

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
EBONY MEDIA OPERATIONS, LLC,

Plaintiff,

-v-

UNIVISION COMMUNICATIONS INC.,  
FUSION MEDIA GROUP, LLC, and  
GIZMODO MEDIA GROUP, LLC

Defendants.  
-----X

No. 1:18-cv-11434 (AKH)

**REPLY MEMORANDUM OF  
LAW IN SUPPORT OF  
DEFENDANTS' MOTIONS TO  
DISMISS PURUANT TO  
RULE 12(B)(6) AND THE TEXAS  
ANTI-SLAPP STATUTE**

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Defendants respectfully submit this Reply Memorandum of Law in further support of their Motions to Dismiss the Complaint of Ebony Media Operations, LLC (“Plaintiff” or “Ebony”) pursuant to Federal Rule of Civil Procedure 12(b)(6) and the Texas Citizens Against Participation Act, Tex. Civ. Prac. & Rem. Code § 27.001 *et seq.* (the “TCPA”).

### **PRELIMINARY STATEMENT**

Plaintiff’s opposition brief ignores binding precedent and mischaracterizes the law. Plaintiff ignores (1) the pleading standard of “plausibility” that has governed in federal court for the last 12 years; (2) the doctrine of nominative fair use, which ends Plaintiff’s trademark claims; (3) the express statutory limitations on the Lanham Act’s reach; and (4) the binding Second Circuit precedent holding that state anti-SLAPP statutes *do* apply in federal court. Most remarkable of all, Plaintiff, itself a media company, disregards the First Amendment of the U.S. Constitution and its essential guarantees of free speech and free press.

Contrary to Plaintiff’s arguments, no reasonable consumer could ever be confused into believing that the Parody Cover emanated from Plaintiff. Indeed, both the Article in which the Parody Cover appears and the Parody Cover itself are unapologetically and expressly critical of Plaintiff, and the Parody Cover succeeds precisely because consumers can and will understand from the face of the document that it is a parody, and not a real copy of *Ebony* magazine. In any event, the Parody Cover is an expressive work entitled to the protection of the First Amendment, and the First Amendment dictates that the public interest in Defendant’s free expression outweighs Plaintiff’s pretextual and unavailing confusion concerns.

For each of these reasons, Plaintiff fails to state plausible claims for relief under federal law for trademark infringement, false advertising, or dilution and under state law for unfair competition or tortious interference. Plaintiff also fails to overcome Defendants’ showing that the TCPA applies to Plaintiff’s state law claims and mandates their dismissal.

## ARGUMENT

### **I. PLAINTIFF’S LANHAM ACT CLAIMS SHOULD BE DISMISSED UNDER RULE 12(B)(6) BECAUSE PLAINTIFF FAILS TO STATE PLAUSIBLE CLAIMS FOR RELIEF**

#### **A. This Court May Properly Dismiss Plaintiff’s Claims Where Plaintiff’s Likelihood Of Confusion Allegations Are Implausible**

Plaintiff’s opposition ignores the operative pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Under *Twombly*, this Court can and should dispose of Plaintiff’s claims on this motion to dismiss because Plaintiff’s claims of confusion are implausible.<sup>1</sup> Indeed, it is well settled under *Twombly* that courts may “dispose[] of trademark claims” on a motion to dismiss “where simply looking at the work itself, and the context in which it appears, demonstrates how *implausible* it is that a viewer will be confused into believing that the plaintiff endorsed the defendant’s work.” *Louis Vuitton Malletier S.A. v. Warner Bros. Entm’t Inc.*, 868 F. Supp. 2d 172, 183 (S.D.N.Y. 2012) (emphasis added) (accumulating cases); *see also, e.g., Cintas Corp. v. Unite Here*, 355 F. App’x 508, 510–11 (2d Cir. 2009) (affirming dismissal of trademark claims where plaintiff failed to plead plausible likelihood of confusion); *Pub. Free Will Corp. v. Verizon Commc’ns Inc.*, No. 15-CV-6354, 2017 WL 1047330, at \*4 (E.D.N.Y. Mar. 17, 2017) (although likelihood of confusion “is ultimately a fact-sensitive question,” Plaintiff “is still required to allege facts regarding likelihood of confusion that would state a claim to relief that is plausible on its face”).

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<sup>1</sup> Plaintiff wrongly relies on the now-inapplicable standard of “notice” pleading and, remarkably, chastises Defendants for invoking *Twombly*’s governing plausibility standard, which has been the operative standard for the past 12 years. *See* Pl. Br. 4 (“contending that Plaintiff’s Complaint “put [Defendants] on notice as to the claims and grounds upon which those claims rest”); *id.* 3 (citing *Conley v. Gibson*, 355 U.S. 41 (1957), the notice pleading case that *Twombly* overruled); *id.* 6 (“Defendants improperly focus on the plausibility of the facts alleged.”).



Even a case relied upon by Plaintiff, *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446 (S.D.N.Y. 2008), confirms that this Court should dismiss Plaintiff’s Lanham Act claims as implausible. That case concerned the alleged parody use of the plaintiff’s mark in a Times Square video billboard to promote the defendant’s M&M store. *Id.* at 449. The court denied the defendant’s motion to dismiss because the plaintiff *had* plausibly alleged a likelihood of confusion regarding his endorsement of defendant’s product—not because parody cases cannot be dismissed at the pleading stage. *Id.* at 456–57. Indeed, the court recognized that there are situations where a trademark parody “may be clear enough to result in no confusion under the statutory likelihood of confusion analysis,” even at the pleading stage. *Id.* at 455 (internal quotations omitted). As discussed here and in Defendants’ moving brief, that is the situation here.<sup>2</sup>

**B. Plaintiff’s Trademark Infringement Claim Fails Because Plaintiff Does Not Plausibly Allege Any Likelihood Of Confusion**

Plaintiff ignores, and thus effectively concedes, the paramount reasons set forth in Defendants’ opening brief as to why Plaintiff’s claims of confusion are both implausible and not actionable under the First Amendment. Defs. Br. 7; 9–11. Instead, Plaintiff argues, wrongly, only that the Parody Cover is not a parody at all. Pl. Br. 8–11.

As an initial matter, by focusing solely on whether the Parody Cover “is a trademark parody” (*id.*), Plaintiff ignores Defendants’ larger points demonstrating why Plaintiff’s trademark claims fail. Plaintiff does not dispute that Defendants’ use of the Ebony marks is a

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<sup>2</sup> Plaintiff is also incorrect that this Court cannot consider Defendants’ “affirmative defense” of parody on this motion because the “defense” does not appear on the face of Plaintiff’s Complaint. Pl. Br. 5. Parody is not an affirmative defense. In fact, “[p]arody is not really a separate ‘defense’” at all “but merely a way of phrasing the traditional response that customers are not likely to be confused as to source, sponsorship or approval.” *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 416 (S.D.N.Y. 2002). In any event, the Parody Cover and the Article are properly before this Court. Plaintiff annexed the Parody Cover as an exhibit to its Complaint, and this Court may take judicial notice of the Article. Defs. Br. 4 n.2.

nominative fair use done to criticize Plaintiff. *See* Defs. Br. 7, 9–10. Nor does Plaintiff challenge that the public interest in Defendant’s free expression and social criticism outweighs any purported confusion concerns. *Id.* 10–11. Plaintiff thus effectively concedes these points. *See, e.g., Scott v. JPMorgan Chase & Co.*, No. 13-CV-646 KPF, 2014 WL 338753, at \*10 (S.D.N.Y. Jan. 30, 2014), *aff’d*, 603 F. App’x 33 (2d Cir. 2015) (“A Plaintiff effectively concedes a defendant's arguments by his failure to respond to them.”) (citation omitted) (accumulating cases). For this reason alone, this Court should grant Defendants’ motion.

Plaintiff is, in any event, wrong that the Parody Cover is “not a parody.” Pl. Br. 8. *First*, Plaintiff contends that this Court should put blinders on, look only to the trademark itself, and ignore the actual contents of the Article and Parody Cover when assessing whether reasonable consumers can identify the parody. Pl. Br. 7–8. Yet, it is absurd for Plaintiff to suggest that this Court merely “[g]lanc[e] at the cover” and its mimicking of the Ebony marks, and ignore everything else—including the context in which the marks are used. Pl. Br. 7–8. The law bars such a superficial inquiry. Instead, this Court must evaluate “whether the use [of the plaintiff’s mark] in its entirety creates a likelihood of confusion,” which requires it to “look not only at the portion” that “duplicates” the plaintiff’s trademark, but the work “as a whole.” *See Anheuser-Busch, Inc. v. L. & L. Wings, Inc.*, 962 F.2d 316, 319 (4th Cir. 1992) (looking “as a whole” at t-shirt that replicated Budweiser’s trademarked label design to determine that it is a parody); *see also Spring Mills, Inc. v. Ultracashmere House, Ltd.*, 689 F.2d 1127, 1130 (2d Cir. 1982), *superseded by statute with respect to a standard of review* (“inquiry into the degree of similarity between two marks does not end with a comparison of the marks themselves,” but must also consider “the ‘impression’ conveyed by the setting in which the mark is used”).

Upon a proper assessment of the Article and Parody Cover “as a whole,” the Parody Cover’s “biting critique of Ebony” is “self-evident,” despite Plaintiff’s claims to the contrary. Pl. Br. 8. Indeed, the Parody Cover does not appear until the end of the Article, after the Article admonishes and criticizes Ebony for its failure to pay its black writers. *See* Defs. Br., Arato Decl., Ex. C. In addition, the Article explicitly refers to the Parody Cover as “satirical.” *Id.* And the Parody Cover contains headlines, such as “Special Deadbeat Edition: #EbonyStillOwes” and “Cheat your black writers by not paying? Ebony owners Michael Gibson & Willard Jackson show us how!” (Compl. ¶ 23), that no consumer could plausibly believe came from Ebony.

*Second*, Plaintiff invents a supposed rule that “an infringing work cannot be a parody if it uses the exact same mark.” Pl. Br. 9. Plaintiff cites to no support for this supposed rule, and Plaintiff cannot because there is no such rule. As even Plaintiff concedes, the applicable legal inquiry in parody cases is whether the parody effectively “convey[s] two simultaneous-and contradictory-messages: that it is the original, but also that it is *not* the original and is instead a parody.” *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Grp., Inc.*, 886 F.2d 490, 494 (2d Cir. 1989); *see also* Pl. Br. 9–10 (citing *Cliffs Notes*); *New York Stock Exch., Inc. v. Gahary*, 196 F. Supp. 2d 401, 413 (S.D.N.Y. 2002) (operative question is whether the parody conveys that trademark holder is “the actual source of the message, as opposed to simply the target of the parody.”).

Indeed, there is no requirement that a defendant convey parody only through the vehicle of a different or partial mark involving a “funny play on words,” as was the case in the cases cited by Plaintiff. Pl. Br. 9. To the contrary, it is axiomatic that parodies are non-actionable even when they use the full names or the same trademarks of their targets. *See, e.g., Gahary*, 196 F. Supp. 2d at 412–13 (“parodies routinely use the full names of prominent public

personalities as part of their humorous message,” and “no one could seriously suggest that the targets of these parodies therefore have a claim for trademark infringement”); *see also Cliff Notes*, 886 F.2d at 494 (“The keystone of parody is imitation. It is hard to imagine . . . a successful parody of Time magazine that did not reproduce Time’s trademarked red border.”); *Charles Atlas, Ltd. v. DC Comics, Inc.*, 112 F. Supp. 2d 330, 332, 340-41 (S.D.N.Y. 2000) (comic book that “precisely” “replicate[d] key elements of the artwork and dialogue” from plaintiff’s advertisement was expressive parody); *Yankee Pub. Inc. v. News America Pub. Inc.*, 809 F. Supp. 267, 271, 279 (S.D.N.Y. 1992) (same for magazine cover that was an “obvious takeoff on the famous traditional cover design of the [Farmer’s] Almanac”).

Here, the Parody Cover conveys its two “simultaneous” yet “contradictory” messages” (*see Cliff Notes*, 886 F.2d at 494) by juxtaposing the classic Ebony Magazine cover against jarring headlines that are harshly critical of Ebony. That is classic parody. That conclusion is especially appropriate here, where Defendants do not use the Ebony marks, or a variant of the Ebony marks, to brand their own commercial product. Rather, Defendants incorporate the Ebony marks into the Parody Cover to comment on Plaintiff. While Plaintiff tries to ignore the clear messaging behind Defendants’ use of the Ebony marks, that messaging is crucial because courts “have accorded considerable leeway to parodists whose expressive works aim their parodic commentary at a trademark or a trademarked product, but have not hesitated to prevent a manufacturer from using an alleged parody of a competitor’s mark to sell a competing product.”<sup>3</sup> *Harley Davidson, Inc. v. Grottanelli*, 164 F.3d 806, 813 (2d Cir. 1999).

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<sup>3</sup> In contrast to Defendants’ use of the Ebony marks, the defendants in Plaintiff’s cited cases used parody marks as brand names for commercial merchandise. *See Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007) (“Chewy Vuiton” dog toys); *Jordache Enterprises, Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482 (10th Cir. 1987) (“Lardashe” jeans);

Finally, Plaintiff wrongly claims “Defendants are using [the Ebony marks] in a commercial context to push [their] own product,” to their “commercial advantage,” and “this is not the type of use the First Amendment protects.” Pl. Br. 10. The Parody Cover, however, is not a “commercial product.” It is an expressive work because it “communicates information, expresses opinion [and] recites grievances.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 289 (1964). That does not change because Defendants publish the work for profit (Defs. Br. 12) or compete with Plaintiff, *see Baiqiao Tang v. Wengui Guo*, No. 17-CV-9031 (JFK), 2019 WL 1207859, at \*4 (S.D.N.Y. Mar. 14, 2019) (defendant’s postings not commercial speech despite allegations that the parties compete in the online media business). Nor does the Parody Cover “push,” “promote,” or “sell” *The Root*. Pl. Br. 10. Rather, the Parody Cover is published within *The Root*. It is thus *part* of that expressive work; it is not somehow ancillary to it.

In any event, even commercial speech enjoys First Amendment protection. *See Cliff Notes*, 885 F.2d at 496–97 (parody of commercial study guide); *Burck*, 571 F. Supp. 2d at 457 (“Because a parody may be of a hybrid nature, combining artistic expression and commercial promotion, it is valid to plead a parody defense even where the parody is used in part for advertising purposes.” (internal quotations and citation omitted)). Accordingly, Plaintiff’s claims would fail even if the Parody Cover and Article were considered “commercial,” because the public interest in Defendant’s free expression would still outweigh any purported confusion concerns. Defs. Br. 10–11.

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*Starbucks U.S. Brands, LLC & Starbucks Corporation D.B.A. Starbucks Coffee Co. v. Ruben*, 78 U.S.P.Q.2d 1741 (T.T.A.B. 2006) (“Lessbucks” coffee); *Schieffelin & Co. v. Jack Co. of Boca*, 850 F. Supp. 232 (S.D.N.Y. 1994) (“Dom Popignon Champop” snacks).

**C. Plaintiff's False Advertising Claim Fails Because Plaintiff Does Not Plausibly Allege That The Parody Cover Is An Advertisement Or Contains Materially False Information**

The Parody Cover and Article are not advertisements simply because “Defendants are direct competitors of Ebony” or if works are “commercial speech.” Pl. Br. 11.

The Parties’ status as alleged competitors does not transform the Parody Cover or Article into “advertisements.” Although that status may afford Plaintiff standing for the purposes of its false advertising claim, it is otherwise irrelevant as to the analysis of whether the challenged material are advertisements, as even Plaintiff concedes. *See* Pl. Br. 11 (“[t]o have standing for a [Lanham Act] false advertising claim, the plaintiff must be a competitor of the defendant,” but “to obtain relief against a false or misleading advertisement, ‘a plaintiff must demonstrate . . . that an *advertisement* is literally false or . . . likely to mislead” (emphasis added)); *see also Farah v. Esquire Magazine*, 736 F.3d 528, 541 (D.C. Cir. 2013) (statements posted on the *Esquire.com* “Politics Blog” not false advertising, regardless of competition).

Even if the Article and Parody Cover could be deemed “commercial speech,” the Lanham Act’s prohibition on false advertising “is limited to false advertising as that term is generally understood.” *Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974). It does not “encompass all commercial speech.” *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 57 (2d Cir. 2002). Here, neither the Article nor the Parody Cover mentions Defendants, promotes *The Root*, or proposes a commercial transaction between Defendants and the public. They are thus not advertisements. *See* Defs. Br. 21.

Plaintiff also fails to establish that the Parody Cover or Article is materially false or misleading. Plaintiff does nothing more than repeat the allegations of its Complaint and fails to

refute Defendants' showing that the claimed "falsehoods" are true.<sup>4</sup> *See* Pl. Br. 12; Defs. Br. 22–23.

#### **D. Plaintiff's Dilution Claim Is Barred By Statute**

Plaintiff's dilution claim fails because the Federal Anti-Dilution Act exempts from its reach the use of a trademark for "parody," and "news reporting" *and* for "identifying," "criticizing," or "commenting upon" the owner of a mark or that owner's goods. 15 U.S.C. § 1125(c)(3). The Parody Cover is a "parody" for the reasons set forth above. Plaintiff concedes that *The Root* is a "competing magazine" in the "news" field and that the Article and Parody Cover are published within that work. Compl. ¶¶ 13, 16, 21, 22. Thus, Plaintiff cannot credibly challenge that the Parody Cover and Article also constitute "news reporting." Finally, Plaintiff does not dispute that the Article and Parody Cover use the Ebony marks to identify, criticize, and comment on Ebony. Pl. Br. 12–14; *supra* Section I.B.

## **II. THE TCPA APPLIES TO PLAINTIFF'S STATE LAW CLAIMS**

### **A. Plaintiff Ignores Second Circuit Law**

Plaintiff improperly relies on two decisions from the Eastern District of Texas to contend "the TCPA cannot apply in this federal court" because the TCPA "is inherently procedural and conflicts with the Federal Rules of Civil Procedure." Pl Br. 15 (citing *Star Systems International Ltd. v. Neology, Inc.*, No. 18-CV-00574, 2019 WL 215933 (E.D. Tex. Jan. 16, 2019) (appeal

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<sup>4</sup> Plaintiff's Opposition adds a new purported falsity to its unimpressive list: the Article's statement that "the owners Willard Jackson and Michael Gibson only made payments after many protests and a lawsuit." Pl. Br. 12. Plaintiff contends that this statement is either false and/or confusing because there is no "causal connection between payments made by Ebony and any protests or litigation." *Id.* To the contrary, the challenged statement itself sets forth a chronology, and there is no dispute that the its chronology is true and correct. In any event, Plaintiff admits in the Complaint the casual connection it disclaims in its brief. *See* Compl. ¶ 26 (conceding that a group of writers filed a lawsuit against Ebony and that Ebony eventually paid the writers to settle that suit).

pending) and *Rudkin v. Roger Beasley Imports, Inc.*, No. 17-CV-849, 2017 WL 6622561 (W.D. Tex. Dec. 28, 2017), *report and recommendation adopted* 2018 WL 2122896 (W.D. Tex. Jan. 31, 2018). However, it is the law of the Second Circuit, not the Eastern District of Texas, that controls, and the Second Circuit has twice held that anti-SLAPP statutes like the TCPA apply in federal court. *See Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 148 (2d Cir. 2013).

As *Liberty Synergistics* explains, whether a state’s anti-SLAPP law (1) is substantive or procedural, and (2) applies in federal court are questions of federal law. *Liberty Synergistics*, 718 F.3d at 152. In resolving those questions of federal law, this Court “is bound to follow” the Second Circuit. *Rodriguez v. Coastal Ship Corp.*, 210 F. Supp. 38, 40 (S.D.N.Y. 1962).

Plaintiff attempts to brush aside *Liberty Synergistics* and *Adelson* as “simply saying generically a federal court may apply anti-SLAPP statutes in general,” whereas “Texas is different—its anti-SLAPP does not apply to federal court.” Pl. Br. 15. Plaintiff’s sole “support” for this assertion is *Star Systems*, one of the two Eastern District of Texas decisions noted above. That decision, however, does not establish that “Texas is different.” *See id.* It simply examines whether an anti-SLAPP statute is substantive or procedural under federal law, and it concludes—contrary to the Second Circuit—that the TCPA is procedural and should not apply in federal court. Accordingly, all that *Star Systems* establishes is a conflict with the Second Circuit.

*Liberty Synergistics* and *Adelson* have already held, respectively, that the anti-SLAPP statutes of California and Nevada are substantive for purposes of federal law and apply in federal court. *Liberty Synergistics*, 718 F.3d at 148; *Adelson*, 774 F.3d at 809. Nothing about those decisions suggests a different outcome when considering the Texas statute, especially because the California statute was the “primary model or influence” for the TCPA. *See Serafine v. Blunt*,



466 S.W.3d 352, 386 (Tex. Ct. App. 2015).

In any event, Plaintiff does not even accurately describe the law in the Fifth Circuit. Plaintiff does not disclose that decisions from Fifth Circuit have applied state anti-SLAPP statutes, including the TCPA, in federal court. For example, the Fifth Circuit previously held that Louisiana's anti-SLAPP statute applies in federal court. *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 169 (5th Cir. 2009). In addition, at least three district courts within the Fifth Circuit *have* applied the TCPA in federal court. *See, e.g., Williams v. Cordillera Commc'ns, Inc.*, No. 13-CV-124, 2014 WL 2611746, at \*2 (S.D. Tex. June 11, 2014) (“[A]nti-SLAPP statutes such as the TCPA are enforceable in federal courts . . . .”); *accord Banik v. Tamez*, No. 16-CV-462, 2017 WL 1228498, at \*2 (S.D. Tex. Apr. 4, 2017); *Charalambopoulos v. Grammer*, No. 14-CV-2424-D, 2016 WL 915739, at \*2 (N.D. Tex. Mar. 10, 2016).

For each of these reasons, the TCPA applies in this Court. Neither *Star Systems* nor *Rudkin* mandate a different result.

**B. Plaintiff Ignores That Texas Has the Most Significant Interest in Applying Its Anti-SLAPP Statute**

Plaintiff does not rebut Defendants' showing that Texas has the most significant interest in applying its anti-SLAPP statute. Instead, Plaintiff contends that (1) Defendants failed to identify an actual conflict between the Texas and New York anti-SLAPP statutes (Pl. Br. 16); and (2) New York has the most significant interest in applying its common law to Plaintiff's underlying tort claims (*id.* 20–21). These points are incorrect and/or address the wrong issue.

There is an actual conflict between the TCPA and New York's anti-SLAPP statute. The TCPA applies broadly to a party's full exercise of the right of free speech, whereas New York's anti-SLAPP statute applies only to petitioning activities. Defs. Br. 26 (comparing TCPA § 27.001 with N.Y. Civ. R. § 70-a & 76-a). This suit involves Defendants' right of free speech

but not any petitioning. Accordingly, if New York's anti-SLAPP controls, that statute would not apply to this case. In contrast, if the TCPA controls, it would both apply to this case *and* mandate the dismissal of Plaintiff's state law claims, along with an award of fees and sanctions. Thus, an actual conflict exists between the laws of Texas and New York that has a "significant possible effect on the outcome" of this dispute. *See Fin. One Pub. Co. v. Lehman Bros. Special Fin.*, 414 F.3d 325, 331 (2d Cir. 2005).

Plaintiff does not address the relevant issue of which state has the greater interest in the application of its own anti-SLAPP law. Plaintiff makes no argument that New York has the most significant interest in applying its anti-SLAPP statute to this case. Nor does Plaintiff refute Defendants' showing that Texas has that greatest interest. Rather, Plaintiff contends that New York has the most significant interest on a different issue—applying its common law to Plaintiff's tort claims. *See* Pl. Br. 20–22. But which state has the greatest interest in applying its common law, and which state has the greatest interest in applying its anti-SLAPP law, constitute distinct choice of law questions requiring their own choice of law analysis. *See Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 397 n.1 (2d Cir. 2001) (New York choice-of-law principles embrace the doctrine of *dépeçage*, under which the choice of law analysis is done independently for different substantive issues); *see also, e.g., Babcock v. Jackson*, 12 N.Y.2d 473 (1963) (distinct issues arising out of tort claims are governed by the law of the jurisdiction having the strongest interest in the resolution of the specific issue). By ignoring the latter question, Plaintiff effectively concedes that Texas has the most significant interest in applying the TCPA to this case. *Scott*, 2014 WL 338753, at \*10.

For this reason, and the reasons set forth in Defendants' opening memorandum, this Court should apply the TCPA to Plaintiff's state law claims.

### III. PLAINTIFF HAS FAILED TO PLAUSIBLY ALLEGE OR ESTABLISH ITS STATE LAW CLAIMS UNDER THE TCPA OR RULE 12(B)(6)

#### A. Texas Law Applies to Plaintiff's Common Law Tort Claims

Plaintiff is also wrong in arguing that (1) there are no conflicts between Texas and New York regarding tortious interference and unfair competition, and (2) New York supposedly has the most significant interest in having its common law apply.

Actual conflict: Plaintiff relies on two opinions from *SourceOne Dental, Inc. v. Patterson Cos.* to contend that there is no actual conflict between Texas and New York law. 310 F. Supp. 3d 346 (E.D.N.Y. 2018) (*SourceOne I*) and 328 F. Supp. 3d 53 (E.D.N.Y. 2018) (*SourceOne II*). Both decisions, however, recognize the differences between New York and Texas law. *See Source One I*, 310 F. Supp. 3d at 366 (recognizing that, unlike Texas, New York's tortious interference law requires the plaintiff to use criminal or fraudulent means); *Source One II*, 328 F. Supp. 3d at 69 (recognizing that, unlike Texas, New York unfair competition law requires the extra element of bad faith). For various reasons, the decisions held that those differences were immaterial to the issues at hand. *Source One I*, 310 F. Supp. 3d at 366–67; *Source One II*, 328 F. Supp. 3d at 69.

Notably, in *Source One II*, the court determined these differences were immaterial only because plaintiff could not prove a common element of either of its tort claims, namely an underlying Lanham Act violation. *Id.* Defendants do not dispute that, as in *SourceOne II*, Plaintiff's claims for tortious interference and unfair competition fail as a matter of law based on a common element, namely, the lack of any underlying Lanham Act violation or any independent crime or tort. *See* Defs. Br. 25; *supra* Sections I.B–D. Defendants thus agree that this Court may dismiss Plaintiff's state law claims without resolving the choice of law question.

Texas Has the Most Significant Interest. Plaintiff acknowledges that under New York’s conflict of laws, “the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest,” and “the locus of the tort will almost always be determinative.” Pl. Br. 21. Plaintiff nevertheless contends that New York has the greater interest here because Plaintiff’s claimed torts allegedly occurred “everywhere at once” and not in Texas. Pl. Br. 22. That is incorrect. As Defendants demonstrated in their opening memorandum, the torts of tortious interference and unfair competition occur where the plaintiff is located.<sup>5</sup> *See* Defs. Br. 18–19. Here, Plaintiff is located in Texas, Compl. ¶ 1, so “the locus of the tort[s]” is Texas, and that locus is “determinative.” Pl. Br. 22. Plaintiff’s cited cases do not alter this conclusion. Instead, Plaintiffs’ cases involve claims of multistate defamation and not tortious interference or unfair competition. *Id.* 21–22. Since those cases rely on a choice of law test other than the “locus of the tort,” they are inapplicable.

#### **B. Plaintiff Has Failed to Allege Essential Elements of Its State-Law Claims**

1. Tortious interference. Plaintiff’s claims continue to fail under either New York or Texas law because (a) Plaintiff fails to identify any specific, identified prospective business relationship that Plaintiff lost because of the Parody Cover (*see* Defs. Br. 22–23, 25 & n.11); (b) Plaintiff cannot allege its *own* lost ad revenue on information and belief (*id.* 23); and Plaintiff’s allegation that Defendants had “the intent to interfere” does not plausibly allege the requisite state of mind (*id.* at 32).

2. Unfair competition. Plaintiff’s unfair competition claim fails for the same reason Plaintiff’s Lanham Act claims fail. Pl. Br. 24 (recognizing that Plaintiff’s unfair competition

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<sup>5</sup>*White Plains Coat & Apron Co. v. Cintas Corp.*, 460 F.3d 281 (2d. Cir. 2006), is in accord. There, the court found that New York law applied to plaintiff’s tortious interference claim because, among other things, plaintiff was a New York company headquartered in New York and “the damages were suffered at [plaintiff’s] New York headquarters.” *Id.* at 283–84.

claim mirrors its Lanham Act claims); Defs. Br. 24–25 & n.11.

3. GBL § 349. Plaintiff does not allege “public harm,” which is required for an alleged competitor to state a claim under the GBL. *See* Defs. Br. 24. Plaintiff relies on *GTFM, Inc. v. Solid Clothing Inc.*, 215 F. Supp. 2d 273 (S.D.N.Y. 2002), a district court case that is not good law. *See, e.g., Boule v. Hutton*, 328 F.3d 84, 94 (2d Cir. 2003) (trademark infringement claims brought by a competitor are not actionable under the GBL absent “some harm to the public at large”); *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2d Cir. 1995) (same); *Gucci Am., Inc. v. Duty Free Apparel, Ltd.*, 277 F. Supp. 2d 269, 273 (S.D.N.Y. 2003) (commercial plaintiff must “allege conduct that has significant ramifications for the public at large,” such as a “potential danger to the public health or safety”).

#### **IV. THIS COURT SHOULD DENY LEAVE TO AMEND**

This Court should deny Plaintiff’s request for leave to file an amended complaint because any amendment would be futile. *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993). Indeed, for the reasons set forth in Defendants’ opening brief and above, not even a “liberal reading” of the Complaint gives “any indication that a valid claim might be stated.” *Howard v. Brown*, No. 15-CV-9930 (ER), 2018 WL 3611986, at \*6 (S.D.N.Y. July 26, 2018).

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