IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nazerali v. Mitchell,*
2016 BCSC 810

Date: 20160506
Docket: S116979
Registry: Vancouver

Between:

Altaf Nazerali

Plaintiff

Between:

Mark Mitchell, Patrick Byrne, Deep Capture LLC, High Plains Investments LLC, GoDaddy.com, Inc., Nozone, Inc. dba Steadfast Networks, Google Inc. and Google Canada Corporation

Defendants

- and -

Docket: S137262
Registry: Vancouver

Between:

Altaf Nazerali

Plaintiff

And

Judd Bagley, Evren Karpak and Overstock.com, Inc.

Defendants

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Plaintiff: D.W. Burnett Q.C.
H. Maconachie

Counsel for the Defendants Mark Mitchell, Patrick Byrne, Deep Capture LLC, High Plains Investments LLC and Judd Bagley:	R.D. McConchie R.A. McConchie
Counsel for the Defendant Overstock.com, Inc.:	S.R. Schachter, Q.C.
Place and Dates of Trial:	Vancouver, B.C. April 13-17, 20-21 & 23-24, 2015, June 15-19 & 22, 2015, and September 28-30, 2015,
Place and Date of Judgment:	Vancouver, B.C. May 6, 2016

Table of Contents

[1] In these two libel actions, the first of which I will call the "Deep Capture action" and the second I will call the "Overstock action", the plaintiff alleges he was defamed in 2011 on an Internet website found at www.deepcapture.com ("the website" or "the Deep Capture website").

The Deep Capture Action Pleadings

A. The Amended Notice of Civil Claim

[2] The plaintiff alleges that the defendant Mr. Mitchell is liable as the principal author and publisher of the defamatory words published on the website. The website is alleged to contain articles entitled "The Miscreants' Global Bust Out" (the "Articles") written primarily by the defendants Mark Mitchell and Patrick Byrne whose purpose, they claim in their writings, is "to expose wrongdoing and unsavoury individuals in the stock and financial markets". The Articles are contained in 21 "chapters" all but five of which refer to the plaintiff.

[3] The allegations of defamatory publications concerning the plaintiff are taken directly from the website as follows:

> (Chapter 3, May 2011) "The year was 1979 ...a powerful bomb exploded, turning Kott's car into a giant fireball... Kott took some shrapnel but survived, and the first thing he did, according to some of his associates, was call his friend, Ali Nazerali. ...he wanted to know what the deal was with the car bomb. Ali Nazerali said he'd ask around. ...
>
> ...Nazerali called back and said the word on the street was that a hit man named Cecil Kirby planted the bomb, and Kirby worked for Canadian mob boss Vic Controni. ...Nazerali offered to patch things up with the Mafia - and he did a good job of it. Commisso ordered Kirby to lay off, and a couple of years later, Kott, Nazerali and the Mafia were all doing business together...
>
> ...Nazerali dabbled in arms dealing, delivering weapons to war zones in Africa and to the mujadeen...
>
> (Chapter 8) "...at least some of these market manipulators got lucky on September 11, 2001. Among the lucky were Ali Nazerali...
>
> (Chapter 9) "...it is likely not a coincidence that the head of Saudi intelligence was running scams with the Nazerali brothers"
>
> (Chapter 12) As I mentioned in Chapter 10, Mark Salter, a principal at Gene Phillips' Sinex Securities (the outfit that laundered around $4 billion for the Russian government and the Russian Mafia), previously worked for Westcap Securities, then controlled by the above-mentioned Ali Nazerali (who has, as I

documented earlier, has run stock scams with the chief of Saudi intelligence, and was a former top employee of a man, Abbas Gokal, who works for Pakistani intelligence)

Boesky met with Ali Nazerali (who has his own ties to the Iranian regime)

Mafia capo Phillip Abramo (who was involved with Ali Nazerali's BCCI brokerage

He was previously among the small pack of closely affiliated market manipulators who traded through Global Securities.

That's the pack that included Anthony Elgindy (tied to the Russian Mafia and multiple leaders of jihadi terrorist groups); Ali Nazerali (former top employee of Abbas Gokal, a Pakistani ISI asset who works for the Iranian regime); Rakesh Saxena (Marxist Naxalite), Adnan Khashoggj (asset to multiple intelligence agencies), and similar characters

In addition, Mr. Dvoskin-Lozin-Kozin-Etc. is a notorious market manipulator who has orchestrated multiple death spiral scams, sometimes in league with prominent members of the Milken network, including Ali Nazerali (former Gokal employee; major BCCI figure; hedge fund partner of Yasin al Qadi, Osama bin Laden's favorite financier).

Michael Milken and some of his close associates, including Gene Phillips and Ali Nazerali, discussed ways in which to destroy some big companies

Ali Nazerali and Nazerali's friend Soleiman Rashid, who is, like Nazerali, on especially close terms with jihadis

Yasin al-Qadi (Osama bin Laden's favorite financier).

Among the many Yasin al Qadi deals handled by the brokerage were Imagis (the anti-terrorism company that Yasin al-Qadi and Nazerali listed just before the 9-11 attacks)

(Chapter 13): ... Nazerali's hedge fund partner Yasin al Qadi (Osama bin Laden's favorite financier). ...Ali Nazerali is best known for small-time "pump and dump" scams, though he is involved in much bigger schemes — the sorts of destructive schemes that I have already described, such as bust-outs, death spiral finance, and naked short selling.

Nazerali, recall, has working relationships with the Gokal family (of BCCI fame), members of Al Qaeda's Golden Chain, the regime in Iran, Pakistan's ISI, the chief of Saudi intelligence, the ruler of Dubai, the royals of Abu Dhabi, La Cosa Nostra, the Russian Mafia, and others in the Milken network.

At this time in 2006, Nazerali has some business with the Belzberg brothers - Sam and Hymie (who, say Canadian and U.S. authorities, have done business with Genovese Mafia capos). The Belzberg's once employed short seller David Rocker, whose attack on Patrick Byrne inspired Patrick to embark on a crusade against market manipulators who seemed to threaten the stability of the financial system.

That crusade eventually led Patrick to found DeepCapture (the website that is publishing this story), but back in 2006, the crusade is already in full-swing.

(Chapter 15) The Miscreant's Global Bust-Out...Ali Nazerali in Aruba, and an Al Qaeda Financial Weapon...the ties that bind a Russian arms dealer, a dangerous mobster, Osama Bin Laden's favourite financier

(Chapter 19, July 2011) "I have written extensively about Ali Nazerali in earlier chapters, but it seems worth repeating...

Ali Nazerali got his start as an arms dealer to the mujahedeen. Later Nazerali was the top employee of Abbas Gokal, a Pakistani intelligence asset who now resides in Tehran, where he serves as an important financial advisor to the Iranian regime.

In the 1970's and 1980's, Nazerali and Gokal were important figures in the Bank of Credit and Commerce international (BCCI), the massive criminal enterprise that did business with everyone from La Cosa Nostra and the Russian Mafia to Columbian drug cartels...

In addition, Nazerali and his relative Naqvi, and organized crime figure Irving Kott controlled BCCI subsidiary First Commerce Securities, which manipulated the US markets from its base in the Netherlands...

Recall from earlier chapters that in 2006, Nazerali formed a fund, Star Soft, in partnership with members of the Mogilevich organization...and Mufti al Abbar, who was an honorary colonel in the Libyan army, and the man in charge of manipulating the markets for Libyan dictator Muammar Qaddafi

…

(also Chapter 19) "Nazerali's business partners have included: 1) the Mogilevich organization (instrument of Russian intelligence, tried to sell enriched uranium to Al Qaeda); 2) Osama bin Laden's favourite financier (Yasin al Qadi); 3) Mufti al Abbar, chief market manipulator for Muammar Qadaffi... 4) Abbas Gokal (Pakistani intelligence asset and key financial advisor to the Iranian regime); 5) Habib Bank (bankers to Daniel Pearl's kidnappers and D-Company, among others.

There are more: 6) Sergei Chemezov (Russian intelligence operative and Russia's chief arms dealer...); 7) DeCalvacante Mafia capo Phil Abramo...; (8) Boris Berezovsky (former "Godfather of the Kremlin"); 9) Roman Abramovich (current "Godfather of the Kremlin"); 10) the Abu Dhabi royal family; 11) the ruler of Dubai.

And the list goes on: 12) the head of Saudi intelligence (Nazerali partner in the stock scam Even Resources); 13) Adnan Khashoggi (Capcom); 14) the Ndrangheta Mafia organization in Italy; 15) an impressive number of securities traders who are also narco-traffickers (such as Paul Combs, until Combs was whacked by Nazerali's mobster friend Egor Chernov); 16) the Mafia brokerages that cleared their trades through Adler Coleman and JB Oxford...and, for course, 17) BCCI, the greatest criminal bank of all time, controlled by future financiers of Al Qaeda.

The Defendants are liable for republication on portions of the Defamatory Statements on additional websites as the permitted or forseeable result of publishing the Defamatory Statements to the world on www.deepcapture.com. The particulars of websites to which portions of the Defamatory Statements have been republished known at the time of this

> *claim are zerohedge.com, twitter.com, ragingbull.com and rumourmillnews.com.*
>
> [The italicized words are not taken from the website and appear to be misplaced in the pleading.]
>
> (Chapter 20)... Nazerali perpetrated a stock fraud (Even Resources) with Prince Anwar bin Abdul al-Aziz al Saud, who had just been named the new head of Saudi intelligence. Nazerali was also involved (in the 1980s) with Capcom, the BCCI subsidiary that was controlled by Saudi intelligence and implicated (by a U.S. Congressional committee) in the manipulation of the U.S. markets and an attempt to seize control of U.S. telecommunications companies, likely for the purpose of espionage.
>
> (Chapter 21) Many other key financial advisors to the Iranian regime - e.g. Ali Nazerali (hedge fund partner of "Specially Designated Global Terrorist" Yasin al Qadi

[4] The plaintiff alleges that the "Defamatory Statements were meant and were understood to mean that he is a criminal, arms dealer, drug dealer, terrorist, fraud artist, gangster, mobster, member of the Mafia, dishonest, dangerous and not to be trusted".

[5] The plaintiff alleges that at the time the amended notice of civil claim was filed, the alleged defamatory words had been republished on 13 Internet sites.

[6] The defendants Deep Capture LLC and High Plains Investments LLC are alleged to be vicariously liable because they own, operate, finance and control the website and are the "alter egos" of the defendant Patrick Byrne.

[7] The defendant Nozone, Inc. dba Steadfast Networks is alleged to have published the defamatory words as the website's "hosting company".

[8] The defendant GoDaddy.com Inc. is alleged to be the "domain name registrar who contracts the domain name www.deepcapture.com … containing the Defamatory Statements".

[9] The plaintiff alleges the defendants Google Inc. and Google Canada Corporation "are subject to injunctive relief" to prevent continuing access through online searches to the following defamatory articles about him:

> "financial advisors to the Iranian regime - e.g. Ali Nazerali"

> "Ali Nazerali in Aruba, and a Jihad Financial Weapon"
> "Ali Nazerali in Aruba, and an Al Qaeda Financial Weapon"
> "Ali Nazerali is a market manipulator of the first order"

[10] Mr. Nazerali sought an interlocutory and permanent injunction against all defendants to prevent them from continuing their defamatory conduct. An *ex parte* interlocutory injunction was obtained, but it eventually expired. I will comment on the injunction later in these reasons.

[11] The plaintiff alleges the "Defamatory Statements were motivated by express malice of the defendants Mitchell and Byrne, arising from the known publication of falsehoods, continued publication of falsehoods after notification of their falsity, and the treatment of the plaintiff as an 'enemy' in the campaign led by Byrne and Mitchell to seek revenge on people they believe, falsely in the case of the Plaintiff, to have engaged in illegal short selling".

[12] The plaintiff seeks an award of general damages against all defendants except GoDaddy.com, Inc., Google Inc. and Google Canada Corporation and an award of punitive and aggravated damages against the defendants Mark Mitchell, Patrick Byrne, Deep Capture LLC and High Plains Investments LLC (the "Deep Capture defendants").

B. The Third Amended Response of the Deep Capture Defendants to the Amended Notice of Civil Claim

[13] In their third amended response, the Deep Capture defendants admit Deep Capture LLC owns the website and published "the Bust-Out Article" and then plead an extensive recitation of the plaintiff's alleged misconduct which is reproduced below in full:

> 4. On October 19, 2011, the Bust-Out Article represented about 10% or less of the data posted on www.deepcapture.com. More than one hundred other articles which had been written over a three-year period were also posted to www.deepcapture.com.
>
> 5. Paragraphs 1 to 20 of Part 1 of the amended notice of civil claim do not disclose a reasonable claim, are unnecessary, frivolous, or vexatious,

may prejudice or delay the fair trial or hearing of this action, and/or are otherwise an abuse of the process of this court and should be struck out.

6. Further, and in the alternative, paragraph 12 of Part 1 of the amended notice of civil claim complains of words which either did not appear on www.deepcapture.com on October 19, 2011 or words which are taken out of context.

7. Further, and in the alternative, the words complained of in paragraph 12 of Part 1 of the amended notice of civil claim are not capable of being defamatory of the plaintiff, and are not in fact defamatory of the plaintiff, either in their literal meaning or in the inferential meanings alleged in paragraph 13 of the amended notice of civil claim or at all.

8. Further, and in the alternatively (*sic*), if the words complained of in paragraph 12 of Part 1 of the amended notice of civil claim are defamatory in their literal or inferential meanings as alleged in paragraph 13 of the amended notice of civil claim or at all (which is not admitted but denied), they are true in substance and in fact. Particulars are as follows:

A. With respect to the allegation that in their natural and ordinary meaning, the Defamatory Statements meant or were understood to mean that the plaintiff is a "fraud artist," "dishonest" and/or "not to be trusted":

a. In or about 1982, the plaintiff was personally hired by Abbas Gokal, the Geneva-based chairman of the Gulf Group, to serve as a top management employee of Gulf International at the direction of Abbas Gokal.

b. The Gulf Group, a collection of companies from Geneva to London, run by Abbas Gokal, Murtaza Gokal and Mustapha Gokal (the "Gokals"), publicly purported to be a legitimate enterprise, was known to the Gokals, and to senior insiders including the plaintiff to be an international criminal organization engaged in global fraud, arms trading, and money-laundering, which included a close relationship with the Bank of Credit and Commerce International ("BCCI"), which itself was an unprecedented international criminal enterprise. In 1975, acting as a front for the BCCI, Abbas Gokal unsuccessfully attempted to acquire Chelsea National Bank in New York, contrary to USA law. When regulators in 69 countries seized the BCCI in 1991, Abbas Gokal's Gulf Group was the largest single unsecured debtor of BCCI in the amount of $1.2 billion, which was never recovered, making Abbas Gokal the biggest single fraudster in history. In May 1997, Abbas Gokal was sentenced by a British Court following trial to 14 years in prison for his involvement in a scheme which involved the Gulf Group and BCCI as two sides of one operation: two bankrupt companies which maintained the illusion of each other's solvency: BCCI showed its dud loans to the Gulf Group as assets and the Gulf Group was kept afloat with BCCI money.

c. As a result of his senior role with the Gulf Group, the plaintiff became privy to a wide range of its corrupt and fraudulent operations, and developed strong personal relationships not only with the Gokal brothers but also with Sinan A. Raouff ("Raouff") who before

becoming employed by a series of Gokal companies in 1976, had served as an Iraqi diplomat during the period 1959 to 1968. Raouff was involved in arms dealing on behalf of the Gulf Group.

d. In 1982, the plaintiff was posted by Abbas Gokal to Luxembourg with responsibility for the administration of Gulf Group interests in that country and in the Netherlands. The plaintiff also began trading in futures and options for his own account through Comptoir Luxembourgeois de Gestion Financiere SA, a company founded by Alphonse Schmit ("Schmit"), who was a member of the Luxembourg Stock Exchange Commission.

e. On or about November 9, 1984, acting on the instructions of Abbas Gokal and the Gulf Group, who were in turn acting in collaboration with the BCCI, the plaintiff and Raouff incorporated a number of companies, including Alva Holdings BY; Inter Alva Services SARL- Luxembourg; Asset Investment Management and Brokerage SA ("AIM"); and Investors Discount Brokerage. AIM purchased the practice of an inactive brokerage firm founded two years previously under the name Fintrust International S.A.

f. In 1986, the senior members of AIM included the plaintiff, then director of AIM, Ernest Backes ("Backes"), Claude Thill ("Thill") (who was later involved in the Pechiney scandal described below in paragraph 8. (a) nn.), Romain Gaasch ("Gaasch"), then secretary general of Alya Holdings, Michael Kott, son of Irving Kott, a man who asked to be called Peter Green (alias Pedro Verde), then a dealer with First Commerce Securities in Amsterdam who served in different Kott companies, and Schmit, then CEO of AIM. The plaintiff and Schmit sat on the administrative council of AIM.

g. In or about December, 1984, acting on instructions of Abbas Gokal and the Gulf Group, who were in turn acting in collaboration with the BCCI, the plaintiff and Raouff entered into negotiations with Irving Kott ("Kott") and Dawson Roberts concerning First Commerce Securities, a "boiler room" operation located in Amsterdam, the Netherlands, which engaged in high pressure telephone sales tactics to sell securities of negligible value which were not listed or traded on any recognized exchange to Europeans and other international customers.

h. By December, 1984, there was considerable international and domestic new media controversy, of which the plaintiff was well aware, relating to the involvement of Kott in First Commerce Securities, in view of his reputation as a stock swindler who had plead guilty and been fined $500,000 in Quebec in May, 1976 (then a record fine) for conspiracy to defraud regarding Somed Mines Limited. Kott had also been: convicted in 1961 in Quebec of selling securities without a license; charged in 1974 in Quebec regarding a false prospectus and illegal distribution of shares of Fallinger Mining Corporation, convicted in 1979 and sentenced to four years in jail, conviction overturned in the Quebec Court of Appeal in 1981; charged in Quebec with multiple counts of fraud and conspiracy regarding

Continental Finance Corp. and others, but later acquitted; and convicted in 1981 in Quebec for failure to file income tax returns for Onyx Securities Ltd. and Onyx Investments Ltd. The plaintiff was at all material times fully aware of Kott's reputation as a stock swindler.

i. Before December, 1984, to the knowledge of the plaintiff, Kott was also the subject of considerable controversy relating to his involvement in promoting the shares of Devoe-Holbein NY (the "Devoe-Holbein Shares"), a company purportedly formed to exploit a scientific/technical development created by two McGill professors named Devoe and Holbein. The Devoe-Holbein Shares became a phenomenal success for First Commerce Securities which made the market in those shares, were not registered or traded on any exchange and were in fact worth little or nothing and lost all value when First Commerce Securities was eventually closed down by Dutch regulators in 1986.

j. The plaintiff was well aware, when he and Raouff embarked on negotiations with Kott, that First Commerce was conducting a boiler-room operation in Amsterdam and that it had run into issues with the Netherlands government regarding permits, its selling methodology, the shares in which First Commerce was making a market, and employment permits for its staff and tax issues. The plaintiff was also well aware that it was necessary to conceal the involvement of Kott in the operations of First Commerce Securities because of his history in Canada as a stock swindler. To the knowledge of the plaintiff, in the 1980's Kott had a reputation in the international press as the greatest North American fraudster.

k. The negotiations between the plaintiff and Raouff, on the one hand, and Kott, Dawson Roberts and others from First Commerce Securities on the other hand, took place as follows:

> i. Meetings over two days at the St. James Club in London. UK, with Kott and Dawson in late 1984;
>
> ii. Meetings in Amsterdam several days after the London meeting, during which the plaintiff and Raouff inspected the headquarters operation of First Commerce Securities in leased space in a renovated townhouse near the centre of Amsterdam and the boiler-room operations located in leased space in two or three buildings. At these meetings, discussion focused on: (i) the companies in whose shares First Commerce was making a market, namely Devoe-Holbein and another company, whose shares were not admitted for trading on any type of stock exchange: complaints from clients about high pressure sales tactics from the 40 staff, which included 10 to 12 Canadians including Michael Kott, the son of Irving Kott. During these meetings, the plaintiff and Raouff were joined by Walter J. Bonn, another employee of the Gokals and a colleague of the plaintiff, who eventually became the "managing director" of First Commerce Securities in 1985;

iii. A meeting in Luxembourg at the offices of Alva Holdings Ltd. in leased space in downtown Luxembourg, attended by the plaintiff, Raouff, Schmit and Albert Wildren, on the one hand, and Kott and Katia Adler, a managerial employee of First Commerce Securities, on the other. This meeting, with Kott as the principal negotiator for First Commerce Securities, took place over a number of days.

iv. The plaintiff was made aware of outstanding customer claims and was well aware they related to the boiler room pressure tactics employed in the sale of the shares and the failure of First Commerce Securities to repurchase the shares at a reasonable price or at all. The plaintiff, through Bonn and Bashir Hussein a.k.a. Bahir Uddin Hussain ("Hussain"), controller of First Commerce Securities, kept a precise track of each claim as it came in with details as to who the claimant was, when it was filed, what the amount was, and its disposition. The plaintiff was fully aware of the swindle that was being perpetrated on the customers of First Commerce Securities.

v. For public consumption, the plaintiff and Raouff purported to negotiate a "conditional purchase agreement" which involved the acquisition of shares in Euro Placement Securities, the parent company of First Commerce Securities. The shares in Euro Placement Securities were bearer shares and were given to the plaintiff, who kept them locked in a safe on the premises of Alva Holdings Ltd. in Luxembourg. First Commerce Securities never disclosed to the Dutch authorities the true owners of First Commerce Securities and the purported transaction involving the so-called "conditional purchase agreement" was never disclosed to the Dutch authorities. This secrecy was maintained because the plaintiff and all parties to the transaction wanted to avoid any liability or regulatory responsibility for the boiler- room operations of First Commerce Securities.

l. Commencing in January, 1985 and continuing until the fall of 1986, the plaintiff and his Gulf Group colleague, Raouff, maintained an office on the premises of First Commerce Securities and effectively directed and managed the operations of First Commerce Securities, including its boiler-room operations, which swindled European and other foreign investors out of large sums of money, estimated by the authorities to range from several hundred million to four hundred million dollars (in contemporary dollars). The plaintiff and Raouff were assisted at First Commerce Securities by Michael Kott, the son of Kott, and Hussain. Michael Kott worked on the boiler-room floor. Hussain reported to Bonn who in turn reported to ^ the plaintiff and Raouff. To the knowledge of the plaintiff, Micheal Kott, like many of the salemen, often used a false name when dealing with clients of First Commerce Securities, in part to facilitate the swindling of naive investors.

m. The plaintiff was actively involved at First Commerce Securities with particular reference to the marketing of securities in which First Commerce Securities was making a market. The plaintiff had learned from Kott that the secret to the successful marketing of next-to-worthless securities was to find, or set up, a company which has an exciting and superficially plausible business plan, although probably not any immediately commercially viable product. The company is supplied with a limited amount of capital in return for shares, which First Commerce Securities then made a market in. The boiler-room salespeople would then falsely claim that the stock, which was not listed on any exchange, was being trading on the Amsterdam over-the- counter market, which did not in fact exist except to the extent it was made by First Commerce Securities. Shares in Devoe-Holbein, a company which never showed a profit, exemplified this strategy.

n. As a result of his experience with Kott and First Commerce Securities, the plaintiff enjoyed saying to co-workers at Alya Holdings and AIM in Luxembourg: *"Every morning an ignorant man gets up for us to find him, and turn him into our client!"*

o. During the administration of First Commerce Securities by the plaintiff and Raouff, with the behind-the-scenes involvement of Kott, the number of customers of First Commerce Securities was increased from several thousand to approximately 18,000 to 20,000, which made it the largest boiler-room operation in the Netherlands in 1986 and possibly the largest boiler-room operation in history.

p. In 1985, during the first year of the plaintiffs involvement with Kott in the First Commerce Securities boiler-room operation. Kott escaped a second assassination attempt by the mafia and subsequently began to travel under false names. When he travelled to Europe, Kott always bought two plane tickets, one to Paris and the other to Amsterdam, and only decided at the last minute which flight to take.

q. Because of the relationship between Abbas Gokal and BCCI, AIM, Alya, Alya SARL and First Commerce Securities had a privileged banking relationship with BCCI, which permitted the funds being paid to First Commerce Securities by share purchasers to disappear into a labyrinth of corporate accounts, with the result that they were never recovered by investors. Checks received by First Commerce Securities in Amsterdam from investors were picked up and flown to Luxembourg, where they were deposited in the name of First Commerce Securities or AIM in accounts opened at BCCI and its sister agency, la Banque de commerce et de placements ("BCP").

r. During the course of his hands-on involvement with First Commerce Securities during the period 1985-1986, the plaintiff approved the lease of new space in the World Trade Centre in Amsterdam in 1985, in order to have better supervision and control over staff. All of the operations of First Commerce Securities were consolidated and the boiler-room sales staff increased from 20 to

nearly 40 people at the peak of operations. First Commerce Securities focused on promoting the sale of worthless shares in Devoe-Holbein and City Clock International, a maker of freestanding clocks carrying advertising, whose shares were not trading on any recognized market.

s. During 1985, in addition to attempting to sell the Devoe-Holbein Shares and City Clock International shares through a news bulletin named "Investors Alert," First Commerce Securities placed advertisements in many newspapers, including the Wall Street Journal/Europe, the International Herald Tribune and other newspapers such as The Straits Times of Singapore. The advertisements actively promoted the sale of stock in Devoe-Holbein and City Clock International.

t. In 1986, while the plaintiff and Raouff were actively involved, First Commerce Securities became the most important client of the Amsterdam telephone company, with monthly invoices averaging $400,000. In the boiler-rooms of First Commerce Security, employees did multiple "three eight (three eight-hour)" shifts with forty-person teams taking turns on the telephones in an effort to seduce investors on five continents.

u. In March, 1986, an officer of the Luxembourg Stock Exchange, Backes, became a director of AIM on the basis of false statements by the plaintiff that the Agha Khan was involved in the company. Not long after joining AIM, Backes was introduced to Kott, who he was told at first was an important client. Backes later learned that Kott was a de facto owner of AIM.

v. The plaintiff was fully briefed by Kott, during his time at First Commerce Securities in 1985 and 1986, on the devious methods that Kott employed to sell worthless shares to small investors, such as the Devoe-Holbein Shares.

w. In 1986, there was a new wave of media controversy about worthless shares being sold by First Commerce Securities.

x. In May, 1986, Dutch police raided a number of Amsterdam boiler rooms but did not target First Commerce Securities in that raid, although police informed the news media that First Commerce Securities was the subject of an investigation following complaints from investors.

y. By May, 1986, First Commerce Securities had become one of the largest retail securities firms in Europe, with revenue mainly from selling the shares of only two companies. Devoe-Holbein International and City Clock International. Sales personnel estimated that First Commerce Securities grossed about $500 million in trading in Devoe-Holbein Shares and City Clock shares. Whenever investors tried to sell back their shares to First Commerce Securities, the salesmen were told to dissuade them by marking down the share price sharply. If an investor insisted on selling, he or she was met with administrative delays. As many as 50 to 60 telexes arrived on some days from complaining investors.

z. By May, 1986, First Commerce Securities had become a large and sophisticated organization, with about 50 sales and another 70 administrative staff.

aa. By May 15. 1986, First Commerce Securities had been raided by the Dutch police.

bb. By May 15. 1986, First Commerce Securities was also promoting the sale of shares in Infergene, Inc., another company with ties to Kott, who was linked to Infergene's board of directors and one of that company's founders. Infergene made claims to have proprietary techniques used in genetic engineering but held no patents and had no patent applications pending. Inter Alya was financial advisor to Infergene, which sold more than two million shares in two offerings in Britain made through Investors Discount Brokerage, a subsidiary of Inter Alva Services SARL, which also held warrants to obtain an additional 750,000 common shares of Infergene at $1.50 each. AIM held more than 1.9 million Infergene shares as of July 18, 1986, of which 280,500 were owned by AIM. In the Amsterdam raids, investigators seized First Commerce Securities newsletters and "special buy" reports published by First Commerce Securities relating to Infergene.

cc. In July, 1986, new Dutch regulations took effect requiring all investment firms such as First Commerce Securities to obtain licences by showing they are providing reliable information to investors and have expertise and financial backing. The regulations also required the firms to issue prospectuses of companies whose shares they are selling.

dd. First Commerce Securities submitted an application for a licence under the new regulations but was eventually refused a licence by the Dutch authorities.

ee. In early December, 1986, the Dutch authorities requested a bankruptcy declaration against First Commerce Securities and arrested Walter Bonn on suspicion of swindling and falsification of documents. The primary allegation was that First Commerce Securities had peddled virtually worthless shares to as many as 20,000 investors worldwide by mailing excessively promising newsletters followed up with aggressive telephone calls.

ff. The collapse of First Commerce Securities in December, 1986 resulted in the total loss by shareholders of their investments in Devoe-Holbein and City Clock shares which had been sold by First Commerce Securities.

gg. Although Dutch prosecutor Jan van Apeldoorn was temporarily successful in freezing some of the bank accounts of Alya Holdings and related companies operated by the plaintiff, the freeze orders were eventually vacated on technical grounds and the moneys were released.

hh. In 1986, the plaintiff maintained close contact with Adnan Khashoggi, a Saudi arms dealer, Raouff and the plaintiff had both

been active in trafficking arms on behalf of Abbas Gokal's company, Gulf International.

ii. In 1985 and/or 1986, the plaintiff met with Adnan Khashoggi at Marbella, in the Costa del Sol region of Spain, where he visited Khassoggi on his yacht or at his home, La Baraka, and also spent time together on property nearby owned by Kott.

jj. In 1987, First Commerce Securities was placed in receivership by the Dutch authorities who also issued an arrest warrant seeking to question Kott regarding the operations of First Commerce Securities and suspected market manipulation, fraud and tax evasion. The Dutch authorities alleged at the time that First Commerce Securities might have taken more than $400 million from investors fin 1986 dollars). Prosecutor Jan van Apeldoorn traced the flow of millions of dollars from Panamanian shell companies suspected to be related to First Commerce Securities to corporate accounts of BCCI in New York, USA.

kk. The plaintiff claims that the so-called "conditional purchase agreement" was rescinded but acknowledges that nothing was returned to the alleged seller except the bearer shares of Euro Placement Securities. The plaintiff purports to be unable to find either the so-called "conditional purchase agreement" or the notice of rescission.

ll. The plaintiff has deliberately made deceptive statements regarding himself, Irving Kott and First Commerce Securities:

i. In an interview with reporter Brent Mudry, which was the subject of an article published in the January 2-8, 1996 edition of Business in Vancouver, the plaintiff stated: (a) he was unwittingly deceived when he bought First Commerce Securities before he realized the company was controlled by Kott; and (b) the book [*Contreprenuers* by Diane Francis] never mentioned three judgments he won in Luxembourg courts for $10 million in the aftermath of the firm's collapse.

   The plaintiff knew in advance of his first meeting with Kott that he would be negotiating with Kott regarding the terms of his involvement with First Commerce Securities. See paragraphs 8 (a) a. to 8 (a) kk. above.

   The plaintiff did not win three judgments in Luxembourg courts for $10 million. He did receive three verdicts in favour of AIM, Alya, and Ayla SERL setting aside certain garnishing orders which the Dutch prosecutor had obtained freezing funds in the accounts of those companies, not exceeding several hundred thousand dollars, pending a trial of claims against the funds by the bankruptcy trustee of First Commerce Securities.

ii. In a telephone conversation with the defendant Mitchell on or about September 9, 2011, the plaintiff stated:

> "I first met Irving Kott in 1984 and that was in Amsterdam in Holland, where he purported to be a consultant to a company called First Commerce, which I acquired and substantially divested myself of about two years later, after we found out the whole thing was a fraud and sold to us based on numerous misrepresentations about the financial condition of the company and the assets of the company. ...And I had nothing further to do with the company after we revoked our initial sales purchase agreement. It was a conditional purchase subject to due diligence. And that's the only time I met Irving Kott. I have had no association with him or his family since 1984 - I'm sorry, 1986, or thereabouts.
>
> I met him for the first time in 1984, as I said, when he purported to be a consultant for First Commerce. The owner was represented to be a certain gentleman by the name of Dawson Roberts, who introduced me to Mr. Kott. I had some business discussions with the two of them, which led to a conditional contract to acquire the firm. And we revoked the contract in '96. I have had no dealings with either one of those two gentlemen since 1986."

iii. In his 1st Affidavit made on October 7, 2011 and filed in support of his application for an *ex parte* injunction against the defendants, the plaintiff failed to disclose any of the information set forth in paragraphs 8 (a) a. to 8 (a) kk. above.

iv. In his 2nd Affidavit made on October 19, 2011 and filed in support of his application for an *ex parte* injunction against the defendants, the plaintiff failed to disclose any of the information set for in paragraphs See paragraphs 8 (a) a. to 8 (a) kk. above.

v. In his submissions to the Court through his lawyer on October 19, 2011, which resulted in an *ex parte* injunction, the plaintiff failed to disclose any of the information set forth in paragraphs 8 (a) a. to 8 (a) kk. above.

vi. In his 3rd Affidavit made on November 18, 2011, the plaintiff failed to disclose any of the information set forth in paragraphs 8 (a) a. to 8 (a) kk. above.

vii. In his 4th Affidavit made on December 14, 2011, the plaintiff stated:

> 7. To dispose of one story which is the starting point for many points emphasized by Mr. Mitchell in his affidavit #3 on deep capture. I was once a principal of Alya Holdings, which entered into a conditional purchase contract in 1984 with First Commerce Securities. We at Alya discovered

> numerous representations by the vendors, and Alya rescinded the agreement in June 1986. ...
>
> 9. ...Deepcapture.com and now Mr. Mitchell's affidavit continue to describe me as being connected to First Commerce and its alleged misdeeds despite facts to the contrary.

Although he knew they were plainly material, the plaintiff failed to disclose the facts set forth in paragraphs 8 (a) a. to 8 (a) kk. above.

viii. In his 5th Affidavit made on March 14, 2012, the plaintiff failed to disclose the facts set forth in paragraphs 8 (a) a. to 8 (a) kk. above.

ix. In his 6th Affidavit made on October 29. 2012, the plaintiff failed to disclose the facts set forth in paragraphs 8 (a) a. to 8 (a) kk. above and stated:

> Defendants' document 1.14 is a Diane Francis article referring to the subject matter of a passage in document 1.9 about me having once known Irving Kott and having been introduced to someone by him. I have never denied that yet it has nothing to do with any of the defamatory statements. The suggestion that I am somehow involved in wrongdoing because I at one point met a person who committed wrongdoing is absurd.

mm. In January, 1987, authorities in London, England began proceedings against Investors Discount Brokerage, which had been owned by AIM until October, 1986, alleging it had sold shares in Infergene, falsely assuring its approximately 2,000 to 3,000 investors that the shares would soon be quoted on Nasdaq.

nn. AIM changed its name to Petrusse Securities in 1998 or 1989. In November, 1988, the USA SEC and France's securities commission examined suspiciously large trades in Triangle Industries Inc. of New York, the week before a takeover of that company was made by Pechiney. a big aluminum company owned by the French government. Investigators found evidence of suspicious trading in firms in France and Switzerland, including Petrusse.

oo. In 1987, an Ontario Securities Commission (the "OSC") tribunal heard evidence that the plaintiff and Kott associates Dominque Schittecatte, and Hussain and other Kott associates were involved in trading shares in Tricor Holdings Co. Inc. The OSC also heard testimony that the plaintiff opened an account at the Toronto brokerage firm Merit Investment Corporation ("Merit") for AIM. The call to Merit was initiated by Kott who introduced the plaintiff to Merit, and then passed the phone to the plaintiff, who in turn opened the account. The OSC ultimately found on September 29, 1988 that Tricor Holdings was under the control of Kott and sustained a ban on the sale of Tricor shares. The plaintiff knew at all material times that Kott

controlled Tricor and sought to exploit this situation to manipulate the price of the shares of Tricor in the market place.

pp. During the period from 1999 to 2003, the plaintiff conspired with his brother Shafiq Nazerali ("Shafiq"). Treyton L. Thomas ("Thomas") and others to artificially inflate the price of stock in Imagis Technology Inc. ("Imagis") through false and misleading positive statements in order to benefit from the sale of cheaply-purchased stock at an unwarranted higher price (the "Imagis Pump and Dump Scheme").

qq. The central elements of the Imagis Pump and Dump Scheme involved:

i. Creating a false perception among potential investors that Imagis had developed cutting edge, industry leading facial recognition computer software, and that such software was both being used and was in high demand by airports and government agencies, including law enforcement agencies in the United States of America. Canada. Mexico and elsewhere: and

ii. Creating a false perception among potential investors that a U.S. - based, legitimate, substantial, credible and multi-facted premier investment fund run by Thomas under the name the Pembridge Group Ltd. had hundreds of millions of dollars under management on behalf of institutional investors and was making a *bona fide* offer to purchase all outstanding stock in Imagis at a price well in excess of its market price, because of the value of the aforesaid facial recognition software.

rr. At all material times, the plaintiff knew that the facial recognition software was of negligible or no value, that Thomas was a conman or fraudster, and that the Pembridge Group Ltd. and its alleged affiliates were sham enterprises with no funds, no assets, no institutional investors, that they did not have the capacity to purchase all or any significant number of Imagis shares at their unwarranted offer prices, and that there was no intention to complete the sham purchase offer for Imagis shares.

ss. Pursuant to the Imagis Pump and Dump Scheme:

i. In 2000 and 2001, the plaintiff successfully orchestrated favourable mainstream news media coverage of Imagis and its false claims that it owned valuable cutting-edge, industry-leading facial recognition computer software, which appeared: (1) in newspapers including the *National Post, The Globe and Mail. The Province* (Vancouver), *The Times-Colonist* (Victoria), the *Toronto Star*, the *Calgary Herald, The Spectator* (Hamilton), *the Chatham Daily News*, the *Telegram* (St. John's. Nfld.), the *Sault Star* (Sault Ste. Marie), the *Leader Post* (Regina), the *Pembroke Observer*, the *Expositor* (Brantford), the *Daily*

News (Prince Rupert), The *Record* (Kitchener), and the *Pembroke Observer;* (2) on television on the Business News Network.

ii. Following destruction of the World Trade Center buildings in New York on September 11, 2001, the plaintiff exploited the heightened public interest in security to continue to arrange for false claims by and on behalf of Imagis that it owned valuable, cutting-edge, industry- leading facial recognition software to be made in new public statements and media interviews by Imagis executives, including the plaintiff. Particulars include, but are not limited to, the following:

1. On or about September 18, 2001 the plaintiff caused Imagis to publicly release a statement (the "September 18 2001 Statement"), falsely claiming *inter alia* that since September 11 *"government agencies in the United States and in other countries worldwide ... have contacted [Imagis] to assist in the development of identification, airport and security system installations using its biometric facial recognition technology"* and that "*Imagis has installations of its biometric facial technology at Toronto's Pearson Airport, in specific RCMP detachments in western Canada, numerous counties in the state of California, and Mexico."*

   [Italics in original.]

2. Media interviews with Imagis executives which resulted in stories in the mainstream news media which favourably reported the (false) claims by Imagis about its facial recognition software, which appeared in: (1) newspapers including: *The Globe and Mail,* the *National Post,* the *Toronto Star, The Vancouver Sun, The Province* (Vancouver), *The Gazette* (Montreal), the *Times-Colonist* (Victoria), the *Calgary Herald,* the *Examiner* (Barrie), the *Standard - Freeholder* (Cornwall), the *Expositor* (Brantford), the *Leader Post* (Regina), *Moose Jaw Times Herald,* the *Daily Mercury* (Guelph), the *Prince George Citizen,* the *Nanaimo Daily News,* the *North Bay Nugget, The Record* (Kitchener), the *Daily News* (Prince Rupert), and the *Alberni Valley Times* (Port Alberni); (2) newswire stories including on the *Canadian Press NewsWire;* and (3) television, including CKYU (Vancouver) on its CityNews news program which involved an on-camera interview with the plaintiff.

3. In their interviews with the mainstream news media post- September 11, 2001, the plaintiff and other Imagis executives falsely claimed:

    a. Imagis was a Canadian pioneer in facial recognition technology which was being used in many airports to spot wanted persons.

    b. Imagis was one of the world leaders in facial recognition software.

    c. Since September 11, 2001 Imagis had received overwhelming interest from potential purchasers of its software from around the world, but especially from the U.S.

    d. A number of U.S. government agencies and system integrators were advising Imagis that its facial recognition software will be the dominant new technology in U.S. airport security.

iii. Also pursuant to the Imagis Pump and Dump Scheme, the plaintiff authorized and participated in the publication and dissemination of the aforesaid false claims about Thomas and the Pembridge Group Ltd., including the following specific falsehoods:

1. That Thomas was the founder, chairman and U.S. representative of a Cayman Island entity called the Pembridge Group Ltd., which actively carried on a real and substantial business from offices in Boston, Massachusetts.

2. That the Pembridge Group Ltd. was a legitimate, substantial, credible and multi-faceted premier investment firm which managed or controlled 600 hundred million dollars and which had numerous sophisticated institutional investors as clients.

3. That the Pembridge Group Ltd. carried on highly profitable investment activities through its affiliate. Pembridge Fund Management, which managed the "Concert" series of technology hedge funds, the "Symphony fund-of-funds", and a "private equity affiliate" named "Pembridge Venture Partners", a company which allegedly provided growth capital to formative companies in the areas of software, data-storage, networking and the health sciences.

iv. In order to prevent the public from detecting that Thomas and the Pembridge Group Ltd. were a sham, with the knowledge and approval of the plaintiff, Thomas created

fake identities for purported employees of Pemberton Group Ltd. and employed those fake identities in communications with the news media and others, with the result that the news media and potential investors were fraudulently tricked into believing that the Pemberton Group Ltd. and PFM were authentic businesses carrying on real and substantial operations.

v. The publication and dissemination of false claims about Thomas and the Pembridge Group Ltd. involved numerous news releases, written articles, and interviews with the knowledge and approval of the plaintiff, including:

1. A September 1999 news release ostensibly issued by the Pembridge Group Ltd., which was carried on Business Wire, which falsely claimed that the Pembridge Group Ltd. "manages or has custody over capital in excess of $400,000,000" (USD) and that investments in its hedge funds are available to "accredited non-U.S. institutions with a minimum threshold investment of (USD) $3,000,000 and are currently closed to new investors." The release invited readers to contact "Ms. Tyler Carrington," which was one of the fictitious characters created and acted by Thomas.

2. A January 2000 news release ostensibly issued by the Pembridge Group Ltd. which falsely claimed that Pembridge's "Concert Fund" had achieved a "102.3% total-return for the year ending 12/31/99" and falsely claimed that Pembridge Group Ltd. controlled more than $400,000,000 (USD) in assets. The release invited readers to contact the non-existent "Ms. Tyler Carrington."

3. A January 3, 2002 news release ostensibly issued by Imagis which falsely stated that Thomas had entered into a consulting arrangement with Imagis pursuant to which Thomas would advise Imagis concerning alternative ways of financing operations.

4. On or about January 4, 2002 Iain Drummond, the President and CEO of Imagis, gave interviews to the news media, including *The National Post* newspaper, in which he claimed that Imagis was planning a "significant [share] offering" in the spring of 2002.

5. A February 21, 2002 article carried on Business Wire which including the false claims that:

    a. Pembridge intended to purchase all of the issued shares in Imagis, because Thomas

was interested in certain facial recognition software owned by Imagis.

b. Pembridge Investment Group, and its affiliate PVP, would be the vehicle employed to Thomas to make the aforesaid purchase of all issued Imagis shares.

c. Pembridge Investment Group was the hedge fund equivalent of Berkshire Hathaway.

d. PVP was a revolving Evergreen fund with $30 to $100 million dollars at its disposal from existing investors.

e. Gross margins for facial recognition software of 90% and inherent scalability made Imagis an attractive investment for PVP.

f. Thomas, prior to taking a recent sabbatical at Harvard University, had managed an exhausting two-year proxy battle where his group created over $200 million for shareholders.

6. A March 6, 2002 release ostensibly published by the Pembridge Group Ltd. which falsely claimed:

a. That the Pembridge Group Ltd. planned to take "Imagis private by a form of transaction that would result in the existing shareholders receiving cash for their Imagis shares."

b. That the Pembridge Group Ltd. was asking Imagis' Board of Directors to respond within 30 days to a proposal "whereby Imagis' shareholders would receive $4.10 cash per share" [a price which represented a 60% premium over the publicly-traded price of Imagis shares on March 5, 2002, a transaction which would have required Pembridge, a sham company with no assets, to expend $65 million for 16 million shares of common stock then issued and outstanding.]

vi. As a result of the March 6 2002 press release, the price of Imagis shares rose to a 52-week high with record-level volume — $5.36 (CDN) on the Toronto Stock Exchange, up $1.44 (CDN) from March 5 2002, and to $3.40 (USD on the NASDAQ Over the Counter Bulletin Board ("OTC BB"), up $0.93 (US) from March 5, 2002.

vii. The March 6 2002 press release received extensive media attention in Canada, including stories in *The Vancouver*

Sun and national newspapers the *National Post* and *The Globe and Mail*, further generating unwarranted interest on the part of investors in the purchase of Imagis stock. The plaintiff intentionally orchestrated the aforesaid media attention in order to ensure that the false claims relating to Thomas and the Pembridge Group Ltd. would enjoy public credibility with potential investors in the stock of Imagis.

viii. Prior to the March 6 2002 press release, the plaintiff, Thomas and the Pembridge Group Ltd. had cheaply-acquired acquired Imagis stock, directly or indirectly, and therefore personally stood to make immense profits when the market price of stock in Imagis increased as a result of the pump component of the Imagis Pump and Dump Scheme.

ix. In July 2002, the plaintiff caused Thomas to be appointed to the Imagis Board of Directors, in order to lend further credibility to the false claims about Thomas and the Pembridge Group Ltd. which are described above.

x. Following the March 6 2002 press release, the plaintiff also took other steps to create the false public perception that the Pembridge Group Ltd. was willing and able to complete the purchase of all outstanding shares of Imagis at a premium price. Among other things, he approved and participated in a sham extension by the Pembridge Group Ltd. of the initial thirty day response period, knowing that the Imagis Pump and Dump Scheme would come to an end once the public realized that Thomas and the Pembridge Group Ltd. did not have the funds to complete a purchase, a fact well-known to the plaintiff and to Imagis at all times.

xi. Before or after March 6, 2002 and before July 9, 2002, the plaintiff and his co-conspirators dumped the stock in Imagis, which they owned directly or indirectly, before the artificially inflated price collapsed, which was inevitable because the Imagis software was of little or negligible value and Thomas and the Pembridge Group Ltd. had no intention or capacity to complete the purchase of all issued Imagis stock at any price.

xii. On July 9, 2002, Imagis publicly announced that it had terminated talks with the Pembridge Group Ltd. and that Pembridge would not be purchasing the issued shares of Imagis.

xiii. By September 2002, the price of Imagis stock had fallen to $1.36 (CDN) on the TSX and $.85 (U.S.) on the U.S. OTC Bulletin Board.

xiv. In early 2003, the price of Imagis stock had fallen to $0.60 (CDN) on the TSX.

> xv. The precipitous fall in the price of Imagis shares after July 9, 2002, resulted in substantial monetary losses for gullible investors who had been induced to purchase shares in Imagis by the false claims made pursuant to the Imagis Pump and Dump Scheme.
>
> xvi. In April 2003 Imagis laid off most of its employees and ostensibly sought $500,000 in bridge financing from one of its shareholders merely to continue operations. The price of Imagis stock was $.40 (CDN) on the TSX in April, 2003.
>
> xvii. The plaintiff's sale of his Imagis stock at the artificially inflated price resulting from the Imagis Pump and Dump Scheme promoted an investigation by the British Columbia Securities Commission (the "Commission"). The plaintiff had planned for this possibility, and arranged to have Peter Brown of Canaccord Capital Corporation tell the Commission that he had forced the plaintiff to sell his Imagis stock before July 9, 2002, for the purpose of repaying a loan that had been made to the plaintiff. Peter Brown told this information to the Commission, which he knew was false, with the intention and for the purpose of assisting the plaintiff avoid any legal liability, responsibility or consequences for his involvement in the Imagis Pump and Dump Scheme.
>
> tt. The defendants also rely on the facts which are set out in the words complained of and the testimony of the plaintiff on his examination for discovery in this matter.
>
> [Underlining added and original underlining deleted.]

[14] The Deep Capture defendants plead the alleged defamatory words are "protected expression" in the United States because of the First Amendment to the Constitution of the United States of America and because the plaintiff is a "public figure" as described in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and any defamation judgment against them by a foreign court will not be recognized or enforced in the United States because of the provisions of the *Securing the Protection of our Enduring and Established Constitutional Heritage Act*, 28 U.S.C. § 4102.

[15] Further, the Deep Capture defendants plead that the plaintiff's allegation of the "republication on other Internet sites" with the permission of or in a manner foreseeable by the defendants Byrne and Mitchell fails to disclose a reasonable claim.

[16] In mitigation of damages, the defendant Mitchell pleads that before the publication of the words complained of "the plaintiff had a generally bad reputation as a notorious boiler-room operator who had associated in business with convicted stock swindlers".

[17] In division three of their response, the Deep Capture defendants plead that this Court has no jurisdiction to entertain the Deep Capture action and allege so-called "additional facts", that are essentially an argument not a pleading, namely:

> 3. On October 19, 2011, without notice to the defendants, the plaintiff sought and obtained an ex parte interim injunction from this Court which enjoined these defendants from continuing to publish any statements regarding the plaintiff on the internet at www.deepcapture.com or elsewhere, or in any other form of publication; and enjoined the defendant GoDaddy.com, Inc., from permitting operation of the domain name www.deepcapture.com or from transferring or permitting any transfer of the domain registration of www.deepcapture.com; and enjoined the defendant NoZone, Inc., from permitting internet access to any website files comprising www.deepcapture.com or which may be added in the future, which refer to Altaf Nazerali, Ali Nazerali, or Aly Nazerali; and enjoined the defendants Google, Inc. and Google Canada Corporation from permitting Google.com or Google.ca search engines from publishing any search result from www.deepcapture.com. The plaintiff did not comply with his obligation, when seeking an *ex parte* injunction, to give the Court complete information regarding relevant facts, and more specifically, did not inform the Court of the facts stated in paragraph 8 of Division 2 of this Amended Response to Amended Civil Claim.
>
> 4. In consequence of the aforesaid *ex parte* interim injunction, during the period October 19, 2011 to and including December 13, 2011, and afterwards, the defendants Mitchell, Byrne, Deep Capture LLC, and High Plains Investments LLC, suffered substantial loss, damage and expense, including special damages, particulars of which will be provided in due course.
>
> 5. On December 13, 2011, this Court dismissed an application by the plaintiff to extend the interim injunction to the trial of this proceeding, in oral reasons for judgment which have been transcribed but are not yet available to these defendants. Particulars of that judgment will be provided once the oral reasons of the Court are released.
>
> 6. By virtue of Rule 10-4 of the *Supreme Court Civil Rules,* the aforesaid *ex parte* order for an interim injunction was deemed to contain the plaintiffs undertaking to abide by any order the court may make as to damages.
>
> 7. In consequence of the matters alleged in paragraphs 1 to 6 of this Division 3, the defendants submit that if the plaintiff is entitled to any damages (which is not admitted but denied), the defendants are entitled to

> set off the aforesaid damages they have incurred as a consequence of the *ex parte* interim injunction.
>
> 8. Further, Rule 7-1 of the *Supreme Court Civil Rules* eliminates the long-standing requirement that the plaintiff disclose on his or her list of documents "all documents which are or have been in the party's possession or control relating to any matter in question in the action" and repealed Rule 26(1) which reflected the long-standing discovery rule in *Peruvian Guano Company* (1882), 11 O.B.D. 55 at 62. Rule 7- 1(1)(a)(i) substitutes a significantly narrower obligation on a plaintiff, with the result that the reformulation of the discovery obligation may motivate a defamation plaintiff to suppress disclosure or documents by taking a very restrictive approach to what could "prove or disprove" a material fact, with the result that disclosure of importance to a defence of justification may be withheld by a plaintiff. Rule 7-1(2)(a) arbitrarily limits the duration of a defendant's examination for discovery of a plaintiff to 7 hours, which encourage a plaintiff to engage in a variety of delay tactics which are calculated to thwart the defendant's discovery and minimize its utility. Rule 9-7, coupled with Rule 7 of the *Supreme Court Civil Rules*, permits a defamation plaintiff to seek a defamation judgment in Chambers on the basis of affidavit evidence, without cross-examination in the presence of the trier of fact, without any requirement that the discovery of documents and oral examination for discovery be completed, or that the defendant waive his or her rights to discovery. These provisions of the *Supreme Court Civil Rules*, coupled with the existing common law presumption of falsity which places the burden of proof of justification on the defendant, has significant deleterious effects for freedom of expression, namely, they: (a) substantially increase the likelihood that a defamation plaintiff will not disclose but will instead conceal documents which relate to the matter of justification; (b) substantially increase the likelihood that a defamation plaintiff will obfuscate his or her oral examination for discovery; (c) substantially increase the likelihood that a defamation plaintiff will refuse to consent to a reasonable extension of time for the defence to complete its examination for discovery; and (d) encourage the plaintiff to make tactical decisions relating to discovery and summary adjudication in order to prevent the defendant from establishing a defence of justification, which could be established if the plaintiff gave proper discovery and submitted to cross-examination of his or her witnesses in the presence of the trier of fact in open court.

[18] The Deep Capture defendants delivered a notice pursuant to s. 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, advising that they intended to:

> … challenge the constitutional validity and constitutional applicability of the common law presumption of falsity of defamatory expression, which places the onus on the defendant to prove that defamatory expression is true instead of placing the onus on the plaintiff to prove the falsity of defamatory expression, in the context of certain rules governing civil procedure in defamation proceedings brought in the Supreme Court of British Columbia which individually and collectively impair the ability of the defendant to establish a defence of justification.

[19] The Deep Capture defendants amplify their constitutional position by alleging the following:

> The general consequence of the common law presumption of falsity coupled with the restrictive *Supreme Court Civil Rules* is to chill appropriate free-wheeling debate on matters of public interest by deterring publishers, who will fear the ballooning legal costs and disruption involved in defending a defamation action under court rules which effectively handcuff the defence and provide the plaintiff with incentives to obfuscate, delay and thwart the defendant's discovery and prevent the defence from presenting its case on a full record in accordance with the standards of a modern democracy governed by the rule of law. In the circumstances, the rights and freedoms guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms* are unjustifiably infringed or denied by the combined effect of the common law presumption of falsity of defamatory expression and the above-noted *Supreme Court Civil Rules* which unjustifiably impair the ability of a defendant to defend on the basis of truth. In the circumstances, the law requires that this action by the plaintiff against these defendants be permanently stayed, or alternatively, a finding that the common law presumption of falsity has no application to defamation proceedings and that the above-noted *Supreme Court Civil Rules* are of no force and effect.

The Plaintiff's Evidence In Chief

[20] The plaintiff is a businessman. He was born in Kenya in 1953. He finished high school in Africa, and was accepted to Columbia University in New York in 1969 where he took a degree in economics followed by graduate studies through which he obtained a Masters of Business Administration in Finance and International Business.

[21] On completing his formal education, Mr. Nazerali was employed first in Puerto Rico, then in the State of New Jersey, and then the State of Connecticut. In 1975, he moved to Algeria where he remained until 1979. Thereafter, he spent a number of years working for companies with interests in Italy, Belgium, France and Germany. He speaks many languages including English, French, Italian, Spanish and Portuguese. He has a reasonable acquaintance with Hindi, Arabic, Swahili and Gujarati. He is a sophisticated and intelligent man with wide connections in the business world and throughout his religious community.

[22] In 1982, Mr. Nazerali was contacted by a headhunting firm and was interviewed by, among others, a man named Abbas Gokal and eventually was

offered employment through a Luxembourg based holding company known as Gulf International Holdings. The plaintiff accepted employment with a company known as International Shipping and Trading Services which was part of Gulf International.

[23] The Gulf group of companies had experienced considerable financial difficulties which Mr. Nazerali was employed to assist to overcome. He was based in Luxembourg but his employment required travel particularly to the Netherlands. Mr. Nazerali left the Gulf group of companies in the late 1984. By that time he was not on good terms with Mr. Gokal and has had no contact with him for about 30 years.

[24] Mr. Nazerali's next employment was with First Commerce Securities in Amsterdam. That company had a large client base, but had received adverse publicity related to the sale of unregulated securities. Mr. Nazerali and a man named Sinan Raouff recognized in First Commerce Securities an opportunity to "turn around" a troubled business. Mr. Nazerali and Mr. Raouff met with representatives of the Netherlands Finance and Justice Ministries to discuss the management of First Commerce Securities, which Mr. Nazerali understood had become somewhat of a "blight" on the government of the Netherlands which was anxious to rid itself of this embarrassment.

[25] As part of the process of familiarizing himself with the affairs of First Commerce, Mr. Nazerali met in London with two men, Dawson Roberts and Irving Kott. Mr. Nazerali had been informed that Mr. Roberts held considerable stock in First Commerce and that he relied on Mr. Kott for financial advice. Mr. Nazerali had met neither man previous to the meeting in London.

[26] Mr. Nazerali and Mr. Raouff also continued to meet with representatives of the Netherlands government and eventually reached an agreement to manage First Commerce Securities, subject to receiving audited accounts; the resolution of claims of some of First Commerce Securities' customers; information about the securities that First Commerce marketed to its customers, and the resolution of tax liabilities.

Mr. Nazerali did not become an officer of First Commerce, but was on its "supervisory board".

[27] The first steps in overcoming the problems of First Commerce Securities included the dismissal of several employees; the termination of a number of consulting contracts, and the eradication of certain "disturbing practices" such as cold calling of customers.

[28] First Commerce had a "score chart" of the securities to be recommended to customers. The staff who spoke to customers were given a script to tutor them to avoid making "promises or guarantees" and to advise prospective clients of the risks associated with the purchase of securities.

[29] Within about a year of involvement with First Commerce Securities, Mr. Nazerali realized its financial records over many years were in "a disastrous state". Thereafter, he commenced negotiations with Mr. Roberts and Mr. Kott to rescind the agreement to assist in the management of the affairs of First Commerce. Mr. Nazerali was in contact with the relevant Netherlands authorities to advise that he and Mr. Raouff had to "bow out".

[30] A receiver-manager of First Commerce was appointed and, in January 1987, a receiver in bankruptcy. In February 1987, the receiver obtained *ex parte* orders against three companies of which Mr. Nazerali was a principal. Mr. Nazerali described them as "garnishing orders". The garnishing orders were ostensibly to attach assets of First Commerce Securities which, it was alleged, had been unlawfully removed from the Netherlands. Mr. Nazerali understood the garnishing orders potentially had both civil and criminal implications. The three companies against which the garnishing orders were served were Alya Holdings S.A. and its two subsidiaries AIM S.A., a brokerage firm, and International Alya Services S.A. I mention these names only because they appear in the Deep Capture defendants' "version of the facts".

[31] Appeals were taken against the garnishing orders. Mr. Nazerali met with the relevant regulatory agencies to discuss the appeals. He took the position that, so long as these matters did not receive unfavourable publicity, the companies subject to the orders would continue to operate and would meet all their obligations to clients. The request to avoid adverse publicity was agreed.

[32] Mr. Nazerali met with the Dutch police to discuss the affairs of First Commerce Securities. He did so over a period of about two or three days and also met with the receiver of First Commerce Securities "with a view to coming to an understanding to lift the garnishing orders". No understanding was reached.

[33] Mr. Nazerali retained Dutch counsel. In November 1987, some "penal seizure orders" were withdrawn, and in January 1988, a Luxembourg court gave judgment setting aside the garnishing orders. An appeal was taken from that judgment, but was abandoned.

[34] Further litigation ensued in which the companies subject to the garnishing orders sought damages arising out of the garnishing proceedings. That litigation was settled by agreement.

[35] Mr. Nazerali testified that throughout this protracted and difficult process he was never arrested, nor charged, nor required to pay any financial penalty.

[36] One of the banks used by Mr. Nazerali for various transactions was the Bank of Credit and Commerce International. At that time, BCCI had an efficient clearing system operating throughout the world which Mr. Nazerali found beneficial. Mr. Nazerali's dealings with BCCI ended in mid-1986.

[37] In 1987, Mr. Nazerali decided to emigrate to Canada to facilitate his children's education. He was granted landed immigrant status in early 1988 and eventually came to live in Vancouver.

[38] In Vancouver Mr. Nazerali became involved in Global Futures Corporation, which was a commodity trader. That led to him becoming a principal of a company

called Global Asset Management. He applied to register with the B.C. Securities Commission.

[39] In late 1988, a book entitled "The Contrapreneurs", written by Diane Francis was published. Mr. Nazerali received some critical mention. In early 1989, he was called by a representative of the British Columbia Securities Commission who advised him that he was under investigation. Mr. Nazerali was requested to provide authorizations for investigations to take place in various other countries. The investigation by the British Columbia Securities Commission ultimately led to no difficulties for Mr. Nazerali.

[40] Mr. Nazerali left Global Futures to develop business opportunities on his own. In the several years thereafter he travelled in South America where he was involved in the founding of a company in Brazil called Canbras Communications which was eventually listed on what is now the Toronto Stock Exchange. Subsequently, Mr. Nazerali sold a substantial stake in Canbras to Bell Canada. He was involved as a principal in other companies in Brazil.

[41] These activities required filings with various stock exchanges and regulatory agencies, including the then Vancouver Stock Exchange. The Head of Compliance interviewed Mr. Nazerali, as did the exchange's Board of Governors. Mr. Nazerali was found to be a fit person to be a director of a publicly traded company.

[42] In the late 1990s, the Canadian Stock Exchange initiated "capital pooled companies". Mr. Nazerali was invited to form one of the first such companies. His involvement was preceded by an extensive investigation into his business history by the Canadian Stock Exchange.

[43] Mr. Nazerali's next venture was in the field of "facial recognition technology". Through a company called Colloquium he acquired an interest in Imagis Technologies, which was listed on the Canadian Stock Exchange. Mr. Nazerali was one of the directors of Imagis. Oliver "Buck" Revell became chairman of the board of Imagis. Mr. Revell had recently retired from a position as Associate Deputy Director

of the Federal Bureau of Investigation in the United States. Other prominent persons, such as Norman Inkster, formerly Commissioner of the Royal Canadian Mounted Police, also became involved.

[44] Imagis achieved some success with its facial recognition technology. The RCMP became a client as did some other law enforcement agencies. Nevertheless, the process of acquiring government-related clients was slow, apparently because of budgetary constraints. Imagis began to experience financial difficulties. Following the destruction of the World Trade Centre in Manhattan in September 2001, interest in Imagis Technologies increased. There were very few "biometrics" companies at that time. Imagis sought additional financing. Contact with private investment management companies was initiated in the United States. Two were Morgan Keegan and Roth Capital. Thompson Kernaghan in Toronto was approached.

[45] In September 2001, Mr. Nazerali received a telephone call from Brad Harrington who introduced himself as an "analyst" with a Boston company called Pembridge Venture Partners. Mr. Harrington expressed an interest in Imagis. Mr. Nazerali was invited to meet with a man named Treyton Thomas of Pembridge in Boston. Mr. Thomas was interested in investing in Imagis. One of Pembridge's affiliates eventually participated with an investment of about $350,000.

[46] Mr. Nazerali had not known Mr. Thomas previously. He investigated Pembridge and Mr. Thomas. He learned that Pembridge had significant experience in managing large sums of money. It had "several hundred million dollars" under management at that time. He spoke with a representative of Roth Capital about Pembridge and also spoke to Mr. Revell who gave him the names of Howard Shapray Q.C. and Leon Getz Q.C., both members of the bar of British Columbia. Each spoke highly of Mr. Thomas's financial acumen.

[47] In January 2002, Pembridge began to give "strategic financial advice" to Imagis. In a news release of Imagis, Mr. Thomas was described as the chairman of the Pembridge Group, which is:

> …a premier Boston-based investment firm (“Pembridge Group”). Pembridge Group acts as advisor to Pembridge Fund Management ("PFM") and Pembridge Venture Partners. PFM is the asset management arm of the firm and manages the Concert series of technology hedge funds and the Symphony fund-of-funds. PVP provides growth capital to formative companies in the areas of software, data-storage, networking, and the health sciences. Pembridge manages over $600,000,000 in capital, and its funds have consistently posted some of the highest returns to investors in the alternative asset management industry. Pembridge funds are eligible to accredited non-U.S. institutions only and are currently closed to new investors.
>
> …
>
> Imagis issued to PVP [Pembridge Venture Partners] 50,000 warrants, with each warrant being exercisable into one common share in the capital of the Company at a price of CDN$2.20 per share for a period of two years.

[48] Early in the morning of March 6, 2012, Mr. Nazerali, through Imagis, received a “strictly confidential” letter from Pembridge suggesting “there is a compelling case for taking Imagis private” at a price of $4.10 U.S. per common share. Shortly after Mr. Nazerali saw the letter, and without notice to Mr. Nazerali, Pembridge issued a news release which referred to the letter and to the suggestion that the price for the shares should be $4.10. Imagis shares immediately “took a big jump”. Mr. Nazerali testified he was “livid” with Mr. Thomas for sending a “confidential” letter to Imagis immediately followed by a press release which betrayed the confidence. He called Mr. Thomas to remonstrate with him.

[49] Imagis put out its own news release which reads in part:

> Imagis Technologies Inc. … a leading developer and marketer of advanced, biometric software, today announced that its Board of Directors ("The Board") has received a letter from the investment, management firm Pembridge Group of Boston requesting that the Board consider a proposal to take Imagis private. The Directors intend, to appoint a special committee of the Board to evaluate the proposal and the benefits to the Company and its shareholders.
>
> Mr. Iain Drummond, President and CEO of Imagis said, "Pembridge Group is a premier private investment firm and we welcome the opportunity to discuss the merits of a going private transaction. Since our engagement of Pembridge earlier this year, they have brought a high degree of professionalism and decorum to the relationship. Our industry is progressing rapidly, and this proposal is one of several alternatives that the Company will give serious deliberation. The Board will entertain this and all other alternatives with the objective of maximizing shareholder value, and accelerating the Company's growth."

> There can be no assurance that the proposal will result in a definitive agreement or that any proposed transactions will be completed.

[50] Imagis made clear to "insiders" that they were "blacked out" from trading in Imagis stock for four months. Mr. Nazerali did not trade in Imagis stock during that time.

[51] Following up on the Pembridge proposal, a company was retained by Imagis to conduct an evaluation. Mr. Thomas suggested moving the company to the United States. This was resisted by Imagis. It carried on business as usual.

[52] Several companies thereafter made substantial investments in Imagis. Notwithstanding his anger over the Pembridge news release, Mr. Nazerali testified that Mr. Thomas became a director of Imagis. This was prompted on Mr. Nazerali's part by the requirement for Mr. Thomas to make filings with regulatory agencies thereby ensuring "no monkey business".

[53] Mr. Thomas ceased to be a director in about October 2002. In November of that year, the British Columbia Securities Commission ordered Imagis to disclose all documents concerning its dealings with Pembridge and with Mr. Thomas. This was done.

[54] Shortly thereafter Mr. Nazerali received a call from a representative of the United States Securities and Exchange Commission in Boston requesting an interview. That could not be done in Canada without the acquiescence of Canadian authorities, but Mr. Nazerali agreed to meet in Seattle for that purpose. The British Columbia Securities Commission also asked to interview Mr. Nazerali. Neither interview led to accusations of any wrongdoing by Mr. Nazerali.

[55] Technical difficulties were faced by Imagis in selling its facial recognition software. A computer scientist at the University of British Columbia, through a company known as Briyante, devised a means to overcome the technical problems. Eventually, Imagis and Briyante merged, but by this time the merged company had substantial overdue receivables. Mr. Nazerali agreed to loan the merged company

$200,000. More money was needed and Mr. Nazerali agreed to provide a $500,000 revolving line of credit. The loan and the agreement to provide a revolving line of credit put Mr. Nazerali in a conflict of interest and in April 2003 he resigned from the Board of the merged company. The shareholder's loan was repaid several months later.

[56] Starting in about 2005, Mr. Nazerali travelled and lived in Europe. He returned to Vancouver in 2008 at a time when there were "major disturbances in the financial markets". He testified that he was "easy to find" throughout his time in Europe and later. His contact information was online.

The Alleged Defamatory Publication on the Deep Capture Website

[57] In August 2011, when Mr. Nazerali travelled to Turkey for business purposes, he received an email which prompted him to look at the Deep Capture website and the Articles. He was "horrified" to see that he was described as a "criminal"; an "arms and drug dealer"; a member of the Italian and Russian mafia, and that he was helping to finance Al Qaeda.

[58] After Mr. Nazerali determined the name of the owner of the website, he wrote in September 2011 to complain of what had been published about him. He requested that the author's sources be checked and that inaccurate material about him be removed from the website. He testified that virtually nothing of consequence was changed as a result of this complaint.

[59] The 21 chapters of the Articles listed on the website are entitled as follows:

1. Was the United States Attacked By Financial Terrorists?
2. The "Money Weapon" and a Jihad Bigger than Bin Laden
3. Michael Milken and the BCCI Criminal Enterprise
4. Michael Milken, the Mafia, and Some Powerful Hedge Funds
5. The Russians, their Friends, and Bernie Madoff's Bear Markets
6. Man Financial and Al Qaeda's Wash Trades
7. The Bernie Madoff Cover-Up, the Blind Sheikh, and the RLevi2 Algorithmic Market Manipulation Machine

8. Al Qaeda, Iran, and Some Mafia-tied Agents of Economic Sabotage
9. The Collapse of MJK Clearing, a Few Loose Nukes, and a Lot of Self-Destruct CDOs
10. The Mafia, the Markets, and a Message from Russia
11. Michael Milken's Market Manipulation Club and Al Qaeda's Big Bank
12. Russian Spies, Rogue States, and the Manipulation of the American Markets
13. The Collapse of Refco; the Take-down of National Heritage Life; and the Day the Mafia-Jihadi Nexus Discovered Penson Financial
14. How the Russian Mafia Captured the DTCC — and the American Financial System
15. Ali Nazerali in Aruba, and an Al Qaeda Financial Weapon Called PTech
16. The Deep Capture of America, and Some Clues as to the Once and Future Cataclysm
17. A Brief Note on the Unimaginable
18. Penson Financial's Strange Clientele
19. How the Mafia-Jihadi Nexus Made Penson Financial the Biggest Brokerage on the Planet
20. Uhm, Mr. President, We Might Have a Problem...
21. How a Small Gang of Organized Criminals Wrecked the World

[60] Portions of Chapters 3, 8, 9, 12, 13 and 15 of the 21 chapters are repeated in the following paragraphs of these reasons with a brief description of Mr. Nazerali's comment on each of them.

A. Chapter 3

The Miscreants' Global Bust Out (Chapter 3): Michael Milken and the BCCI Criminal Enterprise

Posted on 05 May 2011 by Mark Mitchell

Tags: 650 Fifth Ave, Abbas Gokal, Alavi Foundation, Alfred Hartmann, Ali Nazerali, Antonio Commisso, BCCI, Capcom, Cecil Kirby, CenTrust, Charles Keating, Drexel Burnham, economic warfare, Financial Terrorism, First Commerce Securities, Gokal, Iran, Irving Kott, ISI, Ivan Boesky, Lincoln Savings and Loan, Mafia, Mahfouz, Marc Rich, Michael Milken, Ndrangheta, organized crime, Pakistan, Saudi intelligence, Swaleh Naqvi, Vic Cotroni

…

These seemingly unrelated events would have figured in the thoughts of a man named Irving Kott, who one day that year got into his car and started the engine. But Kott suddenly remembered that he forgot something in the

> house, and he jumped out of the car. Lucky for him, because that's when a powerful bomb exploded, turning Kott's car into giant fireball of mangled metal. Kott took some shrapnel, but he survived, and the first thing he did, according to some of his associates, was call his friend, Ali Nazerali.

Mr. Nazerali characterized this paragraph as "fiction".

> Kott was livid - he wanted to know what the deal was with the car bomb. Ali Nazerali said he'd ask around. After a few hours, Nazerali called back and said the word on the street was that a hit man named Cecil Kirby planted the bomb, and Kirby worked for Canadian mob boss Vic Controni. It seemed Kott had run a stock scam with Controni, who was then one of North America's biggest market-manipulators, and Kott stole Controni's share of the deal. [Emphasis in the original.]

Mr. Nazerali characterized this paragraph as "fiction".

> One way or another, Nazerali offered to patch things up with the Mafia - and he did a good job of it. Commisso ordered Kirby to lay off, and a couple of years later Kott, Nazerali and the Mafia were all in business together, running a brokerage called First Commerce Securities.

Mr. Nazerali characterized this paragraph as "fiction".

> Nazerali had spent his formative years working in key positions for the powerful Gokal family of Pakistan.

Mr. Nazerali had never heard of the Gokal family until 1981-1982.

> Nazerali was also a blood relative of Swaleh Naqvi, the chief executive officer of BCCI… [Emphasis in the original.]

Mr. Nazerali is not a relative of Swaleh Naqvi.

> Nazerali dabbled in arms dealing, delivering weapons to war zones in Africa and to the mujahedeen in Afghanistan, but his primary line of business in the early 1980s was his Mafia brokerage, First Commerce Securities, which soon became an important component of the BCCI syndicate.

Mr. Nazerali has had no known mafia involvement and has never been involved with arms dealing.

> …according to the judge, almost single-handedly "shattered the integrity" of the global financial system.

> BCCI's contribution to this destruction was accomplished with considerable help from Mafia-tied entities such as the Nazerali and Kott operation, First Commerce Securities…

This, again, was characterized as "fiction".

B. Chapter 8

[61] Chapter 8 of the Articles refers to "some Mafia-tied agents of economic sabotage". This is said to have been posted on May 23, 2011 by Mark Mitchell. Many names are mentioned, including that of Mr. Nazerali with much detail about the "agents of economic sabotage" including the following about the plaintiff:

> Meanwhile, Ali Nazerali launched several investment funds, one of which was Valor Invest, which in later years participated in a number of schemes with MIT Ventures, whose proprietor was "Specially Designated Global Terrorist" Yasin al Qadi (Osama bin Laden's favorite financier). [Emphasis in the original.]

Mr. Nazerali agrees he had an interest in Valor Invest but has no knowledge of Yasin al Qadi, nor any knowledge that he was a financier of Osama bin Laden.

> Nazerali also did business with the "House of Islamic Money" and surely he knew this outfit was one of Al Qaeda's most important sources of funding.

Mr. Nazerali testified he has no knowledge of the "House of Islamic Money" and denies any knowledge whatsoever of Al Qaeda's sources of funding.

C. Chapter 9

[62] Chapter 9 of the Articles again contains a number of paragraphs, among which are the following:

> At least some of these market manipulators also got lucky on September 11, 2001. Among the lucky were Ali Nazerali and Yasin al Qadi, both of whom were members of the Elgindy pack.
>
> In 1999, Nazerali, with finance from Yasin al Qadi, set up a tiny penny stock company called Imagis and soon listed it over the counter. In the weeks leading up to the Al Qaeda attacks on September 11, 2001, Nazerali unleashed Imagis options, warrants and stock.
>
> …

> But I will say this - it is likely not a coincidence that the head of Saudi intelligence was running scams with Nazerali.

Mr. Nazerali denies that he has been involved in market manipulation and denies that he has any knowledge of "the Elgindy pack". He also denies Imagis was a "tiny penny stock company" and that he "unleashed Imagis options, warrants and stock" leading up to September 11, 2001. Further, Mr. Nazerali denies he has ever run a scam. He does not know the head of Saudi intelligence.

He amplified his denial about "unleashing" options, warrants and stock. He testified he would have had no means to do so. The only occasions on which a public company could issue additional shares would be in the course of a financing or an acquisition. Any options that were issued had to be preauthorized and would normally go only to officers and directors as an inducement to remain with the company, and warrants were issued in connection with financing arrangements which had been approved by regulators.

D. Chapter 12

[63] Chapter 12 of the Articles is headed "Russian Spies, Rogue States, and the Manipulation of the American Markets".

[64] A paragraph reads:

> As I mentioned in Chapter 10, Mark Salter, a principal at Gene Phillips' Sinex Securities (the outfit that laundered around $4 billion for the Russian government and the Russian Mafia), previously worked for Westcap Securities, then controlled by the above-mentioned Ali Nazerali (who has, as I documented earlier, has run a stock scam with the chief of Saudi intelligence, and was a former top employee of a man, Abbas Gokal, who works for Pakistani intelligence).

Mr. Nazerali testified that he has never heard of Mark Salter and had no knowledge that Abbas Gokal had a connection to Pakistani intelligence.

[65] A further paragraph in Chapter 12 reads:

> Nowadays, according to people who know Boesky, the mysterious Houshang Wekili never leaves Boesky's side. They regularly show up at meetings together, they share a house, and they were together when Boesky met with

> Ali Nazerali (who has his own ties to the Iranian regime) at the offices of Lines Overseas Management.

Mr. Nazerali has heard of Mr. Boesky, but has had no dealings with him and does not know Houshang Wekili. He denies having any "ties to the Iranian regime".

[66] A further paragraph in Chapter 12 reads:

> Later, Datek was implicated in the trading of Phil Gurian, right hand man of the DeCalvacante Mafia capo Phillip Abramo (who was involved with Ali Nazerali's BCCI brokerage and later came to be known as the "King of the Wall Street").

Mr. Nazerali's evidence is that this is entirely fictional.

[67] Further paragraphs in Chapter 12 read as follows:

> In addition, Mr. Dvoskin-Lozin-Kozin-Etc. is a notorious market manipulator who has orchestrated multiple death spiral scams, sometimes in league with prominent members of the Milken network, including Ali Nazerali (former Gokal employee; major BCCI figure; partner of Yasin al Qadi, Osama bin Laden's favorite financier).

The plaintiff testified that he does not know what the phrase "death spiral scam" means. He has never been a "major BCCI figure" and does not know Yasin al Qadi.

> In 2006, we know, Curshen (who was then operating out of the same building that housed the Israeli embassy in San Jose) was hosting those meetings in Costa Rica where (according to the former spy who monitored them) Michael Milken and some of his close associates, including Gene Phillips, discussed ways in which to destroy some big companies.
>
> Thompson Kernaghan was managed by a guy named Mark Valentine, who got his job thanks to his connections to Ali Nazerali and Nazerali's friend Soleiman Rashid, who is, like Nazerali, on especially close terms with jihadis.

The plaintiff denies he has ever been to Costa Rica. He acknowledges he met Mark Valentine twice, but has no knowledge that Mr. Valentine "got his job thanks to his connections to Ali Nazerali". Mr. Nazerali does not know Soleiman Rashid. He also denies that he is on "close terms with jihadis".

> With remarkable speed, Valentine assumed the leadership of Thompson Kernaghan, and in allegiance with his mentor Rashid, he became an important financier to both the Mafia and jihadis. In fact, Thompson

> Kernaghan repeatedly showed up as a co-investor in companies targeted by Yasin al-Qadi (Osama bin Laden's favorite financier).
>
> Among the many Yasin al Qadi deals handled by the brokerage were Imagis (the anti-terrorism company that began pumping out massive volumes of unregistered stock just before the 9-11 attacks) and NCT Group, the outfit whose key investors inducted Yasin al-Qadi, Gene Phillips, Solomon Obsfeld, Martin Schlaff, Mr. Grin/Grinshpon, and the Isosceles Fund (which employed the Russian spy Anna Chapman).
>
> [Emphasis in the original.]

The plaintiff denies that Yasin al Qadi, whom he does not know, had any involvement with Imagis; that it was an anti-terrorism company; and that it pumped out "massive volumes of unregistered stock just before the 9-11 attacks".

E. Chapter 13

[68] Chapter 13 of the Articles contains the following paragraph:

> Curshen, recall, is the fellow who later opened an office in the same building that housed the Israeli embassy in Costa Rica. He was the white knight for YBM Magnex, the Mogilevich Mafia outfit linked to the Bank of New York scandal. And he hosted the meetings (monitored by a former spy) where Milken and some of his close associates, including Ali Nazerali and Gene Phillips, discussed ways to destroy some big companies.

Mr. Nazerali denies that he ever had any discussions "to destroy some big companies" and he attended no such meeting in Costa Rica.

[69] Further paragraphs in chapter 13 are the following:

> The year is 2006. The place is the Cala Di Volpe, a hotel on the Sardinian coast developed by His Highness the Aga Khan, the hereditary Imam, son of Prince Aly Ay Khan.
>
> …
>
> It's early 2006, and in a suite on the fifth floor of this hotel, there's a party going on – Russian hookers, Champaign, fat Cuban cigars, Mawlana Hazar, and the most fearsome Mafia outfit the world has ever known. After this party, some of the people in attendance will meet with Ali Nazerali, and a business venture will be hatched.
>
> Ali Nazerali is best known for small-time "pump and dump" scams, though he is involved in much bigger schemes — the sorts of destructive schemes that I have already described, such as bust-outs, death spiral finance, and naked short selling.

> Nazerali, recall, has working relationships with the Gokal family (of BCCI fame), members of Al Qaeda's Golden Chain, the regime in Iran, Pakistan's ISI, the chief of Saudi intelligence, the ruler of Dubai, the royals of Abu Dhabi, La Cosa Nostra, the Russian Mafia, and others in the Milken network.
>
> At this time in 2006, Nazerali has some business with the Belzberg brothers – Sam and Hymie (who, say Canadian and U.S. authorities, have done business with Genovese Mafia capos).
>
> …
>
> Shortly before the party at the Cala di Volpe, Ali Nazerali attended a meeting with Milken's famous co-conspirator Ivan Boesky at the Bermuda offices of Lines Overseas Management. And now Lines Overseas has some new clients: Nazerali, Boesky, the Russian spy Christopher Metsos, and the people with whom Mawlana Hazar (a close associate of Nazerali) is now having a party in his fifth-floor suite at the Cala Di Volpe hotel.

The plaintiff testified he was in Cala di Volpe in August 1972 when he met the Aga Khan, but has never returned. In 1972, the plaintiff was 19 years old.

"Mawlana Hazar" is a reference to the Aga Khan. Mr. Nazerali found the paragraph with this reference to be particularly offensive and described it as "egregious lies".

Mr. Nazerali denies that he has ever been involved with "bust-outs, death spiral finance and naked short selling". He also denies having any knowledge of the Al Qaeda Golden Chain, Pakistan's ISI, the chief of Saudi intelligence, the rulers of Dubai, the royals of Abu Dhabi, the Cosa Nostra, the Russian Mafia and any others in "the Milken network".

Mr. Nazerali acknowledges he has met Sam Belzberg, but he has never done business with either of the Belzberg brothers.

Mr. Nazerali denies a meeting with Mr. Milken and his "famous co-conspirator Ivan Boesky", at any time or anywhere, and testified that the entirety of the words from Chapter 13 quoted above is false.

F. Chapter 15

[70] Chapter 15 of the Articles refers to Ali Nazerali in Aruba to which place Mr. Nazerali denies he has ever been.

The chapter also contains the following paragraph:

> Maybe nobody at the FBI knew that Nazerali and Yasin al Qadi were tied not only to jihadis, but also to Mafiosi who work for Semion Mogilevich — known as the "most dangerous mobster in the world" in part because he tried to sell highly enriched uranium to Osama bin Laden. Or, maybe nobody at the FBI knew that Semion Mogilevich was #2 on the FBI's Most Wanted list.

Mr. Nazerali denies any ties to jihadis or to Mafiosi, or to Semion Mogilevich.

[71] The plaintiff testified that in the past, he has had business dealings with law enforcement agencies in Canada, the United Kingdom and the United States. These business dealings have ended, which he attributes to the defamatory publications.

The Plaintiff's Evidence Concerning the Steps he Took after the Publication of the Articles

[72] On September 6, 2011, Mr. Nazerali sent an email to Mr. Mitchell which reads:

> Mr. Mitchell,
>
> I have been reading the recent stories on your website with interest and considerable chagrin. Many of the events your relate are not true nor are the purported connections with other people who are mentioned. For example, the only time I've ever visited Sardinia or been to the Hotel Cala di Volpe was in August 1972 when I was pursuing graduate studies in New York. I have never been to Aruba. My itineraries are well documented, and are certainly available to the US and other international agencies which track such matters, and therefore, can be easily verified. Further, you have mistaken me for another person who bears a similar name who is a respected professional and who has worked for the United Nations and is currently employed by a major international charitable organization and whose credentials are irreproachable.
>
> I can only surmise that your sources have deliberately given you misinformation with a view towards damaging your credibility as a journalist, and mine as a businessman. You should be aware that I have never been arrested, paid a fine, pleaded no contest, or charged by any regulatory body, nor any governmental authority anywhere in the world. Nor am I, to my knowledge, currently facing any criminal or regulatory action in any jurisdiction. A cursory search of the relevant databases should confirm this.
>
> In the interest of setting the record straight, and to give you the opportunity to reexamine your sources for the various events you relate, I would like to speak to you. Because of my professional commitments, I propose to speak to you on either Wednesday afternoon, September 7 or Friday, September 9 or Monday, September 12. I understand you are based in the Chicago area,

> and I would therefore propose 2H30PM on either of these three dates. Please advise which day is acceptable to you, and the number to call.
>
> I look forward to your response, and to speaking with you.
>
> Sincerely,
>
> Aly Nazerali

[73] Mr. Mitchell responded in an email of September 7, 2011, which reads in part:

> Dear Mr. Nazerali,
>
> I would be happy to talk with you. Indeed, I am most eager to do so. I would do it today, but I have a previously scheduled meeting at that time. Would your suggested time of 2:30 pm on Friday still work for you? I think you meant Chicago time? Anytime on Friday afternoon would work for me.
>
> In addition to talking on the phone (which is sometimes not amenable to productive conversation), I would enjoy having the opportunity to meet you in person, and would be happy to travel to just about any city (anywhere in the world) to do so. I could make the trip on short notice-anytime, at your convenience.
>
> I think a meeting would be beneficial for both of us. The important thing is ensuring that the true story gets told, and if we were to spend an hour or two discussing this, I could help you to understand how I came upon the information in the story, and I would have the benefit of hearing your version of events.
>
> Please note, though, that I mentioned in the story that the descriptions of the meetings (Aruba, Cala di Volpe), were composites of multiple meetings, with true locations disguised to hide the identity of sources. So whether you traveled to those places is not necessarily important.
>
> In any case, nothing in the story is written in stone, so if I find that there are errors, I will be happy to make revisions. If there is other verifiable information that you can direct me to, and that information makes the story better, I might consider rewriting it altogether.
>
> Indeed, I might do so anyway, not because I think the facts are wrong (though, again, if there are factual errors, I will, in any case, correct them), but because in the time since I wrote that story, I have undergone I rather major transformation of my worldview. That is, the facts being what they are, my opinions about them have changed.

[74] Mr. Nazerali recorded the telephone conversation of September 9, 2011, with Mr. Mitchell. A transcript reads:

> MARK: Hello.
>
> ALTAF: Mark?
>
> MARK: Yes.

ALTAF: This is Ali Nazerali. Good afternoon.

MARK: How are you?

ALTAF: I'm well, thanks.

MARK: Sorry I missed your first call. It didn't ring for some reason. It just went straight to voicemail.

ALTAF: Well, Mark, the purpose of this call from my perspective is I believe you've been very seriously misinformed about me and my activities and I would like to set the record straight. I can only imagine that this information was fed to you to destroy or to compromise your integrity as a reporter and destroy my business career. So that's where I'm coming from.

MARK: Right. Well, the -- I'd be hap-- happy to listen to whatever you have to say with an open mind and -- and ...

ALTAF: All right. Well, then let me lead the conversation and then you can ask me specific questions.

MARK: Sure. Sure.

ALTAF: So what I'm going to do is I'm going to be referencing your website and specific statements that you've made about me and we can go from there.

MARK: Okay.

ALTAF: What you're alleging is that in 1979 I was somehow involved with the Mafia and there was an assassination attempt on a Mr. Kott and that I somehow patched up the things with the Mafia, and I'm paraphrasing what you said.

MARK: All right.

ALTAF: Well. In 1979 I was not even resident in the United States or in Canada and I did not know Mr. Kott. So let's start there.

The other two allegations that you make are that there are two gentlemen, by the name of Naqvi. One is a Swaleh Naqvi and the other one is *Kazim* Naqvi, and that they are somehow related to me as my blood relatives. And they're not related to me. I have no connection with them family-wise whatsoever.

You also state --

MARK: [inaudible 00:03:27/overlapping speakers]

ALTAF: --without any substantiation, that I am an important business partner of a gentleman by the name of Yasin al-Qadi. I don't even know who that gentleman is. I've never met him. And I --

MARK: Okay.

ALTAF: You *say* that I have several -- I've launched several death spiral hedge funds. To my knowledge I'm not involved with any hedge funds, death spiral or otherwise. And I would challenge you to provide me with names of references of funds that I purportedly am

involved with. Valor Invest is a company which I am one of the principals and it's not a hedge fund.

Then, with respect to Imagis, it is true that it is a company of which I was a founder and the allegation was that I was involved with Yasin al-Qadi. I've already covered that specific subject. And you say that I unleashed massive amounts of Imagis options, warrants, and unregistered stock. That is patently untrue. The company was listed on the Canadian markets, it was listed in the United States, and there is no way the company could issue any shares without regulatory approval. There's a very stringent process in Canada on how warrants, options, or any kind of securities can be issued. And all the regulatory filings were made and were current at every time that I was involved with the company. And we had regulatory approval for every -- or Stock Exchange approval for every issuance that was ever made.

MARK: Okay. [inaudible 00:05:33]

ALTAF: You then, allege that there's a mystery man called Ali Kassam that - who does a lot of business with me. I do not know an Ali Kassam.

MARK: [inaudible 00:05:46]

ALTAF: You then go on to allege that -- that I was somehow in partnership with the head of Saudi intelligence. And you state specifically that he was running scams with the Nazerali brothers. I don't believe you have any evidence to substantiate that, nor is it true.

My main, concern and where I'm going with this is it's one thing for you to express an opinion, it's another thing for you to believe certain things. But when you state them as facts, I would think that you as an investigative journalist would at the very least try and confirm your sources and speak to some of the people about whom you write.

MARK: Well, I do wish that I had got in touch with you earlier, but the --

ALTAF: You did not get in touch with me earlier. I contacted you.

MARK: Right. No, I -- I -- I do wish that I had been able to -- to -- to know where to contact you earlier.

ALTAF: I'm not hard to find, Mark. Any cursory search of any one of the social networks or listings would find me very quickly. I'm a relatively well-known person where I live.

MARK: Okay. Well, the -- we -- we can address each of the -- each of the issues.

ALTAF: Okay. Well, let me go on --

MARK: [inaudible 00:07:18/overlapping speakers]

ALTAF: -- because, I mean, there's several other major misstatements of fact.

MARK: Okay.

ALTAF: You say that I was involved with the Belzbergs in multiple stock manipulation schemes. I do not know Hymie Belzberg. I do have a passing acquaintance with Sam Belzberg, who is a very well-known financial figure in Vancouver. I have never done business with him and I'm not involved with him in any financial dealings whatsoever.

MARK: Okay. Do you want me to [inaudible 007:58/overlapping speakers]

ALTAF: Well, let me just go through it and then you can answer any way you want.

MARK: Okay.

ALTAF: And you state specifically that in 2006 I was investigated by the Canadian authorities for some schemes I had going with the Belzberg brothers. You have no evidence of that because that never happened.

I have never been the subject of any regulatory inquiry anywhere in the world by neither the Canadian, U.S., or any European authority. Nor have I ever been charged, paid a fine, pleaded no contest, or in any way avoided any kind of prosecution, disappear, or whatever. I'm not party to any civil suit. I am not party to any criminal suit.

MARK: Okay, go on.

ALTAF: Okay. We already discussed the fact that I had never been to *the Cala di Volpe* except once in 1972. That was in my e-mail to you. Nor have I ever been to Aruba ever.

And then you specifically state that I am the founder of something called Star Soft, which is a hedge fund. I have no idea what you're talking about. And if it was a hedge fund, presumably it would be registered in some jurisdiction. And I have no knowledge of it. If you can show me any corporate papers that show that I am connected with them in any way, I'll be happy to discuss it with you.

MARK: Okay. Go on.

ALTAR: Well, you also are associating me with a number of very unsavoury characters, with the Italian Mafia, the Mogilevich organization. I have no idea who these people are, nor do I know how you got me involved with them, somehow.

MARK: Okay. Go on.

ALTAR: Okay. Then specifically, you know, you talk, about a meeting in Costa Rica and you say that some former spy provided you with that information. I have never been to Costa Rica, leave alone know any of those people.

Another allegation you make, is that I was in Germany at the end of December 2006, meeting government officials in my capacity as CEO of an outfit called the Aga Khan Foundation. That is clearly a case of mistaken identity. I am not the Aly Nazerali who is a senior member of the management of the Aga Khan Foundation. I have no connection with the Aga Khan Foundation.

MARK: Okay.

ALTAF: Well, you know, that's substantially the gist of it, you know. I don't want to comment on the rest of it because they all flow from the fact that most of these circumstances that you allege that I'm involved with I'm not involved with, nor do I know what you're talking about. If there, are any specific issues that you'd like to discuss, I'm happy to answer them.

MARK: Okay. Well, let me just go through and give you an idea of where -- where I got all this information. The -- I just kind of wrote them down in order, sort of what you said. I'll go through them each and -- and let you know where I got the information.

Swaleh Naqvi -- that came from a book written by a Wall Street Journal reporter, said that you were *a relative of that guy*.

ALTAF: Well, that's hearsay, isn't it? That's repeating an allegation made by a third party without any verification on your part.

MARK: Well, it comes from a reliable source. I consider that a reliable source. But --

ALTAF: Well, he's -- Mr. *Truell* is misinformed and he was told that at the -- at the time. And that book, as you know, is about 15 or 20 years old.

MARK: Okay. Well, I-- I can double check and see whether or not- it's mistaken.

Irving Kott, I guess there are multiple reports that you were involved with him at *First Commerce Securities*.

ALTAF: That is partially true, but certainly not in 1979 and I was not even in North America. So that whole story about me preventing a Mafia hit on him is totally fabricated. I first met Irving Kott in 1984 and that was in Amsterdam in Holland, where he purported to be a consultant to a company called First Commerce**,** which I acquired and subsequently divested myself of about two years later, after we found out that the whole thing was a fraud and sold to us based on numerous misrepresentations about the financial condition of the company and the assets of the company. And that was the subject of an extensive investigation made by Interpol, the Dutch authorities, and the Luxemburg authorities. I *was never* charged. I was cleared of any wrongdoing. And I had nothing further to do with the company after we revoked our initial sales purchase agreement. It was a conditional purchase subject to due diligence. And that's the only time I met Irving Kott. I. have had no association with him or his family since 1984 -- I'm sorry, 1986 or thereabouts.

MARK: That was in 1986 until -- until when?

ALTAF: I met him for the first time in1984, as I said, when he purported to be a consultant for First Commerce. The owner was represented to be a certain gentleman by the name of Dawson Roberts, who introduced me to Mr. Kott. I had some business discussions with, the two of them, which led to a conditional contract to acquire the

firm. And we revoked the contract in ’86. I have had no dealings with either one of those two gentlemen since 1986.

MARK: Okay.

ALTAF: And as I said --

MARK: [inaudible 00:15:10/overlapping speakers]

ALTAF: -- that matter was investigated by the Dutch authorities, by the Luxemburg authorities, and subsequently by the Canadian authorities when they licensed me to be the principal of the firm that I founded here and when they licensed me to -- when they authorized me to be a director of a public company. That was part of their due diligence. And I have documents that substantiate what I said.

MARK: Okay. And were you aware of his relationships with the Mafia people that I mentioned in the story?

ALTAF: No. I never met any of those people that you indicate in your writings.

MARK: You've never spoken to them or met them in any way?

ALTAF: No, I don’t even know who they are.

MARK: Okay. Well, for that one I have what I -- what I consider to be good sources *that say otherwise.* I’ll go back and check with the -- with the sources and -- and tell them what you said and see what they [inaudible 00:15:41/overlapping speakers]

ALTAF: Well, I'm not interested in sources who make allegations and place me with people and events and times which are fabricated. You know, why don't you go into the legal databases and look at the judgments that were given at the appropriate time? I'm telling you that there were judgments in Luxemburg and there were judgments in -- in -- in the Netherlands at that time. I was never charged. I was specifically never party to any investigation. I certainly cooperated with the -- with the authorities when they asked me various questions. That was part of a fairly detailed and thorough Interpol investigation at that time into the operations of Mr. Kott and his cohorts.

MARK: Okay. I’ve got that written down and I will -- I will check and if there’s some -- somebody telling me information that’s not right, but it -- [inaudible 00:17:54] information, but I won't completely rule it out [inaudible 00:17:59]

ALTAF: You know, Mark, I don't wish to be adversarial because that's not my style.

MARK: No, [inaudible 00:18:11]

ALTAF: All -- all I can -- all I can suggest to you is that you've been fed some very serious misinformation. And if I were to be the person you allege, trust me, I wouldn't be walking around with impunity *where I am* and I wouldn't be travelling freely around the world. I'd be a

target of every regulatory, governmental authority there is in the world. So what you've got to go back is question what's the motive? Why would somebody want to do this?

MARK: *Well* I did push *on that* to begin with, but I will question it again. But the information that we have *is that Valor Invest*, Yasin al-Qadi was a limited partner in that.

ALTAF: Can you prove that? Can you substantiate that in any way, especially since I've told you I don't know who he is?

MARK: Do you know Pierre Besuchet?

ALTAF: Yes, I do. He was one of the people who I founded Valor Invest with in 1991. And he ceased being associated with Valor Invest in approximately 2004/2005. There was another gentleman with me who was a principal as well called Steven Popovics, who was a Brazilian national. And the poor gentleman passed away in 2010 of natural circumstances. I have had no association with Mr. Besuchet since approximately 2004/2005.

MARK: Okay. And you are aware that he was a board member on *with Yasin al-Qadi's fund* as well?

ALTAF: I have no idea, like I said, who that gentleman is. I do know that he was a director of Faisal Finance, which is based in Geneva. Faisal Finance was founded by Prince Muhammad bin Faisal, who was a senior member of the Saudi Royal Family. It is part of a much larger financial institution, called Dar al-Maal al-Islami. Faisal Finance is their Swiss arm. It is regulated by the Swiss authorities. And post-9/11, the Swiss authorities conducted a very thorough investigation of Faisal Finance. And it is still licensed and operates in Switzerland as a bank. And I understand that Mr. Besuchet may still be, but I'm not sure, a director of the bank. And it has gone through all the regulatory scrutiny of the Swiss banking authorities, as well as European financial institutions that regulate such matters.

MARK: And you had no involvement whatsoever with *Yasin al-Qadi*?

ALTAF: I have never met the man. I don't know who he is.

MARK: You must know who he is if --

ALTAF: No, I don't. The first time if heard of his name was when I read your website.

MARK: Okay. [inaudible 00:21:43]

ALTAF: And as far as I know, that gentleman is not the principal of Faisal Finance. I told you who it was.

MARK: All right. And have you had any dealings with Faisal Finance?

ALTAF: No.

MARK: Okay. Um … Valor Invest is not a hedge fund [inaudible 00:22:09]

ALTAF: No, it's not.

MARK: What is it?

ALTAF: I'm sorry, what is it?

MARK: Yeah.

ALTAF: It's an asset management company where we make investments in a number of public and private entities from time to time. if you got to the TSX, which is a regulatory website *of* the stock exchange here in Canada, you will find that we've participated in numerous financings over the last 20 years. We generally buy as principals.

MARK: Okay.

ALTAF: On a fully declared basis all the details regarding the company, the positions we buy are filed with the regulatory bodies in the appropriate jurisdictions depending on where we're participating in financings.

The TSX --

MARK: Okay.

ALTAF: -- website has a comprehensive list of all the financings we've performed. It's a matter of public record.

MARK: Okay. The … And Imagis, the -- well, you said that the -- what was false about that, that …?

ALTAF: Well, you made the allegation that we issued a substantial amount of unregistered stock, warrants and options, and I' told you that's not true.

MARK: [inaudible 00:23:46/overlapping speakers]

ALTAF: You cannot, issue shares in a regulated listed company in Canada, because it's a Canadian company, without regulatory and stock exchange approval. And we had approval for every single transaction that was made. The auditors at the time were KPMG. The lawyers for the company were one of the best firms in Canada. And, the board of the company was certainly above reproach internationally.

MARK: Okay. The ... The -- that -- that information came from media reports.

ALTAF: It came from an article by Christopher Byron**.**

That's obvious.

MARK: [inaudible 00:24:35]

ALTAF: And Mr. Byron was sued. Red Herring fought the lawsuit. They lost. A week later they declared bankruptcy. That's also a matter of public record.

MARK: Okay.

ALTAF: The judgment in favour of Imagis, where the plaintiffs were Mr. Revell, myself, and the company, and the defendants were Christopher Byron and Red Herring is in the public court records here in Canada in the B.C. Supreme Court.

MARK: Okay. *Umm*,

ALTAF: So that article that's still flying around the internet,there's nothing I can do about it.

MARK: Yeah. Okay. The next on the list, Ali Kassam [inaudible 00:25:32]

ALTAF: I don't know Ali Kassam.

MARK: You don't know Ali Kassam?

ALTAF: No. I knew -- I know an Alnoor Kassam, but I don't know an Ali Kassam.

MARK: How about Even Resources?

ALTAF: Yes, I was one of the directors of Even Resources. That's a matter of public record also.

MARK: Was Ali Kassam involved with Even Resources?

ALTAF: No, there was a gentleman by the name of Alnoor Kassam.

MARK: What -- how do you spell that?

ALTAF: A-l-n-o-o-r. And the last name is spelt as you've written it.

MARK: Okay.

ALTAF: Two different individuals. The first I don't know, the second one I do know.

MARK: I think it's the same guy we're talking about.

Um …[inaudible 00:26:29] Okay, let's see. And Even Resources didn't do a deal with the chief of Saudi Intelligence?

ALTAF: No.

MARK: Or a company that was owned by *the Chief*?

ALTAF: No. What Even Resources was, was a mining- company which bid for and was granted an exploration permit in Saudi Arabia, to investigate the possibility of redeveloping a copper and gold deposit which had been discovered in the '50s by BRGM, which is a French governmental geological survey firm. Subsequently in the '70s or early '80s a company had been formed called Red Sea Mining, which began to exploit that particular deposit. And subsequently that deposit was abandoned because of economics, given, the price of copper and gold in the late '70s and early '90s. I did negotiate with the Ministry of Mines of Saudi Arabia, which is the same ministry as the petroleum ministry, which has the responsibility for all natural resource development in Saudi Arabia. And we were granted an exploration permit, to provide them with possible solutions as to how to put that potential mine into production. We spent, about a year working on that particular project. And in the event we -- we formed a joint venture with a corporation called Alujain Corporation, which was the largest consumer of copper in the country because they have a very large copper manufacturing plant, this deposit would potentially have been sufficient to provide the domestic needs of

Saudi Arabia for 10 years for copper. And in the final analysis, after we completed the exploration phase of the program and submitted a technical proposal to the Ministry of Mines and Energy, we applied for a development permit to put the project into production and we were never granted that permit. There were several other companies that bid for that, including a Chinese group and -- and another Saudi domestic, group. And it is my understanding that that mine is now in production but it is operated by the Saudi government with its own staff and its own people. So Even Resources --

MARK: [inaudible 00:29:40]

ALTAF: -- ended up taxing a substantial loss because that project never materialized. I did not negotiate that project with anybody else except the Deputy Minister of Mines and his staff. And I did meet the principals of Alujain Corporation, who is a gentle -- who is a gentleman by the name of Khalid Mahfouz, who was the chairman of the corporation. And we entered into, as I said, a joint venture subject to that project being granted a development license. That joint venture never materialized in the final analysis because the license was never granted. Subsequently --

MARK: [inaudible 00:30:27]

ALTAF: -- Even became a shell, as it had no other assets. And sometime later I entered into a change of business and I acquired a software development company that had been developed and founded by Mr. Alnoor Kassam called Benchmark Technologies, and that company went public through a reverse merger with Even Resources. That entire transaction was subsequent to prospectus disclosure. It was filed with and it is on SEDAR, which is where you -- which is the equivalent of EDGAR in Canada. All the regulatory filings in the entire story was approved by the Exchange and the regulators with a prospectus at the time.

MARK: Okay. And there was — there was an announcement at some point that you had done a deal with Alujain.

ALTAF: Well, they did announce the fact that we had entered into a letter of intent with Alujain to form the joint venture with all the caveats.

MARK: Right.

ALTAF: Because that would -- that was a material event and required regulatory disclosure.

MARK: Right. And then were you aware of Khalid bin Mahfouz's background?

ALTAF: Well, certainly at the time there was a lot of news flying around and he was at that time involved with Citibank. He was involved with a number of banking institutions.

MARK: Yeah.

ALTAF: I met him in his capacity as chairman and founder of Alujain, which was a publicly listed company in Saudi Arabia. And I was introduced to him by the Ministry of Mines as a potential industrial partner because they were sourcing their copper among other places in Turkey and were a significant potential user of copper domestically. And if you check into Alujain, that cable factory that they had built in Saudi Arabia was originally built in cooperation with AT&T because AT&T had a very large telecommunications contract in Saudi Arabia and Alujain was providing with the copper, fiber and cable.

MARK: Okay. And then -- and how long had you known Khalid bin Mahfouz before that?

ALTAF: I met him twice. Once for lunch, which was the original introduction, and subsequently when we initialled the letter of intent some months later.

MARK: Okay.

ALTAF: That would have been in approximately 1993 or 1994. And I've had no dealings with him or his company since then.

MARK: Did you know that he was the founding shareholder of BCCI?

ALTAF: No, but that became a matter of public record later.

MARK: All right. Okay.

The next one on the list is the Belzbergs. That came from a combination of sources and it was -- there were a couple cases: reported in the media. You're saying that the media reports were wrong.

ALTAF: Is there a question here?

MARK: Yeah. Yeah.

ALTAF: What specifically are you referring to?

MARK: *That* you were saying that the media reports were wrong.

ALTAF: Well, I'm not sure what media reports you're referring to.

MARK: I'll have to go back and check, but there were some media reports in Canada about your involvement with the Belzbergs.

ALTAF: With the Belzbergs?

MARK: Yeah.

ALTAF: Well, I'd like to see those because to the best of my knowledge there's never been any media report in Canada whatsoever. But the specific allegation you make was that in 2006 I was being investigated by the Canadian authorities regarding a short selling scheme with the Belzbergs and that's patently untrue. Any regulatory action is a matter of public record.

MARK: All right. I'll -- I'll send you the media report.

ALTAF: Well, you can send them to me if they exist and you can also then try and show me evidence of any Canadian regulatory action

because there was none. I have no connection with the Belzbergs except that I have a passing acquaintance with Sam. I don't know Hymie.

MARK: Okay. Next on the list is *the Cala di Volpe* that was a composite of meetings that actually took place *which came from my contacts*.

ALTAF: Well, it's patently untrue.

MARK: Okay. [inaudible 00:36:11]

ALTAF: I told you the one and only time I was there was in August of 1972 when I was a student.

MARK: I see. The -- the point really wasn't whether or not you were at the *Cala di Volpe* but whether or not you met those people.

ALTAF: I don't know any of those people. We -- I already told you that. And I specifically told you except tor that one time I've never been to the hotel again. I've never been to Costa Rica, where you allege I was involved with meetings with people I don't know. I have never been to Aruba, and I have never been to Bermuda. Those are specific places and events that you say I attended and that I conducted business with people I don't know.

MARK: You *know* Jonathan Curshen?

ALTAF: No. Never met him.

MARK: Were you involved with Global Securities in any way?

ALTAF: I was. And it was not called Global Securities at the time, it was called Global Futures Corporation. I was associated with a commodity trader Global Futures Corporation from 1988 to 1991, when I left. Subsequently the company transformed itself and changed its name sometime later to Global Securities Corporation, but I've had no affiliation or connection with them since nineteen nin-- '91.

MARK: Okay.

ALTAF: That too is a matter of public record. In 1993 or '99 I was licensed as the compliance officer there and I had to go through, a regulatory process to be licensed. And I dropped my licence in 1991 when I left. And at that time I was also licensed as a principal with the CFTC in the United States, as well as the various commodity exchanges in the U.S.

MARK: All right. Okay. The -- *uh* where were we? Um … Star Soft is not a registered fund, but *you were actually involved with it and* people that were involved with it say that you were involved with it. And you -- you maintain that you don't know what that is.

ALTAF: Not only don't I know what it is, I have no involvement whatsoever. And, you know, if you -- if you're saying that I was the principal of it, which is what you seems to indicate, certainly there would be a business card or some kind of account. I mean, how do you operate

a fund without having a custodian or banking relationships or whatso-- or things of that sort?

MARK: It's actually not difficult. *You* can do that very easily.

ALTAF: Well, I don't know how you operate a hedge fund or any kind of a fund without having a banking or clearing relationship with somebody somewhere.

MARK: [inaudible 00:39:55] Okay. The -- the other, *Mufti* Al Abbar (phonetic 00:40:01) and the …

ALTAF: I have met *Mufti* Al Abbar socially twice. I don't know who the other gentleman is.

MARK: Okay. Do you have any involvement with FTE Finanz?

ALTAF: I'm sorry, what?

MARK: FTE Finanz.

ALTAF: No, I don't know who they are.

MARK: You have no involvement with [inaudible 00:40:32] FTE Finanz?

ALTAF: I don't know who they are.

MARK: You don't know who they are. Okay. Just let me make sure I've got that name right. [inaudible 00:40:46]

ALTAF: Are you there?

MARK: Yeah, I'm sorry, I'm just checking something. I'm sorry, JTE Finanz.

ALTAF: Yes, I know who JTE Finanz is. As far as I know, they're an asset management company based in Zurich.

MARK: And were you involved with them [inaudible 00:41:37]?

ALTAF: I -- I know one of the principals of the company. He's a fairly well-known financial figure.

MARK: Is that Joe Eberhard?

ALTAF: yes, I know Joe Eberhard.

MARK: Okay. Okay. The --

ALTAF: What's the allegation? Because they don't appear in any of the writings I've seen here in front of me.

MARK: The allegation is that, the *Mogilevich* organization *is connected*.

ALTAF: I can't comment on their business activities, I know the gentleman. I've known him for approximately 20 years. I knew him when he was a banker, before he founded JTE Finanz.

MARK: Al right. And -- and did -- did you get introduced to any people from Russia?

ALTAF: No.

MARK: No. Okay.

ALTAF: Well, the Russians you mentioned that I'm supposedly connected with I've never heard of.

MARK: Right. You say you've never been to Costa Rica. *There's* pretty strong evidence that you did meet the people *who were meeting* in Costa Rica.

ALTAF: Well, you know, once again, if I've never been there, then your evidence is wrong. I'll make it very easy for you; okay? Approximately two years ago my wife immigrated to Canada and I sponsored her. And as part of that immigration application, I was required to submit, which is standard, a listing of every country I've been to for the last 10 years, with dates and the purpose of my visit, even if I was only transiting through an airport for 10 years -- for 10 minutes. And that was something that obviously the immigration, authorities check. And today, as you know, there are fly and no fly lists all over the world. I have passports and I certainly have very detailed itineraries of all the countries I've been to over the last 20 years.

MARK: Okay. Well, the -- well, I'll preface this by saving that I don't intend to make an issue of *this*.

ALTAF: Well, Mark, put yourself in my shoes; okay? Certainly it is an issue because when -- and it's one thing to allege something or suspect something or believe something. But when something is stated as a fact and you put me in a place, in a time with people I don't know, who are not necessarily savoury characters, and it goes up on a website, and when people do Google searches on you and they read all this stuff, you can imagine they don't know what to believe. And it can destroy someone's reputation and career. So either you --

MARK: [inaudible 00:45:12/overlapping speakers]

ALTAF: -- either you've been fed a line or there's an agenda out here. And if there is one, then let's establish it together.

MARK: Well, there's -- there's no agenda at all. [inaudible 00:45:27].

ALTAF: Well, obviously your sources have misinformed you because they're -- you know, you don't know me personally. You weren't there. And you made statements like regulatory action is being taken by Canadian authorities in 2006 about a purported short scam that I was involved with the Belzbergs. That's a specific allegation and I deny it. And if there, was such an action, you know, I'd like to see the proof of it. And you say there were media reports. Fine, let me see them. Because to my knowledge there were none. Because I certainly would have reacted at the time had there have been any. So would have Mr. Belzberg.

MARK: I -- I will send you the media reports.

ALTAF: You see where I'm going wish this, right, Mark?

MARK: Well, I -- I do and, like I said, I -- I -- I'd actually much rather -- I mean, I don't consider you central to this story and I'd much *rather*

have a cooperative relationship with you than -- than adversarial one, so [inaudible 00:46:43)

ALTAF: And that's the purpose of my call, Mark. You know, I -- I'm the one who sought you out and I'm the one who said I'm happy to talk to you. I have answered every question you've asked me truthfully and correctly. But when I see a headline, Chapter 14 or whatever it was, "Ali Nazerali in Aruba" and then the sentence goes on, now, imagine what that looks like on a Google search with somebody who doesn't know who you are or is trying to establish who you are because of a potential business relationship.

MARK: All right. Well, I. wouldn't, have written any of it if I didn't -- wasn't confident that it wasn't true, *if I wasn't sure of it*.

ALTAF: Well, Mark, you know, the only thing I can fault you on is that you didn't take the time to verify your sources or at least sought me out. You know, if you had written me an e-mail or tried to call me and if I refused to speak to you or I told you to go commit an unnatural act to yourself, that'd be one thing. And that's why I reached out to you.

MARK: Well, I do appreciate that. This is the last item on the list, the Aga Khan Foundation. That's --

ALTAF: That's clearly a case of misidentification.

MARK: So who's the Ali Nazerali who was the CEO of the *Aga Khan*?

ALTAF: Well, go do a Google search on the Aga Khan Foundation and Aly Nazerali. He was a senior official in the United nations- who subsequently joined the Aga Khan Foundation. He's a very bright young man who spends all his time working on charitable things. And he was the gentleman, in Berlin, not me. I certainly don't have any connections with the German government. And as I recall, the event that you're relating to had to do with an award that was given to the Aga Khan by Joschka Fischer, who was the Foreign Minister at the time.

MARK: Right.

ALTAF: And Aly might have attended as part of the Aga Khan's delegation. I have no knowledge of that, aside from what I saw in the media at the time. But certainly not me.

MARK: Well, that one could be a mistaken identity. And if it is, I will *rectify*.

ALTAF: It definitely is. It definitely is.

MARK: Okay. At any rate, the -- the ...Like I said, I am potentially willing to *be accommodating*. I'm pretty confident in most of those facts, but the -- I guess what my -- my question is what -- what do you think about the general thesis of the story and is there a way that -- that we can work together on -- on the story?

ALTAF: Well, Mark, I mean, to the extent that, you know, there's criminal manipulations of the market, which are the bane of the financial industry, you know. I'm happy to give you some perspective on that to the extent that I know any of the events or, you know, can give

you some -- shed some light on it. And, you know, you -- you offered to come meet me and I'm happy to meet with you to discuss it, but the starting point has to be one based on fact and not allegations. You know, you say that, you're pretty confident about your sources and I gave you one specific example that was the first one. In 1979 I was nowhere near North Africa. I was working for a very substantial American corporation as a senior executive overseas, leave- alone being involved with Kott or the Mafia. And I don't know where that kind of stuff comes from. So, --

MARK: Is it wrong that you were working for the Gokal family at that time?

ALTAF: No, I was not. I was working for the GTE Corporation, today known as Verizon.

MARK: The -- you -- at some point you were working for the Gokal family.

ALTAF: I did work for a company that was controlled by the Gokals from 1982 to 1984, but certainly not in 1979.

MARK: Not 1979, right. Okay. Let me give this some thought and go back and check my sources.

ALTAF: All right. Mark, look, let's do this. I've given you my side of the story. I've given, you some very specific facts, some of which clearly are a question of misidentification, some of which are just plain wrong. And you look into it. And if you want to discuss this one more time, give me a shout and I'll call you back. I'm around most of next week before I -- I'm flying to Toronto after that. And. it we can come to some kind of accomodation where, you know, without changing the substance of what it is that you're trying to get at, you know, just correct the record as far as I'm concerned and I think I've given you ample reason to do that. And if I can help in any way in your investigative journalism, I'm happy to do so.

MARK: Yeah, I mean, like I said, I'd much -- much rather have you helping me. And -- and the arrangement that I usually have with *sources is that if they're helping with a story, I leave them out*.

ALTAF: But it has to start on the basis of honesty and mutual trust, okay? Mark? Mark.

(phone line rings)

AUTOMATED FEMALE OPERATOR: Your call has been forwarded to an automated voice messaging system.

MARK: Mark Mitchell.

AUTOMATED FEMALE OPERATOR: -- is not available. At the [tone] please record your message. When you've finished recording, you may hang up or press 1 for more options. To leave a call back number, press 5.

(electronic beep)

ALTAF: Mark, it's Ali Nazerali. I don't know what happened there, but it seems like the communication was cut off. I think I've said what I

> need to say. I'm going to give you an opportunity to review your sources. And if you have any further questions, just email me and I'll be happy to call you back. And if you can see your way towards correcting what you've written, that would be great. And I'll look forward to hearing from youabout the so-called media events and the allegations about Canadian regulatory actions and so on with me and the Belzbergs. Other than that, I wish you a nice weekend. Thank you.

[The corrections in italics in the transcript of the telephone call are those of Mr. Nazerali]

[75] After the telephone call, Mr. Nazerali emailed Mr. Mitchell as follows:

> Mark,
>
> Thank you for taking the time to speak with me earlier this afternoon. I believe I have brought several inaccuracies to your attention regarding the stories about me posted on your website, and one very clear case of mistaken identity. I encourage you to re-verify your sources as I believe they have attempted to deliberately mislead you. Further, I look forward to receiving the media reports from 2006 that you mentioned regarding a purported investigation by Canadian authorities about a short selling scheme in which I was allegedly involved with the Belzbergs.
>
> The allegations about me that you have reported as fact on your website are serious, and extremely damaging to my reputation as a businessman and a respected member of my community. I would appreciate these being corrected.
>
> Should you wish any further clarifications, or have more questions, I am around next week. Just email me and we'll set up a mutually convenient time to speak again.

[76] Following the telephone conversation, Mr. Nazerali also received an email from Mr. Mitchell which reads:

> As for the ongoing DeepCapture investigation, I think that you have seen a lot, and can be helpful--one reason why I should have gotten in touch earlier. If you think you are able to provide meaningful information, please let me know, and please give me a general idea what that information would be, and how I would be able to substantiate it. I do not reveal the names of my sources, so if you were to become a source, I would be obliged to remove all previous mentions of your name on DeepCapture.
>
> Like I said, some facts are more interesting than others, and I'd gladly take your name out of the story altogether in exchange for having you as a source. Let me know what you think.
>
> …

> But I will remove the information about the Belzbergs. As I say, I'll consider removing your name from the story entirely if it means having you as a quality source of information.

[77] Mr. Nazerali was "outraged" by this email, which he considered to be an attempt at "extortion". He understood Mr. Mitchell's offer to recruit him as "a quality source" was coupled with a threat that if he did not agree the false and defamatory words would remain on the website.

[78] Later on September 9, 2011, Mr. Mitchell sent another email to Mr. Nazerali which reads:

> Sorry, forgot to attach the article about the Belzbergs. Now I recall, in the original published version of the story I was referring to business only between the Belzberg's and your brother, Shafiq. However, I took Shafiq out of the story.

The attached "article about the Belzberg's" refers to "Shafiq Nazerali" and "Nazerali - Walji" neither of which is the name of the plaintiff.

[79] Mr. Nazerali's evidence is that no part of the website has been changed in substance as a result of the telephone conversation with Mr. Mitchell. The only concession was to take the reference to Mr. Nazerali's brother Shafiq "out of the story".

The *Ex Parte* Interlocutory Injunction

[80] On October 19, 2011, the notice of civil claim in the Deep Capture action was filed and, on the same day, Mr. Nazerali applied *ex parte* before Mr. Justice Grauer for an interlocutory injunction restraining the Deep Capture defendants from publishing statements about the plaintiff on the website or elsewhere; enjoining the defendant GoDaddy.com Inc. from permitting operations of the domain name www.deepcapture.com; enjoining the defendant Nozone, Inc. from permitting Internet access to any website files comprising www.deepcapture.com, which refer to the plaintiff, and enjoining the defendants Google Inc. and Google Canada Corporation from permitting their search engines to publish any search results from

www.deepcapture.com. The injunction was granted and, unless extended, was to expire on December 2, 2011.

[81] On the application of the plaintiff on notice, the interlocutory injunction was extended by Mr. Justice Saunders to December 13, 2011, but a further extension until trial was refused. Mr. Justice Saunders found that on the initial *ex parte* application, Mr. Justice Grauer had not been provided with all relevant authorities. Saunders J., after a review of the governing authorities, concluded that the injunction ought not to remain in place until trial because the appropriate test for an interlocutory injunction in these circumstances was not simply that the published words were clearly defamatory of the plaintiff, there must also be at least some investigation of possible defences. Mr. Justice Saunders found that the pleadings raised defences, the merits of which he was not entitled to weigh on the application before him. The interlocutory injunction was allowed to expire.

[82] In April 2013, on a further posting on the website Mr. Mitchell referred to the refusal of this court to extend the injunction beyond December 13, 2011 and to the dismissal of an application by the plaintiff for the summary trial of the Deep Capture action. Mr. Mitchell wrote that "at trial we plan to call evidence that we intended no malice in alleging Mr. Nazerali, although not himself involved in drug dealing or terrorism, has had questionable dealings with shady people".

[83] Prior to commencing the Deep Capture action the Articles had been posted to other websites. These included "Before It's News", "Regator", "Boardreader" and "Yahoo Finance". On Yahoo Finance, Patrick Byrne identifies himself as editor-in-chief of deepcapture.com. He asserts that "deep capture remains committed to the highest journalist standards. Any error in our work should be pointed out immediately, and we will rectify it". It ends with:

> All goombas should understand that the day anything untoward occurs is the day that The Collected Works of Mark Mitchell 2008-2011 appears in the in-boxes of 41.7 million people.

[84] The plaintiff viewed those words as a threat to damage his reputation further if he complained about the website. On his examination for discovery Mr. Byrne testified that to him "goombas" means "thugs".

[85] A screen capture dated November 17, 2011 of a Google search of the plaintiff's name shows a search result for "The Miscreants's Global Bust-Out (Chapter 15): Ali Nazerali". Mr. Nazerali followed a link on one of the search engines and landed on "Calibrated Confidence" which reproduces large portions of the Deep Capture website concerning the Articles.

[86] In his evidence in chief, the plaintiff was taken to the defendants' third amended response to the amended notice of civil claim. The plaintiff denied the truth of all of the allegations of his misconduct described in the paragraphs taken from the third amended response reproduced in paragraph 13 of these reasons for judgment.

[87] Mr. Nazerali testified that he has created four websites to try to get "his side of the story out". He hoped to dispel the notion that "where there is smoke there is fire". He retained a search engine optimization firm to improve the ranking of his postings.

[88] On the website "it could happen to you", which the plaintiff testified was generated by a firm he retained, he described how he "was victimized in a series of articles by an unscrupulous writer on an Internet website".

[89] On March 26, 2015, Mr. Byrne was examined for discovery in the two defamation actions. It was recorded by video. Mr. Byrne was not in Vancouver. Mr. Nazerali testified that during a break in the course of the examination, Mr. Byrne asked who was present in the room in Vancouver. He was told by his counsel, in the presence of Mr. Nazerali, that Mr. Nazerali was one of those present. Mr. Byrne responded that he would like to speak to Mr. Nazerali. At the end of the examination for discovery, Mr. Byrne again asked to speak to Mr. Nazerali and, in the presence of the court reporter and of counsel, Mr. Byrne said to Mr. Nazerali "I know your kind,

you are not the kind that does the dirty work themselves. You employ others to do your dirty work. I hate that kind of people".

[90] Mr. Nazerali described the impact of the publication of the defamatory words on him as "the cruelest form of torture and punishment one can possibly imagine". He observed that a person can be jailed, and yet have a date on which they may be redeemed in society, but defamation of the type he was exposed to is like a "perpetual sentence". He observed also that over the past four years he has endured considerable emotional pain. His children have been impacted. On social occasions, he has frequently been faced with questions about the assertions in the Articles. In business, the effect has been devastating. His health has been "disturbed" and he now frequently takes medication to enable him to sleep.

The Cross-examination of the Plaintiff by Counsel for the Deep Capture Defendants and Mr. Bagley

[91] Mr. Nazerali was subject to a rigorous and searching cross-examination for six days on a broad range of topics relating to his business affairs over many years. The theme of the questioning throughout was that Mr. Nazerali's business practices, particularly in Amsterdam and in Vancouver, have been replete with dishonesty.

[92] The cross-examination closely mirrored the "particulars" pleaded by the Deep Capture defendants to support their allegation in paragraph 8 of the third amended response to the amended notice of civil claim that the "defamatory statements", alleged in paragraph 12 of that notice of civil claim, are "true in substance and in fact". Those particulars are reproduced at paragraph 13 of these reasons.

[93] I will not review and comment on all the questions asked of and answered by Mr. Nazerali on his cross-examination. I will touch on some questions and answers that reveal how Mr. Nazerali responded to the cross-examination. I will begin with some reference to the cross-examination about the plaintiff's involvement in First Commerce Securities in Amsterdam.

[94] The activities of First Commerce Securities in Amsterdam, in which Mr. Nazerali was a dominant figure, were characterized as a "boiler-room" operation the indicia of which are a telephone call centre, usually operating from temporary premises, employing numbers of less than honest high pressure sales people with fake names who engage in cold-call telephone techniques to attempt to create a bogus market for shares of dubious value. It was put to Mr. Nazerali he enjoyed saying to his staff that "every morning an ignorant man gets up for us to find him and turn him into our client". Mr. Nazerali denied he ever used that language.

[95] Mr. Nazerali denied that First Commerce Securities, while he played a role in its affairs, operated dishonestly or illegally. He denied the particular assertion that, while he was involved with First Commerce, teams of high-pressure sales callers from a centre or centres in Amsterdam attempted to persuade the gullible to purchase essentially worthless shares.

[96] Mr. Nazerali explained that during his involvement, First Commerce purchased customer mailing lists to enable it to send information to potential purchasers of shares, asking them to respond in writing if they were interested. If they responded, only then were they contacted by telephone. He insisted there was no impropriety in this practice. He testified that First Commerce also advertised its services in a number of newspapers published in various parts of the world. A reader was invited to clip a coupon from the newspaper and return it to First Commerce Securities at an address provided. Mr. Nazerali's evidence was that, in response to this program of advertising, hundreds of inquiries were received daily both in writing and by telephone.

[97] Mr. Nazerali was asked about a meeting he attended in Amsterdam with Katia Adler, who was then the managing director of First Commerce Securities. The meeting occurred at a time when Mr. Nazerali was investigating whether he should become involved in First Commerce. The discussion was about the premises in Amsterdam out of which First Commerce conducted business, and the methods employed by First Commerce to sell securities. They discussed the difficulties

encountered by the company in doing business in the Netherlands and difficulties experienced with the Dutch authorities. Ms. Adler informed Mr. Nazerali that the Dutch authorities had concerns about the shares in which First Commerce was "making a market". The following from Mr. Nazerali's examination for discovery of November 26, 2012 in the Deep Capture action was put to him:

Q Okay. What other authorities?

A They had issues with the stock exchange. They had issues with employment permits. They had issues with the companies whose shares they were making a market on.

Q And what companies did they have issues with, the companies whose shares they were making a market on?

A Primarily two. A company called Devoe-Holbein.

Q Could you spell that?

A D-e-v-o-e, and the second word is Holbein H-o-l-b-e-i-n.

Q Is that hyphenated?

A I believe so, maybe.

Q What was the -- that company, what was its business?

A They had developed a technology to extract minute amounts of substance from larger substrates. So, for example, theoretically you could recover precious metal from sea water, assuming that there's a sufficient kind of the precious metal or you could remove toxic materials.

One specific application might be removing the uranium or the isotopes from heavy water in nuclear reactors.

Q Okay. So why was that company concerned? Why was it giving problems to First Commerce according to Katia Adler?

A Difficulties in raising money, difficulties in explaining what the business of the company was.

Q Devoe-Holbein?

A Yes.

Q Who's having the difficulties, Devoe-Holbein or First Commerce?

A Both.

Q What did you mean by "making a market"?

A Devoe-Holbein's shares were not registered or admitted for trading on any type of stock exchange.

Q All right.

A There were only two market makers for that stock.

Q What is a market maker?

A Someone who calls a market and helps determine a price at which you can buy the shares or sell the share.

Q And who were the two market makers?

A one was First Commerce Securities. The other one was a Dutch bank called HBU.

Q And was this a problem that they were making markets in these shares?

A The problem was a lack of transparency.

Q And what was missing in the transparency?

A The fact that they were not listed on any exchange.

[98] Mr. Nazerali agreed his answers to the above questions were true.

[99] Mr. Nazerali and Ms. Adler spoke about the sales methods employed by First Commerce. The following from his examination for discovery of November 26, 2012 was put to him:

Q And what did Katia Adler say about the method of selling?

A She said that there had been a lot of discussion in the company internally about sales practices, cold calling.

Q What was the discussion about sales practices?

A There were a lot of Canadians there who had previously been stock salesmen and who had come to work in the Netherlands and they were not adequately papered in terms of their immigration permits, work permits, things of that sort.

Q This is what Katia Adler is reporting to you at the second meeting, the one at the head office?

A Correct.

Q Okay. How many Canadians?

A As I recall at the time there were probably about 10 or 12.

Q Okay. And not properly papered, is that what today we'd call an illegal immigrant or something?

A They weren't there illegally, but they were not permitted to work.

Q. I see. So anything else about sales practices that she reported to you?

A Yes.

Q What else?

A That some clients had complained about the high pressure sales tactics.

[100] Mr. Nazerali agreed his answers truthfully reflected what Ms. Adler told him.

[101] Ms. Adler and Mr. Nazerali discussed a concern within First Commerce that the Canadians employed to sell shares may have engaged in improper sales tactics. Mr. Nazerali agreed that he had asked Ms. Adler about why there were so many Canadians working for First Commerce and was told that Mr. Kott, who came from Canada, had attracted Canadians to come to the Netherlands to work for First Commerce. The implication of the questions was that Mr. Kott was no more scrupulous than were the Canadians he employed.

[102] From the same examination for discovery transcript, the following questions and answers were put to Mr. Nazerali:

Q I see. So nobody was egging them on. They were just these untrained Canadians working without the right to do so in the Netherlands and were taking it upon themselves to make cold calls?

A No. The Canadians apparently were leading little teams of non-Canadian personnel.

Q Oh. So there were more than the 10 or 12 Canadians working?

A Yes.

Q There were a bunch of other people who were what, local people?

A yes.

Q and the Canadians were running these teams. How big were these teams?

A I think the staff total was about 40 people at the time.

The "other" people, he testified were spread over three locations in Amsterdam.

[103] Mr. Nazerali testified that when he became directly involved with First Commerce Ms. Adler's employment was terminated.

[104] Lengthy portions of the cross-examination concerned the affairs of Imagis, which company, it was suggested, was employed to further Mr. Nazerali's dishonest aims. It was suggested to Mr. Nazerali that when Pembridge publicly recommended

a share price of $4.10, when the shares were trading much lower, it must have been "crystal clear" that Mr. Thomas had "decided to pump the stock". Mr. Nazerali denied that had become clear to him at all. He accepted it was "unusual" for Mr. Thomas to have issued the press release, but denied it was so extraordinary that he must have known that Mr. Thomas was up "to monkey business". Mr. Nazerali denied he ever knew Mr. Thomas was "up to monkey business". Mr. Nazerali was reminded he had used that phrase himself in his evidence in chief to characterise Mr. Thomas' conduct in a manner that led him to conclude that Mr. Thomas should come on the board of Imagis and be required to make regulatory filings. Mr. Nazerali insisted he had no reason to believe Mr. Thomas had acted dishonestly in his dealings with Imagis and, in particular, did not accept the press release was part of a "pump and dump" scheme in which he was a participant.

[105] The plaintiff's attention was directed to the Imagis press release, which is copied in paragraph 49 of these reasons, and in particular to the sentence which reads: "Since our engagement of Pembridge earlier this year, they have brought a high degree of professionalism and decorum to the relationship". It was suggested to the plaintiff that this sentence is inconsistent with his evidence that he was "livid" about Mr. Thomas' conduct. Mr. Nazerali explained that he simply was not prepared to engage in a public controversy with Mr. Thomas. A few months later, he came to the conclusion that Mr. Thomas had failed badly to perform his role as a director of Imagis and Mr. Thomas resigned.

[106] The plaintiff was cross-examined about some of the circumstances surrounding the *ex parte* application for an injunction. It was suggested that he had been less than candid in his affidavit evidence, and, in particular, had not provided the Court with a copy of the transcript of his telephone conversation with Mr. Mitchell. He explained that at that time he had listened only to an audio recording, but had given the CD or DVD of the recording to his counsel.

[107] Although the allegations of the "defamatory statements" found at paragraph 12 of the amended notice of civil claim were touched on in Mr. Nazerali's cross-

examination, no questions were asked about any of the following matters that the plaintiff alleges are defamatory:

(a) the bombing of Mr. Kott's car and Mr. Nazerali's intervention with the mafia;

(b) Mr. Nazerali's dealings with the Italian or Russian mafia;

(c) arms dealing in Africa;

(d) laundering $4 billion for the Russian government and the Russian mafia;

(e) involving a "Mafia capo" in "Ali Nazerali's BCCI brokerage";

(f) discussing with Michael Milken and others "ways in which to destroy some big companies";

(g) being on "especially close terms with jihadis";

(h) "working relationships" with "members of Al Qaeda's Golden Chain … La Cosa Nostra, the Russian Mafia, and others in the Milken network";

(i) "Ali Nazerali got his start as an arms dealer to the mujahedeen";

(j) "Nazerali and Gokal were important figures in the Bank of Credit and Commerce international (BCCI), the massive criminal enterprise that did business with everyone from La Cosa Nostra and the Russian Mafia to Columbian drug cartels";

(k) "Nazerali formed a fund, Star Soft, in partnership with members of the Mogilevich organization...and Mufti al Abbar, who was an honorary colonel in the Libyan army, and the man in charge of manipulating the markets for Libyan dictator Muammar Qaddafi";

(l) "Nazerali's business partners have included: 1) the Mogilevich organization (instrument of Russian intelligence, tried to sell enriched uranium to Al Qaeda); 2) Osama bin Laden's favourite financier (Yasin al Qadi); 3) Mufti al

> Abbar, chief market manipulator for Muammar Qadaffi … Habib Bank (bankers to Daniel Pearl's kidnappers and D-Company, among others. There are more: 6) Sergei Chemezov (Russian intelligence operative and Russia's chief arms dealer...); 7) DeCalvacante Mafia capo Phil Abramo ... And the list goes on: 14) the Ndrangheta Mafia organization in Italy; 15) an impressive number of securities traders who are also narco-traffickers (such as Paul Combs, until Combs was whacked by Nazerali's mobster friend Egor Chernov);"

[108] Mr. Nazerali was not cross-examined by counsel for Overstock.com, Inc. ("Overstock").

The Overstock Action Pleadings

A. The Notice of Civil Claim

[109] The plaintiff alleges that the publishers of the defamatory words on the website included the defendants in the Overstock action.

[110] It is alleged:

a) the defendant Overstock has an office in the State of Utah, but does business in Canada and in the United States;

b) the defendant Judd Bagley is an employee of the defendant Overstock and of Deep Capture LLC of which he is a director;

c) Mr. Bagley acted in the course of his duties to both companies when the defamatory words were published;

d) Mr. Bagley designed and operates the website and "is a publisher of all expression contained" in the website;

e) particulars of the defamatory publications are provided and are identical to those in the Deep Capture action, except for the italicized words in

paragraph 3 of these reasons which do not appear in the Overstock notice of civil claim;

f) the published words "meant and were understood to mean 'that the plaintiff is a criminal, arms dealer, drug dealer, terrorist, fraud artist, gangster, mobster, member of the Mafia, dishonest, dangerous and not to be trusted'";

g) the defamatory words were republished on 15 particularized Internet sites "read by many people in British Columbia and the world";

h) further defamatory words were published by the defendants in the Overstock action in January 2012 on the website. Those words are:

> Commencing in or about January of 2012 and continuing through the date of this Notice of Civil Claim, the defendants have also published further false and defamatory statements about the plaintiff on www.deepcapture.com as follows:
>
> a) "Nazerali's involvement with First Commerce Securities, which has been described as history's largest-ever "boiler room" operation ("boiler room" being a common name for brokerages that "pump" stocks that are subsequently "dumped" to rip off investors)."
>
> b) "Nazerali later claimed in an affidavit filed in Canadian court proceedings that Ayla Holdings only had a "conditional" agreement to purchase First Commerce, but a number of sources allege that Nazerali was involved along with Kott in the operations of the brokerage during the period from 1984 to 1986"
>
> c) "According to multiple sources, including "False Profits," Nazerali was, like Raouff, also involved in the arms business, and it is likely that he began selling arms while working for the Gulf Group."
>
> d) "Ali Nazerali wants his past sealed in Orwell's memory hole"
>
> e) "Ali Nazerali, a Canadian resident who has operated boiler rooms (though he denies it)"
>
> f) "Ali Nazerali wants to keep Deep Capture and its reporting away from the public"
>
> g) "Now that we are back on-line you deserve to know what happened, especially since the facts should cause concern in everybody that appreciates the role a free press and free speech play in a free nation (and the offending story will be republished, in full, and with a great deal of new information

> that Nazerali's legal jousting caused to come our way: thank you, Ali Nazerali)."

i) in their ordinary meaning, the further defamatory publication was understood to mean that the plaintiff has a past of illegal activity; has lied about his past and is attempting to cover up his lies and his terrible past; and the plaintiff was an arms dealer and operated illegal stock scams;

j) the publication of defamatory words was "motivated by express malice of the defendants, arising from the known publication of falsehoods, continued publication of falsehoods after [the defendants] knew or ought to have known of their falsity, and the treatment of the plaintiff as an 'enemy' in the campaign carried out on [the website] and elsewhere;

k) the defendant Byrne is the editor-in-chief of the Deep Capture website and, in conjunction with his role with the defendant Overstock, is vicariously liable for the defamation of the plaintiff;

l) the defendant Byrne "controls the activities of the defendants Bagley and Karpak" and they report to him;

m) the resources of "Overstock, Inc. [*sic*] have been used in the publication" of the website "such that Overstock, Inc. [*sic*] is a publisher or is alternatively vicariously liable".

[111] The plaintiff seeks general, special, punitive and aggravated damages against all defendants in the Overstock action. The named defendant Evren Karpak was not served with the notice of civil claim.

B. The Overstock Response to Civil Claim

[112] Overstock pleads that:

a) it is "a discount online shopping retailer that sells products such as furniture, rugs, bedding, electronics, clothing, jewelry, and apparel. Overstock's business does not include or relate to news or journalism websites";

b) Patrick Byrne, the defendant in the Deep Capture action, is Overstock's Chief Executive Officer;

c) Overstock "is a separate and distinct legal person from Byrne";

d) Overstock "has not and does not direct or control the activities of Byrne in his personal capacity";

e) Byrne is a media commentator on United States financial markets and does not act nor represent himself in that role as acting in other than his personal capacity;

f) Overstock has no legal relationship of any kind with Deep Capture LLC and did not control or authorize anyone in relation to the publication of the defamatory statements;

g) the website explicitly stated at all material times that Deep Capture LLC is not "part of or owned by Overstock";

h) the defendant Judd Bagley was employed by Overstock and not by Deep Capture LLC;

i) the defendant Bagley did not write or publish the alleged defamatory words; and

j) if the alleged defamatory words are found not to be defamatory, or are found to constitute fair comment or responsible communication, Overstock cannot be found liable to the plaintiff.

[113] Overstock adopts and pleads the facts "set out in part one, paras. 7 - 11 and 14 of the second amended response to amended claim filed in the [Deep Capture] action on July 30, 2014", most of which include the extensive recitation of the plaintiff's alleged misconduct reproduced at paragraph 13 of these reasons. The adopted paragraph 14 reads as follows:

> Further, and in the alternative, if the plaintiff has suffered any damage or injury to reputation as alleged or at all (which is not admitted [but] denied), the defendants say in mitigation of damages that before publication of the words complained of in this action, the plaintiff had a generally bad reputation as a notorious boiler-room operator who had associated in business with convicted stock swindlers.

The Second Amended Response to Civil Claim of Judd Bagley

[114] Mr. Bagley admits Deep Capture LLC owns the Deep Capture website and he pleads that:

a) he was exclusively and continuously employed by Deep Capture LLC from April 2008 to September 2010. From September 2010 until September 2013, he was employed exclusively by Overstock, except for a period of time in early 2012 when he was employed part-time by Deep Capture LLC;

b) he did not write, edit, approve, encourage, authorize or endorse in any way, however minor or inconsequential, the publication of the "words complained of on the Deep Capture website";

c) "the plaintiff had a generally bad reputation as a notorious boiler-room operator who had been associated in fraudulent ventures and stock swindlers" based in Europe and North America;

d) if the words complained of are defamatory, they are true in substance and in fact. He relies on the allegations pleaded by the Deep Capture defendants which are reproduced at paragraph 13 of these reasons and continuing to subparagraph (oo) of the quoted material. Thereafter Mr. Bagley does not adopt the allegations of the Deep Capture defendants, but provides his own description of the alleged "pump and dump" scheme for Imagis stock.

[115] The remainder of Mr. Bagley's response pleads the defences as found in the Deep Capture response including alleging consent to the republication of the words complained of; fair comment, and that this Court lacks jurisdiction to entertain the action.

[116] Although neither Mr. Bagley nor Overstock delivered a *Constitutional Question Act* notice, Mr. Bagley in his pleading refers to changes in the *Supreme Court Civil Rules* that he alleges disadvantage defendants in defamation actions and he invokes section 2(b) of the *Canadian Charter of Rights and Freedoms* as well as the *First Amendment to the Constitution of the United States of America;* the *Securing the Protection of our Enduring and Established Constitutional Heritage Act,* and *New York Times Co. v. Sullivan.*

The Plaintiff's Other Witnesses

[117] Floyd Wandler discussed business matters of mutual interest with Mr. Nazerali in late 2011. Mr. Wandler described his involvement with a company which he testified had a sophisticated board. Before engaging in a business venture with Mr. Nazerali, whom Mr. Wandler did not know well, he conducted a Google search of Mr. Nazerali and in doing so, landed on the Deep Capture website. After spending two to three hours reading the Articles, he discussed what he had learned with his chief financial officer and then telephoned Mr. Nazerali to tell him that he could not recommend to his board that there be any further dealings with Mr. Nazerali.

[118] John Paul Thompson has known Mr. Nazerali since 1992 and had business dealings with him over many years. He was involved with a company called Union Securities Ltd., but he sold his interest in 2012 and my understanding is he has been retired since that time.

[119] In 2011, Mr. Thompson became aware of the Deep Capture website and spent some time reading it. He did not believe what was said about Mr. Nazerali and concluded it “was ridiculous”.

[120] Sam Hirji has known Mr. Nazerali for many years and considers him to be a friend. Mr. Hirji’s father and Mr. Nazerali’s father were also friends. Mr. Hirji became aware of the website in 2011. A “number of people” brought the website to his attention. He was asked by some “if I really know this man”.

[121] Mr. Hirji testified that he spent considerable time reading the website. He had done business with Mr. Nazerali and had difficulty believing what he saw written about him.

[122] Zahir Dhanani is the founder of Bread Garden, a Vancouver catering company. He is also involved in a number of public companies, most of which have engaged in the mining industry. Mr. Dhanani has known the plaintiff for more than 20 years and they have done business together. When he saw the website in 2011, he concluded it was "outrageous", "crazy", "completely false", and "laughable". He described Mr. Nazerali as a "very ethical businessman" and a "family man".

Examination for Discovery of the Defendants tendered pursuant to Rule 12-5(46)

A. Examination for Discovery of Mark Mitchell

[123] Evidence given on examination for discovery by Mr. Mitchell was tendered in evidence by the plaintiff, and from that evidence I derive the following:

i. Mitchell wrote the 21 chapters of the Articles and once Byrne had read the chapters, they were posted to the website;

ii. Mitchell is employed by the defendant Deep Capture LLC to write the Global Bust Out articles in which the plaintiff has featured;

iii. Prior to the commencement of the Deep Capture action, Byrne did not ask Mitchell about the steps he had taken to verify the statements on the website about the plaintiff;

iv. Mitchell did not attempt to contact the plaintiff before posting the Articles;

v. The website was designed to allow readers to respond so that the Articles "got the widest possible circulation";

vi. Mr. Mitchell has read the transcript made by Mr. Nazerali of the telephone conversation between the two of them and found nothing in it "as being inaccurate";

vii. Many of Mr. Mitchell's "sources" about Mr. Nazerali's conduct "were very shady characters" and in Mr. Mitchell's mind that is a reason why "they had first-hand access to information";

viii. After his telephone conversation with the plaintiff, Mitchell emailed Mr. Byrne "this is going to be fun" and "I am going to talk to him on Friday and see if I can meet him in person", and also "unless you [Byrne] have objections I am also going to suggest to him (I can do this in a roundabout way) that while I consider the facts to be correct, I am open to changing the story if he can provide other verifiable information that would be valuable", and "I might even suggest that I will be willing to remove his name from the story altogether if he were to provide me with, say, trading records of global terrorist Yasin al-Qadi", and lastly "if Nazerali agrees, nothing lost, after he gives me the information I will just put him back in the story. Sleazy, but, well it is what it is";

ix. Mitchell posted all 21 chapters without speaking to the author Diane Francis, who had written "Contrapreneurs" in which the plaintiff is mentioned, nor to the author of any other book on which Mitchell relied to write the 21 chapters.

B. Examination for Discovery of Patrick Byrne

[124] Patrick Byrne was examined for discovery in the Deep Capture action on September 23, 2013 and the following can be derived from that examination:

i. Byrne is the publisher of the website deepcapture.com and he ultimately controls what is published on the website;

ii. Byrne reviewed each of the 21 chapters before they were posted to the website;

iii. Byrne approved for publication the chapter which refers to "the Belzbergs having been implicated in multiple stock and manipulation schemes with others in the Milken network including Ali Nazerali";

iv. Byrne could not recall if he was told that Mr. Mitchell had attempted to contact the plaintiff before publication of the Articles on the website;

v. Mr. Byrne did not approve of Mr. Mitchell's stated intention to obtain information from the plaintiff on the pretense only of removing his name from the website.

The Non-suit Application of the Defendant Overstock

[125] At the close of the plaintiff's case, the defendant Overstock applied, pursuant to R. 12-5(4), for dismissal of the Overstock action on the ground that there was no evidence to support the claim.

[126] Overstock submitted that there was no evidence that either Mr. Byrne or Mr. Bagley had published the alleged defamatory words while in the course of employment with Overstock, nor was there evidence that Overstock had contributed to the risk of the publication of the defamatory words on the website that it did not own.

[127] I dismissed the application for a non-suit.

[128] The defendants in both actions elected to call no evidence.

The Governing Law

A. The Elements of the Tort of Defamation

[129] In *Grant v. Torstar Corp*., 2009 SCC 61, at paras. 28 and 29, McLachlin C.J.C. wrote:

> [28] A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism: see, e.g., R. A. Smolla, "Balancing Freedom of Expression and Protection of Reputation Under Canada's *Charter of Rights and Freedoms*", in D. Schneiderman, ed., *Freedom of Expression and the Charter* (1991), 272, at

p. 282. (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous *per se*: R. E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), vol. 3, at pp. 25-2 and 25-3.) The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.

[29] If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

B. Malice

[130] In *Smith v. Cross,* 2009 BCCA 529 at paras. 32-34, Madam Justice Kirkpatrick, with whom the other judges agreed, wrote:

> [32] The term "malice" is more expansive than the everyday meaning of a desire to harm another. Brown at 16.3(2) suggests the alternate language of "bad faith". This Court summarized the definition in *Creative Salmon* at para. 37:
>
> > In *Botiuk* at para. 79, malice was defined to include "ill will" and "any indirect motive which conflicts with the sense of duty created by the occasion [in the case of qualified privilege]". The definition of malice stated by Mr. Justice Dickson in *Cherneskey* at 1099, and adopted by Mr. Justice LeBel in *WIC Radio* at para. 102, includes "spite or ill will" and "any indirect motive or ulterior purpose".
>
> [33] The Supreme Court of Canada summarized the law of malice and qualified privilege in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 at para. 145:
>
> > Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in *Cherneskey, supra*, at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. See, also, *Taylor v. Despard*, [1956] O.R. 963 (C.A.). Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. See *McLoughlin, supra*, at pp. 323-24, and *Netupsky v. Craig*, [1973] S.C.R. 55, at pp. 61-62.
>
> [34] In *Canadian Libel and Slander Actions* (Toronto: Irwin Law, 2004) at 299, R.D. McConchie and D.A. Potts reduce this statement to a helpful framework for the categories under which a finding of malice can be made. A defendant is actuated by malice if he or she publishes the comment:
>
> i) Knowing it was false; *or*
>
> ii) With reckless indifference whether it is true or false; *or*
>
> iii) For the dominant purpose of injuring the plaintiff because of spite or animosity; *or*

iv) For some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.

More than one finding can be present in a given case (McConchie and Potts at 299).

[131] In *A.T.U. v. I.C.T.U.* (1997), 49 Alta L.R. (3d) 1 (Q.B.), Lutz J. of the Alberta Court of Queen's Bench discussed malice at paras. 73, 74 and 75, which read as follows:

> [73] There are a number of factors that can indicate the presence of malice. For example, malice can be found where the published statements are false, and are known to be false by the Defendant. In addition, the conduct of the parties, or the manner of use of the words can indicate the presence of malice (*Lawson v. Thompson* (1968), 66 W.W.R. 427 (B.C. S.C.)). In addition, "[m]alice may be shown by the constant repetition of the same or similar remarks … The evidence is admissible even though the subsequent words may be independently actionable" (Brown, *The Law of Defamation in Canada,* pp. 946-7).
>
> [74] The Plaintiffs rely heavily on Brown's text *The Law of Defamation in Canada* in their argument, and I reproduce some of the helpful sections below. According to Brown, the evidence necessary to establish malice may be either intrinsic or extrinsic. He looks first at the intrinsic evidence of malice:
>
> > Malice may "be inferred from the terms of the defamatory statements themselves." Thus, the court will look to the "mode and style" of the publication, or the language which the defendant "has chosen to couch the communication," to see if there is unnecessary violence of expression or intemperance in language. Words exhibiting an "unwholesome virulence" or exaggeration, or which are "couched in terms stronger than necessary to gain the object in view", or are "entirely disproportionate to", or "beyond the absolute exigence" of, or utterly beyond and disproportionate to, the facts or circumstances of the occasion, may give rise to an inference of malice. This is particularly true where the violence or intemperance is the product of deliberation. *However, violent language may be more expectable where someone is responding to a personal attack. For that reason, it may be inappropriate to find malice merely in the way in which the defendant has framed his response.* (Brown, *The Law of Defamation in Canada,* pp. 948-9) [Emphasis added by Lutz J.]
>
> He then turns his mind to the extrinsic evidence of malice.
>
> > In proving actual malice it is appropriate for the plaintiff "to interrogate as to the steps or precautions taken, the inquiries made, and the information obtained by the defendant before publication." Evidence of malice may be found in the conduct of the defendant throughout the course of events, both before and after the publication of the

> defamatory remarks, including the course of the judicial proceedings (pp. 950-1).

The motives of the Defendant are relevant.

> The court will receive evidence of any spite or ill-will on the part of the defendant which may have motivated him to speak and from which malice may be inferred. Therefore, the intent with which the defendant published the defamatory statement is relevant on the issue of malice. The court will search for evidence of personal animosity, threats, rivalry, or squabbles, hostility or bitterness between the parties. It is relevant to inquire whether or not the defendant had previously waged a personal vendetta against the plaintiff, or harboured ill feeling or a grudge against him. Evidence that the defendant belonged to a dissenting group within an organization to which the plaintiff belonged, engaged in any prior altercations, quarrels or litigation with him, acted out of irritation, or previously exchanged heated or defamatory words, is also relevant to the issue of malice. Thus malice may be found in evidence that the defendant had systematically libelled the plaintiff over a period of several years … (pp. 951-2).
>
> By the same token, the defendant may introduce evidence that he and the plaintiff were never previously acquainted, or that they knew each other for only a short period of time, in order to show that he could not have harboured any personal animosity against the plaintiff or that he did not act maliciously. … He may also show lack of malice by evidence demonstrating that the plaintiff was treated no differently by the defendant from other persons in the same position (p. 952).

[75] The Defendant must have known the words were false, have not believed in their truth, or have been reckless as to their truth.

> To prove malice it is not sufficient merely to show that the words are false and defamatory. The plaintiff must go further and introduce evidence that the words were false to the knowledge of the defendant at the time he published them, or that the defendant did not believe they were true, or that he recklessly published that which was untrue, or had absolutely no foundation for his charge. … (pp. 952-3).

"Malice may also be shown if there is evidence that the Defendant acted out of 'gross and unreasoning prejudice', vindictiveness, intemperance, or in the heat of unreasoning anger" (p. 953).

C. The Defences Pleaded

i. Truth

[132] On page 10-1 of *Brown on Defamation: Canada United Kingdom, Australia, New Zealand, United States*, 2d ed, vol 3 (Scarborough, Ontario: Carswell, 1994) (loose-leaf updated 2013, release 1) these words are found:

> Justification or "truth" is a complete defence to an action for defamation. If the defamatory publication is false, the defendant will be liable even though he or she may have published it with an honest belief in its truth based upon reliable information supplied by someone else. The defendant must prove the truth of every defamatory imputation and he or she may do so if the justification meets the sting of the charge and it is shown that the publication is substantially true. It is not sufficient to show that the plaintiff has engaged in other types of conduct equally or more reprehensible in character if the defendant cannot justify the particular conduct charged in his or her publication. Nor can he or she justify charges of general bad conducts or acts of persistent misconduct by evidence showing a single incident or isolated instances of such conduct. Where the defendant enters a plea of justification, that is considered a republication of the original defamation and the persistence in such plea may be used by the plaintiff for the purpose of showing an aggravation of damages.

ii. Fair Comment

[133] In *Grant, supra*, the Supreme Court of Canada at para. 31 set out the test to support the defence of fair comment as follows:

> [31] …a defendant claiming fair comment must satisfy the following test: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognisable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?; and (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice.

iii. Responsible Communication

[134] In *Grant* at para. 126, the Supreme Court of Canada described the elements of the test a defendant must meet to succeed in this defence, namely:

> [126] The defence of public interest responsible communication is assessed with reference to the broad thrust of the publication in question. It will apply where:
>
> A. The publication is on a matter of public interest, and
>
> B. The publisher was diligent in trying to verify the allegation, having regard to:
>
> (a) the seriousness of the allegation;
>
> (b) the public importance of the matter;
>
> (c) the urgency of the matter;
>
> (d) the status and reliability of the source;

> (e) whether the plaintiff's side of the story was sought and accurately reported;
>
> (f) whether the inclusion of the defamatory statement was justifiable;
>
> (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); …

iv. The Constitutional Argument

[135] This argument is advanced in the abstract without any facts unique to this trial. I will address the constitutional argument now rather than wait until I describe my findings of fact on this trial and apply the relevant law.

[136] In *Pressler v. Lethbridge* (1997), 41 B.C.L.R. (3d) 350 (S.C.), Mr. Justice Owen-Flood of this Court dismissed a pretrial application by the defendants to revise the common law of defamation. The proposition urged on Owen-Flood J. was that:

> [10] … in order to conform with *Charter* values the common law of defamation should require the plaintiffs to prove that the defendant was at fault through acting maliciously, or alternatively, negligently in publishing the words complained of. The defendants also submit that *Charter* values mandate that the onus of proof be shifted from the defendant to the plaintiff, who should bear the onus of proving that the words complained of were false. Lastly, the defendant would have the court require proof of actual damage to reputation be established on the evidence.

[137] Owen-Flood J. observed that the inspiration for the application before him was the decision of the United States Supreme Court in *New York Times Co. v. Sullivan*. In that case, the Court ruled that the common law of defamation which presumes falsity once words published by the defendant concerning the plaintiff are found to have been defamatory violated the guarantee of freedom of speech in the *First Amendment to the Constitution of the United States*.

[138] The Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, considered the question of whether the common law of defamation in Canada ought to be modified in a manner similar to that in *Sullivan* so that it conformed with *Charter* values. The Supreme Court of Canada declined to take the approach of the United States Supreme Court.

[139] The Deep Capture defendants submit that the changes introduced in 2010 to the British Columbia *Supreme Court Civil Rules*, B.C. Reg. 168/2009, which constrain the obligation to make discovery of documents and limit the time available for pre-trial examinations for discovery, have the "deleterious effect" of increasing the likelihood that plaintiffs in defamation suits will fail to disclose documents that a defendant needs to be able to prove facts which the current state of the common law imposes on the defendant. Further, the Deep Capture defendants submit that the limitation on the length of examinations for discovery will encourage plaintiffs to employ "delay tactics which are calculated to thwart the discovery". Lastly, the defendants submit that the summary trial process permits a plaintiff to seek judgment on affidavits alone without cross-examination before the trier of fact who can thereby assess credibility.

[140] This Court has a discretion to enlarge the document discovery obligation of a plaintiff if good cause is shown; has a discretion to permit further time for examinations for discovery, and may order cross-examination on affidavits filed in support of a summary trial application. I recognize that cross-examination on affidavits rarely takes place in this jurisdiction before the trier of fact, but that has long been the practice in this province and I see no basis for finding that it is not a satisfactory means of getting at the truth, particularly when the transcript goes before the trier of the fact.

[141] The overriding objective of the *Supreme Court Civil Rules* is to facilitate a proceeding to be determined "on its merits". Judges are ever mindful of that principle and are not slow to apply the rules in a manner which avoids the evils the defendants fear may be perpetrated.

[142] I do not accept the constitutional argument has merit.

The Submissions of the Deep Capture Defendants

[143] The submissions are that:

(a) the plaintiff has failed to plead the defamatory words with precision;

(b) neither literally not inferentially can the words alleged at paragraph 12 of the amended notice of civil claim be understood to be defamatory of the plaintiff;

(c) if the words are defamatory, they are true in substance and in fact;

(d) the words were fair comment published without malice;

(e) the plaintiff has not demonstrated that the words have been re-published on 13 Internet sites as alleged in paragraph 12A of the amended notice of civil claim;

(f) the publication of the words was responsible communication;

(g) if the plaintiff is entitled to an award of damages, the award should be nominal because:

i. the plaintiff's general reputation prior to the publication of the words was bad,

ii. the modest scope of publication; and

(h) the plaintiff consented to the publication of the defamatory words to Nelson Scalbania, John Thompson, Zahir Dhanani and Sam Hirji. The Deep Capture defendants rely on the maxim *volenti non fit injuria*.

Findings on Each of the Above Submissions

A. "Precise words"

[144] The Deep Capture defendants refer to a number of authorities concerning the importance of pleadings in defamation actions. In *Canmar Grain Inc. v. Ferguson et al.* (1986), 55 Sask.R. 52 (Q.B.) Barclay J. of the Saskatchewan Court of Queen's Bench struck out a statement of claim in a defamation action for failure to disclose a cause of action writing:

> [12] In an action for defamation the actual words complained of, and not merely their substance, must be set out verbatim in the statement of claim: Capital & Countries Bank Limited v. George Henty & Sons (1882), 7 App.

> Cases 741, at p. 771 (H.L.); Shannon v. King, [1931] 2 W.W.R. 913 (B.C.C.A.) and Berry v. Retail Merchants Association of Saskatchewan et al., [1924] 1 W.W.R. 1279 (Sask. C.A.).
>
> …
>
> [16] At p. 571 [of *Collins v. Jones*, [1955] 1 Q.B. 564] Denning L.J. states:
>
> > "In a libel action it is essential to know the very words on which the plaintiff founds his claim. As Lord Coleridge C.J. said in Harris v. Warre: "In libel and slander everything may turn on the form of words, and in olden days plaintiffs constantly failed from small and even unimportant variance between the words of the libel or slander set out in the declaration and the proof of them . . . In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having using defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends."
> >
> > "Assuming that these letters did contain some statements defamatory of the plaintiff, that is not sufficient to ground a libel action. She must show what the actual words were. A plaintiff is not entitled to bring a libel action on a letter which he has never seen and the contents of which he is unaware. He must in his pleading set out in the words with reasonable certainty: and to do this he must have the letter before him, or at least have sufficient material from which to state the actual words in it. A suspicion that it is defamatory is not sufficient. He cannot overcome this objection by guessing at the words and putting them in his pleading." [Emphasis in original.]

[145] In *Shannon v. King*, referred to by Barclay J., MacDonald C.J.B.C. observed at 913 that "[t]he law of libel and slander is definitely settled that the libellous and slanderous words must be set out, and that practice has existed for a long time".

[146] In my opinion, the plaintiff has pleaded his case with the precision that the authorities require. In paragraph 3 of these reasons the precise words the plaintiff alleges are defamatory are repeated. They are taken from the website and copied into the pleading verbatim.

B. The published words are not defamatory of the plaintiff

[147] The assertion that the words complained of by the plaintiff are not, in their literal meaning, defamatory of the plaintiff is spurious. To write of a man that he:

i. does business with the Mafia;

ii. has sold arms to the mujahedin;

iii. is a market manipulator;

iv. has run stock scams;

v. has ties to the Russian mafia and jihadi terrorist groups;

vi. has been "in league" with a market manipulator who has engaged in multiple "death spiral scams";

vii. has a working relationship with La Cosa Nostra;

viii. has had business dealings with Osama bin Laden's favourite financier; Russia's chief arms dealer; a Mafia Capo; the Ndrangheta Mafia; "narco traffickers", and that he is a "specially designated global terrorist".

would tend to lower his reputation "in the eyes of a reasonable person" (See: *Grant*).

C. The words are true in substance and in fact

[148] To escape liability for publishing the defamatory words concerning the plaintiff, the Deep Capture defendants committed themselves to prove the words are justified in substance and in fact.

[149] Mr. Nazerali withstood a lengthy and aggressive cross-examination without conceding the truth of any of the defamatory words. No doubt, in a six-day cross-examination, some uncertainties or inconsistencies with his answers could be detected. I find they were not damaging to his credibility.

[150] A cross-examination over many days by a skilful cross-examiner may paint in the mind of a listener a very unflattering picture of the witness if emphasis is placed on the questions and less so on the answers. It can be seductive to fall prey to the conclusion that the questioner has woven a coherent and plausible narrative, and when accusation is piled upon accusation, they ought to be believed. The sheer weight and volume of accusations may begin to have an impact on the mind of a listener.

[151] Questions, however, are not answers. Mr. Nazerali at no time accepted the premise on which the accusatory questions rested, namely, that over many years, he has been a rapaciously dishonest businessman who consorts with people no

more honest than he is and patterns his conduct on theirs. I have no evidence before me from which I could draw those conclusions so unfavourable to the plaintiff.

[152] I have already commented that in the cross-examination of the plaintiff, no attempt was made to question the plaintiff about important portions of the amended notice of civil claim. The defendants did not attempt to prove the truth of many of the defamatory words out of the mouth of the plaintiff, nor through documents, nor through other witnesses of which there were none. Defendants who take on the onerous burden of proving that defamatory words are justified, but who offer no evidence of their own, must prove the truth of the words using the plaintiff's evidence. That was not done.

[153] I find the defence of truth must fail.

D. Fair comment

[154] To be fair comment, published words must first be recognizable as comment, not statements of fact. The published words alleged in paragraph 12 of the amended notice of civil claim allege facts. They are not comment. The defence of fair comment is not open to the Deep Capture defendants for that reason alone.

[155] I have considered Division 2 of the third amended response to civil claim of the Deep Capture defendants which contains 21 pages of the "Defendants' Version of Facts". Those 21 pages are pleaded as "particulars" of the published defamatory words and are reproduced beginning on page 10 of these reasons. They contain multiple factual allegations and are interlarded with some comment, but that cannot change the character of what are, essentially, allegations of fact.

[156] Furthermore, I find the plaintiff has proven the Deep Capture defendants conducted themselves with express malice towards the plaintiff when publishing the defamatory words. Malice is revealed by:

i. the inflammatory language of the defamatory words;

ii. these defendants' reckless indifference for the truth;

iii. the threat to keep the plaintiff in "the story" if he did not agree to become a "quality source".

iv. the motive of these defendants to inflict damage on the plaintiff;

v. Mitchell's intention (not carried out) to promise to remove the plaintiff's name from the website if he became an informant but later, once the information was received, to renege on the promise;

vi. the overt animosity, even hatred of the plaintiff, expressed by Mr. Byrne following his examination for discovery;

vii. a reckless disregard for the reputation of non-parties. The Belzbergs are an example and I also refer to the following from paragraph 8.A. ss. (xvii) of the third amended response to the amended notice of civil claim, which reads:

> The plaintiff's sale of his Imagis stock at the artificially inflated price resulting from the Imagis Pump and Dump Scheme promoted an investigation by the British Columbia Securities Commission (the "Commission"). The plaintiff had planned for this possibility, and arranged to have Peter Brown of Canaccord Capital Corporation tell the Commission that he had forced the plaintiff to sell his Imagis stock before July 9, 2002, for the purpose of repaying a loan that had been made to the plaintiff. Peter Brown told this information to the Commission, which he knew was false, with the intention and for the purpose of assisting the plaintiff avoid any legal liability, responsibility or consequences for his involvement in the Imagis Pump and Dump Scheme.

No evidence was offered of those allegations.

E. Whether the words were re-published

[157] The defendants assert it has not been demonstrated that the defamatory words were "republished". The plaintiff's witnesses testified that defamatory words were published to them. That is sufficient for liability, but I am satisfied publication on the Internet ensured a wide dissemination of the words. Wide dissemination was the intention of the Deep Capture defendants. Mr. Nazerali also testified that, on social occasions, he has been asked about the defamatory words in the Articles. I have no

doubt the intention of the Deep Capture defendants has been to damage Mr. Nazerali's reputation by spreading the libel as far as possible.

F. The publication was "responsible communication"

[158] This defence is devoid of merit. That no attempt was made by the defendants to contact the plaintiff before publication to hear his response to the assertions to be made in the Articles is sufficient to defeat it.

G. Whether the plaintiff's alleged bad reputation disentitles him to an award of damages

[159] It is pleaded by all defendants that the plaintiff's reputation was generally bad before publication of the defamatory words. The defendants were content to have proof of that allegation rest on written materials, such as the book entitled "The Contrapreneurs" written by Diane Francis. Although her name appeared on the Deep Capture defendants' list of witnesses on their trial brief, she did not testify.

[160] A plaintiff in a defamation action is presumed to come to court with a good reputation. In *Manno v. Henry*, 2008 BCSC 738 at para. 131, Grauer J. wrote:

> [131] …I accept that the plaintiffs are presumed to be of general good character and that evidence of such need not (and should not) be led in chief. It nevertheless remains open to the defendants to introduce evidence of the reputation of the plaintiff(s) at the time of publication, as was evidently done in the *Neeld* [*v. Western Broadcasting Co*. (1976), 65 D.L.R. (3d) 574 (B.C.S.C.)] case without rebuttal. According to Brown, *loc. cit. supra*, such evidence is to be limited to the plaintiff's general reputation in the community. It may not include evidence of particular acts of misconduct or of rumours and suspicions of like effect.

[161] The defendants offered no evidence to prove the plaintiff had a generally bad reputation prior to the publication of the defamatory words.

[162] In paragraph 14.A of the third amended response to the amended notice of civil claim the Deep Capture defendants plead:

> Further, and in the alternative, if the plaintiff suffered any damage or injury to reputation as alleged or at all (which is not admitted but denied), the defendants rely in mitigation of damages on the facts set out in Part 1, Division 2, paragraphs 8.A.a. to and including paragraph 8.A.ll.(ii) and in

> Part 1, Division 2, paragraph 8.A.mm. to and including paragraph 8.A.ss.xvii, which are directly relevant background context which is relevant to the subject matter of the alleged defamation or to the plaintiff's reputation or sensitivity in that part of his life.

[163] The passages referred to in paragraph 14.A of the Deep Capture pleading are set out on paragraph 13 of these reasons.

[164] As I understand, paragraph 14.A in the defendants' pleading it is intended to articulate an allegation that the plaintiff has behaved so disreputably throughout his business career that if he does not have a bad reputation he should have and thus he has a heightened "sensitivity".

[165] In *Burstein v. Times Newspapers Ltd.*, [2000] E.W.C.A. Civ 338 at para. 28, the Court referred to the decision in *Scott v. Sampson* (1882), 8 QBD 491 as follows:

> "As to the third head or evidence of facts and circumstances tending to show the disposition of the plaintiff, both principle and authority seem equally against its admission. At the most it tends to prove not that the plaintiff has not, but that he ought not, to have a good reputation, and to admit evidence of this kind is in effect as was said in *Jones v. Stevens* (11 Price, 235) to throw upon the plaintiff the difficulty of showing an uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of."

H. The *volenti non fit injuria* pleading

[166] The *volenti non fit injuria* pleading of the Deep Capture defendants wisely was not pressed in argument.

"Protected Speech" in the United States

[167] The pleading that the words complained of constitute protected speech in the United States is irrelevant to liability in these actions, but I will return to this pleading when I come to the relief claimed.

Liability in the Deep Capture Action

[168] I find that the words alleged by the plaintiff in paragraph 12 of the amended notice of civil claim were defamatory, and that the words referred to the plaintiff, and that they were widely published. I find the defendants Mark Mitchell, Patrick Byrne and Deep Capture LLC liable to the plaintiff for the tort of defamation.

[169] I do not have an evidentiary basis which satisfies me that the plaintiff has proved that the defendant High Plains Investments Ltd participated in the publication of the defamatory words. The claim against it is dismissed.

[170] I do not have evidence on which Nozone, Inc. dba Steadfast Networks could be found liable. That claim is also dismissed.

[171] Overstock is not alleged to be in the business of publishing news or comment on line or otherwise, nor does the evidence suggest it does. None of the examination for discovery evidence read in at the trial was evidence against Overstock except for an email sent by Mr. Byrne to Mr. Mitchell in which Mr. Byrne commented on the Articles. Mr. Byrne is a publisher of those chapters. I dismissed Overstock's application for a non-suit because Mr. Byrne's email was sent from the email address: pbyrne@overstock.com, and the attachments included his comments on the chapters. I concluded that was some evidence that the trier of fact was entitled to consider against Overstock. Once I had determined there was some evidence, it was not necessary, at that stage of the trial, to determine if there was other evidence that could also go to the trier of fact on that issue. I must now consider whether there is other evidence, which along with the Byrne email and its attachments, prove the case against Overstock.

[172] The plaintiff, as well as pointing to the email, points to a document posted to "Investor Village" on October 23, 2011 which was after the publication of the 21 chapters of the Articles began, and several days after the Deep Capture action was commenced and the *ex parte* injunction granted. The Overstock action was commenced almost 2 years later.

[173] The posting is apparently by Patrick Byrne who describes himself as "CEO of overstock.com." He requests the reader to "consider nothing I write here as being a comment in any way on shares of OSTK. I am here socially". He asked those who write to him to use Patrick@overstock.com email address.

[174] Mr. Byrne, assuming he was the author of the posting to Investor Village, wrote: "that's the spirit, Ali Nazerali. It looks like Ali Nazerali wants to go a few rounds. Happy to oblige. In the meantime, I wonder what injunctions these esteemed jurists of the Supreme Court of British Columbia are considering doing about these websites".

[175] Paragraph 15 of the notice of civil claim in the Overstock action under the heading "Vicarious Liability of Overstock.com, Inc." reads:

> Patrick Byrne is the Editor in Chief, writer, promoter of and a publisher of www.deepcapture.com and carries out those roles within or in conjunction with his activities as Chief Executive Officer of Overstock.com, Inc., and as such, Overstock.com, Inc. is vicariously liable for the defamation of the plaintiff published on www.deepcapture.com. Byrne as CEO of Overstock, and financier, publisher, owner, and editor in chief of Deep Capture controls the activities, and directs both Bagley and Karpak and is the person to whom they report.

[176] The only evidence which might tend to prove the allegations in paragraph 15 is the email and its attachments that led me to conclude that the non-suit application must be dismissed and, as well, the posting by Mr. Byrne to Investor Village. The comment by Mr. Byrne in the posting that "it looks like Ali Nazerali wants to go a few rounds" and his reference to injunctions granted by this Court is clearly a reference to the Deep Capture action and tends to show Mr. Byrne's involvement in the Deep Capture action but it cannot be read as evidence to demonstrate control over the Overstock action or his control of the defendant Overstock. His use of an Overstock email address is some evidence of his involvement with Overstock.com, Inc., but no more than that. The allegation in the notice of civil claim that Mr. Byrne was a publisher of the Deep Capture website and that that role was carried out within or in conjunction with his activities as chief executive officer of Overstock and that therefore Overstock.com, Inc. is vicariously liable for the defamatory publications of

Deep Capture LLC, cannot be proven by the email and posting to which I have referred.

[177] There is no other evidence to implicate Judd Bagley and Overstock.com, Inc. in the publication of the defamatory words, and therefore the claim against those defendants is dismissed.

[178] No claim for damages is made against GoDaddy.com, Inc., Google Inc. and Google Canada Corporation. I do not have evidence on which to find Nozone, Inc. dba Steadfast Networks is liable. That claim is dismissed.

Assessment of Damages against Mark Mitchell, Patrick Byrne and Deep Capture LLC

[179] Mitchell, Byrne and Deep Capture LLC engaged in a calculated and ruthless campaign to inflict as much damage on Mr. Nazerali's reputation as they could achieve. It is clear on the evidence that their intention was to conduct a vendetta in which the truth about Mr. Nazerali himself was of no consequence. Their mission was to expose what they conceive to be corrupt business practices damaging to the global economy. Mr. Nazerali became a convenient means to that end, even when he himself could not be demonstrated to be corrupt.

[180] No effort was made by Mitchell, Byrne and Deep Capture LLC to obtain Mr. Nazerali's views before publication and no effort of consequence was made after Mr. Nazerali contacted Mr. Mitchell to review the Articles to determine if they were false. On the contrary, Mr. Nazerali's approach to Mr. Mitchell was treated with scorn. It is apparent that whatever was said by Mr. Mitchell to Mr. Nazerali about making changes to the website in exchange for his cooperation was a sham.

[181] Not only are the defamatory words pleaded by the plaintiff damaging to his reputation, these defendants, instead of choosing to tone down their extravagant language once they were sued, chose to pile on the abuse with a narrative of multiple allegations of serious misconduct which are set out in paragraph 13 of these reasons. I have highlighted portions of that narrative which purport to inform the

reader that the defamatory words are true in substance and in fact and that Mr. Nazerali has engaged in a litany of illegal and, in some instances, criminal activity over many years. Paragraph 13 does not contain the defamatory words complained of, but it is an indication of the malice these defendants bear against Mr. Nazerali.

[182] The plaintiff was subjected to a prolonged and aggressive cross-examination. No misconduct was proven through the cross-examination. Mitchell and Byrne then chose not to attempt to support the aggressive cross-examination with their own testimony, but instead to call no evidence at all. The reasonable inference to draw is that they knew from the beginning of the trial that they could not justify the Articles' false and extravagant language. Their approach to the defence of the action was an attempt to intimidate the plaintiff and to humiliate him into abandoning his lawsuit.

[183] The result for Mr. Nazerali has been to inflict emotional pain as well as to disrupt business relationships built up over many years. He has incurred considerable expense to attempt to counter the effects of the false words on the website. In *Hill* at 1203, Cory J. took the following from *Gatley on Libel and Slander,* 8th ed. By Philip Lewis (London: Sweet & Maxwell, 1981):

> … In an action of libel "the assessment of damages does not depend on any legal rule." The amount of damages is "peculiarly the province of the jury," who in assessing them will naturally be governed by all the circumstances of the particular case. They are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and "the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action," and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow "for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused." They should also take into account the evidence led in aggravation or mitigation of the damages.

[184] In *Hill*, the Supreme Court of Canada held that an award by the jury of $300,000 in general damages was justified.

[185] In *Southam Inc. v. Chelekis*, 2000 BCCA 112, the defendants published defamatory words to the effect that the personal plaintiff, who was a business reporter with the plaintiff newspaper chain, had written articles for publication intended to influence stock prices for his own benefit. The Court of Appeal upheld an award by the trial judge of $250,000 in "compensatory damages".

[186] In *Ager v. Canjex Publishing d.b.a. Canada Stockwatch*, 2005 BCCA 467, the Court of Appeal upheld an award of $200,000 for general damages. The defamatory words were found in published articles in which the plaintiff is alleged to have been involved in the "peddling of a worthless" resourced property which had been "salted" and had engaged in a massive "stock fraud".

[187] In *WeGo Kayaking Ltd v. Sewid*, 2007 BCSC 49, the defendant was in competition with the plaintiff to conduct oceangoing kayaking tours. The defendant advertised on the Internet disparaging "other companies" with whom customers "will more likely stay in a soggy, wet, dirty tent and this will effect (*sic*) your whole trip…". The advertising went on to say that other tour operators (which included the plaintiff) made "First Nations become token Indians". A total of $250,000 in general damages was awarded.

[188] In *Griffin v. Sullivan*, 2008 BCSC 827 the defendant published statements on the Internet to the effect that the plaintiff was a "stalker, abuser, harasser, criminal, evil, liar, killer, sexual predator, pervert, pedophile, coward, manipulator and hate monger". The trial Judge found that the published words were "monstrous" and "so extreme that it is difficult to find case precedents that come anywhere close". $100,000 in general damages were awarded.

[189] In my opinion the sustained attack by Mitchell, Byrne and Deep Capture LLC on the reputation of the plaintiff and the changing value of money since the awards I have referred to above should lead to an award in this instance of $400,000 in general damages.

[190] In *Hill*, Cory J. wrote that aggravated damages may be awarded when the defendant's conduct has "been particularly high-handed or oppressive thereby increasing the plaintiff's humiliation and anxiety arising from the libelous statement" (at 1205). The Deep Capture defendants' conduct is consistent with that description. Mr. Nazerali testified as follows to the effects the libels have had on him:

> This is the cruelest form of torture I can possibly imagine. A person can be jailed for an offence and has a date and serves his time and can be redeemed. Internet defamation of this type is like a perpetual sentence especially with the kind of allegations half truths and statements represented as facts and are in fact false.
>
> For the last 4 years I've been in considerable pain, my children have been impacted, questions are often being asked. Nazerali is not a common name. On a social level when I attend dinner and other social functions, I am constantly being asked about these allegations.
>
> On a business level, it's been devastating. Various projects I've tried to initiate have failed after the first or second level. Health has been disturbed. Frequently have to take meds to sleep. I'm trying to control my emotions. It's the cruelest form of undeserved punishment one human could inflict on another.

[191] In *Hill*, the Supreme Court of Canada upheld an award of $500,000 in aggravated damages. I award that sum to the plaintiff.

[192] Punitive damages are justified in this case. They are meant to punish, not to compensate, and should be awarded only in those circumstances where a combined award of general and aggravated damages will not be sufficient to achieve the goal of punishment and deterrence. The tortious misconduct of Mitchell, Byrne and Deep Capture LLC demonstrates an indecent and pitiless desire to wound. There will be the award of $250,000 in punitive damages.

[193] The plaintiff has incurred the cost of retaining a search engine optimization firm to attempt to mitigate his losses. I concluded it was appropriate to do so and the evidence satisfies me that the cost has been reasonable. I award $55,000 in special damages.

The Request for an Injunction

[194] The allegation of Mitchell, Byrne and Deep Capture LLC that the website contains speech which is protected in the United States suggests the Deep Capture defendants, all of whom are in the United States, will resist enforcement of a monetary judgment of this Court against them in that country. That factor and the apparent intention to inflict as much damage on the plaintiff as possible persuades me that it is appropriate to grant a permanent injunction restraining publication, dissemination or posting on the Internet of any statements by them about the plaintiff. The permanent injunction will employ, *mutatis mutandis*, the same language as the interlocutory injunction pronounced by this Court on October 19, 2011. In *Trout Point Lodge Ltd v. Handshoe,* 2012 NSSC 245, the Nova Scotia Supreme Court at para. 104 wrote the following:

> [104] It is clear from the evidence before me that Mr. Handshoe will continue to publish the defamatory material. He says he is protected from foreign defamation judgments such as the default judgment in this proceeding by legislation in the United States. It also may be difficult, if not impossible, for the plaintiffs to recover on their judgment. It is not known what assets Mr. Handshoe has or whether enforcement in the U.S. on the monetary judgment will be possible. I, therefore, conclude that an injunction should issue.

[195] In *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), Blair J.A. for the majority wrote:

> [75] … The highly transmissible nature of the tortious misconduct at issue here is a factor to be addressed in considering whether a permanent injunction should be granted. The courts are faced with a dilemma. On the one hand, they can throw up their collective hands in despair, taking the view that enforcement against such ephemeral transmissions around the world is ineffective, and concluding therefore that only the jurisdiction where the originator of the communication may happen to be found can enjoin the offending conduct. On the other hand, they can at least protect against the impugned conduct re-occurring in their own jurisdiction. In this respect, I agree with the following observation of Kirby J. in Dow Jones [*Dow Jones & Company Inc. v. Gutnick*, [2002] H.C.A. 56], at para. 115:
>
> > Any suggestion that there can be no effective remedy for the tort of defamation (or other civil wrongs) committed by the use of the Internet (or that such wrongs must simply be tolerated as the price to be paid for the advantages of the medium) is self-evidently unacceptable.

Summary

[196] The outcome of this trial is as follows:

a) The plaintiff is entitled to an award of damages for the tort of defamation by the defendants Mark Mitchell, Patrick Byrne and Deep Capture LLC;

b) The claims against the defendants High Plains Investments LLC, Nozone Inc. dba Steadfast Networks, and Judd Bagley are dismissed, as is the claim against Overstock.com, Inc.;

c) The defendants Mark Mitchell, Patrick Byrne and Deep Capture LLC are permanently enjoined from publishing on the Internet or elsewhere any defamatory words concerning the plaintiff including those words described in paragraphs 3 and 13 of these reasons for judgment; Google Inc. and Google Canada Corporation are permanently enjoined from permitting any response to an online search of the 21 chapters of the Articles.

d) The award of damages against Mark Mitchell, Patrick Byrne and Deep Capture LLC, for which they are each jointly and severally liable, is:

i. $400,000 in general damages;

ii. $500,000 in aggravated damages;

iii. $250,000 in punitive damages, and

iv. $55,000 in special damages

Total $1,205,000

[197] The parties may make arrangements through the registry to speak to costs.

"Affleck J."