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

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MOSDOT SHUVA ISRAEL and BEN ZION SUKY,

Plaintiffs,

-against-

ILANA DAYAN-ORBACH p/k/a ILANA DAYAN, KESHET BROADCASTING LTD., THE ISRAELI NETWORK, INC., and ISTRAELI TV COMPANY,

Defendants.

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Index Number: 156173/2014

Motion Sequence No. 1

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO DISMISS OF DEFENDANTS ILANA DAYAN-ORBACH AND KESHET BROADCASTING LTD.

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Plaintiffs Mosdot Shuva Israel ("Shuva") and Ben Zion Suky ("Suky") (collectively "Plaintiffs") respectfully submit this memorandum of law and the accompanying affirmation in opposition to the Motion to Dismiss, dated October 15, 2014 ("Motion") of defendants Ilana Dayan-Orbach ("Dayan") and Keshet Broadcasting Ltd. ("Keshet") (collectively "Defendants").

SUMMARY OF ARGUMENTS

The current action was filed in direct response to Defendants Ilana Dayan-Orbach and Keshet Broadcasting Ltd.'s false and defamatory representations [1] in an expose television broadcast regarding Rabbi Yoshiyahu Yosef Pinto, Shuva and Suky.

Defendants were well aware of the falseness of the allegations in the program. Prior to the airing, Suky was contacted in New York by Dayan's office to address certain allegations by opposition to Rabbi Pinto. Suky provided hundreds of pages of documents to Dayan that refute the allegations. Dayan failed to disclose the documents disclosed by Suky in the Program.

Now Defendants move for dismissal on purely technical grounds, asserting lack of personal jurisdiction, *Forum Non Conveniens* and pleading issues. It is respectfully submitted that each and every argument put forth by the defendants are without merit.

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[1] Defamation is the making of a false statement about a person that "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society." Rinaldi v Holt, Rinehart & Winston, 42 N.Y.2d 369, 379, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (N.Y.1977) *cert denied* 434 US 969 (1977). "The elements are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." Dillon v City of New York, 261 A.D.2d 34, 38, 704 N.Y.S.2d 1 (1st Dept. 1999).

COUNTER-STATEMENT OF FACTS

A complete statement of the relevant facts is found in the Verified Complaint, sworn to on June 24, 2014 ("Complaint"). Below is a brief statement of the facts relevant to this Motion:

Plaintiff Mosdot Shuva Israel and Ben Zion Suky:

Shuva is a religious not-for-profit corporation led by Rabbi Yoshiyahu Yosef Pinto, a scholar and religious leader in the Orthodox Jewish community ("Rabbi Pinto"). (Complaint, ¶¶1-2). Shuva was created on or about July 22, 2003, with primary address at 122 East 58th Street, New York, New York, to conduct and maintain a House of Worship in accordance with the traditions of the Jewish faith and all communal affairs necessary for a viable community among other things as set forth in its Certificate of Incorporation. (Complaint, ¶¶1, 39).

Suky met Rabbi Pinto on or about 2002, and helped to create Shuva in New York. (Complaint, ¶¶37-38). Suky donates time, money and resources to Shuva to further its objects and purposes. (Complaint, ¶40).

Shuva, as part of its communal services, sponsors and provides: (1) religious schools throughout the United States, including New York City; (2) weekly dinners for needy people; (3) kosher food service deliveries for the elderly and needy; (4) medical support; and (5) medical accommodations. (Complaint, ¶¶40-41). The community programs and outreach of Shuva have garnered positive public opinion and praise throughout the secular and Jewish Communities in the New York and Israel. (Complaint, ¶42).

Based upon Rabbi Pinto's reputation throughout the world, Shuva's reputation has been enhanced and advanced throughout the world as well, resulting in significant donations in time and money from various individuals and corporations. (Complaint, ¶¶43-44).

Defendants Ilana Dayan-Orbach and Keshet Broadcasting Ltd.:

Defendant Ilana Dayan-Orbach p/k/a Ilana Dayan ("Dayan") is an Israeli investigative journalist, anchorwoman, and attorney. She is the host of the investigative television program Uvda on Israeli Channel 2. (Complaint, ¶¶4-5).

Defendant Keshet Broadcasting Ltd. ("Keshet") is an Israeli business entity that operates under the auspices of the Second Israeli Broadcasting Authority, and is one of two operators that run the main Israeli commercial television channel, Channel 2. Keshet shows original drama series, news, entertainment and lifestyle shows, and foreign programs, and is the owner of the investigative television program Uvda ("Uvda") on Israeli Channel 2. (Complaint, ¶¶8-11).

Defendant The Israeli Network, Inc. ("Israeli Network") is a domestic subscription cable network which features programming from all the top networks in Israel, including Channel 1, Channel 2, Channel 10, and Channel 8 for transmission throughout the United States, including the County, City and State of New York. The Israeli Network distributes and transmits Israeli television programs, including Uvda, in the New York Tri-State Area. (Complaint, ¶¶12, 17-22).

Defendant Israeli TV Company ("Israeli TV") is a subscription internet service located in New York which provides access to Israeli television shows and stations, including Uvda on Israeli Channel 2, for a fee. Israeli TV's corporate offices are located at 1404 Avenue Z, Brooklyn, New York 11235. (Complaint, ¶¶14, 26).

Uvda was and is also aired in New York through Mako.co.il, a website owned and operated by Keshet. (*See* ¶ 5 of the Affirmation of Charles S. Sims, dated October 15, 2014 (NYCEF Doc No. 20) ("Sims Afm."); *See also* Google Analytics Report (Exhibit 3 of the Motion (NYCEF Doc No. 23)).

Defamatory Program:

On or about May 22, 2014, an episode of Uvda, which focused on Suky and Rabbi Pinto. The episode was aired on Israeli Channel 2, posted on Israeli Channel 2's official website, and posted, upon information and belief, upon the websites of Israeli TV and Israeli Network. The episode, upon information and belief, was aired in New York by cable providers.

Prior to the airing of the episode, Suky was contacted by Dayan's office to address certain allegations by opposition to Rabbi Pinto. Suky provided hundreds of pages of documents to Dayan which refutes the allegations by opposition to Rabbi Pinto. Dayan failed to disclose the documents produced by Mr. Suky in the May 22, 2014 episode of Uvda.

As specifically alleged in the Complaint:

> 45. In an effort to tarnish, diminish and destroy the reputation of Rabbi Pinto and his Shuva, the Defendants Keshet and Dayan engaged in a course of conduct which instead of seeking the truth, solely provided former followers of the Rabbi and Shuva to gain their revenge against Plaintiffs for… alleged failed business losses.
>
> 46. A review of the entire transcript of the season finale of Uvda, which aired in both Israel and New York on or about May 22, 2014, (the "Program")… demonstrates that the Defendants, Keshet and Dayan with total disregard for the truth, instead forged ahead and produced a show that instead provided the public with an expose solely geared to destroy Rabbi Pinto, Shuva, and Suky….
>
> 49. Within the first five minutes of the Program, Defendant Dayan falsely asserted that Rabbi Pinto's "Empire", i.e., Shuva, is not really a charity or religious organization, but rather a "tangled web" and front for "money and profit":
>
> > "Ilana Dayan: The modest man, who rose from the pages of the book he himself wrote, has meanwhile turned into an international empire with ties with the government high-ups, politicians, senior police officers, and even tycoons. With a well-oiled mechanism that raises millions for charity, assets and capital estimated at NIS 75 million. Only when you lift the veil do you discover how the system works, and how the tangled web that this man has woven around him pumps information to him, which turns into money and power. And how this money has been used to pay for a life of

extravagance and abundance for the rabbi and his close associates for years."

See Exhibit 1, p. 1.

50. Without regard for the truth, Defendants Dayan and Keshet, their agents, servants, and/or employees, caused induced, and/or permitted false statements to be included in the Program and aired in New York so that the Rabbi's and Shuva's followers would denounce Plaintiffs, thereby causing Plaintiffs to be harmed and damaged.

51. Approximately a week before the Program was aired in both Israel and New York, Plaintiff, Suky learned about it.

52. Approximately one week prior to the airing Plaintiff Suky contacted Defendant Dayan in an effort to provide her with the truth.

53. Approximately one week prior to the airing of the Program, Suky, individually and on behalf of Plaintiff Shuva, and Rabbi Pinto, forwarded written materials to Defendant Dayan for her review.

54. The documents forwarded by Plaintiff Suky to Defendant Dayan specifically refuted the false allegations which were ultimately included in the Program and aired in Israel and New York.

55. Defendant Dayan intentionally, maliciously, and with total disregard for the truth, disregarded the documents forwarded to her by Plaintiff Suky and instead went forward and aired the Program without referencing any documents from Plaintiff Suky.

56. Defendant Dayan disregarded the documents forwarded to her by Plaintiff Suky and aired the Program without disclosing that documentary evidence produced by Plaintiff Suky demonstrating the falsity of the statements made throughout the Program and that would have refuted the allegations made in the Program.

57. Defendant Dayan also ignored all efforts made by Plaintiff Suky to demonstrate that the claims she was going to publish were false.

See Complaint, ¶¶ 45-57; *See also* page 1 of Transcription of Defamatory Program (Exhibit 1 of Complaint).

All Bribery Charges Against Rabbi Pinto Dropped:

In the Motion, significant weight is given to an alleged plea deal and charges levied against Rabbi Pinto for bribery.

However, since the filing of the Motion the bribery charges against Rabbi Pinto have been dropped for lack of evidence:

> "The State Attorney's office announced on Monday that all bribery charges against Rabbi Yoshiyahu Pinto have been dropped for lack of evidence. Pinto was suspected of bribing police Maj. Gen. Ephraim Bracha to get information about a corruption case being levied against Pinto's charity, Hazon Yeshaya.
>
> This decision was praised by Shuva Israel Community which is led by Pinto. 'It has now been made clear that all the incitement against our community was based on nothing but evilness. The state should apologize to Rabbi Pinto for making these false accusations.'"

See "State Drops Charges Against Rabbi Pinto" by Omri Ariel (Jerusalem OnLine, December 29, 2014) (http://www.jerusalemonline.com/news/in-israel/local/state-drops-charges-against-rabbi-pinto-10580).

ARGUMENTS

POINT I

LONG-ARM JURISDICTION PROPERLY EXISTS OVER DAYAM AND KESHET

Defendants assert that this court lacks long-arm jurisdiction over Dayan and Keshet under C.P.L.R. § 302(a). Specifically, they argue that neither Dayan nor Keshet transacted business in New York that was directly connected to the Program, contrary to the detailed allegations in the Complaint. (*See* Complaint, ¶15-36). However, as demonstrated below, Dayan's own admissions submitted in support of the Motion [2] demonstrate that long-arm jurisdiction is proper in the current action.

[2] Affidavit of Ilana Dayan-Orbach in Support of the Motion to Dismiss, sworn to on October 13, 2014 (NYSCEF Doc No. 30) ("Dayan Afd").

The requirements for long-arm jurisdiction in defamation cases were explained in Montgomery v. Minarcin, 263 A.D.2d 665, 693 N.Y.S.2d 293 (3d Dept. 1999):

> "New York courts may exercise personal jurisdiction over [foreign defendant] for these [defamation] claims under this State's long-arm jurisdiction statute (*see*, CPLR 302(a)(1))... Plaintiff's maintenance of this defamation action against... a nondomiciliary, under CPLR 302(a)(1) requires a showing that [defendant] engaged in '"purposeful activities"' within this State and demonstration of a '"substantial relationship"' between those activities and the cause of action (Talbot v Johnson Newspaper Corp., *supra*, at 829, *quoting* McGowan v Smith, 52 NY2d 268, 272; *see also*, Legros v Irving, *supra*, at 55-56; *Siegel*, NY Prac § 86, at 123-130 [2d ed]).

263 A.D.2d at 667.

As explained by the court in Sino Clean Energy Inc. v Little, 35 Misc.3d 1226(A), 953 N.Y.S.2d 553 (N.Y. Sup. Ct. 2012):

> "On a motion to dismiss, courts do not require that the plaintiff make a prima facie showing of personal jurisdiction. Rather, plaintiff must only demonstrate that facts 'may exist' to exercise personal jurisdiction over the defendant. And, to the extent that, in opposition to a motion to dismiss, the plaintiff seeks disclosure on the issue of personal jurisdiction pursuant to CPLR § 3211(d) 'the plaintiff [...] only needs to set forth a sufficient start, and show that its position is not frivolous'."

35 Misc.3d at 1226A (citation omitted).

In Fischbarg v. Doucet, 9 N.Y.3d 375, 880 N.E.2d 22, 849 N.Y.S.2d 501 (N.Y. 2007), the Court held that jurisdiction over non-domiciliary defendants was properly asserted since defendants "projected themselves into New York via telephone." 9 N.Y.3d at 385. The Court held that physical presence and quantity of activity are not important for a finding of doing business in New York pursuant to C.P.L.R. § 302(a)(1):

> "Although it is impossible to precisely fix those acts that constitute a transaction of business, our precedents establish that it is the quality of the defendants' New York contacts that is the primary consideration."

9 N.Y.3d at 380 *citing* Siegel, NY Prac § 86 (4th Ed.); *See also* Legros v. Irving, 38 A.D.2d 53, 327 N.Y.S.2d 371 (1st Dept. 1971) (Court found long-arm jurisdiction where "purposeful business transactions have taken place in New York giving rise to the [defamation] cause of action." 38 A.D.2d at 55).

Jurisdiction is proper even if the defendant denies physically appearing in New York, as in the current action. Deutsche Bank Sec., Inc. v. Montana Bd. of Invs., 21 A.D.3d 90, 797 N.Y.S.2d 439 (1st Dept. 2005) (Reversed dismissal, finding long-arm jurisdiction over non-domiciliary and holding "electronic communications, telephone calls or letters... may be sufficient if used by the defendant deliberately to project itself into business transactions occurring within New York State." 21 A.D.3d at 94); *See also* GTP Leisure Products, Inc. v. B-W Footwear Co., 55 A.D.2d 1009, 391 N.Y.S.2d 489 (4th Dept. 1977) (Court affirmed denial of summary judgment on issue of long-arm jurisdiction, holding that jurisdiction was proper over defendant who remotely engages in business activities in New York and asserts defamatory statements outside of New York).

In the current action, the factual allegations proffered by Dayan clearly support the allegations in the Complaint that Keshet and Dayan engaged in purposeful business (i.e. investigative journalistic activities) within New York which were substantially related to the Program at issue in this action. Specifically, Dayan admits that she and Keshet transacted business in New York in preparation and in furtherance of the Program.

First, Dayan concedes that business activities, i.e. investigations, for the Program was undertaken in New York. In paragraph 13 of Dayan's affidavit, she asserts that

> "***virtually*** all of the work on the [Program]... was undertaken in Israel"

(emphasis added). By using the term "virtually", Dayan admits that some unknown quantity of "work" was performed in New York.

Second, Dayan further concedes that, in preparation of the Program, she and other journalists of Uvda interviewed people in New York via telephone:

> During preparation of the Uvda piece on Rabbi Pinto, I, as well as other journalists from the Uvda team, attempted to contact by phone certain individuals in the United States and conversed with a few of these individuals mainly to get comments, reactions, and responses ..."

Dayan Afd, ¶ 16. Specifically, in paragraph 17 of the Dayan Afd, Dayan admits she spoke with the following individuals while said individuals were in New York:

(1) Rabbi Pinto;

(2) Rabbi Pinto's wife;

(3) Suky;

(4) Arthur Aidala, Esq. (counsel for Rabbi Pinto); and

(5) Tomer Shohat.

See also Dayan Afd, ¶ 20 (Dayan concedes that three journalists from Uvda communicated with unspecified individuals somewhere in the United States via telephone and e-mail regarding the Program).

Finally, Dayan concedes that she and Uvda hired a videographer in New York to obtain original video for the Program at issue:

> "Uvda engaged a videographer to obtain visual content on the few locations in New York referred to in the Pinto report [i.e. the Program]."

Dayan Afd, ¶ 28.

The facts in the current action are strikingly similar to Montgomery v. Minarcin, 263 A.D.2d 665, 693 N.Y.S.2d 293 (3d Dept. 1999), another defamation action regarding a foreign

journalist. In Montgomery, the Appellate Division reversed dismissal on jurisdictional grounds. The Court held that since elements of defendant's interviews, research, and preparation of the news pieces were done in New York, defendant's activities in New York were purposeful and directly related to plaintiff's causes of action. [3]

Thus, there is no question that Dayan and Keshet engaged in purposeful activities in New York, i.e. investigative journalism and videography. There is also no question that a substantial relationship exists between those activities and the defamation claims in the current action.

A. Plaintiffs Are Entitled to Discovery on Jurisdictional Issues:

It is respectfully submitted that dismissal is especially inappropriate in the current action since discovery has yet to be held. C.P.L.R. § 3211(d) ("Should it appear... that facts essential to justify opposition may exist... the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just."); *See also* Goel v. Ramachandran, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013) ("Since the plaintiffs demonstrated that facts 'may exist' which would permit the exercise of personal jurisdiction over [defendants], but that such facts remain in the exclusive control of the... defendants, the Supreme Court providently exercised its discretion in denying that branch of... defendants' motion which was to dismiss the complaint...." 111 A.D.3d at 789); American BankNote Corp. v. Daniele, 45 A.D.3d 338, 845 N.Y.S.2d 266 (1st Dept. 2007) (Denial of motion to dismiss affirmed where the "pleadings, affidavits and accompanying documentation

[3] Keshet and Dayan's attempts to distinguish Montgomery on a quantitative comparison of the conduct in New York in Mongomery and the current action is entirely inappropriate. The issue is not the amount of journalistic activities in New York, but the nature and quality of said activities.

made a 'sufficient start' to warrant further discovery on the issue of personal jurisdiction. 45 A.D.3d at 340).

Discovery is necessary in the current action to allow Plaintiffs an opportunity to investigate the issues regarding Keshet and Dayan's business dealings in New York. The nature and full extent of those dealings are unknown and unavailable to Plaintiffs, including the contractual and business relationships between Keshet and defendants The Israeli Network, Inc. and Israeli TV Company.

It is respectfully submitted that the Motion should be denied to allow Plaintiffs the opportunity to engage in discovery.

POINT II

DISMISSAL OF CLAIMS ON GROUNDS OF FORUM NON CONVENIENS WOULD BE IMPROPER

Defendants move for dismissal under the doctrine of *Forum Non Conveniens* pursuant to C.P.L.R. § 327(a). As demonstrated below, dismissal is inappropriate as New York is the proper forum.

The factors to be considered in a motion to dismiss pursuant to C.P.L.R. § 327(a):

> "include the burden on New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. Islamic Republic of Iran v. Pahlavi, 62 NY2d 474, 479, 478 N.Y.S.2d 597. 'The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation' (Id.). Further, although not the sole determining factor, the residence of a plaintiff has been held 'to generally be "the most significant factor in the equation"' Cadet v. Short Line Terminal Agency, Inc., 173 AD2d 270, 569 N.Y.S.2d 662.

Kastendieck v. Kastendieck, 595 N.Y.S.2d 184, 185, 191 A.D.2d 328 (1st Dept. 1993).

There is no question that both Plaintiffs Shuva and Suky, reside or are located in the County, City and State of New York. Furthermore, there is no question that New York is the forum of choice of the Plaintiffs.

Regarding the defendants, as demonstrated above, they do in fact do business in New York. Furthermore, Dayan owns property in the tri-state area. (*See* LexisNexis Records Search Report (Exhibit "A" of the accompanying affirmation of Marc Jonas Block).

Defendants' reliance upon the unpublished opinion in Metropolitan Worldwide v. Bunte Entertainment, et al. (Index No. 105247/2002) is both inappropriate, as it is a non-published decision, and misplaced. Undisclosed by defendants is the fact that the corporate plaintiff, i.e. Metropolitan Worldwide, was a foreign corporation with offices in New York but unauthorized to do business in New York and not authorized to file the action in New York. Thus, unlike in the current action, in Metropolitan Worldwide, New York was precluded from being a proper forum.

It is respectfully submitted that New York is the proper forum for the current action, and dismissal under C.P.L.R. §327(a) would be inappropriate.

POINT III

PLAINTIFFS PROPERLY STATED VALID CLAIMS FOR DEFAMATION

Keshet and Dayan do not deny the defamatory statements made, but rather seek to dismiss on technical pleading grounds. As demonstrated below, Plaintiffs have in fact properly pled all claims as a matter of law.

A. Pleading Requirements Satisfied By The Attachment Of The Transcript Of The Program To The Complaint:

It is respectfully submitted that the Plaintiffs met pleading requirements for claims of defamation in C.P.L.R. § 3016(a) by attaching a copy of the certified transcript and translation of the Program to the Complaint. (*See* Complaint, Exhibit 1). A simple review of the transcript demonstrates the defamatory content and implications to the Plaintiffs.

Courts have repeatedly held that attachment of the defamatory materials to the complaint satisfies the pleading requirements C.P.L.R. § 3016(a). McRedmond v. Sutton Place Rest. & Bar, Inc., 48 A.D.3d 258, 851 N.Y.S.2d 478 (1st Dept. 2008) (Defamation properly pled "where a copy of the allegedly libelous statement is attached to the [pleadings] and is expressly incorporated in the [claims]." 48 A.D.3d at 259); David J. Cogan Management Co. v. Lipset, 434 N.Y.S.2d 417, 79 A.D.2d 918 (1st Dept. 1981) ("Pleading of defamation claim held to satisfy "requirements of C.P.L.R. § 3016(a) in that a copy of the allegedly libelous letter [was] attached to the amended answer and expressly incorporated." 434 N.Y.S.2d at 418); Pappalardo v. Westchester Rockland Newspapers, Inc., 475 N.Y.S.2d 487, 101 A.D.2d 830 (2d Dept. 1984) *affirmed* 64 N.Y.2d 862 (1985) (Attachment of defamatory material held to satisfy pleading requirements of defamation claims); Ostrer v. Reader's Digest Ass'n, 48 A.D.2d 856, 368 N.Y.S.2d 575 (2d Dept. 1975) (Pleading requirement met by attachment to complaint "the alleged libelous article". 48 A.D.2d at 857); John's 53-26, Inc. v. Chilton Co., Div. of American Broadcasting Cos., 83 A.D.2d 830, 441 N.Y.S.2d 556 (2d Dept. 1981) (Dismissal reversed since plaintiff attached allegedly defamatory material to complaint, and it "is for the jury to decide whether the defamatory sense was the meaning conveyed." 83 A.D.2d at 831); Hogan v. Herald Co., 84 A.D.2d 470, 446 N.Y.S.2d 836 (4th Dept. 1982) (Held that "relatively short offending

article has been annexed to [the complaint], thereby satisfying reasonable notice pleading requirements." 84 A.D.2d at 474).

Thus, since the certified translation of the transcript of the Program, containing the defamatory content and implications to the plaintiffs, is attached to the Complaint (Complaint, Exhibit 1), the pleading requirements of defamation claims are met in the current action. McRedmond, 48 A.D.3d at 259.

B. Even Without Attachment Of Transcript, The Claims For Defamation Are Properly Stated:

Assuming for purposes of this motion only that the attachment of the transcript and translation of the Program do not satisfied technical pleading requirements, it is respectfully submitted that the defamation claims are properly pled.

1. The Allegedly Defamatory Statements Are "Of And Concerning" The Plaintiffs:

Defendants assert that Plaintiffs fail to meet the pleading standards of defamation, claiming Plaintiffs failed to allege claims that are "Of and Concerning" Plaintiffs. As demonstrated below, the statements complained of clearly meet the pleading requirements.

As stated in the Complaint, the defamatory statements made in the Program were formulated by Keshet and Dayan in such a way that they were geared to defame Rabbi Pinto, Shuva and Suky.

It is un-dispute that Shuva is operated by Rabbi Pinto. Keshet and Dayan put forth concerted effort to tarnish, diminish and destroy the reputation of Rabbi Pinto and his Shuva. Instead of seeking the truth, Keshet and Dayan relied upon and referenced statements solely provided by enemies and former followers of the Rabbi and Shuva. Upon review of the entire transcript of the season finale of *Uvda*, Keshet and Dayan demonstrate how they disregarded the

truth and instead forged ahead and produced a show that provided the public with an expose solely geared to destroy the reputations of Rabbi Pinto, and Plaintiffs Shuva and Suky.

As can be read in the transcript of the program, portions of which are repeated below, within the first five minutes, Dayan falsely asserted that Rabbi Pinto's "Empire", i.e. Shuva, is not really a charity or religious organization, but a "tangled web" and front for "money and profit":

> Dayan: The modest man, who rose from the pages of the book he himself wrote, has meanwhile turned into an international empire with ties with the government high-ups, politicians, senior police officers, and even tycoons. With a well-oiled mechanism that raises millions for charity, assets and capital estimated at NIS 75 million. Only when you lift the veil do you discover how the system works, and how the tangled web that this man has woven around him pumps information to him, which turns into money and power. And how this money has been used to pay for a life of extravagance and abundance for the rabbi and his close associates for years.

See Exhibit 1 to Plaintiffs' Complaint, p. 1. The afore-stated statements are without a doubt "Of and Concerning" the Plaintiffs.

Through Dayan's own statements in the Program, as well as those of the interviewees (*to wit* Nissim Biton, Tomer Shohat, unidentified male "A", and Menashe Arviv), Keshet and Dayan assert false deeds, improper activities, self-dealings and other salacious defamatory claims:

> Dayan: the Rabbi's "Empire" has fallen because, instead of his giving, the Rabbi is now taking.

See Exhibit 1 to Plaintiffs' Complaint, p. 1;

Dayan asserts that Rabbi Pinto does more than give advice, he

> Dayan: "also conjures up huge real estate deals on his own,... [and] recruits investors for a hotel that his followers want to buy on Madison Avenue in New York";

See Id., p. 2 at 5:00; See also Id., p. 3 (Dayan asserts the Rabbi is "pulling funds out of the kitty"); Id., p. 6 at 15:00 (Dayan asserts the Rabbi "threats and mentioning the names of officers are part of the system"). Dayan asserts that Rabbi Pinto and Shuva use a hotel owned by a member of the Shuva as a "guest house", which allegedly "gives out free accommodations for people of Rabbi Pinto's choosing." Id.

Dayan and Keshet also assert that the Rabbi and the Shuva are dangerous, routinely threatening others with harm:

> Dayan: "[Rabbi] Pinto… turns from an admired rabbi into a dangerous man. This happens when the rabbi realizes he's in over his neck. What happens between Pinto and Arviv demonstrates the system rather well: making connections with senior officers, occasionally throwing temptations their way, always collecting information, ready for action. And above all – maintaining a handle on the people at the top."

See also Id., p. 7 at 20:00 (When followers get in trouble with the Rabbi's courtyard, the "police are after them as well."); Id., p. 9 at 25:00 ("millions of shekels went from charity organization, 'Hazon Yeshaya' into the rabbi's wife's private account" and after attempting to bribe a government official the Rabbi goes to the Attorney General and says "give me a deal");

> Dayan: "the problem starts when a web of tainted connections is woven around this rabbi, when they stand in line – the minister and the tycoon, the criminal and the chief investigator, looking to get his blessing, not just for spiritual purposes, and effusing to see what he is looking to get from them."

Id., p. 13 at 50:00;

> Dayan: "But you knew, questioning Menashe Arviv about Aziza, Yossi Harari, and Shalom Domrani, various individuals with criminal backgrounds, they were hanging around the Rabbi. You didn't understand that a rabbi that somehow attracted Nochi Dankner and Yossi Harari, as well as Eduardo Elstein and Moshe Aziza, that perhaps something there was different than the rabbis you knew as a child?"

Id., p. 11 at 30:00;

Dayan: "Rabbi Pinto's name is already mentioned at this point in the investigation here in Israel on the Hazon Yeshaya affair. This investigation gets the rabbi nervous, and also leads him to action."

Id., p. 12 at 35:00.

All of the statements listed above, as well as others contained in the transcript and translation attached to the Complaint, are without a doubt "Of and Concern" the Plaintiffs.

Furthermore, false and misleading statements made with regard to Suky and his business dealings touch and concern Suky.

As such, Defendants Motion to Dismiss should be denied.

2. The Statements Are Defamatory *Per Se*:

As demonstrated below, defamatory statements identified by plaintiffs are Defamatory *per se*, notwithstanding claims by Defendants.

Defamation *per se* occurs when a statement is defamatory on its face, i.e. when it suggests improper performance of one's professional duties or unprofessional conduct. Chiavarelli v Williams, 256 AD 2d 111, 113, 681 NYS 2d 276 (1st Dept. 1998). "The words should be considered in the context in which they were used and whether they can be readily interpreted as imparting to plaintiff fraud, dishonesty, misconduct or unfitness in her business." Herlihy v. Metro. Museum of Art, 214 A.D.2d 250, 261, 633 N.Y.S.2d 106, 113 (1st Dept. 1995) (citation omitted).

There is no question that the Complaint in the current action identifies claims for Defamation *per se*. Accusations of an individual stealing from a charity, attempting to bribe government officials and referring to the Rabbi as the "criminal and chief investigator" are clear assertions of criminality.

Defendants assert that alleged statements regarding Suky involve harassment and do not arise to defamation *per se*. Defendants' fail to take any position as to the level of harassment, and therefore, Defendants' Motion should be dismissed.

The natural connotations of the statements made by Dayan and Keshet clearly impart upon Plaintiffs fraud, dishonesty, misconduct and unfitness. Such allegations are the very definition of Defamation *per se*. Pezhman v. City of New York, 29 A.D.3d 164, 812 N.Y.S.2d 14 (1st Dept. 2006) (Defamation *per se* as a matter of law, where, as in the current action, the defaming party alleged fraud, dishonesty, misconduct and unfitness against plaintiff).

Finally, with regard to "special damages," Defendants define the term to mean "the loss of something having economic or pecuniary value." Throughout Plaintiffs' complaint, economic and pecuniary value has been Plaintiffs' first and foremost alleged loss. Painting Rabbi Pinto as a criminal puts both Shuva and Suky at the forefront of an economic loss, as the Shuva will lose membership due to the alleged criminality of Rabbi Pinto and Suky's hotel will suffer economic losses due to the allegations of his alleged wrongful activities. Therefore, the Complaint identifies special damages.

In conclusion, Plaintiffs had alleged and properly pled claims for Defamation *per se* against Keshet and Dayan.

3. Keshet and Dayan Cannot Hide Behind A Claim of Opinion:

Keshet and Dayan move for dismissal, trying to claim that the representations in the Program where "nearly" [4] all opinion, and therefore not actionable. As demonstrated below, the allegations were not opinion, and dismissal is improper.

[4] It should be noted that Defendants' own argument requires denial of the Motion. Even if "nearly all" statements were opinion, some, by definition of the word "nearly", were not.

The question of "[w]hether a particular statement constitutes an opinion or an objective fact is a question of law" is to be decided by the trial court in the first instance. Mann v. Abel, 10 N.Y.3d 271, 276 (2008). In determining whether a statement is opinion or subject to a defamation claim on a motion to dismiss, the court should consider whether the challenged expression "would reasonably appear to state or imply assertions of objective fact" based upon a consideration of "the impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person." Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235, 243 (1991).

It is obvious from a reading of the Complaint and transcript that many, if not all, of the statements complain of by the Plaintiffs are of an objective facts and not an opinion.

Defendants reliance on Foley v. CBS Broadcasting, 2006 N.Y. Misc. LEXIS 9327 (N.Y. Sup. Co. 2006) is not persuasive. Contrary to the statements in Foley, where a news program stated that one of the plaintiffs was allegedly "a 'con artist,' that the Plaintiff engaged in a 'scam,' that the plaintiff 'ripped off' her customers, and that she ran a 'crooked' business," Defendants here specifically stated, that, as a fact:

- the Rabbi's "Empire" has fallen because, instead of giving, the Rabbi was now taking," the Rabbi was "pulling funds from the kitty,"
- "Millions of Schekels went from charity organization to the rabbi's wife's private account to bribe a government official;"
- "These documents ... show, 'according to suspicion,' that thousands of dollars allegedly flow from the hotel's kitty to Ben Zion Suky."

The three statements listed above, among the many other statements in within and attached to Plaintiffs' pleadings are statements of objective fact, not mere conjecture or opinion, and can be proven or disproven.

Plaintiffs cannot claim to have documents in hand to prove an allegation, then pretend it is merely an opinion because the defendants loads its statement with the words "according to suspicion." Making such a claim does not automatically transfer an alleged objective fact to that of an opinion.

The allegation that a balance sheet displayed on a television screen is an opinion is ludicrous on its face. A backdrop of a balance sheet "that clearly shows" the transfer of money does not come across to an onlooker as opinion but an objective fact as one is looking at an allegedly genuine piece of evidence while the Plaintiff Suky is alleged to be some sort of thief.

Finally, contrary to the Defendants' Motion, the extensive "research" done by Dayan and Keshet clearly demonstrates that Defendants statements are asserted as fact and truth, not mere conjecture or opinion. Why would an investigative reporter conduct such extensive research to devote an entire episode of their television show, nevertheless the season finale, to mere opinion and not alleged fact? In this light, viewed in the broader context of an investigative news program, viewers would absolutely recognize the allegedly defamatory statements as objective fact. Immuno, 77 N.Y.2d at 255. Refuting an opinion is not the same as refuting an alleged factual statement backed up by what appears to be an authentic balance sheet of Plaintiff Suky's hotel. Foley, 2006 N.Y. Misc. LEXIS 9327, at *8.

Viewing the statements against this contextual background, all of which were included in the Plaintiff's complaint, this court must conclude that a reasonable viewer would understand the

statements that the Defendants made about the Plaintiffs as facts and deny the Defendants' Motion accordingly.

4. Complaint Properly Alleges That Defendants Acted With Gross Irresponsibility:

When pleading allegations of defamation against an alleged "public figure," the pleadings must allege gross irresponsibility. Notwithstanding assertions to the contrary in the Motion, Plaintiffs have properly pled gross irresponsibility, once again requiring denial of the Motion.

The burden of proof on public figures, should Rabbi Pinto and Plaintiff Suky be considered the same, is higher than that of a lay person.

> "To prevail in a defamation suit, [plaintiff] would have to prove with evidence of 'convincing clarity' 'that the statement was made with "actual malice"--that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' (New York Times Co. v Sullivan, 376 US 254, 285-286, 279-280; *see also*, Harte-Hanks Communications v Connaughton, 491 US 657, 659)."

Prozeralik v. Capital Cities Communs., 82 N.Y.2d 466, 474, 626 N.E.2d 34, 38-39, 605 N.Y.S.2d 218, 222-223 (N.Y. 1993). For Plaintiffs to warrant recovery for defamation in this situation, it "must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." Chapadeau v. Utica Observer-Dispach, Inc., 38 N.Y. 2d 196 (1975).

As stated in Plaintiffs' pleadings, Defendants made the false statements regarding Shuva and Suky with knowledge of the falsehood of the statements. Approximately a week prior to the *Uvda* program being aired in both Israel and New York, Plaintiff Suky learned about the pending news program. Immediately thereafter, Plaintiff Suky contacted Defendant Dayan in an effort to provide her with the truth. Plaintiff Suky then, individually and on behalf of Plaintiff Shuva, forwarded written materials to Defendant Dayan for her review. The documents forwarded by

Plaintiff Suky to Defendant Dayan specifically refuted the false allegations that were ultimately included in the *Uvda* news case and aired in Israel and New York. (See Complaint, ¶¶ 50-57)

Therefore, Defendant Dayan intentionally, maliciously, and with total disregard for the truth, disregarded the documents forwarded to her by Plaintiff Suky and instead went forward and aired the Program without referencing any documents from Plaintiff Suky in a grossly irresponsible manner in direct contravention of the standards set forth in Chapadeau.

It is without a doubt that a Jury of ones' peers could review the documents provided to the Defendants by the Plaintiff Suky and find that Defendants acted with complete recklessness. For these reasons, Defendants' Motion to Dismiss must be denied.

POINT IV

PLAINTIFFS' *PRIMA FACIA* TORT CLAIM IS NOT SUBJECT TO DISMISSAL AS A MATTER OF LAW

Defendants seek dismissal of *Prima Facia* Tort claims in the current action as duplicative of the defamation claims. As demonstrated below, defendant's position is contrary to the law of New York and must be denied.

In Board of Education v. Farmingdale Classroom Teachers Asso., 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (N.Y. 1975), the Court held that, as a matter of law, it is improper to dismiss claims of *Prima Facia* Tort as duplicative of other tort claims:

> "a modern system of procedure, one which permits alternative pleading, should not blindly prohibit that pleading in the area of prima facie tort. Of course, double recoveries will not be allowed, and once a traditional tort has been established the allegation with respect to prima facie tort will be rendered academic. Nevertheless there may be instances where the traditional tort cause of action will fail and plaintiff should be permitted to assert this alternative claim."

38 N.Y.2d at 406; *See also* L/M Ninety CM Corp. v. 2431 Broadway Realty Co., 566 N.Y.S.2d 277, 170 A.D.2d 373 (1st Dept. 1991) ("The fact that some of the acts alleged may also constitute traditional tort causes of action does not require the dismissal of the prima facie tort claim." 566 N.Y.S.2d at 278).

Defendants reliance upon Chao v. Mount Sinai Hosp., 2010 U.S. Dist. LEXIS 133686 (S.D.N.Y. 2010) is misplaced. In Chao, the defamation claims were barred as privileged and in violation of statute of limitations. Since the defamatory statements were twice barred, they could not simply be reconfigured as the basis for *Prima Facia* Tort. In the current action, no privilege is asserted and no allegations are barred.

Thus, it is improper to dismiss plaintiffs' claims of *Prima Facia* Tort as duplicative of their defamation claims.

A. Prima Face Tort Was Properly Pled:

Defendant's claim that the requirements for a *Prima Facia* Tort have not been met is without merit. As defendant stated, the four requirements of a prima facie tort claim are "(1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification." Amodei v. New York State Chiropractic Ass'n, 160 A.D.2d 279, 553 N.Y.S.2d 713 (1st Dept. 1990) *afd* 77 N.Y.2d 890 (1991).

A simple review of the Complaint clearly demonstrates that all pleading requirements of a *Prima Facia* Tort have been met in this action:

1. Intentional Infliction of Harm - The actions of Dayan and Uvda were done with the specific intent to harm the reputation of Mosdot Shuva Israel and Mr. Suky. *See* Complaint, ¶¶61-62, 107.

2. Causing Special Damages – The conduct of the defendants caused $5 million dollars in special damages to the plaintiffs by causing harm to their reputation and ability to carry out their respective businesses. *See* Complaint, ¶¶70, 108, 112.

3. Without Excuse or Justification - The complaint states that Uvda purposefully presented information that they knew was false to their viewers after being contacted by Mr. Suky with documents supporting the truth. *See* Complaint, ¶¶52-57, 109.

Thus, plaintiffs properly plead their claim for *Prima Facia* Tort.

CONCLUSION

Plaintiffs Shuva and Suky respectfully submit that the Motion be denied in its entirety for all the reasons statedand set forth above and in the accompanying affirmation.

Dated: New York, New York
January 16, 2015

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