**STATE OF NEW YORK**
**SUPREME COURT: CHAUTAUQUA COUNTY**

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**Todd Shatkin,**

**Plaintiff,**

**-vs.-**

**Steven Ald,**

**Defendant.**

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**AFFIDAVIT IN SUPPORT OF MOTION TO AMEND ANSWER AND RESPONSE TO CROSS MOTION**

Index Number EK1202200689

State of New York )
) ss.:
County of Erie )

Joseph M. Finnerty, sworn, states:

## I. Introduction

1. I submit this affidavit in further support of Defendant Steven Ald's pending Motion to Amend his Answer (Docket Document Nos. 145-149) (the "Motion") and in response to Plaintiff's cross motion (Docket Document Nos. 152-158) (the "Cross-Motion") to amend his complaint *for the third time.*

2. The Defendant takes no position on the aspect of the Cross-Motion seeking to amend the complaint yet again.[1] This is not by any stretch of the imagination to say the proposed third amended complaint is meritorious or will have its desired effects, namely, (a) stating causes of action pleaded in good faith and with a substantial basis in fact and law and (b) ameliorating the damage done by and recoverable as a result of his bad faith and insubstantial initial assertions of

[1] This, of course, is without prejudice to the Defendant's right and intention to seek under New York's anti-SLAPP statute the recovery of his costs and attorney's fees in having had to defend all of the Plaintiff's claims – including the ones now being abandoned – from the outset of this litigation.

the Civil Rights Law §50 and "common law copyright" claims in the original complaint and in both the first and second amendments thereof.

3. In fact, Plaintiff's new proposed pleading adds insubstantial additional defamation claims, thus contextualizing it on a continuing basis squarely within the proscriptions of New York's anti-SLAPP statute as an attack on publicly-focused speech (s*ee* First Cause of Action, Proposed Second [*sic*, actually Third] Amended Verified Complaint, Exhibit E to the Cross-Motion, Docket Document No. 58.) Moreover, he continues to assert both improperly pleaded (Prima Facie Tort) and legally nonexistent ("The New York Common Law Right of Privacy") claims under his proposed Second Cause of Action (*id*.).

## II. Overview: The Plaintiff Cuts and Runs

4. It is revelatory that, on the very first serious challenge to the adequacy and good faith of his and his counsel's pleadings, the Plaintiff and counsel have chosen to surrender on two of their three initial causes of action – violation of Civil Rights Law §50 and what they called "The New York Copyright Common Law" – speciously attempting in retreat to demonstrate a valid basis to have asserted them in the first place. In fact, however, these claims were bogus from the outset and the circumstantial evidence to this effect is convincing.

5. In withdrawing *two-thirds of their initial pleading*, counsel defensively suggests she and the Plaintiff "… had more than a good faith belief that the Defendant's use of Plaintiff's image without Plaintiff's consent was in violation of New York's Civil Rights Law and constituted copyright infringement that was engaged in for commercial purposes." *See*, for example, Affirmation in Support of Cross-Motion, subscribed October 13, 2023, at paragraph "13" (Docket Document No. 153).

6. This is transparently disingenuous. There was no good faith basis for pleading either cause of action.

### III. Analysis of the Withdrawn Causes of Action

7. Let's start our analysis with the assertion in the original Complaint (Docket Document No. 1), and the two subsequent amended complaints (Docket Document Nos. 13 and 20), that "… Defendant has violated Plaintiff's common law copyright rights under New York law with respect to said photograph." *See* Docket Document No. 1 at paragraph "29."

8. As indicated in Defendant's Reply Memorandum in Further Support of His Motion to Amend His Answer and in Response to Plaintiff's Cross-Motion ("Defendant's Reply Memorandum"), there is no such cause of action. The federal courts have so held. Plaintiff's counsel, a veteran practitioner in the federal courts, certainly should have known, or with a modicum of effort could have determined, the Federal Copyright Act has preempted such claims under state law.[2]

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[2] On information and belief, Plaintiff has not registered the photograph at issue (*i.e.*, the cropped image of Plaintiff wearing an argyle sweater) which he claims to own. This is significant because without registration Plaintiff cannot properly assert in federal court a claim under the Copyright Act. It is also problematic for Plaintiff in the context of his and his counsel's repeated efforts to coerce internet service providers to disable Defendant's two websites, meetoo-shatkin.com and metoo-buffalo.com (and possibly the billboard) vis-à-vis takedown demands issued under the federal Digital Millennium Copyright Act. (A requisite statement, *under penalty of perjury,* in asserting such takedown demands is that the requester is the "… owner of an *exclusive right* that is allegedly infringed." 17 U. S. Code §512 (c) (3) (A) (vi). (Emphasis added.) However, Plaintiff, it will be shown, has no "exclusive right" in the photograph at issue; thus, the takedown demands were improperly made.)

That there was no registration (and therefore no lawsuit under the Copyright Act) presented a problem for Plaintiff because it appears from the limited document production made by the Plaintiff in this action that some internet service providers who received DMCA takedown requests required, as a prerequisite to disabling Defendant's websites, copies of pleadings verifying the Plaintiff had commenced litigation to enforce the copyright; without a registration, however, Plaintiff could not properly commence an action under the Copyright Act. Plaintiff's solution, apparently, was to commence this action in state court using a defunct cause of action ("common-law copyright"), affording him the opportunity to then present this state court lawsuit as "proof"

9. How can there be a good faith basis to assert a cause of action that does not exist?

10. Counsel's protestations of "good faith" in asserting the Civil Rights Law §50 claim are equally unpersuasive.

11. The "proof" and "due diligence" underlying Plaintiff's assertion of this cause of action consisted, according to the initial Complaint (*see* Docket Document No. 1 at paragraph "11" and Exhibit B (Docket Document No. 3) thereto), essentially in matching Internet "advertisements" with one of the Defendant's telephone numbers associated with his former law practice. But if one examines the "advertisement" in Exhibit B to that initial Complaint, one sees that it is merely one of the countless generic listings put out by various online directory services based on outdated information that hasn't been verified as either accurate or current. Indeed, the exhibit attached to the Plaintiff's Complaint indicates on its face that it lacks authorization, legitimacy, currency and credibility: "Suggest an edit. Own this business?"[3]

12. The billboard in question, Exhibit A (Docket Document No. 2) to the initial Complaint, contains not a single indication to substantiate the probandum underlying this cause of action: not a single statement to the effect that Mr. Ald is a practicing attorney, no reference whatsoever to a law office.

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of copyright litigation. As Alicia Rood testified on May 9, 2023: "And so I would write the web hosting companies identified in host checker. It's basically a Digital Millennium copyright letter, which is to say the website contains content that was protected by copyright. I referenced the fact that we were already in litigation, and requested that the websites be taken down." May 9, 2023 Transcript at p. 250-251. In other words, Plaintiff's counsel used an *unregistered* image and state court litigation containing a bogus copyright claim to convince web hosting companies to curtail Mr. Ald's protected speech regarding a matter of public interest.

[3] Indeed, while dictating this affidavit I did an Internet search for an attorney and personal friend of mine, David Jay, a prominent Civil Rights lawyer here in Buffalo, who I know to have been dead since 2010. The results of that search, conducted on the search engine Bing, included a similar FindLaw ad for Mr. Jay, and at least 4 other advertisements for his practice.

13. Indeed, Plaintiff's counsel, a practicing lawyer with access to the documentation available through the New York Office of Court Administration, could have exercised diligence in a more productive way by researching Mr. Ald's *actual* professional status. With surprisingly little effort, counsel would have seen he is officially retired and has been for approximately a decade. I attach as **Exhibit 1** a copy of the initial receipt, dated February 21, 2014, confirming Mr. Ald's official retirement from the practice of law (as well as all subsequent re-registration receipts confirming his continued retirement thereafter and up to the present, plus the OCA Attorney Detailed Report for Mr. Ald).[4] And further, a minor additional inquiry into the Rules of the Chief Administrative Judge would have glossed for counsel the scope of retirement: "An attorney is "retired" from the practice of law when, other than the performance of legal services without compensation, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law." *See* Part 118.1 (g).

14. So much for the "good faith basis" of these pleadings.

15. Indeed, and by way of irony and further commentary on the "good faith basis" for the Plaintiff's ongoing and yet-again amended litigation against Mr. Ald: the prima facie tort cause of action in the proposed amended complaint is not even properly pleaded; and the alternative claim under something counsel calls "The New York Common Law Right of Privacy" doesn't

[4] In preparing this affidavit I actually called the Office of Court Administration using the telephone number on its website for attorney registrations. After waiting in a queue for less than a couple minutes, I asked the clerk who answered how any member of the public can ascertain whether an attorney is registered to actively practice law versus being retired. "By doing just what you're doing," she said. I asked what she meant and she explained that a simple phone call is all it takes. This entire interaction lasted probably less than 30 seconds.

even exist. There is no such right of privacy at common law in New York. *See* Defendant's Reply Memorandum at p. 3.[5]

## IV. Defendant Has the Right To Assert Claims, Counterclaims etc. Under New York's Anti-SLAPP Statute

16. As explained in Defendant's Reply Memorandum, counsel's suggestion that the amendment of the complaint somehow "moots" or renders the proposed amendment "futile" is misplaced.

17. Counsel unpersuasively asserts in conclusory fashion that the subject matter of Defendant's speech and publications does not involve "public petition and participation" and then goes on to misstate the record and the Defendant's testimony.

18. Counsel's conclusory assertion fails to acknowledge or address the language of the anti-SLAPP statute that both defines an "action involving public petition and participation" and dictates the liberality with which the statute is to be applied.

19. The speech protected by the statute is as follows:

> (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or
> (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest….

New York Civil Rights Law §76-a (a) (1) and (2).

20. Additionally and crucially, the Legislature has commanded that "public interest shall be construed broadly, *and shall mean any subject other than a purely private matter*." New York Civil Rights Law §76-a (d). (Emphasis added.)

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[5] Civil Rights Law §50, which Plaintiff and his counsel concede are inapplicable on the facts of this case and as to which they are now withdrawing as a claim, is the exclusive remedy in New York for so-called "right of privacy" violations.

21. Counsel argues that, because the genesis of Defendant's publications arose out of Plaintiff's extramarital affair with Mr. Ald's wife – who was then the dentist's patient – the speech cannot be of "public interest."

22. This observation is faulty for many reasons.

23. First and fundamentally, it ignores the language of the publications. The billboard addressed professional impropriety and sought input from the public, and the thrust of the websites similarly addresses impropriety by a health care professional toward patients and employees and also seeks input from the public to help bring the perpetrator to justice and prevent future victims. Indeed, the websites by their very title invoke the very public "MeToo" movement which addresses male sexual victimization of women. The test for the qualification of speech under the anti-SLAPP statute is the *content of the speech,* not whether its inspiration arises from a private event.

24. The language of the websites clearly invokes public issues and public interest:

**from metoo-buffalo.com:**

- Have You Had an Unwanted or Inappropriate Experience with Todd Shatkin, DDS?

- Me Too Shatkin is dedicated to putting an end to this. If you have any information about the unethical, depraved behavior from the Buffalo dentist Todd Shatkin, share your story here. With your help, we can prevent future mistreatment of women.

- To Prevent Future Victims, We Need to Stop Todd Shatkin, DDS

- If you've been victimized by Dr. Shatkin, you can also contact us. All information will be kept confidential unless you decide to come forward publicly.

- You can also contact the New York State officer in charge of investigating complaints of this nature directly:
AnthonyMastanuono
Supervising Investigator, Buffalo OPD
295 Main Street Suite 924
Buffalo, NY 14203
(716) 842-6606

- We're looking for justice for the victims of Todd Shatkin. If you've been victimized by Dr. Todd Shatkin, we encourage you to come forward. All information will be held in strict confidence until you agree to come forward. We'll also offer any assistance you need to make sure your cases brought to the attention of the proper authorities.

**from metoo-shatkin.com**

- Please contact us if you can add your story or if you know anyone that could add to this. Any information given will be held in strict confidence unless and until you agree to come forward.

- You can also contact the New York State officer in charge of investigating complaints of this nature directly. . . .

- If you too have been a victim of Dr. Shatkin's predatory sexual behavior, we encourage you to come forward now. We will offer any assistance that we can to ensure that your case is brought to the attention of the proper authorities. Any information given will be held in strict confidence unless and until you agree to come forward.

25. Second and fatally, counsel attempts to cite Defendant's testimony in the April/May, 2023, sanctions hearing to support her argument that the speech at issue does not qualify for protection under the anti-SLAPP statute. However, counsel misrepresents much of the testimony.

26. In paragraph "23" of her affirmation, for example, she misrepresents his testimony by saying that his sole motive for creating the websites was to "protect his family" – which she suggests is a purely private motive and subject matter outside the protections of the anti-SLAPP statute. And in paragraphs "29" through "32," she again misrepresents his testimony, suggesting repeatedly that the Defendant "… has not identified a single patient… with whom the Plaintiff had a sexual relationship" (paragraph "29"); "… Defendant has failed when questioned at the aforementioned hearing to identify a single patient … whom he claims to have had a sexual relationship with the Plaintiff" (paragraph "31"); "This failure of Defendant to identify even a single alleged victim…" (Paragraph "32").

27. These are mischaracterizations of the testimony. (Note: counsel does not include a single verbatim quotation or a single specific page reference to the hearing transcripts to support these mischaracterizations (*see* Affirmation in Support of Cross-Motion, paragraphs "23" - "33"), except to have referenced the "protect his family" statement which she has isolated to give the misimpression that he indicated this was the sole basis of his publications.

28. While Mr. Ald acknowledged protection of his family as an impetus for his activities, he stated on numerous occasions that his motive in his publications is public in nature, and his testimony is both consistent with the plain language of the publications and laced throughout the testimony:

- indeed, just a few pages after the "to protect my family" statement (April 18, 2023 Tr. at 143) Mr. Ald confirmed his authorship and reiterated the public purpose of his publications as Plaintiff's counsel read from one of the publications:

> Q. Did you write this about – it says to prevent future victims we need to stop Todd Shatkin DDS. Did you write this page?
>
> A. I did.
>
> Q. And we look at the second paragraph on that page. It says it's time to change that. To give a voice to the victims and to protect more women. We can learn more about the lawsuits filed against Dr. Shatkin here. If you've been victimized by Dr. Shatkin, you can also contact us, all information will be kept confidential unless you decide to come forward publicly. Do you see that?
>
> A. Yes.
> April 18, 2023 Tr. at 150-151.[6]

[6] Ironically, counsel herself associated Defendant's language on this website with the very public-interest oriented Me Too Movement because it suited her polemical purposes at the time. Now, however, when the adversarial purpose is exactly the opposite, counsel ignores both the existence of the testimony and her own characterization of it at the time.

- similar testimony indicating the public-interest purpose of the publications occurred on the second day of the hearing (*see* May 9, 2023 Tr. at 217-239). For example:

> A. I did hope that it would go to patients, victims of his practice, yes. That was the intent. I thought victims of his practice might live in close proximity.
>
> Q. And it was done to hurt his business, correct?
>
> A. To generate victims' responses.
>
> Q. It was done to hurt his business? The answer is yes or no.
>
> A. No.
>
> (Tr. at 217)

> A. The whole purpose of this is to bring forth victims of his sexual misconduct. So yes, I'm seeking out – and only victims – the only victims that matter to the prosecutor are patients or former patients.
>
> (Tr. at 231)

> A. I want him to – to be brought to justice for his abuse of women . … I want the state licensing board to punish him .
>
> (Tr. at 234)

29. Counsel's inaccurate assertion that the Defendant failed to identify a single patient victim and that his outreach to the public failed to yield responses confirming Plaintiffs' improper sexual conduct ignores his testimony to the contrary, as well as the fact that *she herself cut the Defendant off at least twice during the course of the hearing when he attempted to provide details of the contacts he received from victims and witnesses of the Plaintiffs' victimization of women*. Counsel's assertion that Mr. Ald failed to disclose the names of patients ignores the fact that the

reason such names were not provided during discovery is because they contacted him under a promise of confidentiality.

30. For example, counsel fails to mention the following exchange, which occurred on the first day of the hearing:

> A. So the website was created in 2018. That's when – when I started to get responses from women asking for confidentiality. All of the sexual victims, except for Rebecca Blair Cole, requested confidentiality. I – one of them just came in a couple of days ago and said that she knew Dr. Shatkin when he was a resident at Buffalo General and that he threw parties at which women –
>
> Ms. Joseph: I'm going to move to strike, because my question was simply whether he was – yes or no question – whether he has received any emails from people in response to his website that he admits having.
>
> A. Yes, yes.
>
> (April 18, 2023 Tr. at 154-155)

31. Counsel also omits reference to the following testimony on the second day of the hearing:

> Q. And when you talk about victims, who other than your wife do you know personally that you claim to have been a victim?
>
> A. I have been in contact with, like I said, Rebecca Blair Cole who has given me permission to use her name. I had numerous people contact me through the website giving details such as, you know, Dr. Shatkin sent a picture of his groin to –
>
> [Counsel again cuts the witness off as he is about to detail these accounts received from victims. She demands names even though he previously has testified all the victims other than Ms. Cole required confidentiality.

(May 9, 2023 Tr. at 232[7]

32. There are numerous other misleading omissions, misrepresentations and misstatements of fact and law throughout the papers opposing Defendant's instant motion and in support of the cross-motion. A number of these are addressed in the Defendant's Reply Memorandum of Law.

33. The Defendant does not have the burden on this motion, as counsel incorrectly states, to show that Plaintiff and his counsel commenced or continued this action without a substantial basis in fact and law that could not be supported by a substantial argument for the extension, modification or reversal of existing law. *See* New York Civil Rights Law §70-a (a). On the contrary, the Plaintiff has the burden of proof on each and every element of his claims in this case. With respect to the defamation claims, Plaintiff assumes the highest and most difficult burden of proof known to the civil law, namely, he must prove *by clear and convincing evidence* that Defendant's statements, on a *subjective* level, were made with knowing and intentional falsity.

34. If Defendant prevails on his anticipated dispositive motion under CPLR 3211 (g) and 3212 (h), then the "substantial basis" analysis will have been accomplished and decided in his favor for purposes of the recovery of his costs and attorney's fees under the anti-SLAPP statute. In the event, the fee award is **mandatory**.[8]

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[7] Also not referenced in counsel's affirmation is the Defendant's May 9 testimony that he has successfully obtained knowledge of numerous incidents: "multiple, multiple other incidents besides that [Dr. Shatkin's predatory conduct toward Mrs. Ald when she was his patient]." Tr. at 239.

[8] Since the November 10, 2020 effective date of the amendments to the anti-SLAPP statute, our firm has successfully litigated to disposition on behalf of our defendants-clients three defamation cases. In each such case, the court has awarded our client attorney's fees under Civil Rights Law §70-a.

## V. Summary and Conclusion

35. The expressed avowed purpose of the Plaintiff and his counsel in this action (and by their conduct even before starting this lawsuit) has been to stop Mr. Ald's speech and expression. They have prosecuted their efforts through intimidation, coercion, misrepresentation and litigation with attendant accumulation of attorney's fees.

36. From the outset, they included in their complaint baseless and even nonexistent causes of action. On information and belief, they used the pendency and contents of this litigation to coerce website hosting entities, the billboard company, and other vehicles of the Defendant's speech into disabling his methods of dissemination.

37. They now ask the Court to permit yet another amendment of their pleading and, in it, they have asserted improperly pleaded defamation claims, an insubstantial prima facie tort claim, and a nonexistent "common law privacy" claim.

38. The content of Defendant's speech is clearly within the sphere of "public interest" as defined in the Civil Rights Law and the cases interpreting it.

39. This lawsuit is precisely what the Civil Rights Law amendments are designed to prevent and punish: a strategic lawsuit against public participation.

40. Defendant's claim for damages under § 70-a is appropriate as a counterclaim in this litigation. It also can be brought in a separate litigation as an independent claim. The Court should grant the motion.[9]

[9] As indicated in the Defendant's Reply Memorandum of Law Mr. Ald takes no position on the cross-motion under a full reservation of rights. While he concedes he has no present basis to oppose the imposition of the sanctions judgment, he continues to maintain he is not the author of the text messages or creator of the websites at issue in the sanctions application, and he continues to work through retained forensic consultants to prove this negative, while also prosecuting an appeal from the determination. He also reserves all rights in this respect.

Joseph M. Finnerty

Subscribed and sworn to before me
this 3rd day of November, 2023.

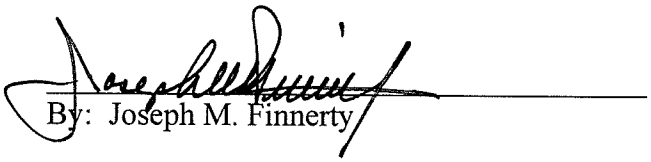
Notary Public

KARIM A. ABDULLA
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Nov. 13, 2026

**WORD COUNT CERTIFICATION**

Pursuant to 22 N.Y.C.R.R. §202.8-b, the undersigned hereby certifies that the word count of the foregoing Affidavit, exclusive of the caption and signature block, is 3982 words.

DATED: November 3, 2023



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