that they were advising their clients, with whom they had a common interest and to whom they owed a legal/moral duty, about potential harm as a result of using Dr. Katz as an expert after the *Bermejo* proceedings.

Accordingly, the Tenth Cause of Action for prima facie tort should be dismissed.

Conclusion

For all of the foregoing reasons, the Second, Fourth, Sixth, Eighth, and Tenth Causes of Action and the claims for compensatory and punitive damages against the LSKD Parties should be dismissed with prejudice, and the Court should order whatever further and other relief which it deems just and fair.

Dated: New York, New York
July 30, 2014

Ciampi, LLC

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