COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT

SALAHEDDIN BARHOUM, ppa EL HOUSSEIN BARHOUM and YASSINE ZAIMI, Plaintiffs,	
v.	Civil Action No. 13-2062D
NYP HOLDINGS, INC., d/b/a *NEW YORK POST*, LARRY CELONA, BRAD HAMILTON, JAMIE SCHRAM LORENA MONGELLI, KATE KOWSH and JANE DOE, Defendants.	

PLAINTIFFS' SURREPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM

Dismissal of this case is inappropriate because defendants cannot show the complaint is insufficient to "raise a right of relief above the speculative level … [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Fraelick v. Perkettpr, Inc.,* 83 Mass. App. Ct. 698, 699-700 (2013). Defendants have not established that the article could not have been reasonably understood in any defamatory sense. Defendants' efforts to numb the defamatory sting of their publication cannot succeed in light of the words, pictures, juxtapositions and commentary evident in the article itself. The document appended to defendants' original memorandum does not support the statements and implications that the article conveys.

Defendants now take the position (not taken in their original memorandum), that their appended document shows plaintiffs were being "sought" by authorities. Def. Reply Mem., pg. 6. Leaving aside the impropriety of relying on an extrinsic document in support of a Rule

12(b)(6) motion to dismiss, the document relied on by defendants simply does not demonstrate that plaintiffs were being sought by authorities. It only states that photos were being circulated "*in an attempt to identify the individuals highlighted therein.*" Def. Mem., Exh. 1 (emphasis added). There is a significant difference between "attempting to identify" individuals and "seeking" those individuals. This difference is especially important in the context of an ongoing manhunt. Given the headlines, pictures and text of the article, which were published during authorities' search for two suspects, the term "seek" could easily have been interpreted by readers as suggesting that plaintiffs were the suspects.[1] Plaintiffs reserve the right to object to the admissibility of the appended document at a later stage in the proceedings, but note that if the document is admissible, then any analysis of the degree to which it supports the statements made in the article is best made by the jury.

Defendants' Reply Memorandum cites the following additional cases that are off-point or readily distinguishable. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) is not a defamation case and does not negate the well-established rule that the position of an item in a newspaper may be relevant to whether the item is defamatory.[2] *Briarcliff Lodge Hotel, Inc. v. Citizen-Sentinel Publs.*, 260 N.Y. 106, 118-19 (1932) is particularly off-point. The decision did not involve a motion to dismiss, but rather an appeal from a lower court's dismissal of defendants' defenses. By ruling in defendants' favor, the *Briarcliff* court did not throw the case out, but allowed it to be heard by the jury. Also, the "fair and expectant comment" allowed in *Briarcliff* pertained to formal proceedings before a Village water board concerning plaintiff hotel's failure to

[1] The document does not even establish that the purported "effort to identify" plaintiffs was being carried out by "authorities" who had any role or responsibility in the ongoing investigation. See Plaintiffs' Opposition Memorandum, pgs. 5, 15.

[2] *See Stanton v. Metro Corp.*, 438 F.3d 119, 125 (1st Cir. 2006).

pay its water bill.[3] The qualified "fair comment" privilege applied to defamation of public figures.[4] Defendants do not claim that plaintiffs are public figures. Thus, the language defendants rely on from *Briarcliff* does not apply to this case.

Both *Abbas v. Foreign Policy Group, LLC* ___ F. Supp. 2d ___, 2013 WL 5410410, at *9 (D.D.C. 9/27/13) and *Adelson v. Harris,* __ F.Supp. 2d __, 2013 WL 5420973, at *15 (S.D.N.Y. 9/30/13) involve protected statements of opinion, a form of expression not at issue in this case.[5] *Mulina v. Item Co.*, 217 La. 842, 847 (1950) is an older Louisiana case affirming a jury's decision that a publication containing a picture of plaintiff public figure was not defamatory. The court in *Mulina* affirmed the jury's decision after carefully considering "all of the facts and surrounding circumstances of [the]case." The court did not supplant the role of the jury, as defendants ask this Court to do.

Defendants ignore plaintiffs' central argument regarding the fair report privilege: the privilege does not apply here because the article extends far beyond a simple recounting of any "official action," and makes broad defamatory statements and inferences not found in the source material. *See* Plaintiffs' Opposition Memorandum, pg. 16. Defendants' reply to plaintiffs' secondary argument concerning the fair report privilege, which is found in footnote 47 of plaintiffs' Opposition Memorandum, is ineffective. Defendants do not cite any cases to support their claim that "the e-mailing of photos for purposes of identification as part of an official investigation" is an official action within the scope of the fair report privilege. Certainly

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[3] Assuming defendants' allegations of facts concerning the nonpayment to be true in considering whether their defenses were proper, the court concluded that the following facetious statement was not libelous: "'Water, water everywhere, but never a drop to drink' will be the cry at [plaintiff's] Lodge in a short while, according to the Briarcliff Manor Village Board, if [plaintiff] and his associates at the exclusive and expensive hostelry do not pay their water bill.'" 260 N.Y. at 117-118.

[4] The current standard for evaluating defamation against public figures is the actual malice standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[5] *Abbas* also involves rhetorical questions posed in a commentary, a subject different from a headline on the front page of a newspaper.

Massachusetts courts have held that a variety of different actions qualify as "official" for the purposes of the privilege. However, none give credence to defendants' argument that law enforcement officers (whose connection to the case is unclear) e-mailing each other about the identities of two people who were never arrested, questioned, or connected in any way to the Marathon bombing, is an official action.[6]

For reasons described in Plaintiffs' Opposition Memorandum, defendants' arguments should be made to the jury. There are no grounds to dismiss plaintiffs' complaint at this stage of the proceedings.[7]

Dated: October 28, 2013 Respectfully submitted,

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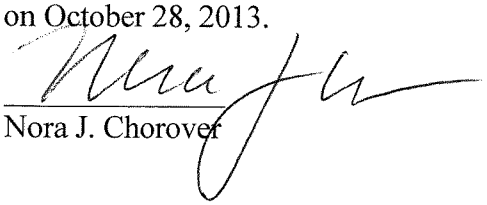
[6] Defendants seem to argue that cases such as *Bruenell v. Harte-Hanks Communication, Inc.* and *Ingenere v. ABC, Inc.* lead rationally to the conclusion that the email in question in the present cases constitutes official action. *Bruenell* holds that a report written about open worker's compensation cases for a town government constitutes official action for the purposes of the privilege. 3 Mass.L.Rptr. 127, 1994 WL 790830, at *3 (Mass. Super. Ct. 1994). Such a report is a formalized document, developed for a specific governmental purpose. It is in no way analogous to an email exchange that leads nowhere. In *Ingenere*, the court held that "confidential governmental reports" were official for the purposes of the privilege, in part because they contained information about governmental misconduct that would not otherwise have been revealed, invoking one of the public policy purposes of the privilege not present in this case. 1984 WL 14108, at *2 (D. Mass. Sept. 18, 1984). Again, there is no comparison to be drawn between a formalized report and an email exchange. Lastly, in *Oort v. Dasilva*, in concluding that the police report in question was official for the purposes of the privilege, the court explained that, while police reports of an investigation that do not lead to an arrest are not official action, this report was essentially the first of two reports, the second of which led directly to an arrest. 18 Mass.L.Rptr. 324, *4 (Mass. Super. Ct. 2004). Again, there is no comparison to the present case, where no arrest was ever made.

[7] Defendants' Reply concerning the non-defamation claims raises no new arguments. See Def. Reply Mem., pg. 10. Plaintiffs respectfully refer the Court to their Opposition Memorandum, which argues that dismissal of these claims at this early stage of the proceedings would be improper.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served on Attorneys Jeffrey S. Robbins and Joseph D. Lipchitz by email and by hand, and on Attorneys James M. McDonald and Kevin T. Baine by email and first-class mail on October 28, 2013.



Nora J. Chorover