UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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SHIMSHON WEXLER,

Plaintiff,

-against-

MEMORANDUM AND ORDER
18-CV-3066-SJB

DORSEY & WHITNEY, LLP,
ARTIN BETPERA,

Defendants.
----------X

BULSARA, United States Magistrate Judge:

On May 24, 2018, Plaintiff and lawyer Shimshon Wexler ("Wexler"), proceeding *pro se*, filed this defamation action against Dorsey & Whitney, LLP ("Dorsey") and Artin Betpera ("Betpera") (collectively, "Defendants"). (Compl., Dkt. No. 1). The Complaint was later amended to include a claim under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). (Am. Compl. dated July 9, 2018, Dkt. No. 13). Wexler alleges that Dorsey published an article, written by Betpera, on its consumer financial services blog that contained false and disparaging information about him and caused him financial and reputational harm. (*Id.* ¶ 40).

On March 14, 2019, Defendants filed a motion to dismiss the Amended Complaint for failure to state a claim under Rule 12(b)(6) and, as against Betpera, for lack of personal jurisdiction under Rule 12(b)(2). (Mot. to Dismiss dated Mar. 14, 2019 ("Defs.' Mot."), Dkt. No. 33). The parties consented to have this Court handle the case for all purposes, pursuant to 28 U.S.C. § 636(c) and Rule 73. (Consent to Jurisdiction by U.S. Magistrate Judge dated Mar. 6, 2019, Dkt. No. 31).

For the reasons stated below, Defendants' motion to dismiss is granted, and the action is dismissed with prejudice.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The facts, which the Court accepts as true for the purposes of considering a Rule 12(b)(6) motion to dismiss, *see Friedman v. Bloomberg L.P.*, 884 F.3d 83, 93 (2d Cir. 2017), are drawn from the Amended Complaint and its attached exhibits, unless otherwise noted.

I. The Parties

Wexler is a solo practitioner licensed in New York and Georgia and domiciled in Georgia. (Am. Compl. ¶¶ 1–2). He is a "private figure," who does not regularly appear in the media. (*Id.* ¶ 41).

Dorsey is a large law firm and a limited liability partnership organized under the laws of Minnesota. (*Id.* ¶ 3). Dorsey represents companies which are sued for violations of the Telephone and Consumer Protection Act ("TCPA"). (*Id.* ¶ 9). Betpera is a California citizen and former employee of Dorsey. (*Id.* ¶ 5). The Amended Complaint alleges that Dorsey has no partners domiciled in Georgia, making the parties completely diverse. (*Id.* ¶¶ 4, 6).

II. Judge Block's Opinion in *AT&T*

Wexler's Complaint stems from an article Defendants published regarding a putative class action Wexler filed as counsel in the Eastern District of New York under the TCPA against AT&T Corp. ("AT&T"). The article discussed Judge Frederic Block's decision regarding the adequacy of the class representative, plaintiff Dr. Eve Wexler ("Dr. Wexler"), Wexler's wife. *See Wexler v. AT&T Corp.*, 323 F.R.D. 128, 129 (E.D.N.Y. 2018). Although Wexler was originally the only attorney on the case, he was joined one month after the lawsuit was filed by co-counsel James Giardina ("Giardina"). *Id.* AT&T moved to strike the class allegations, taking the position that "unless and until

Shimshon Wexler both withdraws as counsel and renounces any interest in any future award of attorney's fees in this case, Dr. Wexler is an inadequate class representative as a matter of law, and the case cannot proceed as a class action." *AT&T*, 323 F.R.D. at 129–30 (quotations omitted). In response to AT&T's motion, Giardina informed the court that Wexler would withdraw as counsel for Dr. Wexler and a new firm would join the case. *Id.* at 130. However, Giardina stated that while "Wexler will not be entitled to any share of attorney fees recovered in the case," he might "petition the Court for quantum meruit only for the work done prior to his withdrawal." *Id.* (quotations omitted).

Judge Block issued an opinion granting AT&T's motion to strike on February 7, 2018. *Id.* at 129. He found that Dr. Wexler was an inadequate class representative because of her marriage to class counsel Wexler. While "[t]here is no per se rule against relatives of class counsel serving as class representatives . . . [,] courts have long found that a familial (or other) relationship creates a conflict if it gives the class representative an interest in the fees class counsel might recover." *Id.* at 130. Judge Block reasoned that a class representative has a responsibility to "monitor class counsel," and "an interest in class counsel's fee will dull [the class representative's] vigilance, especially if the fees are likely to dwarf the class representative's own recovery." *Id.*

Although Dr. Wexler acknowledged that "she would have had an interest in a potential fee award to her husband, had he been appointed class counsel," she nonetheless argued that her husband's withdrawal permitted her to remain class representative. *Id.* at 131. Judge Block disagreed. He concluded that:

> Notwithstanding his withdrawal, Mr. Wexler intends to seek fees for his work based on quantum meruit. Since he is no longer in a position to negotiate with the defendant, any fee award would come out of the class's

> recovery. As class representative, Dr. Wexler should act to maximize that recovery and, by extension, minimize reductions to it. But her interest in the fee award supplies the opposite incentive.

AT&T, 323 F.R.D. at 131. Judge Block also rejected Dr. Wexler's argument that Giardina, as class counsel, and the Court—in its role approving settlements and fee awards—would provide sufficient safeguards against any impropriety: "[i]f the interests of Dr. Wexler and the class were to diverge over Mr. Wexler's fee request, then so would counsel's loyalties. And while the Court has a role in approving both settlements and fee awards, the Second Circuit has held that court approval does not supplant the need for a conflict-free class representative." *Id.* (citation omitted). "Because Dr. Wexler has an interest in a possible fee award to her husband," Judge Block granted AT&T's motion to strike the class allegations. *Id.*

III. Alleged Harm Caused By Dorsey's Blog

Dorsey runs a consumer financial services blog that covers "cutting-edge legal issues impacting the consumer financial services industry." (Am. Compl. ¶¶ 10–11). The blog claims that "Dorsey's attorneys have handled dozens of nationwide TCPA class actions. They know the tricks used by class action lawyers and how best to thwart them at the outset." (*Id.* at ¶ 14 (quotations omitted) (emphasis removed)).

On February 12, 2018, five days after Judge Block's opinion was issued, Dorsey's blog published a "Legal Update" article written by Betpera. (*Id.* ¶ 20). The headline of the post was "TCPA Class Certification Denial Exposes Major Spousal Scheme," and stated in its entirety:

> There are plenty of things I'd like to do with my wife one day. Take a trip to Greece. Finally convince her to go camping with me (never going to happen). But filing a class action with her as class representative is definitely not one of them.

> That's exactly what one husband-and-wife duo tried to pull in the Eastern District of New York. Senior Judge Frederic Block made quick work of the scheme.
>
> In *Wexler v. AT&T Corp.*, No. 15-CV-0686 (FB) (PK), 2018 U.S. Dist. LEXIS 20157 (E.D.N.Y. Feb. 5, 2018), the Court granted AT&T's motion to strike class allegations based on the inadequacy of the class representative. The class representative was Dr. Eve Wexler, who was the wife of class counsel Shimshon Wexler. After AT&T alerted the Court to their relationship, Mr. Wexler quickly withdrew and was replaced by class counsel who had no relation to Plaintiff. However, Mr. Wexler made it clear that he still intended to pursue an award of fees for his work on the case prior to withdrawal.
>
> Plaintiff argued that Mr. Wexler's withdrawal "mooted" the issue. Not so, said Judge Block. There's no disputing Plaintiff would have an interest in a potential fee award to her husband, had he been appointed class counsel. "Courts have long found that a familial (or any other) relationship creates a conflict if it gives the class representative an interest in the fees class counsel might recover." And that conflict didn't just vanish after Mr. Wexler withdrew, especially because he was still planning to seek an award of fees for his work prior to withdrawal.
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> The Court astutely observed that "[a]s class representative, Dr. Wexler should act to maximize [class] recovery and, by extension, minimize reductions to it. But her interest in the fee award supplies the opposite incentive." The Court emphasized that because the "very nature of a class creates conflicts of interest between the class, class counsel and the class representative," the requirements of Rule 23 must be "scrupulously enforced."
>
> And enforced they were. The Court held that because Plaintiff had an interest in a possible fee award to her husband, "she cannot adequately represent the interests of absent class members," and granted AT&T's motion to strike. Maybe the Wexlers should try salsa dancing instead.

(Am. Compl. ¶¶ 20, 24; "Dorsey Legal Update," attached as Ex. I to Am. Compl., Dkt. No. 13). Wexler alleges that the article was written to advertise Dorsey's ability to "expose" the "tricks and schemes of plaintiff's lawyers" and that it would do the same for a prospective client facing a TCPA lawsuit. (Am. Compl. ¶¶ 34–35).

The Amended Complaint takes issue with a number of elements of Dorsey's article. Wexler contends that Dorsey defamed him by using the words "major scheme"

in the headline and "scheme" in the article itself. (Am. Compl. ¶¶ 38, 59). He asserts that the words "major scheme" mean an "important, serious or significant[,]" "clever and often dishonest plan to do or get something." (*Id.* ¶¶ 22–23). The use of the word "scheme" and the allegation that a lawyer engaged in a "major spousal scheme," Wexler argues, impugned his professional veracity, honesty, and fitness as an attorney; subjected him to ridicule, contempt, and shame; and caused others to refrain from hiring or associating with him. (*Id.* ¶¶ 53, 57, 58). Wexler emphatically denies that he or his wife engaged in any "spousal scheme" or "major spousal scheme" and that at no time did he "attempt to conceal the fact that Dr. Eve Wexler was his wife . . . ." (*Id.* ¶¶ 25, 29).

Wexler also contends that other elements of the article are false. First, he believes the article suggests Wexler intended to seek fees despite his withdrawal as counsel. (*Id.* ¶ 32). Wexler claims he "never made clear that he was going to seek" attorney's fees and that he in fact "renounced his rights to any fees" for the time period after Judge Block's decision. (*Id.* ¶ 33). Second, he believes the article erroneously suggests that prior to his withdrawal, Wexler was the sole attorney representing plaintiffs. (*Id.* ¶ 31).

In addition to the blog post, Dorsey also published the article on JD Supra, "a website that law firms . . . use to advertise their services and show themselves to be thought leaders on certain topics." (*Id.* ¶ 39).

A separate but related article was subsequently posted on another website, AccountsRecovery.net, which also discusses TCPA litigation. (*Id.* ¶ 37; "Husband Lawyer Tried Using His Spouse as Class Representative in TCPA Case," attached as Ex. G to Am. Compl., Dkt. No. 13). The AccountsRecovery article linked to the blog post,

summarized the Dorsey article, and offered, "Having read [the Dorsey article], my only question is, for how long did they think they could get away with it?" (Am. Compl. ¶ 37 (emphasis omitted)). Wexler alleges that the AccountsRecovery article interpreted the "Dorsey article to mean that Shimshon Wexler and Eve Wexler engaged in a major scheme." (*Id.* ¶ 38).

The Amended Complaint contains two causes of action. The first is for violation of Section 43(a) of the Lanham Act. (*Id.* ¶¶ 46–49). Wexler argues that the allegedly defamatory article constitutes false advertising and "is likely to influence consumers not to hire . . . Wexler as their lawyer." (*Id.* ¶¶ 47, 49). The second cause of action is for defamation under New York law. (*Id.* ¶¶ 50–61). Wexler requests compensatory and punitive damages, pre- and post-judgment interest, and costs. (Am. Compl. at 8 (Prayer for Relief)). He claims that he has suffered damages in an amount exceeding $75,000. (Am. Compl. ¶ 45).

Both before and after the commencement of this lawsuit, Wexler asked Dorsey to retract the article, which it refused. (*Id.* ¶ 36). In October 2018, however, Dorsey removed the article from its blog and from JD Supra. (Mem. of Law in Supp. dated Mar. 14, 2019 ("Defs.' Mem."), attached as Ex. 1 to Defs.' Mot., Dkt. No. 33 at 2 n.1).

DISCUSSION

I. Legal Standard for Motion to Dismiss under Rule 12(b)(6)

"The purpose of a motion to dismiss for failure to state a claim under Rule 12(b)(6) is to test the legal sufficiency of Plaintiff['s] claims for relief." *Amadei v. Nielsen*, 348 F. Supp. 3d 145, 155 (E.D.N.Y. 2018) (citing *Patane v. Clark*, 508 F.3d 106, 112 (2d Cir. 2007)). For a 12(b)(6) motion, the Court must "construe the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all

reasonable inferences in the plaintiff's favor." *Palin v. N.Y. Times Co.*, No. 17-CV-3801, __ F.3d __, 2019 WL 5152444, at *2 (2d Cir. Oct. 15, 2019) (quotations and alteration omitted); *Amadei*, 348 F. Supp. 3d at 155 ("[W]hen reviewing a complaint on a motion to dismiss for failure to state a claim, the court must accept as true all allegations of fact in the complaint and draw all reasonable inferences in favor of Plaintiffs.").

Once the facts are construed in the light most favorable to the plaintiff, to avoid dismissal, there must be sufficient facts that allege a plausible claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss [pursuant to Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." (quotations omitted)). "[A] district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference. Of course, it may also consider matters of which judicial notice may be taken under Fed.R.Evid. 201." *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991).

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. A complaint must contain more than "naked assertion[s] devoid of further factual enhancement." *Id.* (quotations omitted). In other words, a plausible claim contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; Fed. R. Civ. P. 8(a)(2). "Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007). The determination whether a plaintiff has alleged a plausible claim is "a context-specific task that requires the reviewing court to draw on

its judicial experience and common sense." *Iqbal*, 556 U.S. at 679; *see also Escamilla v. Young Shing Trading* Co., No. 17-CV-652, 2018 WL 1521858, at *2 (E.D.N.Y. Jan. 8, 2018), *report and recommendation adopted*, 2018 WL 1033249 (Feb. 23, 2018).

II. Wexler's Defamation Claim

"Defamation is the injury to one's reputation either by written expression, which is libel, or by oral expression, which is slander." *Biro v. Condé Nast*, 883 F.Supp.2d 441, 456 (S.D.N.Y. 2012). Under New York law, to recover on a libel claim, a plaintiff must establish the following elements: "(1) a written defamatory statement of and concerning the plaintiff, (2) publication to a third party, (3) fault, (4) falsity of the defamatory statement, and (5) special damages or per se actionability." *Palin*, ___ F.3d ___, 2019 WL 5152444, at *2 (citing *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 176 (2d Cir. 2000)). The first element "should ordinarily be resolved at the pleading stage." *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001); *see also Croton Watch Co. v. Nat'l Jeweler Magazine, Inc.*, No. 06-CV-662, 2006 WL 2254818, at *5 (S.D.N.Y. Aug. 7, 2006) ("The determination of whether the words at issue are defamatory presents a legal question to be resolved, in the first instance, by the court."). The parties focus on—as does the Court—the first of these elements: whether there was a written defamatory statement of and concerning Wexler.

To evaluate that element on a motion to dismiss, "the court must decide whether the alleged statements are reasonably susceptible to defamatory meaning." *Wexler v. Allegion (UK) Ltd.*, 374 F. Supp. 3d 302, 310 (S.D.N.Y. 2019) (quotations omitted). "[A] defamatory statement [is] one that exposes an individual to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or induces an evil opinion of one in the minds of right-thinking persons, and

deprives one of confidence and friendly intercourse in society." *Karedes v. Ackerley Grp., Inc.*, 423 F.3d 107, 113 (2d Cir. 2005) (quotations and alterations omitted). "A statement is reasonably susceptible of a defamatory meaning when it tends to expose a person" to those things, e.g., "hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number in the community." *Restis v. Am. Coal. Against Nuclear Iran, Inc.*, 53 F. Supp. 3d 705, 718 (S.D.N.Y. 2014) (quotations and alterations omitted).

The Court will only analyze whether the headline of the article is a defamatory statement about Wexler. Wexler's Amended Complaint refers to both the headline and the statements in the body of the article. (Am. Compl. ¶¶ 20, 24, 53). And Defendants' motion to dismiss addresses the headline and the article as a whole. (Defs.' Mem. at 9 ("The Context of the Article Indicates Statements Are Opinion"), 14 ("The Statements Are Absolutely Privileged . . ."). Yet, in his brief in opposition, Wexler only argues that the headline is defamatory and responds to Defendants' arguments only by referencing the headline as defamatory. (*See* Mem. in Opp'n dated Mar. 28, 2019 ("Pl.'s Mem."), Dkt. No. 34 at 2 ("This lawsuit spotlights the *article's defamatory headline* . . . . Dorsey should not be allowed to claim that the headline of its article was not false . . . . Dorsey argues that its headline was not defamatory . . . ") (emphasis added), 3 ("Dorsey's headline did not fairly index the content of its article and did not fairly summarize *The AT&T Opinion*. The headline used no words that indicated it was the author's opinion."), 5 ("The Headline to Dorsey'[s] Article is not an Opinion"), 7 ("The title . . . is false."), 12 ("The headline at issue here conveys facts capable of verification, not opinions."), 15 ("Section 74 does not apply to Dorsey's defamatory headline . . . ."), 16 ("The Article's Headline is Not a 'Report' Protected by Section 74")). Given this

deliberate omission, the Court concludes that Wexler's defamation claim is based solely on the headline, namely "Legal Update: TCPA Class Certification Denial Exposes Major Spousal Scheme." The Court considers Wexler's other allegations—that the text of the article constitutes defamation—to have been abandoned. *See, e.g.*, *McLeod v. Verizon N.Y., Inc.*, 995 F. Supp. 2d 134, 143 (E.D.N.Y. 2014) ("[A] plaintiff's failure to respond to contentions raised in a motion to dismiss claims constitute an abandonment of those claims." (quotations omitted)); *Chamberlain v. City of White Plains*, 986 F. Supp. 2d 363, 392 (S.D.N.Y. 2013) ("A court may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed." (quotations omitted)).

The words in the headline that Wexler objects to—"Major Spousal Scheme"—are not reasonably susceptible to convey a defamatory meaning. The Court, therefore, concludes that as a matter of law the defamation claim must be dismissed.

To start, the headline cannot be read to be a statement "of and concerning" Wexler. At the pleading stage, a plaintiff must "plead sufficient facts to make it plausible—not probable or even reasonably likely—that a reader familiar with . . . Plaintiff would identify him as the subject of the statements at issue." *Elias v. Rolling Stone LLC*, 872 F.3d 97, 105 (2d Cir. 2017). Here, the headline makes no mention of a lawyer, or Wexler himself, and one cannot read the headline as saying anything about Wexler at all. It is an unnamed "spouse" involved in the "scheme," not an attorney, let alone Wexler. Indeed, several courts have held that under New York law, a headline that makes no mention of the plaintiff is not actionable defamation. *E.g.*, *Triano v. Gannett Satellite Info. Network, Inc.*, No. 09-CV-2533, 2010 WL 3932334, at *4 (S.D.N.Y. Sept. 29, 2010) ("[A] headline that does not directly name the plaintiff is not

independently actionable." (quotations omitted)) (collecting cases); *Trudeau v. Plattsburgh Publ'g Co.*, 11 A.D.2d 852, 852 (3d Dep't 1960) (affirming dismissal where article named plaintiff but "[t]here [wa]s nothing in the headline naming or identifying any person" and "[r]eading the headline alone no one [wa]s defamed"); *White v. Berkshire-Hathaway, Inc.*, 10 Misc. 3d 254, 255–56 (Sup. Ct. 2005) (dismissing complaint where "Plaintiff now limits his claim solely to the headline of the news article, 'Unscrupulous operation gouges nursing home,'" and finding it "significant that plaintiff was not named in the headline at issue"). This alone requires dismissal of the defamation claim. *See, e.g.*, *Gilman v. Spitzer*, 902 F. Supp. 2d 389, 397 (S.D.N.Y. 2012) ("Because the challenged statements cannot reasonably be construed as 'of and concerning' the plaintiff as a matter of law, Defendants are entitled to judgment dismissing Plaintiff's defamation claim."), *aff'd*, 538 F. App'x 45 (2d Cir. 2013).

Wexler nonetheless argues that the headline is defamatory because the article that follows is about him and his case. Even assuming someone would reasonably attribute the headline to be a statement about Wexler, the headline is still not defamatory. The headline would only be defamatory if it was a statement of fact, and not an opinion. "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*." *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995). In determining whether a statement is a factual assertion—as opposed to a nonactionable opinion—a court examines three factors: "(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." *Id.* (quotations and alterations omitted). "Application of these three factors is not rigid and mechanical, and no single factor is dispositive." *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 376 (S.D.N.Y. 1998).

Based on the application of these factors, the Court finds that the headline is opinion. Wexler argues otherwise, claiming that by using the words "major spousal scheme," the headline falsely alleges that he engaged in a "dishonest plan." (Am. Compl. ¶¶ 23, 53). To be sure, in some situations, "scheme" implies a plan tinged with impropriety. But the use of the word "scheme" alone does not make a statement defamatory. The word "scheme" can often just mean a plan—and not carry the implication of deception. *See Scheme*, Black's Law Dictionary (11th ed. 2019) ("A systemic plan; a connected or orderly arrangement, esp. of related concepts <legislative scheme>"); *see also, e.g.*, *Grimo v. Blue Cross & Blue Shield of Vt.*, 899 F. Supp. 196, 201 (D. Vt. 1995) ("If a benefits scheme satisfies the definition of an employee welfare benefit plan, then ERISA governs the matter and jurisdiction must remain in the federal court."). In fact, to understand the meaning of the word "scheme"—and whether it implies deception—requires understanding the words that precede or follow. For instance, the terms "scheme to defraud," "tax fraud scheme," and "pyramid scheme" connote deception and illegality; a "scheme to regulate" or "statutory scheme" do not.

It is not self-evident that the word "scheme" in the headline "Legal Update: TCPA Class Certification Denial Exposes Major Spousal Scheme" implies deception or impropriety. While saying that a scheme has been "expose[d]" implies underhandedness, it need not. The headline is just as plausibly read to mean that a plan

was brought to light—and not the more sinister conclusion that it was also a dishonest plan. The word "scheme" is like the word "scam," which the First Circuit found equally incapable of being the basis of a defamation claim:

> [W]e observe that the word "scam" does not have a precise meaning. As the district judge said in his bench ruling, "it means different things to different people . . . and there is not a single usage in common phraseology." While some connotations of the word may encompass criminal behavior, others do not. The lack of precision makes the assertion "X is a scam" incapable of being proven true or false.

McCabe v. Rattiner, 814 F.2d 839, 842 (1st Cir. 1987).

In addition, the use of "major," an adjective, is an attempt to ascribe a measure of significance to the scheme. What is major to one is minor to another; it is a term that adds relativity, and therefore uncertainty, to the meaning of the headline. *See Underwood v. Dig. Equip. Corp.*, 576 F. Supp. 213, 217 (D. Mass. 1983) (holding that statement that plaintiff's departure was a "minor loss" for his employer was "inherently subjective" and nonactionable). People can disagree; however, the point is that the phrase "major spousal scheme" is not capable of precise and specific meaning. This is an indication that the headline is a statement of opinion.

Taken together, the words "major spousal scheme" are a kind of rhetorical flourish—indicative of opinion—not fact. "Often, statements of 'rhetorical hyperbole' or 'imaginative expression' are held not actionable, because they 'cannot reasonably be interpreted as stating actual facts' that could be proved false." *Biro*, 883 F. Supp. 2d at 460 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (noting that loose, figurative, or hyperbolic language or context can negate the impression that author is implying criminal conduct)); *see also, e.g.*, *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (holding that the use of the word "blackmail" in an article describing

real estate negotiations with city council was not actionable libel; "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole."). Rather than serving as a one-line factual recap of Judge Block's decision, the headline is the author's opinion about the underlying case that uses loose figurative language. *See Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 155 (1993) ("[A]ssertions that a person is guilty of 'blackmail,' 'fraud,' 'bribery' and 'corruption' could, in certain contexts, be understood as mere, nonactionable 'rhetorical hyperbole' or 'vigorous epithets'." (citation and alteration omitted)).[1]

Moreover, the headline is for a blog piece on a private firm's website. These increasingly commonplace blogs act like a law firm's editorial or op-ed page. "[An] Op Ed page is a forum traditionally reserved for the airing of ideas on matters of public concern. Indeed, the common expectation is that the columns and articles published on a newspaper's Op Ed sections will represent the viewpoints of their authors and, as such, contain considerable hyperbole, speculation, diversified forms of expression and opinion." *Brian*, 87 N.Y.2d at 53 (concluding that op-ed piece alleging plaintiff engaged in "scheme" to defraud government was nonactionable opinion). Using "major spousal scheme" in a similar online forum ensconces these words in a context "encouraging a freewheeling, anything-goes writing style" characteristic of opinion writing, not factual recitation. *Sandals Resorts Int'l Ltd. v. Google, Inc.,* 86 A.D.3d 32, 43 (1st Dep't 2011)

[1] Wexler attempts to analogize his case to *Gross*; his arguments are without merit. The complaint in *Gross* was actionable because there were multiple statements about criminal behavior engaged in by the plaintiff. "[T]here are also actionable charges made in the articles—such as the charges that plaintiff engaged in cover-ups, directed the creation of 'misleading' autopsy reports and was guilty of 'possibly illegal' conduct." *Gross*, 82 N.Y.2d at 154. Wexler, in contrast, is asking the Court to infer criminality and dishonesty from a single phrase in a headline.

(quotations omitted); 1 Robert D. Sack, *Sack On Defamation* § 4:3.1, at 4-47 (5th ed. 2019) ("[S]ome courts have recognized that Internet-borne communications, in the form of blogs, social media postings, reader-posted comments on established news sites, and the like, are frequently used as vehicles for often hyperbolic personal opinions."); *see also Biro v. Condé Nast*, No. 11-CV-4442, 2014 WL 4851901, at *4 (S.D.N.Y. Sept. 30, 2014) (holding that blog post that characterized plaintiff's litigation filing as "drivel" and that characterized plaintiff as "frightfully shady" was nonactionable opinion based on disclosed facts), *aff'd in part*, 807 F.3d 541, *and aff'd*, 622 F. App'x 67 (2d Cir. 2015). Indeed, the body of the piece in this case begins and ends with the author's tongue-and-cheek musings about how he would like to spend time with his wife (camping and going to Greece) and what the Wexlers should do (try salsa dancing). Given this framing, no one could reasonably read the article and its headline as anything other than the author's opinion and editorial gloss on a court decision.[2]

Having concluded that the phrase "Major Spousal Scheme" is an opinion, the Court must determine whether it is a statement of "pure opinion" or "mixed opinion."

[2] The context decisions cited by Wexler in his opposition do not compel a different conclusion. He cites to *Stega v. New York Downtown Hospital*, 31 N.Y.3d 661 (2018), a case in which the New York Court of Appeals denied a motion to dismiss a defamation case. In *Stega*, the term "channeled"—in an FDA inspection report—suggested that plaintiff "transferred funds in a clandestine manner" or engaged in misappropriation. 31 N.Y.3d at 674. An FDA report recounting witness statements made to the FDA about a plaintiff in the context of an investigation is hardly akin to an unaffiliated law firm recounting a decision in a blog post that begins and ends with editorial, opinion-laden content. The former conveys factual information; the latter is clearly opinion. Likewise, in *Flamm v. American Ass'n of University Women*, 201 F.3d 144 (2d Cir. 2000), another case cited by Wexler, the defamation claim based on a statement that an attorney was an "ambulance chaser" could not be dismissed as opinion because it appeared in "an otherwise fact-laden directory" providing lawyers' names, contact information, and practice areas. 201 F.3d at 147. Dorsey's blog does not purport to be a compendium of caselaw squibs devoid of editorialization, something that might be analogous to the *Flamm* directory.

"An expression of pure opinion is not actionable. It receives the Federal constitutional protection accorded to the expression of ideas, no matter how vituperative or unreasonable it may be." *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 (1986). The line between a "pure" and "mixed" opinion turns on whether the opinion, on the one hand, is "accompanied by a recitation of facts or does not imply the existence of undisclosed underlying facts" or instead, on the other hand, "implies a basis in facts which are not disclosed to the reader." *See Gross*, 82 N.Y.at 153. The former is pure, nonactionable opinion; the latter is a mixed opinion that may be a basis of a defamation claim. *See Protic v. Dengler*, 46 F. Supp. 2d 277, 280 (S.D.N.Y.) (opinion is nonactionable where "the plaintiff's pleadings do not clearly allege such extrinsic facts"), *aff'd*, 205 F.3d 1324 (2d Cir. 1999). "The actionable element of a 'mixed opinion' is not the false opinion itself—it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking." *Steinhilber*, 68 N.Y.2d at 290.[3]

There is nothing in the article that implies that the headline, or the article, is based upon facts known only to its author. The blog is clearly discussing a "class certification denial" and almost immediately refers to Judge Block, and then even includes the LexisNexis citation for the opinion. *See, e.g., Johnson v. Riverhead Cent. Sch. Dist.*, No. 14-CV-7130, 2018 WL 4344957, at *12 (E.D.N.Y. Sept. 11, 2018) ("This statement is 'pure opinion' because it constitutes a conclusion (Plaintiff presented a threat to school safety) accompanied by the publicly disclosed facts upon which that

[3] Wexler seems to suggest that Dorsey should be held responsible for how AccountsRecovery.net characterized Dorsey's article, (Pl.'s Mem. at 7), but there is no basis to do so since no connection is alleged between the two entities.

conclusion was based (Plaintiff had been found in possession of a firearm without a license)."); *Kamalian v. Reader's Digest Ass'n, Inc.*, 29 A.D.3d 527, 528 (2d Dep't 2006) (holding that the headline "Doctors' Deadly Mistakes" and accompanying article, which included a recitation of plaintiff-doctor's malpractice history, were not defamatory). And while Wexler disputes the accuracy of the summary of the case (Pl.'s Mem. at 3–4), this does not imply that the headline or statements in the article are based on undisclosed facts and does not, therefore, transform the post into actionable mixed opinion.[4] *See, e.g.*, *Hayashi v. Ozawa*, No. 17-CV-2558, 2019 WL 1409389, at *4 (S.D.N.Y. Mar. 28, 2019) (holding that defendant's assertion that it was misleading for plaintiff to call herself a doctor was nonactionable, pure opinion based on disclosed facts despite plaintiff's contentions that statement was inaccurate); *Parks v. Steinbrenner*, 131 A.D.2d 60, 66 (1st Dep't 1987) (reversing lower court holding that press release with baseball club owner's opinion about umpire "was actionable because the accompanying underlying facts were found . . . not to adequately support the opinions proffered," reasoning that pure opinion with disclosed facts is not actionable even if "one may dispute the conclusions drawn from the specified facts").

[4] *Friedman v. Bloomberg L.P.*, 884 F.3d 83 (2d Cir. 2017), cited by Wexler, is factually inapposite. In *Friedman*, the Bloomberg's news article—about litigation brought by plaintiff against his former employer—stated that plaintiff "repeatedly tried to extort" his employer and was fired for "gross misconduct." 884 F.3d at 89. By referencing events outside of the litigation between plaintiff and his employer, Bloomberg suggested it was aware of other additional and undisclosed facts that supported such claims. There is nothing in the Dorsey post, on the other hand, that references any conduct other than what the underlying TCPA litigation. To the extent Wexler attempts to support his claim by distinguishing between filings in the TCPA litigation or, in the alternative, labeling Judge Block's opinion and other filings as containing "false facts," (*see* Pl.'s Mem. at 13–14), such arguments are without merit or basis in the record.

The Court concludes that the headline of Dorsey's article—in light of the failure to mention Wexler, the potentially benign alternative interpretation of the word "scheme," and its use as a title on an editorial-like blog of a law firm—is nonactionable pure opinion. Therefore, Wexler's defamation claim is dismissed.[5] The Court also concludes any amendment would be futile because (i) this is a pre-discovery motion where Wexler has not sought leave to amend, and (ii) the Court has both the alleged defamatory statements and extensive arguments from Wexler about the supposed defamatory character. The dismissal is, therefore, with prejudice. *See, e.g.*, *Thai v. Cayre Grp., Ltd.*, 726 F. Supp. 2d 323, 338 (S.D.N.Y. 2010) (denying leave to amend because there was "no additional substantive information [plaintiff] could offer to cure the deficient pleadings with respect to her . . . defamation claim[]."); *Hammer v. Amazon.com*, 392 F. Supp. 2d 423, 433 (E.D.N.Y. 2005) (dismissing defamation claims with prejudice "because they are predicated upon statements that cannot be construed as anything but opinion[,]" and denying leave to amend because court found "that Plaintiff can prove no set of facts in support of his claims.").

III. Wexler's Lanham Act Claim

Wexler also brings a claim under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125, on the theory that Defendants' article constitutes false advertising. (Am. Compl. ¶ 47). Section 43(a) provides:

> Any person who, on or in connection with any goods or services, . . . uses in commerce any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . in *commercial advertising or promotion*, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or

[5] In light of the finding that the article's headline is nonactionable opinion, the Court does not reach the other bases for dismissal proffered by Defendants.

> commercial activities shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(B) (emphasis added). "The Lanham Act therefore 'makes actionable false or misleading descriptions or false or misleading representations of fact made about one's own or another's goods or services.'" *Burton v. Label, LLC*, 344 F. Supp. 3d 680, 700 (S.D.N.Y. 2018) (quoting *Boule v. Hutton*, 328 F.3d 84, 90 (2d Cir. 2003)). "Because the Act proscribes conduct that, but for its false or misleading character, would be protected by the First Amendment, free speech principles inform [the] interpretation of the Act." *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 496 (2d Cir. 2013).

To state a Section 43(a) claim, the allegedly false or misleading statement must be made in "commercial advertising or promotion." *SourceOne Dental, Inc. v. Patterson Cos.*, 328 F. Supp. 3d 53, 61 (E.D.N.Y. 2018); *see also Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC*, No. 08-CV-442, 2016 WL 815205, at *6 (S.D.N.Y. Feb. 29, 2016) ("[T]he Lanham Act does not prohibit false statements generally . . . .") (quotations omitted)). To constitute "commercial advertising or promotion," a statement must be: "(1) commercial speech, (2) made for the purpose of influencing consumers to buy defendant's goods or services, and (3) although representations less formal than those made as part of a classic advertising campaign may suffice, they must be disseminated sufficiently to the relevant purchasing public." *Gmurzynska v. Hutton*, 355 F.3d 206, 210 (2d Cir. 2004) (quotations omitted).

Dorsey's blog post is not "commercial advertising or promotion." The article was on a website titled "Consumer Financial Services Legal Update," with a web address different than Dorsey's firm website. (*See* Am. Compl. ¶¶ 17–20). Dorsey's logo is in the

upper right-hand corner of the article webpage, (Ex. I to Am. Compl.), and Dorsey represents that "[t]he blog, authored by Dorsey attorneys . . . , discusses cutting-edge legal issues impacting the consumer financial services industry[,]" ("Dorsey Launches New Consumer Financial Services Blog," attached as Ex. A to Am. Compl., Dkt. No. 13). But the content of the article does not relate to Dorsey and does not mention by name or implication any services Dorsey provides. (*See* Ex. I to Am. Compl.). The article reports on a case in which Dorsey was not involved, and the underlying opinion itself also did not mention Dorsey. *See Wexler v. AT&T Corp.*, 323 F.R.D. 128, 129–31 (E.D.N.Y. 2018). While Dorsey's motivation in having a blog, and publishing this particular article, may be to attract new clients, such motivation does not transform the article—describing a court's decision in a case unrelated to Dorsey—into commercial speech. That is, "[e]ven if defendants paid to run the piece with a motivation toward indirectly influencing customers to buy their goods, such a motivation does not transform the piece into commercial speech." *Edward B. Beharry & Co. v. Bedessee Imps. Inc.*, No. 09-CV-77, 2010 WL 1223590, at *8 (E.D.N.Y. Mar. 23, 2010) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)) (finding an article did not constitute commercial speech when it did not include "any of defendants' products, prices, or business contacts"). Simply put, this blog post is not "commercial advertising or promotion." *See, e.g.*, *Edward Lewis Tobinick, MD v. Novella*, 848 F.3d 935, 951 (11th Cir. 2017) (affirming dismissal of Lanham Act claims, concluding that doctor's blog posts critical of another doctor's practice and medical treatments were noncommercial speech because of absence of commercial transactions being proposed or products for sale); *GOLO, LLC v. HighYa, LLC*, 310 F. Supp. 3d 499, 505 (E.D. Pa. 2018) (holding that website's review of plaintiff's weight loss products were not actionable under

Lanham Act, notwithstanding site's affiliation with sellers of exercise equipment, because it "did not propose any form of commercial transaction nor [did] it embody the typical characteristics of an advertisement"). The Lanham Act claim is dismissed with prejudice. *See, e.g.*, *Croton Watch*, 2006 WL 2254818, at *10 n.10 (denying leave to amend complaint following dismissal of Lanham Act false advertising and defamation claim, where defendant's magazine article summarized trademark consent judgment entered into against plaintiff).

IV. Personal Jurisdiction over Betpera

Because the Court has concluded that the claims asserted should be dismissed and the claims asserted against Betpera are identical to those against Dorsey, it need not evaluate whether the Court has personal jurisdiction over Betpera. *See, e.g.*, *Alexander v. Murdoch*, No. 10-CV-5613, 2011 WL 2802899, at *19 (S.D.N.Y. May 27, 2011) ("Because I recommend dismissing all of the plaintiff's claims against the foreign defendants, their personal jurisdiction defense is moot, and I will not address it here."), *report and recommendation adopted*, No. 10-CV-5613, 2011 WL 2802923 (July 14, 2011), *aff'd*, 502 F. App'x 107 (2d Cir. 2012).

CONCLUSION

For the reasons stated above, the Court grants Defendants' motion to dismiss and dismisses the Amended Complaint with prejudice. The Clerk of Court is directed to close this case.

SO ORDERED.

/s/ Sanket J. Bulsara October 25, 2019
SANKET J. BULSARA
United States Magistrate Judge

Brooklyn, New York