20-0642 cv

United States Court of Appeals

for the

Second Circuit

CHARLES OAKLEY,

Plaintiff-Appellant,

v.

JAMES DOLAN, in his individual capacity, in his professional capacity, MSG NETWORKS, INC., MADISON SQUARE GARDEN COMPANY, MSG SPORTS & ENTERTAINMENT, LLC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee MSG Sports & Entertainment, LLC states that it is now named MSG Entertainment Group, LLC. It is wholly owned by its parent company, Madison Square Garden Entertainment Corp. (NYSE: MSGE). Madison Square Garden Entertainment Corp. does not have a parent corporation, and no publicly traded company owns 10% or more of the company. Defendant-Appellee The Madison Square Garden Company states that it is now named Madison Square Garden Sports Corp. Madison Square Garden Sports Corp. is a publicly traded company (NYSE: MSGS). It does not have a parent corporation, and no publicly traded company owns 10% or more of Madison Square Garden Sports Corp. Defendant-Appellee MSG Networks Inc. states that it is a publicly traded company (NYSE: MSGN). MSG Networks does not have a parent corporation, and no publicly traded company owns 10% or more of MSG Networks Inc.

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INTRODUCTION

This case concerns a February 2017 incident in which Plaintiff-Appellant Charles Oakley was removed from Madison Square Garden ("MSG") during a New York Knicks basketball game and arrested by the New York City Police Department ("NYPD") for assaulting the security officers who removed him when he refused their request to leave. The allegations in Oakley's own Amended Complaint confirm he has no viable claim here. This Court should affirm the dismissal of his case in its entirety.

By Oakley's own admission, he was asked to leave the arena by MSG security personnel (A-39 ¶ 34), refused to comply (*id.* ¶¶ 35, 37), became physically defensive (*id.* ¶¶ 37–38), sat back down in defiance (A-40 ¶ 40), and ultimately had to be removed by force (*id.* ¶ 45), after which he was arrested for assault (A-41 ¶ 51). Over the next 24 hours, the MSG Defendants posted two messages on Twitter explaining what had transpired—namely, that "Charles Oakley came to the game tonight and behaved in a highly inappropriate and completely abusive manner," that "[h]e has been ejected and is currently being arrested by the New York City Police Department," that Oakley engaged in "abusive behavior," and that "[h]e was a great Knick and we hope he gets some help soon." (A-42–43.) Shortly after the incident, James Dolan was interviewed on a sports talk show and, in response to questioning, said that Oakley had spoken

in a "terribly abusive" way that night to security personnel and service workers, "[w]ith racial overtones, sexual overtones," "stuff you wouldn't want to say on the radio," and opined, among other things, that "[t]o me, Charles has got a problem." (A-43–46, A-70.)

Based on those events—Oakley's removal from MSG by security officers after he refused their request to leave, the MSG Defendants' comments afterward on Twitter, and Dolan's interview responses—Oakley filed a 10-count complaint asserting a hodge-podge of torts. Defendants identified the many deficiencies in Oakley's original complaint in letters to the district court and at a lengthy pre-motion conference (*see* A-146–99), prompting Oakley to amend his pleading. But the Amended Complaint suffered from the same legal shortcomings, and Defendants moved to dismiss it in its entirety. The district court granted Defendants' motion. In a meticulous opinion, Judge Richard Sullivan concluded that Oakley's grievances do not belong in federal court (*see* A-220), and he methodically identified the failings of each of Oakley's causes of action—most of which were deficient for multiple independent reasons.[1]

Oakley now appeals that decision. His appeal has no merit. Oakley's arguments for reversal are undermined by his own factual allegations and black-

[1] Judge Sullivan was elevated to the Second Circuit while Defendants' motion to dismiss was still pending and retained this case upon his elevation.

letter law—including that conclusory allegations cannot sustain a cause of action. *Compare Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), *with* Br. 34 (relying on outdated pre-*Twombly* case law in arguing that the Amended Complaint meets "fair notice" requirements).

Oakley makes his assault and battery claims the centerpiece of this appeal, arguing that the reasonableness of the force used to remove him is a fact issue that can only be decided by a jury. He is wrong: many New York federal and state courts have dismissed assault and battery or excessive force claims against private security guards or police officers based on allegations strikingly similar to Oakley's because the force alleged was not objectively unreasonable. (*See infra* pp. 22–23.) Moreover, Oakley concedes—as he must—that New York law permits venue owners to direct licensees to leave their property and "to use reasonable force to eject" a licensee who "refuse[s] to go." (Br. 15 (quoting *Noonan v. Luther*, 206 N.Y. 105, 108 (1912)).) While Oakley argues that the force used during his removal was unreasonable (Br. 14), his Amended Complaint forecloses that argument: it acknowledges that he was escorted from MSG after he repeatedly refused requests to leave, concedes that any physical contact occurred in the course of effectuating his removal, and fails to allege any injury in the process or any intent to injure. The key inquiry is whether a defendant's actions were *objectively* unreasonable, and the district court correctly found that Oakley failed

to plead any facts that would support such an inference, or otherwise override Defendants' privilege to use force in removing him. Oakley merely claims to have been "[e]mbarrassed" (A-39), which is plainly not a cognizable "injury." Thus, per his own pleading, there was no intent to injure Oakley, he was not injured, and the force used was not objectively unreasonable.[2]

Oakley likewise offers no reason for this Court to overturn the district court's dismissal—on *three* independent grounds—of Oakley's claims alleging defamation over Defendants' post-incident statements. *First*, notwithstanding the Amended Complaint's conclusory allegations, the actual statements made never accused Oakley of committing assault or being an alcoholic. Oakley tries to cobble together isolated, out-of-context snippets of disparate statements made by different speakers at different times (*see, e.g.*, Br. 23–24), but even then, his

[2] Of note, uncontroverted video footage of the national broadcast of this Knicks game and internal security footage—submitted in support of the motion to dismiss—show conclusively that Oakley refused repeated requests to leave, that he first struck security guards in resisting removal, and that any force used to remove him was thereafter not objectively unreasonable. (*See infra* Section I.B.) The footage also shows that NYPD officers were present throughout the incident, and helped escort Oakley out of MSG. While the district court chose not to consider this video evidence (at Oakley's urging) in deciding to dismiss this case, for the reasons explained here (*infra* n.10), it is permissible to consider such dispositive video evidence—especially where, as here, Oakley's original complaint specifically referred to the fact that the incident was captured on a national television broadcast and, therefore, incorporated that uncontroverted video evidence by reference (*see* A-20).

characterization is both misleading and unpersuasive. Moreover, characterizing conduct as "abusive" or saying that "[t]o me, Charles has got a problem," for example, are classic statements of opinion that cannot support a defamation claim. For both of these reasons, Oakley fails to plead any defamatory statement of fact concerning himself. *Second*, none of the alleged statements are defamatory *per se*: Defendants never accused Oakley of committing a serious crime, alcoholism is not a loathsome disease under New York law, and Oakley failed to plead the statements injured him in *any* trade, business, or profession, let alone any in which he is engaged. And Oakley does not adequately plead any special damages in the absence of defamation *per se*. *Third*, Oakley does not allege any facts supporting his conclusory allegation that Defendants acted with actual malice in making any of these alleged statements, which he must do because, as he concedes, he is a public figure. *See Biro v. Condé Nast*, 807 F.3d 541, 544 (2d Cir. 2015). The district court ruled against Oakley on all three of these issues, any one of which is sufficient for this Court to affirm.

Oakley makes only a tepid effort to preserve his other claims, but all lack merit. For example, regarding his false imprisonment claim—premised literally on the few minutes in which MSG security personnel escorted Oakley *out* of the arena into police custody (accompanied at all times by NYPD officers (*see infra* Section I.B.))—Oakley cannot claim actual confinement. Otherwise, he presses only one

new argument—that his confinement was discriminatory and therefore not privileged—that is both meritless and now waived. Oakley's challenge to the dismissal of his discrimination claims fares no better. He cannot identify any non-conclusory allegation suggesting Defendants perceived him to be an alcoholic—indeed, he vehemently denies that fact—or that they predicated his ejection on that basis, as opposed to a host of other reasons he acknowledges in his pleading.

Finally, in light of Oakley's cursory request in a footnote for leave to amend, and the ample opportunity he had to address his pleading's fundamental flaws—including amending his complaint once already—the district court did not abuse its discretion in refusing to allow Oakley to amend his complaint yet again.

Over three years have now passed since this incident occurred. This case has gone on long enough. Judge Sullivan put it best, finding that "[f]rom its inception, this case has had the feel of a public relations campaign," and has no business being in court. (A-220.) Oakley's removal and arrest may have caused him embarrassment, his plea deal with local prosecutors requiring him to stay away from MSG for a year was perhaps humiliating, but he simply has no basis for making a federal case out of it. Judge Sullivan got it right in all respects. It is time to close the book on this sad chapter. This Court should affirm the district court's judgment.

COUNTERSTATEMENT OF ISSUES

1. Did the district court correctly dismiss Oakley's assault and battery claims where Defendants, as owners of MSG, were entitled to use reasonable force to remove Oakley after he refused to leave MSG, where Oakley claimed no injury from his removal and no intent to injure him, and where any alleged physical contact Defendants' security officers had with Oakley was privileged and, consequently, the force used to remove him was not objectively unreasonable?
2. Did the district court correctly dismiss Oakley's defamation claims where (a) Oakley premised his theory of liability on the erroneous contention that statements characterizing his behavior as "abusive," and speculating that he "may have a problem with alcohol, we don't know," accused him of committing a serious crime and of being an alcoholic; (b) the challenged assertions are, in any event, protected opinion under well-established law; and (c) his Amended Complaint contained only conclusory allegations and, therefore, inadequately pled special damages and actual malice?
3. Did the district court correctly dismiss Oakley's false imprisonment claim where Oakley's own allegations evince that Defendants' actions in allegedly confining Oakley during the brief time security guards escorted him from his seat and into full police custody were privileged?

4. Did the district court correctly dismiss Oakley's denial of public accommodation claims where those claims hinged on the conclusory allegation that Oakley was removed "based on the Defendants' alleged perception that he suffers from alcoholism"—an allegation that is inconsistent with Oakley's theory of defamation and other claims in his pleading—and where the Amended Complaint did not adequately allege discriminatory animus on Defendants' part toward alcoholics?
5. Did the district court abuse its discretion in denying Oakley further leave to amend, where Oakley had already previously amended his complaint, was made aware of—but failed to correct—the central defects in his pleading before previously amending it, and where Oakley made only a boilerplate request in a footnote for further leave to amend?

COUNTERSTATEMENT OF THE CASE

I. Factual Background

A. Oakley's Removal from Madison Square Garden.

On February 8, 2017, Plaintiff Charles Oakley, a former All-Star power forward with the New York Knicks, attended a Knicks game at Madison Square Garden. As alleged in the Amended Complaint (and taken as true for the purposes of the motion to dismiss), shortly after his arrival, Oakley was asked to leave the game by MSG security personnel. (A-39.) Oakley refused to comply with this request. (*Id.*) Instead, Oakley protested the basis of his removal, questioned the

security officers, and, according to his allegations, "raised his arms . . . in a defensive posture." (*Id.*) Oakley alleges he then turned his back on the officers and "return[ed] to his seat." (A-40.)

Faced with Oakley's repeated non-compliance with their requests that he leave, MSG security personnel had to use physical force to remove Oakley from the arena. (*Id.*) As Oakley concedes, he remained defiant, and at one point "pushed the[] hands" of security personnel "away." (*Id.*) Eventually, Oakley was removed from the arena. (A-41.) Oakley's refusal to leave, physical assault of the security officers attempting to remove him, and eventual removal were all captured on national television. (A-20; *see also* A-65.)

Immediately after being escorted from his seat, Oakley was handcuffed and arrested by NYPD officers. (A-41.) Based on the actions he took in the course of resisting his ejection and the "violent conduct" in which he admits he participated, Oakley was criminally charged with assault. (*Id.*) While Oakley alleges that his arrest was "unjustifi[ed]" (A-53), he agreed with prosecutors to not return to MSG for a year as part of a plea disposition of the criminal charges pending against him (A-75).[3]

[3] The uncontroverted video evidence submitted by Defendants—which is not necessary to consider in order to affirm, but which this Court can consider, especially from the nationally televised game that is referenced in Oakley's original claim (*see infra* n.10)—shows Oakley initiating the physical aggression

B. Defendants' Statements Concerning Oakley's Removal.

In the wake of the ejection of a high-profile former player on national television, the Knicks issued a pair of public statements. First, immediately after the incident on February 8, 2017, the Knicks' public relations team tweeted that Oakley had behaved in an "inappropriate" and "abusive" manner, had thereafter been "ejected," and was "currently being arrested by the New York City Police Department." (A-42.) The tweet praised Oakley as "a great Knick," and stated that "we hope he gets some help soon." (*Id.*) The next day, the public relations account tweeted an updated statement responding to claims that Oakley had made to the media. (A-43.) The tweet reiterated that Oakley had been "abusive," that "dozens of security staff, employees and NYPD [] witnessed" his behavior, and that Oakley's contrary public accounts were "pure fiction." (*Id.*)

Defendant James Dolan, the Executive Chairman and then-CEO of the Knicks, addressed Oakley's removal during an interview on ESPN Radio's *The Michael Kay Show* two days after the incident. (A-43.) Dolan praised Oakley as a "great Knick" whom he "loved" to watch play and "still admire[s]," and emphasized that "nothing [] would make me . . . happier than to see . . . Oakley be

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and then striking, shoving, and slapping the security guards who were asking him to leave. (*See infra* Section I.B.) It also shows that NYPD officers were present throughout the incident, were among those escorting Oakley from his seat, and were the ones who handcuffed Oakley. (*See id.*)

at center court, being honored along with the rest of his teammates, and my shaking his hand." (A-70 at 1:58–2:18, 14:30–42.) In response to questioning about the February 8 incident, Dolan noted that Oakley had "said on TV that he was drinking before[]" the game, and that MSG staff had "heard statements from police that he appeared to be impaired." (A-44.) Responding to further questioning, Dolan expressed his opinion that Oakley "may have a problem with alcohol," but added "we don't know." (*Id.*, A-70 at 9:48–52.) Dolan also characterized Oakley's behavior as "abusive." (A-44.) He said that "[t]he No. 1 concern has to be the safety and comfort of the fans," and that "anybody drinking too much alcohol" or "looking for a fight" will be "ejected." (A-44–45.) Dolan reiterated at the end of the interview that Oakley was a "great Knick," and that he would "like to be chanting Charles Oakley['s name]." (A-70 at 27:40–48.)

II. Procedural History

On September 12, 2017, Oakley filed a 10-count complaint against Dolan, MSG Networks, Inc., The Madison Square Garden Company, and MSG Sports & Entertainment, LLC. On November 13, 2017, Defendants filed a pre-motion letter identifying numerous flaws in Oakley's legal theories. The parties then attended a lengthy pre-motion conference before Judge Richard Sullivan on January 12, 2018, during which Defendants addressed in detail each of the deficiencies of Oakley's

claims. (*See generally* A-146–99.) The court, too, highlighted various deficiencies in Oakley's complaint. (*See*, *e.g.*, A-152, A-158, A-171–72, A-187, A-192.)

In the wake of this extensive feedback, Oakley filed an Amended Complaint on February 9, 2018. Oakley's Amended Complaint added a claim for defamation *per quod*—and with it new allegations regarding special damages—and dropped a claim previously brought under the New York City Human Rights Law. Otherwise, however, the Amended Complaint featured allegations and theories of liability substantially similar to the original complaint. Defendants accordingly moved to dismiss the Amended Complaint on March 30, 2018.

In their motion to dismiss, Defendants argued that each of the claims in the Amended Complaint failed as a matter of law. Defendants also submitted a series of exhibits, including uncontroverted video evidence of Oakley's ejection from MSG, which Defendants argued were either incorporated by reference, integral to the complaint, and/or the proper subject of judicial notice. Defendants argued that these exhibits (A-65–139) showed that (i) Oakley had physically resisted his ejection and initiated the "violent conduct" of which he complained; (ii) NYPD officers had been present throughout the incident and were the ones who restrained him; (iii) Oakley agreed to a plea disposition to resolve his assault charge that mandated he stay away from MSG for a year; (iv) Oakley's extensive personal website did not indicate that he was in the business of making appearances at

alcohol rehabilitation clinics; (v) Oakley continued to make appearances with the Rebound Institute—which he alleged had disassociated with him after Defendants' allegedly defamatory statements—after the alleged defamation; and (vi) Oakley has a long history of physical altercations and misconduct at entertainment venues and altercations with law enforcement, resulting in multiple criminal charges.

On February 19, 2020, the district court granted Defendants' motion and dismissed Oakley's Amended Complaint with prejudice, holding that each of Oakley's claims failed as a matter of law. In doing so, the district court considered only the allegations of the Amended Complaint and the video of Dolan's interview on *The Michael Kay Show*. (*See* A-207.)

Beginning with Oakley's defamation claims, the court rejected Oakley's argument that certain statements implied that Oakley had committed assault, finding that the challenged statements "do not accuse Oakley of causing physical injury to anyone," and that many of those statements were "nonactionable statements of opinion." (A-208.) The district court also ruled that none of the statements were *per se* defamatory (A-210–13), and that Oakley had failed to sufficiently plead special damages (A-212). Finally, the district court held that each claim failed for the independent reason that Oakley only offered "conclusory allegations that [Defendants] . . . acted with actual malice," which is required when the allegedly defamed plaintiff is a public figure like Oakley. (A-210.)

The district court also dismissed Oakley's assault and battery claims, his false imprisonment claim, his abuse of process claim, and his unlawful discrimination claim. On assault and battery, the district court held that Oakley's "refusal to leave justified [Defendants'] use of reasonable force to remove him," that Oakley had failed to plead facts that would "support an inference of excessive or unreasonable force" or that would suggest that MSG security personnel "intended to injure him," and that Oakley had not "allege[d] that the guards intended to injure him." (A-215–16.) The district court similarly found that "MSG Defendants were permitted to restrain [Oakley] as they led him out of the Garden"—thus dooming Oakley's false imprisonment claim—and that Oakley had not "sufficiently plead[ed] special damages" to support his abuse of process claim. (A-217.) Finally, the district court concluded that Oakley did "not plead any fact that supports a plausible inference that Defendants discriminated against Oakley on the basis of his purported alcoholism," instead finding that the "obvious reading" of Oakley's allegations "is that Oakley was denied access for his conduct on the night of February 8, 2017, not for being an alcoholic." (A-218–19.)

Because Oakley had previously amended his pleading after pre-motion exchanges and Judge Sullivan's comments at the pre-motion conference, the district court denied Oakley's cursory request to amend again. The district court

noted that the relevant footnote in which Oakley made his request for leave to amend offered "no basis" for that request. (A-219.)[4]

SUMMARY OF ARGUMENT

The district court correctly applied settled precedent and basic pleading requirements in dismissing each of Oakley's claims. This Court should affirm the district court's judgment in full.

First, the district court properly dismissed Oakley's assault and battery claims because, as Oakley concedes, MSG security guards restrained and removed him from MSG only *after* he refused to comply with the guards' request that he leave. Oakley's admitted defiance gave MSG the legal right to forcibly remove him from the property as a matter of black-letter New York law. Moreover, Oakley's allegations do not support an inference of objectively unreasonable force, as would be necessary to override Defendants' privilege to use force in ejecting him. Oakley also does not allege that Defendants intended to injure him, as is required to defeat Defendants' privilege to forcibly remove a trespasser. Indeed,

[4] Since the decision, both parties have made statements to the press: Defendants expressed the hope that "[m]aybe now there can be peace between us," while Oakley has repeatedly criticized the Knicks organization, at one point calling it a "plantation." *Compare Charles Oakley's Civil Lawsuit Following MSG Run-In Dismissed*, ESPN (Feb. 19, 2020), https://www.espn.com/nba/story/_/id/28737579/charles-oakley-civil-lawsuit-following-msg-run-dismissed, *with* Golic & Wingo (@GolicAndWingo), TWITTER (Mar. 4, 2020, 8:27 AM), https://twitter.com/golicandwingo/status/1235195205873258496.

Oakley admits that he was not injured—he claims merely to have suffered "embarrass[ment]" and "emotional distress." (*See* A-39, 57.) That is not enough to state an assault and battery claim.

Second, the district court correctly dismissed Oakley's defamation claims for *three* independent reasons. Oakley insists that the district court erred by not combining isolated fragments of statements from different speakers made at different times to divine an allegedly defamatory meaning, but such misuse of context is directly contrary to well-established precedent. Oakley next tries to circumvent the fact that the challenged statements are clearly protected opinion by mischaracterizing them as "mixed opinion." They are not. Oakley also misapprehends the scope of the narrow categories of defamation *per se*—into which Defendants' generalized observations do not fit—and asks this Court to overlook his failure to sufficiently allege special damages. Finally, Oakley relies on unpersuasive pre-*Twombly* case law in an attempt to excuse his conclusory, insufficient allegations of actual malice.

Third, Oakley's false imprisonment claim fails because Oakley does not allege that Defendants actually confined him at MSG—indeed, his entire complaint is premised on the notion that MSG security wanted him to *leave*, and thus *removed* him from the arena. And as the district court correctly held, Defendants were entitled to escort a defiant Oakley out of MSG and into full NYPD custody.

Oakley's new argument that the alleged confinement was not privileged because it was purportedly discriminatory is not properly preserved and, regardless, is meritless.

Fourth, Oakley's denial of public accommodation claims also fail because the Amended Complaint does not plausibly allege that Defendants regarded Oakley as an alcoholic or ejected him on the basis of that false perception, or that Oakley suffered any damages. In the words of the district court, "the obvious reading" of Oakley's pleading "is that Oakley was denied access for his conduct on the night of February 8, 2017, not for being an alcoholic." (A-219.)

Finally, it was well within the district court's discretion to deny Oakley leave to amend, once again, where Oakley had already had that opportunity and amended his complaint with notice of his claims' original defects, yet still failed to allege facts sufficient to state a claim. Furthermore, Oakley only requested leave to amend in a brief footnote, and offered neither a basis for his request for leave to amend nor a proposed amendment.

STANDARD OF REVIEW

This Court "review[s] *de novo* the grant of a motion to dismiss under Rule 12(b)(6)." *Biro*, 807 F.3d at 544. The denial of leave to amend is reviewed for abuse of discretion. *United States ex rel. Ladas v. Exelis, Inc.*, 824 F.3d 16, 28 (2d Cir. 2016).

ARGUMENT

I. The District Court Correctly Held That Oakley's Assault and Battery Claims Must Be Dismissed

A. Oakley's Pleading Is Legally Deficient for Multiple Reasons.

The district court correctly dismissed Oakley's assault and battery claims because, as Judge Sullivan found, Oakley's own pleadings demonstrate that Oakley "refused to comply with Defendants' lawful directive that he leave the premises," and any alleged physical contact Oakley had with MSG security officers was therefore privileged. (A-216.) Oakley cannot overcome that privilege, first, because his allegations "do[] not support an inference of excessive or unreasonable force," and second, because "[n]owhere does Oakley allege that the guards intended to injure him" or that Oakley "was in fact injured." (*Id.*)

A civil battery claim requires Oakley to prove an intentional bodily contact "without [his] consent" that was "wrongful under all of the circumstances." *Higgins v. Hamilton*, 794 N.Y.S.2d 421, 422 (App. Div. 2005). Assault is the "intentional placing of another person in fear of imminent harmful or offensive contact." *Gould v. Rempel*, 951 N.Y.S.2d 677, 678 (App. Div. 2012). Oakley alleges that Defendants, through MSG security guards, committed assault and

battery "when . . . they physically and forcibly removed [him] from [MSG] and subsequently detained him until police could arrive." (A-53.)[5]

Oakley, however, does not dispute—and cannot—that settled law permits property owners to direct licensees to leave their property and "to use reasonable force to eject" a licensee who "refuse[s] to go" (Br. 15). *Accord, e.g.*, *Noonan v. Luther*, 206 N.Y. 105, 108 (1912) ("Defendant had the right to withdraw the license to the plaintiff to remain on his premises; and if . . . she refused to go, he had the right to use reasonable force to eject her."); *McGovern v. Weis*, 239 N.Y.S.2d 115, 118 (App. Div. 1943) (same); *Hill v. Greeley Square Hotel Co.*, 161 N.Y.S. 1085, 1086–87 (App. Div. 1916) (same); *Ryan v. City of New York*, 2018 WL 3364580, at *1 (N.Y. Sup. Ct. July 5, 2018) (same); *Mitchell v. N.Y. Univ.*, 2014 WL 123255, at *1 (N.Y. Sup. Ct. Jan. 8, 2014) (same). Oakley's own allegations establish this privilege applied. Oakley concedes that MSG security guards approached him and instructed him "to leave the arena"—and that he refused to comply—before they ever touched him or attempted to physically remove him. (A-39–40.) Thus, Oakley's "failure to leave" MSG "when ordered to

[5] While Oakley's claims should be dismissed even if his factual allegations are accepted as true, his version of events is undermined by the video evidence, including because NYPD officers were involved throughout Oakley's removal. (*See infra* Section I.B.)

do so" entitled Defendants to use reasonable force to remove him. *Hill*, 161 N.Y.S. at 1086.

Oakley tries to side-step this legal bar, claiming on appeal that Defendants "had no right to resort to force at all" because he "never actually refused to leave" MSG. (Br. 14–15.) But Oakley's own pleading allegations foreclose that argument. Oakley admits that, instead of leaving MSG as directed (*see* A-39), he "asked . . . [the] guards why he was being forced to leave," insisted that he "had done nothing wrong" and wanted to "watch the game," and "turn[ed] around and . . . return[ed] to his seat" (A-39–40). Despite Oakley's attempts to re-characterize his reaction on appeal, the Amended Complaint indisputably concedes that Oakley refused to comply with the MSG security officers' lawful directive that he leave, thus entitling those officers to use reasonable force to effectuate his removal.

Oakley also contends that he was not "behaving in a disorderly manner" and that he was entitled to "request . . . an explanation" for why he was asked to leave. (Br. 15.) But New York law is clear that property owners, including the owners of sports arenas, have the right to remove individuals from their property for any reason, or for no reason, and are not required to provide an "explanation" for the ejection. *See Impastato v. Hellman Enters., Inc.*, 537 N.Y.S.2d 659, 661 (App. Div. 1989) ("[A] ticket to a place of public amusement is merely a license which is revocable, without cause, at the will of the proprietor."); *see also*, *e.g.*, *Madden v.*

Queens Cty. Jockey Club, 296 N.Y. 249, 253 (1947) ("[T]he operator of a race track can, without reason or sufficient excuse, exclude a person from attending its races."); *Gottlieb v. Sullivan Cty. Harness Racing Ass'n*, 269 N.Y.S.2d 314, 316–17 (App. Div. 1966).[6] As the district court reasoned, if "Oakley's version of property rights [were] accurate, property owners would be powerless to remove trespassers, who would be free to ignore the entreaties of property owners to an inevitable stalemate. The law is not so anemic." (A-215.)

Moreover, the district court correctly held that Oakley's allegations "do[] not support an inference of excessive or unreasonable force" that would "forfeit[]" Defendants' "privilege to use force" to remove Oakley. (A-215–16.) Oakley alleges, *at most*, that security officers brought him to the ground in attempting to remove him following his defiance of their orders (*see* A-39–40), but such allegations are insufficient to demonstrate that the MSG Defendants used unreasonable force, particularly in the absence of any claim that Oakley was injured. Courts have repeatedly granted motions to dismiss assault and battery claims based on allegations of "forcibl[e] shoving . . . to the ground" (A-40), by security guards or police officers, in the course of removing an individual from the

[6] It is thus irrelevant that Oakley "purchase[d]" his own ticket to attend the February 8 game. (A-33, A-38.) Indeed, the backs of all tickets for Knicks games at MSG explicitly state that the ticket is a "license revocable in MSG's sole discretion." (A-130.)

premises. *See Mitchell*, 2014 WL 123255, at *1 (granting motion to dismiss where private university's safety officers allegedly "forcefully removed [plaintiff] from class and then the building"); *see also, e.g.*, *Hatcher v. City of New York*, 2018 WL 1583036, at *10 (S.D.N.Y. Mar. 27, 2018) (granting motion to dismiss because allegations that police officer "aggressively shov[ed] [plaintiff] against the gate, push[ed] her arms behind her back, and handcuff[ed] her" during arrest do not constitute "unreasonable and excessive force"); *B. v. City of New York*, 2016 WL 4530455, at *11–12 (E.D.N.Y. Aug. 29, 2016) (granting motion to dismiss where plaintiffs alleged, *inter alia*, that they were "thrown to the floor" in the course of being arrested).

Oakley asserts that the district court erred in dismissing his assault and battery claims because "the question of whether the amount of force used was reasonable is a fact intensive inquiry" that is "not appropriate to be made on the pleadings alone." (Br. 16.) But that argument ignores the many cases in which New York courts have dismissed assault and battery claims because the underlying allegations did not demonstrate the use of unreasonable force as a matter of law. Those precedents, correctly applied by Judge Sullivan, include the cases cited in the prior paragraph, where claims were dismissed under strikingly similar circumstances. In *Mitchell*, for example, the trial court noted that the private university "ha[d] the right to use reasonable force to eject [plaintiff] from its

premises" and held that "it cannot be inferred from the allegations in the complaint"—which included claims that the university's security officers had "forcefully removed [plaintiff] from class and then the building"—"that unreasonable force was used to remove plaintiff." 2014 WL 123255, at *1, *aff'd*, 12 N.Y.S.3d 30 (App. Div. 2015).[7]

New York courts also routinely dismiss on the pleadings Fourth Amendment excessive force claims, which are evaluated on the "same standard" as "assault and battery claims under New York law." *Feaster v. City of Middletown*, 2016 WL 10570984, at *3 (S.D.N.Y. Nov. 28, 2016) (internal quotation marks omitted); *see also Posr v. Doherty*, 944 F.2d 91, 94–95 (2d Cir. 1991). The burden is on plaintiffs in such cases to show that the amount of force used was "objectively unreasonable." *Lowth v. Town of Cheektowaga*, 82 F.3d 563, 573 (2d Cir. 1996). Courts therefore dismiss complaints that fail to allege facts demonstrating the objective unreasonableness of the force used—including where even greater force

[7] Oakley contends that he adequately alleged "the amount of force used . . . was unreasonable," relying on his allegations that Defendants "greatly exceeded the amount of force that was necessary" and "exceeded the bounds of reasonable behavior." (Br. 14.) But these conclusory allegations are no more than "labels and conclusions" that need not be accepted as true. *Twombly*, 550 U.S. at 555. Oakley does not identify—and cannot—any *facts* alleged in his pleading "that would establish that [Defendants'] use of force was unreasonable under the circumstances." *Nogbou v. Mayrose*, 2009 WL 3334805, at *7 (S.D.N.Y. Oct. 15, 2009).

was used than Oakley alleges here. *See generally Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 376 (S.D.N.Y. 2015) ("Courts in this District have routinely dismissed excessive force claims where the plaintiff alleged that he was thrown to the ground, but did not allege any physical injuries."); *see also, e.g.*, *Feaster*, 2016 WL 10570984, at *3–4 (finding that plaintiff failed to plead the use of "objectively unreasonable" force where officers allegedly "grabbed plaintiff and yanked her out of the vehicle," "grabbed her right arm," and "slammed her chest-first into her vehicle"); *Wims v. N.Y.C. Police Dep't*, 2011 WL 2946369, at *5 (S.D.N.Y. July 20, 2011) (dismissing excessive force claim where plaintiff alleged that, in the course of being detained, "he was pulled out of his car and thrown flat on [his] face onto the filthy ground"); *Nogbou*, 2009 WL 3334805, at *6–7 (dismissing excessive force claims where plaintiff alleged that officers "kick[ed]," "dragged," and "violently pushed" him), *aff'd*, 400 F. App'x 617 (2d Cir. 2010). Applying these clear precedents, the district court correctly held that, as a matter of law, Oakley's allegations do not suffice because they fail to show the force used was "objectively unreasonable."

In the face of this ample precedent against him, Oakley fails to identify any assault or battery case holding that such a claim should survive a motion to dismiss where, as here, the complaint fails to allege facts demonstrating that the use of

force was "objectively unreasonable."[8] Oakley instead principally relies on inapposite cases—such as the "equitable tolling" of a statute of limitations, *Mandarino v. Mandarino*, 180 F. App'x 258, 261 (2d Cir. 2006), the reasonableness of a "modification" under the ADA, *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995), or "successor in interest" status, *Aguas Lenders Recovery Grp. LLC v. Suez, S.A.*, 585 F.3d 696, 703 (2d Cir. 2009)—where a district court erred in resolving unrelated "fact-specific" disputes.

Furthermore, even if Oakley had alleged that "the amount of force used by Defendants' security personnel was unreasonable" (Br. 14), merely claiming "unreasonable" force does not defeat a property owner's privilege to remove a trespasser. The alleged force used must be "objectively" unreasonable based on the allegations in the complaint. *See Feaster*, 2016 WL 10570984, at *3. And Oakley must also plausibly allege that MSG security personnel were motivated by a "specific wrongful intent . . . to injure" him. *Gage v. Bewley*, 160 N.Y.S. 1111, 1112 (Cty. Ct. 1916), *aff'd*, 160 N.Y.S 1131 (App. Div. 1916); *see also Noonan*, 206 N.Y. at 107–08 ("[T]he question of the [assault and battery] defendant's intent

[8] Oakley's reliance on *Hernandez v. Denny's Corp.*, 114 N.Y.S.3d 147 (App. Div. 2019) is misplaced. (*See* Br. 16.) *Hernandez* was decided on summary judgment based on conflicting evidence in the record that created a "triable issue of fact," 114 N.Y.S.3d at 151–52, rather than whether the facts alleged in the pleading were sufficient to state an assault and battery claim.

was of vital importance . . . [to] the plaintiff's right of action," because, while the "[d]efendant had the right to withdraw the license to the plaintiff to remain on his premises" and to "use reasonable force to eject her," he "could use that force only for one purpose and that was to remove her from the premises," and not to "inflict violence to her person."); *McGovern*, 239 N.Y.S.2d at 118 (finding that, where "defendant had a right to terminate the plaintiff's privileges as a guest upon his becoming disorderly and upon his refusal to go," "intent to do the injury" was an "essential element" of plaintiff's assault and battery claim). As the district court correctly determined, "Oakley alleges no facts that support an inference that the [MSG] guards . . . intended to injure him." (A-216.) Nor does Oakley allege that he was, in fact, injured; rather, Oakley asserts only that he was "embarrass[ed]" and "emotional[ly] distress[ed]." (A-216 (quoting A-41, A-57).) Such allegations fail as a matter of law. *See Feaster*, 2016 WL 10570984, at *4; *Mitchell*, 2014 WL 123255, at *1.[9]

[9] The district court did not "conflate[] its definition of *criminal* assault with *civil* assault" in considering Oakley's failure to allege intent to injure, or erroneously find that an action for assault requires physical injury. (Br. 17, 19.) The district court looked for allegations of intent to injure and injury because the MSG Defendants' removal of Oakley is privileged absent such allegations—an issue that Oakley does not address. (A-214–16.)

B. Uncontroverted Video Evidence Corroborates that Oakley's Assault and Battery Claims Must Be Dismissed.

While this Court need not consider anything beyond the pleading to affirm the district court's dismissal of Oakley's assault and battery claims, there is also video evidence in this record that belies the Amended Complaint's core allegations and further confirms that the district court properly dismissed Oakley's claims.[10]

The video evidence depicts Oakley being asked to leave but refusing to do so. (A-67 at 0:04–19, A-68 at 0:09–11.) It also reveals that Oakley was the initial physical aggressor. (A-66 at 8:00–19, A-67 at 0:19–40.) Although Oakley alleges that the security "guards grabbed [him] and pushed him to the ground" (A-40),

[10] Although the district court declined to consider the video evidence that Defendants submitted (A-205), this Court can "affirm on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely," *Name.Space, Inc. v. Network Sols., Inc.*, 202 F.3d 573, 584 (2d Cir. 2000) (internal quotation marks omitted). The video footage of the incident from the nationally televised game was incorporated by reference into Oakley's original complaint (A-13, A-20), and should be considered on that basis alone; in addition, all of the video footage in the record is integral to the Amended Complaint's core allegations and is capable of judicial notice. *See, e.g.*, *Kalyanaram v. Am. Ass'n of Univ. Professors at the N.Y. Ins. of Tech., Inc.*, 742 F.3d 42, 44 n.1 (2d Cir. 2014); *Lewis v. Brown*, 2017 WL 1091986, at *8 (S.D.N.Y. Mar. 15, 2017); *Hays v. City of New York*, 2017 WL 782496, at *1 (S.D.N.Y. Feb. 28, 2017). Parts of the incident were also replayed during *The Michael Kay Show* interview, which the district court *did* consider. (*See* A-70 at 8:12–45.) Thus, while it need not do so to affirm the dismissal, this Court can consider the video evidence, which further confirms that the district court properly dismissed Oakley's claims. *See Estate of Roman v. City of Newark*, 914 F.3d 789, 796–97 (3d Cir. 2019) (taking judicial notice of extrinsic evidence "attached . . . to [defendants'] motion to dismiss" that district court declined to consider in granting motion to dismiss).

video footage plainly establishes that Oakley tripped and fell (A-68 at 0:12–14). Moreover, after returning to his feet, Oakley proceeded, unprovoked, to engage in aggressive behavior toward MSG security personnel, culminating in Oakley striking two more security guards. (A-67 at 0:09–44.) The videos further prove that, during his removal, Oakley was not "thrown onto the ground" (*contra* A-40), but purposefully pulled himself to the ground in resisting efforts by NYPD officers and security personnel to remove him (A-65 at 0:20–25, A-67 at 0:49–54). Finally, the video evidence shows that NYPD officers were present and involved at all times during the incident, and were the ones who ultimately handcuffed Oakley. (A-65 at 0:16–1:10, A-66 at 7:50–11:28, A-67 at 0:08–55, A-68 at 0:00–2:30.)

While Oakley objected to consideration of the video evidence by the district court, he now claims the video footage of the incident demonstrates that he "engaged in *no* conduct warranting the excessive force employed by Defendants' personnel." (Br. 15.) To the contrary, the videos confirm that Oakley was asked to leave MSG, refused to comply with that request, and had to be physically removed from the arena by MSG security through the use of reasonable force. Accordingly, any physical contact that MSG guards had with Oakley was privileged, reasonable, and not actionable—conclusions which, in any event, this Court may reach as a matter of law based on Oakley's own pleading allegations, regardless of the video evidence.

II. The District Court Correctly Held that Oakley's Defamation Claims Must Be Dismissed

Under New York law, a successful defamation claim must allege (i) a "defamatory statement of fact concerning the plaintiff"; (ii) "publication to a third party"; (iii) "fault (either negligence or actual malice depending on the status of the libeled party)"; (iv) "falsity of the defamatory statement"; and (v) "special damages of per se accountability (defamatory on its face)." *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 176 (2d Cir. 2000). New York law also affords absolute protection to expressions of opinion, meaning that "no matter how offensive" an expression of opinion might be, it "cannot be the subject of an action for defamation." *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008). Applying these standards, the district court found the Amended Complaint deficient for *three* different reasons: (i) the alleged statements did not communicate the defamatory meaning Oakley ascribed to them (and many of the statements were protected expressions of opinion), (ii) they were not defamatory *per se* nor had they caused Oakley special damages, and (iii) Oakley failed to plausibly allege actual malice.

Oakley offers no compelling reason for this Court to disturb any basis for Judge Sullivan's dismissal of the defamation claims, let alone all three. This Court should accordingly affirm the district court's dismissal under any one of the bases outlined below.

A. The Challenged Statements Do Not Communicate that Oakley Committed Assault or Is an Alcoholic.

The foundation of Oakley's defamation claim is that Defendants' comments "impl[ied] both that [Oakley] was an alcoholic and that he had committed a violent crime against Knicks fans." (A-42; *see, e.g.*, A-48, A-50; Br. 11.) However, based on its careful assessment of the relevant statements and surrounding context, the district court found that Defendants "neither explicitly accuse[d] nor impl[ied] that Oakley committed assault," and reasoned that, *at most*, Defendants' other comments suggested that Oakley had been "in public while drunk." (A-208, A-218–19.) Oakley's attempts to resist these findings defy the plain meaning of the statements at issue and settled precedent. Moreover, the statements are non-actionable opinion.

i. The challenged statements do not support the inference that Oakley committed assault.

In contesting the district court's conclusion that Defendants' statements did not accuse Oakley of assault, Oakley assembles a misleading mosaic of words from snippets of different statements made by different Defendants at different times. (*See* Br. 23.) The excerpts on which Oakley's claim hinge include:

- A tweet from the Knicks public relations Twitter account reporting, on February 8, that Oakley "is currently being arrested by the New York City Police Department";
- A line from that same post noting, as a basis for his ejection, that Oakley had "behaved in a highly inappropriate and completely abusive manner";

- Defendant Dolan's blanket statement, during the course of his February 10 interview on *The Michael Kay Show*, that "*anybody* . . . looking for a fight, they're going to be ejected";

- Dolan's statements during that interview that, on a general level and in his view, Oakley is "both physically and verbally abusive," that Oakley displayed "[a]busive" and "disrespectful" behavior that started "the moment he stepped into the Garden" on February 8, including making statements "[w]ith racial overtones, sexual overtones," and Dolan's belief that security and fans had been "abused" during the underlying incident; and

- Dolan's assurance during the interview that "the number one concern always has to be the safety and comfort of the fans."

(*Compare* Br. 23, *with* A-42–46, *and* A-70 (emphasis added).) None of these statements—or any of Defendants' statements—uses the words "assault" or "alcoholic." Nevertheless, Oakley insists that the district court committed reversible error by declining to credit his *post hoc* "coupl[ing]" of disjointed statements. (Br. 23–24.)

Oakley's approach to textual construction is flatly contrary to established defamation precedents. While it is correct that statements must be read "in the context of *the article* as a whole" (Br. 22 (emphasis added) (quoting *Elias v. Rolling Stone LLC*, 872 F.3d 97, 109 (2d Cir. 2017))), Oakley cites no authority that would allow him to conveniently drop critical words from the relevant statements, combine those altered fragments with other altered fragments, and then

claim that the resulting amalgam is defamatory.[11] Indeed, "New York courts will not strain to find a defamatory meaning where none exists." *Lenz v. Young*, 492 F. App'x 145, 147 (2d Cir. 2012) (internal quotation marks omitted); *see, e.g.*, *Gaeta v. N.Y. News Inc.*, 62 N.Y.2d 340, 349 (1984) ("[O]ffending statements can only be viewed in the context of the writing as a whole, and not as disembodied words, phrases or sentences."); *James v. Gannett Co.*, 40 N.Y.2d 415, 420–21 (1976) (rejecting plaintiff's claim that the isolated statement "[m]en is my business" supported an inference of prostitution, where context proved otherwise). Oakley is simply wrong to suggest that if "*any* defamatory construction is possible," the relevant statements must go to the jury. (Br. 24 (emphasis added).) The proposed

[11] Oakley also cites *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163 (2d Cir. 2000), and *Enigma Software Group USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263 (S.D.N.Y. 2016) to support his interpretive method, but neither purports to grant a court license to mix and match fragments of disparate statements. *Celle* analyzed the combined effect of two articles only where the second article appeared "directly under" the first article and had explicitly referenced the first article by opening with "[i]n another development." *See* 209 F.3d at 187. And in *Enigma Software*, the court considered statements made on the *same webpage*. 194 F. Supp. 3d at 284–86. Here, even if the combined effect of the February 8 tweet and isolated comments from Dolan's February 10 interview supported Oakley's interpretation—which they do not—there is nothing to suggest that they were intended to be read or heard together.

interpretation must still be "*reasonable*." *Purgess v. Sharrock*, 33 F.3d 134, 140 (2d Cir. 1994) (emphasis added).[12]

Interpreting Defendants' statements to imply that Oakley committed assault is unreasonable and strains the words beyond their meaning. As the district court correctly underscored, "Defendants never accused Oakley of causing physical injury to anyone." (A-208.) Oakley does not—and cannot—identify a single statement on appeal where Defendants accused him of taking *any* physical actions during the underlying incident, much less assault. (*See* Br. 23.) The vast majority of the challenged statements merely assert that Oakley engaged in "abusive" behavior or that MSG personnel were "abused." But one can be "abusive" without committing or threatening to commit any physical injury. *See* Merriam-Webster's Collegiate Dictionary 5 (10th ed. 2001) (defining the verb "abuse" as "to put to a wrong or improper use"). Indeed, the full context of Dolan's statements make clear that he was principally referring to *verbal* abuse. (*See* A-45 ("[T]hey were abused. With racial overtones, sexual overtones."); ("Abusive behavior, stuff you wouldn't want to say on the radio."); *id.* ("He did say a bunch of things along the way . . . .").) That is simply not defamatory.

[12] To accept Oakley's mix-and-match theory of liability would dramatically expand the scope of actionable defamation at the expense of the First Amendment. *Cf. N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270–72 (1964).

Oakley likewise misrepresents the only two statements that go beyond general references to "abuse." (*See* A-45.) As emphasized above, Dolan merely said that "anybody" looking for a fight would be "ejected" (not that *Oakley* had been *arrested* because he was looking for a fight), and that Oakley, *generally*, "has a problem with anger. He's both physically and verbally abusive" (not that he was physically abusive on February 8, much less that he committed assault that night). (A-44.)[13] This court should accordingly reject Oakley's counter-textual distortion of Defendants' statements.

ii. The challenged statements do not support an inference that Oakley is an alcoholic.

Defendants likewise never accused Oakley of being an alcoholic. While not an explicit basis for denying Oakley's defamation claim,[14] the district court effectively made this finding when it concluded that the only statement that even came close to accusing Oakley of alcoholism for purposes of Oakley's defamation claim was Dolan's statement that Oakley "*may* have a problem with alcohol, *we*

[13] Likewise, Defendants never stated that "Oakley was 'arrested' for endangering the 'safety' of New York Knicks fans." (*Contra* Br. 27 n.4.) The February 8 tweet did not comment on the reason for Oakley's arrest, and the only reference to "safety" in the challenged statements was Dolan's plain and uncontroversial remark that it is the Knicks' "No. 1 concern." (A-45.)

[14] This Court may affirm the district court on any ground that finds support in the record. (*See supra* n.10.)

don't know." (*See* A-218–19 (emphases added).)[15] Dolan's non-committal reflection on whether Oakley "may" have a problem with alcohol cannot be reasonably read as a statement of fact that Oakley *is* an alcoholic. *Cf. Pisani v. Westchester Cty. Health Care Corp.*, 424 F. Supp. 2d 710, 716 (S.D.N.Y. 2016) (rejecting interpretation that would require court to "pile inference upon inference").

iii. The challenged statements are non-actionable opinions.

This Court can also affirm the dismissal of Oakley's defamation claims on the grounds that each of the challenged statements was a protected opinion. Under New York law, expressions of opinion enjoy absolute protection from liability, such that even accusations of serious criminal behavior are not actionable if they are properly understood as the speaker's opinion. *See Hayashi v. Ozawa*, 2019 WL 1409389, at *2 (S.D.N.Y. Mar. 28, 2019) (citing *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146 (1993) and aggregating examples). This Court has emphasized four factors relevant to assessing whether a statement is protected opinion: (i) "whether

[15] Oakley also cites to a statement in the February 8 tweet expressing "hope" that Oakley "gets some help soon," as well as Dolan's statement that "the first step for anybody is to ask for help," as implying that Oakley is an alcoholic. (Br. 38–39.) This argument fails, as neither claim referenced alcohol: the expression of hope concerned Oakley's arrest, while Dolan's message about helping Oakley was an elaboration on a prior comment about "trouble[s]" that "all seem[] to [have] stem[med] from [Oakley's] anger." (A-42, 70 at 10:00–10:55, 24:38–25:12.)

the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous," (ii) "whether the statement is capable of being objectively characterized as true or false," (iii) "the full context of the communication in which the statement appears," and (iv) "the broader social context or setting surrounding the communication." *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 402 n.7 (2d Cir. 2006) (internal quotation marks omitted).

Although the district court recited this test, emphasized that it would not "consider the words in isolation," and then found that "abusive" and "inappropriate" are "subjective" terms that "New York courts have held to constitute a nonactionable statement[] of opinion" (A-208–09), Oakley insists that the district court "never actually applied" the four factors that it cited (Br. 25). Regardless, it is clear that the challenged statements satisfy the four-factor test. Defendants' characterizations of Oakley's behavior as having been "abusive" and "inappropriate" are inherently subjective, defy precise meaning, and cannot be said to be "true" or "false," making them quintessential statements of opinion under New York law. *See, e.g.*, *Abbitt v. Carrube*, 72 N.Y.S.3d 53, 55 (App. Div. 2018) (finding "inappropriate," "unethical," "detrimental," and "disrespect" to be expressions of opinion); *Rotondi v. Madison Square Garden Co.*, 2017 WL 4083093, at *3 (N.Y. Sup. Ct. Sept. 12, 2017) (finding statement that "plaintiff was abusive and interfered with [a basketball] game" to be expression of

opinion). Moreover, the two contexts in which the statements were delivered—a radio talk show and a social media platform—are classic forums for opinion. *See, e.g.*, *Hobbs v. Imus*, 698 N.Y.S.2d 25, 26 (App. Div. 1999); *Jacobus v. Trump*, 51 N.Y.S.3d 330, 341–44 (Sup. Ct. 2017).

Oakley further objects to the district court's finding by suggesting that *all* of Defendants' statements were mixed opinion because *one* of the Defendants' statements—a Twitter post from February 9—allegedly referenced undisclosed facts. (Br. 26, 27 n.5.) However, the narrow mixed-opinion exception only applies when the challenged statement "implies that it is based upon facts which justify the opinion but are *unknown* to those reading or hearing it." *Sorvillo v. St. Francis Preparatory Sch.*, 607 F. App'x 22, 25 (2d Cir. 2015) (emphasis added) (internal quotation marks omitted).[16] Oakley cites no authority that would allow him to cherry-pick one sentence from a statement by one speaker and then use it as the basis for a mixed-opinion finding for statements delivered by a different speaker on a different day. (*Contra* Br. 26.) Moreover, the excerpt on which Oakley's argument rests—"dozens of security staff, employees and NYPD [officers] []

[16] Oakley's claim that an opinion is non-actionable "*only* where it is 'accompanied by a full recitation of the facts on which it is based'" is a misstatement of the law. (*See* Br. 26.) "An opinion *not* accompanied by such a factual recitation may, nevertheless, be 'pure opinion' if it does not imply that it is based upon undisclosed facts." *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 (1986) (emphasis added).

witnessed Oakley's abusive behavior" (A-43)—merely identifies witnesses to a public event; it does not imply the existence of facts unknown to the public. Indeed, that Oakley's actions took place in full view of the thousands of fans in physical attendance and countless people watching on live national television forecloses Oakley's mixed-opinion argument. *See, e.g.*, *Gisel v. Clear Channel Commc'ns, Inc.*, 942 N.Y.S.2d 751, 752 (App. Div. 2012) ("Because [defendant's] statements were based on facts that were widely reported by . . . media outlets and were known to his listeners, it cannot be said that [they] were based on undisclosed facts.").

Finally, Defendants' statements regarding Oakley and alcohol are also protected opinion. Many of the statements explicitly note that they are reflections of the speaker's personal view. (*See, e.g.*, A-42 ("*we hope* he gets some help soon"), A-44 ("*[t]o me*, Charles has got a problem"), A-45 ("[i]t's very clear *to us* that Charles Oakley came into the Garden with an agenda") (emphases added).) Courts routinely hold such statements to be opinions. *See, e.g.*, *Galland v. Johnston*, 2015 WL 1290775, at *6 (S.D.N.Y. Mar. 19, 2015) (finding statements preceded by "in my mind" and "I found" to be opinions); *Dworin v. Deutsch*, 2008 WL 508019, at *5 (S.D.N.Y. Feb. 22, 2008) (finding statement preceded by "it seemed to me" to be an opinion). Likewise, non-committal statements like Oakley "*may* have a problem with alcohol, *we don't know*" are not

assertions of fact, but subjective speculation.[17] *See, e.g.*, *Levin v. McPhee*, 119 F.3d 189, 197 (2d Cir. 1997) (underscoring that "conjecture, hypothesis, [and] speculation" are not actionable). This Court can accordingly fully affirm the district court's dismissal on the independent basis that the challenged statements were all protected opinion.

B. The Challenged Statements Are Not Defamatory *Per Se*, and the Amended Complaint Failed to Adequately Plead Special Damages.

As a second basis for dismissal, the district court found that neither the alleged assault claims nor the alleged alcoholism claims were *per se* actionable, and that Oakley had failed to "plausibly allege" that the alcoholism statements had caused his purported special damages. (A-211–13.)[18] Oakley's challenges to these conclusions defy settled law and are entirely unpersuasive.

i. The district court correctly found that none of the statements are defamatory per se.

In the absence of special damages, a defamation action is cognizable only if it successfully alleges that the challenged statements were defamatory *per se*, meaning the statements either "(i) charg[ed] plaintiff with a serious crime; (ii) []

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[17] Other statements, such as that "[w]e know he said on TV that he was drinking beforehand," and that there were "statements from police that he appeared to be impaired," merely recount facts that Oakley does not allege were false. (A-44.)

[18] The district court correctly noted that Oakley had "not alleged that he suffered special damages as a result of Defendants' purportedly false accusations that he committed the crime of assault." (A-210.)

tend[ed] to injure another in his or her trade, business or profession; (iii) [alleged] that plaintiff has a loathsome disease; or (iv) imput[ed] unchastity to a woman." *Liberman v. Gelstein*, 80 N.Y.2d 429, 435 (1992). None of these exceptions applies here.

Serious Crime. The district court held that the "serious crime" exception did not apply because "Defendants' statements neither explicitly nor implicitly accused Oakley of committing assault," which requires "physical injury to another person." (A-208, 211.) As previously explained, Oakley's attempts to avoid this conclusion rely on impermissible distortions of Defendants' statements. (*See supra* Section II.A.i.) Oakley's parallel attempt to divorce the serious crime exception from the actual elements of serious crimes finds no support in the case law. *Cf. Cieszkowiski v. Baldwin*, 2019 WL 7496391, at *3 (N.Y. Sup. Ct. Dec. 26, 2019) (rejecting plaintiff's attempt to import the word "reckless" into defendant's allegedly defamatory statements about plaintiff's driving). *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373 (1995), on which Oakley purports to rely, does not address defamation *per se*, and certainly does not give courts authority to ignore the underlying crime's elements in applying the serious crime exception, *see id.* at 380–81.[19]

[19] Moreover, since *Armstrong*, New York courts have held that claims for implied defamation require a "rigorous showing" that the defendants "affirmatively . . .

That Oakley cannot identify a single statement that specifically refers to physical actions he took on February 8—much less assaultive physical actions—forecloses his reliance on *Sprewell v. NYP Holdings, Inc.*, 772 N.Y.S.2d 188 (Sup. Ct. 2003), and *LeBlanc v. Skinner*, 955 N.Y.S.2d 391 (App. Div. 2012). In *Sprewell*, the challenged statements accused the plaintiff of having "took a swing," "busted [his] hand" in a "skirmish," "punch[ed] a wall," and used a "clenched fist" to "hit[] a surface." 772 N.Y.S.2d at 193.[20] *LeBlanc*, meanwhile, concerned allegations that the plaintiff had placed a severed horse head in a political rival's pool, a transparently serious crime. *See* 955 N.Y.S.2d at 394. The cases with facts most analogous to Oakley's underscore that Oakley cannot avail himself of the serious crime exception. *See, e.g.*, *Burdick.*, 305 A.D.2d at 1031 (finding allegation that plaintiff "hit" or "took a swing" at another person not actionable *per*

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intended or endorsed th[e claimed] inference." *Stepanov v. Dow Jones & Co., Inc.*, 987 N.Y.S.2d 37, 44 (App. Div. 2014). Oakley does not even *attempt* to satisfy this heightened standard, instead arguing throughout his brief that he should be held to a pleading standard *lower* than the minimum federal standard. (Br. 28–29, 33–34.)

[20] Oakley's protestation that "'punching a wall' is not injuring anyone" is inapposite: the *Sprewell* statement accused the plaintiff of violent physical activity that amounted to attempted assault, far more than can be implied from Defendants' statements. (*Contra* Br. 25 n.3.) Regardless, *Sprewell* is at odds with authority from a higher court. *See Burdick v. Verizon Commc'ns, Inc.*, 305 A.D.2d 1030, 1031 (N.Y. App. Div. 2003).

se); *Cieszkowiski*, 2019 WL 7496391, at *3 (allegation that plaintiff "almost hit/r[a]n over my wife and child" not actionable *per se*).

Finally, as these and similar cases underscore, Oakley's reliance on the serious crime exception also fails because third-degree assault is not a serious crime. *See, e.g.*, *Cavllaro v. Pozzi*, 814 N.Y.S.2d 462, 465 (App. Div. 2006) (emphasizing that, in contrast to the previously broad scope of the exception, New York law "now requires that the statements [must] charge the plaintiff with the commission of a *serious* crime" (emphasis added)).

Alcoholism. In a footnote, Oakley argues that the district court erred in not finding that the relevant statements "imputed that Plaintiff suffered from the loathsome disease of alcoholism." (Br. 32 n.7.) As with the alleged assault allegations, this argument fails at the starting block because the relevant statements neither accuse nor imply that Oakley is an alcoholic. (*See supra* Section II.A.i.) Oakley also has no response to the district court's straightforward finding that "New York law does not consider alcoholism to be a loathsome disease." (A-213 (collecting cases).) As he did before the district court, Oakley cites *Hayes v. Sweeney*, 961 F. Supp. 467 (W.D.N.Y. 1997), but that case made clear that "[i]t is *not* actionable per se to charge a man orally with being drunk or in the habit of getting drunk, unless drunkenness is an indictable offense [*i.e.*, meets the serious crime exception] or unless the charge touches the plaintiff in some office,

profession, or occupation in which drunkenness is a disqualification or tends to constitute incapacity [*i.e.*, meets the injury-to-trade exception]," *id.* at 481 (emphasis added) (internal quotation marks omitted). Bereft of any supporting authority, Oakley's argument falls flat.

Injury to Trade, Business, or Profession. The district court rejected Oakley's contention that Defendants' statements disparaged him in his purported profession of making appearances at alcohol rehabilitation centers for three reasons: (i) Oakley "does not plead" that such work is his "trade, business, or profession" (A-213), (ii) "the challenged statements speak only to Oakley's general personal qualities" (A-212), and (iii) "Oakley has not alleged any connection between the allegedly defamatory statements and his trade" (*id.*). Oakley does not and cannot refute these conclusions.

First, offering no citations to the Amended Complaint, Oakley insists that he alleged that he "frequently made [] appearances" at "drug and alcohol rehabilitation clinics." (Br. 33–34.) This is not true: Oakley *at most* alleged that he had made "guest appearances at a drug and alcohol rehabilitation clinics [sic]." (A-49; *see also* A-50.) Regardless, even alleging that one *frequently* does a particular activity is not the same as pleading that the relevant activity is one's

profession, as is required under the injury-to-trade exception.[21] The district court did not demand that Oakley "prove" anything (*contra* Br. 34); it simply applied a black-letter procedural requirement, and dismissed Oakley's claim when, even after amendment, it failed to plead a necessary element for recovery.

Second, the district court's parallel findings that *per se* actionability under the injury-to-trade exception requires that the statement must concern plaintiff's business and does not apply to general reflections upon plaintiff's character find ample support in case law (*contra* Br. 34–35). *See Liberman*, 80 N.Y.2d at 436 (noting that, for the exception to apply, the "statement must be made with reference to a matter of significance and importance for th[e] purpose [of the business, trade, profession or office itself], rather than a more general reflection upon the plaintiff's character or qualities" (internal quotation marks omitted)); *see, e.g.*, *Tacopina v. Kerik*, 2016 WL 1268268, at *4 (S.D.N.Y. Mar. 31, 2016); *Kalimantano GmbH v. Motion In Time, Inc.*, 939 F. Supp. 2d 392, 420 (S.D.N.Y. 2013). Indeed, *Jones v. Crisis Services of Erie County*, 2018 WL 3708494 (W.D.N.Y. Aug. 3, 2018), to which Oakley cites, explicitly found the challenged

[21] Oakley misreads the district court's opinion when he suggests that it found that his work with "individuals suffering from substance abuse was of such general knowledge that it contributed to making him a public figure." (Br. 33 n.8.) The district court merely highlighted Oakley's public appearances as an *effect* of his NBA fame (in support of its uncontested finding that he is a public figure), not an independent cause of that celebrity. (*See* A-209.)

statements were "not defamation per se *because they do not reference [plaintiff's] character or conduct in the context of her profession*," *id.* at *9 (emphasis added).

None of the challenged statements addressed Oakley in his capacity as an allegedly inspirational speaker to participants in alcohol rehabilitation clinics. This glaring hole is fatal to Oakley's attempted reliance on the injury-to-trade-exception. *See, e.g.*, *Walker v. Urban Compass, Inc.*, 2017 WL 608308, at *6–7 (N.Y. Sup. Ct. Feb. 15, 2017) (dismissing defamation *per se* claim premised on statements of alleged drug and alcohol abuse that "do not specifically relate to plaintiff's ability to be a real estate broker").

Finally, each of the injury-to-trade cases on which Oakley relies is distinguishable, as they either (i) featured unambiguous workplace allegations that the plaintiff is *both* an alcoholic *and* that plaintiff's drinking was having a material and adverse effect on his or her work, *see Hayes*, 961 F. Supp. at 481; *Sadowy v. Sony Corp. of Am.*, 496 F. Supp. 1071, 1078 (S.D.N.Y. 1980), or (ii) concerned accusations of shocking conduct far beyond musing about possible alcohol consumption that, if true, would expose the plaintiff to such a degree of public contempt and disgrace as to irreparably shatter his or her professional reputation, *see Jones*, 2018 WL 3708494, at *10 (statement that attorney "intended to kill her daughter and consumed medication prescribed for her dog" *per se* actionable); *Giuffre v. Maxwell*, 165 F. Supp. 3d 147, 154–55 (S.D.N.Y. 2016) (statement that

president of non-profit designed to help victims of sex trafficking "is lying about a history of underage sexual abuse" *per se* actionable); *Allen v. CH Energy Grp., Inc.*, 872 N.Y.S.2d 237, 238 (App. Div. 2009) (statement by plaintiff's supervisor accusing plaintiff of having "defecated on the sidewalk" *per se* actionable).

Because the challenged statements do not fit into any of the categories of defamation *per se*, Oakley's defamation claims can only survive if they plausibly plead special damages. Oakley did not even attempt to plead special damages for the assault claims, and, as emphasized below, failed to carry his burden for the alcoholism claims.

ii. The district court correctly found that Oakley had failed to plead special damages.

In the absence of *per se* defamatory statements, Oakley had to plead special damages to sustain his defamation claim. He failed to do so. As the district court correctly held, Oakley had not "plausibly allege[d] that . . . [his] actual losses [] are 'causally related to the alleged tortious act[s].'" (A-212 (quoting *L.W.C. Agency, Inc. v. St. Paul Fire & Marine Ins. Co.*, 509 N.Y.S.2d 97, 100 (App. Div. 1986)).) On appeal, Oakley relies on the same conclusory allegations regarding an alleged causal connection between the challenged statements and his purported loss of an appearance fee. (*See* Br. 37.) However, the relevant allegation—"as a direct result of Defendants' statements claiming that Mr. Oakley was an alcoholic, one such rehabilitation clinic, the Rebound Institute, came to the conclusion that it

was not appropriate for someone with such a reputation to interact with their patients" (A-49)—is precisely the sort of "threadbare recital[] of a cause of action's elements" prohibited by *Twombly*. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).[22]

In addition to being conclusory, Oakley's pleadings also fail because they lack plausibility. *See id.* Notably, the facts alleged in the Amended Complaint support the self-defeating conclusion that the Rebound Institute disassociated with Oakley for *non-actionable* reasons, such as that Oakley was involved in violent conduct, was taken into police custody on national television, was removed from MSG, was arrested, or was later charged with assault. (*See* A-41.) Oakley thus effectively pleads himself *out* of federal court, and provides no reason on appeal for this Court to deviate from established federal pleading standards.[23]

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[22] Despite *Twombly* and *Iqbal* being the governing law on pleadings in federal court, the only case Oakley cites in defense of the sufficiency of his special damages allegations is a state court case from nearly 40 years ago, *Privitera v. Town of Phelps*, 435 N.Y.S.2d 402, 406 (App. Div. 1981).

[23] Oakley's special damages allegations also fail because, as revealed by public postings on its website (A-107–28), the Rebound Institute continued to associate with Oakley after the allegedly defamatory statements (*see supra* n.10).

C. The Challenged Statements Were Not Spoken with Actual Malice.

Even if the challenged statements implied what Oakley alleges they imply (which they do not), and even if Oakley had successfully alleged special damages or *per se* actionability (which he has not), Oakley's defamation claim would still fail because the Amended Complaint does not plausibly allege actual malice. When a public figure like Oakley brings a defamation claim,[24] he must plausibly allege that the speaker acted with "actual malice," meaning "knowledge that the statements were false or with reckless disregard as to their falsity." *Biro*, 807 F.3d at 544. The district court found that Oakley failed to carry this burden because (i) he did not "offer any facts beyond conclusory allegations that the MSG Defendants or Dolan acted with actual malice," and (ii) "the only assertion that the Amended Complaint makes regarding actual malice is that Dolan harbored a general animosity toward Oakley." (A-210.)

Citing to pre-*Twombly* cases, Oakley suggests that he should be forgiven for not plausibly alleging actual malice because "resolution of the actual malice inquiry typically requires discovery." (Br. 28.) Yet this Court has already rejected precisely this argument. *See Biro*, 807 F.3d at 545. A public figure plaintiff must plead "'enough fact[s] to raise a reasonable expectation that discovery will reveal

[24] Oakley does not challenge the district court's finding that he is a public figure. (*See* A-209.)

evidence of' actual malice." *Id.* at 546 (quoting *Twombly*, 550 U.S. at 556). While Oakley may lament this high barrier, it is high by design, given the "First Amendment interests at stake." *Id.* at 545.[25] Indeed, despite Oakley's suggestions to the contrary, complaints are often dismissed at the pleading stage for failing to plausibly allege actual malice. *See, e.g.*, *Milton v. Wazed*, 2018 WL 2074179, at *7 (E.D.N.Y. Mar. 30, 2018) (aggregating examples).

On appeal, Oakley does not identify a single non-conclusory allegation from which a court could plausibly infer actual malice. (*See* Br. 31–32 (aggregating conclusory allegations).) Nor can the Amended Complaint's attempts to plead that Dolan harbored ill will toward Oakley save the actual malice allegations: as Oakley acknowledges (*see* Br. 29), "the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989). Finally, the allegation that Defendants "were left scrambling" because there was "no legitimate basis" for Oakley's expulsion does not remedy the actual malice deficiency. (*Contra* Br. 29.) Even ignoring the implausibility of this allegation—which overlooks Oakley's concession that he disobeyed requests to

[25] Plaintiffs who—unlike Oakley—are able to plausibly allege actual malice can overcome this pleading hurdle. *See Biro*, 807 F.3d at 545–46.

leave by security personnel—the allegation does not speak to whether Defendants had "subjective doubts" about the content of their statements, *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001).[26]

All of the cases Oakley cites in support of his argument feature defamatory statements concerning factual matter that the speaker would plainly know to be false. Thus, in *Celle*, the court emphasized evidence suggesting that, in allegedly falsely reporting that the plaintiff had been found negligent by a court, the defendant "actually understood at the time of the writing that no determination of negligence had actually been rendered." 209 F.3d at 187. Personal knowledge of the alleged falsity of the underlying accusations was also key to the holdings in Oakley's other cases.[27] Here, by contrast, Defendants either explicitly *disclaimed*

[26] Oakley's contention that Defendants lied in stating that Oakley committed an assault because Oakley never committed an assault fails because Defendants never claimed Oakley committed an assault. (*Compare* Br. 30, *with supra* Section II.A.i.)

[27] *See, e.g.*, *Grayson v. Ressler & Ressler*, 271 F. Supp. 3d 501, 510–11 (S.D.N.Y. 2017) (emphasizing allegations that defendants misrepresented various aspects of prior joint venture with plaintiff, of which they would have personal knowledge); *Giuffre*, 165 F. Supp. 3d at 156 (finding actual malice sufficiently alleged where plaintiff sued defendant who allegedly sexually abused plaintiff and then claimed plaintiff's story of sexual abuse was false); *Herlihy v. Metro. Museum of Art*, 633 N.Y.S.2d 106, 112 (App. Div. 1995) (finding issue of fact regarding whether defendants fabricated a claim that plaintiff had made anti-Semitic comments to them in particular).

personal knowledge ("we don't know") or made representations about Oakley's traits or habits that they would have no reason to know were false.[28]

III. The District Court Correctly Held that Oakley's False Imprisonment Claim Must Be Dismissed

The district court properly dismissed Oakley's false imprisonment claim. To state a claim for false imprisonment, Oakley must allege that Defendants "intended to confine him," that he was "conscious of the confinement," that he "did not consent to the confinement," and that "the confinement was not otherwise privileged." *McGowan v. United States*, 825 F.3d 118, 126 (2d Cir. 2016) (internal quotation marks omitted). Because the Amended Complaint revolves around Oakley's *removal* from MSG, the false imprisonment claim is premised on the MSG Defendants' purported "confine[ment]" of Oakley during the short window when they escorted him *out* of MSG and into police custody. (A-54.)

The district court correctly held that this alleged confinement was privileged. (A-217.) The MSG Defendants were entitled to revoke Oakley's license to be at MSG and to subsequently remove him. (*See supra* Section I.A.) And in removing Oakley after he refused to comply with their directive to leave, MSG security personnel were permitted to physically lead him outside. *See Schaeffer v.*

[28] Indeed, with respect to the alleged alcoholism comments, the Amended Complaint pleads elsewhere that Defendants discriminated against Oakley because they believed that he *was* an alcoholic. (A-55–56.)

Cavallero, 54 F. Supp. 2d 350, 352 (S.D.N.Y. 1999). Immediately after his removal, Oakley was "arrested and charged with assault" by the NYPD (A-41), for which Defendants cannot be held liable, *see Levy v. Grandone*, 789 N.Y.S.2d 291, 293 (App. Div. 2005).

Oakley contends that Defendants' actions were not privileged because "the Amended Complaint alleges that [he] was thrown out of MSG based on Defendants' perception that he was an alcoholic." (Br. 41.) However, Oakley raises this argument for the first time on appeal (*see* SUPA-49–50), and his "fail[ure] to press the argument below" results in its waiver. *Biocad JSC v. F. Hoffmann-La Roche*, 942 F.3d 88, 95 (2d Cir. 2019).

Oakley's argument is, in any event, meritless. Even if Oakley adequately alleged that the MSG Defendants ejected him for a discriminatory reason (which he did not), Oakley fails to explain how "throw[ing] [him] *out* of MSG" amounts to false imprisonment. (Br. 41 (emphasis added).) A false imprisonment claim requires a "prima facie showing of *confinement*." *Elson v. Consol. Edison Co. of N.Y.*, 641 N.Y.S.2d 294, 295 (App. Div. 1996) (emphasis added); *Mitchell*, 12 N.Y.S.3d at 33 (affirming dismissal of false imprisonment claim "as the complaint fails to allege that plaintiff was confined by the public safety officers").[29] Oakley

[29] Put another way, Oakley's false imprisonment claim does not provide sufficient factual allegations—as opposed to conclusory and formulaic recitations—to

asserts, without explanation, that if he is "ultimately able to prove" that he was ejected "based on Defendants' perception that he was an alcoholic," he will "be able to prove that his imprisonment was unlawful and, consequently, not privileged." (Br. 41.) But Oakley's speculation that he may eventually be able to prove a particular allegation is insufficient to remedy the Amended Complaint's deficiencies. *See Twombly*, 550 U.S. at 555.

IV. The District Court Correctly Held that Oakley's Public Accommodation Claims Must Be Dismissed

In order to state a claim under the Americans with Disabilities Act and the New York State Human Rights Law, "a plaintiff must establish that (1) he or she is disabled within the meaning of the ADA [or NYSHRL]; (2) that the defendants own, lease, or operate a place of public accommodation; and (3) that the defendants discriminated against the plaintiff within the meaning of the ADA [or NYSHRL]." *Krist v. Kolombos Rest. Inc.*, 688 F.3d 89, 94–95 (2d Cir. 2012) (internal quotation marks omitted); *Giambattista v. Am. Airlines, Inc.*, 584 F. App'x 23, 26 (2d Cir. 2014). Oakley alleges that Defendants falsely perceived him

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establish that Defendants were responsible for restraining and detaining him. (A-54.) The Amended Complaint is conspicuously silent on who allegedly restrained or detained Oakley. (*See* A-41.) Such vague allegations do not support a plausible inference that Defendants—as opposed to the NYPD officers at the scene—imprisoned Oakley, and are insufficient to state a claim. *See Sun v. City of New York*, 803 F. App'x 469, 472 (2d Cir. 2020); *Radin v. Tun*, 2015 WL 4645255, at *8 (E.D.N.Y. Aug. 4, 2015).

to be an alcoholic, even though he pleads the opposite in support of his defamation claim: that Defendants knew he was *not* an alcoholic. (*Compare* A-49–52, *with* A-55–56.) The district court found that Oakley had "abjectly fail[ed] to allege a claim" under either statute (A-219), emphasizing that Oakley "does not plead *any* fact that supports a plausible inference that Defendants discriminated against [him] on the basis of his purported alcoholism" (A-218 (emphasis added)). The district court's dismissal finds ample support: the Amended Complaint fails to plausibly allege that Defendants regarded Oakley as an alcoholic, that Defendants ejected Oakley because they perceived him to be an alcoholic, or that Oakley suffered any injury.

Despite Oakley's attempts to identify statements from Defendants that suggest a discriminatory animus (*see* Br. 38–39), none of the statements communicate the meaning that Oakley ascribes to them (*see supra* Section II.A.i). And on a broader level, the district court correctly found that Oakley's allegations regarding discriminatory animus are contrary to the Amended Complaint, which repeatedly asserts, "in a conclusory manner[,] that Dolan knew that Oakley was *not* an alcoholic." (A-219.)[30]

[30] The fact that the Amended Complaint expressly "repeats and realleges each and every allegation in the preceding paragraphs as if set forth fully herein" in support of his discrimination claims (A-54–55)—including its allegations that Defendants knew Oakley was *not* an alcoholic (*e.g.*, A-44)—provides reason

Oakley also has no response to the district court's finding that "Dolan in no way connected" the comment about Oakley maybe having a problem "to Oakley's ejection" (A-218), apart from the false suggestion that Dolan's entire interview was one extended explanation of Defendants' reasons for ejecting Oakley (it was not). (*See* Br. 39.) Nor can an isolated incident where Dolan speculated that somebody else might be an alcoholic, or another incident where Dolan complained about a drunk heckler, plausibly support the claim that Defendants harbor a discriminatory animus toward alcoholics, believe Oakley to be an alcoholic, and/or specifically threw Oakley out of MSG because they harbor ill will toward alcoholics. (*Contra* Br. 39–40.) Oakley's allegations effectively ask this Court to treat a defendant's rational reaction to misconduct possibly connected to the overconsumption of alcohol as unlawful discrimination, a position that is squarely foreclosed by precedent. *See Klaper v. Cypress Hills Cemetery*, 593 F. App'x 89, 90 (2d Cir. 2015).[31] This failure to plausibly plead an inference of discrimination

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alone for this Court to dismiss the claim. *See, e.g.*, *Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co.*, 976 F.2d 58, 62 (1st Cir. 1992); *Nat'l W. Life Ins. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 175 F. Supp. 2d 489, 492 (S.D.N.Y. 2000).

[31] The two cases on which Oakley relies only accentuate his pleadings' deficiencies. In *Kelly v. North Shore—Long Island Jewish Health System*, 166 F. Supp. 3d 274 (E.D.N.Y. 2016), defendants placed the plaintiff on administrative leave two hours after learning of her alcoholism, and explicitly told her that they had done so because of her "problem," *id.* at 279. *Holcomb v.*

warrants dismissal of the claim. *See, e.g.*, *Pierce v. Fordham Univ.*, 692 F. App'x 644, 646 (2d Cir. 2017); *Perry v. NYSARC, Inc.*, 424 F. App'x 23, 25–26 (2d Cir. 2011).

Finally, Oakley's claims also fail for lack of standing because the threat of injury is "conjectural or hypothetical" instead of "real and immediate." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Oakley fails to plausibly allege that he would be denied access to MSG in the future on account of Defendants' belief that he is an alcoholic. *See Small v. Gen. Nutrition Cos., Inc.*, 388 F. Supp. 2d 83, 87 (E.D.N.Y. 2005). To the contrary, Oakley independently agreed with prosecutors to stay away from the arena as part of his criminal plea agreement, which precludes his theory of liability. (*See* A-75.)

V. The District Court Did Not Abuse Its Discretion in Denying Oakley Leave to Amend

A district court has "broad discretion in determining whether to grant leave to amend," and this Court "review[s] such determinations for abuse of discretion." *Ladas*, 824 F.3d at 28 (internal quotation marks omitted). Oakley has failed to

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Iona College, 521 F.3d 130 (2d Cir. 2008), a case of alleged race-based employment discrimination in which the termination occurred in a "racially charged atmosphere" and the cited reasons for termination appeared pretextual, is even further afield, *see id.* at 141–43. Again, Oakley pleads *zero* non-conclusory facts that would suggest Defendants regarded him as an alcoholic, much less that they ejected him for that reason.

show any abuse of discretion on the district court's part in denying him to leave to amend for a second time.

A plaintiff's "failure to fix deficiencies in the previous pleading, after being provided notice of them, is alone sufficient ground to deny leave to amend." *BankUnited, N.A. v. Merrit Envtl. Consulting Corp.*, 360 F. Supp. 3d 172, 191 (S.D.N.Y. 2018); *accord Nat'l Credit Union Admin. Bd. v. U.S. Bank Nat'l Ass'n*, 898 F.3d 243, 257–58 (2d Cir. 2018). Oakley already amended his complaint once, with the benefit of both the parties' pre-motion letters (SUPA-1–3, 4–6), and the pre-motion conference concerning Defendants' contemplated motion to dismiss, during which the district court and Defendants addressed, at length, the deficiencies in Oakley's original complaint (A-152–53, A-157–73, A-178–92.) Despite notice of the defects in his pleading and an opportunity to amend, Oakley's Amended Complaint still failed to state a claim. Oakley is not entitled to "yet another bite at the proverbial apple." *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 118 (2d Cir. 2017).

Furthermore, Oakley's cursory sentence requesting leave to amend, buried in a footnote at the end of his Opposition to Defendants' Motion to Dismiss, did not offer any basis for his request, let alone submit a proposed further amended pleading. (SUPA-56 n.19.) Leave to amend was appropriately denied on that basis as well. *See, e.g.*, *Porat v. Lincoln Towers Cmty. Ass'n*, 464 F.3d 274, 275–

76 (2d Cir. 2006). On appeal, Oakley still fails to identify the allegations that he would add to his pleading. He merely asserts that he would provide unspecified "detail" about the Rebound Institute's decision not to pay him appearance fees and "clarify" that Defendants "acted with an intent to injure him" and "used excessive or unreasonable force." (Br. 42.) These vague assertions are insufficient to "demonstrate that [Oakley] would be able to amend his complaint in a manner that would survive dismissal." *Bellikoff*, 481 F.3d at 118. The district court thus "rightfully denied" leave to amend. *Id.*

CONCLUSION

The district court's judgment dismissing the Complaint in full with prejudice should be affirmed.

/s/ Randy M. Mastro

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Dated: June 5, 2020

/s/ Randy M. Mastro
Randy M. Mastro

SUPPLEMENTAL APPENDIX

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November 13, 2017

VIA ECF AND E-MAIL (sullivannysdchambers@nysd.uscourts.gov)

Hon. Richard J. Sullivan
United States District Judge
40 Foley Square

Re: *Oakley v. Dolan, et al.*, 17-cv-6903 (RJS)

Dear Judge Sullivan:

We write as Defendants' counsel, pursuant to Your Honor's Rule 2(A), to request a pre-motion conference to seek permission to file a motion to dismiss this Complaint (Doc. No. 1) under Federal Rule of Civil Procedure 12(b)(6), and for a stay of discovery pending that motion's disposition.[1]

Plaintiff Charles Oakley has a long, documented history of altercations with law enforcement and security personnel.[2] This case concerns the latest example of his recidivist behavior. On February 8, 2017, Oakley, a former New York Knick and conceded public figure (*id.* at 4), attended a Knicks game (the "Game") at Madison Square Garden ("MSG"). Minutes after taking his seat, near children, Oakley began shouting obscenities at a group of MSG security guards, calling them names like "motherf***ers" and "rat bast*rd," as witnesses will attest. Concerned by Oakley's disruptive, threatening behavior, the guards and a nearby NYPD police officer approached Oakley and asked him to leave. Oakley refused and became violent, shoving one of the guards in the face and another in the chest. The guards and two NYPD officers then escorted Oakley out of the arena. Oakley remained hostile and aggressive, cursing and hurling homophobic slurs at the guards and officers, calling them "motherf***ers" and "fa**ots," and shouting words to the effect of "all you whites over there get your story straight," "why don't you have some brothers over there with you," and "f*** all you white boys." Oakley was arrested and charged with third-degree assault, aggravated harassment, and other crimes. On August 4, 2017, as part of a plea disposition, a New York judge granted an adjournment in contemplation of dismissal, and the Manhattan DA and Oakley agreed to a trespass notice barring Oakley from MSG for one year. Despite his deplorable behavior and his criminal plea, Oakley cynically sued MSG shortly thereafter.

LEGAL STANDARD. Rule 12(b)(6) "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint must plead facts that make a plaintiff's claims "plausible." *Id.* A court may consider documents or statements that are "incorporated . . . by reference" or otherwise "integral" to the allegations in the complaint. *Yak v. Bank Brussels Lambert*, 252 F.3d 127, 130–31 (2d Cir. 2001).[3]

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[1] The Complaint asserts various state law claims and a public accommodation claim under local, state, and federal law.

[2] *See* Counterclaim filed in *Oakley v. Aria Resort & Casino, LLC* (Nev. 2011) (describing prior incidents in which Oakley cursed, punched, kicked, and bit security guards trying to restrain him and threw a bystander's camera into a hotel pool; punched a guard in the face; and sent a hotel employee to the hospital by throwing dice at his face); *see also Charles Oakley To Security Outside Cavaliers Locker Room: "Touch Me, Y'all See What Happens"*, USA Today (June 20, 2016); *Former Knicks' Player Charles Oakley Busted for DUI*, NY Daily News (Dec. 18, 2007).

[3] Applying this standard, the Court should consider videos of Oakley at the Game and the full text of statements

DEFAMATION *PER SE*/LIBEL/SLANDER. Oakley alleges that Defendants made defamatory statements that accuse him of "subject[ing] other individuals to abusive conduct," "committ[ing] assault," and "being an alcoholic." Compl. ¶¶ 78–79, 85, 90. A public-figure plaintiff must establish five elements to recover on a defamation claim: (1) a statement of fact about plaintiff, (2) publication to a third party, (3) actual malice, (4) falsity, and (5) defamation *per se* or special damages. *Chau v. Lewis*, 771 F.3d 118, 126–27 (2d Cir. 2014). Oakley fails to plead and cannot establish these necessary elements.[4] *First*, the Complaint does not point to any statements made by Defendants constituting defamation *per se*, so Oakley must plead special damages, which he does not do. "[A] general reflection upon the [plaintiff's] character or qualities" is not defamatory *per se*. *Golub v. Enquirer/Star Grp.*, 89 N.Y.2d 1074, 1076 (1997). There are only four narrow defamatory *per se* categories: "statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman." *Liberman v. Gelstein*, 80 N.Y.2d 429, 435 (1992). Statements like those challenged here do not fit into any of these categories. The Complaint does not point to any statement by any Defendant where the term "assault" was uttered, let alone any statement actually accusing Oakley of having committed the crime of assault.[5] Being abusive is not a crime, let alone a "serious crime." Alcoholism is not a "communicable" or otherwise loathsome disease. *Marino v. Jonke*, 2012 WL 1871623, at *11 (S.D.N.Y. Mar. 30, 2012).[6] Thus, Oakley must plead special damages, i.e., "the loss of something having economic or pecuniary value." *Franklin v. Daily Holdings, Inc.*, 135 A.D.3d 87, 93 (1st Dep't 2015). He makes no attempt to do so.[7] *Second*, the Complaint does not plead any facts that suggest Defendants acted with "actual malice," i.e., "a subjective awareness of either [the statements'] falsity or probable falsity [or a] reckless disregard" thereof. *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 182–83 (2d Cir. 2000).[8] *Third*, certain challenged statements are non-actionable opinions, *e.g.*, Compl. ¶ 65 ("*To me*, Charles has got a problem."; "He *may* have a problem with alcohol." (emphases added)). *See Chau*, 771 F.3d at 129.[9]

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discussed in the Complaint. *See* Compl. ¶¶ 4–5, 53–54, 59–72; *see, e.g.*, *Hershey v. Goldstein*, 938 F. Supp. 2d 491, 498 n.1 (S.D.N.Y. 2013) (considering security camera video footage of underlying incident on motion to dismiss). The Court should take judicial notice of filings and actions taken in other cases involving Oakley, including in his related criminal case. *See, e.g.*, *Corley v. Jahr*, 2013 WL 265450, at *6 (S.D.N.Y. Jan. 24, 2013).

[4] Defendants focus on certain elements in this letter but reserve all rights to challenge all five elements.

[5] In any event, such a statement would not constitute defamation *per se*. Third-degree assault—a misdemeanor—is not considered a serious crime. *See Fusco v. Fusco*, 2008 WL 307456, at *4 (N.Y. Sup. Ct. Jan. 16, 2008) (dismissing *per se* claim because statement concerned "simply a misdemeanor"); *see also Liberman*, 80 N.Y.2d at 436 ("harassment" not a "serious crime"). Oakley also cannot establish falsity or actual malice because he was charged with assault and Defendants observed him committing the act. *See LoFaso v. City of New York*, 66 A.D.3d 425, 426 (1st Dep't 2009) (dismissing defamation claim since statement that plaintiff "was arrested for assault" was true and "truth provides a complete defense"). These reasons each warrant dismissal of Oakley's defamation claims predicated on "assault."

[6] *See Ruderman v. Stern*, 2004 WL 3153217, at *16 (N.Y. Sup. Ct. Oct. 25, 2004) ("statements that plaintiff was an alcoholic . . . do not constitute slander *per se*").

[7] The Complaint only alleges that Oakley "suffered harm"—there is no mention of his current professional or personal activities, let alone how the at-issue statements could have directly caused him financial harm. Compl. ¶¶ 83, 88, 93.

[8] The statements were reasonable and/or true, as court filings and news articles of Oakley's history, videos of his conduct at the Game, and his own statement that he had been drinking that night, *see id.* ¶ 65, reflect.

[9] *See also Rotondi v. Madison Square Garden Co.*, 2017 WL 4083093, at *3 (N.Y. Sup. Ct. Sept. 12, 2017) (regarding

FALSE IMPRISONMENT. A requisite for a false imprisonment claim is that the challenged "confinement" was "not privileged." *Lynn v. State*, 822 N.Y.S.2d 600, 601 (2d Dep't 2006). An arrest of a criminal suspect by a law enforcement officer with probable cause is a "privileged" confinement. *See id*. The Court should dismiss this claim because Oakley was detained and arrested by NYPD officers who had probable cause to confine him based on their direct observations of his unlawful conduct at the Game, and he was in fact charged with several crimes stemming from the arrest.

ABUSE OF PROCESS. Oakley fails to allege "an *abuse* of process which has as its direct object an effect outside the intended scope of operation of the process employed." *Jones v. Maples/Trump*, 2002 WL 287752, at *7 (S.D.N.Y. Feb. 26, 2002). "[W]ithout an allegation that the process has been improperly perverted 'after' its issuance, a claim of abuse of process must be dismissed." *Id.* (quoting *Curiano v. Suozzi*, 63 N.Y.2d 113, 117 (1984)). The Complaint contains nothing bearing even a resemblance to this kind of allegation, and that is fatal.

ASSAULT AND BATTERY. These claims fail because Oakley's own actions necessitated physical removal from the Game by guards and NYPD officers after Oakley refused to voluntarily comply with a request to leave the arena. *See Schaeffer v. Cavallero*, 54 F. Supp. 2d 350, 352 (S.D.N.Y. 1999) (dismissing battery claim because plaintiff-passenger had refused to peacefully disembark a plane when instructed and thus "brought [the battery] upon himself").

DENIAL OF PUBLIC ACCOMMODATION (ADA/NYSHRL/NYCHRL). Oakley claims Defendants denied "him access to [MSG] based on their perception that he suffers from alcoholism." Compl. ¶¶ 111, 115, 119. First, under the ADA, Oakley only has a right to "injunctive relief," not monetary damages for past discrimination. *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 86 (2d Cir. 2004). He therefore "cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he . . . will be injured in the future." *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004). Oakley alleges that Defendants have banned him indefinitely from MSG, but as court documents in the related criminal case show, in August 2017, Oakley himself voluntarily agreed with the DA, a non-party, to a trespass notice barring him from entering MSG for one year. Oakley only speculates about future encounters with Defendants, which is insufficient to state a claim for injunctive relief. *See id.* Second, all three claims should be dismissed since the Complaint does not include facts that make it "plausible" that Oakley was removed because of Defendants' alleged perception that he is an alcoholic. Oakley was escorted out of MSG because of his disruptive conduct. Compl. ¶¶ 45–46. It is lawful to remove someone from a sports venue under such circumstances. *Cf. Cain v. Atelier Esthetique*, 2016 WL 6195764, at *3 (S.D.N.Y. Oct. 21, 2016).[10]

Respectfully,

/s/ Randy Mastro
Randy M. Mastro

"incident" where plaintiff was "ejected" from MSG after he "refused to exit" and "became abusive with MSG security personnel," court found that "statements made by MSG's vice [president]" asserting "that the plaintiff was abusive and interfered with the game" were "nonactionable statements of opinion").

[10] The NYCHRL claim further fails because Oakley denies he is or ever was an alcoholic, Compl. ¶ 66. *See Makinen v. City of New York*, 857 F.3d 491, 495 (2d Cir. 2017) (NYCHRL is "limited to *recovering or recovered* alcoholics") (emphasis added).

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December 1, 2017

VIA ECF AND EMAIL

The Honorable Richard J. Sullivan
United States District Court, Southern District of New York
40 Foley Square, Room 2104
New York, New York 10007

Re: Oakley v. Dolan, *et al.*; Civil Case No. 17-cv-06903 (RJS)

Dear Judge Sullivan:

We represent Plaintiff Charles Oakley in the above-referenced action and write in opposition to Defendants' November 13, 2017 request for a pre-motion conference concerning their anticipated motion to dismiss.[1] As explained below, while we cannot, obviously, prevent Defendants from making a motion, it would ultimately prove futile and be a waste of resources for both the Court and the parties.

I. Defamation *per se*, Slander and Libel

In New York, the following relevant categories of statements are considered defamatory *per se*, and damages therefore need not be alleged or proven: "(1) those that accuse the plaintiff of a serious crime; (2) those that tend to injure another in his or her trade, business or profession; [or] (3) those that accuse the plaintiff of having a loathsome disease. . ." Stern v. Cosby, 645 F. Supp. 2d 258, 273 (S.D.N.Y. 2009) (internal quotations and citations omitted).

Here, Plaintiff alleges that he suffered serious injury to his personal and professional reputation as a result of Defendants' malicious publication of defamatory statements stating, *inter alia*, that he suffered from alcoholism, subjected others to violent and abusive conduct and committed the crime of assault. Compl. ¶¶ 77-93. These allegations, accepted as true, are sufficient to state a claim for defamation *per se*. See, e.g., Sprewell v. NYP Holdings, Inc., 772 N.Y.S.2d 188, 193 (Sup. Ct. 2003) (allegations implying the plaintiff committed assault sufficient to support defamation *per se*).[2] Defendants' argument that their statements do not constitute *per se* defamation because Plaintiff was

[1] As a threshold matter, it is entirely improper for Defendants to attempt to rely on evidence outside of the Complaint in support of their motion to dismiss, given that Plaintiff neither referenced nor otherwise adopted this evidence in his Complaint. The cases to which Defendants misleadingly cite do not support their argument. See Hershey v. Goldstein, 938 F. Supp. 2d 491, 498 n. 1 (S.D.N.Y. 2013) (court only considered video recording of incident where *the plaintiff* referenced the video footage in his complaint and affirmatively incorporated the video footage by reference); Corley v. Jahr, No. 11 Civ. 9044 (RJS)(KNF), 2013 WL 265450, at *6 (S.D.N.Y. Jan. 24, 2013) (judicial notice of prior actions only considered for purposes of collateral estoppel).

[2] See also Hayes v. Sweeney, 961 F. Supp. 467, 481 (W.D.N.Y. 1997) ("New York courts have determined that an imputation of alcohol consumption is defamatory when accompanied by some aggravating factor, such as the suggestion that conduct is habitual or that the person is 'a drunk.'").

only charged with third degree assault is irrelevant.[3] Defendants' statements do not mention that Plaintiff was charged with a misdemeanor, and instead emphasize his purportedly violent conduct in a clear effort to denigrate his reputation. Likewise, Plaintiff specifically alleges that Defendants acted with actual malice, and that they were aware that their statements were false. Compl. ¶¶ 5, 77-93. Finally, Defendants' statements, which allude to Plaintiff's supposed history of "problems," and statements by purported witnesses,[4] id. at ¶¶ 59-69, do not constitute pure statements of opinion, but instead "impl[y] a basis in undisclosed facts [which] is actionable mixed opinion." Wilcox v. Newark Valley Cent. Sch. Dist., 904 N.Y.S.2d 523, 526 (3d Dep't 2010) (collecting cases).

II. Assault and Battery

To state a claim for civil assault, a plaintiff must plead "the intentional placing of another person in fear of imminent harmful or offensive contact." Cohen v. Davis, 926 F. Supp. 399, 402 (S.D.N.Y. 1996). A claim for battery requires "an intentional wrongful physical contact with another person that is without that person's consent." Id. Plaintiff's allegations that Defendants both threatened him and forcibly removed him from Madison Square Garden ("MSG") see Compl. ¶¶ 38-52, are sufficient to state a claim for assault and battery. See, e.g., Cohen, 926 F. Supp. at 402 (denying motion to dismiss assault and battery claims because whether the plaintiff felt appropriately threatened "is an issue of fact that cannot be decided on a motion to dismiss"). Defendants' contention that Plaintiff's claims should be dismissed because "Oakley refused to voluntarily comply with a request to leave the arena," is premature at this stage and will ultimately be shown to be untrue. Defendants are asking the Court to find, absent any record, that Plaintiff refused to leave the arena after a legitimate request, a claim that can only be tested after discovery.[5] See McKinnon v. Bell Sec., 268 A.D.2d 220, 221 (1st Dep't 2000) ("The trier of fact must determine whether plaintiff's demeanor and behavior aggressively precipitated [a] confrontation, to the extent of relieving the defendant of responsibility").

III. False Imprisonment and Abuse of Process

To state a claim for false imprisonment, the plaintiff need only allege, "(1) the defendant intended to confine her; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged." Cellamare v. Millbank, Tweed, Hadley & McCloy LLP, No. 03 Civ. 39, 2003 WL 22937683, at *7 (E.D.N.Y. Dec. 2, 2003). To state a claim for abuse of process, the plaintiff must allege: "(1) regularly issued process, either

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[3] Likewise, despite what Defendants argue, there is no requirement that they actually mention the term "assault" in order to be found liable for defamation *per se*. Id. ("[D]efamatory language need not consist of the technical words of a criminal indictment provided that it is "reasonably susceptible to a connotation of criminality").

[4] These oblique references to Mr. Oakley's history and purported witness statements clearly distinguish the instant case from Rotondi v. The Madison Square Garden Co., Index No. 150097/2015 (NMB), 2017 WL 4083093 at *3 (N.Y. Sup. Ct., N.Y. Cnty. Sept. 12, 2017) in which the defendants' representative confined his comments about the plaintiff to the incident in question.

[5] Indeed, demonstrating the fallacy of Defendants' arguments, the only case to which they cite was only decided "**following discovery, motion practice, trial preparation, and completion of plaintiff's case at trial**." Schaeffer v. Cavallero, 54 F. Supp. 2d 350, 351 (S.D.N.Y. 1999) (emphasis added). To that end, the vast majority of the case law cited by Defendants in support of their legally deficient motion to dismiss were decided *after* discovery, with a developed factual record, and not at the motion to dismiss stage. See, e.g., Shain v. Ellison, 356 F.3d 211, 213 (2d Cir. 2004) (summary judgment decision); Powell v. Nat'l Bd. of Med. Examiners, 364 F.3d 79, 83 (2d Cir. 2004) (same); Lynn v. State, 822 N.Y.S.2d 600, 601 (2d Dep't 2006) (post-trial motion).

civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective." D'Amico v. Corr. Med. Care, Inc., 120 A.D.3d 956, 961 (4th Dep't 2014) (internal quotation omitted). Plaintiff's allegations that Defendants intentionally confined him without his consent, by removing him from MSG and detaining him he was arrested, Compl. ¶¶ 38-55, state a claim for false imprisonment and abuse of process. See D'Amico, 120 A.D.3d at 960 (denying motion to dismiss where the defendants gave false statements with the intent of "demeaning, humiliating, and defaming [the plaintiff]").

Defendants' argument that Plaintiff "was detained and arrested by NYPD officers who had probable cause," misses the point. Plaintiff's false imprisonment claim does not stem from the NYPD's actions. Rather, as alleged in the Complaint, Plaintiff's false imprisonment claim arises from *Defendants'* restraining him and removing him from MSG. Compl. ¶¶43-48, 101. Similarly meritless is Defendants' argument that Plaintiff fails to allege that legal process had "been improperly perverted 'after' its issuance," as, unlike in Jones v. Maples/Trump, No. 98 Civ. 7132, 2002 WL 287752, at *7 (S.D.N.Y. Feb. 26, 2002), Defendants here specifically referred to the arrest that they procured through false pretenses in subsequent public statements, all in a clear attempt to further humiliate Mr. Oakley. See Compl. ¶55.

IV. ADA, NYSHRL and NYCHRL

To state a claim for disability discrimination, the plaintiff must allege: "(1) that she is disabled within the meaning of the statute and regulations, (2) that the defendant owns, leases or operates a place of public accommodation, and (3) that the defendant discriminated against her on the basis of her disability."[6] See de la Rosa v. 597 Broadway Dev. Corp., No. 13 Civ. 7999, 2015 WL 7351540, at *6 (S.D.N.Y. Aug. 4, 2015). Plaintiff's allegations, including that Defendants denied him access to MSG based on their perception that he suffers from alcoholism, are sufficient to state a claim. See Naiman v. New York Univ., No. 95 Civ. 6469 (LMM), 1997 WL 249970, at *2 (S.D.N.Y. May 13, 1997) (violation of the ADA where the plaintiff was excluded from a public accommodation).

Defendants' arguments to the contrary are meritless. First, in order to seek injunctive relief under the ADA, the case law is clear that a plaintiff need only allege, as Mr. Oakley has done here, see Compl. ¶¶ 1, 7, 33, that his past conduct demonstrates that he intends to return to the public facility from which he was unlawfully denied access. Hirsch v. Hui Zhen Huang, No. 10 Civ. 9497, 2011 WL 6129939, at *2-3 (S.D.N.Y. Dec. 9, 2011). Similarly, Defendants' argument that Plaintiff fails to allege that he was discriminated against because of his perceived alcoholism completely ignores the specific allegations that Defendants discriminated against him specifically based on their perception that he was an alcoholic. See Compl. ¶¶ 57-60, 64-65, 111-19.

Based upon the foregoing, Defendants' request for a pre-motion conference regarding an anticipated motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) should be denied as futile.

Respectfully submitted,

Renan F. Varghese

[6] Claims arising under the NYSHRL and NYCHRL are analyzed under the same standard as claims arising under the ADA. Andrews v. Blick Art Materials, LLC, No. 17 Civ. 767, 2017 WL 3278898, at *12 (E.D.N.Y. Aug. 1, 2017).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES OAKLEY, Plaintiff, v. JAMES DOLAN, in his individual and professional capacities, MSG NETWORKS, INC., THE MADISON SQUARE GARDEN COMPANY and MSG SPORTS & ENTERTAINMENT, LLC, Defendants.	:	Civil Case No.: 17-cv-6903 (RJS)

PLAINTIFF CHARLES OAKLEY'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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Plaintiff Charles Oakley ("Plaintiff" or "Mr. Oakley") submits this Memorandum of Law in opposition to Defendants James Dolan ("Mr. Dolan"), MSG Networks, Inc., the Madison Square Garden Company and MSG Sports & Entertainment, LLC's (collectively, "Defendants") motion to dismiss Plaintiff's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth herein, Defendants' motion should be denied in its entirety.

PRELIMINARY STATEMENT

Despite having been specifically admonished by the Court to avoid arguments "tailored more to the court of public opinion than the United States District Court of the Southern District of New York," and to limit their submissions "to argument and authorities relevant to the pending motion," Defendants have disregarded the Court's explicit instructions. Rather than litigate Mr. Oakley's claims on the merits, Defendants have instead used this motion as a vehicle to further the process that they began on February 8, 2017—to publicly destroy Plaintiff's reputation by relying on false and misleading statements designed to sway the public.

Having rejected the Court's offer to allow them to convert their motion to dismiss to a motion for summary judgment, Defendants nevertheless introduce evidence outside of the four corners of the Amended Complaint, knowing that Plaintiff has no access to such evidence. Much of this evidence, including references to Plaintiff's prior lawsuits and his purported criminal record, is not even tangentially relevant to the allegations in the Amended Complaint, a fact of which Defendants are undoubtedly aware. Defendants have included this improper evidence in a transparent attempt to impugn Plaintiff's reputation and to distract from their own unlawful conduct, which gave rise to this meritorious lawsuit. Tellingly, even this extrinsic evidence alone is insufficient to support Defendants' claim that Plaintiff was behaving inappropriately as soon as he entered Madison Square Garden ("MSG," the "Garden" or the "Arena") on February 8, 2017, forcing security guards to violently confront him and publicly eject him from the place he had

called home for a decade (the "Incident"). However, Defendants' internal video footage of this very Incident from inside the Arena paints a starkly different picture. As depicted in the video footage, from the moment he takes his seat Mr. Oakley can be seen laughing and casually interacting with fans. Nowhere is there evidence that he was acting as belligerently as Defendants falsely claim.

In fact, most notably during a stoppage in play, Defendant Dolan can be seen summoning a security guard and speaking to him at length. *See* Kushner Decl.[1] Ex. 2a at 8:18:41–8:18:52. As soon as the security guard returned to his station, Defendant Dolan signaled for his attention and made a very clear gesture with his right hand, bringing it from his head and pointing it towards the ground. *Id*. at 8:19:12. Within seconds of Defendant Dolan's gesture, the security guard gathered other security personnel who proceeded to surround Mr. Oakley and throw him out of the Arena. *Id*. at 8:19:13–8:19:30. When the guards were finished assaulting Mr. Oakley and violently ejecting him from MSG, Defendant Dolan can be seen giving a thumbs up to the security guards. *Id*. at 8:22:43. It is therefore clear that as alleged in the Amended Complaint, it was not Mr. Oakley's conduct on February 8, 2017 that led to him being violently assaulted by Defendants' personnel, but Defendant Dolan's inability to even tolerate Mr. Oakley's presence at the Garden.

It is to address this unlawful conduct, as well as Defendants' subsequent attempts to malign Plaintiff by instituting a defamatory media campaign designed to falsely portray Mr. Oakley as a violent and out of control alcoholic, that has prompted Plaintiff to institute this lawsuit. For the reasons set forth below, Defendants' meritless motion to dismiss should be denied in its entirety and Plaintiff should be permitted to proceed to discovery where he will adduce the evidence that will conclusively prove his claims.

[1] All citations to the "Kushner Decl." refer to the Declaration of Sarah L. Kushner submitted in support of Defendants' motion to dismiss and its corresponding exhibits.

RELEVANT FACTS AND BACKGROUND

I. ALLEGATIONS OF THE AMENDED COMPLAINT

A. The February 8, 2017 Incident

Plaintiff Charles Oakley is a former all-star power forward for the New York Knicks. *See* Am. Compl. ("AC"), Dkt. No. 36, ¶ 6. At all relevant times, Defendants MSG Networks, Inc., The Madison Square Garden Company and MSG Sports & Entertainment, LLC (collectively, the "MSG Defendants") owned and operated Madison Square and the New York Knicks, and Defendant Dolan was Executive Chairman of the MSG Defendants. *Id.* ¶¶ 7-10.

Despite never having met Defendant Dolan during his playing career, Mr. Oakley constantly found himself the target of his harassing behavior. *Id.* ¶¶ 27-28. This pattern of harassing behavior reached a crescendo on February 8, 2017, when Plaintiff attended the Knicks game at MSG against the Los Angeles Clippers. *Id.* ¶ 30. Mr. Oakley was neither intoxicated nor behaving inappropriately when he arrived at the Arena, and he was allowed to enter and go to his seat without incident. *Id.* ¶ 31. Although Mr. Oakley's seat was coincidentally located several rows behind Mr. Dolan's seat, Mr. Oakley went to his seat without speaking to Mr. Dolan or otherwise acknowledging him in any way. *Id.* ¶¶ 32-33.

Within a few minutes of arriving at his seat, three men approached Mr. Oakley, identifying themselves only as members of MSG's security team, and ordered him to leave the Arena without any explanation. *Id.* ¶ 34. When Mr. Oakley calmly sought an explanation as to why he was being treated with such hostility, one of the security guards publicly berated him by demanding loudly, "Why are you sitting so close to Mr. Dolan," making it clear that Plaintiff was being ejected from MSG on Defendant Dolan's orders. *Id.* ¶¶ 35-36.

Despite Mr. Dolan's attempt to publicly humiliate him, Mr. Oakley attempted to defuse the situation by patiently explaining that he had done nothing wrong and simply wanted to watch the

game in peace. *Id.* ¶ 37. Indeed, as he spoke with the security guards, Mr. Oakley raised his arms in a defensive posture to clearly convey that he had no intention of engaging in any violent behavior. *Id.* ¶ 38. As Mr. Oakley turned to peaceably return to his seat, two of the security guards grabbed Mr. Oakley and forcibly pushed him to the ground. *Id.* ¶¶ 40, 42-43.

When Mr. Oakley stood up, the security guards continued to demand that Mr. Oakley leave the Garden immediately, despite having no basis for making such a demand. *Id.* ¶ 44. When Mr. Oakley again asked for an explanation as to his removal from MSG, the security guards further escalated the Incident by physically grabbing Mr. Oakley in an effort to forcibly compel him to leave the Arena. *Id.* ¶ 45. When he attempted to defend himself, the guards turned Mr. Oakley around, grabbed him and threw him to the ground. *Id.* ¶ 47. Mr. Oakley was thereafter placed in restraints and roughly thrown out of the Garden, after which he was arrested and charged with assault. *Id.* ¶¶ 51, 55, 123, 127, 130.

B. Defendants Subsequently Defame Mr. Oakley

1. MSG's Defamatory Statements

Shortly after the Incident, the Knicks public relations Twitter account (@NY_KnicksPR), which Defendants own and operate, tweeted:

> Charles Oakley came to the game tonight and ***behaved in a highly inappropriate and completely abusive manner***. He has been ejected and is currently being arrested by the New York City Police Department. He was a great Knick and ***we hope he gets some help soon***.

Id. ¶ 58 (emphasis added in Amended Complaint). Defendants knew this statement was completely false when they made it, as at no point while being attacked at the Garden had Mr. Oakley acted inappropriately or abusively. *Id.* To the extent that Mr. Oakley ever touched anyone, it was either to shake hands with fans, or to defend himself after he had been roughly grabbed by Defendants' personnel. *Id.* The public statement made by the Knicks that the organization hoped Mr. Oakley

would "get[] some help soon" was similarly defamatory, as it blatantly insinuated that Mr. Oakley had a substance abuse problem of some kind. *Id*.

On February 9, 2017, the Knicks organization doubled down on its defamatory statement that Mr. Oakley had somehow been "abusive" and sought to reinforce their claim that he had somehow deserved the physical abuse he had received from its security guards. *Id*. ¶ 62. Specifically, the @NY_KnicksPR tweet read:

> Updated statement (2/9): There are dozens of security staff, employees and NYPD that witnessed Oakley's abusive behavior. It started when he entered the building and continued until he was arrested and left the building. Every single statement we have received is consistent in describing his actions. Everything he said since the Incident is pure fiction.

Id. Plaintiff alleges that in reality Defendants intentionally misrepresented the statements of their security guards and of witnesses, several of whom supported Mr. Oakley's account of the events but were silenced. *Id*. ¶ 63. These references to alleged statements made by security guards and other witnesses were designed to provide the impression that Defendants' prior and subsequent statements had factual underpinnings and were not mere statements of opinion. *Id*. ¶ 64.

2. Defendant Dolan's Defamatory Statements

On February 10, 2017, Defendant Dolan appeared on ESPN Radio's "The Michael Kay Show" and further disparaged Mr. Oakley in discussing the Incident. *Id*. ¶ 65. Mr. Dolan confirmed that Mr. Oakley had been banned from the Garden indefinitely and proceeded to defame Mr. Oakley by making untrue statements regarding his purported alcoholism and violent propensities, including the following:

- I think the most important thing with that is we need to keep the Garden safe for anybody who goes there . . . So anybody drinking too much alcohol, looking for a fight, they're going to be ejected and they're going to be banned.
- To me, Charles has got a problem. We've said it before; he's his own worst problem. People have to understand that. He has a problem with anger. He's both physically and verbally abusive. He may have a problem with alcohol.

- We know he said on TV that he was drinking beforehand. We heard statements from police that he appeared to be impaired. Our staff clearly could see that.

- When you have issues like this, the first step for anybody is to ask for help.

Id. ¶¶ 68-69. Defendant Dolan was fully aware that his comments had no basis in fact, as Mr. Oakley has never suffered from an alcohol problem. *Id.*

Mr. Dolan further falsely stated that Mr. Oakley had put both Knicks fans and MSG security guards at risk in stating the following:

- We'll probably hear chants [in support of Mr. Oakley] tonight. But I would like for those people to look around and look at the people working at Madison Square Garden and realize that the guy they're chanting for might have been a great Knick player, but he was terribly abusive to them.

- There were security people there who were abused. There were service people who were abused. The same people who help fans get to their seats, they were abused. With racial overtones, sexual overtones. How do you bring your kids to a game if you think that's going to happen?

- It's very clear to us that Charles Oakley came into the Garden with an agenda. From the moment he stepped into the Garden, he began with this behavior. Abusive behavior, stuff you wouldn't want to say on the radio . . . It just accelerated and accelerated and accelerated . . . I'm not inside of Charles Oakley's mind. He did say a bunch of things along the way that looked like he was headed in my direction. I didn't hear them myself but we heard from our employees that he was using my name a lot. But this isn't because I'm nervous. This is because you can't do what he did and stay. We clearly did not—we weren't perfect here, and I think Charles never should have made it to his seats. And that's on us, and we're doing things to remedy that and make sure that never happens again . . . I can't say for sure.

Id. ¶¶ 72-73. Mr. Dolan was aware that these statements were also untrue, and he made them with actual malice. *Id.* ¶¶ 74-76.

3. Mr. Oakley's Damages

As a result of the aforementioned defamatory statements, Mr. Oakley has suffered both reputational harm and specifically, identifiable monetary damages. *Id.* ¶¶ 82-95. First, Defendants' false statements concerning Mr. Oakley's abusive behavior, including that Mr. Oakley had acted abusively toward MSG security guards and Knicks fans, leads to the inference that Mr. Oakley had

committed such a serious act of violence towards Knicks fans that it had warranted his arrest. *Id*. ¶¶ 85-87. Likewise, Mr. Dolan's statements regarding Mr. Oakley's purported drinking problem leads to the inference that Mr. Oakley suffers from the disease of alcoholism. *Id*. ¶¶ 88-90.

Defendants' defamatory statements also caused Plaintiff to lose significant business opportunities, as he had previously been retained to make guest appearances at drug and alcohol rehabilitation clinics to speak with patients and provide them other services. *Id*. ¶¶ 91-92. However, as a direct result of Defendants' statements claiming that Mr. Oakley was an alcoholic, one such rehabilitation clinic, the Rebound Institute, no longer thought it was appropriate for someone with such a reputation to interact with their patients, and cancelled appearances from which Plaintiff was scheduled to earn. *Id*. ¶¶ 93-95.

II. PROCEDURAL BACKGROUND

On September 12, 2017, Plaintiff commenced this action against Defendants, asserting causes of action for defamation *per se*, libel, slander, assault, battery, false imprisonment, abuse of process and denial of a public accommodation in violation of the ADA, NYSHRL and NYCHRL. Dkt. No. 1. Following a January 12, 2018 pre-motion conference regarding Defendants' anticipated motion to dismiss, Plaintiff filed his Amended Complaint on February 9, 2018. Dkt. No. 36. On March 30, 2018, Defendants filed the instant motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Dkt. No. 42. For the reasons set forth herein, Defendants' motion should be denied in its entirety.

LEGAL ARGUMENT

I. MOTION TO DISMISS STANDARD

A. Rule 12(b)(6) Standard

Pursuant to Fed. R. Civ. P. 8, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss for failure to state a claim, the plaintiff must merely allege "sufficient factual matter,

accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In deciding a motion pursuant to Fed. R. Civ. P. 12(b)(6), the court must "liberally construe the complaint, accepting the factual allegations as true, and drawing all reasonable inferences in Plaintiff's favor." *Frangipani v. HBO*, No. 08 Civ. 5675 (GBD), 2010 WL 1253609, at *2 (S.D.N.Y. Mar. 16, 2010). The court should deny a motion to dismiss "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

II. DEFENDANTS IMPROPERLY RELY ON SUBSTANTIAL EXTRINSIC EVIDENCE

As a threshold matter, Defendants' attempt to cure the deficiencies in their motion to dismiss by drawing from "evidence" outside of the pleadings fails as a matter of law. It is well settled that, in deciding a motion to dismiss, a court is limited to the four corners of the complaint. *See Tommy Lee Handbags Mfg. Ltd. v. 1948 Corp.*, 971 F. Supp. 2d 368, 382 (S.D.N.Y. 2013) (disregarding extrinsic evidence and considering only "the complaint and any documents incorporated therein"). Where a movant submits extrinsic materials in support of a motion to dismiss, the court must disregard such improperly submitted extrinsic materials. *See Brown v. Austin*, No. 05 Civ. 9443 (PKC), 2007 WL 2907313, at *1 (S.D.N.Y. Oct. 4, 2007) ("The Court declines to convert the motion to dismiss into a motion for summary judgment under Rule 56, Fed. R. Civ. P., and accordingly, does not consider the extrinsic evidence submitted by the moving defendants"); *Rivera v. New York City Health & Hosps. Corp.*, 191 F. Supp. 2d 412, 425 (S.D.N.Y. Mar. 26, 2002) ("I decline to convert the motion to dismiss to a summary judgment motion and thus I will not consider the extrinsic materials.").

In support of their motion to dismiss, Defendants repeatedly cite to the exact kind of extrinsic materials not properly considered at this stage, including, *inter alia*, video footage of the

Incident, video footage of Defendant Dolan's February 10, 2018 interview on "The Michael Kay Show," court documents from prior judicial proceedings, and information and tweets found online. *See* Dkt. No. 42 ("Defs. Mem.") at 13-15. If Defendants believed that such evidence presented a full and complete picture of the relevant events, the proper course of conduct would have been to file a motion for summary judgment, as the Court expressly offered them the opportunity to do. However, the Court noted that such a decision would carry consequences—namely that Plaintiff could seek discovery to uncover the existence of other relevant evidence:

> THE COURT: If you want to make a motion for summary judgment and then we can collect all the videos and I can look at them all, then that would be fine, I suppose, and then **I guess we will hear from Mr. Wigdor whether he thinks some additional discovery is necessary including testimonial discovery. But, this is a motion to dismiss**. Varghese Decl., Ex. 1 at 30:19-24 (emphasis added).
>
> THE COURT: I am inclined to stay discovery pending resolution of this motion but if it is going to be a motion for summary judgment then I guess I would be curious to hear whether the tapes are the whole story or **we need some additional limited discovery if it were converted to a summary judgment motion**. Varghese Decl., Ex. 1 at 53:2-8 (emphasis added).

It is clear that by both refusing the opportunity to convert their motion to a motion for summary judgment, while nevertheless attaching substantial extrinsic evidence in support of their "motion to dismiss," Defendants are impermissibly attempting to obtain the benefits of a summary judgment while simultaneously denying Plaintiff his right to take corresponding discovery. Such a blatant misuse of the Federal Rules should not be countenanced by the Court. *See Speedmark Transp., Inc. v. Mui*, 778 F. Supp. 2d 439, 440 n.1 (S.D.N.Y. 2011) ("The Court declines to consider these extraneous materials and will not convert [the] motion to dismiss into one for summary judgment, since plaintiffs have not had the opportunity to take discovery").

It is for this reason that the Court explicitly stated that it was not interested in considering extrinsic evidence, such as the video on which Defendants rely in the instant case, in deciding the instant motion, stating at the Pre-Motion Conference, *inter alia*, "I don't want to go to the video, I

want to leave it to the pleadings" (Varghese Decl., Ex. 1 at 37:6-7), "it doesn't seem to me that this is a case in which I should be broadening the pleadings to include the video" (*id.* at 16:4-5), "Mr. Mastro, you really are relying on the video and I'm not sure that I am prepared to do that" (*id*. at 28:1-2), and "[Y]ou are telling me that there is a lot of video that proves what you are claiming in your defense and I just think that's not what a motion to dismiss is about" (*id.* at 32:14-18).

Defendants' false claim that "Plaintiff and his counsel have 'actual notice' of all the information referenced in and attached as Exhibits to Defendants' motion papers," is insufficient to change the Court's analysis. As the Second Circuit has been forced to explain as a result of numerous parties misstating the law as Defendants do in the instant case,[2] "[b]ecause this standard has been misinterpreted on occasion, we reiterate here that a plaintiff's ***reliance*** on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough." *Chambers v. Time Warner, Inc*., 282 F.3d 147, 153 (2d Cir. 2002) (emphasis in original); *see also Mason Tenders Dist. Council of Greater New York v. W. Sur. Co.*, No. 15 Civ. 9600 (JPO), 2016 WL 4098568, at *3 ("For external evidence to be considered on a 12(b)(6) motion, it is not sufficient that Plaintiffs had notice or possession of that evidence; rather Plaintiffs must have *relied upon it* in drafting the complaint.") (emphasis in original).

As explained in further detail below, *none* of the extrinsic material upon which Defendants rely is integral to *any* of the allegations in the Amended Complaint. In fact, Defendants' evidence is not referenced in the Amended Complaint at all, let alone to such an extent as it could be accurately said that Plaintiff relied on this evidence in bringing his claims, and the Court should therefore

[2] Defendants' reliance upon *Condit v. Dunne*, 317 F. Supp. 2d 344 (S.D.N.Y. 2004) is misplaced, as the court in *Condit* held that it may only consider an extrinsic document, "***upon which [the plaintiff] solely relies*** and which is integral to the complaint. *Id*. at 356. Similarly, in *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42 (2d Cir. 1991), another case upon which Defendants rely, the Second Circuit specifically observed that extrinsic evidence was only properly considered because it was "integral to [the] complaint." *Id*. at 48. Here, Plaintiff clearly did not heavily rely upon the extrinsic material which Defendants cite, as the materials are neither referenced in the Amended Complaint nor part of the allegations contained therein.

refuse to consider such evidence in deciding the instant motion to dismiss. *See Lawhorn v. Algarin*, No. 16 Civ. 6226 (FPG), 2018 WL 1046794, at *4 (W.D.N.Y. Feb. 26, 2018) (holding that, even where the complaint cited facts contained in extrinsic materials, they were not relied upon heavily, and therefore were not integral to the complaint).

A. The Court Should Not Consider Video Footage of the Incident

Defendants first claim that the Court may consider video footage of the incident because "Oakley's counsel has admitted that he had the evidence in his position before filing this lawsuit." Defs. Mem. at 13. This argument is simply not true, as Defendants are well aware, given that Plaintiff has repeatedly explained that while he had *some* video footage of the Incident, he did not have *all* of the relevant videos (indeed, it would have been impossible to know whether other videos existed, given the stay of discovery that Defendants sought and obtained in this matter), and that "there very well could be" other videos that would be disclosed during discovery. *See* Kushner Decl. at Ex. 15; *see also* Varghese Decl.[3] at ¶ 4. The statements in these e-mails are in accord with the representations that Plaintiff's counsel made at the Pre-Motion Conference, where he specifically told the Court that "there are many different camera angles, some of which we have, *some of which we don't have*." Varghese Decl., Ex. 1 at 17:6-9 (emphasis added). Accordingly, Defendants' misleading claim that the Court should consider the video footage they attach to their motion papers because Plaintiff was in possession of such footage should be rejected. *See Gersbacher v. New York*, 134 F. Supp. 3d, 711, 719 (S.D.N.Y. 2105) (finding that the mere possession of extrinsic evidence is an insufficient basis to consider in a motion to dismiss).

Second, Defendants claim that the video footage in question should be considered by the Court here "because it is objective, dispositive, and the best evidence of the event at issue." Defs. Mem. at 13. This, too, is a blatant misstatement of the facts as well as of the relevant law. There is

[3] All references to the "Varghese Decl." refer to the Declaration of Renan F. Varghese in Opposition to Defendants' Motion to Dismiss Plaintiff's Amended Complaint, dated May 24, 2018.

no evidence that Defendants' self-selected video footage is *all* of the relevant and available footage of the incident. Indeed, the only internal video that Defendants provided showing the events leading up to Plaintiff being ousted from MSG consists of a single camera angle. There is no video of (A) Plaintiff walking into MSG, (B) Plaintiff interacting with MSG employees as he walked to his seat, or (C) the hallways and elevators showing Plaintiff walking to his seat. It defies belief that there would be no videos of the time from when Plaintiff entered MSG to when he got to his seat, especially considering that Defendants have provided ample video of the time when Plaintiff left the MSG floor and was forced out of the Garden by security. *See* Kushner Dec. Ex. 5a-5d. More importantly, none of the internal surveillance videos provided by Defendants contain *any* audio indicating that Plaintiff made any inappropriate statements prior to being violently accosted by the security guards. Instead, Defendants blatantly attempt to poison the Court's view of Plaintiff's actions by providing unverified and unsourced "quotes" of what Plaintiff purportedly said. Such conclusory and self-serving claims are not evidence at all, let alone the "best evidence" that Defendants claim to have.

Moreover, while the videos contain some footage of the Incident, this does not end the inquiry as to whether they are admissible at the motion to dismiss stage. Rather, in order for such video evidence to be considered, Defendants must demonstrate that Plaintiff *relied* on the video itself in drafting the Amended Complaint, such that it can be fairly found to be integral to Plaintiff's allegations. Here, the video footage upon which Defendants rely is neither incorporated by reference nor integral to the Amended Complaint.[4] While the Amended Complaint describes the

[4] Defendants' attempt to introduce the video evidence by claiming that the original Complaint referenced the national broadcast of the February 8, 2017 Knicks game is futile. First, Defendants have utterly failed to explain how merely mentioning the obvious fact that an NBA game was televised means that any video footage taken anywhere in the Arena is therefore also incorporated into the allegations. Such a result would utterly pervert the motion to dismiss evidentiary standard so as to render it meaningless. Second, as the case law makes clear, in order for a court to consider extrinsic evidence, it is not enough for the plaintiff to merely make a passing reference to it in the Complaint. *Alvarez v. Cty. of Orange, N.Y.*, 95 F. Supp. 3d 385, 396 (S.D.N.Y. 2015) ("[T]he documents that Defendants ask the Court to consider . . . are not integral to the Amended Complaint merely because Plaintiff mentions and arguably relies on [them]"). In this

incident, it makes absolutely no reference to any video footage capturing the Incident such that the footage would be "heavily relied upon."[5] Accordingly, it would be an error for this Court to consider these videos in deciding Defendants' motion to dismiss. *See Gersbacher*, 134 F. Supp. 3d at 718 (declining to consider video of arrest where the plaintiff "may have been aware that his arrest was filmed, but there is nothing that indicates that he had seen the videos prior to Defendants raising them, much less relied upon them in drafting the complaint"); *Marlin v. City of New York*, No. 15 Civ. 2235 (CM), 2016 WL 4939371, at *8 (S.D.N.Y. Sept. 7, 2016) (observing that video clips "that purport to show in real time what was happening . . . on the night [the plaintiff] was arrested" were not integral to the complaint because the complaint "makes no reference to them").

Defendants cite readily distinguishable cases where the plaintiffs had specifically referenced (or heavily relied on) the video in their complaints. *See, e.g.*, *Lewis v. Brown*, No. 15 Civ. 5084 (NRB), 2017 WL 1091986, at *2 (S.D.N.Y. Mar. 15, 2017) (finding that the "video [was] *referenced in the complaint*") (emphasis added); *Hays v. City of New York*, No. 14 Civ. 10126 (JMF), 2017 WL 782496, at *1, n. 1 (S.D.N.Y. Feb. 28, 2017) (a "video of the primary incident at issue" had been incorporated into the Complaint by reference); *Chamberlain v. City of White Plains*, 986 F. Supp. 2d 363, 374, n.1 (S.D.N.Y. 2013) (the videos were "relied on heavily in drafting" the complaint). As discussed above–and in contrast to *Lewis*, *Hays* and *Chamberlain*–the videos of the Incident were neither incorporated by reference nor relied upon at all in drafting the Amended Complaint.

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case, that Plaintiff was able to excise any reference to the television broadcast from his Amended Complaint without changing the substance of his allegations, is fatal to Defendants' argument that this broadcast was a central component of Plaintiff's allegations.

[5] Similarly, despite Defendants' claims in their May 10, 2018 letter to the Court, the fact that Plaintiff believed that the Court may see the video before ruling on the motion to dismiss does not warrant a different result. Mr. Oakley's off the cuff comments are not evidence that the video footage was heavily relied upon in drafting the Amended Complaint, especially considering Plaintiff did not even have the internal security footage at the time. Further, as will be explained below, Mr. Oakley was correct in stating that the video footage does not support Defendants' arguments in the instant case.

1. Defendants' Description of the Video Footage is False and Misleading

While the law is clear that the Court should not consider the video footage provided by Defendants for the reasons discussed above, Defendants' reliance on this material is particularly disingenuous insofar as it does not support the arguments they put forth. Instead, the internal video footage clearly shows that Defendants' violent and abusive behavior was unjustified and that additional discovery is necessary to resolve Plaintiff's claims.

Though Defendants devote substantial effort to characterizing the sequence of events which transpired after security descended upon Mr. Oakley, they conveniently fail to address what transpired immediately prior to such events. A portion of the aforementioned video footage clearly depicts Defendant Dolan summoning security to violently confront Plaintiff without any legitimate justification.

Contrary to Defendants' claims that Plaintiff was behaving in a belligerent manner, warranting his ejection, it is apparent from the MSG internal security footage that nothing could be further from the truth. From the moment he took his seat until the moment security personnel approach him, Mr. Oakley never leaves his seat. Moreover, while Defendants now baselessly claim that Mr. Oakley was yelling obscenities at Defendant Dolan and various security guards stationed several yards away from him, nothing in the video supports this representation. None of the people seated near Mr. Oakley stare at him as one would expect them to had he been loudly cursing at security guards, no security guards approach him to ask him to cease his alleged conduct, and no one sitting near Defendant Dolan turns in Mr. Oakley's direction to see who was purportedly screaming at him. Quite the contrary, Mr. Oakley is seen shaking hands with fans, laughing with people sitting next to him, and speaking with MSG's service employees, without any objection.

However, immediately before MSG security approaches Mr. Oakley, Defendant Dolan can be seen speaking at length to a security guard stationed near Plaintiff. *See* Kushner Decl. Ex. 2a at

8:18:41–8:18:52. Once the security guard returns to his station, Defendant Dolan looks back at Mr. Oakley, signals the security guard's attention and makes a very clear gesture with his right hand, taking it from his head and pointing down toward the ground. *Id*. at 8:19:12. It is only then, a mere eight seconds after Defendant Dolan's gesture, that the security guard gathers a group of personnel, approaches Plaintiff who has remained in his seat during the entirety of this interaction, and proceeds to violently confront him. Kushner Decl. Ex. 2a at 8:19:13–8:19:30. This video footage makes clear that, consistent with what Plaintiff has alleged in his Amended Complaint, it was Defendant Dolan's unlawful animus towards him, rather than anything Mr. Oakley himself did, that led to Plaintiff being forcibly and violently confronted by MSG personnel.

After Defendant Dolan instructed MSG security guards to approach Mr. Oakley, while they stood around him, Mr. Oakley rose to his feet to speak to the guards. *Id*. at 8:19:45. Contrary to Defendants' representation that, when Mr. Oakley stood up, he "reached out with his right hand and violently lunged at the security guard," in reality, the video shows that upon standing up Mr. Oakley was immediately violently pulled backwards by several security guards. *Id*. at 8:19:47. The footage ends with Defendant Dolan giving the security guard a thumbs-up gesture after Mr. Oakley is dragged out of the Garden, making clear that the guard had successfully complied with his instructions. *Id*. at 8:22:43. Thus, the security footage is devoid of any evidence that Mr. Oakley's behavior warranted the violent assault committed by Defendants' personnel. At the very least, although the Court should not consider the video footage in deciding the instant motion to dismiss, the differing descriptions of what transpired during the course of the Incident demonstrate why discovery on these issues is absolutely necessary, including testimony from witnesses who were seated in Plaintiff's vicinity, other camera angles from within Madison Square Garden, as well as any available audio. Indeed, by citing to purported testimony by their security guards in support of their motion to dismiss, *see* Defs. Mem. at 6, n. 5, Defendants are conceding the relevance of such

testimony and to the fact that their motion cannot be sustained without such statements, which can only be adduced during discovery in this matter where Plaintiff will have the opportunity to cross examine these alleged witnesses.

B. The Court Should Not Consider Video of Mr. Dolan's February 10 Interview

Defendants likewise claim that the Court should consider the entirety of Mr. Dolan's February 10, 2018 interview on "The Michael Kay Show" because Plaintiff "relies on and quotes extensively from that interview." Defs. Mem. at 14. While Plaintiff quotes excerpts of the interview, it is a distortion to claim that Plaintiff *relied on* the entirety of the interview such that it can be considered at this stage. Instead, as the Amended Complaint makes clear, the only portions of the interview on which Plaintiff relies are those specifically quoted and identified as being defamatory. AC ¶¶ 68-73. *See also Bounkhoun v. Barnes*, No. 15 Civ. 631A, 2017 WL 1331359, at *4 (W.D.N.Y. Apr. 11, 2017) ("Although allegations in the amended complaint refer to events that purportedly are explained in greater detail within the documents, the documents themselves are not integral to the basic assertion of any party's claim"). Thus, Defendants' reliance upon *Fuji Photo Film U.S.A., Inc. v. McNulty*, 669 F. Supp. 2d 405 (S.D.N.Y. 2009) is misplaced, as the court in *Fuji* only considered a document in its entirety where the plaintiff alleged that "all of the statements" contained therein were defamatory. *Id.* at 414. In contrast, Plaintiff has not alleged that the entirety of Mr. Dolan's interview on "The Michael Kay Show" was defamatory, and has specifically identified those portions that were defamatory.

C. The Court Should Not Consider Prior Court Proceedings

Defendants' proffer of documents "filed in Oakley's related criminal case and pleadings from his prior civil cases," Defs. Mem. at 14, fares no better. The mere fact that Defendants caused Plaintiff to be arrested does not make his entire criminal record relevant to the instant case, let alone relevant at the pleading stage on a motion to dismiss. Nothing in the Amended Complaint

specifically references the criminal complaint or the trespass notice[6] and courts have held that such documents are not properly considered in deciding a motion to dismiss.[7] *See McLennon v. City of New York*, 171 F. Supp. 3d 69, 90 (E.D.N.Y. 2016) (declining to consider "documents related to [the plaintiff's] criminal case" where they were not "incorporated by reference"); *Bejaoui v. City of New York*, No. 13 Civ. 5667 (NGG)(RML), 2015 WL 1529633, at *6 (E.D.N.Y. Mar. 31, 2015) ("Where, as here, Plaintiff does not mention [complaint reports and arrest reports] and does not appear to rely on them, the court cannot deem such extrinsic materials to be integral to the Complaint").

Similarly, Defendants have not even attempted to argue how the Amended Complaint incorporates or otherwise heavily relies on the other civil litigations in which Plaintiff was a party, such that they would be relevant at the motion to dismiss stage, when such litigations are not mentioned anywhere in the Amended Complaint in the first instance. It is clear, therefore, that Defendants have only included such evidence in a transparent attempt to malign Plaintiff's reputation to the Court (or, more likely, to the general public), by improperly portraying him as a violent, litigious individual.[8] *Greenfield v. City of New York*, No. 99 Civ. 2330 (AJP), 2000 WL 124992, at *12 (S.D.N.Y. Feb. 3, 2000) ("[T]he Second Circuit is clear that . . . evidence of prior litigation cannot be admitted solely for the purpose of proving that a plaintiff has a character trait for litigiousness and acted in conformity with that trait in the present lawsuit"). Defendants admit

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[6] To the extent that Defendants cite to the trespass notice for the proposition that Plaintiff voluntarily agreed not to enter the Garden, this argument willfully conflates two different issues. Irrespective of whatever agreement Oakley made with the District Attorney's office, this does not change the fact that, as alleged in the Amended Complaint, *Defendants* have separately banned him from entering MSG. *See* AC ¶¶ 67-68.

[7] *Oblio v. City Univ. of New York*, No. 01 Civ. 5118 (DGT), 2003 WL 1809471 (E.D.N.Y. Apr. 7, 2003) is distinguishable, as the court observed that it could rely on extrinsic evidence where "plaintiff's counsel conceded [at oral argument] that the exhibits were incorporated in plaintiff's complaint by reference." *Id*. at 4 n.11. Here, Plaintiff has never made any such concession.

[8] Contrary to what Defendants now claim, Plaintiff certainly challenges both the accuracy and relevance of Defendant Dolan's claim that Plaintiff has a "troubled" history with various physical altercations. Defs. Mem. At 29, n. 26. Not only is this statement untrue, it further underscores the fact that Defendants are simply trying to further malign Plaintiff and continue their defamatory campaign.

that this is the sole intention for which they seek to introduce this material, conceding that the only relevance of such documents is to demonstrate Mr. Oakley's purported "recidivist history." Defs. Mem. at 15. Sadly, this is yet another example of the vindictive and defamatory conduct that has marked Defendants' actions towards Mr. Oakley, in their misguided efforts to explain their violent and inexcusable behavior which gave rise to this lawsuit.

D. The Court Should Not Consider Information on Public Websites

Finally, Defendants falsely claim that the Court should consider information on various websites to support their motion. Defs. Mem. at 15. First, and contrary to what Defendants argue, the materials on http://oakleyinthekitchen.com do not qualify as "a party admission" of which the Court may take judicial notice, as such a position is undercut by the very case they cite, *Doron Precision Sys., Inc. v. FAAC, Inc.*, 423 F. Supp. 2d 173 (S.D.N.Y. 2006). The court in *Doron* observed that a plaintiff's website may be considered "as long as the website's authenticity is not in dispute and it is capable of accurate and ready determination," and the plaintiff "admitted to this [information at issue] during . . . oral argument." 423 F. Supp. 2d at 179, n. 7. As the materials upon which Defendants rely have not been properly authenticated, they should be disregarded. Second, there is absolutely no support for the proposition that the Court can consider the information on the third-party Rebound Institute website, and Defendants do not even attempt to offer a persuasive argument, instead stating, without explanation, that the Court "may take judicial notice" of such material simply because they claim it supports their motion to dismiss. As this argument blatantly misstates the evidentiary standard in deciding a motion to dismiss, Defendants' argument lacks merit.

III. PLAINTIFF STATES A CLAIM FOR DEFAMATION

Under New York law, defamation "consist[s] of the twin torts of libel and slander, [and] is the invasion of the interest in a reputation and good name." *Albert v. Loksen*, 239 F.3d 256, 265 (2d

Cir. 2001). To state a claim for defamation, the plaintiff must allege "(i) a defamatory statement of fact, (ii) that is false, (iii) published to a third party, (iv) of and concerning the plaintiff, (v) made with the applicable level of fault on the part of the speaker, (vi) either causing special harm or constituting slander per se, and (vii) not protected by privilege." *Grogan v. Blooming Grove Volunteer Ambulance Corp.*, 917 F. Supp. 2d 283, 290 (S.D.N.Y. 2013). Where a statement is defamatory *per se*, courts "presume[] that damages result from those specifically enumerated categories of statements," and the plaintiff need not "plead and prove special damages." *DiFolco v. MSNBC Cable LLC*, 831 F. Supp. 2d 634, 648 (S.D.N.Y. 2011). In contrast, a statement is defamatory *per quod* if it results in actual damages and "the false statement is contained ***not in the statement's literal wording but rather its innuendo***." *Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 248 (S.D.N.Y. 2014) (emphasis added).

A. Plaintiff States a Claim for Defamation *Per Se*

Relevant here, a statement is defamatory *per se* if it falls into one of the following three categories: "(1) statements charging the plaintiff with a serious crime; (2) statements that tend to injure the plaintiff in her trade, business or profession; [or] (3) statements that impute to the plaintiff a 'loathsome disease.'" *Nolan v. State*, 158 A.D.3d 186, 195 (1st Dep't 2018). In light of the fact that Defendants' statements satisfy all three categories, it is beyond dispute that Defendants' defamatory statements were defamatory *per se*. AC ¶¶ 65-77.

As a threshold matter, Defendants attempt to escape liability by carefully parsing their various statements and arguing that none of the statements, standing alone, meet the standards of defamatory conduct. In taking this position, Defendants completely ignore the body of case law which makes clear that, in the context of a defamation case, a court must look at the statements *in total* and *in context*. *See Elias v. Rolling Stone LLC*, 872 F.3d 97, 109 (2d Cir. 2017) ("The District Court erred by evaluating the Article's various allegations . . . in isolation, rather than considering

them in the context of the article as a whole"). When seen through this prism, there is no question that Defendants' statements, taken together, defamed Plaintiff.

First, Defendants' statements unquestionably accused Mr. Oakley of a serious crime—assault, and Defendants' claim to the contrary rings hollow. Specifically, Defendants stated that Mr. Oakley was "arrested" because he "behaved in a highly inappropriate and completely abusive manner" and was "looking for a fight." AC ¶¶ 58, 68-69. Likewise, Defendant Dolan stated that Mr. Oakley was "both physically and verbally abusive," that security people and fans "were abused" and that Mr. Oakley's purported "abusive behavior" began "the moment he stepped into the Garden." *Id.* ¶¶ 72-73. He then clarified his meaning, stating that Defendants ejected Plaintiff because his conduct endangered the "**safety** . . . of [the] fans" and that the fans needed to understand that "he was ***terribly abusive*** to them." *Id.* ¶¶ 71-72 (emphasis added).

Taken together, the statements that Plaintiff was "arrested" for "engaging in physically abusive" behavior that jeopardized the safety of Knicks fans, give rise to the reasonable inference that he was arrested for physically attacking members of the public. No reasonable reader would believe that Plaintiff had been arrested for simply yelling (or even cursing) loudly at a basketball game. In choosing their words as carefully as they did, Defendants clearly wanted to convey the impression that Plaintiff had violently assaulted fans that had attended the game, and was arrested as a result.[9] Having been successful in doing so, it would fundamentally pervert the law to claim, as Defendants now do, that they can escape liability merely by omitting the specific crime of which they accuse Mr. Oakley, and the case law on the subject is in accord. *See Sprewell v. NYP Holdings, Inc.*, 772 N.Y.S.2d 188, 192–93 (N.Y. Sup. Ct. 2003) (an article which said that the plaintiff threw a punch at someone and "*missed*" was defamatory per se because "defamatory

[9] Defendants' explicit linking of Mr. Oakley's alleged "physically abusive" behavior with his subsequent "arrest" differentiates the instant case from the sole case cited by Defendants, *Burdick v. Verizon Commc'ns, Inc.*, 758 N.Y.S.2d 877 (4th Dep't 2003), in which there was no mention of the plaintiff having been charged with, or even committed, criminal conduct.

language need not consist of the technical words of a criminal indictment provided that it is reasonably susceptible to a connotation of criminality").

Likewise, Defendant Dolan's comments imputed that Plaintiff suffered from the loathsome disease of alcoholism. Specifically, while speaking about Mr. Oakley, Mr. Dolan stated that "anybody drinking too much alcohol . . . [is] going to be ejected and [is] going to be banned." AC ¶ 68. Mr. Dolan further stated that "Charles has a problem," that "[h]e may have a problem with alcohol," that he "was drinking beforehand," and that there were "statements from police that he appeared to be impaired." *Id.* ¶ 69. These allegations are sufficient to support an inference that Mr. Dolan's statements were *per se* defamatory. *See Hayes v. Sweeney*, 961 F. Supp. 467, 481 (W.D.N.Y. 1997) ("[A]n imputation of alcohol consumption is defamatory when accompanied by some aggravating factor, such as the suggestion that conduct is habitual or that the person is 'a drunk'").

Finally, Defendants' statements clearly disparaged Mr. Oakley in his trade or business. In order to allege such a claim, a plaintiff must demonstrate that the statements "reflect on [his] performance or [are] incompatible with the proper conduct of [his] business." *Sprewell*, 772 N.Y.S.2d at 195. Here, as alleged in the Complaint, Plaintiff derived significant income opportunities from making appearances at drug and alcohol rehabilitation centers to give speeches and to interact with patients. AC ¶¶ 92, 105-106. By falsely claiming that Mr. Oakley was an alcoholic, Defendants' statements clearly disparaged his ability to perform in that capacity, as there can be no question that treatment centers cannot retain the services of an individual who is alleged to be suffering from the same substance abuse problems as their patients. *See Allen v. CH Energy Grp., Inc.*, 872 N.Y.S.2d 237, 239 (3d Dep't 2009) (finding that a statement defamed the plaintiff's business reputation where "a person who engaged in the conduct described by [the defendant] would not be qualified to continue in [the plaintiff's] position").

Despite the fact that their statements clearly impugned Plaintiff's ability to provide services to people suffering from substance abuse issues, Defendants nevertheless attempt to avoid liability by citing to case law standing for the unremarkable proposition that statements *generally* reflecting negatively on a plaintiff's reputation are not actionable. *See Kalimantano GmbH v. Motion in Time, Inc.*, 939 F. Supp. 2d 392, 420 (S.D.N.Y. 2013) (finding that a statement that the plaintiff stole a watch was not related to his business as food wholesaler); *Medcalf v. Walsh*, 938 F. Supp. 2d 478, 488 (S.D.N.Y. 2013) (a statement about the plaintiff's post-partum depression being irrelevant to her job as a legal secretary); *Tacopina v. Kerik*, No. 14 Civ. 749 (LTS)(FM), 2016 WL 1268268, at *4 (S.D.N.Y. Mar. 31, 2016) (a statement that the plaintiff was untrustworthy did not impugn his ability to perform as an author or consultant).

However, Defendants' argument elides the fact that Plaintiff is not claiming that their statements merely damaged his general professional reputation.[10] Rather, by falsely claiming that Plaintiff himself was an alcoholic, Defendants' statements damaged Plaintiff's specific business reputation as someone who worked with alcoholics, making them actionable. *See Wilcox v. Newark Valley Cent. Sch. Dist.*, 74 A.D.3d 1558, 1561 (3d Dep't 2010) (statement that the plaintiff's action endangered the safety of students injured her business reputation as a teacher).

Finally, Defendants claim that Plaintiff's defamation *per se* claim fails because it relies on extrinsic facts. However, Defendants' definition of extrinsic facts does not comport with that established under the law. While New York courts have held that they cannot consider extrinsic evidence in determining whether a statement is defamatory, this only applies when the statements themselves are not clear on their face. *See Agnant v. Shakur*, 30 F. Supp. 2d 420, 426 (S.D.N.Y.

[10] It is for this reason that Defendants rely on *Walker v. Urban Compass, Inc.*, 2017 WL 608308 (N.Y. Sup. Ct. Feb. 15, 2017). In *Walker*, the court merely held that a claim that the plaintiff abused drugs and alcohol did not damage his professional reputation as a real estate agent, as the two were unrelated matters. *Id.* at *3. In contrast, in the instant case, accusing Mr. Oakley of being an alcoholic directly impacted his ability to provide services to alcohol treatment centers.

1998) (finding that song lyrics making veiled references to the plaintiff were not sufficiently clear as to be defamatory); *Franklin v. Daily Holdings, Inc.*, 135 A.D.3d 87, 94 (1st Dep't 2015) (same). Here, there is no question that Defendants are both speaking about Plaintiff and referring to him as an alcoholic. Moreover, contrary to Defendants' claims, Plaintiff does allege that it was a matter of public knowledge that he worked with alcohol rehabilitation centers. *See* AC ¶105. Thus, there is no need to rely on any extrinsic facts to impute a defamatory meaning as to Defendants' comments.[11]

B. Plaintiff States a Claim for Defamation *Per Quod*

Even putting aside the fact that Defendants' statements were defamatory *per se*, Defendants' motion to dismiss Plaintiff's defamation claims would nevertheless be futile because Plaintiff has also adequately alleged a cause of action for defamation *per quod*. Statements are defamatory *per quod* "[w]hen the common usage of the challenged language can be [defamatory] due to extrinsic circumstances." *Idema v. Wager*, 120 F. Supp. 2d 361, 368 (S.D.N.Y. 2000). As a claim for defamation *per quod* requires special damages, *see Ava v. NYP Holdings, Inc.*, 64 A.D.3d 407, 412 n.3 (1st Dep't 2009), where Plaintiff addresses his claims of defamation *per se* and defamation *per quod* simultaneously. It is well established under New York law that "[s]pecial damages contemplate the loss of something having economic or pecuniary value." *Sprewell*, 772 N.Y.S.2d at 196 (Sup. Ct. 2003) (quoting *Liberman v. Gelstein*, 80 N.Y.2d 429, 434-35 (1992)).[12]

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[11] Even if Plaintiff hadn't alleged that his work with alcohol treatment centers was commonly known, this would be irrelevant to the Court's analysis. The law does not mandate that the general public be aware of a plaintiff's profession in order for a statement to defame his or her business reputation, as this would act as a *de facto* bar to any private individual from bringing such a defamation claim given that such an individual's occupation would likely not be widely known.

[12] Defendants' contention that "Oakley's counsel repeatedly informed the Court that he was not and had no intention of alleging defamation based on special damages" is inaccurate. Defs. Mem. at 22. In reality, Plaintiff's counsel represented that at the time of the pre-motion conference, he was not aware that Plaintiff had suffered from any special damages sufficient to support a claim for defamation *per quod*. Upon further investigation, Plaintiff's counsel learned that as a direct result of Defendants' defamatory statements, Mr. Oakley did suffer actual pecuniary harm, supporting his subsequent cause of action for defamation *per quod*.

Plaintiff's allegations support an inference that, when considered with additional factors, Defendants' statements are susceptible to a defamatory meaning which resulted in special damages. Defendants' statements that they "hope [Mr. Oakley] gets some help soon," that "Charles has got a problem," that he was "drinking too much alcohol," that "he appeared to be impaired" and that "the first step for anybody is to ask for help" all suggest that Mr. Oakley is an alcoholic. AC ¶¶ 58, 60, 69. Plaintiff further alleges that as a result of these defamatory statements, he has suffered special damages in the amount of $40,000, in appearance fees that he had previously been scheduled to earn. *Id.* ¶¶ 91-95.

In moving to dismiss, Defendants first argue that Plaintiff fails to allege the requisite causal link between their defamatory statements and Mr. Oakley's damages, claiming that there were "other factors" from which an organization could choose to disassociate from Mr. Oakley. Defs. Mem. at 22-23. This argument fails for two reasons. First, these "other factors" are not included in the Amended Complaint and are therefore not the proper basis to sustain a motion to dismiss. *Alfaro v. Labador*, 300 F. App'x 85, 86 (2d Cir. 2008) (holding that, "[i]n ruling on a motion to dismiss under Rule 12(b)(6), the District Court was required to accept as true the allegations in the complaint, and apart from those allegations, there was no factual basis upon which the District Court could have" granted the motion to dismiss). Second, Defendants concede that Plaintiff alleges the necessary causal link by stating that his loss in compensation from the Rebound Institute was "a direct result" of their statements. Defs. Mem. at 23. Specifically, prior to Defendants' defamatory statements, Plaintiff had been retained to make appearances at treatment facilities and the Rebound Institute only "came to the conclusion that it was not appropriate for someone with such a reputation to interact with their patients," *after* Defendants defamed Mr. Oakley. *Id.* ¶¶ 92-93. Thus, as a result of Defendants' defamatory statements, Plaintiff was denied $40,000 in appearance fees that he had been scheduled to receive from the Rebound Institute. *Id.* ¶¶ 94-95.

Defendants further argue that, based upon certain websites and tweets, Mr. Oakley's special damages are "fabricated," as Mr. Oakley is "actively involved with and a featured face of the Rebound Institute." Defs. Mem. at 23. As an initial matter, as discussed above, the Court should disregard the materials upon which Defendants rely, as they are extrinsic to the Amended Complaint. *See supra* at pp. 8-10, 18. In any event, while Defendants may use this extrinsic evidence during the course of discovery to test the credibility of the claims of Mr. Oakley and the Rebound Institute, they do not conclusively prove that Plaintiff did not lose the business opportunities alleged in the Amended Complaint. At worst, they merely show that at some point the Rebound Institute was comfortable being associated with Mr. Oakley again. However, a plaintiff need not allege a total and complete loss of *every single potential* business opportunity as a result of the defendant's defamatory conduct. *See Charles Atlas, Ltd. v. Time-Life Books, Inc.*, 570 F. Supp. 150, 155 (S.D.N.Y. 1983) (holding that the plaintiff adequately alleged special damages where it alleged that the defendant's defamatory statements "caused it to lose $30,323 in sales and revenues and to expend $14,000 in 'special advertising expenses'"). As Plaintiff alleges that Defendants' defamatory statements resulted in a specific and identifiable pecuniary harm, his allegations support an inference that he has sustained special damages.

C. Plaintiff Alleges Actual Malice

A defendant acts with actual malice when he acts "with knowledge that [the defamatory statement] was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). The actual malice standard "does not measure malice in the sense of ill will or animosity, but instead the speaker's subjective doubts about the truth of publication." *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001). Given the fact-intensive nature of the inquiry as to whether a defendant knew its statements were false, courts have held that "resolution of the . . . actual malice inquir[y] typically requires discovery." *Id.* at

173; *see also Karedes v. Ackerley Grp., Inc.*, 423 F.3d 107, 118-19 (2d Cir. 2005) (observing that, "[g]iven th[e] opportunity [for discovery], [the plaintiff] may be able to adduce facts establishing the speaker's subjective doubts about the truth of the publication").

Plaintiff's allegations in this case support an inference that Defendants acted with actual malice. Plaintiff alleges that Defendants knew their statements about his supposedly violent and abusive conduct were false, as he never engaged in any such conduct while at the Garden or otherwise behaved inappropriately, and Defendants had to fabricate witness statements to support their false depiction of the events. AC ¶¶ 59, 63-64, 70, 74, 75. To the contrary, Mr. Oakley never initiated contact and, at all times, was acting in self-defense. *Id.* ¶59. As Plaintiff alleges that Defendants were aware that their statements that Mr. Oakley had instigated the Incident and acted abusively were false, he thus adequately alleges that Defendants acted with actual malice in defaming him. Similarly, given that Plaintiff alleges that Defendants were at all times aware that he was never an alcoholic (*id.* ¶70), it is clear that the Amended Complaint contains specific allegations sufficient to demonstrate actual malice. *See World Wrestling Fed. Entmt., Inc. v. Bozell*, 142 F. Supp. 2d 514, 528 (S.D.N.Y. 2001) (holding that the plaintiff alleged actual malice where "[a] reasonable fact-finder could certainly infer reckless disregard for the truth and/or spite, ill will, and an intent to harm"); *Manno v. Hembrooke*, 120 A.D.2d 818, 819 (3d Dep't 1986) (finding that actual malice was alleged where statements "were made with knowledge that they were false or with reckless disregard as to whether they were false").

The case law cited by Defendants for the proposition that Plaintiff purportedly failed to allege actual malice is inapposite, as in all of those cases the respective plaintiffs merely relied on the ill will on the part of the defendant, rather than demonstrating they had any knowledge that the statement was incorrect. *See Biro v. Conde Nast*, 963 F. Supp. 2d 255, 281 (S.D.N.Y. 2013) (dismissing a complaint where the plaintiff failed to allege any facts demonstrating that the

defendant knew the article was false); *Amadsau v. Bronx Lebanon Hosp. Ctr.*, No. 03 Civ. 6450 (LAK)(AJP), 2005 WL 121746, at *13 (S.D.N.Y. Jan. 21, 2005) (where the plaintiff solely relied on a claim that the defendant was motivated by "malice, ill will, personal spite, or in the alternative, by defendants' culpable recklessness or gross negligence"); *Dunlop-McCullen v. Rogers*, No. 00 Civ. 3274 (JSR)(JCF), 2002 WL 1205029, at *16, n.3 (S.D.N.Y. Feb. 21, 2002) (one cannot prove actual malice merely by describing past disputes between the parties). Here, not only has Plaintiff alleged that Defendants were aware that their statements were false, but he has also demonstrated that Defendant Dolan has a history of engaging in the same type of reckless conduct as in the instant case, by claiming twice without justification that two other people who upset him were drunk and/or alcoholics. AC ¶¶78-81.

D. Defendants' Statements Were Not Opinions

Finally, contrary to Defendants' argument, their defamatory statements are not non-actionable statements of opinion. Despite ultimately acknowledging that the statements must be viewed as a whole and in context, Defendants once again attempt to parse each statement individually to support the claim that their statements were non-actionable opinions. Under New York law, "a statement of opinion accompanied by a full recitation of the facts on which it is based will be deemed a pure opinion, while a statement of opinion that implies a basis in undisclosed facts is actionable 'mixed opinion.'" *Clark v. Schuylerville Cent. Sch. Dist.*, 807 N.Y.S.2d 175, 176–77 (3d Dep't 2005).

Here, when viewed in their totality, it is clear that Defendants were indisputably attempting to communicate factual statements about Plaintiff. As a threshold matter, Defendants left no doubt as to their intentions when they specifically said of Mr. Oakley, "**everything he has said since the Incident is pure fiction**." AC ¶62. Any reasonable reader would interpret this claim to mean that Defendants were claiming that, in contrast, their statements were *factual*. Defendants cannot escape

this conclusion merely by making half-hearted efforts to couch their statements with purported qualifying words such as "hope" or "may," especially where, as here, they repeatedly seek to bolster their claims with unspecified references to Plaintiff's purported history of "problems," as well as witness statements that they claim corroborate their version of the events. AC ¶¶59-69. By using this language, Defendants have "impl[ied] a basis in undisclosed facts [which] is actionable mixed opinion." *Wilcox v. Newark Valley Cent. Sch. Dist.*, 904 N.Y.S.2d 523, 526 (3d Dep't 2010) (collecting cases).

In moving to dismiss the Amended Complaint, Defendants further argue that "courts have consistently protected statements made in online forums as statements of opinion rather than fact." Defs. Mem. at 28. However, the mere fact that statements are made online does not preclude a finding that a statement is actionable as defamation. *See Franklin*, 135 A.D.3d at 94 (holding that a statement published on Twitter was actionable defamation). Likewise, Defendants' argument that Defendant Dolan's statements on a television program are *per se* not actionable is not supported by the case law. Unlike in *Huggins v. Povitch*, No. 131164/94, 1996 WL 515498 (N.Y. Sup. Ct. Apr. 19, 1996), Defendant Dolan did not repeatedly state that he was merely expressing his personal opinions. *Id.* at *7. Nor are Defendant Dolan's comments the kind of off-the-cuff "shock talk" from radio hosts with a history of "crude and hyperbolic" statements such as was the case in *Hobbs v. Imus*, 698 N.Y.S.2d 25, 26 (1st Dept. 1999). Rather, these were carefully-thought-out statements made by Defendants to convince the general public that Mr. Oakley was a violent, out-of-control alcoholic. *See* AC ¶¶58-75.

Similarly unavailing is Defendants' argument that "the challenged statements are not mixed opinion because Defendants disclosed the facts on which they were based." Defs. Mem. at 29. The decision by the Court of Appeals in *Gross v. New York Times Co.*, 82 N.Y.2d 146 (1993) is dispositive. In *Gross*, the court found that statements are not actionable "if the facts on which they

are based are fully and accurately set forth and it is clear to the reasonable reader or listener that the accusation is merely a personal surmise built upon those facts." *Id.* at 155. However, the court found that a newspaper article which claimed its allegations were supported by unspecified "documents" and that "interviews conducted with several pathologists" gave rise to the inference that they were provable facts.[13] *Id*. at 149-50, 155.

Based upon the foregoing, Defendants' motion to dismiss Plaintiff's claims for defamation *per quod*, defamation *per se*, libel and slander should be denied.

IV. PLAINTIFF STATES A CLAIM FOR ASSAULT AND BATTERY

To state a claim for assault under New York law, "a plaintiff must plead an intentional placing of another person in fear of imminent harmful or offensive contact."[14] *Bass v. World Wrestling Fed. Entmt., Inc.*, 129 F. Supp. 2d 491, 508 (E.D.N.Y. 2001). An action for assault "need not involve physical injury." *Di Gilio v. Burns Int'l Detective Agency*, 46 A.D.2d 650, 650 (2d Dep't 1974). To state a claim for battery, the plaintiff "must prove bodily contact, with intent that was offensive in nature." *Hassan v. Marriott Corp.*, 243 A.D.2d 406, 407 (1st Dep't 1997). It is well established that whether an individual would find conduct to be offensive "or would be in apprehension of harmful or offensive conduct are issues of fact that cannot be resolved on [a] motion to dismiss." *Cohen v. Davis*, 926 F. Supp. 399, 402 (S.D.N.Y. 1996).

Plaintiff states a claim for both assault and battery. Within minutes of taking his seat at the Garden, and with no basis or justification, three large men approached Mr. Oakley and demanded,

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[13] As Defendants did not actually fully disclose what the witness statements and Plaintiff's purported "history" indicated in their statements, *Sorvillo v. St. Francis Preparatory Sch.*, 607 F. App'x 22 (2d Cir. 2015), a summary order with no precedential effect, does not support Defendants' argument that the defamatory statements are non-actionable. Instead, given the fact that Plaintiff challenges the very existence of the witness statements to which Defendants cite, there is no question that Defendants' motion to dismiss should be denied. *See* AC ¶¶ 62-63.

[14] To the extent that Defendants attempt to procure dismissal of Plaintiff's assault and battery claims by arguing that he failed to plead that Defendants' security officers acted with the requisite intent, this is flatly contradicted by the allegations in the Amended Complaint, wherein Plaintiff alleges that Defendants "intentionally placed Plaintiff in imminent fear of harmful and/or offensive conduct" and that they "intentionally and wrongfully physically contacted Plaintiff without his consent." AC ¶¶ 123, 127.

without explanation, that he leave the Arena. AC ¶ 34. When Mr. Oakley explained that he had done nothing wrong and turned around to peaceably return to his seat, two security guards grabbed Mr. Oakley and pushed him to the ground. *Id.* ¶¶ 37-42. The security guards then physically grabbed Mr. Oakley to forcibly compel him to leave the Arena, placing him in fear for his safety. *Id.* ¶¶ 44-46. These allegations are sufficient to survive Defendants' motion to dismiss Plaintiff's claims for assault and battery. *See Cohen*, 926 F. Supp. at 402 (holding that the plaintiff stated a claim for battery where she alleged that "someone grabbed her arm to prevent her from leaving a room").

Defendants argue that they were allowed to use force when Plaintiff refused to leave the Garden, citing to the language used on the back of the ticket. Defs. Mem. at 30-31. Once again, the terms on the ticket itself are extrinsic evidence not integral to the allegations in the Amended Complaint and should therefore be rejected by the Court. *See supra* at pp. 8-11. Even putting this fact aside, the terms of the ticket state that MSG is only entitled to eject "any person whose conduct MSG deems disorderly, who uses vulgar or abusive language or who fails to comply with these terms," and Plaintiff's allegations do not support an inference that he was behaving in such a manner. *See* Kushner Decl. Ex. 14; *see also* AC ¶¶ 35, 40, 43-45, 50. Accordingly, Plaintiff's allegations do not support an inference that Defendants were entitled to baselessly eject Mr. Oakley in the first instance, and the terms of the ticket are therefore irrelevant.

Defendants' reliance upon *Gottlieb v. Sullivan Cty. Harness Racing Ass'n*, 25 A.D. 798 (3d Dep't 1966) is clearly misplaced. In *Gottlieb*, the plaintiff was forcibly removed from a racetrack for bringing a convicted bookmaker, and relevant rules and regulations provided that "[a]ny person . . . whose conduct is deemed detrimental to the best interest of harness racing or who is deemed an undesirable person may be expelled from the track." *Gottlieb*, 25 A.D.2d at 798. Likewise, *Schaeffer v. Cavallero*, 54 F. Supp. 2d 350 (S.D.N.Y. 1999) is similarly unpersuasive, as the

plaintiff had a statutory duty to obey "an authorized airline representative['s] [instruction] to leave the plane," was asked to leave a plane because he was yelling and being "quarrelsome," and refused a "polit[e]" request that he disembark. *Id.* at 352. In contrast to a convicted bookmaker at a racetrack and an individual instructed to leave an airplane – situations that are both expressly addressed in relevant rules and regulations – Mr. Oakley engaged in no behavior that warranted his expulsion from the Garden at all, let alone in a violent and abusive manner.

Irrespective of Defendants' purported right to throw Plaintiff out of Madison Square Garden without any justification, their motion to dismiss should nevertheless be denied because Plaintiff sufficiently alleges that the amount of force used against him was legally unreasonable. Plaintiff alleges that he was peacefully watching the game, that he never acted violently, that he never refused to leave the Garden[15] and that he merely sought an explanation as to why he was being baselessly ejected. AC ¶¶ 35, 40-45, 50. Despite his non-confrontational demeanor and reasonable inquiries, MSG security guards repeatedly grabbed Mr. Oakley and threw him to the ground. *Id.* ¶¶ 42, 47. In light of the foregoing, it would be entirely premature to conclude that the security guards' use of force in doing so was reasonable as a matter of law, and Defendants' argument that "discovery on these tort claims is unnecessary" is patently false. *See J.L. v. E. Suffolk Boces*, No. 14 Civ. 4565 (SIL), 2018 WL 1882847, at *13 (E.D.N.Y. Apr. 19, 2018) (a question of the defendant's state of mind in assaulting the plaintiffs and whether the type of force used against the plaintiffs was appropriate given the circumstances was a factual issue for the jury to resolve); *Combs v. City of New York*, 130 A.D.3d 862, 864-65 (2d Dep't 2015) ("Because of its intensely

[15] Despite Defendants' transparent efforts to impugn Plaintiff's honesty by claiming that his allegations in the Amended Complaint — to the effect that he never refused a request to leave — contradicted those in his original Complaint, a comparison of the language exposes the lie in Defendants' arguments. Nowhere in the original Complaint did Plaintiff state the he affirmatively refused to leave. Rather, Mr. Oakley simply asked for an explanation as to what he had purportedly done to warrant being thrown out of the Garden, and attempted to show that he was capable of watching the game in a peaceful manner by returning to his seat. Comp. ¶¶ 39-42; AC ¶¶ 35-46. Thus, his Amended Complaint makes explicit what was implicit in the original Complaint—that Mr. Oakley never refused any direction to leave the Garden and that Defendants therefore had no right to violently remove him from his seat.

factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide.")

Defendants' reliance on *Mitchell v. New York Univ.*, No. 150622/13, 2014 WL 123255 (N.Y. Sup. Ct. Jan. 8, 2014) does not warrant a different result. In *Mitchell*, the plaintiff was explicitly barred from entering the defendants' premises absent express permission. *Id.* at *1. When the plaintiff attempted to enter the defendants' property without such clearance, the defendants' officers "forcibly removed" him. *Id.* In dismissing the plaintiff's assault and battery claims, the *Mitchell* court noted that the complaint did not describe the force used on the plaintiff, and tellingly, the court also explained that while a property owner can "use *reasonable* force" to eject a trespasser, that privilege disappears with "the use of unnecessary force." *Id.* However, because the plaintiff did not allege the force was unnecessary, the complaint was dismissed. *Id.* Here, Mr. Oakley never refused to comply with a request to leave the Garden, and was certainly not barred from Defendants' facilities beforehand such that they could automatically eject him without prior notice. AC ¶¶ 30-33. Moreover, the Amended Complaint is replete with allegations both describing the offensive physical contact and making it clear that such contact was unreasonable given the circumstances.[16] *Id.* ¶¶ 42, 45, 47-49.

Finally, Defendants argue that "videos of the Incident further confirm that Defendants did not assault or batter Oakley." *See* Defs. Mem. at 32. As an initial matter, for the reasons discussed above, the Court should decline to consider video of the Incident, and Defendants' reliance upon *Zsigray v. Cty. Comm'n of Lewis Cty.*, No. 16 Civ. 64, 2017 WL 462011, at *4 (N.D. W.Va. Feb. 2,

[16] Defendants also rely on *Mitchell* in support of their argument that "unreasonable force alone does not defeat a property owner's privilege to remove a trespasser," because a plaintiff ***must*** establish "that security personnel were motivated by an intent to inflict injury." Defs. Mem. at 32 (emphasis added). However, in *Mitchell*, the court observed that "the use of unnecessary force ***or*** evidence of an intent to injury as opposed to guard the owner's property removes the privilege." *Mitchell*, 2014 WL 123255, at *1 (emphasis added). Accordingly, Defendants' arguments that a property owner is entitled to use unreasonable or excessive force and that Plaintiff would be required to establish an intent to injure are both incorrect. *See also Rivera v. Puerto Rican Home Attendants Servs., Inc.*, 930 F. Supp. 124, 133 (S.D.N.Y. 1996) ("New York law does not make intent to cause physical injury an element of the torts of assault and battery").

2017) is unavailing. *See* Defs. Mem. at 34. Unlike *Zsigray*, in which the court considered an extrinsic video tape because the "Complaint [made] multiple references to video footage of the Incident and, in effect, [made] the video part of the Complaint" (*Zsigray*, 2017 WL 462011, at *3), Mr. Oakley has not made any references to the video footage, and it is therefore not integral to the Amended Complaint. Further, in *Zsigray*, the court's observation regarding the accuracy of the plaintiff's allegations had nothing to do with the court's ability to consider the video tape in the first instance. *Id.* In any event, even if the Court were to consider Defendants' video footage, their description of the contents of such footage is inaccurate and, at the very least, warrants further discovery, as Mr. Oakley did not initiate any contact with the security guards, and the security guards violently throw Mr. Oakley to the ground on multiple occasions. *See supra* at pp. 14-16; AC ¶¶ 42, 45, 47-4; *see also McKinnon v. Bell Sec.*, 268 A.D.2d 220, 221-22 (1st Dep't 2000) ("The trier of fact must determine whether plaintiff's demeanor and behavior aggressively precipitated the confrontation, to the extent of relieving defendant of responsibility").

V. PLAINTIFF STATES A CLAIM FOR FALSE IMPRISONMENT

A claim of false imprisonment "consists of the unlawful detention of the person of another, for any length of time, whereby he is deprived of his personal liberty." *Moore v. Sam's Club*, 55 F. Supp. 2d 177, 187 (S.D.N.Y. 1999). To state a claim for false imprisonment, the plaintiff must allege that: "(1) he was confined, (2) the defendant intended to confine him, (3) the plaintiff was aware of his confinement, (4) the plaintiff did not consent to the confinement, and (5) the defendant's actions were not otherwise privileged." *Faiaz v. Colgate Univ.*, 64 F. Supp. 3d 336, 356 (N.D.N.Y. 2014).

Plaintiff states a claim for false imprisonment, as he alleges that the MSG Defendants "grabbed [him] and pushed him to the ground," and that when he got back to his feet, he was "forcibly turned around so his back faced security, grabbed by six officials and thrown onto the

ground." AC ¶¶ 42, 47. The MSG Defendants then "physically and forcibly removed Plaintiff from the Garden and subsequently detained him until police could arrive to unjustifiably arrest him." *Id.* ¶ 130. As Plaintiff alleges that the MSG Defendants unlawfully detained him, his allegations are sufficient to state a claim for false imprisonment. *See Campoverde v. Sony Pic. Entmt.*, No. 01 Civ. 7775 (LAP), 2002 WL 311633804, at *8 (S.D.N.Y. 2002) (denying a motion to dismiss where the court was unable to "find that plaintiffs can prove no set of facts in support of their false imprisonment claim").

In moving to dismiss, Defendants first argue that Plaintiff did not allege that they played a role in his false imprisonment. Defs. Mem. at 34. However, as discussed above, there are multiple allegations identifying MSG security guards as being directly involved in Mr. Oakley's confinement and detention. *See* AC ¶¶ 42, 47-48, 123, 127, 130. As Plaintiff identifies MSG security guards as being responsible for his unlawful detention, the Court need not engage in any speculation to conclude that the MSG Defendants are liable for false imprisonment.

Defendants further argue that the presence of NYPD officers on the scene absolves them of any liability. *See* Defs. Mem. at 35. However, the mere fact that NYPD officers were present is irrelevant, as Defendants concede that MSG security guards were involved in physically escorting Mr. Oakley out of the Arena, and Plaintiff's allegations support an inference that MSG security unlawfully detained Mr. Oakley. *See* Defs. Mem. at 35; *see also* AC ¶¶ 42, 47-48, 123, 127, 130. The extent to which the NYPD were actually responsible for Plaintiff's imprisonment is not an issue that can be resolved on the face of the pleadings, and discovery is necessary.

VI. PLAINTIFF STATES A CLAIM FOR ABUSE OF PROCESS

A claim for abuse of process "lies against a defendant who (1) employs regularly issued legal process to compel performance or forbearance of some act (2) with the intent to do harm without excuse or justification and (3) in order to obtain a collateral objective that is outside the

legitimate ends of the process." *Ying Li v. City of New York*, 246 F. Supp. 3d 578, 616 (E.D.N.Y. 2017).

The Amended Complaint states a claim for abuse of process, as it alleges that Defendants baselessly and unjustifiably instigated his arrest and criminal charge to accomplish the collateral objective of publicly embarrassing him and destroying his reputation. *See* AC ¶¶ 134-36. As Plaintiff was behaving appropriately and only attempted to defend himself after being violently confronted without basis, Defendants' actions in procuring his arrest were without justification, and their subsequent defamatory media campaign was intended to harm Mr. Oakley. *Id.* ¶¶ 58-62, 67-77. Plaintiff further alleges that he lost $40,000 as a result. *Id.* ¶ 137. These allegations are sufficient to state a claim for abuse of process. *See D'Amico v. Corr. Med. Care, Inc.*, 120 A.D.3d 956, 960, 991 N.Y.S.2d 687, 692 (2014) (denying a motion to dismiss where the defendants gave false statements with the intent of "demeaning, humiliating, and defaming [the plaintiff]").

In moving to dismiss Plaintiff's abuse of process claim, Defendants first argue that Plaintiff does not allege that Defendants caused the issuance of the criminal process. However, a defendant who "promote[s] or facilitate[s] an arrest and prosecution may be liable for abuse of process." *Phelps v. City of New York*, No. 04 Civ. 8570 (DLC), 2006 WL 1749528, at *5 (S.D.N.Y. June 27, 2006).[17] As discussed above with respect to Plaintiff's false imprisonment claim, Defendants actively participated in Mr. Oakley's arrest and prosecution by detaining him at MSG and assisting the NYPD upon his arrest and charge of assault.[18] AC ¶¶ 42, 47-48.

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[17] *Oparaji v. New York City Dep't of Educ.*, No. 03 Civ. 4105 (NG)(VVP), 2005 WL 1398072 (E.D.N.Y. June 14, 2005) is distinguishable as, unlike Mr. Oakley, the plaintiff in *Oparaji* was neither arrested nor charged with a crime, but instead alleged that he had been discriminatorily terminated. *Id.* at *3.

[18] Defendants' argument is particularly disingenuous in light of the fact that the extrinsic evidence they themselves have submitted to the Court fatally undermines their claim. The Misdemeanor Charge provided by Defendants reflects that MSG officials provided information that facilitated Mr. Oakley's arrest, and the Trespass Notice issued to Mr. Oakley further demonstrates that Defendants played a key role in his prosecution, as the Trespass Notice states that he is subject to arrest should he return to the Garden, and is signed by a "venue representative." *See* Kushner Decl. Exs. 7, 8.

Defendants further argue that Plaintiff fails to allege that Defendants sought to achieve a collateral objective. *See* Defs. Mem. at 37. However, Plaintiff alleges that Defendants caused the issuance of process for the purpose of humiliating him and damaging his reputation, which they were able to accomplish with the subsequent defamatory statements specifically referencing the arrest. *See also Radow v. Weiss*, 733 N.Y.S.2d 488, 489 (2001) (denying summary judgment on an abuse of process claim because of factual issues about the defendants' motivations).

Defendants' argument that "Courts have thus routinely dismissed claims based on allegations similar to Oakley's" is simply not true and not supported by the case law to which they cite. *See* Defs. Mem. at 37. In *Vessa v. City of White Plains*, No. 12 Civ. 6989 (ER), 2014 WL 1271230 (S.D.N.Y. Mar. 27, 2014), the court dismissed the plaintiff's abuse of process claims because the plaintiff had failed to demonstrate that any legal process was issued in the first instance, and the plaintiff could not challenge the validity of the warrant. *Id.* at *8. Likewise, in both *Hauser v. Bartow*, 273 N.Y. 370 (1937) and *Jones v. Maples/Trump*, No. 98 Civ. 7132, 2002 WL 287752, at *7 (S.D.N.Y. Feb. 26, 2002), the courts rejected abuse of process claims where the plaintiffs did not demonstrate that the defendant used the process after it was issued. *Hauser* at 374, *Jones* at *7. In contrast, here, Defendants specifically referred to the arrest that they procured through false pretenses in subsequent public statements, all in a clear attempt to further humiliate Mr. Oakley, thereby abusing the previously-obtained criminal process. *See* AC ¶¶ 58, 62, 69.

Finally, Defendants argue that Plaintiff has not alleged special damages from their abuse of process. *See* Defs. Mem. at 38. However, as discussed above, Defendants' unlawful conduct has resulted in Plaintiff losing exactly $40,000 in appearance fees to which he otherwise would have been entitled. *See* AC ¶¶ 94-95, 137. Defendants' argument that this loss was incurred as a result of Defendants' defamatory statements misses the point. The defamatory statements, which

explicitly reference the arrest, are the very abuse of process for which Plaintiff now seeks recovery. Therefore, Defendants' motion to dismiss Plaintiff's claim for abuse of process should be denied.

VII. PLAINTIFF STATES A CLAIM FOR DISABILITY DISCRIMINATION

To state a claim for discrimination based on a perceived disability arising under the ADA or NYSHRL, the plaintiff "must allege (1) that she is disabled within the meaning of the ADA; (2) that defendants own, lease, or operate a place of public accommodation; and (3) that defendants discriminated against her by denying her a full and equal opportunity to enjoy the services defendants provide." *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156, 158 (2d Cir. 2008). An individual is "disabled" within the meaning of the ADA and NYSHRL even if he or she is merely "regarded as" having a disability. *See* 42 U.S.C. § 12102 (1)(C) (defining an individual as having a "disability" under the ADA if he or she is "regarded as having such an impairment"); N.Y. Exec. Law § 292(21)(c) (defining "disability" under the NYSHRL as "a condition regarded by others as such an impairment"). Relevant here, the Second Circuit has observed that alcoholism qualifies as a disability under the ADA and the NYSHRL. *Makinen v. City of New York*, 857 F.3d 491, 495 (2d Cir. 2017).

In moving to dismiss Plaintiff's disability discrimination claims, Defendants first argue that Plaintiff has not alleged that he was forcibly removed from Madison Square Garden because they perceived him to be an alcoholic. Defs. Mem. at 39. However, Defendants made multiple comments supporting an inference that Plaintiff was ejected because of Defendants' belief that he was an alcoholic, including, *inter alia*, Dolan's statements that "anybody drinking too much alcohol, looking for a fight, they're going to be ejected and they're going to be banned," that Mr. Oakley "may have a problem with alcohol" and that he had "heard statements from police that [Plaintiff] appeared to be impaired." AC ¶¶ 67-69, 146, 149. Plaintiff further alleges that, but for Defendants discriminatorily banning him from the Garden, he would have routinely returned. *Id.* ¶

54. These allegations support an inference that Defendants denied Mr. Oakley access to MSG based on their perception that he suffered from alcoholism. *See Naiman v. New York Univ.*, No. 95 Civ. 6469 (LMM), 1997 WL 249970, at *2 (S.D.N.Y. May 13, 1997) (holding that the defendant violated the ADA where the plaintiff was excluded from a public accommodation).

Defendants' argument that Plaintiff "self-defeatingly pleads that there were non-discriminatory reasons for his removal" (*see* Defs. Mem. at 39) is similarly meritless. As an initial matter, and contrary to Defendants' argument, Plaintiff does not allege that his ejection from the Garden was actually motivated by his physical proximity to Mr. Dolan or his purported abusive behavior, but rather, that Defendants fabricated those reasons to cover for their discriminatory behavior. *See* AC ¶¶ 35, 53, 58, 62. Indeed, Plaintiff specifically alleges that he was not acting inappropriately in any way such as to warrant his ejection. *Id.* ¶¶ 35, 37, 40-41, 45, 48, 50. Furthermore, even assuming other bases for Defendants' discriminatory conduct existed, "under the ADA, it is enough if the plaintiff's disability was a motivating factor in the discrimination." *Cain v. Mandl Coll. of Allied Health*, No. 14 Civ. 1729 (ER), 2017 WL 2709743, at *3 n.1 (S.D.N.Y. June 22, 2017). Accordingly, Plaintiff need not allege that his disability was a "but-for" cause of his discrimination. *See also Doe v. Deer Mountain Day Camp*, 682 F. Supp. 2d 324, 343 (S.D.N.Y. 2010) ("The existence of additional factors causing an injury does not necessarily negate the fact that the defendant's wrong is also the legal cause of the injury."). As Plaintiff alleges that Defendants' perception of his disability was a motivating factor in his denial of access to a public accommodation, his allegations are sufficient to state a claim arising under the ADA and NYSHRL.

As Plaintiff's allegations do not support an inference that he was acting abusively, Defendants' argument that they were merely "tak[ing] action to remove the individual and ensure the safety of other patrons" lacks merit. Defs. Mem. at 10. To that end, Defendants' reliance upon *Van Ever v. New York State Dep't of Corr. Servs. at Sing Sing Corr. Facility*, No. 99 Civ. 1234

(SAS), 2009 WL 1727713 (S.D.N.Y. Nov. 21, 2000) is misplaced, as the *Van Ever* court examined whether the plaintiff stated a claim for employment discrimination where his employer failed to provide a reasonable accommodation for his disability. In contrast, Plaintiff alleges that Defendants denied him access to a public accommodation based upon their perception of Plaintiff as an alcoholic, which the Second Circuit has observed "may qualify as a disability for purposes of the ADA." *Buckley v. Consolidated Edison Co. of New York*, 127 F.3d 270, 273 (2d Cir. 1997). Moreover, as Plaintiff was not acting abusively or in an unsafe manner, there was clearly no need to remove him to ensure the safety of other patrons. *See* AC ¶¶ 31, 36-38, 75-76.

Finally, Defendants claim that Plaintiff's perceived disability discrimination claim cannot proceed given his allegation that they knew or were recklessly indifferent to the fact that Plaintiff was not an alcoholic. Defs. Mem. at 39. However, while Defendants claim that Plaintiff cannot plead such inconsistent facts, the case law compels a different result. Under the law, a party is permitted to "assert contradictory statements of fact" where there is legitimate "doubt about the facts in question." *Stone v. Sutton View Capital, LLC*, No. 17 Civ. 1574 (VEC), 2017 WL 6311692, at *5 (S.D.N.Y. Dec. 8, 2017) (internal citations and quotations omitted); *see also Parker v. Zugibe*, No. 16 Civ. 4265 (KMK), 2017 WL 4296795, at *5 (S.D.N.Y. Sept. 26, 2017) (allowing the plaintiff to proceed with allegations that a search warrant was forged while also alleging that the search warrant was signed by a judge). This is a case where such doubt exists. Unlike an objectively provable fact such as whether a contract was executed, in the instant case, the "facts" which Defendants claim are inconsistent involve Defendant Dolan's state of mind, and whether or not he believed Mr. Oakley was an alcoholic. Without having the opportunity to take his deposition, it is impossible for Mr. Oakley to state with certainty what Defendant Dolan believed in the moment. And, indeed, to follow Defendants' reasoning would provide Defendants an easy end-run around legal liability. If Plaintiff were forced to only proceed with his defamation claim,

Defendant Dolan could claim that he at all times believed Mr. Oakley to be an alcoholic, and ejected him for that reason. On the other hand, if Plaintiff were required to solely assert a disability discrimination claim, Defendant Dolan could admit that his subsequent statements were a lie and that he never believed that Plaintiff suffered from alcoholism. This kind of Hobson's choice is precisely what the alternative pleading provision of Fed. R. Civ. P. 8 was designed to avoid. *See Henry v. Daytop Vill., Inc.*, 42 F.3d 89, 95 (2d Cir. 1994) (explaining that inconsistent pleadings "may lie either in the statement of the facts or the legal theories" and, pursuant to the Federal Rules of Civil Procedure, "we may not construe [the plaintiff's] first claim as an admission against another alternative or inconsistent claim") (internal citations omitted).

CONCLUSION

For the reasons set forth herein, Defendants' motion to dismiss Plaintiff's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) should be denied in its entirety.[19]

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New York, New York

Respectfully submitted,

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[19] To the extent that the Court finds deficiencies in any of Plaintiff's claims, Plaintiff respectfully requests the right to amend his pleadings to address any such deficiencies. Contrary to what Defendants claim, there is no basis to find that such an amendment would be futile given that neither party knows the basis of the Court's eventual decision.