IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YASSER ABBAS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 12-cv-01565**
	)	
FOREIGN POLICY GROUP, LLC, A DIVISION OF THE WASHINGTON POST COMPANY, AND JONATHAN SCHANZER,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiff Yasser Mahmoud Abbas ("Plaintiff" or "Abbas"), the son of Palestinian president Mahmoud Abbas, has accused Foreign Policy Group, LLC and Dr. Jonathan Schanzer (collectively, "Defendants") of libeling him in a June 5, 2012 commentary headlined "The Brothers Abbas" (the "Commentary").[1] Plaintiff's theory is that the Commentary defamed him by posing "libelous questions." Although the Commentary leaves those questions unanswered—inviting readers to form their own opinions based on the facts reported throughout the balance of the piece—Abbas contends that the questions *suggest* and *imply* false and defamatory answers. Plaintiff attempts to bolster that theory by pointing to affirmative statements in the Commentary that, if imprecise, are neither materially false nor capable of defamatory meaning. For example, Abbas alleges that the Commentary falsely reports that his company received "nearly $300,000 in USAID funds" when, he insists, it actually "received ***$296,933***" through "***a consultant to*** USAID." Ex. A (emphases added). Neither the questions upon which Plaintiff's complaint relies nor the affirmative statements with which he quibbles are actionable as a matter of law.

Even if the Commentary contained actionable statements, however, the complaint must be dismissed for the separate reason that Abbas has failed to allege facts to support a finding of fault—a constitutionally required element of a libel claim. Plaintiff acknowledges that he is "the son[] of Mahmoud Abbas, the Palestinian President" and "a businessman who operates businesses throughout the Middle East" and that he has served as a "special envoy" and "done much work on behalf of the Palestinian people." Compl. ¶ ¶ 4, 9, 40, 43. In light of those admissions, Abbas is a public figure. Accordingly, he must plead and prove facts sufficient to

[1] The Commentary is included with this filing as Exhibit A. The articles to which the Commentary hyperlinks are collected as a composite exhibit (Exhibit B). The remaining exhibits (Exhibits C–J) are referenced and hyperlinked in the Commentary or referenced in Plaintiff's complaint.

show that Defendants published the Commentary with "actual malice"—that is, with "knowledge that it was false" or "serious doubts" about its truth. *St. Amant v. Thompson*, 390 U.S. 727, 728, 731 (1968). Plaintiff makes no such allegations (except for a few conclusory allegations that, in simply repeating the legal standard, are insufficient under *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). Thus, Abbas's complaint should be dismissed with prejudice.

ARGUMENT

Lawsuits like the present warrant special scrutiny at the motion to dismiss stage. Because of the "threat to freedom to the press" that libel actions pose, "district courts should apply close judicial scrutiny and properly dispose of defamation cases against the news media through summary procedures when and as soon as possible." *Mar-Jac Poultry, Inc. v. Katz*, 773 F. Supp. 2d 103, 111 (D.D.C. 2011) (citing *Coles v. Wash. Free Weekly, Inc.*, 881 F. Supp. 26, 30 (D.D.C. 1995), *aff'd* 88 F.3d 1278 (D.C. Cir. 1996), and *McBride v. Merrell Dow & Pharms., Inc.*, 717 F.2d 1460, 1466 (D.C. Cir. 1983)).[2] When the alleged defamation is by implication, as here, "careful exegesis" is necessary "to ensure that imagined slights do not become the basis for costly litigation." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 596 (D.C. 2000).

In evaluating a motion to dismiss, a court may consider the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the court may take judicial notice. *Phillips v. Mabus*, – F. Supp. 2d –, No. 11-2021 (EGS), 2012 WL 4476539, at *3 (D.D.C. Sept. 30, 2012) (quoting *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002)) (quotation marks omitted). When the subject of the complaint is an

[2] As Abbas has filed suit in the District of Columbia and alleged that "the damage to Plaintiff's reputation . . . transpired in the District of Columbia," Compl. ¶ 3, District of Columbia law applies to the merits of this dispute. *See Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 857 (D.C. Cir. 2006) (citing *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 626 (D.C. Cir. 2001)).

electronic publication that contains hyperlinks to other materials, the court may consider the other materials in deciding the motion. *See Jankovic v. Int'l Crisis Grp.*, 593 F.3d 22, 26 (D.C. Cir. 2010).[3]

The complaint should be construed in Plaintiff's favor, but inferences that are "unsupported by the facts set out in the complaint" should be rejected. *Phillips*, 2012 WL 4476539, at *3 (quoting *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)) (quotation marks omitted). Under *Ashcroft v. Iqbal*, Plaintiff must allege facts sufficient to show that his claim is "plausible," 556 U.S. 662, 679 (2009)—in this case, that the challenged portions of the Commentary are: (1) defamatory, (2) capable of being proven true or false, (3) "of and concerning" Plaintiff; (4) false; and (5) made with the requisite degree of intent or fault. *Coles*, 881 F. Supp. at 30 (quotation marks omitted). Plaintiff's complaint fails this test.

First, Abbas's central allegation is based on portions of the Commentary that are neither assertions of fact nor capable of being proven true or false; and Plaintiff's supporting allegations are based on statements that are not "of and concerning" him, not defamatory, and/or not materially false by his own admission. Second, Abbas fails to allege any facts to support his conclusory charge that Defendants acted with "actual malice."

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[3] *See also Agora, Inc. v. Axxess, Inc.*, 90 F. Supp. 2d 697, 704-05 (D. Md. 2000) (dismissing defamation claim based on facts disclosed through hyperlinks to underlying documents), *aff'd*, 11 F. App'x 99 (4th Cir. 2001); *Redmond v. Gawker Media, LLC*, No. A132785, 2012 WL 3243507, at *6 (Cal. Ct. App. Aug. 10, 2012) (unpublished) (article was protected opinion based on disclosed facts where "the article incorporates active links to many of the original sources"); *Sandals Resorts Int'l Ltd. v. Google Inc.*, 925 N.Y.S.2d 407, 409, 416 (App. Div. 2011) (where body of challenged email "intersperses comments by the writer with links to various Web sites that presumably contained information that prompted or support the writer's remarks," court concluded that "[f]ar from suggesting that the writer knows certain facts that his or her audience does not know, the e-mail is supported by links to the writer's sources").

I. The Challenged Portions of the Commentary Are Not Actionable.

This Court must decide as a matter of law whether the challenged portions of the Commentary are actionable. *See Moldea v. N.Y. Times Co.*, 22 F.3d 310, 316–17 (D.C. Cir. 1994). Because this case implicates First Amendment concerns, the Court should "err on the side of nonactionability." *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988).

A. Plaintiff's Central Allegation Is Based on Portions of the Commentary that Are Neither Assertions of Fact Nor Capable of Being Proven True or False.

Abbas's central allegation is that he was defamed not by any affirmative statement of fact, but by unanswered questions. In the operative paragraph of his libel cause of action, he alleges that "[t]he FP Article 'tells the world' that plaintiff is 'growing rich' off his 'father's system.'" Compl. ¶ 49. That allegation, however, quotes the Commentary's sub-headline, which merely posed a question: "Are the sons of the Palestinian president growing rich off their father's system?" Ex. A.

The remainder of the complaint alleges that the Commentary "***asked . . . the world to wonder if*** plaintiff has 'enriched' himself 'at the expense of regular Palestinians—and even U.S. taxpayers.'" Compl. ¶ 49. (emphasis added). That allegation is based on another question posed by the Commentary: "Have they enriched themselves at the expense of regular Palestinians and even U.S. taxpayers?" Ex. A.

According to Abbas, these are "*libelous* questions," Compl. ¶ 38,[4] which give rise to false and defamatory "innuendos," implication[s]," and "suggestions." *See, e.g.*, *id*. ¶ 38 (alleging that

[4] Plaintiff references these allegedly libelous questions throughout the operative "Counts" section of his complaint. *See Compl.* ¶¶ 49, 54, 81, 82, 89. In the "Statement of Facts" section, he cites two additional portions of the Commentary that he claims pose defamatory "questions." *See id.* at ¶ 39 (alleging that the Commentary "continues to libel plaintiff *by posing questions*: 'But the question is whether his lineage is his most important credential . . .'"); ¶ 41 (alleging

"defendants have defamed plaintiff by posing libelous questions and printing innuendos"); ¶ 39 (alleging that Dr. Schanzer "continues to libel plaintiff by posing questions"); ¶ 41 (discussing Defendant Schanzer's "final [allegedly] libelous question"); ¶ 54 (alleging that the Commentary "suggest[s] that plaintiff enriched himself at the expense of regular Palestinians"); ¶ 79 (alleging that the Commentary's "question and innuendos" were published "with reckless disregard as to their truth"); ¶ 89 (alleging that the Commentary "raises questions and makes innuendoes and suggestions about whether plaintiff enriched himself at 'the expense of regular Palestinians—and even U.S. taxpayers'"); ¶ 93 (alleging that the Commentary "was libelous by implication").

As explained below, the questions about which Plaintiff complains are legally insufficient to sustain his libel claim.

1. Plaintiff's Central Allegation Is Based on Questions—Not Assertions of Fact.

Questions have seldom been the subject of successful defamation actions, and for good reason—like statements of opinion, they are rarely amenable to interpretation as assertions of fact and are almost never "susceptible of being proved true or false." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). Although "[a] question can conceivably be defamatory," it is only be actionable if it can "be reasonably read as an *assertion* of a false *fact*; inquiry itself, however embarrassing or unpleasant to its subject, is not accusation." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1094 (4th Cir. 1993) (emphasis in original).

In *Chapin*, the court considered an article in the *Philadelphia Inquirer* that "pointedly questioned the finances" of a charity program that enabled participants to send "Gift Pacs" to

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that the Commentary "poses [its] *final libelous question*: 'At a time when the sons of Arab strongmen are under scrutiny, the questions surrounding the Abbas brothers will not go away. Indeed, the Arab public continues to demand accountability from its leaders—and the upcoming Rachid trail will only bring this controversy closer to Ramallah.'") (emphases added). These questions are addressed in Part I.B.

troops in Saudi Arabia. In one challenged portion of the article, the author posed a "hard to answer" question: "Who will benefit more from the project—GIs or veteran charity entrepreneur Roger Chapin of San Diego and Falls Church, Va., the organizer of the campaign?" *Id*. at 1093–94. That question, the court wrote, "is pointed, and could certainly arouse a reader's suspicion," but it "cannot be reasonably read to imply the assertion of the false and defamatory fact—pocket-lining—of which plaintiffs complain." *Id*. Instead, it "simply provokes public scrutiny of the plaintiffs' activities." *Id*.

In another challenged portion of the article, the author observed, "it is not clear where the rest of the money goes." *Id*. at 1095. With that sentence, the court held, the author was not making an assertion that "could be false"; rather, he was "invit[ing] the public to ask." *Id*. at 1096. The court reasoned:

> This invitation, rather than a libel, is the paradigm of a properly functioning press. Again, plaintiffs argue that the question implies the answer: Chapin is a dishonest man who pockets the difference. That answer was certainly within the wide range of possibilities, which is precisely why we need and must permit a free press to ask the question.

Id.

Courts across the country have employed similar reasoning in holding that questions could not support defamation actions. *See, e.g.*, *Partington v. Bugliosi*, 56 F.3d 1147, 1157 (9th Cir. 1995) (question did not "impl[y] a false assertion of fact"); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 195–96 (8th Cir. 1994) (question "was not a false statement of fact, nor could it reasonably be read as such"); *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 730 (1st Cir. 1992) (question "reasonably could be understood only as [the author's] personal conclusion about the information presented, not as a statement of fact"); *Volm v. Legacy Health Sys., Inc.*, 237 F. Supp. 2d 1166, 1178 (D. Or. 2002)

(statement in the form of a "rhetorical question" was not "an assertion of objective fact" and "not capable of being proven true or false"); *Carani v. Meisner*, No. 08-cv-02626-MSK-CBS, 2010 WL 3023805, at *3 (D. Colo. July 30, 2010) ("The question does not imply the existence of a fact that can be proven to be true or false, and thus, cannot be defamatory."); *Eisenstein v. WTVF-TV*, No. M2011-02208-COA-R3-CV, 2012 WL 3090307, at *5 (Tenn. Ct. App. July 30, 2012) (question was "'not equivalent to a direct charge'" but rather "invite[d] an answer of 'yes,' 'no,' or 'I don't know'") (quoting *McCluen v. Roane Cnty. Times, Inc.*, 936 S.W.2d 936, 940 (Tenn. Ct. App. 1996)).

In *Partington*, for example, the court considered whether a question posed in a book about the famous "Palmyra trials" was actionable. 56 F.3d at 1155. The author, Vincent Bugliosi, asked: "Had Walker's defense lawyers not *read* the theft-trial transcripts?" *Id*. (emphasis in original). The plaintiff claimed that the question was defamatory because "it implie[d] that he did not read the transcripts and that he therefore did not adequately represent his client." *Id*. The court rejected the claim because "the rhetorical device used by Bugliosi"—the question—"negates the impression that his statement implied a false assertion of fact." *Id*. at 1157. "Bugliosi's use of a question mark," the court explained, "serves two purpose[s]: it makes clear his lack of definitive knowledge about the issue and invites the reader to consider the possibility of other justifications for the defendants' actions." *Id*.

Similarly, in *Beverly Hills Foodland*, the court considered whether a question in a handbill distributed by a union was actionable. 39 F.3d at 195. The handbill stated the union's opinion that "employees of Beverly Hills Foodland are being treated unfairly" and asked recipients: "Is Beverly Hills Foodland being discriminatory in their hiring practices in the community?" *Id.* at 195 n.4. Quoting *Chapin*, the court noted that although "opinions [and]

questions do not enjoy absolute protection as such, to be actionable such statements must be 'reasonably read as an *assertion* of a false *fact*.'" *Id*. at 195–96 (citation omitted) (emphasis in original). Because the challenged portion of the handbill "was not a false statement of fact, nor could it reasonably be read a such," the court held that it could not support a defamation action. *Id*. at 196.

In *Phantom Touring*, the allegedly libelous question—posed by a columnist who wrote about a musical-comedy version of the "Phantom of the Opera"—was: "is Hill & Company trying to score off the success of Andrew Lloyd Webber's 'Phantom'?" 953 F.2d at 729 n.10. The court noted that the question "was posed rhetorically" and held that, at most, it "reasonably could be understood only as [the author's] personal conclusion about the information presented, not as a statement of fact." *Id*. at 729–30.

In this case, as in *Chapin*, *Partington*, *Beverly Hills Foodland*, and *Phantom Touring*, the portions of the Commentary upon which Plaintiff's complaint focuses are questions. Those questions—did Abbas "grow[] rich off" his father's system, and did he benefit personally at the expense of Palestinians and U.S. taxpayers—are legally indistinguishable from the questions found nonactionable in *Phantom Touring*—did the plaintiff "score off the success" of Andrew Lloyd Webber's musical—and *Chapin*—did the plaintiff "benefit" personally from his charity. And, like the questions in *Chapin*, *Partington*, *Beverly Hills Foodland*, and *Phantom Touring*, the questions in the Commentary are left unanswered. They cannot be reasonably read as assertions of facts, much less false facts, *see infra*, Part I.B; rather, they are an invitation to ask, which, "rather than a libel, is the paradigm of a properly functioning press." *Chapin*, 993 F.2d at 1096.

2. If the Questions Upon Which Plaintiff's Central Allegation Is Based Imply Anything, They Imply an Opinion—Not an Actionable Assertion of Fact.

Even assuming that the questions about which Abbas complains could be said to imply anything by way of an answer, what would be implied would be a mere *opinion*. *See Lucille Farm Prods., Inc. v. Dow Jones*, No. 19923-83, 11 Med. L. Rptr. 2240, 2242 (Sup. Ct. N.Y. Cnty. June 3, 1985) (sub-headline "Another Alburg?" questioning whether Plaintiff's business was associated with organized crime "makes no affirmative statement—at best it is to be construed as an opinion, or at worst a speculation"). In distinguishing assertions of fact from opinions, courts consider the language used, the context of the language, and the extent to which the language is verifiable (*i.e.*, capable of being proven true or false). *See Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc).[5]

As in *Ollman*, the Commentary uses "questions" and "interrogatory language," which "put[s] the reader on notice that what is being read is opinion." *Id*. at 983, 987.[6] Similarly, like the article in *Ollman*, which appeared on the Op-Ed page of the *Washington Post*, the Commentary in this case appeared on the "Arguments" page of the Foreign Policy ("FP")

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[5] *Ollman* was decided prior to *Milkovich* when the prevailing view was that statements of opinion received "absolute immunity from defamation actions." 750 F.2d at 974. *Milkovich* clarified that opinions can be actionable but only if they "contain a provably false factual connotation." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). Since *Milkovich*, however, courts have affirmed the continuing validity of the *Ollman* considerations in distinguishing opinions from facts. *See Moldea v. N.Y. Times Co.*, 22 F.3d 310, 313–15 (D.C. Cir. 1994); *Q Int'l Courier, Inc. v. Seagraves*, No. 95-1554 (RMU), 1999 WL 1027034, at *6 (D.D.C. Feb. 26, 1999) ("[T]he *Milkovich* holding does not discount the four factor test established in *Ollman* for distinguishing between utterances of fact and opinion.").

[6] The questions in *Ollman* concerned a Marxist professor who had been appointed to lead the department of politics and government at the University of Maryland. In an article about the appointment, the authors asked: "What is the true measure of Ollman's scholarship? Does he intend to use the classroom for indoctrination? Will he indeed be followed by other Marxist professors? Could the department in time become closed to non-Marxists, following the tendency at several English universities?" 750 F.2d at 973, 987 (quotation marks omitted).

website. *See* http://www.foreignpolicy.com/articles/2012/06/05/the_brothers_abbas (Nov. 5, 2012). The FP website describes the Arguments page as "[p]olemical, controversial, and powerful," providing "timely insight on stories making headlines around the world." *See* http://www.foreignpolicy.com/about_us (Nov. 5, 2012). FP's placement of the Commentary on the Arguments page signals to the "average reader" that he or she should "read the [challenged questions] to be opinion." *Ollman*, 750 F.2d at 990. Thus, to the extent one reads the questions as implicitly asserting opinions, rather than just posing questions, the resulting statements still cannot support a libel claim, since they cannot be proven true or false. Given the myriad of factors that may have contributed to Plaintiff's wealth—his education, his experience, his skill, and indeed, his connections and opportunities—it would be impossible to prove that Plaintiff grew wealthy solely because of his father. Conversely, given the myriad intangible ways that Abbas may have benefitted from his father's connections, it would be impossible to disprove the possibility that Plaintiff's success, at least in part, is attributable to his father.

The most that can be alleged of the questions challenged by Plaintiff is that they implicitly express an *opinion* on the controversy surrounding Abbas's wealth. *See Ollman*, 750 F.2d at 987 (noting that the authors "made it clear that they were not purporting to set forth definitive conclusions, but instead meant to ventilate what in their view constituted the central questions raised" by the facts in the article). However, because "[u]nder the First Amendment there is no such thing as a false idea," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), where an author sets forth the facts upon which his interpretation is based, leaving the reader free to form his or her own opinions, the author's opinion is not actionable. *Moldea*, 22 F.3d at 317 ("Because the reader understands that . . . supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based

upon those facts, this type of statement is not actionable in defamation." (quotation marks omitted)); *Partington*, 56 F.3d at 1156–57 ("[W]hen an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment."); *Agora*, 90 F. Supp. 2d at 704 (collecting cases for proposition that "opinions based on disclosed facts are protected").

And under D.C.'s fair comment privilege, even if the facts are not disclosed, so long as the underlying facts are available to the public, the author's comment upon those facts is not actionable. *Fisher v. Washington Post Co.*, 212 A.2d 335, 338 (D.C. App. 1965) ("Whether the article in question is fair comment and criticism on a matter of public interest is a question of law."). Here, the facts upon which the Commentary is based are clearly available to the public, and indeed sources for those facts are hyperlinked in the Commentary itself. Thus, the "opinions expressed by the writer" concerning that fact are not actionable. *Id.* at 337.

Where the author goes even further and provides facts from which a range of contrary conclusions may be drawn, the challenged questions are even less likely to support a defamation claim. *See Chapin*, 993 F.2d at 1096 (noting that answer allegedly implied by challenged question "was certainly within the wide range of possibilities, which is precisely why we need and must permit a free press to ask the question"); *Phantom Touring*, 953 F.2d at 730 (noting that journalist "not only discussed all the facts underlying his views but also gave information from which readers might draw contrary conclusions"). Such facts may be provided in the article itself or through hyperlinks to source materials. *Jankovic*, 593 F.3d at 26; *Agora*, 90 F. Supp. 2d at 704-05; *Redmond*, 2012 WL 3243507, at *6; *Sandals Resorts Int'l*, 925 N.Y.S.2d at 409, 416.

Here, the Commentary outlines facts from which a reader could formulate a "wide range" of answers to the questions it poses. At one end of the spectrum, the Commentary presents facts from which a reader might conclude that Abbas is a self-made man. The Commentary reports on Plaintiff's qualifications—he holds "a degree in civil engineering from Washington State University" and "worked for a variety of Gulf contracting firms from the 1980s until the mid-1990s"—and notes that Abbas "return[ed] to Ramallah ***in 1997***"—8 years before his father became the Palestinian president—"to launch businesses ***of his own***." Ex. A (emphases added). The Commentary further points out that Plaintiff does not use the surname "Abbas" in his biography, which might well be interpreted as a decision by Plaintiff ***not*** to exploit his father's name. And the Commentary includes hyperlinks to source materials that provide additional support for the self-made-man theory. For example, as Plaintiff concedes, the Commentary links to a "Reuters report," discussing some of his companies' contracts, that "state[s] that USAID confirmed that 'family ties were not a consideration' and the contracts were won through 'full and open competitive bidding.'" Compl. ¶ 26.

At the other end of the spectrum, one might argue that a reader could conclude that Abbas has exploited his father's system for personal gain, but substantial middle ground also exists. A reader might conclude, for example, that Plaintiff's father introduced him to certain legitimate business opportunities, but that Plaintiff, a well-educated and experienced businessman, capitalized on those opportunities on his own merit. By posing questions rather than making accusations, the Commentary leaves the choice to the reader. *See Chapin*, 993 F.2d at 1094.

Fundamentally, as Abbas acknowledges throughout his complaint, the Commentary is "constructed around questions, not conclusions," and merely raising questions is "insufficient to

sustain a defamation suit." *Chapin*, 993 F.2d at 1098. Indeed, "[t]he First Amendment is served not only by articles . . . that purport to be definitive but by those articles that, more modestly, ***raise questions*** and prompt investigation or debate." *Ollman*, 750 F.2d at 983 (emphasis added).

B. Plaintiff's Supporting Allegations Are Based on Portions of the Commentary that Are Not Capable of Defamatory Meaning, Not Materially False, and/or Not Of And Concerning Plaintiff.

In an apparent attempt to moor his tenuous defamation-by-questions theory to affirmative statements in the Commentary, Abbas quibbles with additional portions of the Commentary in the background section of his complaint. None of the statements that Plaintiff questions, however, is actionable.

As discussed in Part I.A, to be actionable, a statement must contain an assertion of fact and must be capable of being proven true or false. It also must be defamatory, i.e., "capable of defamatory meaning," as a matter of law. *Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1091 (D.C. Cir. 2007) (quotation marks omitted). The District of Columbia Court of Appeals has established a "high standard" for judging a statement defamatory: it "must be more than unpleasant or offensive; the language must make the plaintiff appear odious, infamous, or ridiculous." *Fleming v. AT&T Info. Servs., Inc.*, 878 F.2d 1472, 1475 (D.C. Cir. 1989) (quotation marks omitted).

Plaintiff also bears the burden of pleading falsity. *See Coles*, 881 F. Supp. at 30. "Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (quotation marks omitted). Similarly, "[s]light inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1296 (D.C. Cir. 1988) (quoting Restatement (Second) Torts § 581A cmt. f (1977)) (quotation marks omitted).

Finally, to state a defamation claim, the portions of the Commentary about which Abbas complains must be "of and concerning" him. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964) (quotation marks omitted); *Croixland Props. L.P. v. Corcoran*, 174 F.3d 213, 216 (D.C. Cir. 1999); *Coles*, 881 F. Supp. at 33. As the following review of the statements challenged by Abbas demonstrates, each fails one or more of these legal tests.

1. Mahmoud "Abbas's *wealth recently became a source of controversy during the investigation of Mohammed Rachid, an economic advisor to the late Palestinian leader Yasir Arafat, in a high-profile corruption probe. Last month, Palestinian officials charged Rachid with siphoning off millions of dollars in public funds; his trial is set to begin on June 7. According to a former Palestinian advisor,* Abbas *holds a grudge against Rachid dating back to the peace talks during the waning days of the Clinton era. In that intense period, Rachid was an advocate of working with Israel to find a solution, while* Abbas *called diplomacy a 'trap that was laid for us.'* Abbas *also resented Rachid because he was an Iraqi Kurd—not even a Palestinian—who had gained Arafat's trust and was part of his inner circle, while* Abbas *was on the outside looking in. 'There was a huge amount of jealousy,' the former advisor said. With his back up against a wall, Rachid has now fired back at the Palestinian president with claims that* Abbas *himself has socked away $100 million in ill-gotten gains.*" Ex. A (emphases added).

Plaintiff complains that Mohammed Rachid was a biased source and that Rachid's allegation that President Mahmoud Abbas socked away $100 million in ill-gotten gains was a "lie." Compl. ¶ 14.

This allegation does not support a libel against Plaintiff,Yasser Mahmoud Abbas, because it, is not "of and concerning" Plaintiff; it is "of and concerning" Plaintiff's father, Mahmoud Abbas.[7]

[7] Moreover, Rachid's allegation is not reported as fact. The Commentary puts the allegation in context, making it clear to the reader that Rachid's statement is merely the latest in an ongoing exchange of charge and countercharge. Ex. A. And, the Commentary expressly refrains from taking a position on the veracity of Rachid's allegation that President Abbas "socked away $100 million in ill-gotten gains," noting, "whether ***or not*** the charges have merit." *Id*. (emphasis added). In addition, the Commentary gives the reader ample factual context within which to evaluate the source and credibility of the allegation. For example, the Commentary reports that Rachid was investigated "in a high-profile corruption probe" and "charged" with "siphoning off millions of dollars in public funds." *Id*. And it notes that when Rachid made his allegation against President Abbas about the $100 million, he did so "[w]ith his back up against a

2. *Yasser now owns Falcon Tobacco, which reportedly enjoys a monopoly on the sale of U.S.-made cigarettes in the Palestinian territories.* Ex. A.

Plaintiff alleges that this statement is false and defamatory because "the cigarettes which Falcon Tobacco distributes": (a) are "manufactured primarily in Turkey," not the U.S., and (b) "constitute less than 3% of the market in the Palestinian Territories." Compl. ¶ 20.

Reporting that Falcon Tobacco distributed American-made cigarettes when in fact it distributed Turkish-made cigarettes is not a distinction of defamatory moment. Even if it were, the Commentary reports that Falcon Tobacco—not Plaintiff—distributed the cigarettes. *See Jankovic*, 494 F.3d at 1089 ("statements which refer to an organization do not implicate its members").

Moreover, this statement is not materially false. First, Abbas does not contest that Falcon Tobacco distributes U.S.-***branded*** cigarettes like Kent and Lucky, as reported in the Jerusalem Post article to which the challenged statement is attributed and hyperlinked. Exs. A, B. The alleged falsity, therefore, arises out of the use of the term "U.S.-***made***" instead of "U.S.-***branded***"—a distinction without a difference. *See* Compl. ¶¶ 18, 20. The "gist" and "sting" of both formulations—that Falcon Tobacco distributes what are generally regarded as American cigarettes—is true.

Second, contrary to Abbas's suggestion, the Commentary does not discuss the market for ***all*** cigarettes in the Palestinian territories; rather, it discusses the market for some "***U.S.-made*** cigarettes in the Palestinian territories." Thus, even if true, Abbas's allegation that "the cigarettes which Falcon Tobacco distributes . . . constitute less than 3% of the market in the

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wall." *Id*. A reader might reasonably decide to discount Rachid's allegation in light of these facts.

Palestinian Territories" does not make the Commentary's statement that Falcon enjoys a monopoly in the ***market for the brands of U.S. cigarettes*** that are referenced false.

3. *According to the Toronto Star, Yasser, also chairs Falcon Holding Group, a Palestinian corporate conglomerate that owns Falcon Electrical Mechanical Contracting Company (also called Falcon Electro Mechanical Contracting Company, or FEMC), an engineering interest that was established in 2000 and boasts offices in Gaza, Jordan, Qatar, the United Arab Emirates, and the West Bank. This business success has come with a helping hand from Uncle Sam: According to a Reuters report, Abbas's company received $1.89 million from USAID in 2005 to build a sewage system in the West Bank town of Hebron.* Ex. A.

Plaintiff claims that this portion of the Commentary is actionable because: (a) "FEMC has not 'received $1.89 million from USAID in 2005,'" and (b) FEMC won the contract following a "competitive tender"—not because Plaintiff is the son of President Abbas. Compl. ¶¶ 21–27. As to Plaintiff's first claim, the statement that FEMC received $1.89 million from USAID in 2005 is not materially false. As Plaintiff admits, USAID "ultimately awarded" FEMC the $1.89 million contract in 2005, but the project "was terminated . . . when Hamas took over the Palestinian Legislative Council" in 2006, by which point, FEMC had received only $872,578. Compl. ¶ 27. The precise amount of money that FEMC ultimately received is immaterial. The "gist" of the statement is that FEMC was a USAID contractor—a fact Abbas admits. And, in any event, the fact that FEMC received money from USAID is not defamatory.

As to Abbas's second claim, the Commentary simply does not report what Plaintiff alleges. The Commentary does not say that there was no competitive tender or that FEMC won the contract because of Plaintiff's father. In fact, as Abbas acknowledges, the Commentary cites and links to the source of the challenged statement—a "Reuters report"—that attributes to USAID the statements that "family ties were not a consideration" and the contract was won through "full and open competitive bidding." Compl. ¶ 26.

4. *According to Yasser's biography, other arms of Falcon Holding Group include Falcon Global Telecommunications Services Company and Falcon General Investment Company, companies about which less is known. Through the Falcon companies, Yasser boasted to an Emirati magazine in 2009 that the companies' revenues total some $35 million per year.* Ex. A.

Abbas challenges this portion of the Commentary because, he alleges: (a) the revenue figure is inaccurate and (b) revenues "do not equate to income for plaintiff because in the case of tobacco for example, approximately 93% of revenues were accounted for in cigarette costs, taxes and custom fees." Compl. ¶ 29.

Plaintiff admits the substantial truth of the revenue figure: "revenues," he acknowledges, "may have totaled some $35 million per annum in about 2005/6." *Id*. Plaintiff takes issue with the statement because "from 2006 onwards," revenues fell. Even if that is true, the "gist" and "sting" of the statement—that the Falcon companies have generated considerable revenue—is admittedly true. Furthermore, the Commentary does not report that the $35 million figure is current; rather, it discloses that the source of the figure is Abbas's own comments in 2009.

Regardless whether the figure is accurate, however, it is not defamatory of Plaintiff to report that his companies earned a particular amount of revenue. Nor does the Commentary say that the Falcon companies' revenue "equate[d] to income for plaintiff," as Abbas's complaint suggests. The Commentary refers to the "companies'" (not Abbas's) and "revenues" (not profits).

5. *Yasser is listed by the New York-based financial information database CreditRiskMonitor.com as the chairman of the publicly traded Al-Mashreq Insurance Company, with 11 offices across the Palestinian territories. The company is valued on the Palestinian stock exchange at $3.25 million.* Ex. A.

Plaintiff complains about these statements because he "owns only 2.85% of the shares" of Al-Mashreq, "making his shareholding worth some $92,625, rather than the $3.25 million" that the Commentary "suggests." Compl. ¶ 31. The alleged "suggest[ion]," however, is belied by the plain language of the Commentary, which states that "***[t]he company***"—not Abbas's share of

it—"is valued . . . at $3.25 million." Ex. A (emphasis added). Furthermore, these statements are not capable of defamatory meaning; there is nothing "odious, infamous, or ridiculous" about chairing a publicly-traded insurance company. *Fleming*, 878 F.2d at 1475 (quotation marks omitted). Finally, Abbas does not allege that any part of these statements is untrue, and he admits that "[i]n fact, Plaintiff is the Chairman of Al-Mashreq Insurance company." Compl. ¶ 31.

6. *Finally, Yasser serves as managing director of the First Option Project Construction Management Company, whose website suggests that it does a great deal of public works projects, such as road and school construction, on behalf of the Palestinian Authority. First Option employs at least 15 people in offices in Amman, Tunis, Cairo, Montenegro, and Ramallah. This enterprise also benefited from the U.S. government's financial support: As Reuters reported, First Option was awarded nearly $300,000 in USAID funds between 2005 and 2008.*

Abbas alleges that this portion of the Commentary is actionable because First Option: (a) "did not win business because plaintiff's father was President of the Palestinian Authority," (b) "is a consultancy rather than a construction company," (c) "won a bid from CH2M HILL, a consultant of USAID," and (d) "received $296,933." Compl. ¶¶ 33–34.

First, even if they exist, the factual discrepancies about which Abbas complains are neither material to his libel claim nor capable of defamatory meaning. The Commentary does not label First Option a "consultancy" *or* a "construction company," and even if it did, Plaintiff does not contest that the name of the company is "First Option Project *Construction* Management Company." Compl. ¶ 34. In light of that acknowledgement, it would not be materially false or defamatory to describe First Option as a "construction company." Similarly, whether First Option received funds directly from USAID or indirectly through a USAID consultant (CH2M HILL), the gist of the statement, that First Option "benefited from the U.S. government's financial support," is admittedly true. Compl. ¶ 34 ("First Option . . . won a bid from . . . a consultant to USAID . . . and received $296,933 . . . ."). And, perhaps most

obviously, it is not materially false or defamatory to report that First Option received "nearly $300,000," when, as Abbas concedes, it "received $296,933." Compl. ¶ 34.

Second, contrary to Plaintiff's suggestion, the Commentary does not report that First Option won this business "because plaintiff's father was President of the Palestinian Authority." Even if that was Dr. Schanzer's opinion, he provides ample facts from which a reader might form contrary opinions. *See Chapin*, 993 F.2d at 1096; *Phantom Touring*, 953 F.2d at 730. For example, the Commentary reports that First Option had relevant experience ("it does a great deal of public works projects, such as road and school construction") and capacity ("offices in Amman, Tunis, Cairo, Montenegro, and Ramallah"), as well as that Abbas's personal background includes a civil engineering degree and substantial business experience. Ex. A.

7. *Since the Arab Spring began in late 2010 and early 2011, the Abbas brothers have largely dropped out of sight in the West Bank. Where have they gone? According to an article written by Rachid on the staunchly anti-Abbas website InLight Press, the family owns lavish properties worth more than $20 million in Gaza, Jordan, Qatar, Ramallah, Tunisia, and the UAE*. Ex. A.

Plaintiff's only allegation about this portion of the Commentary confirms its substantial truth: "Plaintiff simply owns property," he acknowledges, "purchased with the profits of a lifetime in business, most successfully in the Gulf." Compl. ¶ 36. As Abbas seems to acknowledge, there is nothing "odious, infamous, or ridiculous" about "*simply* own[ing] property," Compl. ¶ 36 (emphasis added). Furthermore, the Commentary reports that "the family"—not Abbas himself—owns over $20 million worth of properties, and that assertion is placed in context by attribution to President Abbas's opponent, "Rachid," on a "staunchly anti-Abbas website." Ex. A. This qualification assures that the reader understands the source of the assertion and can make his or her own determination about its import. *See also* n. 6, *supra*.

8. *Of course, the Abbas brothers' absence doesn't mean that Palestinians will forget. On a research trip to Ramallah last year, several Palestinians told me that the Abbas family dynasty is common knowledge. However, discussion of the issue rarely rises above a whisper—thanks to growing fear of retribution by PA security officers, who have apprehended journalists and citizens for openly challenging President Abbas's authority*. Ex. A.

Plaintiff alleges that what "several Palestinians told" Dr. Schanzer "is no evidence to support the allegation that Palestinian Authority security officers are being used to protect Plaintiff's reputation," and "[o]n various Palestinian TV channels . . . the people attack and criticize the President, the Prime Minister, and the PA freely, and demonstrations take place in cities all over the West Bank." Compl. ¶ 38. Again, Plaintiff's reading of the Commentary is unreasonable. First, the Commentary does not say that security officers are protecting *plaintiff's reputation*; rather, it suggests that they are protecting *President Abbas's "authority."* Ex. A (emphasis added). Moreover, the Commentary does not suggest that Plaintiff is involved in any such use of Palestinian security officers, who answer to his father. In short, the lines about which Plaintiff complains are not "of and concerning" him.

Second, the accounts of "several Palestinians" are not reported as the basis for the alleged implication that "Palestinian Authority security officers are being used to protect plaintiff's reputation." Instead, they support the statement that "the Abbas family dynasty is common knowledge." By openly attributing that observation to first-hand conversations with "several Palestinians," the Commentary equips the reader to evaluate it as he or she deems appropriate.

9. *But the question is whether his lineage is his most important credential—a concern bolstered by the fact that he has occasionally served in an official capacity for the Palestinian Authority. In 2008, Yasser reportedly visited Kazakhstan as a special envoy, and according to a former Bush administration official, he regularly accompanies his father on official travel*. Ex. A.

Again, Abbas's only allegation about this portion of the Commentary confirms its substantial truth: "Plaintiff does sometimes accompany his father when his father is travelling on ***official trips***," including "as a ***special envoy***." Compl. ¶ 40 (emphases added). Plaintiff takes

issue with the stated "question[] . . . whether Plaintiff's lineage is his most important credential." *Id*. ¶ 39. However, the Commentary does not answer that question. *See* Part I.A, *supra*. Plaintiff alleges that he travels as a special envoy not "to exploit his connection" or "win business" but "only and strictly for the benefit of the Palestinians." *Id*. The Commentary does does not say *why* Plaintiff travels as a special envoy, and plaintiff confirms that he does indeed occasionally serve in an official capacity.

10. *At a time when the sons of Arab strongmen are under scrutiny, the questions surrounding the Abbas brothers will not go away. Indeed, the Arab public continues to demand accountability from its leaders—and the upcoming Rachid trial will only bring this controversy closer to Ramallah*. Ex. A.

Plaintiff's only allegation about this portion of the Commentary is that it constitutes Dr. Schanzer's "final libelous question." Compl. ¶ 41. Like the questions discussed in Part I.A, however, these lines do not convey assertions of fact that are capable of being proven true or false. *See* Part I.A, *supra*; *Compuware Corp. v. Moody's Investors Servs., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007) (holding that "predictive opinion" could not connote "actual, objectively verifiable facts" and therefore could not support a defamation claim).

In short, neither the Commentary as a whole, nor any question or statement therein, is legally sufficient to sustain Plaintiff's libel claim. Accordingly, the Court should dismiss Plaintiff's complaint with prejudice.

II. Plaintiff Fails To Allege that Defendants Acted with Fault.

The complaint should also be dismissed because Abbas fails to allege facts to support his conclusory allegation that defendants acted with the requisite degree of fault. *See Coles*, 881 F. Supp. at 30. As the complaint and the materials it incorporates by reference show, Plaintiff is a public figure, and thus, he must establish that defendants acted with actual malice in publishing

the Commentary. The complaint, however, contains no factual allegations that, if proven true, could establish actual malice on the part of either Dr. Schanzer or FP.

A. Plaintiff Is a Limited Purpose Public Figure.

"Whether the plaintiff is a public figure is a question of law for the court to resolve." *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1293 n.12 (D.C. Cir. 1980). In a libel case, "the question of public figure status is pervasive, and it should be answered as soon as possible." *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 724 (5th Cir. 1980); *see also Barry v. Time, Inc.*, 584 F. Supp. 1110, 1118 (N.D. Cal 1984) (holding that a collegiate basketball coach was a limited purpose public figure, noting "[t]his is not a case where further discovery is necessary to determine the plaintiff's particular role in the public controversy"); *Besen v. Parents & Friends of Ex-Gays, Inc.*, No. 3:12cv204, 2012 WL 1440183, at *4-5 (E.D. Va. Apr. 25, 2012) (holding, on a 12(b)(6) motion, that a spokesman for a non-profit group was a limited purpose public figure).

A person is limited purpose public figure if: (1) there is a pre-existing public controversy, (2) the plaintiff has played a non-trivial role in the controversy, and (3) the alleged defamatory statements are germane to the plaintiff's participation in the controversy. *Waldbaum*, 627 F.2d at 1296-98. Although Abbas summarily asserts that he is a "private businessman and is not a public figure," Compl. ¶ 75, his specific factual allegations and the articles referenced in his complaint establish that he is limited purpose public figure. First, Abbas's complaint establishes that there is a pre-existing public controversy. Plaintiff alleges that there is an ongoing public debate concerning the Palestinian Authority's leadership, noting "[o]n various Palestinian TV channels, such as the National Palestinian Channel, the people attack and criticize the President, the Prime Minster, and the PA freely, and demonstrations take place in cities all over the West Bank." Compl. ¶ 38. One aspect of that controversy concerns Plaintiff's wealth, and specifically

whether the U.S. government has contributed to the Plaintiff's accumulation of wealth. In his complaint, Abbas references various articles that have been published on this topic, and the Commentary cites and links to others.

One set of publications, incorporated by reference throughout the complaint, and hyperlinked in the Commentary, is a series of Reuters articles. Compl. ¶¶ 15, 22, 26, 32. On April 22, 2009, Reuters published an article revealing that firms run by Plaintiff and his brother had been awarded over $2 million in U.S. government contracts and subcontracts since their father became president of the Palestinian Authority. Ex. C; *see also* Ex. D. Reuters noted that it had "no information suggesting wrongdoing" by the USAID, but also noted controversy concerning the contracts as "[w]atchdog groups questioned USAID's level of transparency." Ex. C. In a follow-up article, Reuters revealed the details of the contracts between USAID and the Plaintiff's companies, noting that USAID claimed that the contract was awarded based on merit following a competitive bid. *Id*., Ex. D.

Similarly, a *Toronto Star* article, referenced at Compl. ¶ 21 and hyperlinked in the Commentary, notes that Israelis "have seized almost gleefully upon news of such wealth in the hands of a man so closely associated with the top Palestinian leadership." Ex. E. Plaintiff also admits that there has been a series of articles "concerning plaintiff published by Al-Aswak.net economic magazine." Compl. ¶ 12. And the complaint references an online article by Mohammed Rachid, which outlines charges of "financial corruption of Mahmoud Abbas and his family." Compl. ¶ 35; *see* Ex. F (Rachid's article followed by a Google translation). Finally, the complaint references congressional hearings about U.S. financial support to the Palestinian Authority in which open questions were raised about Plaintiff's accumulation of personal wealth during his father's presidency. Compl. ¶¶ 57-74; *see* Exs. G, H. The mere fact that Dr.

Schanzer testified in Congress about this subject underscores that it is an issue of pre-existing, public significance – particularly for a U.S. audience whose government's funds are implicated.

Second, Abbas is not a bystander to this controversy. By his own admission, he has voluntarily thrust himself into a role of prominence in both Palestinian politics and the controversy surrounding his wealth. As he explained in his complaint: "Plaintiff does sometimes accompany his father when his father is travelling on official trips," and "when plaintiff travels as a special envoy he does so only and strictly for the benefit of the Palestinians and the Palestinian cause." Compl. ¶ 40. He further alleges:

> Plaintiff has, for no remuneration, done much work on behalf of the Palestinian people, including ensuring the repatriation to the Palestinian National Fund of $45 million held by Orascom Telecom, ensuring the resumption of US and Canadian aid to the UN Relief and Works Agency for Palestinian Refugees, providing financial assistance to Palestinian students for studies in Palestinian and other universities, providing financial aid to Palestinians freed from Israeli jails and assistance to others in need.

Compl. ¶ 43. Plaintiff's decision to travel as a special envoy and to advocate internationally on behalf of the Palestinian people has necessarily implicated him in the controversy surrounding the Palestinian Authority.

Before filing suit in this case, Plaintiff gave an interview, which received media attention, about his relationship with the Palestinian Authority. In the interview, with Al-Aswak.net economic magazine (referenced in Compl. ¶ 28), Abbas "complained . . . that he had never received any privileges due to the fact that he's the son of the PA president." Ex. I. Like Abbas's decision to publicly advocate for the Palestinian people, his decision to grant an interview with a magazine in which he commented on his ability to use his father's position to his economic advantage has thrust him into the public controversy surrounding Plaintiff's and his

family's wealth. *See Waldbaum*, 627 F.2d at 1298 ("Those who attempt to affect the result of a particular controversy have assumed the risk that the press, in covering the controversy, will examine the major participants with a critical eye."); *see also Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994) (holding that the plaintiff "became a public figure through his activities," partly through "voluntarily submit[ing] to numerous interviews"). Plaintiff's prior interview also demonstrates that he has "access to the media to correct misstatements about [him]," further justification for holding Plaintiff to the burden of pleading and proving actual malice. *Waldbaum*, 627 F.2d at 1291.

While Abbas suggests that his participation in public life was only for the Palestinian people's benefit, he cannot selectively choose to insert himself into a public debate and avoid the attendant risk of criticism. *See, e.g.*, *Waldbaum*, 627 F.2d at 1300 ("[W]hen one assumes a position of great influence within a specific area and uses that influence to advocate and practice controversial policies that substantially affect others, he becomes a public figure for that debate."); *Clyburn v. News World Commc'ns, Inc.*, 903 F.2d 29, 33 (D.C. Cir. 1990) ("One may hobnob with high officials without becoming a public figure, but one who does so runs the risk that personal tragedies that for less well-connected people would pass unnoticed may place him at the heart of a public controversy.").

Third, the Commentary is clearly germane to the public controversy surrounding Plaintiff's wealth. The questions raised by the Commentary respond directly to Abbas's admitted voluntary participation in public life. The Commentary's questions about whether Abbas has grown rich based on his father's system ask if Plaintiff's claims that he works as a special envoy "strictly for the benefit of the Palestinians and the Palestinian cause," Compl. ¶ 40,

and has worked "on behalf of the Palestinian people" for "no remuneration," Compl. ¶ 43, are accurate.

B. Plaintiff Fails To Allege that Defendants Acted with Actual Malice.

Because Plaintiff is a public figure, he has the burden of pleading that defendants acted with actual malice in publishing the allegedly defamatory statements. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967). Abbas's complaint fails to allege any facts that would establish actual malice on the part of either defendant. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Under *Iqbal*, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). But not all purported factual matter must be "accepted as true," *id.*, as allegations that "are no more than conclusions, are not entitled to the assumption of truth," *id.* at 679. A complaint which "tenders 'naked assertion[s]' devoid of 'further factual enhancement'" fails to state a claim. *Id.* at 678 (alteration in original) (quoting *Twombly*, 550 U.S. at 557). Thus, the *Iqbal* Court, following the "two-pronged approach" of *Twombly*, began its analysis "by identifying the allegations in the complaint that are not entitled to the assumption of truth." 556 U.S. at 679-80. Only after "reject[ing]" allegations that "are conclusory and not entitled to be assumed true" did the *Iqbal* Court "consider the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief." *Id.* at 681.

Plaintiff's allegations parallel the allegations that were found to be insufficient by the Court in *Iqbal*. In *Iqbal*, Javaid Iqbal, a Pakistani citizen, was detained by the federal government in the wake of 9/11 and sued a number of federal government officials, including then-Attorney General John Ashcroft and then-FBI Director Robert Mueller, for unconstitutionally discriminatory conditions of confinement on the basis of his race, religion,

and/or national origin. *Id.* at 666. For Ashcroft and Mueller to be held personally liable, Iqbal had to show that they had personally known of and supported a policy of subjecting certain detainees to harsher conditions of confinement "because of, not merely in spite of, adverse effects upon an identifiable group." *Id.* at 677 (quotation marks omitted). Iqbal's complaint alleged all the elements of the claim: it stated that the defendants "'knew of, condoned, and willfully and maliciously agreed to subject' [Iqbal] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'" *Id.* at 680 (quoting Iqbal's complaint). The Supreme Court, however, dismissed these allegations as "bare assertions" that "amount to nothing more than a formulaic recitation of the elements of a constitutional discrimination claim." *Id*. at 681 (quotation marks omitted). Stripped of these conclusory allegations, the Court concluded that Iqbal's complaint lacked any allegations that, if proven true, would establish his entitlement to relief. It therefore dismissed his complaint.

As to the issue of actual malice, the complaint here is not materially different from that filed in *Iqbal*. Like the tort at issue in *Iqbal*, which required personal knowledge of and support for the practices at issue, Plaintiff's libel claims require a similar showing of fault, actual malice. Courts in post-*Iqbal* defamation cases have made clear that boilerplate assertions of actual malice are insufficient to withstand a 12(b)(6) motion to dismiss. *See, e.g.*, *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 56 (1st Cir. 2012) (dismissing a libel complaint that "used actual-malice buzzwords" because they were "merely legal conclusions, which must be backed by well-pled facts"); *Mayfield v. NASCAR, Inc.*, 674 F.3d 369, 377-78 (4th Cir. 2012) (dismissing a libel claim because the Plaintiffs pled only "conclusory" allegations of actual malice); *Hanks v. Wavy Broad., LLC*, No. 2:11CV439, 2012 WL 405065, at *12 (E.D. Va. Feb.

8, 2012) ("Since *Iqbal* and *Twombly*, in cases where a defamation claim requires a showing of actual malice, courts in the Eastern District of Virginia have found that conclusory allegations regarding the [defendants'] intent . . . are insufficient to survive a motion to dismiss." (alterations in original) (quotation marks omitted)). As in *Iqbal*, Plaintiff's complaint on its face alleges actual malice, stating that "The FP article and Dr. Schanzer's 9/14/11 testimony establish actual malice on the part of Dr. Schanzer." Compl. ¶ 76. But like *Iqbal*'s statement that John Ashcroft and Robert Mueller "knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to harsh conditions "on account of his religion, race, and/or national origin," 556 U.S. at 680 (alteration and quotation marks omitted), Plaintiff's complaint merely parrots back the legal standards—asserting that defendants acted with the requisite degree of fault. Plaintiff's conclusory allegation of actual malice fail to meet the pleading standards applicable to "all civil actions and proceedings in the United States district courts." *Iqbal*, 556 U.S. at 684 (quotation marks omitted). [8]

[8] Even if Abbas were not a public figure, the complaint should be dismissed because it fails to allege that Defendants acted negligently. *Phillips v. Evening Star Newspaper Co.,* 424 A.2d 78, 80 (D.C. App. 1980) (holding that even a private plaintiff must prove negligence in a defamation claim). *See, e.g., Winn v. United Press Int'l*, 938 F. Supp. 39, 45 (D.D.C. 1996) ("a periodical that relies on articles from other reliable publications is not negligent as a matter of law when it does not verify those articles with their original sources"); *Ortiz v. Valdescastilla*, 478 A.D.2d 513, 519 (N.Y. App. 1984) ("[A] publisher is privileged to publish information received from a dependable source of news unless he had, or should have had, substantial reasons to question the accuracy of the information or the bona fides of his sources. . . [A] publisher who reasonably relies on the investigative reporting of a trustworthy author cannot be deprived of the qualified privilege merely because the report is later determined to be without factual foundation. To deny the publisher his qualified privilege in such circumstances is tantamount to the unconstitutional imposition of liability without fault.").

1. Plaintiff Fails to Allege Facts Supporting Actual Malice by Dr. Schanzer.

Once the complaint is stripped of Abbas's conclusory recitations of fault, as required by *Iqbal*, his claims fail. As his only non-conclusory allegations of actual malice, Abbas relies on the Commentary itself and Dr. Schanzer's *consistent* testimony to Congress. Neither of these facts, taken alone or together, plausibly establish that Dr. Schanzer acted with actual malice.

Actual malice is a subjective standard. The requisite "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Actual malice should "not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991). Instead, a plaintiff must establish actual malice by presenting "sufficient evidence to permit the conclusion that the defendant in fact entertained *serious doubts* as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant*, 390 U.S. at 731 (emphasis added). Statements made with actual malice are "only those false statements made with the high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Neither of Plaintiff's allegations of actual malice, if true, would establish that Dr. Schanzer published the Commentary with "serious doubts" as to its truth or a "high degree of awareness of [its] probable falsity."

First, Abbas's allegation that the "FP Article . . . establish[es] actual malice on the part of Dr. Schanzer," Compl. ¶ 76, does not plausibly support a claim of actual malice. Malice on the part of Dr. Schanzer turns on whether he, in fact, harbored serious doubts about the truth of the Commentary. Allegations of errors in an article does not establish the defendant's subjective belief as to an article's accuracy. It is well established that the actual malice test "contemplates

that 'erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the breathing space they need to survive.'" *Washington Post Co. v. Keogh*, 365 F.2d 965, 971-72 (D.C. Cir. 1966) (alteration in original) (quoting *Garrison*, 379 U.S. at 74). Pointing to the Commentary itself does not establish a plausible claim that Dr. Schanzer harbored serious doubt about its veracity at the time of publication. Indeed, it would render the pleading standard for fault a nullity if libel plaintiffs could simply cite the content of the challenged publication as their evidence of actual malice.

Plaintiff's only remaining allegation of malice, that Dr. Schanzer gave congressional testimony about him, misses the mark. *See* Compl. ¶¶ 57–74. At best, the fact that Dr. Schanzer testified before Congress on the same subject contributes to an inference that he has repeatedly criticized the Abbases, not knowledge of falsity or serious doubts as to truth. *See Lohrenz v. Donnelly*, 350 F.3d 1272, 1284 (D.C. Cir. 2003) ("Evidence that the publishers of the alleged defamatory statements" that a woman pilot was unqualified "were on a mission to reinstate the ban against women being assigned to combat positions in the military does not suffice to show actual malice."); *Mayfield*, 674 F.3d at 378 (holding that "allegations that the Appellees intended to harm Mayfield by publishing his drug test results" "simply do not suggest that Appellees knew their statements were false or that they were reckless with respect to their veracity"). Dr. Schanzer's consistent congressional testimony does not establish that Dr. Schanzer published the Commentary with serious doubts as to its accuracy. To the contrary, the fact that Dr. Schanzer twice testified before Congress in a manner wholly consistent with the Commentary indicates his genuine belief in the veracity of the Commentary's content.

Plaintiff includes no further specific allegations of actual malice against Dr. Schanzer in his complaint. His general allegations that Dr. Schanzer made no "effort to contact plaintiff prior

to publication of the FP article" and "only used sources that supported his point of view," if proven true, would not establish that Dr. Schanzer acted with actual malice. Compl. ¶ ¶ 11, 12. The law is clear that "[f]ailure to investigate does not in itself establish bad faith." *St. Amant*, 390 U.S. at 733. In *St. Amant v. Thompson*, for example, the Supreme Court held the defendant's failure to confirm a charge before publishing it, without any evidence of the source's reliability, was insufficient to support a finding of actual malice because it did not demonstrate the defendant's subjective awareness of probable falsity. *Id.*; *see also Diario El Pais, S.L. v. Nielsen Co.*, No. 07CV11295, 2008 WL 4833012, at *7 (S.D.N.Y. Nov. 6, 2008) (holding that the "contentions that a different methodology would have produced a more accurate result do not amount to allegations that Defendant acted with actual malice" but rather was "merely a difference of opinion").

Here, Abbas's allegations of actual malice are even weaker. Dr. Schanzer relied on many articles and sources for the Commentary. The fact that he did not choose to conform his story to Plaintiff's preferred narrative, or rely on articles that Plaintiff would have found more favorable to his viewpoint, does not establish that Dr. Schanzer acted in bad faith or with actual malice. *See Coles*, 881 F. Supp. at 33 (holding that courts should be "very wary" of finding libel based on omission, as "[c]ourts must be slow to intrude into the area of editorial judgment" with respect to "omissions from news stories") (quoting *Janklow v. Newsweek*, 788 F.2d 1300, 1306 (8th Cir. 1986)).

2. Plaintiff Fails To Allege Facts Supporting Actual Malice by Foreign Policy.

Abbas has similarly failed to allege facts that, if proven true, would constitute actual malice on the part of FP. Dr. Schanzer is not an employee of FP, Compl. ¶ 8, and his state of mind is therefore not attributable to FP. *Secord v. Cockburn*, 747 F. Supp. 779, 787 (D.D.C.

1990) ("Actual malice must be proved separately with respect to each defendant, and cannot be imputed from one defendant to another absent an employer-employee relationship giving rise to *respondeat superior*." (citations omitted)). None of Plaintiff's well-pleaded allegations establish a plausible claim of actual malice on the part of FP.

To establish actual malice, Plaintiff relies on conclusory assertions that FP acted with the requisite degree of fault. *See* Compl. ¶¶ 79, 81, 82, 86. For example, Abbas alleges that the "[t]he questions, innuendoes and statements in the FP article were published by FP with reckless disregard of their truth or falsity or with malice." Compl. ¶ 86. Under *Iqbal*, these "bare assertions" that "amount to nothing more than a formulaic recitation" of the legal standard are insufficient. *Iqbal*, 556 U.S. at 681 (quotation marks omitted).

Once this court rejects the conclusory allegations of fault in the complaint, Plaintiff's allegations are insufficient to establish actual malice. First, Abbas asserts that FP "has acknowledged that at least a half dozen of the alleged facts it published may need clarification or to update the article with a more precise definition." Compl. ¶ 80. As a preliminary matter, that assertion is demonstrably false. FP responded to a letter from Plaintiff and maintained the substantial truth of all statements in the Commentary. Ex. J. Even assuming Plaintiff's allegation is true, however, it does not establish that FP harbored serious doubts as to the truth of the Commentary at the time of publication. Evidence of falsity is not circumstantial proof of FP's alleged bad faith in publication. *Tavoulareas v. Piro*, 817 F.2d 762, 775-76 (D.C. Cir. 1987) (en banc) (explaining that it is "well established that the standard of actual malice requires proof not merely that the defamatory publication was false, but that the defendant either knew the statement to be false or that the defendant 'in fact entertained serious doubts as to the truth of his publication.'") (quoting *St. Amant*, 390 U.S. at 731); *Secord*, 747 F. Supp. at 792 ("To argue

that evidence of actual malice exists by the mere fact that subsequent events determine the falsity of a source or statement would be tantamount to conflating the actual malice and falsity elements of a libel action. Accordingly, it is hornbook libel law that post-publication events have no impact whatever on actual malice as it bears on this lawsuit since the existence or non-existence of such malice must be determined as of the date of publication."). As the Supreme Court has emphasized "the First Amendment protect[s] some erroneous publications as well as true ones," as long as they are published in good faith. *St. Amant*, 390 U.S. at 732.

Abbas's allegation that FP "either knew or recklessly disregarded the fact that Dr. Schanzer's 9/14/11 testimony should have been disclosed to readers" also does not establish actual malice. Compl. ¶ 85. As explained above, the fact that Dr. Schanzer testified to facts consistent with the Commentary only serves to highlight his belief that the facts reported in the Commentary were accurate. Plaintiff's allegation against FP is likewise bereft of any plausible evidence of actual malice. Plaintiff alleges that FP should have known of Dr. Schanzer's prior testimony and disclosed it to readers. However, there is no reason why FP's decision not to disclose Dr. Schanzer's consistent testimony indicates that FP had serious doubts as to the accuracy of the Commentary.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's complaint with prejudice.

Respectfully submitted,

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