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Greenberg v Spitzer
2014 NY Slip Op 50995(U) [44 Misc 3d 1202(A)]
Decided on June 24, 2014
Supreme Court, Putnam County
Lubell, J.
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Decided on June 24, 2014

Supreme Court, Putnam County

Maurice R. Greenberg, Plaintiff,

against

Eliot L. Spitzer, Defendant.

1436/13

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The following papers were considered in connection with this motion by defendant for an Order pursuant to CPLR 3211(a)(1) and (a)(7) dismissing plaintiff's complaint and granting such other and further relief as this Court deems appropriate:

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SECOND AFFIRMATION OF NABIHA SYED/EXHIBITS A-H7

Plaintiff, Maurice R. Greenberg ("Greenberg"), the former Chairman and Chief Executive Officer ("CEO") of American International Group, Inc. ("AIG"), brings this defamation action against Defendant, Eliot L. Spitzer ("Spitzer"), the former Governor and Attorney General of the State of New York, in response to a series of public statements made by Spitzer in relation to Greenberg's tenure at, and management of, AIG. Greenberg's amended complaint alleges that Spitzer made defamatory statements on two occasions, to wit: (1) July 13, 2012, and (2) July 16, 2012. Additionally, Greenberg alleges that Spitzer's book, "Protecting Capitalism Case by Case ("Protecting Capitalism")," contains defamatory statements.

On July 13, 2012, Spitzer appeared on "The Closing Bell with Maria Bartiromo" (the "July 13, 2012 Interview"). Greenberg alleges that, during said interview, Spitzer made false statements regarding Greenberg. Bartiromo began the interview by noting that during Spitzer's time as Attorney General of the State of New York, he brought nine claims against Greenberg. She added that of those nine claims, only two remain today. Spitzer interrupted and said:

Maria, wait a minute. Let's deal with the facts for a minute. We brought a charge that AIG's accounting was fundamentally fraudulent. The company admitted that, the Justice Department, the SEC joined us in those charges. The company's board removed Hank Greenberg. Because of what the silliness that is attached to this claim, people are saying I did this out of personal invective or somehow personal animosity attacks. Can I tell you something very simple, and I don't know if this will make Hank feel better or not. I have no emotions about him one way or the other. He is merely one in a litany, Maria, he is one in a

litany of corporate executives who defrauded the market. We prosecuted them, the charge against the prosecutor that a prosecutor's motive is flawed is the last refuge of the guilty. I've had this claim [*3]made against me by every person we prosecuted.

(Amended complaint ¶20).

Spitzer continued:

Maria, Maria[...]You know, let's deal with reality here. Hank Greenberg's accounting was fraudulent. His company...

(*Id.* at ¶21).

In response to Bartiromo's assertion that Spitzer's use of the word "fraud" was not supported by any evidence, Spitzer stated:

Maria, look, I hate to say this to you, deal with facts and reality, not what Hank Greenberg's PR machine wants you to believe. Hank Greenberg was thrown out by his own board. His company paid 1.6 billion dollars in a settlement, acknowledged his accounting was fraudulent. These are facts, read the Federal Judicial Opinions. He was the one who instigated the conspiracy.

(*Id.* at ¶22).

Later, Bartiromo referenced 2005, when Spitzer went on television and said Greenberg had committed fraud. Bartiromo stated that "we have no evidence of this so many years later, still. [Greenberg's] camp say[s] you [Spitzer] destroyed his reputation and caused the collapse of AIG" (*id.*). Spitzer responded by stating that his 2005 television statements had been proven correct over time. In support, and to reveal what he said on that television appearance, Spitzer recited a portion of the transcript. His recitation of what he said was as follows:

Deals were fundamentally flawed. The evidence is overwhelming that these were transactions created for the purpose of deceiving the market. We call that fraud, it's deceptive, it's wrong, it's illegal. That company was a black box run with an iron fist by a CEO who did not tell the public the truth.'

(*Id.* at ¶24).

After his recitation, Spitzer said "[e]very piece of that statement was accurate, and has been proven" (*id.*). Again, Bartiromo took issue with Spitzer's use of the word "fraud" and asserted that there were no charges of fraud. Spitzer replied:

Maria, Maria, here is the federal court opinion. Do you want to read it. Twenty-nine pages. Hank Greenberg co-conspirator in fraud. Facts matter, Maria. I know this is cable TV, but facts matter...

...Maria, you need to understand, AIG was being led by a CEO whose accounting was fraudulent. That's why the board removed him. He paid a fine of 1.6 billion dollars...

(*Id.* at ¶26).As the Interview continued, Spitzer, again, asserted, "Hank Greenberg at AIG committed fraud. The record on that is indisputable" (*id.* at ¶27). Bartiromo replied:

You keep saying fraud, but there's no charge of fraud...it's important for our viewers to understand what went on and give people the benefit of the doubt if in fact there is absolutely no evidence supporting that.

(*Id.* at ¶28).

In response, Spitzer allegedly falsely asserted that a federal judge had found that Greenberg "is a conspirator whose actions began the conspiracy" (*id.* at ¶29). Bartiromo responded, "[n]o, no it does not. It does not say Hank Greenberg committed fraud. You said it, you continue to say it, and you say it all the time, and I want to just get to the facts

here" (*id.*).

Greenberg alleges that the July 13, 2012 Statements are false and defamatory in that: (1) Greenberg was not "thrown out" or "removed" by AIG's board; (2) Greenberg did not engage in fraud at AIG with respect to AIG's accounting or otherwise; (3) Greenberg did not pay a fine of $1.6 billion; and (4) AIG did not admit that anyone at AIG engaged in fraud (*id.* at ¶34). Greenberg also asserts that there have been no final court determinations that he engaged in any wrongdoing during his tenure at AIG, nor have there been any rulings establishing that such misconduct constituted fraud (*id.*). Furthermore, neither Spitzer, nor any other party, ever brought criminal charges against Greenberg (*id.*).

On July 16, 2012, during Bartiromo's show, she reiterated her concerns that Spitzer had abused his power as a regulator and acted out of personal animus toward Greenberg (*id.* at ¶ 35). Later that day, Spitzer appeared on his television program, "Viewpoint." During said appearance, Spitzer re-aired several portions of the July 13, 2012 Interview, many of which included portions of the allegedly defamatory statements Spitzer made on July 13, 2012 (*id.*).

Subsequently, during Spitzer's appearance on "Viewpoint," he asserted that "[e]very statement I have made about Hank Greenberg's role in these frauds has been proven true and accurate" (*id.* at §36). This statement, along with the republication of the July 13, 2012 allegedly defamatory statements, constitute the July 16, 2012 allegedly defamatory statements (*id.*).

Greenberg alleges that the July 16, 2012 Statements are false and defamatory in the same manner as are the July 13, 2012 statements, to wit: (1) Greenberg was not "thrown out" or "removed" by AIG's board; (2) Greenberg did not engage in fraud at AIG with respect to AIG's accounting or otherwise; (3) Greenberg did not pay a fine of $1.6 billion; and (4) AIG did not admit that anyone at AIG engaged in fraud. Greenberg also asserts that there have been no final court determinations that he engaged in any wrongdoing during his tenure at AIG, nor have there been any rulings establishing that such misconduct constituted fraud. Furthermore, neither Spitzer, nor any other party, ever brought criminal charges against Greenberg (*id.* at ¶42).

Greenberg alleges that, in addition to republishing his prior defamatory statements, Spitzer made additional false and misleading statements about Greenberg in Spitzer's book,

"Protecting Capitalism" (*id.* at ¶45).

First, Spitzer wrote: "AIG and Hank Greenberg were charged by the New York Attorney General's office—when I was Attorney General—with civil fraud and deceptive accounting practices, as well as a raft of other abuses" (*id.* at ¶46).

Second, Spitzer allegedly misleadingly quoted from an article published in The New York Times regarding AIG's 2006 settlement with regulatory authorities. Specifically, Spitzer wrote: "Under the settlement reached with the Justice Department, the Securities and Exchange Commission, the New York attorney general's office, and the New York State Insurance Department, AIG acknowledged that it had deceived the investing public and regulators" (*id.* at ¶47).

Third, Spitzer allegedly falsely stated that Greenberg had been removed as CEO by AIG's board and that a federal judge had found that Greenberg had initiated a "conspiracy" to "deceive investors," as evinced by the following passage:

4. A quote from a Bloomberg News report about the removal of Greenberg by the board:

Last night, AIG announced that Greenberg, 79, would step down as chief executive officer...Greenberg's resignation as CEO came as New York Attorney General Eliot Spitzer zeroed in on a specific reinsurance transaction between AIG and Berkshire Hathaway Inc.'s General Reinsurance subsidiary...Spitzer obtained information in the past 10 to 14 days that Greenberg himself may have himself initiated the transaction...'

5. Lest there be ANY doubt about the veracity of this claim of Greenberg's role, here is a quote from a federal judge's written opinion after a federal criminal prosecution that focused on these very transactions:

The government presented sufficient evidence that, starting with Greenberg's October 31 2000 phone call to Ferguson, there was an agreement to carry out a transaction to artificially inflate AIG's loss reserves and deceive investors about the amount of the company's loss reserves and quality of earnings.' More from the federal judge: The evidence provides an adequate basis for a reasonable jury to conclude that the conspiracy to artificially inflate

AIG's loss reserves and deceive the company's investors started with Greenberg's call to Ferguson on October 31, 2000.'

(*Id.* at ¶48).

Greenberg further alleges that Spitzer either knew or recklessly disregarded the fact that the statements he republished from "The New York Times" and "Bloomberg News" contained inaccuracies and false statements (*id.* at ¶62). Greenberg claims that Spitzer either knew or recklessly disregarded the fact that his selective quotation of a judicial opinion in the federal [*4]criminal prosecution did not constitute a fair and true report of the federal criminal proceedings (*id.* at ¶63).

Fourth, Spitzer allegedly misleadingly stated that Greenberg had invoked his fifth Amendment privilege when the former wrote: "Perhaps that is why Greenberg invoked his Fifth Amendment right to avoid answering questions when we invited him to explain these transactions" (*id.* at ¶48).Fifth, Spitzer allegedly falsely stated that Greenberg was charged by the Department of Justice: "And perhaps that is why after the SEC and the Justice Department charged him in 2009 for the actions relating to these same transactions; he settled for $15 million" (*id.* at ¶51).

Sixth, Greenberg takes issue with Spitzer's statement that "Greenberg was deemed to be an unindicted co-conspirator by federal prosecutors, invoked his Fifth Amendment right to avoid answering questions and was removed by his own board of directors after the accounting at AIG was deemed to be unreliable. Our case against him was rock solid" (*id.* at ¶50). Greenberg alleges that Spitzer either knew or recklessly disregarded the fact that his selective quotation of a judicial opinion in the federal criminal prosecution did not constitute a fair and true report of the federal criminal proceedings (*id.* at ¶63).

Seventh, Greenberg alleges that Spitzer stated that Greenberg and his son, Jeffrey Greenberg, were akin to an organized crime family, analogizing them to the Gambino crime family (*id.* at ¶52). In this regard, the passage from Spitzer's book reads as follows:

The desire to be a monopolist runs deep - whether for organized crime families or traditional' businesses. Competition, after all, is a serious impediment to profit margins. So it was with

Marsh & McLennan, the world's biggest insurance broker, and its desire to dominate the insurance industry.

Marsh at the time had as its CEO Jeff Greenberg - the son of Hank Greenberg, the now former but then still reigning CEO of AIG. Jeff, who had worked at AIG for a time, seemed intent while at Marsh on proving that he too could become a corporate titan.

Often during the period I was Attorney General I would analogize the behavior of the [*5] organized crime families to the behavior of some of our major companies. Needless to say, a lot of people got bent out of shape about that. But there was a reason I made the analogy. As I said above, the organized crime families learned about monopoly power from the history of the oil and other trusts, and traditional businesses learned the power of monopoly the same way. They all decided that the best way to extract profits and ensure a lack of competition was collusion, not competition. Marsh exemplified this.

But just as the Gambinos and other organized crime families divided up the trucking market to ensure there would be no competition, so too did Marsh arrange the market so it could make bigger fees...

(*Id.*).

Greenberg claims that Spitzer's only bases for analogizing Greenberg and his son to an organized crime family were Spitzer's actual malice and personal animus against Greenberg, Spitzer's desire to damage Greenberg's reputation and career, and Spitzer's desire to continue his personal vendetta against Greenberg in order to restore Spitzer's tarnished political reputation as he seeks to return to elected office (*id.* at ¶64).Eighth, Greenberg alleges that Spitzer falsely suggested that Greenberg breached corporate governance rules and failed to independently perform his duties as a director on the New York Stock Exchange ("NYSE") Board of Directors (*id.* at ¶53). These allegedly defamatory suggestions are contained in a chapter of Spitzer's book entitled "Failure of corporate governance," which also concerns Richard Grasso, the former Chairman and CEO of the NYSE. In relevant part, Spitzer wrote:

The first failure that contributed to Grasso's overcompensation was the selection and

composition of the NYSE's board of directors and compensation committee. The majority of directors and almost all members of the compensation committee during Grasso's tenure as CEO were subject to regulation and oversight by the NYSE and either they or their firms could be rewarded or punished by Grasso.

Indeed, during Grasso's tenure as chairman and CEO of the NYSE, only a small minority of directors was independent of Grasso, and an even smaller fraction of the compensation committee was independent.

Put another way, almost all of the members of the committee responsible for Grasso's compensation had a personal stake in remaining in the good graces of the NYSE's chairman and CEO.

In 2001, the year Grasso was awarded more than $30 million, there were exactly zero independent directors on the compensation committee[.]

(*Id.*).

Spitzer included a table listing the members of the 2001 NYSE Committee and their respective interest. Spitzer then continued:

This composition of the board and the compensation committee did not occur by chance. In another failure of corporate governance, Grasso exerted significant influence over who was elected to the NYSE's board of directors. This allowed Grasso to stack the compensation committee with directors who were more likely to approve excessive pay packages, either because of his influence over them or because of a shared interest in ever-rising CEO compensation.

(*Id.*).

In addition, Greenberg alleges that Spitzer falsely asserted that Grasso assisted Greenberg in efforts to "prop up" AIG's stock price:

Even listed companies could be helped or harmed by the influence Grasso held over the specialist responsible for the company's stock.

For example, in 2001, Maurice Greenberg, who was the chairman and CEO of AIG and a member of the NYSE's compensation committee, called [*6]Grasso to complain that the specialist in AIG stock was not doing enough to keep the stock price high. Grasso dutifully relayed Greenberg's concerns to the specialist in question, creating pressure to prop up the stock price.

(*Id.* at ¶54).Greenberg alleges that, through the deliberate omission of relevant facts, the abovementioned statements from Spitzer's book mislead readers of those statements into forming a false impression that Greenberg had engaged in wrongdoing (Amended complaint ¶ 61). Specifically, Greenberg alleges that these statements are false and defamatory because: (1) Greenberg was not "thrown out" or "removed" by AIG's board; (2) Greenberg did not engage in fraud at AIG with respect to AIG's accounting or otherwise; (3) Greenberg later relinquished his Fifth Amendment rights and responded to all questions asked by the New York Attorney General ("NYAG"); (4) AIG did not admit that Greenberg or anyone at AIG engaged in fraudulent conduct or "deceived the investing public and regulators;" (5) No court has finally determined that Greenberg engaged in any wrongdoing during his tenure at AIG; (6) Greenberg was never indicted by the Department of Justice or charged by the U.S. Securities and Exchange Commission ("SEC") with fraud; and (7) Greenberg was not a party in the federal criminal prosecution, and the convictions of all the defendants in the federal criminal prosecution were vacated on appeal (*id.* at ¶59).

In sum, Spitzer's allegedly defamatory statements at issue consist of the following:

(1)The Removal Statements. Spitzer asserted that Greenberg was "removed" and "thrown out [of AIG] by his own board;"

(2)The Co-Conspirator Statements. Spitzer stated:

(a)"He [Greenberg] was the one who instigated the conspiracy;"

(b)"Hank Greenberg[,] co-conspirator in fraud"

(3)The Fifth Amendment Privilege Statement. Spitzer asserted that Greenberg "invoked his Fifth Amendment right to avoid answering questions" about allegedly fraudulent AIG transactions;

(4)The Paid Fine Statement. Spitzer allegedly falsely stated that Greenberg "paid a fine of 1.6 billion [*7]dollars;"

(5)The DOJ Charges Statement. Spitzer allegedly falsely asserted that the "Justice Department charged" Greenberg in connection with AIG transactions;

(6)The Organized Crime Statement. Spitzer "analogized the behavior of the organized crime families to the behavior of" Greenberg and one of his sons;

(7)The NYSE Board of Directors Statements. Spitzer asserted that Greenberg breached corporate governance rules and failed to independently perform his duties as a director on the NYSE Board of Directors.

(8)The Fraudulent Accounting Statements. Spitzer repeatedly stated that Greenberg committed fraud by:

(a)Identifying Greenberg as "one in a litany of corporate executives who defrauded the market;"

(b)Asserting that "Hank Greenberg's accounting was fraudulent;"

(c)Asserting that AIG had "acknowledged [Greenberg's] accounting was fraudulent;"

(d)Asserting that Greenberg "was the one who instigated the conspiracy;"

(e)Claiming that "every statement I've made about Hank Greenberg's role in these frauds is proven and accurate;" and

(f)Stating that "Hank Greenberg at AIG committed fraud. The record on that is indisputable."

(*See* amended complaint; Greenberg's Memorandum of Law in Opposition to Spitzer's Motion to Dismiss the Complaint at 22).

Spitzer now moves to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and (7).

CPLR 3211(a)(1)

A motion to dismiss pursuant to CPLR 3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]).

(*Saleh v New York Post*, 78 AD3d 1149, 1151 [2d Dept 2010]).

Put differently,

A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" [internal citations omitted]. "[I]f the court does not find [their] submissions documentary,' it will have to deny the motion" [internal citation omitted].

(Fontanetta v John Doe 1, 73 AD3d 78, 83-84 [2d Dept 2010]).

Furthermore, "to be considered documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86)[internal citation omitted]). "From the cases that exist, it is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable,' would qualify as documentary evidence' in the proper case" (*id.* at 84-85

[internal citation omitted]).

CPLR 3211(a)(7)

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Foley v D'Agostino*, 21 AD2d 60, 64-65 [1964]). In considering such a motion, the court must " accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007], *quoting Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*EBC I. Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

(*Sokol v Leader*, 74 AD3d 1180, 1180-81 [2d Dept 2010]).

[A] motion to dismiss pursuant to CPLR 3211(a)(7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).(*Id.* at 1182).

Defamation

The elements of a cause of action for defamation 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'" (*Salvatore v Kumar*, 45 AD3d 560, 563, 845 NYS2d 384, *quoting Dillon v City of New York*, 261 AD2d 34, 38, 704 NYS2d 1). A false statement constitutes defamation per se when it charges another with a serious crime or tends to injure another in his or her trade, business, or profession (*see Liberman v Gelstein*, 80 NY2d 429, 437—438, 590 NYS2d 857; *Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 637, 849 NYS2d 75).

(*Geraci v Probst*, 61 AD3d 717, 718-19 [2d Dept 2009]).

Where a plaintiff alleges that statements are false and defamatory, the legal question for the court on a motion to dismiss is whether the contested statements are reasonably susceptible of a defamatory connotation (*Weiner v Doubleday & Co.*, 74 NY2d 586, 592 [1989]). In making this determination, the court must give the disputed language a fair reading in the context of the publication as a whole (*James v Gannett Co.*, 40 NY2d 415, 419-20 [1976]).

(*Armstrong v Simon & Schuster*, 85 NY2d 373, 380 [1995]; *see also Stepanov v Dow Jones & Co., Inc.*, 2014 NY Slip Op 03940 [1st Dept May 29, 2014], 2014 WL 2208921, *2 ["On a motion to dismiss a defamation claim, the court must decide whether the statements, considered in the context of the entire publication, are [*8] reasonably susceptible of a defamatory connotation,' such that the issue is worthy of submission to a jury"]).

At the outset, Defendant argues that Plaintiff has not adequately pleaded and cannot prove the requisite degree of fault as a matter of law. As a public figure, Plaintiff may not recover damages for defamation unless he proves that the offending 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'" (*Freeman v Johnston*, 84 NY2d 52, 56 [1994] [internal citation omitted]). "It is a subjective inquiry, focusing upon the state of mind of the publisher of the allegedly libelous statements at the time of publication'" (*Stepanov*, 2014 NY Slip Op 03940, 2014 WL 2208921, *4 [internal citation omitted]).

Accepting the facts as alleged in the amended complaint as true, and according Plaintiff the benefit of every possible favorable inference (*Sokol*, 74 AD3d at 1180-81), the Court concludes that Greenberg has adequately pleaded actual malice (*see Alianza Dominicana, Inc. v Luna*, 229 AD2d 328, 329-30 [1st Dept 1996]; *Arts4All, Ltd. v Hancock*, 5 AD3d 106, 109-11 [1st Dept 2004]; *Shaw v Club Managers Ass'n of Am., Inc.*, 84 AD3d 928, 930-31 [2d Dept 2011]).

Next, Spitzer contends that the Removal Statements, the Fraudulent Accounting Statements, the Co-Conspirator Statements, and the Fifth Amendment Privilege Statements are all substantially true and/or privileged pursuant to Civil Rights Law §74. With respect to the Paid Fine Statements and the DOJ Charges Statements, Spitzer contends that each are substantially true, and even if inaccurate, cannot have caused Greenberg any injury as a matter of law.

Substantial Truth

The test is whether the statement "as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced. When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done"' (*Fleckenstein v Friedman*, 266 NY 19, 23 [1934] [internal citation omitted]; *see also Love v Morrow & Co.*, 193 AD2d 586, 587-88 [2d Dept 1993]).

Civil Rights Law §74

Civil Rights Law §74 provides, in relevant part, that "[a] civil action cannot be [*9] maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding." The Court of Appeals has noted that "[f]or a report to be characterized as fair and true' within the meaning of the statute, thus immunizing its publisher from a civil suit sounding in [defamation], it is enough that the substance of the article be substantially accurate" (*Holy Spirit Assn. For Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67 [1979]). Moreover, "a fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated" (*Briarcliff Lodge Hotel v Citizen-Sentinel Publishers, Inc.*, 260 NY 106 [1932]).

(*McDonald v East Hampton Star*, 10 AD3d 639, 639-40 [2d Dept 2004]).

Opinion

Since falsity is a necessary element of a defamation cause of action and only "facts" are capable being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action' (*Gross v New York Times Co.*, 82 NY2d at 152-53, *quoting 600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d at 139).

(*Goldberg v Levine*, 97 AD3d 725 [2d Dept 2012]).

[In distinguishing between assertions of fact and nonactionable expressions of opinion,] the

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

(*Brian v Richardson*, 87 NY2d 46, 51 [1995]).

[T]he courts must consider the content of the communication as a whole, as well as its tone and apparent purpose. Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis "whether the reasonable reader would have believed that the challenged statements were conveying facts about the [defamation] plaintiff" [internal citations omitted].

(*Id.* at 51).

Upon application of the law herein above and otherwise herein below noted, the Court hereby rules as follows with respect to each category of challenged statements.

The Removal Statements

To establish a defense, Spitzer relies on the following:

(1)a copy of the excerpted transcript of Greenberg's testimony from *American International Group, Inc. v Starr International Co., Inc.*, (S.D.NY June 16, 2009)(Syed aff, exhibit UU); and

(2)a copy of relevant excerpts from Greenberg's book, "The AIG Story," by Maurice R. Greenberg and Lawrence A. Cunningham (Syed aff, exhibit N).

The Court accepts the copy of the excerpted transcript of Greenberg's testimony as "documentary evidence" pursuant to CPLR 3211(a)(1)(*see Fontanetta*, 73 AD3d at 84-85 [judicial records qualify as documentary evidence under CPLR 3211(a)(1)]). In pertinent part, Greenberg testified as follows:

Q:Well, the only thing that happened on March 14 is that you lost your job, right?

A:I lost my job, yes.

Q:You were forced to resign as CEO of AIG [*10]on March 14th of 2005. Right?

A:Yes, sir.

Q:And your stepping down as the CEO of AIG on March 14th was not voluntary, correct?

A:No, it wasn't.

(Syed aff, exhibit UU).

In light of the above, the Court finds that Spitzer's statements in this regard were substantially true. Greenberg's reliance upon *Fontanetta* in arguing that trial testimony does not qualify as documentary evidence is unpersuasive (*see Warshaw Burnstein Schlesinger & Kuh, LLP v Longmire*, 106 AD3d 536, 537 [1st Dept 2013]). "To some extent, the term documentary evidence' is a fuzzy" term, and what is documentary evidence for one purpose might not be documentary evidence for another" (*Fontanetta*, 73 AD3d at 84).

Fontanetta deals with documents which can best be characterized as letters, emails, etc. Here, Spitzer has submitted *Greenberg's* sworn testimony, which utterly refutes Greenberg's allegation that any of Spitzer's verbal formulations in this regard are false (*see Warshaw*, 106 AD3d at 537). Furthermore, there is nothing before the Court to question the authenticity or accuracy of the transcript.

In any event, the Court finds that Spitzer's statements are privileged pursuant to Civil

Rights Law §74, since they constitute a substantially fair and accurate report of a judicial proceeding (*see McDonald v East Hampton Star*, 10 AD3d 639, 639-640 [2d Dept 2004]). Accordingly, the Court need not consider the excerpts from Greenberg's book.

As such, the Court finds that Spitzer has conclusively established that the Removal Statements are substantially true and, in any event, privileged pursuant to Civil Rights Law §74.

The Co-Conspirator Statements

In support of his contention that his statements are substantially true and/or privileged pursuant to Civil Rights Law §74, Spitzer relies on:

(1)*United States v. Ferguson*, 553 F.Supp.2d 145 (D. Conn. 2008) ("Ferguson 1"); and

(2)*United States v. Ferguson*, 676 F.3d 260 (2d. Cir. 2011) ("Ferguson 2").

The Court finds that each qualifies as documentary evidence (CPLR 3211[a][1]). Furthermore, the Court is persuaded that said documentary evidence conclusively establishes that the Co-Conspirator Statements are substantially true. Moreover, said statements are also privileged (Civil Rights Law §74).

In *United States v. Ferguson*, 553 F.Supp.2d 145 (D. Conn. 2008), Judge Droney, in relevant part, opined as follows:

[T]he government presented sufficient evidence that, starting with Greenberg's October 31, 2000 phone call to Ferguson, there was an agreement to carry out a transaction to artificially inflate AIG's loss reserves and deceive AIG's investors about the amount of the company's loss reserves and the quality of its earnings...

(*Ferguson*, 553 F.Supp.2d at 158).After recapitulating the testimony from the trial, Judge Droney held that "this evidence provides an adequate basis for a rational jury to conclude that the conspiracy to artificially inflate AIG's loss reserves and deceive the company's investors started with Greenberg's call to Ferguson on October 31, 2000" (*id.*).With respect to "Ferguson 2," Greenberg argues that Spitzer, at the time he made the Co-Conspirator statements, knew that the "Ferguson 1" decision had been reversed and the convictions of the

defendants in that trial had been vacated by the Second Circuit Court of Appeals in "Ferguson 2." However, the appellate court's reasons for reversal of the district court's decision, as well as its decision to vacate the convictions of the defendants, do not stem from the district court's ruling regarding the conspiracy. The relevant portions of the "Ferguson 2" decision are as follows:

The government insists that the deal was tainted from the very first call between Ferguson and Greenberg, when AIG asked to rent a specific amount of reserves for a defined period. Yet it also theorized that the idea of a no-risk deal did not surface until Garand suggested it in mid-November. Ferguson claims that this is a contradiction that renders untenable the district court's finding that [*11]the conspiracy began with the Greenberg—Ferguson call on October 31, a ruling that allowed the government to introduce co-conspirator statements made starting on October 31 (rather than starting from mid-November)...

.. The government's theories are not irreconcilable. Although the details of the plan were not settled during the October 31 call, Greenberg and Ferguson agreed to a highly unusual deal: The transaction was prompted predominately by stock market concerns; it inverted their customary commercial roles as cedant and reinsurer, even though there was no evidence that Gen Re wanted reinsurance; and AIG requested a specific dollar range of loss reserves for a specific term...

... Even if Greenberg and Ferguson had hoped to accomplish their objectives legally, execution of a no-risk transaction was not unforeseeable. These very senior executives agreed to pursue specific parameters. And their objective predictably exerted pressure on their subordinates on the deal team to get the transaction done that way no matter what. Under these circumstances, we cannot say that it was clearly erroneous for the district court to find that the conspiracy began on October 31.

(*Ferguson*, 676 F.3d at 288-89).

As the excerpts from the appellate court's decision make abundantly clear, Judge Droney's finding in "Ferguson 1" regarding the conspiracy was affirmed.

Thus, the Court finds that Spitzer has conclusively established that the Co-Conspirator Statements are substantially true and, in any event, privileged (Civil Rights Law §74).**The Fifth Amendment Privilege Statements**

In support of his argument that his statements are substantially true and/or privileged pursuant to Civil Rights Law [*12]§74, Spitzer refers to the following documents:

> (1)a copy of a letter to the editor titled, "The Case of Hank Greenberg," published in The Wall Street Journal (April 2, 2005) (which, upon Defendant's information and belief, was authored by David Boies, counsel of record in the instant action) (Syed aff, exhibit U); and

(2)a copy of the Opinion in *People of the State of New York v. Greenberg* (Sup Ct, New York County 2010) (Syed aff, exhibit FF).

The Court rejects the copy of the letter to the editor of the Wall Street Journal as documentary evidence (*see Fontanetta*, 73 AD3d 78). However, the Opinion in *People of the State of New York v. Greenberg*, (2010 NY Slip Op 33216(U) [Sup Ct, New York County 2010][Syed aff, exhibit FF at 7]) constitutes documentary evidence pursuant to CPLR 3211 (a)(1) (*see Fontanetta*, 73 AD3d at 87). To the extent Spitzer relies upon the Opinion, the Court finds that it conclusively establishes that Spitzer's statement was true. In said Opinion, Justice Ramos wrote, in pertinent part:

> On April 12, 2005, Greenberg appeared for an examination as part of the OAG's investigation, but refused to answer substantive questions concerning the Gen Re Transaction and invoked his Fifth Amendment privilege, a decision that his counsel publicized in an open letter to the Wall Street Journal.

(*Greenberg*, 2010 NY Slip Op 33216(U)[Syed aff, exhibit FF at 7]).

Although it appears that Justice Ramos referred to the letter relied upon by Spitzer, the Court cannot conclude that Justice Ramos was referring to the same letter. In any event, the Court finds that Spitzer's statement is privileged (Civil Rights Law §74). In addition, the Court is not persuaded that Spitzer's assertion that Greenberg invoked his Fifth Amendment privilege "to avoid answering questions" is reasonably susceptible of a defamatory connotation (*see Stepanov*, 2014 NY Slip Op 03940, 2014 WL 2208921, *2).

Based upon the foregoing, this category of challenged statements, namely, the Fifth Amendment Privilege Statements, are not actionable.

Spitzer contends that the Paid Fine Statements and the DOJ Charges Statements are substantially true, and even if inaccurate, [*13]cannot have caused Greenberg any injury as a matter of law.

The Paid Fine Statement

Spitzer does not cite to any exhibits to refute the allegations in the amended complaint or to establish a defense to Greenberg's claim regarding the Paid Fine statements. Rather, Spitzer concedes that during his July 13, 2012 interview, he mistakenly said that Greenberg (as opposed to AIG) paid the $1.6 billion fine. Nevertheless, Spitzer asserts that said mistake constitutes a minor inaccuracy that, when considered in the context of the July 13, 2012 interview, is excusable pursuant to the doctrine of substantial truth.

The Court concludes that Spitzer's statement would not have "a different effect on the mind of the reader from that which the pleaded truth would have produced" (*Love*, 193 AD2d at 588). According to Greenberg's amended complaint, Spitzer, in the July 13, 2012 interview, stated that "[h]is (Greenberg's) company paid 1.6 billion dollars in a settlement..." Subsequently, and in the same interview, Spitzer stated that "AIG was being led by a CEO whose accounting was fraudulent. That's why the board removed him. He paid a fine of 1.6 billion dollars" (amended complaint ¶26).

Since Spitzer accurately stated that it was AIG that paid $1.6 billion prior to mistakenly saying that Greenberg paid $1.6 billion, in conjunction with the fact that Spitzer made the mistake only once throughout the course of the entire interview, the Court is not persuaded that a reasonable viewer would have inferred that Greenberg also paid a $1.6 billion fine (*see Love*, 193 AD2d at 587 ["Provided that the defamatory material on which the action is based is substantially true (minor inaccuracies are acceptable), the claim to recover damages for libel must fail"]). In any event, the Court is not persuaded that the statement is reasonably susceptible of a defamatory connotation (*see Stepanov*, 2014 NY Slip Op 03940, 2014 WL 2208921, *2).

As such, the Court concludes that the Paid Fine Statement is not actionable.

The DOJ Charges Statement

As with the Paid Fine Statement, Spitzer concedes that he was mistaken when he wrote in his book that the Justice Department joined with the SEC to bring claims against Greenberg when, in fact, only the SEC was a party. However, Spitzer argues that this mistake "cannot have produced a discernibly different impact on reader than the (demonstrably) true statement that the SEC in fact [*14]brought those claims against Greenberg" (Spitzer's Memorandum of Law in Support of his Motion to Dismiss the Amended Complaint at 40-41).

Accepting Greenberg's allegation that Spitzer's statement was false and defamatory, the Court finds that Spitzer's mistake would have "a different effect on the mind of the reader from that which the pleaded truth would have produced" (*Love*, 193 AD2d at 588). Charges brought by the SEC pertain to civil liability, whereas charges brought by the DOJ pertain to criminal liability. By stating that the DOJ brought charges against Greenberg, a reasonable listener or viewer would be inclined to believe that the person charged engaged in some sort of criminal misconduct. Thus, the Court is persuaded that the statement is reasonably susceptible of a defamatory connotation (*see Stepanov*, 2014 NY Slip Op 03940, 2014 WL 2208921, *2).Therefore, the Court finds that the DOJ Charges Statement is actionable.

The Organized Crime Statement

Upon review of the statement, while "consider[ing] the words in the entire context of the publication, and according to their ordinary meaning" *(Aronson v. Weirsma*, 65 NY2d 592, 594 [1985]), the Court is not persuaded that Spitzer's statement is reasonably susceptible of a defamatory connotation (*see Armstrong v Simon & Schuster*, 85 NY2d at 380 [1995]; *Golub v Enquirer/Star Grp., Inc.*, 89 NY2d 1074 [1997]; *Stepanov v Dow Jones & Co., Inc.*, 2014 NY Slip Op 03940 [1st Dept May 29, 2014]).

As such, the Court concludes that the Organized Crime Statement is not actionable.**The NYSE Board of Directors Statements**

Spitzer argues that no reasonable person could infer from his criticism of the NYSE and its chairman that Greenberg breached his fiduciary duty to the NYSE. Furthermore, Spitzer contends that even if a reasonable reader could draw such an inference from his statements, the statements nevertheless constitute non-actionable opinion based on disclosed facts.

To the extent that Greenberg alleges that Spitzer falsely suggests that Greenberg failed

to independently perform his duties as a director on the NYSE Board of Directors, the Court is persuaded that the challenged statement is properly considered nonactionable opinion (*see Brian*, 87 NY2d at 51). In any event, [*15]the Court is not persuaded that Spitzer's statements regarding the structure of the NYSE's Board of Directors and/or the compensation committee are reasonably susceptible of a defamatory connotation (*see Armstrong v Simon & Schuster*, 85 NY2d 373, 380 [1995]; *Stepanov v Dow Jones & Co., Inc.*, 2014 NY Slip Op 03940 [1st Dept May 29, 2014]).

Spitzer merely presented the argument that the NYSE permitted its chairman to select a compensation committee without sufficiently independent directors. This argument was surrounded by disclosed facts, including a chart naming all eight members of the 2001 NYSE compensation committee (*see* amended complaint ¶53). Since Spitzer's chart includes all the members of the compensation committee, not just Greenberg, the Court is not persuaded that Spitzer was attempting to accuse Greenberg of violating *his* fiduciary duty to the NYSE.

As such, the Court finds that this allegedly defamatory aspect of the NYSE Board of Directors Statements, namely, that Spitzer falsely suggests that Greenberg failed to independently perform his duties as a director on the NYSE Board of Directors, constitutes nonactionable opinion.

Next, the Court rules as follows with respect to Greenberg's allegation that Spitzer falsely asserted that Grasso assisted Greenberg in efforts to "prop up" AIG's stock price. In pertinent part, Spitzer wrote:

For example, in 2001, Maurice Greenberg, who was the chairman and CEO of AIG and a member of the NYSE's compensation committee, called Grasso to complain that the specialist in AIG stock was not doing enough to keep the stock price high. Grasso dutifully relayed Greenberg's concerns to the specialist in question, creating pressure to prop up the stock price.

(Amended complaint ¶54).

At the outset, the Court notes that Spitzer has not submitted any proof in admissible form that utterly refutes Greenberg's allegation. Upon consideration of the factors used in

determining whether this statement constitutes an assertion of fact or nonactionable opinion (*see Brian*, 87 NY2d at 51), the Court concludes that this statement is properly considered an assertion of fact that is reasonably susceptible of a defamatory connotation, namely, that Greenberg abused the power afforded to him by virtue [*16]of his position on the NYSE (*see Armstrong v Simon & Schuster*, 85 NY2d 373, 380 [1995]; *see also Stepanov v Dow Jones & Co., Inc.*, 2014 NY Slip Op 03940 [1st Dept May 29, 2014]).

Therefore, the Court finds that this allegedly defamatory aspect of the NYSE Board of Directors Statements, namely, that Spitzer falsely asserted that Grasso assisted Greenberg in efforts to "prop up" AIG's stock price, is actionable.

The Fraudulent Accounting Statements

Spitzer refers to the following documentary evidence:

(1)a copy of the complaint filed in *Securities and Exchange Commission v. American International Group, Inc.*, 1:04-cv-02070-GK (D.D.C. Nov. 30, 2004) ("2004 SEC Complaint") (Syed aff, exhibit G);

(2)a copy of the Final Judgment as to Defendant American International Group, Inc. filed in *Securities and Exchange Commission v. American International Group, Inc.*, 04-cv-020270-GK (D.D.C. Dec. 7, 2004) ("2004 SEC AIG Final Judgment") (Syed aff, exhibit I);

(3)a copy of AIG's Annual Report on Form 10-K for the fiscal year ending December 31, 2004 ("2004 Annual SEC Filing") (Syed aff, exhibit Q);

(4)a copy of the signature pages from AIG's Annual Report on Form 10-K for the fiscal years ending December 31, 2000; December 31, 2001; December 31, 2002 ("2000-2003 Signature Pages") (Syed aff, exhibit R);

(5)a copy of the complaint filed in *Securities and Exchange Commission v. American International Group, Inc.*, No. 1-06-cv-1000-LAP (S.D.NY Feb. 9, 2006) ("2006 SEC Complaint) (Syed aff, exhibit X);

(6)a copy of the press release issued by the Securities and Exchange Commission on February 9, 2006 ("2006 SEC Press Release") (Syed aff, exhibit Z);

(7)a copy of a letter agreement between the Department of Justice, Fraud Section, Criminal Division and American International Group, dated February 7, 2006

("2006 DOJ Letter Agreement") (Syed aff, exhibit AA);

(8)a copy of the complaint filed by the SEC in *Securities [*17]and Exchange Commission v. Maurice R. Greenberg and Howard I. Smith*, No. 09-cv-06939-LAP (S.D.NY Aug. 6, 2009) ("2009 SEC Complaint") (Syed aff, exhibit BB); and

(9)a copy of the Final Consent Judgment as to Defendant Maurice R. Greenberg in *Securities and Exchange Commission v. Maurice R. Greenberg and Howard I. Smith*, No. 09-cv-06939-LAP (S.D.NY Aug. 7, 2009)("2009 SEC Greenberg Consent Judgment") (Syed aff, exhibit CC);

Various exhibits submitted by Spitzer in connection with this aspect of his motion constitute "documentary evidence" within the meaning of CPLR 3211(a)(1), while others do not.

The Court rejects the 2004 Annual SEC Filing as documentary evidence. The information contained therein consists of conclusions reached by AIG's independent auditors. In essence, it is a summary (albeit lengthy) and, therefore, is not properly considered "documentary" for the purpose of CPLR 3211(a)(1) (*see Fontanetta*, 73 AD3d at 87). The Court reaches the same conclusion regarding the 2000-2003 Signature Pages, since they are part and parcel of the 2004 Annual SEC Filing (*id.*). In any event, the Court is not persuaded that the 2004 Annual SEC filing conclusively establishes a defense as a matter of law.

The 2006 SEC Press Release, which is approximately three pages, summarizes the action brought by the SEC against AIG in February 2006. Due to the 2006 SEC Press Release's summary form, the Court finds that same does not qualify as documentary evidence pursuant to CPLR 3211(a)(1) (*id.*). Moreover, said Press Release, standing alone, does not conclusively establish a defense as a matter of law. The Press Release characterizes the 2006 SEC action's resolution as a "settlement," which does not indicate that there was a determination of AIG's liability, much less Greenberg's. Lastly, the 2006 DOJ Letter Agreement qualifies as documentary evidence (CPLR 3211[a][1]). Even though it is characterized as a letter, it "reflects an out-of-court transaction,'" thereby rendering it sufficient for the purpose of CPLR 3211(a)(1) (*see Fontanetta*, 73 AD3d at 84). Nonetheless, the Court finds that the document does not conclusively establish a defense as a matter of law.

With respect to the 2004 SEC Complaint and the 2004 SEC AIG Final Judgment, the Court finds that each comes within the purview of CPLR 3211(a)(1). However, said

document does not conclusively establish a defense as a matter of law. The 2004 SEC AIG Final Judgment reveals that AIG "consented to entry of this Final Judgment...without admitting or denying the allegations of the [*18]Complaint..." (Syed aff, exhibit I at 1).

In regards to the 2006 SEC Complaint, the Court accepts its purported sufficiency as documentary evidence pursuant to CPLR 3211(a)(1). However, it does not conclusively establish a defense as a matter of law.With respect to the 2009 SEC Complaint and the 2009 SEC Greenberg Consent Judgment, the Court finds that each falls within the intendment of CPLR 3211(a)(1) (*see Fontanetta*, 73 AD3d at 84-85). Nevertheless, the Court is not persuaded that either document conclusively establishes a defense as a matter of law. The 2009 SEC Complaint reveals that Greenberg "consented to entry of this Final Judgment without admitting or denying the allegations of the Complaint..." (Syed aff, exhibit CC at 1).Spitzer's argument that the distinction between common law fraud and fraud as contemplated by the Martin Act should be considered in connection with the Court's determination of this category of statements is not persuasive at this preliminary stage of the proceeding.

To the extent the Court has found that certain exhibits submitted by Spitzer in relation to the Fraudulent Accounting Statements constitute documentary evidence (CPLR 3211[a][1]), none of them, when standing alone, conclusively establish a defense as a matter of law (*see Fontanetta*, 73 AD3d 78). "[CPLR 3211(a)(1)] was intended only as a backup when the defendant has a document *which seems all by itself* to defeat the plaintiff's claim but eludes any of the more specific dismissal grounds listed in CPLR 3211(a)" (221 Siegel's Prac. Rev. 2)[emphasis added]).

The Court reaches the same determination even when undertaking the task of considering them in the aggregate.

Although Spitzer's submissions may very well be considered at trial or upon a motion for summary judgment, the Court is not yet presented with these circumstances, and has not elected to treat this CPLR 3211 motion as one for summary judgment in connection with this or any other issue raised herein (see CPLR 3211[c]).[FN1]

Based upon the foregoing, and there being no merit to any other aspect of defendant's motion, it is hereby

ORDERED, that, the Court hereby grants those aspects of defendant's motion to dismiss this defamation action which are based upon the "Removal Statements", the "Co-Conspirator Statements", the "Fifth Amendment Privilege Statements", the "Paid Fine Statements," the "Organized Crime Statement," and that aspect of the "New York Stock Exchange Board of Directors Statements" alleging that Spitzer falsely suggests that Greenberg failed to independently perform his duties as a director on the NYSE Board of Directors; and, it is further

ORDERED, that, the motion to dismiss is denied to the extent that it relates to the "Fraudulent Accounting Statements", the "DOJ Charges Statement", and that aspect of the "New York Stock Exchange Board of Directors Statements" alleging that Spitzer falsely asserted that Grasso assisted Greenberg in efforts to "prop up" AIG's stock price; and, it is further

ORDERED, that, defendant shall serve his answer to the amended complaint within twenty-one days of the date hereof; and, it is further

ORDERED, that, the motion is denied to any further extent; and, it is further

ORDERED, that, the parties shall appear before the Court at 9:30 A.M. on August 25, 2014, for a Preliminary Conference on the surviving aspects of the action.

The foregoing constitutes the Decision and Order of this Court.

Dated: Carmel, New York

June 24, 2014

S/_____

HON. LEWIS J. LUBELL, J.S.C.

Footnotes

Footnote 1: The transactions at issue in "Ferguson 1" and "2," as well as the transactions at

issue in the 2006 SEC Complaint and the 2009 SEC Greenberg Complaint are, to a certain extent, intertwined. This raises the question of whether it is consistent for the Court to conclude that the 2006 SEC Complaint and the 2009 SEC Greenberg Complaint do not conclusively establish a defense as a matter of law regarding the Fraudulent Accounting Statements, while simultaneously concluding that "Ferguson 1" and "2" do conclusively establish a defense as a matter of law regarding the Co-Conspirator (In Fraud) Statements. However, given the quantity and quality of the documentary evidence submitted with respect to the Co-Conspirator Statements and the Fraudulent Accounting Statements, the Court cannot determine the degree to which the facts underlying the SEC proceedings and the Ferguson actions are one and the same. As such, the Court answers the question in the negative. Furthermore, Spitzer does not rely on "Ferguson 1" and "2" to establish a defense to the Fraudulent Accounting Statements. Relatedly, Spitzer does not rely on the 2006 SEC Complaint and the 2009 SEC Greenberg Complaint to establish a defense to the Co-Conspirator Statements. Since the documentary evidence Spitzer relies upon to establish a defense to the Fraudulent Accounting Statements and the Co-Conspirator statements is not the same, the Court will not undertake the task of determining the degree that the transactions overlap.

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