AMERICAN ARBITRATION ASSOCIATION

Blaze Media LLC F/K/A CRTV, LLC

-vs-

Mark Steyn and Mark Steyn Enterprises (US), Inc.

Case Number: 01-18-0001-6846

# PARTIAL FINAL AWARD

**I. INTRODUCTION**: The undersigned Arbitrator, having been designated in accordance with the procedures agreed to in paragraph 19 of the Binding Term Sheet ("BTS")(Cx-0005) dated as of May 9, 2016 between Claimant/Counterclaim Respondent Blaze Media LLC, formerly known at times relevant hereto as CRTV, LLC ("CRTV") and Respondents/Counterclaimants Mark Steyn ("Steyn") and Mark Steyn Enterprises (US),Inc.("MSE")[1]; proceeding as agreed by the Parties pursuant to the Commercial Arbitration Rules (the "Rules") of the American Arbitration Association ("AAA"); having been requested by the Parties to resolve certain claims and counterclaims; having received from the Parties voluminous written submissions, documentary evidence, five days of oral testimony, along with legal authorities pertaining to the third amended demand, and having heard oral arguments, all as described or referenced below in relevant part; and having duly reviewed and considered all the Parties' submissions, documents, testimony, authorities and arguments, does hereby FIND, CONCLUDE, DECLARE and AWARD as follows:

1. The Parties' pending claims and counterclaims as well as affirmative defenses and the remedies sought are all reflected in detail in the demand as specified in the Compendium of Statements of Claim ("Compendium")(Cx-0298), answer and counterclaims, each as amended, as well as Statements of Relief requested, except in so far as certain claims were dismissed by prior orders, which are incorporated herein by general reference; namely Order Nos. 5, 7 and 13. This case was previously bifurcated, with only the third amended demand and defenses to it at issue in the initial phase of this proceeding ("Phase One"). See Order No. 15.

2. The summary below is not an exhaustive recapitulation of the Parties' respective assertions. In particular, the Sole Arbitrator assumes the Parties' familiarity with the underlying facts pleaded and offered in proof by both sides, and does not describe with particularity the background facts that gave rise to their relationship, or to their later disputes, except as needed. The Sole Arbitrator's assessment is based on

[1]CRTV, Steyn and MSE are collectively referred to as the "Parties." Terms not otherwise defined shall have the same meaning accorded to them during this proceeding.

applicable law as well as close attention to the demeanor and content of the witnesses' testimony, the contemporaneous writings and actions of the key actors involved, and the manner and candor (or where there was a lack thereof) with which they presented their positions. The facts stated in the Sole Arbitrator's analysis are those found by the Sole Arbitrator to be true and necessary to the Award. To the extent that the Sole Arbitrator's recitation differs from any Party's position, that is the result of determinations as to credibility, relevance, burden of proof considerations, the weighing of the record evidence, both oral and written, and discounting or dismissing overly aggressive and, in the end, unsupportable and/or inconsistent record positions (including those advanced in related proceedings).

3. As will be seen below, the issues tendered for decision are largely rooted in disputes about the Parties' respective conduct as they established their business relations, negotiated their agreements and thereafter acted with reference to them. While, as mentioned, the Sole Arbitrator does not here embark on an "exhaustive recapitulation" of their behavior, it is important to note at the outset that assessment of party behavior has been given appropriate weight, where legally necessary, in resolving the substantive issues in the case. The Sole Arbitrator's evidentiary analysis does not address each element of the myriad claims presented, but rather focuses here on material and relevant evidence on dispositive issues in large part[2], since the failure to meet one element of a claim suffices to bar an award of relief.

4. The claims and counterclaims fall into temporal sequence and convenient categories for purposes of disposition, as denoted in Claimant's Compendium as well as Statement of Relief Requested. Reduced to essentials, there are two contract based claims — disparagement[3] and confidentiality — as well as a tort based claim for defamation. In the discussion that follows, the Sole Arbitrator focuses on those contentions that were pressed or contested most vigorously by the Parties and which are critical to the disposition of the claims.

## II. ANALYSIS[4]

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[2] The omission of an element from discussion should not be construed as necessarily implying that the Sole Arbitrator otherwise found in favor of the Party asserting the position with the burden of proof; while in some instances that may be a fair conclusion, in others it is not, as an issue was either not reached or if reached, it may have been decided favorably or unfavorably, but if unfavorably it was not deemed essential to the reasoning in support of the ruling.

[3] The characterization of the claim as one of disparagement is for ease of reference only, and not in any way of limitation as to substantive scope; paragraph 13 of the BTS on its face also extends to public criticism, ridicule, derogatory and/or detrimental comments to a party's good name or business reputation, as well as disparagement and defamation.

[4] This reasoned award is issued pursuant to AAA Rule 46(b) and upon request of the Parties. The ongoing conflicts after resolution of the prior arbitration between the Parties, as well as the fact that Respondents proceeded *pro se*, militate in favor of a more detailed explanation than might otherwise be the case.

The Sole Arbitrator finds and/or concludes as follows:

**A. The Parties:**

5. The threshold challenge mounted by Respondents is to the standing of CRTV to continue to bring this action in light of a subsequent business transaction with Blaze Media in late 2018. The persuasive proof at the hearing was that CRTV continues its legal existence, after having changed its name in Delaware to Blaze Media, LLC on November 30, 2018. See Cx - 0160. There was no evidence of alienation of the cause of action; hence, Claimant generally has standing to bring and to pursue this action,[5] except where specified below.

**B. The Contract:**

6. The threshold issue on the contractual claim of disparagement is what meaning to ascribe to the BTS paragraph 2 sentence: "Provisions of this Term Sheet that are reasonably expected to survive the termination or expiration of this Term Sheet ... shall survive" in relation to the survival of the non-disparagement provision found in BTS paragraph 13. A reasonable expectation generally in this context connotes a person who has the pertinent knowledge, competency, skills and expertise to assess a given condition after due analysis, investigation and/or diligence. Here both sides were represented by counsel in the negotiation and entry into the BTS, with the senior most personnel from each side acting as the business negotiators. The evidence of contractual negotiation reflected that CRTV communicated in writing to Steyn/MSE its expectation that the non-disparagement provision would survive per BTS paragraph 2. See Cx-0024.003 at number 3. There was no record evidence of response thereto, orally or in writing, either accepting or rejecting that position, other than the final language of the BTS. According to the testimony of principals from both sides who participated in the negotiation (Mr. Katz and Ms. Howes), there was no specific oral discussion between the parties on which provisions in fact were covered by the survival provision. As such, although Steyn/MES asserted a subjective understanding that the provision on non-disparagement (paragraph 13) would not survive "termination or expiration," no weight is accorded to such unexpressed subjective understanding as a matter of black letter rules of interpretation under New York law. Those rules of construction provide further for ascribing meaning through attention to what intent can be discerned from other provisions within the four corners of the contract, as well as how the parties performed the contract terms. The resulting inquiry is three-pronged: (i) how does a facial construction of BTS terms aid the interpretative process, (ii) what is the course of dealing between the Parties with respect to the survivability of the non-disparagement provision; and (iii) what makes commercial sense?

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[5] The Sole Arbitrator previously granted Respondents' motion to compel production of certain records reflecting any alienation of the right of action in this proceeding. See Order No. 14(2). No such persuasive evidence was introduced at hearing.

7. As to the first point of inquiry, while nothing definitive can be divined, the BTS diction is still illuminating. The Parties provided specifically in paragraph 15 for the survival of certain rights to revenue after termination (paragraph 15)[6]. Similarly, the Parties expressly provided in paragraph 16 for certain licensing rights to survive termination (16.1) with others triggered "[e]ffective upon the termination or expiration of" the BTS "for any reason...."(Paragraphs 16.2 and 16.3). In contrast, there are a number of paragraphs where the rights/obligations are specifically limited to "during the term." See, e.g., paragraphs 3.2; 9; 10; and 16.1. With respect to paragraph 13 dealing with non-disparagement, there are neither express words of survival nor limitation provided. Significantly, though, there also are no words to the effect that the provisions survive termination "for any reason," as in paragraphs 16.2 and 16.3. (See discussion at paragraph 16, *infra*.)

8. Given that the Parties addressed certain paragraphs specifically in terms of their extended duration, the absence of any such words of empowerment or limitation regarding non-disparagement render it susceptible to inclusion in the phrasing in BTS paragraph 2 that are reasonably expected to survive. Such language would not be needed if it was limited to only those provisions where the Parties made express provision for survival. Hence, paragraph 2 necessarily embraces others in the BTS where survival is treated *sub silentio*. For example, although the arbitration provision contained in paragraph 19 does not address its survivability in the event of a termination (e.g. for material breach), it nevertheless does so by operation of long standing U.S. Supreme Court precedent. See Order No. 3 at paragraph IV(A)(i), *citing Drake Bakeries v. Bakery Workers*, 370 U.S. 254 (1962). So, it may fairly be inferred that provisions recognized by legal precedent to survive termination of a contract are certainly within the survival ambit of paragraph 2. Since the operative diction in that paragraph — "Provisions" —is in the plural, it is also fair to infer that more than paragraph 19 was reasonably expected to survive expiration or termination by the Parties, even without express provision for it. That does not in and of itself support inclusion of the non-disparagement clause as a surviving provision, but certainly creates ample room for its inclusion.

9. With respect to the second point above, the Parties course of dealing regarding the non-disparagement provision is significant. The persuasive evidence shows that after the filing (and sealing shortly thereafter) of an action in Federal District Court for the District of Vermont seeking interim measures of relief (See CX-0004), CRTV publicly announced cancellation of the Mark Steyn show on Facebook. Certain postings made by Steyn on line and through twitter then found their way into a Salon reporter's initial article about the dispute (See CX. 0028), which was further informed by a conversation with Steyn that resulted in a slightly revised article later the same day (CX. 0297). While much of the Salon article featured background on CRTV controlling shareholder Carey Katz, Steyn did acknowledge among other things that he had been fired and confirmed that a six figure sum was owed by CRTV. CRTV thereafter launched a highly escalatory public counterstrike by orchestrating placement of an

[6] The paragraph says nothing about what happens in the event of expiration of the BTS.

article (See, e.g., RX 0336-0337, 0434, 0442, and 0919 ) in the Daily Beast (RX-0915). That article was "massive retaliation" by CRTV; it was based in large part upon declarations procured by Claimant for the prior arbitration and additional information supplied to the reporter by Claimant. That Daily Beast article was replete with disparaging comments about Steyn — who then based his counterclaim in that proceeding in relevant part on them (See CX-0033 at paragraphs 176-79)[7]. Following release of the prior arbitral award (CX-0043) finding material breach by CRTV and upholding Steyn/MES performance, Claimant still maintained the BTS non-disparagement provision was "active," while the Respondents contested its continued viability given the material breach of the BTS found in the prior arbitration award.

10. Another rule of construction in New York is to interpret the contract in a commercially sensible manner. A non-disparagement clause typically has little use while the parties are working together in a productive relationship. If the relationship sours, then it may be commercially sensible to have the clause act as a shield while the parties try to work out their difficulties, and often times they keep it in place thereafter. Likewise, if the relationship ultimately fails, then there may be commercial utility and value in having neither side speaking ill of the other. As long as the law upholds such limitations on free speech, then the party who is the accuser may decide whether a settlement is worth the constraint on their speech[8].

11. While the provision in BTS paragraph 13 may serve a valid commercial purpose through its survival, reading paragraph 2 together with paragraph 13 and others in the BTS, as New York law requires, also is instructive in discerning the Parties' mutual intent. First, the use of the phrase in paragraph two tying survival disjunctively to "termination or expiration" means that the Parties intended that substantive paragraphs survived pursuant to that clause in both scenarios; to hold otherwise in the event of a general performance breach would ascribe no meaning to use of the word "termination," which per BTS paragraph 12 expressly includes material breaches. Such an interpretative approach would contravene New York law. See, e.g., *Two Guys From Harrison-NY v.SFR Realty Associates,* 63 N.Y. 396, 403 *(1984)*("In construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless."); *Suffolk County Water Auth. v. Village of Greenport*, 21 A.D. 3d 947, 948 (2d Dept. 2005) *citing Lawyers' Fund for Client*

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[7] The Prior award did not expressly address that particular counterclaim of breach for which relief was sought. See CX-0033 at paragraph 193 at the seventh prayer for relief seeking recompense for "the harm to Steyn's reputation, among his readers, listeners, and viewers and the public, caused by CRTV's and Katz's conduct, including CRTV's and Katz's violations of the Binding Term Sheet's non-disparagement and confidential-arbitration clauses"....
See also discussion, *infra,* at paragraph 13.

[8] Here the Parties both agree that New York has not decided the issue of whether a true statement can be disparaging and in violation of an enforceable contract prohibiting such statements. Claimant certainly marshaled precedents from other jurisdictions finding truth not to be a defense to a contractual non-disparagement clause. See letter brief dated March 22, 2019. The Sole Arbitrator finds it unnecessary to reach the issue because of Claimant's material breach of the clause for the reasons stated herein, *infra*.

*Protection of State of N.Y. v. Bank of Leumi Trust Co. of N.Y.*, 94 NY 2d 398, 404 (2002) ("[one of the] basic principles of contract construction [is] that an interpretation which renders language in the contract superfluous is unsupportable.").

12. In the Prior Arbitration Award, a breach of the performance obligation to provide a functioning studio was found to be a condition precedent that provided the gravamen of the ruling. See Prior Arbitration Award (CX-0043) at pp. 12 and 14. While Respondents contend that material breach extinguished all contractual relations between them, giving such import to the Prior Arbitration Award would ignore the plain contractual intent of the Parties, both expressly through such provisions as paragraphs 16.2 and 16.3, as well as paragraph 2. Significantly, paragraphs 16.2 and 16.3 of course, also included specific language that they survived and were triggered despite termination or expiration "for any reason." See ibid. Likewise, the Parties also treated the filings in New York state court litigation related to enforcement/vacatur of the Prior Arbitration Award as "confidential," until agreement was reached otherwise[9]. As such, they gave continuing import to the survival of provisions that were not impacted directly by the material breach found in the Prior Arbitration Award. This course of dealing suggests that the Parties recognized continuing vitality in those provisions surviving the "termination" of the BTS per paragraph 2 that were unrelated to the material breach (that rendered the termination of the BTS by CRTV unlawful, and which both excused further show performance obligations by Respondents, and resulted in a damages award in their favor).

13. Although there were counterclaim issues relating to non-disparagement and evidence taken in the prior proceeding, as noted above (footnote 7) there was no ruling on them. This result can be a function of certain logical possibilities: (i) they were abandoned as a matter of law as Claimant now maintains; and (ii) it was thought unnecessary to reach them — no findings were necessary to the holding of the Prior Arbitration Award[10] because a prior condition precedent was materially breached — leaving open the issue of whether certain further performance obligations existed by virtue of the survival provision notwithstanding the finding of material breach.

(i) First, Claimant maintains that the failure of the prior Arbitral Award to address these allegations and relief was because the claim was abandoned. Claimant relies on the fact that while the counterclaim was made, the post-hearing brief did not address these allegations or claims. However, the legal authority which Claimants cited in support fail to mandate that conclusion. First, in the decision in *Marks v. Nat'l Commc'ns Ass'n*, 72 F.Supp. 2d 322, 328n.6 (S.D. N.Y. 1999), it is clear from the

[9] Respondents may well have accorded such confidential treatment under the duress of the threat of suit, but they pointed to no place in the evidentiary record where there was a reservation of right in that regard, and so their course of dealing after the prior award stands unconditionally as reflecting their understanding of their surviving confidentiality obligations.

[10] In Order No. 7, the Sole Arbitrator previously acknowledged this conclusion as a possible logical implication of the Prior Arbitration Award based on the record presented at that juncture, but did not decide the issue. See Order No. 7 at paragraph 3(b)(i).

transcript cite in the footnote itself that plaintiff's counsel in that case expressly informed the court that the claim was not being pursued. In *Withers v. Teachers' Ret. Sys.*, 447 F.Supp. 1248, 1261 (S.D.N.Y. 1978) the court simply recites that the claim was apparently abandoned without more. Here, in contrast it is readily apparent that the prior arbitrator well knew how to recognize and communicate when a counterclaim was regarded as abandoned, since the counterclaims for fraud and tort were expressly recognized as such. See CX-0043 at p.14. In contrast, the prior arbitrator made no such finding and reached no such conclusion as to additional contract based counterclaims. See ibid. Hence, there is not a persuasive basis for inferring abandonment of contract based counterclaims for disparagement and breach of confidentiality in circumstances so factually distinct from the cases cited; rather, one must look for another explanation for the arbitrator's non-action in this regard.

ii) The second possible explanation was that of inferring from the prior arbitral award that it was unnecessary, or then thought to be, to reach the the contract counterclaims related to disparagement and confidentiality. The prior arbitrator engaged in no reasoned analysis whatsoever of the survival issue under BTS paragraph 2 with respect to non-disparagement after finding the earlier material breach of the condition precedent of a functioning studio. The record from the prior arbitration actually reflects the arbitrator's expression of confusion as to whether there was even a claim/counterclaim for breach of the confidentiality provision, or merely general allegations that included evidence of post-termination conduct. CX-0038 at Tr. pp. 1758-59. The prior arbitrator allowed such evidence, indicating it would be "dealt with by weight" (See ibid at p.1759) — apparently not recognizing there was any issue of survivability and, instead, accepting it in connection with the breach of contract counterclaim generally, rather than as a separate claim pled upon which relief had been specifically sought. See CX 33 paragraph 193 (request for relief seven). Indeed, Counsel for Claimant contemporaneously offered to stipulate that "we don't have to get into anything that occurred with respect to publicity after termination of the contract," but there was no response by Respondents to the proffered stipulation other than to have the particular questioning continue. See id. In that circumstance, it seems fair to infer the prior arbitrator simply did not recognize — nor did either side's counsel point out — the need to reach or to resolve survival of the breach of contract counterclaim for confidentiality/disparagement that arose after the termination — at least once termination was found to be wrongful based on the earlier in time failure of the condition precedent obligation of Claimant.

14. While the assertion and availability of a claim at the time of the prior arbitration likely precludes on res judicata grounds an affirmative counterclaim now based on contractual disparagement issues again in this proceeding, no such claim is advanced; rather, the issue is raised only by way of an affirmative defense in this proceeding. Based on the briefing of the Parties on limited New York precedent and above findings with respect to the fair import of the procedural posture of the prior arbitration, the conclusion follows that there is no preclusion from relying on the alleged breach of paragraph 13 by Claimant as an affirmative defense in this proceeding. Cf. *Mattes v. Rubinberg*, 220 A.D.2d 391 (2nd Dept. 1995).

15. The Respondents assertion of the breach of the BTS non-disparagement provision (paragraph 13) and confidentiality provision of the arbitration agreement (paragraph 19) as an affirmative defense to claims made pursuant to those two paragraphs rests, at bottom, on the afore-mentioned Daily Beast article. The testimony in this proceeding (as in the prior arbitration) is replete with admissions of Messrs. Katz and Mooney regarding instigating and shaping the slant and content of the Daily Beast article. Indeed, at the direction of its sole controlling voting shareholder, Mr. Katz, Mr. Mooney as Vice President of Corporate Communications of CRTV, was tasked (with the assistance of Eric George) in getting the "CRTV side" into the public domain through publication of the Daily Beast article. This was done through the witness declarations provided to the reporter, providing contacts with such witnesses to verify quotes, and additional background information. See, e.g., Rx-0336-038; 0434 and 0919. Mr. Mooney provided detailed information regarding the facts supporting the underlying claims of CRTV and anticipated defenses/ counterclaims both directly and through the statements of witnesses, many of whom were then also interviewed for the article to verify the quotes provided by CRTV proffered declarations. Mr. Mooney, who had a promotion on the line based on the contemporary documentation, did not stop there; he organized the quotes into "common themes" and advanced CRTV's own spin in summarizing them to the reporter — the thrust of which were that Mr. Steyn "engaged in bizarre antics/speech; erratic behavior; utter mismanagement; self sabotaging the Mark Steyn Show; exhibiting paranoia; creat[ed] a toxic environment; spent the Show's money frivolously" and was "driven by "megalomanic behavior" while engaging in "disrespectful" "tirades" among his "antics."

16. Those personal characterizations of Mr. Steyn to the Daily Beast by CRTV's duly authorized executive met any definition of disparagement. As such, those CRTV communications were in callous disregard and material breach of BTS section 13's mutual prohibition — "Both parties will not criticize, ridicule, disparage, or defame each other, or make statements to the press or third parties that may be derogatory or detrimental to either party's good name or business reputation." These facts and the contrasting absence of any "saving" language in paragraph two (or thirteen) — to the effect that survival continues after termination "for any reason" as in paragraphs 16.2 and 16.3 — combine such that the material breach of the non-disparagement provision by Claimant itself excused further performance obligations under it through paragraph 2 by Respondents. As such, that material breach by Claimant in March 2017 extinguished any on going Party obligations of non-disparagement that otherwise survived pursuant to BTS paragraph 2 the earlier material breach by CRTV of its condition precedent functioning studio obligation, as found in the Prior Arbitration Award (CX-0043). Stated differently, Claimant failed to meet its burden of proof that Respondents had an enforceable contractual obligation of non-disparagement under BTS paragraph 13 at the times relevant to the particular claims in this proceeding. Accordingly, the "stand alone" disparagement claims based on Compendium Statements 41, 43-44, 47, 57, 60-61, 72, 86 and 88 are hereby dismissed with prejudice. Similarly, the following Compendium Statements, to the extent they are

based in part on a disparagement claim, are also hereby dismissed with prejudice: 36, 38, 42, 45-46, 48-50, 52-59, 60A, 62-71, 73-85, 87 and 88-92.

17. The other BTS provision that is ambiguous and in need of interpretation is that of "confidential binding arbitration" found in paragraph 19. Claimant relies upon the term "confidential" as the basis for its claims in that regard found in Compendium Statements 57-59, 60A, 64-65A, 68-71, 74-75, 84-85, 87, and 89-91.[11] Neither the contract as written, nor the AAA Commercial rules as incorporated by reference in it, provide guidance as to the scope of the Parties' intent in this regard. While the applicable Ethics codes provide for Arbitrator confidentiality[12] and that of the AAA Staff,[13] they are neutral as to whether parties generally should enter into a confidentiality agreement or agreed order pertaining to the confidentiality of the proceeding or the award. While the Parties here also agreed in the BTS to the applicability of the laws of the United States (in addition to that of New York), generally in the federal courts there is no presumption of an obligation of confidentiality among the parties to an arbitration, but the courts will enforce arbitration confidentiality between parties if provided in a confidentiality agreement or arbitral order. See, e.g., *ITT Educational Services v. Arce*, 533 F.3d 342 (5th Cir. 2008).

18. In this case, as in the prior arbitration, no confidentiality order was sought by either Party for most of the arbitral proceeding. In the prior arbitration the Parties' confidentiality concerns seemed to surface around the time of Party depositions and production of their respective internal documents. See, e.g., Interim Order dated August 25, 2017. In this case, it was not until March 1, 2019 that a limited/interim confidentiality order was entered (No. 16) in connection with document production and depositions prior to the Phase One evidentiary hearing. It is noteworthy that confidentiality protection in the Prior Arbitration did not extend to the Final Award itself despite a specific request by Claimant. See, e.g., Howes Declaration dated March 24, 2019 at p. 3 paragraphs 10-12. No such request was made or order entered herein in connection with this Partial Final Award. Compare Order No. 16 at paragraph 8. See also "Relief Sought by Defendants" at pp. 5-7 paragraphs 7-8 and Claimant's "Statement of Relief Sought" at pp. 10-11. That prior Final Award itself is also instructive with respect to the parameters of the confidentiality obligation, for it

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[11]The Respondents first argued that the material breach by CRTV of the BTS found in the Prior Arbitration Award precluded continued performance under the arbitration clause, including that of confidentiality; that argument was rejected in Order No. 7.

[12]The AAA and ABA have jointly issued a Code of Ethics for Arbitrators in Commercial Disputes One section of the code, Cannon VI, governs the obligations of arbitrators to maintain the confidentiality of the proceedings.

[13] See American Arbitration Association, "Statement of Ethical Principles for the American Arbitration Association, an ADR Provider Organization", *available at* https://www.adr.org/StatementofEthicalPrinciples

concluded that: "On the Claim filed by CRTV, an Award is made in favor of the respondents. The "Claim filed by CRTV" included a breach of contract claim that BTS paragraph 19's confidentiality provision was violated by Steyn/MES "by making public comments about the parties' dispute....and by filing and then dismissing the frivolous federal-court complaint." (Amended Demand Attachment A at paragraph 1 bullet point 3). CRTV's claim failed on this count. As such, comments of the sort made by Steyn in the Salon article (CX-0028) and the Vermont court action (CX- 0004) were found to be not violative of the confidentiality provision of BTS paragraph 19[14]. In sum, the fact of the prior arbitration's existence as well as its basic factual underpinnings (other than those of a business confidential nature covered by the interim order eventually entered in that case) were not within the shared confidentiality expectations of the Parties arising from BTS paragraph 19.

19. The course of dealing between the Parties in the prior arbitration, reflected both by the Parties conduct before the August 25, 2017 order and Final Award, proves telling on how the Parties understood their BTS paragraph 19 confidentiality obligations in this regard and behaved in relation to it. First, it is noteworthy that the Daily Beast article (Rx-0915) disclosed the existence of the arbitration between the Parties since that fact was not treated as "confidential" by CRTV, which readily disclosed it to the reporter. See, e.g., Rx-338 ("CRTV has filed an arbitration against Mr. Steyn.") and Rx-0340 (3/5/17 Mooney email to WND Chief Executive Officer acknowledging the "pending arbitration"). Second, an equally noteworthy aspect of the Daily Beast article and disclosures by CRTV to that publication is that the factual underpinnings for the claims and related defenses were readily provided as well by and through CRTV. Thus, either CRTV acted in breach of its BTS paragraph 19 confidentiality obligations in this regard, or its actions abided by its contractual obligations, which simply did not extend so far as to restrict such basic disclosures. Either way — whether as a matter of estoppel or of contract interpretation based on course of dealing — CRTV's prior behavior effectively precludes its ability to meet its burden of proof now with respect to its confidentiality claims.

20. To explain, here the BTS Paragraph 19 confidentiality claims advanced are readily reduced to two categories: the fact of the pending arbitration as well as basic factual underpinnings for it (See Statements 57-59, 60A, 64-65A, 68-71, 74-75, 84-85, 87, and 89-91). As with the prior arbitration, based on CRTV's prior course of conduct, there is no legitimate shared expectation that the fact of this arbitration's existence is to be treated as confidential. Additionally, given the disclosures by CRTV of the factual basis for the prior arbitration, which it caused to be publicly released through the Daily Beast article, there is similarly no confidentiality to be associated with the general factual basis for this case — at least in so far as there is no disclosure of Party confidential business information prior to March 1, 2019 that was protected by arbitrator order. Here the operative facts disclosed prior to Order No. 16 pertained

[14] No grounds are stated in the Prior Final Award (CX-43) in this regard, so apparently either the confidentiality restriction was construed not to encompass such conduct, or an estoppel precluded CRTV's claim based on its unclean hands in connection with the Daily Beast article.

initially to certain songs as a basis for the claim in part, an issue pertaining to the cat tree, and amount sought. Later the disclosure extended to the Compendium itself (Cx-0298), which is simply a compilation of Steyn publications on which the amended demand is based. Since none of those disclosed facts in the Statements involved any business confidential information of the Parties, there was no shared expectation of confidentiality based on conduct in the prior arbitration and absence of a broad arbitrator confidentiality order in this proceeding[15]. Moreover, the fact of an amount claimed by MES was also referenced in the Salon article, but confidentiality claim of breach filed by CRTV did not withstand scrutiny, for the prior award was made in favor of Respondents. See Cx-043 at p.14. Finally, although CRTV in some of the statements at issue as to confidentiality highlights disclosures of Katz's parallel suit, that suit is public litigation, not under seal, and could not possibly be a breach of BTS paragraph 19's confidentiality obligation of Respondents. Accordingly, the remaining claims for breach of confidentiality under BTS paragraph 19 are dismissed with prejudice, for Claimant has failed to meet its burden of proof for these reasons.

21. A final word on confidentiality is necessary for clarity sake; namely, nothing in BTS paragraph 19's reference to "confidential" imposed any broader constraint on the parties outside the parameters of the arbitration with respect to their dealings. The Parties never entered into a broad confidentiality agreement to govern their business dealings —- which CRTV well knew how to do at the time, as the evidence reflected in numerous employment agreements it entered into. Further, the BTS confidentiality provision in paragraph 17, while it was operative, only extended to the the BTS terms. Thus, only the limited confidentiality order (No. 16) currently constrains the Parties. That order continues in place at this time through the Second Phase of the proceeding, unless otherwise ordered or addressed in the Final Award for phase two.

**C. Defamation:**

22. The remaining claims to be addressed all are advanced under a defamation theory of recovery (Statements 36, 38, 42, 45-46, 48-50, 52-53, 55-56, 60A, 62-68A, 70-71, 73, 75-77, 79-85, 87, and 89-92). Under applicable New York law, defamation is "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" *Foster v. Churchill,* 87 N.Y.2d 744, 751(1996)(internal quotation marks omitted). The basic elements of that tort on which Claimant has the burden of proof are: (i) a false statement of fact; (ii) made about the plaintiff; (iii) published by a third party; (iv) without privilege or authorization; and (v) damage to the plaintiff, unless it is actionable regardless of harm. *Cardali v. Slater,* 56 Misc. 3d 1003, 1008 (N.Y.S.Ct.2017), *affirmed* 2018 NY Slip Op. 08544 (12/13/18 App. Div. 1st Dept.). Further, under New York law,

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[15] In this case the opportunity to request such an order was made available to the Parties from early in the case and thereafter throughout it until limited relief was finally requested and granted on March 1, 2019.

"owners and operators of media outlets" are by definition public figures. See, e.g., *Diario El Pais, S.L. vs Nielsen Company,* , 07CV11295(HB) (S.D.N.Y. Nov. 6, 2008)("As owners and operators of media outlets, Prisacom and El Pais qualify as 'public figures' and consequently must allege that Nielsen, also a media company, acted with actual malice.). Accessed at:https://casetext.com/case/diario-el-pais-sl-v-nielsen-company-us Thus, because a media company such as CRTV is a public figure, Claimant is also required to prove actual malice. As New York's Court of Appeals has observed: "[to] cross the constitutional threshold of actual malice, there must be 'clear and convincing evidence . . . that the author in fact entertained serious doubts as to the truth of his publication or acted with a high degree of awareness of . . . probable falsity'. The inquiry is thus a subjective one, focusing upon the state of mind of the publisher of the allegedly libelous statements at the time of publication." *Kipper v. NYP Holdings Co., Inc.*, 2009 NY Slip Op 03407(Internal citations omitted.) accessed at https://www.law.cornell.edu/nyctap/I09_0061.htm. Still, while "[a] corporation cannot suffer personal humiliation or mental anguish [from a defamatory falsehood] ... it can be actually damaged through injury to its reputation in the community regardless of whether it can also demonstrate special damages ( *see generally, Ruder Finn v Seaboard Sur. Co.*, 52 N.Y.2d 663, 670-671; 2 N.Y. PJI 87 [Supp]; Restatement [Second] of Torts § 561)." *Wolf St. v. McPartland*, 108 A.D. 2d 25,32 (N.Y. App. Div. 1985).

23. In this case as in *Diario*, a threshold defense is raised that the claim is really one of contract and not of tort. In *Diario* the court observed that: "[a] breach of contract claim cannot be considered a tort unless a legal duty independent of the contract itself has been violated. *Clark-Fitzpatrick v. Long Island Rail Road, Co.*, 516 N.E. 2d 190,193 (N.Y. 1987); *TD Waterhouse Investor Services, Inc. v. Integrated Fund Services, Inc.*, 01cv8986 (HB), 2003 WL 42013, at *13-14 (S.D.N.Y. Jan. 6, 2003)." The independent legal duty to support a tort claim must "spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract." *Clark-Fitzpatrick,* 516 N.E. 2d at 193. The broad prohibitory swarth of BTS paragraph 13, here as in *Diario,* renders it clear that much of the fundamental subject matter of the claims was coextensive. Indeed, in the Compendium Claimant designated most of the statements as violative of both the disparagement clause and the tort of defamation. See CX-0298 (E.g., "Red text notes the specific diction that violates paragraph 13 of the BTS and constitutes defamation."). This should not be surprising since the BTS includes within paragraph 13 an express prohibition on "defamation." At the same time, the parties in the BTS also incorporated New York law, so presumably they had in mind something more narrow contractually than the common law tort in so providing; otherwise the inclusion of the term would have no meaning apart from the common law and be rendered meaningless. Thus, ordinary meaning can be given to defamation as used in paragraph 13 — ie. acts causing harm to someone's reputation — without necessarily incorporating each of the other elements found in the common law tort. Such a construction is consistent with New York cannons of construction, as an interpretation that differentiates between the scope of the prohibitions expressly provided in the contract and that which it incorporated by reference in the governing law section is to

be preferred. Still, as in, *Diario*, "the range of conduct alleged in the Amended Complaint that may possibly 'spring from circumstances extraneous to' the Contract and give rise to an 'independent legal duty' is exceedingly narrow." (*citing Clark-Fitzpatrick v. Long Island Rail Road, Co.*, 516 N.E.2d 190,193 (N.Y. 1987) — at least while that contract provision was operative. In the circumstances of this case, where the disparagement/defamation contract provision was extinguished by CRTV's material breach of it, the time period where it was operative was short-lived and limited to time period one[16] claims. Those claims have already been dismissed on other grounds. See Order No. 5. Accordingly the very limited survival of BTS paragraph 13 before CRTV's material breach of it is not a legal impediment to Claimant now asserting its tort based claims for time periods two and three, when paragraph 13 was no longer binding on the Parties.

24. That said, the task then becomes one of examining the words at issue. As a New York trial court observed recently in *Cardali*, supra, the "...words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction" ( *id.* at 38, 704 N.Y.S.2d 1 ). That court also noted:
"It is well-settled that "[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" ( *Davis v. Boeheim,* 24 N.Y.3d 262, 269, 998 N.Y.S.2d 131, 22 N.E.3d 999 [2014] ). Whether a particular statement constitutes an opinion or an objective fact is a question of law (*see Rinaldi v. Holt, Rinehart & Winston,* 42 N.Y.2d 369, 381, 397 N.Y.S. 2d 943, 366 N.E.2d 1299 [1977], *cert. denied* 434 U.S. 969, 98 S.Ct. 514, 54 L.Ed.2d 456 [1977] ). Certain factors must be considered under New York law to distinguish between statements of "fact" and privileged expressions of opinion; these factors 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 [signals to] ... readers or listeners that what is being read or heard is likely to be opinion, not fact" *( Brian v. Richardson,* 87 N.Y.2d 46, 51, 637 N.Y.S.2d 347, 660 N.E.2d 1126 [1995], quoting *Gross v. New York Times Co.*, 82 N.Y.2d 146, 153, 603 N.Y.S.2d 813, 623 N.E.2d 1163 [1993] [internal citations omitted] ). At bottom, statements that merely express opinion are not actionable as defamation, no matter how offensive, vituperative or unreasonable they may be. See, e.g., *Trump v. Chicago Tribune Co.*, 616 F. Supp. 1434 (S.D.N.Y. 1985). As the New York Court of Appeals observed in *Immuno AG. v Moor-Jankowski*, 77 NY2d 235 [1991] cert. den. 500 U.S. 954 (1991) "The key inquiry is whether challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact. In making this inquiry, courts cannot stop at literalism. The literal words of challenged statements do not entitle a media defendant to "opinion" immunity or a libel plaintiff to go forward with its action. In determining whether speech is actionable, courts must additionally consider the

[16] At the outset of the case the Statement claims were divided into three separate time periods for analytic purposes. See Order No. 5 at n.6.

impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person."

25. Claimant further maintains that it only seeks (and is entitled to) damages for CRTV; not for Mr. Katz individually, whose defamation claims are the subject of a separate, parallel litigation proceeding in Nevada. At the same time, Claimant conceded that "[c]ertain of the Steyn Parties' defamatory statements are ambiguous as to whether they relate *solely* to Mr. Katz, CRTV or both." Responses to the Steyn Parties' Objections to CRTV's Amended Requests for Production of Documents, Set One at p. 4 (Emphasis in the original *citing* e.g., Statement 52). Claimant also acknowledged that "[i]t is true that where the defamation is *solely* an attack on an individual employee, investor, or officer, the defamation will not be imputed to the company. See *Adirondack Record v. Lawrence*,195 N.Y.S.627,630 (App.Div.1922)." Ibid. at p. 4. In *Adirondack*, a news publication sued for defamation directed at its editor. 196 N.Y.S. at 629. The court held that the news publication could not maintain a suit against the alleged defamer where the defamation did not mention or could not be understood to impart damage to the news publication. Id. at 632. But the *Adirondack* court recognized that "[i]f any recovery were to be permitted in such a case, it should be upon proper allegation of special damage[17]." Id. In an effort to bring its claim within *Adirondack*'s recognized ambit, CRTV sometimes relies upon certain references by Mr. Steyn to Mr. Katz and CRTV that it argues conflates them, thereby allegedly encouraging readers and listeners to think of them interchangeably. See Responses, *supra,* at p.5.

26. Claimant generally breaks its defamation claims into three categories, seeking a ruling of defamation per se in each instance: (i) criminality (citing as examples Statements 38, 48, 50, 53, 56, 75a, 83 and 87); (ii) impugning creditworthiness (citing e.g., Statements 51, 52, 63, 64, 66, 82 and Statements referencing "deadbeat") and those (iii) impacting public perception (citing e.g., Statements 45-46 and 64). Claimant contends the statements in these categories above, "impugn[] [Claimant's] basic integrity or credit worthiness," *Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 670 (1981), and injured Claimant's business

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[17]Special damages "as the term is used by New York courts, are defined as the loss of something having economic or pecuniary value such as loss of profits." *Wolf St. Supermarkets, Inc. v. McPartland*, 108 A.D.2d 25, 32 (4th Dep't 1985) [citing *Hogan v. Herald Co.*, 84 A.D.2d 470, 480 (4th Dep't (1982)]. "The general rule governing the recovery of lost profits in tort cases is that damages proximately caused by the wrongful conduct of the defendant may be recovered if plaintiff proves them with reasonable certainty and without speculation." *Wolf St., supra*, 108 A.D.2d at 33 (Citations omitted.). In this case CRTV sought monetary damages, inter alia, in the amount of $5,400.00 representing 30 individual subscribers lost due to Respondents comments, purportedly as shown by the termination comments left by the cancelling subscriber, See CX-0247, multiplied by the expected lifetime value of each subscriber of $180 per subscriber, as testified to by Eric Wong, Tr. at p.1024: ll 10–20. This figure failed to take into account the myriad discounts shown to be offered by CRTV during the relevant time period and included subscribers whose voiced discontent was not limited to Mr. Steyn.

reputation thereby establishing defamation (libel) per se, for which New York law allows corporate entities to seek damages. *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D. 3d 32, 39 (1st Dep't 2011). Accordingly, Claimant further argues that " no proof of special damages [is] required." *John Langenbacher Co. v. Tolksdorf*, 199 A.D.2d 64, 65 (1st Dep't 1993). "[T]he existence of damage is conclusively presumed from the publication itself and a plaintiff may rely on general damages," *Matherson v. Marchello*, 100 A.D.2d 233, 237 (2d Dep't 1984) (citations omitted), to account for Claimant's "impairment of reputation and standing in the community." *Hogan v. Herald Co.*, 84 A.D.2d 470, 480 (4th Dep't 1982) (*quoting Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

27. In response, Respondents generally: (i) admit to making the subject Statements; (ii) stand by the truth of each of the Statements, (iii) maintain they harbored no "malice" toward CRTV, or Mr. Katz to the extent that statements about him are imputed to damage CRTV, (iv) insist that the vast bulk of the statements at issue fall well outside any conceivable definition of defamation per se; (v) contend that any damage to CRTV was of its own doing; and (vi) seek a "final scorecard" on each of the Statements remaining at issue. See Relief Sought by Defendants" at p.10 paragraphs 11-12. As with any claim for defamation or libel per se, they are completely defeated by a showing that the published statements are true or substantially true. (*Newport Serv. & Leasing, Inc. v Meadowbrook Distrib. Corp.*, 18 AD3d 454 [2d Dept 2005].)[18] They are also subject to a defense that the material, when read in context, would be perceived by a reasonable person to be nothing more than a matter of personal opinion. (*Immuno AG. v Moor-Jankowski*, 77 NY2d 235 [1991] cert. den. 500 U.S. 954 ( 1991). Moreover, "[l]oose, figurative or hyperbolic statements, even if deprecating to the plaintiff, are not actionable. *Dillon v. City of N.Y.*, 261 AD2d 34 (1st Dept.1999).

28. In order to treat allegations pertaining to criminality as per se defamatory as Claimant requests, New York law requires a certain gravity as well as specificity. The New York Court of Appeals recognizes "slander per se" in this regard where the statement charges plaintiff with a "serious crime". *Liberman v. Gelstein*, 80 N.Y. 2d 429 (1992). But as that Court also observed: "Not every imputation of unlawful

[18] Of similar import is the decision in *Mulder v. Donaldson, Lufkin & Jenrette*, 161 Misc.2d 698, 704 (Sup. Ct. 1994), *aff'd*, 208 A.D.2d 301 560 (1st Dep't 1995) cited in Order No. 13 with regard to the applicability to arbitrations of N.Y. Civ. Rights Section 74 privilege of fair reports that are not misleading. The Parties disagreed heatedly in submissions prior to the evidentiary hearing as to the applicability of the statutory privilege to arbitrations and whether *Mulder* was correctly decided. Given the alternative legal basis for analysis available through the common law privilege for substantial truth reflected in *Newport* and similar New York decisional parameters, much of the analysis is therefore addressed through application of common law privilege generally, particularly since the Parties failed to argue the statutory privilege with specific application after evidence at hearing to certain of the Statements at issue that could not be resolved summarily. The same analysis obviates the need for application of other privileges asserted by Respondents (e.g., related to republication) that might otherwise have served in some instances as a framework for analysis and disposition.

behavior, however, is slanderous per se. 'With the extension of criminal punishment to many minor offenses, it was obviously necessary to make some distinction as to the character of the crime, since a charge of a traffic violation, for example, would not exclude a person from society, and today would do little, if any, harm to his [or her] reputation at all' (Prosser § 112, at 789). Thus, the law distinguishes between serious and relatively minor offenses, and only statements regarding the former are actionable without proof of damage (see, Restatement § 571, comment g [list of crimes actionable as per se slander includes murder, burglary, larceny, arson, rape, kidnapping]).Ibid.

29. Application of this standard is well illustrated by the recent *Cardali* case, supra. There, plaintiff made "much ado" about being called a "common criminal," maintaining his actions were civil in nature not criminal. There, the court equated the criminal characterization in context with being called a "lowlife." The trial court further characterized the term as a "non-specific pejorative description of someone with whom upstanding, law-abiding people would not want to associate." It specifically found that in context, "'common criminal' meant that [plaintiff] was an untrustworthy double-dealer who was taking advantage of his clients. The record before this Court demonstrates that the allegation was true." Significantly, the *Cardali* court went on to insulate the criminal characterization from any liability as an expression of opinion. As the court observed: "It is well-settled that "[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" ( *Davis v. Boeheim,* 24 N.Y.3d 262, 269, 998 N.Y.S. 2d 131, 22 N.E.3d 999 [2014] ). Whether a particular statement constitutes an opinion or an objective fact is a question of law (*see Rinaldi v. Holt, Rinehart & Winston,* 42 N.Y. 2d 369, 381, 397 N.Y.S.2d 943, 366 N.E.2d 1299 [1977], *cert. denied* 434 U.S. 969, 98 S.Ct. 514, 54 L.Ed.2d 456 [1977] ). Certain factors must be considered to distinguish between statements of "fact" and privileged expressions of opinion; these factors 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 [signals to] ... readers or listeners that what is being read or heard is likely to be opinion, not fact" *( Brian v. Richardson,* 87 N.Y.2d 46, 51, 637 N.Y.S.2d 347, 660 N.E.2d 1126 [1995], *quoting*

*Gross v. New York Times Co.*, 82 N.Y.2d 146, 153, 603 N.Y.S.2d 813, [1993] [19][internal citations omitted]) As for the first factor, the specific language "common criminal" does not have a precise meaning such that it could constitute a false "fact". Slater did not, for instance, claim that Cardali committed grand larceny against his clients, fraudulently billed them, or breached his fiduciary duty. With respect to the second factor, whether the statements are capable of being proven true or false, Slater's statements constituted an opinion and opinions are not capable of being true or false. Slater may have a low opinion of Cardali, but reasonable people can disagree although it is unlikely that any ethical attorney would hold Cardali in high esteem if they knew of his double-billing scheme. The third factor, considering the entire context, compels the conclusion that Slater qualified his statement as opinion; he said 'in my opinion.' It was an opinion Slater was entitled to have and an opinion Slater was entitled to share. Here, considering the context of Slater's note about Cardali's overcharging certain clients, a reasonable reader would determine that the remarks were Slater's opinion, which are non-actionable due to the privilege."

30. Thus, the *Cardali* court considering the context of the publication of overcharging certain clients, found a reasonable reader would determine that the remarks were opinion and concluded they are non-actionable due to the privilege. In that case the reader knew the facts upon which the opinion was based. Furthermore, the writer even stated that because of those facts, it was his opinion that plaintiff was nothing more than a common criminal. A reasonable reader of that publication, in

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[19] In *Gross*, the New York Court of Appeals observed in the context of a case where accusations of criminality were at issue: "Thus, in determining whether a particular communication is actionable, we continue to recognize and utilize the important distinction between a statement of opinion that implies a basis in facts which are not disclosed to the reader or listener (see, *Hotchner v Castillo-Puche*, 551 F.2d 910, 913, cert denied sub nom. *Hotchner v Doubleday & Co.*, 434 U.S. 834; Restatement [Second] of Torts § 566), and a statement of opinion that is accompanied by a recitation of the facts on which it is based or one that does not imply the existence of undisclosed underlying facts (see, *Ollman v Evans*, supra, at 976; *Buckley v Littell*, 539 F.2d 882, 893, cert denied 429 U.S. 1062; Restatement [Second] of Torts § 566, comment c). The former are actionable not because they convey "false opinions" but rather because a reasonable listener or reader would infer that "the speaker [or writer] knows certain facts, unknown to [the] [82 N.Y.2d 154] audience, which support [the] opinion and are detrimental to the person [toward] whom [the communication is directed]" (*Steinhilber v Alphonse*, supra, at 290). In contrast, the latter are not actionable because, as was noted by the dissenting opinion in *Milkovich v Lorain Journal Co.* (supra, at 26-27, 28, n 5 [Brennan, J.]), a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture (see, e.g., *Potomac Value & Fitting v Crawford Fitting Co.*, 829 F.2d 1280, 1290). Indeed, this class of statements provides a clear illustration of situations in which the full context of the communication "`signal[s] * * * readers or listeners that what is being read or heard is likely to be opinion, not fact'" (*Steinhilber v Alphonse*, supra, at 292, quoting *Ollman v Evans*, supra, at 983)."

which the author specifically qualified his remarks as his opinion, would not interpret the author as informing the reader that Cardali was a convicted, or even an indicted, criminal. Rather, it was in direct response to the author's opinion of Cardali's low-life double-dipping practice. In so concluding, the *Cardali* trial court relied on precedents involving aspersions of "extortion"; namely, *Pecile v. Titan Capital Grp., LLC*, 96 A.D.3d 543, 544, 947 N.Y.S.2d 66, 67 [1st Dept.2012] (holding that "the use of the term 'shakedown' did not convey that defendants 'were seriously accusing [plaintiffs] of committing extortion' " [internal quotations and citation omitted] ); and *Trustco Bank of N.Y. v. Capital Newspaper Div. of Hearst Corp.*, 213 A.D.2d 940, 942, 624 N.Y.S.2d 291, 294 [3d Dept.1995] (holding that a newspaper's use of the word "extortion" to describe a lawsuit was non-actionable opinion)[20]. Because a reasonable reader would not conclude that plaintiff was actually convicted of crimes, but would instead conclude that the author felt that plaintiff's disreputable practice was disgraceful, the court concluded the publication was privileged and non-actionable as a matter of law. As the New York Appellate Division very recently concluded in affirming the *Cardali* trial court position on appeal: "The libel per se claim was properly dismissed because [the author's} statement that plaintiff was "really nothing more than a common criminal" is a non-actionable statement of opinion (see generally *Mann v Abel*, 10 NY3d 271, 276 [2008], cert denied 555 US 1170 [2009]). The phrase has an imprecise meaning that is not capable of being proven true or false and, when read in context, no reasonable reader would understand it to be accusing plaintiff of having been charged with or convicted of an actual crime (see *Melius v Glacken*, 94 AD3d 959, 960 [2d Dept 2012]; see also *Galasso v Saltzman*, 42 AD 3d 310, 311 [1st Dept 2007]; *Lacher v Engel*, 33 AD3d 10, 16 [1st Dept 2006])."

31. At bottom, the factual distinction between this case and that of *Cardali* on "criminality" basically may be reduced to the additional use of the modifier "common" and the express reference to opinion by the author of the remark. The question here is whether those facts are a distinction without import. As a matter of

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[20] Because certain statements in the Compendium also involve diction pertaining to "extortion", these precedents will help inform that inquiry, just as *Cardali* does with respect to being called "criminal". Consistent with that view, the decision in *Penn Warranty vs DiGiovanni, 2005 NY Slip Op 25449, 10 Misc 3d 998* (New York Supreme Court, 2005), where plaintiff had been accused of being a "crooked company... ripping off its contract holders" that had "been committing fraud on a grand scale", etc. , will also have import. There, as here the contents of the website were not disputed. But the cause of action for libel was dismissed, for the facts on which the maker based his conclusions were his personal small claims lawsuit with plaintiff, which were disclosed. The court found that "the Web site, when viewed in its full context, reveals that defendant is a disgruntled consumer and that his statements reflect his personal opinion based upon his personal dealing with plaintiff. They are subjective expressions of consumer dissatisfaction with plaintiff and the statements are not actionable because they are defendant's personal opinion." As a result, the court concluded that the statements reflected the maker's personal opinion based upon his personal dealing with plaintiff and were therefore privileged.

law, there is no requirement in New York that an opinion be expressly identified as such; that is one reason why context matters to the determination made through application of the three pronged examination required by New York's highest court. See *Brian*, *supra*, 87 N.Y. 2d at p. 51. At the same time, given the requirement of allegation of a serious crime, it is necessary to scrutinize each Statement at issue in this regard to determine if the requisite serious charge is made. Thus, the answer on criminality related Statements, as for all the remaining statements, is evaluated in the specific context of each statement in accordance with New York law as outlined above.

32. CPLR 3016 (a) requires that the particular words complained of be set forth in a litigation complaint alleging defamation. In this arbitration, Complainant was directed to produce a Compendium of Statements at issue, highlighting in color coded fashion the precise language complained to the theory of recovery to reflect, inter alia, claims as to the tort of defamation and providing the context thereof. The amended Compendium submitted into evidence (Cx-0298) included the full publication to show the context in which the complained of language appeared, as well as identifying the precise contested language in it The New York Court of Appeals provided the guidepost for reviewing the entire Compendium, as was done here: "Given the purpose of court review--to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff--we believe that an analysis that begins by looking at the content of the whole communication, its tone and apparent purpose (*Steinhilber v Alphonse*, 68 NY2d at 293, supra) better balances the values at stake than an analysis that first examines the challenged statements for express and implied factual assertions, and finds them actionable unless couched in loose, figurative or hyperbolic language in charged circumstances (citation omitted) A media defendant surely has no license to mis-portray facts; false statements are actionable when they would be perceived as factual by the reasonable person. But statements must first be viewed in their context in order for courts to determine whether a reasonable person would view them as expressing or implying any facts."

33. An examination of those specific Compendium Statements within the context of each publication and the New York legal framework and precedents cited above yields the following findings and conclusions:

Statement 36 (Cx-0169): There can be no dispute that CRTV terminated wrongfully the BTS and as such "fired" Mr. Steyn, while suing him for breach of contract among other things. Both are true statements. Thus the "false fact" claimed must be that the suit was for a "gazillion dollars." As Order No. 13 made clear (at paragraph 10a) in previously dismissing this defamation claim, there is no such figure as a "gazillion." By its plain and ordinary meaning in this context, it is simply a a very large number used for emphasis. The use of such diction is plainly not a "false fact," but rather It is an indefinite and fictitious number not susceptible to being proven true or false. In short, it is rhetorical hyperbole, "a made-up word meaning a 'whole bunch' that is modeled after actual numbers such as million and billion." https://www.vocabulary.com/dictionary/gazillion. As a matter of law, ""Loose, figurative or

hyperbolic statements, even if deprecating the plaintiff, are not actionable." *Dillon, supra* paragraph 27. Claimant had no right to continue to press this claim through evidentiary hearing in the revised Compendium (Cx-0298) given the prior Order.

Statement 38 (Cx-0170): The diction complained of includes references that CRTV "lost the case" and is "refusing to pay the damages ordered by the judge." There can be no dispute that CRTV "lost" the prior arbitration. The prior award expressly states: "As outlined above, CRTV has failed to prove its claims by a fair preponderance to the evidence." That award further states:"On the Claim filed by CRTV, an Award is made in favor of the Respondents." Cx-0043 at pp. 14 and 20. As such, there is neither ambiguity nor room for doubt — CRTV lost on its claims; the statement is true in that respect and the defamation claim based on it was previously summarily dismissed in Order No. 13 at paragraph 10b. CRTV had no right to continue to pursue this claim through evidentiary hearing as one for defamation by coding it in red in the Amended Compendium[21]. As to the refusal to pay the damages ordered, that too was a true statement when published on March 14, 2018. The record evidence is clear that not even a partial payment — on the undisputed part of the prior award —was made until on or about November 5, 2018 (See Statement 87 dated November 6, 2018), just before the filing on November 7, 2018 of the Partial Satisfaction of Judgment in the New York enforcement litigation. Thus, the context for the statement that was advanced by CRTV as a defamation claim was the reference to not wanting to link to a website that lost the case, refused to pay and as such would be promoting "scofflaws"[22] and "deadbeats." [23] By their plain and ordinary meanings, the terms connote respectively: scofflaw —"a person who flouts the law, especially by failing to comply with a law that is difficult to enforce effectively"and deadbeat: "a person who tries to evade paying debts." See Rx-0561. As in *Penn Warranty, supra* note 19, the characterizations are "subjective expressions" of dissatisfaction with plaintiff. There, as here, the statements are not actionable because they are defendant's personal opinion based upon his personal dealing with plaintiff, which are disclosed through the contextual reference to the prior arbitration and nonpayment of the damages awarded. See also *Cardali, supra*. Even if the statements were not regarded as opinion and reasonably understood to be statements of fact, the omission of any reference to a pending appeal on some of the damages awarded would nevertheless leave them "substantially true" per *Newport, supra*. After all, no partial payment of the undisputed damages, which were never the subject of any appeal, was

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[21] Leave was only granted by Order No. 13 to leave the language in as context or to pursue it as a disparagement claim, but it was not coded in green to pursue such a claim and hence was waived.

[22] The reference to "scofflaws" is also found in Statements 48, 49, 52, 56, 60A, 64, 65A, 66, 67, 70, 71, 73, 75A, 83 and 87. The disposition here applies to those Statements as well in so far as applied or imputed to CRTV.

[23] The reference to "deadbeats" is also found in Statements 48, 52, 64, 66, 67, 70, 71, 75, 75A, 76, 80, 83, 84, 87, 89 and 91. The disposition here applies to those Statements as well in so far as applied or imputed to CRTV.

made or tendered at relevant times to almost all of the Statement(s) at issue[24] In any event, there is ample record evidence to support a finding here that the author did not in fact entertain "serious doubts as to the truth of his publication," nor act with "a high degree of awareness of . . . probable falsity" as is required to show malice in New York. See *Kipper, supra*. As such, there are alternative grounds with persuasive record support that would provide legal excuse to withstand the imposition of liability based on these characterizations. Stated differently, CRTV failed to meet its burden of proof on this Statement and like ones employing the same diction (See footnotes 20 and 21, *supra.*).

Statement 42(Cx-0172): There are several phrases in this Statement that CRTV characterizes as "false facts" in asserting its defamation claim. The first phrase challenged is that CRTV was "plaintiffs (sic), they brought the suit, they dragged me into a pit of legal hell." While CRTV is more properly referred to as Claimant and the proceeding as an arbitration rather than suit, despite this technical imprecision the remark is substantially true since it is beyond dispute factually that CRTV commenced the prior proceeding. See *Newport, supra*. Thus, the only part of the initial phrasing that can provide the basis for the CRTV claim of a "false fact" is that it "dragged [Steyn/MES] into a pit of legal hell." No reasonable person reading that characterization could think it anything other than a statement of opinion under the elements of the *Brian* test, *supra*, for while it is an evocative phrase it is also without precise meaning. The context for the Statement is framed in reference to the judicial confirmation of the award in favor of Steyn/MES ("We won.") It is as obvious in this Statement as it was in *Penn Warranty, supra,* that the remark is one of dissatisfaction based on personal dispute resolution experience. The second and third phrases at issue in this Statement are equally matters of opinion, but here CRTV maintains they imply defamatory facts. While the facts to be implied are left as unstated conjecture, the remarks themselves are at least substantially true; namely, that two judges — one retired sitting as arbitrator and one presiding over an enforcement proceeding — decided in Respondents' favor and the judgment remained unpaid at the time. As for attempting delay — that was an opinion and, in the absence of any payment of that portion of the award that was undisputed, it was a substantially true comment at the very least, which suffices to defeat liability under *Newport, supra*. Further, the observation that the "CRTV brought a suit that never should have been brought" and was then "punished" is again an opinion of a dissatisfied participant in the dispute resolution process, with the context expressly tied to the fact that he prevailed in arbitration and on appeal at that juncture. See *Penn Warranty*. The reference to "punished" is simply the "loose" language of a lay person and insulted from action under New York law. See *Dillon, supra*. The last remark at issue in this Statement about Mr. Dunn not working might reasonably be construed by a reasonable reader as a statement of fact. The evidentiary record reflects some truth in that regard in so far as full time employment is concerned. See, e.g., Rx-0005. Whether it is true enough to be

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[24] Only Statements 87, 89 and 91 were made after the partial satisfaction of judgment in early November, 2018. To the extent, if at all, that temporal difference may impact the analysis of those Statements, it is addressed separately. See discussion, *infra* at those paragraphs.

"substantially true" does not ultimately matter, for even if this remark is construed as a false fact by a reasonable reader, there is with this remark as with the others at issue in this Statement a persuasive record basis from which to find affirmatively a lack of malice, as defined by New York's Court of Appeals in *Kipper*, *supra*. Stated differently as an alternative ground for denying defamation liability in this respect, CRTV did not meet a clear and convincing evidentiary standard and so it failed to meet its burden of proof on the element of malice to support this defamation claim. Equally, there was no persuasive showing that Mr. Dunn should be identified with CRTV for purposes of meeting the *Adirondack* standard.

Statement 45 (Cx-0175): The claim of defamation here is based on the re-publication of a picture photoshopping a "pussy hat" on the head of Mr. Katz, which is claimed as both a false fact and opinion implying defamatory facts. The doctored photo expressly identifies "CRTV head honcho Cary Katz in his new pussy hat." At the same time, the text besides which the photo appears providing its context expressly references the prior Arbitration Award (Cx-0043)'s findings that included CRTV head honcho Cary Katz and his Chief Content Officer Chris Crane scoffing at "Pussy Steyn" and pledging to 'put this motherf++ker on the hook for everything.' Well, who's the pussy now? That's CRTV chief Executive Pussy Cary Katz at top right being fitted for his new hat, courtesy of the Evil Blogger Lady. Mark's report on this court triumph was, gratifyingly, our most read piece of the week"(to which it linked back). In this context, the *Adirondack* test, *supra* paragraph 25, is satisfied by linkage of the complained of activity with respect to the corporate executive to the company. However, it is equally the case that under New York law a "statement" like the "pussy hat" photo is not to be understood literally, but rather has an exaggerated, imaginative meaning that is not to be taken seriously. As such the "statement" qualifies under New York law as a "figurative" or "hyperbolic" epithet within the plain meaning of those terms, which brings it within the protected speech ambit of the *Dillon* standard; as such it is not actionable even if deprecating[25].

Statement 46 (Cx-0176): The initial reference in this string of comments between Mr. Steyn and readers is to a conversation with Cary Katz of CRTV within 24 hours of the loss. To the extent that Mr. Katz is there identified with CRTV and hence the referenced loss is by CRTV, that part of the statement is true — CRTV lost the prior arbitration. See discussion of Statement 38, *supra*. As for the next contested reference — "There's nothing 'strong' or 'conservative' about a (sic) opportunistic billionaire like Cary Katz" — that remark is purely personal; as such it does not meet the *Adirondack* test. Indeed, further context is given in the remark that follows by reference to enriching "him" — not them (which would include CRTV) — and is framed in contradistinction to CRTV ("...he doesn't care about it"). Alternatively, even if this remark did meet the *Adirondack* standard, it is an opinion, for there is no precise meaning that is readily understood in this context or way to prove the

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[25] Perhaps in recognition of the likelihood of this conclusion Claimant color coded the designation of the same photo of Mr. Katz in the "pussy hat" only as an act of contractual disparagement and not the tort of defamation in Statement 48.

characterizations' truth or falsity. The question, for example, of who or what is a "conservative" varies, even if some core values may be shared. In short, the *Brian* standard is not met. Similarly, the next reference in the Statement to two judges finding CRTV "guilty of wrongdoing & ordered them to make it right" is just a non-lawyer's "loose" way of saying CRTV lost and has to pay damages. Given the contextual reference to the arbitration damages the "loose" remark meets the *Dillon* standard, therefore evading being actionable defamation. The final aspect of this Statement at issue is the remark that "So the person who's hurting a 'fledgling conservative TV network' is its own boss. Don't get played for a sap by these 'phony' conservatives." As to the former remark about hurting the network, truth is a complete defense as is "substantial" truth under New York law. See *Newport, supra*. A public suit for twenty million dollars by CRTV's controlling owner alleging it can't pay him, with no contest on the claim or allegations, certainly has more impact than remarks by a person to a limited audience trying to collect a fraction of that amount. As for the admonitory remark about "phony conservatives," since it is in the plural it would appear to encompass CRTV as well as Mr. Katz, thus satisfying the *Adirondack* standard in that respect. The adjective certainly connotes not being genuine (See Rx-0561). However, the epithet is again clearly an opinion voiced to the reasonable reader in the specific context of the reference to the Nevada suit by Mr. Katz against CRTV to get his money back by another creditor who was dissatisfied with the dispute resolution system and his experience in it with Mr. Katz and CRTV — to the point of seeking to intervene in their public litigation. As in *Penn Warranty*, *supra*, the characterizations are "subjective expressions" of dissatisfaction with the Complainant. There as here the statements are not actionable because they are Mr. Steyn's opinion based upon his personal dealing with CRTV, of which the reader is informed through the contextual reference to the prior arbitration and nonpayment of the damages awarded.

Statement 48 (Cx-0178): The initial remarks challenged reference Mr. Katz as "the Great Patriot seems more like some sleazy bum that no genuine 'constitutional conservative' should be mixed up with." The context for the remark is to take CRTV's leading commentator's[26] characterization of its controlling shareholder as a "great patriot, and to rhetorically examine how great he is since very shortly before the remark he sued CRTV for twenty million dollars, in circumstances where he said he would never pay the judgment from the prior arbitration. A "bum" connotes an irresponsible or worthless person, while "sleazy" connotes an odious or contemptible person; together they certainly connote a repulsive person. See Rx-0561. Again, this characterization is advanced in the context of the controlling shareholder of CRTV personally deciding to sue his controlled company for failure to pay him upon demand twenty million dollars. The remark is expressly framed as a simile rather than as an accusation of fact. That imaginative juxtaposition does not rise to the level of defamation, but rather is nestled within the safe harbor of "figurative" speech under the *Dillon* decision, *supra*. The second reference challenged is again that of "great scofflaw and great deadbeat." Here, unlike Statement 38, the references are seemingly directed at Mr. Katz personally, at least viewed in the narrow context of where they specifically appear in the

[26] That commentator also is a shareholder in CRTV.

publication. Under the *Adirondack* standard that would not suffice to base a claim by CRTV for these remarks. But since the broader context of the article links Mr. Katz and CRTV, it would not necessarily be unreasonable for a reader to blur the distinction. However, even viewed as such, the claim suffers the same disability as that in Statement 38, and fails for largely the same reasons. In contrast, the next allegation pertaining to Mr. Katz personally deciding to leave Mr. Steyn on the hook for a few hundred thousand dollars in payroll and production costs for Steyn shows that were aired prior to the termination is a statement of fact. It also is true, as contemporaneous texts between Ms. Howes and Mr. Katz showed persuasively. Further, Mr. Katz never denied it. See Tr. at pp. 548-49. Likewise, the next statement asserted is that Mr. Katz also said he would never pay the arbitral award. That too was also true. Ms. Howes credibly so testified, and Mr. Katz never once denied it, vaguely testifying in response only that he was "negotiating". See, e.g., Tr. at p. 535. Finally, the last remark under attack in this Statement is again a "criminal" reference. The Statement reads: "Unless 'conservative' is a synonym for 'criminal', this man and his associates hold have no place on the American right." Once again the reference is phrased as a simile rather than as an accusation of fact. It falls under the privilege for statements that are "figurative" or "hyperbolic" as referenced in the *Dillon* decision. Finally, the Statement could not be reasonably understood as a specific factual statement that a serious crime had been committed by Mr. Katz and/or CRTV. Thus, it also fails to meet the requirements of the *Liberman* decision, *supra*, by the New York Court of Appeals. As such the remark does not even rise to the level of an opinion being asserted — unlike those in *Cardali* and *Penn Warranty,* discussed *supra*.

Statement 49 (Cx-0179): This Statement also seeks to hold Respondents accountable for calling CRTV "bums and scofflaws." The prior analysis for Statements 38 ("scofflaw") and 48 ("bum") control the disposition here for the same reasons. The context is clear here in tying the expression of dissatisfaction with the dispute resolution system that leaves uncontested damages from a "binding" arbitration award unpaid; it is a personal opinion based on personal experience as in *Penn Warranty*. A reasonable reader would not read these opinions as factual statements, and the reference to the arbitration and subsequent enforcement proceeding would leave no doubt as to the basis, eliminating any inference the view might be informed by undisclosed defamatory facts.

Statement 50 (Cx-0180): The initial observation that is contested here as to "Conservatism, Inc." being a "bust" is clearly a statement of opinion. As such it is privileged under New York law, consistent with the analysis above. The next portion of the Statement that is contested also fails to meet the burden of proof, albeit for largely different reasons. To explain, there is a reference to " CRTV's local enforcers)(a gang of criminals and criminal associates from Lake Placid) [who] attempted to intimidate female associates of mine." This diction could be reasonably construed as a statement of fact, rather than of opinion. The particular statements go on to reference them trashing the studio, including cutting through wiring and improperly removing fixtures and fittings. From there the remarks move on to a reference to CRTV "still bullying" with a threat to re-sue and intimidating warnings to female colleagues. Addressing

these references seriatim, each had its own flaws in terms of proving a basis for a viable tort claim. The word "enforcers" connotes an organized group keeping others in line, often through physical intimidation. The persuasive evidence showed that female associates of Respondents were subjected to efforts to intimidate (e.g. with the return of equipment pursuant to the prior arbitral award) for which there was no persuasive counter testimony from those involved. The evidentiary record adduced at hearing also made a persuasive showing that certain people in the group had criminal convictions of varying sorts, ranging from embezzlement to traffic related offenses. That CRTV used these people to perform tasks in connection with the wind up of the studio after the wrongful termination of Mr. Steyn was also uncontested. In sum, the persuasive evidence reflected "substantial truth" in the notion of a group, some of whom had criminal records, being employed by CRTV in connection with the unwinding of the studio and relationship, in fact intimidated some female associates of Mr. Steyn, and successfully left the studio unusable. As such, much of the complained of language fails to surmount the privilege hurdle of substantial truth under New York law. See *Newport, supra*. Yet, even if the remarks were fairly construed by a reasonable reader to connote a factual statement that CRTV employed a gang of organized criminals to this end, which would suggest a potentially serious crime such as assault, there was no persuasive evidence of such an understanding of that interpretation. Moreover, it too would suffer the same shortcoming of other statements above with respect to a failure to prove "malice" under the New York standard. See, e.g., Statement 42, *supra*. The evidence from CRTV at hearing was neither clear nor convincing that Mr. Steyn entertained serious doubts as to the truth of the remarks, or a high degree of awareness of probable falsity. As for the final reference in this part of the publication to "bullying," that characterization is clearly an opinion — initially that of a reader whose remarks were published, and then re-published and referenced by Mr. Steyn himself. The term is advanced in multiple references, but all pertain to the "fight" with CRTV; namely the prior arbitration and threats of another (come to fruition in this proceeding). Lastly, there is a reference to the CRTV "goon squad." The connotation in context is that of "thugs" hired to commit acts of intimidation in a dispute. See Rx-0561. Truth or substantial truth is a defense under New York law. See *Newport, supra*. While the record is unclear on why the individuals involved were hired, it is plain on the persuasive evidence how they behaved in certain instances ranging from placement of the Daily Beast "hit" piece to the treatment of female associates (e.g., returning items pursuant to the prior award), or at least how they were perceived to have behaved such that there is no persuasive showing of malice. The characterization is privileged.

Statement 52 (Cx-0181): The remarks are expressly tied to Mr. Katz' suit against "his own company to drive them into bankruptcy and make them broke enough that they'll never be able to pay me" (M.Steyn/MES). There is no dispute that Mr. Katz is sole controlling shareholder of CRTV; the statement is true in that respect. As to the remainder, it is clearly opinion, since it effectively is Mr. Steyn speculating as to the purpose of Mr. Katz in suing his own company, given the arbitral award debt of the company of approximately four million dollars to Mr. Steyn/MES and timing of the Nevada litigation filing for the day after affirmation of the arbitral award in New York. The evidentiary record reflects that the complaint in that litigation is replete with

allegations that CRTV admitted that it could not perform its obligations under the notes nor pay a twenty million dollar debt to Mr. Katz upon demand. The record also reflects CRTV confessing to judgment in that regard. In addition, the term appears entirely in the lower case without any initial capital, thereby suggesting the ordinary meaning of a simple inability to pay one's debts as they come due; that is, to be insolvent. Moreover, the contextual inquiry mandated by applicable New York law, as Claimant itself elsewhere contended, inexorably leads — by Claimant's own judicial admission to the complaint allegations — the conclusion that the litigation description is substantially accurate, fairly described and not misleading within a common layman's meaning of the term summarily employed. The publication is, therefore, privileged within Section 74 and as such it is not defamatory. Alternatively, for the reasons previously stated above as to other statements of opinion, this particular opinion is likewise privileged under New York common law. See *Gross, supra*. As to the remainder of the cited language in the Statement pertaining to Mr. Katz as "dishonorable" not a "great patriot" but rather a "great scofflaw and a great deadbeat," in the first instance these characterizations are advanced personally toward Mr. Katz. While he is tied to CRTV elsewhere in the article, he is not in these particular references. Whether a reasonable reader would tie the characterization to CRTV to these particular characterizations is open to doubt, as Claimant itself expressed in its Responses to a motion to compel. See paragraph 25, *supra*. Yet, even accepting as satisfied the *Adirondack* standard, the remarks in context are clearly an opinion based on an unsatisfactory personal dispute resolution experience in which debt collection is perceived as being jeopardized by what is in effect, at some level, a form of self-dealing. Once again, here as elsewhere in the Compendium, the decision in *Penn Warranty*, *supra* paragraphs 30 n.18 and 33 at Statements 38 and 42, controls the analysis. CRTV failed to meet its burden of proof in this respect as with the malice element as well even were undisclosed facts to otherwise imply defamation.

Statement 53 (Cx-0182): The contested remark here is a slight variation in context, but otherwise a verbatim restatement of the content in Statement 48 pertaining to "...CRTV is 'conservative' only if you think 'conservative' is a synonym for 'criminal'." The simile is privileged for the same reasons.

Statement 55 (Cx-0184): Mr. Steyn's publicized response to a reader who characterized the Katz v. CRTV suit as "sharp practice" in using the courts to avoid creditors invoked the specter of "collusion"and characterization of "sleazebag." As to the former, in the context of the response it is clear that there is an exchange of opinions, which for the reasons previously stated is privileged in the use here as elsewhere. There are no implied facts of a defamatory nature, as the reader thread of comments makes clear that the specter arises in the context of the controlling shareholder of CRTV suing CRTV for a debt which might or might not be discharged in bankruptcy, given it was an uncontested settlement of an alleged debt (ie. rather than equity) — to "secure it" as Mr. Katz testified at hearing. The unstated implication is that the secure debt would then come ahead of other unsecured creditors of a company, such as Respondents, in circumstances where CRTV did not contest the claimed inability to pay its debts. CRTV did not prove by clear and convincing

evidence that even if there were implied defamatory facts, Mr. Steyn harbored serious doubts of truth much less a high degree of awareness of probable falsity. As the persuasive evidence showed, the timing of the Nevada suit in juxtaposition to the enforcement litigation in New York, coupled with dispute resolution positions taken by CRTV, plus the potential to challenge the settlement as a "fraudulent transfer" — to transform what was arguably equity or unsecured debt into secure debt at a much higher rate of interest to the exclusion of debt to Mr. Steyn, MES and other creditors — gave him ample basis for a good faith belief in this regard. Indeed, the basic thrust of the motion to intervene was to prevent a "fraudulent transfer"under Nevada law. The motion is one of the linked documents to the publication, the remarks of which served as a "loose" summary by a non-lawyer of the litigation effort in Nevada based on his personal experience. As such, CRTV failed to meet its burden of proof and the remarks are privileged under New York law. Cf., e.g., *Dillon* and *Penn Warranty, supra*. As for the "sleaze bag" characterization, in the first instance the term is singular not plural, so it is far from clear that it is meant to apply to CRTV and not just to Mr. Katz given that it is framed in contradistinction to the company and referenced to the documentary context. Thus, it is a stretch tor a reasonable reader to have understood the characterization as applying to the company as well as Mr. Katz. However, even if the *Adirondack* standard is taken as met, the disposition and reasoning in Statement 48 above applies with equal force here to block the claim; it is not actionable

Statement 56 (Cx-0185): The remarks at issue in this Statement are largely a compilation of the same diction or import as prior statements with respect to "sleazebag scofflaw Cary Katz and CRTV's brazen attempt to evade their obligation to pay me...by suing themselves into pseudo-bankruptcy." Mr. Steyn went on to characterize the Nevada suit as "nothing more than a cover for the fraudulent conveyance of funds from CRTV to Katz." And finally closing with a flourish about the motion to intervene in the "deadbeat Katz's phony-baloney bullsh+t suit...."
As acknowledged above in Statement 55, the employment of the initial adjectives is in the singular not plural, so it would be reasonable to construe the characterization contextually as pertaining only to Mr. Katz and not to CRTV. Thus, the *Adirondack* standard would not be met. However, even if it is deemed satisfied, the same reasoning previously applied to these characterizations as opinions applies here. With respect to the remarks that they are attempting to evade their obligation to Mr. Steyn through self-suit into "pseudo-bankruptcy", there is no such thing, so it is privileged as a figurative statement or hyperbole under the *Dillon* decision, *supra*. As to the motive imputed, that is a speculative opinion or belief which is not reasonably viewed as a statement of fact by an objective reader. Finally, the characterization of the "phoney-baloney bulls'+t self suing suit" is again the expression of an opinion, with the self suit context providing the justification for the rest of the characterization connoting fake nonsense. New York treats opinions such as this as privileged, especially as here where the personal opinion is based on personal experience, with the publication providing context by linking to that dispute resolution experience. See *Penn Warranty, supra*. CRTV again fails to meet its burden of proof.

Statement 60A (Cx-0191): The reference to "sleazy scofflaw Cary Katz' decision to come back for more" appears in context to relate to CRTV's commencement of the present arbitral proceeding; as such this express linkage in the mind of a reasonable reader could satisfy the *Adirondack* test. However, for the reasons previously stated, the characterization does not pass muster as a defamatory comment, but rather is a privileged opinion under New York law. As such, there is no actionable defamation by the initial remarks of this Statement. The other language flagged by CRTV here as defamatory pertains to CRTV's head honcho taking time our of his hectic schedule of suing himself. While CRTV acknowledges the statement as one of opinion, it maintains there is an implication of defamatory facts. However, the reference to "suing himself" is linked to a prior article that, in turn, links to the complaint in the Nevada action in which Mr. Katz sues CRTV. There are no defamatory facts implied; after all, it is undisputed that Mr. Katz is the sole controlling shareholder who has ultimate say on such litigation, so in effect he authorized the company to settle with himself on the terms he set. In these circumstances CRTV failed to meet its burden of proof, as Respondents' credible proof met both the *Newport* (substantial truth) and *Kipper* (lack of malice) standards. At most the remark is a non-lawyer's "loose" summary of the Nevada litigation, which is not actionable under *Dillon* ("Loose, figurative or hyperbolic statements, even if deprecating of the plaintiff, are not actionable."). The last remark in this Statement references the "self-suing sleaze bag Katz." That reference is tied to a spoof "contest' arising out of the assertion of claims in this proceeding of defamation by certain song references that have been previously dismissed. The context does not make the reference to the sleaze bag opinion any more actionable here than in other Statements. See, e.g., Statements 48 and 56 *supra*. Similarly, the notion of "self suit" remains just a non-lawyer's "loose" summary of the Nevada proceeding, which is not actionable under *Dillon, supra*.

Statement 62 (Cx-0191): "File under collusion" is the sole remark challenged in this publication; it appears in response to a reader observing how quickly CRTV "folded" to Mr. Katz in the Nevada litigation and is juxtaposition to "The Verdict" with the scales of justice being held — a depiction previously held in this proceeding not to be actionable regarding the Prior Arbitral Award. The term "collusion" has a plain and ordinary meaning of secret cooperation, especially for an illegal purpose." See Rx-0561. The claim is that it is a "false fact". See Cx-0298. Whether regarded more aptly as opinion implying defamatory fact or a false factual statement, the claim falls short at least on the element of malice, thereby precluding a defamation finding. There is ample record evidence of Mr. Steyn's awareness of the unchecked voting control Mr. Katz exerted over CRTV; his sole authority to authorize the company to not contest this personal claim of its inability to meet his payment demand; the effort to "secure" this debt and thereby place it in front of unsecured creditors, such as Respondents seeking to enforce their prior arbitral award, in a manner that left the company with fewer assets than its debts; the timing of the filing of the Nevada suit on the heels of the New York court affirming the prior award enforcement; and myriad other facts, the effect of which collectively engendered a subjective belief on the part of Mr. Steyn that the "self suit" was a collusive "fraudulent transfer" in the legal sense of the term. That was the basis for his motion to intervene. As such, the persuasive record evidence did not

meet the "clear and convincing" *Kipper* standard of serious doubt as to the truth of the remark or a high degree of awareness of probable falsity required in a defamation claim against a public figure. See *Diario, supra*.

Statement 63 (Cx-0192): This Statement begins with yet another reference to "sleaze bag Katz." Since it is then linked to him declining "to be bound by 'binding arbitration'...and would never pay what Judge Gordon (the prior arbitrator) ordered, it meets the *Adirondack* standing requirement permitting CRTV to complain, since the award of damages was against the company. The initial opinion is privileged for the same reasons as previously stated. From the Compendium, it appears that the latter observation is challenged as a "false fact." However, the persuasive record evidence shows that CRTV failed to pay or make any offer of payment of the part of the damages award that it did not challenge prior to the partial satisfaction payment on that aspect of the damages awarded in November 2018. As of May 1, 2018 when the Statement was made, there was substantial truth in it, for the record evidence was persuasive that Mr. Katz made the remark and he never denied making it in his testimony. See discussion at Statement 48, *supra*. There is, therefore, no defamation for truth or substantial truth is a defense. See *Newport, supra*. Thereafter, the remarks go on to voice the opinion that "The poker guys seem to pick up the stink of Katz rather more easily than his talent at CRTV does..." The question is whether this opinion implies defamatory facts as the Compendium asserts. However, the Compendium summary omits the context; the comment is made following the extended quote excerpted from an April 30, 2018 pokertube.com article that is linked in full to it for the reader. There are, therefore, no undisclosed facts pertaining to the opinion voiced about the "stink" for the source of it is disclosed fully. See *Gross, supra*. The persuasive record evidence shows that CRTV did not meet its burden of proof once again.

Statement 64 (Cx-0193): Multiple remarks are challenged in this publication. The first remark is a reference to Mr. Katz stating that CRTV would never pay the prior arbitral award. This appears to be challenged as a false statement of fact. However, as noted above in Statement 48, *supra,* Mr. Katz never denied making the statement and there was credible evidence he did so; in any event CRTV failed to meet its burden of proof in this regard. The second set of remarks are also tied to the assertion of nonpayment despite the rulings of two judges, to which is added the characterization of Mr. Katz as a "creep." The nonpayment aspect of the remark has already been dealt with above, as has the reference to the rulings of the two judges (See Statement 42, *supra*). That leaves only the characterization of Mr. Katz as a "creep." Clearly that label is one of opinion; it connotes a very annoying person. See Rx-0561. The context of the source of annoyance is provided and there are no implied defamatory facts that are unstated. Similarly, the characterization in the next remarks referencing Mr. Katz as a "boob" is likewise opinion, connoting a foolish or stupid person. See Ibid. The context for the remark is Mr. Katz' Nevada suit the day after the prior arbitral award was upheld in the New York court. To the extent that context is also asserted as actionable (e.g. driving his own company into "pseudo-bankruptcy" it was basically addressed and found to be non-actionable with respect to similar employment of just

the word "bankruptcy.". See, e.g., Statement 52, *supra*. Adding a hyperbolic modifier makes it no more actionable under *Dillon, supra,* since there is no such thing. The next set of remarks challenged include references once again to Mr. Katz as a "scofflaw and deadbeat" for the non-payment of the prior arbitral award, all of which are non actionable per the analysis above. The only new characterizations is analogizing Mr. Katz to a "deadbeat dad" for his noncompliance as founding father of CRTV with the "support" obligation imposed by the prior award. Given the linkage of the characterization of the failure to cause CRTV to pay even the acknowledged debt(s) owed, the *Adirondack* standard is satisfied. Still, this rhetorical hyperbole, including the "milk carton" imagery (which was not proven to have occurred in fact), is equally non actionable for the reasons previously stated pertaining to "deadbeat'. See also *Dillon*, supra. Claimant also seeks to hold Respondents responsible for the statement's re-publication of a reader's remark that referenced Mr. Katz and CRTV's "unbelievable shadiness and litigiousness." The Statement continues, in sum, with references again to breaking the contract (BTS) and refusal to be bound by the result of the "binding arbitration." The Statement closes this discussion with the observation that the other CRTV hosts ought to be aware by analogy that if his contract is worthless so are their respective contracts with the scofflaw and deadbeat. Here CRTV again fails to meet the high standard of its burden of proof with respect to this mixture of old and new remarks. The "shadiness" epithet follows the discussion of refusing to pay the prior award upheld at the time despite a vacatur challenge. It is protected opinion. The litigiousness comment also follows the prior discussion of multiple dispute resolution processes in the courts and in arbitration. Given the multiple suits/arbitrations flowing out of the BTS and short lived commercial relationship, this aspect of the comment is at least "substantially true" and thus privilege under *Newport, supra,* even if viewed as a statement of fact rather than of opinion. In any event it would be non actionable under *Penn Warranty, supra*. As for the remarks by Mr. Katz about nonpayment, they have already been found to be true based on the persuasive evidence adduced at hearing in this proceeding. The repeated characterizations of "bum," "scofflaw" and "deadbeat" all are controlled by the prior disposition above in this context as well. The additional remarks asserted as defamatory in this statement are two references to CRTV as a criminal outlet and organization. They arise in the context of a reader suggestion that Respondents take ten percent of the award and let go the rest owed by the fledgling conservative media network. Once again, under New York law, in the absence of serious crimes being asserted with express or implied specificity by the context, the hyperbolic characterization is not actionable. See, e.g., *Cardali and Gross, supra*. Finally, the factual reference to "gang rape sabbatical" and Mr. Katz is not tied expressly to CRTV, but rather field research (for what was to be a book.) However, the "sabbatical" reference could potentially be tied by a reasonable reader to time away from the Mark Steyn Show on CRTV controlled by Mr. Katz. Assuming the *Adirondack* standard was met, there was still, at a minimum, a failure of clear and convincing proof of malice. CRTV's failure to meet just that element of the defamation standard suffices to dispose of that claim, and obviates the need to go into the rest of the analysis.

Statement 65 (Cx-0192): This Statement repeats the claim about "sleazebag Katz" declining to be bound or pay the damages Judge Gordon ordered, as well as the "stink" reference. These remarks are not an actionable basis for a defamation claim for the same reasons as found with regard to Statement 63.

Statement 65A (Cx-0194): The references here to "scofflaws" and "sleazy business partners" at CRTV breaking the contract (BTS) and refusing to be bound after losing are addressed above as to the opinion characterizations and the specific context here does not dictate a different result. Hence, they are not actionable. That leaves only a further reference at issue; namely, "I promise that we shall be around long after CRTV is gone...." First, that is clearly an opinion. There was no way as of May 1, 2018 to prove the truth or falsity of that boast, which the record evidence eventually proved substantially true approximately seven months later[27].

Statement 66 (Cx-0195): This figurative statement about the "Scofflaws and Deadbeats Debt Clock," made on the home page of SteynOnline is alleged to have been posted on May 7, 2028, was privileged under New York law. See *Dillon, supra*. The claim, however, goes on to allege in the Compendium that the webpage remained posted through 10/3/18 when a New York court vacated part of the prior arbitral award. Yet, there was no proof that there was in fact a continued posting of the clock such that the Compendium statement could be said to be omitting facts then. Accordingly there was a failure of proof in that regard by CRTV. At the same time, even if proved, the New York litigation remained ongoing at that subsequent time; neither side had as of the October date changed positions on what was then a non-final judgment over particular disputed issues. Claimant advanced no New York or other precedent that would impose as of that date a legal duty to change the clock to admit to a position with which Respondents disagreed and as to which there was an ongoing legal challenge. The Claimant failed to prove an actionable claim under New York law.

Statement 67 (Cx-0196): This Statement initially references once again the characterization of Mr. Katz as a scofflaw deadbeat owner. The remark continues by linking the characterization to CRTV. As such, the context provides enough connection to satisfy the *Adirondack* standard, thereby permitting a complaint by the company. However, the rulings on these privileged opinions, as well as a factual statement of nonpayment by Mr. Katz despite rulings by the prior arbitrator and reviewing judge, remain the same as above. Thus, the only remaining issue in this Statement is the additional remark stating that: "Apparently, @crtv's definition of 'constitutional conservatism' doesn't include outmoded concepts like the rule of law." Once again, this remark like others is an opinion, but CRTV complains it implies a defamatory fact. However, the factual context is provided and there is no room for a reasonable reader

[27]Thus, even if the opinion is regarded as somehow implying defamatory facts, the record evidence shows that CRTV changed its name by December 1, 2018 to Blaze Media and no longer does business under that name or otherwise brands itself as CRTV. In that sense, even if one grants that there is some factual implication it proved true. Accordingly, even if the statement remained published to December, 2018 it met the *Newport* standard.

to draw the inference that there is an unstated source for the remark. As such, CRTV fails to meet its burden of proof. See *Gross, supra.*

Statement 68 (Cx-0197): The initial contested remark here is in reference to a six figure sum owed for production and payroll expense incurred with certain Mark Steyn Shows that were aired by CRTV. The Compendium labels it as a false fact. However, the persuasive evidence reflected both that CRTV did not contest that debt (but rather refused to pay it, maintaining it was offset by the much larger damages to which it was entitled) and, further, the prior arbitrator determined the debt was owed and awarded damages based on it. See Cx-0043 at pp. 15 and 17. See also *Newport, supra*. The balance of the remarks challenged pertain to the "cat tree" from the show, which was prominently on display through the evidentiary hearings in this proceeding. The removal of the cat tree by CRTV's personnel was characterized as "stealing". As such it was an un-permitted taking for a short time before returning it. There was no recitation in the article of the cat tree having value other than that of sentimental attachment (for a now dead cat). The reaction chronicled in the posting was one of never having been so "exhaustively assailed." As such, the rhetorical hyperbole does not extend to suggesting that a serious crime had been committed. Thus, once again this claim like those of "criminality" above are not actionable for defamation, as it fails to meet the New York standard. See *Cardali* and *Gross, supra*. The final remark at issue in this Statement pertains to the "shabby and dishonorable CRTV" resisting compliance with the prior arbitral award and subsequent enforcement affirmation in the New York court. In this context the characterization is privileged opinion. The context is clearly stated and not left to the reader's imagination. That a word like "dishonorable " is used certainly connotes a lack of moral acceptability that brings shame. (See Rx-0561). But as New York law establishes, the deprecating effect is not the test. See, e.g., *Gross, supra.*

Statement 68A (Cx-0197A): The initial remark at issue is a reference to three "crappy" pilots, none of which went anywhere. The use of the term "crappy" is opinion and privileged as such — there being no contextual intimation that there were unexpressed facts implied in the assessment. See *Gross, supra*. In contrast, the second and third observations seem closer to being factual observations; namely, that the pilots went nowhere and that two members of the CRTV team ran into unemployment benefit problems with the Sate of Vermont. The record reflects persuasive evidence that those assessments to be true or substantially true, such that neither is actionable under the *Newport* standard in New York, as CRTV failed to meet its burden of proof.

Statement 70 (Cx-0198): The initial statement CRTV seeks to challenge is another characterization of CRTV "deadbeat scofflaw Cary Katz's decision to come back for more." The characterizations, as noted previously, are not actionable under New York law for the reasons previously stated and the context, which is disclosed, is tied to the past and pending claims against Respondents. The second reference challenged is tied to the present action and the Nevada litigation, along with reference to two other Statements previously addressed and found to be non-actionable for

defamation. As with those other statements, these references, too, fail to surmount the New York high hurdles to prove a defamation action, as explained earlier. The final reference is again to "self suing sleaze bag Katz." The context sufficiently links him to CRTV as a continuation of the prior thought for *Adirondack* purposes. However, for the reasons previously stated, these repeated characterizations are not actionable as opinion and the facts on which the opinion is based are sufficiently transparent on the face of the statement as well as though the links provided to satisfy the *Gross* test. In any event, the challenged comments are all presented in the context of a figurative contest which is protected under New York law. See *Dillon, supra*.

Statement 71 (Cx 0200): This statement made two days after Statement 70 repeats the same language contested through Statement 70, which is not actionable for the same reasons.

Statement 73 (Cx-0202): These repetitive remarks again seek to assert a defamation challenge based on the characterization of CRTV's boss Mr. Katz as a "scofflaw" who broke his contract and the "bums" are now refusing to abide by orders of two judges. This reply to the comments of readers references the prior arbitration award, which was upheld (in full) at the time by the New York Supreme court as the context for the remark. The "scofflaw" characterization here again is privileged opinion under New York law for the reasons previously stated, and the reference to the broken contract is true based on the conclusion of the prior arbitrator (Cx- 0043 at pp. 14 and 20). The participation of Mr. Katz is well reflected in the credible evidence of his sole voting control over CRTV and operational approval involvement. The additional reference to the "bums" refusing to abide by the orders of two judges is both a privileged opinion, as previously determined (See Statement 48) as to the former remark and, as to the latter, a "loose" and substantially true summary by a non lawyer that is not actionable in New York under the *Dillon* and *Newport* decisions.

Statement 74 (Cx-0203): Here Claimant seeks to assert as defamatory the phrase"second prize is (all together now) two subscriptions." This particular posting is one of a series in which a contest spoof "figuratively" awards spoof prizes in connection with the "song of the week" essay that by separate order was found to be non-actionable here under New York law. While Claimant challenges none of the other instances in which this same reference appears as defamatory, that inconsistency aside, the statement is not actionable under *Dillon* as "figurative" and rhetorical "hyperbole."

Statement 75 (Cx-0204): This statement begins with a reference to "Sleazy CRTV." Employment of the characterization is no more actionable opinion than it was in the earlier context above when it was rejected as non-actionable. See Statement 48, *supra*. Here the reader is left with no conjecture but that it is an opinion voiced in the dissatisfied context of multiple disputes resolution processes. See Statement 48 and *Penn Warranty, supra*. The further references at issue are to the "deadbeat" Mr. Katz suing CRTV — "in other words, suing himself to make his own company sufficiently bankrupt to be unable to pay us. This devious maneuver has attracted little attention

from the conservative media, but the poker press is all over it: ..." A combination of factors preclude CRTV from meeting its burden of proof here. First, yet another attribution of being a "deadbeat" fails for the same reasons as at the outset of this analysis in Statement 38. Second, the reference to suing oneself to make his company sufficiently bankrupt is also previously plowed ground. The analysis for Statements 52, 60A and 62 suffice to cover advancement of the same privileged message here. Finally, the characterization of the legal maneuver — that is, suing the company in which you own a controlling interest such that it does not contest a twenty million dollar debt to you since it is unable to pay it to you on demand and you will not cause it to pay — as "devious" with the poker press is all over it withstands defamatory challenge for two reasons at least. First, in this context "devious" connotes a "showing of skillful use of underhand tactics to achieve goals." https://en.oxforddictionaries.com/definition/devious. That statement is one of opinion, based on Mr. Steyn's personal experience, as in *Penn Warranty,* and sufficient context is provided by link both to poker press articles and to the motion to intervene filed in the Nevada action so that there is no nondisclosure issue under *Gross, supra*. Further, no evidence was introduced showing the conservative press, however comprised, to be addressing the Nevada litigation. As such, the latter statement on the present record is either true or substantially true per *Newport*, or a failure by CRTV to meet its burden of proof — either way the record evidence justified the defense to the claim in that respect as well.

Statement 75A (Cx-0204A): Here the litany of adjectives ascribed to CRTV's CEO, Cary Katz, is almost a complete summary of the characterizations previously advanced in myriad publications by Mr. Steyn[28]. The terms "scofflaw, deadbeat sleaze bag self-suing bum" are all employed seriatim. They all suffer the same disabilities in proof chronicled elsewhere with respect to other statements employing them above and are not any more actionable here. Similarly, the notion of the reference to "CRTV's total defeating and my victory" is as true in this statement as it was in Statement 38 above, and just as privileged under New York law. The notion that an overlap between SetynOnline aficionados and fans of certain CRTV hosts as being defamatory is mystifying in circumstances where CRTV claims it lost customers because of Steyn's comments — necessarily implying that there was an overlap between some of its customer base and Steyn's — but CRTV failed to meet its burden of proof in this regard. That leaves only the additional reference to Mr. Katz as "seedy" and the enduring image of not being able to "draw sweet water from a fouled well, and right now Katz's fetid sewage is dripping all over CRTV." As for the former, the notion that Mr. Katz is "dishonorable", as the term connotes — see https://en.oxforddictionaries.com/definition/seedy — was also tested in Statement 52 and found to be deficient under New York law. The substantial same opinion is employed here through a different word, but the opinion remains privileged in this context as well

[28] Apparently inspiration did not strike until months later for Mr. Steyn to call Mr. Katz a "dummy" (see Statement 79 dated August 12, 2018), but that characterization apparently was not regarded as defamatory, for it was only coded in the Claimant's Compendium in the color green, signifying disparagement that did not rise to the level of common law defamation. There are some additional examples that also follow temporally and which are addressed in due course.

for the reasons previously stated. Equally, the "figurative" and "hyperbolic" imagery of the metaphor employed in this Statement with respect to the well is also protected under New York law. See *Dillon, supra.*

Statement 75B (Cx-0215): This claim invokes the re-publication of an introductory remark by Lord Black at a dinner honoring Mr. Steyn[29]. There was a failure of proof by CRTV that Mr. Steyn in any way caused Lord Black to characterize Mr. Katz as an "absolute scoundrel." The credible evidence indicated there was no collaboration in this regard[30]; CRTV failed to meet its burden of proof for the claim it made. As the full remarks of Lord Black make clear that CRTV itself cites (not in the Compendium but only in its request for relief), he is talking about Mr. Katz's "character and personality" — not that of CRTV. Even though the remark was delivered in reference to them doing business together — which was the BTS through their respective corporate entities— it was not stated as such, but rather personalized. There is, therefore, ample basis to find that the *Adirondack* standard was not met here in this context, so CRTV failed to meet its threshold burden of proof in this regard.

Statement 76 (Cx-0205): Invoking a card-playing (blackjack) metaphor of "doubling down," Mr Steyn is accused of defamation here for his characterizations of CRTV's "lawlessness" and "mendacity" for refusing to be bound by the judge's award of damages. In short, the remarks connote behavior that is not controlled by law (See Rx-0561) and falsehood. This language is opinion and the context makes it sufficiently clear that the characterization is tied to the finding of breach and award of damages in the prior arbitration. As such, there is "substantial truth" in the characterization as well under the *Newport* test, for at least one CRTV witness (Kullman) was expressly characterized as lying by the prior arbitrator (Cx-0043 at p. 12), others were not believed, and the termination was found to constitute an unlawful material breach by CRTV. See *ibid*. The next remark at issue is that within days of the CRTV defeat being in the public domain, two new suits were brought against Steyn/MES seeking a total of twenty million dollars. It is noteworthy that the record reflected five million (later ten) plus punitive damages initially sought (later withdrawn) in this arbitration, and an initial expert report, later withdrawn, on which to base a claim of fifteen million dollars in the Nevada action (See, e.g., Tr. at pp.832-33), in which case punitive damages were also sought. Thus, there was "substantial truth" in the remark about the suits and damages sought; hence they were privileged under New York law. See *Newport, supra*. Even if the statement did not rise to that level, CRTV failed to meet its high burden of clear and convincing proof in showing malice in this respect. See *Kipper, supra*. The subsequent reference in the article to "deadbeats" CRTV and to the "collusive" Katz

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[29] The Compendium reflects the comment as provided in Answer 2 to Interrogatories in the Nevada litigation. However, the claim is not based on publication in the interrogatory response, but rather the actual remark as delivered at the Toronto award dinner, and perhaps also subsequently in an article subsequently published by Lord Black in Canada.

[30] Indeed, CRTV relies on the testimony as given (rather than as a product of collusion) to try to prove one aspect of its damage claim. See Statement of Relief Sought at p.6 paragraph 3(B)(2).

and CRTV as defendants in intervention are previously addressed and controlled by the analysis and reasoning for Statements 38, 55 and 62, *supra*. The next remark at issue in this Statement is to Katz and his sock-puppet 'Galaxy Media' sharing the same 'manager' and the filing of multiple "fraudulent UCC claims" against CRTV. Any corporate claim for being called a "sock-puppet" entity belongs to Galaxy Media, not to CRTV as previously determined. Hence, there is no actionable remark in this regard under the *Adirondack* standard. Further, the thrust of these statements again was a "loose" summary of investigatory evidence offered in the Nevada proceeding to support the effort to intervene in the Nevada litigation between Mr. Katz and CRTV. See Ex. 3 to Reply to Motion to Intervene, which was linked to the publication and which provides unmistakeable context for the reasonable reader. With respect to the characterization of Mr. Katz as a "frivolous litigant", the context would indicate to a reasonable reader that the reference is to Mr. Katz' personal litigation, as the assertion is made in juxtaposition to other entities (characterized as shells). That characterization is personal and not the source of a corporate claim for CRTV per the *Adirondack* decision. In contrast, a reasonable reader could well conclude that the reference to"shells" of Katz controlled entities would include CRTV; therefore, to the extent the defamation claim is based on that characterization, it does meet the *Adirondack* test. At the same time, that context for the statement includes the Motion to Intervene in Nevada and related documents that were linked to the publication. They provide the litigation context for the opinion that CRTV was being treated merely as a shell. The remark is privileged in New York as such, for it is a short hand reference to a litigation position plead in Nevada and reflects Mr. Steyn's non-lawyer opinion as of the time it was made there. The final remark protested is the request that Mr. Katz and CRTV stop their "legal terrorism." Here the stated context for the remark is the multiple ligations and arbitrations commenced against Respondents. The opinion connotes that the use of the dispute resolution process in that way is an unlawful use calculated to intimidate[31] — See e.g., https://en.oxforddictionaries.com/definition/terrorism — here through legal process. The comment is privileged opinion under New York law. See, e.g. *Dillon, supra*

Statement 77 (Cx.-0206): The initial remark as to which issue is taken on a defamation theory in this publication is that "Katz and CRTV have re-sued me in multiple jurisdictions this time for a combined $20 million." The statement is not defamatory; it was substantially true, as the record evidence reflected, or otherwise not actionable as found in Statement 76, for CRTV did not meet its burden of proof regarding malice. The next set of remarks takes issue with the characterization of an unnamed "he" as a "depraved goon"— where the continuing context of the piece would allow a reasonable reader to conclude it was Mr. Katz who was referenced, but with the explanation tying the remark to his control over CRTV. Viewed as such the *Adirondack* standard was met. Nothing in the context suggests the meaning of "goon" as a "thug" or "ruffian" but rather as a "stupid" or "foolish" person. As for the modifier "depraved," the ordinary meanings of morally corrupt, wicked or perverse comes

[31] Whether it is or not may be reached in the second phase of this arbitration addressing the counterclaims.

through loud and clear. See Rx-0561. In combination, the portrait is hardly flattering, but the inability to base a defamation action on it for CRTV under New York law rests on the fact that it is clearly an opinion based on personal experience in the dispute resolution process with Mr. Katz and nothing else. As the decisions in *Cardali, Penn Warranty* and myriad other New York cases involving offensive statements make clear, an expression of opinion with the context provided cannot be the subject of an action for defamation. As for the remarks that immediately follow this characterization pertaining to financial consequences of the CRTV material breach of the BTS, they are true or substantially true as both the persuasive evidence at hearing and the findings of the prior arbitrator (See Cx-0043) made clear. CRTV did not meet its burden of proof on these factual statements to make any of them actionable for defamation. Further, this statement next references a "dirty man's dirty money"....Here the connotation from the context of the prior suits is that there is no interest in utilizing money to other ends that has been unlawfully or immorally retained by a immoral or dishonorable man. See Rx-0561. The characterization is thus linked to CRTV's failure to pay, which ties the corporation sufficiently to the remark to be able to assert a claim that meets the *Adirondack* standard. However, once again the remark is one of opinion, however offensive to those on the receiving end, that is clearly contextually tied to unpaid damages awarded in the prior arbitration. As such, the context does not suggest to the reasonable reader any implied facts that are being concealed. Rather, that context is tied further to the remarks attributed to Mr. Katz that he would never pay, which as noted above the credible evidence substantiated, especially in the absence of any denial by Mr. Katz. It is at that point that Mr. Steyn "piles on" the characterizations previously used in relation to Mr. Katz with new epithets — "dishonorable, unprincipled, thieving sociopathic" added to his repeated use of "bum." The latter term has been previously addressed, and the context of this remark does not make that word any more actionable now than in the context previously addressed. See Statement 48, *supra*. While the diction is different, at least with respect to the words dishonorable, unprincipled thieving, the message, meaning and context of these opinions are essentially the same as for other language previously determined to be privileged. See, e.g., Statement 75A. Nor is there any material difference in context, as none suggest or invite a reaction of undisclosed defamatory facts, Each epithet is made in th context of Mr. Steyn's personal experience in the arbitral and related ligation experiences. They are privileged opinion in New York. See, e.g., *Penn Warranty, supra*. The only new twist provided in this challenge is that of "sociopathic". While that term basically connotes aggressively antisocial behavior and perhaps a personality disorder, See Rx-0561, the context for this opinion is transparent, since it is expressly tied not only to the failure to pay the arbitral award, but also to the remarks attributed to Mr. Katz and not denied by him about never paying the award, which remarks have been found herein to be true or substantially true. See *Newport, supra*. What Mr. Katz termed "negotiation," Mr Steyn terms sociopathic, especially when coupled with the additional litigation and arbitral proceedings commenced on the heels of the conversation as referenced in the publication. The context for the opinion of Mr. Steyn is fully stated and nothing else is fairly implied to a reasonable reader. Thus, under New York law the remark is one of opinion with sources stated is not defamatory. See *Gross, supra*. The final remark contested is Mr. Steyn's "we'll see about that"

taunt with respect to CRTV never paying. That rhetorical device is but another way of a layman saying that is a matter for the New York courts in which that contest was and is taking place. There is nothing defamatory about it, for the remark, so construed, was true when made. It is, therefore, privileged under New York law. See, e.g., *Newport, supra*.[32]

Statement 79 (Cx-0208): In this Statement the sole claim of defamation pertains to the publication of a reader's comment that references CRTV founder/owner Cary Katz's "henchmen." The term's ordinary meaning primarily connotes a trusted helper or follower, but can extend to those who would do service through crime or violence. See Rx-0561. There is no context provided that suggests the extended meaning here. Rather, the context is simply that of a debt owed that should be paid and the failure to do so could not be good for business. In any event the characterization is one of opinion and there is no basis in the context for implying undisclosed facts of a defamatory nature. Hence, the speech is privileged. See *Gross, supra*.

Statement 80 (Cx-0209): Here the operative terms complained about have appeared previously; namely deadbeat and sleazy as modifiers to CRTV's Mr. Katz. The context is no different than that for other statements containing those terms, for the publication expressly links the context to the multiple dispute resolution cases involving CRTV/Mr. Katz and Respondents. With no hidden source to be implied given the context provided, these characterizations — as with the others, See e.g., statements 38 and 48, *supra* — do not constitute actionable defamation under New York law as opinions. See *Gross*, *supra*.

Statement 81 (Cx-0210): In this Statement reference is again made to "goons" serving Mr. Steyn with a defamation suit. As with Statement 77, the characterization is one of opinion delivered in a stated factual context (service of process while present to intervene in the Nevada litigation between Mr. Katz and CRTV) that would provide no reasonable reader a basis for inferring unstated implied defamatory facts. As with other such statements, (e.g. Statement 77), there is no persuasive basis under New York law for finding that CRTV has met its burden of proof. See, e.g., *Gross*, *supra*.

Statement 82 (Cx-0211): This Statement repeats the references to CRTV continuing not to admit loss of the prior arbitration by paying up, combined with the characterization again of "deadbeat" and "sleazy" applied to CRTV's Cary Katz. The context provided is once again the "handy guide" linking the reader to records from the multiple suits and arbitrations. As such there is no basis for a reasonable reader to imply unstated defamatory sources of fact for the opinions. There is nothing in the context that makes these repeated claims any more actionable under New York law than the prior use of the phrases in earlier statements. See,e.g., Statements 38 and

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[32]In fact, on the undisputed record in this proceeding, by early November, 2018, about four and a half months later, CRTV did partially pay a seven figure portion of that prior award.

48. CRTV again fails to meet its burden of proof. See *Gross, supra* note 17. See also *Dillion and Penn Warranty, supra*.

Statement 83 (Cx-0212): The remarks at issue in this Statement basically repeat the prior characterizations of "scofflaw, deadbeat, criminal, sleazy bum" with respect to Mr. Katz that were complained of elsewhere. The context, as previously, is that of the ongoing dispute resolution process with CRTV and Mr. Katz. As such the *Adirondack* standard is satisfied to permit the claim being advanced for the company. However, there is nothing on the context that makes any of these repeated characterizations actionable under New York defamation law than when originally made in earlier statements in which the claim has ben held to be non-actionable in New York. The only unique twist here is that there are additional references to the filing of "15" and "a gazillion" different suits against Mr. Steyn. Under New York law hyperbolic statements are insulated from actionable defamation. Here a reasonable reader would recognize from the context that these statements are rhetorical exaggeration that was not meant to be construed as statements of false facts. CRTV again fails to meet its burden of proof under New York law. See *Dillon, supra.* Indeed, from the context it would be impossible for a reasonable reader to take the remarks literally. See also discussion of Statement 36 above with respect to "gazillion," including the prior order precluding use of the term as a basis for a defamation claim in this proceeding.

Statement 84 (Cx-0213): Multiple remarks come under attack in this Statement. The starting point is the repeated reference to doubling down "on their lawlessness and mendacity and refused to be bound by the judge's award of damages." There is no meaningful difference in context here than in Statement 76 where the remark was held to be non-actionable under New York law. The next contested remark is the reference to Mr. Katz as a "vexatious litigant. The stated context for the opinion, which connotes one who causes distressing delays, irritability or annoyance — See, e.g., https://www.urbandictionary.com/define.php?term=Vexacious and https://www.merriam-webster.com/dictionary/vexatious — is expressly tied to the many cases filed against Mr. Steyn by Mr. Katz and CRTV. The characterization is one of opinion with disclosed source and nothing to be implied by the reasonable reader. Hence, the remark is not defamatory under New York law. See *Gross, supra*. The third remark advanced in support of the defamation claim through this publication is once again the characterization of getting the "deadbeats CRTV" to pay up. The context is plain and the opinion characterization, as previously, is not actionable as defamation in New York. See Statement 38, *supra*. This Statements' third area of contention arises from the "figurative" image employed of Mr. Katz's "self-suing buttocks" in Nevada "where his left buttock is suing his right buttock" and continues into "pseudo-insolvency" as a "fraud upon the court" through a "collusive" self-suing "legal terrorism" by a "frivolous litigant" to evade the prior arbitral award and public scrutiny (through record sealing). Most of these remarks again seek to plow familiar terrain. The figurative "buttock" language defeats a defamation claim per *Dillon* as previously stated. The reference to "pseudo-bankruptcy" has already been decided as legally permissible, as has the reference to "collusion," "phony" and "legal terrorism" references. See Statements 55 and 62 (collusion); 56 and 64 (pseudo-

bankruptcy); Statement 46 ("phony"); and Statement 76 ("legal terrorism"). The context here is not meaningful different from those prior statements. The "fraud upon the court" characterization is made in the context of the Respondents' motion to intervene in the Nevada litigation between Mr. Katz and CRTV; a link to that motion, which reflects a fraudulent transfer claim in violation of Nevada law, provides the context for the statement. Similarly, the final remark at issue repeats the claim based on a reference to "fraudulent UCC filings" by the "sock puppet" Galaxy Media. These remarks are a "loose" summary of the motion and exhibits thereto provided by a non-lawyer and, as such, is privileged per *Dillon* and *Penn Warranty*, *supra*. Those remarks, as well as the "sealing" reference, are specifically linked to Nevada pleadings and an order of the court. Given the express context they are not defamatory for a reasonable reader as they do not implying unstated facts, but instead link the court record as the source. See *Gross, supra*. *See also* Statement *76, supra (*"sock puppet"*)*. The next reference at issue is the "bogus self-suing stunt." The "self-suit" aspect of the phrase was previously addressed in Statement 52 and elsewhere; that analysis continues to control in this context. As to the remaining diction, "bogus" connotes something "not genuine" or true (See https://en.oxforddictionaries.com/definition/bogus) and "stunt" connotes an "unusual or difficult feat" ( https://en.oxforddictionaries.com/definition/bogus). The meaning is substantially the same as that provided with the analysis of the characterizations of the Nevada litigation and related UCC filings. See,e.g., Statements 52 and 55. See also statements 56 and 64. The other remarks at issue pertain to a new characterizations of Plaintiff Katz as an "extortionist" and "grifter.' The connotation for the former here is of one who seeks to obtain something by threat. See Rx-0561. The basis for the remark is stated, which expressly links it to the CRTV damages from the prior award, thereby satisfying the *Adirondack* standard. Under New York law, the opinion characterization advanced is not actionable. See, e.g., *Pecile v. Titan Capital Grp., LLC,* 96 A.D.3d 543, 544, 947 N.Y.S.2d 66, 67 [1st Dept. 2012] (holding that "the use of the term 'shakedown' did not convey that defendants 'were seriously accusing [plaintiffs] of committing extortion' " [internal quotations and citation omitted] ); and *Trustco Bank of N.Y. v. Capital Newspaper Div. of Hearst Corp.,* 213 A.D.2d 940, 942, 624 N.Y.S.2d 291, 294 [3d Dept.1995] (holding that a newspaper's use of the word "extortion" to describe a lawsuit was non-actionable opinion). There certainly is no suggestion — express or implied — that the serious criminal offense of extortion has been committed, as is required to constitute potentially actionable defamation. See *Caraldi, supra*. Alternatively, to the extent there is a swearing contest between Mr. Steyn and Mr. Katz on this issue, the weight of the credible evidence at hearing is with Mr. Steyn, as Mr. Katz again — as with the conversation with Ms. Howes, see Statement 48, *supra* — did not expressly deny it, but instead focused on other aspects and characterizations of the particular conversation. CRTV did not, therefore, meet its burden of proof and defamation claim fails in this respect. As for "grifter" the context for this re-publication of a reader's adaption of lyrics alludes to Mr. Katz coming back with more litigation. As a "figurative" remark there is no defamation liability in New York under *Dillon, supra*. Alternatively, the term connotes obtaining money illicitly by a petty swindler. Since the lyrical context links Mr. Katz to suing again the very next day, a reasonable reader would understand it as a reference to his suit against CRTV in Nevada immediately

following issuance of the New York court's affirmation of the arbitral award enforcement action, both of which are linked earlier in the publication. There are, then, no hidden sources from which a reasonable reader would imply defamatory facts. See *Gross, supra*. In those circumstances, no action for defamation lies in New York for this privileged opinion. See *ibid*. The final remarks challenged in this Statement pertain to "frivolous litigant," "shells" and again expressing the hope the "legal terrorism" will stop. While the "frivolous" characterization is new, the "shell" and "legal terrorism" characterizations were previously ruled to not support a defamation action under New York law in the context of prior Statements. See Statements 76 ("shell" and "legal terrorism"). The analysis is no different in this context for each of the previously used phrases and compel the same result here of non-actionable defamation claims. As for using the modifier "frivolous" before litigant pertaining to Mr. Katz and or his "shell" entities, the reference to the latter would reasonably encompass CRTV, so the *Adirondack* standard is met. Yet, it is a personal opinion of Mr. Steyn based on his personal experience in which none of the claims brought against him by Mr. Katz or CRTV (solely controlled by Mr. Katz), have resulted in any finding of liability, and as to which he challenges the propriety of actions such as this one in a counterclaim. As in *Penn Warranty*, the publication of that opinion is privilege in New York. Nor does the context suggest implied defamatory facts, for Mr Steyn makes his sources explicit and links the recitation of his personal dispute resolution experience to records of the various actions. As in *Penn Warranty*, no action for defamation lies in New York for opinions expressed based on that experience when it is provided as the context for the opinions.

Statement 85 (Cx-0214): The composition of this claim is tied basically to a CRTV "goon" attempting to steal "TJ's cat tree," coupled with denial of the loss of the prior arbitration by failing to pay the damages and "serial litigant" Katz referenced in "dead Katz bounce" losses in the New York Supreme Court and in this proceeding. The cat tree "caper" is disposed of earlier in Statement 68, as was the use of the term "goon" in Statement 77. Those prior dispositions control here in the present context. Similarly, the "lost" suit is dealt with in prior Statement 38. The figurative language about the "dead Katz bounce" is not to be taken literally by a reasonable reader and is not defamatory under New York law. See *Dillon, supra*. As to the reference to the "great TJ cat-tree heist" invoked by Claimant as defamatory for being part of this arbitration proceeding (See Compendium red coding at CX-0297), this was previously addressed in Statements 68 and 84 and at a minimum CRTV failed to meet it burden of proof of malice and thus the statement is incapable of supporting a defamation claim. Finally, despite not seeking to claim the "handy guide" as defamatory anywhere else in the multitude of Statements in which it appeared, in this particular Statement that phrase is asserted as defamatory in the Compendium. Yet, in Order No. 13 on Statement 78, because Claimant failed to contest in the summary determination context the claim of defamation by the phrase "handy guide," it was dismissed as abandoned. Nevertheless, that dismissal did not stop Claimant from subsequently pressing the claim under this Statement. Regardless, since the handy guide is linked to pleadings in the various lawsuits and arbitrations, one can only surmise by the naked, unexplained assertion that Claimants must be arguing implied defamatory facts,

perhaps by selective posting and omission of unspecified documents. The claim, if that is the basis, is rejected, for the guide passes muster under *Newport* and *Penn Warranty, supra.* In any event CRTV failed to meet its burden of proof.

Statement 87 (Cx-0216): The contested remarks in this Statement pertain to Cary Katz and CRTV as "the guys who tried to steal TJ's cat tree" and to having lost the prior arbitration and ordered to pay damages. The statement is not defamatory under New York law, for it is a "loose" summary of the prior arbitration and a claim advanced in it. See *Dillon, supra*. It is also privileged as "figurative" under *Dillon* in the sense that it is not to be taken literally since an employee of CRTV, which is solely controlled by Mr. Katz, was the person known to be involved in the incident. To explain, the remarks were specifically targeted contextually to "those who follow the boring suit with Cary Katz and CRTV....." That targeted audience has, through the "handy guide"and elsewhere in prior postings, had full access to the minutia of the incident and results of the prior award, including the award itself. The other challenged reference here is to the "right dishonorable Sir Scofflaw McDeadbeat Cary Katz." the characterization is expressly tied to "these stupid cases" so it satisfies the *Adirondack* burden for CRTV to advance the claim. However, beyond that threshold inquiry the CRTV claim fails to meet New York law requirements under *Dillon,* for the use of such "figurative" epithet is not actionable to support a defamation claim.

Statement 89 (Cx-0218): Th initial remarks at issue in this publication relating to "doubling down on their lawlessness and mendacity" in refusing to be bound by the judge's award of damages and and re-suing for a combined twenty million dollars are repeats from prior statements. See Statements 76 and 84. There is no meaningful difference in the context with that here so the analysis of those prior dispositions control again to preclude a defamation claim based on these remarks. Similarly the next reference to "vexatious litigant" Katz is covered by the disposition of prior Statement 84. This time the phrasing continues by adding a reference to "tedious and unavailing cases against me." The opinion contained therein is privileged under New York law. These personal opinions are placed in context by the "handy guide" linking the reader to pleadings etc in the various cases. That is the context in which the evaluative characterizations are advanced. The lack of final resolution in the "binding" prior arbitration, combined with the results to date in which CRTV/Katz have been complaining parties and have not been awarded damages as of the date of the publication renders the remark, even if construed as a factual statement, "substantially true" al least under the *Newport* decision and hence privileged. The next remark asserted as the basis for the claim of defamation here is once again the characterization of "deadbeats CRTV to pay up." The context of the remark is the enforcement suit in New York on the prior arbitral award. The opinion characterization in context here is once again not one that can support a defamation claim in New York, as with the prior use of the term in other statements. See, e.g., Statement 38. Similarly, the next remarks all are repeats previously held not to support a defamation action in New York — See, e.g., Statements 84 ("self-suing left buttock suing the right buttock into pseudo-insolvency; frivolous litigant; extortionist, shells; fraudulent UCCs...."); 55 and 62 ("collusion"); as well as 46 and 56 ("phoney"). They remain in

this context just as non-actionable as in the prior Statement(s) in which they also appeared. Further the reference to the settlement of the Nevada litigation following the effort to intervene is privileged as true or substantially true. See *Newport, supra*. Finally, the additional commentary on Judge Johnson's ruling is a "loose" summary by a non-lawyer under *Dillon* and expressly linked to the actual order, so that there is no basis for implying a false fact by a reasonable reader under *Gross*.

Statement 90 (Cx-0219): This claim arises initially from the the statement that Cary Katz's CRTV network ceased to exist. The context provided is that of a merger with The Blaze to become part of Blaze TV. As such, it is a non-lawyer's view of the result of that merger. There is "substantial truth" in the statement in so far as CRTV no longer went by that name or brand, and instead became Blaze Media. Thus, for purposes of New York law, the remark is not actionable for defamation. See *Newport, supra.* In any event, there was no persuasive showing of malice. The other comment asserted pertains to "potty mouthed CRTV chief content officer being advised by Mr. Steyn against the CRTV branding in 2016. The first part of the statement while personally directed against Mr. Crane, is tied to CRTV branding. The remark thereby satisfies the threshold *Adirondack* standard. As for characterization itself, the connotation to a reasonable reader is someone given to rude or vulgar language. Rx-0561. Since truth is a defense to a defamation action, CRTV has failed to meet its burden of proof. As the prior arbitrator quoted in the award (Cx-0043), Mr. Crane referred to Mr Steyn as a "m...f...r" and "pussy" as well to Ms. Howes as "Momma Bitch Nutcase." Cranes email to Mr. Katz quoted by the prior arbitrator at p.8 of the award provides ample evidence to justify the opinion as truthful or certainly as "substantially true" under the *Newport* decision. Further, the comment was made in the context of the affirmation of the prior arbitral award by the New York Supreme court, and the article contained a link to that prior award for further context. That context eliminates any room for a reasonable reader to imply defamatory facts. There is, therefore, no defamation actionable by CRTV for this remark.

Statement 91 (Cx-0220): The initial remark challenged from this publication was that of CRTV,LLC being "defunct" ....we're still here and they are not. The connotation of the remark is "no longer existing or functioning." https://en.oxforddictionaries.com/definition/defunct . As noted above, there is substantial truth in the remark in the sense that CRTV,LLC no longer existed under that name and no longer functioned with that brand. In contrast Mr. Steyn is still doing what Mr. Steyn does. Accordingly, the "loose" remark by a non-lawyer is privileged under New York law. See *Newport, supra*. See also *Dillon, supra*. Similarly, there was again no persuasive showing of malice. The remainder of the remarks challenged have all been dealt with elsewhere as they repeat prior statements that were held not to be actionable as a claim for defamation under New York law. See, e.g., Statements 38

("lost the case" and "deadbeats[33]"); 76 ("doubling down on lawlessness and mendacity;" "fraudulent UCCs;" "frivolous litigant;" "shells;" "legal terrorism" and reference to two suits seeking twenty million in damages); 84("self-suing buttocks;" "bogus self-suing stunt;" "pseudo-insolvency;" "fraud upon the court;" "collusive;" "phonies;" "extortionist;" and "grifter"); 89 ("vexatious litigant;"). They are likewise not actionable in the context of this publication, as CRTV again failed to meet its burden of proof, and the prior analysis as well as reasoning continue to control here.

Statement 92(Cx-0221): Th initial remark contested pertains to Katz as being litigious and who sues over everything. A link is provided in the publication to the give the reader the context— which is a prior Steyn publication referencing the claim advanced in this arbitration (until dismissed by an earlier Order that the reference to the song "Oh Happy Day" in yet another posting was defamatory of Mr. Katz and CRTV). Even if the threshold *Adirondack* standard is taken as met in this particular respect, the claim does not withstand further scrutiny. The import of the remaining reference complained of in linked context is that CRTV brought a claim in this proceeding based on a song that neither mentions it nor Mr. Katz and which apparently impelled Mr. Steyn to establish a prank contest based on it for his readers. Linking the sur-real—CRTV will sue for defamation over the song of the week — to an imaginary contest is hardly a formula for basing a successful defamation claim in reality. The "figurative use" (linkage of the contest) and rhetorical hyperbole (sue over anything) is simply privileged use in New York. See *Dillon, supra.* The next remark CRTV seeks to ground its own defamation claim on is the assertion that "the real cockwombles are the who still believe in Katz." The immediate context refers to breaking the BTS agreement and then suing for ten million in damages. Beyond that the further context and claimed defamatory comments pertain to a prior comment, which repeats the prior claim in Statement 64 about breaking contracts. As to the latter statements, CRTV seeks to assert as actionable in this context, it is no different than that which was precluded under New York law above in the analysis of the same remarks in Statement 64; that analysis likewise controls here. That reduces the final defamation claim to "cockwombles" — which suggests foolishness on the part of the believers as the article itself makes clear with its express etymological analysis. Perhaps the operative foolishness here is in CRTV believing that provides an actionable basis for a defamation claim under New York law. There is no way to prove the truth or falsity of such a characterization, for it is purely a personal opinion, with the source disclosed such that there is no room for a reasonable reader to imply defamatory facts. As a result. the remark passes muster under *Gross, supra.* See also *Penn Warranty, supra.* CRTV yet again failed to meet its burden of proof.

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[33] Although this particular publication reference to "deadbeat" may obviate the earlier reasoning as to non-payment of the undisputed portion of the damages debt, the rest of the reasoning in Statement 38 relying upon *Penn Warranty* as an expression personal opinion based on personal experience remains applicable given Respondents continuing effort to collect in full the Prior Arbitral Award though the New York enforcement litigation and appellate process.

34. In the end, the defamation claims advanced here may have collectively reflected at some level a clash between a business' right or effort to protect its own reputation and the constitutionally guaranteed right to free speech. [34] But given the result, clearly "much ado" —to employ the phrase of New York's *Cardali* court in a very recent "criminal" defamation case — was made about nothing (to give Shakespeare his due), in that each of the vast host of claimed defamatory statements and phrases proved non-actionable under New York law[35]. The bedrock guarantee of our society is that people should be able to speak and write freely in public. US Const Amend I; NY Const, art I, § 8. CRTV purports to stand for that principle as its "primary value". See Tr. at p.1202 ll. 9-15 (Alena Charles, Senior VP Marketing Blaze Media, Tr. p.1160 ll020-23.) Yet, when push came to shove, CRTV sought to constrain that guarantee in a dispute with one of its former talents. However, as a consequence of that guarantee, under applicable New York law most of the statements involved herein merely express opinion in a disclosed context and are not actionable as defamation — no matter how offensive, "vituperative or even unreasonable" they may be. *Steinhilber v. Alphonse*, 68 N.Y.2d 283 (1986). See also *Dillon v City of New York*, 261 AD2d 34 [1st Dept 1999] *citing Gross v. New York Times,* 82 N.Y. 2d 146, 152-53 (1993) and *Immuo AG. v Moor-Jankowski, supra,* 77 N.Y. 2d at 244, and *Cardali supra citing Davis v. Boeheim*, 24 N.Y. 3d 262, 269 (2014)("it is well- settled that '[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be subject of an action for defamation.") While Mr. Steyn may have occasionally skated on thin ice with some published remarks, he did not fall through, as the law and applicable factual context simply do not sustain the complaint here against protected speech given CRTV's failures in proof and New York law chronicled above. Steyn and MES, therefore, prevail in total on every Statement at issue under the tort of defamation claim in the amended Compendium for the reasons stated, since there has been no actionable abuse of the right of free speech by them. This arbitrator, like a judge in the New York courts,`"will not strain"'" to find defamation "where none exists" (*Cohn v National Broadcasting Co.*, 50 N.Y.2d 885, 887, cert denied 449 U.S. 1022)."

III. PARTIAL FINAL AWARD

Based on the foregoing findings and/or conclusions, the undersigned Sole Arbitrator hereby finds, determines, rules, adjudges, declares and PARTIALLY FINALLY AWARDS as follows with respect to the amended demand as filed in the phase one proceedings:

1. CRTV had standing to bring the claims generally for the reasons stated in paragraph 5 above, and those found in paragraph 33, except as otherwise specified therein.

2. The BTS disparagement provision in paragraph 13 survived for a short time the original material breach of the BTS by the unlawful termination because of the failure of

[34] This characterization is without prejudice to the pending counterclaim to be addressed in Phase Two of this proceeding

[35] Whether they would have been disparaging under the BTS is not reached since that clause was no longer operative given CRTV's prior material breach of it.

a condition precedent previously decided in the prior Arbitral Award (Cx-0043). But that surviving provision itself was subsequently materially breached by CRTV shortly thereafter in March, 2017 through its actions in connection with the Daily Beast article, thereby extinguishing further obligation under paragraph 13 by Respondents particularly (and CRTV as well). Accordingly each of CRTV's disparagement claims for time periods two and three are hereby dismissed with prejudice pursuant to the reasons stand in paragraphs 13—16 above.

3. The BTS confidentiality obligation contained in BTS paragraph 19 did not preclude the disclosure of the statements complained of by CRTV herein to be in violation of it (on the alternate grounds of contract interpretation or estoppel) for the reasons staled in paragraphs 17-20 above; nor did it create any separate general obligation of continuing confidentiality as between the Parties apart from arbitration proceedings, for the reasons stated in paragraph 21 above.

4. Each of the tort claims for defamation asserted by CRTV are dismissed with prejudice for the reasons stated above in paragraphs 22-34.

5. Pursuant to AAA Rule 54, as well as in the statement of Relief Sought by Defendants" in paragraph I, the Respondents are the prevailing parties in Phase One in of this arbitration and they are awarded costs. Therefore, Claimant shall reimburse Respondents the total sum of $119, 566.70, representing that portion of Arbitrator fees ($118,964.31) and expenses ($602.39) of the allocated costs previously incurred and paid by Respondents that are instead to be borne entirely by Claimant for phase one.

6. In consequence of this Partial Final Award and bifurcation of this proceeding, the counterclaims remain pending in this arbitration, as does the possible further shifting of fees and costs for phase II, including the administrative fees and expenses of the AAA for the counterclaim and the further compensation of the Sole Arbitrator. Except for the counterclaims and possible cost shifting in due course in Phase II of this proceeding, over which the Sole Arbitrator hereby retains continuing jurisdiction, this Partial Final Award is in full resolution of all claims submitted by CRTV to this arbitration; all other claims, arguments or issues, not specifically addressed and not reserved for further disposition are either rejected and denied with prejudice, or unnecessary to reach because they have been mooted by the dispositive grounds set forth above.

7. I hereby certify, for the purposes of Article 1 of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Partial Final Award is deemed made in Williston, Vermont, the formal seat of this arbitration.

AMERICAN ARBITRATION ASSOCIATION

Philip D. O'Neill, Jr.
Sole Arbitrator
Dated: June 7, 2019

Commonwealth of Massachusetts )
) SS:
County of Middlesex )

I, Philip D. O'Neill, Jr., do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Partial Final Award.

June 7, 2019
Date

Philip D. O'Neill, Jr., Sole Arbitrator

Commonwealth of Massachusetts
Town of Lincoln
On this 7 day of June, 2019, before me personally came and appeared Mr. Philip D. O'Neill, Jr., to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

MARIA CASO
MY COMMISSION EXPIRES MAR. 6, 2024
NOTARY PUBLIC COMMONWEALTH OF MASSACHUSETTS

Notary Public