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.	)	
	)	

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss narrows considerably the libel claim in this case—to a supposed allegation of fact that the challenged Commentary cannot reasonably be read to support. Although Plaintiff devoted much of his complaint to criticizing the Commentary's discussion of his businesses, he now concedes that "the article's reference to these businesses is not the basis for Plaintiff's libel claim." Mem. in Opp. to Defs' Mem. to Dismiss, Dkt. No. 19, ("Opp.") at 10. Nor is the libel claim based on any alleged implication that he owes his success to family connections. "The question," Plaintiff explains, "is not whether Plaintiff is growing wealthy because of his father's connections, but rather whether Plaintiff is growing rich from the alleged corruption in the Palestinian Authority." *Id.* In other words, the libel claim here is that the questions posed in the Commentary "read as assertions of the false fact that Plaintiff is wrongfully and possibly even criminally getting rich off of his 'father's [corrupt] system.'" *Id.* at 1-2. Plaintiff claims to derive his interpretation of the Commentary not from the myriad statements about Plaintiff's (and his brother's) businesses that he no longer challenges, but rather from what he claims are two "new details" that the Commentary purported to introduce.

As redefined in Plaintiff's Opposition, this libel claim fails for a multitude of reasons: (1) the Commentary merely posed questions, without stating or implying as a factual matter that Plaintiff was guilty of criminal or corrupt conduct, and Plaintiff has wholly mischaracterized the Commentary in an effort to suggest otherwise; (2) even if the Commentary could be read to reflect any judgment about the facts that are revealed, that judgment would be protected as an (at most implied) opinion based on disclosed facts; and (3) as an entirely separate matter, Plaintiff is a public figure, and his Opposition, like his complaint, fails to set forth any facts that would support a finding of actual malice*, see Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

ARGUMENT

I. Plaintiff Implicitly Concedes the Nonactionablity of the Affirmative Statements in the Commentary.

Defendants systematically addressed Plaintiff's allegations about each portion of the Commentary in the Memorandum in Support of Defendants' Motion to Dismiss. Dkt. No. 16, at 4–21 ("Mem."). In Part I.A of the Memorandum, Defendants addressed the two questions in the Commentary upon which the complaint focused. *See id*. at 4–8. In Part I.B, Defendants addressed the various affirmative statements in the Commentary that the complaint suggested were objectionable, including the statements quoted at paragraphs 16, 21, 22, 28, 30, 32, 35, 37, 39, and 41 of the complaint. *See id*. at 13–21. Now, in his Opposition, Plaintiff accuses Defendants of "barking up the wrong tree" and trying to "divert attention from the ***actual*** allegations of libel" by including Part I.B and addressing these "***strawman*** supporting allegations." Opp. at 12 (emphases added) (internal quotation marks omitted). In particular, Plaintiff admits that "the article's reference to [his] businesses is not the basis for Plaintiff's libel claim." *Id*. at 10.

Consistent with those concessions, Plaintiff does not refute Defendants' argument that the portions of the Commentary quoted in paragraphs 16, 21, 22, 28, 30, 32, 35, and 39 of his complaint are not "of and concerning" him, not capable of defamatory meaning, and/or not materially false.[1] *See* Mem. at 13–21. Plaintiff has thus not contested any of the actual factual assertions in the Commentary that are actually about him. That is significant for two reasons: First, it means that there is no claim that any explicit statement in the Commentary is itself false

[1] Plaintiff makes a passing reference to his "dispute" with "various factual allegations" in the Commentary, but he does not identify the nature of that dispute or expound upon it, instead contrasting the "various factual allegations" with "the ***principal*** allegations supporting Plaintiff's libel claim." Opp. at 12 (emphasis added).

and defamatory. And second, it means that any opinions that may be expressed or implied are not actionable, because the facts have been disclosed in a manner that allows the reader to draw his own conclusions. *See* Mem. at 9-13; *Moldea v. New York Times Co.*, 22 F.3d 310, 317 (D.C. Cir. 1994) ("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)) .

II. Plaintiff's Claim Based on "Libelous Questions" Fails as a Matter of Law.

What remains, then, is Plaintiff's contention that the questions posed in the Commentary amount to a statement of fact that he engaged in criminal or corrupt conduct to obtain his wealth. That contention is baseless. The two questions posed were the following: (1) "Are the sons of the Palestinian president growing rich off their father's system?" and (2) "Have they enriched themselves at the expense of regular Palestinians—and even U.S. taxpayers?" Mem., Ex. A. Plaintiff's recitation actually leaves out the ultimate question the Commentary ultimately zeroes in on: "The President's son is certainly entitled to do business in the Palestinian territories. But the question is whether his lineage is his most important credential . . . ." Mem., Ex. A. Nothing about the way those questions were phrased—and nothing about the factual account contained in the Commentary—supports the proposition that they are merely a rhetorical device to disguise a straightforward allegation of fact that Plaintiff was guilty of criminal or corrupt conduct.

A. The Questions Do Not Amount to Assertions of Corruption by Plaintiff.

As a preliminary matter, Plaintiff is wrong that Defendants "do not dispute" that the Commentary poses "libelous questions." *Id*. at 1; *see also id*. at 8, 12. As Defendants explained in their Memorandum, the term "libelous questions" is an oxymoron; questions cannot be libelous unless they reasonably can be read as assertions of false facts—*Chapin v. Knight-*

Ridder, Inc., 993 F.2d 1087, 1094 (4th Cir. 1993); *see also Partington v. Bugliosi*, 56 F.3d 1147, 1157 (9th Cir. 1995); *Beverly Hills Foodland, Inc. v. United Food & Comm. Workers Union, Local 655*, 39 F.3d 191, 195–96 (8th Cir. 1994); *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 730 (1st Cir. 1992); *Carani v. Meisner*, No. 08-cv-02626-MSK-CBS, 2010 WL 3023805, at *3 (D. Colo. July 30, 2010); *Volm v. Legacy Health Sys., Inc.*, 237 F. Supp. 2d 1166, 1178 (D. Or. 2002); *Eisenstein v. WTVF-TV*, No. M2011-02208-COA-R3-CV, 2012 WL 3090307, at *5 (Tenn. Ct. App. July 30, 2012); *Lucille Farm Prods., Inc. v. Dow Jones*, No. 19923-83, 11 Med. L. Rptr. (BNA) 2240, 2242 (Sup. Ct., N.Y. County June 3, 1985)—or as implied opinions with factual connotations "susceptible of being proved true or false." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). Defendants' point, as the case law demonstrates, is that posing questions is rarely capable of being understood as an assertion of fact. "[I]nquiry itself, however embarrassing or unpleasant" to Plaintiff, "is not accusation," and the Commentary, which is structured around unanswered questions, "cannot be tortured to 'make that certain which is in fact uncertain.'" *Chapin*, 993 F.2d at 1094 (quoting *Carwile v. Richmond Newspapers, Inc.*, 82 S.E.2d 588, 592 (Va. 1954)).

In his Opposition, Plaintiff does precisely what *Chapin* prohibits. He twists the questions at issue into affirmative accusations of corruption—in his words, that he "wrongfully and possibly even criminally is getting rich off of 'his father's corrupt system'"—as a result of "alleged corruption in the Palestinian Authority." Opp. at 1, 6-7, 9.[2] The words "wrongfully,"

[2] *See also* Opp. at 10 ("The question is not whether Plaintiff is growing wealthy solely because of his father or whether his success is, at least in part, attributable to his father because of his father's connections, but rather whether Plaintiff is growing rich from the alleged ***corruption*** in the Palestinian Authority."); 11 (arguing that the Commentary makes a "defamatory innuendo that [his] wealth is attributable in some measure to ***corruption*** in the Palestinian Authority"); 12 (asserting that the Commentary makes the "libelous implication . . . that Plaintiff has ***wrongfully*** enriched himself"); 13 (contending that the Commentary makes

"criminally," "corrupt" and "corruption," however, appear nowhere in the Commentary—even in the form of questions, much less in the form of answers.[3] The fact that Plaintiff himself resorts to such vague, nonspecific terms in an effort to try to locate a defamatory statement of fact—for example, he nowhere points to what crime or corrupt act the Commentary supposedly accuses him of committing—merely reinforces that there is none to be found.

Indeed, even Plaintiff's own purported interpretation of the Commentary fails to point to anything that accuses ***him*** of corruption. Plaintiff argues that the Commentary implies that he "wrongfully . . . is getting rich off of '***his father's*** corrupt system'"—not his own. Opp. at 1 (emphasis added). If Plaintiff's father engaged in corrupt behavior to steer business to his son, that would bear upon his father's reputation, but not necessarily on his son's. The "wrongful" element would be "his father's corrupt system," not his own behavior—at least in the absence of anything directly charging Plaintiff himself with corruption. A plaintiff cannot complain of a defamatory charge, explicit or implicit, unless the charge is "of and concerning him"—in this case, unless Plaintiff was himself accused of criminal or corrupt conduct. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964); *Croixland Props. L.P. v. Corcoran*, 174 F.3d

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"the rhetorical accusation that Plaintiff is profiting from PA ***corruption***"); 15 (arguing that the Commentary makes "libelous accusations of ***corruption*** within the government of his father"); 16 (asserting that the Commentary makes the "scurrilous allegation that Plaintiff is growing rich off of his father's alleged ***corruption***") (emphases added).

[3] Plaintiff's current focus on an alleged implication of corruption is a departure from the theory of his complaint—that the questions at issue defamed him by implying that he benefitted from nepotism. *See* Compl. ¶ 24 (alleging that no contracts "were awarded to plaintiff as a result of his being the ***son*** of President Abbas"); ¶ 26 (alleging that Dr. Schanzer "neglect[ed] to report that . . . '***family ties*** were not a consideration'" in USAID's selection of Plaintiff's company to build a sewage system in Hebron); ¶ 33 (alleging that Plaintiff's company "did not win business because plaintiff's ***father*** was President of the Palestinian Authority"); ¶ 39 (alleging that the Commentary libeled Plaintiff by questioning "whether his ***lineage***" is his "most important" business "credential"); ¶ 40 (alleging that Plaintiff does not travel with his father "to exploit his ***connection*** to win business"); ¶ 48 ("Plaintiff worked hard his entire life to build his reputation long before his ***father*** was President of the Palestinian Authority.") (emphases added).

213, 216 (D.C. Cir. 1999). And there is nothing in the Commentary stating or implying that Plaintiff himself, as opposed to his father, had engaged in corrupt behavior.

Plaintiff himself acknowledges that language that "'admit[s] of numerous interpretations'" is "'unprovable'" and therefore not actionable. Opp. at 7 (quoting *Phantom Touring*, 953 F.2d at 728). Similarly, "language of ambiguity and imprecision" is not actionable. *Id*. at 8 (citing *Chapin*, 993 F.2d at 1093, 1098; *Beverly Hills Foodland*, 39 F.3d at 196). And more particularly, language in the form of questions, like the language at issue, is by design ambiguous. *Ollman v. Evans*, 750 F.2d 970, 983 (D.C. Cir. 1984) ("cautionary language or interrogatories . . . put the reader on notice that what is being read is opinion and . . . weaken[s] any inference that the author possesses knowledge of damaging, undisclosed facts"); *Partington*, 56 F.3d at 1157 ("a question mark serves two purposes: it makes clear [the author's] lack of definitive knowledge about the issue and invites the reader to consider the possibility of other justifications").

Defendant Schanzer did not imply that he had the answers to the questions he posed, let alone the answers that Plaintiff posits. Plaintiff repeatedly rests his claim that the questions here implied factual assertions of corruption by ignoring almost everything in the Commentary, including the portion he no longer challenges. Instead, he focuses almost exclusively on the single phrase in the beginning of the Commentary that "new details are emerging." Opp. at 1-2, 7, 9, 10-11. According to Plaintiff, the "new details" referenced consist entirely of just two things: (1) allegations by Mohammed Rachid, "a former Palestinian advisor," that his father has "socked away $100 million in ill-gotten gains"; and (2) "allegations by several unnamed Palestinian sources that critics of Plaintiff's father allegedly fear "retribution by PA security

officers, who have apprehended journalists and citizens for openly challenging President Abbas's authority." *Id.* at 2.

This completely mischaracterizes the Commentary, and demonstrates why Plaintiff's effort to identify some conclusive answer to the questions posed fails. It is clear from the Commentary as a whole that these are not the "new details" to which the author, defendant Schanzer, refers in the introduction to his Commentary. Schanzer states in his introduction that "new details are emerging of how close family members of Palestinian leader Mahmoud Abbas, a major U.S. partner in the Middle East, have grown wealthy." The "new details" are the details about Plaintiff's and his brother's personal wealth, and they are set forth in the very portions of the Commentary that Plaintiff no longer challenges. In other words, the "new details" to which Schanzer refers in his introduction are not themselves actionable, and they do not transform his questions into false and defamatory assertions of fact.

The two passages that Plaintiff erroneously characterizes as the "new details" appear later in the Commentary—in one instance at the very end—and do not imply corruption on his part at all. *See* Mem. at 14 & n.7, 20. As Defendants explained in their Memorandum, they are not even "of and concerning" Plaintiff; they are "of and concerning" his father, Mahmoud Abbas. *See* Mem. at 14. Thus, this passage cannot sustain a libel claim by Plaintiff. Moreover, with respect to Rachid's allegation, the Commentary does not even assert it as a statement of fact about Plaintiff's father. Rather, it expressly points out that Rachid made these charges "with his back up against the wall" after being charged with corruption by Palestinian officials, and the Commentary does not purport to endorse the merits of either position.

Read in context, the point of these two passages, which Plaintiff incorrectly labels as the "new details," is to opine that more people within the Palestinian territories may ask the same

questions Schanzer raises, at least more vocally than in the past. As such, these passages actually reinforce the point that the Commentary is posing questions, not offering answers. The Commentary notes that Plaintiff's and his brother's wealth "has become a source of quiet controversy within Palestinian society" since at least 2009, and suggests that the charges and counter-charges between Rachid and their father, regardless of their merit, may also lead to more scrutiny of Plaintiff's and his brother's wealth. Similarly, the point of the passage at the very end is that up to this point "discussion of this issue barely rises above a whisper," because people fear that Plaintiff's father (not Plaintiff) might perceive it as a challenge to his political authority. The Commentary then explicitly makes clear the only conclusion that it draws from these points—which is simply that "at a time when the sons of Arab strongmen are under scrutiny, the questions surrounding the Abbas brothers will not go away." Mem., Ex. A. The Commentary does not purport to conclude what the result of such scrutiny would be, and indeed does not rule out the possibility that it could ultimately benefit Plaintiff and his brother by yielding answers that would put the controversy over their wealth to rest.

News commentary would be stifled if journalists could not pose questions without having their questions construed as vague, undefined accusations of corruption. Courts are sensitive to this concern. Thus, for example, in *Chapin* the reporter posed the question: "Who will benefit more from the project—GIs or veteran charity entrepreneur Roger Chapin?" 993 F.2d at 1093-94. Chapin argued that the question asserted the false fact that he was corrupt—that he was guilty of "pocket-lining." *Id*. at 1094. The court rejected that argument because the question did not "naturally imply direct pocketing of Gift Pac sales proceeds or even dishonesty in a more general sense." *Id*. Likewise, the questions here do not "naturally imply" corruption on Plaintiff's part.

In sum, the two "new details" upon which Plaintiff relies do not amount to a factual assertion that the Plaintiff engaged in any criminal or corrupt conduct, nor do they transform the questions posed in the Commentary into factual charges of corruption.

B. Any Alleged Implications Were Matters of Opinion.

Even if a reader were to interpret the Commentary as doing more than posing questions and providing background facts, any alleged implications would be matters of opinion based on disclosed facts—and therefore protected by the First Amendment. "[C]autionary language or interrogatories . . . put the reader on notice that what is being read is opinion and . . . weaken any inference that the author possesses knowledge of damaging, undisclosed facts." *Ollman*, 750 F.2d at 983. The relevant facts in this case were set forth in the body of the Commentary and in hyperlinks embedded in the Commentary. *See* Mem. at 9-13; *see also Silvercorp Metals Inc. v. Anthion Mgmt. LLC*, No. 150374/2011, 2012 WL 3569952, at *10 (Sup. Ct., N.Y. Cnty. Aug. 16, 2012) (challenged statements not "based upon undisclosed facts" where they "were derived from data accessible by the provided hyperlink, giving readers the opportunity to review the underlying facts and form their own conclusions"); *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1102-03 (N.D. Cal. 1999) (where internet "posting directed readers to specific articles on [defendant's] web-site and provided a hyperlink for immediate access to such articles," court held that "[t]hese articles were at least as connected to [the] posting as the back page of a newspaper is connected to the front" and therefore "adequately disclosed the facts underlying" the opinion expressed). There was no suggestion of any undisclosed facts, and any subjective judgment that might be attributed to the author is therefore a matter of protected opinion. *See* Mem. at 9-13.

Plaintiff responds that the Commentary reads as a "news story"—not an "opinion piece." Opp. at 9. The nature of the piece as one of opinion, however, is supported not only by the

liberal use of "questions" and "interrogatory language," but also by the appearance of the Commentary on the "Argument" page of Foreign Policy's website. *See Ollman*, 750 F.2d at 983, 989, 990. To be sure, the Commentary contains facts. But so do most opinion pieces, and that does not render the alleged defamatory implication one of fact rather than opinion. To the contrary, the inclusion of facts in the Commentary serves to insulate any opinions that might be gleaned from the Commentary. "[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." *Partington*, 56 F.3d at 1156–57.

Plaintiff appears to argue that the Commentary implies the conclusion that Plaintiff's "wealth is attributable in some measure to corruption," and that the facts set forth in the Commentary do not support that conclusion. Opp. at 11. But even if the Commentary could somehow be read to imply that conclusion, it would be protected as a matter of opinion. By its very nature, a suggestion that Plaintiff's wealth is attributable "in some measure" to corruption would be so vague and uncertain that it is incapable of being proved true or false. *See Henry v. National Ass'n of Air Traffic Specialists, Inc*., 836 F. Supp. 1204, 1217 (D. Md. 1993) (statements suggesting that union officials had been "corrupted by their positions" and referring to "power's corrupting influence" on them were incapable of positive proof, and therefore protected opinion). And "when a speaker outlines the ***factual basis*** for his conclusion, his statement is protected by the First Amendment." *Partington*, 56 F.3d at 1156 (emphasis added). In the District of Columbia, as long as those facts are true and reasonably available to the public, the author's conclusion is also protected by the common law privilege of fair comment. *Fisher v. Washington Post Co.*, 212 A.2d 335, 338 (D.C. 1965).

It does not matter that Plaintiff contends that the opinion is not well-founded; no libel plaintiff thinks that a defendant's opinion is sound. The point is that the author's opinion enjoys protection because the disclosure of the facts upon which he relies enables the reader to decide whether he or she is in agreement. *Partington*, 56 F.3d at 1156–57; *Moldea v. New York Times Co.*, 22 F.3d at 317. That protection for opinions based on disclosed facts is obviously no less strong—if anything, it should be stronger—when the allegedly defamatory opinion is not expressed, but only arguably implied, and when it is set forth as an "Argument."[4]

In sum, the Commentary here did not accuse Plaintiff of criminal conduct or corruption, and any alleged implication based on the facts in the Commentary would be protected as an expression of opinion in any event.

III. Plaintiff Fails Adequately To Allege Fault.

Plaintiff's arguments that he is not a public figure, and that he has adequately alleged facts to support the constitutionally required element of fault, also fail — providing an additional, independent basis for dismissal.

A. Plaintiff Is a Limited Purpose Public Figure.

Plaintiff is a limited purpose public figure because there is a pre-existing public controversy in which he plays a non-trivial role and to which the alleged defamatory statements are germane. *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296-98 (D.C. Cir. 1980). Plaintiff argues that the public controversy concerning the wealth of President Abbas and his family, including Plaintiff, did not pre-exist the Commentary, but the articles incorporated by

[4] That opinion is involved here is underscored by Plaintiff's vague reference to an implication that Plaintiff is "wrongfully" getting rich off of his father's system. Opp. at 1. What is right and wrong in matters of business in general, and nepotism in particular, is often a matter of subjective judgment. Labeling favoritism for a relative as "wrong" is clearly a matter of protected opinion; stopping short of labeling it "wrong" is well within the bounds of free speech.

reference in the complaint and hyperlinked in the Commentary show otherwise. Furthermore, Plaintiff does not contest that he plays a non-trivial role in the controversy to which the allegedly defamatory statements relate.

First, based only on the articles incorporated by reference in the Complaint and hyperlinked in the Commentary, the wealth of President Abbas and his family, including Plaintiff, was the subject of public scrutiny at least two years before the Commentary was published. Two Reuters articles dated April 22, 2009 reported on USAID's award of a contract to Plaintiff's company. Mem., Exs. C & D. Reuters reported that watchdog groups questioned the "level of transparency" in awarding those contracts to Plaintiff's firms, specifically noting that the agency redacted the names of company officials in the contract documents. Mem., Ex. C. Reuters also reported that USAID defended the contract by stating that "[f]amily ties were not a consideration." *Id.* That Reuters included these details shows that, in 2009, questions about Plaintiff's businesses were already being asked.

Plaintiff voluntarily inserted himself into the controversy over his wealth. In the Reuters article, Plaintiff's attorney responded that allegations of favoritism were "baseless." Mem., Ex. C. And, as the *Jerusalem Post* reported on April 16, 2009, Plaintiff gave an interview to alaswaq.net economic magazine, claiming that "he's a self-made millionaire." Mem., Ex. I. In the interview, Plaintiff "complained . . . that he had never received any privileges due to the fact that he's the son of the PA president," specifically noting that "the PA government had never offered him so much as a free airline ticket or one pill of Aspirin." *Id.* On April 27, 2009, the *Toronto Star* followed up on the *Jerusalem Post* article, noting that the Plaintiff had become "the most talked-about Palestinian in the Holy Land." Mem., Ex. E. "Senior Palestinian officials groused about the interview in at least one newspaper in Israel," while others "seized almost

gleefully upon news of such wealth in the hands of a man so closely associated with the top Palestinian leadership." *Id.*

Plaintiff first argues that Dr. Schanzer created this controversy through his "article and his comments before Congress." Opp. at 13. As is clear from the sources hyperlinked in the Commentary, however, the controversy predated both the Commentary and Dr. Schanzer's congressional testimony in 2011 and 2012. Mem., Exs. G & H. The very title given to the 2012 hearing by the congressional committee, "Chronic Kleptocracy; Corruption Within the Palestinian Political Establishment," demonstrates that Congress, and not Dr. Schanzer, recognized a preexisting controversy.[5]

Plaintiff also argues that he has not inserted himself into the controversy over his wealth, but has instead "done much work for the Palestinian people." Opp. at 14. As is clear from Plaintiff's 2009 interview, however, *see* Mem., Ex. I, Plaintiff has specifically addressed and inserted himself into the public controversy concerning his wealth. Plaintiff argues that his involvement with the Palestinian Authority is for the purpose of "adding to the coffers, not pilfering them." Opp. at 14. But the public figure question does not turn on whether Plaintiff contends that his motives were pure or not; the question is simply whether he was involved in a public controversy. And a person cannot insert himself into the public eye for a limited purpose,

[5] Indeed, further confirming that Dr. Schanzer did not create the controversy, at both hearings, members of Congress and witnesses other than Dr. Schanzer raised questions about the source of Plaintiff's (and his brother's) wealth. *See Promoting Peace? Reexamining U.S. Aid to the Palestinian Authority, Part II: Hearing Before the H. Comm. on Foreign Affairs*, 112th Cong. 112-68 (2011) *available at* http://foreignaffairs.house.gov/hearings/view/?1350 (testimony of Elliott Abrams, Senior Fellow for Middle Eastern Studies, Council on Foreign Relations) (calling for investigation of "the personal finances of President Abbas and his family" as "part of any aid program"); *id.* (noting the "fair amount of money that the [Abbas] family has gotten" as something "we will investigate"); *Chronic Kleptocracy: Corruption within the Palestinian Political Establishment*, *Hearing before the Subcomm. on the Middle East and South Asia of the H. Comm. on Foreign Affairs*, 112th Cong. 112-167 (2012) *available at* http://foreignaffairs.house.gov/hearings/view/?1454 (introductory comments by Subcommitee Chairman Steve Chabot).

and then foreclose the public from commenting on his participation. *See Chapin*, 993 F.2d at 1094; *Waldbaum*, 627 F.2d at 1300.[6]

B. Plaintiff Has Not Alleged Actual Malice (or Negligence).

To allege that Defendants acted with actual malice, Plaintiffs must plead facts that indicate that Dr. Schanzer and Foreign Policy ("FP") "entertained serious doubts as to the truth" of the Commentary at the time of publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). An individual acts with actual malice only if he had "subjective awareness of probable falsity" at the time of publication. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974). Plaintiff has failed to identify a single fact that would support such a conclusion. All he has offered is a conclusory allegation of fault in the complaint and the equally conclusory statement in his Opposition that "neither the [Commentary] itself, nor any of the several articles and sources upon which Mr. Shanzer relied . . . even remotely support the libel." Opp. at 15. Statements like this, which are "no more than conclusions," do not suffice. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); Mem. at 26-28.

Plaintiff argues that Defendants have "acknowledge[d] in a different context" that Dr. Schanzer's sources do not support his Commentary. That is not so. In their public figure discussion, Defendants referenced one of the Reuters articles, which noted that it had "no information suggesting wrongdoing" pertaining to the USAID contract but that "[w]atchdog groups questioned USAID's level of transparency." Mem., Ex. C. That hardly supports any

[6] Further, Plaintiff alleges that he is a "special envoy," Compl. ¶ 40, "who has done much work for the Palestinian people," Opp. at 14 (listing examples of Plaintiff's accomplishments). As a "special envoy," Plaintiff would also qualify as a public official under *New York Times* and its progeny. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that public officials must establish that defendants acted with actual malice).

inference that the Defendants here entertained serious doubts as the truth of anything in the Commentary.

Even if the Reuters article somehow signaled a dispute over anything in the Commentary, that would not support an inference of actual malice. *See McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1305-08 (D.C. Cir. 1996) (holding that a reporter did not act with actual malice, even though it deleted from its draft a fact contradicting its source); *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 601 (D.C. Cir. 1988) (holding that a publication did not act with actual malice, even though it relied on an article which had been partially retracted); *Secord v. Cockburn*, 747 F. Supp. 779, 793 (D.D.C. 1990) ("the mere fact that divided opinion exists among reporters as to the credibility of an individual does not reflect on the defendant's state of mind and actual malice"). Indeed, again assuming that the Reuters article signaled a dispute over anything in the Commentary, the fact that the Commentary linked to and disclosed the full text of both Reuters articles is evidence of the absence of malice. *Lohrenz v. Donnelly*, 350 F.3d 1272, 1286 (D.C. Cir. 2003) ("reporting perspectives at odds with the publisher's own, 'tend[] to rebut a claim of malice, not to establish one.'" (citation omitted) (alteration in original)); *McFarlane*, 74 F.3d at 1304 ("full (or pretty full) publication of the grounds for doubting a source tends to rebut a claim of malice, not to establish one").

In essence, Plaintiff's theory of fault is that the Defendants did not conform the Commentary to his preferred narrative, and did not rely on the exact passages in various articles that he finds most favorable. But that does not amount to a claim that Defendant acted with subjective awareness as to the probable falsity of the Commentary. *See Coles v. Wash. Free Weekly, Inc.*, 881 F. Supp. 26, 33 (D.D.C. 1995), *aff'd per curiam*, 88 F.3d 1278 (D.C. Cir. 1996) (unpublished table decision) ("Courts must be slow to intrude into the area of editorial judgment"

with respect to "omissions from news stories."). In this respect and others, Plaintiff simply misunderstands the actual malice standard. He says that "the legal standard" is whether the Commentary "tend[s] to injure plaintiff in his trade, profession or community standing or lower him in the estimation of [his] community." Opp. at 16. That, of course, is the standard for defamatory meaning, not the standard for actual malice.

Unable to set forth a proper allegation of actual malice, Plaintiff asks the Court to ignore *Iqbal*. *See* Opp. at 16 ("Plaintiff . . . seeks discovery of Defendants so that he can show the malice that Defendants argue cannot be proven."); 17 ("The Court may wonder why Mr. Schanzer would be making such entirely unsubstantiated serous libelous accusations. Discovery will expose his motives and the at best reckless disregard of Defendant FP . . . ."). Plaintiff is not entitled to this discovery, however, because he has not alleged facts that make his actual malice theory plausible. *See Schatz v. Republican State Leadership Comm.,* 669 F.3d 50, 59 (1st Cir. 2012) ("to make out a plausible malice claim, a plaintiff must still lay out enough facts from which malice might reasonably be inferred" (citing *Iqbal*, 556 U.S. at 686-87)).

Indeed, Plaintiff has not even set forth a proper allegation of negligence, which he would be required to allege and prove even if he were not a public figure. *See* Mem. at 28 & n.8. Plaintiff has not alleged that Dr. Schanzer violated any standard of care in writing the story. And FP's reliance upon the work of Dr. Schanzer, an independent contractor, was not negligent as a matter of law. *See 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 N.Y.S.2d 895, 899 (App. Div. 1984) ("[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.").

CONCLUSION

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

Respectfully submitted,

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Dated: December 31, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December 2012, I served the foregoing **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS** via the Court's CM/ECF system, upon:

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