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

SEAN PENN,	:	Index No. 159710/2015
Plaintiff,	:	
v.	:	
LEE DANIELS, an individual, and JOHN DOES 1-100,	:	
Defendants.	:	Mot. Seq. 002

MEMORANDUM OF LAW IN SUPPORT OF LEE DANIELS' COMBINED SPECIAL MOTION TO STRIKE AND MOTION TO DISMISS SEAN PENN'S FIRST AMENDED COMPLAINT

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Defendant, Lee Daniels ("Daniels"), submits this Memorandum of Law in Support of his combined Special Motion to Strike Sean Penn's ("Penn") First Amended Complaint pursuant to California's Anti-Strategic Litigation Against Public Participation ("Anti-SLAPP") rule, Cal. Civ. Proc. Code § 425.16, and Motion to Dismiss pursuant to Civil Practice Law and Rules ("CPLR") 3211(a)(1) and 3211(a)(7).

PRELIMINARY STATEMENT

Penn sues over an opinion that dared to invoke his name. Because this opinion was voiced inside the state of California and because Penn is a citizen and resident of California, choice of law interests direct this Court to apply California's stringent Anti-SLAPP statute, strike Penn's complaint with prejudice, and award the attorneys' fees associated with this motion.

Regardless of whether California or New York law is applied, dismissal is required because the core of the complaint – that Daniels wronged Penn by falsely comparing Penn to someone else – is constitutionally (to quote Penn's iconic movie character Jeff Spicoli) "bogus."[1] The First Amendment protects all comparisons, even comparisons to paragons of criminal and evil: Charles Manson and the Nazis. Penn's defamation claim additionally fails because Penn can neither plead with specificity nor produce any evidence of actual malice. Further, the challenged statement is not defamatory, is a constitutionally-protected opinion, and could not have tarnished Penn's reputation for domestic abuse any further than a quarter century of explicit media coverage already has. The intentional infliction of emotional distress claim fails, too, because it is premised upon the exact same acts which fail to support Penn's deficient defamation claim.

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[1] Spicoli understands the United States Constitution better than Penn. For his final, oral exam in high school history class, surfer-dude Spicoli expounds upon the intent of America's founding fathers: "What Jefferson was saying was, 'Hey! You know. We left this England place because it was bogus. So if we don't get some cool rules ourselves – Pronto! – we'll just be bogus, too. Okay?'" *Fast Times at Ridgemont High* (1982). To avoid being bogus, Jefferson and his contemporaries adopted the First Amendment, cherished protector of honest opinions and vigilant striker of lawsuits brought to punish and deter such opinions. This "cool rule" animates the California and New York laws that mandate dismissal of Penn's bogus claims.

FACTUAL BACKGROUND

Penn complains about an opinion Daniels allegedly expressed during an interview with *The Hollywood Reporter* and published in the article "*Empire's 'Batshit Crazy' Behind-the-Scenes Drama: On the Set of TV's Hottest Show*" ("Article") (*See* Amended Complaint at ¶ 39, attached as **Exhibit A** to the Affirmation of James Sammataro, and Lacey Rose's Article, attached as **Exhibit B**).[2] The Article questions whether Terrence Howard ("Howard"), an African American who plays *Empire's* male lead, should (or will) have his screen time "scal[ed] back because of his recent divorce drama and numerous prior allegations of domestic abuse" (*See* Sammataro Aff., Ex. B-13). The Article provides in pertinent part: "The embattled actor has, however, reduced his press availability, presumably fearing questions will shift toward his offscreen drama as they did in a recent *Rolling Stone* profile. His co-stars have been advised not to comment on the ongoing saga, but Daniels can't help himself." (*Id.* at B-14).

> "***That poor boy***," [Daniels] says, fiercely protective of his actor. He then alludes to other actors who have been the subject of domestic abuse allegations in the past. "***[Terrence] ain't done nothing different than Marlon Brando or Sean Penn, and all of a sudden he's some f—in' demon ... That's a sign of the time, of race, of where we are right now in America***" ("Challenged Statement"). (*Id.* at B-2, B-14) (emphasis added).

For these thirty-eight (38) quoted words, Penn claims damages in excess of $10,000,000.00.

ARGUMENT

I. Under California Law, Penn's Complaint Must Be Struck and Fees Awarded.

A. California's Anti-SLAPP Law Applies to the Alleged Conduct.

Where, as here, a conflict of law exists between two states, courts look to choice of law rules

[2] Rather than attach the Article to his Amended Complaint, Penn – tellingly – plucks the challenged statement from its context. In that the law calls for the Court to consider "the entire publication," the Article and other documentary evidence, which are properly considered in ruling on a dismissal motion, are attached as exhibits to the accompanying Sammataro Affirmation. *See Martinez v. Welk Grp., Inc.*, No. 09-cv-2883, 2011 WL 90313, at *3 (S.D. Cal. Jan. 11, 2011); *Goldberg v. Levine*, 97 A.D.3d 725 (2d Dep't 2012) (dismissing the case pursuant to CPLR 3211(a)(1) and (7) on documents submitted by the defamation defendant).

of the forum to determine which state law applies. *See Locke v. Aston*, 31 A.D.3d 33, 37 (1st Dep't 2006); *Broadspring, Inc. v. Congoo, LLC*, No. 13-cv-1866, 2014 WL 4100615, at *6 (S.D.N.Y. Aug. 20, 2014) (finding conflict between California and New York defamation law).

New York utilizes an interest analysis to determine "which of two competing jurisdictions has the greater interest in having its law applied in the litigation." *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 192 (1st Dep't 1998). The "greater interest" is determined by an evaluation of the facts and the specific issues raised in the litigation. *Id.* "This analysis raises two inquiries: '(1) what are the significant contacts and in which jurisdiction are they located; and (2) whether the purpose of the law is to regulate conduct or allocate loss.'" *K.T. v. Dash*, 37 A.D.3d 107, 111 (1st Dep't 2006). When the conflict involves rules that ***regulate conduct***, "the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greater interest in regulating behavior within its borders." *Cooney v. Osgood Mach.*, 81 N.Y.2d 66, 73 (N.Y. 1993). "Defamation law regulates conduct, so the rule is to apply 'the law of the place of the tort ('*lex loci delicti*').'" *Lee v. Bankers Trust Co*., 166 F.3d 540, 545 (2d Cir. 1999). Where, as here, an alleged defamatory statement is published nationally, there is a ***presumptive*** rule that the law of the plaintiff's domicile applies. *See Adelson v. Harris*, 973 F. Supp.2d 467, 477 (S.D.N.Y. 2013).

Because this is a defamation case where the Challenged Statement[3] was made in California and because Plaintiff is a resident and citizen of California (*see* Sammataro Aff., Ex A at ¶¶ 24, 39), the Court should apply California law. *See Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d 189, 198-99 (N.Y. 1985) (the state where the conduct occurs has the greater interest in regulating it); *Arochem Int'l, Inc. v. Buirkle*, 767 F. Supp. 1243, 1247 (S.D.N.Y. 1991) (New York's choice of law rules require application of California law to defamation claims).

[3] Despite Penn's insistent reference to "Daniels' statements," plural, there is only one statement.

B. California's Anti-SLAPP Statute Requires Penn to Demonstrate Probability of Prevailing on the Merits or Pay Daniels' Fees and Costs.

The California Legislature enacted the Anti-SLAPP statute to provide a "fast and inexpensive unmasking and dismissal of lawsuits that implicate the constitutional right of freedom of speech." *Ludwig v. Superior Court*, 43 Cal. Rptr. 2d 350, 356 (Cal. Ct. App. 1995). Specifically designed as a quick dismissal remedy, Section 425.16(b)(1) provides that when a SLAPP suit is filed, it "shall be subject to a special motion to strike." The Anti-SLAPP statute applies to all "litigation without merit filed to dissuade or punish the exercise of First Amendment rights of defendants." *Governor Gray Davis Com. v. Am. Taxpayers All.*, 125 Cal. Rptr. 2d 534, 538 (Cal. Ct. App. 2002); *Price v. Stossel*, 620 F.3d 992, 999 (9th Cir. 2010) (Anti-SLAPP strikes "meritless defamation cases aimed at chilling expression through costly, time-consuming litigation").[4]

California's Anti-SLAPP statute sets forth a two-step process to evaluate a special motion to strike. First, the defendant must make a prima facie showing that the plaintiff's cause of action arises from an act of the defendant in furtherance of the right of petition and/or the right of free speech in connection with a public issue. *See* Cal. Civ. Proc. Code § 425.16(b)(1); *Navellier v Sletten*, 52 P.3d 703, 708 (Cal. 2002); *Wilbanks v Wolk*, 17 Cal. Rptr. 3d 497, 502 (Cal. Ct. App. 2004). Once the defendant makes this showing, the burden ***shifts*** to the plaintiff who must establish a probability of prevailing on his claims by establishing that "the complaint is both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment[.]" *Governor Gray Davis Com.*, 125 Cal. Rptr. 2d at 543.

To satisfy his burden, the plaintiff must "show ***by competent and admissible evidence***, that [he] would probably prevail" on the merits of his complaint. *Macias v. Hartwell*, 64 Cal. Rptr. 2d 222, 226 (Cal. Ct. App. 1997) (emphasis added). This burden is significantly higher than the

[4] Penn concedes that the purpose of his Amended Complaint is "to punish and deter" others from talking about him. (*See* Sammataro Aff., Exhibit A at ¶ 52 and the prayer for relief).

showing required to survive dismissal and akin to the threshold needed to survive summary judgment, as the plaintiff "cannot simply rely upon [his] pleadings" to provide the necessary evidentiary showing." *Roberts v. L.A. County Bar Ass'n*, 129 Cal. Rptr. 2d 546, 552 (Cal. Ct. App. 2003). If the plaintiff cannot meet this burden by marshaling the requisite competent evidence – including evidence of actual malice – the defendant's motion must be granted. *See Varian Med. Sys., Inc. v. Delfino*, 106 P.3d 958, 966 (Cal. 2005).

When a special motion to strike is granted, plaintiff must pay fees and costs: "a prevailing defendant on a special motion to strike ***shall*** be entitled to recover his or her attorney's fees and costs." Cal. Civ. Proc. Code § 425.16(c) (emphasis added). *See also U.S. ex. Rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 973 (9th Cir. 1999) ("California's 'special motion to strike' adds an additional, unique weapon to the pretrial arsenal, a weapon whose sting is enhanced by an entitlement to fees and costs").

C. <u>Daniels' Conduct is Protected under the Anti-SLAPP Statute</u>.

Daniels' prima facie showing is easily satisfied. The Challenged Statement was made during the course of an interview with a press journalist and, therefore, arises from an act "in furtherance of the right of free speech." Cal. Civ. Proc. Code § 425.16(b)(1). Daniels' opinion that the media's on-going treatment of Howard is "… a sign of the time, of race, of where we are right now in America" was made "in connection with a public issue." *Id.* Additionally, Penn prays for this Court "to punish" Daniels for the exercise of his constitutional right of free speech. In short, the Amended Complaint seeks to hold Daniels liable for a statement made in a public forum in connection with an issue of public interest. Daniels' satisfaction of his burden places the Amended Complaint squarely within the ambit of California's Anti-SLAPP statute. Penn must now put up "competent and admissible evidence" and not merely "rely on his pleadings" to show that he "would probably prevail" on his defamation claim. This he cannot do.

D. Penn Cannot Establish a Probability of Prevailing on His Defamation Claim.

1. Penn Cannot Establish Actual Malice.

Because public figures enjoy significantly greater access to the channels of effective communication and, hence, have a greater opportunity to counter-argue false statements, they must prove with "convincing clarity" that the publication was made with constitutional actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (public figures merit less protection for defamation claims).

Penn is a public figure who admits to "worldwide fame." (*See* Sammataro Aff., Ex. A at ¶¶ 1, 13, 24, 29-38, 54). Aside from, in his words, being "one of this generation's mostly highly acclaimed and greatest artists" and thus the recipient of intense media coverage, Penn amplifies such media coverage by voluntarily thrusting himself into public controversies. A self-described experimental journalist, he has written for *Time*, *Interview, The Nation* and just recently penned a highly publicized article in *Rolling Stone* detailing his sit-down with alleged drug kingpin Joaquin "El Chapo" Guzman. (*Id.* at ¶ 38). Perhaps more than any celebrity on earth, Penn uses his near-constant presence in today's 24/7 news cycle as a public pulpit.

Penn must therefore show, with ***clear and convincing evidence***, that Daniels made the allegedly defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.*, 376 U.S. at 279-80. The "reckless disregard" standard requires proof that the statements were made "with a high degree of awareness of their probable falsity," *i.e.*, while ***in fact*** entertaining "serious doubts as to their truth." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 666-67 (1989). The inquiry focuses on the knowledge of the speaker of the falsity of the challenged statement at the time of the publication. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 511, n. 30 (1984). "The burden of proving 'actual malice' requires the plaintiff to demonstrate

with clear and convincing evidence that the defendant ***realized*** that his statement was false or that he ***subjectively entertained*** serious doubts as to the truth of his statement." *Id.* (emphasis added). This is a daunting burden.

Despite an obligation to demonstrate knowledge of falsity, reckless disregard, or serious doubt, Penn only pleads it – and insufficiently so. In fact, Penn merely parrots the requisite words, alleging "upon information and belief" that Daniels "knew that [the statements] were false and/or entertained serious doubts as to their truth;" "made his defamatory statements with actual malice, reckless disregard for the truth, and for improper purposes;" and "intentionally and maliciously portrayed Penn knowing that his depiction was false and untrue or did so with reckless and wanton disregard for the truth." (*See* Sammataro Aff., Ex A at ¶¶ 12, 21, 45, 47 and 52). These mere allegations do not suffice.

Nor do Penn's alleged theories that Daniels had constructive knowledge, *i.e.*, that Daniels "as a celebrity, knew that celebrities are often the fodder of tabloid gossip and sensational, but false, allegations" (*id.* at ¶ 43); that Daniels could have known Penn's version of the truth because Daniels had access to Penn's personal acquaintances and governmental records[5] (*id.* at ¶¶ 6, 7, 22, 23, 44); and that Daniels had a "duty to check the facts" (*id.* at ¶¶ 7, 22). Conjecture, theories and unsubstantiated conclusions do not demonstrate actual malice. In fact, the law is clear that a failure to investigate – a popular plaintiff's canard – is legally insufficient to warrant an inference of actual malice. Indeed, a defendant has ***no affirmative duty to investigate the truth***, but rather a negative duty to not entertain serious doubts about the truth of what is said. *See Newton v. National Broadcasting Co.*, 930 F. 2d 662, 669 (9th Cir. 1990) ("Even an extreme departure from accepted

[5] Contrary to Penn's allegation that Daniels "could have contacted the Los Angeles District Attorney's Office" about Penn's arrest record for his alleged baseball bat beating of Madonna in the 1980s, a Los Angeles County Sheriff's Department official has stated that documents dated before 1992 "have been purged from our system in accordance with our retention schedule and are no longer available." *See* http://gawker.com/did-sean-penn-beat-up-madonna-an-archaeology-of-hollyw-1748746261 (attached as Exhibit C to the Sammataro Aff.).

professional standards of journalism will not suffice to establish actual malice; nor will any other departure from reasonably prudent conduct, including the failure to investigate before publishing.").

With only mere allegations and constructive theories of actual malice, Penn offers nothing to show a probability of prevailing on his defamation claim.

2. A Quarter Century of *Unchallenged* Explicit, Reputation-Tarnishing Media Coverage on Penn's Alleged Domestic Abuse Vitiates Any Reasoned Suggestion that Daniels Acted with Actual Malice.

Reckless conduct "is not a negligence test measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant*, 390 U.S. at 731. It is "a subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue … This test directs attention to the defendant's attitude toward the truth or falsity of the material published … [not] the defendant's attitude toward the plaintiff." *Reader's Digest Ass'n v. Superior Ct.*, 690 P.2d 610, 618 (Cal. 1984). The evidence must show the defendant actually had a high degree of awareness of probable falsity.

Penn is incapable of establishing that Daniels uttered his opinion with knowledge of probable falsity, as the Challenged Statement is pre-dated by decades of spine-chilling accounts[6] of Penn's alleged violent abuse of his ex-wife Madonna. The 1991 best-selling book[7] "*Madonna Unauthorized*" published this lurid account of Penn's domestic terror:

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[6] Penn's contention that his reputation for domestic abuse is based on a single, solitary tabloid accusation published thirty years ago (*See* Sammataro Aff., Ex. A at A-2, n.1) is brazen, and analogous to isolating one grain of sand and calling it the beach.

[7] Courts may "take judicial notice of facts that various newspapers, magazines, and books were published solely as an indication of information in the public realm at the time, not whether the contents of those articles were, in fact, true." *Effie Film, LLC v. Pomerance*, 909 F. Supp.2d 272, 299 (S.D.N.Y. 2012); *see also Wells v. State*, 130 Misc. 2d 113, 121 (1985) ("Judicial notice is appropriate on pretrial motions that seek dismissal of Plaintiff's case"); *Cho v. Chong*, No. B171970, 2005 WL 675508, at *6 n.5 (Cal. Ct. App. Mar. 24, 2005) ("[t]he trial court did not abuse its discretion in taking judicial notice of the newspaper article" in connection with defendant's anti-SLAPP motion to strike defamation lawsuit).

> Around 4 p.m., after Madonna had given her small household staff the rest of the day off, [Penn] scaled the fence encircling the estate, broke into the house and confronted a terrified Madonna. After slapping her around, he bound and gagged her, then strapped her to a chair with twine. He berated and beat her for two hours, then stormed out of the house.
>
> Gagged, tied up and trembling with fear, Madonna waited for hours for help to arrive. Incredibly, Penn returned, swigging tequila, and began tormenting her all over again. This time, she managed to persuade him to untie her. Once free, she dashed out of the house, jumped into the coral-colored 1957 Thunderbird Penn had bought her for her 28th birthday, locked the doors and called the police on her car phone. She then sped off to the Malibu sheriff's station to swear out a complaint against her husband.

(*See* Sammataro Aff. at ¶ 7, **Exhibit D** at D-7, D-8). This book quotes Penn describing his relationship with Madonna: "I got ***most*** of the beatings," implying that she "got" some beatings at Penn's hands. (*Id.* at D-5). Another book, *Madonna Revealed*, described the incident as "torture," "a unique, specific type of violence," and quoted an involved police lieutenant: "It was a serious matter. It was something that if prosecuted would have had great implications." (*See* Sammataro Aff. at ¶ 8, **Exhibit E** at E-5).

Penn's abusive reputation has also been captured in copious news articles, spanning decades including up and until the week prior to the Challenged Statement, for example:

- **Madonna Found Bound and Gagged** (The People, January 8, 1989) ("SEXY pop star Madonna spent New Year's Eve trussed up like a turkey after being cruelly battered by her drunken, bully-boy husband Sean Penn … 'This was the final degradation after three years of hell,' said a secretary at the singer's Malibu mansion. 'Madonna was weeping. Her lip was bleeding, her spirit was crushed. She was marked and sore where he had cracked her across the face.'"). (*See* Sammataro Aff. at ¶ 6, Exhibit C at C-5 and C-6).

- **A Marriage Filled With Abuse** (The Seattle Times, November 6, 1991) ("Their daily rows grew more violent. [Penn] threw a chair through a closed window and smashed a full tureen of soup on the floor; she hurled a vase at his head and pummeled him with her fists. ***He stuck her head in their gas oven***.") (*Id.* at ¶ 9, **Exhibit F** at F-1) (emphasis added).

- **Is Madonna still in love with Sean Penn, the man who beat her up with a baseball bat?** (The Daily Mail, 2009) ("Penn was 'drinking liquor straight from the bottle' and the abuse went on for several hours, ***during which time he smacked and roughed up the victim*** … ***Penn was taken away in handcuffs and charged*** with inflicting 'corporal injury and traumatic conditions' on [Madonna]") (citing to the police report) (emphasis added) (*Id.* at ¶ 10, **Exhibit G** at G-4).

- **No More Free Passes to Famous Men Who Abuse Women** (Aly Neel, The Washington Post, February 12, 2013) ("Once Madonna was hospitalized after ***Penn struck her with a baseball bat***. He was charged with domestic assault in 1998 and pleaded guilty to a misdemeanor.") (*Id.* at ¶ 11, **Exhibit H** at H-2) (emphasis added).

- **There Was No PSA When Sean Penn Presented Best Picture: Sean Penn's History of Violence is Often Overlooked by His Hollywood Peers** (www.buzzfeed.com, February 23, 2015) ("Penn has been arrested for domestic violence … In 1988, Penn was charged with felony domestic assault on his then-wife Madonna. And by assault I mean he ***HIT HER OVER THE HEAD WITH A BASEBALL BAT***") (all caps in the original). (*Id.* at ¶ 12, **Exhibit I** at I-3) (emphasis added).

- **Why Do Famous Men Keep Getting Away with Violence Against Women?** (Zaba Blay, The Huffington Post, September 8, 2015) ("In 1987, Sean Penn ***infamously tortured then-wife Madonna for nine hours***. He tied her to a chair, threatened to cut off her hair, forced her to perform degrading sexual acts, and ***beat her with a baseball bat***.") (*Id.* at ¶ 13, **Exhibit J** at J-2) (emphasis added).

Aside from raising the obvious question – *i.e.*, why neither Penn nor Madonna cried defamation and sued any of these prior publications – these reports (as well as other unchallenged publications from reputable media outlets), singularly and cumulatively, crush Penn's fantastical allegation that "Daniels had no legitimate basis to believe that Penn has ever been arrested or charged… with anything related to domestic abuse" (*id*. at Ex. A at ¶ 43). The thick dossier of Penn's alleged abuse renders it legally impossible for him to establish that Daniels acted with the requisite actual malice.[8]

3. Penn Cannot Produce Any Evidence of Actual Malice.

Penn offers only one piece of "evidence." While certain to amplify his media coverage, it is immaterial to the issue of actual malice. (*See* Sammataro Aff. at ¶ 14, **Exhibit K** (the declaration of

[8] Three decades of steady and unchallenged statements of Penn's alleged domestic abuse have also rendered Penn libel-proof on the issue of domestic abuse because "plaintiff's reputation with respect to a specific subject may be so badly tarnished that he cannot be further injured by allegedly false statements on the subject." *Cerasani v. Sony Corp*., 991 F. Supp. 343, 352 (S.D.N.Y. 1998); *Jones v. Plaza Hotel*, 249 A.D. 2d 31, 31 (1st Dep't 1998) (affirming dismissal based on prior court's finding that the plaintiff was libel proof); *Wynberg v. National Enquirer*, Inc., 564 F. Supp.2d 924, 928-929 (C.D. Cal. 1982) (finding plaintiff libel-proof on the topic as to whether he financially exploited Elizabeth Taylor based on pre-existing articles).

Madonna Louise Ciccone) ("Immaterial Girl's Declaration")). The Immaterial Girl's Declaration expresses ***Madonna's attitude*** toward the truth of the Challenged Statement as of October 7, 2015 (9,768 days after the media first reported that she was "trussed up like a turkey" by Penn), but it says absolutely nothing about ***Daniels' attitude*** toward the truth or falsity of the Challenged Statement at the time he uttered his opinion.[9] Only Daniels' attitude is relevant to assessing actual malice. *See Reader's Digest*, 690 P.2d at 618 (the defendants' attitude toward the truth or falsity of the material published "is the crucial issue").

The Immaterial Girl's Declaration is incapable of overcoming Daniels' competing declaration that he entertained no serious doubts as to the truth of the Challenged Statement at the time it was made (*see* Affirmation of Lee Daniels attached hereto as **Exhibit L** at ¶¶ 8-10). With zero proof, Penn offers zero "***competent and admissible evidence***" of actual malice and, thus, has zero chance of showing a probability of prevailing on his defamation claim. *See Macias*, 64 Cal. Rptr. 2d at 226.

4. <u>Penn's Intentional Infliction Claim Fails, Too</u>.

Penn's intentional infliction of emotional distress claim is also subject to dismissal under California's Anti-SLAPP statute and the First Amendment. The California Supreme Court has noted that "to allow an independent cause of action for the intentional infliction of emotional

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[9] The Immaterial Girl's Declaration, like her music, is compelling because of the silence in between the noise: it is silent on whether she filed a police report accusing Penn of domestic abuse, and it is silent as to why she has remained silent for over 26 years. Since the filing of her declaration, Madonna has stated two very public opinions that undercut Penn's claim. First, she posted on Instagram: "A lie doesn't become truth, wrong doesn't become right and evil doesn't become good, just because it's accepted by a majority." (*See* Sammataro Aff. at ¶ 16, **Exhibit M**) (emphasis added). That may be, but a view accepted by a majority over decades does vitiate actual malice in this case.

Second, she recently announced during a live concert that Penn is an "assh*le" and a "c*nt," vituperations that could not contrast more sharply with her sworn declaration that he is a "caring, compassionate individual" (*Id*. at ¶ 17, **Exhibit N** at N-6). *See Cerasani*, 991 F. Supp. at 354 n. 4 (taking judicial notice of widespread press coverage).

distress, based on the same acts which would not support a defamation action, would allow plaintiffs to do indirectly what they could not do directly. It would also render meaningless any defense of truth or privilege.'" *Fellows v. National Enquirer, Inc.*, 42 Cal. 3d 234, 245 (1986). Further, the name of the claim is irrelevant. As long as the claim is derived from the same publication and seeks damages from protected speech, the claim must meet the same constitutionally imposed standards or fail. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (intentional infliction of emotional distress claim requires same proof of actual malice); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1971) (First Amendment limitations on tort apply where a plaintiff is "seeking damages for injury to his reputation or state of mind").

Here, Penn's intentional infliction of emotional distress cause of action is based on the same exact acts underlying his defamation claim. (*See* Sammataro Aff., Ex. A at ¶¶ 53-57). As Penn's defamation claim fails, so must his intentional infliction claim. *See Gilbert v. Sykes*, 53 Cal. Rptr. 3d 752, 769 (Cal. Ct. App. 2007); *Seelig v. Infinity Broad. Corp.*, 119 Cal. Rptr. 2d 108, 119 (Cal. Ct. App. 2002) (Anti-SLAPP motion should have been granted as to intentional infliction claim because it arose from and was dependent upon plaintiff's defamation claim).

Consequently, under California law, this Court should grant Daniels' Motion to Strike the Amended Complaint and for fees and costs in making this motion. Cal. Civ. Proc. Code § 425.16(c) ("[A] prevailing defendant on a special motion to strike ***shall*** be entitled to recover his or her attorney's fees and costs.") (emphasis added).

5. Penn Should Not Be Permitted Yet *Another* Opportunity to Amend His Complaint.

In light of the stated legislative policy for expeditious resolution of claims arising from protected activity, Penn should not be permitted further leave to amend. *See Simmons v Allstate Ins. Co.*, 112 Cal. Rptr. 2d 397, 401 (Cal. Ct. App. 2001) ("Allowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely

undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy."). Penn has filed two complaints and still cannot establish a probability of prevailing on the merits. Permitting a third bite at the apple undermines the legislative intent of resolving SLAPP suits in an "early and expeditious manner." *Lafayette Morehouse Inc. v. Chronicle Publ. Co.*, 44 Cal. Rptr. 2d 46, 52 (Cal. Ct. App. 1995).

II. Penn's Amended Complaint Fails under California and New York Law.

Irrepective of whether California or New York law applies, Penn's defamation claim fails because the Challenged Statement is not reasonably susceptible to a defamatory meaning.

A. Penn Invents a *New,* Unreasonable Meaning of the Challenged Statement After Realizing His Old Meaning Was Unreasonable.

Penn's original Complaint claimed that the Challenged Statement was defamatory because it "falsely asserted and/or implied that Penn is guilty of ***ongoing, continuing*** violence against women." (*See* Sammataro Aff. at ¶ 18, **Exhibit O** at ¶ 2) (emphasis added). After Daniels' first dismissal motion illustrated the fatal flaw in that interpretation [*see* D.E. 9, pp. 7-8], Penn attempts to ascribe a ***new*** meaning to the Challenged Statement: that Penn has committed "***criminal, physical abuse of multiple woman***," and "serious multiple crimes against women." (*See* Sammataro Aff., Ex. A at ¶¶ 2, 3) (emphasis added). Penn's interpretive flip-flop exposes his artificial construction of defamatory meaning where none exists. If Penn cannot readily ascertain the defamatory meaning of the Challenged Statement, it is wholly unreasonable of him to allege that the average reader could.

None of the actual words contained in the Challenged Statement state any of the things that Penn contends – *e.g.*, that Penn has been accused, arrested or convicted of "serious, multiple crimes against women;" or is a "serial domestic abuser of multiple women." (*See id*. at ¶¶ 2-3, 7-8, 11, 14, 43, 50). In order to concoct his claim, Penn is forced to imbue the Challenged Statement with defamatory facts that are ***conspicuously absent*** from the Article. To conjure so much from nothing,

Penn offers a collection of explicit excerpts about Howard from ***other publications*** (not from the Article) scoured from the Internet. (*Id.* at ¶ 9 (offering an "Arrest" report alleging Howard "punched," "hit," "struck," and "slapped" his wife) and ¶ 19 (presenting sensational headlines and quotes from three articles publishing how Howard "SLAPPED HER," "got physical," "hit two ex-wives," and "punching his first wife")). Penn, ironically, cites to the very tabloids he scorns (*i.e.*, tabloids "that often fabricate and/or sensationalize allegations against celebrities") to pluck colorful details regarding Howard's alleged conduct, disingenuously suggesting that these details are in the Article and attributable to Daniels.[10]

Yet, readers of the Article would encounter ***none*** of the exaggerated statements that Penn litters throughout his Amended Complaint. To the contrary, readers of the Article would have only encountered two phrases – both authored by *The Hollywood Reporter*, ***not*** Daniels – which bear any remote relation to Penn's ascribed meaning: (i) that Howard has been subject to "numerous prior ***allegations*** of domestic abuse" and (ii) "other actors who have been the subject of domestic abuse ***allegations*** in the past" (a true fact as it relates to Penn). (*See* Sammataro Aff., Ex. B-13) (emphasis added). The Article is fastidious in noting that the allegations against Howard are just allegations – going so far as to state that Howard's personal travails, including his recent divorce have reduced him to "gossip-world piñata" (*Id.* at B-5).

Penn, nonetheless, asserts that having his hallowed name mentioned in the same breath as Howard implies that Penn is a criminal and a serial abuser of woman. This is an unreasonable, self-

[10] If the "facts" comparing Howard to Penn hurt Penn, then Penn should not have smuggled them from outside the Article into his own pleadings. His introduction of extrinsic facts legally certifies Penn's claim as a defamation per quod (not, as Penn alleges, defamation per se) and increases Penn's burden of pleading and proving special damages under the Anti-SLAPP statute. *See McGarry v. Univ. of San Diego*, 64 Cal. Rptr. 3d 467, 479 (Cal. Ct. App. 2007); *Kavanagh v. Zwilling*, 997 F. Supp.2d 241, 249 (S.D.N.Y. 2014) ("For libel per quod, there is an additional requirement that the plaintiff plead 'special damages' – that is, actual harm"). Penn has failed to meet his pleading burden. *See Matherson v. Marchello*, 100 A.D.2d 233, 235 (2d Dep't 1984) ("'[r]ound figures' or a general allegation of a dollar amount as special damages do not suffice," because they do not meet the stringent requirement imposed for pleading special damages).

serving conclusion. "What meaning a communication is capable of bearing" is a very different inquiry from identifying "the inferences that can reasonably be drawn from it." *White v. Fraternal Order of Police*, 707 F. Supp. 2d 579, 589 n. 12 (D.D.C. 1989) (emphasis added), *aff'd*, 909 F.2d 512 (D.C. Cir. 1990); *Aronson v. Wiersma*, 65 N.Y.2d 592, 594 (N.Y. 1985) (courts should not strain to interpret statements as defamatory); *Forsher v. Bugliosi*, 608 P.2d 716, 722 (Cal. 1980) (courts must "refrain from scrutinizing what is not said to find a defamatory meaning which the article does not convey to a lay reader").

B. The Court Must *Now* Decide: Is the Challenged Statement Reasonably Susceptible to a Defamatory Meaning?

"Whether the contested statements are reasonably susceptible of a defamatory connotation is in the first instance a legal determination for the court." *Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 592 (N.Y. 1989), *cert. denied*, 495 U.S. 930 (1990); *Gilbert*, 53 Cal. Rptr. 3d at 768. Consistent with the policy underlying California's Anti-SLAPP statute, New York courts are instructed to dismiss defamation claims at the earliest possible stage of the proceedings. *See Immuno AG v. Moor-Jankowski*, 145 A.D.2d 114, 128 (1st Dep't 1989), *aff'd*, 77 N.Y.2d 235 (1991) (delaying disposition "countenance[s] waste and inefficiency" and "enhance[s] the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights").

Consequently, on a motion to dismiss a defamation claim, the court must decide whether the statement, considered in the context of the entire publication, is reasonably susceptible of a defamatory connotation, such that the issue is worthy of submission to a jury." *Stepanov v. Dow Jones & Co, Inc.*, 120 A.D.3d 28, 40 (1st Dep't 2014). If in the understanding of the average reader, the words are "not reasonably susceptible of a defamatory meaning, they are not actionable" and must be dismissed with prejudice. *See, e.g., Brian v. Richardson*, 87 N.Y.2d 46, 51 (N.Y. 1995); *Dillon v. City of New York*, 261 A.D.2d 34, 42 (1st Dep't 1999); *Steinhilber v. Alphonse*, 68

N.Y.2d 283, 294 (N.Y. 1986); *Cohn v. National Broadcasting Co*., 50 N.Y.2d 885, 887 (1980), *cert. denied*, 434 U.S. 969 (1980) (affirming dismissal with costs).

III. The Challenged Statement is Opinion and, Thus, Not Actionable under either California or New York Law.

1. Opinions Are Constitutionally Protected.

A "statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection," so long as such a statement does not "reasonably impl[y] false and defamatory facts." *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 20 (1990). "Opinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions," irrespective of how vituperative, distasteful or unreasonable those opinions might be. *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 380 (1977); *Steinhilber*, 68 N.Y.2d at 289; *Gilbert*, 3 Cal. Rptr. 3d at 764.

"On a motion to dismiss in a libel action, the court must determine whether the plaintiff sufficiently alleged false defamatory statements of *fact* rather than nonactionable statements of *opinion*." *Bonanni v. Hearst Communications*, 58 A.D.3d 1091, 1092 (3d Dep't 2009) (emphasis in original) (citation omitted). In making this fact-or-opinion determination, New York courts consider:

> (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, 87 N.Y.2d at 51 (quoting *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 153 (1993)).

California courts review the same factors but call it a "totality of the circumstances" test: "first, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense … Next, the context in which the statement was made must be considered." *Baker v Los Angeles Herald Examiner*, 721 P.2d 87, 90-91 (Cal. 1986).

The critical inquiry under either test is whether the words, in full context, would reasonably be understood as asserting a fact about the plaintiff rather than expressing a point of view. *See Mann v. Abel*, 10 N.Y.3d 271, 276 (N.Y. 2008); *Gilbert*, 53 Cal. Rptr. 3d at 764 ("to state a defamation claim … plaintiff must present evidence of a statement of fact that is *provably false*") (emphasis in original). This analysis requires that the court consider the content of the communication as a whole, its tone and apparent purpose, as well as to consider the broader social context to "determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff." *Brian*, 87 N.Y.2d at 51; *Steinhilber*, 68 N.Y.2d at 295 ("even apparent statements of fact may assume the character of statements of opinion" in context of "public debate"). This holistic approach was consciously designed to "assure that the cherished constitutional guarantee of free speech is preserved." *600 West 115th Street Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 145 (N.Y. 1992).

2. <u>The Challenged Statement is a Comparison, a Non-Actionable Opinion</u>.

The grammar of the Challenged Statement – specifically, its pivot around the word "than" – proves that a comparison was made: "[Terrence] ain't done nothing different ***than*** Marlon Brando or Sean Penn…." (emphasis added). "Than" is defined as "in comparison with." Merriam-Webster's Collegiate Dictionary (11th Ed. 2012). Penn concedes that the Challenged Statement compares: "Daniels' statements … indicate Daniels was falsely and defamatorily ***equating*** Penn with Howard as an alleged serial domestic abuser who had been convicted for a domestic abuse-related crime." (Sammataro Aff., Ex. A at ¶ 21) (emphasis added). "Equate" is defined as "comparable." Merriam-Webster's Collegiate Dictionary (11th Ed. 2012).

A comparison is invariably an opinion incapable of sustaining a defamation claim. *Zochlinski v. Regents of the Univ. of California*, 10-cv-1824, 2015 WL 6744654, at *8 (E.D. Cal. Nov. 4, 2015) (comparison of plaintiff to Charles Manson not actionable because the statements

"were nothing more than expressions of [defendant's] own opinion of plaintiff"); *The Holy Spirit Association for the Unification of World Christianity v. Harper & Row,* 420 N.Y.S.2d 56, 58-59 (N.Y. Sup. Ct. 1979) (dismissing complaint about comparison to Nazis: "Clearly, the comparison of one organization with another and pointing out similarities between them expresses the opinion of the person making the comparison."); *Miller v. Richman*, 184 A.D.2d 191, 193 (4th Dep't 1992) (statements comparing plaintiff unfavorably to others are non-actionable expressions of opinion). Daniels asks this Court to adopt the reasoning from the *Unification of World Christianity* decision and simply substitute the names of the parties to this lawsuit: "Clearly, the comparison of Howard with Penn and pointing out similarities between them expresses the opinion of the person, Daniels, making the comparison."

Grammar confirms and Penn admits: the Challenged Statement is a comparison. A comparison is an opinion, and opinions are constitutionally protected and cannot defame.

3. <u>The Challenged Statement Is Incapable of Being Proven True or False</u>.

Neither expressly nor impliedly does the Challenged Statement accuse Penn of a specific act, let alone a specific criminal act. Devoid of any words precise or provable enough to qualify as an assertion of fact, the Challenged Statement cannot be defamatory as a matter of law.

If the Challenged Statement had a precise or provable fact (as Penn wrongly asserts), then such a fact would be substantially true and not defamatory. Though Penn fulminates at the comparison to Howard, the parallels are undeniable. By Penn's own admission, both have had "several brushes with the law." (*See* Sammataro Aff., Ex. A at ¶ 8). Both have been arrested, multiple times.[11] Both have been arrested for acts of violence. Both have been accused of domestic

[11] *See, e.g., State of California v. Sean Penn*, Case No. LAX0WA00476-01 (2010); *State of California v. Sean Penn*, Case No. LAA31368796-01 (1986); *The State of Tennessee v. Sean Penn*, Case Nos. L42039 and L42040 (1985).

violence in police reports.[12] Both have received sensationalized media coverage of these experiences. The only apparent difference is that Penn has neither publicly admitted (aside from his alleged "I got ***most*** of the beatings" comment in regard to Madonna), nor has he been convicted of domestic violence (though Penn has been convicted of other crimes). The mere fact that Penn was not criminally charged does not dispel the overall "gist" that Penn has "done" some of the same things as Howard.[13] *See Guccione v. Hustler Magazine, Inc.,* 800 F.2d 298, 301-03 (2d Cir. 1986); *Chau v. Lewis*, 935 F. Supp. 2d 644, 662 (S.D.N.Y. 2014) ("Substantial truth turns on the understanding of the average reader"); *Cobb v. Time, Inc.*, 278 F.3d 629, 639 (6th Cir. 2002) (statement that boxer tested positive for cocaine when it was actually marijuana was substantially true, as the "sting" of the statement was that illegal drugs were used).

Relatedly, if the Challenged Statement had a precise or provable fact in the form of a criminal slur (it does not), then such a slur would still be subject to a full fact-or-opinion defamation analysis (and not, as Penn misstates, qualify as some special species of automatic defamation). "[T]here is simply no special rule of law making criminal slurs actionable regardless of whether they are asserted as fact or opinion." *Gross*, 82 N.Y.2d at 155. "In all cases, whether the challenged remark concerns criminality or some other defamatory category, the courts are obliged to consider the communication as a whole …" *Id.* Provocative rhetoric – even statements which when read in the literal sense allege a crime – cannot properly form the basis of a defamation claim when it is understood to be expressing a point of view. Assertions that individuals have committed war crimes, cold-blooded murder, negligent homicide and pedophilic acts have been held non-

[12] In attempting to draw a distinction between himself and Howard, Penn cites to Howard's 2001 arrest report but not to Madonna's infamous-yet-unavailable police report about Penn's violence. A recent investigation that dug deeply into the whereabouts of that report concluded that its existence – and, therefore, its contents – remained incapable of being proven true or false. (*See* Sammataro Aff., Ex. C).

[13] Ray Rice was not convicted of domestic violence, though a momentary glance at the now infamous and ubiquitous elevator video captures an act of domestic violence.

actionable when, in context, they are properly understood as mere, non-actionable rhetorical hyperbole or vigorous epithets. *See Gross*, 82 N.Y.2d at 155; *Zochlinski*, 2015 WL 6744654 (comparison to convicted serial-killer Charles Manson is an expression of opinion); *Egiazaryan v. Zalmayev*, 880 F. Supp. 2d 494, 510-11 (S.D.N.Y. 2012) ("responsibl[e] for war crimes"); *Gisel v. Clear Channel Communications, Inc.*, 94 A.D.3d 1525, 1526 (4th Dep't 2012) ("a cold-blooded murderer"); *Torain v. Liu*, No. 06-cv-5851, 2007 WL 2331073 (S.D.N.Y. Aug. 16, 2007), *aff'd*, 279 F. App'x 46 (2d Cir. 2008), at *4 (finding accusation of criminal activity constitutionally protected; "no reasonable listener … would conclude that defendant was accusing plaintiff of committing an act of pedophilia").

4. <u>The Full Context Signals an Opinion</u>.

The Hollywood Reporter is a leading source of entertainment news. It has a specialized readership and reports industry trends, not rigorous or comprehensive criminal analyses. The Article reports on *Empire*'s "outsized success," "back stage drama" and how, in becoming a "full-blown cultural phenomenon" the program has dismantled "the decades mold of primetime programming … that a show by black people, about black people and for black people could, in fact, appeal to other people, too."[14] (*See* Sammataro Aff., Ex. B at B-3).

The Article's multi-layered context underscores that the Challenged Statement is an opinion. First, the Article contains an obvious ***comparative context*** referencing the "numerous prior allegations of domestic abuse" levied against Howard as well as "domestic abuse allegations" involving "other actors" in a manner that the average reader would understand is a point of comparison. (*Id.*). Similarly, the ***qualifying context*** reports "other actors" have merely been the subject of "allegations" and nothing more, despite Penn's attempts to exaggerate "allegations" into arrest, guilt, and conviction.

[14] Penn's suggestion that the Challenged Statement was made to promote *Empire* is washed away by the tsunami of unsolicited media coverage for *Empire*, including the Article.

Third, there is an equally apparent ***subjective context***. The Article explicitly disclaims that Daniels "stir[s] things up," "push[es] provocative ideas," is "fiercely protective [of his actors,]" and, immediately before the Challenged Statement, "can't help himself." (*Id.*). Collectively, these statements signal that Daniels is not a disinterested observer stating facts, but rather speaking from an impassioned, heat-of-the-moment, personal view rife with inherent bias and not, as Penn alleges, a "calculated and premeditated" assertion of established factual deliberation or investigation. (*Id.*, Ex. B at B-14). Fourth, the ***hyperbolic context*** reports references to Howard as a "poor boy," or a "f—in' demon" (*id*. at Ex. B at B-14), but nobody would reasonably interpret these statements as assertions of fact, as if Daniels were calling Howard impoverished or demonic. The use of lusty language and rhetorical flourish illuminates the Challenged Statement as an expression of opinion. *See Steinhilber*, 68 N.Y.S.2d at 294 (epithets, fiery rhetoric and hyperbole signal advocacy); *Treppel v. Biovail Corp*., No. 03 Civ. 3002, 2004 WL 2339759, at *12 (S.D.N.Y. Oct. 15, 2004) ("an opinion may be offered with such excessive language that a reasonable audience may not fairly conclude that the opinion has any basis in fact"); *Balzaga v. Fox News Network, LLC*, 93 Cal. Rptr. 3d 782, 796 (Cal. Ct. App. 2009) ("[T]he use of hyperbole or language 'in a loose figurative sense' is constitutionally protected and not actionable.").

Finally, there is nothing in the Article that suggests that Daniels' opinion is premised on his knowledge of undisclosed facts. *See Levin v. McPhee*, 917 F. Supp. 230, 240 (S.D.N.Y. 1996) ("[I]f a statement of opinion either discloses the facts on which it is based or does not imply the existence of undisclosed facts, the opinion is not actionable") (citing *Gross*, 82 N.Y.2d at 154); *Themed Restaurants, Inc. v. Zagat Survey, LLC*, 781 N.Y.S.2d 441, 447 (N.Y. Sup. Ct. 2004) (a pure opinion "does not imply that it is based upon undisclosed facts").

Viewing the Article in its full context signals the Challenged Statement was a comparison, a subjective, qualified and hyperbolic viewpoint. A reasonable reader would understand this as an

opinion, not a statement of facts. *See Bonanni*, 58 A.D.3d at 1093 ("Given this contextual background, we conclude … that a reasonable reader would understand the statements defendant made about plaintiff as mere *allegations* to be arbitrated rather than as *facts*" (emphasis in original) (internal citations omitted).

5. <u>The Broader Social Context Signals an Opinion</u>.

The final factor, "the broader social context," confirms that the Challenged Statement conveys Daniels' personal view of media bias and the double-standard applied to men of color. The Article's principal focal points are the need for diversified voices in Hollywood, and *Empire's* unprecedented willingness to provide a much-needed black perspective. (*See* Sammataro Aff., Ex. B). Daniels' statement that Howard's receipt of imbalanced media coverage is a "***sign of the time, of race, of where we are right now in America***" is a paradigmatic expression of an opinion, one which the First Amendment fiercely protects. (*Id.* at B-14). At the time the Challenged Statement was made, the issue of race, both in Hollywood and in America, roiled public debate and media coverage.[15] The Challenged Statement's social relevance should enjoy the Constitution's "bias toward unfettered speech at the expense, perhaps, of compensation for harm to reputation, at least where a public figure and a topic of enormous public interest, going to the heart of political discourse, is concerned." *Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976) (citing *Gertz v. Robert Welsh, Inc.*, 418 U.S. 339, 343 (1974)).

Further, even if Daniels were erroneous in opining that there is no meaningful difference between the prior actions of Howard, Brando and Penn, it is nonetheless a safeguarded opinion. "Erroneous opinions are inevitably put forward in free debate but even the erroneous opinion must

[15] Consider the then-current, racially-related events contemporaneous to the publication of the Challenged Statement (the Ferguson, Missouri riots; Eric Garner's death and the attendant "I Can't Breathe" protests and the Black Lives Matter movement; Viola Davis' Emmy win and the invocation of Harriet Tubman in her acceptance speech), as well as the current debate raging over the prospective boycott of The Oscars due to their exclusionary practices.

be protected so that debate on public issues may remain robust and unfettered and concerned individuals may have the necessary freedom to speak their conscience." *Rinaldi*, 366 N.Y.2d at 1306. *See also Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944) ("One of the prerogatives of American citizenship is the right to criticize public men and measures[.]"). Whether Daniels is erroneous or not, he has the right to speak his conscience and express his opinion and cannot be punished for voicing his honestly held views.

Considering the Challenged Statement's whole content, its tone and apparent purpose, as well as the broader social context, this Court should deem it a comparative opinion incapable of being proven true or false and not susceptible of defamatory meaning as a matter of law.

IV. The Complaint Fails to Plead Actual Malice under New York Law.

Actual malice must be pled with specificity under New York law. *See Themed Restaurants,* 781 N.Y.S.2d at 449; *Jimenez v. United Federal of Teachers*, 239 A.D.2d 265 (1st Dep't 1997). "[S]urmise and conjecture" are legally insufficient. *Dillon*, 261 A.D.2d at 40. When a defendant's allegedly defamatory statements are based either upon articles the defendant has read or upon a large volume of published commentary, it is "***impossible***" to conclude that the defendant entertained serious doubts as to the truth of his statement or spoke with a high degree of probable falsity. *See, e.g.*, *Church of Scientology Int'l v. Daniels*, 992 F.2d 1329, 1334 (4th Cir. 1993) ("volume of published commentary" supporting the alleged defamation statement makes actual malice conclusion "impossible"); *Konrad v. Brown*, 937 N.Y.S.2d 190, 191 (1st Dep't 2012) ("defendant's statements were based on documents or articles he had read") (citing *Kipper v. NYP Holdings. Co*, 12 N.Y.3d 348, 353-54 (2009)).

Penn has failed to plead actual malice with the requisite specificity about Daniels' subjective state, alleging merely surmise and conjecture based "upon information and belief" and upon what a purportedly prudent person would have, could have and should have done before publication.

Three decades of published commentary about Penn's alleged domestic abuse makes it impossible to conclude that Daniels entertained serious doubts as to the truth of his statement or spoke with a high degree of probable falsity. Daniels, like millions, read published commentary about Penn's alleged domestic abuse prior to the Challenged Statement. (*See* Exhibit L at ¶ 8). Penn is, thus, incapable of pleading actual malice with the specificity required by New York law and his defamation claim must be dismissed.

V. Penn's Claim for Intentional Infliction Fails under New York Law.

Intentional infliction of emotional distress claims are only appropriate where the conduct complained of is sufficiently extreme or outrageous as to exceed all bounds of decency and the confines of other traditional tort liability. *See Rozanski v. Fitch*, 113 A.D.2d 1010, 1010 (4th Dep't 1985); *Como v. Riley*, 287 A.D.2d 416, 417 (1st Dep't 2001) (affirming dismissal where alleged conduct neither sufficiently extreme nor outrageous); *Fischer v. Maloney*, 43 N.Y.2d 553, 557 (N.Y. 1978) (claim lies only "for conduct exceeding all bounds usually tolerated by decent society"). Daniels' expression of his opinion – even if it actually caused Penn the alleged "great anguish" – falls well short of the requisite level of extreme outrageousness.

Like California law, New York law does ***not*** recognize an independent cause of action where the alleged intentional infliction facts "are inseparable from the tort of defamation." *Como*, 287 A.D.2d at 417; *see also Rozanski*, 113 A.D.2d at 1010 (intentional infliction of emotional distress claim "redundant" of defamation claim: "If the latter fail, the former must also fail."); *Sweeney v. Prisoners' Legal Services of New York, Inc.*, 146 A.D.2d 1, 7 (3rd Dep't 1989) (other claim "should be dismissed" because it "falls entirely within the scope of his more traditional tort claim for defamation."); *La Luna Enters. v. CBS Corp*., 74 F. Supp.2d 384, 392 (S.D.N.Y. 1999) ("[as] plaintiff's fraud claim is based on the same alleged injury to his reputation as his defamation

claim" it is also "subject to the stricture of the First Amendment.). Consequently, Penn's claim for intentional infliction of emotional distress should be dismissed.

CONCLUSION

For the foregoing reasons, Daniels respectfully requests that this Court enter an order striking and/or dismissing Penn's First Amended Complaint, with prejudice, pursuant to either Section 425.16(b)(1) of California's Anti-SLAPP statute or CPLR §§ 3211(a)(1) and 3211(a)(7) and for such other and further relief as the Court deems just and proper, including an award of attorneys' fees and costs.

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Respectfully submitted,

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