

New York Appellate Division Affirms Dismissal of Public Company's Defamation Lawsuit Against Short Sellers

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Key Points:

- On February 9, 2021, the New York Appellate Division, First Department, affirmed the dismissal of a defamation action brought by Eros International plc, an Indian media company, against several short sellers based on a series of investor reports, tweets and public statements questioning the accuracy of Eros's reported financials.
- In affirming the decision below, the court agreed that the investors' statements were constitutionally protected opinion based on each statement's disclosure of underlying facts and the use of speculative language.
- The decision emphasizes that critical statements concerning third parties must be made carefully and joins a growing body of precedent protecting investment analysts from lawsuits aimed at chilling free speech.

On February 9, 2021, the New York Appellate Division, First Department, unanimously affirmed a lower court's dismissal of a defamation action brought by Eros International plc against hedge funds and other investors who opined, in a series of research reports, tweets and presentations, that Eros might be engaging in fraud and misrepresentation.

Eros, a publicly traded company based in India, produces and distributes Bollywood films internationally, including through a Netflix-type offering called Eros Now. Its securities are traded on the New York Stock Exchange.

The statements in question—which were made pseudonymously online by a number of hedge funds and other investors over the course of several years—called into question the accuracy and integrity of Eros's reported financials and other statements regarding its performance. Eros claimed that the investors had engaged in a "short and distort" market-manipulation scheme and defamed Eros in the process; the defendants contended that the lawsuit was an attempt to silence plaintiff's critics from expressing protected opinions based on legitimate investment research.

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The court below dismissed Eros’s defamation and conspiracy claims against all of the moving defendants, finding that the challenged statements were constitutionally protected opinion—not purported statements of fact—and thus not actionable. In so holding, the court relied on the facts that each statement disclosed the author’s short position and that many were published on online fora such as Seeking Alpha and Twitter, which traffic in opinions. The court also noted that the reports disclosed the bases for the authors’ conclusions in detail, and encouraged other investors to undertake their own analyses of the company’s financials. Importantly, the court also observed that the reports, tweets and conference presentations contained “language of conjecture,” such as “we believe,” “in our opinion” and other disclaimers, which further underscored that the statements were nonactionable opinion about Eros based on disclosed facts.

In reaching its decision, the court below cited approvingly to *Silvercorp Metals Inc. v. Chinastockwatch.com* (New York Supreme Court, Index No. 150374/2011), a case in which Akin Gump Strauss Hauer & Feld LLP represented the lead defendant, and where the court granted a motion to dismiss defamation claims. In *Silvercorp*, which similarly involved negative reports published online by short sellers, the court noted that the challenged reports disclosed the bases for their opinions, disclosed the authors’ short positions and contained phrases indicating that the reports were statements of opinion.

Eros appealed to the First Department, which agreed that defendants’ statements were constitutionally protected opinions, pointing to the disclosure of each statement’s underlying facts and the speculative language throughout. Notably, the First Department stressed that simply using the word “fraud” does not render a statement actionable. And in dispensing with Eros’s arguments that investors’ posts distorted facts about the company, the First Department highlighted that appellant did not challenge the accuracy of the statements’ underlying facts. This is the first time a New York appellate court has applied the defamation analysis to a case involving short sellers opining on the market.

Defamation claims are assessed on a case-by-case basis, and the challenged language must be considered in the context in which the language was disseminated. Both *Silvercorp* and the First Department’s ruling here provide important guidance for investors and analysts who are considering publicizing their opinions regarding companies such as Eros, who may threaten to retaliate by commencing a defamation action. Critical statements concerning third parties must be made carefully: by disclosing interest in the subject matter, providing the underlying documents and facts undergirding the opinion and using language of conjecture, the author signals to the reader that they should treat the publication as opinion and helps reduce potential exposure.

The appeal was captioned *Eros Int’l plc v. Mangrove Partners, et al.* (New York Appellate Division, First Department, Case No. 2019-2425). The lead defendants-respondents were represented by Akin Gump Strauss Hauer & Feld LLP. The team responsible for handling the appeal included Michael A. Asaro, Joseph L. Sorkin, Z.W. Julius Chen, Jessica Fitts and Victoria Fydrych.

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