COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 13-2062

SALAHEDDIN BARHOUM[1] & another[2]

v.

NYP HOLDINGS, INC.[3] & others[4]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This action arises from a New York Post article published in the wake of the 2013 Boston Marathon bombings. Plaintiffs claim that the article defamed them, inflicted emotional distress on them, and violated their privacy. Now before the Court is the defendants' motion to dismiss. For the reasons that will be explained, the motion will be allowed in part and denied in part.

BACKGROUND

For the purposes of the present motion, the Court accepts as true all well-pleaded factual allegations of the complaint, but disregards conclusions and characterizations asserted therein.

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[1]By his father and next friend El Houssein Barhoum.

[2]Yassine Zaimi.

[3]d/b/a New York Post.

[4]Larry Celona; Brad Hamilton; Jamie Schram; Lorena Mongelli; Kate Kowsh; and Jane Doe.

See *Sisson* v. *Lhowe*, 460 Mass. 705, 707 (2011); *Welch* v. *Sudbury Youth Soccer Ass'n., Inc.*, 453 Mass. 352, 354 (2009); *Eyal* v. *Helen Broad. Corp.*, 411 Mass. 426, 429 (1991). Along with the complaint itself, the Court also considers materials appended to or referenced in it, particularly copies of the print and on-line versions of the article in issue.[5] See *Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 (2004).[6]

Considered in that manner, the plaintiffs' Verified Complaint, filed on June 5, 2013, provides the following factual background. On Monday, April 15, 2013, at approximately 2:49 p.m., two bombs exploded near the finish line of the Boston Marathon. The blasts killed three people and injured more than 260 others, fourteen of whom lost limbs. Media outlets covered the incident extensively. Early media reports revealed that investigators believed that the perpetrators had transported the bombs to the area in duffel bags or backpacks. The plaintiffs, sixteen-year-old Salaheddin Barhoum and twenty-four-year-old Yassine Zaimi, were in the area of the finish line earlier in the day to observe the elite runners. Each carried his own running gear, one in a backpack and one in a duffel bag. The two left at 12:45 p.m., and had no connection to the bombings.

Following the bombings, law enforcement officials asked the public to provide them with photos and videos of the scene at the marathon. Users of social media Internet sites began discussion groups dedicated to finding the bombers. Annotated collections of photographs began appearing on these sites, some of which showed circles around images of particular individuals.

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[5]A copy of the print article is attached to the complaint. Defendants have provided a print-out of the on-line version as an attachment to their memorandum in support of their motion; plaintiffs make no objection to the Court's consideration of that document.

[6]Defendants have offered certain additional materials, which the Court will address *infra*.

At some time on or prior to Wednesday, April 17, 2013, photographs of the two plaintiffs began circulating on these sites. By the afternoon of that same date, law enforcement authorities had obtained photographs of two individuals whom they suspected of causing the bombings; those two were later identified as Tamerlan and Dzhokhar Tsarnaev. On the same date, the Federal Bureau of Investigation issued a press release, as follows:

> Over the past day and a half, there have been a number of press reports based on information from unofficial sources that has been inaccurate. Since these stories often have unintended consequences, we ask the media, particularly at this early stage of the investigation, to exercise caution and attempt to verify information through appropriate official channels before reporting.

During the evening of April 17, 2013, both plaintiffs learned that pictures of them at the marathon appeared on Internet sites. Each of them voluntarily went to a local police station. Zaimi went to the Malden police station, where he gave a lengthy interview with law enforcement personnel, including FBI agents, and offered to retrieve the backpack he had been wearing for inspection. At the conclusion of the interview, the agents told Zaimi that he was "all clear" and not to worry. He left the police station at approximately 2:00 a.m. on April 18, 2013. Barhoum went to the East Boston police station in the early morning hours of April 18, 2013. After telephoning other law enforcement personnel, the personnel with whom he spoke at the station told him that he was not a suspect and was free to leave.

At some point that same night or on the early morning of April 18, 2013, the New York Post released its April 18, 2013, print edition and an accompanying on-line story. The front page of the print edition consisted entirely of a photograph of the two plaintiffs standing at the marathon finish line, with a headline, sub-headline, and small text box superimposed on the photograph. The headline, reading "BAG MEN," measured 9 x 2 inches. Underneath the words

"BAG MEN," a 4 x 4.25 inch sub-headline read "Feds seek this duo pictured at the Boston Marathon." The text box below the sub-headline stated:

> Investigators probing the deadly Boston Marathon bombings are emailing law-enforcement agencies photos of these two men seen on surveillance near the finish line, The Post has learned. One is carrying a duffel bag and the other has a backpack–which is not visible in a later photo. There is no direct evidence linking them to the crime, but authorities want to identify them.

At the bottom of the text box, in larger font highlighted red, readers were instructed to "SEE PAGES 4, 5, 6, 7."

Pages four and five each contained a header at the top of the page that read "TERROR AT THE MARATHON." Across the two pages, below the headers, appeared an 18 x 1.25 inch headline reading, "FEDS HAVE 2 MEN IN SIGHTS." Page five featured two additional photos of the plaintiffs at the finish line, one with red circles around the plaintiffs' faces. A caption under the other read "IN FOCUS: Cops are seeking these two men (above) who were spotted near the site of the Boston blasts. The man in blue (circled left) still has the bag over his shoulder in the crowd later, but the black backpack the man in the cap was wearing is no longer visible." An underlined 9 x .5 inch sub-headline appearing below the two photos read "Seen in pix with backpack and bag."

The article, which appeared below the sub-headline on page five, began with the following:

> Investigators probing the deadly Boston marathon bombings are circulating photos of two men spotted chatting near the packed finish line, The Post has learned. In the photos being distributed by law-enforcement officials among themselves, one of the men is carrying a blue duffel bag. The other is wearing a black backpack in the first photo, taken at 10:53 a.m., but it is not visible in the second, taken at 12:30 p.m. "The attached photos are being circulated in an attempt to identify the individuals highlighted therein," said an email, obtained by The Post. "Feel free to pass this around to any of your fellow agents

elsewhere." Meanwhile, officials have identified two potential suspects who were captured on surveillance videos taken shortly before the deadly blasts, law-enforcement sources told The Post yesterday. Authorities know the names of the two men, but do not have enough evidence to make an arrest for Monday's attack, which killed three and wounded 176, the sources said. It was not immediately clear if the men in law-enforcement photos are the same men in the surveillance videos.

The Post's on-line edition included a virtually identical article under the headline, "Authorities circulate photos of two men spotted carrying bags near site of Boston bombings." Beneath the headline were the two photographs that appeared on page five of the print edition, with a caption reading, "Cops are seeking these two men (above) who were spotted near the site of the Boston blasts." The article began, "Investigators probing the deadly Boston marathon bombings are circulating photos of two men spotted chatting near the packed finish line." The Post distributed the print edition throughout Greater Boston, the United States and the world. Defendants Larry Celona, Brad Hamilton, Jamie Schram, Lorena Mongelli, and Kate Kowsh contributed to the publication as reporters for the Post, while defendant Jane Doe designed and/or wrote the headlines.

Zaimi did not learn of the Post's article until after he arrived at work on April 18, 2013. Upon his arrival, a manager informed him that he had called the FBI, who said that Zaimi was not a suspect. Another manager then showed him the front page of The Post. Upon seeing his picture under the headline "BAG MEN," Zaimi immediately started shaking; his mouth went dry; and he felt as though he was having a panic attack. Barhoum first learned of Post's article upon returning home from a track meet at approximately 11:30 a.m. the same day. He observed media trucks outside of his home, and found a crowd of reporters inside, filming and interrogating his parents. A reporter showed him an image of the front page of The Post. Seeing the publication

for the first time, Barhoum became terrified, began to shake and sweat, and felt dizzy and nauseous. Thereafter, strangers began to recognize both plaintiffs in public. Both received numerous unsolicited communications by cell phone and social media, some of which caused them to be frightened. As a result of these events, plaintiffs allege, they "were put in fear for their lives and suffered harm, including but not limited to damage to their reputations and ongoing extreme emotional distress."

Based on these factual allegations, the complaint sets forth six counts against all defendants. Counts I, II and III are labeled "defamation/libel *per se*," based respectively on the front page, the print article, and the on-line version. Count IV claims "Negligent, Intentional and/or Reckless Infliction of Emotional Distress." Count V claims invasion of privacy in violation of G. L. c. 214, § 1B. Count VI claims "false light invasion of privacy." As to all counts, plaintiffs seek damages, attorneys fees, interest and costs.

DISCUSSION

Dismissal under Mass. R. Civ. P. 12 (b)(6) is proper where a reading of the complaint establishes beyond doubt that the facts alleged do not support a cause of action that the law recognizes, such that the plaintiff's claim is legally insufficient. *Nguyen* v. *William Joiner Center for the Study of War and Social Consequences*, 450 Mass. 291, 295-296 (2007). To survive a motion to dismiss, the complaint must set forth "'allegations plausibly suggesting (not merely consistent with)'an entitlement to relief", which "must be enough to raise a right to relief above the speculative level." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007).

1. **Defamation Claims (Counts I, II, and III).**

Defendants argue that the defamation counts fail to state a claim because the publication included no defamatory falsehood, and because it was privileged as a fair report of official action. Both arguments rely on a factual assertion that goes beyond the allegations of the complaint: that on April 17, 2013, an email originally from an FBI agent in Buffalo circulated among officers of various law enforcement agencies around the country, including the Boston Police Department, with attached photographs showing the plaintiffs at the marathon, along with the following text:

> The attached photos are being circulated in an attempt to identify the individuals highlighted therein. Feel free to pass this around to any of your fellow agents elsewhere. This is unclassified, but I believe it is Law Enforcement Sensitive still.

Defendants offer evidence of circulation of the email in three forms: (1) an unauthenticated copy of what purports to be the email attached to their memorandum in support of the motion to dismiss; (2) an affidavit appended to defendants' reply memorandum, signed by a retired sergeant of an unidentified police department, attesting that he received the email from an official of the Los Angeles County Sheriff's Department on April 17, 2013; and (3) copies of pleadings in another case pending in this Court, Suffolk Civil Action No. 2013-2062. That case, brought by defendants' law firm against various Massachusetts law enforcement entities, seeks access to records of circulation of the alleged email pursuant to the Massachusetts Public Records Act, G. L. c. 66, § 1, *et seq*. The complaint in that case alleges, at paragraphs 16-19, that the FBI agent sent an email as described *supra* on April 17, 2013; that others forwarded it; and that among those who received it on that date were the Massachusetts entities named. The Boston Police Department's answer, filed on January 29, 2014, admits that it received the email.

Plaintiffs object to the Court's consideration of these materials. As indicated *supra*, the

Court can properly consider materials appended to or referenced in the complaint, along with its allegations. Defendants argue that the email is effectively incorporated into the complaint, since the article reported that "[i]nvestigators probing the deadly Boston Marathon bombings are emailing law-enforcement agencies photos of these two men." The Court is not persuaded that this second-hand reference is a sufficient basis to permit consideration of the materials defendants offer on a motion to dismiss. The email provided, and attached to the affidavit submitted, may well be what the article refers to, but the Court cannot so determine that at this stage.

The pleadings in case No. 2013-2062 fall into a different category. The Court can consider materials of which it can properly take judicial notice, among which are the Court's own records. See *Jarosz* v. *Palmer*, 49 Mass. App. Ct. 834, 835-836 (2000). But the pleadings offered do not carry the weight defendants seek to place on them. What they show is that the Boston Police Department has made a judicial admission that on April 17, 2013, it received the email described in the complaint in that action, which is consistent with the email defendants offer here. That admission is binding on the Boston Police Department in that case. See *Hibernia Sav. Bank* v. *Bomba*, 35 Mass. App. Ct. 378, 384 (1993). But it is not binding on plaintiffs in this action, who are not parties in that case, and who have made no admissions regarding any email.

That said, it appears to be undisputed, even at this early stage, that an email with the language quoted *supra*, with attached photographs, was circulated among various personnel, at least some of whom would fall into the general category of law enforcement. Plaintiffs do, however, question whether the version supplied is complete; whether the personnel circulating it

were investigators probing the marathon bombings; whether the circulation of photographs among law enforcement personnel constitutes official action for purposes of the fair report privilege; and whether The Post's reporting of it was such as to fall within that protection. Accordingly, the Court will consider the arguments presented based on the assumption that the email supplied was circulated among some law enforcement personnel on April 17, 2013, but will make no assumptions about the facts on which these other questions may turn.

To state a claim of defamation with respect to a matter of public concern, a plaintiff must allege facts sufficient to show that the defendants published a statement, of and concerning the plaintiff, that was both defamatory and false. *Dulgarian* v. *Stone*, 420 Mass. 843, 847 (1995). A statement is defamatory if it "would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community. *Phelan* v. *May Dept. Stores Co.*, 443 Mass. 52, 56 (2004). "[T]he imputation of a crime is defamatory per se." *Id.* To constitute defamation on that ground, the publication need not use "direct and explicit language" discrediting or imputing a crime to the plaintiff. *Mabardi* v. *Boston Herald-Traveler Corp.*, 347 Mass. 411, 413 (1964). "'An insinuation may be as actionable as a direct statement.'" *Id.*, quoting *Thayer* v. *Worcester Post Co.*, 284 Mass. 160, 162 (1933). Whether a statement is reasonably susceptible of a defamatory meaning is a question of law for the Court. *Phelan*, 443 Mass. at 56; *Foley* v. *Lowell Sun Publishing Co.*, 404 Mass. 9, 11 (1989).

With respect to the element of falsehood, courts consider the allegedly defamatory report as a whole to determine whether the gist or tenor of the report was accurate. See *Masson* v. *New Yorker Magazine*, Inc., 501 U.S. 496, 517 (1991). The Court considers the impact of the inaccuracy on the reader or listener, as compared to the impact of the truth. See *Jones* v. *Taibbi*,

400 Mass. 786, 795-796 (1987) (impact of inaccurate statement did not create substantially greater defamatory sting than accurate report would have). When a statement is substantially true, a minor inaccuracy will not support a defamation claim. *Reilly* v. *The Associated Press*, 59 Mass. App. Ct. 764, 770 (2003). But the Court must address the question of truth or falsehood by reference to the communication in its entirety and the context in which it was published, as well as "[t]he emotions, prejudices and intolerance of mankind." *Ingalls* v. *Hastings & Sons Pub. Co.*, 304 Mass. 31, 33 (1939).

Applying these standards here, the Court must determine whether, on the facts alleged, including the facts describing the context, the publication was reasonably susceptible to the interpretation that the plaintiffs participated in the bombing, or that investigators suspected them of doing so. See *Phelan*, 443 Mass. at 56; *Mabardi*, 347 Mass. at 413. Defendants contend that the publication was not reasonably susceptible to that interpretation, and that a reasonable reader could understand it as saying no more than the truth: that law enforcement personnel were seeking to identify the individuals who appeared in the photographs. The Court is not persuaded. To the contrary, in the Court's view, a reasonable reader could construe the publication as expressly saying that law enforcement personnel were seeking not only to identify the plaintiffs, but also to find them, and as implying that the plaintiffs were the bombers, or at least that investigators so suspected.[7]

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[7]Some courts, although none in Massachusetts, have held that where the alleged defamatory falsehood arises from implication, rather than from direct statement, the language of the publication must "affirmatively suggest that the author intends or endorses the inference." *Chapin* v. *Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993), citing *White* v. *Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990). Here, as indicated, the defamatory meaning arises partly but not entirely by implication. But even if intention or endorsement of a defamatory implication is required, the publication in issue here would support that inference. A

Significant to the Court's conclusion are the following. First, the publication occurred in the context of widespread media reports that police believed that the perpetrators had brought the bombs to the site in backpacks or duffle bags. In that context, the cover headline "BAG MEN," in large capital letters, across a photograph of the plaintiffs carrying bags, could fairly have been understood to imply that their bags were the ones that had transported the bombs. The repeated reference to one of the men carrying a backpack that was visible in earlier photographs but not in later ones could fairly have been understood to suggest that one of the plaintiffs had left his backpack at the scene, as the perpetrator was believed to have done. Compare *Dulgarian*, 420 Mass. at 850-851 (phrase "Highway Robbery" in title of broadcast about insurance company practices could not reasonably be interpreted literally to mean that plaintiff committed highway robbery); *Nat'l Ass'n of Govt. Emp., Inc. v. Central Broadcasting Corp.*, 379 Mass. 220, 228 (1979) (labeling union leader's tactics as "communism" is "[t]oo amorphous a characterization to be actionable").

The sub-headline on the cover, announcing that "Feds seek this duo," could fairly be read to indicate not just that federal authorities were seeking the men's identities, as defendants contend was the case, but that federal authorities were seeking the men themselves; indeed, that is the most natural reading of "seek." On the inner two-page spread, the sub-heading, "FEDS HAVE 2 MEN IN SIGHTS," along with "Seen in pix with backpack and bag," could fairly be read to indicate that federal authorities suspected the two men pictured in the photographs. See

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factfinder could easily conclude that defendants presented the information about the email in the inflammatory form in which it appeared precisely because the implication of involvement in the bombing, or of law enforcement suspicion of such, would attract the reader's interest to a far greater degree than would a more straightforward account of the email.

Howell v. *Enterprise Publishing Co., LLC*, 455 Mass. 641, 665 (2010) ("Use of a defamatory headline in a newspaper report, qualification of which is found only in the text of the article, can render the report unfair."), quoting Restatement (Second) of Torts § 611 cmt. f (1977); compare *Dulgarian*, 420 Mass. at 850 (describing headline "Highway Robbery" as "rhetorical flourish or hyperbole, which is protected from defamation liability").

The text of the article itself retreats slightly from these implications, informing the reader that the photographs were being circulated "in an attempt to identify" the men shown. It goes on to report that authorities had identified "potential suspects," whose names authorities knew but whom they could not yet arrest, and that "[i]t was not immediately clear" whether those two, shown in surveillance videos, were the ones pictured in the photographs. A reader who carefully parsed these sentences might perceive that, if authorities were seeking to identify the men in the photographs, then those men could not be the "potential suspects" whose names authorities knew; that is, contrary to the statement in the article, in fact it was "immediately clear" that the pairs were not the same. But an ordinary reader could easily come away with the impression that the men pictured in what the front page had referred to as "surveillance photos" were indeed the "potential suspects" identified from surveillance videos, or were otherwise in some way involved in the crime.

This interpretation is not, as defendants contend, "unreasonably strained." *King* v. *Globe Newspaper Co.*, 400 Mass. 705, 711 (1987). The publication is not in a form that would suggest opinion. Compare *id.* (political cartoon); *Aldoupolis* v. *Globe Newspaper Co.*, 398 Mass. 731, 734 (1986) (op-ed column). Nor do plaintiffs rest their claims on an excerpt taken out of context, or on distortion of word usage. Compare *Damon* v. *Moore*, 520 F.3d 98, 106 (1st Cir. 2008)

(sixteen seconds out of two-and-a-half hour documentary); *Lambert* v. *Providence Journal Co.*, 508 F.2d 656, 659 (1st Cir. 1975) (report of criminal charge not reasonably interpreted as assertion of guilt). Defendants' publication expressly states that authorities were "seek[ing]" the two men shown, as authorities would be expected to do with respect to suspects. In the factual context, the headlines, sub-headlines, photographs, and placement, along with the repeated emphasis on one backpack not being visible in later photographs, all contributed to the impression that the two men shown were suspects, and that there was reason to believe they had committed the crime. Compare *Friedman* v. *Boston Broadcasters, Inc.*, 402 Mass. 376, 381 (1988) (implication that further investigation of plaintiffs might be appropriate was non-actionable opinion).

Defendants emphasize the statement in the box on the front page that "[t]here is no direct evidence linking them to the crime." Cautionary terms in a publication certainly warrant consideration. See *Lyons* v. *Globe Newspaper Co.*, 415 Mass. 258, 263 (1993) ("The court must give weight to cautionary terms used by the person publishing the statement."). But this disclaimer, even if a reader noticed it amidst the much larger headlines, see *Stanton* v. *Metro Corp.*, 438 F.3d 119, 126-128 (1st Cir. 2006), would have accomplished little to dispel the overall impact of the publication. "Direct evidence" is not necessary even to establish proof beyond a reasonable doubt. See *Commonwealth* v. *Dostie*, 425 Mass. 372, 375 (1997) ("There is no difference in probative value between direct and circumstantial evidence."). Still less is direct evidence necessary to convey to readers the impression that two people labeled "bag men" whom "Feds seek" were perpetrators of or at least suspects in a horrendous crime committed by means of bombs carried in bags. See *Brown* v. *Hearst Corp.*, 54 F.3d 21, 24-25 (1st Cir. 1995)

(although television report made clear that there was no direct evidence that plaintiff had murdered his wife, that implication ran "through the program like a gold thread").

Defendants argue that any erroneous impression could have harmed the plaintiffs' reputations only among readers who recognized them, and that such readers would have been the ones most likely to read the entire article carefully enough to avoid any such impression. But the facts alleged refute that theory. As recited *supra*, plaintiff Zaimi's manager called the FBI, who informed him that Zaimi was not a suspect; it may be inferred that he thought otherwise upon reading the article. News media representatives identified Barhoum, it may be inferred through contact with someone who recognized him. And both plaintiffs experienced unsolicited and frightening communications. These allegations are sufficient at this preliminary stage to support the inference that at least some readers who recognized the plaintiffs gave credence to the impression of their involvement in the crime, or identified him to others who did, such that the article triggered harm to their reputation. See *Mabardi*, 347 Mass. at 414 (article referencing "unnamed lawyers" implicated in wrongdoing, featuring plaintiff's photograph without mentioning his name, could give rise to inference he was one such lawyer); *Stanton*, 438 F.3d at 128-129 (despite disclaimer, plaintiff's photograph beneath headline about teenage sex could lead reasonable reader to "conclude that the teenage girl depicted in the photograph . . . is sexually active and engages in at least some form of sexual misconduct").

Defendants invoke the so-called "fair report privilege," which protects "those who report on statements and actions so long as the statements or actions are official and so long as the report about them is fair and accurate." *Howell* v. *Enterprise Publishing Co., LLC*, 455 Mass. at 651. As that case explains, the privilege reflects the recognition that the public's "interest in

subjecting official actions and statements to public scrutiny outweighs the defamatory harm that would otherwise be actionable" as a result of reports of such actions and statements." *Id.* at 652. To serve that policy, the privilege is "construed liberally and with an eye toward disposing of cases at an early stage of litigation. *Id.* at 653.

A report falls within the privilege if it is "of an official action or proceeding," and is "accurate and complete or a fair abridgment of the occurrence reported." *Id.* at 652, quoting Restatement (Second) of Torts § 611 (1977). An "official action or proceeding," for purposes of the privilege, is the "administration of public duties" or "the exercise of the power of government to cause events to occur or to impact the status of rights or resources." *Id.* at 654. That definition extends at least to "formal (as opposed to informal), governmental (as opposed to private) proceedings and actions." *Id.* at 656. Reports of official statements also qualify for the privilege, as long as the reports fairly and accurately describe the statements. *Id.* at 657.

Whether a report is fair and accurate is a question of law to be determined by the Court. *Id.* at 661. A report is accurate if it "conveys to the persons who read it a substantially correct account of the proceedings"; it is fair if it "is not edited and deleted as to misrepresent the proceeding and thus be misleading." *Id.* at 661-662, quoting Restatement (Second) of Torts § 611 cmt. f (1977). Although the concepts are distinct, they tend to merge in application. A report that is substantially accurate may fall within the privilege if its impact "did not create a substantially greater defamatory sting than an accurate report" would have. *Id.* at 662, quoting *Jones* v. *Taibbi*, 400 Mass. 786, 795-796 (1987). "A statement is considered a fair report 'if its 'gist' or 'sting' is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced.'" *Elm Med. Lab., Inc.* v. *RKO Gen., Inc.*, 403 Mass. 779,

783 (1989), quoting *Williams* v. *WCAU-TV*, 555 F. Supp. 198, 202 (E.D. Pa. 1983); see *Salvo* v. *Ottaway Newspapers, Inc.*, 57 Mass. App. Ct. 255, 262 (2003). The Court evaluates fairness and accuracy "through the lens of the reasonable recipient." Howell, *supra*, at 663. The question is whether "the report [is] sufficiently factually incorrect or sufficiently mischaracterized that the impression on the reader is so unfair to the plaintiff as to warrant placing it outside the privilege[.]" *Id.*

Here, as discussed *supra*, although the facts available at this stage leave open questions regarding any actions of public officials, the Court assumes for purposes of the present motion that some law enforcement officers transmitted and received an email with the language quoted *supra*, with attached photographs of the plaintiffs, on April 17, 2013. Whether the circulation of such an email constitutes an official action, for purposes of the privilege, is a close question that may turn on facts that remain to be developed. Circulation of the email was hardly formal action of any governmental official or body, but depending on the factual particulars, it might be considered to have "cause[d] events to occur" insofar as it spread the effort to identify the individuals shown in the photographs to a broad population of law enforcement officers. *Howell* at 654.

Assuming circulation of the email qualifies as official action, the question becomes whether The Post's report of it was fair and accurate. The Court concludes that it was not. The portions of the publication that report directly on the email are accurate, or at least substantially so. But the publication as a whole goes far beyond reporting on circulation of the email. The publication may be read as stating that investigators were seeking the plaintiffs, not just information about their identity. That statement, along with the inflammatory headlines, and the

other aspects discussed *supra*, could be expected to have a far more damaging effect in the minds of a reasonable reader than a report that law enforcement officers were seeking merely to identify the men in the photographs. The Court concludes, therefore, that defendants are not entitled to dismissal based on the fair report privilege.

2. Infliction of Emotional Distress (Count IV).

The defendants argue that the complaint fails to allege facts sufficient to support a claim of either intentional or negligent infliction of emotional distress. To state a claim of intentional infliction of emotional distress, a plaintiff must allege facts sufficient to show "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct . . . ; (2) that the conduct was extreme and outrageous, was beyond all possible bounds of decency and was utterly intolerable in a civilized community . . . ; (3) that the actions of the defendant were the cause of the plaintiff's distress . . . ; and (4) that the emotional distress sustained by the plaintiff was severe." *Howell*, 455 Mass. at 672 (quotations omitted); *Agis* v. *Howard Johnson Co.*, 371 Mass. 140, 145 (1976). The facts alleged here, along with reasonable inferences therefrom, in the Court's view are sufficient to support each element.

As to the first element, although there is no basis to believe that defendants intended to inflict emotional distress, a factfinder could reasonably infer that defendants knew or should have known that the publication would likely cause the individuals pictured and referred to in it to experience emotional distress. As to whether the conduct was extreme and outrageous, the Court considers the factual context, particularly the horrendous nature of the crime, the strong and widespread public reaction, the FBI's cautionary notice to news media, and the intense ongoing

effort to identify and find the perpetrators. These circumstances could "reasonably . . . lead the trier of fact to conclude that the defendants' conduct was extreme and outrageous, having a severe and traumatic effect upon the plaintiff[s'] emotional tranquility." *Agis* v. *Howard Johnson Co.*, 371 Mass. at 145; see also *Boyle v. Wenk*, 378 Mass. 592, 596 (1979) (noting the significance of the defendant's failure to honor plaintiff's request to stop harassing her in analysis of whether conduct was extreme and outrageous); *Tech Plus, Inc.* v. *Ansel*, 59 Mass. App. Ct. 12, 26 (2003) (false and defamatory statements sufficient to constitute extreme and outrageous conduct); compare *Richey* v. *American Auto. Assn., Inc.*, 380 Mass. 835, 839 (1980) (discharge of probationary employee after prolonged absence was not extreme and outrageous). As to the third and fourth elements, the allegations that upon seeing the publication each of the plaintiffs experienced symptoms such as shaking, sweating, dry mouth, a sense of panic, dizziness and nausea are sufficient to support the claim. See *Sullivan* v. *Boston Gas Co.*, 414 Mass. 129, 131, 139 (1993); *DiGiovanni* v. *Latimer*, 390 Mass. 265, 487 (1983); *Payton* v. *Abbott Labs*, 386 Mass. 540, 556 (1982); *Dziokonski* v. *Babineau*, 375 Mass. 555, 556 (1978).

The facts alleged similarly support a claim of negligent infliction of emotional distress, for which neither intent nor extreme or outrageous conduct is required. Such a claim does require facts indicating some physical manifestation of emotional distress, *see Sullivan* v. *Boston Gas Co.*, 414 Mass. at 131, 139; *Haddad* v. *Gonzalez*, 410 Mass. 855, 871 (1991); *Payton*, 386 Mass. at 555, but the facts alleged here meet that requirement.[8]

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[8]As defendants point out, plaintiffs cannot use a claim of emotional distress to circumvent First Amendment protections for speech. Thus, an ultimate finding that the publication was true, or not defamatory, would preclude recovery on the emotional distress claim. As discussed *supra*, however, on the facts alleged the factfinder could find that the publication was both false and defamatory. If so, the emotional distress claim would allow recovery for emotional harm, along

3. G. L. c. 214, § 1B, and False Light (Counts V and VI).

General Laws chapter 214, § 1B, provides: "A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages." The statute provides a cause of action for disclosure of "facts about an individual that are of a highly personal or intimate nature when there exists no legitimate countervailing interest," *Mulgrew* v. *Taunton*, 410 Mass. 631, 637 (1991), or "private conduct which is no business of the public and the publicizing of which is, therefore, offensive." *Cefalu* v. *Globe Newspaper Co.*, 8 Mass. App. Ct. 71, 77 (1979); see *Ayash* v. *Dana-Farber Cancer Institute*, 443 Mass. 367, 382 (2005). "The appearance of a person in a public place necessarily involves doffing the cloak of privacy which the law protects." *Cefalu, supra*, citing *Thermo* v. *New England Newspaper Publishing Co.*, 306 Mass. 54, 58 (1940); see Restatement (Second) of Torts § 652D, cmt. b (photograph invades privacy if taken in private space but not if taken in public space).

The facts alleged here involve no publicizing of private conduct; the photographs show the plaintiffs attending a public event in a public place. The Court concludes, therefore, that the complaint fails to state a claim under G. L. c. 214, § 1B. As to the false light theory, Massachusetts law does not recognize any such tort. See *Ayash* v. *Dana-Farber Cancer Institute*, 443 Mass. at 382 n.16; *ELM Med. Lab., Inc.*, v. *RKO Gen., Inc.*, 403 Mass. 779, 787 (1989). Defendants' motion will be allowed as to counts V and VI.

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with the recovery for reputational harm that would be available on the defamation claims.

CONCLUSION AND ORDER

For the reasons stated, the defendants' motion to dismiss is **DENIED** as to counts I, II, III, and IV and **ALLOWED** as to counts V and VI.

Judith Fabricant
Justice of the Superior Court

March 5, 2014