

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

CELIA FARBER,

Plaintiff,

v.

RICHARD JEFFERYS, KEVIN KURITSKY and
JAMES J. MURTAUGH,

Defendants.

Index No.: 106399/09

**MEMORANDUM OF LAW IN SUPPORT OF
RICHARD JEFFERYS'S MOTION TO DISMISS**

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**MEMORANDUM OF LAW IN SUPPORT OF
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Defendant Richard Jefferys ("Jefferys") submits this memorandum in support of his motion to dismiss the claims against him pursuant to CPLR §§ 3211(a)(1) & (7). As set forth below, the Complaint fails to state any cause of action against Jefferys upon which relief may be granted and all claims asserted against Jefferys should be dismissed with prejudice.

PRELIMINARY STATEMENT

The evidence that the HIV virus causes AIDS is "clear-cut, exhaustive and unambiguous," and halting transmission of the virus has been a centerpiece of efforts to curb the epidemic. See Ex. C,¹ The Durban Declaration, Nature, July 6, 2000, at 15, available at <http://www.nature.com/nature/journal/v406/n6791/pdf/406015a0.pdf> (stating that HIV causes AIDS and "signed by over 5,000 people, including Nobel prizewinners, directors of leading research institutions, scientific academies and medical societies");

¹ "Ex. __" citations are to the Exhibits to the accompanying Affirmation of M. Brendan Smith.

see also Compl. ¶ 36 (describing document by “5,000 (mostly) HIV/AIDS scientists and researchers” who “state that HIV causes AIDS”). A handful of fringe scientists deny that HIV causes AIDS; such “AIDS denialists” are at odds with the worldwide scientific and medical community, and, by minimizing the threat of HIV transmission, present horrific dangers to public health. See Ex. D, Nicoli Nattrass, AIDS and the Scientific Governance of Medicine in Post-Apartheid South Africa, African Affairs, February 7, 2008, at 157 (estimating that the since-repudiated embrace of AIDS denialism by the president of South Africa gave rise to policies that led to 300,000 preventable South African deaths, and 200,000 preventable HIV infections in that country).

Obviously the controversy over “AIDS denialism” is a heated one. This case involves an allegedly defamatory private comment made by Richard Jefferys, an AIDS policy worker, about the AIDS denialism of journalist Celia Farber and the leading proponent of the theory, Peter Duesberg. This case also involves separate statements allegedly made by the two other defendants; their statements are not part of the claim against Jefferys and are not addressed in this motion.

The claim against Jefferys should be dismissed because the statements complained of are either factually true, or nonactionable assertions of opinion. Moreover, Farber is a public figure—at least on the issue of AIDS denialism—who has aggressively inserted herself into a debate on this highly controversial subject. Yet she fails to plead or assert that Jefferys possessed the requisite level of culpability required under well-settled law. This failure warrants dismissal as well.

STATEMENT OF FACTS²

Defendant Richard Jefferys

Defendant Richard Jefferys coordinates the Michael Palm Basic Science, Vaccines & Prevention Project at the Treatment Action Group (“TAG”), a small non-profit organization located in New York City. TAG is a research and policy think tank that advocates for increased access to HIV medication,³ vaccine research, and development of preventative technologies.⁴ Jefferys is on record about AIDS denialism, and how it can undercut the HIV prevention and treatment efforts that he works to advance. See Ex. E, Denied, The Body, May 16, 2008, at <http://www.thebody.com/content/whatis/art46788.html>, referenced at Compl. ¶ 22 (quoting Jefferys as stating that

² At the motion to dismiss stage, the court is not limited to considering only the words of the complaint or documents attached thereto; it may also consider documents “incorporated by reference . . . and documents that are integral to the plaintiff’s claims, even if not explicitly incorporated by reference.” Lore v. N.Y. Racing Ass’n, 2006 WL 1408419, at *2 (N.Y. Sup. Ct. 2006); see also Pullman Group, LLC v. Prudential Ins. Co., of Am., 733 N.Y.S.2d 1 (N.Y. App. Div. 2001) (relying on “the contents of the documents referenced” in the complaint to dismiss a claim based on lack of standing). Therefore, all of the article cited and discussed by Farber in her complaint, including the article Errors in Celia Farber’s March 2006 Article in Harper’s Magazine (“56 Errors”) (Ex. B) authored by Jefferys and others should be considered in deciding this motion to dismiss. See Schiffer v. Tarrytown Boat Club, Inc., 219 A.D.2d 704, 704 (N.Y. App. Div. 2005) (affirming dismissal of defamation claim based on documents cited in the complaint); Dillon v. City of New York, 261 A.D.2d 34, 36 (N.Y. App. Div. 1999) (relying on an employment policy manual to dismiss a defamation claim). To the extent that this brief mentions documents that are neither referenced in the Complaint nor discussed in documents referenced in the Complaint, such information provides context and background, and may in any event be subject to judicial notice.

³ HIV, the Human Immunodeficiency Virus, is a type of virus known as a “retrovirus.” Drugs used to prevent HIV from growing or replicating are known as “antiretroviral therapies.”

⁴ The Complaint includes numerous scurrilous and false allegations about Jefferys’s employer, TAG, including the statement that TAG attacks anyone who highlights the toxicity of antiretroviral drugs. Compl. ¶ 16. Although not relevant to this motion, TAG is on record as consistently raising the issue of potential drug toxicity. See, e.g., Ex. E, Denied, The Body, May 16, 2008, at <http://www.thebody.com/content/whatis/art46788.html>, referenced at Compl. ¶ 22.

“[o]ften those who work in the AIDS field just think of denialism is silly and that no one believes it. But a newly diagnosed person who went to a doctor who only gave him five minutes, then decided to do a web search and saw ‘AIDS Myth Exposed’ is who I am concerned about.”).

Plaintiff Celia Farber’s AIDS Reporting

Plaintiff Celia Farber (“Farber”) is a journalist who has spent over two decades writing about controversial issues, including HIV and AIDS. According to her Complaint, by 2006, she had written for SPIN, Harper’s, Rolling Stone, Vogue (Germany), Interview, New York Post, New York Press, Salon, The Herald on Sunday (Scotland), Stop Smiting, Alive, and Media Post, as well as numerous “online outlets” and television stations, and had lectured in various cities. Compl. ¶ 13. Farber has also covered celebrity news in her capacity as a freelance journalist, writing an article for Esquire in 1997 on O.J. Simpson’s post-trial life that purportedly broke publicity records for the magazine. Id. ¶ 12.

Farber and her career have drawn a great deal of attention from the media, and she has appeared on television and radio shows, including CNN, ESPN, The Today Show, Politically Correct with Bill Maher, The Charlie Rose Show, and the Keith Olbermann Show on MSNBC. Id. at ¶ 13. Her persona has found its way to “Page 6,” the New York Post gossip column. See Ex F, Mandy: Boat-Rocker, N.Y. Post, March 1, 2006; Talking Truth on Aids Data, N.Y. Post, Nov. 3, 2001; Hands Not So Bloody, N.Y. Post, April 25, 2008.

Farber's Embrace of Peter Duesberg and AIDS Denialism

Throughout her career, Farber's writings and television and radio appearances have publicized those who challenge the connection between HIV and AIDS. Immediately after college in 1986 and continuing through 1994, Farber wrote for SPIN's column on AIDS, which she created, called "Words From the Front." Compl. ¶ 10. Farber's column immediately drew criticism from the medical community, including a published response from virologist Dr. Gallo (one of the discoverers of the HIV virus) in 1988. Id. Gallo's response was part of the "HIV debate" that started to draw much attention from doctors and scientists while Farber worked at SPIN. Id. Feeding on the criticism, Farber persistently covered the highly contentious topic for most of the following decade. Id. Farber has thus been at the center of "AIDS denialism," which asserts that AIDS is not caused by HIV, but rather by lifestyle or drugs. This theory has been so fully discredited and rejected by the worldwide scientific community that the National Institute for Allergic and Infectious Diseases, of the National Institutes of Health, maintains a 16-page single-spaced citation-filled document on its website entitled "The Evidence that HIV Causes AIDS," seven pages of which are dedicated to responding to what it calls "Myths" that HIV does not cause AIDS. Ex M, NIAID, The Evidence that HIV Causes AIDS, at <http://www3.niaid.nih.gov/topics/HIVAIDS/Understanding/How+HIV+Causes+AIDS/HIVcausesAIDS.htm>, referenced in Ex. B, Robert Gallo et al., Errors in Celia Farber's March 2006 Article in Harper's Magazine, Mar. 25, 2006, at 29 n.25, at <http://ww2.aegis.org/files/tac/2006/errorsinfarberarticle.html> (hereinafter "56 Errors"), referenced at Compl. ¶ 17.

Farber’s reporting on AIDS denialism features its major scientific champion, Peter Duesberg, who contends that HIV is harmless. Id. at ¶ 15. Duesberg has proposed that “recreational drugs, anti-HIV drugs, and malnutrition” cause AIDS, not HIV itself. Ex. G, Peter Duesberg, Claus Koehnlein & David Rasnick, The Chemical Bases of the Various AIDS epidemics: Recreational Drugs, Anti-Viral Chemotherapy and Malnutrition, J. Bioscience, June 2003, at 383, noted generally at Compl. ¶ 11. In that article, Duesberg describes a study that reported a dramatic reduction in mortality (the incidence of death) and morbidity (the incidence of opportunistic infections) in AIDS patients who received certain anti-HIV drug therapies. Ex. H, Frank J. Palella, Jr., et al., Declining Morbidity and Mortality Among Patients with Advanced Human Immunodeficiency Virus Infection, New England Journal of Medicine, Mar. 26, 1998, at 853, referenced in 56 Errors (Ex. B), supra, at 29 n.19. Morbidity, or the existence of AIDS, was defined by the presence of opportunistic infections, such as cytomegalovirus retinitis, *Myobacterium avium* complex infection, or *Pneumocystis carinii* pneumonia. Id. at 854 tbl.2.

Duesberg’s article misquotes the landmark Palella study and therefore characterizes it as limited to “AIDS-free subjects”—claiming that patients with opportunistic infections were excluded:

Uncontrolled studies investigating the mortality of HIV-positives on HIV drugs: . . . The largest and most influential of these surveys was conducted by Palella et al (1998) who investigated in 1998 1255 anti-HIV drug-treated “patients, each of which had at least one CD4+ count below 100” from nine clinics in the US. However, all of these “patients” were “nonhospitalized”, **AIDS-free subjects. “Patients with a diagnosis of cytomegalovirus retinitis or *M. aviarum* complex disease before study entry or during the first 30 days of follow-up and patients with**

active *P. carinii* pneumonia at the beginning of follow-up were excluded.”

Duesberg (Ex. G), supra, at 399 (emphasis added). The quotation omits language, however, that states unambiguously that the study did in fact include patients with AIDS:

Acquired immunodeficiency syndrome (AIDS)—defining opportunistic infections were analyzed in the aggregate; in addition, separate analyses were performed for *Pneumocystis carinii* pneumonia, *M. avium* complex infection, and cytomegalovirus retinitis. Patients with a diagnosis of cytomegalovirus retinitis or *M. avium* complex disease before study entry or during the first 30 days of follow-up and patients with active *P. carinii* pneumonia at the beginning of follow-up were excluded **from the analyses of the incidence of that opportunistic infection.**

Pallella (Ex. H), supra, at 854 (emphasis added). The full sentence thus simply states that in counting the number of people who developed a particular infection during the study period, the people who had that infection when the study started were omitted from the count. It does not say that they were omitted from the study.

Duesberg’s article, referring again to the Pallella study as well as another HIV study, also states “Neither of these studies mentions drug-free controls.” Duesberg (Ex. G), supra, at 399. Yet the Pallella study clearly reports data for participants who received no antiretroviral therapy. A table that compares the outcome of the various drug combinations tested includes a column for the controls, labeled “No Antiretroviral Therapy,” and the data for the groups receiving antiretroviral therapies show a significant decrease in mortality for the medicated group over that “drug-free” control group. See, e.g., Pallella (Ex. H), supra, at 856 tbl.1.

Farber’s Controversial, and Highly Criticized, Article in Harper’s Magazine

In 2006, Farber published an article in Harper’s called “Out Of Control: AIDS and the Corruption of Medical Science.” Ex. I; Compl. ¶ 15. In that article, Farber wrote

about an alleged whistleblower within a government regulatory organization; the article also included a sympathetic portrayal of Peter Duesberg and his theories. Farber's article also discussed a number of studies of HIV drugs, including studies to determine whether one drug, nevirapine, could prevent transmission of the virus from a pregnant woman to her unborn child. With respect to one such study, Farber wrote:

A small Phase I trial preceded HIVNET 012 that studied the safety, primarily, of nevirapine in pregnant women but also looked at efficacy. It was called HIVNET 006, and it enrolled twenty-one pregnant women for initial study. Of twenty-two infants born, four died. There were twelve "serious adverse events" reported. The study also showed that *there was no lowering of viral load* in the mothers who took the study drug (the industry's agreed-upon standard for interrupting maternal transmission).

Ex. I, Celia Farber, Out of Control: AIDS and the Corruption of Medical Science, Harper's Magazine, March 2006, at 42 n.6 (emphasis added), referenced at Compl. ¶ 14. To the contrary, however, the text of the study explicitly stated that there was a reduction in viral load (i.e., HIV RNA) in the mothers who took nevirapine:

The antiviral activity of nevirapine appeared to be quite strong, resulting in a relatively consistent median 1.3 log reduction in maternal plasma HIV RNA at 1 week after a single 200 mg dose in all mothers.

Ex. J, Philippa Musoke et al., A Phase I/II Study of the Safety and Pharmacokinetics of Nevirapine in HIV-1-Infected Pregnant Ugandan Women and Their Neonates (HIVNET 006), 13 AIDS 479, 484 (1999), referenced in Farber, Out of Control (Ex. I), supra, at 42 n.6.

Farber's article generated a firestorm of media attention. See Ex. K, Lia Miller, An Article in Harper's Ignites a Controversy over HIV, N.Y. Times, Mar. 13, 2006, referenced at Compl. ¶ 30. A number of articles were published in forums such as

Columbia Journalism Review, The Nation, and Slate, that both criticized the scientific veracity of Farber's claims and took issue with her article's political content. See Ex. L, Gal Beckerman, Harper's Races Right Over the Edge of a Cliff, Columbia Journalism Review, Mar. 8, 2006; Richard Kim, Harper's Publishes AIDS Denialist, The Nation, Mar. 2, 2006; Jon Cohen, Pharmanojia: Coming to a Clinical Trial Near You, Slate, Feb. 21, 2006. This criticism, like the criticism earlier in her career from Dr. Gallo, did not prevent Farber from continuing to cover the discredited AIDS denialist view.

In response to Farber's article in Harper's, Jefferys joined a group of scientists and medical doctors and published an analysis that identified fifty-six misleading, false, unfair, and biased statements that it contained. Compl. ¶ 17; see 56 Errors (Ex. B), supra. The article refuted "Farber's misconceptions about HIV/AIDS and antiretrovirals [one group of anti-HIV drugs]," noting that with "a plethora of false, misleading, biased and unfair statements, Farber attempted to discredit the scientific consensus that HIV is the cause of AIDS, and HIV drugs reduce death and illness in infected people." Id.

Jefferys Communicates Farber's Views to the Whistleblower Tribunal

According to the Complaint, the nonprofit Semmelweis Society is devoted to ending the practice by which physicians and hospitals purportedly use pretexts to attack health care professionals who report dangerous conditions within their hospitals. Compl. ¶ 19. In April 2008, the Semmelweis Society allegedly told Farber that as a result of her Harper's article (which went into considerable depth about an alleged whistleblower), she would be presented with a "Clean Hands Award" at the annual "Whistleblower Week" conference in Washington D.C. Id. ¶ 19. Duesberg was also to receive an award, and they would both be given an opportunity to speak. Id. ¶ 20.

Recognizing Farber and Duesberg, or giving them a forum to present their views, could appear to legitimize “AIDS denialism” and threaten public health education efforts. It was not surprising, then, that the following month, upon learning that Farber and Duesberg were to be recognized and given the opportunity to testify about their work, Jefferys submitted a comment through the feedback form located on the temporary website for Whistleblower Week.⁵ The comment stated:

It is my understanding that you have accepted Celia Farber and Peter Duesberg to give testimony at your tribunal. These individuals are not whistleblowers, they are simply liars who for many years have used fraud to argue for Duesberg’s long-discredited theory that drug use and malnutrition – not HIV – cause AIDS. I can provide many, many examples, including their altering of quotes from the scientific literature, false representations of published papers, etc. They use instances of genuine medical malpractice simply as ammunition to support their erroneous ideas about HIV and AIDS (which Duesberg has said is ‘caused by a lifestyle that was criminal twenty years ago’). The inclusion of these individuals will, regrettably, discredit and demean your efforts to support the very real issues of recrimination against legitimate whistleblowers.

Compl. ¶ 21.

Farber received the award. *Id.* at ¶ 22. The following year, she brought this action against Jefferys, claiming that four phrases in his private comment—that Farber and Duesberg are “liars” who have used “fraud” to advance their theory, including “altering of quotes” and “false representations of published papers”—were defamatory.

Compl. ¶ 39.

⁵ Contrary to Farber’s allegations, Jefferys’s comment did not originate in a direct email to Walter Fauntroy, but instead as a comment posted to the conference organizer via www.w3conference.org, a temporary website for Whistleblower Week. Jefferys’s comment had to comply with the character limit imposed by the website’s feedback form. The source of the comment is not relevant to this motion.

ARGUMENT

I. Jefferys's Allegedly Defamatory Statements Are Nonactionable Opinion

Farber's claim for defamation fails because Jefferys's statements are non-actionable opinion. Defamation claims may only be brought for assertions of fact that are capable of being proven false. Versaci v. Richie, 30 A.D.3d 648 (N.Y. App. Div. 2006). They cannot be brought against assertions of opinion, even if the opinion is expressed in an offensive, vituperative, or unreasonable manner. Weiner v. Doubleday & Co., Inc., 74 N.Y.2d 586 (1989). Whether a given statement constitutes protected opinion or actionable fact is a question of law, 600 West 115th Street Corp. v. Von Gutfeld, 80 N.Y.2d 130 (1992), that depends on whether a reasonable reader would understand the complained-of assertions to be opinion or fact, Millus v. Newsday, Inc., 89 N.Y.2d 840 (1996). Statements of "rhetorical hyperbole" are nonactionable where a reasonable reader would not take them as literal factual assertions. See Wanamaker v. VHA, Inc., 19 A.D.3d 1011 (N.Y. App. Div. 2005) (calling nurse a "surgery Nazi" was nonactionable rhetorical hyperbole).

Applying this rule in Greenbelt Cooperative Publishing Ass'n v. Bressler, 398 U.S. 6, 11 (1970), the U.S. Supreme Court held that there was no defamation when speakers at a city council meeting called a local real estate developer a "blackmailer." The Supreme Court noted that the debates about the land use issues in question were "heated, as debates about controversial issues usually are," and it was "simply impossible" to believe that a reasonable reader would have thought that any of the defendants were literally charging the developer with the criminal offense of blackmail. Id. at 13-14. "On the contrary, even the most careless reader must have perceived that the word was not more than rhetorical hyperbole, a vigorous epithet" on the part of those

who considered the developer’s bargaining stance to be unreasonable. Id. at 14; see also Letter Carriers v. Austin, 418 U.S. 264, 284 (1974) (recognizing that the use of “loose language” is “part of the conventional give-and-take” in public debate, and does not amount to falsification of facts).

Jefferys’s statement that Farber and Duesberg were “liars” and “frauds,” which Farber specifically contends was defamatory, is similar. There can be no question that the issue of AIDS denialism is highly charged and controversial. Indeed, Farber herself admits it gives rise to heated and passionate response.⁶ The elevated rhetoric surrounding the subject of AIDS denialism is expected in view of the important public health ramifications of the issue—AIDS denialism has resulted in the denial of life-saving AIDS medications—and the incendiary rhetoric that has been associated with the denialists. See, e.g., Compl. ¶¶ 7–8 (“Duesberg had said [HIV and AIDS] is ‘caused by a lifestyle that was criminal twenty years ago’”).⁷

It was against this backdrop that Jefferys submitted the comment that Farber alleges to contain defamatory statements. Given the highly charged debate and explosive discourse over the issue, Jefferys’s use of the words “liars” and “frauds” was unsurprising, and plainly involved “rhetorical hyperbole” and “vigorous epithet.” No

⁶ See Ex. K, Lia Miller, An Article in Harper’s Ignites a Controversy over HIV, N.Y. Times, Mar. 13, 2006, referenced at Compl. ¶ 30. (quoting Farber as stating with respect to the AIDS denialism topic “I’m very familiar . . . the rage that breaks out when one touches certain tenets of dogma. . . . Anger has been the dominant emotion in AIDS for a long time, almost the only emotion that seems to really function. Anger is connected to fear. I understand it. I’m used to it.”); see also Ex. I, Letters to the Editor, Harper’s Magazine, May 2006, at 6, 7, referenced in Compl. ¶ 14 (noting “the extremely vitriolic, character-assassinating responses that have appeared on the Internet”).

⁷ See also Ex. M, “Doctors Without Boundaries,” Semmelweis Society Blog, June 2, 2009 (statement on Semmelweis Society’s website that AIDS was caused when “a small group of promiscuous, addicted, nitrite-huffing, gonorrhoeal and syphilitic bath house veterans began to get sick”).

reasonable reader could conclude that Jefferys was accusing Farber and Duesberg of the tort or crime of fraud, or of perjury. In the context in which his comment was made, these words are not actionable.

Moreover, Jefferys's statements that Farber and Duesberg perpetrated their "fraud" by "altering of quotes from the scientific literature," and through "false representations of published papers," is similarly an expression of opinion that their methodology is deficient in view of the enormous body of legitimate scientific literature linking HIV to AIDS. Jefferys's statements are simply a shorthand summary of longer pieces making the same point—such as the detailed analysis previously published as 56 Errors (Ex. B), supra (characterizing each error as either "false, misleading, biased [or] unfair") or the painstaking analyses published by Public Health Organizations throughout the world, such as the NIH document on the "The Evidence That HIV Causes AIDS," which devotes seven pages to debunking, through literature and other cites, what it calls the "Myths" of the AIDS denialists. See Ex. N, NIAID, The Evidence that HIV Causes AIDS, at <http://www3.niaid.nih.gov/topics/HIVAIDS/Understanding/How+HIV+Causes+AIDS/HIVcausesAIDS.htm>.

Jefferys's comments—taken in context, and considered as a whole—are plainly expressions of opinion that Farber and Duesberg, in espousing discredited views that are inconsistent with the global scientific community and the peer-reviewed scientific literature, have not fairly reflected or reported on legitimate scientific literature about HIV and AIDS. As such, the statements are non-actionable expressions of opinion.

II. Farber’s Claim Against Jefferys Must Also Be Dismissed Because She Failed To Plead That He Acted With Actual Malice

Even if some of Jefferys’s statements are held to be factual, Farber’s claim must be dismissed for the additional reason that she failed to plead facts sufficient to find that Jefferys acted with actual malice. Having voluntarily inserted herself into the public eye through her advocacy of AIDS denialism, Celia Farber made herself a limited purpose public figure who must allege with specificity, and prove, “actual malice” in order to recover for defamation. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974); Huggins v. Moore, 94 N.Y.2d 296, 301 (1999); Red Cap Valet, Ltd. v. Hotel Nikko (USA), Inc., 273 A.D.2d 289 (App. Div. 2000) (pleading with specificity is required). Because Farber has failed to allege facts sufficient to justify a finding of actual malice by Jefferys, the complaint against him should be dismissed for failure to state a claim for defamation.

A. Farber is a Limited-Purpose Public Figure

The category of “public figures” under the United States Constitution includes those who “might invite publicity only with respect to a narrow area of interests,” and is thus “of necessity quite broad.” James v. Gannett Co., 40 N.Y.2d 415, 423 (1976); accord Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). In New York, limited purpose public figures include any person who “has taken an affirmative step to attract public attention . . . [and has] strived to achieve a measure of public acclaim.” James, 40 N.Y.2d at 422; see also Bee Publications, Inc. v. Cheektowaga Times, Inc., 107 A.D.2d 382, 387 (App. Div. 1985) (newspaper editor was a public figure). Thus, a person who “has voluntarily injected himself into a public controversy, which is a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way”

is a limited purpose public figure. Krauss v. Globe Int'l, Inc., 251 A.D.2d 191, 192 (App. Div. 1998); see also Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) (psychoanalyst was a public figure with respect to work directing psychology archives). Journalists are routinely found to be limited purpose public figures with respect to the subject of their journalism. See, e.g., Adler v. Conde Nast Publications, Inc., 643 F.Supp. 1558 (S.D.N.Y. 1986) (journalist who had written for several national publications was a public figure); Maule v. NYM Corp., 54 N.Y.2d 880 (1981) (sports journalist).

Whether or not a person is a public figure is a question of law for the court to decide. James, 40 N.Y.2d at 423. In making this legal determination, the court should consider “the nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.” Gertz, 418 U.S at 352.

Farber’s complaint pleads facts that mandate the conclusion that she is at least a limited purpose public figure on the subject of HIV/AIDS. According to her complaint, she has been regularly published in numerous national periodicals, including Harper’s, SPIN, Rolling Stone, (German) Vogue, Interview, New York Post, Salon, The Herald on Sunday, Stop Smiling, Alive, and Media Post. Compl. ¶¶ 10, 13. By her own account, she has provided “extensive coverage of the burgeoning ‘H.I.V. debate’” since she began publishing her “Words From the Front” column for SPIN magazine in 1986. Compl. ¶¶ 3, 10 & 13. Farber tied her career to this issue through her coverage of Peter Duesberg and others who advance the claim that the HIV retrovirus is harmless. See Miller, An Article in Harper’s (Ex. K), supra, cited in Compl. ¶ 30 (stating that “Ms. Farber, a longtime magazine journalist, has been a polarizing figure because she has frequently written about the position of ‘AIDS dissidents,’ who argue that H.I.V. does not cause

AIDS.”). Farber alleges that she “has appeared on numerous radio and TV shows, including CNN, The Today Show, Politically Correct with Bill Maher, The Charlie Rose Show, ESPN, and the Keith Olberman Show on MSNBC.” Compl. ¶ 13.

Accepting her pleaded facts as true, Farber is therefore a limited purpose public figure with respect to her journalism about HIV/AIDS. See Adler v. Conde Nast Publications, Inc., 1558, 1564–65 (S.D.N.Y. 1986) (dismissing suit brought by journalist Renata Adler against Vanity Fair in view of “immense controversy” she had generated in her writings, which were published “widely read and respected periodicals”); see also Maule v. NYM Corp., 54 N.Y.2d 880 (1981) (Sports Illustrated writer Tex Maule was limited purpose public figure, having “not only welcomed but actively sought publicity for his views and professional writing.”). Like Maule, Farber’s long history of publicity shows that the public attention she received was “not only welcomed but actively sought” as a means to advance her writing and professional reputation. Maule, 54 N.Y.2d at 417–18. And like both Adler and Maule, Farber is a limited purpose public figure.

B. Farber Has Not Pleaded Facts Sufficient to Show That Jefferys Acted With Actual Malice

Because Farber is a limited purpose public figure who voluntarily assumed a role in a public debate, her right to recover for defamation is restricted by the First Amendment. Exchanges that occur in the context of heated public debate must be considered against our “profound national commitment” to a forum for public debate that is “uninhibited, robust and wide-open,” and that “may well include vehement, caustic and sometimes unpleasant attacks.” N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). Criticism of public figures is thus non-actionable, protected speech absent the allegation

of “facts which would tend to prove that the defendant acted maliciously” in the constitutional sense of the term. James, 40 N.Y.2d at 422 (citing N.Y. Times Co., 376 U.S. at 270).

“Actual malice” can be shown by the speaker’s “knowledge that [a statement] was false or . . . reckless disregard to whether it was false or not.” N.Y. Times Co., 376 U.S. at 280; Huggins, 94 N.Y.2d at 301. Reckless disregard as to truthfulness exists where a defendant either (1) had a “high degree of awareness” of the statement’s falsity or probable falsity, Garrison v. Louisiana, 379 U.S. 64, 74 (1964), or (2) “in fact entertained serious doubts as to the truth of his publication.” St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Public figure plaintiffs must prove “actual malice” with “convincing clarity.” Gertz, 418 U.S. at 342. It is not enough to assert a “mere failure to investigate.” St. Amant, 390 U.S. at 731; Sweeney v. Prisoners’ Legal Serv. of N.Y., Inc., 84 N.Y.2d 786, 793 (1995). Moreover, “there is a critical difference between not knowing whether something is true and being highly aware that it is probably false. Only the latter will establish reckless disregard in a defamation action.” Lieberman v. Gelstein, 80 N.Y.2d 429, 438 (1992).

Moreover, where statements about limited purpose public figures are involved, the law “does not insist on complete verbal precision.” Shulman v. Hunderfund, 12 N.Y.3d 143, 150 (2009). Courts must “overlook[] minor inaccuracies and concentrate[] upon substantial truth . . . even if [a defendant] cannot ‘justify every word of the alleged defamatory matter.’” Id. (quoting Masson, 501 U.S. at 516). Thus, as long as a defendant does not “substantially depart from what he believed to be the truth,” he will

not be found to have possessed reckless disregard, and his statement will be protected.

Id.

Farber has pled no facts, beyond a bald assertion that Jefferys’s statement was “culpably uttered,” that could support an inference of actual malice on Jefferys’s part. To the contrary, Farber’s Complaint cites an article co-authored by Jefferys that “purports to identify [56] errors” in Farber’s Harper’s article. Compl. ¶ 17. 56 Errors delineates, in great detail, many examples of Farber distortion the scientific literature: it identifies and cites 16 misleading statements, 25 false statements, 10 insufficiently supported implications and 5 examples of apparent bias. Following this long and detailed analysis, Jefferys and his co-authors concluded that Farber’s article contains “a plethora of false, misleading, biased and unfair statements.” 56 Errors (Ex. B), supra, at 1. Notably, too, his coauthors include experts in the area of HIV/AIDS upon whom it would be reasonable for him to rely—including Dr. Robert Gallo (Director, Institute of Human Virology, University of Maryland).

Not only does Farber allege no facts that would support a finding of actual malice, but her reference to Jefferys’s 56 Errors article itself compels the conclusion that Jefferys could not have acted with the requisite “recklessness” required for a claim to move forward. Her alleged facts are not even consistent with the notion that Jefferys failed to investigate the veracity of his statements—and even if they were, alleging “mere failure to investigate” a statement’s truthfulness would not suffice to state a claim. See St. Amant, 390 U.S. at 731. Moreover, Farber’s allegations lack any suggestion that Jefferys did not actually believe his statements to be true—a suggestion that would also be farfetched given her reference to 56 Errors (and given publications by Public Health

Organizations concerning the basis for the worldwide scientific consensus that AIDS is caused by HIV infection). See Shulman, 12 N.Y.3d at 150 (no actual malice where defendant “did not substantially depart from what he believed to be the truth.”).

As long as a “debatable” claim about a public figure is “not obviously untenable,” it is protected speech. Shulman, 12 N.Y.3d at 149. Farber’s Complaint pleads no facts that would support a finding of actual malice, and the facts that are pled compel the conclusion that Jefferys’s statements are at the very least “debatable,” and certainly “not obviously untenable.” By the terms of her Complaint, the claims against Jefferys must be dismissed.

III. Jefferys Had Reasonable Grounds to Believe His Statements Were True

Even if this Court declines to find that Farber is limited purpose public figure as a matter of law, the Complaint should nevertheless be dismissed because Jefferys had reasonable grounds to believe that his statements were true.

A private figure must prove fault on the part of a defendant amounting to at least negligence in order to recover for defamation. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974); Rupert v. Sellers, 65 A.D.2d 473, 475 (N.Y. App. Div. 1978). A defendant is negligent where he “has actual or constructive notice of the defamatory character of his statement,” and is not negligent if he “has reasonable grounds to believe that what he [communicates] is true.” Lee v. City of Rochester, 174 Misc. 2d 763, 786 (N.Y. Sup. Ct. 1997), aff’d, 254 A.D.2d 790 (N.Y. App. Div. 1998). The court will consider “whether [defendant] acted negligently in failing to ascertain the facts on which the publication was based.” Lee, 174 Misc. 2d at 786.

In Lee v. City of Rochester, the Rochester police chief was sued for defamation for statements he made about the plaintiff’s loss of his liquor license. The police chief

had received the information from one of his police officers, who provided details from memory. Id. at 786. The court held that it was reasonable for the police chief to rely on the police officer’s memory. Id. “General awareness of the possibility of untruthfulness” could not satisfy the negligence requirement, but instead, defendant needed actual or constructive notice of the falsity of the statement. Id. Because the police chief did not have actual or constructive knowledge of the falsity of the statement, he did not have the requisite negligence required for the private figure plaintiff to sustain a claim for defamation.

Here, Farber has not alleged that Jefferys had any actual or constructive knowledge that his statements were not true. Nor has she pleaded that Jefferys failed to ascertain the facts on which his statements were based. Indeed, the consistency of Jefferys’s comments with the gist of the “56 Errors” article and publications by Public Health Organizations, and their thorough debunking of the claims of “AIDS denialism,” suggest that Jefferys had no reason to believe that his statements were anything but true. And the Complaint as a whole certainly tells the story of someone dedicated to knowing the science of HIV/AIDS—and as such belies the conclusion that he failed to ascertain the relevant facts.

Having failed to plead the requisite culpability for defaming a private figure, Farber’s claims against Jefferys should be dismissed even if she is deemed a private figure for all purposes.

IV. Jefferys’s Comment Was Not Defamatory Because It Was Substantially True

Farber defamation claim against Jefferys also fails because his statement is substantially true. Under New York law, truth is an “absolute, unqualified defense to a civil defamation action.” Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 301 (2d Cir.

1986). A statement's truth renders it nonactionable, even if the statement was prompted by a malicious intent. See Sanctuary v. Thackrey, 189 Misc. 724, 731 (N.Y. Sup. Ct. 1947) (holding that express malice does not give rise to a valid defamation cause of action when the disputed statements are true).

A statement need not be literally true to be non-actionable; instead it only needs to be "substantially true." Ingber v. Lagarenne, 299 A.D.2d 608, 609 (N.Y. App. Div. 2008). A "substantially true" statement is one that would have the same effect on a reader as the literal truth. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991). Stated another way, the "gist" of a disputed statement must be substantially true. Chung v. Better Health Plan, 1997 WL 379706, at *2 (S.D.N.Y. 1997); see also Kamalian v. Reader's Digest Ass'n, 29 A.D.3d 527, 528 (N.Y. App. Div. 2006) (statements in an article calling doctors "inept" and "dangerous" were substantially true due to the doctors' malpractice history). The question of truth is properly determined on a motion to dismiss stage. See Witherwax v. Transcare, Inc., 8 Misc.3d 1005(A), 3 (N.Y. Sup. Ct. 2005) (dismissing a defamation claim on a motion to dismiss based on a truth defense).

Jefferys's statements were, at the very least, substantially true. 56 Errors contains a detailed analysis of Farber's writings and the writings cited by her; they show that Farber had used "a plethora of false, misleading, biased and unfair statements" in her attempt to discredit the scientific consensus that HIV is the cause of AIDS. 56 Errors (Ex. B), supra, at 1. This is the same conclusion that Jefferys communicated in his comment that Farber and Duesberg are liars who have used fraud, altered quotes, and made false representations. Although the internet comment form that was the vehicle for

Jefferys's allegedly defamatory speech precluded the detailed analysis in 56 Errors, the gist of both statements was the same. Jefferys's online comment leaves readers with the same impression as the literal truth published in 56 Errors—that Farber's journalism uses a variety of methods to misrepresent the scientifically proven fact that HIV causes AIDS. As 56 Errors meticulously explains, these statements are true. This court should therefore dismiss Farber's defamation claim against Jefferys on the grounds that the allegedly defamatory statement is substantially true.

Moreover, what Jefferys said is literally true. For example, Farber's Harper's article states that the HIVNET 006 study of nevirapine showed "no lowering of viral load in the mothers who took the study drug," Farber, Out of Control (Ex. I), supra, at 42 n.6. when in fact the HIVNET 006 study reported that the anti-viral activity of nevirapine in those patients was "quite strong," with an approximately 20-fold [i.e., log 1.3] "consistent median reduction" in RNA. Musoke et al., HIVNET 006 (Ex. J) , 13 AIDS at 484. Similarly, Farber states that "a majority of HIV-positive tests, when retested, come back indeterminate or negative." At 39. According to the National Institutes of Health, however, "HIV antibody tests have . . . specificity ["the ability of the test to give a negative finding when the subjects tested are free of the disease under study"] in excess of 98%." (Ex. N at 10, citing literature). Moreover, the seven pages of the NIH bulletin that addresses specific "myths" of AIDS denialists, with citations to the scientific literature, make clear that Farber's conclusions about AIDS denialism is utterly contradicted by the scientific literature. Ex. N.

Duesberg has also made false representations and altered quotations from the scientific literature. Duesberg falsely represented the Palella study by stating that it never

“mentions drug-free controls,” when in fact, the reported data specifically show a control group of patients who were administered “No Antiretroviral Therapy.” Compare Duesberg (Ex. G), supra, at 399, with Pallella (Ex. H), supra, at 856 tbl.1. And Duesberg altered a quotation from the Pallella study by deleting the clause “from the analyses of the incidence of that opportunistic infection,” thereby completely distorting the meaning of the sentence to serve his interests. A direct comparison of the original study and Duesberg’s article clearly shows the alteration in the quotation. Id. This Court should therefore dismiss the claim for defamation because Jefferys’s statements were true.

CONCLUSION

For the foregoing reasons, Richard Jefferys respectfully requests that this Court grant his motion to dismiss the Complaint with prejudice pursuant to CPLR §§ 3211(a)(1) & (7) and for such other and further relief as the Court deems just and proper.

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