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 M.D. PC,

Index No.: 153581/2014

Plaintiffs,

-against-

LESTER SCHWAB KATZ & DWYER, LLP, PAUL L. KASSNER, 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.

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TURKEWITZ MEMORANDUM OF LAW SUPPORTING
PRE-ANSWER MOTION TO DISMISS

LEWIS BRISBOIS BISGAARD & SMITH LLP

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and ERIC TURKEWITZ, Individually
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PRELIMINARY STATEMENT

Last year Justice Duane Hart in Queens made numerous acidic comments about well-known defense orthopedist Michael J. Katz, calling him a liar at least 25 times (among other things). Eric Turkewitz reported on these extraordinary court proceedings on his law blog. Since Katz can't sue the judge, he sued Turkewitz instead for reporting on what the judge said, claiming defamation, as well as a kitchen sink of other claims based on the exact same protected conduct. Not only must the case be dismissed since such reportage is absolutely protected by the law, but sanctions should be imposed against the plaintiffs for each of the clearly frivolous claims.

This Memorandum of Law supports the motion of defendants TURKEWITZ LAW FIRM and ERIC TURKEWITZ (collectively "Turkewitz") seeking an Order:

(a) dismissing plaintiffs' verified complaint pursuant to CPLR §§ 3211(a)(1) and (7), for failing to state a valid cause of action as a matter of law;

(b) sanctioning plaintiffs, pursuant to CPLR § 8303-a and 22 NYCRR 130-1., given the frivolous nature of the verified complaint and the frivolous conduct;

(c) sanctioning plaintiffs for their improper *ad damnum* clause due to its request for specified compensatory damages in explicit violation of CPLR § 3017(c); and

(d) together with such other and further relief as this Court deems just and proper.

This defamation action arises out of trial testimony given by plaintiff Michael J. Katz, M.D. ("Katz") as a medical expert in a judicial proceeding before Justice Duane Hart in Supreme Court, Queens County [1]("underlying action"). Justice Hart made a long series of eviscerating and critical comments about Katz, calling him a liar on numerous occasions as well as "Typhoid Mary," that are exquisitely chronicled in the plaintiffs' own verified complaint on pages 15-30. Justice Hart's ire

[1] *Manual Bermejo v. Amsterdam & 76th Associates, et. al,* Queens County, Index No. 23985/09.

was brought on after Katz testified that a medical-legal exam that he did likely took between 10 and 20 minutes, when in fact, a surreptitiously made video showed his physical exam of the plaintiff took just one minute and 56 seconds. Justice Hart said that there was no way that Katz could have done all the tests he claimed in that short period of time.

The initial testimony was followed by two subsequent hearings during which Katz's criminal defense counsel was present due to statements by Justice Hart that he would forward the transcripts of Katz's trial testimony to the District Attorney for potential perjury prosecution, to the Office of Professional Medical Conduct to investigate action against his license, and to the Administrative Justice to explore civil contempt proceedings, all of which Katz concedes Justice Hart said.

Turkewitz reported on these extraordinary court proceedings in a series of posts on his *New York Personal Injury Law Blog*. Turkewitz was joined in reporting for the first two posts in the series by co-defendant Samson Freundlich.

Katz now claims that reporting on Justice Hart's critical comments was defamatory, and destroyed his livelihood as a professional witness. But because he can't sue a judge, Katz instead tries to shoot the messengers by commencing this frivolous suit.

Given that Katz conceded in his verified complaint that Justice Hart called him a liar no less than 25 times, and said the judge would refer the matter to other powers with the authority to sanction him, his suit cannot possibly withstand scrutiny. It is not defamation to report on judicial proceedings.

In addition to defamation, Katz throws four others causes of action up against the wall, praying that one will stick: injurious falsehood, tortious interference with contract, tortious interference with business advantage, and prima facie tort. Plaintiffs claim that as a result of the blog posts reporting on judicial proceedings, insurance companies and third party medical-legal

examination brokers will no longer retain Katz as a medical expert, allegedly entitling him to a stunning $150,000,000 in punitive damages as well as compensatory damages estimated to exceed $50,000.000.

All of plaintiffs' frivolous claims must be dismissed as a matter of law, since they are based upon fair and true reports of statements actually made by Justice Hart in open court during the underlying action, and conceded by the plaintiffs, and are therefore absolutely protected by New York's statutory fair report privilege. The Court should also find that the claims should be dismissed for failing to state a cause of action as a matter of law.

In addition, a number of the purportedly defamatory statements contained within the blog posts are mere opinion and are therefore not actionable.

Regarding the kitchen sink of alternate theories: First, plaintiffs' injurious falsehood claim must be dismissed as the transcripts of the underlying trial and hearings, and the explicit admissions in Katz's verified complaint, demonstrate that the allegedly false statements are true, as Justice Hart did, in fact, call Katz a liar. And he did so repeatedly. This claim also fails on the ground that plaintiffs have not pled facts tending to show that the purportedly defamatory statements contained within the blog posts spoke to the quality of Katz's medical services or that plaintiffs have sustained special damages in the form of lost earnings.

Plaintiffs' next effort, tortious interference with contract, must also be dismissed as the verified complaint fails to allege that Turkewitz intentionally procured the insurance carriers and third party independent medical brokers breach of contract without justification, or that there was an actual breach of contract.

As for plaintiffs' tortious interference with economic advantage claim, dismissal is required since the verified complaint is devoid of any facts tending to show that Turkewitz's blog posts were directed at insurance carriers or third party independent medical brokers.

Plaintiffs' final claim, purporting to sound in prima facie tort, neither alleges special damages nor that Turkewitz's sole motivation in writing the blog posts was disinterested malevolence. Moreover, plaintiffs incorrectly use prima facie tort as a catch-all alternative to their defamation claim, requiring dismissal of this cause of action as well.

It is abundantly clear from the verified complaint that Katz is burning mad at Justice Hart. But by improperly dragging Turkewitz into his pursuit of vengeance against Justice Hart, he has engaged in a clear abuse of the civil justice system and attempted to chill free speech.

Finally, by bringing this suit and asserting five patently frivolous claims seeking an outrageous amount of specified punitive and compensatory damages -- in direct violation of CPLR § 3017(c) prohibition on stating such amounts -- Turkewitz requests an Order that not only dismisses the verified complaint, but sanctions the plaintiffs for the reasonable expenses, including the costs, disbursements and attorney's fees incurred in defending this suit, pursuant to CPLR § 8303-a and 22 NYCRR 130-1.1.

UNDERLYING TRIAL AND HEARINGS

On April 12, 2013, Katz, an orthopedic surgeon, was called as a defense witness at the underlying jury trial of *Bermejo v. Amsterdam & 76th Associates* (Anesh Aff. Exh. A).[2] Katz testified that he conducted two physical examinations in *Bermejo*, (Exh. A, p. 908) and that the first such examination on May 23, 2011, took 45 minutes. (Exh. A, pp. 908-909, 947). When asked about the

[2] Transcript of Katz's April 12, 2013, trial testimony in *Manual Bermejo v. Amsterdam & 76th Associates, et. al,* Queens County, Index No. 23985/09, annexed as Exhibit A to the July 16th 2014 Affidavit of Mark K. Anesh.

duration of the second examination, conducted just a month before on March 14, 2013, Katz initially testified, "I don't really recall at this point." (Exh. A, p. 947). Justice Hart then insisted that Katz testify as to what his custom and practice was for exams of such type (Exh. A, p. 948) and Katz testified that it was "in the range of between 10 and 20 minutes"(Exh. A, p. 948).

After providing this testimony, plaintiff's counsel in *Bermejo* called Ms. Yury Ramirez as a witness. (Exh. A, p. 1031). Ms. Ramirez testified that, as a paralegal for underlying plaintiff's counsel, she attended the March 14, 2013, exam performed by Katz. (Exh. A, pp. 1032-1035). Despite Katz's testimony that the examination was in the range of 10 and 20 minutes, Ms. Ramirez testified that she timed the exam and that it was significantly shorter. (Exh. A, pp. 1035-1036). Ms. Ramirez further testified that a surreptitiously made video of the examination, taken by the underlying plaintiff's counsel, confirms her testimony. (Exh. A, pp. 1041, 1044).

Once Ms. Ramirez testified as to the existence of the video, which had not been produced during the course of discovery, Justice Hart immediately dismissed the jury and spoke to the attorneys. Justice Hart directed the attorneys to appear before him the following Monday, April 15, 2013, and that counsel for the parties be prepared to argue why he should or should not grant a mistrial in light of the introduction of the video. (Exh. A, pp. 1046, 1050).

When counsel returned to court on Monday, April 15, 2013, submitting various motions in support of and in opposition to a mistrial, Justice Hart said that if the case did not settle he would declare a mistrial. (Exh. A, p. 1057). The matter did not settle and at a further appearance on July 1, 2013, Justice Hart advised that he had reviewed the video of the March, 2013, medical examination. He found that since the video depicted an examination of a minute and 56 seconds, and not between 10 and 20 minutes, Katz could not have performed the various tests and examination of the

underlying plaintiff to which he testified in that brief time. Justice Hart was blunt in stating on the record, therefore, that Katz had lied under oath. Justice Hart explained:

> No. You see this is the part that you are missing. I am not making a big thing of 10, 20 minutes. Witnesses confuse time all the time but he didn't do the tests that he said he did in the minute 56 seconds. That is the problem.
>
> *See* a copy of the transcript of the July 1, 2013, hearing annexed to the Anesh Aff. as Exhibit B, p. 34.

Justice Hart did not singularly state that Katz lied under oath as a result of the time discrepancy. Rather, and as Katz frequently admits throughout his verified complaint,[3] Justice Hart repeatedly noted that Katz was a liar and that he lied on the stand. Indeed, plaintiffs' verified complaint readily admits that during the July 1, 2013, hearing, Justice Hart "called Dr. Katz a liar no less than 25 times."[4] Justice Katz stated:

> "Dr. Katz' future doing IME's because he lied in this one will probably be finished." (Exh. B, p. 4)
>
> "I can hold him in civil contempt for costing the state to expend thousands of dollars on a trial and then coming in here to lie about what he did, causing a mistrial." (Exh. B, p. 4)
>
> "We have, the worst thing is that we have a doctor who clearly lied about the length of time he took to do an IME, clearly. No matter how you slice it, 10, 15, 20 minutes. It turns out he took 1 minute and 56 seconds." (Exh. B, p. 5)
>
> "We are wasting our time trying cases over and over and over again because a doctor who is making millions of dollars doing IME's decides he is going to lie." (Exh. B, p. 5)
>
> "I am withdrawing any sealing of the prior record in this case. Dr. Katz lied. I am finding that he lied." (Exh. B, p. 6)

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[3] Anesh Aff., Exh. D ¶¶ 75, 84, 98, 102, 103, 105, 108, 121, 128, 132, 135, 138.

[4] Anesh Aff., Exh. D ¶ 108.

"Now, he gets caught lying. There is no other way to put it. He lied." (Exh. B, pp. 6-7)

"They are going to come out with my finding that he lied." (Exh. B, p. 7)

"I have one lie here, a huge lie. Does anybody disagree that he lied on the stand?" (Exh. B, p. 10)

"I want you to appeal the finding that two of the carriers caused this gentleman to testify and he lied. And he lied. And he lied badly." (Exh. B, p. 11)

"It is the lie that caused the mistrial." (Exh. B, p. 12)

"I am trying to deal with this case and to some extent this is an abuse and not the first time that I have seen it, though this is clearly the most blatant example of a doctor getting up there and just not telling the truth." (Exh. B, p. 13)

"We know he lied." (Exh. B, p. 17)

"For the first exam, he testified took 45 minutes which is completely outrageous. That is why Ms. Romres (phonetic) had the reaction she did because he absolutely full of lies at that point." (Exh. B, p. 23)

"I still don't condone the fact that you called a witness as they say in my part of Queens lied his whatever off." (Exh. B, p. 29)

"It is not my guess that Dr. Katz lied. There is a difference between 1 minute 56 which was the recorded time of the IME that Dr. Katz performed and the 10, 20 minutes that Dr. Katz testified to." (Exh. B, p. 33)

"It is like a wound that is festering. Every time he does another IME. When is it going to stop? He is making 7 figures a year doing IME's. Then he comes to my part and lies." (Exh. B, p. 39)

"It is that the tape shows that he didn't do the tests that he spent a considerable period of time talking about that he did. That is the perjury. Yes, didn't do the tests. It is not just me saying it. It is not just the plaintiff saying it. The defendants are saying it too. Does your client really think if the insurance industry or some of the insurance companies that hired him before when they find out that he lied, do you really think they are going near him?" (Exh. B, p. 39)

Justice Hart's extraordinary condemnation of Katz did not stop at the end of the July 1, 2013, hearing. At a subsequent July 8, 2013 hearing in the underlying action, Justice Hart continued his rebuke of Katz, stating, "Dr. Katz lied on the stand"[5]; "He lied. He lied." (Exh. C, p. 5); "Where did the doctor not lie at the length of the exam he took?" (Exh. C, p. 13); "Yes, we will have a finding forever more that a Justice of the Supreme Court of the State of New York said that he lied because he did" (Exh. C, p. 14).

In addition to repeatedly calling Katz a liar during the underlying hearings, Justice Hart referred to Katz as "Typhoid Mary" (Exh. D, ¶ 98) and noted that while he could not sanction Katz pursuant to the Court rules, he could hold him in contempt. (Exh. B, pp. 7, 11, 15-16).

But the condemnation of Katz by Justice Hart didn't stop. At a July 1, 2013, hearing, Justice Hart expressly stated that if Katz "is not out of the medical/legal business, I am going to refer this to the Administrative Judge and the District Attorney of Queens County so they can do whatever they want to do. Perjury is a D felony." (Exh. B, p. 36). A recess was then taken and when the underlying hearings recommenced, Justice Hart stated:

> Let the record reflect that I gave Dr. Katz the option of and I would institute a special proceeding to retire from the medical/legal business. Retire at the time and he has declined. What I am going to do, I am going to order a full transcript of everything, the trial and the subsequent proceedings. I will present that to both the administrative judge of Queens County and the District Attorney. I would recommend to the District Attorney that they explore prosecuting Dr. Katz for perjury.
>
> Again counsel, it is not the time so much if the doctor thinks that he can explain the time. It is not the time problem. It is that there are tests that he testified to that he didn't do. That is perjury.
>
> (Exh. B, p. 37).

[5] July 8, 2013, transcript annexed to Anesh Aff., as Exhibit C, p. 4.

At the conclusion of the July 8, 2013, hearing in the *Bermejo* action, Justice Hart stated that he was sending a copy of Katz's testimony to Queens County, ADA James Neander and that he would also provide a copy of same to the Administrative Judge of Queens County, Judge Weinstein. (Exh. C, p. 10).

TURKEWITZ DEFENDANTS' BLOG POSTS

Turkewitz reported on the foregoing events in various blog posts dated July 8, 2013, July 9, 2013, July 10, 2013, July 16, 2013 and January 6, 2014, respectively. Copies of those posts are annexed to plaintiffs' verified complaint as Exhibits 1-5. Co-Defendant Samson Freundlich was a co-author on the first two of the postings.

The July 8th post reported on what happened during both the April 12, 2013, underlying trial and the subsequent July 1, 2013, hearing when Justice Hart repeatedly castigated Katz for lying under oath. This post also provided a link to the transcript of the July 1, 2013, hearing.[6]

The July 9th post, reported on what occurred during the July 8, 2013, hearing, including Justice Hart's statement that he was forwarding the underlying trial transcripts to both the Queens District Attorney and the Queens Administrative Judge, and also that he was referring the matter to the Department of Health – Bureau of Professional Medical Conduct.[7]

The July 10th post was an analysis of many defense medical examinations performed by Katz, to determine the average time he spent on them (approximately 4-5 minutes each).[8]

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[6] Verified Complaint, Exh 1

[7] Verified complaint, Exh. 2

[8] Verified complaint, Exh. 3

The July 16th post discussed the prevalence of defense expert physicians reaching medical conclusions after examining plaintiffs for incredibly short periods of times, often five minutes or less.[9]

The fifth and final post, dated January 6, 2014, provided a recap of the Turkewitz postings for 2013 on this subject, and included a link to the initial post regarding Justice Hart's castigation of Katz.[10]

ALLEGATIONS ASSERTED IN THE VERIFIED COMPLAINT

Plaintiffs commenced this defamation action against Turkewitz and others on April 14, 2014, by filing a verified complaint.[11] Plaintiffs allege that Turkewitz "maintains a popular internet blog called the New York Personal Injury Blog" (Exh. D, ¶ 141) which is "primarily intended to generate business and attract potential clients to the Turkewitz Law firm." (Exh. D, ¶ 144). The verified complaint alleges that Turkewitz has been named in this lawsuit for publishing the series of blog posts concerning the proceedings before Justice Hart. (Exh. D, ¶ 145). It further alleges that Turkewitz "repeated the false accusations made by Justice Hart concerning Dr. Katz in his blog posts and otherwise made a portion of the transcripts of the proceedings available to the public at large." (Exh. D, ¶ 146).

As for the purported damages that flowed from the blog posts, the verified complaint alleges that Katz had a "long and successful career" (Exh. D, ¶ 11) which was "destroyed overnight by an overzealous state court judge and the defendants in this action." *Id.* Specifically, the verified complaint alleges that Katz has been informed "time and time again by insurance companies and

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[9] Verified complaint, Exh. 4

[10] Verified complaint, Exh. 5

[11] Anesh Aff., Exh. D

third party independent medical examination companies that they can no longer use him as an expert witness" because of the Turkewitz blog. (Exh. D, ¶ 39). Plaintiffs allege that "Dr. Katz has been repudiated, ostracized and completely shut out of the insurance defense industry directly as a result of defendants' improper and unlawful conduct." (Aff., Exh. D ¶ 40).

The verified complaint alleges that Turkewitz was not content to report on the proceedings and instead made "gross misrepresentations and false statements of facts concerning the proceeding in an effort to destroy Katz's career." (Exh. D, ¶ 147). The alleged "gross misrepresentations and false statements" set forth in the subject verified complaint are numerable and can be broken down into the following general categories: (1) Justice Hart saying that Katz lying in the underlying action (Exh. D, ¶¶ 155, 158, 159, 165, 177, 179); (2) the implication that Katz was charged with or found guilty of committing a crime by providing untruthful testimony in the underlying action (Exh. D, ¶¶ 148, 150, 153, 159, 165, 171, 173, 174, 179); (3) Justice Hart sending copies of Katz's testimony in the underlying action to the Queens District Attorney, the Administrative Judge of Queens County and the Office of Professional Medical Conduct, so that they might investigate Katz (Exh. D, ¶¶ 149, 163, 164, 166, 167, 175, 176, 180, 182); (4) the length of the March, 2013, medical examination conducted by Katz according to Katz's testimony versus the length depicted in the video (Exh. D, ¶¶ 157, 158, 172, 177); (5) the potential fallout from Justice Hart's finding that Katz lied under oath in the underlying action. (Exh. D, ¶¶, 161, 170, 163, 168, 169, 170).

As a result of these purported misrepresentations and false statements of fact plaintiffs' assert five causes of action against Turkewitz purporting to sound in defamation, injurious falsehood, tortious interference with contract, tortious interference with business advantage, and prima facie tort. As detailed below, all such claims are barred by the fair report privilege, requiring their

dismissal. Alternatively, dismissal is required, as plaintiffs have failed to state a single cause of action as against Turkewitz as a matter of law.

STANDARD OF REVIEW

For the purposes of this motion only, the allegations in plaintiffs' verified complaint are accepted as true, except for those disproved by documentary evidence. It is well settled that on a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction in the light most favorable to the plaintiff.[12] The Court must initially accept the facts alleged in the complaint as true and then determine whether those facts fit within any cognizable legal theory, irrespective of whether the plaintiff will likely prevail on the merits.[13] The test to be applied is whether the complaint "gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to in law can be discerned from its averments."[14]

Where extrinsic evidentiary material is considered, the Court need not assume the truthfulness of the pleaded allegations. The criterion to be applied in such a case is whether the plaintiff actually has a cause of action, not whether he has properly stated one.[15] Thus, where it has been shown that material fact or facts claimed by the plaintiff "have been negated beyond substantial question" by the documentary evidence or affidavits or other evidentiary submissions, and/or where

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[12] *Leon v Martinez*, 84 N.Y.2d 83, 88 (1994)

[13] *See Campaign for Fiscal Equality, Inc. v. State*, 86 N.Y.2d 307, 318 (1995)

[14] *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 A.D.3d 802, 803 (2d Dep't 2010) (quoting *Moore v Johnson*, 147 A.D.2d 621, 621 (2d Dep't 1989).

[15] *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977).

the very allegations set forth in the complaint fail to support any cause of action, the complaint should be dismissed.[16]

ARGUMENT

POINT I

ALL FIVE CAUSES OF ACTION ASSERTED AGAINST TURKEWITZ ARE BARRED BY THE FAIR REPORT PRIVILEGE, REQUIRING THEIR DISMISSAL AS A MATTER OF LAW

All five of plaintiffs' causes of action asserted against Turkewitz arise exclusively out of the fair and true reporting of Katz's trial testimony in the underlying action and Justice Hart's fervent conclusions and repeated condemnation of Katz. Given the fact that such reports are absolutely protected under the fair report privilege, Turkewitz is immunized for all five causes of action arising out of the protected language, thereby requiring dismissal of the verified complaint in its entirety as a matter of law.

Under New York's Civil Rights Law § 74:

> A civil action ***cannot be maintained*** against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which *is* a fair and true headnote of the statement published." (emphasis added)

The fair report privilege is a liberal standard and is intended to provide broad protection for news reports of judicial proceedings.[17] A report is fair and true—and thus within the ambit of the statute's protection—so long as it is substantially accurate; literal accuracy is not the standard.[18]

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[16] *See Robinson v. Robinson*, 303 A.D.2d 234 (1st Dep't 2003).

[17] *See Becher v. Troy Publ'g Co.,* 183 A.D.2d 230, 233 (3d Dep't 1992).

[18] *See, e.g.,McDonald v. E. Hampton Star*, 10 A.D.3d 639, 640 (2d Dep't 2004); *see also Freeze Right*, 101 A.D.2d at 183; *cf. Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) ("Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." (internal quotation marks omitted)).

In 1979, our Court of Appeals wrote in *Holy Spirit Ass 'n for Unification of World Christianity v. N.Y. Times Co.*,[19] that the statute does not require that judicial proceedings be reported "with a lexicographer's precision." It is enough that the news article be a fair and substantially accurate summary of the proceedings. The report, the court wrote, should not be "parsed and dissected on the basis of precise denotative meanings."[20]

The touchstone of substantial accuracy is whether a report containing the precise truth would have produced a different effect upon a reader from the report containing the statements that were (allegedly) technically inaccurate.[21] The Court of Appeals was clear in *Holy Spirit* that the applicability of § 74, including the question of whether an article constitutes a fair and true report of a judicial proceeding, is a question of law for the court to decide. [22] In doing so, "it is almost always preferable to err on the side of free expression."[23]

Here, it is undisputed that Turkewitz's blog posts reported on statements made during a judicial proceeding before Justice Hart in Supreme Court, Queens County. Plaintiffs contend that several statements in the blog posts were defamatory. Yet plaintiffs' concede that each and every one of these statements, is consistent with what actually transpired. And because the comments are consistent with the record -- Justice Hart did, in fact, as plaintiffs' repeatedly concede , call him a liar

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[19] 49 N.Y.2d 63, 68

[20] *Id.*

[21] *See Cholowsky v. Civiletti,* 69 A.D.3d 110, 115 (2d Dep't 2009); *Sassower v. N.Y. Times Co.,* 48 A.D.3d 440, 441 (2d Dep't 2008).

[22] 49 N.Y.2d at 67-68

[23] *Becher,* 183 A.D.2d at 234 (internal quotation marks omitted).

-- Turkewitz is statutorily protected. Katz's essential claim is that Turkewitz was too accurate about the tongue lashing that Justice Hart gave him.

First, plaintiffs claim that the Turkewitz blog posts were false and misleading, as they indicated that Katz lied, by stating that Katz offered "falsified testimony," was caught lying, and that Katz "offered testimony at trial that was completely inconsistent with the actual events." (Exh. D, ¶¶ 155, 158, 159, 179). Even a cursory review of Katz's admissions in his complaint clearly indicates that the foregoing statements were an exceptionally accurate report of Justice Hart's July 1, 2013, and July 8, 2013, findings in the underlying action.

After viewing the video of the March, 2013 medical examination conducted by Katz, Judge Hart found that Katz lied under oath stating, "Now, he gets caught lying. There is no other way to put it. He lied." (Exh. B, p. 7). Justice Hart reached this conclusion since Katz's trial testimony as to the duration of the March, 2013 examination was inconsistent with the actual length of the examination. Justice Hart explained:

> No. You see this is the part that you are missing. I am not making a big thing of 10, 20 minutes. Witnesses confuse time all the time but he didn't do the tests that he said he did in the minute 56 seconds. That is the problem. (Exh. B, p. 34.)

Given the foregoing, the statements contained within the blog posts indicating that Katz lied in the underlying action are an accurate report of the statements made by Justice Hart in the *Bermejo* matter and are, therefore, not actionable.

Second, plaintiffs vaguely allege that the Turkewitz posts were false and misleading as they *implied* that Katz was either guilty, charged with or convicted of perjury (Exh D, ¶¶ 148, 150, 153, 155, 159, 165, 171, 173, 174, 179) because they stated that Katz "falsified testimony", was caught lying, and was busted for lying on the stand. Again, not only do the transcripts of the underlying trial and hearings confirm that Justice Hart repeatedly stated that Katz lied under oath, but the

transcripts reveal that Justice Hart stated that Katz perjured himself (i.e., committed the *crime* of perjury) and that he "would recommend to the District Attorney that they explore prosecuting Dr. Katz for perjury." (Exh. B, p. 37). Thus, the statements that Katz falsified testimony, was caught lying, and was busted for lying on the stand, are most certainly a substantially accurate report of the statements made by Justice Hart. As such, these statements are protected by the fair report privilege.

Third, plaintiffs allege that the blog posts were false and misleading as they *implied* that Katz was being investigated; that Justice Hart forwarded the transcripts of Katz's trial testimony to the Queens District Attorney, the Queens County Administrative Judge, and the Office of Professional Medical Conduct. (Exh. D, ¶¶ 149, 163, 164, 166, 167, 175, 176, 180, 182). But the record and Katz's complaint clearly indicate that Justice Hart stated that he was forwarding the transcripts of Katz's testimony to the Administrate Judge and the District Attorney (Exh. C p. 10) since Justice Hart thought that they should "explore prosecuting Dr. Katz for perjury." (Exh. B, p. 37). Thus, these statements are a substantially accurate report of statements made by Justice Hart in the underlying hearings. Therefore, they are protected by the fair report privilege so that plaintiffs' claims are not colorable.

Fourth, plaintiffs allege that the blog posts were false and misleading as they state that the duration of the March, 2013 examination as depicted in the video was a minute and 56 seconds and that Katz testified that the examination took between 10 and 20 minutes. (Exh. D, ¶¶ 157, 158, 172, 177). But the transcripts of the underlying trial and hearings overwhelmingly demonstrate that Justice Hart repeatedly stated that the length of the examination as depicted in the video was a minute and 56 seconds (Exh. B, pp. 5,7, 34) and that Katz testified that the examination was between 10 and 20 minutes. (Exh. B, pp. 5, 33). Katz says so himself by quoting Justice Hart in ¶102 of his verified complaint:

> The worst thing is that we have a doctor who clearly lied about the length of time he took to do an IME, clearly. No matter how you slice it, 10, 15,20 minutes. It turns out he took 1 minute and 56 seconds...

How could this not be protected by the fair report privilege when the plaintiff actually concedes the accuracy of the report in the very complaint he used to start the lawsuit? How could such a suit be anything but frivolous?

In summary, a fair reading of the blog and transcripts of the underlying trial and hearings plainly reveals that Turkewitz's blog posts are protected by the fair report privilege because the posts were a substantially accurate account of Justice Hart's statements. What plaintiffs actually complain of are the statements that Justice Hart himself made in open court regarding Katz's testimony. In fact, the verified complaint includes numerous allegations suggesting that Justice Hart repeatedly threatened Katz, that Justice Hart was "overzealous" and that Justice Hart destroyed Katz's career overnight.[24] Plaintiffs, of course, cannot state a claim against Justice Hart because statements made by a judge in a judicial proceeding are absolutely privileged.[25]

POINT II

PLAINTIFFS' DEFAMATION CAUSE OF ACTION MUST BE DISMISSED, AS MUCH OF THE PURPORTEDLY DEFAMATORY LANGUAGE AMOUNTS TO OPINION AND IS THEREFORE NOT ACTIONABLE

In addition to the fact that the purportedly false and misleading statements are protected by the fair report privilege, many of them are not actionable on the additional ground that they are constitutionally protected under the First Amendment as mere opinions, and not facts.

In order to state a cause of action to recover damages for defamation, a plaintiff must set forth factual allegations, which if proven true, would show that: (1) false statements were published

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[24] See Anesh Aff. Exh. D, ¶¶ 11, 18, 19, 24.

[25] *See Sexter & Warmflash, P.C. v. Margrabe,* 38 A.D.3d 163, 171 (1st Dep't 2007).

without privilege or authorization to a third party; (2) the false statements constituted fault; which (3) must either cause special harm or constitute defamation *per se*.[26] A plaintiff alleging defamation must plead that he or she sustained special damages, i.e., the loss of something having economic or pecuniary value.[27]

In 1986 the Court of Appeals said in *Steinhilber v. Alphonse* that expressions of opinion, as opposed to assertions of fact, are privileged and, no matter how offensive, cannot be the subject of an action for defamation.[28] Non-actionable opinion includes "rhetorical hyperbole, vigorous epithets, and lusty and imaginative expression," as well as "loose, figurative, hyperbolic language. [29]

Citing to the First Amendment and *Gertz v. Robert Welch, Inc.*, the *Steinhilb*er Court noted that:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas"[30]

In *Steinhilber* , the Court sought to distinguish between opinion and fact, and laid out the following factors to be considered: (1) whether the specific language in issue has a precise meaning which is readily understood, (2) whether the statements are capable of being proven true or false, and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that

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[26] See *Dillon v. City of New York*, 261 A.D.2d 34 (1st Dep't 1999).

[27] *See Liberman v. Gelstein*, 80 N.Y.2d 429, 434-435 (1992)

[28] *68 N.Y.2d 283* (1986).

[29] *See Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 244-245 (1990).

[30] 418 US 323, 339-340 (1974)

what is being read or heard is likely opinion, not fact.[31] Whether a particular statement constitutes an opinion or an objective fact is a question of law. [32]

Courts in defamation actions 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 whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.[33]

The plaintiffs here allege that statements contained in the Turkewitz blog posts regarding the *potential* fallout from Justice Hart's finding that Katz lied under oath were defamatory. (Exh. D, ¶¶, 161, 163, 168, 169, 170). But these statements are clearly expressions of opinion as to what might transpire as a result of Justice Hart's findings that Katz lied while giving trial testimony as an expert witness. As expressions of opinion are non-actionable under the First Amendment, plaintiffs' defamation claims arising out of these statements must be dismissed.

POINT III

PLAINTIFFS' INJURIOUS FALSEHOOD CAUSE OF ACTION MUST BE DISMISSED, AS PLAINTIFFS HAVE FAILED TO PROPERLY PLEAD SUCH A CAUSE OF ACTION AS A MATTER OF LAW

Knowing full well that this claim is barred by New York's fair report privilege and basic First Amendment jurisprudence, the plaintiffs come up with a kitchen sink of alternate theories, filled with vague and empty claims, desperately hoping for some other way to focus a light on the true target of their anger and enmity, Justice Hart. They start with "injurious falsehood."

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[31] 68 N.Y.2d at 292

[32] See *Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369* (1977).

[33] *See Brian v. Richardson*, 87 N.Y.2d 46 (1995).

But not only is plaintiffs' injurious falsehood claim barred by the fair report privilege, it also must be dismissed as the transcripts of the underlying trial and hearings clearly demonstrate that the subject statements were accurate in that they were recitations of statements made by Justice Hart. Those transcripts are, of course, supported by Katz's own extensive concessions in his verified complaint as to what Justice Hart said in open court, including additional off-the-record castigations. This claim must fail on the additional grounds that plaintiffs have not plead that the purportedly false and misleading statements contained within the blog posts spoke to the quality of plaintiffs' medical services or that plaintiffs sustained special damages as a result of the blog posts.

A claim for injurious falsehood or trade libel, which is similar to defamation, involves the "knowing publication of false matter derogatory to the plaintiffs business of a kind calculated to prevent others from dealing with the business or otherwise interfering with its relations with others, to its detriment."[34] The false statements must play a material and substantial part in inducing others not to deal with plaintiff, with special damages in the form of lost dealings. *Id.*

Claims for injurious falsehood are distinguishable from defamation claims, as defamation claims involve statements which impugn the *basic integrity or creditworthiness* of a business while claims for injurious falsehood involve the disparagement of *quality* of a business' goods and services.[35] Thus, statements about a party's integrity or business methods may constitute defamation, and those denigrating the quality of the party's goods and services may provide the basis for a claim for injurious falsehood. An injurious falsehood claim is not colorable if the statements giving rise to

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[34] *Waste Distillation Technology v Blasland & Bouck Engineers.*, 136 A.D2d 633, 634, (2d Dep't 1988).

[35] *Ruder & Finn v Seaboard Sur. Co.*, 439 N.Y.S.2d 858, 862 (1981).

the claim are alleged to impugn the plaintiff's basic integrity, creditworthiness or reputation rather than the quality of the plaintiff's services.[36]

Special damages, which as noted above are an essential element of an injurious falsehood claim, must also be pleaded with sufficient specificity.[37] In *Drug Research Corp. v Curtis Publ. Co.* the Court of Appeals wrote that, "If the special damage was a loss of customers the persons who ceased to be customers, or who refused to purchase, must be named. If they are not named, no cause of action is stated."[38]

Here, the first problem, obviously, is that the statements were accurate reports on what Justice Hart said about Katz. The transcripts of the proceedings, and the plaintiffs' voluminous concessions in his verified complaint, unfailingly demonstrate that Justice Hart repeatedly stated that Katz lied; that Justice Hart expressly stated that given Katz's lie, he was sending a copy of Katz's testimony to the Queens District Attorney, the Queens County Administrative Judge and the Office of Professional Medical Conduct; and that given Katz's lie, Katz may have committed a crime, including perjury. Given the foregoing, the blog posts, which told the story of what transpired in the courtroom, certainly cannot be deemed false. Thus, dismissal of plaintiffs' injurious falsehood claim is required.

This claim also fails on the ground that the statements contained in the blog posts did not speak to the quality of plaintiffs' medical services. The statements did not say that Katz was a poor doctor; that he had poor surgical skills; that he was not up to date on advancements in orthopedic

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[36] *See Three Amigos SJL Restaurant v. CBS News*, 2013 N.Y. Misc. LEXIS 2143 (Sup. Ct. N.Y. Cnty. 2013) (dismissing plaintiff's injurious falsehood claim pursuant to CPLR § 3211(a) because plaintiff failed to plead that defendants' statements denigrated the quality of its services).

[37] *See Freihofer v Hearst Corp.*, 65 N.Y.2d 135, 143 (1985).

[38] 7 N.Y.2d 435, 441 (1981).

surgery; or that he lacked any specific medical skill whatsoever. Rather, plaintiffs' allege that the statements contained within the blog posts concerned plaintiffs' "professionalism" (Exh. A, ¶ 265). The plaintiffs' failed, therefore, to plead an essential element of their injurious falsehood claim, requiring its dismissal.[39]

In addition to these obvious deficiencies, plaintiffs' injurious falsehood claim also fails to allege special damages, a requisite element of such a claim.[40] In order to state a claim for injurious falsehood, a plaintiff must allege that it sustained special damages in the form of lost dealings and specifically identify the customers, persons or business whose business it lost.[41] Plaintiffs overwhelmingly fail to do so. Instead, they simply claim that as a result of the allegedly false and misleading statements contained in the blog, "Dr. Katz has sustained serious injuries including injury to his reputation and business" (Exhibit D, ¶ 268) without specifically identifying the customers or business dealings that were lost. As such, plaintiffs' injurious falsehood claim fails to set forth the required facts to show that they sustained special damages.

Plaintiffs have badly ailed to plead requisite elements of their injurious falsehood claim, requiring its dismissal as a matter of law.

POINT IV

PLAINTIFFS' TORTIOUS INTERFERENCE WITH CONTRACT CAUSE OF ACTION MUST BE DISMISSED FOR FAILING TO PROPERLY PLEAD A CAUSE OF ACTION

In addition to being absolutely barred by the fair report privilege, the next kitchen sink claim, tortious interference with contract, must also be dismissed as plaintiffs have failed to allege facts

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[39] See *Three Amigos SJL Restaurant*, 2013 N.Y. Misc. LEXIS 2143, *21-23.

[40] See *Freihofer v Hearst Corp*, 65 N.Y.2d 135, 143.

[41] See *Waste Distillation*, 136 A.D2d 633, 634, (2d Dep't 1988); see also *Drug Research Corp.*, 7 N.Y.2d 435, 441 (1981).

tending to show that Turkewitz intentionally procured the insurance carriers and third party independent medical companies' breach of contract without justification, or an actual breach of contract.

The law is well settled that in order to state a cause of action for tortious interference with contract, the following elements must be pled with factual support: (1) the existence of a valid contract between the plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procurement of the third-party's breach of contract without justification; (4) actual breach of the contract; and (5) damages resulting there from.[42]

Plaintiffs' tortious interference with contract claim is devoid of any allegation that Turkewitz intentionally procured insurance carriers or third-party medical legal brokers breach of contract by writing the blog posts, or that there was an actual breach of contract. Instead, plaintiffs simply allege that the contents of the Turkewitz blog contained "false statements and misrepresentations concerning civil and criminal proceedings against Dr. Katz and his suitability as an expert witness" (Exh. D ¶ 288); that based upon the statements in the blog, "several insurance carriers and third party independent medical companies terminated and/or suspended their contractual relationships with Plaintiffs" (Exh. D ¶ 284); and that but for those statements, "Plaintiffs would have benefitted from his ongoing contractual relationships with the insurance carriers and third party independent medical examination companies." Exh. D ¶ 287.

Given plaintiffs' complete failure to set forth facts tending to show that Turkewitz intentionally interfered with a specific contract or that there was an actual breach of a contract, plaintiffs' tortious interference with contract claim fails as a matter of law.

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[42] *See Lama Holding Company, et al. v. Smith Barney, Inc. et al*, 88 N.Y.2d 413, 424 (1996).

POINT V

PLAINTIFFS' TORTIOUS INTERFERENCE WITH BUSINESS ADVANTAGE CLAIM MUST BE DISMISSED FOR FAILING TO STATE A VIABLE CAUSE OF ACTION

In addition to being barred by the fair report privilege, the tortious interference with business advantage claim must be dismissed as a matter of law since plaintiffs have not pled facts tending to show that Turkewitz's blog posts were directed at insurance carriers or third party medical-legal examination brokers.

To properly state a claim for tortious interference with economic advantage, a plaintiff must allege facts that support the following: 1) that the plaintiff had business relations with a third party; 2) that the defendant interfered with those business relations; 3) that the defendant acted either with the sole purpose of harming the plaintiff or interfered by using means amounting either to a crime or an independent tort; and 4) actual damages.[43] Defendant must direct its wrongful conduct at the third party with whom a plaintiff has or has sought a business relationship, and not against the plaintiff itself.[44]

But plaintiffs' tortious interference with business advantage cause of action merely claims instead that Turkewitz was aware that plaintiffs had "substantial business relationships with insurance carriers and third party independent medical examination companies" (Exh. A, ¶ 304); that Turkewitz knowingly interfered with these relationships "solely out of malice, or alternatively, by using dishonest, unfair or improper means" (Exh. A, ¶ 306); causing injury to "the relationship between Plaintiffs and the insurance carriers and third party independent medical examination companies." Anesh Aff., Exh. A ¶ 307.

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[43] *Thome v. Alexander & Louisa Calder Foundation*, 70 A.D.3d 88, 108 (1st Dep't 2009).

[44] *Havana Central NY2 v. Lunney's Pub, Inc.*, 49 A.D.3d 70, 74 (1st Dep't 2007)

This claim fails, as the bald, verified complaint does not set forth facts tending to show that Turkewitz's blog entries were in any way directed at the insurance carriers or third party medical-legal exam brokers with whom plaintiffs purportedly had business relationships. In fact, the verified complaint alleges the opposite: That the Turkewitz Defendants' blog "is primarily intended to generate business and attract potential clients." (Exh. D, ¶ 144).

Given the foregoing, plaintiffs failed to state a valid cause of action for tortious interference with business advantage, requiring dismissal of said cause of action in its entirety as a matter of law.

POINT VI

PLAINTIFFS' PRIMA FACIE TORT CAUSE OF ACTION MUST BE DISMISSED FOR FAILING TO PROPERLY STATE A VIABLE CLAIM

Pima facie tort is the last of the kitchen sink claims. But not only is plaintiffs' prima facie tort claim barred by the fair report privilege, it must, like all the others, be dismissed since plaintiffs have not plead special damages or that disinterested malevolence was the sole motivation for the Turkewitz blog posts, and since plaintiffs are incorrectly using prima facie tort as a surrogate to their defamation claim.

Prima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy. It is not a catch-all alternative for every grievance, annoyance, gripe and squawk that is not independently viable. There is no cause of action for saying mean things about someone on the Internet. Not in this country.

In order to state a valid cause of action for prima facie tort, plaintiffs must set forth facts that support the following elements: (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or a series of acts which would otherwise be lawful. To make a claim in prima facie tort, plaintiffs must allege that disinterested

malevolence was the sole motivation for the conduct of which they complain.[45] In *Freihofer v. Hearst*, the Court of Appeals wrote that "A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages."[46]

Plaintiffs' prima facie tort claim alleges that Turkewitz intentionally inflicted harm upon plaintiffs by maliciously publishing "defamatory, false and derogatory statements" (Exh. D, ¶ 322); that such actions were willful and taken without justification (Exh. D, ¶ 324); and that the actions resulted in "Dr. Katz' lucrative career as an expert witness" (Exh. D, ¶ 326) being destroyed, resulting in special damages. *Id.*

This claim fails to state a cause of action as a matter of law, as it does not allege that Turkewitz's sole motivation in blogging about the underlying trial and hearings was "disinterested malevolence."[47] Instead, plaintiffs allege the opposite, that the motivation for Turkewitz's blog is "to generate business and attract potential clients to the Turkewitz Law Firm." (Ex. D, ¶ 144). In addition to this deficiency, and discussed above at Point III, plaintiffs' have failed to plead special damages, further requiring dismissal of plaintiffs' prima facie tort claim for failing to state a cause of action.

Finally, plaintiffs' claim of prima facie tort must be dismissed as plaintiffs are incorrectly using prima facie tort as an alternative to their defamation claim. Plaintiffs' cause of action appears to be one for defamation and not for prima facie tort. Prima facie tort cannot be used as a catch-all alternative for other causes of action. Thus, "[w]here...complete relief can be accorded under

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[45] *Epifani v Johnson*, 882 N.Y.S.2d at 241 (2d Dep't 2009).

[46] 490 N.Y.S.2d 735, 737 (1985)

[47] *See Epifani*, 882 N.Y.S.2d at 241

classical tort concepts, prima facie tort may not be pleaded side by side with the pleading of a conventional tort." *Springer v. Viking Press*, 90 A.D.2d 315, 318 (1st Dept 1982).

POINT VII

THE PLAINTIFFS SHOULD BE SANCTIONED WITH COSTS, FEES AND DISBURSEMENTS PURSUANT TO CPLR § 8303-a AND 22 NYCRR 130-1.1 AND FOR VIOLATING CPLR § 3017(c)

Given that plaintiffs themselves *concede* in stunning breadth that Justice Hart called Katz a liar no less than 25 times, and said so many nasty things about him, and stated that he was going to refer him to the District Attorney for perjury prosecution, to the Office of Professional Medical Conduct for action on his license and to the Administrative Judge for civil contempt proceedings, it is incredible that this suit was brought.

This action was brought with a clearly improper purpose, to highlight Katz's displeasure and distress for the reaming he got from Justice Hart -- by bringing a suit against wholly innocent parties who merely reported on what occurred and offered up their constitutionally protected opinions.

If any suit is deserving of sanction, it is this one, given the massive concessions that the plaintiffs have made about the truthfulness of the reporting.

The First Department wrote in *Levy v. Carol Mgmt. Corp.* that "Sanctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics."[48]

Under New York law, there are two separate authorities for a court to award costs and reasonable attorney's fees to one party upon a finding that the other party has engaged in a

[48] 260 AD2d 27, 34 (1999).

"frivolous" cause of action. Section 8303-a of the CPLR provides for ***mandatory*** sanctions upon a court's finding that a plaintiff commenced or continued a frivolous claim in a personal injury action, including claims for defamation:

> If in an action to recover damages for personal injury, . . . such action or claim is commenced or continued by a plaintiff. . . and is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court ***shall*** award to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars. (emphasis added)

The CPLR explicitly provides that the costs and fees awarded under this subsection may be assessed against either the party bringing the action or his attorney (or both), depending upon the circumstances of the case. CPLR 8303-a(b).[49]

It is important to note that the CPLR sanctions are set at $10,000 per prevailing party and each individual claim. For the purposes of this matter, there are two plaintiffs and two defendants and five frivolous claims, thus subjecting the plaintiffs to as much as $200,000 in costs under CPLR 8303-a. A long analysis of this subject was done by Justice Lebedeff in *In Re Entertainment Partners Group, Inc. v. Davis*,.[50]

In addition, 130-1.1(a) of the NYCRR provides for a discretionary award of costs and reasonable attorney's fees resulting from frivolous conduct (as opposed to CPLR 8303-a , which deals with a frivolous suit or claim):

> The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited

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[49] *See also Linen v. Hearst Corp.*,2007 N.Y.Slip Op. 34179U(Sup. Ct.N.Y.Cnty. December 13,2007) (ordering a hearing to determine sanctions to be awarded pursuant CPLR 8303-a against plaintiffs' counsel for bringing a defamation action where "none of the causes of action pleaded by plaintiffs contained any reasonable basis in law or fact").

[50] 155 Misc. 2d 894 (Sup. Ct. N.Y.Cnty. October 8, 1992).

> by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engaged in frivolous conduct as defined in this Part.

Under each provision, the definition of "frivolous" conduct is the same: a frivolous action is one for which there is no genuine basis either in law or fact, nor a good faith argument for a change in the law.[51]

Accordingly, each of the two Turkewitz defendants requests an Order be issued against each of the two Katz defendants, sanctioning them for all five of their frivolous claims that we were forced to defend, and for their conduct.

Finally, it cannot escape notice that the plaintiff made a whopping $200 million dollar demand. Leaving aside the abject absurdity of the amount, it is a clear violation of CPLR § 3017(c) in that it seeks a specified amount of damages. The section states, in pertinent part:

> In an action to recover damages for personal injuries or wrongful death, the complaint, ... shall contain a prayer for general relief but shall not state the amount of damages to which the pleader deems himself entitled.

There are only two possible reasons for a lawyer to put such a thing in a pleading, given that this law was passed in 2003. First, that the lawyer deliberately violated the law in the quest for press, in the hopes of embarrassing someone with headlines. Second, that the lawyer is ignorant. And we do not believe that the plaintiffs or their counsel are ignorant.

In this case, simply striking the improper demand is meaningless since the whole verified

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[51] CPLR 8303-a(c)(ii); 22 NYCRR) 130-1.1; Minister, Elders and Deacons of the Reformed Protestant Dutch Church v. 198 Broadway, Inc., 76N.Y.2d 411(1990) (applying 22 NYCRR) 130-1.1); Matter of Sommer v. Harrington, 201 A.D.2d 570 (2d Dep't 1994) (imposing costs payable by a party and her attorney under 22 NYCRR $ 130-1.1).

complaint must be struck anyway. More importantly, if simply striking the monetary demand was the solution, then there would be no downside at all for making improper demands in flagrant disregard to the Legislature's will. The headlines, after all, would have already been written. It was, perhaps with this in mind that Professor David Siegel urged courts to sanction[52] those that violated the Legislature's express intent, writing:

> "Some cases have held that a violation of the CPLR 3017(c) pleading restriction can be cured with a mere amendment striking the reference to the demand,[53] but the imposition of a money sanction in an appropriate sum might better implement this aspect of CPLR 301(c)."

Given that the violation is a willful and contumacious act, a monetary sanction is appropriate.

[52] Siegel, New York Practice, 4th Ed., page 372.

[53] See, e.g. *Twitchell v. Mackay*, 78 AD2d 125, 434 NYS2d 516 (4th Dept. 1980)

CONCLUSION

For the foregoing reasons, the two Turkewitz defendants ask that this court dismiss the verified complaint in its entirety pursuant to CPLR §§ 3211(a)(7) and (1); and sanction the plaintiffs pursuant to CPLR § 8303-a, 22 NYCRR 130-1.1 and CPLR 3017(c); and together with such other and further relief as is just and proper.

Dated: New York, New York
July 16, 2014

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