Yangtze Riv. Port & Logistics Ltd. v Hindenburg Research
2020 NY Slip Op 30506(U)
February 25, 2020
Supreme Court, New York County
Docket Number: 150721/2019
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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YANGTZE RIVER PORT AND LOGISTICS LIMITED,

Plaintiff,

-against-

HINDENBURG RESEARCH, NATHAN ANDERSON, CLARITYSPRING SECURITIES, LLC, CLARITYSPRING INC., and JOHN DOES NOS. 1 through 15, said names being fictitious and unknown,

Defendants.

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DECISION AND ORDER
Index No.: 150721/2019

Motion Sequence No.: 004

O. PETER SHERWOOD, J.:

In this action, plaintiff Yangtze River Port and Logistics Limited (Yangtze, YRIV, or plaintiff) brings causes of action for defamation, defamation per se, conspiracy, common-law fraud, tortious interference with contract, and tortious interference with prospective business relations against defendants Hindenburg Research, LLC (Hindenburg), Nathan Z. Anderson (Anderson), ClaritySpring Securities, LLC (ClaritySpring Securities) and ClaritySpring Inc. (ClaritySpring).

All of Yangtze's causes of action arise from Hindenburg's publication on December 6, 2018 of a due diligence report (the Report) on Yangtze, a publicly traded company. Yangtze claims that certain statements in the Report constitute defamation and defamation per se.

Defendants now move, pursuant to CPLR 3211 (a) (7), for dismissal of the amended complaint for failure to state a cause of action.

BACKGROUND

Yangtze is an international infrastructure company that engages in real estate development via a port logistic project located in the middle reaches of the Yangtze River in Wuhan, China (amended complaint, ¶ 17 [NYSCEF Doc. No. 6]).

ClaritySpring is a research firm co-founded by Anderson, its Chief Executive Officer, and a due diligence entrepreneur who provides investor clients with "news, research and detailed due-diligence" on hedge funds (*id.*, ¶¶ 18-19). ClaritySpring also publishes "research reports" in the name of "Hindenburg Research" (*id.*, ¶ 19). ClaritySpring Securities is a registered brokerage

firm, which is a wholly-owned subsidiary of ClaritySpring, and is also controlled by Anderson (*id.*, ¶ 20).

Hindenburg provides detailed due diligence on public companies, with a particular emphasis on forensic due diligence (aff of Corey Silva, ¶ 6 [NYSCEF Doc. No. 40]). Hindenburg publishes research reports analyzing the financial condition of companies that it believes should be exposed to public scrutiny (*id.*). Hindenburg maintains its own website at https://hindenburgreserach.com/ and the Twitter account "@hindenburgres." (*see id.*, ¶ 7).

Hindenburg published the Report on its website on December 6, 2018 (*see Yangtze River Port & Logistics: Total Zero. On-the-Ground Research Shows Assets to Be Largely Fabricated* [Silva aff, exhibit 2] [NYSCEF Doc. No. 42]). The Report contains the following disclosure: "Disclosure: We are short YRIV" (*id.* at 17). It also contains a disclaimer, in italicized font, concerning Hindenburg's past, current and future trading positions in Yangtze, which includes the following statement:

> "You should assume that as of the publication date of any short-biased report or letter, Hindenburg Research (possibly along with or through our members, partners, affiliates, employees, and/or consultants) along with our clients and/or investors has a short position in all stocks (and/or options of the stock) covered herein, and therefore stands to realize significant gains in the event that the price of any stock covered herein declines. Following publication of any report or letter, we intend to continue transacting in the securities covered herein, and we may be long, short, or neutral at any time hereafter regardless of our initial recommendation, conclusions, or opinions"

(*id.* at 17-18 [italics in original]). The disclaimer also alerts readers that the Report comprises the author's opinions:

> "To the best of our ability and belief, all information contained herein is accurate and reliable, and has been obtained from public sources we believe to be accurate and reliable, and who are not insiders or connected persons of the stock covered herein or who may otherwise owe any fiduciary duty or duty of confidentiality to the issuer. . . . **All expressions of opinion are subject to change without notice**, and Hindenburg Research does not undertake to update or supplement this report or any of the information contained herein"

(*id.* at 18 [italics in original, bold added]).

Throughout the Report, the statements contained therein are explicitly expressed in the form of opinions (*see id.* at 1 ["We are of the strong ***opinion*** that…"]; *id.* at 16 ["We can therefor

infer that..."]; *id.* at 1, 2, 14, 17 ["we ***believe*** that..."] [emphasis added]). Overall, the Report contains many such statements regarding Hindenburg's opinion on the value of Yangtze's stock (*see also id.* at 14 ["We ***think*** that the above is the most obvious 10b-5 Securities Exchange Act . . . violation since 'Funding secured,' and we ***believe*** that it could result in a halt of YRIV shares at any time"]; *id.* at 2 ["Site visits to the company's Chinese properties, interviews with local officials, and a detailed explanation of Chinese and U.S. filings; ***lead us to believe*** that the company's assets have either been grossly exaggerated or are largely fabricated"]; *id.* at 8 ["All told, ***we think*** the supposed leased land for the Logistics Center is a total fabrication"]; *id.* at 15 ["Therefore, ***we believe*** it is impossible for Wuhan Newport to come up with cash to continue its logistics center project"]; *id.* at 17 ["Conclusion: ***We Think*** Yangtze River Port & Logistics Is Worth Nothing"] [emphasis added]).

Substantively, the Report contains analysis on three central themes: (1) Yangtze's apparent inflation of its asset values; (2) Yangtze's failure to report to investors its involvement in numerous legal proceedings; and (3) Yangtze's payment to its Chairman of capital raised in its public offerings. The Report includes citations, charts, graphs, pictures, and embedded hyperlinks to a multitude of publicly available sources upon which the Report is based (*see id.*). In particular, the Report cites the following sources, many of which are the Company's own financial filings with the United States Securities and Exchange Commission (SEC):

- Yangtze, Annual Report (Form 10-K) (Dec. 31, 2015);
- Yangtze, Amended Annual Report (Form 10-K/A) (Amended No. 3) (Dec. 31, 2016);
- Yangtze, Annual Report (Form 10-K) (Dec. 31, 2017);
- Yangtze, Quarterly Report (Form 10-Q) (June 30, 2018);
- Yangtze, Quarterly Report (Form 10-Q) (Sept. 0, 2018);
- Yangtze, Amended Registration Statement (Form S-3) (Amendment No. 4) (Sept. 6, 2018);
- Nathan Vardi, *The $2.4 Billion Nasdaq Stock Headquartered in Apartment 2A, Forbes* (June 30, 2017);
- Bill Alpert, *A Troubled Chinese Company Is Seeking a Lifeline from U.S. Investors, Barron's* (August 27, 2018);
- Yangtze, Website, http:www.yerr.com.cn; and
- James Chen, *Rule 10b-5*, Investopedia (Dec. 8, 2017)

(*see id.*).

On January 23, 2019, plaintiff filed a complaint against defendants in New York State Supreme Court, which was subsequently amended on January 25, 2019. The amended complaint alleges six causes of action arising from the Report's publication: defamation (first cause of action); defamation per se (second cause of action); tortious interference with contract (third cause of action); tortious interference with business relations (fourth cause of action); common law fraud (fifth cause of action); and civil conspiracy (sixth cause of action).

More specifically, plaintiff alleges that defendants took part in a "classic 'short and distort'" scheme against Yangtze, which occurs when "short-sellers: (i) disseminate materially false and misleading information to the market; (ii) orchestrate negative analyst reports and articles; (iii) solicit and coordinate false and exaggerated negative "reports" from biased, paid-for and/or bogus "analysts" and "research firms"; and (iv) use such manufactured misinformation to attract market and regulatory scrutiny, or to cause a loss of investor confidence in the company and its management (id., ¶¶ 32-33). Plaintiff further alleges that defendants began to spread "disinformation and false innuendo" about Yangtze to a vast audience online using email, social media, and online posts on web forums (*id.*, ¶ 35). Plaintiff contends that Yangtze and its shareholders suffered harm caused by these schemes which interfered with the company's ability to conduct business and secure capital (*id.*, ¶ 36). Plaintiff also alleges that the ClaritySpring defendants posed as John Doe defendants nos. 1 through 15 and "Hindenburg Research" to ghost-write or contribute to the "false and defamatory 'research report'" on Yangtze that complimented their short position via platforms such as Yahoo Finance, Twitter, Hacker News and Reddit (*id.*, ¶¶ 39-42).

Plaintiff alleges that the Report, combined with the online defamation that defendants created, succeeded in damaging Yangtze's reputation, as plaintiff's stock price has consistently dropped since its December 4, 2018 $11.62 per share closing price (*id.*, ¶ 54). According to plaintiff, between close of market on December 6, 2018 and January 22, 2019, Yangtze lost $1.29 billion of its market capitalization (*id.*).

The amended complaint present three "quotes" from the Report as the purported basis for plaintiff's claims:

> "We are of the strong ***opinion*** that Yangtze River Port & Logistics is a scheme run by its Chairman and controlling shareholder to siphon money away from U.S. public markets. . . . YRIV has essentially one project called the Wuhan Yangtze River New Port Logistics Center. The constructed part of the project is a cluster of commercial buildings. The company claims that 4 of the buildings in the complex are completed . . . [*omitting citation of, and hyperlink to, page F-12 of Yangtze's 10-Q for the period ended September 30, 2018*] yet they have failed to produce any revenue from them. . . . The unconstructed part of the project is a planned 'Logistics Center' that YRIV states it will build on 1.2 million square meters of land leased from a local village. On YRIV's latest quarterly balance sheet, the rights to the land are reported as having a value of $299 million, comprising over 77% of the company's total assets [*omitting citation of, and hyperlink to, page F-13 of Yangtze's 10-Q for the period ended September 30, 2018*]"

(amended complaint, ¶ 52 [emphasis added]).

The second statement that plaintiff alleges to be defamatory states as follows:

> "Money from YRIV's capital raises has been used to pay the chairman/controlling shareholder rather than advance Company's projects. . . . [*omitting citation of, and hyperlink to, pages F-15 and F-16 of Yangtze's 10-Q for the period ended September 30, 2018*] So where does all the new cash go? YRIV has consistently reported large liability balances 'due to related parties' on its financial statements. These in turn seem to accrue large interest rates which simply get added to the 'advances' over time. When capital is raised, cash is then used to pay back the supposed related-party 'advances,' rather than being employed to further the company's projects. In the September 2018 quarter alone, the CEO and controlling shareholder, Liu Xiangyao, was 'repaid' $6.2 million dollars both directly and through an entity he controlled called Jasper Lake Holdings ('Jasper'). . . . [*omitting quotations from page F-19 of Yangtze's 10-Q for the period ended September 30, 2018*] In the June 2018 quarter, the CEO was 'repaid' $1.3 million, along with another $3 million in the March 2018 quarter. Based on the disclosure, the total amount of those 19 convertible notes [issued by the Company in 2018] amounted to $8.5 million, of which $3.39 million is outstanding while $5.15 million has been redeemed. ***We can therefore infer*** that raised cash from these convertible notes went to the Chairman, not to the business operation of YRIV"

(*id.* [emphasis added]).

The final statement that plaintiff alleges to be defamatory is as follows:

> "[b]ased on these observations, ***we believe*** that YRIV is largely a shell which exists to raise more capital for the personal use of its controlling shareholder and chairman"

(*id.* [emphasis added]).

On January 28, 2019, several entities claiming to be Yangtze shareholders filed a separate complaint against defendants entitled *Majestic Symbol Limited et al v Hindenburg Research*, index No. 150879/2019 (the Shareholders' Complaint [attached to Silva aff as exhibit 3, NYSCEF Doc. No. 43]). The Shareholders' Complaint – which contains basically the same factual allegations as those set forth in the amended complaint here – asserts various claims against defendants, including prima facie tort, civil conspiracy, unjust enrichment, common law fraud and violations of New York's consumer protection statute. The amended complaint in this action was filed simultaneously with the Shareholders' complaint.

DISCUSSION

Although on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction," and "the facts as alleged in the complaint [are presumed] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]), "'factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration'" (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [citation omitted]; *see also Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233 [1st Dept 1994]).

When assessing whether a claim is defamatory, a court should consider the allegedly defamatory words "in the context of the entire statement or publication as a whole" (*Aronson v Wiersma*, 65 NY2d 592, 594 [1985]; *Jacobus v Trump*, 55 Misc 3d 470, 475 [Sup Ct, NY County 2017], *affd* 156 AD3d 452 [1st Dept 2017]). "[W]here the complaint itself does not attach as an exhibit . . . a full copy, transcript, printout, or video of the relevant medium in which the allegedly defamatory statement is contained, the defendant may submit such copy, transcript, printout or video (as the case may be) to aid the court in determining whether the complaint states a cause of action" (*Greenberg v Spitzer*, 155 AD3d 27, 44 [2d Dept 2017]).

Construing the claims in the generous matter to which they are entitled, this court nevertheless concludes that defendants' motion to dismiss must be granted, as each claim is legally deficient.

Defamation and Defamation Per Se (First and Second Causes of Action)

Plaintiff fails to allege that any of Hindenburg's statements are defamatory. "To state a cause of action alleging defamation, a plaintiff must allege that the defendant published a false statement, without privilege or authorization, to a third party, constituting fault as judged by, at a

minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se" (*Rosner v Amazon.com*, 132 AD3d 835, 836-837 [2d Dept 2015]; *see also Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]). "A false statement constitutes defamation per se when it charges another with a serious crime or tends to injure another in his or her trade, business or profession" (*Geraci v Probst*, 61 AD3d 717, 718 [2d Dept 2009], *affd as modified* 15 NY3d 336 [2010]).

CPLR 3016 (a) requires that "the particular words complained of shall be set forth in [a defamation] complaint'" (*Lemieux v Fox*, 135 AD3d 713, 714 [2d Dept 2016] [citation omitted] [affirming dismissal of defamation case because complaint did not set forth offending words]). The complaint must also allege the time, place and manner of the false statement and specify to whom it was made (*see Khan v Duane Reade*, 7 AD3d 311, 312 [1st Dept 2004]). Because falsity is a required element of a defamation claim, only statements of fact can be the subject of a defamation claim (*see Galanos v Cifone*, 84 AD3d 865, 866 [2d Dept 2011]; *see also Celle v Filipino Reporter Enters., Inc.*, 209 F3d 163, 176 [2d Cir 2000] [a statement is only potentially actionable if it contains a "defamatory statement of fact concerning the plaintiff"]).

Accordingly, "[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]; *see also Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 39-40 [1st Dept 2011]). That is because "falsity is a sine qua non of a libel claim . . . and only assertions of fact are capable of being proven false" (*Brian v Richardson*, 87 NY2d 46, 51 [1995]). Whether a particular statement is one of opinion or fact is a question of law for the court to decide (*see id.* at 50-54). In making that determination, courts should consider 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"

(*Gross v New York Times Co.*, 82 NY2d 146, 153 [1993] [citation and internal quotation marks omitted]).

The third factor of the above formula, context, is a significant part of the analysis (*see Brian*, 87 NY2d at 51-53). Thus, with any statement challenged as defamatory, the context must be examined to determine whether a reasonable reader would have believed that the communication was fact, not opinion (*see Davis v Boeheim*, 24 NY3d 262, 270 [2014]; *see also Brian*, 87 NY2d at 51 ["in distinguishing between actionable factual assertions and nonactionable opinion, the courts must consider the content of the communication as a whole, as well as its tone and apparent purpose]). "In addition to considering the immediate context in which the disputed words appear, the courts are required to take into consideration the larger context in which the statements were published, including the nature of the particular forum" (*Brian*, 87 NY2d at 51).

Certain contexts may indicate whether a statement constitutes fact or opinion. For instance, the culture of Internet communications, as distinct from print media, has been characterized as encouraging a "freewheeling, anything-goes writing style" (***Sandals Resorts Intl., Ltd.***, 86 AD3d at 43 [internal quotation marks and citations omitted]; *see LeBlanc v Skinner*, 103 AD3d 202, 213 [2d Dept 2012] ["Internet forums are venues where citizens may participate and be heard in free debate involving civic concerns"]). Thus, "'epithets, fiery rhetoric or hyperbole'" advanced on social media have been held to warrant an understanding that the statements contained therein are "vigorous expressions of personal opinion," "rather than the rigorous and comprehensive presentation of factual matter" (*Brian*, 87 NY2d at 52 [citation omitted]; *see also Matter of Konig v WordPress.com*, 112 AD3d 936, 937 [2d Dept 2013] [reasonable reader would believe that statements made on an Internet blog during sharply contested election generally referencing "downright criminal actions" were opinion, "not a factual accusation of criminal conduct"]).

Consequently, "New York courts have consistently protected statements made in online forums as statements of opinion rather than fact" (*Bellavia Blatt & Cossett, P.C. v Kel & Partners, LLC*, 151 F Supp 3d 287, 295 [ED NY 2015]; *see Matter of Woodbridge Structured Funding, LLC v Pissed Consumer*, 125 AD3d 508, 509 [1st Dept 2015] [disgruntled tone, anonymous posting, and predominant use of statements on consumer grievance website that cannot be definitely proven true or false, support finding that challenged statements constitute nonactionable opinion]; *Brahms v Carter*, 33 F Supp 3d 192, 198-199 [ED NY 2014] [statement was nonactionable opinion where "made on an internet forum where people typically solicit and express opinions"]; *Sandals Resorts Intl. Ltd.,*, 86 AD3d at 43-44 [so-called social media, such as Facebook and Twitter, is increasingly deemed to attract "less credence to allegedly defamatory remarks" than other contexts, noting that

"bulletin boards and chat rooms 'are often the repository of a wide range of casual, emotive and imprecise speech'" [citation omitted]).

As their context shows, Hindenburg's allegedly defamatory statements are constitutionally protected opinions. Where, as here, the context reveals that a reasonable reader would understand an assertion as an allegation to be investigated, rather than as a fact, the statement constitutes opinion (*see Brian*, 87 NY2d at 53). It is on that basis that courts frequently determine that investment analysis, such as that presented in the Report, constitutes the author's opinion (*see e.g. MiMedx Grp., Inc. v Sparrow Fund Mgt. LP*, 2018 WL 847014, *8 [SD NY 2018] [determining that investment analysis presented in conversation between two investors constituted opinions and predictions]; *Matter of Nanoviricides, Inc. v Seeking Alpha, Inc.*, 2014 NY Slip Op 31681[U], *5 [Sup Ct, NY County 2014] [ruling that investment analysis posted on *Seeking Alpha* website was protected opinion]; *Silvercorp Metals, Inc. v Anthion Mgt. LLC*, 36 Misc 3d 1231[A], 2012 NY Slip Op 51569[U], *11 [Sup Ct, NY County 2012] [deciding that investment analysis contained in letter sent to Ontario Securities Commission, several financial journalists and plaintiff's auditors qualified as protected opinion]). For instance, in *Eros Intl. PLC v Mangrove Partners* (2019 NY Slip Op 30604[U] [Sup Ct, NY County 2019]), Justice Joel M. Cohen dismissed a similar case filed against the moving defendants here and other market commentators by another foreign issuer traded on the New York Stock Exchange. The plaintiff claimed that a group of short-seller investors (including ClaritySpring, ClaritySpring Securities, Anderson and Hindenburg) conspired, over several years, to spread false or misleading information about the company in order to artificially depress its stock price. The plaintiff brought defamation, defamation per se, and other related causes of action against the defendants. Like here, the defendants argued that the statements at issue conveyed constitutionally protected opinions, and therefore could not give rise to a claim of defamation, or defamation per se. The court agreed, determining that an analysis of the context surrounding the publication of Hindenburg's report showed that the author was presenting an opinion on plaintiff. In dismissing the defamation and defamation per se causes of action, the court specifically found that the "articles and reports published by the Moving Defendants expressed opinions 'accompanied by a recitation of the facts' on which they were based, signaling to the reasonable reader through a mix of key words and context that the statements were not 'based upon undisclosed facts'" (*id.* at *7 [citation omitted]).

Likewise here, it is clear that defendant's statements are nonactionable statements of opinion. First, the Report contains a global disclaimer highlighting that its contents include opinions of an author:

> "To the best of our ability and belief, all information contained herein is accurate and reliable, and has been obtained from public sources we believe to be accurate and reliable, and who are not insiders or connected persons of the stock covered herein or who may otherwise owe any fiduciary duty or duty of confidentiality to the issuer. However, such information is presented 'as is,' without warranty of any kind – whether express or implied. Hindenburg Research makes no representation, express or implied, as to the accuracy, timeliness, or completeness of any such information or with regard to the results to be obtained from its use. ***All expressions of opinion are subject to change without notice***, and Hindenburg Research does not undertake to update or supplement this report or any of the information contained here"

(Report at 18 [emphasis added]).

Indeed, the Report's first sentence – which plaintiff claims to be defamatory – acknowledges that what follows is purely the author's opinion (*see id.* at 1 ["We are of the strong ***opinion*** that [Yangtze] is a scheme run by its Chairman & controlling shareholder to siphon money away from U.S public markets"] [emphasis added]).

The other allegedly defamatory sections of the Report similarly point out to the reader that its conclusions are merely expressions of the author's opinion (*see id.* at 16 ["We can therefore ***infer*** that raised cash from these convertible notes went to the Chairman, not to the business operation of YRIV"]; *id.* at 17 ["Based on these observations, we ***believe*** that YRIV is largely a shell which exists to raise more capital for personal use of its controlling shareholder and chairman"]). Thus, any reasonable reader would expect the Report to contain the author's negative opinion of the value of Yangtze's stock, especially where, as here, the author has disclosed a decision to short (*see* Report at 17; *see also Silvercorp Metals, Inc.*, 36 Misc 3d 1231[U], 2012 NY Slip Op 51569[U] at *9 [finding that a defendant's disclosure of his self-interest also "indicates to the reader that the author is expressing his opinion," and determining that reader would understand that author is expressing opinion when author reveals short position]; *see also Bellavia Blatt & Crossett, P.C. v Kel & Partners, LLC*, 151 F Supp 3d 287, 296 [ED NY 2015], *affd* 670 F Appx 731 [2d Cir 2016]).

In addition, the allegedly defamatory statements were advanced on social media, including Yahoo Finance, Twitter, Hacker News and Reddit, which New York courts typically protect as statements of opinion, rather than fact (*see Matter of Woodbridge*, 125 AD3d at 509).

Moreover, in assessing the allegedly defamatory statements in their full context, there are numerous additional disclaimers in the Report signaling to any reasonable reader that it is an opinion piece (*see* Report at 1 ["We ***believe*** that at least 77% of [Yangtze's] reported assets are fabricated"]; *id.* at 2 ["Site visits to the company's Chinese properties, interviews with local officials, and a detailed explanation of Chinese and U.S. filings; ***lead us to believe*** that the company' assets have either been grossly exaggerated or are largely fabricated"]; *id.* at 2 ["We ***believe*** that [Yangtze] is an artifice designed to enrich the company's Chairman & controlling shareholder]; *id.* at 8 ["All told, ***we think*** the supposed leased land for the Logistics Center is a total fabrication"]; *id.* at 14 ["We ***think*** that the above is the most obvious 10b-5 Securities Exchange Act . . . violation since 'Funding secured,' and we ***believe*** that it could result in a halt of [Yangtze's] shares at any time"]; *id.* at 15 ["Therefore, ***we believe*** it is impossible for Wuhan Newport to come up with case to continue its logistics center project"]; *id.* at 17 ["Conclusion: ***We Think*** Yangtze River Port & Logistics Is Worth Nothing"] [emphasis added]).

Given the supporting documents linked to the Report, it is clear that this is "pure opinion" (*see Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986] ["A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based"]). Embedded within the allegedly defamatory statements are electronic links to various publicly available sources, most prominently Yangtze's SEC filings. Thus, the Report is nothing more than a financial commentary based on the publicly available information cited, and linked to, by the Report – in other words, textbook opinion.

Although plaintiff contends that the Report contains only a "handful" of "opinion-like" words (opposition at 11), the opposite is true. Indeed, Hindenburg frequently used many opinion-like qualifiers throughout the Report – words like "think," believe" and "infer" (*see* Report at 1, 2, 8, 11, 14, 15, 17 and 18). Moreover, Hindenburg provided readers with a general disclaimer making clear not only that the Report was based on opinion, but that the author had a financial interest in Yangtze's stock (*see id.* at 17-18). This disclaimer unequivocally signalled to readers that "the article is one of opinion" (*see Nanoviricides* at *5).

Plaintiff also contends that the Report's reference to Yangtze as a "shell" or "scheme" constitutes mixed opinion defamation (*see* opposition at 6-7). Plaintiff further argues that "Defendants' allegations of corporate mismanagement are provably false," likewise making them "mixed opinion" (*id.* at 7).

The court rejects this argument as "mixed opinion" defamation requires allegations that a statement is based on undisclosed defamatory facts (*see Steinhilber*, 68 NY2d at 289-90). Contrary to plaintiff's contentions, the Report contains numerous citations and hyperlinks to primary source materials on which Hindenburg's opinions were based (*see generally* Report; *see also Levin v McPhee*, 119 F3d 189, 197 [2d Cir 1997] [noting that statement is not actionable if its discloses facts on which it is based]).

Plaintiff's allegations likewise fail to demonstrate any instance of defamatory opinion. A "defamatory opinion" is a statement of opinion based on disclosed facts that are false to such a degree that the difference between the stated facts and the truth would cause a reader to question the opinion's validity (*see Jacobus*, 55 Misc 3d at 476). The Report is largely based on Yangtze's own financial filings and other publicly available documents – all of which are hyperlinked throughout the Report. Thus, because plaintiff denies that those financial filings and public records are themselves falsely represented or grossly distorted, plaintiff's claim of defamatory opinion has no merit (*see* opposition at 7; *see also Parks v Steinbrenner*, 131 AD2d 60, 62-63 [1st Dept 1987] [stating that defamatory opinion requires underlying facts to be either falsely represented or grossly extorted]).

Accordingly, the court concludes that the Report, considered within its overall context as the research findings of a financial analysis shorting a company's stock, is constitutionally protected opinion. As such, plaintiff's claims for defamation and defamation per se must be dismissed.

Tortious Interference Claims (Third and Fourth Causes of Action)

In its third cause of action for tortious interference with prospective business relations, plaintiff alleges that defendants "intentionally and maliciously interfered with Yangtze's prospective business relationships . . . by employing wrongful means," including "the dissemination of false and misleading statements concerning Yangtze's business," which interference was carried by out by defendants' "publication of false and misleading information about Yangtze," including the Report (complaint, ¶ 89).

In its fourth cause of action for tortious interference with contract, plaintiff alleges that defendants "intentionally and maliciously interfered with Yangtze's contractual relationships . . . by employing wrongful means," including "the dissemination of false and misleading statements concerning Yangtze's business," which interference was carried by out by defendants' "publication of false and misleading information about Yangtze," including the Report (*id.*, ¶ 96).

These allegations make clear that plaintiff's tortious interference claims are based upon, and seek damages for, the same conduct that underlies the failed defamation claims.

Claims for tortious interference will be dismissed as duplicative where they are "based on the same substantive facts pleaded with respect to [a] defamation cause of action" (*Ripka v County of Madison*, 162 AD3d 1371, 1373 [3d Dept 2018]; *see e.g. Phillips v Carter*, 58 AD3d 528, 528 [1st Dept 2009] [dismissing tortious interference claim with contract because underlying defamation claim failed to state a cause of action]; *Dobies v Brefka*, 273 AD2d 776, 778 [3d Dept 2000] ["we decline to reinstate the claim for tortious interference with economic advantage in the absence of an alleged act of interference with a contract or business relationship distinct from the general declaration of injury to reputation included in plaintiff's defamation claims"]).

Thus, dismissal of the defamation claims also requires dismissal of the tortious interference claims, since the alleged defamation is the basis for the allegation that defendants' conduct was accomplished by wrongful means (*see Sabharwal & Finkel, LLC v Sorrell*, 117 AD3d 437, 438 [1st Dept 2014]; *Phillips v Cater*, 58 AD3d 528, 528 [1st Dept 2009]; *see also Perez v Violence Intervention Program*, 116 AD3d 601, 602 [1st Dept 2014] [dismissing tortious interference claim as "duplicative of the defamation claim, as [it alleges] no new facts and seek[s] no distinct damages from the defamation claim"]).

Common Law Fraud (Fifth Cause of Action)

To plead common law fraud, a plaintiff must prove "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on misrepresentation or material omission and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003].

Plaintiff has failed to allege that Hindenburg made false statements with the intent to have Yangtze rely on them. Plaintiff also fails to allege any action that it took in reliance on defendants' alleged misrepresentations. In fact, the amended complaint alleges the complete opposite –

claiming that "Yangtze's shareholders did not reasonably rely on these misrepresentations and omissions" (amended complaint, ¶ 112).

Although plaintiff alleges that the amended complaint contains a typo and that the shareholders did, in fact, reasonably rely on defendants' representations, plaintiff fails to allege any specific conduct to that effect. Instead, plaintiff argues that its reliance is derived from the reliance of its shareholders on defendants' statements, which caused them to "sell their shares as a result" (*see* opposition memorandum at 20). The court rejects this argument, as plaintiff has failed to allege any particular stock sales that its shareholders made in reliance on defendants' statements (*see Terra Sec. Asa Konkursbo v Citigroup, Inc.*, 740 F Supp 2d 441, 448-451 [SD NY 2010]). Indeed, some of Yangtze's main shareholders still own their shares, as manifested by the Shareholders' Action filed against defendants.

Accordingly, the fraud cause of action is dismissed.

Civil Conspiracy (Sixth Cause of Action)

"[]Under New York law, to establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties: (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]). "New York law does not recognize an independent cause of action for conspiracy to commit a civil tort" (*id.*; *see also Gould v County Health Plan of Suffolk*, 99 AD2d 479, 480 [2d Dept 1984]). "[A] cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort" (*Romano v Romano*, 2 AD3d 430, 432 [2d Dept 2003]).

Accordingly, given that plaintiff has failed to state a valid tort claim, its civil conspiracy claim must also be dismissed (*see Antares Mgt. LLC v Galt Global Cap., Inc.*, 2014 WL 2116018, *16 [SD NY 2014]).

Even if plaintiff had alleged a viable tort claim, its civil conspiracy claim would still fail because the amended complaint contains no factual allegations concerning the existence of a conspiracy, and acts in furtherance thereof. Rather, its allegations are completely conclusory, only suggesting that defendants were acting "in concert" with numerous disparate parties, including class action attorneys and online parties who "re-tweeted" or posted online commentary related to

the Report (*see* amended complaint, ¶¶ 7, 23, 35, 42, 55-58). Such conclusory allegations are insufficient to sustain a conspiracy claim under New York law.

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the amended complaint is granted and the complaint is dismissed in its entirely, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants.

This constitutes the decision and order of the court.

DATED: February 25, 2020

E N T E R,

O. PETER SHERWOOD J.S.C.