

# **Exhibit A**

**UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17<sup>th</sup> day of May, two thousand twenty-three.

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David Harris,

Plaintiff - Appellant,

v.

American Accounting Association, Lisa De Simone,  
Mathew Ege, Bridget Stromberg,

Defendants - Appellees,

Jian Zhou,

Defendant.

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**ORDER**

Docket No: 22-811


Appellant, David Harris, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

  
Catherine O'Hagan Wolfe



# **Exhibit B**

22-811-cv  
Harris v. Am. Accounting Ass'n

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1           **At a stated term of the United States Court of Appeals for the**  
2 **Second Circuit, held at the Thurgood Marshall United States Courthouse, 40**  
3 **Foley Square, in the City of New York, on the 6<sup>th</sup> day of April, two thousand**  
4 **twenty-three.**

5  
6 **PRESENT:**

7           **DENNIS JACOBS,**  
8           **GERARD E. LYNCH,**  
9           **EUNICE C. LEE,**  
10           *Circuit Judges.*

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13 **David Harris,**

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15           *Plaintiff-Appellant,*

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17           **v.**

**22-811**

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21 **American Accounting Association,**  
22 **Lisa De Simone, Mathew Ege, Bridget**

1 **Stromberg,**

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*Defendants-Appellees,*

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5 **Jian Zhou,**

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*Defendant.*

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10 **For Plaintiff-Appellant:**

DAVID HARRIS, pro se,  
Manlius, NY.

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13 **For Defendant-Appellee American  
14 Accounting Association:**

ANDREW S. HOLLAND (Peter A.  
Lauricella, *on the brief*). Wilson, Elser,  
Moskowitz, Edelman & Dicker LLP,  
Albany, NY.

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18 **For Defendants-Appellees De Simone,  
19 Ege, and Stromberg:**

BENJAMIN D. WILSON, Deputy  
Solicitor General (H. Melissa Mather,  
Assistant Attorney General, *on the  
20 brief*), for Ken Paxton, Attorney  
21 General of the State of Texas, Austin,  
22 TX.

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25 Appeal from a judgment of the United States District Court for the

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Northern District of New York (Mae A. D'Agostino, *Judge*).

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**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,**

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**ADJUDGED, AND DECREED** that the judgment of the district court is

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**AFFIRMED** in part and **REVERSED** in part.

1 Appellant David Harris, proceeding pro se, sued the American  
2 Accounting Association (“AAA”) and three individuals for unfair competition  
3 under New York common law, alleging that the individual defendants had  
4 plagiarized a working paper he had uploaded to the Social Science Research  
5 Network (“SSRN”) in 2008, and that AAA had published the plagiarizing paper  
6 in its academic journal, *The Accounting Review*.<sup>1</sup> The district court dismissed the  
7 amended complaint, reasoning that it lacked personal jurisdiction over the  
8 individual defendants and that Harris had failed to state a claim against AAA.  
9 It further awarded attorneys’ fees and costs to the defendants under New York’s  
10 anti-SLAPP law.<sup>2</sup> We assume the parties’ familiarity with the underlying facts,  
11 the procedural history of the case, and the issues on appeal.

12 We review de novo district court orders dismissing a complaint for lack  
13 of personal jurisdiction and for failure to state a claim. *Chen v. Dunkin’ Brands,*  
14 *Inc.*, 954 F.3d 492, 497 (2d Cir. 2020) (personal jurisdiction); *Chambers v. Time*

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<sup>1</sup> See generally Lisa De Simone et al., *Tax Internal Control Quality: The Role of Auditor-Provided Tax Services*, 90 *Acct. Rev.* 1469 (2015).

<sup>2</sup> SLAPP stands for Strategic Lawsuit Against Public Participation.

1 *Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (failure to state a claim). We review  
2 the denial of reconsideration for abuse of discretion. *Trikona Advisers Ltd. v.*  
3 *Chugh*, 846 F.3d 22, 29 (2d Cir. 2017).

4 **I. Personal Jurisdiction**

5 Federal Rule of Civil Procedure Rule 12(b)(2) provides that a complaint  
6 may be dismissed for lack of personal jurisdiction. In ruling on a motion under  
7 Rule 12(b)(2), a district court must “determine whether there is jurisdiction over  
8 the defendant under the relevant forum state’s laws” —here, New York’s. *Bank*  
9 *Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir.  
10 1999). The plaintiff bears the burden of demonstrating that jurisdiction  
11 exists. *See Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994).  
12 Because neither party sought to conduct discovery or requested an evidentiary  
13 hearing, and the district court relied on the pleadings and affidavits, Harris was  
14 required to make only a prima facie showing of jurisdiction. *See S. New Eng. Tel.*  
15 *Co. v. Global NAPs Inc.*, 624 F.3d 123, 138 (2d Cir. 2010).

16 Harris did not argue that the individual defendants themselves committed  
17 any acts that subjected them to the jurisdiction of courts in New York. Rather,

1 he asserted that they either conspired with AAA or engaged AAA and non-party  
2 SSRN (both of which, it appears to be conceded, are subject to jurisdiction in New  
3 York) as their agents to commit a tortious act, bringing them within the ambit of  
4 New York's long-arm statute, CPLR § 302(a)(2).

5 Like the district court, we are unpersuaded. To allege a conspiracy theory  
6 of jurisdiction, "the plaintiff must allege that (1) a conspiracy existed; (2) the  
7 defendant participated in the conspiracy; and (3) a co-conspirator's overt acts in  
8 furtherance of the conspiracy had sufficient contacts with a state to subject that  
9 co-conspirator to jurisdiction in that state." *Charles Schwab Corp. v. Bank of Am.*  
10 *Corp.*, 883 F.3d 68, 87 (2d Cir. 2018). A conclusory assertion of conspiracy is  
11 insufficient. *See Lehigh Valley Indus., Inc. v. Birenbaum*, 527 F.2d 87, 93–94 (2d Cir.  
12 1975). Rather, a plaintiff must specifically plead facts that "reveal a unity of  
13 purpose or a common design and understanding, or a meeting of minds in an  
14 unlawful arrangement." *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 781 (2d Cir.  
15 2016) (internal quotation marks omitted).

16 Harris did not allege concrete facts sufficient to support the conclusion that  
17 AAA and the individual defendants conspired to unfairly compete against him.



1 At most, he alleged that AAA was aware of a plagiarism accusation against the  
2 individual defendants because he had emailed his allegations to the editor of *The*  
3 *Accounting Review*, and that AAA went on to publish the individual defendants'  
4 paper anyway. Harris argues that alleging a defendant's knowing participation  
5 in the action that is the basis for this lawsuit is sufficient to show membership in  
6 a conspiracy. But while participation in a conspiracy can create liability for  
7 fraud under New York law, *see Kuo Feng Corp. v. Ma*, 248 A.D.2d 168, 168–69 (1st  
8 Dep't 1998), Harris has not sufficiently alleged that AAA knowingly participated  
9 in a conspiracy *to unfairly compete* against him. The complaint alleges no facts  
10 suggesting that AAA published the article pursuant to an agreement with the  
11 individual defendants to disadvantage Harris, rather than based on its own  
12 independent editorial judgment.

13 Nor can Harris demonstrate personal jurisdiction through an agency  
14 theory. Harris argues that AAA and SSRN were agents of the individual  
15 defendants because AAA and SSRN published the individual defendants' paper,  
16 but he has failed to plead facts showing the requisite degree of control by the  
17 nonresident principals. *See Charles Schwab*, 883 F.3d at 85; *Am./Int'l 1994 Venture*

1 *v. Mau*, 146 A.D.3d 40, 54 (2d Dep't 2016). As the district court ruled, Harris in  
2 fact conceded that the individual defendants lacked control over whether AAA  
3 and SSRN published their work.

4 Accordingly, the district court properly determined that it lacked personal  
5 jurisdiction over the individual defendants.

## 6 **II. Unfair Competition**

7 The district court properly dismissed Harris's unfair competition claim  
8 against AAA. The "essence of unfair competition under New York law is the  
9 bad faith misappropriation of the labors and expenditures of another, likely to  
10 cause confusion or to deceive purchasers as to the origin of the goods." *Jeffrey*  
11 *Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 34 (2d Cir. 1995) (internal  
12 quotation marks omitted). Harris has failed to plausibly allege that the version  
13 of the paper published by AAA is likely to cause consumer confusion.  
14 Although he claims that earlier iterations of the individual defendants' work  
15 published to SSRN systematically downplayed Harris's role in developing the  
16 theories at issue, the final version of the individual defendants' paper published  
17 in *The Accounting Review*—the only iteration published by AAA—demonstrably

1 did no such thing. Crucially, Harris himself concedes that the final version  
2 included a “full and honest” citation to his work acknowledging that Harris and  
3 his coauthors were “first to examine the association” between the auditor  
4 services and accounting deficiencies at the heart of both projects. App’x 137.  
5 The amended complaint provides no basis to conclude that such a citation could  
6 nonetheless invite the misconception that some other group of authors had  
7 actually been “first.”

8 **III. Attorneys’ Fees and Costs Under N.Y. Civ. Rights Law §§ 70-a & 76-a**

9 Harris also challenges the district court’s award of attorneys’ fees and costs  
10 pursuant to New York’s anti-SLAPP statute, New York Civil Rights Law (“CRL”)  
11 § 70-a, as amended in late 2020.

12 Enacted in 1992, New York’s anti-SLAPP statute originally stated that  
13 “costs and attorney’s fees *may* be recovered upon a demonstration that the action  
14 involving public petition and participation was commenced or continued  
15 without a substantial basis in fact and law and could not be supported by a  
16 substantial argument for the extension, modification or reversal of existing law.”  
17 CRL § 70-a(1)(a) (McKinney 1992) (emphasis added). An action involving

1 “public petition and participation” was narrowly defined as one brought “by a  
2 public applicant or permittee, and [that] is materially related to any efforts of the  
3 defendant to report on, comment on, rule on, challenge or oppose such  
4 application or permission.” *Id.* § 76-a(1)(a) (McKinney 1992).

5 In November 2020, two months after Harris commenced this suit, the anti-  
6 SLAPP statute was amended to state that “costs and attorney’s fees *shall* be  
7 recovered” under the specified circumstances, *id.* § 70-a(1)(a) (McKinney 2020)  
8 (emphasis added), as well as to expand the definition of public petition and  
9 participation to include “any communication in a place open to the public or a  
10 public forum in connection with an issue of public interest; or . . . any other lawful  
11 conduct in furtherance of the exercise of the constitutional right of free speech in  
12 connection with an issue of public interest, or in furtherance of the exercise of the  
13 constitutional right of petition,” *id.* § 76-a(1)(a)(1)–(2) (McKinney 2020).

14 Among other procedural issues, the parties dispute whether the  
15 amendments to New York’s anti-SLAPP statute can apply to an action, like  
16 Harris’s, initiated before they became effective. We need not answer those  
17 questions. Even assuming without deciding that the statute applies in a

1 diversity suit in federal court, *cf. La Liberte v. Reid*, 966 F.3d 79, 88 (2d Cir. 2020),  
2 and applies to a case, like this one, begun before the statute's effective date but  
3 continued after, we conclude that the standard set by the statute for an award of  
4 attorneys' fees and costs has not been met. As the parties' significant reliance  
5 on federal (including district court) authority reflects, New York's unfair  
6 competition law is unclear in several respects. We are therefore not persuaded  
7 that Harris's reverse passing off claim, when viewed with the indulgence  
8 afforded to pro se litigants, was wholly "without a substantial basis in fact and  
9 law" and incapable of being "supported by a substantial argument for extension,  
10 modification or reversal of existing law," as the statute requires. *Aristocrat*  
11 *Plastic Surgery, P.C. v. Silva*, 206 A.D.3d 26, 29 (1st Dep't 2022) (quoting CRL § 70-  
12 a(1)(a)).<sup>3</sup>

13 \* \* \*

14 We have considered Harris's remaining arguments and find them to be

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<sup>3</sup> It bears emphasizing, however, that we wholeheartedly agree with the district court that Harris's troubling email weaponizing the specter of, among other things, oppressive legal fees and professional consequences in an attempt to bully the individual defendants is an example of the sort of abuse New York's anti-SLAPP statute was designed to prevent.

1 without merit. Accordingly, we **AFFIRM** the judgment of the district court in  
2 part and **REVERSE** in part. We **DENY** Harris's motion to certify questions of  
3 law to the New York Court of Appeals.

4 FOR THE COURT:  
5 Catherine O'Hagan Wolfe, Clerk of Court

