SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MAXIM A. STEPANOV and MIDLAND CONSULT (CYPRUS) LTD, Plaintiffs, - against - DOW JONES & COMPANY, INC., Defendant.	Index No. 150534/2012 MOT. SEQ. 001

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

DAVIDOFF HUTCHER & CITRON LLP

Larry Hutcher
ljh@dhclegal.com

Steven Skulnik
sps@dhclegal.com

605 Third Avenue
New York, NY 10158
Telephone: (212) 557-7200

Attorneys for Plaintiffs

THE LAW FIRM OF JOSH N. BENNETT, ESQ., P.A.
Josh N. Bennett
josh@joshbennett.com

Ilena Alvarez
ilena@joshbennett.com

440 North Andrews Avenue
Ft. Lauderdale, Florida 33301
(954) 779-1661

Of Counsel

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

STATUTES

OTHER

Plaintiffs Maxim A. Stepanov ("Stepanov") and Midland Consult (Cyprus) Ltd. ("Midland Consult") (collectively, "Plaintiffs") respectfully submit this memorandum of law in opposition to the motion of defendant Dow Jones & Company, Inc. ("Defendant") for an order dismissing the complaint dated March 6, 2012 (the "Complaint") pursuant to CPLR §§ 3211 (a)(1) and (a)(7) or pursuant to CPLR § 3211 (c) converting the motion into one for summary judgment under CPLR § 3212.

PRELIMINARY STATEMENT

This action seeks to recover monetary damages resulting from an egregious breach of Plaintiffs' rights by a major news organization. In an attempt to generate sensationalism and bolster its readership, Defendant has run roughshod over Plaintiffs' rights by the publication of false and defamatory statements about them.

In short, Defendant's motion argues that each statement concerning Plaintiffs in the news article in question was literally true, when viewed in isolation from other statements in the Article. Under applicable law, however, courts view the statements in their context. The statements about the Plaintiffs failed to identify a time frame and thereby suggest that Plaintiffs had a connection to certain people and companies when those people and companies were engaged in questionable activities. In fact, Plaintiffs had no connection to the activities described in the article.

- The article stated that Plaintiffs were connected to Bristoll Export, a New Zealand corporation, which allegedly made a suspicious money transfer, but the article did not explain that there was no connection between Plaintiffs and Bristoll Export at the time of the money transfer.

- The article stated that employees of Plaintiff Midland Consult are directors of a company "nested inside the shell of Bristoll Export," but the article did not state that the deposit of Bristoll Export funds to Credit Suisse, referred to in the article, took place before anyone affiliated with Plaintiffs had any management role with Bristoll Export or its affiliate.

- The article, about corruption in Vladimir Putin's Russia, stated that Plaintiff Stepanov was "a former Russian diplomat" but fails to mention that he left government service long before Mr. Putin came to power.

- The article makes serious allegations against other persons named Stepanov, *i.e.* Olga and her husband Vladlen, but nowhere discloses that Plaintiff Maxim Stepanov is not related to them.

In fact, Plaintiffs should never have been mentioned in the article, as they had precisely nothing to do with the corruption scandal that was the article's focus. This kind of irresponsible and malicious journalism is not the kind of speech that deserves protection from our courts, and, for the reasons stated below, the Court should deny Defendant's motion to dismiss in all respects.

FACTS

On April 16, 2011, Barron's, a weekly newspaper published by Defendant Dow Jones & Company[1] that covers financial information and market developments, ran a news article entitled *Crime and Punishment in Putin's Russia* (the "Article"). Handman Aff.[2] Ex. B.[3] The Article describes a tax refund of 5.4 billion rubles – or $230 million – issued to a company called Hermitage Capital Management Limited ("Hermitage") on December 24, 2007. *Id*. at 1. Detailing allegations of large-scale corruption involving officials and entities connected to the government of Vladimir Putin, the Article describes a host of illegal transactions, including alleged arms trafficking to North Korea and money laundering for a Mexican drug cartel by a

[1] Dow Jones is a subsidiary of News Corporation, which is controlled by Rupert Murdoch and his family members.

[2] "Handman Aff." refers to the Affidavit of Laura R. Handman submitted in support of the motion. (ECF Doc. 8-2)

[3] The print version of the Article is attached to the Handman Aff. as Ex. B. The Article remains available online.
Bill Alpert, *Crime and Punishment in Putin's Russia*, BARRON'S (Apr. 16, 2011), *available at*

New Zealand company. The Article also briefly discusses a letter sent from the London office of the Brown Rudnick law firm, counsel to Hermitage, to the Attorney General of Switzerland (the "Hermitage Letter"). Id. at 2, 7.

Plaintiffs have absolutely no association with the corruption scandal or any illegal activities. Yet, the Article stated the following about the Plaintiffs:

> On Jan. 23, 2008 the Credit Suisse accounts received about $3 million from a shell company called Bristoll Export, registered in New Zealand by a company-formation agency called GT Group. After earlier Barron's stories showed that GT Group sold shells that were ultimately used to launder Mexican drug-cartel money through Wachovia Bank and, separately, to commission a plane filled with anti-aircraft missiles and rocket launchers from North Korea, New Zealand police raided GT Group's offices in October of 2010.
>
> Nested inside the shell of Bristoll Export – like a Russian doll – was yet another shell company whose directors work at Midland Consult, a Russia-focused representative of offshore banks founded by a former Russian diplomat named Maxim A. Stepanov in Cyprus.
>
> The GT Group didn't respond to questions e-mailed to its headquarters on the island of Vanuatu. Midland Group's Maxim Stepanov would not identify the owners of Bristoll Export and said in an e-mail that his customers were "honest, decent businessmen and have no criminal conduct found by the Courts of Justice."

Compl., Handman Aff. Ex. A, ¶ 24 (the "Statements"). In context, the Statements place Plaintiffs in the middle of this scandal and the illegal activity described in the Article.

Similarly, the Article suggests that Plaintiff Stepanov was part of Vladimir Putin's allegedly corrupt government when in fact he never served under Mr. Putin. Stepanov started working at the Ministry of Foreign Affairs of the former USSR in August 1991. At the time, Mikhail Gorbachev was the President and Head of State. Mr. Gorbachev resigned on

---

http://online.barrons.com/article/SB50001424052970204569604576259313266852054.html#articleTabs_article%3D1.

December 25, 1991, and the Soviet Union was formally dissolved the following day. Boris Yeltsin then became the first President of Russia. Stepanov's governmental service ended when he resigned in March 1997, while Mr. Yeltsin was still President. Mr. Yeltsin did not resign until December 31, 1999, when Vladimir Putin became Acting President. Stepanov Aff.[4] ¶ 4. [5]

Stepanov started his work with Midland Services – predecessor of Midland Consult – upon leaving the government in 1997. Plaintiff Midland Consult is a corporation formed under the laws of the Republic of Cyprus. Compl., Handman Aff. Ex. A, ¶ 11. Midland and its affiliates "incorporate and administer business corporations in various jurisdictions to assist clients in asset protection, efficient tax structures, and international banking transactions." *Id.* ¶ 17.

In 2005, Midland Consult began to work with GT Group, which was located in New Zealand. In that connection, Midland New Zealand Limited was formed and its officers and directors were persons associated with GT Group. The deposit of Bristoll Export funds to Credit Suisse, referred to in the Article, took place in January of 2008, when no one affiliated with either Plaintiff had any management role with Bristoll Export or Midland New Zealand. The first time Midland Consult became involved with Midland New Zealand was in November of 2008, when Olga Demosthenous and Jaime Cedeno of Midland Consult filed their

[4] "Stepanov Aff." refers to the Affidavit of Maxim A. Stepanov submitted in opposition to the motion. (ECF Doc. 12).

[5] The Stepanov Aff. provides the Court with certain details that further show the false and misleading nature of the Statements. Such a submission is permissible under a motion to dismiss pursuant to CPLR 3211. *See Thomas v. Thomas*, 70 A.D.3d 588, 591, 896 N.Y.S.2d 30, 33 (1st Dep't 2010) (stating that a plaintiff may use affidavits in response to a CPLR § 3211 motion in order to supplement and clarify allegations in the complaint).

consents to be directors of Midland New Zealand. Stepanov Aff. ¶ 5; *see also* Def. Mem. [6] at 7 ("Bristoll's shares are 100% owned by Midland New Zealand Ltd. and that, as of November 2008, the directors of Midland New Zealand were Jaime Augusto Cedeno Villareal and Olga Demosthenous"). In October of 2009, Plaintiffs severed all ties with the GT Group and Plaintiffs started working with other providers concerning New Zealand companies; GT Group's first legal troubles concerning the airplane mentioned in the Article did not arise until December of 2009, when GT Group was not doing any business with Plaintiffs. Stepanov Aff. ¶ 6.

Finally, the Article makes serious allegations against other persons named Stepanov, *i.e.* Olga (who ran the Moscow tax bureau) and her husband Vladlen. Plaintiff Maxim Stepanov has no connection to these people and is not related to them either by blood or by marriage; nowhere in the Article is the lack of connection mentioned despite the identical surname. *Id.* ¶ 7.

ARGUMENT

I. THE ALLEGATIONS IN THE COMPLAINT SHOULD BE GIVEN EVERY FAVORABLE INFERENCE ON A MOTION TO DISMISS

A. Alleged Failure to State a Cause of Action

Defendant argues that "New York courts are encouraged to dispose of libel cases at the earliest appropriate stage when … the threshold issues can be resolved by the court as a matter of law." Def. Mem. at 10. Defendant ignores that "[o]n a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 974 (1994). "If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to

[6] "Def. Mem." refers to the Memorandum of Law in Support of Defendant's Motion to Dismiss the Complaint or in the Alternative for Summary Judgment (ECF Doc. 8-1).

dismiss will fail." *MBIA Ins. Corp. v. Royal Bank of Can.*, 28 Misc. 3d 1225(A), 2010 WL 3294302, at *23 (Sup. Ct. Westchester County 2010) (citing *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152, 746 N.Y.S.2d 131, 134 (2002); *Cooper v. 620 Props. Assoc.*, 242 A.D.2d 359, 360, 661 N.Y.S.2d 1001, 1001 (2d Dep't 1997)). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon*, 84 N.Y.2d at 88, 614 N.Y.S.2d at 974 (internal quotations and citations omitted). As discussed below in Point II, Plaintiffs have a cause of action for defamation *per se*, or, in the alternative, defamation by implication.

In arguing for a different standard in a defamation case, Defendant relies on *Immuno A.G. v. Moor-Jankowski*, 145 A.D.2d 114, 537 N.Y.S.2d 129 (1st Dep't), *aff'd*, 74 N.Y.2d 548 (1989), *vacated*, 497 U.S. 1021 (1990), *aff'd*, 77 N.Y.2d 235 (1991). Def. Mem. at 10. First, the dismissal in *Immuno A.G.* was granted on a summary judgment motion after depositions were taken and the record on the motion consisted of over 4000 pages. 145 A.D.2d at 121, 537 N.Y.S.2d 133.[7] In the pre-answer motion to dismiss here, there has been no discovery at all.

In this procedural context, the Court should be wary of dismissal. The Court of Appeals explained in affirming the denial of a motion to dismiss under CPLR § 3211:

> We begin our analysis by underscoring the procedural posture of this case. All that is before us is plaintiff's verified amended complaint and defendants' motion to dismiss on the law. We recognize that summary judgment has particular value, where appropriate, in libel cases, so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms….But we recognize as well a plaintiff's right

[7] Similarly the decision in, *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 435 N.Y.S.2d 556 (1980) was rendered in connection with a summary judgment motion.

Salvatore v. Kumar, 45 A.D.3d 560, 845 N.Y.S.2d 384 (2d Dep't 2007) does not help Defendant. The plaintiff in that suit was never identified by name in the published work at issue. *Id*. at 563, 845 N.Y.S.2d at 388. Had Defendant shown the good judgment not to mention Plaintiffs in the Article, there would have been no lawsuit.

> to seek redress, and not have the courthouse doors closed at the very inception of an action, where the pleading meets a minimal standard necessary to resist dismissal of a complaint.

Armstrong v. Simon & Schuster, 85 N.Y.2d 373, 379, 625 N.Y.S.2d 477, 480 (1995) (citations omitted); *see also Pezhman v City of New York*, 29 AD3d 164, 168, 812 N.Y.S.2d 14, 17 (1st Dep't 2006) (reversing trial court's decision dismissing former teacher's defamation claims because plaintiff properly denied the truth of the statements in her complaint).

Second, the Court of Appeals in *Immuno* emphasized:

> *[a] media defendant surely has no license to misportray facts*; false statements are actionable when they would be perceived as factual by the reasonable person. But statements must first be viewed in their context in order for courts to determine whether a reasonable person would view them as expressing or implying *any* facts.

Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 254, 566 N.Y.S.2d 906, 917 (1991), *cert. denied*, 500 U.S. 954 (1991) (emphasis added).[8] Defendant does not address the requirement that defamatory statements must "be viewed in their context" at all in its motion to dismiss.[9]

---

[8] In any event, *Immuno AG* is completely inapposite. Summary judgment was granted to the defendant in that case because the statements at issue would not reasonably have been viewed by readers as conveying facts about plaintiff but instead as expression of opinion. 77 N.Y.2d at 254, 566 N.Y.S.2d at 917. In this case, the Article is clearly a news story and there is no claim that the Statements are an expression of opinion.

[9] Contrary to Defendant's argument, New York law and policy is firmly *against* granting motions to dismiss. *See Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 379, 625 N.Y.S.2d 477, 481 (1995) ("[W]e recognize as well a plaintiff's right to seek redress, and not have the courthouse doors closed at the very inception of an action, where the pleading meets a minimal standard necessary to resist dismissal of a complaint."); *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 442, 449 N.Y.S.2d 941, 945 (1982) (plaintiff's pleadings must be given "their most favorable intendment" on a motion to dismiss); *219 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 509, 414 N.Y.S.2d 889, 890 (1979) (When considering a motion to dismiss, "[t]he sole question presented for … our review is whether the plaintiff's complaint states a cause of action. As such, we accept, as we must, each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts."); *Sokol v. Leader*, 74 A.D.3d 1180, 1181, 904 N.Y.S.2d 153, 155 (2d Dep't 2010) (in a defamation suit, "the court must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'") (*citing Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 758 (2007) (*quoting Leon*, 84 N.Y.2d at 87-88, 614 N.Y.S.2d at 974)).

Moreover, the factual record of whatever investigation Defendant may have made (or not made) prior to publishing the Article is solely in Defendant's possession and unavailable to Plaintiff. In this regard, CPLR § 3211 (d) provides

> [s]hould it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

"Under CPLR § 3211 (d), a party opposing a motion to dismiss needs only show that facts unavailable to the plaintiff may exist which will justify denial of the motion, and need not demonstrate the actual existence of such facts." *Cusumano v. Extell Rock, LLC*, 2008 N.Y. Slip Op. 31582(U), 2008 WL 2413026 (Sup. Ct. N.Y. County June 9, 2008), *citing Peterson v Spartan Indus*., 33 N.Y.2d 463, 354 N.Y.S.2d 905 (1974).

B. Defense Based on Documentary Evidence

Dismissal of a cause of action based upon documentary evidence, pursuant to CPLR § 3211 (a) (1), is permitted only when that evidence "conclusively establishes a defense to the asserted claim as a matter of law." *511 W. 232nd Owners Corp.*, 98 N.Y.2d at 152, 746 N.Y.S.2d at 134 (2002) (quoting *Leon*, 84 N.Y.2d at 88, 614 N.Y.S.2d at 974); *see also Saxony Ice Co., Div. of Springfield Ice Co., Inc. v. Ultimate Energy Rest. Corp.*, 27 A.D.3d 445, 446, 810 N.Y.S.2d 344, 345 (2d Dep't 2006) ("documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claims"); *see also Schapiro v. Schmuckler*, 21 Misc.3d 1119(A), 873 N.Y.S.2d 515, 2008 WL 4668183 at *3 (Sup. Ct. Kings County Oct. 3, 2008) ("the plaintiff's

allegations which are contrary to the documentary evidence must be accepted" unless they are "flatly contradicted by [the] documentary evidence").[10]

In any event, the sole document relied upon by Defendant as "documentary evidence", the Hermitage Letter (Handman Aff. Ex. C), is insufficient for consideration under CPLR § 3211 (a) (1) for at least two reasons. First, an affiant with personal knowledge did not sponsor the Hermitage Letter; it is attached to the affirmation of Defendant's counsel of record. A motion based on CPLR § 3211(a)(1) without a witness with actual knowledge is procedurally defective and must be denied on that ground alone. *Neuschotz v. Newsday Inc.*, 12 Misc. 3d 1199, 824 N.Y.S.2d 769 (Sup. Ct. Kings County 2006). Second, the Hermitage Letter is merely a lawyer's

---

[10] The caselaw cited by Defendant in support of dismissal on documentary evidence are largely in the context of motions for summary judgment (or even for judgment after trial), and therefore they are inapplicable. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) (summary judgment in California defamation law); *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298 (2d Cir. 1986) (appeal from denial of a motion for judgment notwithstanding the verdict and for a new trial); *Shulman v. Hunderfund*, 12 N.Y.3d 143, 150, 878 N.Y.S.2d 230, 234 (2009) (trial court set aside verdict for plaintiff after trial); *Cusimano v. United Health Servs. Hosp., Inc.*, 30 Misc. 3d 1229(A), 926 N.Y.S.2d 343 (Sup. Ct. Broome County 2011), *aff'd*, 91 A.D.3d 1149, 937 N.Y.S.2d 413 (3d Dep't 2012) (motion for summary judgment); *Love v. Morrow & Co.*, 193 A.D.2d 586, 597 N.Y.S.2d 424 (2d Dep't 1993) (same); *Konrad v. Brown*, 91 A.D.3d 545, 937 N.Y.S.2d 190 (1st Dep't 2012) (same); *Miller v. Journal-News*, 211 A.D.2d 626, 620 N.Y.S.2d 500 (2d Dep't 1995) (same).

As the Appellate Division noted in *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc*., 10 A.D.3d 267, 270-71,780 N.Y.S.2d 593, 595-96 (1st Dept 2004), the Court's review of evidence on a CPLR § 3211 motion is much more limited:

> Such a review, culminating in factual findings, would be most unusual even if this CPLR 3211 motion had been converted, which it was not, to one for summary judgment under CPLR 3211 (c) and 3212 . . . . Since the motion was made pursuant to CPLR 3211 (a) (1) and (7), a court is obliged to accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining "only whether the facts as alleged fit within any cognizable legal theory. . . . [D]ismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law."

Citations omitted.

letter attempting to tie together a series of transactions into an alleged conspiracy.[11] Hermitage Letter does not mention the Plaintiffs.[12] The only reference to Plaintiffs in any document that Defendant relies on is on one page out of the one hundred pages attached to the Hermitage Letter,[13] and that page by itself or taken within the context on the entire document fails establish anything concerning Plaintiffs. The Hermitage Letter and its attachments thus cannot be said to "conclusively establish[] a defense to the asserted claims as a matter of law." *511 W. 232nd Owners*, 98 N.Y.2d at 152, 746 N.Y.S.2d at 134 (internal citations omitted); *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc*., 10 A.D.3d 267, 270-71, 780 N.Y.S.2d 593, 595-96 (1st Dept 2004) (improper for the motion court to consider hundreds of pages of exhibits on motion to dismiss).

II. THE STATEMENTS ABOUT PLAINTIFFS ARE DEFAMATORY WHEN CONSIDERED IN CONTEXT

A. The Legal Standard

In its motion to dismiss, Defendant presents the Statements in isolation and fails to address the defamatory meaning conveyed by the Article as a whole. As stated by the Court of Appeals:

> [w]here a plaintiff alleges that statements are false and defamatory, the legal question for the court on a motion to dismiss is whether the contested statements are reasonably susceptible of a defamatory connotation. In making this determination, the court must give the disputed language a fair reading in the context of the *publication as a whole*.

---

[11] According to Defendant, the Hermitage Letter "bore certain 'red flags' suggesting money laundering." Def. Mem at 1. This is hardly the description of a document that conclusively establishes anything, much less a defense as a matter of law.

[12] Handman Aff. Ex. C at 1-10.

[13] Handman Aff. Ex. C at 66.

Armstrong v. Simon & Schuster, 85 N.Y.2d 373, 380, 625 N.Y.S.2d 477, 481 (1995), (emphasis added) (internal citations omitted). *See also Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 155, 603 N.Y.S.2d 813, 819 (1993) (noting that "[i]n all [defamation] cases … the courts are obliged to consider the communication as a whole, as well as its immediate and broader social contexts…"); *Aronson v. Wiersma*, 65 N.Y.2d 592, 594, 493 N.Y.S.2d 1006, 1007 (1985) (explaining that in a defamation suit "[t]he words must be construed in the context of the entire statement or publication as a whole"); *Lenz Hardware Inc. v. Wilson*, 263 A.D.2d 632, 633, 692 N.Y.S.2d 814, 815 (3d Dep't 1999), *aff'd*, 94 N.Y.2d 913, 707 N.Y.S.2d 619 (2000) ("A court making a determination as to whether a statement is defamatory must not isolate the allegedly defamatory words, but must 'consider them in context, and give the language a natural reading rather than strain to read it as mildly as possible at one extreme, or to find defamatory innuendo at the other.'") (*citing Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 592, 550 N.Y.S.2d 251, 253 (1989), *cert. denied*, 495 U.S. 930 (1990); *James v. Gannett Co.*, 40 N.Y.2d 415, 419–420, 386 N.Y.S.2d 871, 874-75 (1976)).

New York courts take three steps in analyzing whether statements about a plaintiff are defamatory. The first is that the "[c]hallenged statements are not to be read in isolation, but must be perused as the average reader would against the 'whole apparent scope and intent' of the writing." *Celle v. Filipino Reporter Enters.*, 209 F.3d 163, 177 (2d Cir. 2000) (quoting *November v. Time Inc.*, 13 N.Y.2d 175, 178, 244 N.Y.S.2d 309, 311 (1963)). "Second, courts are not to 'strain' to interpret such writings 'in their mildest and most inoffensive sense to hold them not defamatory. A fair reading controls." *Id.* at 177 (quoting *November*, 13 N.Y.2d at 178, 244 N.Y.S.2d at 311). Third, "'the words are to be construed not with the close precision expected from lawyers and judges but as they would be read and understood *by the public to which they are addressed.*' It is the meaning reasonably attributable to the intended reader that

controls." *Id.* at 177-78 (emphasis in original) (quoting *November v. Time Inc.*, 13 N.Y.2d at 178-79, 244 N.Y.S.2d at 312).

As set forth below, a fair reading of the Statements in context would be understood to be defamatory by Barron's readership.

B. The Statements in the Article, in Context, Amount to Defamation *Per Se*

> Under New York law, words are *per se* defamatory if they *falsely impute criminal activity* … [or] would tend to *injure a party's trade, occupation or business*…. To determine whether a statement is *per se* actionable, courts look at whether the character of the language used, in the context of the entire publication as well as the circumstances of its issuance, would naturally import one of the above mentioned charges in the mind of an average person.

Lee S. Kreindler *et. al., Per Se Defamation and Damages*, 14 N.Y. Prac., New York Law of Torts § 1:46 (2011) (emphasis added).

The Article describes a massive tax fraud scheme, the highly suspicious and potentially illegal activities that followed the scheme, the death of the lawyer that attempted to prosecute the scheme in Russia, and the highly questionable purchases and large fund transfers by two of the main suspects, Olga Stepanova and Vladlen Stepanov. *See generally* Handman Aff. Ex. B. At this stage of the proceedings, granting Plaintiffs every reasonable inference,[14] it would be fair to assume that readers would draw the conclusion that any person or company (such as Plaintiffs) mentioned within the Article would have some connection to the aforementioned corruption and various alleged illegal activities. Plaintiffs have no connection to those activities and the motion to dismiss does not claim otherwise. A reader of the Article would also assume that plaintiff

[14] "On a motion to dismiss … the court is obliged, *inter alia*, to accept each of the plaintiff's factual allegations as true, to make *all reasonable inferences therefrom* and not evaluate the ultimate merits of the case, to construe the complaint liberally in favor of the plaintiff, and to deny dismissal if a cause of action is at all discernable from the factual allegations of the complaint." *Daniel Goldreyer, Ltd. v. Van de Wetering*, 217 A.D.2d 434, 438, 630 N.Y.S.2d 18, 23 (1st Dep't 1995) (emphasis added).

Maxim Stepanov was related to Olga Stepanova and Vladlen Stepanov. In fact, Plaintiff Stepanov has no connection to these people and is not related to him by blood or by marriage. Nowhere in the Article is the lack of connection mentioned despite the identical surname. Stepanov Aff. ¶ 7.[15]

The Article describes Olga Stepanova and Vladlen Stepanov's past illegal activities of and their involvement in the alleged tax fraud scheme by GT Group (a company with which Plaintiffs have long ago cut off their connection). *See* Handman Aff. Ex. B at 6; Stepanov Aff. ¶ 6. The Article also notes that GT Group registered Bristoll Export. Handman Aff. Ex. B at 6. Following these statements, the Article goes on to state that:

> [n]ested inside the shell of Bristoll Export – like a Russian doll – was yet another shell company whose directors work at Midland Consult, a Russia-focused representative of offshore banks founded by a former Russian diplomat named Maxim A. Stepanov in Cyprus.

Id.

Defendant boldly argues that these statements "are clearly about the GT Group, not Plaintiffs." Def. Mem. at 13 (emphasis in original). Similarly, the motion to dismiss states that '[n]owhere does the Article even state that Midland Consult ever had dealings with GT Group." *Id.* These are remarkable claims. The Article connects GT Group to Bristol Export and Plaintiffs to Bristoll Export. Given that the Plaintiffs are explicitly mentioned in the story and are (allegedly) connected "like a Russian doll" to Bristoll and, therefore, to GT Group (a connection that the "sophisticated Barron's readership"[16] could certainly figure out).[17] The

---

[15] The Article identifies Olga's surname as Stepanova, which is the feminine equivalent of Stepanov. Stepanov Aff. ¶ 7, n.2

[16] *The Barron's Profile*, BARRON'S, http://www.barronsmag.com/advertising/print/reader-profile (last visited May 30, 2012).

statements about Plaintiffs are defamatory because at the time of the Bristoll deposit with Credit Suisse, January 23, 2008, Plaintiffs had no connection whatsoever with Bristoll. Stepanov Aff. ¶ 5. Similarly, the Article mentions that the police raided GT Group's offices in 2010, long after Plaintiffs ceased doing any business with GT Group (*Id.* ¶ 6), leaving the impression that Plaintiffs and GT Group had a connection at the time of the police raid.

The "[n]ested inside the shell of Bristoll Export – like a Russian doll –"[18] accusation suggests that Plaintiff had some connection with Bristoll Export at the time of the Bristoll wire transfer. Defendant now admits that Plaintiff's connection to Bristoll did not occur until November 2008, ten months after the wire transfer (Def. Mem. at 7) but the Article was not forthcoming about this crucial fact. Defendant announces, "[p]laintiffs do not – and cannot – dispute that one or more employees of Midland Consult were directors of Midland New Zealand and that Midland New Zealand was the owner of Bristoll." Def. Mem. at 19. Again, Defendant fails to consider the context. One or more employees of Midland Consult were **not** directors of Midland New Zealand until ten months after the wire transfer reported in the Article.

The Article makes no attempt to separate the Plaintiffs from the alleged illegal activity committed by GT Group or any of the other illegal activity mentioned throughout the Article. Handman Aff. Ex. B at 6. It does not attempt to separate Stepanov from the "chronic corruption" of the Putin regime, and makes matter worse when it sates that he is that he is a "former Russian

---

[17] Defendant cites *Cardone v. Empire Blue Cross & Blue Shield*, 884 F. Supp. 838 (S.D.N.Y 1995) to support the proposition that statements about a person or entity other than the plaintiff do not defame the plaintiff. Def. Mem. at 13. In *Cardone*, however, the plaintiff was "never mentioned … in any of the press releases" that were subject to the defamation claim. *Id.* at 847. If Defendant here had been responsible and did not insert Plaintiffs into a story that had no connection to them, there would have been no cause to bring a defamation complaint.

[18] Defendant now says that Bristoll Export was nested – like a Russian doll – inside Midland New Zealand. Def Mem. at 20. Either way, neither company was connected with Plaintiffs at the time of the Bristoll Export wire transfer described in the Article.

diplomat." To argue, as the Defendant does, that this last statement is by itself accurate misses the point. Def. Mem. at 16. Given that the subject matter of the Article is alleged rampant corruption within the current Russian government under the leadership of Vladimir Putin, reporting that Stepanov had a connection to the Russian Government, without explaining when and under what regime, is essentially a statement that Stepanov may be connected to the corruption in Putin's government. Handman Aff. Ex. B at 3, 6.[19] If, as the motion now suggests, the Article was not meant to suggest that Plaintiffs had any connection to the events featured in the Article, why mention Plaintiffs at all in the Article?

The Court of Appeals decision in *November v. Time Inc*., 13 N.Y.2d 175, 244 N.Y.S.2d 309 (1963) is on point. In *November*, the defendant published an article describing the "bizarre cast of characters" surrounding Floyd Patterson, then the Heavyweight Boxing Champion. As with the Article here, the article in *November* principally did not concern the plaintiff, but rather Patterson's manager, Constantine "Cus" D'Amato. The article contained a brief reference to the plaintiff, D'Amato's lawyer. In reversing the dismissal below, the Court held that while no sentence charged the plaintiff with sinister motives "in so many words," when read in context, "suggestion lurks" in the statements about the plaintiff. 13 N.Y.2d 179, 244 N.Y.S.2d 312. In that case "a jury should decide whether a libelous intendment would naturally be given to it by

[19] Defendant cites *James v. Gannett Co.*, 40 N.Y.2d 415, 421, 386 N.Y.S.2d 871, 75 (1976) where the court states "we reject plaintiff's attempt to pick at two sentences from a feature article and impute to them a libelous connotation that the whole article, let alone the specific sentences, will not bear." The *James* case was the opposite of the case here. In *James*, the plaintiff was the subject of a positive feature article about her belly-dancing career. The four-page story discussed the plaintiff's background, set forth her views on life in general, her approach to her business, and described two of her dancing routines. The two sentences plaintiff objected to were quotes of her statements to the reporter concerning the "lonely old men" who are her clientele. The Court pointed to the positive article and, in that context, the sentences complained of did not have a defamatory meaning. In the case at bar, it is Plaintiffs, not Defendant, who urge the Court to consider the context as the Court of Appeals did in *James*. The Article was not a positive feature on anyone but instead was an indictment of public officials associated with the Putin regime and this is the context in which Defendant placed Plaintiffs.

the reading public acquainted with the parties and the subject-matter." *Id.* (internal quotation marks and citation omitted).

Here, there is no question that the Statements, when viewed within the context of the entire Article and the highly selective reporting by the Defendant, falsely impute criminal activity to Plaintiffs and therefore are defamatory *per se*. The sophisticated reader that typically reads Barron's articles, or even any reader, would understand the Article as (falsely) labeling the Plaintiffs as a part of the tax fraud scheme and other alleged illegal activities. As stated by the Second Circuit, "[t]he court's threshold inquiry [in a defamation suit] is guided not only by the meaning of the words as they would be commonly understood, … but by the words considered in the context of their publication." *Levin v. McPhee*, 119 F.3d 189, 195 (2d Cir. 1997) (citing *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 59 (2d Cir. 1980); *Armstrong*, 85 N.Y.2d at 380, 625 N.Y.S.2d at 481).

"The construction which it behooves a court of justice to put on a publication which is alleged to be libelous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer." *Levin*, 119 F.3d at 195 (citing *James*, 40 N.Y.2d at 421, 386 N.Y.S.2d at 875) (internal citation and quotation marks omitted in original). A reader would likely understand that the Article at issue meant to expose those connected to the alleged criminal activities discussed throughout the story. Therefore, the Statements in the Article could be found to "induce an evil or unsavory opinion of [Plaintiffs] in the minds of a substantial number of the community." *Knutt v. Metro Int'l., S.A.*, 91 A.D.3d 915, 916, 938 N.Y.S.2d 134, 136 (2d Dep't 2012) (internal citations and quotation marks omitted). The Plaintiffs have been wrongfully swept up into this sordid story by the reckless actions of the Defendant, who have,

within the context of the Article, defamed the reputation and business practices of the Plaintiffs.[20]

C. Alternatively the Statements in the Article Create Defamation by Implication

In the alternative, the Statements give rise to defamation by implication. The New York standard for defamation by implication was laid out by the Court of Appeals in *Armstrong v. Simon & Schuster, supra*: "Defamation by implication is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements." 85 N.Y.2d at 380-81, 625 N.Y.S.2d at 481. *See also Silverman v. Clark*, 35 A.D.3d 1, 16, 822 N.Y.S.2d 9, 20-21 (1st Dep't 2006) ("defamation by implication … is generally characterized … by misleading omissions and false suggestions"); *Oluwo v. Hallum*, 16 Misc. 3d 1139(A), 851 N.Y.S.2d 59, 2007 WL 2701286, at *3 (Sup. Ct. Kings County 2007) (finding that "a plaintiff may state a colorable claim for defamation by implication based upon misleading omissions or false suggestions emanating from truthful statements") (internal citations and quotations omitted). A finding of defamation by implication will be premised on the entire Article rather than the just the Statements. *See Levin*, 119 F.3d at 196 (finding that in defamation by implication cases, "defamatory meaning is drawn from the words used and their context").

[20] The other cases cited by Defendant are inapposite. *Marks v. Elephant Walk*, 156 A.D.2d 432, 433-34, 548 N.Y.S.2d 549, 551 (2d Dep't 1989) (Statement in magazine article reporting on defendant's business asserting that plaintiff, who had agreed to serve as design consultant to defendant, "has joined the firm as designer" is not defamatory as matter of law, was "substantially true and factually accurate," and no important facts were omitted); *Panghat v. New York Downtown Hosp.*, 85 A.D.3d 473, 474, 925 N.Y.S.2d 445, 446 (1st Dep't 2011) (plaintiff complained about statements made by his supervisors regarding his Internal Medicine In-Training Examination score, but plaintiff did not contest that he received a very low score on that examination); *Pitcock v. Kasowitz, Benson, Torres & Friedman LLP*, 74 A.D.3d 613, 613, 903 N.Y.S.2d 43, 45 (1st Dep't 2010) (plaintiff admitted to the truth of the statements, both by themselves and within the context of the work at issue, made by the defendant); *Fulani v. New York Times Co.*, 260 A.D.2d 215, 686 N.Y.S.2d 703 (1st Dep't 1999) (public figure plaintiff was linked to a political party of which she in fact had been a longtime member; *Jung Hee Lee Han v. State of New York*, 186 A.D.2d 536, 536-37, 588 N.Y.S.2d 358, 359-60 (2d Dep't 1992) (defendant distributed an

The Court of Appeals in *Armstrong* case found that the Tennessee Supreme Court case of *Memphis Publishing Co. v. Nichols* 569 S.W.2d 412 (Tenn. 1978) was illustrative of defamation by implication. *Armstrong*, 85 N.Y.2d at 380-81, 625 N.Y.S.2d at 481. In *Nichols*, "the court found an article implicitly defamatory where it truthfully reported that a woman, upon finding her husband at plaintiff's home, shot the plaintiff, but the article neglected to state that at the time they all were at a social gathering with several other people, including plaintiff's husband." *Id*. (summarizing the holding in *Nichols*). In reaching this decision, the *Nichols* court reasoned that "[t]ruth is available as an absolute defense only when the defamatory meaning conveyed by the words is true." 569 S.W.2d at 420. Similarly, in this case, Defendant, whose Statements it insists by themselves are accurate and true, omitted key facts from the Article, thereby creating the entirely false impression that the Plaintiffs were involved in the alleged tax fraud and other various illegal activities mentioned in the Article.[21]

These omissions include the failure to separate Plaintiffs from the tax fraud scheme or the other alleged illegal activities, the failure to distinguish Stepanov from the alleged conspirators of the tax fraud who share his surname, and the failure to note that Stepanov was a government official prior to Putin taking power. By omitting these essential facts, the inclusion of Plaintiffs in the Article by Defendant created "false suggestions, impressions and implications [that arose]

---

internal letter truthfully explaining plaintiff had resigned after having been caught violating employer's written policy).

[21] Defendant cites to *Rappaport v. VV Publishing Corp.*, 163 Misc. 2d 1, 5, 618 N.Y.S.2d 746, 748 (Sup. Ct. N.Y. County 1994), *aff'd*, 223 A.D.2d 515, 637 N.Y.S.2d 109 (1st Dep't 1996) for the general proposition that "[a] defamatory implication must be present in the plain and natural meaning of the words used" (internal citations and quotation marks omitted). (Def. Mem. at 14 n.14). This proposition, however, entirely fails to address the Statements in the Article. Here, the Statements, when viewed within the context of the entire Article, at the very least impliedly defame Plaintiffs in this matter. *Rappaport* 163 Misc. 2d at 5, 618 N.Y.S.2d at 748. Defendant also cites to *Asensio v. KMPG, LLP*, 293 A.D.2d 426, 740 N.Y.S.2d 862 (1st Dep't 2002), but this is yet again another case where the plaintiff is not explicitly mentioned in the published work at issue, unlike in the instant matter.

from otherwise truthful statements," thereby defaming Plaintiffs by implication. *Armstrong*, 85 N.Y.2d at 381, 625 N.Y.S.2d at 481.[22]

III. THE CLAIMED PRIVILEGE UNDER NEW YORK CIVIL RIGHTS LAW § 74 IS INAPPLICABLE IN THIS CASE

Defendant relies on Civil Rights Law § 74, which, in relevant part, states, "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any … official proceeding." *See* Def. Mem. at 20-24. As with Defendant's arguments regarding defamation, here too the arguments are flawed because they (a) fail to properly address the New York standard for applying section 74, (b) substantially misinterpret and distort the context of Hermitage Letter, and (c) focus narrowly on the Statements in isolation rather than within the context of the entire Article.[23]

First, as noted in the discussion *supra* regarding the defense based on "documentary evidence," the Hermitage Letter is not sponsored by an affiant with personal knowledge; it is attached to the affidavit of Defendant's counsel of record. A motion to dismiss based on Civil Rights Law § 74

> is not merely a point of law and requires proof that the defendant's published article was derived from an official proceeding. The failure of the defendant to provide an affidavit from anyone with personal knowledge on the applicability of the privilege renders this branch of the motion procedurally defective.

Neuschotz v. Newsday Inc., 12 Misc. 3d 1199, 824 N.Y.S.2d 769, 2006 WL 2446142 at *3-*4 (Sup. Ct. Kings County 2006).

---

[22] Plaintiffs will be able to prove special damages at trial in support of their claim of defamation by implication. *See Cuevas v. Harvard Univ. Press*, No. 104365/98, 1999 WL 35133914, at *7 (Sup. Ct. N.Y. County Sept. 15, 1999), *aff'd*, 269 A.D.2d 328, 703 N.Y.S.2d 916 (1st Dep't 2000).

[23] Defendant again primarily relies on cases decided on motions for summary judgment.

Second, the section 74 privilege only applies to a "judicial proceeding, legislative proceeding or other official proceeding." Defendant has pointed to no such proceeding. It hangs its hat on a letter from a U.K. solicitor to the Attorney General of Switzerland, who, as far as can be ascertained from the record, did not investigate the allegations contained in the letter before the Article was published.[24] Indeed, at the time the article was published, Barron's inquiries of the Office of the Attorney General of Switzerland had not been answered. Handman Aff. Ex. D at 1.[25] In *Abakporo v. Sahara Reporters*, No. 10 CV 3256 (RJD) (VVP), 2011 WL 4460547 (E.D.N.Y. Sept. 26, 2011), a case cited by Defendant, the court rejected any defense based on Civil Rights Law § 74 to a report on petition a group of Nigerian citizens addressed to the President of Nigeria. As in this case, no action was known to have been taken on the petition at the time of the publication. The court explained that for section 74 to apply, the news reporting must concern actions taken by a person officially empowered to do so. In that case, as here:

> The conclusion that Section 74 shields reporting on the Petition itself, divorced from the investigation its authors request, does not follow….Even assuming that the Petition reached the relevant Nigerian authorities, however, this fact would not transform the Petition into part of an "official proceeding" under Section 74.

Id. at *9.[26] The court reasoned that to apply section 74 in these circumstances "would expand the statutory privilege beyond established or defensible boundaries." *Id*. at *8.

---

[24] The absence of Swiss counsel alone cast doubt that there was any sort of "official" proceeding in Switzerland upon the delivery of the Hermitage Letter.

[25] At the time Defendant published the Article, the Hermitage Letter had triggered a freeze of certain Credit Suisse bank accounts, an action that was required "[b]y law." Handman Aff. Ex. B at 2-3.

[26] Defendant oddly relies on *White v. Fraternal Order of Police*, 707 F. Supp. 579 (D.D.C. 1989), *aff'd*, 909 F.2d 512 (D.C. Cir. 1990) an entirely inapplicable District of Columbia case that does not address or even mention section 74 but rather District of Columbia common law. *See also Reeves v. Am. Broad. Cos.*, 719 F.2d 602 (2d Cir. 1983) (case cited in support by Defendant that addresses California law and not section 74; *Medico v. Time, Inc.*, 643 F.2d 134 (3d Cir. 1980) (case cited in support by Defendant that addresses Pennsylvania law). The cases that Defendant cites that actually address section 74 largely stand for the uncontested proposition that the privilege applies to reports or publications issued ***by*** a governmental agencies, and therefore these cases are inapplicable to the facts here. *See Sharon v.*

Third, the section 74 privilege will not attach where a defendant "did not inspect … court files but obtained its information from outside sources," further undermining Defendant's attempt to obtain section 74 protections "from liability for the consequences resulting from the publication of false and defamatory statements." *Shiles v. News Syndicate Co.*, 27 N.Y.2d 9, 15, 313 N.Y.S.2d 104, 108 and n.4 (1970) (internal citations and quotation marks omitted). Here, Defendant did not obtain the Hermitage Letter from the Swiss Attorney General and most likely received it from Hermitage's solicitors. Defendant admitted that before the Article was published, "Barron's made inquiries with the Office of the Attorney General of Switzerland which weren't answered." Handman Aff. Ex. D at 1. In this case, therefore, the Article is nothing more than the republication of empty accusations and therefore not covered by section 74. S*hiles v. News Syndicate Co.*, 27 N.Y.2d at 15, 313 N.Y.S.2d at108. Defendant states coyly that it "had a copy" of the Hermitage Letter and exhibits at the time of the Article's publication. Def. Mem. at 5-6. Discovery will uncover how the Hermitage Letter made its way to Defendant.

Fourth, the privilege does not attach where the article "suggests more serious conduct than that actually suggested in the official proceeding." *Daniel Goldreyer, Ltd. v. Van De*

Time, Inc., 599 F. Supp. 538, 542-43 (S.D.N.Y. 1984) (finding that section 74 privileges could apply to reports about published findings by an Israeli government commission); *Geiger v. Town of Greece*, No. 07-CV-6066, 2007 WL 4232717, at *7 (W.D.N.Y. Sept. 4, 2007) (section 74 privileges are applicable to reports about published findings by the New York Attorney General in an investigation); *Freeze Right Refrigeration & Air Conditioning Servs., Inc. v. City of New York*, 101 A.D.2d 175, 182, 475 N.Y.S.2d 383, 388 (1st Dep't 1984) ("the announcement of an investigation by *a public agency*, made before the formal investigation has begun, is protected as a report of an official proceeding within the contemplation of the statute") (emphasis added); *Karedes v. Village of Endicott*, 254 F. Supp. 2d 276, 293(N.D.N.Y. 2003*), judgment vacated and remanded sub nom Karedes v. Ackerley Group, Inc*., 423 F.3d 107 (2d Cir. 2005) (section 74 privileges are applicable to reports regarding a government audit); *Komarov v. Advance Mag. Publs.*, 180 Misc. 658, 660, 691 N.Y.S.2d 298, 300 (Sup. Ct. N.Y. County 1999) (section 74 privileges are applicable to affidavits submitted by FBI agents).

Defendant also cites *Lacher v. Engel*, 33 A.D.3d 10, 17, 817 N.Y.S.2d 37, 43 (1st Dep't 2006). *Lacher* involved a publication summarizing a malpractice complaint filed in a New York court. There is no question that a malpractice complaint is part of a judicial proceeding under section 74 and a fair report

Wetering, 217 A.D.2d 434, 436, 630 N.Y.S.2d 18, 22 (1st Dept 1995).[27] Here, the Hermitage Letter makes no accusations against the Plaintiffs. The only connection between the Hermitage Letter and Plaintiffs, as Defendant admits, is the following:

> Government records attached to the Hermitage Letter also show that Bristoll's shares are 100% owned by Midland New Zealand Ltd. and that, as of November 2008, the directors of Midland New Zealand were Jaime Augusto Cedeno Villareal and Olga Demosthenous. *Id.* at Ex. 1 pp. 62-66 (exhibits are printouts from New Zealand government website, http://www.business.govt.nz/companies). Olga Demosthenonous, worked for Midland Consult – indeed, the Hermitage Letter has attached an "About Our Company" description of Midland Consult taken from its website, with a photo of Plaintiff Maxim Stepanov, Group Director, together with Olga Demosthenous, identified as "Administrative Assistant." Ex. C at Ex. 1 p. 66.

Def. Mem. at 7. Defendant went beyond reporting on the Hermitage Letter and cannot invoke section 74 as a defense.

Fifth, Defendant incorrectly argues that "[a]ny negative inference that flows from the accurate report of those allegations is itself privileged." Def. Mem. at 23. This "standard," is not supported with any New York case law, and the cases cited by Defendant actually undermine its position. *Fuji Photo Film U.S.A., Inc. v. McNulty*, 669 F. Supp. 2d 405, 411 (S.D.N.Y. 2009) states, "the privilege does not apply to statements in a report that imply misconduct beyond that

---

of allegations in a judicial proceeding is covered by section 74. The Hermitage Letter is not even arguably part of a judicial proceeding and therefore *Lacher* lends Defendant no support.

[27] This is a case that Defendant oddly cites as support for the proposition that section 74 privileges should be applied to the Hermitage Letter. *See* Def. Mem. at 22-23. However, instead of supporting Defendant's contentions, this case undermines them. This case largely reinforces the uncontroversial position that section 74 applies to reports or publications issued by government entities. *See Daniel Goldreyer, Ltd.*, 217 A.D.2d at 436, 630 N.Y.S.2d at 22 (court finds that section 74 privileges can properly be applied to a Dutch Ministry of Justice report); *see also supra* note 22. The court in that case also found that the defendant's use of an official report will not defeat a defamation claim where key facts were omitted from defendant's published work. *See Daniel Goldreyer, Ltd.*, 217 A.D.2d at 436, 630 N.Y.S.2d at 22 ("[Defendant's] article does not quote the Ministry of Justice report in detail and the portions of the article cited by plaintiffs, *when read in context*, suggest that there has been an

alleged in the judicial proceeding on which the report is based." (*citing Daniel Goldreyer, Ltd.*, 217 A.D.2d at 436, 630 N.Y.S.2d at 22; *Ocean State Seafood, Inc.*, 112 A.D.2d 662, 666, 492 N.Y.S.2d 175, 179 (3d Dep't 1985) (The privilege does not apply when the news account of the judicial proceeding adds other facts or opinions to imply wrongdoing).

As described earlier, the Article incorrectly states, or at least implies, that the Plaintiffs were involved in or connected to criminal misconduct, an allegation not made in the Hermitage Letter. Immediately following a discussion of the illegal activities allegedly perpetrated by GT Group (and within the greater context of a story involving serious allegations of corruption within the Russian government), the Article notes the connection Plaintiffs previously had to GT Group (using the rather non-complimentary phrase, "[nested]…like a Russian doll," to make the connection) without mentioning that (a) the connection between Plaintiffs and GT Group had ended before the events attributed to GT Group occurred and (b) Plaintiffs connection to Midland New Zealand and Bristoll Export had not commenced until ten months after the reported wire transfer.

Finally, the Hermitage Letter raises serious allegations against GT Group and Bristoll. Handman Aff. Ex. C. at 4-5. However, the Hermitage Letter does not state or even imply that the Plaintiffs had any connection to GT Group and Bristoll at the time of the conduct alleged in the Hermitage Letter. The Plaintiffs are not mentioned at all within the main body of the Hermitage Letter (*see id*. at 1-10), and only are explicitly mentioned on one page of the over one hundred page long exhibit. *See id*. at 66. Defendants were not relevant to, and not even mentioned in, the Hermitage Letter; it was Defendant who decided to inject them into this story. Thus, the Statements are in no way "a fair and true report of the Hermitage Letter's allegations,"

---

investigation and that the reporters are in possession of undisclosed details from the report that support the assertions they make against plaintiffs.") (emphasis added) (citations omitted).

as claimed by Defendant. Def. Mem. at 23. Rather, the Statements "imply misconduct beyond that alleged in the [official] proceeding on which the report is based," and therefore the privilege afforded by Civil Rights Law § 74 is inapplicable as a matter of law.[28]

IV. DEFENDANT'S MOTION TO DISMISS SHOULD NOT BE CONVERTED INTO A MOTION FOR SUMMARY JUDGMENT

Defendant's argument for conversion to summary judgment is made in just one footnote, which cites two cases where conversion was granted. *See* Def Mem. at 1 n.1. In *McGill v. Parker*, 179 A.D.2d 98, 106, 582 N.Y.S.2d 91, 96 (1st Dep't 1992) conversion was granted because the parties made "'it unequivocally clear that they [were] laying bare their proof and deliberately charting a summary judgment course'" (*quoting Four Seasons Hotels Ltd. v. Vinnik*, 127 A.D.2d 310, 320, 515 N.Y.S.2d 1, 8 (1st Dep't 1987)). In *Labin v. New York Univ. Med. Ctr.*, 72 A.D.3d 905, 898 N.Y.S.2d 501 (2d Dep't 2010) dismissal was warranted pursuant to Soc. Serv. Law § 413 covering persons and officials required to report cases of suspected child abuse or maltreatment. Here, as no discovery has been taken and all of the evidence relevant to the issues raised by this motion is in Defendant's possession, and no statute bars this case, the motion to dismiss should not be converted into one for summary judgment.

[28] Defendant does not even invoke Section 74 regarding any statement in the Article except for the false statement about Midland Consult having appointed directors to Midland New Zealand during the time period discussed in the Article.

CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied in its entirety.

Dated: New York, New York
June 21, 2012

Respectfully submitted

DAVIDOFF HUTCHER & CITRON LLP

By: _____
Larry Hutcher
LKH@dhclegal.com

Steven Skulnik
sps@dhclegal.com

605 Third Avenue
New York, NY 10158
Telephone: (212) 557-7200

Attorneys for Plaintiffs

THE LAW FIRM OF JOSH N. BENNETT, ESQ., P.A.

Josh N. Bennett
josh@joshbennett.com

Ilena Alvarez
ilena@joshbennett.com

440 North Andrews Avenue
Ft. Lauderdale, Florida 33301
(954) 779-1661

Of Counsel