# MEDIA LAW

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## INTRODUCTION

This year's *Survey* covers a broad range of state and federal cases involving media litigants including newspapers, magazines, television stations, and a broad swath of modern media including websites, podcasts, and social media. Many of these cases involve high-profile public figures including pop stars, media entities, a former governor, and the former President of the United States. These cases implicate important First Amendment, free press, free speech, and newsgathering rights, responsibilities, and standards.

## I. FIRST AMENDMENT AND PRIOR RESTRAINTS

Prior restraint, the attempt by the government or an official to censor or withhold editorial content from the public before publication, will be unconstitutional under the First Amendment unless there is a compelling government interest.[1] Prior restraints can take many forms, as shown in *Trump v. Trump/New York Times.*[2]

Former President Donald Trump's tortious interference with contract claims against the *New York Times* not only failed on substantive and First Amendment grounds but were also dismissed under New York's anti-SLAPP statute, a trial court ruled in *Trump v. Trump/New York Times*.[3] Trump accused the newspaper of inducing his niece to reveal private information and violate terms of a confidentiality agreement relating to a family estate settlement by revealing information about his tax returns for a 2018 news story on his finances, detailing

1. *See* Near v. Minnesota, 283 U.S. 697, 713-15 (1931). Chief Justice Charles Evans Hughes, a New Yorker, applied William Blackstone's influential commentary on the despotic nature of censorship and prior restraints. (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 151, 152) (cited in Trump v. Trump, 128 N.Y.S.3d 801 (Sup.Ct. Dutchess Cnty. 2020).
2. *See* Trump v. Trump, 189 N.Y.S.3d. 430, 432–33 (Sup. Ct. N.Y. Cnty. 2023).
3. *Id.*

how Trump overstated his wealth and underpaid his taxes, while promoting himself as a self-made billionaire.[4]

The trial court dismissed Trump's suit and awarded the newspaper attorney's fees under the anti-SLAPP statute.[5] The court held that the tortious interference lawsuit aimed at punishing the newspaper and its reporters for its newsgathering and reporting on an important matter of public interest fell squarely into the anti-SLAPP law's 2020 amendments.[6] The court wrote:

> New York's amended anti-SLAPP statute applies to the claims at hand because plaintiff's causes of action, as stated in the complaint and as asserted against The Times and its reporters, constitute a strategic lawsuit against public participation. Moreover, and contrary to what plaintiff argues, the anti-SLAPP statute is not limited only to defamation claims.[7]

Further, the court wrote, "[t]he revised anti-SLAPP law was specifically designed to apply to lawsuits like this one. In fact, among other reasons, plaintiff's history of litigation — that some observers have described as abusive and frivolous — inspired the expansion of the law."[8]

The court viewed the underlying action as an attempt by a rich, powerful individual to silence media and stifle critical newsgathering operations.[9] Trump's use of tort law to punish newsgathering violated both the First Amendment and New York's Constitution, Article I, Section 8.[10] Tort liability for newsgathering would "chill free speech" and run afoul of well-established precedent.[11]

The court's refusal to find the newspaper violated any tort law followed decades of New York precedent and standards protecting the

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4. *See id.* at 432–35.
5. *See id.* at 445–46.
6. *See id.* at 436.
7. *Id.* at 435.
8. *Trump*, 189 N.Y.S.3d at 436.
9. *See id.* at 436–38.
10. *See id.* at 440, 443.
11. *See id.* at 439–40. Specifically, the court referred to long-standing newsgathering case law. *See generally* Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979) (holding reporters were protected in newsgathering and reporting lawfully-obtained truthful information involving juvenile crime); *see generally* Bartnicki v. Vopper, 532 U.S. 514 (2001) (holding a radio commentator not liable for playing an illegally-recorded cell phone conversation on the air); *see generally* Fla. Star v. B.J.F., 491 U.S. 524 (1989) (holding a newspaper not liable for invasion of privacy for identifying a rape victim).

newsgathering and reporting process from frivolous tort liability.[12] "In fact, New York courts have consistently rejected efforts to impose tort liability on the press based on allegations that a reporter induced a source to breach a non-disclosure agreement," the court wrote.[13]

In following New York's "especially vigilant" protections of newsgathering and reporting, the court also quoted a famous declaration from the Supreme Court's *Branzburg v. Hayes*: "without some protection for seeking out the news, freedom of the press could be eviscerated."[14] The court noted that plaintiff was unable to cite any precedent supporting his claims that the reporters could be held liable for violating any laws or inducing a breach of the law or confidentiality agreements.[15]

On the principal underlying complaint, tortious interference, the court recited and rejected the five prongs a plaintiff must prove: 1) a valid contract between plaintiff and a third party; 2) defendant's knowledge of the contract; 3) intentional procurement of the third-party's breach of the contract without justification; 4) actual breach of the underlying contract; and 5) ensuing damages.[16]

The newspaper's coverage "on a newsworthy story constitutes justification as a matter of law," the court held.[17] Holding media, whether a newspaper or a television talk show, liable for tortious interference would violate important First Amendment principles, the court explained.[18]

## II. Defamation

### *A. Elements*

Business news stories and an accompanying tweet by the author did not rise to the level of falsity with actual malice, the Second Circuit

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12. *See Trump*, 189 N.Y.S.3d at 440.

13. *Id.* at 442 (applying Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235, 249–50 (1991)).

14. *Id.* at 440, 441 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

15. *See id.* at 442 (referencing Highland Cap. Mgmt., L.P. v. Dow Jones & Co., 116 N.Y.S.3d 18, 19–20 (App. Div. 1st Dep't 2019)).

16. *See id.* at 443 (citing Lama Holding Co. v. Smith Barney Inc., 668 N.E.2d 1370, 1375 (N.Y. 1996)).

17. *Trump*, 189 N.Y.S.3d at 443 ("Justification provides an absolute defense to a tortious interference claim.").

18. *See id.*

affirmed in *Kesner v. Jones*.[19] The plaintiff, a securities lawyer, argued that 2018 and 2019 *Barron*'s articles, one under the headline, "The Lawyer at the Center of SEC Pump-and-Dump Case," falsely accused him of criminal activity.[20]

The court recited the five prima facie elements for defamation and libel: 1) a written or published statement of and concerning or about the plaintiff; 2) which is published to a third party; 3) with fault (negligence or actual malice); 4) with falsity; and 5) proof of special damages (provable monetary loss) or per se liability (implied damages).[21]

Affirming the district court's dismissal, the Second Circuit found that the plaintiff failed to show proof of falsity of fact and publication with actual malice, either known falsity or reckless disregard for the truth, because the report was based on extensive reporting, largely drawn from court records.[22] Both the story and the headline were a "fair index" of the underlying evidence.[23] The court wrote:

> Here, there was not sufficient evidence, even resolving all ambiguities and drawing all permissible inferences in favor of Kesner, from which a rational trier of fact could have found by clear and convincing evidence that Buhl acted with actual malice when she published the October 2018 article, June 2019 article, and March 2019 tweet. Although Kesner points to various pieces of evidence that he asserts could have supported an actual-malice finding, we disagree, largely for the reasons already described by the district court.[24]

A state trial court found statements posted on a soccer association's comments forum accusing a youth soccer coach of sexual misconduct satisfied the prima facie elements of libel per se in *Susa Soccer Training v. Back of the Net*.[25] At the pleading stage, as a matter of

19. *See* Kesner v. Jones, No. 22-875, 2023 U.S. App. LEXIS 15255, at *10 (2d Cir. June 20, 2023); *see also* Roy S. Gutterman*, 2021–2022 Survey of New York Law: Media Law*, 72 SYRACUSE L. REV. 959, 963 (2022).

20. *See Kesner*, 2023 U.S. App. LEXIS 15255, at *1–4.

21. *See id*. at *2–3 (citing Palin v. N.Y. Times Co., 940 F.3d 804, 809 (2d Cir. 2019)).

22. *See id*. at *4.

23. *See id*. at *3–5 (citing Mondello v. Newsday, Inc., 774 N.Y.S.2d 794, 794 (App. Div. 2d Dep't 2004)).

24. *Kesner*, 2023 U.S. App. LEXIS 15255, at *6*; see also* Kesner v. Buhl, 590 F. Supp. 3d 680, 695 (S.D.N.Y. 2022).

25. *See* Susa Soccer Training v. Back of the Net, N.Y.L.J., Nov. 8, 2022, at 4 (Sup. Ct. Nassau Cnty. Nov. 3, 2022). This case is only reported in the *New York Law Journal*.

law, the statements presented a sufficient element that "tends to expose a person to hatred, contempt or aversion, or induces an evil or unsavory opinion in the minds of the community."[26] The underlying comments described plaintiff's departure from a high school teaching and coaching job, which defendant stated was related to sexual misconduct.[27] The meaning of the published statements and whether they could be proven true or false were matters for a jury determination.[28]

The court also rejected defendant's common interest privilege, because it determined that the plaintiffs "have overcome, at this stage of the proceeding, Miller's invocation of the common-interest privilege based upon their allegation of malice."[29] The court wrote that the published statements were "reasonably susceptible of a defamatory connotation" and "tended to expose plaintiffs to unsavory opinions in the minds of the soccer community."[30]

### *B. Defenses – Truth*

A newspaper won a summary judgment dismissal in a defamation case on procedural grounds because the plaintiff did not comply with discovery orders to establish falsity, a state trial court ruled in *Milton v. Queens Daily Eagle*.[31] A news story covering the plaintiff's guilty plea for grand larceny in relation to a mortgage fraud indictment, which he withdrew, but then had reinstated by the Court of Appeals,[32] constituted a truthful admission and could not be the grounds for the plaintiff's subsequent defamation claim against the newspaper.[33] Truth is a "complete defense" for defamation.[34] The court wrote:

> The plaintiffs have not shown, and cannot demonstrate, that the Queens Daily Eagle's reporting of Milton's conviction, or its description of the conduct underlying it, are substantially untrue. Nor have they demonstrated, prima facie, that the statements made by the individual defendants in the course of their

26. *Id*.
27. *See id*.
28. *See id.*
29. *Id.*
30. *Susa Soccer Training*, N.Y.L.J., Nov. 8, 2022, at 7.
31. *See* Milton v. Queens Daily Eagle, No. 151740/2019, 2022 N.Y. Slip Op. 32548(U), at 1–2 (Sup. Ct. N.Y. Cnty. July 18, 2022).
32. *See id.* at 5–7 (citing People v. Milton, 989 N.E.2d 962, 965 (N.Y. 2013)).
33. *See id.* at 7–8.
34. *Id*. at 7 (citing Brian v. Richardson, 660 N.E.2d 1126, 1129 (N.Y. 1995)).

reporting for the Queens Daily Eagle were substantially untrue.[35]

In addition to the substantial truth, the plaintiff more or less ignored the court's discovery orders and was further unable to establish falsity.[36] Thus, the court dismissed the complaint on summary judgment grounds.[37]

In another case, a website publishing statements accusing the plaintiff of trademark fraud was substantially truthful, a state trial court ruled in dismissing a defamation claim in *Bunstine v. Kivimaki*.[38] Though the published material was within the one-year statute of limitations,[39] the court held that the published content was truthful and supported by deposition testimony and other underlying documents.[40] "Truth is a complete defense to a defamation claim, regardless of the harm done by the statement," the court wrote.[41]

The court added that the defendant established a prima facie truth defense as a matter of law: "The alleged defamatory statements portray plaintiff as having filed fraudulent federal trademark documents. In defamation actions, generally words are to be construed in their ordinary meaning and in context."[42]

### *C. Libel Per Se*

Accusations of prostitution by an online social media critic and a model/influencer sufficed as a prima facie example of libel per se and was sent to trial on damages in *Abuzaid v. Almayouf*.[43] This dispute arose from an extensive series of social media posts describing the plaintiff, a Saudi Arbian model living and working in the United States, known professionally as Model Roz.[44] The defendant, Danah Almayouf, also from Saudi Arabia, made numerous postings on Instagram, Twitter, Telegram, YouTube, and TikTok describing Roz as a

35. *Id*. at 7–8.
36. *See* Milton v. Queens Daily Eagle, 2022 N.Y. Slip Op. 32548(U), at 1–3.
37. *See id*. at 8.
38. *See* Bunstine v. Kivimaki, 2023 N.Y. Slip Op. 50078(U), at 3–5 (Sup. Ct. Westchester Cnty. Feb. 6, 2023).
39. *See id*. at 1 (applying N.Y. C.P.L.R. 215 (McKinney 2024)).
40. *See id*. at 4–5.
41. *Id*. at 3.
42. *Id*.
43. *See* Abuzaid v. Almayouf, No. 654536/2019, 2023 N.Y. Slip Op. 30257(U), at 1–3, 13 (Sup. Ct. N.Y. Cnty. Jan. 24, 2023).
44. *See id*. at 1–3.

liar and a hypocrite while repeatedly calling her a "prostitute," "whore," and "escort."[45]

The court ruled on the plaintiff's motion for summary judgment under C.P.L.R. 3212,[46] first finding that the defendant could not establish that the plaintiff had achieved enough fame or notoriety to be considered either a general public figure or a limited purpose public figure.[47] The court added that the plaintiff was not involved in any important matter of public concern.[48] The court wrote:

> The record before the court does not establish that Model Roz is of such known celebrity that she can be considered a general-purpose public figure. Rather, the only proof provided shows that Model Roz is an influencer whose work is limited to the fashion, beauty, and lifestyle industries. A plaintiff's success in a specified industry, even if it makes her well-known within that industry, "is not enough to bring [her] into the realm of a general-purpose public figure."[49]

Even though this finding removed the actual malice standard from the defendant's defense, it was largely immaterial because the court ruled that the defendant provided no admissible factual evidence—either in documentation or witness testimony—establishing or proving that plaintiff engaged in activities that could be categorized as either criminal or promiscuous, distinct categories of libel per se, which do not require proof of pecuniary loss.[50] The plaintiff's deposition testimony also helped her establish her clean reputation.[51]

One key piece of evidence, a series of sexually suggestive photos the plaintiff posted online, were not enough to support the defendant's allegations.[52] The defendant attempted to argue that her point was that the plaintiff's career as a model in the United States would have been considered prostitution in their homeland.[53] But the court rejected the argument noting the specific, pointed language the defendant repeatedly published, and continued to publish throughout the litigation.[54]

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45. *Id*. at 2–4.
46. *See* N.Y. C.P.L.R. 3212 (McKinney 2024).
47. *See id*. at 9–12.
48. *See id*. at 11.
49. *Abuzaid*, 2023 N.Y. Slip Op. 30257(U), at 14–15 (quoting Gottwald v. Sebert, 148 N.Y.S.3d 37, 43 (App. Div. 1st Dep't 2021)).
50. *See id*. at 11–13 ("Almayouf has admitted throughout this litigation that none of her statements were based on 'actual evidence.'").
51. *See id*. at 9.
52. *See id*. at 11–12.
53. *See id*. at 12.
54. *See Abuzaid,* 2023 N.Y. Slip Op. 30257(U), at 12–13.

On the underlying substantive language, the court held that the plaintiff established a prima facie claim for libel per se as published statements about the plaintiff were imputing criminal activity and imputing unchastity of a woman.[55]

In another case, a former college student subject to a social media campaign impersonating him with racist and other potentially defamatory statements could be defamatory and was not grounds for an anti-SLAPP pretrial dismissal, a state court held in *Dugan v. Berini*.[56]

This modern media case did not involve mass media but involved multiple social media platforms in which the defendant, posing as the plaintiff, posted multiple statements and comments attributed to the plaintiff, which included repeated racist statements and accusations of sending inappropriate personal photos of his genitalia to children.[57] The plaintiff made reports to both Adelphi University public safety officers and the New York City Police Department, which prompted the defendant to deactivate accounts, but he later reactivated them to continue publishing false statements about the plaintiff.[58]

The court considered this a private dispute and not related to any matter of public interest, which would not implicate the actual malice standard or the anti-SLAPP statute.[59] As a substantive matter, the court determined that the accusations included in the multiple posts would constitute libel per se:

> A false accusation that plaintiff sent "dick pictures" to minors constitutes libel per se because it likely constitutes a crime, or at the very least, is the kind of sexual misconduct that would undoubtedly be injurious to plaintiff's business reputation or tend to expose plaintiff to public contempt, ridicule, or disgrace.[60]

The racist statements, which included posts using offensive language and stereotypical language, could also have defamatory impact because even though it does not directly affect the plaintiff's business reputation, it similarly creates a false impression.[61]

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55. *See id.* at 9 ("Almayouf's repeated assertions that Model Roz is a 'whore,' a 'prostitute,' and an 'escort' who is paid by men in the Saudi consulate for sex are patent examples of defamation per se.").

56. *See* Dugan v. Berini, No. 525698/21, 2022 N.Y. Slip Op. 33774(U), at 2–6, 10–11 (Sup. Ct. Kings Cnty. Oct. 28, 2022).

57. *See id.* at 2–3.

58. *See id.* at 3.

59. *See id.* at 4–5.

60. *Id.* at 9.

61. *See Dugan*, 2022 N.Y. Slip Op. 33774(U), at 10–11.

Interestingly, the court did not find that the plaintiff had a viable private cause of action for false impersonation under Penal Law Section 190.23 and rejected the plaintiff's request of an injunction or further equitable action.[62]

Another trial court ruled that comments posted in an online video live stream were not deemed defamatory under standards for libel per se.[63] In *Payne v. Jackson*, the plaintiff, who held herself out as a children's book author and filmmaker, argued that comments posted during a Twitch broadcast accused her of stalking and other criminal activity, or otherwise injured her in her business or profession and were libel per se.[64] The comments, however, not only did not specifically identify the plaintiff, but were too vague to constitute a defamatory statement, the court held.[65]

The online Twitch comments were:

> (1) "OOO THAT'S ME"; (2) "I hope yo *(sic)* are listening to this! LOL![“]; (3) "Our communities need to unite as a gang to virtually jump these people"; (4) "I have several of her names blocked"; and (5) "IGNORE Larry K; this is another single white female creating more screen names; that is jpayne; if you know who that is."[66]

The court wrote:

> Affording plaintiff's pleading a liberal construction and every possible favorable inference, none of defendant's written statements are reasonably susceptible to a defamatory connotation. Defendant's statements do not charge plaintiff with a crime, let alone a serious crime, and none of defendant's statements can reasonably be construed to injure her career as a children's book author or filmmaker.[67]

The court further found that the case could be barred under res judicata because several elements to this case had already been litigated by lower courts in California.[68]

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62. *See id.* at 12–13 (referencing N.Y. PENAL LAW §190.23 (McKinney 2024)).
63. *See* Payne v. Jackson, 2023 No. CV-010846-22/NY, 2023 N.Y. Slip Op. 50180(U), at 1–2 (Civ. Ct. N.Y. Cnty. Mar. 8, 2023).
64. *See id.*
65. *See id.* at 2.
66. *Id.*
67. *Id.*
68. *See id.* at *3–4. (observing that plaintiff "in essence, brings the same cause of action against defendant that was dismissed . . . .").

### *D. Public/Private Figure*

A music producer accused of sexually assaulting the singer Kesha, should have to prove actual malice because he was a limited purpose public figure, the Court of Appeals held in *Gottwald v. Sebert*.[69] This high-profile defamation case emerged from a dispute between Kesha, whose given name is Kesha Rose Sebert, and her former producer Lukasz Gottwald, professionally known as "Dr. Luke."[70] After a contractual dispute between the two, Kesha sought to void their business and production agreement, claiming Gottwald had raped her in 2005.[71]

Gottwald denied the accusation and filed a defamation—libel per se—case in New York in an effort to repair his reputation.[72] The Court of Appeals ruled on three substantive issues: 1) whether the plaintiff should be treated as a public figure; 2) whether statements contained in the lawsuits should be privileged; and 3) whether the New York anti-SLAPP law should be retroactively applied.[73]

The first substantive issue could be the most critical: the plaintiff's status as a public figure would determine whether he has to prove that the statements were published with actual malice—publication either with known falsity or reckless disregard for the truth—under *New York Times v. Sullivan*.[74] Though not a household name, the plaintiff achieved prominence in the music and entertainment field, and was considered to have voluntarily injected himself into the public spotlight.[75]

The plaintiff's own pleadings seemed to undercut his argument that he should be considered a private figure, who would only have to prove that false statements were published with negligence.[76] The court noted:

> [B]y his own account, a celebrity—an acclaimed music producer who had achieved enormous success in a high-profile career. As self-described in the complaint, he "has written the most Number One songs of any songwriter ever" and "was

69. *See* Gottwald v. Sebert, 220 N.E.3d 621, 631 (N.Y. 2023).
70. *See id.* at 625.
71. *See id.*
72. *See id.*
73. *See id.* at 627, 628–29, 630–31.
74. *See Gottwald*, 220 N.E.3d. at 627 (applying New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964)).
75. *See id.* at 627–28.
76. *See id.* at 628.

> named by Billboard as one of the top ten producers of the decade in 2009."[77]

Also, "[h]e purposefully sought media attention for himself, his businesses, and for the artists he represented, including Sebert, to advance those business interests."[78]

The Court then analyzed whether any of the twenty-five allegedly defamatory statements in the plaintiff's complaint should be dismissed under one of three privileges: the litigation privilege; the pre-litigation privilege, or the fair and accurate report privilege.[79] Applying these privileges would essentially remove liability for defamation under the well-established principles and also New York's fair and accurate report privilege under New York Civil Rights Law Section 74.[80]

The Court held that five of the allegedly defamatory statements the plaintiff identified were privileged because they were part of the court pleadings in this and the underlying California contract dispute.[81] The Court left the pre-litigation privilege to jury determination, applying a "good-faith" understanding with statements made at the pre-litigation phase.[82]

The defendant's fair and accurate report privilege, though, was more nuanced because the nineteen statements at issue were drawn from her public relations "Press Plan," which was sent to numerous media and social media entities.[83] Reciting the purpose of the privilege, which protects published statements drawn from public records and judicial proceedings, the court held that this was a matter of fact better determined by a jury.[84]

The court wrestled with this qualified privilege issue because there were questions as to whether the litigation was brought in good faith:

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77. *Id.*

78. *Id.*

79. *See Gottwald*, 220 N.E.3d. at 628.

80. *See id.* (citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2024)).

81. *See id.* at 629 ("Because these five statements fall squarely within the purview of the absolute litigation privilege, they 'cannot serve as the basis for the imposition of liability in a defamation action.'") (citing Rosenberg v. Metlife, Inc., 866 N.E.2d 439, 442 (N.Y. 2007)).

82. *See id.* at 628–30 ("We agree that questions of fact exist as to the application of the pre-litigation and fair report privileges—those issues must go to a jury—but disagree as to application of the absolute litigation privilege . . . . A 'sham exception' is inconsistent with the absolute privilege recognized by this Court for statements made in connection with judicial proceedings.").

83. *See id.* at 630.

84. *See Gottwald*, 220 N.E.3d. at 630.

> [I]t is an admittedly narrow qualification to the statutory privilege, applicable in this case, where there is a question of fact as to whether the litigation in California and counterclaims in New York were brought by Sebert in good faith or maliciously to defame Gottwald and pressure plaintiffs to release her from her contracts.[85]

The final substantive issue at stake involved whether amendments to New York's Anti-SLAPP statute, New York Civil Rights Law section 76-a passed during the litigation, should be applied retroactively to dismiss the defamation case altogether.[86] Some of this analysis is somewhat immaterial because even though the anti-SLAPP law requires plaintiffs to prove actual malice, Gottwald would have to do that anyway as a limited purpose public figure.[87] The anti- SLAPP statute gives defamation defendants a speedy road to dismissal and an award of lawyers' fees if a plaintiff cannot establish publication with actual malice.[88] But the court was reluctant to apply the statute retroactively.[89]

### *E. Actual Malice*

A woman linked to former Governor Eliot Spitzer could not prove that news accounts describing her as an escort were published with actual malice because of extensive previous media accounts and public records, a state court ruled in *Travis v. Daily Mail*.[90] First, the court held that the news stories about the plaintiff satisfied the standard as a matter of public interest because Spitzer and his post-gubernatorial actions remain newsworthy.[91]

The public interest finding required that the plaintiff prove the prima facie elements of defamation, but also with clear and convincing

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85. *Id.*

86. *See id.* (citing N.Y. CIV. RIGHTS LAW § 76-a (McKinney 2024)).

87. *See id.* at 631.

88. *See id.* at 631–32.

89. *See Gottwald*, 220 N.E.3d. at 631–32. Even so, the Court permitted a counterclaim for damages pursuant to New York Civil Rights Law Section 70-a: "As applied here, Sebert may assert a counterclaim under Civil Rights Law § 70-a and, if successful, recover costs, attorney's fees, and damages based on Gottwald's continuation of this action following the amendment's effective date." *Id.* at 634 (citing N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2024)).

90. *See* Travis v. Daily Mail, No. CV-010973-22NY, 2023 N.Y. Slip Op. 50256(U), at 1–4 (Civ. Ct. N.Y. Cnty. Mar. 31, 2023).

91. *See id.* at 2–3 ("Defendants' coverage of a former high-ranking elected official, the events surrounding his resignation, and other individuals involved is unquestionably of public interest to a readership comprising his former constituency.").

evidence that the defamatory statements were published with actual malice—known falsity or with reckless disregard for the truth.[92]

*The Daily Mail* based its reporting on a wealth of previous media reports, including a 2014 first-person story the plaintiff wrote (with a ghostwriter), in which she acknowledged and described her lifestyle as a high-end escort.[93] The court noted that the plaintiff never brought defamation claims to other earlier media accounts with similar allegations.[94] In her filings, plaintiff claimed that the first-person story was a fabrication intended to jumpstart her career as a writer.[95] The court found this argument unavailing.[96] The court wrote:

> The Medium piece is written from a first-person perspective and presents as a truthful account, and at no point in the piece or the credits following it is there an indication to the reader that the account is fictional. The piece itself signals exactly the opposite, as the contributor credits state to the reader that it was fact-checked by the staff and the author is explicitly described as a "former escort." Indeed, it is difficult to fault a reporter who, seeking to verify an account of escort work, comes to believe in the account's veracity based on websites, online advertisements, and a review site entry resembling precisely what is described in the account.[97]

The plaintiff's filings also included a request to seal court papers to protect the privacy of some tangential people associated with the potentially scandalous case.[98] The court rejected the request because the extraordinary request would violate the presumed openness of judicial proceedings of matters of public interest.[99] Courts rarely seal papers and apply narrow restraints, only upon showing of "good cause."[100] The court wrote:

> Here, plaintiff claims that failure to seal court records has a high probability of causing harm to a third party, who had previously "gone through stalking, harassment, and sexual trafficking." However, plaintiff never specifies this individual by

92. *See id.* at 3 (citing N.Y. CIV. RIGHTS LAW § 76-a(2) (McKinney 2024)).
93. *See id.* at 2–4.
94. *See id.* at 4, 5, 11, 13.
95. *See Travis*, 2023 N.Y. Slip Op. 50256(U), at 3.
96. *See id.*
97. *Id.* at 4.
98. *See id.*
99. *See id.*
100. *See Travis*, 2023 N.Y. Slip Op. 50256(U), at 4 (citing 22 N.Y.C.R.R. § 216.1(a) (2024)).

> name nor is this third party otherwise essential to this action, at least to any extent discernable. . .[101]

### *F. Gross Irresponsibility*

A paternity extortion sex scandal at Harvard University was a significant matter of public concern, warranting proof of publication with gross irresponsibility, which the plaintiff was unable to prove, the appellate division affirmed in *Shuman v. New York Magazine*.[102] In a matter of public interest, which has a broad application, courts require that the defendant acted with gross irresponsibility, a standard more exacting than negligence.[103] The plaintiff's pre-publication denials were insufficient to prove the magazine was grossly irresponsible.[104] The court explained "defendants' decision to credit sources other than plaintiffs' blanket denials is no indication of gross irresponsibility, but instead a provident exercise of defendants' editorial discretion."[105]

Another appellate division decision on gross irresponsibility involved a Gawker news reporter in *Griffith v. Daily Beast*.[106] Here, a story about the journalist described as racist, homophobic, xenophobic, and transphobic was not published with gross irresponsibility, the appellate division affirmed.[107] The Plaintiff argued that the 2019 Daily Beast article "Gawker 2.0 Implodes as its Only Reporters Quit" was false and led to her firing.[108]

As a matter of public interest, both as a journalist herself and the general interest in media issues and controversies, the plaintiff was unable to prove the higher burden that the article was published with gross irresponsibility.[109] The plaintiff was unable to show that the defendant failed to employ reasonable or responsible verification methods in its reporting and publishing.[110] The plaintiff argued that the story was irresponsible because the reporter relied on only two sources

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101. *Id.*
102. *See* Shuman v. N.Y. Mag., 179 N.Y.S.3d 651, 652 (App. Div. 1st Dep't 2022).
103. *See id.*
104. *See id.* at 653.
105. *Id.*
106. *See* Griffith v. Daily Beast, 188 N.Y.S.3d 481, 483 (App. Div. 1st Dep't 2023).
107. *See id.* at 483–84.
108. *See id.* at 483.
109. *See id.* at 483–84.
110. *See id.*

and did not contact her for comment until forty minutes before publishing the piece.[111]

The court wrote: "Although plaintiff faults defendants for not having reached out to her directly to get her comments on the article, New York courts have not required journalists to verify a source's statements with the subject of reporting."[112]

In a state trial court case, a convicted rapist and sex trafficker's defamation suit against a newspaper was dismissed on summary judgment because the plaintiff could not establish he was defamed with gross irresponsibility, the court held in *Baines v. Daily News, L.P.*[113] Though he was convicted on numerous counts including rape, assault, sex trafficking, and unlawful imprisonment, the plaintiff claimed he was defamed because the newspaper published a story previewing the trial based on potentially misleading information provided by a confidential source.[114] The depth of the reporting and fact-checking by the reporter, which included the confidential sourcing and confirmation from the district attorney's office did not rise to the level of gross irresponsibility, the court held.[115]

### *G. Fair & Accurate Report Privilege*

The *Utica Observer-Dispatch's* newspaper's coverage of a criminal case, which included quotes from the Oneida District Attorney, were protected under the fair and accurate report privilege under Civil Rights Law Section 74, the Second Circuit affirmed in *Jeanty v. Cerminaro*.[116] Plaintiff argued both newspaper accounts and the District Attorney's comments constituted defamation because his 2009 conviction was later overturned on a constitutional criminal procedural matter.[117] The court affirmed the dismissal of the defamation claims.[118]

The fair and accurate privilege, as broadly interpreted, provides protection for statements drawn from public records and judicial proceedings as well as other governmental communications such as press

111. *See Griffith*, 188 N.Y.S.3d at 483–84.
112. *Id.* at 484.
113. *See* Baines v. Daily News, L.P., No. 401845/2013, 2022 N.Y. Slip Op. 50862(U), at 1–4, 8 (Sup. Ct. N.Y. Cnty. Aug. 19, 2022).
114. *See id.* at 2–6.
115. *Id.*
116. *See* Jeanty v. Cerminaro, No. 21-1974-cv, 2023 U.S. App. LEXIS 1421, at *3–4 (2d Cir. Jan. 20, 2023).
117. *See id.* at *1–4.
118. *See id.* at *3–4.

releases and official statements relating to these records or proceedings.[119] Thus, the reporter covering these proceedings or official press conferences would not have a duty to "fact-check the D.A.'s official statements."[120]

The court wrote: "Therefore, all the statements that Jeanty alleges were defamatory in the article, even if false, were fair and true reports of the comments by a government official— namely, the District Attorney—regarding a criminal case. As such, they are absolutely privileged under Section 74."[121]

News reports about a real estate developer described as underpaying for properties while gentrifying neighborhoods was considered a fair and accurate report of judicial proceedings, the appellate division affirmed in *Golan v. Daily News, L.P.*[122] Further, the court added that the allegations described in the newspaper story, headline, and subheadline could not be read to imply the plaintiff was a criminal.[123] The headlines "were fair indices of the article and, therefore, were not actionable."[124]

The appellate division issued a similar holding under Section 74 in another high-profile contentious divorce case in *Reeves v. Associated Newspapers, Ltd.*[125] The court held that "[h]ere, defendants' article provided a substantially accurate reporting of Reeves's arrests for domestic violence and related criminal proceedings . . . ."[126]

A series of press releases issued by a litigant in a contentious divorce and business break up were deemed privileged under Section 74 because they related to underlying litigation, a trial court held in *Haart v. Scaglia*.[127] The complex unpublished opinion involved a high-profile fashion designer and reality television star, who argued that press releases had accused her of financial mismanagement and other

119. *See id.* at *4 (citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2024)).

120. *Id.* at *5 (citing Jeanty v. City of Utica, No. 6:16-cv-00966 (BKS/TWD), 2017 U.S. Dist. LEXIS 218307, at *55 (N.D.N.Y. Aug. 18, 2017)).

121. *Jeanty*, 2023 U.S. App. LEXIS 1421, at *5.

122. *See* Golan v. Daily News, L.P., 183 N.Y.S.3d 854, 854 (App. Div. 1st Dep't 2023).

123. *See id.*

124. *Id.*

125. *See* Reeves v. Associated Newspapers, Ltd., 191 N.Y.S.3d 395, 397 (App. Div. 1st Dep't 2023).

126. *Id.*

127. *See* Haart v. Scaglia, No. 158329/2022, 2023 N.Y. Slip Op. 50475(U), at 7–13 (Sup. Ct. N.Y. Cnty. May 11, 2023).

criminal activities.[128] Many of the statements, some which served as the basis for unrelated news stories, were not published with actual malice, the court held.[129]

The court noted that a plaintiff cannot file a bogus lawsuit and then invoke the fair and accurate report privilege for indemnification purposes.[130]

### *H. Opinion*

A city councilmember's letter and social media posts rebutting a comedy club's public criticism of New York City's COVID-19 policies, comparing them to Nazi-era anti-Semitic Nuremburg laws, was not actionable as protected opinion, a state court ruled in *Comic Strip Promotions, Inc. v. Envivo LLC.*[131] The councilmember's rebuttal pointed out the offensiveness and inappropriateness of plaintiff's comparisons to Nazi policies.[132] The plaintiff unsuccessfully argued that he and the club were defamed by the rebutting letters.[133]

The defendant's letters, which were also posted on social media, were protected as her opinion under the well-established standards of *Steinhilber v. Alphonese's* four-prong test:[134] 1) assessing the precise meaning of the language; 2) whether the language is capable of being proven true or false; 3) the full context of the language; and 4) an analysis of the broader social context of the language.[135]

The court held: "[T]he Councilmember's statements sound in opinion. In her tweet and letter, Councilmember Menin expressed her opinion, and that of her constituents, that plaintiff's tweet amounted to anti-[S]emitic language. There is no precise meaning of what constitutes anti-[S]emitism or 'condoning hatred and division.'"[136]

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128. *See id.* at 1–3.

129. *See id.* at 8–15.

130. *See id.* at 7.

131. *See* Comic Strip Promotions, Inc. v. Envivo LLC, N.Y.L.J., Nov. 10, 2022, at 1–2 (Sup. Ct. N.Y. Cnty. Oct. 31, 2022). This case is only reported in the *New York Law Journal*.

132. *See id.* at 1–3.

133. *See id.* at 10–13 (The court also rejected plaintiff's count that the letters constituted trade libel because they criticized a business).

134. *See* Steinhilber v. Alphonse, 501 N.E.2d 550, 554 (N.Y. 1986).

135. *See Comic Strip Promotions, Inc.*, N.Y.L.J., Nov. 10, 2022, at 7–8 (citing *Steinhilber*, 501 N.E.2d at 554).

136. *Id.* at 8–9.

The court added that "the context of the tweet and the letter are such that a reasonable reader would have concluded that he or she was reading opinions, and not facts, about the plaintiff."[137]

A companion defamation case against a publisher covering the dispute, as well as its social media posts, was also dismissed because the plaintiff could not establish that the articles were published with actual malice.[138] The source material, legally deemed opinion, could not satisfy the actual malice standard.[139] The court wrote:

> This Court upholds the importance of the First Amendment in protecting the right to free speech by the press. Here, the plaintiff fails to demonstrate actual malice, and thus, it would be a violation of the First Amendment to permit the plaintiff to proceed with this action against the defendants.[140]

### *I. Section 230 Immunity*

The Better Business Bureau could not be held liable for users' comments and reviews alleging an online seller engaged in fraud and other unethical business conduct, a state trial court ruled in *Amuze v. Better Business Bureau*.[141] The court dismissed the claims based under New York's anti-SLAPP statute because the postings were important matters of public concern and not published with actual malice.[142]

The court also found support for dismissal under the Communications Decency Act, 47 U.S.C. § 230, because the Better Business Bureau operated its online review section with no editorial oversight or control.[143] In recent years, New York courts, like most other jurisdictions, are "broadly in favor of immunity" in cases in which users post comments, even critical or offensive about businesses, on interactive computer services similar to the defendant here.[144] The court wrote:

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137. *Id.* at 11.

138. *See* Comic Strip Promotions, Inc. v. Envivo LLC, No. 150484/2022, 2023 N.Y. Slip Op. 31112(U), at 4–5 (Sup. Ct. N.Y. Cnty. Apr. 11, 2023).

139. *See id.*

140. *Id.* at 5.

141. *See* Amuze v. Better Bus. Bureau, No. 651529/2022, 2023 N.Y. Slip Op. 30679(U), at 1–2 (Sup. Ct. N.Y. Cnty. Mar. 3, 2023).

142. *See id.* at 3–4 (applying N.Y. CIV. RIGHTS LAW § 76-a (McKinney 2024)) ("Defendants have clearly established that the allegedly defamatory statements on defendants' Amuze profile are 'communications . . . in a public forum' and concern the 'public interest.'").

143. *See id.* at 3–5 (applying 47 U.S.C. § 230(c)(1) (2024)).

144. *Id.* at 4 (citing Force v. Facebook, Inc., 934 F.3d 53, 64 (2d Cir. 2019)).

> The most basic problem with plaintiff's argument is that it has not alleged that defendants altered or in any way included its own views when displaying the consumer complaints. . . . An examination of Amuze's BBB-GM profile reveals that every complaint and review (which defendants display separately) are posted without comment and input from defendants. Moreover, where consumers have followed BBB-GM's procedures to submit what is specifically described as a "complaint," defendants post the complaints but provide businesses with the opportunity to respond. So while the Court recognizes that §230 immunity is not so broad as to cover internet platforms that take active roles in developing their own content, the allegation that defendants hold themselves out as neutral mediators or investigators – without allegations describing defendants' own input in the posts – does not transform defendants into "interactive content providers" under § 230(f)(3).[145]

### *J. Anti-SLAPP*

An ex-husband's defamation suit relating to allegations of domestic abuse made during a podcast was properly dismissed under the anti-SLAPP statute,[146] the appellate division held in *Gillespie v. Kling*.[147] The podcast was considered a public forum, and the defendant's statements were sufficiently vested as matters of public interest, and without knowledge of their falsity, were protected under the statute.[148]

"The statements Kling made regarding the domestic violence she experienced during her marriage to Gillespie and the attendant mental health issues she suffered concerned 'an issue of public interest' rather than a 'purely private matter,'" the court held.[149] Because the lawsuit was deemed an attempt to chill the speaker, the court also awarded defendant costs and attorneys' fees.[150]

A trial court properly declined dismissal of the extensive *Smartmatic USA Corp. v. Fox Corp.* defamation case, the Appellate Division ruled.[151] The plaintiff's "meticulously detailed" complaint overcame

145. *Id.* at 4–5.

146. *See* CIV. RIGHTS § 76-a.

147. *See* Gillespie v. Kling, 192 N.Y.S.3d 78, 80 (App. Div. 1st Dep't 2023).

148. *See id.*

149. *Id.* (quoting CIV. RIGHTS § 76-a(1)(a)(1)).

150. *See id.*

151. *See* Smartmatic USA Corp. v. Fox Corp., 183 N.Y.S.3d 402, 404 (App. Div. 1st Dep't 2023).

defendants' anti-SLAPP motion, the court held.[152] Because the anti-SLAPP statute requires the plaintiff to present evidence of actual malice, the court wrote that the plaintiff established that the defendant, in denying results of the 2020 election and asserting, without proof, extensive fraud at the polls, Fox News and some of its hosts and guests "endorsed and participated in the statements with reckless disregard for, or serious doubts about, whether the assertions or implications that plaintiffs had participated in election fraud had any basis in truth or were supported by any reliable evidence."[153]

### *K. Miscellaneous*

The high-profile defamation case by E. Jean Carroll, a writer who wrote that she was raped by Donald Trump in a New York City department store in the 1990s, was the subject of eight reported opinions from both the Southern District[154] and the Second Circuit[155] throughout this *Survey* year. This resulted in a $5 million jury verdict.[156]

The breadth of the topics covered in the opinions ranges from blackletter recitation of defamation law and the penal code's definition of rape and sexual assault[157] to whether the jurors should be publicly identified[158] to whether Trump could have the trial postponed for a

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152. *Id.* (citing CIV. RIGHTS § 76-a(1)(a)–(2)).

153. *Id.*

154. *See* Carroll v. Trump, 650 F. Supp. 3d 213, 215, 224–27 (S.D.N.Y. 2023); *see also* Carroll v. Trump, 660 F. Supp. 3d 196, 198, 209 (S.D.N.Y. 2023) (upholding the Adult Survivors Act, N.Y. C.P.L.R. 214-j (McKinney 2024), while also rejecting Trump's motions to dismiss and to exclude evidence because Carroll's underlying lawsuit and her libel claims had merit).

155. *See* Carroll v. Trump, 49 F.4th 759, 760–61 (2d Cir. 2022) (certifying to the D.C. Court of Appeals the question of whether Trump was a federal employee, immune from liability while in office under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), 28 U.S.C. § 2679 *et. seq.* (2024)).

156. *See* Carroll v. Trump, No. 22-cv-10016 (LAK), 2023 U.S. Dist. LEXIS 124540, at *40–41 (S.D.N.Y. July 19, 2023).

157. *See id.* at *2–4, *29–31, *40–41, *64 (denying Trump's request to overturn the multi-million-dollar jury verdict in the April and May 2023 rape and defamation trial).

158. *See* Carroll v. Trump, 663 F. Supp. 3d 380, 381–85 (S.D.N.Y. 2023) (ordering seating of an anonymous jury withholding identification, addresses, and workplaces of potential and seated jurors, over challenges by the *Daily News* and the *Associated Press*, because of fears that media attention could threaten individuals' safety).

"cooling off" period because of media coverage.[159] Trump's denials included multiple personal attacks on the plaintiff that crossed into the defamatory, courts ruled.[160] Other non-media issues were related to Trump's liability for both the defamation and the underlying assault and other trial procedures and issues.[161]

### *L. Privilege*

A complaint about a city court judge filed with the New York State Commission on Judicial Conduct was considered absolutely privileged and thus not susceptible of being defamatory, a state court held in *Mora v. Koch*.[162] Though no media entities were involved in this dispute, finding the underlying complaint about the judge to be privileged has important implications on newsgathering and potential liability attached to underlying content.

In this case, following a heated dispute at an ophthalmologist's office in 2021, after the plaintiff, a Poughkeepsie City Court judge, refused to wear a facemask covering, the underlying complainant filed a complaint with the New York State Commission on Judicial Conduct.[163] The Commission, which intervened in the subsequent defamation action, is a quasi-judicial body which investigates complaints of

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159. Carroll v. Trump, No. 22-cv-10016 (LAK), 2023 U.S. Dist. LEXIS 67737, at *1–2, *10 (S.D.N.Y. Apr. 17, 2023) (denying Trump's request for a postponement of the trial with the court writing: "At bottom, Mr. Trump has failed to show that there is anything about the media coverage of his indictment or about the supposed efficacy of a 'cooling off' period that would warrant an adjournment of this trial.").

160. *Id.*

161. *See* Carroll v. Trump, 66 F.4th 91, 92–94 (2d Cir. 2023) (remanding the question of whether Trump was acting within the scope of his employment as President of the United States when he responded with defamatory statements to Carroll's accusations); *see also* Trump v. Carroll, 292 A.3d 220, 240 (D.C. 2023) (court answered one certified question in part and declined to answer in part regarding the President's scope of employment); *see also* Carroll v. Trump, 664 F. Supp. 3d 550, 552 (S.D.N.Y. 2023) (denying Trump's motion for summary judgment in which he argued his responses were privileged and protected as a fair and accurate report under New York Civil Rights Law Section 74); *see generally* Carroll v. Trump, No. 22-cv-10016 (LAK), 2023 U.S. Dist. LEXIS 27906, at *1–5, *22 (S.D.N.Y. Feb. 15, 2023) (ruling on a DNA evidentiary matter not related to any media law issue).

162. *See* Mora v. Koch, 190 N.Y.S.3d 575, 577, 581 (Sup. Ct. Dutchess Cnty. 2023).

163. *See id.* at 577.

unethical conduct by judges.[164] Because the complaints are confidential, the court noted that nobody besides the plaintiff, defendant, and the Commission knew about the complaint or the underlying incident, possibly blunting the publication prong required under the tort.[165] The court wrote:

> The only defamatory conduct alleged in the complaint is Defendant's submission of her statements concerning Plaintiff to the Commission. It was further admitted during oral argument on this matter, and as supported by the affirmation of counsel for the Commission, that Defendant did not publish the statements to anyone else; and until Plaintiff filed this lawsuit, Defendant's statements and the Commission's proceedings with respect thereto were confidential and non-public.[166]

Further, the court held that the complaints were absolutely privileged like other similar public documents, including lawyer grievance complaints.[167] Privileging these types of complaints regarding public officials and their potential unethical misconduct helps to protect the process and encourages citizens to come forward with legitimate complaints without fear of liability for defamation.[168] The plaintiff also argued that the privilege should be overridden based on the so-called "sham" complaint exception, which the court rejected.[169]

In finding the report to be absolutely privileged, the court explained that dismissal of the defamation action was proper at the preliminary phase.[170] The court wrote:

> [T]here can be no abuse of the absolute privilege in the submission of a confidential complaint to the Commission, because the only persons to whom the complaint is published are public officials charged with "receiv[ing], initiat[ing], investigat[ing], and hear[ing] complaints with respect to the conduct, qualifications, fitness to perform, or performance of official duties of any judge," and who are bound by law to keep such complaints and related proceedings confidential.[171]

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164. *See id.* at 577–78, 580–81.
165. *See id*. at 579–80.
166. *Id.* at 579.
167. *See Mora*, 190 N.Y.S.3d at 579 (citing Wiener v. Weintraub, 239 N.E.2d 540, 540–41 (N.Y. 1968)).
168. *See id.* at 581.
169. *See id.* at 580–81.
170. *See id.* at 581.
171. *Id.* at 580.

### *M. Procedural*

#### *1. Diversity Jurisdiction*

A district court rejected an effort to amend a complaint with a demand to remand to state court for a defamation case that had already been dismissed because the addition of new defendants was motivated to revive the case in state court, the court held in *Isaly v. Boston Globe Media Partners*.[172] The case involved application and interpretation of 28 U.S.C. §1447, governing post-removal proceedings.[173] The court held that the amended complaint was done to prolong the litigation, not necessarily in the interest of justice or liability.[174]

#### *2. Personal Jurisdiction*

The Satanic Temple could not assert personal jurisdiction in New York over a writer whose article in *Newsweek* magazine described criminal and other abuses, a district court ruled in *Satanic Temple v. Newsweek*.[175] The article, published on *Newsweek*'s website under the headline, "Orgies, Harassment, Fraud: Satanic Temple Rocked by Accusations, Lawsuit," the plaintiff contended include twenty-two instances of defamation.[176] The court applied New York's long-arm statute, which is not welcoming to out of state defamation plaintiffs.[177]

#### *3. Discovery*

A witness in a defamation case involving international intrigue, Russian oligarchs, and a former FBI official, could invoke the Fifth Amendment privilege against self-incrimination in a deposition, but must provide the court with a privilege log, a magistrate ordered in *In re Forensic News LLC*.[178] In addition to the international nature of the litigants and the published statements, the witness at issue here is also

172. *See* Isaly v. Bos. Globe Media Partners, LLC, 650 F. Supp. 3d 106, 109–10, 115–20 (S.D.N.Y. 2023); *see also* Isaly v. Bos. Globe Media Partners LLC, No. 21-1330-cv, 2022 U.S. App. LEXIS 1006 (2d Cir. Jan. 13, 2022); *see also* Roy S. Gutterman, *2022–2023 Survey of New York Law: Media Law*, 73 SYRACUSE L. REV. 849, 856–57 (2023).

173. *See Islay*, 650 F. Supp. 3d at 111–12 (citing 28 U.S.C. §1447 (2024)).

174. *See id.* at 115–20.

175. *See* Satanic Temple, Inc. v. Newsweek Mag. LLC, 661 F. Supp. 3d 159, 165–66 (S.D.N.Y. 2023).

176. *See id.* at 165, 170–71.

177. *See id*. at 167–68.

178. *See* In re Forensic News LLC, No. 22-MC-0229, 2023 U.S. Dist. LEXIS 28567, at *1–3, *6–7 (S.D.N.Y. Feb. 21, 2023).

involved in a separate prosecution and Department of Justice investigation relating to Russian election interference.[179] The witness, the court held, may have additional valid arguments based on the attorney-client privilege, the litigation privilege, and legal standards under the United Kingdom's laws.[180]

### *N. Procedural (General)*

A state trial court rejected a newspaper's second motion for summary judgment, considered a "successive motion," on procedural grounds even though the defendant located relevant criminal records pertaining to the plaintiff, a court ruled in *J.T. v. F.I. News Inc*.[181] The newspaper published news stories, both in print and online, describing the plaintiff's previous conviction for rigging rental bedrooms, bathrooms and showers with surreptitious recording devices.[182] The plaintiff argued the news accounts constituted libel, libel per se and intentional and negligent infliction of emotional distress.[183]

The newspaper initially filed a motion for summary judgment under C.P.L.R. 3212, arguing the stories were covered by the fair and accurate report privilege under Civil Rights Law Section 74.[184] The court rejected the first motion because the newspaper did not include the underlying records upon which it based the fair and accurate report defense.[185]

After securing the criminal records from the Suffolk County District Attorney's Office through a Freedom of Information Law request, the newspaper filed a second summary judgment motion.[186]

Procedurally, the court considered the second motion a successive motion, which are motions that are generally frowned upon unless they are based on "good cause, such as a showing of newly discovered evidence."[187] Appending records that should have been part of the initial motion did not constitute new evidence, the court held. "[T]he

179. *See id.* at *1–3.
180. *See id.* at *6–7.
181. *See* J.T. v. F.I. News Inc., No. 000000-2019, 2023 N.Y. Slip Op. 50385(U), at 3 (Sup. Ct. Nassau Cnty. Apr. 11, 2023).
182. *See id.* at 2.
183. *See id.* at 1.
184. *See id.* at 2 (citing N.Y. C.P.L.R. 3212 (McKinney 2024); N.Y. CIV. RIGHTS LAW § 74 (McKinney 2024)).
185. *See id.*
186. *See J.T.*, 2023 N.Y. Slip Op. 50385(U), at 3.
187. *Id.* (quoting Wells Fargo Bank, N.A. v. Osias, 169 N.Y.S.3d 338, 341 (App. Div. 2d Dep't 2022)).

defendants should have anticipated having to 'lay bare' their proof, and should not have expected that they would 'readily be granted a second or third chance' to obtain summary judgment."[188]

The court ruled that the police records should be material for a jury to consider in assessing the underlying factual claims.[189]

A plaintiff suing *The New York Times* for defamation in two stories and a podcast was declared *in forma pauperis* but was not assigned pro bono counsel by the Southern District in *Atas v. New York Times Company*.[190] The plaintiff established her indigence but the court found that the defamation matter was within her ability to understand, investigate, and litigate on her own as a pro se party in a civil matter.[191] "Plaintiff's filings indicate that she is able to understand and plead the basic elements of defamation. Given that the allegedly defamatory statements concern information within Plaintiff's personal knowledge, the Court does not find that the appointment of counsel would increase the likelihood of a just determination at this time."[192]

Because the allegations in the news story related to criminal activity, the court in *Baines v. Daily News L.P.* held that the appropriate cause of action would be libel per se.[193] However, for the same reasons, the court held that the plaintiff was unable to establish that the newspaper reporters and editors acted with gross irresponsibility, the standard required for private-figure litigants involved in matters of public interest.[194]

The court explained the nuanced differences between the gross irresponsibility standard and the *Times v. Sullivan* actual malice standard of known falsity or reckless disregard for the truth.[195] The newspaper's reporting, verification, editing, and reliance on court papers,

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188. *Id.* (quoting *Wells Fargo Bank, N.A.*, 169 N.Y.S.3d at 342).

189. *See id.*

190. *See* Atas v. N.Y. Times Co., No. 22-cv-853, 2022 U.S. Dist. LEXIS 230864, at *2–4 (S.D.N.Y. Dec. 22, 2022).

191. *See id.*

192. *Id.* at *4.

193. *See* Baines v. Daily News L.P., No. 401845/2013, 2022 N.Y. Slip Op. 50862(U), at 5 (Sup. Ct. N.Y. Cnty. Aug. 19, 2022).

194. *See id.* at 7–8. The court observed that "[c]rime, the legal process, and the penalties imposed on crimes through that legal process legitimately concern the public and warrant public exposition." *Id.* at 7 (citing Baines v. Daily News L.P., No. 401845/2013, 2018 N.Y. Slip Op. 50435(U), at 4 (Sup. Ct. N.Y. Cnty. Mar. 28, 2018)).

195. *See id.*

showed that it did not publish with gross irresponsibility.[196] The newspaper did not have any reason to doubt the story.[197]

The court added: "The various steps taken to verify [the confidential source's] credibility and the accuracy of the story, including having the story reviewed by multiple people before publication, demonstrate that the Daily News defendants were not acting in a grossly irresponsible matter."[198]

## III. NEWSGATHERING/FOIL 50-A

Challenges seeking police records under FOIL[199] and the repeal of Civil Rights Law section 50-a[200] generated two appellate division decisions and lower court interpretations.

Last year's *Survey* covered the lower court decisions in two cases: *New York Civil Liberties Union v. City of Syracuse* and *New York Civil Liberties Union v. City of Rochester*.[201] The Court of Appeals granted review of the Rochester case.[202]

The Fourth Department issued similar rulings on the two cases which involved similar facts: the civil rights group sought police disciplinary records under FOIL and was denied, thus leading to litigation.[203]

In *New York Civil Liberties Union v. City of Syracuse*, a unanimous panel held that the personal privacy exemption the city and police relied on to withhold the documents was too broadly applied and not in the spirit of the FOIL or its appropriate "narrow" exemptions.[204] The court added:

> In order to invoke the personal privacy exemption here, respondents must review each record responsive to petitioner's FOIL request and determine whether any portion of the

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196. *See id.* at 7–8.
197. *See id.*
198. *Id.* at 8.
199. *See* N.Y. PUB. OFF. LAW §§ 84–90 (McKinney 2024).
200. *See* N.Y. Senate Bill No. 8496, 242d Sess. (2019) (repealing N.Y. CIV. RIGHTS LAW § 50-a (repealed 2020)).
201. *See* Gutterman, *supra* note 168, at 870, 871 n.169, 872.
202. *See* N.Y. C.L. Union v. City of Rochester, No. 2022-905, 2023 N.Y. LEXIS 935, at *1 (N.Y. June 13, 2023).
203. *See* N.Y. C.L. Union v. City of Syracuse, 178 N.Y.S.3d 331, 334–35 (App. Div. 4th Dep't 2022); *see also* N.Y. C.L. Union v. City of Rochester, 177 N.Y.S.3d 405, 406–07 (App. Div. 4th Dep't 2022).
204. *See N.Y. C.L. Union*, 178 N.Y.S.3d at 335–37.

> specific record is exempt as an invasion of personal privacy and, to the extent that any portion of a law enforcement disciplinary record concerning an open or unsubstantiated complaint of SPD officer misconduct can be disclosed without resulting in an unwarranted invasion of personal privacy, respondents must release the non-exempt, i.e., properly redacted, portion of the record to petitioner.[205]

In *Lockwood v. Nassau County Police Department*, a court ordered release of police disciplinary records because the department's privacy and confidentiality arguments were invalid under both the statute and existing precedent.[206] The police department sought to withhold the police records invoking the FOIL exception to both matters of privacy as a collective bargaining issue and other aspects of the far-reaching law enforcement exception.[207]

The court explained that an overbroad, blanket exception on personal privacy grounds, as the police department argued, "threatens to subvert the goals of the legislation repealing Civil Rights Law §50-a, particularly in view of the facility with which an agency could simply theorize that any record is, in its opinion, private."[208]

Actual private information, which may be part of a police disciplinary record, should be redacted by a reviewing authority, but the underlying documents should nonetheless be released for public scrutiny.[209] "[T]his Court is of the opinion that, as a general rule, to the extent that disciplinary records are relevant to the performance of a police officer's official duties, they should now be available for disclosure," the court wrote.[210]

## IV. REPORTER'S PRIVILEGE

A *Buzzfeed* reporter who wrote about sex abuse allegations involving the actor Kevin Spacey could invoke New York's Reporter's Shield Law after being subpoenaed in a subsequent civil case, a district

205. *Id.* at 336.

206. *See* Lockwood v. Nassau Cnty. Police Dep't, No. 603929/22, 2023 N.Y. Slip Op. 50265(U), at 4–11 (Sup. Ct. Nassau Cnty. Apr. 5, 2023) (citing N.Y. PUB. OFF. Law §§ 84–90 (McKinney 2024)).

207. *See id.* at 2–3 (discussing PUB. OFF. §§87(2)(a), (2)(b), (2)(c), (2)(e), (2)(g), 89(2-c).

208. *Id.* at 8.

209. *See id.*

210. *Id.* at 7.

court held in *Fowler v. Vary*.[211] Though the reporter was ultimately compelled to sit for a deposition about some communications, the court acknowledged that the statutory privilege was applicable to this federal case under New York law.[212]

The New York Shield law, Civil Rights Law section 79-h, provides an absolute protection for reporters' testimony for confidential information and a qualified protection for non-confidential information.[213] The court did not embark on an extensive choice of law discussion even though there was a companion case in California.[214] New York law was applicable here because *Buzzfeed* and the author were based in the jurisdiction as was the underlying source, the accuser in the story.[215]

The rules for subpoenaing a reporter for nonconfidential materials requires a specific showing that 1) the information was highly material and relevant; 2) critical or necessary to a party's claim, defense, or proof of a "material" issue; and 3) not obtainable through other sources.[216]

The bulk of the documents and materials held by the reporter, largely based on communications with confidential sources were deemed confidential and absolutely privileged from discovery.[217] Some additional non-confidential information was also shielded under the qualified privilege.[218] The court did order discovery of documents and information pertaining to personal correspondence and information between the defendant and the source of the story because they predate the reporter-source relationship.[219]

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211. *See* Fowler v. Vary, Nos. 22-mc-0063 (LAK); 20-cv-9586 (LAK), 2022 U.S. Dist. LEXIS 142084, at *1–2, *15–17 (S.D.N.Y. Aug. 9, 2022).

212. *See id.* at *36–37.

213. *See id.* at *19–20, *26–27 (citing N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2024)).

214. *See id.* at *12.

215. *See id.*

216. *See Fowler*, 2022 U.S. Dist. LEXIS 142084, at *28 (applying CIV. RIGHTS § 79-h(c)).

217. *See id.* at *25–27 (citing CIV. RIGHTS § 79-h(b)).

218. *See id.* at *27.

219. *See id.* at *30–33, *35–36.

## V. INVASION OF PRIVACY

New York's statutory right to privacy under Civil Rights Law sections 50 and 51[220] generated reported opinions in some colorful and quirky cases.

A group of models whose images were used without their consent to promote strip clubs were unsuccessful on their appeal for their Lanham Act and right of publicity claims, the Second Circuit affirmed in *Souza v. Exotic Island Enterprises*.[221] This case also closely paralleled a similar unsuccessful lawsuit in *Electra v. 59 Murray Enterprises*.[222]

The Lanham Act claims, arguing that the use of the photos and images constituted a false endorsement and a likelihood of confusion failed on numerous grounds, especially after the trial court excluded an expert's report that the court found inflated the monetary losses the plaintiffs suffered under the unauthorized use of their images.[223]

On the false advertising claim, the court found that the plaintiffs did not prove the requisite four elements: 1) falsity, either literal or implied; 2) materiality; 3) placement in interstate commerce; and 4) cause of actual or likely injury.[224] The court was unsympathetic and did not believe the plaintiffs showed that they were competitively harmed by the use of their images.[225]

On the state invasion of privacy claims under New York Civil Rights Law sections 50 and 51 and the accompanying right of publicity claims under the statute, the Second Circuit affirmed the dismissal on procedural grounds because the underlying content was almost entirely published before the one-year statute of limitations.[226] New York's conception of invasion of privacy under sections 50 and 51 provides a civil cause of action for the unauthorized use of the

220. *See* N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2024).

221. *See* Souza v. Exotic Island Enters., 68 F.4th 99, 105, 123 (2d Cir. 2023).

222. *See* Electra v. 59 Murray Enters., 987 F.3d 233, 238–39 (2d Cir. 2021) *cert. denied*, 142 S. Ct. 563 (2021); *see also* Gutterman, *supra* note 168 at 873 n.188. The court also seemed dismissive in *Souza* because plaintiff's counsel had brought similar cases in both this and other jurisdictions. *Souza,* 68 F.4th at 107–08.

223. *See Souza*, 68 F.4th at 108–13 (citing 15 U.S.C. § 1125(a) (2024)).

224. *See id.* at 118 (citing Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH, 843 F.3d 48, 65 (2d Cir. 2016)).

225. *See id.* at 118–21.

226. *See id.* at 121–23 (applying N.Y. C.P.L.R. 215(3) (McKinney 2024)).

plaintiff's name, portrait, picture, or voice for commercial or advertising purposes without the plaintiff's written consent.[227]

The court acknowledged the potential viability of the plaintiffs' arguments with regard to their images, writing, "[p]ublicity rights are, in that sense, property-like in nature."[228] The court added:

> However one may conceptualize different aspects of the right protected by §§50-51, New York law provides a cause of action only for acts that fall within the singular statutory definition set forth in those provisions, and supplies a specific statute of limitations keyed to that cause of action. Unsurprisingly, New York courts have applied the one-year statute of limitations to §§50-51 claims that, like the claims in this case, could be classified as right of publicity claims.[229]

A tattoo artist referenced in a Showtime documentary about a rap artist was not entitled to summary judgment for defamation under New York Civil Rights Law sections 50 and 51, a trial court held in *Matsuba v. Hernandez*.[230] The plaintiff failed to show that the single reference to his first name in the documentary fit within the statute's purpose of protecting the commercial interest in a person's name or image.[231] The court held, "[m]oreover, plaintiff fails to demonstrate that he is known in the community by his first name alone."[232]

The plaintiff, however, was able to establish a prima facie case for defamation based on a single reference in a voiceover alleging he was a former heroine user.[233] The court acknowledged the accusation of using an illegal controlled substance could be defamatory and denied the defendant's informal attempt at a motion to dismiss the claim.[234]

## VI. MISCELLANEOUS PRIVACY

A magazine's digital platform which automatically sent its registered users' video preferences to Facebook did not violate the Video

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227. *See* N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2024).

228. *Souza*, 68 F.4th at 121.

229. *Id.* at 122.

230. *See* Matsuba v. Hernandez, No. 156473/2021, 2023 N.Y. Slip Op. 30554(U), at 1–2, 4 (Sup. Ct. N.Y. Cnty. Feb. 23, 2023).

231. *See id.* at 2–3. Similarly, plaintiff's Lanham Act claims also were unavailable for summary judgment. *See id.*

232. *Id.* at 3.

233. *See id.* at 4.

234. *See id.* at 3–4.

Privacy Protection Act,[235] a federal court held in *Martin v. Meredith Corp*.[236] The plaintiff, a registered user of People.com, had standing for a private action under the law, but was unable to establish disclosure of requested or obtained specific video materials or services when video preferences were forwarded without his knowledge or consent.[237] He argued that he was harmed by the distribution of allegedly private information, his video viewing history on People.com.[238] The VPPA allows recovery of damages when a video provider discloses private information relating to videos the plaintiff viewed.[239] The court wrote:

> Simply sending a URL of a People.com webpage which may or may not include a video does not show that a person requested or obtained specific video materials or services. And even for webpages including a video, sending the URL does not identify a person as having requested or obtained the video on that page since the person may instead have merely reviewed an article on the page or opened the page and done nothing more.[240]

## VI. Hot News Misappropriation

A doctor who appeared on several Fox News shows and also wrote commentaries for *The Wall Street Journal* failed to establish that the news outlet unfairly misappropriated previous writings and other news tips, the Second Circuit affirmed in *Greer v. Fox News Media*.[241] The district court rejected his misappropriation, unfair competition, unjust enrichment, defamation and tortious interference claims.[242]

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235. *See* 18 U.S.C. §2710 (2024).

236. *See* Martin v. Meredith Corp., 657 F. Supp. 3d 277, 282–84 (S.D.N.Y. 2023).

237. *See id.* at 282–85.

238. *See id.* at 281, 283.

242. 18 U.S.C. §2710(b) requires the plaintiff to allege four elements: "that (1) a defendant is a 'video tape service provider', (2) the defendant disclosed 'personally identifiable information concerning any consumer' to 'any person', (3) the disclosure was made knowingly, and (4) the disclosure was not authorized . . . ." *Id.* at 284 (quoting Mollett v. Netflix, Inc., 795 F.3d 1062, 1066 (9th Cir. 2015)).

240. *Martin*, 657 F. Supp. 3d at 285.

241. *See* Greer v. Fox News Media, No. 22-1970-cv, 2023 U.S. App. LEXIS 7407, at *1–4 (2d Cir. Mar. 29, 2023).

242. *See id.* at *1–6.

The plaintiff attempted to argue his unfair competition and unjust enrichment claims were not preempted by federal copyright law.[243] The case, however, was preempted by the U.S. Copyright Act, but also strayed into the difficult arena of policing and protecting "idea[s]" and facts, which courts have never regarded as protectable.[244] "So even if we assume that the 'factual content' in Greer's blogs and emails is itself 'uncopyrightable,' expressing that content in a blog, email, or other tangible medium nonetheless brings it within the subject matter of federal copyright law."[245] The lower court also had dismissed the claims as preempted under the Copyright Act.[246]

As a matter of "hot news" misappropriation, the court applied the three prong analysis under *National Basketball Ass'n v. Motorola, Inc.*, which requires proof that 1) the plaintiff gathered 'time-sensitive' information; 2) the plaintiff was in direct competition with the defendants; and 3) the defendants' "free riding" created a "substantial" threat to the quality of plaintiff's journalism.[247] The court affirmed the lower court's judgment to dismiss Greer's misappropriation of "hot news" claim because "Greer failed adequately to allege the basic elements for such a claim."[248]

## VIII. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In *Moore v. Cohen*, the Second Circuit affirmed dismissal of an intentional infliction of emotional distress claim by Roy Moore, a former United States Senator and Alabama Supreme Court justice, who was the subject of a mockumentary-style interview on a cable television series.[249] This decision was the latest win for the controversial comedian Sacha Baron Cohen, whose controversial undercover

243. *See id.* at *2–4.

244. *See id.* (citing Forest Park Pictures v. Universal Television Network, Inc., 683 F.3d 424, 429 (2d Cir. 2012)).

245. *Id.* at *4 (citing *Forest Park Pictures*, 683 F.3d at 429).

246. *See Greer*, 2023 U.S. App. LEXIS 7407, at *2–4.

247. *Id.* at *4 (applying and quoting Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997)).

248. *Id.*

249. *See* Moore v. Cohen, No. 21-1702-cv, 2022 U.S. App. LEXIS 18648, at *1–3, *9 (2d Cir. July 7, 2022).

documentary-style format has caught people, mostly public figures, in embarrassing situations.[250]

In this case, the plaintiff sued for intentional infliction of emotional distress because Cohen, posed as a character, a former Israeli antiterrorist expert, testing out a security device that could detect a child molester or pedophile.[251] Moore had been accused of having a relationship with an underage girl earlier in Alabama, who was fourteen at the time.[252]

Because Moore had signed an extensive Standard Consent Agreement before agreeing to the interview for the Showtime mockumentary series, *Who is America?*, both the District Court and the Second Circuit ruled that he had voluntarily waived his rights to litigate a broad range of claims, including the torts of defamation and IIED.[253] The court was firm in enforcing the agreement and the waivers under New York law, which does not hold signatories to a reliance theory.[254] Further, the courts disregarded Moore's handwritten modifications to the contract.[255]

The release specifically excluded the plaintiff's claims, the court noted, adding

> [u]nder New York law, we give effect to the intention of the parties as reflected in the language of the contract. Even if Judge Moore intended not to waive any claims arising from accusations of pedophilia or sexual misconduct, "a party's subjective intent and understanding of the terms is irrelevant."[256]

The Second Circuit also paid special attention to the satirical nature of the underlying content as a form of protected speech and political commentary.[257] The court held that the material was protected from liability because it "was clearly comedy and that no reasonable viewer would conclude otherwise."[258]

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250. *See id.* at *1–2; *see also* Roy S. Gutterman, *Liable, Naaaht: The Mockumentary: Litigation, Liability and the First Amendment in the Works of Sacha Baron Cohen*, 13 HARV. J. OF SPORTS & ENT. L. 141, 142–43 (2022).

251. *See Moore*, 2022 U.S. App. LEXIS 18648, at *1–2.

252. *See id.* at *2.

253. *See id.* at *1,*3–6, *9.

254. *See id.* at *5 (citing Mfrs. Hanover Tr. Co. v. Yanakas, 7 F.3d 310, 315 (2d Cir. 1993)).

255. *See id.* at *5–6.

256. *Moore*, 2022 U.S. App. LEXIS 18648, at *6–7 (quoting HOP Energy, L.L.C. v. Loc. 553 Pension Fund, 678 F.3d 158, 162 (2d Cir. 2012)).

257. *See id.* at *7–9.

258. *Id.* at *8.

## IX. INTELLECTUAL PROPERTY/MISCELLANEOUS

A former employee's internet and social media campaign criticizing his former employer posed enough potential to proceed past the motion to dismiss phase based on both defamation and unfair competition grounds, a district court held in *Loanstreet, Inc. v. Troia*.[259] This case brings old-world employment disputes into the modern media digital world with a series of disparaging and potentially defamatory posts on websites including Glassdoor.com, Reddit, Treamblind.com, and LinkedIn.[260] Additionally, the defendant, who had been fired by the plaintiffs and publicly complained about money and stock options he believed he was owed, also took out an online advertisement on Google, with links to the plaintiffs' website and use of its name and logo.[261]

The published statements were actionable under New York's one-year statute of limitations[262] and, most were deemed factual allegations of misconduct and fraud, not protected opinions.[263] Even though the burden of proof is on the plaintiffs to establish falsity of fact, the defamation and falsity analysis also looked at whether the defendant's assertion of a truth defense was valid.[264] The court also pointed out that the allegations can be either true or "substantially true" to escape liability under defamation law.[265] The court held that some specific allegations regarding stock option payments and other specific statements could be proven true or false.[266]

Though the plaintiffs did not show proof of special damages or specific monetary loss, because the published statements hit to the heart of the plaintiffs' business reputation, some of the statements

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259. *See* Loanstreet, Inc. v. Troia, No. 21 Civ. 6166 (NRB), 2022 U.S. Dist. LEXIS 148022, at *1–2, *22, *33 (S.D.N.Y. Aug. 17, 2022).

260. *See id.* at *1–5.

261. *See id.* at *3–5.

262. *See id.* at *9–10 (applying N.Y. C.P.L.R. 215(3) (MCKINNEY 2024)).

263. *See id.* at *12–16. The court applied New York's well-established three-prong analysis to determine whether the statements were protected opinion: 1) whether the language used is susceptible to a "precise meaning which is readily understood"; 2) whether the statements can be proven true or false; and 3) how the statements should be viewed within their published context. *Id.* at *10–11 (citing Wexler v. Dorsey & Whitney LLP, 815 F. App'x 618, 621 (2d Cir. 2020)).

264. See *Loanstreet, Inc.*, U.S. Dist. LEXIS 148022, at *16–19.

265. *See id.* (citing Jewell v. NYP Holdings, Inc., 23 F. Supp. 2d 348, 366 (S.D.N.Y. 1998)).

266. *See id.* at *12–16.

were suited for defamation per se, through which general damages could be pleaded without proof or are generally implied.[267] Similarly, the court determined that the injurious falsehoods claims were duplicative of the defamation claims.[268]

The most novel element of this lawsuit revolves around the plaintiffs' unfair competition cause of action under the federal Lanham Act.[269] The plaintiffs asserted that because the published claims used the LoanStreet name and trademarked logos, it struck at the heart of its business trade use and could cause likelihood of confusion and unfair competition.[270] This was coupled by the defendant's purchase of online advertising.[271] An initial two-prong analysis determined that the trademark is entitled to protection under trademark law and that the defendant's use would be "likely to cause consumers confusion."[272]

The likelihood of confusion determination under the eight-point analysis established in *Polaroid Corp. v. Polarad Electronics Corp.*,[273] fell in favor of the plaintiffs, the court held.[274] Though the

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267. *See id.* at *19–22.

> Read in context, defendant's statements would lead an average reader to believe that LoanStreet and/or Lampl unlawfully withheld or otherwise swindled him out of compensation duly owed to him. Defendant's accusations thus charge plaintiffs "with the commission of a serious crime and would tend to injure [them] in their business by imputing 'fraud, dishonesty, misconduct, or unfitness in conducting their profession.'"
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> *Id.* at *21 (citing Levy v. Nissani, 115 N.Y.S.3d 418, 422 (App. Div. 2d Dep't 2020)).

268. *See id.* at *22–23 (noting that while the defamation tort injures plaintiffs' reputation, the injurious falsehood cause of action relates to plaintiffs' business goods or services, but the statements at issue did not relate to the 'condition, value or quality of [plaintiffs'] product or property.') (citing Angio-Med. Corp. v. Eli Lilly & Co., 720 F. Supp. 269, 274 (S.D.N.Y. 1989)).

269. *See Loanstreet, Inc.*, U.S. Dist. LEXIS 148022, at *25–26 (citing 15 U.S.C. § 1125(a) (2024)).

270. *See id.* at *26, 30.

271. *See id.* at *26.

272. *Id.* at *25–33.

273. *See* Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961), *cert. denied*, 368 U.S. 820 (1961).

274. *See Loanstreet, Inc.*, U.S. Dist. LEXIS 148022, at *30–33. The eight elements the court considers are: 1) the strength of the mark; 2) similarity of the

court acknowledged that "it seems unlikely that an internet user who reads defendant's advertisements would believe that they belong to or are endorsed by plaintiffs," it nevertheless held that the "allegation raises an issue of fact that would be premature to resolve at this stage . . . ."[275] The court allowed the plaintiff to replead within 30 days.[276]

A fake social media account by a former business partner, purportedly mocking the plaintiff's beverage company, was not an example of unfair competition, a trial court held in *Borovsky v. Lopez*.[277] An earlier opinion dismissed claims for libel per se and copyright infringement.[278] The common law unfair competition claim for "palming off" or misappropriation was not valid because the fake social media account was not purporting to sell a product that was similarly bottled, packaged or marketed.[279]

## X. TRADEMARK

A YouTube-based video show and channel, "Little Baby Bum," won damages under federal trademark law, against a group of twenty-seven companies selling counterfeit, unauthorized merchandise, a magistrate determined in *Moonbug Entertainment Ltd. v. Store*.[280] The underlying intellectual property involved a series of 3D animation videos on YouTube depicting traditional nursery rhymes and other original music.[281] The defendants defaulted, and the plaintiff was awarded over $1.2 million in damages.[282]

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competing marks; 3) competitive proximity of the products; 4) likelihood that plaintiff will bridge the gap and offer a product similar to the defendant's product; 5) actual confusion; 6) good faith by the defendant; 7) quality of the defendant's product; and 8) buyers' sophistication. *See id.* at 30.

275. *Id.* at *32–33.

276. *See id.* at *33.

277. *See* Borovsky v. Lopez, No. 516318/2019, 2022 N.Y. Slip Op. 32864(U), at 1–5 (Sup. Ct. Kings Cnty. Aug. 23, 2022).

278. *See* Borovsky v. Lopez, No. 516318/2019, 2020 N.Y. Slip Op. 34241(U), at 8–10 (Sup. Ct. Kings Cnty. Dec. 21, 2020).

279. *See Borovsky*, 2022 N.Y. Slip Op. 32864(U), at 5.

280. *See* Moonbug Ent. Ltd. v. Store, No. 21-CV-10315 (LGS) (JLC), 2023 U.S. Dist. LEXIS 2278, at *1 (S.D.N.Y. Jan. 6, 2023).

281. *See id.* at *2.

282. *See id.* at *6–7, *17.