UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRANCIS PELKOWSKI,	:	
	:	
Plaintiff,	:	
	:	MEMORANDUM & ORDER
-against-	:	
	:	20-CV-1845 (ENV) (RLM)
FRED HOVERMANN, and KINK, LLC,	:	
	:	
	:	
Defendants.	:	

VITALIANO, D.J.

Retired United States Coast Guard Rear Admiral Francis Pelkowski commenced this action against Fred Hovermann and Kink LLC, bringing causes of action for libel/defamation, tortious interference with employment contract and prospective business relations, invasion of the right of privacy under New York Civil Rights Law ("NYCRL") §§ 50–51, unjust enrichment, and seeking equitable relief. Compl. at 15–32, Dkt. 1. Defendants have moved to dismiss the complaint in its entirety, pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. *See* Defs.' Mot. to Dismiss, Dkt. 14. For the reasons that follow, the motion is granted in part and denied in part.

Background[1]

Admiral Pelkowski is a highly decorated veteran, retired after 38 years of active duty service in the Coast Guard. Compl. at 1. In a separate career, he has served as Executive Chair

[1] The background facts are drawn from the complaint and are deemed true for purposes of this motion, and all reasonable inferences are drawn in favor of plaintiff. *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 115 (2d Cir. 2008). Also considered on the motion are any documents attached to or referenced in the complaint. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002).

of the School of Business, Humanities, and Sciences and as Department Chair of the Global Business and Transportation Department at the State University of New York Maritime College ("SUNY Maritime"), where he remains a faculty member. Compl. ¶ 30. The *dramatis personae* on the defense side includes Fred Hovermann, a resident of Pennsylvania and the sole owner and operator of co-defendant Kink Shoppe ("Kink"). *Id.* at 1. The Kink Shoppe is a limited liability corporation organized under the state laws of Pennsylvania and located in Philadelphia. *Id.* Kink sells adult themed items. *Id.* at 1–2. Hovermann is also responsible for the Kink Shoppe Instagram account, which describes its business as an "[u]pscale adult toy and fetish boutique." *Id.* at 1; Compl. ¶ 32.

It is seemingly undisputed that the occurrences that give rise to this lawsuit begin with Admiral Pelkowski's shopping excursion at the Kink Shoppe on October 8, 2019. *Id.* at ¶ 6. In his telling of the events, Admiral Pelkowski entered the shop and saw what he believed was a free sample of lipstick, which he picked up and placed in his pocket. *Id.* After he finished browsing, Admiral Pelkowski headed for the check-out where he bought two other items totaling $77 and made payment by a credit card issued in his name. *Id.* He then left the Kink Shoppe with the two purchased items and the "free sample" "lipstick" still in his pocket. *Id.* Admiral Pelkowski soon discovered that the "free sample" was not, in fact, free and that the "lipstick" was really a vibrator. *Id.* at ¶ 48, 109. In his complaint, Admiral Pelkowski pleads, self-servingly, that he never intended to leave the store with any sale item without paying for it. *Id.* at ¶¶ 6, 37, 109.

Two days after Admiral Pelkowski left the shop, the Instagram account @kinkshoppe

posted on Instagram,[2] without his permission and without notice, a post with Admiral Pelkowski's official portrait from the Coast Guard webpage, video footage from a surveillance camera of Admiral Pelkowski walking around, browsing items, and then picking up the lipstick and slipping the lipstick in his pocket, and several screenshots of Admiral Pelkowski's face from the surveillance camera. *Id.* at ¶¶ 35, 42, 47; Ex. B attached to Aff. in Supp. of Mot. to Dismiss. The post was accompanied by the following caption:

> Friends, meet Rear Admiral Francis "Stash" Pelkowski. Rear Admiral Pelkowski retired from the U.S. Coast Guard in 2018. He is currently Department Chair of Global Business and Transportation Dept at SUNY @maritimecollege. In his free time, Rear Admiral Pelkowski enjoys shoplifting from small businesses - specifically testers from sex boutiques, as witnessed in this video. We wish him all the best in his retirement, a sincere thank you for his service, and extreme and utter disappointment in his personal morals. #shoplifting #shoplifter #thief #kinkshoppe #kinkphilly #kinkphiladelphia #kinkpa #oldcity #oldcityphilly #bdsm #kink #adult #sexpositive #allarewelcome #boutique #smallbusiness #shopsmall #shoplocal #military #uscg #cbs3 #cbsphilly #fox29 #fox29goodday #6abcaction #murderedbywords
> *Id.* at ¶ 42; Compl., Ex. A.

Through the time of actual pleading, the Kink Shoppe Instagram post of Admiral Pelkowski's alleged shoplifting episode had accumulated over 200 comments, including comments by defendants, and over 1,170 "likes." Compl. ¶¶ 60–65. Among the comments were posts calling Admiral Pelkowski a "piece of shit," "idiot," "bozo," "pathetic excuse of a human being," "an asshole," "a disgrace," "a disgusting human," and "scumbag." *Id.* at ¶ 67. Commenters also suggested Admiral Pelkowski has a "lack of morals" and "[d]ef has done this before." *Id.* at ¶ 68. As of this writing, the Instagram post remains publicly available and

[2] Instagram is a social media platform on which users can share photos, videos, captions, and comments. The @ symbol is used to "tag" another user. When a user includes the @ symbol before a username, the "tagged" user will receive a notification. *See How do I mention someone on Instagram?*, Instagram, https://help.instagram.com/1422266748076581?helpref=uf_permalink (last visited August 31, 2021).

defendants have refused to remove it from the internet despite a cease and desist demand from Admiral Pelkowski sent on October 11, 2019. *Id.* at ¶¶ 56–57. Not only have the faces not been removed, he alleges, defendants have actually taken actions to refresh the post in a way to maintain its high visibility on the internet. *Id.* at ¶ 56.

Aside from being featured on Instagram, Kink Shoppe's post was subsequently re-posted on various other websites, again without Admiral Pelkowski's permission and without notice. *Id.* at ¶¶ 105–08. For instance, a "Reddit user" linked the defendants' post to a "subreddit" page titled "r/MurderedByWords." *Id.* at ¶¶ 70–72.[3] Hovermann also posted the Instagram post to another subreddit, r/Philadelphia, a subreddit dedicated to the city of Philadelphia. *Id.* at ¶ 74; Compl., Ex. B. Later, the Instagram post was uploaded to YouTube, garnering over 300,000 views and over 24,000 likes. Compl. ¶ 83; Compl., Ex. C.[4] The video and comments were also posted on social and professional media sites used by maritime industry profession, including gCaptain.com. Compl. ¶ 128.

All of this cyberspace exposure set in motion by defendants, Admiral Pelkowski claims, inflicted widespread damage to his reputation and professional standing. *Id.* at ¶ 84. Specifically, he alleges he had to resign from prestigious Coast Guard boards, was subjected to an inquiry by SUNY Maritime College, and lost the ability to secure a dean's position with the college. *Id.* at ¶ 54–55. For the same reasons, he states, he had to resign from his position as the Executive Chair of the School of Business, Humanities, and Sciences and as the Department

[3] Reddit "is a social news aggregation, web content rating, and discussion site which features user generated posts from many different sources." Compl. at ¶ 70. Further, subreddits "are smaller user-created boards featuring content focused on a particular topic or theme and names begin with 'r/'." *Id.* at ¶ 71

[4] The complaint does not specify who uploaded this video.

Chair of the Global Business and Transportation Department. *Id.* at ¶ 130. Though Admiral Pelkowski was never charged with a criminal offense, much less convicted of one, he was subjected to an investigation by the Coast Guard Investigation Service for "conduct that could have discredited the Coast Guard." *Id.* at ¶¶ 109, 140.

Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." This rule does not compel a litigant to supply "detailed factual allegations" in support of his claims, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964, 167 L.Ed. 2d 929 (2007), "but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation," *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed. 2d 868 (2009). "A pleading that offers 'labels and conclusions' . . . will not do." *Id.* (quoting *Twombly*, 550 U.S. at 555); *see also In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95 (2d Cir. 2007). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). This "plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotations omitted); *see Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007) (interpreting *Twombly* to require a "plausibility standard" that "obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible") (emphasis omitted), *rev'd on other grounds*, 556 U.S. 662 (2009). On a Rule 12(b)(6) motion,

the district court must accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the nonmoving party. *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 115 (2d Cir. 2008).

Discussion[5]

I. Libel/Defamation Claim

New York law, which the parties agree is the choice of law for Admiral Pelkowski's claims,[6] recognizes a cause of action for libel, which it defines as defamation in writing or print. *Celle v. Filipino Rep. Enters., Inc.*, 209 F.3d 163, 176 (2d Cir. 2000). To prevail on a libel claim, a plaintiff must establish five elements:

1) a written defamatory statement of fact of and concerning the plaintiff;

2) publication by defendant to a third party;

3) fault;

4) falsity of the defamatory statement; and

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[5] Confusingly, plaintiff has moved to strike the introduction of a 20-minute surveillance video, which defendants have not submitted, nor apparently sought to introduce. Dkt. 13, 23–24. The only video defendants have introduced with the briefing is a 23 second video that is part of the Instagram post. All parties do not dispute that the 23 second video can be considered on the instant motion to dismiss as it is integral to the complaint and central to plaintiff's defamation claim. Dkt. 23–24; *see also Tannerite Sports, LLC v. NBCUniversal News Grp.*, 864 F.3d 236, 243 (2d Cir. 2017) ("When a court interprets a publication in an action for defamation, "[t]he entire publication, as well as the circumstances of its issuance, must be considered in terms of its effect upon the ordinary reader" (internal quotation marks and citation omitted)). At any rate, since defendants have not offered the video for consideration on this motion to dismiss, plaintiff's motion to strike is denied for the absence of controversy.

[6] The parties cite New York law throughout their papers for these claims "and such implied consent is, of course, sufficient to establish the applicable choice of law." *Arch Ins. Co. v. Precision Stone, Inc.*, 584 F.3d 33, 39 (2d Cir. 2009) (citation omitted); *see also Tehran-Berkeley Civil & Envtl. Engineers v. Tippetts-Abbett-McCarthy-Stratton*, 888 F.2d 239, 242 (2d Cir. 1989) ("[I]mplied consent to use a forum's law is sufficient to establish choice of law."). Accordingly, the Court applies New York substantive law for the instant motion. *Pogodin v. Cryptorion Inc.*, No. 18-CV-791, 2019 WL 8165040, at *2 (E.D.N.Y. May 14, 2019).

5) injury to plaintiff, either special damages or *per se* libel.

See id.; *Meloff v. New York Life Ins. Co.*, 240 F.3d 138, 145 (2d Cir. 2001). Libel actions require courts to consider both a plaintiff's interest in protecting one's reputation and society's interest in preserving free speech rights. *See Curtis Publ'g. Co. v. Butts*, 388 U.S. 130, 146–47, 87 S. Ct. 1975, 1991, 18 L. Ed. 2d 1094 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Therefore, even though defamation actions are created by state law, they are not solely delimited by state law. In fact, "the elements of a libel action are heavily influenced by the minimum standards required by the First Amendment" and any additional free expression protections afforded speech by the state constitution. *Celle*, 209 F.3d at 176; *Immuno AG. v Moor-Jankowski*, 77 N.Y.2d 235, 249, 566 N.Y.S.2d 906, 567 N.E.2d 1270 (1991).

These variable constitutional standards affect the fault and falsity analyses. Under federal constitutional law, plaintiffs who are public figures must show defendants acted with actual malice, whereas private figures need only meet a gross negligence standard. *Curtis Publ'g. Co.*, 388 U.S. at 155; *Sullivan*, 376 U.S. at 280; *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001). Second, only factual statements, which are capable of being proven false, can be actionable libel. *Gross v. New York Times Co.*, 82 N.Y.2d 146, 153, 603 N.Y.S.2d 813, 623 N.E.2d 1163 (1993). Overlaying defamation litigation is the understanding that there is "particular value" in resolving defamation claims at the pleadings stage to avoid chilling the exercise of constitutionally protected freedoms through protracted litigation and discovery. *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 457 (S.D.N.Y. 2012).

With that litigation equation in mind, defendants immediately reach for the constitutional cloak, contending that that the Instagram post should be characterized as opinion and therefore protected from a defamation claim. Defs.' Mem. at 6; Defs.' Reply at 4–5. Opinions are a safe

harbor because falsity is an element of a libel claim. To be libelous, a statement must consist of falsifiable facts in order to be actionable. Opinions, by contrast, are constitutionally protected. *Gross*, 82 N.Y.2d at 153. Whether a statement is fact or opinion, it must be asked "whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff." *Immuno AG*, 77 N.Y.2d at 254. Although this question can prove difficult to answer, it is one of law, properly—and preferably—decided by the Court. *Id.* at 256. In this decisional framework, Admiral Pelkowski bears the burden to show the challenged statement is fact, not protected opinion. *See Celle*, 209 F.3d at 179.

To determine whether a challenged statement is protected opinion, the statement must be evaluated to see: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proved 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." *Gross*, 82 N.Y.2d at 153 (internal citations and quotations omitted).

Turning to the first element, some of the specific statements in the Instagram post use words that have commonly accepted meanings while some statements do not. For instance, terms such as "shoplifting," "shoplifter," and "thief" have, more or less, precise meanings. On the other hand, the statement that defendants feel "extreme and utter disappointment in [Admiral Pelkowski's] personal morals" lacks a clear, precise meaning. Looking with greater scrutiny, it is clear that the accusations that plaintiff had committed a crime, that he was a "#shoplifter" and "#thief" could be proven true or false. Conversely, the statement "In his free time Rear Admiral Pelkowski enjoys shoplifting from small businesses" suggests an "inherently subjective

evaluation[].” This latter statement implicates [Admiral Pelkowski’s] intent and state of mind, which are matters not readily verifiable, are “intrinsically unsuitable as a foundation for defamation.” *See Cummings v. City of N.Y.*, No. 19-CV-7723, 2020 WL 882335, at *22 (S.D.N.Y. Feb. 24, 2020).

Reflected in the analytical framework for assessing a defamation claim is the law’s recognition that the context in which a statement is uttered can be critical. Courts must be mindful that the “hypertechnical parsing of a possible ‘fact’ from its plain context of ‘opinion’” imperils “the cherished constitutional guarantee of free speech.” *See Immuno AG*, 77 N.Y.2d at 256. The contextual analysis of an allegedly defamatory statement is always very significant and, often, dispositive. Importantly, an opinion does not become actionable because its author includes supporting facts. *Gross*, 82 N.Y.2d at 153.

Contextual analysis of allegedly defamatory statements begin, as one might imagine, with where and how the statements are published. The defamatory statements Admiral Pelkowski claims defendants made first appeared on the widely popular social media website Instagram, a context which weighs in favor of a finding that the statements were opinion. Numerous New York courts have noted that communication appearing on social media and other internet websites are distinct from that which appears in print media such as newspapers and magazines. *See Jacobus v Trump*, 55 Misc.3d 470, 478, 51 N.Y.S.3d 330, 339 (N.Y. Sup. Ct.), *aff’d*, 156 A.D.3d 452, 64 N.Y.S.3d 889 (2017) (collecting cases). The culture of internet communication has been described as “encouraging a freewheeling, anything goes writing style.” *Sandals Resorts Int’l. Ltd. v Google, Inc.*, 86 A.D.3d 32, 43, 925 N.Y.S.2d 407 (1st Dep’t 2011) (internal citation and quotation omitted). Use of “epithets, fiery rhetoric or hyperbole” on social media have been held to “warrant an understanding” that these statements are “‘vigorous expressions of

personal opinion,' 'rather than the rigorous and comprehensive presentation of factual matter.'" *Trump*, 55 Misc. 3d at 478 (quoting *Brian v. Richardson*, 87 N.Y.2d 46, 52, 637 N.Y.S.2d 347, 660 N.E.2d 1126 (1995)). Indeed, defendants' post is comprised of plenty of fiery rhetoric and sarcastic undertones, as demonstrated by the statements "[w]e wish him all the best in his retirement, a sincere thank you for his service, and extreme and utter disappointment in his personal morals," "[i]n his free time Rear Admiral Pelkowski enjoys shoplifting from small businesses," and "#murderedbywords." Read as a whole, the context and tone of the post itself suggest snarky opinion, which is further bolstered by the fact that it appears in a social media post featuring a string of hashtags, colorful emojis, and snarky writing.

Admiral Pelkowski protests that the focus on context misses the forest for the trees, stressing that, whatever the context, the Instagram post cannot be read as opinion because it makes an unequivocal factual assertion that he committed a crime. Plaintiff contends that a reasonable reader would read the theft accusation as fact, or at the very least, actionable mixed opinion. His contention relies on the recognition in New York law that an allegedly defamatory statement may be "actionable mixed opinion" where there is "an implication that the speaker knows certain facts, unknown to [the] audience, which support [the speaker's] opinion and are detrimental to the person" being discussed. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290, 508 N.Y.S.2d 901, 501 N.E.2d 550 (1986) (citing *Rand v New York Times Co.*, 75 A.D.2d 417, 422, 430 N.Y.S.2d 271 (1st Dep't 1980) and *Silsdorf v. Levine*, 59 N.Y.2d, 8, 14, 462 N.Y.S.2d 822, 449 N.E.2d 716 (1983)). But, the law distinguishes between implication and explication. Therefore, an opinion that offers "a full recitation of the facts on which it is based is readily understood by the audience as conjecture" and allows readers to make up their own minds, so it is nonactionable. *Gross*, 82 N.Y.2d at 154.

In fact, this concept applies even to accusations of criminal conduct. Perhaps surprising to the common man's understanding of defamation, "assertions that a person is guilty of 'blackmail,' 'fraud,' 'bribery' and 'corruption' could, in certain contexts, be understood as mere, nonactionable 'rhetorical hyperbole' or 'vigorous epithet[s]'" or, "even when uttered or published in a more serious tone," nonactionable if based on disclosed facts and framed as "personal surmise built upon those facts." *Coleman v. Grand*, No. 18-CV-5663, 2021 WL 768167, at *11 (E.D.N.Y. Feb. 26, 2021) (quoting *Gross*, 82 N.Y.2d at 155) (claim of harassment supported by facts and framed as a personal narrative is protected opinion); *see also Melius v. Glacken*, 94 A.D.3d 959, 961, 943 N.Y.S.2d 134 (2d Dep't 2012) (finding statement that plaintiff was "extortionist" nonactionable where supported by factual statement that "plaintiff's lawsuit was seeking an amount 'far in excess of the appraised value' of the property.'").

Here, defendants posted the surveillance footage depicting Admiral Pelkowski placing the tester lipstick vibrator in his pocket. They then claim that "as witnessed in the video" Admiral Pelkowski "enjoys" in his "free time" "shoplifting from small businesses." The disclosed footage, on which defendants explicitly base their sarcastic conclusion upon, allows a reasonable viewer to make up his or her own mind as to whether Admiral Pelkowski's actions amounted to theft.[7] In other words, the inclusion of the surveillance video along with the

[7] Admiral Pelkowski also flags that buried within the comments section, in response to a comment chastising defendants for posting on social media rather than reporting to the cops, defendants wrote "worry not, there is a police report" and that they "don't take kindly to crime of ANY kind." Pl.'s Opp'n at 12. He contends these comments are further proof that defendants made actionable factual assertions notwithstanding the fact that he was never charged with or convicted of a crime. *Id.* at 14. These comments were not specifically included in the complaint. Regardless, to the extent Admiral Pelkowski flags these comments to suggest that defendants implied the existence of undisclosed facts, this does precisely the opposite, disclosing more facts

hyperbolic caption further supports a finding that a reasonable reader would find the post to be nonactionable conjecture. *See, e.g., Seldon v Compass Rest.*, 2012 WL 5363518, at *1 (N.Y. Sup. Ct. 2012) (dismissing complaint where allegedly defamatory email contained hyperlinks and citations to the source of the information the remarks were based upon); *see Sandals Resorts*, 925 N.Y.S.2d at 416 (nonactionable opinion because email did not imply that it was based upon undisclosed facts; rather supporting links to sources were included). Thus, viewed in the full context of the statements as well as the broader social context, the Instagram post and its comments are protected opinion. Plaintiff's libel/defamation claim is, as a result, dismissed.

II. Tortious Interference

Under New York law, a tortious interference claim requires plaintiff to show: (1) the existence of a valid contract between plaintiff and a third party; (2) defendants' knowledge of the contract; (3) defendants' intentional procurement of a third-party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom. *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401 (2d Cir. 2006). To satisfy the knowledge element of tortious interference, Admiral Pelkowski must plead facts showing not only that defendants had knowledge of the existence of a contract, but that they had "actual knowledge of the terms of the contract and of the contractual obligation that was allegedly breached." *Taboola, Inc. v. Ezoic Inc.*, No. 17-CV-9909, 2020 WL 1900496, at *9 (S.D.N.Y. Apr. 17, 2020) (quoting *Wellington Shields & Co. LLC v. Breakwater Inv. Mgmt. LLC*, No. 14-CV-7529, 2016 WL 5414979 at *4 (S.D.N.Y. Mar. 18, 2016) (collecting cases)). Although a defendant need not have "perfect

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to support defendants' statement. Indeed, the law does not require defendants include all primary source material, just that they recite the facts supporting their opinions, which defendants do here. *Coleman*, 2021 WL 768167, at *11 n.5. Further, online comments in a chatroom or message board, are given even less credence than statements in other online contexts. *See Sandals Resorts*, 925 N.Y.S.2d at 415.

knowledge" of the contract, the plaintiff must make specific allegations as to a defendant's knowledge of the terms and conditions of the subject contract. *Id.* at *10. Conclusory assertions of knowledge or pleadings based solely on information and belief are insufficient. *Id.*

Here, Admiral Pelkowski merely alleges, in conclusory fashion, that defendants had actual knowledge of his employment with SUNY Maritime college as evidenced by the fact that they tagged SUNY Maritime in the posts with the @ symbol. Beyond this statement, however, there are no allegations that defendants specifically knew about any of the terms of Admiral Pelkowski's employment contract with SUNY. This deficiency is fatal to plaintiff's claim—it is not enough that defendants may have had general knowledge that Admiral Pelkowski was employed there.

Beyond that foundational insufficiency, plaintiff fails to allege that defendants intentionally induced SUNY Maritime to breach its contract with him. Additionally, plaintiff has failed to state that there was an actual and resulting breach of contract between Admiral Pelkowski and SUNY Maritime. Instead, all that Admiral Pelkowski claims is that, due to the humiliation created by defendants' defamatory comments and palpable damage to his reputation and job effectiveness, he felt compelled to resign from his position as SUNY Maritime's Executive Chair of the School of Business, Humanities, and Sciences and as the Department Chair of the Global Business and Transportation Department. Compl. ¶ 130. He also lost the opportunity to become a dean at the college. But none of these allegations even remotely suggest that SUNY Maritime breached its contract with Admiral Pelkowski or that defendants intentionally induced SUNY Maritime to breach its contract.

Recapitulating the shortfall in his pleadings, the only inference available from what Admiral Pelkowski has factually pleaded in his complaint is that he chose to abandon his

leadership positions at SUNY Maritime. Accordingly, since these resignations are the only changes Admiral Pelkowski pleaded regarding his relationship with SUNY Maritime, the complaint has failed to allege that SUNY Maritime has breached its contract with Admiral Pelkowski. This pleading failure is fatal to any tortious interference with contract claim. *See Kirch*, 449 F.3d at 402 (dismissing tortious interference with contract claim where plaintiff merely alleged that the third party "walked away" and "abandoned" the project and there was no assertion that the contracting party with plaintiff actually breached its contract to plaintiff's detriment). For these reasons, Admiral Pelkowski's tortious interference with contract cause of action regarding his employment contract with SUNY Maritime is dismissed.

Apparently seeking to assert a separate cause of action cut from the same cloth, Admiral Pelkowski purports to plead a confusing cause of action, titled "Tortious Interference with Employment: U.S. Coast Guard." Its gravamen, as he pleads it, is that defendants' conduct "forced [him] to voluntarily" resign from his position with the Coast Guard Academy Board of Trustees and subjected him to an investigation by the Coast Guard. Am. Compl. ¶ 140. But nowhere in the complaint does he allege that, at any time relevant to his claim, he was employed by the United States Coast Guard or that he had a contract of any kind with it.

But with finer focus, this cause of action appears to be, in actuality, a claim for tortious interference with business relations (which is sometimes referred to as tortious interference with prospective business relations) rather than, as defendants attempt to construe the claim, a claim for tortious interference with an employment contract. Indeed, plaintiff cannot establish the latter claim—interference with contract—because he has not alleged the existence of an employment contract between him and the United States Coast Guard. *See, e.g.*, *Chanicka v. JetBlue Airways Corp.*, 243 F. Supp. 3d 356, 360 (E.D.N.Y. 2017); *Rosenfeld v. Lenich*, 370 F.

Supp. 3d 335, 361 (E.D.N.Y. 2019) (analyzing claim for tortious interference with employment as a claim for tortious interference with business relations in accordance with plaintiff's opposition briefing). In contrast, the existence of an employment contract is not necessary to sustain a claim for tortious interference with business relations. *Scutti Enters., LLC. v. Park Place Ent. Corp*., 322 F.3d 211, 215 (2d Cir. 2003). For such a claim, a plaintiff need only demonstrate that the defendant tortiously interfered with "a continuing business or other customary relationship [with a third party] not amounting to a formal contract." *Id.* (internal quotation marks and citation omitted). Additionally, however, a plaintiff must allege that defendants interfered with this business relationship, had a singular intent to harm plaintiff or used dishonest, unfair or improper means to do so, and caused injury to the relationship. *Wolff v. Rare Medium, Inc.*, 65 F. App'x. 736, 739, (2d Cir. 2003).

Even trodding this alternative pleading pathway, however, Admiral Pelkowski's presumptive tortious interference with business relations claim still suffers from several deficiencies. First, plaintiff has not alleged that defendants acted with a singular intent to harm him. In fact, elsewhere in the complaint, Admiral Pelkowski alleges that defendants posted the defamatory comments for commercial gain. Compl. ¶ 149; *see, e.g.*, *Harley v. Nesby*, No. 8-CV-5791, 2012 WL 1538434, at *5 (S.D.N.Y. Apr. 30, 2012) (dismissing tortious interference with business relationship claim where plaintiff clearly pleaded that defendant engaged in conduct for his own financial gain).

Without singular intent, plaintiff must instead plead that defendants acted with dishonest, unfair, or improper means. The bar for this kind of wrongful conduct is high—under New York law this conduct must be "more culpable than that which would suffice to sustain a claim for tortious interference with existing contractual relations." *Cardiocall*, 492 F. Supp. 2d at 152; *see*

also NBT Bancorp v. Fleet/Norstar Fin. Grp., 87 N.Y.2d 614, 621, 641 N.Y.S.2d 581, 664 N.E.2d 492 (1996). Such conduct typically must amount to a crime or an independent tort, examples of which include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions and some degrees of economic pressure, but not mere persuasion. *Cardiocall*, 492 F. Supp. 2d at 152; *Scutti*, 322 F.3d at 215. "Conduct that is not criminal or tortious will generally be 'lawful' and thus insufficiently 'culpable' to create liability for interference with prospective contracts or other nonbinding economic relations." *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190, 785 N.Y.S.2d 359, 362, 818 N.E.2d 1100, 1103 (2004).

Although defamation can be a predicate act for a tortious interference claim, *see Amaranth LLC v J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 888 N.Y.S.2d 489, 494, (1st Dep't 2009), having dismissed plaintiff's defamation cause of action for failure to state a claim, defamation cannot form the basis of plaintiff's tortious interference with business relations claim.[8] This claim is, accordingly, dismissed.

In the same vein, Admiral Pelkowski brings a catch-all claim, alleging that defendants "knew or should have known that their actions would interfere with prospective business relations that he would obtain as a result of his position as a licensed Master Mariner, senior business executive, professor, and as a retired rear admiral in the Coast Guard Reserve." Compl. ¶ 147. Plaintiff claims that defendants' act created economic pressure on "third parties" who might hope to enter business relations with him.

[8] NYCRL §§ 50–51, *infra* at 17, creates a narrow statutory privacy right for when a person uses a person's name or likeness for advertising or trade purposes without the person's consent. *See W.A. v. Hendrick Hudson Central School Dist. and Kathleen Coughlin*, No. 14-CV-8093, 2016 WL 1274587, at *15 (S.D.N.Y. Mar. 31, 2016). A potential violation of this statute does not meet the high bar for dishonest, unfair, or improper means within the meaning of tortious interference for business relations.

But to properly plead a tortious interference with prospective business relations claim, a plaintiff must allege that he was "actually and wrongfully prevented from entering into or continuing in a specific business relationship." *Von Rohr Equip. Corp. v. Tanner Bolt & Nut Corp.*, No. 17-CV-2913, 2017 WL 5184676, at *7 (E.D.N.Y. Nov. 7, 2017) (quoting *Korn v. Princz*, 641 N.Y.S.2d 283, 283, 226 A.D.2d 278, 279 (1st Dep't 1996)) (collecting cases). Here, Admiral Pelkowski fails to identify any specific business relationship with which defendants allegedly interfered.[9] Rather, fatally, this conclusory claim is directed at vague, unknown "third parties" who may be deterred from conducting business with Admiral Pelkowski as a result of defendants' Instagram post. The claim is dismissed.

III. New York Civil Rights Law

Defendants also move to dismiss plaintiff's cause of action under NYCRL §§ 50–51. This provision creates a limited statutory private right of action if a person, firm or corporation uses for advertising or trade purposes the name, portrait or picture of any living person without having first obtained that person's written consent. NYCRL §§ 50–51; *accord Electra v. 59 Murray Enters., Inc.*, 987 F.3d 233, 248 (2d Cir. 2021). To proceed with a claim under this section of law, a plaintiff must plausibly plead facts showing: "(1) use of plaintiff's name, portrait, picture or voice (2) for advertising purposes or for the purposes of trade (3) without consent and (4) within the state of New York." *Jackson v. Odenat*, 9 F. Supp. 3d 342, 353 (S.D.N.Y. 2014) (internal quotation marks and citation omitted). For purposes of this action, the only disputed factor is whether plaintiff has plausibly plead that defendants used Admiral

[9] To the extent Admiral Pelkowski is bringing this claim for interference with his relationship with the Coast Guard and/or SUNY Maritime College, it is duplicative of his earlier-discussed tortious interference claims and dismissed.

Pelkowski's portrait in the Instagram post "for advertising purposes" or "trade."[10]

"Courts have liberally construed the statutory term 'advertising purposes.'" *Beverley v. Choices Women's Med. Ctr., Inc*., 78 N.Y.2d 745, 751, 579 N.Y.S.2d 637, 587 N.E.2d 275 (1991) (internal citations omitted). "A name, portrait or picture is used 'for advertising purposes' if it appears in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service." *Id.* "In determining whether a name or likeness is used primarily for advertising or trade in violation of the statute, a court will weigh the circumstances of the use, its extent or degree, and the character of the use." *Netzer v. Continuity Graphic Assocs., Inc.*, 963 F. Supp. 1308, 1325–26 (S.D.N.Y. 1997)

In this light, it seems clear that Admiral Pelkowski has plausibly plead a violation of §§ 50–51. He alleges that the defendants' use of his image on social media, without his consent, in conjunction with hashtags and promotional language for the shop abused his image to achieve publicity, gain interest in their store, drive up website traffic, and receive commercial gain. Compl. ¶¶ 158, 159, 167. Indeed, the post contains hashtags to the name of the shop as well as

[10] The parties do not dispute that the Instagram post occurred "within the state of New York," because, obviously, it occurs within every spec of the universe that the internet can reach. Indeed, use of a person's portrait on social media sites like Instagram have been held to be "ubiquitous[ly] availabil[e] in the State of New York." *Voronina v. Scores Holding Co., Inc.*, No. 16-CV-2477, 2017 WL 74731, at *5 (S.D.N.Y. Jan. 5, 2017); *see Molina v. Phoenix Sound Inc*., 297 A.D.2d 595, 598, 747 N.Y.S.2d 247, 230 (1st Dep't 2002) ("Today, it cannot be disputed that an Internet Web site simultaneously exhibits images both globally and locally. Therefore, while plaintiff's image on the Sound Factory Web site was indeed available for use on a 'world wide basis,' it necessarily was concurrently available within New York State."); *Watson v. Compagnie Financiére Richmont SA*, No. 18-CV-547, 2020 WL 5027120, at *10 (S.D.N.Y. Aug. 25, 2020) (NYCRL §§ 50–51 "does not require proof that Defendants were in New York when they placed the [a]dvertisement.").

hashtags stating "#allarewelcome, #boutique, #small, #smallbusiness, #shopsmall, #shoplocal."[11] The post was published on the shop's social media account, a platform often used for advertising and promotional purposes. One of the comments underneath the post stated, "Thanks to Rear Admiral 'Stash', I've learned of a new kinky boutique that I need to buy things from!" Although there may have been other objectives behind the post, given the liberal construction of the terms "for advertising purposes," plaintiff has plausibly plead that this post, taken in its entirety, meets this prong of §§ 50–51. *Compare Selsman v. Universal Photo Books*, 18 A.D.2d 151, 152, 238 N.Y.S.2d 686, 687 (1st Dep't. 1963) (holding that "[a]lthough in a broad sense the [camera] manual serves an educational purpose, nevertheless it does advertise the Minox camera" and thus the publication of plaintiff's picture in the manual is within the scope of §§ 50–51); *Griffin v. Med. Soc'y. of State of N.Y.*, 7 Misc. 2d 549, 550, 11 N.Y.S.2d 109, 110 (N.Y. Sup. Ct. 1939) (motion to dismiss denied where photographs published in a scientific article could be seen as subtle advertising, *i.e.* an advertisement in disguise); *Morse v Studin*, 283 A.D.2d 622, 622, 725 N.Y.S.2d 93, 94 (2d Dep't. 2001) (use of plaintiff's "before and after" photo in a "newsletter" mailed to patients, taken in its entirety, was distributed for advertising purposes within the meaning of §§ 50–51); *Beverley*, 78 N.Y.2d at 751 (pervasive and prominent placement of office's name and logo and the scope of distribution leaves no doubt that calendar is an advertising medium and photo featuring plaintiff's name was not incidental to the calendar's commercial message and purpose). The motion to dismiss this claim is denied.

IV. Unjust Enrichment

To state a claim for unjust enrichment under New York law, a plaintiff must show "(1)

[11] Hashtags are often used in social media by businesses to promote products and disseminate news. Internet hashtags, 1 *McCarthy on Trademarks and Unfair Competition* § 7:17.70 (5th ed.)

that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution." *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 586 (2d Cir. 2006) (internal quotation marks and citation omitted). "The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement." *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 572, 807 N.Y.S.2d 583, 841 N.E.2d 742, 746 (2005). "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790, 944 N.Y.S.2d 732, 967 N.E.2d 1177 (2012) (holding unjust enrichment is not a "catchall cause of action to be used when others fail.").

On these pleadings, Admiral Pelkowski cannot cobble together a successful unjust enrichment claim. Indeed, as he has framed it, this claim simply duplicates his Civil Rights Law cause of action, which would be more than a sufficient reason to dismiss it. For all intents and purposes, in other words, it is essentially another cause of action for unlawful invasion of his privacy for commercial gain brought in a common law vehicle. But New York courts have long held that there is no common-law right to privacy and that the only remedy for such a claim is the one created by NYCRL §§ 50–51. *Hampton v. Guare*, 195 A.D.2d 366, 366–67, 600 N.Y.S.2d 57 (1st Dep't. 1993) (finding claim for unjust enrichment preempted by NYCRL); *Preston v. Martin Bregman Prods., Inc.*, 765 F.Supp. 116, 120 (S.D.N.Y. 1991); *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 586 (2d Cir. 1990) (preemptive effect of a cause of action brought under NYCRL §§ 50–51). In fact, not only would the unjust enrichment claim Admiral Pelkowski seeks to bring pegged to Kink Shoppe's unauthorized use of his image duplicate the privacy claim advanced by his NYCRL §§ 50–51 claim, the unjust enrichment claim is preempted by it, and, consequently, it must be dismissed.

V. Injunctive Remedy

Admiral Pelkowski also seeks preliminary and permanent injunctive relief.[12] He alleges that the Kink Shoppe's Instagram post is causing continuous and ongoing harm to his reputation and livelihood and his complaint includes a request for relief that the post be deleted, the offending claims be retracted, and, in addition, that defendants use their best-efforts to have members of the internet community remove any reposting of the post and comments. Compl. ¶¶ 186, 190 & p. 31 ¶ 7.

Defendants have moved to dismiss the request for injunctive relief, arguing that under New York and federal law, "absent extraordinary circumstances, injunctions should not ordinarily issue in defamation cases." *See Metro. Opera Ass'n, Inc. v. Loc. 100, Hotel Emps. & Rest. Emps. Int'l. Union*, 239 F.3d 172, 177 (2d Cir. 2001); *see also Stuart v. Press Publ'g. Co.*, 83 A.D. 467, 477, 82 N.Y.S. 401 (1st Dep't 1903). The argument however, is without credence, since the defamation cause of action has been dismissed, and overlooks the fact that the Civil Rights Law expressly authorizes injunctive relief as a remedy in suits brought under NYCRL §§ 50–51. In any event, however, plaintiff has not formally moved for injunctive relief and, at the motion to dismiss stage, an attack on a request for future injunctive relief would be premature. *See Chachkes v. David*, No. 20-CV-2879, 2021 WL 101130, at *14 (S.D.N.Y. Jan. 12, 2021) (denying motion to dismiss claims for preliminary and permanent injunction); *see also Pusey v. Bank of Am., N.A.*, No. 14-CV-4979, 2015 WL 4257251, at *4 (E.D.N.Y. July 14, 2015). The motion to dismiss or strike plaintiff's request for injunctive relief is denied without

[12] Although the request for preliminary and permanent injunction is titled as "Count VII: Right to Preliminary and Permanent Injunction," plaintiff's brief asserts that the request is not being brought as a separate cause of action, but rather as a form of relief he is entitled to on his other claims, specifically his claim under NYCRL. Pl.'s Opp'n at 21–22.

prejudice to renewal should further development make that request appropriate.

Conclusion

For the foregoing reasons, defendants' motion is granted in part and denied in part. All of plaintiff's claims are dismissed with the exception of his NYCRL §§ 50–51 claim, which may proceed as pleaded. Based on the record already before it, the Court finds that any attempt to amend plaintiff's libel/defamation, unjust enrichment, tortious interference with his positions at the U.S. Coast Guard, and tortious interference with prospective business claims would be futile as a matter of law. *See McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). As such, leave to amend these claims is denied. If he can, however, in good faith, cure the deficiencies stated in this order, plaintiff may replead his tortious interference with his employment at SUNY Maritime claim within 30 days from the entry of this order on the docket.

The parties are directed to contact Magistrate Judge Roanne L. Mann for the further pretrial management of this case.

So Ordered.

Dated: Brooklyn, New York
September 9, 2021

/s/ENV
ERIC N. VITALIANO
United States District Judge