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

SEAN PENN,	:	Index No. 159710/2015
Plaintiff,	:	
v.	:	
LEE DANIELS, an individual, and JOHN DOES 1-100,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF LEE DANIELS' MOTION TO DISMISS

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Defendant, Lee Daniels ("Daniels"), respectfully submits this Memorandum of Law in Support of his Motion to Dismiss the Complaint filed by Sean Penn ("Penn") pursuant to Civil Practice Law and Rules ("CPLR") 3211(a)(1) and 3211(a)(7).

PRELIMINARY STATEMENT

With fame, money and high-priced legal counsel, Penn has the power to buy most things. Fortunately for Daniels, the First Amendment is not for sale. It protects Daniels and others from lawsuits like this one, financially-draining attacks brought to punish free speech exercised to Penn's chagrin. Ostensibly filed to protect his name from those who "aggrandize themselves or their projects at his expense," Penn's Complaint is merely a blunt force instrument wielded in an attempt to control the narrative of his life[1] and to expunge alleged misdeeds sensationalized by the press for decades (or, as a neatly summarized by a recent headline: "*Sean Penn Forgets We All Know He Beat Madonna and Sues Lee Daniels for Defamation*").[2] Worse yet, the Complaint attempts to silence Daniels' honestly-held opinion, a contribution to the marketplace of ideas voiced during this nation's agonizing debate about racial disparity and domestic violence. The First Amendment abhors attempts to chill speech on hot topics.

While Penn may have personally experienced the challenged statement as offensive, he must now demonstrate that the statement is reasonably susceptible to a defamatory meaning. He has not, and cannot. The challenged statement is constitutionally protected opinion, and New York courts have repeatedly emphasized the need to summarily reject defamation claims brought

[1] The Complaint evidences this self-serving agenda, reading like a press release and devoting most of its space to rattling off Penn's humanitarian acts. (*See* Compl. at ¶¶ 10-17, attached as **Exhibit A** to the Affirmation of James Sammataro, Esq. ["Sammataro Aff."]). Moreover, in a moment of candor, the Complaint reveals its true (and impermissible) purpose: to "***deter***" others from engaging in debate regarding Penn. (*Id.* at ¶ 1) (emphasis added).

[2] www.clutchmagonline.com/2015/09/sean-penn-forgets-we-all-know-he-beat-madonna-and-sues-lee-daniels-for-defamation. *See* Sammataro Aff., **Exhibit B** at B-1; *Grebow v. City of New York*, 173 Misc. 2d 473, 479 (1997) (taking judicial notice of a newspaper article).

to bully those who dare exercise their constitutional right of free speech. "The threat of being put to the defense of a lawsuit … may be as chilling to the exercise of First Amendment freedoms as the fear of the outcome of the lawsuit itself."[3] In that it is an assault on the First Amendment and New York's Constitution, Penn's Complaint must be dismissed with prejudice.

FACTUAL BACKGROUND

Penn complains about an opinion Daniels allegedly made during an interview with *The Hollywood Reporter* and published in the article "*Empire's 'Batshit Crazy' Behind-the-Scenes Drama: On the Set of TV's Hottest Show*" (Lacey Rose, The Hollywood Reporter, September 16, 2015) ("Article"). (*See* Ex. A at ¶ 19; Sammataro Aff., **Exhibit C**).[4] The Article references rumors that Terrence Howard, an African American who plays *Empire's* male lead, Lucious Lyon, may have his screen time "scal[ed] back because of his recent divorce drama and numerous ***prior allegations of domestic abuse***" (*See* Sammataro Aff., Ex. C-13) (emphasis added). The pertinent portion of the Article provides: "The embattled actor has, however, reduced his press availability, presumably fearing questions will shift toward his offscreen drama as they did in a recent *Rolling Stone* profile. His co-stars have been advised not to comment on the ongoing saga, but Daniels can't help himself." (*Id.* at C-14).

[3] *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 545 (1980).

[4] Instead of attaching the Article to his Complaint, Penn – tellingly – instead plucks the challenged statement from its context. The Article as well as other documentary evidence are attached as exhibits to the accompanying Sammataro Affirmation, all of which are properly considered under CPLR 3211(a). *See Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 115 A.D. 128, 135 (1st Dep't 2014) (affirming dismissal on a CPLR 3211(a) motion to dismiss where "the defendant's evidence establishes that the plaintiff has no cause of actions"); *Goldberg v. Levine*, 97 A.D.3d 725 (2d Dep't 2012) (dismissing the case pursuant to CPLR 3211(a)(1) and (7), given that the documentary evidence submitted by the defendant defeated the plaintiff's defamation claim); *Lore v. N.Y. Racing Ass'n, Inc.*, 12 Misc.3d 1159(A), 2006 WL 1408419, at *3 (Sup. Ct. Nassau Cnty. 2006) (on a motion to dismiss, courts may consider "documents that are integral to plaintiff's claims, even if not explicitly incorporated by reference" in its complaint).

> "That poor boy," [Daniels] says, fiercely protective of his actor. He then alludes to other actors who have been ***the subject of domestic abuse allegations in the past***. "[Terrence] ain't done nothing different than Marlon Brando or Sean Penn, and all of a sudden he's some f—in' demon … That's a sign of the time, of race, of where we are right now in America" (emphasis added). ("Challenged Statement"). (*Id.* at C-2, C-14).

For these thirty-eight (38) quoted words, Penn claims damages in excess of $10,000,000.00.

ARGUMENT

To protect public debate, New York Courts have long-favored dismissal of defamation claims at the earliest possible stage of the proceedings. In such actions, the court must, ***at the dismissal stage***, determine if the alleged defamatory statement is actionable as a matter of law. "Whether the contested statements are reasonably susceptible of a defamatory connotation is in the first instance a legal determination for the court." *Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 592 (1989), *cert. denied*, 495 U.S. 930 (1990); *Duci v. Daily Gazette Co.*, 102 A.D.2d 940, 940 (3d Dep't 1984) ("In determining whether a published article is libelous, it is the role of the court to decide, as a matter of law, whether the words complained of are susceptible of the defamatory meaning ascribed to them.").

Dispositive motions are recognized to hold particular value in defamation cases, so as not to protract litigation through discovery and thereby chill the exercise of constitutionally protected freedoms. To unnecessarily delay the disposition of a defamation action "is not only to countenance waste and inefficiency but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights." *Immuno AG v. Moor-Jankowski*, 145 A.D.2d 114, 128 (1st Dep't 1989), *aff'd*, 77 N.Y.2d 235 (1991).

Consequently, laxity is not permitted, as loose rules and casual judicial review threaten the enjoyment of First Amendment freedoms. Mindful of this constitutional obligation, New

York courts have not hesitated to serve their gate-keeping function by dismissing, with prejudice, actions premised on statements not susceptible of a defamatory meaning. *See Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995); *Stepanov v. Dow Jones & Co, Inc.*, 120 A.D.3d 28, 40 (1st Dep't 2014); *Frechtman v. Gutterman*, 115 A.D.3d 102, 108 (1st Dep't 2014); *Dillon v. City of New York*, 261 A.D.2d 34, 42 (1999) (reversing order with costs); *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 294 (1986); *Duci*, 102 A.D.2d. at 940 (reversing order); *Parks v. Steinbrenner*, 131 A.D. 2d 60, 66 (1st Dep't 1987); *Cohn v. National Broadcasting Co*., 50 N.Y.2d 885, 887 (1980), *cert. denied*, 434 U.S. 969 (1980) (affirming dismissal with costs).

I. The Complaint Fails to State a Cause of Action for Defamation.

A. Generally.

To state a cause of action for defamation under New York law, a plaintiff must plead: (1) a false statement of fact; (2) published to a third party without privilege or authorization; (3) with fault amounting to at least negligence; and (4) that the plaintiff suffered damages as a result of the publication; special harm or defamation *per se*. *See Dillon*, 261 A.D.2d at 38; *Stepanov*, 120 A.D.3d at 34.

A self-described "American icon" and admitted public figure (*see* Sammataro Aff., Ex. A at ¶¶ 1, 10), Penn must additionally plead "actual malice." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This is a heavy burden. Penn must show with convincing clarity that Daniels made the alleged defamatory statements with "knowledge that [the statement] was false or with reckless disregard of whether it was false or not," *id.* at 280 or, alternatively, that Daniels made the statement with a "high degree of awareness of…probable falsity," *Garrison v. State of Louisiana*, 379 U.S. 64, 74 (1964), or "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

B. The Court May Consider Documentation Omitted from Penn's Complaint, and Related Extrinsic Evidence.

A motion to dismiss founded upon documentary evidence may be granted " … where the documentary evidence utterly refutes the complaint's factual allegations, conclusively establishing a defense as a matter of law." *DKR Soundshore Oasis Holding Fund, Ltd. v. Merrill Lynch Intl*., 80 A.D.3d 448, 449-450 (1st Dep't 2011) (quoting *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002)). *See also*, *Alliance Network, LLC v. Sidley Austin, LLP*, 43 Misc. 3d 848, 852, 873 n.1(Sup. Ct. N.Y. Cnty. March 20, 2014) ("On a motion to dismiss, the Court may consider documents referenced in a complaint, even if the pleading fails to attach them."); *Deer Consumer Prods., Inc. v. Little*, No. 650823, 2011 WL 4346674, at * 4 (Sup. Ct. N.Y. Cnty. Aug. 31, 2011) (same); 6A Carmondy-Wait 2d, Cyclopedia of New York Practices with Forms § 38:161 (2011) ("on a motion to dismiss the complaint for failure to state a cause of action, the court is not limited to a consideration of the pleading itself, but may consider extrinsic evidence submitted by the parties in disposing of the motion.").

"The major change intended by the CPLR [ ] was to enable the defendant to use affidavits and other extrinsic proof, unbound by the face of the pleading and therefore able to go behind [the pleading] and challenge any factual allegation on which it depends." *Lohan v. Fox News Network, LLC*, No. 150933/15, 2015 WL 5583940 (Sup. Ct. N.Y. Cnty. Sept. 14, 2015).

C. The Court Must *Now* Decide: Is the Challenged Statement Reasonably Susceptible to a Defamatory Meaning.

"Where a plaintiff alleges that statements are false and defamatory, the legal question for the court ***on a motion to dismiss*** is whether the contested statements are reasonably susceptible of a defamatory connotation." *Lenz Hardware, Inc. v. Wilson*, 263 A.D.2d 632, 633 (3d Dep't 1999) (emphasis added) (internal citation omitted).

In making this determination, the court must examine the statement in depth. The court is required to evaluate both the content and context, and to give the disputed language a fair reading in the context of the publication as a whole. *Stepanov*, 120 A.D.3d at 34 ("On a motion to dismiss a defamation claim, the court must decide whether the statements, considered in the context of the entire publication, are reasonably susceptible of a defamatory connotation, such that the issue is worthy of submission to a jury."). The court is to look at what was explicitly stated, as well as what insinuation and implication can reasonably be drawn from the communication. In considering the statement, the courts will not go to extremes, but will instead construe the language in the same way that the reading public, acquainted with the parties and the subject matter would understand the statement. *See also Dillon*, 261 A.D.2d at 34 (if in understanding of the average reader, the words are "not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction").

If a statement is not reasonably susceptible to the defamatory meaning ascribed by the plaintiff, it is not actionable as a matter of law.

II. The Challenged Statement Is Not Reasonably Susceptible to a Defamatory Meaning.

A. Unpleasant, Embarrassing, Controversial, Offensive Words Are *Not* Defamation.

The mere fact that a statement is unpleasant, embarrassing, controversial, or offensive to a person does ***not*** make it defamatory or legally actionable. *See Chau v. Lewis*, 935 F. Supp. 2d 644, 657 (S.D.N.Y. 2014) ("Not every unpleasant or uncomplimentary statement [ ] is defamatory."). *See also*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (the First Amendment affords the right to criticize public figures, "[s]uch criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to vehement, caustic and sometimes unpleasantly sharp attacks.") (internal citation omitted).

B. The Challenged Statement Cannot Be Reasonably Interpreted as Implying <u>that Penn is Guilty of Ongoing, Continuous Violence against Women</u>.

Penn pleads that the Challenged Statement was "egregious" on "several levels" (Sammataro Aff., Ex. A at ¶ 3), but offers only irrelevant characterizations and strained interpretations.

1. <u>Penn Alleges Characterizations Irrelevant to the Defamation Analysis</u>.

Penn asserts that the Challenged Statement condones Howard's purported misconduct and improperly invokes "two of the greatest actors and humanitarians of our time," [Marlon] Brando and Penn, for the misguided purpose of promoting *Empire* and bolstering Daniels' brand. (*Id.* at ¶¶ 1, 3). A statement that condones purported misconduct does not make a defamation claim. A statement that invokes another name to purportedly promote a television show is also not defamatory. Consequently, Penn's allegations that the Challenged Statement condones or promotes are irrelevant to this defamation analysis and should be disregarded by this Court.

2. Penn Unreasonably Exaggerates the Challenged Statement to Mean that <u>"Penn is guilty of ongoing, continuous violence against women</u>."

Daniels, claims Penn, "falsely asserted and/or implied that Penn is ***guilty of ongoing, continuous violence against women***." (*Id.* at ¶ 2) (emphasis added). The Challenged Statement cannot be fairly read to convey the alleged defamatory meaning that Penn attributes to it.

The Challenged Statement contains grammar that unequivocally references ***past*** action: "[Terrence] ain't ***done*** nothing different than Marlon Brando or Sean Penn." (Sammataro Aff., Ex. C-2, C-14). "Done" is not "doing." The plain meaning of the word "done" cannot denote or imply "on-going, continuous" activity.

Further, the Challenged Statement mentions public figures Brando and Penn in the exact same breadth in the exact same way: "[Terrence] ain't ***done*** nothing different than Marlon Brando or Sean Penn." (*Id.*). Because Brando and Penn are mentioned the same way, such

mentions must be characterized the same way. Brando died in 2004. (*See* Sammataro Aff., **Exhibit D** at D-1, D-3). Can Penn reasonably allege that Brando is doing anything in an "on-going, continuous" fashion, too? Impossible. Therefore, the Court cannot fairly read the Challenged Statement to imply Penn was doing anything in an "on-going, continuous" fashion.

Read literally or naturally with the understanding of the average reader, the Challenged Statement neither states, insinuates, implies or is otherwise reasonably susceptible to an interpretation that Penn is guilty of on-going, continuous violence against women. *See White v. Fraternal Order of Police*, 707 F. Supp. 2d 579, 589 n. 12 (D.D.C. 1989) (under defamation law "what meaning a communication is *capable* of bearing" is a very different inquiry from identifying "the inferences that can *reasonably* be drawn from it") (emphasis added), *aff'd*, 909 F.2d 512 (D.C. Cir. 1990). Penn's strained interpretation unreasonably attempts to manufacture defamation where none exists. *See Dillon*, 261 A.D.2d at 38 ("[c]ourts will not strain to find defamation where none exists."); *Cohn*, 50 N.Y.2d at 887 (same); *Aronson v. Wiersma*, 65 N.Y.2d 592, 594 (1985) (courts should not strain to interpret statements as defamatory).

This should be the beginning and end of the Court's analysis, as it mandates dismissal of the Complaint. Should the Court continue the analysis, then the Complaint should be dismissed for three additional, independent and dispositive reasons: (1) the Challenged Statement is a constitutionally-protected opinion (section III); (2) three decades of on-going public discussion about Penn's alleged domestic abuse have made Penn libel-proof on the topic (section IV) and (3) Penn failed to plead actual malice with the requisite specificity (section V).

III. The Challenged Statement is Opinion and, Thus, Not Actionable.

A. Opinions Are Constitutionality Protected.

The Challenged Statement is immunized by the First Amendment and the New York Constitution. "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." *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 339-340 (1974). In *Milkovich v. Lorain Journal Co*., the United States Supreme Court held that a "statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection," so long as such a statement does not "reasonably impl[y] false and defamatory facts." 497 U.S. 1, 20 (1990). The Court has repeatedly emphasized that the constitutional protection of expression of opinion is necessary to ensure that "public debate will not suffer from a lack of 'imaginative expression' or 'rhetorical hyperbole,' which has traditionally added much to the discourse of our Nation." *Id. See also*, *Bose Corporation v. Consumers Union*, 466 U.S. 485, 503-04 (1984) ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole.").

The New York State Constitution goes even further in its protection of opinion, embracing "… a test for determining what constitutes a non-actionable statement of opinion that is more flexible and is ***decidedly more protective*** of the 'the cherished constitutional guarantee of free speech.'" *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 152 (1993) (emphasis added) (citing *Immuno*, 77 N.Y.2d at 256). *See also, Themed Restaurants, Inc. v. Zagat Survey, LLC*, 781 N.Y.S.2d 441, 449 (2004) ("… the free speech guarantee of the New York State Constitution is even more stringent than that of the First Amendment.").

Under New York law, "falsity is a *sine que non* of a libel claim and since only assertions of fact are capable of being proven false … a libel action cannot be maintained unless it is premised on published assertions of fact." *Brian*, 87 N.Y.2d at 51. "Opinions, false or not,

libelous or not, are constitutionally protected and may not be the subject of private damage actions," irrespective of how vituperative, distasteful or unreasonable those opinions might be. *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 380 (1977); *Steinhilber*, 68 N.Y.2d at 289. *See also Mann v. Abel*, 10 N.Y.3d 271, 276 (2008) ("Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation.").

Consequently, to be actionable, the Challenged Statement must reasonably be understood to assert a fact that is provably false and defamatory, as opposed to conveying an opinion. Whether a particular statement constitutes fact or opinion is a threshold question of law for the court to decide at the dismissal stage. *See Gross*, 82 N.Y.2d at 152-53; *Manno v. Hembrooke*, 120 A.D.2d 818, 819 (1986); *Bonanni v. Hearst Communications*, 58 A.D.3d 1091, 1092 (3d Dep't 2009) ("On a motion to dismiss in a libel action, the court must determine whether the plaintiff sufficiently alleged false defamatory statements of *fact* rather than nonactionable statements of *opinion*.") (emphasis in original) (citation omitted). In making this determination, courts must consider:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact.

Brian, 87 N.Y.2d at 51 (quoting *Gross*, 82 N.Y.2d at 153); *Steinhilber*, 68 N.Y.2d at 292.

This standard requires more than consideration of whether the specific words used can reasonably be understood to convey a false fact. *Immuno AG*, 77 N.Y.S.2d at 255-56; *Doe v. White Plains Hosp. Med. Ctr.*, No. 10 Civ. 5405, 2011 WL 2899174, at *3 (S.D.N.Y. July 8, 2011) ("objective statements that could be proven true or false" may nonetheless be understood

as an expression of opinion), *aff'd* 2012 WL 129836 (2d Cir. Jan. 18, 2012). Rather, courts must consider whether the words, in full context, would reasonably be understood as asserting a fact about the plaintiff rather than expressing a point of view. *Mann*, 10 N.Y.3d at 276.

This test requires that the court consider the content of the communication as a whole, its tone and apparent purpose, as well as to consider the broader social context to "determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff." *Brian*, 87 N.Y.2d at 51; *Immuno*, 77 N.Y.S.2d at 254 *Steinhilber*, 68 N.Y.2d at 295 ("even apparent statements of fact may assume the character of statements of opinion" in context of "public debate") (citations omitted). This holistic approach was consciously designed to "assure that the cherished constitutional guarantee of free speech is preserved". *600 West 115th Street Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 145 (1992).

B. <u>The Challenged Statement Constitutes Non-Actionable Opinion</u>.

Penn pleads that the Challenged Statement defames him because it "falsely equates Penn with Howard." (Sammataro Aff., Ex. A at ¶ 3). Penn argues that the comparison is unfair because "while [Penn] has certainly had several brushes with the law, Penn (unlike Howard) has never been arrested, much less convicted, for domestic violence … Nor has Penn admitted to slap[ping] a woman or abusing others (as Howard also reportedly admitted, reportedly asserting that he was acting in self-defense)." (*Id.*).[5]

By admitting that the Challenged Statement is a comparison, Penn sabotages his entire Complaint. A comparison is invariably an opinion incapable of sustaining a defamation claim. Indeed, a New York court has ***already*** ruled as such in *The Holy Spirit Association for the*

[5] Penn's "brushes with the law" include multiple arrests for violent acts, including assaulting a photographer for which he served 33 days in jail. *See, e.g., State of California v. Sean Penn*, Case No. LAX0WA00476-01(2010); *State of California v. Sean Penn*, Case No. LAA31368796-01(1986); *The State of Tennessee v. Sean Penn*, Case Nos. L42039 and L42040 (1985).

Unification of World Christianity v. Harper & Row, 420 N.Y.S.2d 56 (1979). There, the plaintiff church brought a libel action against the author and publisher of a book which drew parallels between Nazism and present day occult groups including the Unification Church. *Id.* at 58. In dismissing the complaint, the court ruled: "Clearly, the comparison of one organization with another and pointing out similarities between them expresses the opinion of the person making the comparison." *Id.* at 59. *See also*, *Miller v. Richman*, 184 A.D.2d 191, 193 (4th Dep't 1992) (affirming the grant of dismissal, as statements criticizing plaintiff and "comparing her unfavorably to other[s]" are non-actionable expressions of opinion).

Because Penn has already conceded the comparison point, the Challenged Statement is not defamatory as a matter of law and this Court should dismiss the Complaint.

C. <u>The Challenged Statement Is Incapable of Being Proven True or False</u>.

1. The Challenged Statement and Article Are Conspicuously Devoid of a <u>Single Assertion of Fact Regarding Either Howard or Penn</u>.

Penn argues that, by comparing him to Howard, the Challenged Statement "both expressly and by implication … falsely and outrageously imputes serious criminal behavior – repeated violence against women – to Penn." (Sammataro Aff., Ex. A at ¶¶ 3, 28). Yet, none of the alleged facts regarding Howard which Penn attempts to introduce and rely upon in ascribing a defamatory meaning to the Challenged Statement actually appear in the Article.

In fact, Howard's personal travails, including his recent divorce and "numerous prior allegations of domestic abuse," amount to nothing more than a passing reference in a splashy fifteen page article about *Empire*. (*See* Sammataro Aff., Ex. C-13). There is no analysis of Howard's actions beyond that he has turned into a "gossip-world piñata" (*Id.* at C-5). The Article is deliberate in noting that the allegations against Howard are just that, allegations.

The purported facts that Penn seeks to interject would only be available to the reader who

was willing to put down The Hollywood Reporter and conduct an independent investigation into Howard and Penn's alleged criminality and the nuances of the legal system. *See November v. Time, Inc.*, 13 N.Y.2d 175, 178-79 (1963) ("[T]he words are to be construed not with the close precision expected from lawyers and judges but as they would be read and understood *by the public to which they are addressed*") (emphasis in original); *Jewell v. NYP Holdings,* 23 F. Supp. 2d 348, 361 (S.D.N.Y. 1998) ("It is the duty of the court, in an action for libel, to understand the publication in the same manner that others would naturally do.").[6]

Because the Challenged Statement – like the Article itself – is devoid of any provably false factual assertion regarding either Howard or Penn, there is no readily verifiable statement. Further, in that Penn inappropriately embellishes the Challenged Statement with facts not mentioned in the Article (while simultaneously excising the Brando reference), the Challenged Statement is not defamatory as a matter of law and subject to dismissal.

2. A Suggestion of Criminality Does Not Transform a Statement of Opinion into an Objectively Verifiable Fact.

That Penn has purportedly neither admitted to, nor been convicted of, domestic assault does not make the Challenged Statement defamatory. *See Riley v. Harr*, 292 F.3d 282, 289 (1st Cir. 2002) ("a provably false statement is not actionable if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts …") (internal citation omitted). Indeed, there is robust body of case law which provides that provocative rhetoric – even statements that, read literally, allege a crime – cannot properly form the basis of a defamation claim when it is understood to be expressing a point of view. Assertions that individuals have committed war crimes, cold-blooded murder, negligent homicide and pedophilic acts have been

[6] The average reader is unskilled in specifics of the criminal system and would likely view Ray Rice as being guilty of domestic violence, though he was not convicted of domestic abuse.

held non-actionable when, in context, they are properly understood as mere, non-actionable rhetorical hyperbole or vigorous epithets. *See Gross*, 82 N.Y.2d at 155. *See e.g., Egiazaryan v. Zalmayev*, 880 F. Supp. 2d 494, 510-11 (S.D.N.Y. 2012) (letters falsely suggesting that plaintiff was "responsibl[e] for war crimes" and "contribut[ed] human rights violations" were expressions of opinion); *Gisel v. Clear Channel Communications, Inc.*, 94 A.D.3d 1525, 1526 (4th Dep't 2012) (dismissing defamation claim against a defendant for calling a person acquitted of criminally negligent homicide "a cold-blooded murderer"); *Torain v. Liu*, No. 06 Civ 5851, 2007 WL 2331073 (S.D.N.Y. Aug. 16, 2007), *aff'd*, 279 F. App'x 46 (2d Cir. 2008), at *4 (rejecting the argument that accusations of criminal activity are not constitutionally protected and finding that, in context, "no reasonable listener … would conclude that defendant was accusing plaintiff of committing an act of pedophilia"); *Kamalian v. Reader's Digest Ass'n, Inc.*, 29 A.D.3d 527, 527-28 (2d Dep't 2006) (statement that doctor was guilty of "deadly mistakes" protected as opinion).

Contrary to Penn's suggestion, "there is simply no special rule of law making criminal slurs actionable regardless of whether they are asserted as fact or opinion." *Gross*, 82 N.Y.2d at 155. "In all cases, whether the challenged remark concerns criminality or some other defamatory category, the courts are obliged to consider the communication as a whole …" *Id.* Here, the Challenged Statement does not accuse Penn of any specific act and is devoid of any statement that is either precise or provable enough to qualify as an assertion of fact.

D. <u>The Full Context of the Challenged Statement Signals an Opinion</u>.

The Hollywood Reporter is "a leading source of news for and about the entertainment industry." (*See Bergstein v. The Hollywood Reporter et al.*, Case No. 650553/2014 (Sup. Ct. N.Y. Cty. 2014). It has a specialized readership and reports industry trends, not rigorous or comprehensive criminal analysis. The Article is about *Empire*'s "outsized success," "back stage

drama" and how, in becoming a "full-blown cultural phenomenon" the program has dismantled "the decades mold of primetime programming … that a show by black people, about black people and for black people could, in fact, appeal to other people, too."[7] (*See* Sammataro Aff., Ex. C-3, C-4).

Against this backdrop, the Article provides countless contextual disclaimers regarding the Challenged Statement, including that Daniels periodically "stir[s] things up," "push[es] provocative ideas," and is "fiercely protective [of his actors]." The Article also immediately forewarns that Daniels "can't help himself". (*Id.* at pp. C-8, C-14). This prefatory language unequivocally signals to the reader that Daniels is not a disinterested observer stating facts, but rather speaking from an obvious subjective point of view. That Daniels "can't help himself" further signifies that the Challenged Statement is a heat-of-the-moment, personal view rife with inherent bias, not an assertion of established fact. Read contextually, it is clear that the Challenged Statement is the product of emotion, not factual deliberation or investigation.

Additionally, the Article unequivocally notes that Daniels is alluding to other prominent actors "who have been the subject of domestic abuse allegations in the past." (*Id*. at C-14). This is a dispositive qualifier as it underscores that the Challenged Statement is not based upon any undisclosed facts, or that Daniels is either privy to, or aware of, specific facts (about either Penn or Brando) unknown to the reader. *See Bonanni*, 58 A.D.3d at 1093 ("Given this contextual background, we conclude … that a reasonable reader would understand the statements defendant made about plaintiff as mere *allegations* to be arbitrated rather than as *facts*" (emphasis in original) (internal citations omitted). *See also Levin v. McPhee*, 917 F. Supp. 230, 240 (S.D.N.Y.

[7] While irrelevant, the suggestion that the Challenged Statement was made to promote *Empire* is belied by the heavy volume of unsolicited media coverage that *Empire* receives, including a fifteen page spread in The Hollywood Reporter. (*See* Ex. C).

1996) ("[I]f a statement of opinion either discloses the facts on which it is based or does not imply the existence of undisclosed facts, the opinion is not actionable") (citing *Gross*, 82 N.Y.2d at 154); *Themed Restaurants*, 781 N.Y.S.2d at 447 (a pure opinion "does not imply that it is based upon undisclosed facts").[8]

Moreover, the Challenged Statement references Howard as a "poor boy," or a "f—in' demon". (*See* Sammataro Aff., Ex. C-14). Nobody can reasonably interpret these statements as assertions of fact, as if Daniels were calling Howard impoverished or demonic. The use of lusty language and rhetorical flourish further underscore that the Challenged Statement is an expression of opinion. *See Dillon*, 704 N.Y.S.2d at 5 ("Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable."); *Steinhilber*, 68 N.Y.S.2d at 294 (epithets, fiery rhetoric and hyperbole signal advocacy). *See also*, *Treppel*, No. 03 Civ. 3002, 2004 WL 2339759, at *12 (S.D.N.Y. 2004) (stating that "an opinion may be offered with such excessive language that a reasonable audience may not fairly conclude that the opinion has any basis in fact.").

Because the context around the Challenged Statement signals that Daniels was expressing a subjective viewpoint, Daniels used hyperbolic epithets and Daniels did not imply that the Challenged Statement was based on undisclosed facts, the Alleged Statement is not defamatory as a matter of law and this Court should dismiss the Complaint.

E. <u>The Broader Social Context of the Challenged Statement Signals an Opinion</u>.

The final factor, "the broader social context," confirms that the Challenged Statement conveys Daniels' personal view of media bias and the double-standard applied to men of color. The Article's principal focal points are the need for diversified voices in Hollywood, and

[8] Had, for example, Daniels stated, "I've read the police reports and spoken to the pertinent law enforcement officials," then the Challenged Statement would have arguably graduated from one of pure opinion to a mixed opinion.

Empire's unprecedented willingness to provide a much needed black perspective. (*See* Sammataro Aff., Ex. C-6, C-7, C-8). Daniels' statement that Howard's receipt of imbalanced media coverage is a "***sign of the time, of race, of where we are right now in America***" is a paradigmatic expression of an opinion, one in which the First Amendment fiercely protects. (*Id.* at C-14).

The issue of race, both in Hollywood and in America, remains a sensitive subject which elicits disparate views and raging debate. Recent events have sparked heated national dialogue: the media's depiction of the Ferguson, Missouri riots; Eric Garner's death and the attendant "I Can't Breathe" protests and the Black Lives matter movement; Viola Davis' Emmy win and the invocation of Harriet Tubman in her acceptance speech. *See* Michael Gold, *The 2015 Emmy Awards*, The New York Times, September 20, 2015 (noting the impact of Ms. Davis becoming the first African-American to win an Emmy Award for best actress, and the import of the award within the larger context of diversity in Hollywood). (Sammataro Aff., **Exhibit E** at E-1, E-2).

The Challenged Statement allows the reader to form his own conclusion as to whether race plays a role in the reporting of Howard's alleged conduct and to assess the merits of Daniels' espoused opinion. The appropriate inquiry is, thus, not whether Challenged Statement is popular or offensive, but whether it bears on a topic of social relevance. Indeed, the First Amendment defends what is offensive, as what is not offensive does not need defending. This is all the more true when a public figure is embroiled in the conversation. The Constitution contemplates "a bias toward unfettered speech at the expense, perhaps, of compensation for harm to reputation, at where a public figure and a topic of enormous public interest, going to the heart of political discourse, is concerned." *Buckley v. Littell*, 539 F.2d 882, 889 (1976) (citing *Gertz*, 418 U.S. at 339-43).

Further, even if Daniels' opinion that there is no meaningful difference between Howard, Brando and Penn's actions were erroneous, it is nonetheless a viewpoint that is safeguarded. "Erroneous opinions are inevitably put forward in free debate but even the erroneous opinion must be protected so that debate on public issues may remain robust and unfettered and concerned individuals may have the necessary freedom to speak their conscience." *Rinaldi*, 366 N.E.2d at 1306. *See Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944) ("One of the prerogatives of American citizenship is the right to criticize public men and measures").

Whether Daniels is right or not, he has the right to express his opinion, and Penn cannot punish Daniels for voicing his honestly held views.

IV. A Quarter Century of Regular Media Coverage on Penn's Alleged Domestic Abuse Vitiates Any Reasoned Suggestion that the Challenged Statement Could Have Impaired Penn's Reputation.

Under New York law, truth is an absolute and unqualified defense to defamation. *See Guccione v. Hustler Magazine, Inc.,* 800 F.2d 298, 301 (2d Cir. 1986) ("it is fundamental that truth is an absolute, unqualified defense to a civil defamation action") (internal citation omitted). Whether a statement is true or false is not a binary assessment. Some statements are deemed non-actionable because they are completely true. *See also Heins v. Board of Trustees of Incorporated Village of Greenport*, 237 A.D.2d 570, 570-71 (2d Dep't 1997) (granting motion to dismiss where documentary evidence established truth of alleged defamatory statements). Other statements are held to be "substantially true," and non-actionable despite minor inaccuracies. It is sufficient if the substance of the charge is proved true irrespective of any inaccuracy in the details. *See Biro v. Conde Nast*, 883 F. Supp. 2d 441, 458 (S.D.N.Y. 2012).

A third category of statements qualify as substantially true where the admitted truth becomes more tenuous, but still the overall "gist" or "sting" cannot be said to be substantially different. *See Guccione*, 800 F.2d at 302-03; *Chau*, 935 F. Supp. 2d at 662 ("Substantial truth

turns on the understanding of the average reader") (internal citation omitted). *See generally*, *Cobb v. Time, Inc.*, 278 F.3d 629, 639 (6th Cir. 2002) (finding statement that boxer tested positive for cocaine, when actually he tested positive for marijuana, to be substantially true, as "[t]he 'sting' of the statement was that [the boxer] must have used an illegal drug prior to the match."). Under both the First Amendment and Article I, Section 8 of the New York Constitution, no claim for defamation can be based upon a substantially true statement.

The libel-proof plaintiff doctrine is a corollary to the substantial truth defense, insulating statements that "could have produced no worse effect on the mind of a reader than the truth pertinent to the allegation." *Guccione*, 800 F.2d at 302. An individual who is associated with certain anti-social behavior and suffers a diminished reputation may be "libel proof" as a matter of law as it relates to that specific behavior or topic.

Under this doctrine, whether Penn committed domestic abuse or was convicted for doing so is not the pertinent inquiry. *Id.* (the libel proof doctrine "is not limited to plaintiffs with criminal records."). Instead, the focus is whether "a plaintiff's reputation with respect to a specific subject may be so badly tarnished that he cannot be further injured by allegedly false statements on the subject." *Cerasani v. Sony Corp.*, 991 F. Supp. 343, 352 (S.D.N.Y. 1998) (citing *Guccione*, 800 F.2d at 303)). "Under the libel-proof plaintiff doctrine, if there is little or no harm to a plaintiff's already-low reputation, then the statements are not actionable." *Cerasani*, 991 F. Supp. at 352; *Jones v. Plaza Hotel*, 249 A.D. 2d 31, 31 (1st Dep't 1998) (affirming dismissal based on prior court's finding that the plaintiff was libel proof).

Irrespective of whether they are actually (or substantially) true, accusations of misconduct have trailed Penn for decades. The public has long associated Penn with domestic

abuse, if not outright guilty of vicious actions of violence.[9] The public domain is saturated with tales of Penn's alleged violent acts. Penn's alleged physical abuse of his former wife Madonna has, for example, been the subject of best-selling books, including: "*Madonna Unauthorized*" by Christopher Andersen (Simon & Shuster, Inc., 1991); and "*Madonna: An Intimate Biography*" by J. Randy Taraborrelli (Simon & Shuster, Inc., 2001), the latter of which top the best sellers list in both the United Kingdom and United States, selling more than two million copies. (*See* Sammataro Aff. at ¶ 19; *see* Ex. R *supra*, R-1, R-2, R-3). The former of these works contains the following lurid account:[10]

> Around 4 p.m., after Madonna had given her small household staff the rest of the day off, [Penn] scaled the fence encircling the estate, broke into the house and confronted a terrified Madonna. After slapping her around, he bound and gagged her, then strapped her to a chair with twine. He berated and beat her for two hours, then stormed out of the house.
>
> Gagged, tied up and trembling with fear, Madonna waited for hours for help to arrive. Incredibly, Penn returned, swigging tequila, and began tormenting her all over again. This time, she managed to persuade him to untie her. Once free, she dashed out of the house, jumped into the coral-colored 1957 Thunderbird Penn

[9] Evidence of the public's view that Penn has committed acts of domestic abuse was on display earlier this year – prior to the Challenged Statement – in the fervent Twitter™ reaction to Penn's poorly-received joke regarding Alejandro González Iñárritu at the 2015 Academy Awards. *See Sean Penn's Horrifying History of Alleged Abuse* (http://www.thedailybeast.com/articles/2015/02/23/twitter-turns-on-abuser-sean-penn-following-his-oscars-green-card-joke.html) (quoting tweets: "Reminder: ***Sean Penn beats women***. #Oscars2015" and "Guys, Sean Penn is racist. ***Also, he beats women. Lest we forget***. #Oscars2015) (emphasis added). (*See* Sammataro Aff., **Exhibit F** at F-1, F-2).

[10] The Court may take judicial notice of the contents of these books, as well as the below-listed newspaper articles, without converting this motion to a CPLR 3212 motion for summary judgment. *See Grebow*, 173 Misc. 2d at 479 (taking judicial notice of a newspaper article); *Wells v. State*, 130 Misc. 2d 113, 121 (1985) ("Judicial notice is appropriate on pretrial motions that seek dismissal of Plaintiff's case"). *See also, Cerasani v. Sony Corp.*, 991 F. Supp. 343, 354 n. 4 (S.D.N.Y. 1998) (taking judicial notice of widespread coverage"); *Effie Film, LLC v. Pomerance*, 909 F. Supp.2d 272, 299 (S.D.N.Y. 2012) ("[courts may] take judicial notice of facts that various newspapers, magazines, and books were published solely as an indication of information in the public realm at the time, not whether the contents of those articles were, in fact, true.").

> had bought her for her 28th birthday, locked the doors and called the police on her car phone. She then sped off to the Malibu sheriff's station to swear out a complaint against her husband.

(*See* Sammataro Aff., **Exhibit G** at G-7, G-8). This same book attributes the following quotation to Penn in describing his relationship with Madonna, "I got ***most*** of the beatings," implying that Madonna was minimally the recipient of some beatings. (*Id.* at G-5). *Madonna: An Intimate Biography* and *Madonna Revealed* contain equally spine-chilling accounts. (*See* Sammataro Aff., **Exhibit H** at H-6 through H-9 and **Exhibit I** at I-4 through I-7; *see* I-4, commenting that it was "a unique, specific type of violence" and describing, on page I-5, the specific incident as "torture" and quoting Lieutenant Bill McSweeney: "It was a serious matter. It was something that if prosecuted would have had great implications.").

These books are just the tip of the iceberg, as there are nearly three decades of stories, read by millions across-the-globe about Penn's alleged abuse. By way of example, in 1989, the Associated Press reported that Madonna had "dropped assault charges" against Penn, despite the fact that she was "trusted up like a turkey." (*See* Sammataro Aff., **Exhibit J** at J-1). In a more recent piece entitled, "*Why Would Anyone Want To Date Sean Penn*?" The New York Post recapped certain alleged events including:

> In 1987, Penn reportedly struck his then-wife, Madonna, across the head with a baseball bat.... In December 1988, Penn allegedly tied Madonna to a chair in their Malibu home and attacked her. The nine-hour ordeal only ended when the singer was untied to use the bathroom and she fled to a police station.

(*See* Sammataro Aff., **Exhibit K** at K-1, K-2).

A Google™ search of "Sean Penn and domestic violence" produces 432,000 results (*see* Sammataro Aff. at ¶ 20; *see* Ex. Q-1 *supra*), including countless news stories that pre-date, but

continue immediately up until the time of, the Challenged Statement:[11]

- **Is Madonna still in love with Sean Penn, the man who beat her up with a baseball bat?** (The Daily Mail, 2009) ("'According to the police report,' Penn was 'drinking liquor straight from the bottle' and the abuse went on for several hours, ***during which time he smacked and roughed up the victim*** … Penn was taken away in handcuffs and charged with inflicting 'corporal injury and traumatic conditions' on [Madonna]") (citing to the police report) (emphasis added) (*Id.*, **Exhibit L** at L-1, L-2 and L-4).

- **A Marriage Filled With Abuse** (The Seattle Times, November 6, 1991) ("Fueled by prodigious quantities of alcohol, Penn's obsession with Madonna's extramarital affairs careened out of control. Their daily rows grew more violent. He threw a chair through a closed window and smashed a full tureen of soup on the floor; she hurled a vase at his head and pummeled him with her fists. ***He stuck her head in their gas oven***.") (*Id.*, **Exhibit M** at M-1 and M-2) (emphasis added).

- **No More Free Passes to Famous Men Who Abuse Women** (Aly Neel, The Washington Post, February 12, 2013) ("Gossip outlets in recent months have speculated about the possibility of another celebrity reunion – Sean Penn and Madonna. Most of the coverage, interestingly enough, has glossed over ***Penn's violent, abusive behavior*** while the 'Poison Penns' were married. Once Madonna was hospitalized after Penn struck her with a baseball bat. He was charged with domestic assault in 1998 and pleaded guilty to a misdemeanor.") (*Id.*, **Exhibit N** at N-2) (emphasis added).

- ***There Was No PSA When Sean Penn Presented Best Picture: Sean Penn's History of Violence is Often Overlooked by His Hollywood Peers*** (www.buzzfeed.com, February 23, 2015) ("Penn has been arrested for domestic violence … In 1988, Penn was charged with felony domestic assault on his then-wife Madonna. And by assault I mean he ***HIT HER OVER THE HEAD WITH A BASEBALL BAT***") (all caps in the original). (*Id.*, **Exhibit O** at O-2 and O-3) (emphasis added).

- **Why Do Famous Men Keep Getting Away with Violence Against Women?** (Zaba Blay, *The Huffington Post*, September 8, 2015) ("In 1987, Sean Penn ***infamously tortured then-wife Madonna for nine hours***. He tied her to a chair, threatened to cut off her hair, forced her to perform degrading sexual acts, and beat her with a baseball bat.") (*Id.*, **Exhibit P** at P-2) (emphasis added).

Given the volume and breadth of the publicity regarding Penn's alleged domestic abuse, together with the severity and specificity of Penn's alleged actions, the Challenged Statement could not have harmed his already tarnished reputation on the topic of domestic abuse. *See Guccione*, 800 F.2d at 304 (reports of plaintiff's adultery in widely circulated publications

[11] The fact that Penn has not sued these publications raises troubling questions as to the special animus driving this litigation.

rendered him libel-proof on the topic of adultery); *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924, 928-29 (C.D. Cal. 1982) (finding plaintiff libel-proof on the topic as to whether he financial exploited Elizabeth Taylor, and noting the existence of pre-existing articles).

Consequently, the Challenged Statement is not defamatory as a matter of law and this Court should dismiss the Complaint.

V. The Complaint Fails to Plead Actual Malice.

The United States Supreme Court has carefully erected safeguards around defamation actions involving public figures. Because public figures enjoy significantly greater access to the channels of effective communication and, hence, have a more realistic opportunity to counteract false statements, they must prove that the publication was made with actual malice. *See Gertz*, 418 U.S. at 344; *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (noting that public figures merit less protection given that they have "sufficient access to the means of counter-argument to be able to expose through discussion the falsehoods and fallacies of defamatory statements.") (internal citation omitted).

Actual malice focuses on the defendant's attitude towards the truth or falsity of the material published, and has nothing to do with bad motive, ill will, or malice in the ordinary sense of the word. *St. Amant*, 390 U.S. at 730-31 ("Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or the motive arising from spite or ill will."); *Biro v. Condé Nast*, 963 F. Supp.2d 255, 276 (S.D.N.Y. 2013) ("Importantly, actual malice does not connote ill will or spite; rather it is a term of art denoting deliberate or reckless falsification.") (internal citation omitted). "Actual malice means with knowledge that the statement was false or with reckless disregard as to whether or not it is true." *Gertz*, 418 U.S. at 345; *See Kipper v. NYP Holdings Co., Inc.,* 12 N.Y.3d 348, 353 (2009) (actual malice is a subjective inquiry, "focusing upon the state of mind of the publisher of the allegedly

libelous statements at the time of publication"). Significantly, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. at 731.

Not only is proving actual malice a heavy burden, so is pleading it. New York law requires that actual malice be plead with specificity. *See Themed Restaurants,* 781 N.Y.S.2d at 449 ("the court holds that specificity in the pleading of constitutional or actual malice is required."); *Rivera v. NYP Holdings, Inc.*, 16 Misc.3d 1121(A), at *4 (Sup. Ct. N.Y. County, Aug. 2, 2007) ("A failure to plead actual malice in a complaint for defamation is grounds for dismissal of the complaint."). *See also*, *Jimenez v. United Federal of Teachers*, 239 A.D.2d 265 (1st Dep't 1997), *app. dismissed*, 90 N.Y.2d 890 (1997) ("[public figure plaintiff] was required but failed to allege facts sufficient to show actual malice with convincing clarity"); *Red Cap Valet, Ltd. v. Hotel Nikko (USA), Inc.*, 273 A.D.2d 289, 290 (2d Dep't 2000) ("plaintiff failed to allege any facts from which malice could be inferred"); *Diario El Pais, S.L. v. The Nielsen Company (US), Inc.*, No. 07 CV 11295 (HB), 2008 WL 4833012, at *6 (S.D.N.Y. Nov. 6, 2008) ("Actual malice must be pled with specificity."). *Cf. Alianza Dominiciana, Inc. v. Luna*, 229 A.D.2d 328, 329 (1st Dep't 1996) (permitting notice pleading, finding that constitutional malice may be advanced later in the proceeding).

In requiring that actual malice be pled with specificity, the *Themed Restaurants* court noted the need for "vigilance" in order to ensure that free speech is safeguarded against attenuated defamation claims by providing assurance to those exercising their First Amendment rights that do so will not needlessly become prohibitively expensive. *See Themed Restaurants,*

781 N.Y.S.2d at 449. Under *Themed Restaurants* and its progeny, bare recitations are insufficient. *See Rivera v.* 16 Misc.3d 1121, at *4 ("Contrary to plaintiff's assertions merely amending the complaint to insert the words 'actual malice' will not cure the defect since there are no allegations presented in the complaint that fall within the definition of actual malice.").

Penn's bald allegations of actual malice are woefully inadequate:

- "Daniels, upon information and belief, made his defamatory statement for improper purposes, with knowledge that the statements would be published throughout and outside of the United States" (Sammataro Aff., Ex. A at ¶ 23); and
- "Upon information and belief, Daniels intentionally portrayed Penn in the above-referenced manner knowing that his depiction was false and untrue or with reckless and wanton disregard for the truth." (*Id.* at 25).

These allegations are barren of any facts that suggest the Daniels voiced his opinion with a high degree of awareness of probable falsity, or entertained any doubt, much less serious doubts, as to the basis of his viewpoint. *See Dillon*, 261 A.D.2d at 40 (actual malice cannot be plead "on surmise and conjecture.").

Further, because the Challenged Statement echoes nearly three decades of reports about Penn's alleged domestic abuse, permitting conclusory allegations that Daniels' opinion was made with known falsity or a reckless disregard for the truth fails to heed *Themed Restaurant's* call for vigilance. *See, e.g., Church of Scientology Int'l v. Daniels*, 992 F.2d 1329, 1334 (4th Cir. 1993) (the "volume of published commentary" supporting the challenged statement makes it "impossible to conclude that [defendant] entertained serious doubts as to the truth of his statement or spoke with a high degree of probable falsity."); *Konrad v. Brown*, 937 N.Y.S.2d 190, 191 (2012) ("defendant's statements were based on documents or articles he had a read and thus were not made with knowledge of their falsity or reckless disregarded of whether they were true") (citing *Kipper*, 12 N.Y.3d at 353-354)).

Penn's failure to plead actual malice with the requisite specificity warrants dismissal of his Complaint.

CONCLUSION

For each and every of the foregoing reasons, Daniels respectfully requests that this Court enter an order dismissing Penn's Complaint, with prejudice, and for such other and further relief as the Court deems just and proper, including an award of attorneys' fees and costs.

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Respectfully submitted,

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