

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HENEP ISUM MANDINGO and DANIEL WEMP	:	X
	:	
Plaintiffs,	:	Index No: 10551/09
	:	
- against -	:	<u>ANSWER</u>
	:	
ADVANCE PUBLICATIONS, INC. and JARED DIAMOND,	:	
	:	
Defendants.	:	
	:	X

Defendants Advance Publications, Inc. (“Advance”) and Jared Diamond (“Diamond”), by their attorneys, Davis Wright Tremaine LLP, as and for their answer to the Amended Complaint of Plaintiffs Henep Isum Mandingo (“Isum”) and Daniel Wemp (“Wemp”), dated September 15, 2009 (the “Amended Complaint”), respectfully allege as follows:

1. Admit the allegations contained in paragraph 1 of the Amended Complaint.
2. Admit that Advance Publications, Inc. is a New York corporation with a principal place of business in the State of New York, and otherwise deny the remaining allegations contained in paragraph 2 of the Amended Complaint.
3. Admit the allegations contained in paragraph 3 of the Amended Complaint.
4. States that the first sentence of paragraph 4 of the Amended Complaint sets forth Plaintiffs’ subjective belief about what “the action concerns” and deny knowledge of information sufficient to form a truth as to Plaintiffs’ subjective belief as to the truth of those allegations. As to the remaining allegation of the first sentence of paragraph 4, deny that Defendants published any false and defamatory articles in any medium and further deny that Defendants “falsely accuse Plaintiffs of criminal behavior, including complicity in multiple murders and in the case of Wemp promoting prostitution or rape.” Defendants deny the remaining allegations set forth in

this paragraph and refer the Court to the article itself for a true and complete recitation of the contents thereof.

5. Admit that Plaintiff Wemp is a member of the Handa clan, deny the remaining allegations set forth in paragraph 5 of the Amended Complaint, and respectfully refer the Court to the article for a true and complete recitation of the contents thereof.

6. Deny the allegations contained in paragraph 6 of the Amended Complaint and respectfully refer the Court to the article for a true and complete recitation of the contents thereof.

7. Deny the allegations contained in paragraph 7 of the Amended Complaint and respectfully refer the Court to the article for a true and complete recitation of the contents thereof.

8. Deny the allegations contained in paragraph 8 of the Amended Complaint and respectfully refer the Court to the article referred to therein for a true and complete recitation of the contents thereof.

AS AND FOR THE FIRST CAUSE OF ACTION

9. Repeat and reallege the responses contained in paragraphs 1 through 8 hereof respectively as if fully set forth herein.

10. Deny the allegations contained in paragraph 10 of the Amended Complaint.

11. Deny the allegations contained in paragraph 11 of the Amended Complaint.

12. Deny the allegations contained in paragraph 12 of the Amended Complaint.

13. Deny the allegations contained in paragraph 13 of the Amended Complaint.

14. Deny the allegations contained in paragraph 14 of the Amended Complaint.

AS AND FOR THE SECOND CAUSE OF ACTION

15. Repeat and reallege the responses contained in paragraphs 1 through 14 hereof

respectively as if fully set forth herein.

16. Deny the allegations contained in paragraph 16 of the Amended Complaint.

AS AND FOR THE THIRD CAUSE OF ACTION

17. Repeat and reallege the responses contained in paragraphs 1 through 16 hereof respectively as if fully set forth herein.

18. Deny the allegations contained in paragraph 18 of the Amended Complaint.

19. Deny the allegations contained in paragraph 19 of the Amended Complaint.

20. Deny the allegations contained in paragraph 20 of the Amended Complaint.

AS AND FOR THE FOURTH CAUSE OF ACTION

21. Repeat and reallege the responses contained in paragraphs 1 through 20 hereof respectively as if fully set forth herein.

22. Deny the allegations contained in paragraph 22 of the Amended Complaint.

23. Deny the allegations contained in paragraph 23 of the Amended Complaint.

24. Deny the allegations contained in paragraph 24 of the Amended Complaint.

AS AND FOR THE FIFTH CAUSE OF ACTION

25. Repeat and reallege the responses contained in paragraphs 1 through 24 hereof respectively as if fully set forth herein.

26. Deny the allegations contained in paragraph 26 of the Amended Complaint.

AS AND FOR THE SIXTH CAUSE OF ACTION

27. Repeat and reallege the responses contained in paragraphs 1 through 26 hereof respectively as if fully set forth herein.

28. Admit that an article titled "Vengeance Is Ours" by Jared Diamond appeared in the April 21, 2008 issue of *The New Yorker* magazine, that the April 21, 2008 issue of *The New Yorker* magazine was included in a DVD collection of *The New Yorker* back issues, and

otherwise deny the remaining allegations contained in paragraph 28 of the Amended Complaint.

AS AND FOR THE SEVENTH CAUSE OF ACTION

29. Repeat and reallege the responses contained in paragraphs 1 through 28 hereof respectively as if fully set forth herein.

30. Admit that an article titled “Vengeance Is Ours” by Jared Diamond appeared in the April 21, 2008 issue of *The New Yorker* magazine, that the April 21, 2008 issue of *The New Yorker* magazine was included in a DVD collection of *The New Yorker* back issues, and otherwise deny the remaining allegations contained in paragraph 30 of the Amended Complaint.

INTRODUCTION TO AFFIRMATIVE DEFENSES

Under the law, it is Plaintiffs’ burden to prove most of the issues raised in the affirmative defenses set forth below. It is Defendants’ intent to preserve, and not to waive, their legal position that Plaintiffs maintain the burden of proof on these issues.

FIRST AFFIRMATIVE DEFENSE

1. The Amended Complaint fails, in whole or in part, to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

2. The statements complained of are not alleged with particularity as required by Rule 3016 (a) of the N.Y. Civil Practice Law and Rules.

THIRD AFFIRMATIVE DEFENSE

3. The statements complained of in the Amended Complaint are not actionable to the extent they are not “of and concerning” Plaintiff Wemp and are not susceptible to interpretation by a reasonable viewer as “of and concerning” Plaintiff Wemp.

FOURTH AFFIRMATIVE DEFENSE

4. The statements complained of in the Amended Complaint are not actionable to the

extent they are not “of and concerning” Plaintiff Isum and are not susceptible to interpretation by a reasonable viewer as “of and concerning” Plaintiff Isum.

FIFTH AFFIRMATIVE DEFENSE

5. The statements complained of in the Amended Complaint are not actionable to the extent they are not defamatory, are not reasonably capable of a defamatory meaning or susceptible to a defamatory interpretation, and did not defame Plaintiff Wemp.

SIXTH AFFIRMATIVE DEFENSE

6. The statements complained of in the Amended Complaint are not actionable to the extent they are not defamatory, are not reasonably capable of a defamatory meaning or susceptible to a defamatory interpretation, and did not defame Plaintiff Isum.

SEVENTH AFFIRMATIVE DEFENSE

7. The causes of action alleged in the Amended Complaint are barred because the Plaintiffs have not alleged or suffered special damages or actual injury to reputation.

EIGHTH AFFIRMATIVE DEFENSE

8. The statements complained of in the Amended Complaint were not published with the requisite degree of fault and are therefore not actionable.

NINTH AFFIRMATIVE DEFENSE

9. The statements complained of in the Amended Complaint are not published in a grossly irresponsible manner without due regard for the standards of information gathering and dissemination ordinarily followed by responsible parties, and are therefore not actionable.

TENTH AFFIRMATIVE DEFENSE

10. The statements complained of in the Amended Complaint are not published with actual malice, meaning knowledge of falsity or reckless disregard of probable falsity, and are therefore not actionable.

ELEVENTH AFFIRMATIVE DEFENSE

11. The statements complained of in the Amended Complaint cannot be the basis for a claim of exemplary or punitive damages as a matter of law because they were not published with both knowledge of falsity or reckless disregard of probable falsity, and common law malice.

TWELFTH AFFIRMATIVE DEFENSE

12. Plaintiffs' claim for punitive damages is barred by the Constitution of the United States, the Constitution of the State of New York and the common law.

THIRTEENTH AFFIRMATIVE DEFENSE

13. Plaintiffs' claim for punitive damages fails because they fail to allege facts sufficient to warrant the imposition of punitive damages.

FOURTEENTH AFFIRMATIVE DEFENSE

14. The statements complained of in the Amended Complaint are not actionable to the extent they are privileged under the common law.

FIFTEENTH AFFIRMATIVE DEFENSE

15. The statements complained of in the Amended Complaint are not actionable to the extent they are based on unreasonable implications that allegedly arise out of the statements complained of in the Amended Complaint.

SIXTEENTH AFFIRMATIVE DEFENSE

16. Plaintiffs' claims are barred by the statute of limitations.

SEVENTEENTH AFFIRMATIVE DEFENSE

17. Plaintiffs' claims fail because Defendants did not intend or endorse any of the allegedly defamatory implications set forth in the Amended Complaint.

EIGHTEENTH AFFIRMATIVE DEFENSE

18. The statements and purported implications complained of in the Amended Complaint by Plaintiffs are protected by the doctrine of fair comment.

NINETEENTH AFFIRMATIVE DEFENSE

19. The statements complained of in the Amended Complaint are not actionable to the extent they were made within the sphere of legitimate public interest and concern and/or were reasonably related to matters warranting public exposition.

TWENTIETH AFFIRMATIVE DEFENSE

20. The statements complained of in the Amended Complaint are not actionable to the extent they are substantially true and therefore are absolutely protected under the First and Fourteenth Amendments to the U.S. Constitution and by Article I, § 8 of the Constitution of the State of New York.

TWENTY-FIRST AFFIRMATIVE DEFENSE

21. The statements complained of in the Amended Complaint are not actionable to the extent they contain expressions of opinion or rhetorical hyperbole, which are privileged under the First and Fourteenth Amendments to the U.S. Constitution and by Article I, § 8 of the Constitution of the State of New York.

TWENTY-SECOND AFFIRMATIVE DEFENSE

22. To the extent Plaintiffs seek to plead any cause of action other than defamation, based on the same allegations on which their claims for defamation are based, they are barred from disguising such claims as other torts in order to circumvent constitutional protections, and any such claims fail under the First and Fourteenth Amendments to the U.S. Constitution and/or Article I, § 8 of the Constitution of the State of New York.

TWENTY-THIRD AFFIRMATIVE DEFENSE

23. Defendants owe no duty in law or equity to either Plaintiff.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

24. Defendants did not engage in extreme or outrageous conduct, intend to cause Plaintiffs emotional distress, or intentionally, recklessly or negligently cause Plaintiffs such distress.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

25. This Court lacks personal jurisdiction over Defendant Diamond.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

26. Defendant Advance is not a proper party to this action.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

27. Plaintiffs have not suffered any actual harm or damages as a result or proximate cause of the acts alleged in the Amended Complaint, or as a result of the allegedly defamatory statements on which Plaintiffs' defamation claims are predicated.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

28. Neither Plaintiff Wemp nor Plaintiff Isum have any reputation in New York.

TWENTY-NINTH AFFIRMATIVE DEFENSE

29. The statements complained of in the Amended Complaint did not injure the reputation of either Plaintiff Isum or Plaintiff Wemp in Papua New Guinea.

THIRTIETH AFFIRMATIVE DEFENSE

30. Plaintiffs' claims are barred in whole or in part by the doctrine of unclean hands.

THIRTY-FIRST AFFIRMATIVE DEFENSE

31. Plaintiffs' claims are barred in whole or part by the doctrines of laches.

THIRTY-SECOND AFFIRMATIVE DEFENSE

32. To the extent that Plaintiffs have suffered any harm or damages, it is the result of their own actions.

THIRTY-THIRD AFFIRMATIVE DEFENSE

33. Plaintiffs' claims fail because they failed to mitigate any alleged injury or damages, which injury or damages Defendants expressly deny.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

34. Defendants reserve the right to amend their Answer and Affirmative Defenses to assert such additional defenses as may later become available or apparent to them. Nothing stated herein constitutes a concession that Defendants bear any burden of proof on any issue on which they would not otherwise bear such burden.

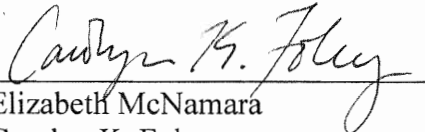
WHEREFORE, Defendants respectfully request judgment against the Plaintiffs:

- (a) dismissing the Amended Complaint in its entirety and with prejudice;
- (b) awarding Defendants the costs and disbursements incurred in defending this action; and
- (c) awarding Defendants such other and further relief as the Court deems just and proper.

Dated: New York, New York
October 13, 2009

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: 
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Carolyn K. Foley
Monica Pa

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*Attorneys for Defendants
Advance Publications, Inc. and Jared Diamond*

AFFIDAVIT OF SERVICE

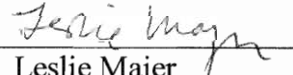
STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

I, LESLIE MAJER, being sworn, say: I am not a party to the action, am over 18 years of age and reside in Brooklyn, New York. On October 13, 2009, I caused to be served the within ANSWER by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to the following at the last known address set forth after their name:

Richard M. Asche, Esq.
Litman, Asche & Gioisella, LLP
45 Broadway, 30th floor
New York, New York 10006
Attorneys for Plaintiffs



Leslie Majer

Sworn to before me this
13th day of October, 2009.



Notary Public

LORETTA E. PERRY
NOTARY PUBLIC, State of New York
No. 24-4931617
Qualified in Kings County
Commission Expires August 1, 2010