SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PHILIP R. SHAWE,

Index No.: 151025/2017

Plaintiff,

DECISION & ORDER

-against-

KRAMER LEVIN NAFTALIS & FRANKEL LLP, PHILIP S. KAUFMAN and RONALD S. GREENBERG,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Kramer Levin Naftalis & Frankel LLP, Philip Kaufman, and Ronald Greenberg (together, Kramer Levin) move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint. Plaintiff Philip Shawe opposes the motion. For the reasons that follow, Kramer Levin's motion is granted.

I. Factual Background

1. The Delaware Proceedings

As this is a motion to dismiss, the facts recited are taken from the complaint and the documentary evidence submitted by the parties.[1]

This is yet another iteration of a prolonged dispute between Philip Shawe and his former business partner, Elizabeth Elting, over the management and control of TransPerfect Global, Inc., a Delaware corporation that they co-founded in college.[2] Dkt. 1 (Compl.) ¶ 9. On May 15,

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). All citations are to the pdf pagination on NYSCEF.

[2] Earlier this year, by order dated June 29, 2017, this court dismissed with prejudice three lawsuits brought by Shawe that sought to collaterally challenge a decision of the Delaware Court of Chancery ordering the forced sale of TransPerfect (discussed further below). *See Shawe v*

2014, Elting commenced a lawsuit against Shawe in Delaware, seeking the forced sale of the company. ¶ 15. Kramer Levin represented Elting in the Delaware litigation along with local counsel. *Id.* Kaufman and Greenberg, both partners at Kramer Levin, participated in the representation. *Id.* This action sues defendant-lawyers for defamation and tortious interference with business advantage.

On August 13, 2015, the Delaware Court of Chancery (Bouchard, C.) issued a 104-page, post-trial opinion. *In re Shawe & Elting LLC*, 2015 WL 4874733 (Del Ch 2015), *aff'd sub nom Shawe v Elting*, 157 A3d 152 (Del 2017) (the Post-Trial Decision). Chancellor Bouchard took the unusual step of appointing a custodian and ordering the forced sale of TransPerfect due to the "complete dysfunction between Shawe and Elting, resulting in irretrievable deadlocks over significant matters that are causing the business to suffer and that are threatening the business with irreparable injury, notwithstanding its profitability to date." *Id.* at *1.

The court assumes familiarity with the Post-Trial Decision. It is painstakingly detailed and makes substantive findings regarding Shawe's "reprehensible" and "disturbing" conduct both before and during the Delaware proceedings. *See e.g.*, *id.* at *12-14, 27, 34, 36-38. To take but one example, Chancellor Bouchard found that:

> Shawe engaged in a secret campaign to spy on Elting and invade her privacy by intercepting her mail, monitoring her phone calls, accessing her emails (including thousands of privileged communications with her counsel), and entering her locked office without permission on numerous occasions . . . .

Id. at *27; *see also id.* at *13 ("Shawe gained access to approximately 19,000 of Elting's Gmails, including approximately 12,000 privileged communications with her counsel at Kramer Levin

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Elting, 2017 WL 2882221 (NY Sup Ct June 29, 2017). Those actions were dismissed due to their "borderline frivolity" and because it was determined that Shawe's claims were "infirm by virtue of the rulings of the Delaware courts." *Id.*

and her Delaware counsel in this litigation"); Dkt. 25 (2/19/15 Tr.) at 4-5 ("the record shows Mr. Shawe personally skulking around at all hours of the night on numerous occasions to surreptitiously access Elting's hard drive in her office and to copy [email] files from it remotely"); Dkt. 26 (11/10/15 Tr.) at 5 ("Shawe accessed Elting's office . . . without her permission to extract the hard drive from her computer in what was tantamount to a burglary").

Based on such findings, the Chancellor warned that Elting's separate, then-pending sanctions motion "raises very serious issues of spoliation and discovery abuse that may warrant shifting to Shawe the entire amount of the attorneys' fees and expenses Elting has incurred in [] litigating the actions in this Court." Post-Trial Decision at *25. The Chancellor further determined that Shawe's pattern of misbehavior necessitated the forced sale of the company, because:

> [A]bsent this remedy, [Elting] will be left with the "Hobson's choice of remaining locked with Shawe in corporate hell or cashing out her stake for a fraction of its true value," affording Shawe a windfall . . . Shawe's actions have cast a pall on the prospect that a third party would pay a fair price for her shares. *What rational person would want to step into Elting's shoes to partner with someone [Shawe] willing to "cause constant pain" and "go the distance" to get his way?* To afford no relief in this circumstance would be unjust in my opinion.

Id. at *30-31 (emphasis added).

On July 20, 2016, following a two-day evidentiary hearing, Chancellor Bouchard issued a second scathing, yet equally thorough decision sanctioning Shawe for his egregious litigation misconduct.[3] *In re Shawe & Elting LLC*, 2016 WL 3951339 (Del Ch 2016), *aff'd sub nom Shawe v Elting*, 157 A3d 142 (Del 2017) (the Sanctions Decision). The Sanctions Decision, with which the court also assumes familiarity, established that:

Shawe acted in bad faith and vexatiously during the course of the litigation in three

[3] The sanctions hearing was held on January 7-8, 2016. *See* Sanctions Decision at *1.

> respects: (1) by intentionally seeking to destroy information on his laptop computer after the Court had entered an order requiring him to provide the laptop for forensic discovery; (2) by, at a minimum, recklessly failing to take reasonable measures to safeguard evidence on his phone, which he regularly used to exchange text messages with employees and which was another important source of discovery; and (3) by repeatedly lying under oath—in interrogatory responses, at deposition, at trial, and in a post-trial affidavit—to cover up aspects of his secret deletion of information from his laptop computer and extraction of information from the hard drive of Elting's computer.

Id. at *1.

In particular, the Chancellor found that, "follow[ing] the initiation of litigation [], the service of discovery requests from Elting, and the issuance of two Litigation Hold Notices" as well as a court order requiring him to provide his laptop for forensic discovery, Shawe deleted approximately 41,000 files from his computer, 1,068 of which proved unrecoverable. *Id.* at *5-7, 13-15. The deleted files included "Elting's privileged Gmails with her lawyers on a range of topics, and files that were personal to Elting and relevant to the Merits Trial." *Id.* at *7. The Chancellor determined that "Shawe fully intended and attempted to destroy a substantial amount of information from his laptop" with "the intended purpose of mak[ing] information unavailable for the required forensic discovery in direct contravention of the [court's] Expedited Discovery Order." The Chancellor held that, although Shawe "was unsuccessful in doing so in a permanent and irretrievable manner," he was liable for spoliating evidence, because "[b]eing an ineffective spoliator does not negate the intention to spoliate." *Id.* at *13-14.

Regarding Shawe's failure to safeguard evidence on his cellphone, the Chancellor held that the communications stored on his phone "were an important source of discovery that were reasonably calculated to yield information relevant to the Merits Trial," noting that "many text messages retrieved from Shawe's *next* phone provided relevant evidence at the Merits Trial." *Id.* at *16. The Chancellor deemed the evidence concerning the timing and manner of the phone's

loss to be "palpably suspicious," stating that "Shawe has a demonstrated propensity to use subordinates firmly under his control to do dirty work for (and with) him in secret," and that, "[g]iven Shawe's *modus operandi* and [the] farcical explanation of what happened to the phone [after Shawe gave it to a loyal subordinate] . . . it is more likely that Shawe told or otherwise made it clear to [his subordinate] to get rid of the phone."[4] *Id.* Nevertheless, the Chancellor held that, even if the phone was not intentionally damaged and lost, "at a bare minimum, [Shawe] recklessly failed to take appropriate measures to preserve the phone so that genuine efforts to recover information from it could have been utilized." *Id.*

Finally, the Chancellor found that Shawe made "repeated false statements under oath during the course of this litigation . . . concerning the deletions to his laptop, [and] the concealment of [his subordinates'] role in those deletions and in the extraction of emails from Elting's hard drive." Such knowingly false statements "plainly support the conclusion that Shawe subjectively acted in bad faith to obstruct discovery and conceal the truth about activities relevant to this case." *Id.* at *17-18. In sum, the Chancellor held that, "Shawe's actions obstructed discovery, concealed the truth, [] impeded the administration of justice . . . [and] needlessly complicated and protracted these proceedings to Elting's prejudice, all while wasting

[4] Shawe's iPhone was allegedly damaged in a "1 out of 100,000" accident when it was submerged in a plastic cup of Diet Coke just four days after an expedited trial was ordered. Shawe, who was the co-CEO of a company specializing in e-discovery, and who therefore had easy access to "personnel qualified to conduct forensic recovery of damaged devices . . . inexplicably chose to give the phone [for repair] to a subordinate under his control who had no forensic training in retrieving data from a phone" and whose sole relevant experience was that "his own phone once fell into a toilet and it worked after he let it dry." Said subordinate, being unable to revive the phone, placed it in a desk drawer. Subsequently, the subordinate had a visceral reaction when he discovered rat droppings in the drawer and spontaneously threw out all of the drawer's contents, including the phone—a tale Chancellor Bouchard described as "bizarre" and "preposterous." *See* Sanctions Decision at *4-5, 16-17.

scarce resources of the Court." *Id.* at *1; *see id.* at *15, 17-18. Chancellor Bouchard imposed a spoliation sanction against Shawe consisting of 33% of the litigation expenses incurred by Elting in connection with the merits trial and all of her expenses associated with the sanctions proceedings. *See id.* at *20. The total amount of the sanction exceeded $7 million. *See In re Shawe & Elting LLC*, 2016 WL 5122738, at *3 (Del Ch Sep. 20, 2016). On February 13, 2017, the Supreme Court of Delaware affirmed both the Post-Trial and Sanctions Decisions. *See Shawe v Elting*, 157 A3d 152 (Del 2017) (Post-Trial Affirmance); *Shawe v Elting*, 157 A3d 142 (Del 2017) (Sanctions Affirmance).

2. Alleged Defamatory Statements & Procedural History

On February 3, 2016, approximately a month after the sanctions hearing before the Court of Chancery, Kaufman and Greenberg were interviewed by a pair of journalists—identified in the complaint only as a "freelance reporter" and a "financial and business reporter"—who expressed interest in authoring an article concerning the Shawe-Elting dispute and the future of TransPerfect following the Post-Trial Decision.[5] Compl. ¶¶ 23-24; *see* Dkt. 18 (First Interview Tr.). At the outset, the reporters confirmed that they had read the Post-Trial Decision, and explained that their aim was to get Kaufman's and Greenberg's "opinion[s] on where [the Shawe-Elting dispute] might be going, how it should play out, [and] how it might play out . . . ." First Interview Tr. at 4 & 7. The attorneys agreed to discuss the Post-Trial Decision and "highlight" its key features, but urged the reporters to re-read the decision because "it really does lay out quite well the entirety of the dispute" and the Chancellor's rationale for ordering

[5] Although both Kaufman and Greenberg participated in the interview, as well as in a second, follow-up interview, Kaufman answered most of the reporters' questions and made virtually all of the statements relevant to this case. *See* Dkt. 18 (First Interview Tr.) at 31:2-13 (identifying "Speaker 2" as Greenberg); *see generally id.*; Dkt. 19 (Second Interview Tr.).

TransPerfect's sale. *Id.* at 7-8.

In discussing the Post-Trial Decision's damning substantive findings regarding Shawe's behavior, Kaufman stated that, "as you can read in the decision . . . Shawe engaged in such conduct, such misconduct that as the court found, [Elting] justifiably lost any inkling of trust in him. **He's a bad guy.** The things that the court found **he did**, and he admitted to have done, are **very bad things**."[6] *Id.* at 11-12. He then detailed some of this misconduct—that Shawe stole Elting's mail, broke into her office, took her hard drive, downloaded and read her emails, including privileged communications with counsel, and "**spoliated evidence in droves**." *Id.* at 12. Echoing language in the Post-Trial Decision, Kaufman said that "**[Shawe] was holding Elting hostage basically**" and referred the reporters to the Chancellor's explanation that it would be unjust to "leave Elting with the Hobson's choice of having been put in prison with Phil Shawe for the rest of her career or having to sell her 50 percent interest for a huge discount." *Id.* at 19.

Asked whether Elting might attempt to buy TransPerfect at auction, Kaufman stated:

> I would suspect Liz will be a participant in that . . . this company was her idea and she chose the name. She's the one with the background in translation. She speaks five languages. She majored in this. It was her baby . . . Shawe was a financial guy. So, Liz--**this is Liz's company really**.

Id. at 20-21. In response to a question regarding whether Shawe would also be eligible to bid on the company, Kaufman explained that:

> Theoretically, the answer to that is yes. **As a practical matter, I believe not a chance** . . . I think if you read [the Post-Trial Decision], including among other

[6] Language appearing in bold font is identified as defamatory in Shawe's complaint. *See* Compl. ¶¶ 38-42. The bolded language in the quotation above conforms to the selective quotation as it appears in the complaint. *See* ¶ 38 (identifying as defamatory the selectively quoted language "He's a bad guy . . . he did . . . very bad things"). In addition, all citations to the interview transcripts, articles, and press releases containing the allegedly defamatory statements at issue are to the versions of those documents attached to Defendants' dismissal motion, in which the relevant language has been highlighted. *See generally* Dkts. 18-22.

> things both the Chancellor of Delaware or Chancery Court saying **no rational person would ever want to partner with Shawe, I find it highly unlikely that he's going to be able to get the financing it would require to buy this company.**[7]

Id. at 21. Kaufman also reminded the reporters of the then-pending sanctions proceeding referenced in the Post-Trial Decision, explaining that a hearing had recently been held and that a separate sanctions decision was expected to be issued soon. "[I]n my view," Kaufman stated, "it is a virtual certainty . . . [that] **Shawe's going to be compelled to pay all of the legal fees and expenses that Elting has incurred in this litigation . . . somewhere north of $20 million.**" *Id.* at 22. Kaufman also predicted that the Sanctions Decision "is going to be far more scathing than [the Post-Trial Decision]," and that "after this decision comes out, **Shawe wouldn't be able to finance his way out of his own bathtub . . . I don't think Shawe's going to be able to finance himself--get any financing for anything.**" *Id.* at 23.

A second, follow-up interview was held on March 1, 2016. ¶¶ 25-26; *see* Second Interview Tr. The interview began with a discussion of Kramer Levin's post-hearing brief summarizing the evidence of Shawe's misconduct adduced at the sanctions hearing (the Sanctions Brief), a copy of which was provided to the reporters following the first interview. Second Interview Tr. at 4-7. Asked whether significant sanctions against Shawe might depress TransPerfect's sale price, Kaufman stated that he did not expect that to be the case, explaining that:

> [O]ur view is [that] **Shawe is already out of play. He is so incapable of getting financing to be a serious bidder** as it stands right now. When the sanctions ruling comes down . . . it's going to further cement that. It's going to be utterly scathing . . . He couldn't get financing from any bank simply on the basis of the [Post-Trial Decision] . . . which, when you've got the chancellor of the Delaware Chancery

[7] Kaufman later reiterated this point, stating that "[a]s of now, there is nothing barring [Shawe] from participating as a bidder. I was just telling you that as a practical matter I find that unlikely. There is no legal impediment to his doing that." First Interview Tr. at 26.

> Court saying that **no rational person would want to partner with Shawe, no rational person would want to partner with Shawe.**

Id. at 8-9. Again citing the Post-Trial Decision, which "foreshadows the sanctions coming[,]" Kaufman and Greenberg similarly stated that, "**[Shawe's] been adjudicated to be a bad guy, so bad that the company had to be ordered sold**[,]" explaining that "[t]here's still tons of interest in the company. It's all been positive. And we don't see just confirming this with some decision against Shawe as affecting that in any way." *Id.* at 24.

Regarding the company's future, Kaufman expressed his belief that "**whoever buys this company is going to want Liz Elting to stay there in some capacity**" based on her unique role in founding the company and her contributions to its success. *Id.* at 13-14. As for the likelihood that a potential buyer would want Shawe to stay on, Kaufman and Greenberg opined that:

> **[N]obody is going to want Phil Shawe anywhere near that company** . . . don't take our word for it . . . **there are a lot of experienced lawyers who've worked on this case** and I can tell you to a person, **none of us have seen anything like what you read in that brief**. Not even close. **The serial perjury, the spoliation of evidence** after there were court orders to produce--over and over and over again. And as I say, don't take our word for it. You must have a respectable attorney, someone who's neutral, who you would take their word for it. Show him [the Sanctions Brief] and ask him if they ever saw anything like it in their careers.

Id. at 18-19. Both interviews were given off the record, for background only without attribution, and did not result in a published article. *See* Compl. ¶ 24.

Sometime in April 2016, Kaufman gave a third interview to the online legal publication *Law360*. Compl. ¶ 28. This resulted in a short profile of his litigation career, dated April 27, 2016, and titled "Trial Pros: Kramer Levin's Philip Kaufman." Dkt. 20 (*Law360* Article) at 3. Asked to identify the most interesting trial of his career, Kaufman cited the Delaware Proceedings, explaining that, among other things, it involved "**a level of misconduct — indeed, outright skullduggery — that I'd never before encountered or, for that matter, even heard**

about in civil litigation." *Id.*; *see* Compl. ¶¶ 28-29, 40.

On July 26 and August 22, 2016, Kramer Levin released a pair of press releases concerning the recently issued Sanctions Decision. Compl. ¶¶ 31-34, 41-42. As relevant here, the first press release stated that the Court of Chancery had found that Shawe "repeatedly lied under oath and **engaged in massive spoliation of evidence**," while the second press release similarly reported that Shawe was found to have "engaged in 'unusually deplorable behavior' throughout the course of the litigation by, among other things, **deliberately spoliating massive amounts of evidence after being ordered to produce that evidence in discovery** . . . ." Dkts. 21 (First Press Release) at 3; 22 (Second Press Release) at 3.

On January 31, 2017, Shawe commenced this action by filing his summons and complaint. Dkt. 1. The complaint asserted two causes of action for defamation and tortious interference with business advantage. *See id.* ¶¶ 22-54. Specifically, it alleged that the bolded statements in the quotations above defamed Shawe and interfered in his business relationship with TransPerfect, as well as in TransPerfect's relationships with third parties. ¶¶ 36-53. Defendants moved to dismiss on March 31, 2017. Dkt. 12. The court reserved on the motion after oral argument. *See* Dkt. 43 (10/31/17 Tr.).

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the

inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, 1 AD3d at 250, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

1. Defamation

"To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm [i.e., defamation per se]." *Stepanov v Dow Jones & Co.*, 120 AD3d 28, 41-42 (1st Dept 2014), citing *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999). A claim for defamation must be pleaded with particularity pursuant to CPLR 3016(a), which requires that "the particular words complained of . . . be set forth in the complaint." *See BCRE 230 Riverside LLC v Fuchs*, 59 AD3d 282, 283 (1st Dept 2009). Whether a contested statement is reasonably susceptible of a defamatory connotation is in the first instance a legal determination for the court. *Weiner v Doubleday & Co.*, 74 NY2d 586, 592 (1989).

An expression of pure opinion is not actionable defamation, no matter how vituperative

or unreasonable. *Chalpin v Amordian Press, Inc.*, 128 AD2d 81, 84 (1st Dept 1987); *see Mann v Abel*, 10 NY3d 271, 276 (2008) ("Expressions 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"); *Martin v Daily News L.P.*, 121 AD3d 90, 100 (1st Dept 2014) ("Of course, 'only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue.'"), quoting *Thomas H. v Paul B.*, 18 NY3d 580, 584 (2012). Pure opinion includes "a statement of opinion that is accompanied by a recitation of the facts upon which it is based or . . . that does not imply the existence of undisclosed underlying facts." *Gross v N.Y. Times Co.*, 82 NY2d 146, 153-54 (1993); *see Steinhilber v Alphonse*, 68 NY2d 283, 289 (1986). Where a statement of opinion implies that it is based upon undisclosed facts which justify the opinion, it is deemed a "mixed opinion," and is actionable. *Chalpin*, 128 AD2d at 85.

In distinguishing between assertions of fact and nonactionable expressions of opinion, the relevant 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 in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact.

Brian v Richardson, 87 NY2d 46, 51 (1995) (internal quotation marks omitted). The court must consider the content of the communication as a whole, including its tone and apparent purpose, to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the plaintiff or were purely expressions of opinion. *Id.*, citing *Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 254 (1991).

In addition, New York Civil Rights Law Section 74 prohibits a civil action alleging

injury from the publication of a fair and true report of any judicial proceeding.[8] *Fishof v Abady*, 280 AD2d 417, 417-18 (1st Dept 2001). A publication is considered "fair and true" within the meaning of Section 74 if its substance is substantially accurate. *Misek-Falkoff v American Lawyer Media, Inc.*, 300 AD2d 215, 216 (1st Dept 2002), citing *Holy Spirit Assoc. for the Unification of World Christianity v New York Times, Co.*, 49 NY2d 63, 67 (1979) ("[A] fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated.") (internal quotation marks omitted). Section 74 applies to *any person* whose statements fall within the ambit of the privilege, and its protection is routinely extended to statements by attorneys regarding their own cases. *See Lacher v Engel*, 33 AD3d 10, 17 (1st Dept 2006) (applying Section 74 to attorney statements); *Fishof*, 280 AD2d at 417-18 (same).

i. Fair Reporting Privilege

The statements regarding Shawe's spoliation of evidence are substantially accurate reports of the Court of Chancery's factual findings.[9] Chancellor Bouchard found that Shawe intentionally destroyed approximately 41,000 files from his laptop—more than 1,000 of which proved unrecoverable—with "the intended purpose of mak[ing] information unavailable for the required forensic discovery in direct contravention" of a court order. Sanctions Decision at *13-15. Based on this finding, the Chancellor determined that Shawe was a "spoliator" and

[8] Section 74 provides that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding[.]"

[9] These include the statement in the first interview that "[Shawe] had spoliated evidence in droves"; the statement in the first press release that "[Shawe] engaged in massive spoliation of evidence"; and the statement in the second press release that Shawe was found to have engaged in unusually deplorable behavior by "deliberately spoliating massive amounts of evidence after being ordered to produce that evidence in discovery." *See* Compl. ¶¶ 38, 41-42; First Interview Tr. at 12; First Press Release at 3; Second Press Release at 3.

sanctioned him accordingly. *See id.* at *14 ("Being an ineffective spoliator does not negate the intention to spoliate.") & *19 ("In determining what remedy to award for spoliation . . . .") (internal quotation marks omitted); *see also* Sanctions Affirmance at 149-50 (finding no abuse of discretion in imposition of "fee-shifting and *spoliation* sanctions") (emphasis added).

Shawe argues that nowhere in either the Post-Trial or Sanctions Decisions was it stated that he had engaged in "massive spoliation" of evidence "in droves." Rather, he contends, the Chancellor merely found that he had "*attempted* to delete a number of files on his laptop computer, but that those files were in fact not actually deleted." Dkt. 35 (Opp'n) at 12 & n.8 (emphasis added). This is a mischaracterization of Chancellor Bouchard's actual findings. In fact, as just discussed, the Chancellor found that Shawe *had actually deleted* tens of thousands of files from his computer, *roughly 1,000 of which proved unrecoverable*; that his intention in doing so was to make those files unavailable for discovery; that he would have succeeded but for his laptop's automatic backup system and the intervention of his computer expert; and that this fortuitous lack of success "does not negate his illicit intent." Sanctions Decision at *5-7, 13-15. Such conduct can fairly be characterized as "massive" spoliation of evidence "in droves," even if Chancellor Bouchard did not describe it in those terms. *See Holy Spirit Assoc. for the Unification of World Christianity*, 49 NY2d at 67 ("[A] fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated."). Further, insofar as Shawe suggests that he was not found to have spoliated evidence *at all* because most of the files he deleted were ultimately recovered, he ignores the Chancellor's holding, affirmed on appeal, that "[b]eing an ineffective spoliator does not negate the intention to spoliate." Sanctions Decision at *14; Sanctions Affirmance at 150.

Kaufman's statement in the first interview that "[Shawe] was holding Elting hostage

basically" is likewise a substantially accurate description of Elting's position in the underlying litigation, which the Court of Chancery ultimately endorsed. As summarized by Chancellor Bouchard, Elting's position was that "absent [the forced sale of TransPerfect], she will be left with 'the Hobson's choice of remaining locked with Shawe in corporate hell or cashing out her stake for a fraction of its true value' affording Shawe a windfall." Post-Trial Decision at *30. The Chancellor agreed, concluding that "Shawe's actions have cast a pall on the prospect that a third party would pay a fair price for [Elting's] shares," and that "[t]o afford no relief in this circumstance would be unjust . . . ." *Id.* at *31. Shawe's insistence that, contrary to the Chancellor's conclusion, he "was not holding Elting 'hostage' at all" is of no consequence.[10] Shawe also argues that, if opinion, the statement implies a basis in undisclosed defamatory facts. However, Shawe's conclusory assertion is belied by Kaufman's immediate reference to the relevant portion of the Post-Trial Decision on which his comment was based. *See* First Interview Tr. at 19 ("he was holding Elting hostage basically . . . And that's explained in Bouchard's opinion where he says, I'm not going to leave Elting with the Hobson's choice . . .").

Similarly, Kaufman's nearly identical statements in the first and second interviews that "no rational person would ever want to partner with Shawe" and that "no rational person would want to partner with Shawe" are protected by the fair reporting privilege. Both statements echo, almost exactly, the language used by Chancellor Bouchard in the Post-Trial Decision. *Compare* Post-Trial Decision at *31 ("What rational person would want to step into Elting's shoes to partner with someone [Shawe] willing to 'cause constant pain' and 'go the distance' to get his

[10] Moreover, in the Delaware Proceedings, Shawe himself characterized his relationship with Elting as "mutual hostaging." Post-Trial Decision at *5; *see also* Post-Trial Affirmance at 157 (noting the Court of Chancery's detailed factual findings concerning Shawe and Elting's "mustual hostaging").

way?"), *with* First Interview Tr. at 21 ("I think if you read this decision, including among other things both the Chancellor of Delaware or Chancery Court saying *no rational person would ever want to partner with Shawe, I find it* highly unlikely that he's going to be able to get the financing it would require to buy this company.") (emphasis added), *and* Second Interview Tr. at 8-9 ("He couldn't get financing from any bank simply on the basis of the [Post-Trial Decision] . . . which, when you've got the chancellor of the Delaware Chancery Court saying that *no rational person would want to partner with Shawe, no rational person would want to partner with Shawe.*") (emphasis added).

Though Shawe acknowledges the relevant language in the Post-Trial Decision, he claims that these statements, too, falsely imply the existence of undisclosed facts. Shawe argues that the Chancellor's comment that "[no] rational person would want to . . . partner with [him]" was quoted out of context, creating the false impression that Kaufman's statements concerning the (un)likelihood that others would be willing to finance his future bid on the company were based on the undisclosed fact that the Chancery Court had disqualified him from bidding. Opp'n at 14-15. The court disagrees.[11] In his opinion, which had been read by the interviewers, the Chancellor rhetorically asked: "[w]hat rational person would want to . . . partner with someone [Shawe] willing to 'cause constant pain' and 'go the distance' to get his way?" The Chancellor clearly considered Shawe an objectively unattractive business partner based on his demonstrated

[11] This argument is premised on a cramped and misleading reading of the relevant language in the Post-Trial Decision. According to Shawe, Chancellor Bouchard merely commented that "given the dysfunctional relationship between Shawe and Elting, no rational person would simply now step into Elting's shoes, which is why the Chancellor rejected the option . . . that Elting simply be forced to sell her interest in TransPerfect." Opp'n at 15. He conveniently omits that the reason the Chancellor thought that no rational person would want to partner with him was the damning characterization of him as "someone willing to 'cause constant pain' and 'go the distance' to get his way."

history of misconduct. That is precisely the meaning ascribed to the Chancellor's quoted language by the two statements at issue.

Moreover, Kaufman stated explicitly and repeatedly—including once immediately preceding the first of these two statements—that the Chancellor *had not* disqualified Shawe from bidding on the company. *See* First Interview Tr. at 21 ("Theoretically, the answer to that is yes [Shawe is eligible to bid on the company].") & 26 ("As of now, there is nothing barring [Shawe] from participating as a bidder . . . There is no legal impediment to his doing that."). And even were it accepted that the language taken from the Post-Trial Decision was quoted out of its original context, and ought not, therefore, be considered under the rubric of Section 74, Kaufman's use of that language to support his predictions regarding Shawe's inability to obtain financing would still be privileged as expressions of inactionable opinion. *See Gross*, 82 NY2d at 153-54 ("a statement of opinion that is accompanied by a recitation of the facts upon which it is based" is not actionable).

ii. Statements of Opinion

The remaining statements at issue constitute inactionable expressions of opinion. Pejoratives and insults, such as the statements that Shawe is "a bad guy" who engaged in unprecedented "misconduct" and "outright skullduggery," cannot give rise to defamation liability because they are not falsifiable. *See Sandals Resorts Int'l Ltd. v Google, Inc.*, 86 AD3d 32, 38 (1st Dept 2011) ("'Since falsity is a sine qua non of a libel claim and since only assertions of fact are capable of being proven false, . . . a libel action cannot be maintained unless it is premised on published assertions of fact,' rather than on assertions of opinion."), quoting *Brian*, 87 NY2d at 49; *Dillon*, 261 AD2d at 38 ("Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable."). Likewise, predictions concerning the outcome of

unknown future events—such as the statements concerning the future of TransPerfect, Shawe's ability to obtain financing to purchase the company, and the outcome of Elting's then-pending sanctions motion—are, by their nature, incapable of categorization as either true or false. *See Brian*, 87 NY2d at 51; *Immuno*, 77 NY2d at 255 ("predictions as to what 'appeared to be' or 'might well be' or 'could well happen' or 'should be' would not have been viewed by the average reader of the Journal as conveying actual facts about plaintiff").

Then too, the context and circumstances in which these statements were made signaled any potential readers that the speakers' comments were likely to be expressions of opinion rather than fact. *See Brian*, 87 NY2d at 51. The stated purpose of the first two interviews was to elicit Kaufman's and Greenberg's *opinions* on the Shawe-Elting dispute. And Kaufman's statement to *Law360* responded to a request that he opine on the most interesting trial of his career, a question that, by its nature, could only be answered subjectively. *See* First Interview Tr. at 7; *Law360* Article at 3. Kaufman and Greenberg also plainly disclosed their roles as Elting's attorneys, signaling their less than objective, interested perspective on an ongoing dispute. *See Sprecher v Thibodeau*, 148 AD3d 654, 656 (1st Dept 2017) ("comments made to the media by a party's attorney regarding an ongoing lawsuit constitute nonactionable opinions"); *Brian*, 87 NY2d at 53 (affirming dismissal of defamation claim where "defendant disclosed that he had been [acting as an] attorney, thereby signaling that he was not a disinterested observer"). At one point they even urged the reporters not to take their commentary at face value, but to consult a neutral party for a disinterested second opinion. Second Interview Tr. at 19 ("[D]on't take our word for it. You must have a respectable attorney, someone who's neutral, who you would take their word for it. Show him [the Sanctions Brief] and ask him if they ever saw anything like it in their careers.").

Moreover, it is evident that each of the remaining contested statements was based on the

factual determinations made in the Delaware Proceedings. Shawe's conclusory assertions to the contrary notwithstanding, there was no suggestion that any of these statements was based on undisclosed facts more damaging than those already explicitly cited by the speakers. In the first interview, Kaufman plainly stated that the factual basis for his comment that "[Shawe's] a bad guy" was the Chancery Court's factual findings regarding Shawe's litigation misconduct and prior bad acts. Specifically, Kaufman stated that "as you can read in the [Post-Trial Decision] . . . Shawe engaged in . . . such misconduct . . . He's a bad guy. The things that the court found he did, and he admitted to have done, are very bad things." First Interview Tr. at 11-12. Kaufman then detailed specific instances of misconduct identified by the Chancery Court. *Id.* at 12 ("[H]e stole [Elting's] mail, went into her locked office . . . and took her hard drive, downloaded all of her private Gmails with 12,000 emails with her lawyers, read them on a regular basis while the litigation was proceeding . . . spoliated evidence in droves.") [12]

The assertion in the second interview that "[Shawe's] been adjudicated to be a bad guy, so bad that the Company had to be ordered sold" likewise was derived from the factual findings in the Post-Trial Decision, as well as the evidence of misconduct summarized in the Sanctions Brief. *See* Second Interview Tr. at 4-7, 24. Greenberg's remark that Shawe's misconduct was unlike anything he or his fellow attorneys had ever seen before in their careers, too, was

[12] Kaufman's description mirrors the finding in the Post-Trial Decision that "Shawe engaged in a secret campaign to spy on Elting and invade her privacy by intercepting her mail, monitoring her phone calls, accessing her emails (including thousands of privileged communications with her counsel), and entering her locked office without permission on numerous occasions . . . ." Post-Trial Decision at *27. Chancellor Bouchard himself described this conduct as "reprehensible," "disturbing," and "contrary to expected norms of behavior." *Id.* at *34, 36-38; *see also* Dkt. 24 (12/11/14 Tr.) at 4 (Chancellor Bouchard described Shawe's conduct as "so downright creepy that it just doesn't seem right"); Dkt. 26 (11/10/15 Tr.) at 5 (Chancellor Bouchard stated that "Shawe accessed Elting's office . . .without her permission . . . in what was tantamount to a burglary").

explicitly tied to the examples of egregious behavior detailed in the Sanctions Brief. *Id.* at 19 ("there are a lot of experienced lawyers who've worked on this case and . . . none of us have seen anything like what you read in that brief."). Kaufman's statement to *Law360* that the Delaware Proceedings involved "a level of misconduct — indeed, outright skullduggery — that I'd never before encountered or, for that matter, even heard about in civil litigation" was similarly premised on the Chancery Court's factual findings concerning Shawe's misdeeds. None of these statements suggested a justification in undisclosed facts more egregious than the "unusually deplorable conduct" detailed in the Post-Trial and Sanctions Decisions.

Each of the predictions regarding the future of TransPerfect, Shawe's ability to obtain financing to purchase the company, and the outcome of Elting's then-pending sanctions motion also was accompanied by a recitation of the facts upon which it was based, and did not imply the existence of undisclosed additional facts justifying the speaker's opinion. In the first interview, the reporters asked whether Shawe would be eligible to bid on TransPerfect. First Interview Tr. at 21. Kaufman predicated his response on the Chancellor's decision:

> Theoretically, the answer to that is yes. As a practical matter, I believe not a chance . . . I think if you read [the Post-Trial Decision], including among other things both the Chancellor of Delaware or Chancery Court saying no rational person would ever want to partner with Shawe, I find it highly unlikely that he's going to be able to get the financing it would require to buy this company.

Id. Kaufman then explained that the sanctions hearing had recently been held, and that a separate sanctions decision would soon be issued, which he expected to be "far more scathing than [the Post-Trial Decision]." Referring to the conduct at issue in the sanctions proceedings, Kaufman stated that "[s]ome of the stuff, which I'm not at liberty to share with you, is so egregious that it really makes the jaw drop[,]" and predicted that "after this [sanctions] decision comes out, Shawe wouldn't be able to finance his way out of his own bathtub . . . I don't think

Shawe's going to be able to finance himself--get any financing for anything." *Id.* at 22-23.

When, in the second interview, he again was asked to speculate about the future of the company, Kaufman opined that:

> [O]ur view is [that] Shawe is already out of play. He is so incapable of getting financing to be a serious bidder as it stands right now. When the sanctions ruling comes down . . . it's going to further cement that. It's going to be utterly scathing . . . He couldn't get financing from any bank simply on the basis of the [Post-Trial Decision] . . . which, when you've got the chancellor of the Delaware Chancery Court saying that no rational person would want to partner with Shawe, no rational person would want to partner with Shawe.

Second Interview Tr. at 8-9. He stressed, however, that "[t]hings are all, at the moment, unknown." *Id.* at 12. In both interviews Kaufman made clear that his predictions regarding Shawe's ability to obtain financing, and to be a competitive bidder for the company, were based on the factual determinations in the Post-Trial Decision and the briefing on Elting's sanction motion. None of these statements gave any indication that Kaufman's predictions arose from undisclosed additional facts.

Shawe nevertheless contends that the predictions regarding his ability to get financing imply the existence of undisclosed defamatory facts. In particular, he cites to Kaufman's statement that "[s]ome of the stuff, which I'm not at liberty to share with you, is so egregious that it really makes the jaw drop[,]" arguing that this was an express assurance to the reporters that Kramer Levin possessed additional information that "would be ruinous to Shawe – 'bad stuff' that they could not currently disclose."[13] Opp'n at 8; *see id.* at 25-26. However, contrary to the requirements of CPLR 3016(a), this "jaw drop" statement is not alleged in the complaint to

[13] Defendants correctly point out that Kaufman's statement did not actually refer to "bad stuff" as the quotation marks in Shawe's opposition brief suggest. *See* Dkt. 37 (Reply) at 12 & n.9.

be false or defamatory.[14] Moreover, the statement is not actionable. First, it is protected by the fair reporting privilege insofar as it accurately represents Elting's position in the then-ongoing sanctions proceedings—which Kaufman explained would be detailed in the forthcoming Sanctions Brief—that Shawe had engaged in egregious misconduct. *See* First Interview Tr. at 22-23; *Greenberg v Spitzer*, 155 AD3d 27, 62 (2d Dept 2017) ("'Comments that essentially summarize or restate the allegations of a pleading filed in an action are the type of statements that fall within section 74's privilege.'"), quoting *Lacher*, 33 AD3d at 17. Second, the negative characterization of Shawe's "egregious" misconduct is plainly an expression of protected opinion. *See Dillon*, 261 AD2d at 38 ("Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable.").

Considered in its full context and circumstance, it is evident that the factual basis for the "jaw drop" statement was disclosed. The statement was part of the broader discussion of the sanctions proceedings against Shawe, which, Kaufman explained, was based on the same misconduct described in the Post-Trial Decision and already known to the reporters. *See* First Interview Tr. at 22 ("[Y]ou read [in the Post-Trial Decision] that there was a separate proceeding that was going to be held on the sanctions to be imposed against Shawe *as a result of all of this bad conduct*.") (emphasis added); *Steinhilber*, 68 NY2d at 290 (statement of opinion is not actionable when based on facts already known to its audience). Moreover, the Sanctions Brief detailing the "jaw dropping" misconduct alleged by Elting was provided to the reporters prior to the second interview.[15] *See* Second Interview Tr. at 4-5.

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[14] CPLR 3016(a) requires that "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint[.]"

[15] The first and second interviews should be read together due to their temporal proximity (less than a month apart), publication to the same audience (the two reporters, who, prior to this

Kaufman's statements concerning the future of TransPerfect include his first interview remark that he suspected Elting would make an offer to buy the company because "this is Liz's company really[,]" and his predictions in the second interview that "I would assume that whoever buys this company is going to want Liz Elting to stay there in some capacity[,]" and that "nobody is going to want Phil Shawe anywhere near that company." First Interview Tr. at 21; Second Interview Tr. at 14 & 18. Kaufman and Greenberg offered specific facts supporting these conclusions. The first statement was premised on Elting's role as a company founder and her expertise, not shared by Shawe, in its core language translation business. First Interview Tr. at 20-21 ("[T]his company was her idea and she chose the name. She's the one with the background in translation. She speaks five languages . . . Shawe was somebody who she met in business school with whom she had a brief relationship, but Shawe was a financial guy."); *see also* Second Interview Tr. at 13 ("[S]he founded the company . . . It was really her idea. As I think I explained to you the last time we spoke, she was the one and is the one with--the only one with language services knowledge and experience."). The latter two statements, expressing the opinion that Elting, and not Shawe, would remain at TransPerfect following its court-ordered sale, were based on these same disclosed facts, as well as the examples of Shawe's extensive misconduct outlined in the Sanctions Brief. Second Interview Tr. at 13-14, 18-19.

Regarding the result of Elting's sanction motion, Kaufman stated that "in my view . . . I think it's fair to say Shawe's going to be compelled to pay all of the legal fees and expenses that Elting has incurred in this litigation . . . somewhere north of $20 million." First Interview Tr. at

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litigation, were *the only* audience to whom the interview statements were ever actually published), common purpose (source material for the same article), and the fact that the second, follow-up interview was understood by all involved to be a continuation of the discussion begun in the first interview.

22. This prediction followed immediately after Kaufman drew the reporters' attention to the discussion of the sanctions motion in the Post-Trial Decision and echoed the Chancellor's warning that "[t]he Sanctions Motion raises very serious issues of spoliation and discovery abuse that may warrant shifting to Shawe the entire amount of the attorneys' fees and expenses Elting has incurred in [] litigating the actions in this Court." Post-Trial Decision at *25. It clearly was not based on undisclosed facts.

2. Tortious Interference with Business Relations

"To prevail on a claim for tortious interference with business relations in New York, a party must prove: (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party." *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 (1st Dept 2009). Malice in this context means "that the conduct by defendant that allegedly interfered with plaintiff's prospects [] was undertaken for the sole purpose of harming plaintiff." *Jacobs v Continuum Health Partners, Inc.*, 7 AD3d 312, 313 (1st Dept 2004), citing *Alexander & Alexander of N.Y., Inc. v Fritzen*, 68 NY2d 968, 969 (1986). "Defamation is a predicate wrongful act for a tortious interference claim." *Amaranth*, 71 AD3d at 47, citing *Stapleton Studios, LLC v City of New York*, 26 AD3d 236 (1st Dept 2006).

Shawe's allegations, which are substantially the same as those that form the basis of his defamation cause of action, are insufficient to state a claim for tortious interference with business relations. Shawe fails to identify a third party with which he had prospective business relations, to whom Defendants directed their alleged interference. He claims that Defendants interfered in

his relationship with TransPerfect. Compl. ¶¶ 51 & 53. However, alleged interference in the relationship with one's own company cannot form the basis of a tortious interference claim. *See Carvel Corp. v Noonan*, 3 NY3d 182, 192 (2004) ("[T]he economic pressure that must be shown is not, as the [plaintiffs] assume, pressure on the [plaintiffs], but on the [plaintiffs'] customers."). Nor may Shawe maintain, in his own name, a derivative claim on behalf of TransPerfect. *See O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 281 (1st Dept 2007) ("'An individual shareholder has no right to bring an action in his own name and in his own behalf for a wrong committed against a corporation.'"), quoting *General Motors Acceptance Corp. v Kalkstein*, 101 AD2d 102, 106 (1st Dept 1984).

The only third party actually identified in the complaint is Bank of America (BOA), a major client of TransPerfect. *See* Compl. ¶ 53. Shawe alleges that Defendants damaged TransPerfect's relationship with BOA by informing the bank of Elting's allegations against him. He does not allege that he had an independent relationship with BOA apart from his role as TransPerfect's co-CEO, let alone that Defendants knew of such a relationship. Shawe speculates that Defendants may have informed the bank of his "allegedly unhinged behavior" with an ulterior motive of "discourag[ing] BOA, its subsidiary Merrill Lynch, and other major potential sources of financing from lending money to [him]" to fund a buyout of TransPerfect. *Id.* Such vague and speculative allegations are insufficient to support his claim. *See BDCM Fund Advisor, LLC v Zenni*, 103 AD3d 475, 478 (1st Dept 2013) (tortious interference claim properly dismissed where "plaintiffs offered only a vague and conclusory allegation that [they] had a reasonable probability of a business relationship with this company").

Shawe also does not adequately allege that Defendants acted with malice or employed "wrongful means" against him. He acknowledges that Defendants acted as attorneys on behalf

of their client Elting, who had a significant economic and legal interest in their dispute. Consequently, he cannot claim that their actions were wholly malicious, "undertaken for the sole purpose of harming [him]." *Jacobs*, 7 AD3d at 313; *see also* Halevi v Fisher, 81 AD3d 504, 504-05 (1st Dept 2011) (attorneys are "'immunized from liability under the shield afforded attorneys in advising their clients . . . in the absence of fraud, collusion, malice or bad faith.'"), quoting *Beatie v DeLong*, 164 AD2d 104, 109 (1st Dept 1990). Nor can he rely on his defamation claim, which, as already discussed, fails as a matter of law, to make the alternative showing that Defendants' actions amounted to a crime or independent tort.

Finally, Shawe fails to adequately plead injury. "Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct." *Vigoda v DCA Prods. Plus Inc.*, 293 AD2d 265, 266 (1st Dept 2002). Shawe does not identify a specific business relationship that he would have entered into absent Defendants alleged interference. Rather, as already discussed, his allegations consist of vague speculation that reports of his misconduct in the dispute with Elting *may have generally* harmed his reputation and interfered with his ability to obtain financing. Such speculative allegations are insufficient.[16] *Id.* Accordingly, it is

ORDERED that the motion to dismiss the complaint is granted, and the complaint is dismissed, and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint with

[16] Except for the three statements contained in the *Law360* Article and the two press releases, the allegedly defamatory statements Shawe identifies were given in the course of the first two interviews. Those interviews never resulted in a published article. Accordingly, prior to this litigation, most of the statements at issue were never published to anyone other than the two reporters to whom they were given.

prejudice.

Dated: February 16, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.