Oral Argument Not Yet Scheduled

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

13-7171

YASSER ABBAS,

Plaintiff-Appellant,

—v.—

FOREIGN POLICY GROUP, LLC and JONATHAN SCHANZER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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GLOSSARY

"The anti-SLAPP Act" and "the Act" mean the District of Columbia anti-SLAPP Act of 2010, D.C. Code § 16-5501, *et seq.*

"Br." refers to Appellees' brief.

"D.C. Br." refers to the District of Columbia *amicus curiae* brief.

"FP" stands for Foreign Policy Group, LLC, formerly a division of the Washington Post Company.

"*Foreign Policy*" stands for the on-line and print publication by FP.

"Rule 12" refers to Federal Rule of Civil Procedure 12.

"Rule 56" refers to Federal Rule of Civil Procedure 56.

"The Schanzer article" and "the article" mean the June 5, 2012 article written by defendant Jonathan Schanzer and published in *Foreign Policy* entitled, "The Brothers Abbas," with the subtitle, "Are the sons of the Palestinian President growing rich off their father's system?"

SUMMARY OF ARGUMENT

The anti-SLAPP special motion to dismiss procedure does not apply in federal court because it conflicts with Rules 12 and 56. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege facts stating a claim that is "plausible on its face" even if it strikes a savvy judge that the proof of those facts is improbable. By forcing the plaintiff to establish that success is not merely plausible but likely, the anti-SLAPP Act bars claims at the pleading stage when Rule 12 would allow them to proceed—a direct conflict.

The Act also conflicts with Rules 12(d) and 56 because to defeat summary judgment under the federal rules, the non-movant only needs to "designate specific facts showing that there is a genuine issue for trial," which is a significantly different showing from identifying material factual disputes that a jury could reasonably resolve in plaintiff's favor. Defendants' argument that courts are applying a "summary-judgment-like" standard despite the contrary and significantly more onerous standards actually set forth in the anti-SLAPP statutes is meritless. It also appears to conflict with the amicus brief filed by the District of Columbia, which emphasizes the draconian nature of the Act to make the point that it is "akin to a qualified substantive immunity." (D.C. Br. 8; 7-13).

Here, while some of Plaintiff's defamation claim involves a question of law, other parts involve questions of fact. The federal rules do not permit the court to

dismiss a complaint that is pled with detailed and plausible factual allegations, with prejudice, based on the court's own assessment of disputed evidence or its finding that the claim is not likely to succeed on the merits. The anti-SLAPP Act does.

* * *

If the anti-SLAPP standard for dismissal is, as Defendants seem to argue, whether Plaintiff's Complaint states a claim for defamation, then the district court's order should be reversed for that reason also because the Complaint does in fact do so. Defendants do not seriously dispute that accusing the son of the Palestinian President of "enriching himself at the expense of regular Palestinians and even U.S. taxpayers" is defamatory. The publication must be considered as a whole and in the sense it would be understood by readers. The Court should draw on its judicial experience and common sense in considering the parties' arguments and reading the Schanzer article for itself to determine whether the questions posed in the article, when read in the context of the article, are "at least capable of defamatory meaning." If they are, then whether they are defamatory and false are questions of fact to be resolved by the jury. Defendants' contrived alternative, non-defamatory characterizations of the article do not pass muster under any reasonable, common sense reading of the article.

Unlike case law relied on by Defendants, the Schanzer article is not "permeated with ambiguity," nor does it advance alternative answers to the questions it raised.

Even if the libelous questions are deemed to be the author's opinions, they are still actionable if they contain a provably false factual connotation. Whether Plaintiff is "growing rich off [his] father's system" is a provable fact by investigating Plaintiff's relevant financial records to see what business he does, how he got it, and with whom he does it.

Finally, the Complaint alleges that Defendants acted with the requisite fault. Plaintiff disputes that he is a limited purpose public figure concerning the issue raised by Mr. Schanzer as to whether he is enriching himself at the expense of regular Palestinians and U.S. taxpayers. That is an issue of Mr. Schanzer's own making and Mr. Abbas's only involvement in that issue is limited to defending himself from Mr. Schanzer's defamatory allegations.

The Complaint pleads in detail Mr. Schanzer's lack of any support for his allegations, showing, at a minimum, his reckless disregard for the truth and his negligence in carelessly making his claims. Plaintiff's opposition also explains the serious consequences of the Schanzer article's reckless accusations—consequences with which Mr. Schanzer, who professes intimate familiarity with the Palestinians

and their culture, should be aware of—which further supports Plaintiff's malice claim.

ARGUMENT

The district court's denial of Defendants' Rule 12(b)(6) motion to dismiss is not before this Court because they have not appealed the order denying that motion. Yet, Defendants make the argument that the district court decided that the Schanzer article is not actionable as a matter of law and that this supported a dismissal under Rule 12(b)(6). Indeed, Defendants claim that "[e]ven if this Court decides that the Anti-SLAPP Act does not apply here, it could affirm the judgment below on the ground that the Complaint fails to state a claim under Rule 12(b)(6)," citing *Crocker v. Piedmont Aviation, Inc.,* 49 F.3d 735, 741 (D.C. Cir. 1995). (Br. 41 n.13).

Crocker holds that the prevailing party does not have to cross-appeal with respect to alternative *arguments* raised by it in the motion below unless it wants to enlarge the judgment in its favor. 49 F.3d at 741. Defendants' Rule 12(b)(6) motion was an entirely separate motion, not an alternative ground for them to prevail on their anti-SLAPP motion. *Crocker* does not support Defendants' position that they did not have to cross-appeal from the district court's order

denying their separate Rule 12 (b)(6) motion. The only question before the Court is whether the district court properly granted Defendants' anti-SLAPP motion.[1]

I. THE ANTI-SLAPP SPECIAL MOTION-TO-DISMISS PROCEDURE CONFLICTS WITH FEDERAL RULES OF CIVIL PROCEDURE 12 AND 56.

Defendants' lead argument on the conflict issue is that the "District of Columbia's own versions of Rules 12 and 56 exist 'side by side' with its anti-SLAPP Act without any apparent conflict, and the same holds true with respect to the Act and their nearly identical counterparts in the Federal Rules." (Br. 47).

In any case in which a defendant employs the anti-SLAPP Act's special motion to dismiss procedure, the District's own versions of Rules 12 and 56 for pretrial dismissal of actions will be supplanted, just as Federal Rules 12 and 56 would be supplanted in federal court—unless the defendant loses, in which case the *defendant* will be able to use the versions of Rules 12 and 56 as two additional, fallback opportunities to move to dismiss a plaintiff's action before trial. This view of existing side-by-side, shared by Defendants and the District, is unreasonable on its face.

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[1] Despite its denial on mootness grounds, given his likely consideration of judicial economy (his own and this Court's), the only reasonable explanation for Judge Sullivan's having denied Defendants' 12(b)(6) motion is that he concluded that the motion could not be granted because discovery is necessary.

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege facts stating a claim that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This standard does not impose a "likelihood of success" requirement at the pleading stage. *See id.* at 556.

Thus, any attempt to impose a "likelihood of success" requirement obviously conflicts with Rule 12(b)(6). By forcing the plaintiff to establish that success is not merely plausible but likely, the anti-SLAPP Act bars claims at the pleading stage when Rule 12(b)(6) would allow them to proceed. Defendants do not say otherwise.

The Act also conflicts with Rules 12(d) and 56. Rule 12(d) provides that "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Defendants' motion to dismiss under the anti-SLAPP Act is based largely on hundreds of pages of hearsay material from the internet.

Under Rule 56, the non-movant only needs to "designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986) (quotation marks omitted).

The federal rules do not *permit* the court to dismiss a complaint that is pled with detailed and plausible factual allegations, with prejudice, based on the court's

own assessment of the weight of disputed evidence or on its finding that the claim is not likely to succeed on the merits. The anti-SLAPP Act permits a dismissal in precisely those circumstances.

Here, while some of Plaintiff's defamation claim involves a question of law, other parts involve questions of fact—issues such as whether the Schanzer article's questions are supported by facts provided in the hyperlinked source material, whether Mr. Schanzer's alleged opinions are based on verifiable facts, whether the libelous questions at issue imply a provably false fact, whether Mr. Abbas is a limited purpose public figure, and, if so, whether he can prove, by clear and convincing evidence, that Defendants are guilty of actual malice, or alternatively, if Mr. Abbas is not a limited purpose public figure, whether Defendants were negligent.

The anti-SLAPP Act mandates a stay of discovery pending the court's resolution of a motion to strike. [16-5502(c)]. As Defendants note, a court may allow some "targeted discovery" if plaintiff establishes that such "discovery will enable the plaintiff to defeat the motion *and* will not be unduly burdensome." *Id.* para. (c)(2) (emphasis added). (Br. 55). By contrast, Rule 12(d) states that "[a]ll parties must be given a reasonable opportunity to present *all* the material that is pertinent to the motion." (Emphasis added). Similarly, Rule 56(d) places no limits

on the discovery available. Fed.R.Civ.P. 56(d) (stating that the court may "allow time to obtain affidavits or declarations or to take discovery").

This discovery-limiting aspect of the anti-SLAPP statute collides with the discovery-allowing aspects of Rules 12(d) and 56 and further highlights the conflict between the statute and the rules. Under the federal rules, a defendant cannot get a case dismissed for factual insufficiency while concealing evidence that supports plaintiff's case. The District anti-SLAPP Act allows for precisely that.

The application of the anti-SLAPP procedure in a defamation case like this one, where the defendant claims (erroneously, in Plaintiff's view) that the plaintiff is a public figure, is unfair in the extreme in ways that the federal rules would plainly not permit. Based on the anti-SLAPP Act, Mr. Abbas is required to establish a likelihood of proving by clear and convincing evidence the inherently fact-intensive question of actual malice by Defendants without any discovery from Defendants.

Defendants assert that Mr. Abbas's "arguments are purely speculative because he never sought any discovery under either the Anti-SLAPP Act or the Federal Rules." (Br. 56).

First of all, Defendants cannot seriously be taking the position that the provisions in the anti-SLAPP Act staying discovery do not stay discovery served

under the federal rules. That argument makes no sense—like Defendants' claim that Plaintiff could have, but did not, sought leave to amend his Complaint after the district court dismissed it with prejudice (Br. 57). The argument also is highly disingenuous because, as the District makes clear, the whole point of the Act is to put the plaintiff to his proof (45 days after the complaint is filed) before plaintiff can conduct discovery. This is in direct conflict with Rule 56, which ensures that adequate discovery will occur before summary judgment is commenced. Based on this conflict, the Ninth Circuit concluded that the discovery-limiting provisions of California's statute did not apply in federal court. *See Metabolife Int'l. Inc. v. Wornick,* 264 F.3d 832 (9th Cir. 2001).

Defendants assert that "the Federal Rules give him no right to demand that *Defendants* take discovery of *him.*" (*Id.*) (emphasis in original). Mr. Abbas does not demand that Defendants take discovery of him. He has denied Mr. Schanzer's accusations against him in great detail in the Complaint. (*See* JA-010 to 015, at ¶¶ 13-45). Mr. Abbas also filed an affidavit denying the accusations (*See* JA-009 at ¶¶ 4, 8). Plaintiff simply made clear that he understands that he must, and that he is prepared to, open up his records to rebut any claim that Mr. Schanzer's accusations are true. (*Id.* at ¶5).

The main thrust of Defendants' argument appears to be that courts, most notably those in California, including the Ninth Circuit, have construed their anti-

SLAPP Act to be "an early 'summary-judgment-like' motion" in which the courts have purportedly applied the summary judgment "material question of fact" standard despite the contrary and significantly more onerous "probability of success" standard actually set forth in the statute. (*See* Br. 49-54).

The short answer is that if that is what the drafters intended, then they could have and should have said so. They had Rule 56 to use as a model. Since they did not, it is reasonable to conclude that they intended something different—namely, in this case, that the D.C. Council intended the "likelihood of success" standard that it drafted. The District's amicus brief supports Plaintiff's view.

It also is by no means clear that, even if a court says that it is applying a "summary-judgment-like" standard, that doing so means the same thing as in an actual Rule 56 motion context following discovery given that the anti-SLAPP motion is made with no discovery or, at most, discovery that is deemed not unduly burdensome for the defendant and the Act also purports to shift the burden.

Along these lines, while Defendants confidently assert that Chief Judge Kozinski's opinion in *Makaeff* "rested on the erroneous view that the California anti-SLAPP statute requires a 'showing considerably more stringent than identifying material factual disputes" (Br. 54), nothing suggests that Defendants are better situated than the Chief Judge to understand and address the practical application of the anti-SLAPP statute in California.

Defendants further argue that even if this Court "were to construe the statute as imposing a higher pleading standard for a plaintiff to survive an anti-SLAPP motion . . . that would make no difference" because federal courts routinely apply heightened pleading and evidentiary standards provided by state law for a specific category of cases. (Br. 51-52 and n.18).

This argument misses the mark. All of the cases implicating state law cited by Defendants deal with state law *evidentiary* requirements (*see id.*), which are materially different from the procedural pretrial dismissal requirements governed by Rules 12 and 56. While some courts have found evidentiary requirements to implicate state substantive interests, Defendants do not dispute Plaintiff's assertion, which seems obvious, that Rules 12 and 56 are quintessentially rules of procedure. This is plainly relevant to whether a conflict exists between the anti-SLAPP Act's special motion to dismiss procedure and the pretrial dismissal procedures under Rules 12 and 56.

Defendants also cite the federal Private Securities Litigation Reform Act of 1995, requiring a §10(b) private securities claimant to "state with particularity facts giving rise to a strong inference" of scienter, to support Defendants' argument that Rules 12 and 56 were not intended to preclude special rules designed to make it more difficult to bring certain types of actions where state law defines the cause of action. (Br. 53 quoting *Godin,* 629 F.3d at 91). However, stating the obvious, the

Godin Court itself noted that Congress' enactment of additional *federal* pleading requirements for a particular class of *federal* cases does not mean that Federal Rules 12 and 56 do not displace similar pleading requirements under state law. *See id.*

Since the Act conflicts with Rules 12 and 56, the question is whether the rules run afoul of the Rules Enabling Act. They do not.

Defendants' approach invalidates Rules 12 and 56 to the extent they conflict with the alleged substantive policies and aims of the anti-SLAPP Act. As Justice Scalia noted in *Shady Grove* in rejecting a similar argument, "[t]he test is not whether the rule affects a litigant's substantive rights; most procedural rules do." 559 U.S. 393, at 406-07. "[I]t is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule." *Id.* at 410.[2]

Defendants and the District ignore the fact that the anti-SLAPP Act is codified with procedural matters in the D.C. Code, and the Act applies to all claims, not just to claims brought under District law, seriously undermining their claim that the Act "serves the function of defining state rights or remedies." It is

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[2] Defendants take issue with Plaintiff's reliance on this statement claiming that it is irrelevant to the conflict issue because it pertains to whether a federal rule that does conflict with a state law would violate the Rules Enabling Act. (Br. n.15). However, as here, that is the issue for which Plaintiff cites it. (*See* Pltf's Br. at 32). Moreover, that discussion is relevant because Plaintiff submits that the Act *does* conflict with Rules 12 and 56.

significant to note that California courts have repeatedly held, as a matter of state law, that California's anti-SLAPP rule is procedural in nature, and therefore, when the shoe is on the other foot, applies in California courts regardless of whether federal law governs plaintiff's claim. *See, e.g., Bradbury v. Superior Court,* 49 Cal.App.4th 1108, 1118 (Ct. App. 1996).

Even assuming a substantive right is created, the anti-SLAPP Act cannot apply in this Court because the D.C. Council has clearly mandated the *procedure* for enforcing any such substantive right that preempts Federal Rules 12 and 56. *See 3M Co. v. Boulter*, 842 F. Supp. 2d 85, at 108 (D.D.C. 2012).

While Defendants and the District note that the D.C. Council characterized the Act as "akin to a qualified immunity" (Br. 43), it is not, in fact, a substantive immunity from suit. The Act neither constitutes nor enables a court to effect any kind of "immunity." The D.C. Council could have, but chose not to, simply granted a defendant an immunity that could be invoked via a Rule 12 or 56 motion, similar to existing qualified or absolute immunities. Instead, the Council mandated a dismissal procedure that directly conflicts with the operation of the federal rules.[3]

Finally, since Rules 12 and 56 are applicable and valid, the Court need not

[3] The Court should also reject Defendants' fallback claim that even if the Act does not apply in federal court, the fee-shifting provision should be applied because it is substantive and "outcome determinative." (Br. 61 and n.23). It is no more substantive and outcome determinative than the Act's early dismissal procedure.

"wade into *Erie's* murky waters." *See Shady Grove,* 550 U.S. at 398. However, if the Court were to undertake an *Erie* analysis, the Court should reject Defendants' and the District's forum-shopping and "inequitable administration of the laws" arguments. Such claims are based on the implied premise that the federal judiciary and federal procedure are not up to the task of weeding out meritless claims early. But even if the parity were less than perfect, "[t]he short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping. To hold otherwise, would be to 'disembowel either the Constitution's grant of power over federal procedure' or Congress's exercise of it." *Shady Grove,* 559 U.S. at 416 (plurality) (cit. omitted).

II. THE COMPLAINT STATES A CLAIM FOR DEFAMATION.

A. Read in context, the accusatory questions posed by the Schanzer article can reasonably be read as assertions of false facts that are "at least capable of defamatory meaning."

On the merits, this case presents a familiar but difficult balancing act between recognizing "the First Amendment's vital guarantee of free and uninhibited discussion of public issues," on the one hand, and recognizing society's "pervasive and strong interest in preventing and redressing attacks upon reputation," on the other. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 22 (1990). In the words of the Court in *Milkovich,* "holding the balance true" in this case means permitting Mr. Abbas his day in court to clear his name.

As FP recognized when Mr. Abbas first objected to the Schanzer article (JA-374 – 376), the basis for Mr. Abbas's claim is the posing of the questions by Mr. Schanzer of whether Mr. Abbas is "growing rich off his father's system" and "enriching himself at the expense of regular Palestinians and U.S. taxpayers."

Defendants do not dispute that such accusations are defamatory. Under District of Columbia law, an utterance is defamatory "if it tends to injure [a] plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Olinger v. Am. Say. & Loan Ass'n*, 409 F.2d 142, 144 (D.C. Cir. 1969).

In determining whether something is defamatory, Defendants acknowledge that a court is to consider both the words themselves and the entire context in which the alleged defamatory utterance occurs. *See Ollman v. Evans*, 750 F.2d 970, 982-83 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

With the Schanzer article, it is not just the libelous questions posed but the tenor and nature of the article as a whole that shows that the questions are defamatory. Unlike case law relied on by Defendants, the article is not "permeated with ambiguity," nor does it "advance alternative answers to the questions it raised." *Chapin,* 993 F.2d at 1098. *See also Milkovich,* 497 U.S. at 21.

Read in context, the Schanzer article's libelous questions may be read, not as questions, but as outright assertions that Plaintiff is wrongfully and possibly

criminally getting rich off of his "father's system." The new "details" in the article concerning his "father's system" include allegations that his father "has socked away $100 million in ill-gotten gains" and allegations by several unidentified Palestinians 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."

The question is whether the meaning of the defamatory utterance "was reasonably understood by the recipient of the communication to have been intended in the defamatory sense." *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.D.C. 1990).

The article can reasonably be read to imply the meaning Mr. Schanzer alleges (rather than the contrived alternative conclusions suggested by Defendants). This is best shown by the fact that the comments following the article and the links to the article, when they are responding to the article, overwhelmingly understand the article to, not just imply, but to be actually making the claims that Mr. Schanzer alleges. (*See* *http://www.foreignpolicy.com/articles/2012/06/05/the_brothers_abbas*). Defendants do not dispute that this is the understanding of those commenting on the article.

Rather, Defendants object that the comments are not part of the record. (Br. 30 n.4). Plaintiff submits that the Court should give little consideration to this objection given all of the hearsay material used by Defendants to support their contemporaneously filed twin motions.[4]

But even disregarding the comments showing how the article was understood, the Court should "draw on its judicial experience and common sense" in considering the parties' arguments and reading the Schanzer article for itself to determine whether the questions posed in the article can reasonably read as assertions of false facts that are "at least capable of defamatory meaning"—and not as an "imagined slight" in Defendants' words (Br. 17). *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Defendants' alternative non-defamatory characterizations of the Schanzer article do not pass muster under any reasonable, common sense reading of the article. The same is true for their claim that the Schanzer article cannot reasonably be understood to be accusing Mr. Abbas of improper or criminal conduct when it alleges that he has grown rich off of his father's system "at the expense of" regular

[4] Plaintiff submits that the double-barreled motion to dismiss procedure allows the anti-SLAPP motion, with its hundreds of pages of prejudicial hearsay material in this case, to hopelessly infect the contemporaneously filed Rule 12(b)(6) motion, severely poisoning the well and making an objective consideration by the Court of the 12(b)(6) motion based on the complaint alone all but impossible.

Palestinians and U.S. taxpayers. (Br. 26 at n.2). To support this claim, Defendants argue that the article "did not even mention any possibility of 'theft' or 'stealing.'" (Br. 26).[5] Courts recognize that one word may imply another. In *Milkovich,* the allegedly defamatory column accused the petitioner of lying at a hearing. The column did not use the word "perjury." The Court nonetheless read the column as connoting that the petitioner committed perjury. So, too, here the article does not use the word "corruption" and yet a reasonable factfinder could conclude that the column implies that Mr. Abbas's wealth is attributable to such corruption.

As to the language used, Defendants, quoting *Ollman,* argue that the use of questions "put[s] the reader on notice that what is being read is opinion." (Br. 28). However, more to the point here is this Court's conclusion in *Ollman*, after noting Judge Friendly's rejection of "the notion that cautionary language could immunize an otherwise defamatory statement," that "when a statement is as 'factually laden' as the accusation of a crime, …cautionary language is by and large unavailing to dilute the statement's factual implications." 750 F.2d at 983.

When it comes to the context, Defendants focus on the article's placement in the Commentary section of *Foreign Policy* analogizing it to the Op-ed page of a

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[5] Along these lines, Defendants claim that Plaintiff's use of different words to describe Mr. Schanzer's accusations in the briefing below from the words used on appeal (*e.g.,* "criminally getting rich" vs. "stealing") shows that Mr. Abbas "has had difficulty defining what defamatory assertions he contends these questions imply [and] further underscores that they are nonactionable." (Br. 26 n. 3). The actual words are not the point. The concern is what they imply.

newspaper (Br. 28-29, 31). In *Milkovich,* the Supreme Court concluded that a column appearing on the editorial page of a newspaper connoting that the petitioner committed perjury was actionable. 497 U.S. at 21. The majority makes no mention of the column's placement, focusing instead on the content of the column. As in *Milkovich,* the actual content of the Schanzer article is more important than where the article physically appears in the on-line magazine, reading as it does like a news story purportedly shedding new light on an old story involving allegations of corruption in the Palestinian Authority.

Defendants also focus on the article's discussion of Plaintiff's financial holdings. (Br. 31-32). Read in context, that discussion is used to support Mr. Schanzer's implied accusation that Mr. Abbas must be growing rich off of nepotism because President Abbas is rich and powerful and his son is wealthy.

Defendants skirt the discussion in the article referring to "new emerging details" purportedly supporting Mr. Schanzer's accusation that Plaintiff has "enriched himself at the expense of regular Palestinians and U.S. taxpayers," signaling that this is news reporting, not *mere opinion*, as does the citation throughout the article to unidentified Palestinian sources.

The district court's denial of Defendants' Rule 12(b)(6) motion to dismiss is not before this Court because they have not appealed that order. However, if the Court were to consider that issue, contrary to Defendants' claim that a purely legal

question is presented by their Rule 12 motion, if statements appear to be "at least capable of a defamatory meaning," it is for the jury to determine whether the statements were so understood by their recipients and whether the statements are, in fact, false. *See, e.g., Olinger v. Amer. Sav. & Loan Ass'n,* 409 F.2d 142, 144 (D.C. Cir. 1969); *Von Kahl v. Bureau of Nat. Affairs, Inc.,* 934 F.Supp.2d 204, 216 (D.D.C. 2013). The jury's proper function, in turn, is to determine whether a statement, held by the court to be capable of a defamatory meaning, was in fact attributed such a meaning by its readers. *Restatement (Second) Of Torts* § 614 (2).

B. Defendants' cases are inapplicable.

Defendants principally rely on four cases to support their argument that the questions posed by the Schanzer article are not capable of defamatory meaning. None of the cases support their argument that Plaintiff's Complaint fails to state a claim.

Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 729 (1st Cir. 1992), involved statements in a theater column that the Plaintiff's musical comedy production of "Phantom of the Opera" was a "fake" and "phony" and questioned whether Plaintiff was "trying to score off the success of Andrew Lloyd Webber's 'Phantom.'" The "fake" and "phony" statements were "unprovable," in the Court's view, since those adjectives admit of numerous interpretations. *Id.* at 728. Most important, the Court concluded that "[t]he sum effect of the format, tone and entire

content of the articles is to make it unmistakably clear that [the author] was expressing a point of view." *Id.* at 729. That is not the case here where the sum effect of the format, tone and entire content of the Schanzer article conveys the impression that the author is reporting a fact-based news item with the newsworthy nature of the article enhanced by the author's claimed access to informed unidentified Palestinian sources.

In *Chapin v. Knight-Ridder, Inc.,* 993 F.2d 1087, 1093 (4th Cir. 1993), the Fourth Circuit held that the phrase "hefty mark-up" is too subjective a phrase to be verifiable, and in *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655,* 39 F.3d 191, 196 (8th Cir. 1994), the Eighth Circuit reached a similar conclusion concerning the term "unfair." *Beverly Hills*, 39 F.3d at 196.

Defendants claim that, like "hefty mark-up" and "unfair," the defamatory implications of the Schanzer article of "wrongful," improper," "corrupt" behavior and "nepotism" are "inherently a matter of opinion[] and cannot be objectively established." (Br. 29). To the contrary, allegations of "corruption" and "nepotism" are objectively verifiable—as are allegations of "wrongful" and "improper" conduct to the extent they are based on such allegations. *See Ollman,* 750 F.2d at 980 (indicating that accusations of corruption are laden with factual content that may support an action for defamation).

In *Chapin*, the statements were proven to be not defamatory because they were either true or opinions that could not be proven true or false. 993 F.2d at 1093-99. Unlike the Schanzer article, the article in *Chapin* "advance[d] alternative answers to the questions it raise[d], presenting both favorable and unfavorable views . . . [without] ultimately adopt[ing] any particular answer as correct . . . Language of ambiguity and imprecision permeate[d] the article, significantly coloring its tone . . ." *Id.* at 1098. No such "language of ambiguity and imprecision" permeates the Schanzer article, nor does the author advance any non-defamatory answers to his admittedly libelous questions.

Finally, the summary judgment decision in *Partington v. Bugliosi,* 56 F.3d 1147 (9th Cir. 1995), does not support Defendants' motion because the allegedly defamatory book and docudrama at issue in that case are so obviously unlike the Schanzer article in this case. In *Partington*, the allegedly defamatory statements at issue involved criticisms of the Plaintiff's trial strategies in one of the two Palmyra Island murder trials by the Defendant attorney who had tried a companion murder case and prevailed. The Plaintiff alleging defamation had lost.

The crux of the decision was the Ninth Circuit's conclusion that "the book's general tenor makes clear that Bugliosi's observations about Partington's trial strategies, and the implications that Partington contends arise from them, represent statements of personal viewpoint, not assertions of an objective fact." 56 F.3d at

1153. As Defendants acknowledge, the allegedly defamatory question at issue there also was more balanced, like the views in *Chapin*, because, significantly, the article noted: "Had Walker's defense lawyers not read the theft-trial transcripts? *Our copy had ended up in a warehouse; perhaps theirs had, too*." *Partington*, 56 F.3d at 1151 n. 2 (emphasis added).

C. Even if the defamatory questions are deemed to be opinions, they are actionable under *Milkovich* because they "contain provably false factual connotations."

Even if the libelous questions are deemed to be the author's opinions, Defendants acknowledge that they are actionable if they "contain a provably false factual connotation." *Milkovich*, 497 U.S. at 20. In *Milkovich,* the question was "whether a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding." *Id.* at 21. Quoting the Ohio Supreme Court's reading of the column, the Supreme Court wrote: "[t]he clear impact in some nine sentences and a caption is that [Milkovich] 'lied at the hearing after . . . having given his solemn oath to tell the truth.'" *Id.*

In the Supreme Court's words, "[t]his is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression." *Id.* The Court concluded that

"the connotation that the petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false" . . . "on a core of objective evidence by comparing, *inter alia,* petitioner's testimony before the OHSAA board with his subsequent testimony before the trial court." *Id.*

Here, the question is whether the Schanzer article contains provably false factual connotations. It does. There is nothing loose, figurative, or hyperbolic in the language used that would negate the impression that the writer was seriously maintaining that Mr. Abbas is "growing rich off his father's system" and "enriched [himself] at the expense of regular Palestinians—and even U.S. taxpayers." Nor does the general tenor of the article negate that impression. To the contrary, the unmistakable tenor of the article fosters that impression.[6]

Defendants have backed off slightly from the extreme argument regarding the verifiability factor that they cannot possibly be expected to prove that Plaintiff's wealth is *solely* attributable to nepotism and corruption in the Palestinian Authority. On appeal, they incorrectly claim that Mr. Abbas maintains "that unless the questioner can 'prove[]' the worst possible answers to some degree of unspecified certainty, the questions 'should not be published.'" (Br. 24)

[6] As with the perjury implication in *Milkovich,* the implication of wrongful financial dealings in the Schanzer article are capable of being proved true or false—in this case, by investigating Plaintiff's relevant financial records to see what business he does, how he got it, and with whom he does it.

To the contrary, Mr. Abbas's assertion is much more modest: if Mr. Schanzer, who is not a columnist but rather, as Defendants acknowledge, an expert on the Middle East and a terrorism finance analyst (Br. 4), cannot prove that Mr. Abbas is wrongfully profiting from his father's system at the expense of the Palestinian people and U.S. taxpayers, then any such assertions or implications should not be published. Such corruption claims are routinely investigated and prosecuted in this country.[7]

Defendants also rely on the principle that when 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 and the related principle that 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. (Br. 32-34). Based upon these principles, Defendants claim that if any answers were implied by the Schanzer article, the answers would be protected opinions (*Id.* at 33-34).

However, as Defendants acknowledge, if the libelous "facts" upon which the Schanzer article is based are *not* "clearly available to the public," then these

[7] We are not suggesting that Defendants should be put to some ambiguous and unreasonable burden of proof "to some degree of unspecified certainty." The question is whether any part of Mr. Abbas's wealth is attributable, for example, to contracts or work that he obtained that others should have gotten because they were better qualified or offered a better price.

arguments fail. While the article does cite and hyperlink to sources regarding Plaintiff's businesses, the article's reference to these businesses is not the basis for Plaintiff's libel claim. Rather, Plaintiff's libel claim is based on the author's assertion that "new details are emerging" as to how Plaintiff has grown wealthy. The only "new details" in the article relate to the author's reporting on his conversations with "a former Palestinian advisor" and "several Palestinians" during a research trip to Ramallah in 2011. Those alleged sources are unknown to the public. And, very importantly, those sources are the only thing "connecting" (and any such connection is a stretch) the prior reports regarding Plaintiff's wealth and Defendants' defamatory innuendo that the wealth is attributable in some measure to President Abbas's alleged corrupt "system."

D. The Complaint alleges that Defendants acted with the requisite fault.

Defendants assert that the Complaint fails plausibly to allege actual malice. However, to support their assertion on this issue, Defendants rely on over 100 pages of hearsay documents outside of the Complaint. (*See* Br. 35-37 nn.6-10).

Plaintiff disputes Defendants' claim that he is a limited purpose public figure, who must establish that Defendants acted with actual malice in publishing the Schanzer article. To prevail on this claim, Defendants must establish that: (1) there is a pre-existing public controversy, (2) Plaintiff has played a non-trivial role in the controversy, and (3) the alleged defamatory statements are germane to

Plaintiff's participation in the controversy. *See, e.g., Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296-98 (D.C. Cir. 1980).

Defendants do not address Plaintiff's argument concerning whether Defendants can bootstrap the specific allegations of corruption contained in the Schanzer article concerning Plaintiff to the existing broader general public controversy concerning the Palestinian Authority so as to make that part of the public controversy. The article attempts to make a similar bootstrapping argument to support the implication that Plaintiff is profiting from PA corruption with no factual support other than the vague claims of the author's unidentified sources.

Defendants also do not address Plaintiff's argument that this is not a situation like the cases relied on by Defendants in the district court where the alleged limited purpose public figure is the actual maker of the public controversy or inserts himself into a public controversy or uses his influence to advocate and practice controversial policies. Rather, this is a situation where others, most notably Mr. Schanzer and his purported sources, are widening a public controversy to slander a public figure's family and a member of the family is simply defending himself against the slander. Mr. Schanzer's article and his comments before Congress demonstrate that Mr. Schanzer is the one making the public controversy in this case.

In a case like this, a party does not become a limited purpose public figure by virtue of defending himself from the slanderous claims by the persons making the controversy so that he must prove actual malice to state an actionable libel claim. *See Hutchinson v. Proxmire*, 443 U.S. 111, 134-36 (1979).[8]

The scurrilous allegation that Plaintiff is growing rich off of his father's alleged corruption is a very serious charge and is very damaging to Plaintiff's reputation in the Middle East where reputation means everything. But even worse is the possibility that the Schanzer article's unsubstantiated, reckless accusations could be life threatening for Plaintiff and his family in a region where there is great poverty and an angered member of the community might be incited to violence. Defendant Schanzer, who professes intimate familiarity with the Palestinians and their culture, certainly is aware of the possible consequences of reckless news reporting.

[8] In response to Plaintiff's argument that Mr. Schanzer cites links that supposedly support his claims when the links do not support the claims, Defendants urge that Mr. Schanzer's citation to "contrary sources is probative of the *absence* of malice." (Br. 39) (Emphasis in original). That would be so if, as in the cases cited by Defendants, the contrary sources were cited to show evidence of a contrary state of facts. (Br. 39). *See Lohrenz v. Donnelly,* 350 F.3d 1272, 1286 (D.C. Cir. 2003). However, that is not the case, where, as in this case, the author incorrectly cites the contrary sources to support the author's alleged state of facts. In that situation, the careless citation of sources that prove the opposite of why they were cited is evidence of Mr. Schanzer's reckless disregard for the truth.

CONCLUSION

For the foregoing reasons, the Court should reverse the order below and issue an order denying Defendants' Special Motion to Dismiss the Complaint pursuant to the D.C. anti-SLAPP Act and remanding the matter to the district court for further proceedings.

Dated: New York, New York
April 30, 2014

Respectfully submitted,

/s/ Louis G. Adolfsen

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 6,736 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: New York, New York
April 30, 2014

/s/ Louis G. Adolfsen
LOUIS G. ADOLFSEN

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: New York, New York
April 30, 2014

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