

## New York Court Dismisses Public Company's Defamation Lawsuit Against Short Sellers

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### Key Points

- On March 8, 2019, New York State Supreme Court Justice Joel M. Cohen dismissed a defamation action brought by Eros International plc, an Indian media company, against multiple short sellers who had questioned the accuracy of Eros's reported financials in a series of investor reports, tweets and public statements.
- In determining that the challenged statements were constitutionally protected opinion, the court focused on the facts that the short sellers fully disclosed the sources and bases for their conclusions, noted their short positions, posted on online fora trafficking in opinions and used "language of conjecture," such as "we believe" and "in our opinion."
- The decision underscores that critical statements concerning third parties must be made carefully, and expressions of opinion clearly presented as such.

On March 8, 2019, New York Supreme Court Justice Joel M. Cohen dismissed a defamation action brought by Eros International plc ("Eros") against hedge funds and other investors who opined, in a series of investor 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. Although Eros alleged a "short and distort" conspiracy, the defendants contended that they had acted independently and all separately reached the conclusion that Eros may be engaging in fraud. The reports disclosed the bases for this conclusion in detail, and encouraged other investors to undertake their own analyses of the company's financials.

In a 26 page decision, Justice Cohen dismissed Eros's defamation and conspiracy claims against all of the moving defendants, finding that the challenged statements

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were constitutionally protected opinion—not purported statements of fact—and thus not actionable. The court relied on the facts that each statement disclosed the author's short position, suggesting that the author was not disinterested and that the report should be read as opinion, and that many were published on online fora such as Seeking Alpha and Twitter, which traffic in opinions. 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 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.

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 *Eros* 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 she should treat the publication as opinion and helps reduce potential exposure.

Eros's defamation action was captioned *Eros Int'l plc v. Mangrove Partners, et al.*, (New York Supreme Court, Index No. 653096/2017). The lead defendants were represented by Akin Gump Strauss Hauer & Feld LLP. The team responsible for the motion to dismiss included Michael A. Asaro, Joseph L. Sorkin, Jessica Fitts and Richie Williams.

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