

# 06-2228-cv

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In The  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

RACHEL EHRENFELD,

*Plaintiff-Appellant,*

-against-

KHALID SALIM A BIN MAHFOUZ,

*Defendant-Appellee.*

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*On Appeal From a Judgment of the United States  
District Court for the Southern District of New York*

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**REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT  
RACHEL EHRENFELD WITH SPECIAL APPENDIX**

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**TABLE OF CONTENTS**

ARGUMENT .....4

I SINCE MAHFOUZ TRANSACTED BUSINESS IN NEW YORK, THE DISTRICT COURT HAD JURISDICTION OVER HIM .....4

II SINCE MAHFOUZ COMMITTED A TORTIOUS ACT CAUSING INJURY IN NEW YORK, THE DISTRICT COURT HAD JURISDICTION OVER HIM.....12

III SINCE MAHFOUZ DIRECTLY TARGETED DR EHRENFELD’S CONDUCT IN NEW YORK AND STRATEGICALLY CHILLED HER SPEECH THROUGH THE THREAT OF FUTURE NEW YORK ENFORCEMENT PROCEEDINGS, JURISDICTION EXISTS BY IMPLIED CONSENT .....17

IV AT A MINIMUM, DR. EHRENFELD WAS ENTITLED TO DISCOVERY BASED ON HER COLORABLE JURISDICTIONAL CLAIMS .....20

V THE ABSENCE OF NEW YORK AUTHORITY PRECLUDING THE EXERCISE OF PERSONAL JURISDICTION AND THE COMPELLING STATE INTERESTS IN PROVIDING RELIEF FOR VICTIMS OF LIBEL TOURISM SUPPORT CERTIFICATION.....23

VI SINCE DR. EHRENFELD ALLEGES PRESENT, ONGOING HARM FROM THE UK JUDGMENT, THE COURT HAS SUBJECT MATTER JURISDICTION OVER HER CLAIMS .....26

CONCLUSION .....33

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<u>Abbot Labs v. Gardner</u> , 387 U.S. 136 (1967) .....	31
<u>Allojet PLC v. Vantage Associates</u> , 2005 WL 612848 (S.D.N.Y. Mar. 15, 2005).....	21
<u>Ayyash v. Bank Al-Madina</u> , 2006 WL 587342 (S.D.N.Y. Mar. 9, 2006).....	21
<u>Baur v. Veneman</u> , 352 F.3d 625 (2d Cir. 2003) .....	28
<u>Beacon Enterprises, Inc. v. Menzies</u> , 715 F.2d 757 (2d Cir. 1983) .....	5
<u>Curley v. Village of Suffern</u> , 268 F.3d 65 (2d Cir. 2001) .....	28
<u>Denney v. Deutsche Bank AG</u> , 443 F.3d 253 (2d Cir. 2006) .....	28
<u>Deutsche Bank Sec., Inc. v. Montana Bd. of Investments</u> , 7 N.Y.3d 65, 818 N.Y.S.2d 164 (2006).....	15
<u>DiBella v. Hopkins</u> , 403 F.3d 102 (2d Cir. 2005), .....	24
<u>Dow Jones &amp; Co., Inc. v. Harrods, Ltd.</u> , 237 F. Supp. 2d 394 (S.D.N.Y. 2002) .....	15
<u>Etna Prods. Co. v. Lifshitz</u> , 1984 WL 855 (S.D.N.Y. Sept. 11, 1984) .....	9, 14
<u>Fiedler v. First City Nat’l Bank</u> , 807 F.2d 315 (2d Cir. 1986) .....	6

<u>Fox v. Boucher,</u> 794 F.2d 34 (2d Cir. 1986) .....	6
<u>Garbellotto v. Montelindo Compagnie Navegacion, S.A.,</u> 294 F. Supp. 487 (S.D.N.Y. 1969) .....	12, 13
<u>Gill v. Pidlypchak,</u> 389 F.3d 379 (2d Cir. 2004) .....	28
<u>Golden v. Zwickler,</u> 394 U.S. 103 (1969) .....	30
<u>Hernandez v. New York City Health &amp; Hospitals Corp.,</u> 78 N.Y.2d 687, 578 N.Y.S.2d 510 (1991).....	25
<u>Immuno AG v. J. Moor-Jankowski,</u> 77 N.Y.2d 235, 566 N.Y.S.2d 906 (1991).....	24
<u>In re Terrorist Attacks on September 11, 2001,</u> 349 F. Supp. 2d 765 (S.D.N.Y. 2005) .....	20
<u>In re Terrorist Attacks on September 11, 2001,</u> 2006 WL 200864 (S.D.N.Y. June 28, 2006).....	21
<u>Kronisch v. United States,</u> 150 F.3d 112 (2d Cir. 1998) .....	8, 9
<u>Laird v. Tatum,</u> 408 U.S. 1 (1972).....	27
<u>Lerman v. Board of Elections of the City of New York,</u> 232 F.3d 135 (2d Cir. 2000) .....	28, 29
<u>Levin v. Harleston,</u> 966 F.2d 85 (2d Cir. 1992) .....	28
<u>Matter of Sayeh R.,</u> 91 N.Y.2 306, 670 N.Y.S.2d 377 (1997).....	18, 19
<u>Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.,</u> 84 F.3d 560, 569 (2d Cir. 1996) .....	21

<u>Naples v. City of New York,</u> 34 A.D.2d 577, 309 N.Y.S.2d 663 (2d Dep’t 1970) .....	13
<u>Orix Credit Alliance, Inc. v. Wolfe,</u> 212 F.3d 891 (5th Cir. 2000) .....	30
<u>Padilla v. Rumsfeld,</u> 352 F.3d 695 (2d Cir. 2003) .....	6, 7
<u>PDK Labs, Inc. v. Friedlander,</u> 103 F.3d 1105 (2d Cir. 1996) .....	5, 6
<u>Reynolds v. Times Newspapers Ltd.,</u> [2001] 2 A.C. 127 (H.L.) .....	3
<u>Rosenberg v. Metlife, Inc.,</u> 453 F.3d 122 (2d Cir. 2006) .....	26
<u>Schomann Int’l Corp. v. Northern Wireless, Ltd.,</u> 35 F. Supp. 2d 205 (N.D.N.Y. 1999). .....	24
<u>Sealed v. Sealed,</u> 332 F.3d 51 (2d Cir. 2003) .....	26
<u>Sole Resort, S.A. v. Allure Resorts Mgmt. LLC,</u> 450 F.3d 100 (2d Cir. 2006) .....	9
<u>Sterling Nat’l Bank and Trust Co. of New York v. Fidelity Mortgage Investors,</u> 510 F.2d 870 (2d Cir. 1975) .....	4
<u>Telnikoff v. Matusevitch,</u> 347 Md. 561, 702 A.2d 230 (1997) .....	3
<u>United Public Workers of America v. Mitchell,</u> 330 U.S. 75 (1947) .....	30
<u>United States v. Fell,</u> 360 F.3d 135 (2d Cir. 2004) .....	30, 32

<u>Vintero Corp. v. Corporacion Venezolana de Fomento,</u> 675 F.2d 513 (2d Cir. 1982).....	17
--	----

<u>Westinghouse Credit Corp. v. D’Ursom</u> 371 F.3d 96 (2d Cir. 2004) .....	17
---	----

<u>Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme,</u> 433 F.3d 1199 (9th Cir. 2006) (en banc).....	10, 11, 19
--	------------

<b><u>STATUTES</u></b>	<b><u>PAGE(S)</u></b>
------------------------	-----------------------

CPLR 211(B) .....	29
-------------------	----

N.Y. CPLR 301 and 302 .....	<i>passim</i>
-----------------------------	---------------

CPLR 5304.....	24
----------------	----

<b><u>OTHER AUTHORITIES</u></b>	<b><u>PAGE(S)</u></b>
---------------------------------	-----------------------

<u>England and Wales, in International Libel and Privacy Handbook,</u> 209-10 (Charles J. Glasser, Jr. ed., 2006).....	3
---	---

Vincent C. Alexander, "Practice Commentaries to CPLR 301," <u>McKinney's</u> <u>Consol. Laws of N.Y. Annot., Book 7B CPLR 301-306-b</u> (2001) .....	18
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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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RACHEL EHRENFELD, :  
 :  
 Plaintiff-Appellant, : Docket No. 06-2228-cv  
 :  
 - against - :  
 :  
 KHALID SALIM A BIN MAHFOUZ, :  
 :  
 Defendant-Appellee. :

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This is a case where defendant-appellee Khalid Salim Bin Mahfouz has used a foreign lawsuit to successfully chill the speech of a New York author on pressing matters of public concern. Mahfouz claims he should be able to silence Dr. Rachel Ehrenfeld’s speech in New York through the new tool of libel tourism, yet not be subject to personal jurisdiction in New York.

Neither Mahfouz’s belated attempts to whitewash his motives for suing Dr. Ehrenfeld in the UK nor his policy arguments before this Court provide sound reasons for immunizing Mahfouz from personal jurisdiction here. Although Mahfouz claims that his primary goal in filing the UK action was to vindicate his reputation and stop sales of Dr. Ehrenfeld’s book in the UK, the contested UK judgment assesses substantial financial damages against Dr. Ehrenfeld and enjoins her conduct in New York, including requiring her to prevent sales of the book in

the UK, ordering her to cease any further publications regarding Mahfouz's alleged support of terrorism, and ordering her to apologize and make corrections.<sup>1</sup>

Mahfouz's failure to initiate New York proceedings to enforce the UK judgment does not mean he will refrain from doing so in the future.

If the District Court's order is affirmed, Mahfouz can wait to enforce the UK judgment for years -- with full knowledge that the mere existence of the judgment and the continued threat of enforcement suffice to chill Dr. Ehrenfeld's speech and deter other American journalists from writing about him. His proposed policy solutions to this dilemma are not solutions at all; they are simply ways for libel tourists to win at their illegitimate game.

Mahfouz argues that jurisdiction should be denied because New York victims of libel tourism can choose to defend themselves in foreign proceedings -- assuming of course, that they have the financial resources to do so and are willing to bear the legal risks of an adverse judgment in a jurisdiction whose libel laws are

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<sup>1</sup> Mahfouz asserts that he requested only £ 10,000 in damages in the UK action. Opp'n Br. 10. This sum is the maximum amount available under English law, Reply SPA-5 § 9(1)(c) (appended at end of this brief), not a purely "nominal" award as Mahfouz now tries to claim.

Moreover, English law also apparently permits Mahfouz to seek only "a declaration that the [disputed] statement was false and defamatory." Reply SPA-4 § 9(1)(a) (appended at the end of this brief). As a result, Mahfouz could have fully achieved his asserted goal of "vindicat[ing] his reputation in the United Kingdom" without targeting Dr. Ehrenfeld's speech and conduct in New York through his request for additional damages and injunctive relief.

repugnant to First Amendment rights.<sup>2</sup> Mahfouz also contends that New York authors should simply avoid the prospect of foreign defamation suits by restricting the circulation of their work or by forgoing First Amendment protections and tailoring their work to the more restrictive standards imposed by foreign law.

Although libel tourism may be new, it does not escape the reach of New York's long-arm statute, which evaluates the totality of the circumstances surrounding a defendant's contacts with New York and can be applied flexibly to accommodate new methods of causing harm in New York, particularly those that adversely affect fundamental constitutional rights. The District Court's decision should be reversed.

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<sup>2</sup> Mahfouz wrongly implies that Reynolds v. Times Newspapers Ltd., [2001] 2 A.C. 127 (H.L.) significantly expanded protection for speech in the UK. While the Reynolds privilege applies to reporting on matters of public interest, defendants are not be protected by the privilege unless they fulfill a burdensome ten-factor test. Mark Stephens, England and Wales, in International Libel and Privacy Handbook, 209-10 (Charles J. Glasser, Jr. ed., 2006). Reply SPA-12-13. The many other differences between British and American libel law outlined in Telnikoff v. Matusevitch, 347 Md. 561, 598, 702 A.2d 230, 248 (1997), remain intact.

## Argument

### I

#### SINCE MAHFOUZ TRANSACTED BUSINESS IN NEW YORK, THE DISTRICT COURT HAD JURISDICTION OVER HIM

The District Court had jurisdiction over Mahfouz under CPLR 302(a)(1) because he transacted business in New York, and Dr. Ehrenfeld's claims arose from that transaction of business.

#### A. Mahfouz's Strategy: Ignore the Totality of the Circumstances

Mahfouz's arguments against jurisdiction completely disregard the "totality of the circumstances," which a court must examine in assessing personal jurisdiction under CPLR 302(a)(1). E.g., Sterling Nat'l Bank and Trust Co. of New York v. Fidelity Mortgage Investors, 510 F.2d 870, 873 (2d Cir. 1975).

Mahfouz incorrectly frames the question before the Court as whether a few plain vanilla communications into New York suffice for personal jurisdiction over a foreign defendant under 302(a)(1). But Dr. Ehrenfeld did not argue that Mahfouz transacted business in New York because he initiated a handful of innocuous communications into the forum. Mahfouz implemented a wide-ranging scheme designed to chill her speech in New York, which included not only his persistent and threatening communications into New York, but also the complaint he filed

and the actual judgment he obtained against her. Given this totality of circumstances -- as opposed to each narrow contact on which Mahfouz would have this Court focus -- the District Court was justified in exercising personal jurisdiction over him.

Because Mahfouz mischaracterizes the issue before the Court, the cases he cites fail to refute Dr. Ehrenfeld's argument that her claims arise from Mahfouz's transaction of business in New York. In Beacon Enterprises, Inc. v. Menzies, 715 F.2d 757 (2d Cir. 1983), cited by Mahfouz, the defendant sent only a single cease and desist letter to the plaintiff threatening litigation in an unspecified locale, which contrasts with Mahfouz's implementation of an entire scheme directed at New York, and even in that case, the court granted the plaintiff jurisdictional discovery instead of dismissing the complaint. Id. at 766, 768. And in PDK Labs, Inc. v. Friedlander, 103 F.3d 1105 (2d Cir. 1996), also cited by Mahfouz, the court found personal jurisdiction where the defendant had, like Mahfouz, sent a series of persistent communications into New York designed to coerce the plaintiff into taking certain business actions here. Id. at 1109. Compared to the totality of the actual circumstances in this case, as opposed to the narrow view of reality

propounded by Mahfouz, PDK Labs supports the District Court's exercise of jurisdiction over Mahfouz under 302(a)(1).<sup>3</sup>

B. Nature and Timing of Mahfouz's Contacts

It is not enough for Mahfouz to argue that: (1) his contacts did not serve any "business or investment purpose," (2) some of actions were mandated by the English court, and (3) other alleged contacts took place after Dr. Ehrenfeld filed her complaint.

CPLR 302(a)(1) does not require that a defendant's contacts serve a commercial or investment purpose to support personal jurisdiction. For example, in Padilla v. Rumsfeld, this Court found personal jurisdiction over the U.S. Secretary of Defense in a habeas corpus action brought by an alleged enemy combatant and explicitly explained that 302(a)(1)'s "'transacts business' clause is not restricted to commercial activity." 352 F.3d 695, 709 (2d Cir. 2003), rev'd on other grounds, 542 U.S. 426 (2004). Here Mahfouz has, like Secretary Rumsfeld in Padilla, purposefully injected himself into New York to affect the fundamental freedoms of an individual in this state. CPLR 302(a)(1) therefore authorizes

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<sup>3</sup> Fox v. Boucher, 794 F.2d 34 (2d Cir. 1986) and Fiedler v. First City Nat'l Bank, 807 F.2d 315 (2d Cir. 1986) are distinguishable because the defendants there had fewer contacts with New York than Mahfouz, and the subject matter of the litigation (i.e., property and guaranties) had nothing to do with New York.

personal jurisdiction even though Mahfouz was not attempting to make a business deal with Dr. Ehrenfeld.

Padilla also disposes of Mahfouz's argument that some of his contacts should be disregarded for jurisdictional purposes because they were mandated by English procedural rules. That Secretary Rumsfeld's New York contacts in connection with Padilla's detention were also made pursuant to U.S. law did not change the fact that he authorized the disputed detention. Similarly, Mahfouz voluntarily chose to sue Dr. Ehrenfeld in the UK. He cannot argue that his later actions in litigating the UK action and taking the necessary steps to obtain the judgment he sought should have no jurisdictional consequences.

Mahfouz's alternate argument that personal jurisdiction does not exist because some of his New York contacts occurred after Dr. Ehrenfeld filed her complaint is also unpersuasive. Mahfouz inaccurately states that his only contacts with New York that preceded Dr. Ehrenfeld's complaint were "two letters from [his] English solicitors." This is not true -- the filing of Mahfouz's complaint in the UK action seeking to enjoin Dr. Ehrenfeld's conduct in New York, his ownership of his New York condos, and the October 22, 2004 visit by his agent to Dr. Ehrenfeld all predate the filing of Dr. Ehrenfeld's complaint. JA 53 ¶4, 55 ¶12, 59 ¶ 19.

Moreover, whether or not Mahfouz's post-complaint contacts with New York suffice by themselves to establish jurisdiction under 302(a)(1), they highlight that Mahfouz's pre-complaint contacts were not isolated occurrences, but were the initial steps of a wide-ranging, long-term scheme to chill Dr. Ehrenfeld's speech and restrict her behavior in New York. The same is true of Mahfouz's website: although it may not be sufficient by itself to create personal jurisdiction over Mahfouz, it provides more evidence that Mahfouz was monitoring Dr. Ehrenfeld's work and waging a continuous campaign to discredit her work to New York readers and to intimidate her in New York.

C. Claims Arise from Mahfouz's New York Contacts

Mahfouz's argument that Dr. Ehrenfeld's claims do not arise from his New York contacts also fails. Opp'n Br. 26-28. A cause of action arises out of a party's conduct in New York if there is "an articulable nexus" or a "substantial relationship" between the claim asserted and the New York conduct. See, e.g., Kronisch v. United States, 150 F.3d 112, 130 (2d Cir. 1998).

Mahfouz's argument that Dr. Ehrenfeld's claims arise from his UK judgment, not his contacts with New York, ignores her allegation that that he has engaged in a campaign of intimidation to silence her speech. Mahfouz's persistent and threatening contacts with Dr. Ehrenfeld in New York, in pursuing and obtaining the UK judgment, and attempting to secure her compliance with the UK

courts' orders, were part of the same comprehensive scheme from which her claims arise.

Mahfouz's New York contacts not only had a "substantial relationship" to his eventual judgment: they were essential to it. Mahfouz himself states that these communications were required under "English procedural rules." Opp'n Br. 22. Because the alleged in-state contacts provided the necessary foundation for the disputed UK judgment, Dr. Ehrenfeld's claims meet the "arising from" requirement of 302(a)(1).<sup>4</sup> Kronisch, 150 F.3d at 130 (a defendant's New York contacts give rise to personal jurisdiction if they lay the groundwork for later out-of-state conduct that forms the basis of plaintiff's claims); Sole Resort, S.A. v. Allure Resorts Mgmt. LLC, 450 F.3d 100, 105-106 (2d Cir. 2006) (Florida arbitration award does not preclude jurisdiction if the parties' conduct in "negotiating, consummating, and performing" the underlying contract on which the arbitration was based had sufficient New York ties).

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<sup>4</sup> Etna Prods. Co. v. Lifshitz, No. 83 Civ. 8012 (CBM), 1984 WL 855 (S.D.N.Y. Sept. 11, 1984), does not support Mahfouz's efforts to disclaim jurisdiction. In Etna, the defendant had had no contacts with New York that were in any way related to the plaintiff. Here, however, Mahfouz has had many contacts with New York relating to Dr. Ehrenfeld, and her claims directly arise from those contacts.

D. Significance of Yahoo!

Mahfouz would have this Court ignore Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199 (9th Cir.) (en banc), cert. denied 126 S.Ct. 2332 (2006), because New York's long-arm statute was not at issue in that case. But Yahoo! is pertinent because it underscores the significance of Mahfouz's actions vis-à-vis New York and the importance of First Amendment interests in analyzing personal jurisdiction.

Yahoo! explicitly recognizes that a foreign court order that restricts the speech of a U.S. based defendant is in fact aimed at affecting that defendant's behavior in the United States. Id. at 1209. Yahoo! further recognizes that an unenforced foreign court order, like Mahfouz's UK judgment, will continue to "cast[] a shadow" on the defendant's activities in the U.S. if the order is not withdrawn. Id. at 1211.

Regardless of whether New York's long-arm statutes reach the limit of due process, decisions analyzing the jurisdictional impact of foreign judgments are relevant in determining the scope of CPLR 302. Yahoo! refutes the argument, which Mahfouz advances here, that a foreign judgment can never be aimed at, and be designed to primarily affect, an American defendant's speech in the United States. Unlike Yahoo!, moreover, Dr. Ehrenfeld is not a multi-national corporation with operations in many different foreign jurisdictions. The U.S. impact of

Mahfouz's UK judgment, and its specific chilling effect in New York, are even more clear in Dr. Ehrenfeld's case than the California impact of the French orders in Yahoo! Dr. Ehrenfeld is not asking this Court to extend Yahoo! but to apply New York's long-arm statute in light of the real-world factors and First Amendment concerns that Yahoo! identifies.

## II

### SINCE MAHFOUZ COMMITTED A TORTIOUS ACT CAUSING INJURY IN NEW YORK, THE DISTRICT COURT HAD JURISDICTION OVER HIM

Mahfouz also fails refute the existence of personal jurisdiction under CPLR 302(a)(3), which authorizes long-arm jurisdiction over a non-domiciliary for causes of action that arise from the non-domiciliary's commission of "a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act . . . ."

#### A. Tort Cause of Action Not Required

Mahfouz tries, unsuccessfully, to rebut Dr. Ehrenfeld's argument that she only needs to allege that her claims arise from Mahfouz's commission of a "tortious act" -- not plead a tort claim against Mahfouz -- to establish jurisdiction under 302(a)(3). Mahfouz does not address the plain language of the statute, which supports Dr. Ehrenfeld's position. Mahfouz also relies on cases that reject jurisdiction under 302(a)(3) for causes of action arising from that defendant's breach of contract. Dr. Ehrenfeld, however, does not allege that her claims arise from any contract with Mahfouz; she alleges that her claims arise from his commission of a tortious act. Further, Mahfouz does not -- as he cannot -- contend that the rule established in Garbellotto v. Montelindo Compagnie Navegacion, S.A., 294 F. Supp. 487 (S.D.N.Y. 1969) -- that 302(a)(3) does not require that a

plaintiff's cause of action be a tort -- has ever been overruled. See also Naples v. City of New York, 34 A.D.2d 577, 309 N.Y.S.2d 663 (2d Dep't 1970).

B. Unpersuasive Arguments of Non-Tortious Conduct

Mahfouz raises a series of unpersuasive arguments about why his conduct towards Dr. Ehrenfeld is not tortious. He first argues that his tactical delay in enforcing the UK judgment cannot be considered tortious because Dr. Ehrenfeld filed suit a day after the default judgment was issued. But the absence of an attempt by Mahfouz to enforce his judgment when this action was commenced does not mean that delay not was part of his strategy from the outset. Nor was Dr. Ehrenfeld required to wait and accept the chilling effect of the UK judgment before seeking appropriate relief.

Dr. Ehrenfeld also alleges that Mahfouz's acts in filing the UK action were akin to malicious prosecution because he knew that the judgment could not be enforced in the United States, yet devised a scheme to chill Dr. Ehrenfeld's speech using his superior financial assets. Mahfouz's contention that the UK judgment cannot support a malicious prosecution claim until legally or procedurally invalidated (the very opportunity which Dr. Ehrenfeld seeks here) misses the point. Dr. Ehrenfeld alleges that the UK judgment serves an illegitimate purpose and that English laws are incompatible with the fundamental freedoms

guaranteed by First Amendment and New York Constitution. Accordingly, it would be absurd to require her to she demonstrate that she would have prevailed in the UK action to establish jurisdiction in this action.<sup>5</sup>

Mahfouz next argues that 302(a)(3)'s exclusion of claims arising from defamation should bar Dr. Ehrenfeld's suit, which he claims seeks "a remedy for defamation type injury" to her reputation.<sup>6</sup> Opp'n Br. 31. This too is unpersuasive. Dr. Ehrenfeld has a substantial judgment entered against her which, as long as it remains in force, prevents her from freely publishing her work. She is seeking relief from the enforcement of the UK judgment in United States, not simply or only to remedy any injury to her reputation. Moreover, Mahfouz's invocation of the defamation exclusion of 302(a)(3) is ironic given that its purpose and design is to prevent New York claimants from doing precisely what Mahfouz has done in the UK -- sue for defamation based on extra-jurisdictional statements.

Mahfouz's parade of horrors turns out, on inspection, to be nothing more than a march of wooden soldiers. He argues that the exercise of personal jurisdiction in this case would be inconsistent with principles of international

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<sup>5</sup> Etna Prods. Co., 1984 WL 855 (S.D.N.Y. Sept. 11, 1984) does not compel a contrary holding. In that case, unlike here, there was no question that the California litigation challenged by the New York plaintiff would be decided under laws that, unlike here, were not antithetical to the U.S. and New York constitutions.

<sup>6</sup> Mahfouz apparently believes that CPLR 302 can and should be read flexibly – but only to bar Dr. Ehrenfeld's claims – not to authorize personal jurisdiction.

comity and would erode the limits in New York's long-arm statute. Id. Neither of these claims is convincing. Courts have a fundamental obligation to interpret CPLR 302 flexibly to adapt to new phenomena. See, e.g., Deutsche Bank Sec., Inc. v. Montana Bd. of Investments, 7 N.Y.3d 65, 818 N.Y.S.2d 164 (2006). The possibility that Dr. Ehrenfeld is raising a new jurisdictional theory is not grounds for denying jurisdiction under CPLR 302.

Mahfouz's assertion that Dr. Ehrenfeld's action conflicts with international comity is incorrect. Unlike the plaintiff in Dow Jones & Co., Inc. v. Harrods, Ltd., 237 F. Supp. 2d 394 (S.D.N.Y. 2002), aff'd, 346 F.3d 357 (2d Cir. 2003), which sought to enjoin the defendants from pursuing a pending English lawsuit, Dr. Ehrenfeld is not trying to prevent English courts from applying English laws in England. Nor has she tried to interfere with the UK action. Rather, she is attempting to obtain declaratory judgments here about whether Mahfouz could enforce his judgment or prevail on his claims in New York.

Lastly, Mahfouz's assertion that Dr. Ehrenfeld's construction of 302(a)(3) would authorize personal jurisdiction over almost any claim is also incorrect. Dr. Ehrenfeld is not arguing that any foreign litigation against a New York defendant should automatically subject the foreign plaintiff to personal jurisdiction under 302(a)(3). Instead, she argues that personal jurisdiction exists when a foreign plaintiff deliberately uses foreign litigation to target and interfere with the free

speech rights of an individual who lives and works in New York and who has no significant connection with the foreign forum. This interpretation would not undermine the limitations of the long-arm statute, but rather would advance the freedoms guaranteed by the First Amendment and the New York Constitution.

### III

SINCE MAHFOUZ DIRECTLY TARGETED DR EHRENFELD'S  
CONDUCT IN NEW YORK AND STRATEGICALLY CHILLED  
HER SPEECH THROUGH THE THREAT OF FUTURE  
NEW YORK ENFORCEMENT PROCEEDINGS,  
JURISDICTION EXISTS BY IMPLIED CONSENT

Mahfouz presents no persuasive arguments against a finding of personal jurisdiction through implied consent.<sup>7</sup> In fact, he concedes the essential facts that create jurisdiction under CPLR 301:

- Mahfouz does not deny that he sought and obtained broad injunctive relief in the UK action which operates against Dr. Ehrenfeld in New York and continues to restrict her speech here. JA 8, 34-35.
- Mahfouz also admits that if he pursued an enforcement action in New York, he would be subject to jurisdiction on Dr. Ehrenfeld's claims. Opp'n Br. 36.

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<sup>7</sup> Mahfouz attempts to prevent the Court from reaching this question by claiming that implied consent was not raised below. However, Dr. Ehrenfeld stressed throughout the District Court proceedings that Mahfouz's libel tourism was designed to target her speech in New York rendering it permissible and fair for the court to exercise jurisdiction over Mahfouz.

Even if implied consent had not been addressed below, this Court has "broad discretion" to consider all issues raised on appeal, particularly when the "new" issue is purely legal and requires no additional fact-finding. Westinghouse Credit Corp. v. D'Urson 371 F.3d 96, 103 (2d Cir. 2004); Vintero Corp. v. Corporacion Venezolana de Fomento, 675 F.2d 513 (2d Cir. 1982).

- Finally, although Mahfouz states that he “has not chosen” to enforce the UK judgment in the United States, Opp’n Br. 35, he does not pledge to refrain from doing so in the future.<sup>8</sup>

Given these uncontested facts, which in effect concede implied consent, Mahfouz is wrong in arguing that jurisdiction by implied consent can only be triggered by his actual filing of a New York enforcement proceeding.

Not only does this artificial limitation ignore the inherent flexibility of the implied consent doctrine under CPLR 301,<sup>9</sup> it also disregards Matter of Sayeh R., 91 N.Y.2d 306, 670 N.Y.S.2d 377 (1997), which Mahouz makes no attempt to distinguish. In that case, the respondent obtained a Florida order granting her primary custody of her children. The Court of Appeals determined that respondent’s “acts in New York threatening [her] children with successful enforcement [of the Florida custody order] brings respondent within the reach of New York’s long-arm statute.” Id. at 318, 383 (emphasis added).

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<sup>8</sup> In fact, his actions confirm his intent to enforce. Mahfouz has contacted Dr. Ehrenheld in New York to demand that she take “all steps necessary” to comply with the UK judgment or risk being “held in contempt.” JA72. The existence of this threatening letter from Mahfouz’s counsel directly contradicts Mahfouz’s claim that he has neither “taken” nor “threatened” any action to enforce the UK judgment. Opp’n Br. 11.

<sup>9</sup> See, e.g., Vincent C. Alexander, “Practice Commentaries to CPLR 301,” cmt. C301:6 at 18, McKinney’s Consol. Laws of N.Y. Ann., Book 7B, CPLR 301-306-b (2001) (“consent can take many forms and can occur before or after the litigation has commenced”) (emphasis added).

This case warrants the same result. Like the children in Matter of Sayeh R., Dr. Ehrenfeld is a resident of New York, and because her book was written and published here, JA 12, 53, 65, any litigation over its content necessarily has primary impact in this state. By directly targeting New York speech, and taking actions in New York to threaten enforcement of a foreign judgment, Mahfouz has implicitly consented to the jurisdiction of the New York courts.<sup>10</sup> He cannot avoid that result by strategically delaying enforcement proceedings -- all the while seeking to retain his ability to file a New York enforcement action in the future. Cf. Yahoo!, 433 F.3d at 1210 (upholding personal jurisdiction where defendants failed to make “a binding contractual commitment” to refrain from enforcing foreign judgment).

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<sup>10</sup> A finding of implied consent based on the unique facts in this case is not tantamount to authorizing jurisdiction over any party who obtains a foreign judgment against a New York resident. Opp’n Br. at 36. This action is easily distinguishable from a typical commercial dispute involving only damages. Mahfouz specifically obtained injunctive relief from a foreign court restricting Dr. Ehrenfeld’s speech and conduct in New York.

More importantly, in the typical commercial case, there would be no need for a declaratory action to determine the enforceability of the underlying judgment, since the successful foreign litigant would have no incentive to avoid initiating enforcement proceedings and establishing the legitimacy of the foreign judgment.

## IV

### AT A MINIMUM, DR. EHRENFELD WAS ENTITLED TO DISCOVERY BASED ON HER COLORABLE JURISDICTIONAL CLAIMS

Mahfouz fails to refute Dr. Ehrenfeld's argument that the District Court improperly denied jurisdictional discovery. Instead of addressing the underlying decision in this case, which was incorrectly decided, Mahfouz instead relies on a separate decision by Judge Casey in the MDL litigation for monetary compensation brought by 9/11 victims against al Qaeda and other alleged sponsors of terrorism, to imply that Judge Casey also reached the right result here.

#### A. No Prima Facie Showing Necessary

In the MDL action, Judge Casey properly recognized that "jurisdictional discovery is appropriate even in the absence of a prima facie showing" and that "allegations of jurisdictional facts [should be] construed in plaintiffs' favor" in deciding if discovery is warranted. In re Terrorist Attacks on September 11, 2001, 349 F. Supp. 2d 765, 812 (S.D.N.Y. 2005). By contrast, in Dr. Ehrenfeld's case, he improperly imposed a more stringent test -- concluding that no discovery could be granted unless Dr. Ehrenfeld first established prima facie grounds for the exercise of personal jurisdiction. SPA15.

The District Court's decision conflicts with numerous decisions that recognize that jurisdictional discovery is not dependent on a prima facie showing

and that such discovery should be freely granted where the plaintiff can point to “facts that would support a colorable claim of jurisdiction.” Ayyash v. Bank Al-Madina, 2006 WL 587342, at \*5 (S.D.N.Y. ,Mar. 9, 2006) (citing cases); Allojet PLC v. Vantage Assocs., 2005 WL 612848, at \*7 & n.94 (S.D.N.Y., Mar. 15, 2005).

B. Mahfouz’s Prior New York Contacts Are Relevant

In this case, Dr. Ehrenfeld has established grounds for discovery. She specifically alleges, for example, that Mahfouz sold his substantial New York real estate holdings after the initial filings in the UK action -- only four months before this action was filed. JA71, 94-97. The District Court ignored this allegation, concluding that the only relevant contacts were Mahfouz’s existing contacts on the date the lawsuit was filed. SPA7, n.2. As Mahfouz himself concedes, Opp’n Br. 39 n. 10, this was legal error. Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 569 (2d Cir. 1996) (district court “erred in mechanically limiting its jurisdictional inquiry to the year [the complaint was filed]”). “[A] plaintiff seeking to establish a defendant’s continued presence in a forum is entitled to more than a snapshot capturing a fixed moment in time.” In re Terrorist Attacks on September

11, 2001, 2006 WL 2008624, at \*2-3 (S.D.N.Y. June 28, 2006).<sup>11</sup>

Dr. Ehrenfeld's additional allegations about Mahfouz's website and his efforts to intimidate and threaten her (and potentially other authors and reporters) in New York also establish other colorable grounds for discovery. Given the specific jurisdictional facts alleged by Dr. Ehrenfeld, the district court's denial of discovery was not a proper exercise of discretion, as Mahfouz claims -- but a decision premised on a flawed test, which ignored the full-time period relevant to Dr. Ehrenfeld's claims.

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<sup>11</sup> Denial of jurisdictional discovery in this case is particularly anomalous when compared with Magistrate Judge Maas' recent ruling in the September 11th MDL action, which authorized a six-year "look-back period" for discovery into the jurisdictional contacts of National Commercial Bank ("NCB"), In re Terrorist Attacks on September 11, 2001, 2006 WL 2008624, at \*3, covering a period during which Mahfouz was still Chairman of NCB. JA38 at ¶ 8.

THE ABSENCE OF NEW YORK AUTHORITY PRECLUDING THE  
EXERCISE OF PERSONAL JURISDICTION AND THE COMPELLING STATE  
INTERESTS IN PROVIDING RELIEF FOR VICTIMS OF LIBEL TOURISM  
SUPPORT CERTIFICATION

A. Unique Problems Raised by Libel Tourism Cannot Be Ignored

Mahfouz’s primary argument against certification is that the law interpreting CPLR 301 and 302 is well settled and consistent.<sup>12</sup> The relevant question, however, is not whether there are cases that interpret CPLR 301 and 302 generally, but whether there are any authoritative New York decisions that preclude jurisdiction when similar risks to free speech are present. Mahfouz does not deny that libel tourism is a new and increasingly dangerous phenomenon (as *amici* confirm), or that New York has a strong tradition and compelling policy interests in protecting free speech. Yet he maintains that this case is no different than a routine breach of contract action or products liability dispute.

Analysis of personal jurisdiction under the CPLR does not require this Court to overlook the “unique set of facts and circumstances” raised by Mahfouz’s libel

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<sup>12</sup> Mahfouz also criticizes Dr. Ehrenfeld for failing to identify “any specific question” to certify to the Court of Appeals. Opp’n Br. 41. However, it is premature at this stage to determine which questions this Court will deem relevant if it chooses to certify. Moreover, because the totality of the circumstances must be considered under CPLR 301 and 302, it may not be desirable to hamper the Court of Appeals’ discretion by certifying an overly narrow question. If the Court requires more specific guidance after oral argument, Dr. Ehrenfeld will gladly submit additional letter briefing on suggested questions for certification.

tourism. Schomann Int’l Corp. v. Northern Wireless, Ltd., 35 F.Supp.2d 205, 208 (N.D.N.Y. 1999). Because questions of personal jurisdiction are highly fact-specific and the existence of personal jurisdiction must be “evaluated on an individual basis,” id., -- Mahfouz cannot force the Court to ignore the important the First Amendment concerns in this case in deciding whether certification is appropriate.<sup>13</sup>

B. No New York Authority Precludes Jurisdiction

Certification is appropriate because there are no New York decisions that preclude personal jurisdiction in cases of libel tourism. In DiBella v. Hopkins, 403 F.3d 102, 111 (2d Cir. 2005), the case upon which Mahfouz relies, this Court declined to certify a question about the standard of proof for libel since it could predict what the Court of Appeals would hold based on unanimous decisions from the Appellate Divisions. This case presents a sharp contrast to the circumstances addressed in DiBella. Here, there is no “settled law” from any New York court or

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<sup>13</sup> In asking this Court to consider the question of personal jurisdiction in light of the enhanced protections for free speech under the state constitution, see Immuno AG v. J. Moor-Jankowski, 77 N.Y.2d 235, 249, 566 N.Y.S.2d 906, 913-14 (1991), and the provisions of the CPLR that guarantee New York residents the opportunity to challenge the enforcement of foreign judgments, see CPLR 5304, Dr. Ehrenfeld is not seeking to “rewrite the jurisdictional law of New York.” Opp’n Br. 56. She is asking that the jurisdictional provisions of CPLR 301 and 302 be interpreted to avoid undermining important state policies.

any other jurisdiction, Opp'n Br. At 42, that rejects personal jurisdiction on similar facts.

C. Denial of Jurisdiction Would Undermine Longstanding State Policies

There is no reason to believe that the Court of Appeals would endorse Mahfouz's narrow interpretation of New York's long-arm statutes and accept the resulting restrictions on the free speech rights of New York citizens. See Hernandez v. New York City Health & Hospitals Corp., 78 N.Y.2d 687, 693-94, 578 N.Y.S.2d 510, 513-14 (1991) (refusing to require "mechanical application" of CPLR provision, which would cause "unnecessarily harsh result" due to unique facts of case, and instead, interpreting statute to "strike[] the appropriate balance among competing policy considerations").

Because there is a very real possibility that the Court of Appeals would interpret New York's long-arm provisions to avoid conflict with the compelling state interests in promoting free speech and protecting New York's status as a publishing and media center, any uncertainty about the jurisdictional reach of CPLR 301 and 302 should be resolved through certification.<sup>14</sup>

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<sup>14</sup> An issue of state law does not have to be fully dispositive to warrant certification if its resolution "will determine the outcome of this appeal [and] contribute significantly to the completion of [the underlying] litigation." Rosenberg v. Metlife, Inc., 453 F.3d 122, 128 (2d Cir. 2006). In Sealed v. Sealed, 332 F.3d 51, 60 n.11 (2d Cir. 2003), for example, this Court certified an unsettled

## VI

### SINCE DR. EHRENFELD ALLEGES PRESENT, ONGOING HARM FROM THE UK JUDGMENT, THE COURT HAS SUBJECT MATTER JURISDICTION OVER HER CLAIMS

Mahfouz’s challenge to the court’s subject matter jurisdiction over Dr. Ehrenfeld’s claims ignores the real-world effect of the UK default judgment.<sup>15</sup> He cites no case where a court deemed a controversy over an actual judgment assessing damages and imposing injunctive relief against the plaintiff -- too abstract and theoretical to be ripe. Nor can he cite any authority denying constitutional standing to a First Amendment plaintiff who has already been found liable for her speech.

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question of state law although the defendants, like Mahfouz in this case, urged the Court to “dismiss on various alternative grounds not reached by the District Court.”

<sup>15</sup> The District Court declined to decide any issues of subject matter jurisdiction. SPA 15. Therefore, as Mahfouz acknowledges, to the extent this Court chooses to address subject matter jurisdiction -- only issues of constitutional ripeness and standing may provide a basis for affirmance. Opp’n Br. 43-44, n.11.

A. Dr. Ehrenfeld Has Standing <sup>16</sup>

1. Dr. Ehrenfeld Alleges Cognizable Injury-In-Fact

Dr. Ehrenfeld alleges actual injury-in-fact resulting from the UK judgment based on its chilling effect on her speech and her diminished ability to attract publishers for her current work. Mahfouz fails to present any valid reasons to discount Dr. Ehrenfeld's allegations of injury. This case is not analogous to Laird v. Tatum, 408 U.S. 1 (1972), where plaintiffs brought a First Amendment challenge to the Army's surveillance activities but did not allege that they themselves had been the targets of illegal surveillance.

2. Dr. Ehrenfeld's Claims of Harm Are Objectively Reasonable

Dr. Ehrenfeld's claims of injury are also objectively reasonable, and not purely subjective as Mahfouz claims. Not only has Mahfouz actually obtained a judgment directly restricting Dr. Ehrenfeld's speech, but he has sent her letters warning her to comply with the UK judgment on penalty of contempt. Dr. Ehrenfeld's allegations of individualized, targeted injury are sufficient to establish

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<sup>16</sup> It is ironic that Mahfouz tries to preclude the court from considering Dr. Ehrenfeld's implied consent argument, see supra at 17 n.7, while now raising standing issues which he could have, but failed, to present to the District Court.

standing at the pleading stage,<sup>17</sup> Baur v. Veneman, 352 F.3d 625, 632 (2d Cir. 2003), and fully consistent with the general rule that implicit threats to impose discipline or take other enforcement action can chill speech. Levin v. Harleston, 966 F.2d 85, 90 (2d Cir. 1992) (“the threat of discipline implicit in [the defendant’s] actions were sufficient to create a judicially cognizable chilling effect on [plaintiff’s] First Amendment rights”).

### 3. Dr. Ehrenfeld Need Not Prove Her Claims to Establish Standing

Mahfouz also argues that Dr. Ehrenfeld lacks standing because the First Amendment does not shield her from the UK judgment. In order to establish standing, however, Dr. Ehrenfeld simply needs to allege injury-in-fact, not establish the merits of her claim. See, e.g., Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006) (“an injury-in-fact differs from a ‘legal interest;’ an injury-in-fact need not be capable of sustaining a valid cause of action”); see also Lerman v. Board of Elections of the City of New York, 232 F.3d 135, 143 n.9 (2d

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<sup>17</sup> Mahfouz also contends that Dr. Ehrenfeld lacks standing because her speech has not in fact been chilled. Opp’n Br. 51-52. This is a disputed question of fact that cannot be resolved on a motion to dismiss. Cf. Curley v. Village of Suffern, 268 F.3d 65, 73 (2d Cir. 2001) (determining actual chilling effect based on summary judgment record).

In any event, Dr. Ehrenfeld also alleges that publishers have refused to publish her work as a result of the UK judgment, a type of financial harm sufficient to confer standing even if her speech were not chilled. Gill v. Pidlypchak, 389 F.3d 379, 383 (2d Cir. 2004) (“standing is no issue whenever the plaintiff has clearly alleged a concrete harm independent of First Amendment chilling”).

Cir. 2000) (same). Questions about the actual scope of First Amendment protection can and will be addressed if Dr. Ehrenfeld is permitted to pursue her claims; they do not negate her constitutional standing to seek that opportunity.

4. A Favorable Judgment Would Remove the Chilling Effect of the UK Judgment

Equally meritless is Mahfouz's argument that Dr. Ehrenfeld lacks standing because the requested declaratory relief will not remedy her alleged injuries. Mahfouz forgets that Dr. Ehrenfeld seeks relief from the financial burdens of the UK judgment and its resulting chilling effect by obtaining a judicial declaration that the judgment is unenforceable in the United States. A favorable declaration would remedy the injuries that Dr. Ehrenfeld alleges by shielding her assets and the assets of potential publishers from Mahfouz's libel tourism and by enabling her to work as though she has the full benefit of U.S. free speech protections.<sup>18</sup>

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<sup>18</sup> Mahfouz's reliance on the New York statute of limitations for defamation is misplaced. Opp. Br. 46, 53. Dr. Ehrenfeld is not trying to prevent Mahfouz from suing her for defamation in New York; she is contesting the enforceability of the UK judgment. The relevant statute of limitations is for judgment enforcement actions is found in CPLR 211(b).

B. The Ongoing Threat of New York Enforcement Proceedings Renders Dr. Ehrenfeld’s Claims Constitutionally Ripe

Dr. Ehrenfeld’s claims meet also meet the standard for constitutional ripeness. “At the core of the ripeness doctrine is the necessity of ensur[ing] that a dispute has generated injury significant enough to satisfy the case or controversy requirement of Article III . . . by prevent[ing] a federal court from entangling itself in abstract disagreements over matters that are premature for review because the injury is merely speculative and may never occur.” United States v. Fell, 360 F.3d 135, 139 (2d Cir. 2004), cert. denied, 543 U.S. 946 (2004) (emphasis added).

Dr. Ehrenfeld’s alleged injuries are not speculative harms that depend on unknown, future events. Dr. Ehrenfeld alleges that her speech is presently chilled and that publishers have already rejected her work because of the UK judgment. Her claims are ripe because she is currently injured, and continues to be harmed so long as the UK judgment can be enforced against her in New York.

The decisions cited by Mahfouz are irrelevant to the operative facts here. This is not a case about “unasserted, unthreatened claims.”<sup>19</sup> Opp’n Br. 48.

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<sup>19</sup> Cf. Orix Credit Alliance, Inc. v. Wolfe, 212 F.3d 891, 896 (5th Cir. 2000) (plaintiff sought declaratory judgment barring filing of draft motion and future unasserted claims); Golden v. Zwickler, 394 U.S. 103 (1969) (first amendment challenge to state statute where plaintiff could show no threat of future prosecution); United Public Workers of America v. Mitchell, 330 U.S. 75 (1947) (plaintiffs sought advisory opinion on constitutionality of statute although they had not engaged in any of the prohibited actions).

Mahfouz has succeeded in obtaining a substantial judgment against Dr. Ehrenfeld, which chills her speech and hinders her ability to publish her work.

Contrary to Mahfouz's assertions, his present failure to enforce does not mitigate the harm to Dr. Ehrenfeld and somehow render her injuries conjectural. Mahfouz's strategic delay simply extends the chilling effect of the UK judgment by forcing Dr. Ehrenfeld to live with risk of future enforcement while depriving her of an opportunity to challenge judgment's enforceability. Mahfouz cannot simultaneously claim that Dr. Ehrenfeld has no credible fear of future enforcement while carefully preserving his right to bring future enforcement proceedings in the United States.<sup>20</sup> In fact, it is difficult to understand why Mahfouz would so vigorously oppose this action if he had no interest in enforcing the UK judgment here.<sup>21</sup>

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<sup>20</sup> The strength of Dr. Ehrenfeld's claims does not destroy ripeness. Opp'n Br. 46 (arguing that this action is not ripe because "Dr. Ehrenfeld and *amici* assert that an enforcement action would be futile").

The fact that a plaintiff will likely prevail on the merits does not deprive the court of subject matter jurisdiction to hear her claims. Moreover, even if Dr. Ehrenfeld is confident in her arguments, she should not have to bear the risk of a substantial financial judgment if she is wrong. Nor is it reasonable to assume that the third-party publishers who evaluate Dr. Ehrenfeld's work will understand the legal intricacies in this case and be able to make intelligent judgments about Dr. Ehrenfeld's likelihood of success.

<sup>21</sup> Mahfouz's recitation of the protections afforded to British libel defendants, Opp'n Br. 8-10, suggests that he believes the UK judgment may be enforceable in New York -- undermining his claim that Dr. Ehrenfeld has little reason to fear future enforcement.

The ripeness inquiry is not blind to the potential injustice of forcing Dr. Ehrenfeld to wait for judicial review. In evaluating ripeness, a court “must make a fact-specific evaluation of ‘both the fitness of the issues for judicial decision and the hardship to the parties of withholding [judicial] consideration.’” Fell, 360 F.3d at 139 (quoting Abbot Labs v. Gardner, 387 U.S. 136, 149 (1967)). Mahfouz does not contend that the underlying First Amendment issues in this case need further refinement, nor does he claim that he will suffer any prejudice from immediate review. In comparison, Dr. Ehrenfeld’s speech will continue to be chilled, and she will continue to suffer irreparable harm, if the Court denies review on ripeness grounds.

Mahfouz cites no authority that justifies subjecting Dr. Ehrenfeld to this crippling uncertainty until he decides to make her claim ripe by bringing an enforcement action. His proposed rule would effectively permit savvy libel tourists to control the jurisdiction of American courts by delaying or forgoing enforcement in the United States while they continue to rely on the chilling effects of foreign judgments to silence the speech of American writers.

Conclusion

For the reasons given, here and in the main brief, the decision below should be reversed.

Dated: New York, New York  
August 18, 2006

Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief was produced in Times New Roman (a proportionately spaced typeface), 14-point type and contains 6,929 words (based on the Microsoft Word processing system word count function).

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Cecelia Chang

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**SPECIAL APPENDIX**

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## TABLE OF CONTENTS

	<i>Page</i>
Defamation Act 1996 .....	SA1
<u>England and Wales, in International Libel and Privacy Handbook</u> , 209-10 (Charles J. Glasser, Jr. ed., 2006) .....	SA9



# Defamation Act 1996

1996 Chapter 31

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## Defamation Act 1996

1996 Chapter 31

REPLY SPA-0001

## ARRANGEMENT OF SECTIONS

*Responsibility for publication*

## Section

1. Responsibility for publication.*Offer to make amends*2. Offer to make amends.3. Accepting an offer to make amends.4. Failure to accept offer to make amends.*Limitation*5. Limitation of actions: England and Wales.6. Limitation of actions: Northern Ireland.*The meaning of a statement*7. Ruling on the meaning of a statement.*Summary disposal of claim*8. Summary disposal of claim.9. Meaning of summary relief.10. Summary disposal: rules of court.11. Summary disposal: application to Northern Ireland.*Evidence of convictions*12. Evidence of convictions.*Evidence concerning proceedings in Parliament*13. Evidence concerning proceedings in Parliament.*Statutory privilege*14. Reports of court proceedings absolutely privileged.15. Reports, &c. protected by qualified privilege.*Supplementary provisions*16. Repeals.17. Interpretation.*General provisions*18. Extent.19. Commencement.20. Short title and saving.

REPLY SPA-0002

SCHEDULES:

Schedule - Qualified privilege.

1

Part I - Statements having qualified privilege without explanation or contradiction.

Part II - Statements privileged subject to explanation or contradiction.

Part III - Supplementary provisions.

Schedule - Repeals.

2

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Continue

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REPLY SPA-0003

## Defamation Act 1996

### 1996 Chapter 31 - continued

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#### *Summary disposal of claim*

Summary disposal of claim.

8. - (1) In defamation proceedings the court may dispose summarily of the plaintiff's claim in accordance with the following provisions.

(2) The court may dismiss the plaintiff's claim if it appears to the court that it has no realistic prospect of success and there is no reason why it should be tried.

(3) The court may give judgment for the plaintiff and grant him summary relief (see section 9) if it appears to the court that there is no defence to the claim which has a realistic prospect of success, and that there is no other reason why the claim should be tried.

Unless the plaintiff asks for summary relief, the court shall not act under this subsection unless it is satisfied that summary relief will adequately compensate him for the wrong he has suffered.

(4) In considering whether a claim should be tried the court shall have regard to-

- (a) whether all the persons who are or might be defendants in respect of the publication complained of are before the court;
- (b) whether summary disposal of the claim against another defendant would be inappropriate;
- (c) the extent to which there is a conflict of evidence;
- (d) the seriousness of the alleged wrong (as regards the content of the statement and the extent of publication); and
- (e) whether it is justifiable in the circumstances to proceed to a full trial.

(5) Proceedings under this section shall be heard and determined without a jury.

Meaning of summary relief.

9. - (1) For the purposes of section 8 (summary disposal of claim) "summary relief" means such of the following as may be appropriate-

- (a) a declaration that the statement was false and defamatory of the plaintiff;
- (b) an order that the defendant publish or cause to be published a suitable correction and apology;

REPLY SPA-0004

(c) damages not exceeding £10,000 or such other amount as may be prescribed by order of the Lord Chancellor;

(d) an order restraining the defendant from publishing or further publishing the matter complained of.

(2) The content of any correction and apology, and the time, manner, form and place of publication, shall be for the parties to agree.

If they cannot agree on the content, the court may direct the defendant to publish or cause to be published a summary of the court's judgment agreed by the parties or settled by the court in accordance with rules of court.

If they cannot agree on the time, manner, form or place of publication, the court may direct the defendant to take such reasonable and practicable steps as the court considers appropriate.

(3) Any order under subsection (1)(c) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Summary disposal: rules of court.

**10. - (1)** Provision may be made by rules of court as to the summary disposal of the plaintiff's claim in defamation proceedings.

(2) Without prejudice to the generality of that power, provision may be made-

(a) authorising a party to apply for summary disposal at any stage of the proceedings;

(b) authorising the court at any stage of the proceedings-

(i) to treat any application, pleading or other step in the proceedings as an application for summary disposal, or

(ii) to make an order for summary disposal without any such application;

(c) as to the time for serving pleadings or taking any other step in the proceedings in a case where there are proceedings for summary disposal;

(d) requiring the parties to identify any question of law or construction which the court is to be asked to determine in the proceedings;

(e) as to the nature of any hearing on the question of summary disposal, and in particular-

(i) authorising the court to order affidavits or witness statements to be prepared for use as evidence at the hearing, an

REPLY SPA-0005

(ii) requiring the leave of the court for the calling of oral evidence, or the introduction of new evidence, at the hearing;

(f) authorising the court to require a defendant to elect, at or before the hearing, whether or not to make an offer to make amends under section 2.

Summary disposal: application to Northern Ireland.

11. In their application to Northern Ireland the provisions of sections 8 to 10 (summary disposal of claim) apply only to proceedings in the High Court.

*Evidence of convictions*

Evidence of convictions.

12. - (1) In section 13 of the Civil Evidence Act 1968 (conclusiveness of convictions for purposes of defamation actions), in subsections (1) and (2) for "a person" substitute "the plaintiff" and for "that person" substitute "he"; and after subsection (2) insert-

"(2A) In the case of an action for libel or slander in which there is more than one plaintiff-

(a) the references in subsections (1) and (2) above to the plaintiff shall be construed as references to any of the plaintiffs, and

(b) proof that any of the plaintiffs stands convicted of an offence shall be conclusive evidence that he committed that offence so far as that fact is relevant to any issue arising in relation to his cause of action or that of any other plaintiff."

The amendments made by this subsection apply only where the trial of the action begins after this section comes into force.

(2) In section 12 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (conclusiveness of convictions for purposes of defamation actions), in subsections (1) and (2) for "a person" substitute "the pursuer" and for "that person" substitute "he"; and after subsection (2) insert-

"(2A) In the case of an action for defamation in which there is more than one pursuer-

(a) the references in subsections (1) and (2) above to the pursuer shall be construed as references to any of the pursuers, and

(b) proof that any of the pursuers stands convicted of an offence shall be conclusive evidence that he committed that offence so far as that fact is relevant to any issue

REPLY SPA-0006

arising in relation to his cause of action or that of any other pursuer."

The amendments made by this subsection apply only for the purposes of an action begun after this section comes into force, whenever the cause of action arose.

(3) In section 9 of the Civil Evidence Act (Northern Ireland) 1971 (conclusiveness of convictions for purposes of defamation actions), in subsections (1) and (2) for "a person" substitute "the plaintiff" and for "that person" substitute "he"; and after subsection (2) insert-

"(2A) In the case of an action for libel or slander in which there is more than one plaintiff-

(a) the references in subsections (1) and (2) to the plaintiff shall be construed as references to any of the plaintiffs, and

(b) proof that any of the plaintiffs stands convicted of an offence shall be conclusive evidence that he committed that offence so far as that fact is relevant to any issue arising in relation to his cause of action or that of any other plaintiff."

The amendments made by this subsection apply only where the trial of the action begins after this section comes into force.

*Evidence concerning proceedings in Parliament*

Evidence concerning proceedings in Parliament.

13. - (1) Where the conduct of a person in or in relation to proceedings in Parliament is in issue in defamation proceedings, he may waive for the purposes of those proceedings, so far as concerns him, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament.

(2) Where a person waives that protection-

(a) any such enactment or rule of law shall not apply to prevent evidence being given, questions being asked or statements, submissions, comments or findings being made about his conduct, and

(b) none of those things shall be regarded as infringing the privilege of either House of Parliament.

(3) The waiver by one person of that protection does not affect its operation in relation to another person who has not waived it.

(4) Nothing in this section affects any enactment or rule of law so

far as it protects a person (including a person who has waived the protection referred to above) from legal liability for words spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament.

(5) Without prejudice to the generality of subsection (4), that subsection applies to-

- (a) the giving of evidence before either House or a committee;
- (b) the presentation or submission of a document to either House or a committee;
- (c) the preparation of a document for the purposes of or incidental to the transacting of any such business;
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of either House or a committee; and
- (e) any communication with the Parliamentary Commissioner for Standards or any person having functions in connection with the registration of members' interests.

In this subsection "a committee" means a committee of either House or a joint committee of both Houses of Parliament.

[Previous](#)      [Contents](#)      [Continue](#)

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[Other UK Acts](#) | [Home](#) | [Scotland Legislation](#) | [Wales Legislation](#) |  
[Northern Ireland Legislation](#) | [Her Majesty's Stationery Office](#)

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# International Libel and Privacy Handbook

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A Global Reference for Journalists,  
Publishers, Webmasters, and Lawyers

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Edited by

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With a Foreword by MATTHEW WINKLER

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| CHAPTER 12

## England and Wales

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### Introduction to the United Kingdom Legal System

The United Kingdom has three distinct legal jurisdictions: Scotland, Northern Ireland, and England and Wales. Although there are subtle differences among the three independent judicial systems, they share much of the same common law. This introduction will focus on fundamental court structure in England and Wales. The Scottish and Northern Ireland systems are similarly structured with separate branches for criminal and civil actions. Each branch has a trial court, known as county courts or high courts, appellate courts, magistrate courts, and a house of lords.

New laws in the UK common law system originate from either Parliament or common law through judicial decisions. Parliament, composed of the House of Commons and the House of Lords in a bicameral structure, has authority to pass various Acts of Parliament, also called statutes, to create new laws. Case law cannot overrule statutory law; however, case law does serve as a practical tool for determining contemporary application or enforcement of a statute. The hierarchical structure of the British court system

In relation to damages, the tendency is toward larger damages awards for celebrities than for ordinary people, and for derisory awards (e.g., £1) for Claimants who win—technically—but whose conduct finds disapproval with the jury.

**b. Is there a heightened fault standard or privilege for reporting on matters of public concern or public interest?**

Absent the sort of constitutional protection afforded by the First Amendment to the U.S. Constitution, English law has evolved in case law to a point where it can best be summarized as follows: Where matters of public interest are reported and the media has a legitimate duty/interest in doing so and the recipient has a corresponding duty/interest in receiving it, the report may attract the protection of the defense of “qualified privilege” where it satisfies the nonexhaustive criteria which were set out by the House of Lords in 1999 in the leading case of *Reynolds v. Times Newspapers Limited*.<sup>1</sup>

Those criteria are:

1. *The seriousness of the allegation.* The more serious the charge, the more the public is misinformed and the individual harassed by the adverse impact on them if the story turns out to be false. Thus, the more serious the allegation, the more weighty the reporter’s responsibility to be correct.
2. *The nature of the information, and the extent to which the subject matter is a public concern.* The more important the story is to the public’s welfare, the more leeway for error will be granted.
3. *The source of the information.* Some sources have no direct knowledge of events. Some have their own axes to grind, or are being paid for their stories. The credibility of the source, and the reporter’s efforts to ascertain that credibility, will be examined.
4. *The status of the information.* The allegation may have already been the subject of an investigation which commands respect.
5. *The steps taken to verify the information.* Fact-finding, research, interviews, and investigation all combine to convince a judge that the qualified privilege should be applied.
6. *The urgency of the matter.* Whereas news is viewed by some as a perishable commodity, courts are less likely to be swayed by urgency arising from press-competitive pressures and more likely to be convinced by the public’s immediate need for the information.
7. *Whether comment was sought from the claimant.* He may have information others do not possess or have not disclosed. An approach to the claimant may not always be necessary. As a practical tip, because much litigation now centers on this area, it is often

useful to have proof of contact and the matter put to the target, as well as showing that the target has a reasonable opportunity to inform himself, respond meaningfully, and that response should be fairly included in the article.

8. *Whether the article contained the gist of the claimant's side of the story.* Stories that unfairly edit a denial of wrongdoing may be found libelous.
9. *The tone of the article.* A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. *The circumstances of the publication including the timing.*

This is sometimes known colloquially as the defense of "responsible journalism." UK media defendants are faced with considerable legal presumptions to overcome at trial: both falsity and damage are presumed by law.

Truth (called "justification") is an absolute defense. In cases where an error has been made, or proving the truth is impossible, once a claimant has proved the words to be defamatory and to refer to him, the onus falls on the media defendant to prove that it acted "responsibly" (by reference to the above *Reynolds* criteria).

Of course, substantial evidential difficulties can be faced. For example, where the media has relied upon confidential sources, it is impossible to prove the reliability of those sources without compromising that confidence in some way. There is a perception that the *Reynolds* Qualified Privilege is aimed at protecting investigative journalism rather than tabloid sensationalism, but very frequently it is investigative journalists who need to rely on confidential sources.

**7. Is financial news about publicly traded companies, or companies involved with a government contract, considered a matter of public interest or otherwise privileged?**

Owing to the importance of financial news to markets, this information will usually be of public interest, although there is little decided case law on the point. Such publications may fall within the protection afforded by:

1. Statutory qualified privilege which extends to "fair and accurate" reports of: public meetings; proceedings at general meetings of UK public companies; copies of documents circulated to members of public companies in the UK/Channel Islands or Isle of Man and any findings or decisions by certain trade/business/industry/professional associations. Note that for this privilege to attach, the publication must not be prohibited by law or be malicious, and the subject matter must be of public concern.
2. *Reynolds* Qualified Privilege (described in Question 6b. above).

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)

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On August 18, 2006

deponent served:

two copies of Reply Brief with Special Appendix

**Upon:**

Timothy J. Finn  
Jones Day  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001

the Attorney(s) in this action at the address designated by said attorney(s) for that purpose by depositing the same enclosed in a properly addressed wrapper in a depository under the exclusive care, custody and control of United Parcel Service within the State of New Jersey for overnight, next day delivery.

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Darwin Bohorquez

(*Re: Ehrenfeld v. Mahfouz*)  
A.D. Docket No.: 2006-2228-cv

Sworn to before me on  
August 18, 2006

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YESENIA RIVERA-REVERON  
Notary Public, State of New Jersey  
No. 2323638  
Qualified in Hudson County  
Commission Expires January 7, 2010

**ANTI-VIRUS CERTIFICATION FORM**

*See* Second Circuit Local Rule 32(a)(1)(E)

**CASE NAME:** Ehrenfeld v. Mahfouz

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