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

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 ISRAELI TV COMPANY, *Defendants*.	Index No. 156173/2014 Mot Seq.

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF DEFENDANTS ILANA DAYAN-ORBACH AND KESHET BROADCASTING LTD. TO DISMISS FOR LACK OF PERSONAL JURISDICTION, *FORUM NON CONVENIENS* AND FAILURE TO STATE A CLAIM

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Defendants Ilana Dayan-Orbach and Keshet Broadcasting Ltd. ("collectively, "defendants") respectfully submit this memorandum of law in support of their motion to dismiss the complaint of Mosdot Shuva Israel and Ben Zion Suky (collectively, "plaintiffs") under CPLR 3211(a)(8), 327(a) and 3211(a)(7).

PRELIMINARY STATEMENT

This motion to dismiss is filed by two of the four above-captioned defendants: Ilana Dayan-Orbach ("Dayan") – a leading Israeli investigative journalist, who hosts the investigative television program *Uvda* (Hebrew for "Fact") on Israeli Channel 2 – and Keshet Broadcasting Ltd. ("Keshet"), which operates, programs, and transmits on Israeli Channel 2 in Israel.

The complaint should be dismissed under CPLR 3211(a)(8) for lack of personal jurisdiction over Dayan and Keshet, because they are not New York domiciliaries and plaintiffs' defamation claims do not arise from any business Dayan or Keshet transacted in New York. The doctrine of forum non conveniens codified in CPLR Rule 327(a) also bars the complaint because Israel is clearly the correct venue.

Even if jurisdiction were proper, plaintiffs failed to state multiple elements of a good claim for defamation, warranting dismissal under CPLR 3211(a)(7). The allegedly defamatory statements are not of and concerning the plaintiffs, they are non-actionable statements of opinion and plaintiffs have neither pleaded defamation per se nor special damages as required. Plaintiffs have also not pleaded gross irresponsibility, which is an independent basis for dismissal. Their prima facie tort claim is duplicative of the defamation claims and should be dismissed as such.

FACTUAL STATEMENT

A. The complaint – whose allegations are taken as true for the purposes of the CPLR 3211(a)(7) motion to dismiss for failure to state a claim – alleges that Keshet owns the investigative television program *Uvda*, and that Dayan, as the "host" of that program, coordi-

nated the production of its 2014 season finale about Rabbi Pinto, which allegedly intended "to tarnish, diminish and destroy the reputation of Rabbi Pinto and his Shuva." ¶¶ 5, 45.[1] Plaintiffs also allege that defendant Dayan ignored exculpatory written materials provided to her by plaintiff Suky and did not refer to these materials in the program. ¶¶ 52-57.

Only twenty small snippets of the 50 minute Pinto report are alleged to be defamatory. ¶¶ 49, 60 (collecting twelve statements allegedly defamatory of Mosdot Shuva Israel); ¶¶ 77 (collecting eight snippets allegedly defamatory of Suky).[2]

The ersatz lead plaintiff, Shuva Israel, is literally not mentioned in *Uvda's* Pinto report at all, with the exception of two incidental and glowing references Rabbi Pinto made to it, one in an excerpt from a speech to his followers and the other as part of an exculpatory statement, prepared by Suky, that Dayan reads in the program's closing moments, neither of which is alleged to be defamatory. *See* Complt. Ex. 1, pg. 5, 15. The only effort plaintiffs make to allege that any of the twelve snippets alleged to be defamatory of Shuva Israel are in fact of and concerning the plaintiff is to argue that comments made about Rabbi Pinto and his "empire" necessarily refer to Shuva Israel. *See, e.g.*, ¶ 49.

Similarly, of the eight snippets alleged to defame plaintiff Suky per se, three do not refer to him at all, and those that do say nothing defamatory about him. ¶¶ 77(a), (d), (h). Again, the complaint essentially concedes as much, alleging that those statements "where [sic] reasonably susceptible to a defamatory connotation when heard in the context of the Program." ¶ 94.

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[1] All citations in this form in the Factual Statement are to the averments of plaintiffs complaint (attached as Exhibit 1 to the Affirmation of Charles S Sims (hereafter, "Sims Aff.")), unless indicated otherwise.

[2] Plaintiff's references to what the program said are to a transcript prepared at their instance by a commercial litigation services company, and its translation of the original Hebrew is inaccurate in material respects (referring, for example, to a hotel enterprise's "kitty" which, as the program is subtitled with Keshet's post-cablecast translation, is an inaccurate translation of the Hebrew word used in the Pinto report which refers to resources or funds and has no derogatory connotation). A video of the program itself is submitted on this motion, and incorporated by reference and integral to the Complaint. Sims Aff. Ex. 2.

Plaintiffs' Third Cause of Action, which alleges defamation (but not defamation per se) against Suky, does not identify any particular statement, but rather alleges that the content was generally defamatory and that the Defendants presented Suky in an unflattering light. *See*. ¶¶ 94-96. Such an ambiguous claim is not actionable and, in any case, Plaintiffs fail to plead special damages for any of their defamation claims with the requisite specificity. ¶ 104.

On the defamation claims, Shuva Israel seeks $10 million and Suky seeks $15 million in actual and consequential damages, plus special and punitive damages exceeding $100 million. Complt. pp. 16-17, ¶¶ A-E. In addition to the defamation claims, the complaint alleges a claim for prima facie tort that duplicates the defamation claims. ¶¶ 106-113.

B. The allegations of the complaint, although taken as true on a motion to dismiss for failure to state a cause of action, do not limit the branch of the motion to dismiss based on lack of personal jurisdiction or forum non conveniens. The pertinent facts on those motions are not the conclusory, mostly information-and-belief baseless allegations in the complaint, but rather the averments in the affidavit of Ilana Dayan, submitted herewith (hereafter "Dayan").

Defendant Dayan does not live or do business in New York, and likewise Keshet has no office, employees, or other presence in New York. Dayan ¶ 2, 7. Virtually all work on the *Uvda* episode underlying Plaintiffs' claims (the "Pinto report") – and the entirety of the interviews and statements that are allegedly defamatory – took place in Israel. Dayan ¶ 15-30.

The initial stimulus for the Pinto report was not any New York reportage, but the news, carried prominently by Israeli news media, that the Israeli Attorney General planned on indicting Rabbi Yoshiyahu Pinto on severe charges, including bribery, obstruction of justice, police corruption, and witness tampering in connection with a police investigation into Hazon Yeshaya, a charity that is not affiliated with plaintiffs Shuva Israel or Suky. Dayan ¶ 11-12, Exs. A, B.

The Pinto report was conceived, created, and edited in Israel, not in New York. Dayan ¶ 25. Dayan did not – contrary to the information and belief allegation in paragraph 15 – travel to New York in 2013 and 2014 in connection with the Pinto report. She (and the staff working under her) conducted no interviews in New York. *Id*. ¶ 27. Each of the interviews underlying the Pinto report was conducted in Israel. *Id*. ¶ 29. The three persons who worked under Dayan's supervision on the reporting and preparation of the Pinto report are all based in Israel, the entirety of their work on the report was undertaken there. *Id*. ¶ 20. Neither Dayan nor Keshet directed or arranged for any Keshet or *Uvda* employees to travel to New York to "compil[e] information for the production of" the Pinto piece, contrary to the baseless allegations of paragraph 16 of the complaint. *Id*. ¶ 21.

During preparation of the report, Dayan spoke with Rabbi Pinto, his wife, his attorney Arthur Aidala, Suky, Tomer Shochat and Eric Patino over the telephone, while they were presumably in New York. Dayan ¶ 17. These few calls were primarily made, in accordance with standard journalistic practice, for the purposes of allowing Pinto and Suky to comment, and were not the source of any alleged defamatory statements (much less interviews on which the program was based). *Id*. Suky later contacted Dayan, in an attempt to threaten her into ceasing production of the Pinto report. *Id*. ¶ 18, Ex. C. (Suky told Plaintiff Dayan that "you should know that our lawyers told us 'let her do what she wants. We will sue her here in America for 100 million dollars.'").

Contrary to the inaccurate jurisdictional allegations in paragraphs 18-24 and 31-34 of the complaint, the season finale of *Uvda* was not licensed to, transmitted to, or distributed or cablecast by The Israeli Network on either Time Warner Cable, Cablevision, or the Dish Network, or any other broadcast or cable network. Dayan ¶ 22. Some other episodes of *Uvda*

have been licensed to and shown on The Israeli Network, but Keshet chose not to license the Pinto report. *Id*. ¶ 22. Similarly, the allegations in paragraphs 28-30 of the complaint – that Keshet licensed or caused the Pinto report to be distributed by or displayed on the internet in New York on mytvil.com or mytvil.net – are similarly false. Keshet did not license the Pinto report for distribution in New York through those websites, or ever intend to distribute it there, and did not channel it towards New York through those websites. *Id*. ¶ 23.

The Pinto report was available in New York on Keshet's Mako.co.il platform for approximately 36 hours between May 23 and May 25, 2014. Sims Aff. ¶ 5. However, Google analytics show that during this time the report was viewed only 269 times in the New York area, whereas the same content was viewed 12,430 times in Israel during that same timeframe. *Id*. ¶ 5, Ex. 3. With the arguable exception of this short 36 hour window, when the report was on the Israeli all-Hebrew Mako platform (aimed at Israeli users but accessible to readers of Hebrew throughout the world on the Internet) Defendants did not make the Pinto report available to New York audiences.

Uvda engaged a videographer to film establishing shots (visuals only) of the few locations in New York referred to in the Pinto report and the underlying reports about the draft Israeli indictment against Pinto. Dayan ¶ 28. Footage of locations in New York comprise altogether less than five minutes of the fifty minute Pinto report. *Id*. That footage does not depict the defendants, and of course there is nothing defamatory (or even allegedly defamatory) in footage of Manhattan, and plaintiffs' defamation claims do not arise from that footage.

Each of the allegedly defamatory statements pleaded (*see* Complt. ¶¶ 48, 60, and 77) was spoken (and videotaped) in Israel. Dayan ¶ 26. The interviews on which the Pinto report and the entirety of its allegedly defamatory content were based were all conducted in Israel. *Id*. ¶ 30.

ARGUMENT

I. THE COURT LACKS PERSONAL JURISDICTION OVER KESHET AND DAYAN AND SHOULD DISMISS PURSUANT TO CPLR 3211(A)(8)

Under New York CPLR 302(a), the usual bases for personal jurisdiction over non-domiciliaries in tort actions are expressly withdrawn in defamation actions, and jurisdiction is available only where the defendants have transacted business in New York and the claim arises from – that is, bears a substantial relationship to – that transacted business. That narrow provision is the only basis pleaded for subjecting the claims against Keshet and Dayan to the jurisdiction of New York courts, and its terms are plainly not met.

As 302(a)(1) was recently construed and applied by the Court of Appeals in *SPCA of Upstate New York v. American Working Collie Association*, 18 N.Y.3d 400 (2012), jurisdiction over Keshet and Dayan is lacking because they did not transact any business in New York out of which the defamation claims arise, and there is no substantial relationship between any business they transacted in New York and plaintiffs' defamation claims.

In *SPCA*, the Court of Appeals construed 302(a)(1) in light of 302(a)'s express carve-out of defamation actions from long-arm jurisdiction premised on tortious activities that occur inside the state or outside the state but cause harm within the state. The Court of Appeals held that the remaining subsection, 302(a)(1), governing jurisdiction over claims arising from business transacted in New York, would be an adequate basis for personal jurisdiction of defamation actions where there has "been some 'purposeful activities' within the State that would justify bringing the nondomiciliary defendant before the New York courts." 18 N.Y.3d at 404. There must be "some articulable nexus between the business transacted and the cause of action sued upon" – a "*substantial relationship between [the purposeful] activities and the transaction out of which the cause of action arose*." *Id*. (emphasis added) (internal quotation and citation omitted).

Chief Judge Lippman's opinion for the Court expressly agreed with the Second Circuit that "New York courts construe 'transacts any business within the state' more narrowly in defamation cases than they do in the context of all other sorts of litigation." *Id*. at 405 (internal quotation and citation omitted).

The Court cited, as examples of what 302(a)(1) allows and precludes, two cases where jurisdiction was held to exist – one involving a book contract negotiated and executed in New York as well as defamatory statements researched and printed in New York, and the other involving a television news report that was researched over six weeks in New York, as well as written, produced, and broadcast here. *SPCA*, 18 N.Y.3d at 404-05 (citing *Legros v. Irving*, 38 A.D.2d 53 (1st Dep't 1971) and *Montgomery v. Minarcin*, 263 A.D.2d 665, 667-68 (3d Dep't 1999)). Those two decisions were contrasted with two others in which the contacts and nexus were correctly held insufficient – one involving statements made to New York reporters by defendants who had spent less than 60 hours in New York researching that topic, and the other, statements pertaining to conduct observed in New York. *Id.* (citing *Talbot v. Johnson Newspaper Corp.*, 71 N.Y.2d 827, 829 (1988) and *Copp v. Ramirez*, 62 A.D.3d 23 (1st Dep't 2009)).

Applying the teaching and holdings of those cases to the facts in *SPCA*, the court affirmed dismissal, characterizing the defendants' contacts with New York out of which the claims allegedly arose as "quite limited." *SPCA*, 18 N.Y.3d at 405. Although the defendants had made three phone calls and two short visits to New York, the allegedly defamatory statements were "not written in or directed to New York," and not aimed at New York (although they were accessible there on the Internet). *Id*. The alleged mistreatment of dogs at issue was observed in New York, "but written about" only after the defendant "returned to Vermont," and the defendant, "did not visit New York in order to conduct research, gather information or

otherwise generate material" for publication. *Id*. The Court held that the nexus of those facts to the defamation claims was altogether insufficient, since there was "no substantial relationship between the allegedly defamatory statements and defendants' New York activities." *Id*.

SPCA controls here and makes plain that New York courts have no jurisdiction over the defamation claims against Keshet and Dayan. As the record on this motion establishes, *Uvda's* Pinto report was "not written in or directed to New York," and the defamation claims do not arise from the minimal activity conducted in New York, but solely from interviews conducted and taped in Israel. Dayan ¶ 14-30. The fact that individuals in New York briefly, for 36 hours, had the opportunity to watch the Pinto report through Mako.co.il – a Hebrew language Internet platform geared to an Israeli audience but equally accessible in other jurisdictions – does not establish jurisdiction in New York. Sims Aff. ¶ 5. *See SPCA*, 18 N.Y.3d at 405 (holding that articles made available online in New York did not trigger personal jurisdiction because "[w]hile they were posted on a medium that was accessible in this state, the statements were equally accessible in any other jurisdiction"). In any event, Keshet and Dayan did not license the Pinto report for transmission to or in New York, or actively target New York audiences. And most importantly, each of the interviews on which the report was based was conducted in Israel: not a single allegedly defamatory word spoken on the program was uttered in New York, by a New Yorker, or as a result of research undertaken here.

That the Pinto report included very few minutes of background footage of a few New York locales does not create a substantial relationship between New York and the business transacted to produce the allegedly defamatory remarks, which were filmed and spoken in Israel, by Israelis caught up in a local dispute between the Attorney General of Israel and other Israelis, edited there for an Israeli television audience, and broadcast in Hebrew without English caption-

ing. The filming of the allegedly defamatory statements (all uttered in Israel) thus has no substantial relationship with any business conducted by Keshet and Dayan in New York, much less with the defamation claims pleaded.

Ultimately, unlike *Legros v. Irving*, 38 A.D.2d 53, 56 (1st Dep't 1971), cited by the Court of Appeals, where "all the significant actions culminating in the publication of the book occurred in New York," here not one significant action from which the claims arise took place in New York.[3] *See* Dayan ¶ 25-26.

II. UNDER THE DOCTRINE OF FORUM NON CONVENIENS, PLAINTIFFS' CLAIMS SHOULD BE DISMISSED IN FAVOR OF AN ISRAELI FORUM

In the alternative, plaintiffs' claims should be dismissed under CPLR 327(a), because the claims at issue here are far more closely linked to Israel than to New York, and, considering all the relevant factors, an Israeli forum is warranted in the interests of substantial justice.

New York courts are not compelled to entertain any case which has no substantial nexus with New York and so should dismiss "when it plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties." *Bader & Bader v. Ford*, 66 A.D.2d 642, 645 (1st Dep't 1979), (quoting *Silver v. Great Amer. Ins. Co.*, 29 N.Y.2d 356, 361 (1972)). The legislature has afforded trial courts discretion to dismiss when it would be "in the interest of substantial justice" to hear the action in another forum. CPLR 327(a); *Bader*, 66 A.D.2d at 649 (internal quotation and citation omitted).

The burden is on the defendant challenging the forum to demonstrate that there are relevant private or public interest factors at stake which militate against litigating the case in New York. *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984). Amongst the many

[3] *See also Talbot v. Johnson Newspaper Corporation,* 71 N.Y.2d 827, 829 (1988) (affirming dismissal of defamation claims for lack of personal jurisdiction, where there was no showing of the required nexus between defendants' "New York 'business'" (such as it was) and plaintiffs' defamation claims).

factors to consider are the burden on local courts, the potential hardship to the defendant, the residency of the parties, the availability of an alternate forum and the situs of the underlying action. *Id*. No one factor controls: since the doctrine is flexible, the courts have discretion to balance the many factors in light of the circumstances of the case. *Silver*, 29 N.Y.2d at 361.[4]

A relatively recent New York defamation case dealing with forum non conveniens provides a useful example of the balancing of relevant factors. *Metropolitan Worldwide, Inc. v. Bunte Entertainment Verlag GMBH*, No. 105247/02 (Sup. Ct. N.Y. Co. Sept. 18, 2002). The Supreme Court dismissed a case brought by a German citizen resident in the United States, against a German publication and directed the case to Germany. *Id*. at 8. Foremost amongst the factors considered important were that the allegedly defamatory statements were made in German and directed mainly at German audiences, that many important witnesses were German, that plaintiffs maintained an office in Germany and that plaintiffs were already involved in litigation in Germany. *Id*. at 4-8.

The pertinent facts here mirror those almost precisely (if not more powerfully), and weigh heavily in favor of a forum in Israel, where the television program was prepared, broadcast and targeted. Dayan Aff. ¶ 8. The Pinto report was entirely in Hebrew, and broadcast only in Israel. It was aimed at an Israeli audience, reached vastly more viewers in Israel than in the United States where it hardly reached anyone. To the extent that plaintiffs can claim any harm to their reputations, that harm was felt in Israel. *See Metropolitan*, at 7 ("[T]he 'damages'

[4] *See also Koop v. Guskind*, 116 A.D.3d 672 (2d Dep't 2014) (affirming dismissal on forum non conveniens grounds upon review of trial court's weighing of the factors); *Smolik v. Turner Constr. Co.*, 48 A.D.3d 452 (2d Dep't 2008) (same).

to [plaintiffs'] reputation[s] and the impact the article may have on their reputations is measured in the main by the impact the article had in Germany and not in this country.").[5]

Significantly, the Pinto report was viewed 269 times in the New York area through Mako.co.il, but in Israel it was viewed 12,340 times over the same platform and during the same time period. Sims Aff. ¶ 5, Ex. 3. In *Metropolitan*, the court noted that 281 potential New York area readers were "at best insignificant" when compared with much higher circulation in Germany. *Metropolitan*, at 6. The immensely skewed ratio of Israeli viewers to New York viewers here strongly suggests that Israel is the more appropriate forum.

It is also clear that *all* of the parties, plaintiffs and defendants, have significant ties to Israel, and that those ties are, collectively, enormously more significant than any in New York. Dayan is a citizen and resident of Israel, who has no meaningful relationship with the United States (Dayan Aff. ¶ 2) and "Keshet Broadcasting Ltd. is an Israeli business entity" with no offices in the United States. Complt. ¶¶ 8, 11. By contrast, although plaintiffs are allegedly resident in New York, they also have significant ties to Israel. Mosdot Shuva Israel has its principal offices in Israel and was founded there. Sims Aff. Ex. 4. Rabbi Pinto, who heads Shuva Israel, frequently visits Israel and has permanent residence in Ashdod, Israel. Dayan Ex. D. Similarly, Ben Zion Suky is a citizen and former resident of Israel. Sims Aff. Ex. 5. Clearly, the burden that would be placed upon defendants, as strangers to the United States, if the case were to proceed in New York would be far greater than the burden placed upon the plaintiffs if the case proceeded in Israel, a place that they are intimately familiar with.[6]

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[5] *See also Ryan v. Great Atl. & Pac. Tea Co.*, 30 A.D.2d 549, 290 N.Y.S.2d 849, 850 (2d Dep't 1969) (noting that rules allowing transfer of venue are "particularly applicable in defamation cases, especially in those cases where the genesis and effect of the defamation are local in nature").

[6] *See Metropolitan Worldwide*, at 7 (finding that the fact that "plaintiffs maintain an office in Germany and conduct business there" weighed in favor of dismissal).

That Suky has retained Israeli counsel to prosecute related litigation in Israel (and assert threats as to this one) is also highly pertinent. The *Metropolitan* court found that it was significant that the plaintiff, a German citizen resident in New York, was "already in litigation in Germany, [was] represented in Germany and [has] initiated settlement negotiations in Germany" *Id*. Here, Suky engaged Israeli counsel to send a threatening letter to defendants Dayan and Keshet in Israel to silence any negative commentary there on his activities. Sims Aff. Ex. 6. Suky is also currently party to a lawsuit in Israel that one of the individuals interviewed in the Pinto report brought against him. *Id*. Ex. 7. The Israeli court rejected Suky's own motion of forum non conveniens, seeking relegation to New York, in part because Suky is an Israeli citizen, who visits regularly. *Id*. Moreover, in emails sent to dissuade Ms. Dayan from going ahead with the Pinto report, Suky attaches files entitled "For Arnon," presumably Arnon Gitzelter, the Israeli lawyer he has engaged in relation to this case. *Id.* Ex. 8. It would be absurd for Suky to now argue that it would be an undue burden to litigate in Israel.

Moreover, because the key documents (including the video recording) are in Hebrew, and key witnesses use Hebrew as their native language (and some of them, including Rabbi Pinto, as their only language (Dayan Ex. D.)), litigation in New York would entail substantial burdens on the court and a jury, because of the inevitable costs and complications arising from the language barrier. It will be difficult even to ascertain the precise meaning of the allegedly defamatory statements: the entire Pinto report is in Hebrew, with no contemporaneous English captioning. *Id*. ¶ 8.[7] Obviously, in a defamation case, where the central issue is what words mean to their

[7] The English language transcript plaintiffs have offered is tendentiously inaccurate in places (for instance, referring to a business's operating funds as its "kitty" while the Hebrew word used has no such negative implication), and the veracity of the translation is suspect and will be contentious. Complt. Ex. 1, p. 1; *see, e.g.*, Complt. ¶ 77(a).

intended and natural audience, the translation problems would be burdensome indeed and imperil substantial justice.

If this case went forward in New York, the burdens of (and disputes concerning) translation go far beyond *Uvda's* Pinto report itself. Witnesses who researched and prepared the report would need to be deposed in Israel, in Hebrew. Pinto himself will be unavailable to testify in the United States because the plea agreement he recently entered restricts his ability to leave Israel and could result in his incarceration for twelve months. Sims Aff. Ex. 9. The truth of the statements at issue depend largely upon the pending Israeli indictment, in Hebrew, which is subject of a plea agreement (in Hebrew) between Pinto and the Israeli Attorney General. *Id*. The vast majority of the source material and research behind the Pinto report is in Hebrew. *See,* Sims Aff. Exs. 2, 4, 5, 6, 7, 9; Dayan Aff. Ex. C. New York courts have repeatedly found that the need for burdensome translation militates strongly in favor of dismissal.[8] These problems, which loom large in a case that turns on the meaning of words as they are understood by their intended audience, would not exist were the case to proceed before an Israeli court.

Finally, there can be no serious argument that the Israeli courts would deprive the parties of a just and adequate forum for resolving this dispute, to the extent there is any merit to the underlying claims. The First Department has affirmed relegation of a slander action to Israel under similar circumstances. *Stoomhamer Amsterdam N.V. v. CLAL*, 204 A.D.2d 186 (1st Dep't 1994) (dismissing case involving three Israeli citizens allegedly resident in New York on forum non conveniens grounds). This Court can and should do likewise.

[8] *See, e.g.*, *Troni v. Banco Popolare di* Milano, 129 A.D.2d 502, 503-04 (1st Dep't 1987) (stating that need to translate documents weighed in favor of dismissal); *Rigroup LLC v. Trefonisco Mgmt.*, 949 F. Supp. 2d 546, 556 (S.D.N.Y. 2013) ("[M]ost, if not all, of the relevant documents are in Russian, which supports a finding that Russia is more convenient than this forum for litigation of Plaintiffs' claims"), *aff'd*, 559 F. App'x 58 (2d Cir. 2014); *Overseas Media, Inc. v. Skvortsov*, 441 F. Supp. 2d 610, 619 (S.D.N.Y. 2006) ("[T]he language barrier surely factors into the analysis here."), *aff'd*, 277 F. App'x 92 (2d Cir. 2008); *Metropolitan*, at 6 (same).

III. PLAINTIFFS HAVE FAILED TO STATE A VALID CLAIM FOR DEFAMATION

Because of the importance of a vigorous, free press, New York's courts have erected multiple hurdles to defamation claims, which generally result in early dismissal of such claims.

A. Standards for Motion to Dismiss a Defamation Claim Under CPLR 3211(a)

On a CPLR 3211(a) motion to dismiss, the Court's "task is to determine whether, 'accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.'" *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 318 (1995). Allegations consisting of bare legal conclusions or factual claims which are clearly contradicted by documentary evidence, are not presumed to be true. *Maas v. Cornell University*, 94 N.Y.2d 87, 91 (1999); *Franklin v. Winard*, 199 A.D.2d 220, 220 (1st Dep't 1993). Defamation plaintiffs must allege (and ultimately prove) that a there was 1) a defamatory statement 2) of fact 3) that is false, 4) published to a third party, 5) of and concerning the plaintiff, 6) made with the applicable level of fault on the part of the speaker, 7) causing special harm or constituting defamation per se, and 8) not protected by privilege. *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep't 1999). Plaintiffs here have failed to plead multiple necessary elements, which compels dismissal of their claims for defamation on multiple grounds.

In a libel action, "[I]n evaluating whether a cause of action is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." *Id*. Because the key facts – the allegedly defamatory language – are included in (or deemed incorporated into) the complaint, dismissal as a matter of law is frequent, indeed usual: courts frequently determine, as a matter of law, that the allegedly defamatory language is not

defamatory as a matter of law, or opinion as a matter of law, or that plaintiff was required, but failed, to plead special damages.[9]

B. Most of the Allegedly Defamatory Statements Are Not "Of and Concerning" Plaintiffs

"The 'of and concerning' requirement stands as a significant limitation on the universe of those who may seek a legal remedy for communications they think to be false and defamatory and to have injured them." *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 399-400 (2d Cir. 2006) (Sack, J.). Defamation claims are dismissed unless the court can determine, as a matter of law, that the audience would discern that the allegedly defamatory statements refer to the plaintiff. *Carlucci v. Poughkeepsie Newspapers, Inc.*, 57 N.Y.2d 883, 885 (1982) (dismissing claim because "the article was not of and concerning the corporation").[10] Not one of the twelve statements asserted as defamatory of plaintiff Mosdot Shuva Israel, at paragraph 49 and cataloged in paragraph 60 at subparagraphs (a)-(k), even mentions it, and none would be understood by *Uvda*'s audience as defaming it.[11] A person under fear of indictment and

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[9] *See, e.g.*, *Smith v. Catsimatidis*, 95 A.D.3d 737, 737 (1st Dep't 2012) (dismissing defamation claim because "the statement did not name plaintiff at all, and gave no reason for any reader to think that defendant was referring to him"); *Mercado v. Shustek*, 309 A.D.2d 646, 647 (1st Dep't 2003) (dismissing on grounds that defamation claim was "nonactionable, since the pertinent facts … are fully set forth in the article"); *Crucey v. Jackall*, 275 A.D.2d 258, 258-59 (1st Dep't 2000) (dismissing defamation claim for failure to allege that defendants acted "with gross irresponsibility"); *Three Amigos SJL Rest., Inc. v. CBS News, Inc.*, No. 152184/2012, 2013 N.Y. Misc. LEXIS 2143, at *11 (Sup. Ct. N.Y. Co. Mar. 19, 2013) (dismissing claim because plaintiffs failed to show investigative report was "of and concerning them"); *Simpson v. Vill. Voice, Inc.*, No. 0118713/2006, 2007 N.Y. Misc. LEXIS 9041, at *17-20 (Sup. Ct. N.Y. Co. Aug. 7, 2007) (dismissing claim as opinion based upon disclosed fact "where the reporter has set forth a full range of background facts that led up to the administrative proceeding"), *aff'd*, 58 A.D.3d 421 (1st Dep't 2009); *Foley v. CBS Broadcasting, Inc.,* No. 108403/2005, 2006 N.Y. Misc. LEXIS 9327 (Sup. Ct. N.Y. Co. Sept. 13, 2006) (dismissing claim against investigative journalists because report was based on customer interviews);

[10] *See also Smith v. Catsimatidis*, 95 A.D.3d at 737 (dismissing defamation claim because "the statement did not name plaintiff at all, and gave no reason for any reader to think that defendant was referring to him"); *Pusch v. Pullman*, No. 120132/00, 2003 N.Y. Misc. LEXIS 2000, at *13-14 (Sup. Ct. N.Y. Co. Nov. 5, 2003) (dismissing defamation claim for failure to show statements "refer to plaintiff.").

[11] "The modest man, who rose from the pages of the book he himself wrote, has meanwhile turned into an international empire with ties with government high-ups, politicians, senior police officers, and even tycoons." Complt. ¶ 49

therefore afraid to appear as a defamation plaintiff (as Rabbi Pinto plainly is) cannot proceed behind the cloak of some organization he is affiliated with by simply asserting that statements made concerning him are really defamatory of that hidden-behind-organization.

While a plaintiff need not be named in a publication to sustain a cause of action for defamation, "a plaintiff who is not specifically identified must sustain a burden of pleading and proving that the defamatory statement referred to him or her." *Lihong Dong v. Ming Hai*, 108 A.D.3d 599, 600 (2d Dep't 2013); *Three Amigos SJL Rest., Inc. v. CBS News, Inc.*, No. 152184/2012, 2013 N.Y. Misc. LEXIS 2143, at *11 (Sup. Ct. N.Y. Co. Mar. 19, 2013). None of the twelve statements on their face refers to "Mosdot Shuva Israel" or would be understood by the intended audience of *Uvda* watchers in Israel to refer to the plaintiffs. To take an illustrative example, plaintiffs point to the portion of the Pinto report stating "that millions of shekels went

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The eleven allegedly defamatory statements in Complt. ¶ 60 are as follows:

a) the Rabbi's "Empire" has fallen because, instead of his giving, the Rabbi is now taking;
b) that the Rabbi does more than give advice, he "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";
c) "pulling funds out of the kitty;"
d) "threats and mentioning the names of officers are part of the system;"
e) having a "guest house" instead of a hotel that "gives out free accommodations for people of Rabbi Pinto's choosing;"
f) that when followers get in trouble with the Rabbi's courtyard, the "police are after them as well;"
g) "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."
h) "that 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;"
i) and as described by Defendant 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."
j) "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 don'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?"
k) "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."

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.'" Complt. ¶ 60(h). This excerpt refers to a number of figures – Rabbi Pinto, his wife, an unnamed government official, Hazon Yeshaya and the Israeli Attorney General – but plaintiffs cannot and do not explain how this statement would be understood to refer to Shuva Israel. In the same way, the rest of the allegedly defamatory statements refer either to Pinto's alleged corruption or to his real estate holdings in New York, and not to Plaintiffs. *See* Complt. ¶¶ 49, 60(a)-(k).

The conclusory allegations (Complt. ¶¶ 61 and 62 (emphasis added)) that "All of the aforementioned statements were formulated by the Defendants in such a way that they not only were geared to defame Rabbi Pinto, but Plaintiff Shuva" and were made "in such a way to cause the Rabbi to be guilty by association, *and as a result injury and damage Plaintiff, Shuva,*" are nonsensical and in any event insufficient. New York law clearly and specifically forbids the leaps on which plaintiffs rely: the misdeeds of an individual corporate officer are not "of and concerning" the officer's corporation. *Carlucci*, 57 N.Y.2d at 885.[12]

In *Three Amigos*, the court dismissed on the ground that, as a matter of law, allegations in a television news report that a strip club and certain of its officers were running a human trafficking ring were not "of and concerning" two plaintiff corporations, which were not named in the report, but claimed to be closely affiliated with the named parties. Notwithstanding conclusory allegations to the contrary, the court declined to conclude that plaintiffs were "clearly identifiable" from the broadcast. *Three Amigos*, 2013 N.Y. Misc. LEXIS 2143, at *17 (citing

[12] *See also Afftrex Ltd. v. Gen. Elec. Co.*, 161 A.D.2d 855, 856 (3d Dep't 1990) (citation omitted) (affirming dismissal of complaint because comments directed at co-owner and CEO of plaintiff corporation were "insufficiently 'of and concerning'" plaintiff corporation); *Three Amigos*, 2013 N.Y. Misc. LEXIS 2143, at *12.

New York Times v. Sullivan, 376 U.S. 254, 290-91 (1964)). Dismissal was required since defendants "did not on their face make even an oblique reference to … these separate entities." *Three Amigos*, 2013 N.Y. Misc. LEXIS 2143, at *14. The court also noted that the "[f]act that the reports may have had a negative impact … fails to demonstrate that the statements were of and concerning these plaintiffs." *Id*. at *17.

The allegation (Complt. ¶ 49) that a reference in the program to Rabbi Pinto's "Empire" necessarily connotes Mosdot Shuva is similarly unavailing as a matter of law. The sentence which plaintiff relies on to substantiate its "Empire" claim begins "*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." Complt. ¶ 49 (emphasis added). The only plausible interpretation of this statement is that it refers to Rabbi Pinto (apparently considered by plaintiff to be a "modest man") – that is, the statement refers to a person, or perhaps to the web of connections, powerhouses and mechanisms of influence, created by Rabbi Pinto over the years – certainly not to the specific religious not for profit organization in New York that is the plaintiff here.

Similarly, of the eight statements identified in paragraph 77 as defamatory to plaintiff Suky, three of them (a), (d), and (h) make no reference to Suky whatever and the others are not actionable for the reasons discussed in Sections III.C-E below.[13] Plaintiffs have failed to meet

[13] The eight statements alleged in paragraph 77 to defame plaintiff Suky – three of which (a), (d), and (h) do not even refer to him – are as follows:

a) In response to a statement by Nissim Biton, Defendant Dayan stated: "When Biton and his partners invest millions in the hotel, they still do not suspect that someone is pulling funds out of the kitty."
b) "The document that has come into our possession shows, according to suspicion, that for several months thousands of dollars allegedly flow from the hotel's kitty to Ben Zion Suky. He claims he took nothing. Either way, the hotel falls into deep debts."
c) "Tomer Shochat was never a follower of the rabbi. He met him for the first time only after he asked to stop an investment of millions in the New York Metro Hotel, which is run by the same Ben Zion Suky,

their burden of adequately alleging that the statements refer to Suky and so claims as to these statements should be dismissed.

C. The Statements Are Not Defamatory Per Se and There Are No Special Damages

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.'" *Stepanov v. Dow Jones & Co., Inc.*, 120 A.D.3d 28, 34 (1st Dep't 2014). Under New York law, libel, which is the tort at issue here, is broken down into two discrete forms: "libel per se, where the defamatory statement appears on the face of the communication, and libel per quod, where no defamatory statement is present on the face of the communication but a defamatory import arises through reference to facts extrinsic to the communication." *Ava v. NYP Holdings, Inc.*, 64 A.D.3d 407, 411-12 (1st Dep't 2009). A plaintiff must plead special damages unless the statements at issue fall into the more narrowly circumscribed category of libel per se, where damages are presumed. *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep't 1999). The statements at issue (*see supra* n. 11 and 13, reprinting statements

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the rabbi's confidant. Shochat, who represents a group of investors from Israel, still hasn't begun to understand what he's going into."

d) "Shochat will soon understand that threats and mentioning the names of officers are part of the system. Now he goes to New York to find out exactly what's going on in the hotel he bought with his partners. And there he manages to get his hands on documents that according to him raise the suspicion of irregularities in the hotel's management."

e) "Once again Suky insists that everything is working properly. Shochat doesn't let go. Now he also suspects that the hotel he has invested in has turned from a business that's supposed to provide income to its owners into a guesthouse that gives out free accommodations for people of Rabbi Pinto's choosing."

f) "The Rabbi speaks gently during the meeting, but his people take it up a notch. This happens when Shochat arrives at a personal meeting with Zion Ben Suky."

g) "This" (speaking to Shochat) "was your first confrontation, your first head-to-head confrontation with Suky."

h) "Tomer Shochat gets in trouble with the rabbi's courtyard and discovers that now the police are after him as well."

from paragraphs 60 and 77 of the complaint) are not defamatory per se and plaintiffs fail to adequately plead special damages, warranting dismissal.

It is not clear what meaning plaintiffs ascribe to the statements haphazardly strung together in their complaint; perhaps they hope that aggregating disparate statements will somehow create an actionable defamatory statement through sheer weight of words. But on even a cursory reading, it is clear that some of the statements are not susceptible of a defamatory meaning, per se or otherwise, even under the most strained interpretation. *See, e.g.*, "the Rabbi does more than give advice, he '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"; "Tomer Shochat was never a follower of the rabbi. He met him for the first time only after he asked to stop an investment of millions into the New York Metro Hotel, which is run by the same Ben Zion Suky, the rabbi's confidant. Shochat, who represents a group of investors from Israel still hasn't begun to understand what he's going into." Complt. ¶¶ 60 (a), (b), (e) and ¶¶ 77 (c), (d), (f), (g), (h).

Plaintiff identifies excerpts that apparently refer to the political influence enjoyed by Pinto and his associates – for instance the allegation that Pinto made "connections with senior officers, occasionally throwing temptations their way" – but it "has often been held that accusations of the use of political influence to gain some benefit from the government are not defamatory and do not constitute libel per se." *Pace v. Rebore*, 107 A.D.2d 30, 32 (2d Dep't 1985); *Bernard v. Grenci*, 48 A.D.3d 722, 723-24 (2d Dep't 2008) (dismissing because accusation of misuse of political influence did not constitute libel per se). *See* ¶¶ 60 (a), (b), (d), (f), (g), (i), (j) and ¶¶ 77 (d), (f), (g), (h).

Still other statements refer to Suky "taking it up a notch" or engaging in a "head-to-head confrontation" with an investor, but accusations of extreme anger, threats and harassment also do not rise to the level of libel per se. *Kowalczyk v. McCullough*, 55 A.D.3d 1208, 1209-10 (3d Dep't 2008) (finding that statements alleging plaintiff threatened and harassed defendant did not constitute defamation per se); *O'Brien v. Lerman*, 117 A.D.2d 658, 659 (2d Dep't 1986) (dismissing defamation action because statements indicating "plaintiff's extremely angry reaction" did not constitute libel per se). *See* ¶ 60 (d) and ¶¶ 77(f), (g).

In addition, plaintiffs apparently argue that statements made about Rabbi Pinto – who is not a party to this action and has now been indicted and agreed to plead guilty to the indictment (Sims Aff. Ex. 9) – defame plaintiffs by association when the show is taken as a whole.[14] However, an assertion that a person has "criminal associations" is not defamatory per se. *See, e.g.*, *Galasso v. Saltzman*, 42 A.D.3d 310, 311 (1st Dep't 2007) (dismissing defamation claim because "use of the term 'connected,' generally referring to an affiliation with organized crime" could not constitute per se defamation); *see also Huffine v. South Shore Press*, No.11-17764, 2012 N.Y. Misc. LEXIS 312, at *13 (Sup. Ct. Suffolk Co. Jan. 11, 2012) (dismissing claim because article asserting that plaintiff was associated with a man arrested for defrauding a school district was not defamatory per se). Courts have also held that statements alleging that an individual is affiliated with criminal organizations are not defamatory per se. Therefore, the true statements in the Pinto report that merely link Mosdot Shuva Israel and Ben Zion Suky to Rabbi

[14] This certainly seems to be the tenor of plaintiff's arguments that the Pinto report "taken as a whole" defames plaintiffs via their association with Pinto, although the argument is not entirely clear. *See, e.g.*, "All of the aforementioned statements were formulated by the Defendants in such a way that they not only were geared to defame Rabbi Pinto, but Plaintiff Shuva." Complt. ¶ 61; "The statements, video, images and audio soundtrack used by the Defendants in the Program and taken as a whole were falsely geared by Defendants to make Plaintiff Suky appear to the public as a dishonest individual and a thief, using his position with the Rabbi and the Plaintiff Shuva to exploit others for his benefit . . . ." Complt. ¶ 96.

Pinto – such as suggestions of their association with Pinto's "Empire," "the rabbi's courtyard" and "various individuals with criminal backgrounds" (Complt. ¶¶ 49, 60(j), 77(h)) – are not libelous per se. *See* ¶¶ 60 (a)-(k) and ¶¶ 77 (c), (d), (e), (f), (g), (h).

Having failed to adequately plead libel per se, plaintiffs have also failed their obligation to plead cognizable special damages (*i.e.*, "the loss of something having economic or pecuniary value"), a failure which requires dismissal. *Kowalczyk*, 55 A.D.3d at 1209. An allegation of "round figures" does not suffice as a pleading of special damages. *Boyle v. Stiefel Lab.*, 204 A.D.2d 872, 875 (3d Dep't 1994) (dismissing defamation claim "because a round figure of $1 million is not a sufficient allegation of damages").[15] Plaintiffs' only allegations of special damages are arbitrary and rounded amounts of $3 and $5 million dollars, with no indication whatever of how they computed these figures. Complt. ¶¶ 73, 91, 104, 112. Since plaintiffs fail to particularize their harm, their claims for defamation must be dismissed.

D. Nearly All the Statements Complained of Are Non-Actionable Opinion

Yet another basis for dismissal, again assuming the comments are of and concerning plaintiffs, is that the twenty statements complained of are opinion, and thus not actionable under controlling standards. The question of "[w]hether a particular statement constitutes an opinion or an objective fact is a question of law" to be decided by the trial court in the first instance. *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008). Courts determine whether or not a statement is an opinion by a three factor test:

> (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

[15] *See also Drug Res. Corp. v. Curtis Publ'g Co.*, 7 N.Y.2d 435, 441(1960) (rejecting special damages claim for $5 million because "[s]uch figures, with no attempt at itemization, must be deemed to be a representation of general" rather than special damages).

> 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.

Mann, 10 N.Y.3d at 276. In determining on a motion to dismiss whether a statement is opinion or subject to a defamation claim, 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 (1991). Additionally, opinions based on disclosed facts are absolutely immune from defamation liability. Such opinions, "false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 380 (1977); *see also Immuno*, 77 N.Y.2d at 243 (dismissing defamation claim because statements at issue were non-actionable opinion). New York Courts routinely dismiss defamation claims premised upon non-actionable opinions drawn from disclosed facts for failure to state a claim.[16]

These standards render the allegedly defamatory statements alleged as to Shuva Israel in ¶¶ 60(a), (b), (c), (d), (e), (f), (g), (i), (j), and (k) – and as to Suky in ¶¶ 77(a), (b), (c), (d), (e), (f), (g), and (h) – not actionable because those allegedly defamatory statements are not verifiable as true or false. Rather, they present, in context, at most judgments that journalists are free to present, along with underlying facts, as the transcript demonstrates.

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[16] *See, e.g.*, *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 286 (1986) ("[E]xpressions of an opinion, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions."); *Mercado v. Shustek*, 309 A.D.2d 646, 647 (1st Dep't 2003) (affirming dismissal because defamation claim was "nonactionable, since the pertinent facts … are fully set forth in the article"); *Miness v. Alter*, 262 A.D.2d 374, 375 (2d Dep't 1999) (holding same).

Illustrative is *Foley v. CBS Broadcasting,* No. 108403/2005, 2006 N.Y. Misc. LEXIS 9327 (Sup. Ct. N.Y. Co. Sept. 13, 2006), where the plaintiffs sued over statements made in a television news program that alleged, *inter alia*, that one of the plaintiffs "was a 'con artist,' that she engaged in a 'scam,' that she 'ripped off' her customers, and that she ran a 'crooked' business," in the context of an investigative report that included testimony from "[s]everal customers who were interviewed on camera [and] described their complaints." *Id*. at *1, 3. Even "[v]iewing the statements against this contextual background, the court concludes that a reasonable viewer would understand the statements defendants made about plaintiff as mere *allegations* to be investigated rather than as *facts*" and dismissed accordingly. *Id*. at *10 (emphasis added) (internal quotation and citation omitted).[17]

Although the plaintiffs strip the context from the allegedly defamatory statements, the transcript annexed to the complaint clearly demonstrates that Dayan and her team undertook extensive research, and are presenting the story as seen by different witnesses. Dayan presents a range of evidence to viewers drawn from various interviews, and leaves them to draw their own conclusions.[18] Plaintiffs admit as much: they state that Dayan presents the testimony of four of her "interviewees, to wit, Nissim Biton, Tomer Shohat, unidentified male "A"… and Menashe Arviv." Complt. ¶ 60. Viewed in the broader context of an investigative news program, viewers would recognize the allegedly defamatory statements as essentially opinion based on disclosed

[17] *See also Caplan v. Winslett*, 218 A.D.2d 148 (1st Dep't 1996) (affirming dismissal of claim premised on opinion formed from listening to audio tapes of the plaintiff); *Simpson v. Vill. Voice*, *Inc*., No. 0118713/2006, 2007 N.Y. Misc. LEXIS 9041, at *17-20 (Sup. Ct. N.Y. Co. Aug. 7, 2007) (dismissing claim as opinion based upon disclosed fact "where the reporter has set forth a full range of background facts . . . .").

[18] *See, e.g.*, Complt. Ex. 1, p. 1 ("We've met a lot of people when working on this story, but the strongest impression was made by one man, who was one of the rabbi's followers. And he sat in front of the camera, and talked about the crisis he went through after he realized the system works. The research was conducted with Sarit Magen and Nitai Elboim. Here is the story prepared by Nir Shahak and director Gilad Tokalty"); *Id*, Ex. 1, p. 16 ("The rabbi's close associate Ben Zion Suky [states that all] of Shochat's claims are false, as are Nissim Biton's.").

facts. *See Foley*, 2006 N.Y. Misc. LEXIS 9327, at *9-10 (dismissing defamation claims where the "statements were made in the context of Shame on U broadcasts which featured customers complaining that [plaintiff] either failed to deliver goods or delivered defective goods"). In full context, including the accurate news reporting that Israeli Attorney General was considering an indictment of Rabbi Pinto, the statements complained of would have been understood as allegations based on disclosed facts, not as assertions of specific unlawful activity.

Dayan discloses the facts upon which she bases her opinions, using language that clearly signposts that the statements now complained of are opinions. For instance, one allegedly defamatory statement reads "The document that has come into our possession shows, *according to suspicion*, that for several months thousands of dollars allegedly flow from the hotel's kitty to Suky. *He claims he took nothing*. Either way, the hotel falls into deep debts." Complt. ¶ 77(b) (emphasis added). Crucially and glaringly unmentioned in the complaint, the "document" at issue is a balance sheet – which the *Uvda* producers prominently displayed on screen as a backdrop to this statement – and the balance sheet clearly shows thousands of dollars being transferred from a hotel to Suky. *See* Sims Aff. Ex 2, at 10:04-10:15. It is axiomatic that statements of opinion are not actionable when the "pertinent facts" are set forth, as they were here. *See, e.g.*, *Mercado*, 309 A.D.2d at 647 (1st Dep't 2003). This document is a quintessential disclosed fact upon which opinions may be based without fear of liability for defamation. Dayan's language also makes it clear that she is stating an opinion: she refers to "suspicion" of wrongdoing and to Suky's denials, which clearly demarcates her statement as an allegation deduced from the disclosed facts, rather than an actionable statement of fact. Indeed, quoting an allegedly defamatory text with comparable qualifications and signposts, the New York Court of Appeals has held that "[p]resumptions and predictions as to what 'appeared to be' or 'might well

be' or 'could well happen' or 'should be' would not have been viewed by the average reader… as conveying actual facts about plaintiff." *Immuno*, 77 N.Y.2d at 255; *see also GS Plasticos Limitada v. Veritas*, 84 A.D.3d 518 (1st Dep't 2001).

Dayan uses similarly equivocal language based on disclosed fact throughout the Pinto report (and routinely in *Uvda* reports, generally). *See also* ¶ 77(d) ("*Shochat* will soon understand that threats and mentioning the names of officers are part of the system. Now he goes to New York to find out exactly what's going on in the hotel he bought with his partners. And there he manages to get his hands on *documents* that *according to him raise the suspicion* of irregularities in the hotel's management," referring to the on air interview testimony of Tomer Shochat) (emphasis added); ¶ 77(e) ("Shochat doesn't let go. Now *he also suspects* that the hotel he has invested in has turned from a business that's supposed to provide income to its owners into a guesthouse that gives out free accommodations ….," referring to interview with Shochat) (emphasis added). To read these statements as assertions of facts, rather than evaluative assessments based on investigation, would be to make an impermissibly "strained or artificial construction" of the text. *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep't 1999).

Plaintiffs cannot object simply because the conclusions drawn may be critical. In *Foley*, where the makers of an investigative report drew conclusions from interviews with disgruntled customers, statements that the plaintiff was a "con artist" that "ripped off" customers were non-actionable regardless of whether they were true or made with malice. *See Foley*, 2006 N.Y. Misc. LEXIS 9327, at *9-10. The same absolute protection attaches to all of the statements alleged here, made as part of Dayan's investigation into and report on Rabbi Pinto's business practices. *See* Complt. ¶ 60(a)-(g).

Finally, defendants afforded Rabbi Pinto and Suky the opportunity to comment at the end

of the broadcast and their exculpatory statements were read by Dayan on air. Suky in particular denied and offered his own explanation for the allegations made against him. *See* Complt. Ex. 1, p. 16.[19] That Suky actually responded to the allegations against him on air – and characterized them as false – demonstrates that the allegedly defamatory statements, in the context of the broadcast as a whole, would have been understood as "mere *allegations* to be investigated rather than as *facts*," and as such not actionable. *See Foley*, 2006 N.Y. Misc. LEXIS 9327, at *10. To hold otherwise would stifle investigative journalism, which lives or dies on the ability of responsible journalists to draw inferences from the information they uncover and to disclose their findings, without the chilling effect engendered by fear that the subjects of those investigation will be able to bring and maintain lawsuits against them.

E. Plaintiffs Have Failed to Plead That Defendants Acted with Gross Irresponsibility

Fault is an independent and constitutionally-required element of defamation. New York courts have decided that, where media content "is arguably within the sphere of legitimate public concern," a plaintiff must plead 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-Dispatch, Inc.*, 38 N.Y.2d 196,199 (1975).[20] Not a single paragraph in the complaint comes close to pleading gross irresponsibility under the controlling standards.

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[19] "The rabbi's close associate Ben Zion Suky repeats that he and the rabbi did not know Eric Patino's name before Tomer Shochat's arrest and never mentioned his name anyway. According to him, all of Shochat's claims are false, as are Nissim Biton's. Suky concedes that Madison [sic] Hotel ran into debts solely because of the financial crisis in America."

[20] *See also Crucey v. Jackall*, 275 A.D.2d 258, 258-59 (1st Dep't 2000) (dismissing defamation claim for failure to allege that defendants acted "with gross irresponsibility"); *Love v. William Morrow & Co.*, 193 A.D.2d 586, 588-89 (2d Dep't 1993) (same).

The Pinto report clearly falls within the sphere of legitimate public concern. An investigation prompted by future indictments against a famous religious figure for orchestrating corruption through "government high-ups, politicians, senior police officers, and even tycoons" is plainly a matter of public interest. Complt. ¶ 49. Moreover, the ultimate determination of what matters are in the public interest "is best left to the judgment of journalists and editors, which we will not second-guess absent clear abuse." *Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 595 (1989); *Gaeta v. N.Y. News, Inc.*, 62 N.Y.2d 340, 349 (1984) ("Determining what editorial content is of legitimate public interest and concern is a function for editors."). Under New York law, there is no abuse of this editorial discretion "so long as a published report can be fairly considered as relating to any matter of political, social, or other concern of the community." *Huggins v. Moore*, 94 N.Y.2d 296, 303 (1999) (internal quotation and citation omitted). The very fact that *Uvda* investigated Rabbi Pinto is highly probative of public concern, and if more were needed, the Israeli Attorney General's announcement that he was considering an indictment of Rabbi Pinto, extensive reporting about Rabbi Pinto's alleged involvement in a political scandal involving U.S. Congressman Michael Grimm, and, ultimately, the plea deal in which Rabbi Pinto admitted serious criminal charges, preclude any doubt that *Uvda*'s reporting was in the public interest. *See* Sims Aff. Ex. 9.

Plaintiffs attempt to conjure gross irresponsibility by intoning libel buzzwords like "ill will," "actual malice" and "recklessness as to [the] falsehood of the statements" without any factual substantiation. *See* Complt. ¶¶ 64-68, 83-86, 97-100. But those standards look to a subjective state of mind, not, as *Chapadeau* does, to objective compliance with prevailing journalistic standards. To demonstrate gross irresponsibility under New York law, a plaintiff must allege behavior akin to "not checking … facts at all, making gross distortions of the record

or jumping to totally unwarranted conclusions," which plaintiffs totally fail to do. *Med-Sales Assocs., Inc. v. Lebhar-Friedman, Inc.*, 663 F. Supp. 908, 913 (S.D.N.Y. 1987) (citing *DeLuca v. N.Y. News, Inc.*, 109 Misc. 2d 341, 438 N.Y.S.2d 199, 205 (Sup. Ct. N.Y. Co. 1981)).[21]

Ultimately, the Pinto report speaks for itself. New York courts have consistently refused to find fault with thoroughly researched journalism.[22] The extensive interviews shown throughout the broadcast and the willingness to obtain, then include within the program, rebuttals from Rabbi Pinto and his associates, including plaintiff Suky, make plain, even on the face of the complaint, that the defamation claims are subject to dismissal for plaintiffs' utter failure to plead that defendants' preparation and distribution of the program were grossly irresponsible within the meaning of *Chapadeau* and its progeny. *See* Complt. Ex. 1, p. 16; Dayan ¶ 17.

IV. PLAINTIFFS' PRIMA FACIE TORT CLAIM IS DUPLICATIVE OF THE DEFAMATION CLAIMS AND SHOULD BE DISMISSED AS SUCH

Plaintiffs' Fourth Cause of Action is nothing more than a rebranded defamation claim, without any new factual allegation. Generally, "a prima facie tort may not rest upon conduct that is well within the area of activity meant to be regulated by a traditional tort, and which is insufficient to establish that tort." *Nat'l Nutritional Foods Ass'n v. Whelan*, 492 F. Supp. 374, 383 (S.D.N.Y. 1980). However, in the defamation context, "'where the factual allegations

[21] Nor could plaintiffs contend that their allegation (at ¶ 56) that defendants "disregarded the documents forwarded to her by Plaintiff Suky and aired the Program without disclosing that documentary evidence … that would have refuted the allegations made in the Program" sufficed to plead gross irresponsibility. Journalists and editors have discretion over what to include in their investigative reports. *See Rinaldi, e.g.*, 42 N.Y.2d at 383 ("[T]he choice of material to go into a book … and treatment of public issues and public officials, whether fair or unfair, constitute the exercise of editorial judgment"); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974) (noting the First Amendment deprives courts of any power to insist on what newspapers must include); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973) ("For better or worse, editing is what editors are for; and editing is selection and choice of material."). The refusal to allow Suky to dictate *Uvda*'s content is not gross irresponsibility as a matter of law.

[22] *See, e.g.*, *Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 595 (1989) (dismissing claim because book based on accurate summaries of numerous interviews was not written in a grossly irresponsible manner); *Abbott v. Harris Publ'ns,, Inc.*, No. 97 Civ. 7648, 2000 U.S. Dist. LEXIS 9384, at *27 (S.D.N.Y. July 7, 2000) (dismissing defamation claim for failure to show gross irresponsibility because journalist based story upon "credible information from various sources . . . .").

underlying the prima facie tort cause of action relate to the dissemination of allegedly defamatory materials, that cause of action must fail.'" *Chao v. Mount Sinai Hosp.,* No. 10 CV 2869 (HB), 2010 U.S. Dist. LEXIS 133686, at *39-40 (S.D.N.Y. Dec. 17, 2010) (quoting *McKenzie v. Dow Jones & Co.*, 355 F. App'x 533, 536 (2d Cir. 2009)). To substantiate their prima facie tort claims, the plaintiffs do no more than reassert the alleged facts underlying their defamation claims. Complt. ¶¶ 107-109. Such duplicative pleading requires dismissal.

Plaintiffs have also failed to allege all the elements of prima facie tort, which requires 1) intentional infliction of harm "motivated solely by 'disinterested malevolence'" and not by Defendants' own "profit, self-interest or business advantage," 2) causing special damages, 3) without excuse or justification. *Amodei v. New York State Chiropractic Ass'n*, 160 A.D.2d 279, 282 (1st Dep't 1990), *aff'd*, 77 N.Y.2d 890, 891 (1991). The allegation that the defendants wrote and produced an episode of *Uvda*, a longstanding news and public affairs program, solely out of malevolence focused upon the plaintiffs and in no way out of an interest in reporting on instances of alleged corruption is patently absurd. Moreover, plaintiffs' round and unsubstantiated figure of $5 million special damages is insufficient as a matter of law. *See supra* at 19-22.

CONCLUSION

Based on the foregoing, the Court should dismiss each of the causes of action in the complaint and this action in its entirety, and should award such further relief as this Court may deem just and proper.

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